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ABSTRACT

The Article elucidates the Intellectual Property Clause by studying the neglected record from the Constitutional Convention of 1787 pertaining to it. This record consists of proposals by James Madison and Charles Pinckney for congressional power to grant patents, copyrights, and encouragements (bounties), and to establish universities. By tracking the textual transition from the initial proposals to the eventual text of the Clause and by putting this transition in its contemporaneous context, this Article makes two major contributions to our understanding of the Clause.

First, the Article takes a stand in a current controversy by providing three direct indications that the Framers intended the first part of the Clause—“to promote the progress of science and useful arts”—to be a limitation on Congress’s intellectual property power. It thus refutes a widely held belief that the Framers intended this language as a non-binding preamble. Second, the analysis solves a current puzzle—among courts and commentators about the enigmatic ends/means structure of the Clause. It shows that the Clause’s unique text reflects the Framers’ intent to have each of the Clause’s parts participate in defining and limiting the power it confers.

The Article reviews the applications of its findings for originalism, for different readings of the Clause, and for recent (e.g., Eldred v. Ashcroft) and pending (e.g., Kahle v. Gonzales, Golan v. Gonzales) constitutional intellectual property litigation. It ends by suggesting ways in which the legal community can move toward forming a concept of progress as a constitutional limitation.

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INTRODUCTION

Does the first half of the Constitution’s Intellectual Property Clause1 (“Clause”)

1. See U.S. Const. art. I, § 8, cl. 8 (“[Congress shall have the power] [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to
limit Congress’s power? In other words, can plaintiffs argue as a matter of law that an intellectual property enactment is unconstitutional because it fails to promote the progress of science and useful arts? This is the foundational yet unresolved question that this Article answers in the affirmative.

Intellectual property is rapidly becoming constitutionalized. The last six years have seen an unprecedented wave of challenges to intellectual property enactments. Whereas throughout the twentieth century intellectual property law mattered much only to a small group of industry players who would often their respective Writings and Discoveries”). The first half of the Clause will be termed “Progress Clause” and the second “Exclusive Rights Clause.” “Intellectual Property Clause” is somewhat inaccurate because (1) the term “intellectual property” was not used when the Clause was authored, (2) the Clause does not encompass all areas of law that we generally associate today with “intellectual property,” (3) the Clause does not exhaust Congress’s intellectual property power (e.g., Congress’s trademark power stems from its commerce power), and (4) the exclusive rights that Congress secures under the Clause are generally more limited in term and scope than property rights. Other terms suggested to date for the Clause (e.g., “Progress Clause,” “Exclusive Rights Clause,” “Science and Useful Arts Clause”) also fail to describe it accurately. The present research, especially in Part V, infra, leads me to believe that “Progress by Limited Rights Clause” best captures the nature of the unique power in the Clause. This name will not be used here, however, in order not to encumber the reader with new terminology.


strike deals among themselves and have them passed into law, the advent of the Internet and the personal computer endowed larger sections of the public with extraordinary production and distribution powers. Increasingly, less-established creators are challenging the law, and courts find themselves compelled to interpret one of the least explored, yet increasingly divisive, parts of the Constitution.

The most influential of these recent challenges is *Eldred v. Ashcroft*. In this case the Supreme Court upheld the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA"). The Court found that this Act, which extended the statutory copyright term by twenty years, did not violate the Clause's "limited times" prescription. The CTEA was criticized for being tailored to satisfy the interest groups that lobbied for it at the public's expense. *Eldred* exemplifies the importance of demarcating the constitutional boundaries to Congress's intellectual property power: in that case, these boundaries, as interpreted by the Court, were wide enough to allow Congress to determine that the public would not be free to use and build upon a great body of expressive work at the time it was scheduled to fall into the public domain, but rather would have to wait one generation more.

Unfortunately, the structure of the Clause is unique, which makes it hard to interpret. Whereas the other enumerated powers generally consist of "to" (or ends) clauses that demarcate areas of legitimate federal regulation—such as "[t]o borrow money . . ." or "[t]o regulate commerce . . ."—Congress's intellectual property power contains, in addition to the "to" clause, a "by" (or means) clause. This textual and structural uniqueness poses an interpretative difficulty: what made the Framers structure this Clause differently from all others, and what does it imply for Congress's intellectual property power?

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7. See *Eldred*, 537 U.S. at 199, 204.
8. See, e.g., Lawrence Lessig, *Free Culture* 218 (2004) (noting that more than two-thirds of the original sponsors of CTEA in the House and Senate received contributions from Disney and that "Disney is estimated to have contributed more than $800,000 to reelection campaigns in the 1998 cycle"). But for CTEA, Mickey Mouse comics would have fallen into the public domain starting in 2003. For more about the Act, see generally Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363 (2000).
11. Id. art. I., § 8, cl. 3.
12. Id. art. I., § 8, cl. 8 ("To promote the Progress of Science and useful Arts").
13. Id. ("by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").
Because the Clause's textual uniqueness resulted from the framing process, accounting for it credibly would have to involve unearthing the Framers' reasons for cloaking the Clause with its distinctive dress. In addition, an inquiry into the Framers' intent makes sense here because the currently dominant reading of the Clause is based on the Framers' arguable intent and because the Supreme Court has celebrated its importance, together with other historical considerations, in interpreting Congress's intellectual property power. Intellectual property scholars generally agree about the importance of history to understanding the Clause, although they, like Supreme Court Justices, remain divided as to its lessons.

Grappling with the Clause, different courts and commentators have suggested strikingly different ways of reading it. These approaches, reviewed in Part I.B, boil down to two understandings of the Progress Clause: one suggests that it limits Congress's power, while the accepted wisdom reads it as a non-binding preamble. Although all these interpretive approaches rely on historical evidence, the main difficulty faced—other than the conflicting conclusions—is that it is hard to infer, from the evidence studied, the Framers' actual intent. For example, courts and commentators often attributed contemporaneously prevalent beliefs to the Framers. Most notable has been the argument that the Framers abhorred monopolies, and because they thought of patents and copyrights as

15. See infra notes 40–44 and accompanying text.
17. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 260 (2003) (Breyer, J., dissenting) (mentioning "the antimonopoly environment in which the Framers wrote the Clause," which suggests the way the Framers understood "the basic purpose of the Copyright Clause"); Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. Rev. 1057, 1062 (2001) ("The great evil in the Framers' mind, second only to the great evil of centralized, monarchical government, was the evil of state-sanctioned monopoly.").
monopolies, they intended the Progress Clause as a limitation. But others denied that the concern with monopolies was at all widespread, denied that the Clause was drawn to reproduce the British protections against state-sanctioned monopoly, and noted that the Framers considered including an anti-monopoly provision in the Constitution but eventually did not. The reader of the abhorrence controversy is left unable to infer from it credibly the Framers' intent in writing the Progress Clause. Of similarly limited help have been attempts to attribute individual Framers' views to the group at large. Thomas Jefferson's aversion to property rights in ideas was suggested to inform the intent behind the Progress Clause. Setting aside the fact that Jefferson did not attend the Convention, his views happened to be extreme among the Framers rather than representative.

Remarkably, despite the heightened interest in the Clause and its historical origins over the last decade and especially surrounding *Eldred*, no one has studied seriously the record of the Federal Constitutional Convention in which the Clause was framed. The study of this record documenting events at the Convention in the weeks prior to the adoption of the Clause provides direct evidence regarding the Framers' intent. The Convention's record reveals eight proposals for Congressional powers, made by James Madison and Charles Pinckney, which anticipate the eventual text and structure of the Clause. Although the record does not report the Framers' arguments about the framing of the Clause, examining Madison and Pinckney's initial proposals closely, along with other Convention proceedings and proximate historical events, makes it possible to reconstruct the Framers' intent regarding the Clause's unique structure and the role of the Progress Clause within it.

Specifically, the study of the Convention's record provides three indications that the Framers intended the Progress Clause as a limitation on Congress's intellectual property power. First, Madison and Pinckney's initial proposals to vest patent and copyright powers in Congress were plenary and did not include language relating to the promotion of progress in science and useful arts. Had

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19. See *Nachbar*, *supra* note 16, at 330–49; see also *infra* note 78 and accompanying text.
21. *Schwartz & Treanor*, *supra* note 16, at 2383. See also *infra* note 84. Jefferson opposed Congress's intellectual property power. See *infra* text accompanying note 173. The fact that the Constitution includes the Clause suggests that his views were not representative. Jefferson was a minister to France when the Convention sat.
23. The literature has extensively addressed other pre-framing and post-framing occurrences. For the most part, these will be left out of the present study both because they have been reviewed elsewhere and, primarily, because that research has proven inconclusive regarding the Framers' intent.
the Framers been content with such plenary patent and copyright powers, they
would have likely adopted them as proposed. The Framers’ choice not to adopt
the plenary proposals, but rather to subject their exercise to specific ends, tends
to prove that the Progress Clause was added as a limitation. Second, Madison
and Pinckney were nationalists (or centralists) who pushed for a relatively
strong central government. Other members of the Convention were states-
righters who wished the United States to remain a confederation of independent
states. The Constitution embodies the compromise that the two camps struck.
That a power proposal was made by a centralist, and that it was changed by a
less centralist body, tends to prove that the change—the addition of the Progress
Clause—was intended to cut back on the power proposed. Third, the origin of
the Progress Clause suggests its limiting operation. The “promote [progress]”
language was associated initially with other, more controversial proposals for
Congressional powers to establish universities and grant governmental “encour-
agements” to innovation and industry. The fact that the education and encourage-
ments proposals were fiercely opposed and eventually rejected suggests that the
“promote progress” language served to limit them in the first place. The
Framers, whose collective view supported a more limited government than the
one Madison and Pinckney envisioned, rejected Madison and Pinckney’s propos-
als for universities and encouragements even in their limited form. However,
they took the limiting language from the rejected proposals and tacked it onto
Madison and Pinckney’s plenary intellectual property proposals before allowing
them into the Constitution.24

The Supreme Court in Eldred refused to grant certiorari on and did not decide
whether the Progress Clause limits Congress’s power.25 It decided the case by
relying on petitioners’ concession that it was not a limitation.26 Thus, the
question whether the Progress Clause is a limitation or not has been left open to
future courts. This Article’s findings that the Framers’ intent, and consequently
also the Clause’s text and its original understanding, weigh in favor of treating
the Progress Clause as a limitation would be valuable to courts interpreting the
Clause.

It would be useful to clarify at this point this Article’s approach to constitu-
tional interpretation. This Article does not argue that the Framers’ intent (even
when augmented by the textual meaning and the original understanding) is or

24. See infra Part IV. The suggestion that the Progress Clause was intended as a limitation comes to
answer the major question posed at the beginning of this Article and not to suggest that it functions only
as a limitation. The Progress Clause also participates in defining the power. See infra Part V.
25. See infra note 244 and accompanying text.
26. See Eldred, 537 U.S. at 211 (“[P]etitioners do not argue that the Clause’s preamble is an
independently enforceable limit on Congress’ power.”); Timothy R. Holbrook, The Treaty Power and
the Patent Clause: Are There Limits on the United States’ Ability to Harmonize?, 22 CARDOZO ARTS &
ENT. L.J. 1, 16 (2004) (“[The Eldred Court] did not reach the issue of whether the preamble limits
Congress’ power with respect to the patent and copyright systems.”); Edward C. Walterscheid, The
(same).
should be the only consideration in constitutional interpretation. Rather, it recognizes that constitutional interpretation is informed by these and other considerations, such as doctrine and the practical consequences of alternative interpretations. This Article contributes to our understanding of the Clause by illuminating several aspects of its interpretation.

Although the Framers' intent is only one view of the "cathedral" of constitutional interpretation, illuminating it is especially important in the context of intellectual property because of several reasons. First, because the Supreme Court said so. All Justices in the recent Eldred decision relied on intentionalist and originalist arguments, even if these led them to opposite conclusions. Second, because the leading treatise on copyright—on which the dominant interpretation of the Clause relies—involves the Framers' (arguable) intent as the only reason to interpret the Progress Clause as a non-binding preamble. Intellectual property scholars generally agree on the importance of history (and particularly the Framing history) to understanding the Clause, although they disagree on its lessons. Third, the Framers' intent is especially important in intellectual property because the text of the Clause is not clear on its face. The unique ends/means structure of the Clause puzzled courts and commentators and has led them to read it in markedly different ways. When the text is not clear, turning to the Framers' intent and the legislative history to make sense of the text becomes more appropriate and justified. Indeed, as the research below shows, the Framers' intent and legislative history solve the puzzle of the clause's text and structure. Lastly, general critiques of originalism and of relying on the Convention's records are significantly weaker in the particular context of the Clause.

The remainder of this Article proceeds as follows. Part I explicates the importance of history to understanding the Clause and reviews the four major ways in which courts and commentators have understood the Clause to date. Part II reviews the historical setting in which the Convention's intellectual property debates took place and introduces Madison and Pinckney's eight proposals from which the Clause originated. Part III reconstructs the Clause's textual framing process, namely the process in which the Framers started with Madison and Pinckney's proposals and ended up with the Clause. It shows that the Exclusive Rights Clause (the "means" part) was taken from Madison and Pinckney's patent and copyright proposals for congressional power, and that the

27. See infra notes 300-02. For the various arguments that inform constitutional analysis generally, see PHILLIP BOSBRTT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).
29. See infra notes 45-46.
30. See infra notes 40-44 and accompanying text.
31. See infra notes 48-56 and accompanying text.
32. See generally references supra note 16.
33. See infra Part V.
34. See infra Part VI.A.
Progress Clause (the "ends" part) was taken from Madison and Pinckney's education and encouragements proposals. Part IV extracts from this process the three aforementioned indications that the Progress Clause was intended as a limitation on Congress's power. Part V solves the puzzle over the Clause's unique end/means structure by suggesting that this structure reflects the Framers' desire to have both parts of the Clause take part in delineating Congress's power and limiting it at the same time. The Framers wished to confer upon Congress an intellectual property power that would be limited to the promotion of progress in science and useful arts and to prevent Congress from using alternative means—establishing a federal university and granting encouragements. Part VI discusses implications for originalism and intentionalism as interpretive theories, for interpretations of the Clause, and for post-Eldred constitutional litigation. Part VII assumes that the Progress Clause is a constitutional limitation and suggests the first few steps through which courts, litigants, and scholars can move toward enforcing it.

I. HISTORICAL UNDERSTANDING OF THE CLAUSE TO DATE

A. THE IMPORTANCE OF HISTORY FOR UNDERSTANDING THE CLAUSE

Historical argumentation is an important modality of constitutional interpretation and construction. Whereas originalists look primarily to the Constitution's original understanding and the Framers' intent to interpret the Constitution, even nonoriginalists accord these considerations substantial, even presumptive, weight. The Constitution's original meaning serves, at the very least, as the starting point of constitutional analysis.

Originalist considerations are particularly important when it comes to constitutional intellectual property analysis. In Eldred, the Supreme Court recently handed down its most expansive constitutional intellectual property law decision to date. Eldred examined the CTEA, which extended the statutory copyright term by twenty years, and found it constitutional by a 7-2 margin. Although members of the Court hold different views about constitutional interpretation, Eldred manifests universal agreement about the importance of historical considerations in interpreting Congress's intellectual property power.

35. See Bobbitt, supra note 27.
36. See 1 Laurence H. Tribe, American Constitutional Law 52 (3d ed. 2000) ("To the degree that original meaning would at least establish a baseline and create a presumption to be overcome, its gravitational pull remains undeniable."); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 237 (1980) (noting that nonoriginalists "treat[] the text and original history as presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional desicionmaking").
37. See 1 Tribe, supra note 36, at 48-49 (arguing that interpretation of the Constitution ought to begin with original meaning, and that the burden of justification should be placed on whomever seeks to argue for a changed meaning).
39. See id. at 222.
Remarkably, Justice Ginsburg, in the opinion for the Court, wrote that “[t]o comprehend the scope of Congress’s power under the [Intellectual Property] Clause, ‘a page of history is worth a volume of logic.’”\textsuperscript{40} In finding the CTEA constitutional, the Court gave history greater weight than policy considerations, which it recognized could cut the other way.\textsuperscript{41} Dissenting Justices Breyer\textsuperscript{42} and Stevens similarly resorted to historical arguments. Justice Stevens in particular examined the history of the U.S. patent and copyright system extensively\textsuperscript{43} but concluded that “history, in this case, does not provide the ‘volume of logic’ . . . necessary to sustain the Sonny Bono Act’s constitutionality.”\textsuperscript{44}

As \textit{Eldred} and previous Supreme Court case law show, the Framers’ intent\textsuperscript{45} and the Clause’s original understanding\textsuperscript{46} capture an important part of the

\begin{enumerate}
\item\textsuperscript{40} Id. at 200 (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).
\item\textsuperscript{41} See id. at 208 (refusing to second-guess Congress’s policy judgments “however debatable or arguably unwise they may be”).
\item\textsuperscript{42} See id. at 246 (Breyer, J., dissenting) (suggesting that in stating the ultimate purpose of copyright law is public rather than private, “the Court simply has reiterated the views of the Founders”); id. at 246–47 (reviewing the founding generation’s abhorrence of monopolies); id. at 260–61 (reviewing the constitutionality of the CTEA in light of “the basic purpose of the Copyright Clause—as understood by the Framers”); id. at 265 (discussing prior copyright statutes); see also id. at 209 n.16 (majority opinion) (“Justice BREYER several times places the Founding Fathers on his side.”).
\item\textsuperscript{43} See id. at 229–31 (Stevens, J., dissenting).
\item\textsuperscript{44} Id. at 233 (internal quotation marks omitted).
\item\textsuperscript{45} See, e.g., id. at 204 n.8 (majority opinion) (relying on Madison’s and other Framers’ understanding of Congress’s power under the Clause); id. at 194, 196 n.3, 197, 200, 204, 213 & n.19, 214 n.20 (noting or relying seven times on the fact that the First Congress granted copyright protection to previously existing works); id. at 210 n.16 (rejecting dissenting Justice Breyer’s assessment of the copyright term extension according to the present value it provides authors because “[i]t is doubtful, however, that those architects of our Nation, in framing the ‘limited Times’ prescription, thought in terms of the calculator rather than the calendar”); id. at 213 (“Indeed, ‘[t]his Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution’s] provisions.’” (quoting Myers v. U.S., 272 U.S. 52, 175 (1926))); id. at 222 (“[a]s we read the Framers’ instruction”); id. at 228–33 (Stevens, J., dissenting) (dedicating considerable attention to studying “early Congresses’ understanding of the constitutional limits of the Copyright/Patent Clause” and reviewing the legislative history of the first patent and copyright acts); id. at 246–48 (Breyer, J., dissenting) (reviewing the founders’ objectives in the Clause and their abhorrence of monopolies and consulting a 1773 dictionary to interpret “limited”); Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 558 (1985) (downplaying the conflict between the Clause and First Amendment principles because “the Framers intended copyright itself to be the engine of free expression”); Shultz v. Moore, 419 U.S. 930, 931 (1974) (noting that the Framers intended exclusive rights in inventions to be granted only if there were a distinctive contribution to the advancement of scientific knowledge); Graham v. John Deere Co., 383 U.S. 1, 5–6 (1966) (noting that Congress should exercise its intellectual property power as to best effectuate the Framers’ purpose); Int’l News Serv. v. Associated Press, 248 U.S. 215, 234 (1918) (rejecting the copyrightability of facts because “[i]t is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it”); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) (“The construction placed upon the Constitution by the first act of 1790 . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is . . . entitled to very great weight . . . .”).
\item\textsuperscript{46} See, e.g., \textit{Eldred}, 537 U.S. at 199 (looking at dictionaries contemporaneous with the Founding in order to understand the meaning of the word “limited” in the Clause); id. at 245 (Breyer, J., dissenting)
Court's historical constitutional intellectual property analysis.

B. THE DIFFERENT READINGS OF THE CLAUSE

Numerous courts and commentators noted the Clause's unique structure and attempted to account for it. Over time, four major readings of the Clause have emerged, all of which arguably follow the Framers' intent. The first approach, which is currently the dominant, has been advanced by the leading treatise on copyright law—Nimmer on Copyright. According to Nimmer, the grant of power in the Clause rests in the Exclusive Rights Clause, whereas the Progress Clause is not a limitation but rather a preamble of no operative effect. Notably, the only basis the treatise provides for its contention is the Framers' arguable intent:

[T]here is nothing to indicate that the Framers in recognizing copyright intended any higher standard of creation in terms of serving the public interest than that required for other forms of personal property. We may assume that the men who wrote the Constitution regarded the system of private property per se as in the public interest. In according a property status to copyright, they merely extended a recognition of this public interest into a new sector. Therefore, the phrase 'To promote the progress of science and useful arts . .' must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise.

The treatise does not cite the sources from which it learned of the Framers' intent. Nonetheless, Nimmer's contention has proven influential and has been


48. Dominant is meant in the sense of most influential doctrinally, being advanced by the leading treatise on copyright—Nimmer on Copyright—and by the D.C. Circuit, the only circuit court that has addressed the question directly and repeatedly.

49. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (2004) [hereinafter Nimmer] ("This introductory phrase is in the main explanatory of the purpose of copyright, without in itself constituting a rigid standard against which any copyright act must be measured."); id. § 1.03[B] ("[T]he introductory phrase, rather than constituting a limitation on Congressional authority, has for the most part tended to expand such authority." (footnote omitted)).

50. Id. § 1.03[A] (footnotes omitted).

51. For a judicial expression that suggests the non-enforceability of the Progress Clause, see, for example, Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 168 (1989) ("It is for Congress to determine if the present system [is effectual in promoting the goals of the Intellectual Property Clause] . . . ").
followed by commentators, the U.S. government, and the Eighth, Ninth, and, most notably, D.C. Circuits.

A second approach views the Progress Clause as a limitation and the Exclusive Rights Clause as a grant of power. This approach has its origin in a Supreme Court dictum. While interpreting the non-obviousness bar for patentability for the first time after it was instated by the Patent Act of 1952, the Supreme Court, in *Graham v. John Deere Co.*, noted that the Progress Clause serves to limit the power conferred by the Exclusive Rights Clause. To justify its reading of the Clause, the *Graham* Court invoked the originalist abhorrence of monopolies, which was attributed to the Framers as a group, and justified the attribution through lengthy quotes to the views of Thomas Jefferson that manifest opposition to the ownership of ideas. This approach was adopted by the Fifth Circuit and the Court of Federal Claims.

A third approach reads the Progress Clause as a grant of power and the Exclusive Rights Clause as a limitation on it. As the late President Monroe had observed, all the enumerated powers start with a "to" clause that embodies a


54. See *Hutchinson Tel. Co. v. Fronteer Directory Co. of Minn.*, 770 F.2d 128, 130 (8th Cir. 1985) ("We agree with Professor Nimmer that although the promotion of artistic and scientific creativity and the benefits flowing therefrom to the public are purposes of the Copyright Clause, those purposes do not limit Congress's power to legislate in the field of copyright.").

55. See *Ladd v. Law & Tech. Press*, 762 F.2d 809, 812 (9th Cir. 1985) (citing to Nimmer's contention that the first phrase of the Copyright Clause expands, rather than limits, congressional authority in the field of copyright).

56. See *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) ("[I]n *Schnapper* . . . we rejected the argument 'that the introductory language of the Copyright Clause constitutes a limit on congressional power.'"); Schnapper v. Foley, 667 F.2d 102, 111–12 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982) (citing to Nimmer and subsequently concluding that "we cannot accept appellants' argument that the introductory language of the Copyright Clause constitutes a limit on congressional power").

57. 383 U.S. 1, 5–8 (1966) ("Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose."); see also *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 154 (1950) (Douglas, J., concurring) ("Congress acts under the restraint imposed by the statement of purpose in Art. I, § 8.").

58. See *Graham*, 383 U.S. at 7–11.


60. See *James Monroe, Views of the President of the United States on the Subject of Internal Improvements* (May 4, 1822), in 2 A Compilation of the Messages and Papers of the Presidents, 1789–1897, at 144, 163 (James D. Richardson ed., 1897) (observing that enumerated powers start with a general grant of power, and are followed by explanations or qualifications if needed). Later scholars that read the Clause in light of other enumerated powers disagreed over whether the Exclusive Rights Clause was intended as an explanation or a qualification of the Progress Clause. Compare the view of Walterscheid, infra note 71 (explanation), with the view of Solum, supra note 47 (qualification).
grant of power. When powers are qualified, the limitation clause comes after the grant of power. Hence, a structural comparison of the Clause to other enumerated powers suggests arguably that the Progress Clause is a grant of power and that the Exclusive Rights Clause is a limitation. Also, a comparison of the Exclusive Rights Clause to other parts of the Constitution where "by" language follows a grant of power lends further support to this argument.

The fourth and final major reading of the Clause was canonized by De Wolf's early twentieth century copyright textbook. He suggested that the Clause should be read as two separate powers: one to promote the progress of science, by securing for limited times to authors the exclusive right to their writings (a copyright power); and another to promote the progress of useful arts, by securing for limited times to inventors the exclusive right to their discoveries (a patent power). This view is originalist and intentionalist. It is based on the assumption that the ordinary reader of the Clause at the end of the eighteenth century would have read the Clause this way and that the Framers intended the Clause to be so read. This reading, too, has many adherents. This view, if

61. See, e.g., U.S. CONST. art. I, § 8, cl. 2 ("To borrow Money on the credit of the United States").
62. See, e.g., U.S. CONST. art. I, § 8, cl. 12 ("To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years").
63. See Solum, supra note 47, at 14–20 (reading the Clause in light of other enumerated powers and concluding that the Progress Clause is a grant of power and that the Exclusive Rights clause is a limitation); see also Jeffrey T. Renz, What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution, 33 J. MARSHALL L. REV. 81, 128 (1999) (suggesting that the Exclusive Rights Clause limits the power in the Progress Clause).
66. See De Wolf, supra note 65, at 15. De Wolf was not the first to suggest that the Clause should be read "disjunctively." See infra note 68.
67. De Wolf, supra note 65, at 14–15 (arguing that such reading is mandated because the Clause exhibits a "balanced style of composition so much used in the days of the colonial worthies").
68. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 684 (1834) (Thompson, J., dissenting) ("This article is to be construed distributively, and must have been so understood; for when congress came to execute this power by legislation, the subjects are kept distinct, and very different provisions are made respecting them.").
accepted, alters the previous three readings of the Clause. As if these four major readings of the Clause were not enough, other historically-motivated, if idiosyncratic, understandings of the Clause exist.

This multiplicity of interpretive approaches manifests two phenomena that are important to the present research. First, the many and often conflicting readings of the Clause manifest confusion, which highlights the need to reconcile them with one another. Second, although they read the Clause differently, all four major readings of the Clause assume that the Framers' intentions in writing the Clause are an important key to understanding it.

C. DEBATE ABOUT THE PROGRESS CLAUSE HAS BEEN INCONCLUSIVE

Courts and commentators have held conflicting views about the meaning of the Clause's unique text and structure in general and, in particular, whether the Progress Clause was written by the Framers as a limitation. The confusion

70. To wit, this approach, if joined with the first approach, would mean that "to promote the progress of science" would be a non-binding preambular statement of purpose for the "copyright" power and that "to promote the progress of useful arts" would be a preamble for the "patent" power. Joined with the second approach, this fourth approach would mean that Congress's power to secure exclusive rights to authors for their writings is limited to the promotion of science and that Congress's power to secure exclusive rights to inventors for their discoveries is limited to the promotion of "useful arts." Joined with the third approach, this approach would mean that Congress's power to promote science can be exercised only by granting exclusive rights to authors for their writings and its power to promote the useful arts can be exercised only by granting exclusive rights to inventors for their discoveries.

71. See, e.g., Pollack, supra note 16, at 755 (suggesting that people at the end of the eighteenth century would read "progress" to mean geographic "spread"); Edward C. Walterscheid, Conforming the General Welfare Clause and the Intellectual Property Clause, 13 HARV. J.L. & TECH. 87, 123–25 (1999) (reading the Clause in light of other enumerated powers and concluding that the Progress Clause was intended as a grant of power and the Exclusive Rights Clause as an explanation). Additionally, scholars hold not only different historically-based views about the nature of the limitations within the Clause, but also about the way in which the limitations in the Clause can be circumvented by congressional action through other powers, such as the Commerce Clause. Compare, e.g., Heald & Sherry, supra note 16, at 1123, with Nachbar, supra note 16, at 276–77 (agreeing that "principles of constitutional weight" and "constitutional norms," respectively, may limit Congress's Article I powers, while finding, and failing to find, respectively, such standards within the Clause). This debate is beyond the scope of the present Article. It will only be observed that courts have generally enforced limitations in the Clause when congressional action through another Article I power would conflict with these limitations directly. See, e.g., U.S. v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999) (finding a bootleg provision unconstitutional under the Commerce Clause because it was not "fundamentally inconsistent" with the Clause's fixation requirement, which it violated); KISS Catalog v. Passport Int'l Prods., Inc., 350 F. Supp. 2d 823, 832–37 (C.D. Cal. 2004) (finding a civil anti-bootlegging provision unconstitutional because it was "fundamentally inconsistent" with the Clause's "limited times" limitation, even if it was permissible under other Congressional powers), rev'd, 405 F. Supp. 2d 1169, 1173 (C.D. Cal. 2005) (finding the provision constitutional under the Commerce Clause while reversing the finding that the provision was "fundamentally inconsistent" with the Copyright Clause); U.S. v. Martignon, 346 F. Supp. 2d 413, 428–29 (S.D.N.Y. 2004) (finding an anti-bootlegging provision unconstitutional because it was "fundamentally inconsistent" with the Clause's "limited times" limitation, even if it was permissible under other Congressional powers); U.S. v. Elcom Ltd., 203 F. Supp. 2d 1111, 1137–42 (N.D. Cal. 2002) (finding the DMCA constitutional under the Commerce Clause because it was not "irreconcilably inconsistent" with limitations in the Clause).

72. See, e.g., Holbrook, supra note 26, at 14 ("The courts have not decided conclusively, however, the extent to which the phrase 'promote the Progress' limits Congress's legislative powers.").
surrounding the Progress Clause stems, in large part, from the lack of direct
evidence heretofore bearing on the Framers' particular intent behind it. It was
shown above that the major argument in favor of treating the Progress Clause as
a non-binding preamble relies on an assertion about the Framers' intent that is
not accompanied by citations proving this arguable intent.73 Others have ad-
vanced various arguments in favor of reading the Progress Clause as a limita-
tion. In light of actual and potential responses to these arguments reviewed
below—suggesting essentially that the evidence is too remote or insufficient to
support either reading of the Progress Clause—the debate about the nature of
the Progress Clause has remained inconclusive.

The major issue revolved around the Framers' attitude towards monopolies. It
was argued that the Framers abhorred monopolies (especially in light of their
traditional abuse by the Crown)74 and that they saw intellectual property rights
as monopolies.75 Hence, the argument goes, in writing the Progress Clause the
Framers intended "promotion of progress" to limit Congress's intellectual prop-
erty power.76 The counterargument has been twofold. First, there is some doubt
that an intense abhorrence to monopolies existed generally at the time.77 For
example, although several state ratifying conventions suggested that the Consti-
tution include an anti-monopoly provision, this sentiment was not pervasive
enough to make this suggestion pass.78 Second, even accepting that a general
abhorrence of monopolies existed contemporaneously, such abhorrence may not

73. See supra notes 49–56 and accompanying text (reviewing the Nimmer treatise's assertion).
74. See, e.g., Coenen & Heald, supra note 47, at 110–11; Lessig, supra note 17, at 1062 ("The great
evil in the Framers' mind, second only to the great evil of centralized, monarchical government, was the
ever of state-sanctioned monopoly.").
75. See, e.g., Graham v. John Deere Co., 383 U.S. 1, 7 (1966) ("Jefferson, like other Americans, had
an instinctive aversion to monopolies. It was a monopoly on tea that sparked the Revolution and
Jefferson certainly did not favor an equivalent form of monopoly under the new government. His
abhorrence of monopoly extended initially to patents as well."); Figueroa v. U.S., 66 Fed. Cl. 139,
148–49 (2005) (suggesting that the Framers wished to follow the English example of stopping the
abuses of monopoly and patent grants).
(2003) ("By predicking protection on the promotion of 'Science,' the framers were evidently worried
about granting to Congress the same rights that had been abused by the English Crown. With an
important exception for new inventions, Parliament ended the era of 'odious' monopolies."); Ochoa &
Rose, supra note 16, at 925 ("The stipulation that patent and copyright protection be granted... only
'[t]o promote the Progress of Science and useful Arts,' appears to have been aimed at preventing the
kinds of abuses that had prompted the Statute of Monopolies 150 years earlier. It is clear that many of
the Framers were concerned with restraining monopolies of all kinds.").; Richard Posner, The Constitu-
tionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique, 55
SUP. CT. REV. 143 (2003) (finding "powerful" the argument that "[t]he historic Anglo-American
hostility to government grants of monopolies caused the framers of the Constitution to authorize
the granting of copyrights... only for the purpose of promoting intellectual and cultural progress.")
(footnote omitted).
77. See Schwartz & Treanor, supra note 16, at 2378 & n.271 ("[T]here is, for example, no particular
reason to read into the Clause the view that the Founders were afraid that Congress would engage in the
kind of giveaways in which Queen Elizabeth had once engaged.... [M]any of the Founders were much
more accepting of monopolies than the British are said to have been.").
78. See Nachbar, supra note 16, at 330–49; see also supra note 19 and accompanying text.
have applied to intellectual property rights, for which the Constitution provides explicitly. Intellectual property rights are limited in time and bring forth a social benefit (an invention or a work of authorship), different from perpetual monopolies over pre-existing goods (e.g., salt). It is possible that the various limitations in the Exclusive Rights Clause—especially "limited times," but potentially others as well—may have been sufficient to mollify most of the Framers' concerns about monopolies, leaving the question whether the Progress Clause was an additional limitation or a preamble at least somewhat indeterminate.

A second line of argument attempted to extrapolate the opinion of the Framers as a group from the opinions of individual Framers. Most prominent has been the Supreme Court's attempt in *Graham v. John Deere Co.* to interpret the Progress Clause as a limitation in light of Thomas Jefferson's views.

*Graham*'s approach has been criticized on the basis that Jefferson's views were extreme rather than representative among the Framers. Leaving aside the fact that Jefferson, being a minister to France, did not attend the Convention, his correspondence with Madison while the Constitution was pending ratification reveals that he would have left the Intellectual Property Clause out. Additionally, some scholars have argued that the Supreme Court mischaracterized and misused Jefferson's views. Other commentators attempted to understand the Clause in light of Madison's views. Dissenting Justice Breyer in *Eldred*, for example, suggested that Madison was suspicious towards the grant of patents and copyrights and that he was representative of "others in the founding generation." But the Court in *Eldred* suggested that Madison's "true" approach is to be devised from other writings and activities, such as *Federalist No. 43* and his participation in patent grant extensions as Secretary of State and as President. Be it as it may, Justice Breyer and the Court nevertheless agree about the representativeness of Madison, even though the research below suggests that his view of patents was not accepted by the majority of the

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79. See, e.g., infra notes 173–74 and accompanying text (citing a correspondence between Jefferson and Madison that suggests that Jefferson seemed to have abhorred all monopolies while Madison would make an exception in the case of intellectual property rights).

80. Other limitations include, for example, the grant to "authors" (a term that excludes those who use trademarks in commerce, see The Trade-Mark Cases, 100 U.S. 82, 93–94 (1879)) or the protection of "writings" (but not facts, see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346–47 (1991)).

82. See supra note 21 and accompanying text.
83. See infra text accompanying note 173.
84. See Edward C. Walterscheid, *The Use and Abuse of History: The Supreme Court's Interpretation of Thomas Jefferson's Influence on the Patent Law*, 39 IDEA 195, 224 (1999) ("[T]he Court's selective use of the Jeffersonian record, frequently out of context, as a form of advocacy, creates a mythology at odds with the contemporaneous record.").
86. See *Eldred*, 537 U.S. at 202 n.8.
Thus, there seems to be disagreement both as to the views of individual Framers and as to their being representative of the group.

A third line of inconclusive argument for the Clause as a limitation drew on the “first principle” of enumeration of powers in the Constitution, the constitutional principle of a limited government, and the recent Supreme Court federalism decisions to suggest that the Progress Clause should be read as a limitation. However, that Congress’s power has to have limits does not entail that the Progress Clause is necessarily one such limitation. The Court has found the Clause to include several other limitations, so that reading the Progress Clause as a preamble does not necessarily violate the fundamental principles invoked. Assuming that these constitutional first principles do entail that the Progress Clause is a substantial limitation, they are yet to be balanced against other constitutional norms that may lead one to different conclusions.

The last justification for the limiting operation of the Progress Clause has been to use the general interpretive presumption according to which each and every word and phrase in the Constitution should be given meaning. Some argued that interpreting the Progress Clause as a non-binding preambular statement of purpose would render it meaningless and thus should be rejected. However, that the Progress Clause has to be given meaning does not necessitate

87. Rather, it is shown that Madison would support a more expansive view of Congress’s intellectual property power (although quite limited in itself) than the rest of the Framers who added the Progress Clause. See discussion infra Part IV.

88. See Eldred v. Reno, 239 F.3d 372, 380–82 (D.C. Cir. 2001) (Sentelle, J., dissenting) (suggesting that because (1) the “first principle” of enumerated powers necessitates some limitations on government’s power, and (2) United States v. Lopez, 514 U.S. 549, 552 (1995) suggests that limitations on Congress’s power are inherent in the language of the power grant, the Progress Clause must be a limitation); Brief of Eagle Forum, supra note 64, at 2 (suggesting that the first principles—(1) giving constitutional language meaning and (2) that the enumeration of powers in the Constitution suggests that there are limitations to Congress’s power—“lead to the conclusion that all of the language of the Copyright Clause in one way or another limits congressional authority”).

89. See, e.g., Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (“Originality is a constitutional requirement.”); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“the limited copyright duration [is] required by the Constitution”); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (finding the term “authors” to limit copyright grants); The Trade-Mark Cases, 100 U.S. 82, 94 (1879) (finding the term “writings” to limit copyright grants).

90. See Nachbar, supra note 16, at 317 (highlighting the central role that “the norm favoring legislative over judicial policymaking” should play in intellectual property).

91. See, e.g., Figueroa v. United States, 57 Fed. Cl. 488, 498–500 (2003) (relying on the presumption that every clause and word should be given effect in concluding that the Progress Clause is a limitation); Edward C. Walterscheid, “Within the Limits of the Constitutional Grant”: Constitutional Limitations on the Patent Power, 9 J. INTELL. PROP. L. 291, 326 (2002) (suggesting that reading the Progress Clause as a preamble renders it meaningless, which is “contrary to the well-established principle that, to the extent possible, legislative language must be read so as to give effect to all of its parts”).

92. See, e.g., Eldred v. Ashcroft, 255 F.3d 849, 855 (D.C. Cir. 2001) (Sentelle, J., dissenting) (“This interpretation of Schnapper erases from Article I half of the Copyright Clause . . . .”); Coenen & Heald, supra note 47, at 116.
that it was intended as a limitation because the Framers may have intended it as a preamble rather than meaningless text.\textsuperscript{93} To sum up, the arguments made so far to show that the Progress Clause was written into the Constitution either as a limitation or as a non-binding preamble were not adequately supported.\textsuperscript{94} As discussed in the preceding paragraphs, they were either unsupported (e.g., Nimmer's assertion), or supported by evidence whose connection to the particular intent behind the Progress Clause was remote or contested (e.g., the views of particular Framers; the general sentiment towards monopolies), or the arguments and counterarguments in the literature were indeterminate (e.g., how to balance seemingly conflicting first principles of constitutional interpretation), or the argument relied on an interpretive presumption that can support the counterargument as well (the presumption that every word has to be given meaning). Therefore, it is the objective of this Article to reveal the Framers' specific intent as a group regarding the Progress Clause by analyzing hitherto overlooked evidence that sheds direct light on it.\textsuperscript{95}

II. THE FRAMERS' STARTING POINT

The federal Constitutional Convention kicked off in Philadelphia on May 25, 1787. Intellectual property was not a top priority for the Framers; the first draft Constitution, composed by the Committee of Detail on August 6 based on the

\begin{footnotes}
\item[93] Note that the Constitution starts with a preamble, which is commonly accepted as such. Also, some argue that the introductory statement of purpose in the Second Amendment should be read as a non-binding preamble, but this matter is disputed. The case of the Second Amendment does not inform the inquiry here much because of substantive and textual differences between the two. See Coenen & Heald, supra note 47, at 106-07 n.30 (noting the difference between the Amendment that relates to the powers of the national legislature); Solum, supra note 47, at 21-22 (noting textual differences between the Amendment and the Clause); Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. Rev. 793, 793 n.1 (1998) (noting both substantive and textual differences).
\item[94] See Thomas B. Nachbar, Constructing Copyright's Mythology, 6 Green Bag 2d 37, 43 (2002) (pointing out "the danger inherent in relying on broad assertions about the essential features of copyright and its central place in the Framers' vision of government [by those who wish to strike down acts that fail to promote the progress of science and useful arts]"); Schwartz & Treanor, supra note 16, at 2376, 2378-79 (criticizing arguments that favor interpreting the Progress Clause as a limitation in that they rely on "evidence that is... outside of the Convention and ratifying debates," and that their "evidentiary support is very thin," and that "this weak evidence is advanced to support broad claims").
\item[95] As will be clear below, this article does not assume that all the Framers shared the same intent. Quite the contrary: Part III, infra, reviews the Clause's framing process as a compromise between differently-minded Framers, and the "Framers' intent," as used in this Article, simply comes to denote a compromise about constitutional text that at least a majority of the Framers could agree to in the particular point in time when they were drafting the Constitution. It is thus possible that some Framers did not agree—in whole or in part—with the majority's intent, or that Framers that agreed to the same text hoped that it would be interpreted in different ways, or that in later years some Framers argued for a different interpretation of the text because of a bona fide change of view, because of a changed interest, because of the failings of human memory, etc. See also infra Part VI.A for additional qualifications of the present quest for the Framers' intent.
\end{footnotes}
discussions to date, did not mention it.\textsuperscript{96} Intellectual property came up while the Framers were debating various changes to this first draft. On August 18, James Madison of Virginia and Charles Pinckney of South Carolina proposed vesting several additional powers in the federal legislature. Among other proposals,\textsuperscript{97} each proposed a power relating to patents, copyrights, education, and governmental encouragements (or bounties), proposals that would become the precursors of the Clause, as follows:\textsuperscript{98}

<table>
<thead>
<tr>
<th>Subject Matter</th>
<th>Powers Proposed by Madison</th>
<th>Powers Proposed by Pinckney</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patent</td>
<td>To secure to the inventors of useful machines and implements the benefits thereof for a limited time (&quot;Madison's patent power&quot;)</td>
<td>To grant patents for useful inventions (&quot;Pinckney's patent power&quot;)</td>
</tr>
<tr>
<td>Copyright</td>
<td>To secure to literary authors their copy rights for a limited time (&quot;Madison's copyright power&quot;)</td>
<td>To secure to authors exclusive rights for a certain time (&quot;Pinckney's copyright power&quot;)</td>
</tr>
<tr>
<td>Education</td>
<td>To establish an University (&quot;Madison's education power&quot;)</td>
<td>To establish seminaries for the promotion of literature and the arts and sciences (&quot;Pinckney's education power&quot;)</td>
</tr>
<tr>
<td>Encouragements</td>
<td>To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries (&quot;Madison's encouragements power&quot;)</td>
<td>To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures (&quot;Pinckney's encouragements power&quot;)</td>
</tr>
</tbody>
</table>

\textsuperscript{96} See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 177 (Max Farrand ed., 1911) [hereinafter RECORDS].

\textsuperscript{97} Each of the delegates also proposed a congressional incorporation power and one relating to the seat of government. The coincidence of two delegates proposing on the same day, three months into the Convention, for the first time, six pairs of new legislative powers suggests that the two were coordinated. But see LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 193 (1968) ("[t]he proposals submitted by Madison and Pinckney" were "apparently arrived at independently"); L. Ray Patterson & Craig Joyce, Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution, 52 EMORY L.J. 909, 938 (2003) (same).

These proposals were referred to the Committee of Detail. On September 5, the Committee of Eleven,99 to which all pending matters were referred on August 31,100 recommended the adoption of a congressional power that later became the Intellectual Property Clause:

[The Congress shall have power] [t]o promote the progress of science and useful arts by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries.101

This power was unanimously agreed to without any recorded debate. On September 8, the delegates appointed a Committee of Five "to revise the style of and arrange the articles agreed to by the House."102 On September 12, this Committee presented a draft Constitution, which included the Clause.103 This power was intact when the Convention approved the final draft of the Constitution on September 17, 1787.104

The eight proposals by Madison and Pinckney and the eventual text of the Clause are the only sources that have survived the Convention regarding the discussion of intellectual property. The literature has identified only parts of this source material and has reviewed it only in passing, believing it to contain no significant information about the Framers' intent.105 This short and incomplete

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99. This committee had one member from each state. It had eleven rather than thirteen members because Rhode Island did not send delegates to the Convention and the New York delegation had left the Convention by this date. Its members were Gilman, King, Sherman, Brearly, Morris, Dickinson, Carroll, Madison, Williamson, Butler, and Baldwin. See 2 RECORDS, supra note 96, at 473 (Journal for Aug. 31, 1787).
100. See id. at 505 (Journal for Sept. 5, 1787).
101. See id. at 547 (Journal for Sept. 8, 1787).
102. See id. at 590, 595.
103. See id. at 655.
documentation of the Convention’s intellectual property debates is not surprising; it dovetails with the general brevity and incompleteness of the Convention’s journal, which may be attributed to the secrecy vow the Framers undertook. For better or worse, Madison and Pinckney’s eight powers are the only source material from the Convention on which one can draw. To the analysis of this source material, which lay largely unexplored to date, we now turn.

III. RECONSTRUCTING THE CLAUSE’S FRAMING PROCESS

The Framers left no explicit account of the process they went through starting with Madison and Pinckney’s proposals and ending with the text of the Clause, or of their intent in writing the Progress Clause. However, a close review of these texts in light of contemporaneous events suggests that the answers to these questions are implicit in the records that the Framers left behind. This Part will track the textual origins of the two parts of the Clause back to Madison and Pinckney’s proposals and put them in their historical context. This tracking process has two goals. The first is to show that the Framers intended to allow Congress to use some means (patents, copyrights) to “promote the progress of science and useful arts,” and at the same time not others (universities, encouragements (bounties)). The second is to show that there is no reason to suspect that there was anything secret about the framing of the Clause. Debates in the first Congresses reference and repeat the Framers’ choices from the Convention, and the Progress Clause tracks similar language in state enactments. Because there

has been known about the Convention’s intellectual property record, namely that Madison and Pinckney were “primary forces behind the addition of the Clause” and that the Clause was unanimously adopted without recorded debate); Patterson & Joyce, supra note 97, at 937–39 (quoting many of Madison and Pinckney’s proposals and offering a very brief analysis thereof); Malla Pollack, Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act, 36 LOY. L.A. L. REV. 337, 343 (2002) (“[A]ny [interpretive] approach based on the drafting or ratification discussions stumbles on the thinness of the record . . . .”); Schwartz & Treanor, supra note 16, at 2375 (seeing Madison and Pinckney’s patent and copyright proposals as the relevant part of the Convention’s record pertaining to the Clause, and noting that these proposals were the sources of the Exclusive Rights Clause, but failing to note the role of Madison and Pinckney’s education and encouragement proposals as sources of the Clause and noting that the Progress Clause originated first with the Committee of Eleven); Edward C. Walterscheid, To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution, 2 J. INTELL. PROP. L. 1, 26 (1994) (“[T]he question naturally arises as to how the Intellectual Property Clause came to be included in the Constitution. Little has been written on the point. The reason for the dearth of commentary undoubtedly is that so little is actually known about how its inclusion came about.”); Diane Leenheer Zimmerman, It’s an Original! (?): In Pursuit of Copyright’s Elusive Essence, 28 COLUM. J.L. & ARTS 187, 198 & n.73 (2005) (“[L]ittle specific or direct information is available about the thinking of the Framers.”).
is no apparent wedge between what the Framers did and external references, there is no reason to believe that the Clause’s public meaning was substantially different from the Framers’ intent.

Before turning to the tracking process, one observation is necessary. Five of Madison and Pinckney’s eight proposals—their patent and copyright powers and Madison’s education power—consist only of “to” clauses. They lack the unique ends/means structure of the Clause. The remaining three proposals—their encouragements powers and Pinckney’s education power—bear an ends/means structure, similar to that found in the Clause.

A. MEANS REJECTED, MEANS ADOPTED

None of the seven means mentioned in Madison and Pinckney’s education and encouragements powers—seminaries, a university, public institutions, rewards, immunities, premiums, and provisions—appears in the Exclusive Rights Clause, which is the “means” part of the Clause. Only the two means mentioned in Madison and Pinckney’s patent and copyright powers were incorporated into the Exclusive Rights Clause. This should lead one to assume, at least presumptively, that the means included were intentionally included and those excluded were intentionally excluded. The discussion below further buttresses the argument that this was, indeed, the Framers’ intent.

1. Means Rejected

a. Framers’ Intent Regarding an Education Power. The Framers did not want to confer upon Congress a power to establish a university or seminaries. Madison and Pinckney’s education powers of August 18, 1787, did not pass. On September 14, 1787, Madison and Pinckney moved again, this time jointly, to empower Congress to establish a university.107 The Framers voted against this motion, one of the arguments being that Congress could establish a university, if it wanted, at the future seat of government, now the District of Columbia.108 In 1790, George Washington urged the first federal Congress to establish a national university,109 but none was established. One of the arguments made against Washington’s initiative was that the Convention had explicitly rejected such a

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107. See 2 RECORDS, supra note 96, at 616 (Madison’s Journal for Sept. 14, 1787).
108. Delegate Morris commented that such power is unnecessary because Congress can establish a university as a part of its general power at the seat of government. See id. Thus, it can be inferred that the suggested university power reached beyond that geographic limit or else it would be difficult to explain why the proposal was made. See also infra note 110 (supporting the conclusion that the university power proposed was meant to exceed the boundaries of the federal seat of government).
109. See, e.g., 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES 135–36 (Washington, Gales & Seaton 1826) (address of President Washington) (“Nor am I less persuaded that you will agree with me in opinion, that there is nothing which can better deserve your patronage than the promotion of science and literature. . . . Whether this desirable object will be best promoted by affording aids to seminaries of learning already established; by the institution of a national university; or by any other expedients—will be well worthy of a place in the deliberations of the Legislature.”).
power, preferring to leave it to the states.110 Another was that no part of the Constitution allowed Congress to establish a university.111 At the end of his presidency, Washington again encouraged Congress to establish a university,112 but this suggestion was rejected by a “great majority.”113

Had the Framers wished to allow a congressional power over education, it would have been relatively easy for them to do so, such as by adding “and by establishing a university” at the end of the Exclusive Rights Clause. But the above suggests that the Exclusive Rights Clause does not mention a university because that was the Framers’ intent.

The way in which the university and seminaries proposals were framed in the Convention reveals the source of the Framers’ objection to vesting this power in Congress. Attending the Convention, Madison and Pinckney probably knew why the Framers objected to a federal university power, and they likely tried to overcome these objections when they reintroduced their joint proposal on September 14. The joint university power proposal was more qualified than Madison’s education power; it suggested a power to establish a university that would make no distinction among students based on religion.114 This suggests that a major source of the Framers’ objection was governmental endorsement of religion in education. Indeed, contemporaneous evidence suggests that, at the time of the Framing, governmental educational institutions would often bear a strong religious mark115 and that many of the Framers did not want the federal

110. See 3 RECORDS, supra note 96, at 362 (Roger Sherman, May 3, 1790) (“Mr. Sherman said, that a proposition to vest Congress with power to establish a National University was made in the General Convention; but it was negatived. It was thought sufficient that this power should be exercised by the States in their separate capacity.”).
111. See 2 ANNALS OF CONG. 1551 (1790) (“Mr. Stone inquired what part of the Constitution authorized Congress to take any steps [respecting President Washington’s call to encourage science and literature]; for his part, he knew of none.”).
113. See 6 ANNALS OF CONG. 1704 (1796); see also id. at 1711 (statement of Congressman Venable) (opposing the motion to establish a local seminary in D.C. because it was a national university in disguise at a time when a national university was widely opposed).
114. See 2 RECORDS, supra note 96, at 616 (Madison’s Journal for Sept. 14, 1787) (introducing a proposal “seeking to establish an University, in which no preferences or distinctions should be allowed on account of religion”); id. at 620 (McHenry’s Journal for Sept. 14, 1787) (“Moved To authorize Congress to establish an university to which and the honors and emoluments of which all persons may be admitted without any distinction of religion whatever.”).
115. Pinckney’s education power, and potentially Madison’s education power, drew on the Massachusetts’s Constitution of 1780 that anchored the status of Harvard University as a religious institution. See MASS. CONST. of 1780, ch. 5, § 1, art. 1; Oliar, supra note 98. Other state constitutions bundled their universities with religious studies. See PA. CONST. of Sept. 28, 1776, §§ 44–45; VT. CONST. of 1786, art. XXXVIII; VT. CONST. of 1777, §§ XL–XLI (Vermont was not represented in the Convention). The 1786 New York copyright statute shows the contemporaneous close connection between state, religion, promotion of knowledge and promotion of religious science as it provides for the apportionment of land by the Reformed Protestant Dutch Church for the establishment of what seems like a religious academy. See COPYRIGHT OFFICE, LIBRARY OF CONG., BULLETIN NO. 3, COPYRIGHT ENACTMENTS 1783–1900, at 29 (1900) [hereinafter COPYRIGHT ENACTMENTS]. Religious knowledge was contemporaneously understood to be a form of useful knowledge. See 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 269.
government to endorse religion.116 Read in this light, Pinckney's earlier education proposal was likely an attempt to deal with this concern: He did not suggest empowering the government to establish all types of seminaries including religious ones, but rather only those that promote arts and sciences. This reading makes sense especially because Pinckney notably advanced the separation of church and state in the Convention.117 It thus seems that the "ends" part in Pinckney's education power served as a limitation on that power.

That Madison and Pinckney's qualified joint proposal still did not pass suggests that there was probably another objection. The objection seems to be that the Framers did not want the federal government to encroach upon state power in education. State power under the Constitution is residual,118 and a federal education power had the potential to preempt state authority constitutionally.119

The objection to a federal university power and its two accompanying concerns are supported by the fact that a federal university was established only as late as 1821, in the District of Columbia, and its charter forbade religious discrimination.120 It is possible to summarize the aforementioned discussion, by depicting the Framers' intent graphically as follows:121

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116. See U.S. CONST. art. VI, cl. 3; id. amend. I.
118. See U.S. Const. amend. X. Although the Tenth Amendment was not contemporaneous with the Constitution, the residual construction was probably assumed by the Framers, as this had been the rule under Article II of the Articles of Confederation.
119. See supra note 108 (Representative Sherman's view). Later debates in Congress show an additional major objection to the university power, namely that the university would be funded from the public treasury but would benefit primarily people from the states near it. See 6 ANNALS OF CONG. 1697–1711 (1796). It is unclear to what extent this concern played a role in the Convention.
120. See Office of Institutional Research, History, http://www.gwu.edu/ire/history.htm (last visited Feb. 8, 2006) (noting that its charter provided that "persons of every religious denomination shall be capable of being elected Trustees; nor shall any person, either as President, Professor, Tutor or pupil, be refused admittance into said College, or denied any of the privileges, immunities, or advantages thereof, for or on account of his sentiments in matters of religion").
121. The "power at the seat of government" circle comes to represent the power conferred by Article I, Section 8, Clause 17 (granting Congress the power "[t]o exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States"), and the particular awareness of the Framers to this power in the context of the university power, pursuant to Delegate Morris's comment at the Convention, see supra note 108.
b. Framers' Intent Regarding an Encouragements Power. The Framers did not wish to empower Congress to use any of the seven types of encouragements mentioned in Madison and Pinckney's encouragements powers. The meaning of these seven measures is best explicated by the Report on the Subject of
In 1790, the United States was an agrarian country; its economy was weak, and its industry undeveloped. President Washington saw the need for a change. At the opening of the First Congress's second session, he addressed the two houses of Congress and urged them to advance American manufactures (industries) "by all proper means," including "giving effectual encouragement...to the introduction of new and useful inventions from abroad." Consequently, Secretary of the Treasury Alexander Hamilton studied possible ways of promoting American manufactures and published the Report. Among the measures recommended were duties on foreign manufactures, pecuniary bounties to specific manufactures, restrictions and prohibitions on imports and exports, exemptions from duties, premiums, the encouragement of invention by exclusive rights, importation franchises, monetary rewards, and the establishment of a "Board [...] for promoting arts, agriculture, manufactures and commerce" that would make various discretionary disbursements of the aforementioned types. These measures were generally accepted in the mercantile economies of those times, and they give an idea of the types of measures that Madison and Pinckney's encouragements powers addressed.

One should note that Madison and Pinckney's encouragements powers relate to two types of encouragements: encouragements of knowledge and encouragements of industry. The interplay between Madison and Pinckney's proposals to encourage knowledge and their patent and copyright proposals may not be clear, but encouragements for knowledge and intellectual property rights are...
means to a similar end. Economists generally view the works of authors and inventors as “public goods” that share two characteristics. First, they are non-rivalrous, meaning that their consumption by one does not prevent their consumption by others (compare watching a movie to eating an apple). Second, they are partially non-excludable, meaning that it is hard to prevent non-payers’ enjoyment of the goods. Thus, absent some regulation these goods are prone to under-provision by markets because consumers could enjoy them legally without paying. Creators foresee limited opportunities to recoup their creation cost and may be deterred from creating.130

There are several ways to overcome the problem of public goods provision,131 two of which are relevant here. One is to grant to creators legally enforceable exclusive rights in their works, which would enable creators to charge for use. Madison and Pinckney’s patent and copyright powers are of this sort. The second is for governments to pay creators for their works.132 Although the works would be free for all to use once created, authors would recoup their expenses from the government rather than from the market.

Why did Madison and Pinckney propose knowledge-enhancing encouragements? Three possibilities come to mind. First, they may have wished Congress to be able to issue encouragements as a parallel means to promote knowledge, just as state legislatures could choose between the two.133 Second, knowledge-enhancing encouragements may have been proposed primarily to encourage a different type of knowledge. Patents and copyrights seem best suited to promote knowledge that has market value. Encouragements are better suited to promote knowledge that is socially beneficial but unlikely to have a foreseeable market

at 117 (“[Madison’s encouragements power] is much broader in scope than the proposals to provide for patents and copyrights, and incorporation of language closely analogous to it in the clause indicates that the Framers viewed the clause as providing much more than merely power to grant patents and copyrights.”). In a footnote to the latter quote, Walterscheid notes: “The deletion of ‘proper premiums & provisions’ did nothing to change the broad import of this grant of power.” Id. at 117 n.9. However, this reading of Madison and Pinckney’s powers does not make a distinction between their means and ends and does not recognize the different economic means that each suggests to promote knowledge and industry.


132. For two notable proposals of this sort, see id. ch. 6; Steven Shavell & Tanguy Van Ypersele, Rewards Versus Intellectual Property Rights, 44 J.L. & ECON. 525, 534–35 (2001).

133. See, e.g., BUGBEE, supra note 128, at 89 (reviewing the Pennsylvania Assembly’s encouragement of £100 for a machine to clean river beds); id. at 92 (reviewing Pennsylvania’s £100 reward for introducing a cotton-carding machine). From his service on the Virginia legislature, Madison knew that exclusive rights and encouragements were alternative means to promote knowledge. See id. at 96 (noting that James Rumsey petitioned in 1784 the Virginia House of Delegates, of which Madison was then a member, for a patent or a premium for his steamboat invention).
value, such as basic scientific research, which today is heavily funded by the government through institutions like the National Science Foundation and the National Institutes of Health. At least the text of Madison's encouragements power seems to fit this rationale, speaking of "discoveries" rather than "inventions," which were mentioned in Madison and Pinckney's patent powers.\textsuperscript{134} Third, the knowledge-enhancing encouragements may have been suggested as a way to allow the government to terminate intellectual property rights by payment. Madison certainly thought such an option desirable\textsuperscript{135} being aware that termination privileges existed in several State patent grants.\textsuperscript{136}

Ultimately, Madison and Pinckney's encouragements powers were not included in the Constitution. When the issue of patents of importation—a form of encouragements—came up later in Congress, the members rejected their grant while expressing a sentiment that they were unconstitutional.\textsuperscript{137} At the opening of the first Congress's second session, President Washington encouraged Congress to allow for patents of importation,\textsuperscript{138} but these were never provided for. When the Patent Bill of 1790 was introduced, its language allowed for the grant of patents of importation, but such language was eventually deleted as a result of constitutionality concerns.\textsuperscript{139} Similarly, Congress did not adopt Hamilton's suggestion of various encouragements in the Report. In writing the Report, Hamilton himself expressed doubts whether patents of importation were constitutional.\textsuperscript{140}

It is not that the Framers were indifferent to the national interest in strengthening manufacturing or to the American balance of trade. Rather, they probably

\textsuperscript{134} See also Alexander Hamilton, Paper "A," reprinted in 10 THE PAPERS OF ALEXANDER HAMILTON 18, 19 n.52 (Harold C. Syrett et al. eds., 1966) (suggesting that governmental encouragements would be appropriate to remunerate introducers of items or ideas that "will not yield an immediate or adequate benefit" in the market).

\textsuperscript{135} James Madison, Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments., in Elizabeth Fleet, Madison's "Detached Memoranda." 3 WM. & MARY Q. 3d SER. 534, 551–52 (1946) ("In all cases of monopoly, not excepting those specified in favor of authors & inventors, it would be well to reserve to the State, a right to terminate the monopoly by paying a specified and reasonable sum [to the holder]. This would guard against the public discontents resulting from the exorbitant gains of individuals, and from the inconvenient restrictions combined with them.").

\textsuperscript{136} See, e.g., id. at 552 (noting that Virginia's steamboat patent to James Rumsey reserved a right in the State to terminate the patent by paying Rumsey ten thousand dollars); see also BUGBEE, supra note 128, at 97 (Rumsey's patent in Pennsylvania included a £8,000 abolition privilege); id. at 100 (Delaware's flour-mill machinery patents to Oliver Evans were subject to a £1,000 abolition privilege).

\textsuperscript{137} Patents of importation were limited-time exclusive rights conferred upon the first to import an art not previously known or used domestically. These patents were an accepted policy in principal manufacturing European nations in the late eighteenth century. See Edward C. Walterscheid, Patents and Manufacturing in the Early Republic, 80 J. PAT. & TRADEMARK OFF. SOC'Y 855, 857, 865 (1998).

\textsuperscript{138} See text accompanying supra note 125.

\textsuperscript{139} See Walterscheid, supra note 137, at 871–75.

\textsuperscript{140} See Alexander Hamilton, Report on the Subject of Manufactures, supra note 124, at 308 ("[T]here is cause to regret, that the competency of the authority of the National Government to the good, which might be done, is not without a question."); Alexander Hamilton, First Draft of the Report on Manufactures, in 10 THE PAPERS OF ALEXANDER HAMILTON, supra note 134, at 23, 37 (doubting whether the grant of patents of importation is "within the compass of the powers of the government").
thought that other means of achieving these goals were better suited and less prone to abuse. The Founders empowered Congress in the Constitution to impose protective duties and to grant intellectual property rights. These measures were also recommended in the Report and were utilized both before and after it was issued. This inaction by the first Congress (many members of which were Framers) in response to the Report and in defiance of the Report’s warm endorsement by Washington suggests that these measures were left out of the Constitution intentionally. Later debates in Congress further suggest that the Framers did not intend to vest in Congress an encouragements power.

The Framers’ rejection of an encouragements power is supported by a letter written by Madison in which he responded to Tench Coxe’s plea that Madison support public land grants as means of encouraging the importation of inventions:

Your idea of appropriating a district of territory to the encouragement of imported inventions is new and worthy of consideration. I can not but apprehend however that the clause in the constitution which forbids patents for that purpose will lie equally in the way of your expedient. Congress seem to be tied down to the single mode of encouraging inventions by granting the exclusive benefit of them for a limited time, and therefore to have no more power to give a further encouragement out of a fund of land than a fund of money. . . . The Latitude of authority now wished for was strongly urged and expressly rejected.

Madison’s response suggests that the issue of pecuniary governmental encour-

\[\text{141. See Douglas A. Irwin, The Aftermath of Hamilton’s “Report on Manufactures” 7-24 (Nat’l Bureau of Econ. Research, Working Paper No. 9943, 2003). Irwin reviews and agrees with the literature claiming that Congress refused to adopt Hamilton’s recommendations for the encouragement of manufactures. Irwin notes, however, that Congress implemented in May 1792 many of the Report’s recommendations regarding duties (as different from bounties, rewards, premiums, and public institutions) as a means to finance the war on the western frontier. Promulgating taxes and duties, however, as Hamilton notes in the Report, unquestionably lies within Congress’s constitutional ambit.}\\[\text{142. See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1883) (according great weight to the construction placed by the Framers upon the Constitution in the first Congress).}\\[\text{143. See 3 ANNALS OF CONG. 393-94 (1793) (statement of Mr. Page) (“The framers of the Constitution guarded so much against a possibility of such partial preferences as might be given, if Congress had the right to grant them, that, even to encourage learning and useful arts, the granting of patents is the extent of their power. . . . [T]he wise framers of our Constitution saw that, if Congress had the power of exerting what has been called a royal munificence for these purposes, Congress might, like many royal benefactors, misuse their munificence; might elevate sycophants, and be inattentive to men unfriendly to the views of Government; might reward the ingenuity of the citizens of one State, and neglect a much greater genius of another.”); H.R. Doc. No. 74, reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 140 (Walter Lowrie & Walter S. Franklin eds., 1834) (reporting the committee’s view “[t]hat it is their opinion that application to Congress for pecuniary encouragement of important discoveries, or of useful arts, cannot be complied with, as the constitution of the United States appears to have limited the powers of Congress to granting patents only”); see also infra note 156 and accompanying text.}\\[\text{144. See Letter from James Madison to Tench Coxe (Mar. 28, 1790), in 13 THE PAPERS OF JAMES MADISON 128 (Charles F. Hobson et al. eds., 1981).}]}\]
agements was "strongly urged" and rejected during debates in the Convention that were not recorded. This letter (and Coxe's letter to Madison) seems to reflect the contemporaneous understanding that the exclusive rights in the Clause were suggested as exclusive of other means to "promote progress." This latter sense of exclusion is also reflected in Madison's first inaugural speech in which he emphasized that he shall use "authorized means" to promote the progress of knowledge, thus implying that other means were not authorized, namely a federal university and encouragements.

Why were the encouragements powers rejected? It seems that a majority of the Framers opposed them based on one or more of four possible reasons. The first has to do with an anti-monopolistic sentiment of the Framers. The anti-monopolistic background for the Framing was recognized by the Supreme Court in *Graham v. John Deere Co.* The Court noted that the popular anti-monopolistic sentiment the Framers felt dated back to the English 1623 Statute of Monopolies. This sentiment was embodied in the basic legal norms of several colonies (and later, states). An anti-monopolistic sentiment

145. Id.; see also supra note 143.
146. Letter from Tench Coxe to James Madison (Mar. 21, 1790), in 13 THE PAPERS OF JAMES MADISON, supra note 144, at 111–14 (suggesting that the Exclusive Rights Clause prevents the grant of patents of importation).
147. For the current import of this original meaning, see discussion infra Part VI.A.
148. See James Madison, *First Inaugural Address* (Mar. 4, 1809), in 8 THE WRITINGS OF JAMES MADISON 47, 49 (Gaillard Hunt ed., 1900–1910) (noting that as President he shall strive "to promote by authorized means improvements friendly to agriculture, to manufactures, and to external as well as internal commerce; to favor in like manner the advancement of science and the diffusion of information as the best aliment to true liberty; to carry on the benevolent plans which have been so meritoriously applied to the conversion of our aboriginal neighbors from the degradation and wretchedness of savage life to a participation of the improvements of which the human mind and manners are susceptible in a civilized state"); see also Karl B. Lutz, *Are the Courts Carrying Out Constitutional Public Policy on Patents?*, 34 J. PAT. OFF. Soc'y 766, 774 (1952) (noting that one of the “limitations contained in the patent clause [is that] . . . [t]he progress of useful arts is to be promoted by the free-enterprise device of a patent, not by the grant of premiums or rewards from the public treasury").
149. See Ochoa & Rose, supra note 16, at 924–28; see also Walterscheid, supra note 16, at 37–38. Earlier, the Article mentioned scholarly views that doubted that the anti-monopolistic sentiment was intense and shared by all Framers. It is enough, however, that this sentiment was shared by a significant number of Framers, which seems to have been the case, to raise the possibility that this group blocked the use of a federal encouragements power in the legislative process.
150. 383 U.S. 1, 7 (1966) (“Jefferson, like other Americans, had an instinctive aversion to monopolies. It was a monopoly on tea that sparked the Revolution and Jefferson certainly did not favor an equivalent form of monopoly under the new government.”).
151. See id. at 5.
152. Massachusetts had an anti-monopoly provision in its “Body of Liberties” of 1641. See Bugbee, supra note 128, at 61. Connecticut imitated Massachusetts's provision with a similar statute in 1672. See id. at 69. Maryland and North Carolina enacted a similar measure in their respective Bills of Rights. See MD. DECLARATION OF RIGHTS, art. XXXIX (1776) (“That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered.”); N.C. DECLARATION OF RIGHTS, art. XXIII (1776) (“That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.”).
was present during the Convention’s debates, which seems to be the reason why the Framers rejected other proposals by Madison and Pinckney for a federal incorporation power. Moreover, the sentiment was expressed in several state conventions ratifying the Constitution.

A second reason for the rejection of the encouragements powers may be a concern with governmental favoritism of individuals and states by Congress and thus the abuse of such powers.

A third may have been the Framers’ desire to minimize the government’s role in markets and society. The encouragements powers would have endangered newly-earned political and economic freedoms. After all, the background against which the Founders were operating was the long oppressive political and economic English rule of the colonies that utilized a system of monopolies, charters, and trading companies that had exclusive commercial rights. Generally, the colonies could export their produce only to England and import manufactured goods only from England. In fact, Hamilton’s Report addressed concerns of this type at length. The Report acknowledges adversarial claims that “to accelerate the growth of manufactures, is, in fact, to endeavor, by force and art, to transfer the natural current of industry from a more to a less beneficial channel”;

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153. See, e.g., 2 RECORDS, supra note 96, at 616 (Madison’s Journal for Sep. 14, 1787) (opinion of King) (insinuating that there was popular objection to “mercantile monopolies”); id. at 632–33 (Madison’s Journal for Sep. 15, 1787) (opinion of Gerry); id. at 640 (Mason expresses his objection to congressional grant of monopolies in trade and commerce, as a part of his objections to the draft Constitution of September 12, 1787); id. at 635 (King’s journal for September 15, 1787) (noting Gerry’s objection that the congressional power over commerce will enable it to create corporations and monopolies).

154. On August 18, Madison proposed a power “[t]o grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent.” See id. at 325. On that day, Pinckney proposed a power “[t]o grant charters for incorporation.” See id. Madison reintroduced on September 14, 1787, a power similar to his August 18 incorporation proposal, which was similarly rejected. See id. at 615–16 (Madison’s Journal for Sep. 14, 1787). Some objected to an incorporation power because it could be used to establish monopolies. Id. at 616 (opinions of King, Mason). Others may have feared that it would be exercised to charter incorporations whose benefits would accrue to some states while its costs would fall on all states. See infra note 156.


156. See supra note 143. There is reason to believe that at least some Framers did not want Congress to pass regulations whose effect would be to spend federal monies in a way that would benefit some states at the expense of others. Thus Franklin proposed in the Convention to empower Congress to cut canals. This proposal, narrower than a general incorporation power, was rejected; one of the arguments being that “[t]he expence . . . will fall on the U. States, and the benefit accrue to the places where the canals may be cut.” See 2 RECORDS, supra note 96, at 615 (Madison’s Journal for Sep. 14, 1787) (opinion of Sherman).

would "infallibly find its own way to the most profitable employment";\textsuperscript{158} and that the Report’s proposals would "sacrifice the interest of the community to those of particular classes," which would enjoy a "virtual monopoly."\textsuperscript{159} As Hamilton’s proposals were rejected, it is reasonable to assume that they were rejected, at least in part, because of the objections that he was trying to explain away.

A fourth reason may have been pragmatic: the Framers may have wished to encourage innovation in a way that would not encumber the federal treasury, namely through exclusive rights rather than governmental encouragements.\textsuperscript{160} However, there is reason to suspect how real this concern was. Vesting such power in Congress would not impose a duty on Congress to issue encouragements. Rather, it would give Congress the option to issue encouragements in cases it would find suitable. Also, in soliciting Madison’s support for a federal encouragement to importers of inventions, Coxe attempted to address the pecuniary issue by asking for land grants. Madison’s response made no distinction between governmental money grants and land grants.\textsuperscript{161}

The Framers’ intent regarding Pinckney’s encouragements power can be summarized and depicted graphically as follows:

\begin{figure}[h]
\centering
\includegraphics[width=0.8\textwidth]{figure2}
\caption{Text and Original Intent Regarding Encouragements}
\end{figure}

\begin{itemize}
\item \textbf{Means}:
  \begin{itemize}
  \item power to establish public institutions, rewards & immunities
  \item other powers (e.g., tax, IP)
  \end{itemize}
\item \textbf{Ends}:
  \begin{itemize}
  \item promotion of agriculture, commerce, trades, and manufactures
  \end{itemize}
\end{itemize}

\textsuperscript{158} Id.; see also id. at 266–67.
\textsuperscript{159} Id. at 234–34; see also id. at 286.
\textsuperscript{160} See Walterscheid, supra note 16, at 34–35, 56; Edward C. Walterscheid, \textit{To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power}, 43 IDEA 1, 15–16 (2002).
\textsuperscript{161} For Madison and Coxe’s exchange, see supra note 144 and accompanying text.
Pinckney's encouragements power would empower Congress to act in legislative areas $A$ and $B$. He would empower Congress to use the means in the top left circle for the ends in the bottom circle. His proposal was rejected. By doing so, the Framers did not reject these goals. Rather, they did not wish Congress to use these specific means—encouragements—to support industry. They considered other means, including limited-time exclusive rights and Congress's taxation power, to be more appropriate. The Framers intended to confer the power in areas $B$ and $C$ upon Congress. Thus, Pinckney’s encouragements power was rejected because the Framers opposed area $A$, not $B$.

2. Means Adopted

While the Framers rejected Madison and Pinckney’s proposals for federal power over education and encouragements as means to promote the progress of science and useful arts, their patent and copyright proposals were manifestly the means the Convention adopted in the Exclusive Rights Clause. Textually, the terms “to secure,” “limited times,” “authors,” “inventors,” and “exclusive right(s)” —as well as words that denote writings and inventions—appear in Madison and Pinckney’s proposals and in the Exclusive Rights Clause.

Despite the anti-monopolistic sentiment—however widely it was shared—a majority of the Framers probably saw intellectual property rights as “justified” monopolies. A monopoly was defined at the time as depriving the public of something it had previously enjoyed. Since patents and copyrights are granted for something new, the Framers might have thought that the public was not deprived of anything. Moreover, they might have thought the public was enriched by the availability of new goods during both the short-term monopoly and the long-term free access once the protection expired.

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162. See U.S. CONST. art. I, § 8, cls. 1, 8.

163. Note that the analysis relating to Figure 2 is simplified. See paragraph accompanying infra note 191 (highlighting the difference between the “promote” language used in Pinckney’s education power and Figure 2, and the “promote progress” language used in the Clause).

164. See, e.g., Statute of Monopolies, 21 Jac. I, ch. 3 (1624) (Eng.) (prohibiting all royal grants of monopoly but excepting patents of invention of up to fourteen years and printing patents); James Madison, supra note 135, at 551 (viewing patents and copyrights as the only two monopolies that the Constitution has allowed because of their societal benefit); Letter from James Kent to Nathaniel Lawrence, in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 75, 76 (Merrill Jensen ed., 1976) (“I have just been reading Smith on the Wealth of Nations & he has taught me to look with an unfavorable eye on monopolies—But a monopoly of the mental kind I take to be laudable & an exception to the Rule.”); infra text accompanying note 174 (noting James Madison's viewing of intellectual property rights as exceptional monopolies “too valuable to be wholly renounced”).


In the colonies and later the states, patents and copyrights were generally granted on a case-by-case basis after a petition was filed with the state legislature. This limited the number of grants issued. The grants would often differ in their terms, conditions, and durations. By the time the Convention sat, many states had not issued even one patent. The first copyright granted in any of the colonies was in 1672 and the next in 1781, six years before the Convention.\textsuperscript{167} Although twelve states enacted copyright statutes from 1783 to 1786, some of these never took effect, being conditioned on the adoption of similar measures in all thirteen states.\textsuperscript{168} It is believed that many of these statutes were never acted upon. South Carolina had a generic patent provision but would still issue its patents by legislative acts.\textsuperscript{169} Thus, it seems that when the delegates adopted the Clause, they thought that exclusive rights would issue by specific petitions on a relatively infrequent basis and that Congressmen would continue to supervise the extension of each grant.

The delegates thus probably believed that practical hardship (petitioning Congress) as well as the legislature’s supervision would limit the number of grants. Indeed, prior to the Convention, the Founders had taken measures to ensure that the exclusive rights would not rise to the level of “harmful” monopolies. Many of the state copyright statutes allowed courts to issue compulsory licenses and compel authors to provide the public with an adequate supply of copies at reasonable prices.\textsuperscript{170} Affecting price and quantity are among the key objectives of antitrust regulation to this day.\textsuperscript{171} Additionally, the Framers thought of intellectual property rights as limited to terms of about fourteen years, which was a key feature that differentiated them from monopolies.

The aforementioned understanding of the nature of intellectual property rights is demonstrated by the famous 1788 exchange between Madison and Jefferson surrounding the adoption of the Clause.\textsuperscript{172} Jefferson wrote:

\[\text{[It] is better to... abolish... Monopolies, in all cases, than not to do it in any... The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time,}\]

\begin{footnotes}
\item[168] See Patterson, supra note 97, at 933, 936.
\item[169] See Bugbee, supra note 128, at 93. These acts were influenced by South Carolina’s generic patent provision. See id. at 93–95.
\item[170] See Copyright Acts of Connecticut (Jan. 1783), Georgia (Feb. 3, 1786), New York (Apr. 29, 1786), North Carolina (Nov. 19, 1785), and South Carolina (Mar. 26, 1784), reprinted in Copyright enactments, supra note 115, at 9–27.
\item[171] See, e.g., W. Kip Viscusi et al., Economics of Regulation and Antitrust 298–99 (3d ed. 2000).
\item[172] The Supreme Court noted that although he was not a delegate to the Convention because he was the minister to France at that time, Jefferson’s views are relevant to the interpretation of the Clause because of his historic role and involvement in administering the early patent system. See Graham v. John Deere Co., 383 U.S. 1, 7–8 (1966). But cf. Walterscheid, supra note 84, at 224 (suggesting that the Court overstated Jefferson’s contribution to the American patent system).
\end{footnotes}
as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.\(^\text{173}\)

Madison replied:

With regards to monopolies, they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? ... Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power as with us is in the many not in the few the danger cannot be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.\(^\text{174}\)

Jefferson took a more anti-monopolistic position than Madison, but the Clause struck middle ground between their positions.\(^\text{175}\) The Constitution includes a congressional intellectual property power, which Jefferson opposed, but the Clause contains the Progress Clause limitation that Madison's patent and copyright powers did not include, as will be explained below in Part IV.

**B. ENDS REJECTED, ENDS ADOPTED**

Madison and Pinckney's patent and copyright powers are not the sole sources of the Clause. Although they anticipate the Exclusive Rights Clause, they cannot account for the text of the Progress Clause. They are proposals for plenary legislative power to grant limited-time exclusive rights, and had they been the only sources of the Clause, it would have likely looked much like the Exclusive Rights Clause alone. As mentioned earlier, an ends/means structure exists in three of Madison and Pinckney's powers,\(^\text{176}\) in particular their encouragements powers and Pinckney's education power, as follows:

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175. Madison disliked monopolies. As the text demonstrates, his disagreement with Jefferson was about the appropriateness of making an exception in the case of patents and copyrights. For more on Madison's view, see infra note 199.

176. *See supra* note 98 and accompanying table.
Figure 3: Ends/MMeans Structure in three of Madison and Pinckney’s Powers

The ends parts of these three proposals are close textually to the text of the Progress Clause, which combines them into one concise sentence. The Progress Clause speaks of the promotion of progress of science and useful arts. The ends part of Pinckney’s education power regards the promotion of literature, arts and sciences. The ends part of Pinckney’s encouragements power mentions the promotion of various useful arts. The ends part of Madison’s encouragements power regards advances of useful knowledge and discoveries.

The Clause’s overall structure builds on Madison’s encouragements power. The two contain a “to . . ., by . . .” structure, where the “to” statement delineates the ends sought and the “by” statement delineates the authorized means. This structure is different from the structure of Pinckney’s education and encouragements powers, which is a “to . . ., for . . .” one, where the “to” statement delineates the means, and the “for” statement delineates the ends. The means part of Madison’s encouragements power is structurally similar to the Exclusive Rights Clause in the sense that the means in both are qualified. The similarity between Madison’s encouragements power and the Clause is evident in their “ends” parts. If we rearranged Madison’s encouragements power by moving the “by” part to the end, it would read: “to encourage the advancement of useful knowledge and discoveries by proper premiums and provisions.” The structural similarity of the rearranged power to the Clause becomes apparent. Table 2 compares the “ends” portion of Madison’s encouragements power and the Progress Clause:

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177. Madison’s encouragements power limits premiums and provisions to “proper” ones. The Exclusive Rights Clause qualifies exclusive rights to “limited times.” Both limitations are not very strict, since “proper” is subject to a standard of reasonableness and “limited times” may be understood to include very long, albeit limited, durations.
Words on the same line in Table 2 bear a very close, often synonymous, meaning. Regarding the first line, the Supreme Court noted that "the terms 'to promote' are synonymous with the words 'to stimulate,' 'to encourage,' or 'to induce.'"178 Regarding the second line, the words "progress" and "advancement" are synonymous, as a paragraph that is repeated almost verbatim in the state copyright statutes of Massachusetts, New Hampshire, and Rhode Island demonstrates:

As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind: Therefore, to encourage the publication of literary productions, honorary and beneficial to the public, Be it enacted . . . .179

The following is the part relating to "progress" in these state statutes, rearranged and compared with the relevant part of the Progress Clause:

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179. See Copyright Act of New Hampshire (Nov. 7, 1783), reprinted in Copyright Enactments, supra note 115, at 16.
Table 3: Progress in State Copyright Statutes

<table>
<thead>
<tr>
<th>Progress Clause</th>
<th>Preamble I</th>
<th>Preamble II</th>
<th>Preamble III</th>
</tr>
</thead>
<tbody>
<tr>
<td>To promote</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The progress</td>
<td>the improvement</td>
<td>the progress</td>
<td>The advancement</td>
</tr>
<tr>
<td>Of science</td>
<td>of knowledge</td>
<td>of civilization</td>
<td>of human happiness</td>
</tr>
<tr>
<td>and useful arts</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The preamble mentions the furtherance of three objectives as the goals of the copyright statute. Its structure and repetitiveness suggest that the word “progress” is equivalent with “advancement” and “improvement.” Moreover, it suggests that in the eyes of at least some Framers the predominant objective of copyright law, the improvement of knowledge, was closely connected to the progress of civilization and the advancement of human happiness. Other state copyright statutes express this relation in a similar way, such as by finding that the publication of writings would do “service to mankind” and by noting that “learning tends to the embellishment of human nature . . . and the general good of mankind.” This resonates with a remark made during the Convention by one of the Founders that a primary objective of government is the cultivation and improvement of the human mind. Seven of the twelve copyright statutes noted as their goals not only the encouragement of knowledge and learning, but also the betterment of mankind. This sense of betterment of the human condi-

180. See also supra note 148 (in his first inaugural address, Madison paraphrased the Progress Clause as “to promote . . . improvements friendly to [useful arts]; to [promote] the advancement of science”, which further shows the close similarity between progress, as used in the Clause, and improvement and advancement). But cf. Pollack, supra note 16, at 755 (suggesting that “progress” under the Clause means “spread” rather than advancement and improvement). Pollack’s theory relies on the assumption that the wording of the Progress Clause did not follow from any of the suggestions made at the Convention. Id. at 781. It was shown, however, that the Progress Clause followed the wording and structure of Pinckney’s education power and Madison and Pinckney’s encouragements powers. She also claims that the Progress Clause “does not quote any ancestral document.” Id. However, in a related work I show that Madison and Pinckney’s proposals built, among other things, on state enactments and especially copyright statutes. See Oliar, supra note 98. Madison likely perceived of “diffusion of information” as compatible with “progress”. See supra note 148 (quoting Madison’s First Inaugural Address). Although “progress” contains “diffusion of information” as one of its moments, it is not reducible to it.


182. See Copyright Act of New Jersey (May 27, 1783), reprinted in Copyright Enactments, supra note 115, at 14.

183. See 1 Records 605 (Madison’s Journal for July 13, 1787) (documenting James Wilson’s view that the most noble object of government is not securing property but rather the cultivation and improvement of the human mind).
tion is also present in Madison's inaugural speech years later. Of all words suggested as possible synonyms in Table 3, only the word "progress" conveys this additional collective sense, and this seems to be the reason it was preferred over its synonyms. Although the word "progress" does not appear literally in Madison and Pinckney's proposals, its sources and meaning are apparent from the ends part of Madison's encouragements power and from the state copyright statutes.

The third line in Table 2 suggests that "science" was close in meaning to "useful knowledge." Such meaning is supported by the "Preamble I" column in Table 3. Indeed, it was noted that the eighteenth century meaning of "science" was close to the meaning of "knowledge." Table 2 seems to suggest that the meaning of "science" was leaning more towards "useful" knowledge and away from more abstract types of knowledge. This seems to conform to earlier judicial interpretations of the term "science" that denied copyright protection to types of works that were considered not useful. Thus, useful knowledge at the time of the Framing does not seem to have been limited to what is currently engulfed by copyrightable expression.

Finally, the word "discoveries" in the fourth line is not synonymous with "useful arts." The reason seems to be that the word "discoveries" came from Madison's encouragements power. Governmental encouragements are mostly needed to incentivize discoveries that have no independent market value. The term "useful arts" in the Clause, however, is an end that better dovetails with the means that eventually entered the Clause. The grant of exclusive rights is best adapted to induce inventions that are useful, i.e. have market value.

In choosing the final wording of the Progress Clause, the Convention largely

184. See supra note 148 (in his first inaugural address, Madison tied together the promotion of progress in science and useful arts and "true liberty" and "improvements of which the human mind and manners are susceptible in a civilized state").

185. See Solum, supra note 47, at 47; see also Patterson & Lindberg, supra note 69, at 48 ("The word science retains its eighteenth-century meaning of 'knowledge or learning.'"); Pollack, supra note 105, at 376 ("Science' means 'knowledge' in an anachronistically broad sense."); Walterscheid, supra note 16, at 51 ("In the latter part of the eighteenth century 'science' was synonymous with 'knowledge' and 'learning.'").

186. See Solum, supra note 47, at 51 ("There is a general agreement that science was usually understood in a broader sense, so as to include knowledge, especially systematic or grounded knowledge of enduring value.").

187. Early decisions did not consider immoral works and adult materials as copyrightable, arguing that they failed to promote science and useful arts. This trend stopped after Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 859 (5th Cir. 1979). See generally 1 Nimmer, supra note 49, at § 1.03[B] (describing limitations imposed by the introductory phrase). For pre-twentieth century texts and decisions manifesting a requirement of material contribution to the body of human knowledge for copyrightability, see Zimmerman, supra note 105, at 199–200, and references therein.

188. The Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790), listed maps as copyrightable subject matter, although to the extent that they are factual works they would not be protected today. Back then, however, the production of maps was seen as a useful endeavor in need of encouragement.

189. But see Walterscheid, supra note 26, at 376 (suggesting that discoveries and "useful arts" are synonymous).
followed the structure and meaning of Madison's encouragements power and borrowed the words "science" and "arts" from Pinckney's education power\(^{190}\) and "progress" from the preamble of Massachusetts, New Hampshire, and Rhode Island's copyright statutes, as discussed above. It seems that the eventual formulation of the Clause was intended to incorporate the ends of Pinckney's education power and Madison and Pinckney's encouragements powers and to emphasize the sense of advancement in knowledge as mankind's progress.

Note that Madison, in his encouragements power, refers to "promotion of progress," which is discernable from Pinckney's education and encouragements powers that refer to the mere "promotion" of "literature and the arts and sciences" and the mere "promotion" of "agriculture, commerce, trades, and manufactures" respectively. Pinckney's proposals do not seem to carry a necessary sense of advancement in the level of human knowledge. Pinckney's encouragements power, for example, relates to the encouragement of industry. It would involve, for example, transfers of money from the government and protective tariffs but would not necessarily or primarily produce new knowledge. Pinckney's education power would establish seminaries that would spread existing knowledge but would not primarily or necessarily produce new knowledge. Mere encouragement was not the standard adopted in the Clause. By following the standard from Madison's encouragements power, the Framers expressed their desire that exclusive rights are to be issued only if knowledge is advanced.\(^{191}\)

**IV. THE PROGRESS CLAUSE WAS INTENDED AS A LIMITATION**

While the accepted wisdom conjectures that the Framers did not intend the Progress Clause as a limitation,\(^{192}\) the process of the Clause's framing, reviewed in Part III in detail, suggests that, in fact, the Progress Clause was intended as a limitation. That detailed review makes it possible for this Part to identify three specific indications of the Framers' collective intent while they were framing the Progress Clause to have it limit Congress's power.\(^{193}\) These three, reviewed immediately below, are not presented as three absolute demonstrations that each proves the Framers' intent beyond any reasonable doubt. Rather, they each suggest that the inference that the Framers intended the Progress Clause as a

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190. *But see id.* at 341 ("The terms 'science' and 'useful arts' do not appear in any of the proposals submitted by Madison and Pinckney.").

191. The emphasis on advancement as it exists textually in the Clause ("promote the progress") is anticipated by Madison's encouragements power ("encourage advancements") and by Madison's first inaugural speech ("promote [] improvements", "[promote] advancement"). *See supra* note 148. This seems to justify the following statement by the Supreme Court: "Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the standard expressed in the Constitution and it may not be ignored." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (first two emphases added).

192. *See supra* notes 49–56 and accompanying text.

193. *See also supra* note 24.
limitation is more likely than the opposite inference. When viewed together, the three converge to form a consistent story according to which the Framers intended the Progress Clause as a limitation.

Madison and Pinckney’s patent and copyright powers suggested vesting in Congress plenary patent and copyright powers as ends in themselves. Had the rest of the Framers shared Madison and Pinckney’s intentions, they would have likely adopted their proposals without change, and Congress’s intellectual property power would have likely looked like the current Exclusive Rights Clause. Instead, the Framers as a group changed the proposals before adopting them, suggesting disagreement. Moreover, the nature of the change was such that they subjected Madison and Pinckney’s plenary patent and copyright powers as a means to achieving ends they specified in the Progress Clause (but not other ends). This process reveals more information about the Framers’ (limiting) intent regarding the Progress Clause compared to a hypothetical case where the Clause would have been proposed and adopted as is. Unfortunately, the literature to date has limited its analysis to the final text of the Clause but has overlooked the additional information about the framing process analyzed in Part III above. The change that the Framers inserted tends to suggest that they did not wish to vest in Congress plenary powers over patents and copyrights, but rather wanted to limit the exercise of these powers to the end of promoting progress in science and useful arts.

The origin of the Progress Clause further tends to suggest that it was intended as a limitation. The Progress Clause originated from the “ends” parts in Madison and Pinckney’s rejected encouragements powers, and Pinckney’s rejected education power. The “ends” parts of the rejected powers served as a limitation on the rejected powers: there was strong contemporaneous opposition to vesting education and encouragements powers in the federal government. At the same time, Madison and Pinckney proposed these controversial means (but not less controversial means: patents and copyrights) with accompanying ends that directed the exercise of the rejected proposals. The correlation between widespread opposition to particular means and the fact that those means were proposed together with public-regarding ends implies causality between the two. Madison and Pinckney either shared some of the objections that the other Framers had toward vesting these powers in Congress and therefore

194. See, e.g., Howard B. Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 WAYNE L. REV. 1119, 1174–75 (1983) (“Very little is known of the drafters intentions regarding the Copyright-Patent Clause beyond what is apparent on its face.”); Walterscheid, supra note 60, at 12 (“A cogent caution always to be borne in mind is that almost nothing is known of the intent of the Framers in including the [Intellectual Property] Clause beyond that which is apparent on its face.”).

195. That much is learned from the Framers’ rejection of the education and encouragements proposals in the Convention (even in a limited form) and from the persistent refusals later in Congress to provide for education and encouragements, as reviewed in supra Part III.
limited these powers, or knew of the other Framers’ objections and wished to increase the chances that their proposals would pass. Thus, the best reading of the ends parts in the rejected proposals is as a limitation. The fact that the Framers took the limiting ends language from the rejected proposals, and tacked it onto Madison and Pinckney’s patent and copyright proposals, suggests that they wished the limiting language to serve in the same limiting role.

196. By August 18, 1787, when Madison and Pinckney made their proposals, the Convention had already gone through three months of intense debate. It is unlikely that Madison and Pinckney had no general idea of potential objections to proposals they were making, especially that late into the Convention, and especially regarding powers to which at least a majority of the Framers objected.

197. Moreover, the ends in the rejected proposals seem to mollify contemporaneous concerns about objectionable exercise of these powers by channeling such exercise to non-objectionable ends. For example, Pinckney proposed that seminaries were to be established to promote literature and the arts and sciences, but not religion. See discussion supra notes 114–17.

198. See also discussion infra accompanying Table 4 (providing support to reading the Progress Clause as a limitation through a comparison of the different ways in which Madison and Pinckney, on the one hand, and the rest of the Framers, on the other, treated the various proposals for congressional power, conducted in light of the Framers’ views about Congress’s proper scope of power).

199. In light of the conclusion that the Framers added the Progress Clause in order to mollify a concern about Congressional abuse of power, a major and recurring contemporaneous concern that comes up in the evidence available to us today is the distaste for monopolies. Perhaps the one most expansive reflection on the Clause available to us is from James Madison, supra note 135, at 551–52:

Monopolies tho’ in certain cases useful ought to be granted with caution, and guarded with strictness agst abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books and of useful inventions. . . . There can be no just objection to a temporary monopoly in these cases: but it ought to be temporary, because under that limitation sufficient recompence and encouragement may be given . . .

. . . [Monopoly grants for useful undertakings] can be justified in very peculiar cases only, if at all: the danger being very great that the good resulting from the operation of the monopoly, will be overbalanced by the evil effect of the precedent; and it being not impossible that the monopoly itself, in its original operation, may produce more evil than good.

In all cases of monopoly, not excepting those specified in favor of authors & inventors, it would be well to reserve to the State, a right to terminate the monopoly by paying a specified and reasonable sum [to the holder.] This would guard against the public discontents resulting from the exorbitant gains of individuals, and from the inconvenient restrictions combined with them. . . .

In this section, Madison categorizes patents and copyrights as monopolies, mentions the fear that they can be abused, and mentions specifically their negative features, namely high prices and restrictions on free trade. As noted, however, the argument here is different from previous ones in that it does not depend on the assumption that the contemporaneous distaste for monopolies was universal and intense and does not rely on expressions of any one of the Framers as representative of the group. Rather, the findings of this Article as to the limiting force of the Progress Clause are based on direct evidence from the Framing Convention, and reconcilable with evidence suggesting that the distaste for monopolies was simply substantial. Different from the abhorrence argument, the finding that the Progress Clause was intended as a limitation is reconcilable also with the possibility that a majority of the Framers wished the Progress Clause to be a limitation, but for different reasons. One such reason, discussed in the next paragraphs, has to do with the different views among the Framers as to the appropriate scope of federal power. Another related reason may be different assessments among the Framers as to the susceptibility of an intellectual property power to interest group pressures. See infra note 203. Most importantly this Article is able to demonstrate the limiting intent behind the Progress Clause specifically whereas the argument from monopolies could not. In the passage quoted above, for example, the
This argument is finally supported by contextualizing the Clause’s framing process in the larger scheme of the Convention’s political makeup. The delegates to the Convention agreed that the Continental Congress was too weak to act effectively, but they disagreed as to how much change to the Articles of Confederation was needed. On one side were nationalists (also “centralists”) who believed that a substantial invigoration of the central government was needed. On the other side were states-righters who believed that the Union should largely remain confederate, namely a loose association of independent states. The Constitution reflects the compromise struck between the camps.

Madison and Pinckney were nationalists, and thus their views reflect a more centralist line than that of the Convention as a whole, which was composed of nationalists and states-righters. Indeed, Madison and Pinckney...
would vest in Congress plenary patent and copyright powers. The Framers, a group whose collective view was less nationalist than Madison and Pinckney's, subjected the powers they proposed to public regarding "ends." The fact that this change was done by a body less centralist and more suspicious of the central government than Madison and Pinckney tends to suggest that the change was intended as a limitation on power. The same logic runs through Madison and Pinckney's encouragements powers and Pinckney's education power. As reviewed above, we know that there was general resistance to, and suspicion towards, vesting these powers in the central government. Madison and Pinckney seem to have shared it, because they proposed these powers with limiting ends, as different from their patent and copyright proposals. Yet, the Convention as a whole, representing a less nationalist view than Madison and Pinckney's, would not vest these powers in the central government, not even in their limited form.

The following table gauges the perceived potential for abuse of the various

Particularly important to my characterization of Madison as a nationalist are his views about interest groups. He was bothered by the fact that the states passed economic legislation that sacrificed the public good for the immediate interests of the majority of voters. Madison believed that the national legislature would include many interest groups that would balance each other, so that no policy would pass unless it was really in the public good. Thus, to Madison, the best protection against public choice pressures was to vest the power in a large body with diverse interest, like Congress. See id. at 1-10, 74-79. Madison expressed this view explicitly regarding intellectual property in his letter to Jefferson. Madison believed that Congress would not grant intellectual property rights unless it would be in the public good. See text accompanying supra note 174. This may explain why Madison was more at ease than others to vest in Congress a plenary power to hand out patents and copyrights, as he was less concerned than others that Congress would issue these as a result of interest group pressures.

204. Their patent and copyright proposals were certainly qualified in time, but that has become a standard condition of all patent and copyright grants in the states. The time limitation was a major thing that made intellectual property rights exceptions to monopolies. Their proposals, however, were not qualified by ends. They probably believed that the other delegates would not object to the plenary powers as these powers were previously exercised by the states and were suggested to be moved to the federal government for uniformity and efficiency reasons. See Madison, Vices, supra note 202; The Federalist No. 43 (James Madison); Bugbee, supra note 128, at 84-103 (reviewing parallel patent applications and grants in the states). It seems, however, that they underestimated the objection that a majority of the Framers had towards such formulation.

205. The Framers as a group may have been more skeptical than Madison about Congress's ability to resist interest group pressures. See supra note 203.

206. This reasoning raises a question about the intended constitutional division of power between federal and state governments regarding intellectual property. Although the Framers saw the need to pass power from the states to the federal government over intellectual property for uniformity of treatment and efficiency of regulation (as expressed in The Federalist No. 43, at 239 (James Madison) (E.H. Scott ed., 1898) and in Madison, Vices, supra note 202, at 350), the limitation of the federal government's power in this regard may suggest that the Framers wished the states to retain some concurrent intellectual property power. The inference about the retention of state legislative intellectual property power (either for grants that do not "promote [] progress of science and useful arts" or for grants whose validity would only be local rather than national) finds support in a long history of such grants. For a few early examples and discussion of this point, see Bugbee, supra note 128, at 90-103 (reviewing various state patents issued between 1789 and 1791). For current and recent examples, see, for example, Merges et al., Intellectual Property in the New Technological Age 818-19 (3d ed. 2003) (reviewing state and federal enactments for the protection of authors' moral rights); id. at 372 (reviewing the pre-1972 protection of sound recordings through state statutes).
powers proposed by Madison and Pinckney as perceived by them and by the Convention as a whole. If one of Madison, Pinckney, or the Convention objects to a power, it would mean that that party believes that vesting that power in Congress would be prone to abuse. If a party believes that a power can be vested in Congress in a plenary manner, then that party perceives a low potential for abuse of power. If a party is willing to vest a power in Congress but with an “ends” limitation, then that party perceives an intermediate level of potential abuse of that power. The results are as follows:

Table 4: Proposals, Perceived Potential for Abuse, and Disposition

<table>
<thead>
<tr>
<th>Potential For Abuse as Perceived by:207</th>
<th>Power</th>
<th>Madison</th>
<th>Pinckney</th>
<th>The more suspicious of Pinckney, Madison</th>
<th>The Convention</th>
<th>Convention’s Disposition of Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patent</td>
<td>Low</td>
<td>Low</td>
<td>Low</td>
<td>Intermediate</td>
<td>Adopted with added limitation</td>
<td></td>
</tr>
<tr>
<td>Copyright</td>
<td>Low</td>
<td>Low</td>
<td>Low</td>
<td>Intermediate</td>
<td>Adopted with added limitation</td>
<td></td>
</tr>
<tr>
<td>Education</td>
<td>Low</td>
<td>Intermediate</td>
<td>Intermediate</td>
<td>High</td>
<td>Rejected</td>
<td></td>
</tr>
<tr>
<td>Encouragements</td>
<td>Intermediate</td>
<td>Intermediate</td>
<td>Intermediate</td>
<td>High</td>
<td>Rejected</td>
<td></td>
</tr>
</tbody>
</table>

Table 4 suggests that interpreting the “ends” part of proposals as a limitation makes complete sense in light of the political makeup of the Convention and the nature of the powers proposed. Madison and Pinckney had no particular concern about Congressional patent and copyright powers, and thus proposed such powers without limiting them by ends. Pinckney was concerned that a federal education power could be abused for religious studies, and therefore qualified his proposal by adding “ends” to it. Madison seemingly was not concerned about federal abuse of a university power, and thus proposed it without “ends,”

207. The values suggested in the “Madison” and “Pinckney” columns in the table are inferred from the presence or absence of “ends” in the two Framers’ proposals for Congressional powers. The next column takes the greater value of the two Framers regarding that power. The last column notes what the Convention did with the relevant proposal for congressional power. The “The Convention” column states “high” regarding the education and encouragements powers because the Convention rejected them and “intermediate” vis-à-vis the patents and copyrights powers because the Convention would vest these powers in Congress only if limited by ends.
in a plenary manner. Madison and Pinckney saw some potential for abuse of an encouragements power, and therefore each proposed one with qualifying ends. The Convention, however, included also states-righters, and its general opinion was less centralist than that of Madison and Pinckney. Thus, the Convention would not vest in Congress education and encouragements powers that both Madison and Pinckney would in a qualified manner. The Convention would vest in Congress a more limited power over patents and copyrights than Madison and Pinckney would by subjecting these powers to public-regarding ends. According to this interpretation of “ends,” Madison and Pinckney are one level more centralist in their views than the rest of the Convention regarding all four powers, as one would expect; and both Madison and Pinckney, on the one hand, and the general view of the Convention, on the other, share a greater worry about Congressional power over education and encouragements than over patents and copyrights (which explains why each treated each pair of powers differently).

Summing up, the three considerations—the fact that the Framers would not adopt the intellectual property proposals in the plenary form in which they were made, the political makeup of the Convention, and the origin of the words in the Progress Clause as qualifiers of other powers—all contribute to one consistent story according to which the Progress Clause was intended to limit Congress’s intellectual property power.

V. SOLVING THE PUZZLE OF THE CLAUSE’S STRUCTURE

Part III’s reconstruction of the Clause’s framing process also reveals that the Clause emerged from two types of grants of power formulated as “to” clauses. The Progress Clause stemmed from the “to” clause in Madison’s Encouragements Power, and the Exclusive Rights Clause stemmed from the “to” clauses in Madison and Pinckney’s Patent and Copyright Powers. At the same time, the Framers intended each grant of power to be limited and, significantly, to limit the power granted by the other. The Exclusive Rights Clause was intended to limit the “means” by which the “ends,” detailed in the Progress Clause, may be achieved. Conversely, the Progress Clause was intended to limit the ends to which the powers in the Exclusive Rights Clause could be put. The power granted to Congress under the Clause is thus demarcated by complex language that, in its whole, both delineates a power and its limitations as explained just above. This power is located at the intersection of the two clauses, each participating in defining the power and in limiting it at the same time.208 This can be represented graphically:

208. Language granting a power serves to limit it at the same time. Cf. United States v. Lopez, 514 U.S. 549, 553 (1995) (“[L]imitations on the commerce power are inherent in the very language of the Commerce Clause.”).
Figure 4 reconciles the two seemingly contradictory approaches reviewed in Part I.B: one argued that the Progress Clause was a power and that the Exclusive Rights Clause was a limitation, and the other flipped their roles, arguing that the Progress Clause was a limitation on the power conferred by the Exclusive Rights Clause. The former approach starts with the power demarcated by the left-hand side circle in Figure 4, and then carves out the area that is not within the limitation set by the right-hand side circle. The latter approach starts with the power demarcated by the right-hand side circle, and carves out the area that lies outside the area of the left-hand side circle. Both approaches are correct, but neither conveys the intent behind the Clause in full. Rather, the intent behind the Clause is best encapsulated by joining the two approaches together.\(^\text{210}\)

Having an accurate model of the Clause in mind is important because the way one thinks about the Clause affects the way one interprets and applies it. These two approaches may seem formally indistinguishable, as the area at the intersection of the two circles would remain the same regardless of which of them one regarded as a power and which as a limitation.\(^\text{211}\) The power conferred by the Clause would remain the middle area in Figure 4. However, each of the two approaches forces courts to assume, when they review intellectual property

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\(^{209}\) The Figure represents only the structural relation between the parts of the Clause; it is not suggestive of their relative sizes.

\(^{210}\) Note that the model graphically demonstrates Madison's contemporaneous formulation of the Clause in *The Federalist No. 43* that "[t]he public good fully coincides in [intellectual property] with the claims of individuals." Madison expresses the intent to confer upon Congress the middle area in Figure 4, above, since only there does the public good fully coincide with the private interests of those who are granted intellectual property rights.

\(^{211}\) Formally, intersection of two sets is commutative. Formally: \(a \cap b = b \cap a\).
statutes, that Congress enjoys different powers, and each draws courts' attention to enforcing different limitations.\footnote{Compare Graham v. John Deere Co., 383 U.S. 1, 5–6 (1966) (viewing the Progress Clause to be a limitation, which leads the Court to suggest that intellectual property enactments must entail social benefit gained from innovation, and that such enactments cannot constitutionally withdraw materials from the public domain or restrict access to materials previously available), with Eldred v. Ashcroft, 537 U.S. 186, 192–222 (2003) (viewing the Progress Clause as a non-binding preamble, which leads the Court not to spell out what limitations on power it entails).}

The unique textual structure of the Clause is best explained as reflecting the Framers' intent regarding it. The Framers wished to vest in Congress an intellectual property power that would be limited to the promotion of progress of science and useful arts, and they also wished to exclude Congress from using other means to exercise this limited power, namely the founding of a university and the grant of encouragements. The Framers used language as best as they could to reflect this complex intent through the text of the Clause.\footnote{Could the Framers have empowered Congress "to secure for limited times to authors and inventors the exclusive rights to their respective writings and discoveries for the promotion of progress of science and useful arts," and how would this change the interpretation of the Clause, if at all? This would generally follow the means/ends structure of Pinckney's education and encouragements powers (rather than Madison's encouragements power) and would retain figure 4's structure of defining a power through the intersection of ends and means. However, this language would not have conveyed the Framers' negative intent towards the use of alternative means (university, encouragements). Also, this language would seem to convey a lesser sense of progress as a limitation—it would situate the Exclusive Rights Clause as the clear grant of power and would at least make it possible to read the progress language as a non-binding explanation. See supra note 60. Lastly, and perhaps most importantly, it would emphasize the primacy of the power to grant intellectual property rights, whereas the current text of the Clause, in which the "promote [...] progress" language is situated textually—when compared to the other enumerated powers—as the grant of power, emphasizes the primacy of progress, as ends, over the means chosen to achieve it. See supra note 27.}

VI. APPLICATIONS AND QUALIFICATIONS

A. APPLICATIONS FOR ORIGINALISM AND CRITICISMS THEREOF

Myriad considerations inform constitutional interpretation generally, of which the Framers' intent and the text's original meaning are two.\footnote{See discussion supra Part I.A (noting the particular attention paid by courts and commentators to text and history in interpreting the Clause).}

Elucidating these considerations, which courts and commentators found important regarding the Clause particularly,\footnote{Elsewhere, I suggested that the effects of an intellectual property enactment are relevant to assessing its constitutionality. See Avishalom Tor & Dotan Oliar, Incentives to Create Under a 'Lifetime-Plus-Years' Copyright Duration: Lessons from a Behavioral Economic Analysis for Eldred v. Ashcroft, 36 Loy. L.A. L. Rev. 437 (2002) (suggesting that CTEA provides individuals with negligible additional incentive to create based on a behavioral analysis of copyright's term structure).} does not suggest that they represent the whole picture. On the contrary, one may hope that once the interpretive pull of the Framers' intent and the text's original meaning became more clear, courts and commentators would be able to allocate their time to studying the pull of other, less explored, valuable considerations.\footnote{See supra note 27.} Keeping to the scope of the present re-
search, the rest of this Part will take the constitutional debate over methods of interpretation as it finds it, and will examine the extent to which general arguments and counterarguments about the proper use of text and history in constitutional law apply in the context of the Intellectual Property Clause in light of the findings of this Article.

Intentionalism—or the search for the Framers' intent—is often challenged on two related bases: an ontological one (the "original intent" does not exist; there are many different individual intentions) and an epistemological one (we have no way of knowing what the original intent was). The analysis above suggests that in the context of the Convention's intellectual property debates, the ontological critique is generally justified, but that the epistemological critique, at least as characterized by some, is not fully justified. While the Convention's record pertaining to intellectual property is admittedly brief, and while the Clause may have seemed enigmatic because of its unique structure, significant parts of the enigma have been cleared. In particular, it is possible to determine the Framers' intent behind the Clause's distinctive structure and the operation of the Progress Clause within it. It is true that not all Framers shared the same intent regarding patents, copyrights, education, and encouragements. Rather, there was considerable variation among them. Madison and Pinckney would grant the federal government power over education and encouragements, though the majority of the Framers would not. While Madison and Pinckney would vest a plenary power in Congress to grant intellectual property rights, Jefferson would not vest such powers in Congress at all; however, the majority of the Framers would vest such powers in Congress in a limited form (only to the extent that they advanced the arts and sciences). Yet, while recognizing the plurality of opinions among the Framers, it is possible to demarcate the compromise that the Framers achieved, namely the qualification they added to Madison and Pinckney's patent and copyright proposals.

Yet, some aspects of the Framers' intent remain unclear. For example, although Part III.A.1.b identified several possible reasons for the Framers' rejection of an encouragements power, the analysis could not go as far as determining which of the reasons, if any, was the predominant one.

Relying on the Framers' intent, as it is reflected in the Convention's debates, is subject to criticism on the basis that these debates were secret and unknown to the ratifiers who gave the Constitution its binding effect. Secret intentions

217. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (suggesting that the records of the founding era are "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."); William J. Brennan, Jr., Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 14 (The Federalist Soc'y ed., 1986) (suggesting that the search for the Framers' intent "is little more than arrogance cloaked as humility").

218. Jefferson did not attend the Convention. However, from the fact that Madison's initial proposals were not adopted as suggested, we may assume that the Framers that opposed adopting Madison's initial proposals at least shared some of Jefferson's sentiments.

219. See supra text accompanying notes 149–161.
that are not embodied in text, it is argued, cannot have a binding force. Instead, what one should care about is only the original understanding of the text by the ratifiers, or, better yet, the objective meaning of the Constitution to an ordinary contemporaneous reader.\footnote{220}{See generally Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution’s Secret Drafting History, 91 Geo. L.J. 1113, 1115–18 (2003).}

Even if the argument in this Article relied solely on the Framers’ secret intentions, it would still qualify to rebut the dominant view that the Progress Clause is not a limitation. Such view was based solely on the ungrounded assertion that the Framers intended the Progress Clause as a non-binding preamble. The evidence we have from the Convention, however, suggests the opposite. Additionally, because many, including the Supreme Court, academics, and litigants, accord the Framers’ intent considerable weight, intentionalist findings are still important.

Perhaps more importantly, the argument in this Article addresses this critique of intentionalism. The Article has not limited itself to the Convention’s debates, but rather has corroborated the inferences it drew from the Convention’s debates with contemporaneous sources that were publicly available in the years preceding the Convention and following it.\footnote{221}{See generally supra Part III. For example, the original meaning of “progress” was derived based on contemporaneous state copyright statutes that used the term; the original negative implication of the Exclusive Rights Clause for the propriety of the use of university and rewards was derived based, among other things, on views publicly expressed in Congress.}

Moreover, there is no evidence suggesting that the Framers were, or attempted to be, secretive about the debates surrounding the Intellectual Property Clause. On the contrary: Madison and Pinckney’s eight proposals for congressional power that served as the basis for the delegates’ debates were taken from contemporaneous public state enactments.\footnote{222}{See Oliar, supra note 98.} Thus, the materials that this Article relied on were all public contemporaneously, and within enactments that reasonable people could expect the Framers to have consulted. The evidence we have about later debates in Congress and about the Framers’ private correspondence suggests that they were quite open about the Convention’s disposition of Madison and Pinckney’s eight proposals. Moreover, the first Congresses further discussed the subject matter of Madison and Pinckney’s eight proposals, similarly endorsed the federal regulation of patents and copyrights, and rejected the regulation of education and encouragements (while recognizing that they were rejected in the Convention and suspecting their constitutionality).\footnote{223}{See supra note 110 (quoting a view expressed in the first Congress that the Convention rejected a proposal to establish a national university); supra note 143 (arguing that debates in the second Congress imply that the Convention rejected a congressional power to grant encouragements); supra note 144 (quoting Madison’s letter to Tench Coxe recounting that the Convention discussed and rejected the grant of encouragements and chose to provide only for patents). In addition, shortly after the Convention adjourned, Pinckney published a pamphlet in both New York and South Carolina saying that he had suggested intellectual property and university powers in the Convention. See Oliar, supra note 98. The legislative history of the Patent Act of 1790 similarly suggests that the public thought that the...
and especially because there is a dearth of other contemporaneous materials pertaining to the Clause, this seems to be an appropriate case to consult the Convention's debates as informative and reflective of the original meaning of the Clause. 224

Although the present research bolsters the viability of originalism as an interpretive endeavor, in the sense that it was possible to identify much of the Framers' intent surrounding the Clause, originalists would still not find it easy to suggest that we should follow the Framers' intent in all cases. For example, it was shown that the Framers objected to establishing public institutions to encourage advancement in knowledge. Following the Framers' intent seems to mean that current institutions that do the same, such as the National Science Foundation, National Institutes of Health, and the National Endowment for the Arts, are unconstitutional. That would be inconsistent with the long history of these institutions, and would entail harsh consequences. It seems that the widespread objection to institutions of this kind at the time of the Framing does not exist today.

Some originalists, however, would find the present research helpful to answer these challenges. Those who adhere to a softer version of originalism, and look to the higher order intentions of the Framers, may look for the reasons behind the Framers' objection to Madison and Pinckney's encouragements powers. If one believes that the Framers objected to governmental encouragements because they feared that the federal government would discriminate among citizens of the different states in allocating the encouragements monies, then, to the extent that such concern does not exist today, these institutions do not necessarily violate the Framers' intent.

Consulting the Framers' higher level intentions may similarly be helpful regarding the education power. Although the Framers rejected a federal education power, the evidence seems to suggest that it was partially due to their concern that the federal government would endorse religion in education. When the Clause was adopted, however, the First Amendment was not yet a part of the Constitution, and the long tradition of separation of church and state that we have today was nonexistent. Thus, it may plausibly be the case that had the Framers lived today, they would not have necessarily objected to the establishment of a federal university.

224. See Kesavan & Paulsen, supra note 220, at 1113, 1118–21, 1197, 1204–05, 1209–12 (2003) (suggesting that the Convention's debates are admissible evidence of the first degree in searching for the Constitution's original meaning, clearly useful when the text of the Constitution is ambiguous, and that the debates are particularly useful for tracing "the formal evolution of a clause of the Constitution through the Philadelphia Convention of 1787" and to "use amendments and proposals rejected by the Philadelphia Convention to infer the meaning of a Clause").
B. APPLICATIONS FOR INTERPRETATIONS OF THE CLAUSE

In light of the present research, it is possible to assess the various interpretive approaches reviewed in Part I.B. The first approach, namely the accepted wisdom that the Progress Clause was originally intended as a non-binding preambular statement, appears mistaken. The heated debate over the desired shape of intellectual property law is commonly described as one between intellectual property minimalists (or "pessimists"), who wish to cut back on the current levels of protection or even abolish intellectual property law, and intellectual property maximalists (or "optimists"), who believe that expanding intellectual property rights in duration, scope, and subject-matter is socially desirable.\(^{225}\) It is thus not surprising to see that maximalists tend to read the Progress Clause as a non-binding preamble, whereas minimalists tend to read it as a limitation. Maximalists may have more or less compelling arguments on their side, but it is clear that they cannot suggest that one should read the Progress Clause as a non-binding preamble because that was the Framers' intent. Rather, to make their point, they would have to explain why the Progress Clause should not be binding despite the Framers' intent.

It is worth noting that proponents of the first interpretive approach—Progress Clause as a preamble—have not made what would have been their most powerful argument to date, namely that three state copyright statutes included in their preambles language that is close to that in the Progress Clause.\(^ {226}\) The argument thus could have been that the Framers intended, and that the public originally understood, the Progress Clause to serve as a preamble. Although this evidence provides support to the first interpretive approach, it is overwhelmed by the evidence provided in Part IV above regarding the Framers' intent.

Such argument should also be rejected regarding the original understanding and meaning of the Clause because of five reasons. The first is that the Framers' intent is indicative of the original understanding in the context of intellectual property, as suggested above. If the Framers understood the Progress Clause to be a limitation, and were not secretive about the Convention's intellectual property debates, there is no reason to believe that the public understanding was just the opposite, without evidence to that effect. Second, the state copyright statutes presented the preamble as non-binding and distinct from the grant of power. The preambles in the state copyright statutes started with a "whereas" or "as" part, followed by a "be it enacted" part, thus specifying explicitly that the preamble was not intended to be given legal effect. In the Clause, on the contrary, the "promote progress" language is situated explicitly as a part of the

\(^{225}\) For one characterization of the debate, see, for example, Raymond S. R. Ku, The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology, 69 U. Chi. L. Rev. 263, 279–87 (2002).

\(^{226}\) See supra note 179 and accompanying text. There may even be a fourth statute, as Madison's Encouragements Power likely stemmed from text in the preamble to North Carolina's copyright statute. See Oliar, supra note 98.
text of the Constitution, not its preamble. Third, the Progress Clause starts with a “to” clause which designates to the reader operative power, just like the rest of the enumerated powers, rather than preambular, non-binding language. Fourth, the “ends” parts in Pinckney’s education and encouragements powers were likely adapted from substantially similar text in the Massachusetts 1780 constitution. There, the text relating to the promotion of science and arts appeared as a part of the constitution itself, rather than its preamble. Thus, contemporaneous readers of the Progress Clause would have recognized it as familiar non-preambular constitutional language. Lastly, the fact that, to the best of my knowledge, no one has made the connection between the preambles of the statutes and the Progress Clause so far tends to weigh against a contemporaneous understanding of the Progress Clause as preambular.

The second and third interpretive views reviewed in Part I.B hold opposite views as to which of the Progress Clause and the Exclusive Rights Clause is a power and which is a limitation. As explained in Part V above, both approaches are partially correct, as both parts of the Clause limit the power it grants. However, these two approaches are lacking in the sense that they do not include the other’s point of view. This Article’s reading of the Clause doubts an assumption that these two approaches share, which is that one part in the Clause functions exclusively as a grant of power and the other functions exclusively as a limitation. Rather, the complex language of the Clause demarcates in its whole a power and limitations on it.

The last approach, suggesting that the Clause should be read disjunctively because people originally read it as two independent clauses seems doubtful. Especially indefensible is the argument that promotion of progress of science could have only related to “writings” of “authors” in the eyes of the Framers and contemporaneous readers, and that promotion of progress of useful arts could have similarly related only to “discoveries” of “inventors.” We find both ends lumped together (rather than treated disjunctively) in Madison and Pinckney’s proposals as two cumulative ends that each of the proposed education and encouragements powers should have promoted. Thus, there seems to be no convincing argument that the Framers, or contemporaneous readers, would have made a dichotomous distinction between these two ends, and attribute one to copyrights exclusively and the other to patents exclusively. A more (although not totally) defensible argument would be that the Exclusive Rights Clause seems to have stemmed from two independent types of proposals, relating to patents and copyrights. Such more defensible argument would limit the distributive argument to the Exclusive Rights Clause.

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227. See Oliar, supra note 98.

228. This argument would not be free of difficulties. There exists considerable contemporaneous evidence that suggests that the boundary line between the fields of copyright and patent laws was historically more blurred than it is today. See Oliar, supra note 98.
C. APPLICATIONS FOR CONSTITUTIONAL LITIGATION AFTER ELDRED

Are the findings above of no practical import because of Eldred? Two arguments could be advanced to that effect. One may suggest that the research is of little practical importance because Eldred established that the Progress Clause is a non-binding preamble. Alternatively, one may suggest that this is so because of an opposite argument: Eldred accepted the petitioners’ argument that the Progress Clause is an independently enforceable limitation and established that whether Congress has violated this limitation is left for Congress to decide. Below, the Article suggests that these two readings of Eldred are unjustified, and that the findings above are as relevant as ever for courts to take into account.

Eldred’s holding says very little, as a matter of binding precedent, about whether the Progress Clause is a limitation. This is so because the major question raised in Eldred was not about whether the CTEA “promote[d] progress.”

Petitioners themselves did not see this question as the core of their argument. Rather, the question Eldred decided was whether the retroactive extension violated the “limited times” prescription. That Eldred was not

229. But see Marshall Leaffer, Life After Eldred: The Supreme Court and the Future of Copyright, 30 WM. MITCHELL L. REV. 1597, 1599 (2004) (“Eldred’s primary argument was that the CTEA did not ‘promote science and useful arts . . . .’”); Thomas B. Nachbar, Judicial Review and the Quest to Keep Copyright Pure, 2 J. TELECOMM. & HIGH TECH. L. 33, 38 (2004) (“The heart of [petitioners’] Copyright Clause challenge was that extensions to subsisting works do not promote progress, a requirement embodied in the Progress Phrase.”).

230. Petitioners’ “core claim” in the case, as their counsel described it, was that retroactive extensions would violate federalism, not progress. If the Court did not strike CTEA down, they argued, this would open the door for an endless series of retroactive extensions that would secure rights to authors in perpetuity. This would violate “limited times,” and thus the basic principle that there must be limits on government’s power. When they argued that CTEA was unconstitutional, it was not because they brought forth empirical evidence that CTEA retarded progress. It was an argument of principle that upholding CTEA, regardless of its effects on progress, would violate the basic principle of a limited government. See LAWRENCE LESSIG, FREE CULTURE 231, 234–43 (2004) (noting that the Supreme Court’s new federalism jurisprudence was the core of petitioners’ argument, and nobly and candidly suggesting that arguing the case based on harm rather than principle may have been more successful). If so, this may explain best (1) why petitioners brought the case in the D.C. District Court, (2) why after the district court relied on circuit precedent, Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981), in dismissing their case, petitioners saw conceding in the D.C. Circuit that the Progress Clause is not a limitation immaterial to their case, (3) why they refused to adopt amicus’s argument to the contrary at oral argument in the D.C. Circuit, and (4) why they kept focusing on the federalism point at oral argument before the Supreme Court. See id.; infra note 243 and accompanying text (discussing the concession). The alternative view—that the Progress Clause as a limitation was petitioners’ main argument, which they were forced to concede due to Schnapper—does not make full sense as it cannot explain satisfactorily the aforementioned four. See infra note 243. To wit, had the Progress Clause as an independent limitation been petitioners’ core argument, they would not have conceded it. Rather, they would have argued it in the alternative, knowing it would be likely rejected in the D.C. Circuit, but keeping it as grounds for their en banc rehearing and cert petitions.

231. The Court opened its decision with the following description of petitioners’ Intellectual Property Clause argument before it:

[Petitioners] seek a determination that the CTEA fails constitutional review under . . . the Copyright Clause’s ‘limited Times’ prescription. . . . Congress went awry in enlarging the term
primarily about "progress" is also evident from the structure of the decision, which breaks down as follows: The first paragraphs spell out the scope of the dispute, which is whether the CTEA violates "limited times." Part I.A of the Court's decision reviews the repeated congressional practice of retroactive extensions. Part I.B reviews the procedural history of the case. Part II.A goes straight to the main issue. It expounds what "limited times" means as a limitation, which it infers from objective indicia that go beyond Congress's subjective belief. It finds that the original and present meaning of "limited" is "fixed," and reviews Congressional extensions of patents and copyrights, which were upheld by courts. It then concludes that the CTEA does not violate "limited times" as a matter of text, precedent, original intent, and objective understanding over time. The Court proceeds to review whether the CTEA is a rational exercise of Congress's power. It finds that the CTEA would be a rational means to advance six generally legitimate governmental goals: uniformity with E.U. law, improvement of U.S.-E.U. balance of trade, inter-generational equity among authors, grant of additional incentives to create, accommodation of "demographic, economic, and technological changes," and the desire to induce owners to restore and distribute existing works. The Court finds that the CTEA is a rational exercise of government power. It concludes that the CTEA is constitutional.

After having rejected petitioners' main argument in the case, the Court moves, in Part II.B, to dismiss three additional "novel readings" of the Clause, which are: (1) that the CTEA creates, in effect, a perpetual copyright term; (2) three arguments premised on a consideration theory of the Clause, of which the Progress Clause argument is one, and (3) a suggestion for a heightened standard of judicial review. Part III of the decision reviews the petitioners' First Amendment arguments and Part IV concludes. From the structure of the decision, one would be hard pressed to argue that the Court's analysis of the Progress argument (more on which below) was the major issue in *Eldred*, being

for published works with existing copyrights. The 'limited Tim[es]' in effect when a copyright is secured, petitioners urge, becomes the constitutional boundary, a clear line beyond the power of Congress to extend.


232. Id. at 193.

233. See id. at 194–96.

234. Id. at 196–98.

235. See id. at 199–204 (consulting contemporaneous and contemporary dictionaries, using logical inferences about the relation between prospective and retroactive extensions, examining retroactive extensions in patent cases and copyright statutes, and taking into account justice, policy, and equity considerations).

236. See id. at 204–08.

237. See id. at 208–10.

238. See id. at 210–17.

239. See id. at 217–18.

240. See id. at 218–21.

241. See id. at 221–22.
discussed as a sub-category of one out of three residual issues that the Court dismissed after it had dealt with the main issue.\textsuperscript{242}

Further tending to disprove the two arguments put at the beginning of this sub-Part is that nowhere in the discussion of the Progress argument did the Court determine that the Progress Clause is or is not an enforceable limitation. This is because the Court decided \textit{Eldred} pursuant to petitioners’ concession that the Progress Clause was not a limitation.\textsuperscript{243} This becomes clear also from the Court’s modification of its initial grant of certiorari to deny review specifically regarding the D.C. Circuit’s repeated refusals to examine amicus curiae’s argument that the Progress Clause is an independent limitation.\textsuperscript{244} The fact that \textit{Eldred} regarded the Progress Clause as a non-binding preamble therefore represents an agreement among the parties in that case on this point (at least as far as procedure is concerned), not the Court’s determination. \textit{Eldred} also does not stand for the proposition that the Progress Clause embodies an indepen-

\textsuperscript{242} Even if the major question in \textit{Eldred} had been whether CTEA “promote[d] progress,” the Supreme Court, whose analysis was highly affected by originalist considerations, would nevertheless have to reconsider its holding in light of the finding in this Article that the Framers intended the Progress Clause as a limitation. As explained above, the Court decided \textit{Eldred} following an agreement between the parties that the Progress Clause was not an independent limitation. That was one interpretive route in an open debate, but this Article has shown it to be refuted by the evidence.

\textsuperscript{243} See \textit{Eldred}, 537 U.S. at 197, 211 (holding petitioners’ to their concession). Some suggested that the concession was driven by litigation considerations. See Figueroa v. United States, 57 Fed. Cl. 488, 500 n.33 (2003) (suggesting that petitioners had to concede that point because D.C. Circuit precedent barred such argument (citing \textit{Eldred} v. Reno, 239 F.3d 372, 382 (D.C. Cir. 2001) (Sentelle, J., dissenting))); Solum, supra note 47, at 61 (same). One is left wondering whether not having conceded this point would have made a difference in the Supreme Court.

\textsuperscript{244} In granting the Attorney General’s motion for a judgment on the pleadings, the District Court followed D.C. Circuit precedent, \textit{Schnapper v. Foley}, 667 F.2d 102, 112 (D.C. Cir. 1981), in holding that the Progress Clause does not limit Congress. On appeal to the D.C. Circuit, the \textit{Eldred} plaintiffs-appellants conceded that the preamble of the Clause was not a substantive limit on Congress’s power. See \textit{Eldred} v. Reno, 239 F.3d 372, 378 (D.C. Cir. 2001). An amicus brief did not so concede. See Brief of Eagle Forum, supra note 64. Plaintiffs-appellants argued before the D.C. Circuit that it should examine amicus’s argument. Affirming the decision below, the D.C. Circuit held appellants to their concession and refused to consider amicus’s argument. It noted that the argument that the Progress Clause is a limitation was not properly before it and that resolving that argument was not necessary for deciding the case. The court also noted that amicus’s argument would run up against \textit{Schnapper}, a circuit precedent that only an en banc panel could reverse. See \textit{Eldred}, 239 F.3d at 377–78, 380. Plaintiffs-appellants petitioned for a rehearing and filed a suggestion for a rehearing en banc, in which they argued that the appellate panel erred by not considering amicus’s argument. The D.C. Circuit denied these petitions. It could not find error in passing over amicus’s argument where appellants took a view “diametrically opposed” to amicus’s and refused to adopt amicus’s view at oral argument, and where amicus raised a constitutional question about which the parties were in agreement. See \textit{Eldred} v. Ashcroft, 255 F.3d 849, 850–51 (D.C. Cir. 2001). As a part of their petition for certiorari, petitioners asked the Supreme Court to review the D.C. Circuit’s refusal to consider amicus’s argument that the Progress Clause is an independently enforceable limitation. The Court initially granted certiorari on all questions but later modified it to specifically deny certiorari on this issue. See Petition for a Writ of Certiorari at 1, \textit{Eldred}, 537 U.S. 186 (No. 01-618), 2001 WL 34092017 (challenging the D.C. Circuit’s refusal to consider amicus’s argument in Question 3); see also \textit{Eldred} v. Ashcroft, 534 U.S. 1160 (2002) (modifying previous grant of certiorari as to deny review of Question 3). Consequently, the Court decided \textit{Eldred} while assuming that the argument that the Progress Clause is a limitation was not before it. See also supra note 243 and accompanying text.
dently enforceable limitation that is satisfied through complete deference to Congress, because the argument that the Progress Clause is an independently enforceable limitation was not before the Court\textsuperscript{245} let alone accepted or even decided by it.

What, then, is the source of arguments that \textit{Eldred} serves as a binding authority regarding the operation of the Progress Clause? That seems to be the part in the decision, mentioned above, where the Court described its analysis as disposing of the question whether the CTEA "promote[s] the progress of science." By so framing the issue, the Court simply repeated the title from petitioners' brief.\textsuperscript{246} However, sensing the potential for confusion, the Court immediately proceeded to explain exactly what the Progress Clause argument before it was. Petitioners did not argue, the Court reiterated explicitly, that the Progress Clause is an independently enforceable limitation on Congress.\textsuperscript{247} Rather, they argued that "limited times" should be read in light of the concededly non-binding preambular declaration of purpose. This reading arguably changes the meaning of "limited times" beyond its objective literal meaning.\textsuperscript{248} Petitioners' argument was further "premised on the proposition that Congress may not extend an existing copyright absent new consideration from the author."\textsuperscript{249} Thus, the Court completed describing the Progress Clause argument before it: the non-binding preamble, as the objective that "limited times" should serve, bars retroactive extensions \textit{categorically} because they are not accompanied by consideration in the form of new works.\textsuperscript{250} This argument is a variant on the basic "limited times" theme, and adds layers of complexity by blending in a non-

\textsuperscript{245} See supra note 244.

\textsuperscript{246} See Brief for Petitioners at 19, Eldred v. Ashcroft, 538 U.S. 916 (2003) (No. 01-618), 2002 WL 32135676 ("2. Retroactively Extended Copyright Terms Do Not 'Promote the Progress of Science').

\textsuperscript{247} See \textit{Eldred}, 537 U.S. at 211-12:

\textit{[P]etitioners contend that the CTEA's extension of existing copyrights does not 'promote the Progress of Science' as contemplated by the preambular language of the Copyright Clause. To sustain this objection, petitioners do not argue that the Clause's preamble is an independently enforceable limit on Congress' power. See 239 F.3d, at 378 (Petitioners acknowledge that 'the preamble of the Copyright Clause is not a substantive limit on Congress' legislative power'). Rather, they maintain that the preambular language identifies the sole end to which Congress may legislate; accordingly, they conclude, the meaning of 'limited Times' must be 'determined in light of that specified end'. The CTEA's extension of existing copyrights categorically fails to 'promote the Progress of Science,' petitioners argue, because it does not stimulate the creation of new works but merely adds value to works already created.}

Id. (citations omitted); see also id. at 197 (noting that the D.C. Circuit "[s]pecifically... rejected petitioners' plea for interpretation of the 'limited Times' prescription not discretely but with a view to the 'preambular statement of purpose'" and that the D.C. Circuit "took into account petitioners' acknowledgement that the preamble itself places no substantive limit on Congress' legislative power.").

\textsuperscript{248} By this stage in the opinion, one would remember, the Court has already determined that "limited" "at the time of the Framing" meant what it means today—"confin[e]d within certain bounds, restrain[e]d, or circumscribe[e]d"—and found that the retroactive extension did not violate this limitation as it stands on its own. See \textit{Eldred}, 537 U.S. at 199–204.

\textsuperscript{249} See \textit{id. at 210; id. at 214 (noting that petitioners' "assertion that the Copyright Clause 'imbeds a quid pro quo'" is "[c]losely related to petitioners' preambular argument").}

\textsuperscript{250} See \textit{id. at 211–12.}
binding preamble, a consideration requirement, and a per se assumption about the nature of the limitation.

The Court rejected this complex variant—which petitioners and consequently the Court called the "promote [] progress" variant—because of three reasons, each cutting a link in the petitioners' chain of reasoning. The first and central reason had to do with the characterization of the Progress Clause. The Court agreed that the Progress Clause is a statement of purpose, but one that is non-binding by concession.\(^2\) One would remember that this is exactly how the first approach in Part I.B above views the Progress Clause—a non-binding preambular statement of purpose. That the Court left the non-binding preamble for Congress to self-enforce should not come to one as a surprise, but almost as a tautology.\(^2\)\(^5\)\(^2\)

The two other reasons had to do with the consideration theory and the per se character of petitioners' argument. Petitioners' Progress Clause argument was premised on the theory that the preamble incorporates a consideration requirement. The Court noted that the arguable consideration requirement, which necessitated the creation of new works as a consideration for extension, was "overwhelmed" by "Congress' unbroken practice" of extending the copyright term retroactively without such consideration.\(^2\)\(^5\)\(^3\) Lastly, the Court rejected petitioners' argument that was based on a per se logic. "Limited times," petitioners argued, as informed by the Progress Clause, suggests that any retroactive extension is unconstitutional per se.\(^2\)\(^5\)\(^4\) Accepting petitioners' Progress Clause argument would entail the unconstitutionality of all previous copyright extensions back to the first. Since accepting petitioners' argument had such far-reaching consequences, the Court seemingly had a hard time accepting it. The Court's conclusion in that part was that the several governmental ends it listed in its central analysis of "limited times" provided a rational basis for the conclusion that the CTEA promoted the progress of science. In doing so, the Court simply said that adding a non-binding preamble to a limitation that was not violated in itself did not change the analysis.

Despite the aforementioned, Courts and commentators could not satisfactorily square Eldred's explicit emphasis that the argument that the Progress Clause is an independently enforceable limitation was not before it with its statement that Congress could have rationally promoted progress through the CTEA. These statements that seem to be in tension are best explained and understood in light of the route the Supreme Court suggested it would follow to examine the constitutionality of measures Congress used to exercise its powers. In this

\(^{251}\) See id. at 212 ("[t]he primary objective").
\(^{252}\) See id. at 212–13. This is but a corollary to the D.C. Circuit's claim that petitioners could not logically concede that the preamble had no binding force, "yet maintain that it limits the permissible duration of a copyright more strictly than does the textual requirement that it be for a 'limited Time.'" See Eldred v. Reno, 239 F.3d 372, 378.
\(^{253}\) See Eldred, 537 U.S. at 213–14.
\(^{254}\) For petitioners' argument and its rejection, see id. at 211–12.
complex and less-than-clear area of constitutional law, current doctrine, to the extent that it can be ascertained at all, seems to include two stages of inquiry. The Court seems to first spell out the meaning of constitutional limitations that are arguably violated. Although the Court seems to interpret language in the Constitution broadly, in a manner favorable to Congress, it nevertheless does so using objective indicia of meaning, namely ones that go beyond Congress's subjective belief about the limits on its power. Importantly, the Court expounds limitations in the Constitution to demarcate a boundary beyond which Congress's power runs out.

In Eldred, for example, the Court gave "limited Times" a very liberal interpretation, while using objective indicia of meaning. The interpretation of "limited Times" in Eldred established, at a minimum, that perpetual copyrights would be unconstitutional as would congressional bad-faith attempts to circumvent "limited Times." In interpreting other Constitutional limitations, "writings" and "authors," the Court similarly did so liberally using objective indicia of meaning. The Court concluded that these limitations entail a constitutional requirement of originality; it construed the originality limitation broadly, as allowing Congress a great area of discretion within which to implement its copyright policy. The Court set an outer limit as to what this constitutional requirement would allow. It held that to be eligible for copyright protection, works need to be independently created and manifest a "modicum of

255. See supra note 235 and accompanying text (the Eldred Court started by spelling out the meaning of "limited times"); The Trade-Mark Cases, 100 U.S. 82, 94 (1879) (defining the meaning of "inventions" and "writings" of "authors" to determine whether the protection of trademarks was authorized under the Clause); see also infra notes 264-65 (showing how the Graham and M'Culloch Courts imply that Congress deserves deference after it has been determined that it acted within its powers).

256. See infra notes 257, 260 and accompanying text.

257. See Eldred, 537 U.S. at 199.


259. See Eldred, 537 U.S. at 208-09.

260. See The Trade-Mark Cases, 100 U.S. at 94 (suggesting that the "word writings may be liberally construed as it has been," but nevertheless requires the protected works to be "original, founded in the creative powers of the mind"); see also H.R. REP. No. 60-2222, at 6-7 (1909) (suggesting that, to be constitutional, an act has not only to be subjectively intended by Congress to "promote [] progress" but also that its "spirit . . . must . . . promote the progress of science and the useful acts," and it also has to be "designed to accomplish this result" which are objective criteria beyond Congress's best intentions).

261. See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 346 (1991) (concluding that "[o]riginality is a constitutional requirement" from the definitions of "authors" and "writings" in The Trade-Mark Cases, 100 U.S. 82 (1879) and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)).
creativity."^262 This is a very low threshold: it allows Congress to choose a standard of protection from a wide range of possibilities. Yet such liberal interpretation of "authors" and "writings" still limits Congress from protecting discrete types of works, such as facts or trademarks.^263

Once the Court is satisfied that an enactment does not overreach a constitutional limitation on Congress's power, the Court generally moves to a second stage of conducting a means/ends compatibility test. This aspect of the Court's inquiry is characterized by substantial deference to Congress's subjective judgment. This is not to argue that this is what courts should do or that this is what courts always do. Nor is it to suggest that these two aspects of the Court's inquiry are distinct and easily identifiable or to deny that the two phases of the inquiry are interdependent. However, this characterization seems the best way to understand what the Court did in *Eldred*, especially since this characterization dovetails with the most elaborate previous Supreme Court exposition of the scope of Congress's power under the Clause^264 and with the Court's classic authority on the examination of constitutionality under the Necessary and Proper Clause.^265

Thus understood, the *Eldred* Court first examined whether the CTEA was barred by the only limitation ("limited Times") that was arguably overreached, and once it found that it was not, it conducted a deferential means/ends analysis.^266 Since under the deferential means/ends analysis the government is

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263. See *id.* at 344 (holding that facts are uncopyrightable); *The Trade-Mark Cases*, 100 U.S. at 94 (1879) (holding that trademarks are beyond Congress's power under the Clause).

264. See *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966) ("The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose."). *In Graham*, the Court explained that "[w]ithin the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Id.* at 6.

265. See *M'Culloch v. Maryland*, 17 U.S. 316 (1819):

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

*Id.* at 421. That *Eldred* seems to follow *M'Culloch's* analysis is corroborated by the fact that *Eldred* adopted *M'Culloch's* approach vis-à-vis pretextual congressional legislation. *Compare M'Culloch*, 17 U.S. at 423 ("[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."). *With Eldred v. Ashcroft*, 537 U.S. 185, 209 ("Nothing before this Court warrants construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint.").

266. See *Eldred*, 537 U.S. at 199 (opening the first stage of inquiry by stating that "[w]e address first the determination of the courts below that Congress has authority under the Copyright Clause to extend
usually allowed to pursue any generally legitimate government objective, it is not surprising that the Court noted several legitimate government goals, some of which are not related directly to the "promot[ion of the] progress of science," that Congress could have wished to serve by the CTEA. When the Court moved to petitioners' Progress Clause argument, the Court clearly understood petitioners' argument not to be one about a new limitation that the CTEA overreached, but rather that the passage of the CTEA—which was already found to be within Congress's power once the "limited times" limitation was not found to be overreached—was irrational. There, the Court denied petitioners' argument that the CTEA failed a means/ends rationality test because: (1) this phase of the inquiry, which assumes that Congress did not violate any constitutional limitation, is conducted with substantial deference to Congress; (2) because petitioners' concession that the Progress Clause did not establish a limitation likely led the Court to reject petitioners' argument that the Progress Clause was the "sole end" of copyright, and to allow other generally legitimate government objectives to be taken into account; and (3) the Court's finding of a rational basis was the result of rejecting petitioners' particular argument that any retroactive extension would be irrational per se. Taking stock, Eldred did not construe the meaning of the Progress Clause as a limitation in the so-called first stage of the inquiry (because of the concession) and conducted only a deferential rational basis means/ends test in the so-called second stage of the inquiry (where the ends were not limited to the promotion of progress). The Court's analysis seems to suggest that ends other than promoting progress may be legitimate, a suggestion that seems attributable to petitioners' concession about the non-binding character of the Progress Clause.

Would it have made any difference had the Court viewed the Progress Clause as an independent limitation? There would have been two substantial changes in the Court's analysis, one in each stage of the inquiry. In the first "objective" stage, had the Court viewed the Progress Clause as a limitation, it would have

the terms of existing copyrights’); id. at 204 (opening the second state of the inquiry by stating that "satisfied that the CTEA complies with the 'limited Times' prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress.").

267. For example, the court noted the goals of uniformity with E.U. law, the improvement of the U.S.-E.U. balance of trade, and intergenerational equity among authors. See Eldred, 537 U.S. at 204.

268. Id.

269. Petitioners' means/ends argument was that the Progress Clause was the "sole end" for copyright legislation, but the Court was willing to go only as far as it being the "primary objective." Id. at 211-12. This allowed the Court to say, in passing, that the legislative objectives invoked earlier, which sufficed for the finding that a rational basis existed between the CTEA and the advancement of generally legitimate governmental ends, would suffice for the finding of a rational basis between the CTEA and promotion of progress in particular. The Court does not explain what other ends intellectual property legislation is constitutionally allowed to serve. One possibility is that the concession about the non-binding character of the preamble carried over to mean that even as ends, the Progress Clause is non-exclusive of other ends.

270. See id. at 214.
likely come up with a test to determine whether this limitation was overreached. Such a test would look for at least some objective indicia for the promotion of progress that go beyond Congress’s subjective belief. In the second “subjective” stage, the Court would have likely not considered promotion of goals other than those relating to progress of science and useful arts as relevant. The Eldred Court, we saw, regarded goals such as the improvement of foreign balance of trade and the achievement of international uniformity of laws as goals that Congress was allowed to pursue while passing CTEA. Although these are goals that Congress may generally pursue while acting under other powers, reading the Progress Clause as a limitation would make them irrelevant under the Clause.

Later courts were faced with the argument that the Progress Clause is an independently enforceable limitation. Nevertheless, these courts generally saw in Eldred authority that establishes one of the two propositions presented above: they relied on Eldred either in viewing the Progress Clause as a non-binding preamble or in disposing of the argument that the Progress Clause is an independently enforceable limitation by being extremely deferential to Congress on the question of whether intellectual property acts “promote[d] progress.” In doing so, courts did not fully appreciate the difference between the arguments before them and those in Eldred. These post-Eldred discussions are reviewed below.

Plaintiffs in Kahle v. Ashcroft challenged the constitutionality of the Copyright Act of 1976, the Berne Convention Implementation Act of 1988, and the Copyright Renewal Act of 1992, which removed from the law formal prerequisites for obtaining copyright protection, namely the registration, notice, deposit, and renewal requirements. Arguably, these formalities had the effect that the vast majority of works—those whose authors do not create predominantly for financial gain—would fall into the public domain either immediately or after a relatively short time. The plaintiffs argued that the removal of the formalities thus failed to promote the progress of science and useful arts. The Kahle court wrongly understood Eldred to suggest that any statute that granted intellectual property rights promoted progress. Consequently, the court concluded that all it had to do was to determine whether there was a rational connection between the statutes it reviewed and a legitimate government interest. The case is currently pending appeal before the Ninth Circuit, but

271. See id. at 204.
277. Id. (reviewing plaintiffs’ count three arguments)
278. See id. at *9.
279. The court in Kahle stated:
unfortunately appellants have dropped their Progress Clause argument.\textsuperscript{280}

In \textit{Luck's Music Library v. Gonzales},\textsuperscript{281} plaintiffs-appellants challenged unsuccessfelly the constitutionality of section 514 of the Uruguay Round Agreements Act (URAA)\textsuperscript{282} for violating the Progress Clause. The URAA restored copyright protection to foreign works that fell into the public domain primarily because their authors failed to satisfy various formal prerequisites for protection. URAA harmed petitioners who are commercial entities that sell public domain sheet music and film.\textsuperscript{283} Appellants challenged Congress's power to retract material from the public domain because any copyright legislation must "promote the progress of science and useful arts," which arguably meant that copyright legislation must provide additional incentives for authors to create.\textsuperscript{284}

\textit{Luck's Music} was decided in the D.C. Circuit., in which circuit precedent suggests that the Progress Clause is not a limitation on Congress's power.\textsuperscript{285} The D.C. Circuit reasoned that appellants could not show what made their case—about taking material out of the public domain—any different form \textit{Eldred}, which was about extending protection in works that were about to fall into the public domain.\textsuperscript{286} Obviously, the D.C. Circuit did not consider the Progress Clause an independently enforceable limitation, and did not even bother to go through a rational basis review, which it believed was already done in \textit{Eldred}.\textsuperscript{287}

Similar to \textit{Luck's Music}, plaintiffs in \textit{Golan v. Gonzales}\textsuperscript{288} were commercial entities who challenged section 514 of the URAA because of their newly restricted ability to profit off the public domain. Plaintiffs suggested that the Clause should be construed to suggest that Congress lacked power to retract materials from the public domain.\textsuperscript{289} In rejecting their argument, the District

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{280} Plaintiffs' argument is that recent copyright law . . . violates the Copyright Clause by failing to promote the Progress of Science. \textit{Eldred} has foreclosed this type of argument, however, by holding that the Progress of Science is promoted by rewarding authors for their creative labor . . . Consequently, the Court will review the statutes at issue only to determine whether Congress had a rational basis for concluding that the statutes at issue promote the Progress of Science.
\item \textit{Id.} at *10 (citations omitted). Note that \textit{Kahle}, just like Nimmer, supra note 49, and \textit{Eldred}, saw the difference between the Clause as an independently enforceable limitation, and the Clause as a non-binding preambular statement of purpose.
\item 407 F.3d 1262 (D.C. Cir. 2005).
\item See \textit{Luck's Music}, 407 F.3d at 1263.
\item \textit{Id.}
\item See supra note 56 and accompanying text.
\item See \textit{Luck's Music}, 407 F.3d at 1265.
\item See \textit{id.} at 1263–64.
\item No. Civ. 01-B-1854 (BNB), 2005 WL 914754 (D. Colo. Apr. 20, 2005) (mem.), appeal filed, No. 05-1259 (10th Cir. July 18, 2005).
\item \textit{Id.}
\end{itemize}
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The Court of Colorado reasoned that plaintiffs failed to show how the Clause includes the restriction they suggested it includes, especially because their interpretation ran in the face of a history of unchallenged congressional retractions from the public domain. The district court did not recognize the Progress Clause as an independently enforceable limitation. Golan is now on appeal before the Tenth Circuit, but appellants do not repeat their Progress Clause argument.

In Figueroa v. United States, complainant argued that congressional diversion of patent fees to non-patent purposes violated the Intellectual Property Clause by failing to "promote the progress of useful arts." The Court of Federal Claims interpreted Eldred to suggest that the Progress Clause contained a substantive limitation on Congress, but understood Eldred for the proposition that it is for Congress, not courts, to determine what promotes progress. Using the Necessary and Proper Clause in conjunction with the Clause, the Court determined that the limitation in the Progress Clause is to be examined by a deferential rational basis test.

Two trends are notable in these post-Eldred cases. First, courts have failed to notice that Eldred did not focus on the nature of the Progress Clause and that the case was decided following the parties' agreement that the Progress Clause was not an independently enforceable limitation. Second, several of the recent plaintiffs assumed that limitations in the Progress Clause must necessarily be enforced by bright line rules. Arguments to that effect were made in Eldred, Luck's Music, and Golan. Besides the practical fact that the plaintiffs in these cases ran against long histories of unchallenged congressional action to the contrary, it may be worthwhile to consider whether the Progress Clause limitation could be enforced by a judicial standard. The language of the Progress Clause, which seems to pose a standard, suggests that this option deserves consideration.

290. See id. at *11-*14 (reviewing Congressional retractions of material from the public domain under the Copyright Act of 1790, the Patent Act of 1832, and the Copyright Acts of 1919 and 1941).
291. Id. at *14.
292. Golan v. Gonzales, No. 05-1259 (10th Cir.).
295. Id. at 150-52.
296. Id.
297. See Eldred v. Ashcroft, 537 U.S. 186, 193 (2003) ("The 'limited Tim[e]' in effect when a copyright is secured, petitioners urge, becomes the constitutional boundary, a clear line beyond the power of Congress to extend."); id. at 217 ("[Petitioners argue] that extending existing copyrights violates the Copyright Clause per se . . . ").
298. See Luck's Music Library v. Gonzales, 407 F.3d 1262, 1263 (D.C. Cir. 2005) ("[Petitioners] are wrong that the Clause creates any categorical ban on Congress's removing works from the public domain.").
299. See Golan v. Gonzales, No. Civ. 01-B-1854 (BNB), 2005 WL 914754, at *3 (D. Colo. Apr. 20, 2005) (mem.) (noting that plaintiff's perceive an "absolute bar" to restoring copyrights to works that have passed into the public domain).
Taking stock, the argument here is not that the courts above erred because the statutes they reviewed were necessarily unconstitutional. Rather, the argument is that they misread Eldred and failed to treat or give meaning to the Progress Clause as a constitutional limitation. They erred either in assuming that Eldred determined that the Progress Clause was not a limitation, or in assuming that Eldred held that the way to enforce the Progress Clause as a limitation was to ask whether Congress subjectively believed that what it was doing promoted progress. They failed to propose a test for what “promote[s] progress of science and useful arts”.

VII. TOWARD A JUDICIAL CONCEPT OF PROGRESS UNDER THE CLAUSE

The argument so far has shown that the Framers intended the Progress Clause as a limitation,\(^3\) that, based on this finding, the best textual reading of the Progress Clause is as a limitation,\(^3\) and that the original understanding of the Clause was as a limitation.\(^3\) The analysis of Eldred above has suggested that doctrinal considerations weakly support this conclusion (as they do not imply the opposite).\(^3\) This Part will assume that the aforementioned would lead courts to find that the Progress Clause is a constitutional limitation. It will proceed to discuss several difficulties that judicial enforcement of this limitation would likely involve and to suggest possible answers.\(^3\)

The finding that the Progress Clause functions as a limitation does not necessarily entail, and is analytically distinct from, questions regarding the enforcement of this limitation. One could make two arguments in this regard. The first asks how we know whether the limitation in the Progress Clause was intended to be judicially enforceable. The other is that even assuming that the Progress Clause is judicially enforceable, it still does not follow that courts should enforce it strictly.

Regarding the first argument, it is true that we have no way of telling which branch of government the Founding Fathers wished to enforce the Intellectual Property Clause, let alone particular limitations within it (assuming that they

\(^3\) See supra Part IV.

\(^3\) See supra Part V.

\(^3\) See text accompanying supra note 227.

\(^3\) Supreme Court precedent is replete with dicta about the limiting nature of the Progress Clause and that the ultimate goal of the intellectual property system is public—the advancement of human knowledge—rather than the conferral of private property rights. See, e.g., quote from Graham, supra note 191; Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 428–29 (1984). These dicta reflect the basic policy underlying American intellectual property law, utilitarianism. Courts and commentators have advocated judicial restraint in achieving these goals based on the relative lack of institutional competence and the desire to avoid the counter-majoritarian difficulty, but these policy arguments have been advanced to support (and are expressed by) a deferential standard of review rather than to negate the limiting nature of the Progress Clause.

\(^3\) In doing so, this Part will address the major remaining consideration in constitutional interpretation, pragmatism. See generally BOBBI'TT, supra note 27 (reviewing considerations relevant in constitutional interpretation).
thought about these questions at the time of the Framing). A similar argument can also be made regarding many other parts of the Constitution. Yet, today the institution of judicial review of limitations on Congress’s power is well-established. The Court has long enforced Article I limitations on power and has specifically recognized the enforceability of other limitations in the Intellectual Property Clause itself—namely, that copyrights be granted to “authors,” for their “original” “writings,” and that the right last for “limited Times.” Against this backdrop, once it is established that the Progress Clause is a limitation, the conclusion that the Progress Clause should be subjected to judicial review should follow.

Regarding the second argument, scholars have debated at length the policy reasons for subjecting the Clause to different standards of review, a debate which is beyond the scope of the present Article. As a matter of positive constitutional doctrine, Congress’s Article I powers are reviewed under a deferential standard, which the Supreme Court has explicitly applied to the Clause. Keeping to the present framework of highlighting the implications of the findings of this Article to current constitutional law doctrine as it is—indeterminacy and all—one should reach the conclusion that the Progress Clause is a limitation that should be enforced by a deferential standard. There is much more that courts could and should do in order to give the Progress Clause meaning as a limitation under this standard.

“Progress,” of course, is not a clearly defined concept. It would not be straightforward, and it would perhaps even be difficult, for courts to determine which grants of intellectual property rights “promote[] progress.” However, difficulty of definition is not a generally accepted reason for judges not to enforce what the Constitution says. Courts have enforced other limitations that do not seem any easier to define and apply, such as by forming tests for what constitutes “interstate commerce,” “equal protection,” and “due process,” tests which manifest different levels of deference to Congress. It is very likely that any judicial test adopted for what “promote[s] progress” under the Clause will

305. See supra note 89; see also Eldred, 537 U.S. at 243 (Breyer, J., dissenting) (“This Court has made clear that the Clause’s limitations are judicially enforceable.”).

306. For suggestions as to what would be an appropriate standard of review for the Clause, see, for example, Nachbar, supra note 229, at 34, passim (suggesting that “copyright laws deserve the most deferential standard of judicial review conceivable”); Schwartz & Treanor, supra note 16, passim (suggesting that intellectual property laws should be subject to deferential review); Richard A. Epstein, The Dubious Constitutionality of the Copyright Term Extension Act, 36 Loy. L.A. L. Rev. 123, 134–35 (2002) (suggesting the appropriateness of an intermediate scrutiny standard). See also Eldred, 537 U.S. at 245 (Breyer, J., dissenting) (suggesting a three part heightened standard of review); Brief for Petitioners at *31, Eldred, 537 U.S. 186 (No. 01-618), 2002 WL 1041928, (suggesting the adoption of a “congruence and proportionality” standard). The analysis of the Court in Eldred was deferential, although the Court did not specify or name the standard it applied explicitly.

307. See Eldred, 537 U.S. at 190 (“[T]he Copyright Clause ... empowers Congress to define the scope of the substantive right. Judicial deference to such congressional definition is 'but a corollary to the grant to Congress of any Article I power.'” (quoting Graham v. John Deere Co., 383 U.S. 1, 6 (1966)) (citation omitted)).
develop over time, as the conceptions of the aforementioned three constitutional concepts have changed over the years. What seems important, however, is that a discourse as to what “promote[s] progress” in intellectual property simply begin.\textsuperscript{308} Such a discourse can readily take place because scholars who have different views about the standard by which the limitation in the Progress Clause should be enforced can nevertheless engage in debates on what promotes, and does not promote, progress in the arts and sciences.\textsuperscript{309}

To date, intellectual property scholarship and doctrine have not paid much attention to the constitutional foundations of intellectual property law. What Congress legislated by statute was generally assumed to be the last word. Therefore, even if an \textit{Eldred II} were filed tomorrow, we would still be unlikely to see the Supreme Court writing a manifesto about the nature of the Progress Clause as a limitation. Greater direction from the Court as to the meaning of the Progress Clause is more likely to come after the issue has been discussed by lower courts, academics, and society. If that were the case, the Supreme Court would have much precedent, analysis, and theory to rely on in adjudicating what “promote[s] progress.” Although the Supreme Court in \textit{Eldred} could have said more on the Progress Clause if it wanted to, its abstention from doing so is, at a minimum, understandable.

How can the discourse begin? Commentators can take a “top down” approach. They can advance and defend general theories of what promotes progress under the Clause, and suggest applications of their theory to specific cases. The advantages and disadvantages of such proposals will likely be analyzed and refined in scholarship and may serve courts adjudicating specific cases. Commentators (and litigants) can take a “bottom up” approach. They can advance arguments about what “promote[s] progress” in specific contexts or areas of creativity. Over time, through our system’s adversarial and appellate process, we may either have various conceptions of progress in different industries, or may be able to generalize from particular examples to a general concept of progress as a constitutional limitation.

A first, non-controversial step in the route of proposing and refining the meaning of progress under the Clause would be to do so in statutory cases.\textsuperscript{310} When the statute and case law do not unequivocally suggest the result of legal disputes, one of the considerations judges should think about is which of the possible ways of deciding the case would best promote the progress of science and the useful arts. As suggested earlier, over time and through the appellate

\textsuperscript{308} See generally Zimmerman, \textit{supra} note 105 (noting the importance of discourse about what the Progress Clause means).

\textsuperscript{309} See Nachbar, \textit{supra} note 229, at 71 n.135 (arguing for a very deferential standard of review but indicating that he does “not believe Congress should have absolute authority to interpret the Copyright Clause” and suggesting that Congress has no power to create inalienable copyrights, which would fail to “promote [ ] progress”).

\textsuperscript{310} This step should not prove controversial because it can be taken also by those who believe that the Progress Clause is either a preamble or that it is a limitation that should be enforced by Congress.
process, a useful judicial concept of progress, or perhaps various conceptions for different settings and industries,\textsuperscript{311} will emerge, evolve and serve as guidance for future cases and potentially for the future resolution of constitutional disputes.

To some extent, this process is already underway, as courts have done so in some cases. An example of how courts can draw on the Progress Clause for guidance in questions of statutory interpretation is the recent Sixth Circuit case of \textit{Lexmark International, Inc. v. Static Control Components, Inc.}\textsuperscript{312} Lexmark wished to enjoin Static Control Components ("SCC") from manufacturing computer chips that were used in third party remanufactured toner cartridges.\textsuperscript{313} Lexmark argued that in making chips that enabled third parties to circumvent the Lexmark-designed authentication sequence between printers and cartridges that controlled access to the Printer Engine Program located on the printer, SCC violated the anti-circumvention provisions of the Digital Millennium Copyright Act of 1998 ("DMCA").\textsuperscript{314} The Sixth Circuit rejected Lexmark's DMCA argument because it found that the circumvented authentication sequence did not "effectively" control access to the Printer Engine Program, as the DMCA mandates, because the Printer Engine Program's code could be read directly from the printer's memory without any need to go through the authentication process.\textsuperscript{315} The ruling seems to imply that had Lexmark encrypted the software embedded in the printer, it would have won the case. Concurring Judge Merritt forestalled such implication while relating to what really was at stake in that case. He noted that while the DMCA was intended to protect copyrights from widespread piracy in the digital age, Lexmark was not trying to protect its software copyrights but rather to control the after-market for toners.\textsuperscript{316} He thus rejected Lexmark's interpretation of the DMCA, according to which circumvention triggers liability regardless of purpose, and suggested that "a better reading of the statute is that it requires plaintiffs as part of their burden of pleading and persuasion to show a purpose to pirate on the part of defendants."\textsuperscript{317} Choosing this interpretation, he submitted, would promote progress, while Lexmark's would stifle it.\textsuperscript{318} \textit{Lexmark} marks a shift in doctrine from earlier cases that


\textsuperscript{312} 387 F.3d 522 (2004).

\textsuperscript{313} Id. at 529.

\textsuperscript{314} Id. at 529–30.

\textsuperscript{315} Id. at 546.

\textsuperscript{316} Id. at 552 (Merritt, J., concurring).

\textsuperscript{317} Id.

\textsuperscript{318} Id. at 553. As Judge Merritt explained:

Congress gives authors and programmers exclusive rights to their expressive works (for a limited time) so that they will have an incentive to create works that promote progress. Lexmark's reading of the extent of these rights, however, would clearly stifle rather than promote progress. It would allow authors exclusive control over not only their own expres-
allowed firms to use the DMCA to forestall competition in markets substantially unrelated to copyrighted works. The question about the proper scope of permissible DMCA claims is one that cannot be answered satisfactorily by resorting to the letter of the law. Rather, in the absence of direction from the legislature regarding this new and seemingly unforeseeable application of the DMCA, courts can and should choose the interpretation of the statute that promotes progress over the one that stifles it.\textsuperscript{319}

Another major doctrine where judges can and should think about the extent to which their ruling will promote the progress of knowledge is the fair use doctrine in copyright law.\textsuperscript{320} The fair use doctrine directs judges to take into account four considerations when deciding whether to excuse certain unauthorized uses of copyrighted works from liability.\textsuperscript{321} That list, however, is non-exhaustive.\textsuperscript{322} In certain cases it would be desirable, and indeed natural, to ask whether the examined use promotes the progress of knowledge or not. An unrealized opportunity to do so may have been \textit{Kelly v. Arriba},\textsuperscript{323} a case that discussed whether a visual search engine that displayed thumbnails of the photographs found constituted an infringement or a fair use of the originals.\textsuperscript{324} The Ninth Circuit relied heavily on the fact that the use was transformative, which under the first fair use factor weighs heavily in favor of a fair use finding.\textsuperscript{325} The circuit court’s categorization of the use in that case as “transformative” is at least problematic: the canonical example of a transformative use of a work is parody, which “alter[s] the first [work] with new expression, meaning,
or message . . . "326 An identical, albeit size-reduced, photograph does not seem to be very transformative as the term was used by the Supreme Court.327 What clearly drove the Ninth Circuit's finding of transformation was that the defendant used the photos not in their original aesthetic capacity, but rather as an indexing tool to locate information on the Internet.328 Instead of twisting the first fair use factor in order to accommodate this rationale, a better way may have been for the Ninth Circuit to recognize the constitutional purpose of the copyright system as a fifth relevant fair use factor, and to suggest that information location tools favor a fair use finding under this factor.329 Other doctrinal opportunities to resort to the Progress Clause exist.330

Ultimately, the hard task for courts, commentators, and litigants would be to debate how to give the Progress Clause meaning as a limitation on Congress's power. To get this discourse going, I suggest that the discussion at least start by considering the following criterion. An intellectual property enactment does not "promote the progress of science and useful arts" and is therefore unconstitutional if its marginal benefits, in terms of creativity and knowledge, are extremely outweighed by its marginal costs in terms of creativity and knowledge.331

This criterion is attractive to consider and defensible for several reasons. First, it gives meaning to the Progress Clause as a limitation. Second, it is faithful to the original intent, textual meaning, and doctrinal recognition of the policies that underlie the Progress Clause.332 Since "progress" relates to the collective advancement of knowledge, the criterion tests whether there is such advancement. Third, keeping to the present framework of assuming constitu-

327. To wit, the Supreme Court asked whether the infringing work was transformative. The Ninth Circuit asked whether an infringing use of the original work was transformative.
328. Kelly, 336 F.3d at 818.
329. "Better" is meant in the sense that it would have kept the conceptual coherence of the first fair use factor intact, while recognizing explicitly the nature of the rationale driving the circuit court's conclusion. Such an approach would have likely allowed lower courts to further participate in the process of delineating the meaning of "promotion of progress" under the Clause rather than predispose them to further stretch the meaning of transformativeness under the first factor. See, e.g., Field v. Google Inc., 412 F. Supp. 2d 1106, 1117-1119 (D. Nev. 2006) (finding that website caching by a search engine is transformative and weighs heavily in favor of a fair use finding following Kelly's analysis).
330. For example, courts hearing copyright misuse arguments could decide them by asking, among other things, whether a finding of misuse would promote the progress of science and useful arts better than the opposite ruling.
331. Like Justice Breyer in Eldred, I believe that weighing costs and benefits is at the heart of the inquiry, and that in this area the difference between "unwise" and "unconstitutional" is a matter of degree. See Eldred v. Ashcroft, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting). I also share his view that copyright statutes should promote Clause related objectives. See id. at 244. Breyer's test may have been rejected by the Eldred majority because its relevance to the interpretation of "limited Times" may have been unclear to the majority. As a test for judging whether there has been advancement, examining forward movement (benefits) and backwards movement (costs) seems more appropriate. My test differs from Breyer's in that it does not combine First Amendment elements, does not overemphasize the distinction between private and public benefits, and operates on a lower level of judicial review.
332. See supra note 303.
tional law as given, indeterminacy notwithstanding, such a standard is deferential, as would be appropriate for a judicial standard to enforce Article I limitations on power. A strict way to enforce the "progress of science and useful arts" limitation would require, for example, that courts invalidate individual patent and copyright grants on a constitutional basis if they believe that their benefits outweigh their costs. A more deferential, but still heightened, standard of enforcing "advancement" would be to enable courts to declare statutes, rather than individual grants, unconstitutional if their costs for knowledge outweighed their benefits by any margin. That would be the court substituting its own judgment for Congress's. However, legislation whose positive effects on creativity and knowledge are non-existing, arguable, or very small, and whose negative effects are proven, material, and great, will present the right opportunity to determine that the limitation in the Progress Clause has been violated. Fourth, the test requires balancing of benefits and costs, and would not be satisfied just because there is some benefit, regardless of the costs. The grant (or broadening in term or scope) of intellectual property rights, by definition, will always have at least some small benefit (to the beneficiary of the grant and arguably to society), in addition to the private (increased input costs) and social cost (restrictions on widespread use). If the test were to approve any enactment that had some benefit, regardless of cost, it would fail to place any limit on Congress's power and be meaningless. Thus, the fact that some creators might get additional incentives to create cannot serve, without more (assessing the social cost), as a guarantee that progress of science and useful arts has been promoted. Additionally, the suggestion that courts take into account the promoting and stifling effects on creativity and knowledge does not reflect a suggestion for a heightened standard of review. Rather, it regards the nature of the limitation set in the Progress Clause. The text of the Progress Clause speaks of "advancement." Advancement means a forward movement. If an act has advancing and retarding effects on the arts and sciences, then advancement can only happen if the overall effect is positive. Thus, although a judicial balancing of merits and demerits is generally outside the scope of judicial review of other Article I powers, it is appropriate (although under a deferential standard) when it comes to the Clause because such weighing is called for uniquely in the text.

333. See id. at 218 (majority opinion); Graham v. John Deere Co., 383 U.S. 1, 6 (1966).
334. Cf. Mitchell Bros. v. Cinema Adult Theater, 604 F.2d 852, 859 (5th Cir. 1979) (rejecting the view that courts should declare individual intellectual property grants as unconstitutional for failure to "promote progress").
335. See William M. Landes & Richard A. Posner, Indefinitely Renewable Copyright, 70 U. Chi. L. Rev. 471, 484-95 (2003) (suggesting that the merits of enhanced intellectual property protection are not limited to greater incentives to create, but also include greater incentives to maintain the property after creation and to prevent use congestion externalities); Stan J. Liebowitz & Stephen Margolis, Seventeen Famous Economists Weigh In on Copyright: The Role of Theory, Empirics, and Network Effects, 18 Harv. J. L. & Tech. 435, 447-52 (2005) (highlighting the stewardship incentive that property rights provide and their ability to prevent negative network effects that would result from open-access).
of the Progress Clause.\textsuperscript{336}

At what level of generality should courts operate when examining whether progress has been promoted? Three major options come to mind. The first, at one end of the spectrum of levels of generality, would be that courts review whether individual grants of intellectual property rights "promote[] progress." If an intellectual property right failed to "promote[] progress," then the individual work of authorship or invention would not be copyrightable or patentable. A second option, at the other end of the spectrum, would apply the "promot[ion of] progress" limitation to the copyright (or patent) system as a whole. Under this construction, Congress would be acting beyond its intellectual property power when the net value of the copyright (or patent) system became negative. If that happened, the "system" would fail to "promote[] progress." The third and intermediate option would be for courts to apply the constitutional limitation on an act-by-act basis. Following this approach, each act of Congress would have to "promote[] progress" relative to the preexisting base line.

The first approach that suggests that courts review whether individual works "promote[] progress" has been rejected in case law for powerful reasons,\textsuperscript{337} and Congress seems to have backed away from requiring such a high standard of protection by statute.\textsuperscript{338} Also, a judicial enforcement of the "promot[ion of] progress" limitation on a work-by-work basis would, in effect, impose a strict standard of review inappropriate for an Article I power as mentioned above. Thus, only the latter two interpretive approaches remain as reasonable options. As we shall see immediately below, although each of these two approaches is problematic in the sense that each creates interdependence among statutes as to their constitutionality, the third approach seems more defensible overall. For simplicity, it will be assumed below that Congress acted only under its intellectual property power.

The second approach that would apply the progress limitation to the "system" as a whole finds support in *Eldred*.\textsuperscript{339} However, it creates the troubling conse-

\textsuperscript{336} The case would have been different had Congress's power been to "regulate" the arts and sciences (rather than promote their progress) as its commerce power is defined, for example.

\textsuperscript{337} See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903) (refusing to pass judgment on the merit of individual works of authorship); Mitchell Bros. v. Cinema Adult Theater, 604 F.2d 852, 859 n.15 (5th Cir. 1979) ("[T]he Constitution does not require that each individual work be shown to promote the useful arts in order to be copyrightable."); Belcher v. Tarbox, 486 F.2d 1087, 1088 (9th Cir. 1973) (rejecting the defense of fraudulent content in copyright infringement and suggesting that "[t]here is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems, theological, philosophical, economic and scientific, that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it").

\textsuperscript{338} See Mitchell Bros., 604 F.2d at 854–55 & nn.4–5 (5th Cir. 1979) (reviewing Congress's hostility to content-based restrictions on copyrightability and its repeal of such provisions that were instated by the Copyright Acts of 1856 and 1874).

\textsuperscript{339} See Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) ("The 'constitutional command,' we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.'" (citing Graham v. John Deere Co., 383 U.S. 1, 6 (1966))).
sequence that the constitutionality of statutes would depend on the sequence in which they were enacted. For example, assume that in year $t$, the net social value of the copyright system was 10, and that Congress subsequently legislated at $t + 1$, $t + 2$, and $t + 3$ copyright acts $A$, $B$, and $C$ whose net social worth was (-6), (-3), and (-2) respectively. The “system” interpretation would seem to suggest that acts $A$ and $B$ are constitutional (because, when legislated, the net social worth of the copyright system was still positive), but that act $C$ is unconstitutional because in enacting it, Congress rendered the net social value of the copyright system negative. However, if Congress were to legislate these acts in a different order—say $A$, $C$, and then $B$—then the result would be that acts $A$ and $C$ were constitutional, while $B$ was not. The “system” interpretation, if accepted, would entail that the constitutionality of intellectual property statutes would not depend only (or primarily) on their text and the text of the Constitution, but substantially also on the text of other acts and the sequence in which they were passed. Furthermore, if a party were to challenge the constitutionality of any of the acts $A$, $B$, and $C$ at time $t + 3$, then the court would probably have to find the challenged act unconstitutional, because at $t + 3$ Congress would be acting beyond its constitutional scope of power, and striking down the challenged act would remedy that overreach. The “system” interpretation would in effect allow private parties and judges to determine which of the three statutes would be constitutional and which not. Parties would have this power because they would be able to choose which act to challenge. Judges will have this power because there might be a race between courts. For example, if the three acts were challenged simultaneously, the first judge to decide her case would find the act before her unconstitutional. Once one act were voided, the other two judges would have to find the remaining two acts constitutional.

The third approach entails a similar difficulty regarding the sequencing of enactments. Suppose that copyright’s optimal term is fifteen years, and that a copyright term of twenty years would still have an added value relative to no copyright protection at all. According to the third approach (and also the second), if Congress were to initially enact a twenty year copyright protection, this act would be constitutional because it would have “promote[d] progress” relative to the pre-existing no copyright regime. However, if Congress were to initially legislate a fifteen year protection term and then move to a twenty year term, then this latter change would be unconstitutional under the third approach (but not the second) because it would retard progress relative to the pre-existing status. The result is that a twenty year term would be constitutional or unconstitutional depending on the sequence of legislation that Congress has chosen to reach the same statutory text. Also, according to the third approach, after Congress enacted a fifteen year or a twenty year term, it would lack the power to abolish copyright protection (and move to a no-copyright state) because such abolition would fail to “promote[] progress.”

The third approach seems more defensible overall. Although it seemingly runs counter to the general assumption that the grant of power to enact a statute
implies also the power to repeal it, explicit constitutional or statutory text to the contrary would negate the general implication. The Clause empowers Congress to "promote the Progress of Science and the useful Arts" rather than to "regulate" the arts and sciences, or to "make Rules for the Government and Regulation" of the arts and sciences. Whereas the latter language implies a power to pass laws and abolish them as Congress sees fit, the "progress" language in the Clause provides a textual basis for the negation of the implication that the power to "promote" progress implies the grant of power to "retard" progress of arts and sciences. Also, one would remember that under current doctrine, courts would be deferential to Congress in assessing whether the move from a twenty year term to fifteen year term "promot[ed] progress." If the negative effects of an enactment on science and the arts outweighed by a great margin the positive ones, and Congress, according to the assumption above, was relying solely on its intellectual property power, then there would seem to be little to justify such legislation, and the reasons for its enactment would probably be unrelated to the goals of the intellectual property system. Also, the third approach would not prevent Congress from ever repealing intellectual property enactments. Congress would certainly have the power to repeal intellectual property enactments when such repeal would "promote[] progress." Further, the third approach seems more in tune with constitutional doctrine. When limitations are found in the Constitution, courts generally examine whether individual acts of Congress pass those limitations. For example, if an act under Congress's commerce power is not "substantially related" to interstate commerce a court may strike it down, but courts would not normally say that such an act is nevertheless constitutional because it is a part of a "system" that regulates interstate commerce. Additionally, the "system" interpretation that amalgamates all intellectual property enactments and assesses their constitutionality together is in tension with the inseparability doctrine in constitutional law. This doctrine suggests that if a part of an enactment fails a constitutional limitation and is separable from the rest of the act, it alone would be struck down. The "system" interpretation seems to suggest that all the intellectual property statutes are inseparable; thus, the whole "system" is either constitutional or not. Lastly, and perhaps most importantly, the "system" interpretation is less practical because of the informational burden it puts on plaintiffs. To strike down an act, it would require a court to know (and parties to prove) not only the costs and benefits of the challenged enactment—a very difficult undertaking in itself—but also those of all previous ones. Whereas under the third "act-by-act" approach plaintiffs might be able to prove the costs and benefit of a recent enactment, the second "system" approach would require them to prove the same for all past intellectual property legislation (in order to

341. Id., art. I, § 8, cl. 3.
prove the overall effect of the system). Since it is practically impossible to hypothesize, not to mention to prove to a court, what would have been the state of the sciences and the arts had no intellectual property legislation been passed since the 1790’s, the “system” approach would render the limitation in the Progress Clause meaningless.

Would any of the recent, or recently challenged, enactments fail this test and thus be unconstitutional? That is hard to tell. The answer depends on the evidence that plaintiffs would be able to produce at trial. Regarding any challenged act, if evidence will show such a huge disparity between great costs and tiny benefits, then it should be found unconstitutional.

CONCLUSION

This Article has studied the neglected records from the Federal Convention of 1787 regarding intellectual property, and was able to make two contributions to the literature. First, it was shown that the Progress Clause was intended as a limitation on Congress’s power. Second, the puzzling ends/means text of the Clause was shown to reflect the Framers’ intent to have both the ends and the means parts in the Clause participate in delineating the power conferred and limiting it at the same time.

The Framers’ intent is one of several considerations that inform constitutional interpretation. Its exploration is suggested to advance, rather than to conclude, the Intellectual Property Clause’s interpretation. Regarding some interpretive questions—such as whether the NSF and a federal university are constitutional—the Framers’ intent may be in tension with other considerations, such as pragmatism, and should this question come before a court, the court would have to balance these considerations. Regarding other questions—such as whether the Progress Clause is an enforceable limitation—the Framers’ intent seems to align with other considerations to suggest that it is one.

To date, courts have failed to come up with a judicial test to determine whether an intellectual property enactment “promote[s] progress of science and useful arts.” Part VII has grappled with difficult questions that forming such a test would involve and suggested first steps that might be taken in this regard. Since the operation and meaning of the Progress Clause is perhaps the major area of contention surrounding the interpretation of the Clause post-Eldred, and since it was established that the Progress Clause operates also as a limitation, the greatest challenge in this area for courts, commentators, and litigants over the next years, in which intellectual property litigation will probably continue to grow and in which the Constitutional law of intellectual property will continue to evolve, seems to be to come up with a defensible and attractive concept of the Progress Clause as a limitation on Congress’s power.