

THE ORIGINS AND MEANING OF THE INTELLECTUAL PROPERTY CLAUSE

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ABSTRACT

In *Eldred v. Ashcroft* (2003) the Supreme Court reaffirmed the primacy of historical and textual considerations in delineating Congress' power and limitations under the Intellectual Property Clause. Nevertheless, the Court overlooked what is perhaps the most important source of information regarding these considerations: The debates in the federal Constitutional Convention that led to the adoption of the Clause.

To date, several unsettled questions stood in the way of identifying fully the legislative history behind the Clause. Thus, the Article goes through a combined historical and quantitative fact-finding process that culminates in identifying eight proposals for legislative power from which the Clause originated.

Having clarified the legislative history, the Article proceeds to examine the process by which various elements of these proposals were combined to produce the Clause. This process of textual putting together reveals, among other things, that the text "promote the progress of science and useful arts" serves as a limitation on Congress' power to grant intellectual property rights.

The Article offers various implications for intellectual property doctrine and policy. It offers a model to describe the power and limitations set in the Clause. It examines the way in which Courts have enforced the limitations in the Clause. It reveals a common thread of non-deferential review running through Court decisions to date, for which it supplies normative justifications. It thus concludes that courts should examine in future and pending cases whether the Progress Clause's limitation has been overreached. Since *Eldred* and other cases have not developed a concept of progress for the Clause yet, the Article explores several ways in which courts could do so. Lastly, the Article doubts the accepted wisdom of parsing the Clause dichotomously into a patent power and a copyright power.

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“To comprehend the scope of Congress’ power under the [Intellectual Property Clause], ‘a page of history is worth a volume of logic.’”

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

INTRODUCTION

As intellectual property plays an increasing role in our society and economy, and as Constitutional challenges to intellectual property statutes are filed at an increased rate,¹ the importance of delineating Congress’ scope of power under the Intellectual Property Clause² (“Clause”) cannot be overstated.

The Supreme Court’s recent *Eldred v. Ashcroft*³ is a case in point. *Eldred* examined the Constitutionality of the Copyright Term Extension Act of 1998 that added twenty years of protection to all existing works.⁴ This retroactive extension provides a marginal incentive to create at best. At the same time, it comes at a substantial social cost: It reduces incentives to make creative use of works, it burdens technological innovation, it increases monopoly-related losses, and it depletes the public domain.⁵ The Court seems to have recognized the negative net effect of the Act,⁶ but nevertheless upheld it because of the primacy it gives to textual, historical, and doctrinal considerations in construing Congress’ intellectual property scope of power.⁷

¹ Four intellectual property statutes are facing a constitutional challenge at the time of this writing, including the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976). See discussion *infra* Part V.C.3.

² See U.S. CONST. art. I, § 8, cl. 8.

³ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁴ Sonny Bono Copyright Term Extension Act of 1998, 112 Stat. 2827 (1998) [hereinafter CTEA].

⁵ For the social costs of CTEA laid before the Court, see, e.g., Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (detailing the substantial economic cost CTEA entails); Brief Amici Curiae of the American Association of Law Libraries et al. in Support of Petitioners at 15-30, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (detailing the substantial burdens CTEA places on public access to copyrighted works during the extended term); Brief of College Art Association et al. as Amici Curiae in Support of Petitioners at 4-18, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (detailing the substantial burdens CTEA places on creativity); Brief of Amicus Curiae Intel Corp. in Partial Support of Petitioners at 8-10, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (detailing the substantial burdens CTEA places on technological innovation).

⁶ See *Eldred*, 537 U.S. at 208 (refusing to second-guess Congress’ policy-judgments “however debatable or arguably unwise they may be”).

⁷ See *Eldred*, 537 U.S. at 200 (“To comprehend the scope of Congress’ power under the Copyright Clause, ‘a page of history is worth a volume of logic.’”) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). The Court stressed its reliance on “text, history, and precedent” throughout the decision. See *Eldred*, 537 U.S. at 199, 204. The importance of original intent in intellectual property was highlighted in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966) (“Within 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.”). For a typology of arguments in constitutional interpretation, see PHILLIP BOBBITT, *CONSTITUTIONAL FATE* (1982).

This Article thus examines what these considerations imply. It shows that the Court's analysis in *Eldred* and more generally is wanting because the Court never considered the source that probably sheds the most light on the text of the Clause and the intent behind it:⁸ The debates in the federal Constitutional Convention that led to the adoption of the Clause. The Court's neglect to consider these debates and its earlier comment on them⁹ are characteristic of a common assumption that these debates are of little interpretive help.¹⁰ Rather than be discouraged by their shortness, this Article examines what these debates say.¹¹

The Article uses a combined historical and quantitative methodology to provide the first comprehensive analysis of the Convention's intellectual property debates, which it takes as a starting point to understanding the Clause.¹² Striving to obtain from the debates

⁸ See, e.g., Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2375 (2003) (finding the Convention's debates regarding intellectual property "[t]he most relevant historical evidence directly bearing on the original understanding of the Copyright Clause").

⁹ *Mazer v. Stein*, 347 U.S. 201, 220 (1954) ("the constitutional materials are quite meager").

¹⁰ See, e.g., Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 33 (2001) ("Historians of American copyright law do not know much about the making of the constitutional clause, and most of what we have is historical interpretation, or at times, speculation."); Alan L. Durham, "Useful Arts" in the Information Age, 1999 B.Y.U. L. REV. 1419, 1429 (1999) ("There is little 'legislative history' to assist in interpreting the intellectual property clause of the Constitution."); Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. REV. 991, 999 (1990) ("records from the Constitutional Convention concerning the copyright clause are extremely sparse"); 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) ("any [interpretive] approach based on the drafting or ratification discussions stumbles on the thinness of the record"). The brevity of the record stemmed, in large part, from the secrecy pledge the Framers took. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 (Max Farrand ed., 1911) [hereinafter FARRAND]. See also Resolution of Secrecy Adopted by the Continental Congress (November 9, 1775), in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 18 (Charles C. Tansill ed., 1927) [hereinafter TANSILL] (noting that members of the Continental Congress used to keep many of their discussions secret).

¹¹ In discussing the Clause's original intent and textual meaning the Article focuses on the Convention's debates rather than on documents written years before or after it for several reasons. As people often change their opinions over time and as human memory is fallible, the Convention's debates on intellectual property provide the most reliable glimpse into the intent behind and textual meaning of the Clause. Additionally, other sources, external to the Convention, such as the Statute of Monopolies, 21 Jam. 1, c. 3 (1623) (Eng.), and the Statute of Anne, 8 Ann., c. 19 (1710) (Eng.), have already received considerable treatment. Thus, the greatest amount of added interpretive value seems to come from exploring the immediate origins of the Clause. Lastly, as detailed below, the Article finds that the English experience influenced the Framers less than what is generally recognized. Instead, it finds that independent American state experience was more significant than is generally recognized.

¹² Methodologically, the Article joins a growing body of scholarship that combines historical and quantitative methods in legal research. See, e.g., Daniel Klerman, *Statistical and Economic Approaches to Legal History*, 2002 U. ILL. L. REV. 1167, 1167 (2002) (reviewing four articles that employ statistics and economics in legal-history research and suggesting that "legal history could benefit from more attention to economics and statistics"). See also Ron Harris, *The Encounters of Economic History and Legal History*, 21 LAW & HIST. REV. 297 (2003) (highlighting the importance of economic theory and economic history to

as full a picture as possible about the textual meaning of the Clause and the intent behind it, it studies these considerations seriously: It analyzes the unique and complex textual structure that the Clause embodies. It examines a wide variety of historical evidence that it situates in their contemporary context. It examines the textual similarity of sentences and the statistical distribution of letter counts in related documents as indicative of the sources on which they relied and of the intent behind such reliance. It devises and employs a statistical test to determine textual proximity between sources. The Article thus illuminates the considerations highlighted in *Eldred* as the most relevant to Congress' scope of power.¹³

One major finding of this Article is that the Framers intended the text "to promote the progress of science and useful arts" ("Progress Clause") to limit Congress' power "[to secure] for limited times to authors and inventors the exclusive right to their respective writings and discoveries" ("Exclusive Rights Clause"). The first proposals in the Convention for Congress' intellectual property powers did not include this limitation. These proposals were made by James Madison and Charles Pinckney who hoped for a relatively strong federal government. The limiting language was associated initially with other, more controverted proposals for legislative powers relating to universities and governmental encouragements, which proposals were eventually rejected. The Framers, whose cumulative view supported a more limited government than the one Madison and Pinckney envisioned, took the limiting language from the rejected proposals and tacked it deliberately onto Madison and Pinckney's intellectual property proposals.¹⁴ This finding tends against D.C. Circuit precedent that holds that the Progress Clause does not limit Congress' power,¹⁵ which precedent's validity *Eldred* assumed.¹⁶

The analysis does not stop at the time of the Framing, but rather details current implications of its findings. To learn how limitations on power set in the Clause are enforced by the judiciary, the Article reviews relevant Supreme Court cases and reveals a common thread of non-deferential review. The Article suggests several considerations that justify this kind of review. It thus concludes that courts deciding Constitutional

legal history); Ron Harris, *The Uses of History in Law and Economics*, 4 THEORETICAL INQUIRIES L. 659 (2003) (highlighting the importance of history to law and economics).

¹³ This Article associates original intent with the cumulative intent of the Framers, which it infers from the proposals made at the Federal Convention, the text of the Clause, and historical events in the years immediately preceding and following the Convention. Other alternatives could be to associate original intent with the opinions of the individual delegates in the Convention or with the intent of the state ratifying conventions. With regards to these two alternatives, there is no comprehensive record of opinions and thus they are not viable options for understanding original intent. The ratification of the Constitution may also suggest that people in the states shared the same intent with the Framers. For discussions of the comments made in various state ratifying conventions, see, e.g., Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 376-77 (1992); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 922-28 (2002); Schwartz & Treanor, *supra* note 8, at 2736.

¹⁴ See *infra* Part IV.

¹⁵ See *infra* note 200 and accompanying text.

¹⁶ See *infra* note 248 and accompanying text.

intellectual property challenges should examine, in future and pending cases that raise the issue, whether the Progress Clause's limitation was overreached. Since no case decided such a challenge to date, since this argument is raised in several pending cases, and since the Court has not developed a judicial concept of progress for the Clause, the Article explores several ways in which courts could do so.

The analysis will proceed in five stages that form the Parts of this Article. Each of the first three Parts revolves around one major issue surrounding the Convention's intellectual property debates. These Parts aim to uncover the legislative history behind the Clause and to lay the foundation on which the subsequent two Parts build. Part I reviews all four documents that potentially convey information on the Convention's intellectual property debates. It concludes that only two of them - the Convention's journal and James Madison's journal - are credible sources of information. The third - Charles Pinckney's Observations pamphlet - is found to only reference information contained in the first two sources; thus, it sheds no independent light on the debates. The fourth - Pinckney's Plan - is found not to relate to intellectual property and is thus irrelevant to the analysis. The literature to date is indecisive on whether Pinckney's Plan, a copy of which is yet to be found, included proposals relating to intellectual property. This indeterminacy left room for the possibility that in writing the Clause the Framers relied on a source that we do not currently have, and thus that any analysis of the Clause may be incomplete. This Part eliminates this doubt according to available evidence.

Part II picks up from the point reached in Part I. It limits itself to reviewing the contents of the two journals in an attempt to construct from them a joint, consistent body of undisputed facts relating to the Convention's intellectual property debates. This quest is hindered by a 168-year-old puzzle: Did James Madison propose to the Convention that Congress should have power to grant patents? Although Madison recorded initially in his journal a patent proposal that he had made, it was not recorded in the Convention's journal. To make matters worse, Madison's patent power proposal was no longer mentioned after he revised his journal for posthumous publication. Using a statistical test that compares the textual differences among the contents of the Convention's journal, Madison's journal and Madison's revised journal, this Part concludes that Madison indeed proposed a patent power. This finding contributes to the literature, which assumes that the fact that Madison's revision does not mention a patent power suggests that he admitted to not having proposed one. This finding serves the analysis in subsequent Parts since Madison's patent proposal is one of those that served as a basis for the Clause. Part III assumes this finding and traces the source of Madison's patent power proposal. The fact that Madison's patent power proposal was not limited to the promotion of progress serves Part IV as one of the indications that the progress limitation was added to the Clause intentionally to limit Congress' intellectual property power.

Part III takes the coherent whole of the two journals constructed in Part II and identifies therein the eight proposals by Madison and Pinckney that served as the basis for the Clause. This Part shows that these eight proposals drew on independent American state legislation rather than directly on English precedent. This finding, as further discussed in Part V, correlates with four striking characteristics of the early American

patent system: The text of the Progress Clause, the novelty concept, the early examination system, and Thomas Jefferson's administration of the patent system. These phenomena situate the text of the Clause in its historical setting and suggest that the Framers were not trying to replicate English law, but rather intended to create a new concept of intellectual property, more suitable to their values and vision, in which Congress' intellectual property power was limited to the advancement of knowledge.

Part IV proceeds by examining the way in which the Clause was constructed from Madison and Pinckney's proposals. It reviews both the elements in their proposals that were incorporated into the Clause and those that were left out. This analysis of the textual putting together process reveals the original intent behind the Clause: The Framers wished to confer upon Congress two means (patents and copyrights) but not two others (federal university and encouragements), in order to achieve one end (promotion of progress of science and useful arts) but not another (mere encouragement of industry). The Progress Clause and the Exclusive Rights Clause were both originally intended to serve as limitations on the power conferred.

Part V details implications for present times. It suggests a model to explicate the power and limitations set in the Clause. It examines the way Courts have enforced the limitations on Congress' power to date, and reveals a common thread running through relevant case law: Non-deferential construction and enforcement of the limitations on Congress' intellectual property power, accompanied by a more deferential review regarding the means Congress uses to exercise legitimate power. The Article lists several considerations that support this non-deferential review. It then focuses on the "promotion of progress" limitation that has not been elaborated on widely by courts, and delineates ways in which courts could give it meaning in future and pending cases. Lastly, the Article doubts the accepted wisdom of parsing the Clause dichotomously into a patent power and a copyright power.

I. WHICH SOURCES ATTEST TO THE ORIGINS OF THE CLAUSE?¹⁷

A. OVERVIEW OF FACTS

The federal Constitutional Convention began in Philadelphia on May 14, 1787. Intellectual property was not a top priority for the Framers: The first draft Constitution, proposed by the Committee of Detail on August 6, did not mention it at all.¹⁸ The first reference to intellectual property in the Convention's official journal ("Convention's Journal") is from August 18, when James Madison of Virginia and Charles Pinckney of South Carolina proposed that Congress have intellectual property powers.¹⁹ Their proposals were referred to the Committee of Detail. The next reference in the Convention's Journal is from September 5, when the Committee of Eleven,²⁰ to which all pending matters were referred, recommended the adoption of a Congressional power that later became the Intellectual Property Clause.²¹

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

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."²² On September 12, this Committee presented a draft Constitution, which included the Clause.²³ This power was intact when the Convention approved the final draft of the Constitution on September 17, 1787.²⁴ Thus, the Clause can be traced back directly to debates in the Convention on and prior to September 5, 1787, since no changes were made to the Clause after that point.

¹⁷ This Part and the next conduct historical fact-finding by analyzing problematic source material: This Part examines whether the contents of Pinckney's Plan, a missing document, are relevant to the intellectual property debates in the Convention. The next Part analyzes the contents of Madison's journal, a manuscript with deletions and additions that change its meaning. Throughout the discussion, these Parts make references to the rules of evidence. These analogies do not come to suggest that the process the Article goes through is the same as the legal process. Instead, these references augment the discussion by analogizing to evidentiary principles used in similar contexts and provide a helpful shorthand language with which to discuss the factors that weigh for or against the relevancy and reliability of sources. Other students of the questions analyzed in this Article found the analogy helpful as well. See CHARLES C. NOTT, *THE MYSTERY OF THE PINCKNEY DRAUGHT* (1908) (investigating the whereabouts of Pinckney's Plan as if it were a trial); BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 127 (1967) (analyzing Madison's revision of his journal through the prism of evidentiary rules). The present Part's goal is analogous to determining admissibility of evidence.

¹⁸ See 2 FARRAND 177.

¹⁹ For the intellectual property powers proposed see *infra* Part III.A.

²⁰ This committee had one member from each state. It had eleven rather than thirteen members since Rhode Island did not send delegates and the New York delegation had left the Convention by this date.

²¹ 2 FARRAND 505. For the text of the Intellectual Property Clause, which differs from the above in minute details of punctuation and capitalization, see *infra* Part III.A.

²² 2 FARRAND 547.

²³ *Id.* at 590, 595.

²⁴ *Id.* at 655.

There are three original source documents referencing discussions about intellectual property in the Convention prior to September 5: The Convention's Journal, James Madison's private journal of the Convention ("Madison's Journal"), and a pamphlet of observations by Pinckney that will be discussed below ("Observations").²⁵ The first two sources ("Two Journals") record the daily events of the Convention. The Two Journals generally record the same events, although in different levels of detail. Since the Two Journals tend to prove the contents of the intellectual property debates,²⁶ and were kept during the regular course of the Convention,²⁷ we can rely on their contents. Thus, they will be further explored in the next Parts. The third source, Pinckney's Observations, necessitates further exploration to determine its relevancy to intellectual property debates in the Convention.

B. ANALYSIS OF PINCKNEY'S OBSERVATIONS AND PLAN

1. THE OBSERVATIONS AND PLAN ON INTELLECTUAL PROPERTY

According to the Two Journals, intellectual property was first discussed in the Convention on August 18, 1787. The Observations apparently suggest that intellectual property was brought up earlier as a part of Pinckney's Plan of Government ("Plan"), which he presented to the Convention on May 29, 1787.²⁸ There is no extant copy of Pinckney's Plan. All that we know is that immediately after it was presented to the Convention it was passed to the Committee of the whole House for consideration.²⁹ On July 24, the Committee was discharged from further consideration of the Plan, which was then referred to the Committee of Detail. This Committee was to write a draft Constitution based on the Convention's progress up to that point.³⁰ From this point on, the fate of Pinckney's Plan is unknown. Whoever had it last³¹ should have returned it to the Convention's Secretary William Jackson.³² Jackson, in turn, should have kept it

²⁵ See Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia, on the 28th of May, 1787, in 3 FARRAND 106.

²⁶ Cf. FED. R. EVID. 401 ("Definition of 'Relevant Evidence'").

²⁷ Cf. *id.* 803(6) ("Hearsay Exceptions; Availability of Declarant Immaterial", "Records of Regularly Conducted Activity"); *Id.* 803(5) ("Recorded Recollection"); *Id.* 803(8) ("Public Records and Reports").

²⁸ Four plans for a federal government were presented in the early stages of the Convention: The Virginia Plan (May 29, 1787), Pinckney's Plan (May 29, 1787), The New Jersey Plan (June 15, 1787), and Alexander Hamilton's Plan (June 18, 1787). For the plans, see TANSILL, *supra* note 10, at 953-88.

²⁹ 1 FARRAND 16 (Convention's Journal for May 29, 1787).

³⁰ 2 FARRAND 97-98 (Convention's Journal for July 24, 1787); *id.* at 106 (Madison's Journal for July 24, 1787).

³¹ It was probably the Committee of Detail, to which Pinckney's Plan was delivered or the Committee of Eleven that later took over the former's role.

³² Most commentators attribute the responsibility for the Plan's absence from the Convention's archive to Jackson's omission. Nott, however, conjectures that the Committee of Detail failed to return it to Jackson since it handed it with several additions to the printer to print the August 6 Draft Constitution because of the severe time constraints it faced. See NOTT, *supra* note 17, at 236-42. *But cf.* Max Farrand, Book Review of *The Contributions of Charles Pinckney to the Formation of the American Union* by Andrew J. Bethea (1938), in ANDREW J. BETHEA, THE CONTRIBUTION OF CHARLES PINCKNEY TO THE FORMATION OF THE AMERICAN UNION 551, 553 (1937) (suggesting that in making this conjecture, Nott "went farther than other students have been able to follow").

among the Convention’s papers. Upon adjournment, the delegates decided to maintain the secrecy of the debates by entrusting the Convention’s Journal and papers to George Washington, “subject to the order of Congress, if ever formed under the Constitution”, which had yet to be ratified in the states.³³ Washington kept the papers until 1796, at which time he deposited them with the Department of State. They remained there until 1818, when Congress removed the veil of secrecy surrounding the debates. Consequently, President James Monroe ordered Secretary of State John Quincy Adams to publish the Convention’s Journal. Adams saw that the Plan was mentioned in the Journal but did not find it among the Convention’s papers, which were in a disorderly state.³⁴ Adams asked Pinckney for a copy of his Plan. Pinckney searched his files and sent Adams what he believed was a close substitute for the Plan (“The 1818 Plan”).

Shortly after the Convention adjourned, however,³⁵ Pinckney published the Observations,³⁶ a long pamphlet in which he seemingly elaborated on the contents of his Plan. The Observations say that “[t]here is also an authority to the National Legislature (...) to secure to Authors the exclusive rights to their Performances and Discoveries” (“Observations’ IP Part”).³⁷ These events can be summarized as follows:

Figure 1 – Timeline of Pinckney’s Actions

May 29, 1787	August 18, 1787	October, 1787	1818
Pinckney submits Plan in Convention	Pinckney proposes intellectual property powers in the Convention (according to Two Journals)	After Convention ends, Pinckney publishes Observations that suggest Plan conferred intellectual property powers on Congress	Pinckney submits 1818 Plan to Adams as a close substitute for his Plan

If so, the Observations suggest that intellectual property was on the Convention’s table almost right from the start, whereas the Two Journals suggest that it was raised for the first time on August 18, less than a month before the Convention adjourned. It is hard to reconcile the Observations’ version with that of the Two Journals.

2. LITERATURE ASSUMES CLAIM

Scholars share the assumption that in publishing the Observations, Pinckney claimed that he had proposed congressional intellectual property powers as a part of his Plan (“The Claim”).³⁸ This common assumption relies on several indications. First, the

³³ 2 FARRAND 648 (Madison’s journal for September 17, 1787).

³⁴ See John Q. Adams, *Memoires*, in 3 FARRAND 431.

³⁵ But no later than October 14, 1787. See 3 FARRAND 106 n.1.

³⁶ See *supra* note 25.

³⁷ 3 FARRAND 122.

³⁸ See BUGBEE, *supra* note 17, at 193 n.8 (“After the Convention had ended, Pinckney published a pamphlet entitled *Observations* (...) [where] he suggested that Congress be empowered ‘to secure to authors the exclusive rights to their performances and discoveries.’”); WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 22 (Bureau of National Affairs, Washington, D.C.: 1994 & Supp. 2000) (“The first reference to copyright at the Constitutional Convention is a May 28, 1787, proposal by Charles Pinckney of

Observations' title "Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia, on the 28th of May, 1787" suggests that it comments on Pinckney's Plan.³⁹ Second, the Observations are written as a speech given before the Convention and accompanying the presentation of the Plan.⁴⁰ Third, the Observations mention specific article numbers from the Plan and elaborate on their contents.

Scholars differ, however, in their views about the Claim: Some believe it, while others do not.⁴¹ Both camps rely on Pinckney's character and on the contents of the 1818 Plan to make their opposing cases. The evidence relied on, however, is inconclusive and cannot support either camp unequivocally.

The 1818 Plan does not mention intellectual property, which was suggested as a reason to distrust the Claim.⁴² However, the 1818 Plan was shown not to be a true substitute for the Plan,⁴³ and thus the extent to which it can be relied on to disprove the

South Carolina that the Constitution include a clause giving the federal government the power 'to secure to Authors the exclusive right to their Performances and Discoveries.'"); EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 82, 104-05 (2002) ("in a pamphlet published shortly after the federal convention ended, Pinckney alleged that in the South Carolina Plan he had proposed that the Congress have authority 'to secure to authors the exclusive rights to their performances and discoveries.'"); Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 *GEO. L.J.* 109, 109-10 (1929) ("In this pamphlet Pinckney proposed to give authority to Congress 'to secure to authors the exclusive rights to their performances and discoveries.'")

³⁹ The Plan was submitted on May 29. The one-day difference in date is explained *infra* note 56.

⁴⁰ For example, they begin by addressing "Mr. President", and immediately afterwards the delegates: "It is, perhaps, unnecessary to state to the House the reasons which have given rise to this Convention." Addresses to the Convention and fellow delegates are interwoven throughout the Observations, together with remarks concerning the greatness of the hour, the sense of heavy duty, the importance of the Convention and the expectations of the American people and the world from the Convention. *See* 3 FARRAND 106.

⁴¹ Bugbee, Fenning and Walterscheid do not believe the Claim, namely they think that Pinckney's Plan did not mention intellectual property. *See* BUGBEE, *supra* note 17, at 193 n.8.; Fenning, *supra* note 38, at 110-11; WALTERSCHEID, *supra* note 38, at 82. The latter, however, is willing to accept as a possibility that the Plan included a copyright power, but not a patent power. *See id.* at 124-25. Farrand believes the Claim to be more likely true than not; therefore, his suggested reconstruction of Pinckney's Plan includes the Observations' IP Part, although with a disclaimer. *See* 3 FARRAND 609. Patry thinks the Claim is true. *See* PATRY, *supra* note 38 and accompanying text.

⁴² *See* BUGBEE, *supra* note 17, at 193 n.8 (contents of 1818 Plan are evidence tending to disprove the Claim); WALTERSCHEID, *supra* note 38, at 82, 105 (mentioning Pinckney's character and the 1818 Plan as tending to disprove the Claim).

⁴³ Madison was perhaps the first to suggest that the 1818 Plan was not a true substitute for the Plan. *See* Letter from James Madison to W.A. Duer (Jun. 5, 1835), *in* 9 *THE WRITINGS OF JAMES MADISON* 553, 553 ("the copy sent to Mr. Adams could not be the same with the document laid before the Convention."). There was no chance, he argued, that the delegates would have engaged in four months of intense argument only to agree on a text that was lying before them all that time. *See id.* at 553 ("the details and phraseology of the Constitution appear to have been anticipated [by the 1818 Plan]."). He also made a detailed comparison of the inconsistencies between the 1818 Plan and the Observations. *See* A Note Analyzing the Pinckney Plan (1835), *in* 9 *THE WRITINGS OF JAMES MADISON* 558. In his correspondence, however, Madison mentioned a possible explanation for the resemblance between the 1818 Plan and the Constitution. *See* Letter from James Madison to W.A. Duer (Jun. 5, 1835), *in* 9 *THE WRITINGS OF JAMES MADISON* 553, 555 ("One conjecture explaining the phenomenon has been, that Mr. Pinckney interwove with the draught

Claim is doubtful. The fact that the 1818 Plan was not a true substitute for the Plan although Pinckney submitted it as one damaged Pinckney's reputation.⁴⁴ However, when Pinckney sent Adams the 1818 Plan, he accompanied it with a disclaimer: He was sending one of the drafts of the Plan he retained, and he could not be certain that it was identical to the Plan.⁴⁵ Pinckney's letter to Adams made some suggest that the Observations and the 1818 Plan relate to different drafts of the Plan, and hence their incompatibility.⁴⁶ Another reason suggested for not believing the Claim was that Pinckney had a general reputation for claiming to have fathered many Constitutional provisions, and that he had the nickname "Constitution Charlie".⁴⁷ However, a reputation

sent to Mr. Adams passages as agreed to in the Convention in the progress of the work, and which, after a lapse of more than thirty years, were not separated by his recollection."'). Some of the contents of the 1818 Plan differ from the views Pinckney expressed in the Convention. *See, e.g.*, Letter from James Madison to W.A. Duer (Jun. 5, 1835), in 9 THE WRITINGS OF JAMES MADISON 553, 553-54 (noting that while the 1818 Plan suggests election of the House of Representatives by the people, on June 6, 1787, only eight days after the Plan was laid before the Convention, Pinckney suggested that the House be elected by the state legislatures). Some scholars called the 1818 Plan a "pseudo draft" that "should be relegated to the depository of historical lies." *See* Andrew C. McLaughlin, *Sketch of Pinckney's Plan for a Constitution, 1787*, 9 AM. HIST. REV. 735 (1904); Paul L. Ford, *Pinckney's Draft of a Constitution*, 60 (1563) THE NATION 458, 459 (1895). *See also* CLINTON ROSSITER, 1787: THE GRAND CONVENTION 331 n. (1966) ("fraudulent document"). Also, it was shown convincingly that if in response to Adams' request Pinckney had taken the August 6, 1787 Committee of Detail's Draft Constitution as a base from which to work and "paraphrase[ed] to a small extent here and there, and interw[ove] as he went along some of the best-remembered features of his own plan (...) the result would have been precisely like [the 1818 Plan]". Jameson, *Studies*, *supra* note 47, at 124.

⁴⁴ *See, e.g.*, ROSSITER, *supra* note 43, at 331 n. ("The kindest judgment that can be made about Pinckney is that his vanity was appalling and his memory even worse.").

⁴⁵ Letter from Charles Pinckney to John Quincy Adams (Dec. 30, 1818), in 3 FARRAND 427, 428 (cautioning that he has four or five drafts of the plan, that he cannot be sure at the distance of thirty years which most resembles the Plan, that these drafts are generally the same, and admitting that a few days after the Convention began he changed some of his views).

⁴⁶ *See* BETHEA, *supra* note 32, at 44-46 (suggesting that the 1818 Plan was one of the drafts of the Plan, but not identical to it); NOTT, *supra* note 17, at 130, 271-72 (suggesting that the Plan, the 1818 Plan and the Observations were or related to different versions of Pinckney's plan of government).

⁴⁷ *See* WALTERSCHEID, *supra* note 38, at 82 (noting that Pinckney was famous for self-aggrandizement and that no other evidence supports Pinckney's "self-serving claim."). *See also* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 39 (1966) (noting that Pinckney was known as "Constitution Charlie"); ROSSITER, *supra* note 43, at 327 (same). His reputation for taking credit is supported by the publication of the Observations, which were published almost in defiance of the secrecy vow the delegates made. *See* NOTT, *supra* note 17 (arguing that since the Observations were never read in the Convention, and since their copy was never among the Convention's papers, their publication did not formally break the secrecy vow). Even though Pinckney claimed that he only circulated the Observations among a close circle of friends, they happened to find their way into public printing in New York. *See* Letter from James Madison to George Washington (Oct. 14, 1787), in 5 THE WRITINGS OF JAMES MADISON 9-10 (Gaillard Hunt ed., 1900-1910). Additionally, they were published again in a newspaper in South Carolina, Pinckney's home state. *See* John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, 1 ANN. REP. AM. HIST. ASS'N 87, 116 & n.c (1902) (noting that the Observations were published in the State Gazette of South Carolina in installments between October 29 and November 29, 1787). Contemporaneous correspondence also supports this reputation, as do speeches made by Pinckney at various times. *See* Letter from George Washington to James Madison (Oct. 22, 1787), in 5 THE WRITINGS OF JAMES MADISON 9 n.3

for taking credit does not necessarily entail taking false credit, especially since it is accepted that Pinckney made some valuable contribution to the Constitution.⁴⁸ Also, some suggest that Pinckney's character was nearly impeccable.⁴⁹

3. OBJECTIVE EVIDENCE ABOUT THE PLAN

In the early 1900's, two memoranda that reference the contents of Pinckney's Plan were discovered. The memoranda are in the handwriting of James Wilson of the Committee of Detail that authored the August 6 Draft Constitution and to which Pinckney's Plan was transferred. Wilson wrote these two memoranda, it is believed, while serving on the Committee and working on the Draft Constitution. The first memorandum was shown, through a rigorous analysis, to embody excerpts from Pinckney's Plan ("Wilson's Extracts").⁵⁰ This conclusion was based on the views Pinckney expressed in the Convention and on an elimination of other plans and propositions as possible sources of these extracts. The second memorandum was shown to be an outline of Pinckney's Plan ("Wilson's Outline").⁵¹ This demonstration was based on a sophisticated comparison of Wilson's Outline with the Observations: The series of issues each goes through exhibits substantial similarity in content and order. Neither Wilson's Extracts nor Wilson's Outline mentions intellectual property.

4. CLAIM WAS NOT MADE

This sub-Part suggests that the Claim was not made. The Observations' fine print reveals that they do not make the Claim, but only suggest that Pinckney proposed that Congress have intellectual property powers at some point during the Convention. Pinckney added a disclaimer to the Observations saying that they were "Delivered at different Times in the course of their Discussions" ("Disclaimer").⁵² Thus, although the Observations' title, content, and structure may implicitly suggest otherwise, the Disclaimer makes clear that the Observations do not purport to recapitulate the terms of the Plan. Had Pinckney proposed everything included in the Observations on May 29, 1787, he would have had no reason to add the Disclaimer.⁵³ If the Disclaimer needed any

("Mr. C. Pinckney is unwilling ... to lose any fame that can be acquired by the publication of his sentiments."); Charles Pinckney at the House of Representatives, Feb. 13, 1821, in 3 FARRAND 445.

⁴⁸ See McLaughlin, *supra* note 43, at 741 ("We can say that Pinckney suggested some thirty-one or thirty-two provisions which were finally embodied in the Constitution; of these about twelve were originally in the Articles of Confederation"); Max Farrand, Book Review, *supra* note 32, in BETHEA, *supra* note 32, at 551, 552 ("Pinckney made considerable contributions to the framing of the Constitution that ought to be more generally recognized. To claim too much is to push him back into the shadow under which his reputation long rested.").

⁴⁹ See NOTT, *supra* note 17; BETHEA, *supra* note 32.

⁵⁰ See J. Franklin Jameson, *Portions of Charles Pinckney's Plan for a Constitution*, 8 AM. HIST. REV. 509 (1903). For the analysis of Wilson's Extracts see Jameson, *Studies*, *supra* note 47.

⁵¹ McLaughlin, *supra* note 43.

⁵² *Observations*, *supra* note 25, at 106.

⁵³ Jameson and McLaughlin interpreted the Disclaimer literally: They understood the Claim to be that Pinckney may have delivered the Observations verbatim in parts on different dates. They seem not to have considered the possibility that the Observations put in a speech format views Pinckney expressed at different times and in various settings in the Convention. See Jameson, *Studies*, *supra* note 47, at 121-23

further support, scholars identified parts in the Observations that reference suggestions and speeches Pinckney made in the Convention on specific dates after May 29.⁵⁴ Similarly, a close reading of the Observations leads this sub-Part to conclude that the Observations' IP Part references proposals Pinckney made on August 18 rather than as a part of his Plan.

The Observations are well structured, going through various articles of Pinckney's Plan, noting their number each time and then explaining each at length. Toward the end of the Observations and just before the closing paragraphs, two short paragraphs appear, the second of which includes the Observations' IP Part ("Two Paragraphs").

The Two Paragraphs stand out structurally from the rest of the Observations in three ways. First, in contrast to the discussion preceding them, the Two Paragraphs do not mention article numbers in Pinckney's Plan to which they refer.⁵⁵ Second, each of the Two Paragraphs relates to various different congressional powers that are not thematically related and thus do not appear to have been proposed as part of one article in Pinckney's Plan. In contrast, before the Two Paragraphs, articles from Pinckney's Plan are generally elaborated upon by few paragraphs of Observations. Third, the Two Paragraphs are very brief. Before them, the discussion of articles from the Plan is accompanied by lengthy rhetorical exclamations and elaborations of the rationale behind them. The second of the Two Paragraphs that relates to intellectual property stands out especially: It provides no explanations of the congressional powers it elaborates and contains no exclamations.

The Two Paragraphs stand out also regarding their contents because each references proposals that Pinckney made in the Convention on two dates, respectively. The first of the Two Paragraphs lists proposals that Pinckney had made on August 20, 1787. The second paragraph that contains the Observations' IP Part references proposals for congressional powers Pinckney made on August 18, 1787.⁵⁶

(noting the Disclaimer and concluding that the speech was never made, not even in parts on different dates); McLaughlin, *supra* note 43, at 735 (noting that the Observations may have been delivered on different dates as shorter speeches). See also NOTT, *supra* note 17, at 138-39 (noting the Disclaimer, but, since he believes that the Observations were truthfully prepared prior to the Convention and published after its adjournment without tampering, concluding that Pinckney probably added the Disclaimer as an afterthought since some of his speeches in the Convention resembled the Observations).

⁵⁴ See, e.g., Jameson, *Studies*, *supra* note 47, at 121 (suggesting that Pinckney delivered the paragraph next to last in the Observations at the Convention on July 2, 1787); McLaughlin, *supra* note 43, at 736 (suggesting that the fourteenth and fifteenth paragraphs in Pinckney's Observations were a part of a speech he gave in the Convention on June 8, 1787, since they are strikingly similar to the way Madison recorded Pinckney's speech in his journal).

⁵⁵ The first of the Two Paragraphs starts with "[t]he next Article provides for" The second paragraph that refers to intellectual property begins "[t]here is also an authority to" *Observations*, *supra* note 36, at 122.

⁵⁶ The Two Paragraphs seem like a later addition to a document already written. If so, a possible conjecture is that the Observations build on a written speech Pinckney intended to make in the Convention when he submitted his Plan, but which he did not. This sense is conveyed predominantly from the format of the Observations: Had Pinckney chosen to publicize his thoughts after the Convention ended, there would have been little reason for him to do so in a speech format. Surrounding circumstances support this conjecture. Pinckney probably expected to give a speech: Randolph, who presented the Virginia Plan before him,

Augmenting the above evidence that connects the Observations' IP Power to Pinckney's proposals from August 18 is evidence that tends against the possibility that Pinckney suggested intellectual property powers as a part of his Plan. First, Wilson's Extracts and Wilson's Outline do not refer to intellectual property. Second, intellectual property is not mentioned in the Two Journals before August 18. Lastly, the Convention's Journal for August 18 tends against the possibility that Pinckney proposed intellectual property powers earlier. The record begins: "The following additional powers proposed to be vested in the Legislature of the United States having been submitted to the consideration of the Convention -- It was moved and seconded to refer them to the Committee to whom the proceedings of the Convention were referred."⁵⁷ The Committee mentioned is the Committee of Detail, to which Pinckney's Plan was already referred at the end of July. If the Plan included intellectual property powers, there would have been little reason for Pinckney to reintroduce them to the same Committee three weeks later. Since Madison also made intellectual property proposals that day, there would have been similarly little reason for him to do so if Pinckney's earlier proposals were on the table.⁵⁸ Also, if Pinckney already suggested intellectual property powers, it is unlikely that the Convention's Journal would label them *additional* powers, which was also the way Madison labeled them.⁵⁹

C. CONCLUSION

The evidence above suggests that Pinckney's Plan did not relate to intellectual property, that the Observations do not claim the Plan did, and that the Observations reference Pinckney's August 18, 1787 intellectual property proposals.⁶⁰ Since the Plan and Observations do not contain any new or independent information on intellectual property debates in the Convention, they can be left out of the analysis. The August 18 proposals that are available to us in full from the Two Journals will be analyzed below.

enjoyed this honor. Pinckney probably did not give a speech, as none is recorded in any of the several journals that survived the Convention. Further suggesting that he did not make a speech is the fact that he was the second youngest member of the Convention and did not secure other delegates' support for his Plan. If indeed the Observations were based on such a speech, this may explain the fact that the Observations' title carries the date of May 28 rather than May 29. If in publishing the Observations Pinckney used the date that appeared on the speech he had prepared but did not make, and had this speech been finalized the day before it was due, it would have carried the date of May 28. *Cf.* NOTT, *supra* note 17, at 122, 137-39 (suggesting that the Observations are the exact speech Pinckney intended to make on May 29, 1787 but eventually did not).

⁵⁷ 2 FARRAND 321 (Convention's Journal for August 18, 1787).

⁵⁸ See Jameson, *Studies*, *supra* note 47, at 122-23.

⁵⁹ 2 FARRAND 324 (Madison's Journal for August 18, 1787) ("Mr. Pinkney [sic] proposed for consideration several *additional powers* which had occurred to him" (emphasis added)).

⁶⁰ The similarity between the Observations IP Part and the Clause may suggest that the latter influenced the text of the former.

II. DID JAMES MADISON PROPOSE A PATENT POWER IN THE CONVENTION?⁶¹

A. TWO JOURNALS, THREE VERSIONS

1. CONVENTION JOURNAL'S RECORD FOR AUGUST 18, 1787

The Convention Journal's record for August 18 begins by listing twenty⁶² additional powers proposed to be vested in Congress:⁶³

- To dispose of the unappropriated lands of the United States
- To institute temporary governments for new States arising thereon
- To regulate affairs with the Indians as well within as without the limits of the United States
- To exercise exclusively Legislative authority at the seat of the general Government, and over a district around the same, not exceeding square miles: the consent of the Legislature of the State or States comprising such district being first obtained
- To grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent
- To secure to literary authors their copy rights for a limited time
- To establish an University
- To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries
- To authorise the Executive to procure and hold for the use of the United States landed property for the erection of forts, magazines, and other necessary buildings
- To fix and permanently establish the seat of Government of the United-States in which they shall possess the exclusive right of soil and jurisdiction
- To establish seminaries for the promotion of literature and the arts and sciences
- To grant charters of incorporation
- To grant patents for useful inventions
- To secure to authors exclusive rights for a certain time
- To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.
- That Funds which shall be appropriated for payment of public Creditors shall not during the time of such appropriation be diverted or applied to any other purpose—and to prepare a clause or clauses for restraining the Legislature of the United States from establishing a perpetual revenue
- To secure the payment of the public debt.
- To secure all Creditors, under the new Constitution, from a violation of the public faith when pledged by the authority of the Legislature
- To grant letters of marque and reprisal
- To regulate Stages on the post-roads.

The Convention's Journal does not detail who proposed these twenty powers. The Journal also does not record the proceedings that changed any of the above proposals into the final formulation of the Clause. The only reaction to the final Clause as proposed by the Committee of Eleven as documented in the Convention's Journal is "agreed".⁶⁴

⁶¹ This Part's goal is analogous to determining relative weight of evidence. *See* discussion *supra* note 17.

⁶² One may count twenty-one powers if the power beginning with "That" is broken into two.

⁶³ 1 U.S. BUREAU OF ROLLS AND LIBRARY, DEPT. OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 130-31 (Washington: 1894) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION] (Convention's Journal for August 18, 1787).

⁶⁴ *Id.* at 181 (record of September 5, 1787).

2. MADISON JOURNAL'S RECORD FOR AUGUST 18, 1787

Madison's record for that day was:⁶⁵

Mr. Pinkney [sic] proposed for consideration several additional powers which had occurred to him. See Journal of Convention.

Mr. M. proposed the following, to be referred to a committee. 1. to dispose of the unappropriated lands of the U.S. 2. To institute temporary Governments for new States arising thereon. 3 to regulate affairs with the Indians as well within as without the limits of the U. States. 4. to exercise exclusively legislative authority at the seat of the Gen^l Government, and over a district, around the same not exceeding square miles; the consent of the State or States comprehending such district being first obtained. 5 to grant charters of incorporation in cases where the public good may require them and the authority of a single State may be incompetent. 6 to secure to literary authors their copyrights for a limited time. 7 To secure to the inventors of useful machines and implements the benefits thereof for a limited time. 8 to establish a University. 9 to encourage by proper præmiums and provisions, the advancement of useful knowledge and discoveries. 10. to authorize the Executive to procure and hold for the use of the U. States landed property for the erection of forts. magazines and other necessary buildings.

At a later time Madison made changes to this text. He drew two large X's over it, and pasted a sheet of paper on top of it. On this paper, Madison wrote an edited version ("Madison's Edited Journal"):⁶⁶

Mr- Madison submitted in order to be referred to the Committee of detail the following powers as proper to be added to those of the General Legislature

"To dispose of the unappropriated lands of the U. States"

"To institute temporary Governments for New States arising therein"

"To regulate affairs with the Indians as well within as without the limits of the U. States

"To exercise exclusively Legislative authority at the seat of the General Government, and over a district around the same not, exceeding square miles; the Consent of the Legislature of the State or States comprising the same, being first obtained"

"To grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent"

"To secure to literary authors their copyrights for a limited time"

"To establish an University"

"To encourage by premiums & provisions, the advancement of useful knowledge and discoveries"

"To authorize the Executive to procure and hold for the use of the U -- S. landed property for the erection of Forts, Magazines, and other necessary buildings"

These propositions were referred to the Committee of detail which had prepared the Report and at the same time the following which were moved by Mr. Pinkney: -- in both cases unanimously.

"To fix and permanently establish the seat of Government of the U. S. in which they shall possess the exclusive right of soil & jurisdiction"

"To establish seminaries for the promotion of literature and the arts & sciences"

"To grant charters of incorporation"

"To grant patents for useful inventions"

"To secure to Authors exclusive rights for a certain time"

"To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades and manufactures"

⁶⁵ 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 63, at 554-55 (Madison's Journal for August 18, 1787).

⁶⁶ *Id.* at 555-56 (Madison's Edited Journal for August 18, 1787).

“That funds which shall be appropriated for the payment of public Creditors, shall not during the time of such appropriation, be diverted or applied to any other purpose-- and that the Committee prepare a clause or clauses for restraining the Legislature of the U. S. from establishing a perpetual revenue”

“To secure the payment of the public debt”

“To secure all creditors under the New Constitution from a violation of the public faith when pledged by the authority of the Legislature”

“To grant letters of mark and reprisal”

“To regulate Stages on the post roads”

Madison’s Edited Journal suggests that of the twenty proposals in the Convention’s Journal, the first nine were proposed by Madison and the remaining 11 by Pinckney. There is a discrepancy, however, between Madison’s Edited Journal and the Convention’s Journal, on the one hand, and Madison’s Journal, on the other: Power number seven in Madison’s Journal - “[t]o secure to the inventors of useful machines and implements the benefits thereof for a limited time” – is missing from both the Convention’s Journal and Madison’s Edited Journal (“The Missing Power”).⁶⁷

B. QUESTIONS AND CONVENTIONAL ANSWERS

Aware of the differences in version, the literature is puzzled with the following questions:⁶⁸ (1) Did Madison propose the Missing Power? (2) Why did Madison edit his journal? (3) Who is to be credited as the first to propose congressional intellectual property powers?

Conventional wisdom regarding these questions assumes that: (1) Madison did not suggest the Missing Power in the Convention.⁶⁹ Some argued that while editing his journal, Madison made an “admission against the interest” (“The Admission Argument”), thus providing the best evidence that Pinckney was the only one who proposed a patent power.⁷⁰ (2) Madison is assumed to have realized, when he revised his journal, that his

⁶⁷ Cf. FED. R. EVID. 803(7) (“Absence of Entry in Records Kept in Accordance With the Provisions [assuring their trustworthiness]”).

⁶⁸ For a few recent mentions of the puzzle, see, e.g., Birnhack, *supra* note 10, at 34 n.159 (noting the puzzle regarding the role played by Madison and Pinckney); Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 421 n.352 (2004) (noting the puzzle of who suggested patent proposals in the Convention and scholars’ disagreement); Durham, *supra* note 10, at 1431 n.52 (“The omission of [The Missing Power] from Madison’s edited notes has not been explained.”); Schwartz & Treanor, *supra* note 8, at 2375 (repeating the puzzle twice: “Madison may also have proposed a Patents Clause, although the record is confused ... it is not clear whether Madison proposed a Patents Clause”). For a classic mention of the puzzle, see Fenning, *supra* note 38, at 112-13 (noting the omission of the Missing Power from the Convention’s Journal without reconciling the records and concluding that Madison and Pinckney are to be credited as originators of the American intellectual property system).

⁶⁹ See, e.g., 3 THE FOUNDERS’ CONSTITUTION 40 (Philip B. Kurland & Ralph Lerner eds., 1987) (not mentioning the Missing Power among the intellectual property proposals made in the Convention).

⁷⁰ See BUGBEE, *supra* note 17, at 127 (“[Madison’s] revised notes indicate that he did not suggest a Federal patent power. (...) Furthermore, Pinckney is credited in Madison’s self-revised journal with the proposal of a national patent institution – in effect, and ‘admission against interest’ by Madison.”). See also *id.* at 193 n.7 (“Only the patent proposal (...) was dropped. This would indicate that Madison, in editing his notes, felt that Pinckney alone had made the suggestion that the future Congress be empowered to grant patents.”); WALTERSCHEID, *supra* note 38, at 103 (“Madison himself provides the best evidence that it was

original record was inaccurate. (3) The literature cannot tell who should be credited as the first to suggest Congress' intellectual property powers, as the order of the speakers is different: Madison's Journal suggests that Pinckney spoke first, whereas the Convention's Journal suggests that Madison spoke first.

C. SUGGESTED ANSWERS

1. OVERVIEW OF ARGUMENT

This Sub-Part first reviews the credibility of the three versions and shows that Madison's Journal is the most reliable. Madison is shown to have edited his journal superficially and erroneously more than thirty years after the Convention adjourned by not relying on his own recollection. Madison's Journal is therefore preferred over this later revision. It is argued that Madison was probably not aware that he edited out the Missing Power. Then, the soundness of the Admission Argument is doubted. A process to reconcile conflicting records that pertain to the same event is presented and applied. Lastly, additional evidence supporting Madison's proposing a patent power is presented.

2. CREDIBILITY ASSESSMENTS – MADISON'S JOURNAL PREFERRED GENERALLY

a. Credibility of the Convention's Journal

The Journal was kept by Convention's Secretary Jackson. The Journal is concise: Generally, it only contains motions made and voted on and the collective vote of each state. It does not usually record debates among delegates or other exchanges not voted upon nor does it name the delegates who made the proposals on record. Much of its brevity is attributable to the pledge of secrecy the Founders took, but some of it is also attributable to Jackson's disorganization. Occasionally, he would fail to record an event or keep a record in a confused or unclear manner.⁷¹ He was not particularly concerned with keeping the records for future generations, since when the Convention adjourned he burnt "all loose scraps of paper," which he seemingly thought were unimportant, before turning over the records to Washington.⁷² When John Quincy Adams retrieved the Convention's archive in 1818 to prepare it for publication, he noticed that "[t]he journals and papers were very loosely and imperfectly kept. They were no better than the daily

Pinckney who first proposed that the Constitution grant power to the Congress to issue patents for useful inventions. Nonetheless, the claim continues to be made that Madison was one of those responsible for suggesting that the Congress be given power to issue patents. This is not to say that Madison played no significant role in the origination of the intellectual property clause; he obviously did. But it was in the context of protecting the rights of authors rather than those of inventors." (citation omitted)). *See also* Ochoa & Rose, *supra* note 13, at 922 (suggesting that Pinckney made a patent proposal, while Madison's role is unclear).

⁷¹ 1 FARRAND xiii-xiv ("With notes so carelessly kept, as were evidently those of the secretary, the Journal cannot be relied upon absolutely. The statement of questions is probably accurate in most cases, but the determination of those questions and in particular the votes upon them should be accepted somewhat tentatively.").

⁷² *See id.* at xi; Letter from William Jackson to George Washington (Sep. 17, 1787), in 3 FARRAND 82.

minutes from which the regular journal ought to have been, but never was, made out.”⁷³ When Adams asked Jackson for help in making sense of the papers, Jackson “looked over the papers, but he had no recollection of them which could remove the difficulties arising from their disorderly state, nor any papers to supply the deficiency of the missing papers.”⁷⁴ Among these missing papers were not only Pinckney’s Plan, but also, for example, the Hamilton Plan and minutes from the last days of the Convention.⁷⁵ The incompleteness of the Journal may also be attributable to the possibility that Jackson kept a fuller record he intended to print for private gain at a later time, which may have led to his somewhat neglecting his official duties.⁷⁶ Lastly, the Convention’s Journal contains errors that resulted from Adam’s good-faith attempt to bring Jackson’s notes to print.⁷⁷ Although the Convention’s Journal is still a valuable source of information,⁷⁸ the weight it is to be accorded should be reduced to reflect the aforementioned.

b. Credibility of Madison’s Journal

Madison’s Journal is the best-kept record from the Convention.⁷⁹ Generally, Madison recorded the various provisions put up for a vote, arguments made regarding them, and the names of the delegates speaking. His level of detail is outstanding. His fellow delegates had the outmost respect for his record keeping, and would often pass him

⁷³ John Q. Adams, *Memoires*, in 3 FARRAND 430, 433. *See also id.* at 431 (noting that when Adams found the Convention’s papers, they “were so imperfect, and in such disorder, that to have published them, as they were, would have given to the public a book useless and in many respects inexplicable”).

⁷⁴ John Q. Adams, *Memoires*, in 3 FARRAND 426.

⁷⁵ John Q. Adams, *Memoires*, in 3 FARRAND 430, 431-32.

⁷⁶ 3 FARRAND xii n.6 (“It would seem also that [Jackson] had taken notes of the debates (...) in addition to his formal minutes, and it is possible that he somewhat neglected his official duties in order to make his private records more complete”); John Q. Adams, *Memoires*, in 3 FARRAND 426 (“[Jackson] told me that he had taken extensive minutes of the debates in the Convention, but, at the request of President Washington, had promised they should never be published during his own life, which he supposed had been a loss to him of many thousand dollars”).

⁷⁷ 1 FARRAND xii. *See also* John Q. Adams, *Memoires*, in 3 FARRAND 430, 433 (describing the Sisyphean editorial work Adams had to do in order to make the Journal intelligible, noting that “[a]s Adams had nothing whatever to guide him in his work of compilation and editing, mistakes were inevitable, and not a few of these were important”).

⁷⁸ It is the second most valuable source about the Convention’s debates after Madison’s Journal. Secretary Jackson was acting under official duty in recording the debates daily. Figuratively speaking, the Convention’s Journal can be entered for its truth in an analogy to the rule regarding records taken in the regular operation of business and the one regarding public records.

⁷⁹ *See* James Madison, *Preface to Debates in the Convention of 1787*, in 3 FARRAND 539, 550 (describing his note taking in the Convention as follows: “In pursuance of the task I had assumed I chose a seat in front of the presiding member with the other members, on my right & left hand. In this favorable position for hearing all that passed, I noted in terms legible & in abreviations [sic] & marks intelligible to myself what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment & reassembling of the Convention I was enabled to write out my daily notes during the seesion [sic] or within a few finishing days after its close in the extent and form preserved in my own hand on my files.”).

copies of their speeches.⁸⁰ Whenever Madison would not succeed in recording an argument or a speech, he would generally make a note in his journal indicating that this omission should later be filled from other sources.⁸¹ In light of his detailed record and meticulous accuracy, and in light of the incompleteness of all other records, Madison's Journal should be generally preferred to others in cases of conflict unless there is some specific reason to the contrary. Highly relevant to the assessment of Madison's Journal is the fact that Madison was recording events he witnessed as they were happening and while they were still fresh in his mind.⁸²

c. Credibility of Madison's Edited Journal

Madison wanted his journal to be published posthumously.⁸³ Madison died in 1836 at the age of 85, and in the years preceding his death he revised his journal, probably at two different times.⁸⁴ To edit his notes, he used primarily the Convention's Journal, printed in 1819 by Adams, and Yates' journal, published in 1821.⁸⁵

Madison seems not to have fully appreciated the completeness and accuracy of his journal.⁸⁶ He reviewed the Convention's Journal to complete parts he missed. He also looked for places where the records were different. Madison would sometimes change his record because a third source, often Yates' journal, supported the Convention Journal's record, but other times for no apparent reason. In some cases, Madison's correct record was changed to conform the Journal's erroneous record,⁸⁷ or to that of Yates.⁸⁸

When Madison revised his journal, he was between seventy and eighty-five years old and "did not always show the accuracy and discrimination for which the work of his

⁸⁰ See CARL VAN DOREN, *THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES* 30 (1948) ("Madison seems to have been regarded by his fellow delegates as a licensed private recorder of their proceedings.").

⁸¹ See generally 1 FARRAND xv-xix.

⁸² In an analogy to evidence law, Madison's Journal is a record kept in the regular operation of business, and one that records his recollection. See *supra* note 27 and accompanying text.

⁸³ 1 FARRAND xv.

⁸⁴ *Id.* at xviii nn.20, 23.

⁸⁵ Secret proceedings and debates of the convention assembled at Philadelphia in the year 1787 (1821), in TANSILL, *supra* note 10.

⁸⁶ This paragraph draws on 1 FARRAND xvi-xix.

⁸⁷ For example, one instance in which Madison substituted the Convention's Journal erroneous record for his own is detailed in 2 FARRAND 61 n.3, 62. Madison's Journal recorded the votes on July 20, 1787 correctly. The Journal, however, recorded the first vote taken on August 16, 1787 on the same sheet used to record the votes of July 20, 1787. This confused record keeping caused a misprint in the vote count for July 20, 1787 in the Convention's Journal printed in 1819 by John Quincy Adams. Madison, who compared his correct record for July 20 with the Convention's Journal, substituted the error from the Convention's Journal for his correct record. One possible reason for why Madison often adopted the Convention Journal's version could be that when he revised it, Madison's Journal was in its original condition: Handwritten under time pressure during the debates, contained corrections and deletions, and contained notes to complete missing parts. The Convention's Journal was printed, organized, and seemingly flawless. Madison was unaware of the disorganized manner in which the Convention's Journal was kept and of the inevitable editorial errors it included.

⁸⁸ That is similarly surprising, since Madison thought Yates' journal was "very erroneous".

earlier years has given him a reputation.”⁸⁹ In his later years, Madison was “enfeebled by age and crippled by disease.”⁹⁰ It is very unlikely that he had specific recollection of propositions he and others made decades earlier,⁹¹ especially regarding issues that were not the central ones debated in the Convention.

Thus, when Madison revised his journal he generally acted as an editor comparing sources would have acted, rather than as a witness having the events fresh in his mind.⁹² One should tend to prefer Madison’s real-time record to his revision unless there is some reason to make an exception.

3. MADISON’S JOURNAL PREFERRED REGARDING AUGUST 18, 1787

There is no reason to make such an exception regarding Madison’s revision of his record of August 18 because there is no evidence suggesting that Madison kept a specific recollection of that day’s events. Rather, there is evidence showing that Madison did not keep a specific recollection: Madison left himself a note to complete Pinckney’s August 18 proposals because he did not have, and thus could not keep, a recollection of them.⁹³ The way Madison completed them into his Edited Journal shows that he acted as an editor lacking actual knowledge of the events: Madison saw twenty powers listed in the Convention’s Journal. He attributed to Pinckney the eleven powers that do not appear in Madison’s Journal as his own. This suggests another reason to reject Madison’s revision: Careless editorial performances. The last five of the eleven powers Madison attributed to Pinckney were not Pinckney’s.⁹⁴ As the rest of Madison’s Journal for August 18 shows, they were proposed later that day by John Rutledge, George Mason, and Elbridge Gerry.⁹⁵ The Convention’s Journal did not record debates not voted upon, and thus lists the twenty powers sequentially. Madison’s Journal recorded debates that happened after he and Pinckney made their proposals, and thus does not list the twenty powers together.⁹⁶

⁸⁹ 1 FARRAND xviii n.23.

⁹⁰ Letter from James Madison to W.A. Duer (Jun. 5, 1835), in 9 THE WRITINGS OF JAMES MADISON 553, 558.

⁹¹ Cf. John Q. Adams, Memoires, in 3 FARRAND 426, 426 (noting that Secretary Jackson did not have in 1818 any recollection to add to the events he recorded in 1787); Letter from Charles Pinckney to John Quincy Adams (Dec. 30, 1818), in 3 FARRAND 427, 428 (noting that “at the distance of nearly thirty two Years it is impossible for me now to say which of the 4 or 5 draughts I have was the one [submitted in the Convention on May 29, 1787]”).

⁹² In an analogy to evidence law, the exceptions to the hearsay rule that apply to Madison’s Journal – namely, recording events in their due course and recording events while they are fresh in the mind of the recorder – do not apply to Madison’s Edited Journal (at least regarding August 18, 1787). Madison’s editions are mere hearsay: He based them on information he received from a third source, the Journal, rather than on true recollection of the events.

⁹³ See *supra* note 65 and accompanying text.

⁹⁴ These five powers are those from the one starting with “That Funds which shall be appropriated for payment of public Creditors” to the last power “To regulate Stages on the post-roads.” See *supra* note 63 and accompanying text.

⁹⁵ 2 FARRAND 326-28 (Madison’s Journal for August 18, 1787).

⁹⁶ Relevant to the admission argument discussed *infra* Part II.B.5, is that in misattributing these proposals, Madison was clearly not “admitting” that Pinckney had indeed proposed these proposals.

Several indications suggest that in revising his journal, Madison copied from the Convention's Journal not only Pinckney's proposals but also his own. In Madison's Journal, the Congressional powers he proposed are numbered, while in the Edited Journal and the Convention's Journal they are not. In Madison's Journal the powers are written continuously as a part of one long paragraph. In the Edited Journal and the Convention's Journal each power begins on a new line. In Madison's Journal Pinckney appears as the first speaker of the day, but in the Edited Journal and in the Convention's Journal Madison is the first speaker.⁹⁷ Moreover, although the contents of Madison's proposals are similar among the three journals, they are not identical. A complete comparison, provided in the Appendix, shows that Madison was copying the text of his Edited Journal from the Convention's Journal rather than basing it on his Journal. One notable difference, for example, is the fact that the relevant part of power number three in Madison's Journal reads "the consent of the State". Madison's Edited Journal and the Convention's Journal read "the Consent of the Legislature of the State". It is improbable that when Madison edited his Journal some thirty-five years after the Convention ended he added the words "of the legislature" to the text of his journal because he recalled that he used these words. Rather, Madison copied the contents of this proposal from the Convention's Journal. Another example is that under that same power Madison's Journal reads "or States comprehending." Madison's Edited Journal and the Convention's Journal read: "or States comprising". As detailed in the Appendix, the cumulative evidentiary weight of all textual indications supports the conclusion that Madison's Edited Journal is copied from the Convention's Journal. Using a statistical test, the Appendix suggests that the Conventional wisdom, according to which Madison's Edited Journal is a revision of Madison's Journal can be rejected with a certainty level greater than 99.99 percent.⁹⁸ This finding entails the conclusion that the omission of the Missing Power from Madison's Edited Journal was the result of Madison's copying the contents of the Convention's Journal, which does not report the Missing Power.

4. MADISON PROBABLY UNAWARE OF THE MISSING POWER

Madison was probably unaware of the fact that he was omitting the Missing Power when he revised his journal. Comparing Madison's Journal and his Edited Journal, it is clear that but for the Missing Power, both records are substantially the same.⁹⁹ If one assumes that Madison was aware that the Convention's Journal does not include the Missing Power ("The Awareness Assumption,") than one should assume that Madison edited that day's record carefully, or otherwise he would not have noticed the Missing Power. The fact that Madison misattributed five proposals to Pinckney tends against this possibility.

If one rejects the inference from awareness to careful editing of that day's full record, one must still accept the weaker proposition that awareness of the Missing Power would

⁹⁷ It is possible to tell from Madison's Journal that the proposals that appear first in the Convention's Journal are Madison's.

⁹⁸ For situating this analysis in the larger methodological context, see *supra* note 12.

⁹⁹ They are not identical, however. See Appendix.

have led to a careful examination of the other twenty powers for further incompatibility, for the discovery of the Missing Power is startling. If Madison did this, he would realize that but for the Missing Power, the Convention's Journal and Madison's Journal are the same.¹⁰⁰ Thus, what we would expect Madison to do had it suddenly struck him that he did not actually propose a patent power thirty years earlier is to simply cross out the Missing Power. This would have demonstrated Madison's awareness, and would have been the most natural course of action for him. The fact that Madison rather laboriously recopied the other powers, helps refute the Awareness Assumption.

The plausible conclusion then is that Madison was unaware of the fact that he omitted the Missing Power ("The Unawareness Conclusion"). This conclusion is supported by the fact that the Missing Power is in the middle of Madison's ten powers, where it is more easily overlooked. Also, the Missing Power is similar to the one preceding it since they both begin with "to secure to," and end with "for a limited time." Thus, a casual glance at the Missing Power and at the Convention's Journal would not necessarily reveal its absence from the Convention's Journal. Above, we saw that Madison did not pay careful attention to his editing indeed, as is evident by his misattribution of powers to Pinckney. Such superficial editing further supports the Unawareness Conclusion. Lastly, Madison would often record briefly proposals and speeches made in the Convention by the use of numerals.¹⁰¹ He would do so even regarding things he said.¹⁰² It makes sense why Madison would believe, at the casual glance that he gave it, that the Convention's Journal provided a fuller account of his proposals.¹⁰³

¹⁰⁰ Madison would have noticed that there were insubstantial differences between the two, but as is evident from the way he copied the Journal's record into his journal (see Appendix), he would not regard such differences as substantial enough to warrant copying them anew.

¹⁰¹ Madison did so, for example, on the next day of Convention, August 20, 1787. This day began with Pinckney proposing a list of constitutional provisions. Madison's Journal recorded these with the use of numerals, but with their contents abbreviated. The transformation from the original to the revised record are similar to those of August 18: The original numerals do not appear in the edited version, each proposal in the edited version starts on a new line like in the Convention's Journal. On August 20, it is evident that Madison was copying the contents of the Edited Journal from the Convention's Journal rather than from Madison's Journal because the edited journal is substantially fuller than in Madison's Journal.

¹⁰² See 1 FARRAND xviii (noting that Madison in editing his journal, incorporated his own views as recorded by Yates, even though he condemned Yates' notes severely as being a "very erroneous edition of the matter.").

¹⁰³ To make an analogy to evidence law, the argument made thus far could be rephrased as follows: Madison's Journal is hearsay, being an out of court statement. However, it can be entered for its truth according to the evidentiary rule regarding records taken in the regular operation of business. The official Journal can be entered for its truth for similar reasons. Madison's Edited Journal, however, is hearsay without any of the exceptions to the rule applicable: When he edited his journal, Madison did not generally retain actual memory from the Convention's debates, and acted as an editor.¹⁰³ No guarantees are evident that Madison's editions were done in conformity to the historical truth, but rather in conformity to the Journal. Moreover, there is clear evidence showing that many of Madison's editions were wrong, and specifically, regarding the record of August 18, 1787. Absent any assurance for the truthfulness of Madison's editions, one must reject them.

5. CONVENTIONAL WISDOM DOUBTED

Thus far the Admission Argument was refuted externally, by evidence that tends against it. This sub-Part doubts its inner logic. The Admission Argument is not a sound evidentiary argument. There is no rule of evidence regarding an “admission against the interest.” This label seems to amalgamate three separate evidentiary rules: In-court admissions, confessions made in custody, and statements against the interest. None of these can take us from the fact that Madison revised his journal to the conclusion that Madison did not propose a patent power.

The evidentiary logic behind the rule concerning admissions made as a part of the legal process is to have courts verify that the person making an admission is aware of the admission’s contents and its consequences. This is believed to assure the truth of the statement, since innocent people are unlikely to make false admissions when they are aware of the immediate adverse consequences. Awareness does not seem to exist in Madison’s case. There is an absence of evidence proving awareness of the Missing Power. There is also a lack of a guarantee of truthfulness, since the evidence demonstrates that Madison acted like an editor rather than a witness with knowledge. Lastly, Madison did not act voluntarily regarding the “admission”, because he was not aware of the fact that he was making one.

The evidentiary rule regarding confessions has two major components: That the person making the confession be given fair warning before the statement is made of its potential consequences, and that the statement be voluntary.¹⁰⁴ For the reasons discussed above, this logic should be rejected here.

From the context and application of the Admission Argument, it seems to invoke the evidentiary rule regarding statements against the interest.¹⁰⁵ The prerequisites for this rule to apply are that the statement be voluntary and that the statement go against a recognized interest of the declarant. The absence of the first prong is discussed above, and the second prong is meant to ensure the statement’s truthfulness, since a person would not normally make a statement adverse to her interest unless it was true. Here, it has not been established that Madison had an interest in depicting himself as an originator of the patent power. Madison had a general reputation of being modest,¹⁰⁶ and the fact that he published his journal without the patent power and only posthumously further tends against the existence of such an interest. The application of this rule here seems to be substituting the historian’s interest (in attributing credit) for the interest of the declarant (Madison, in taking historical credit).

6. PROCESS TO RECONCILE EVIDENCE: PRESENTED AND APPLIED

At this point there are only two sources that need be considered – Madison’s Journal and the Convention’s Journal. Before reconciling these two, it is necessary to specify a process by which to do so. As a general rule, when one has several credible sources that

¹⁰⁴ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁰⁵ Cf. FED. R. EVID. 804(b)(3) (“Statement against interest.”).

¹⁰⁶ See William Pierce, *Character Sketches of Delegates to the Federal Convention*, in 3 FARRAND 87, 94-95.

have witnessed a real-world occurrence one wishes to reconstruct, the way to go about reconstructing it would be to unite all pieces of information available from any of the sources. This line of reasoning leads us to analyze the situation at hand as follows. Reviewing the Convention's Journal and Madison's Journal, we can group the information into four categories. The first category is details mentioned in both journals. This group contains the list of the first nine and the last five powers in the list of twenty powers that appear in the Convention's Journal. The second category is details mentioned in the Convention's Journal, but not in Madison's Journal. This group contains the tenth to the fifteenth powers in the Convention Journal's list of twenty powers. The third category is details mentioned in Madison's Journal, but not in the Convention's Journal. This group contains the fact that Madison proposed the first nine powers that appear in the Convention's Journal, that Madison proposed the Missing Power, that the last five powers in the Convention's Journal were proposed by Rutledge, Mason, and Gerry, and that Pinckney had proposed several powers that day. The fourth category is the directly conflicting evidence, namely that Madison's Journal suggests that Pinckney was the first speaker of the day, while the Journal suggests that Madison spoke first.

Applying the process above, the reconstructed facts are that Madison proposed the ten powers in his original journal, including the Missing Power; Pinckney proposed powers ten to fifteen from the list in the Convention's Journal; and Rutledge, Mason, and Gerry proposed powers sixteen to twenty.¹⁰⁷

7. ADDITIONAL EVIDENCE SUPPORTING THAT MADISON PROPOSED PATENT POWER

The fact that Madison's Journal is more credible than the Convention's Journal should make one prefer it to the Convention's Journal in cases of inconsistency. The place where the Missing Power appears among the numbered powers in Madison's Journal makes sense: It is a patent power that appears right after a copyright power and in the proximity of powers relating to public education and advancement of knowledge. The Missing Power is very similar to the preceding copyright power in structure and use of words, which makes them likely to have been proposed concurrently. The Missing Power appears in the middle of the list of powers in Madison's Journal, thus making it very unlikely that it was added as an afterthought. Also, that day opened with Pinckney and Madison proposing a list of Congressional powers that were generally not discussed previously in the Convention. It so happened that both came up with six pairs of similar powers: Each suggested a copyright power, a patent power, a power for public education, a power concerning governmental encouragements, a power to regulate incorporations, and a power regarding the seat of government. This remarkable coincidence suggests that the two were highly coordinated in making their proposals,¹⁰⁸ and thus it is more likely true than not that all of Pinckney's proposals found their twin in Madison's proposals,

¹⁰⁷ If one believes that the Missing Power belongs to the fourth category rather than the third, the same conclusion would be reached but on the basis that Madison's Journal is more credible than the Convention's Journal.

¹⁰⁸ *But see* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 193 (1968) (“[t]he proposals submitted by Madison and Pinckney” were “apparently arrived at independently”).

instead of only five. Lastly, the text of the Clause is much closer to Madison's patent proposal than to Pinckney's patent proposal, which further supports the conclusion that Madison proposed it.¹⁰⁹

D. CONCLUSION

Why the Convention's Journal did not record the Missing Power is still unknown, and one could only speculate.¹¹⁰ However, according to the evidence available the most plausible conclusion is that Madison made the patent proposal recorded in his Journal. Regarding the second question presented at the beginning of this sub-Part concerning the reasons for Madison's revision of his Journal, the evidence suggests that Madison did not edit his Journal, but rather copied the Convention's Journal probably because of a note he left to himself in his Journal and because he thought the Convention's Journal was more complete. Lastly, because Madison's Journal for that day is more credible, we should conclude by preponderance of evidence that Pinckney read his intellectual property proposals just before Madison.

III. THE IMMEDIATE ORIGINS OF THE CLAUSE

This Part details the proposals for Congress' intellectual property powers from which the Clause originated. This Part also shows that these proposals built directly on independent American legislation rather than directly on English statutes.

A. THE CLAUSE AND ITS IMMEDIATE ORIGINS

Detailed below are the Clause and five pairs of Congressional powers proposed by Pinckney and Madison on August 18, 1787. The powers are organized in five pairs. Each pair contains two proposals for a congressional power, one made by Pinckney and the other by Madison. Each of the two delegates proposed a power relating to patents, copyrights, public education, governmental encouragements (rewards), and corporations.¹¹¹ The first four pairs are the immediate sources from which the Clause was drawn. The fifth pair, relating to corporations, has a more limited relevance that will be discussed below. Not all proposals are similarly important in understanding the Clause. Each, however, conveys some helpful insight into its textual and original meaning. In listing the Clause and the proposals, various words were highlighted in a way that allows one to associate parts in the Clause with the proposals from which they originated. All the Clause's non-trivial words are attributable to at least one of the proposals, but for the

¹⁰⁹ Both the Exclusive Rights Clause and Madison's patent power use the verb "to secure" and the terms "inventors" and "for a limited time", whereas Pinckney's patent power proposal uses the verb "to grant", does not use an explicit time limitation and does not use "inventors".

¹¹⁰ For example, perhaps Secretary Jackson copied into the Convention's Journal a list of proposals Madison read and handed him, and Jackson skipped the patent proposal that is similar in text to the copyright proposal that precedes it. Maybe Jackson was distracted and believed Madison was repeating the same power. Also, one might conjecture that Madison skipped reading that power. Although these and many more conjectures are possible, none is supported by evidence.

¹¹¹ A sixth pair of powers suggested by both Pinckney and Madison that day related to fixing the seat of government, which is not related to intellectual property.

words “progress” and “writings” whose origin will be discussed below. The Intellectual Property Clause reads:

To promote the Progress of science and useful Arts *by securing **for limited Times** to Authors and Inventors the exclusive right to their respective Writings and Discoveries*
Its immediate sources are:

Table 1 – Immediate Origins of the Clause

Notation	Powers proposed by Pinckney	Subject matter	Powers proposed by Madison	Notation
P1	to grant patents for <u>useful inventions</u>	Patents	To secure to the <i>inventors</i> of <u>useful</u> machines and implements the benefits thereof for a limited time	M1
P2	to secure to <i>authors</i> <u>exclusive rights</u> for a certain <u>time</u>	Copyrights	To secure to literary <i>authors</i> <u>their</u> copyrights for a limited time	M2
P3	to establish seminaries for the <u>promotion</u> of literature and the <u>arts and sciences</u>	Public education	To establish a university	M3
P4	to establish public institutions, rewards and immunities for the <u>promotion</u> of agriculture, commerce, trades, and manufactures	Encouragements	To encourage <i>by</i> proper <u>præmiums</u> and provisions the advancement of <u>useful</u> knowledge and <u>discoveries</u>	M4
P5	To grant charters of incorporation	Incorporations	To grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent	M5

B. ORIGINS OF THE IMMEDIATE ORIGINS

M1 seems to draw on a clause from South Carolina’s “Act for the Encouragement of arts and sciences.” Until the early 1780’s, the various colonies--and later states--would issue copyrights and patents by specific acts of their legislatures. On May 2, 1783, a committee of the Continental Congress, of which Madison was a member, recommended that the states enact general laws respecting literary property. By the time of the Framing, twelve of the thirteen states had a general copyright statute in place.¹¹² However, they would still grant patents by specific acts. South Carolina was unique in having a general patent provision added to its copyright statute. This short provision stated “[t]hat the inventors of useful machines shall have a like exclusive privilege of making or vending their machines for the like term of fourteen years, under the same privileges and restrictions hereby granted to, and imposed on, the authors of books.”¹¹³ This provision would have been a most natural one to use in formulating a congressional patent power proposal, and indeed it shares the phrase “the inventors of useful machines” with M1.

¹¹² Delaware was the only state that did not have a copyright statute.

¹¹³ See Copyright Act of South Carolina (Mar. 26, 1784), *reprinted in* COPYRIGHT OFFICE, LIBRARY OF CONGRESS, COPYRIGHT ENACTMENTS 1783-1900, at 19, 21 (Government Printing Office, Washington: 1900) [hereinafter COPYRIGHT ENACTMENTS].

The later part of M1, “for a limited time,” seems to have been inspired by the same language in M2, as explained below.

M2 seems to draw on the title of the copyright statute of Virginia, Madison’s home state. This title reads: “An act securing to the authors of literary works an exclusive property therein for a limited time.” Among all state copyright statutes, the term “limited time,” which appears in both M1 and M2, appears only in the title of the Virginian statute. The rest of P2 and M2 seem to be influenced by the aforementioned 1783 recommendation of the Continental Congress to the thirteen states to adopt general copyright statutes. The terms “for a certain time” and “exclusive right” in P2 and the term “copyrights” in M2, appear in that recommendation.¹¹⁴ This recommendation, which Madison helped formulate, would have been a natural place to go to for instruction regarding copyright legislation.¹¹⁵

P3 and P4 exhibit striking similarity to the 1780 Constitution of Massachusetts,¹¹⁶ which suggests that these proposals drew on it. This conclusion is also supported by additional similarities between the proposals Pinckney made on the next day of debates,

¹¹⁴ See 14 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 326-27 (Worthington C. Ford et al. eds., 1904-1937) (“Resolved, That it be recommended to the several states, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their heir or assigns executors, administrators and assigns, the copyright of such books for a certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their heirs or assigns executors, administrators and assigns, the copyright of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, or their assigns their executors, administrators and assigns, by such laws and under restrictions as to the several states may seem proper.”).

¹¹⁵ Among all the state copyright statutes, the terms “for a certain time” and “copyright” appear only in Pennsylvania’s statute. Pennsylvania’s statute probably drew most literally on the recommendation of the Continental Congress’ committee on literary property.

¹¹⁶ See MASS. CONST. of 1780, ch. 5, § 2, in 3 THE FOUNDERS’ CONSTITUTION, *supra* note 69, at 39. This similarity is demonstrated below by the use of emphases:

Power	MASS. CONST. of 1780, ch. 5, § 2 ¹¹⁶
<p>P3 - “to establish <u>seminaries for the promotion of literature and the arts and sciences</u>”</p> <p>P4 - “to establish public institutions, rewards and immunities <u>for the promotion of agriculture, commerce, trades, and manufactures</u>”</p>	<p>Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of <u>literature and the sciences</u>, and all <u>seminaries of them</u>; especially the university at Cambridge, public schools and grammar schools in the towns;</p> <p>to encourage private societies and <u>public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures</u>, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments, among the people.</p>

August 20, 1787, and the same Constitution.¹¹⁷ It is possible that M3 drew on Massachusetts's 1780 Constitution as well. This Constitution anchors the status of Harvard University, and since Pinckney and Madison seem to have been coordinated that day, they may have looked at the same source.¹¹⁸

M4 seems to have been influenced by North Carolina's "Act for securing literary property," the preamble of which reads "Whereas nothing is more strictly a man's own than the fruit of his study, and it is proper that men should be encouraged to pursue useful knowledge by the hope of reward; and as the security of literary property must greatly tend to encourage genius, to promote useful discoveries, and to the general extension of arts and commerce"¹¹⁹ (emphasis added). North Carolina's preamble is the only one among the twelve copyright statutes to use the terms "useful knowledge" and "discoveries". It is also the only statute in which the word "reward" appears in this sense.¹²⁰ M4 and the North Carolinian statute have structural and thematic similarity. The statute places the means ("by rewards") in the middle of a sentence relating to ends (encouragement of useful knowledge, promotion of discoveries). Similarly, M4 places the means ("by proper premiums and provisions") in the middle of the ends portion of the proposal ("to encourage the advancement of useful knowledge and discoveries"). The same words appear in the "ends" part of the two (encouragement, useful knowledge, discoveries). Equivalent words are used in the "means" part: "rewards" in M4 and "premiums and provisions" in the statute. Premiums and provisions are close substitutes for rewards, as evinced by the fact that the parallel P4 uses "rewards and immunities".¹²¹

P5 and M5 bear a limited thematic and textual relation to the Clause. They are important, however, because intellectual property rights and corporations have been discussed together and justified by similar reasons on various occasions, which suggests their conceptual proximity in the eyes of the Framers.¹²² P5 and M5 may have drawn on a pamphlet issued by Madison just before the Convention that discussed copyright and corporations together as issues that should be regulated by Congress.¹²³ The reason the

¹¹⁷ Both refer, for example, to freedom of the press, writ of habeas corpus, quartering of soldiers in times of peace, keeping armies in times of peace, the ability to hold only one U.S. office of trust at a time, and regarding the great seal and its keeping by the head of the executive. Some of these proposals, however, were common in several of the state constitutions.

¹¹⁸ See *supra* note 108 and accompanying text. Seminaries are also mentioned in Madison's April 1787 pamphlet. See *infra* note 123.

¹¹⁹ But see WALTERSCHEID, *supra* note 38, at 96-97 (suggesting that in proposing M4, Madison may have been influenced by an August 9, 1787 address of Tench Coxe to the Pennsylvania Society for the Encouragement of Manufactures and the Useful Arts).

¹²⁰ The term "rewards" appears in the copyright statutes of Maryland, Pennsylvania, and South Carolina, but in the sense of a third party's payment for inspection of records in the state's copyright registry.

¹²¹ See also *infra* note 148 and accompanying text.

¹²² This may be so because historically both were granted by royal prerogative. See, e.g., Statute of Monopolies, 21 Jac. 1, c. 3 (1623) (mentioning charters, corporations and letters patent among the royal grants).

¹²³ See Vices of the Political System of the United States (1787), in 1 THE FOUNDERS' CONSTITUTION, *supra* note 69, ch. 5, doc. 16, § 5 ("want of concert in matters where common interest requires it. This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity,

pamphlet gave for federal protection of incorporations and copyrights was the need for uniformity among the states. The Federalist No. 43 mentioned the lack of uniformity among the states and the furtherance of the public good as the reasons for federal protection of intellectual property rights.¹²⁴ The incorporation power is proposed in M5 for the furtherance of the public good and in cases where collaboration among the states is needed.

The word “writings” does not appear in any of Pinckney and Madison’s proposals. The word appears, however, in many of the state statutes.¹²⁵ Generally, these statutes protected the authors of maps, books, and charts, and these statutes use the word “writings” to address all three. The other word not mentioned in the direct origins is the word “progress.” At this point, it will suffice to note that the word was used in the preamble of the copyright statutes of Massachusetts, New Hampshire, and Rhode Island. Further analysis of the meaning of the “progress” appears below.¹²⁶

Pinckney and Madison thus seem to have relied directly on the following sources: Massachusetts 1780 Constitution (P3, P4, perhaps M3), South Carolina’s joint patent and copyright statute (M1), Virginia’s copyright statute (M2, perhaps M1), North Carolina’s copyright statute (M4), Continental Congress’ May 2, 1787 recommendation (P2, M2), and, lastly, Madison’s April 1787 pamphlet (M5, perhaps P5).

1. ASSUMPTION OF PROPOSALS’ SUFFICIENCY

Although it was possible to identify materials Pinckney and Madison relied on directly in making their proposals, there is no evidence suggesting that these materials or others were also before the Committee of Eleven. In the Convention, only proposals that passed a vote were further considered by committees. Thus, the only material that we can assume the Committee considered is the proposals in Table 1.

There would have been reason to believe that other texts played a direct role in the formation of the Clause had the language of the Clause deviated significantly from the proposals above. This is not the case, since almost all the parts of the Clause are traceable to Pinckney and Madison’s proposals. The words “writings” and “progress” do not appear literally in the proposals. These two words were and will be shown respectively to

interest, and revenue suffered from this cause? Instances of inferior moment are the want of uniformity in the laws concerning naturalization & literary property; of provision for national seminaries, for grants of incorporation for national purposes, for canals and other works of general utility, wch. may at present be defeated by the perverseness of particular States whose concurrence is necessary.”).

¹²⁴ THE FEDERALIST NO. 43 (James Madison) states in relevant part: “The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The states cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.”

¹²⁵ The word “writings” appears in the copyright acts of Connecticut, Maryland, Pennsylvania, Georgia and New York. See COPYRIGHT ENACTMENTS, *supra* note 113, at 9-29.

¹²⁶ See *infra* note 177 and accompanying text.

have been anticipated by the language of the state copyright statutes. This may suggest that these statutes had a further effect in the framing of the Clause.¹²⁷

2. STATUTE OF ANNE AND OF MONOPOLIES PROBABLY NOT IMMEDIATE ORIGINS

Some believe that the English Statute of Monopolies (1624) and Statute of Anne (1710) served the Framers as direct sources when they authored the Clause (“Two Statutes”). According to the evidence reviewed, this is an unlikely possibility. The Two Statutes were not directly considered or voted upon. The Convention’s record does not mention the Two Statutes, nor do Pinckney and Madison’s proposals show any specific textual resemblance to the Two Statutes. Rather, Pinckney and Madison’s proposals show that they turned to American legislation for inspiration on intellectual property matters.

The title of the Statute of Anne was suggested to have influence the framing of the Clause directly.¹²⁸ This title, however, is more remote textually from the Clause than Pinckney and Madison’s proposals are. It is also more remote textually from the Clause than the state statutes are. Several words in the Clause - “promote”, “science”, “arts”, “for a limited time”, “exclusive rights” and “discoveries” - appear in Pinckney and Madison’s proposals and not in the text or title of the Statute of Anne. The Clause’s verb “to secure,” which appears in the proposals three times, does not appear in the Statute of Anne’s title, which uses “by vesting”.¹²⁹

The unreasonableness of the assumption that the Clause derived from the Statute of Anne’s title is further shown by reviewing the titles of the various state copyright statutes.¹³⁰ There is no more reason to believe that the Intellectual Property Clause was

¹²⁷ Madison, a member of the Committee of Eleven, may have been the framer of the Clause. If he suggested the words “writings” and “progress”, he may have done so by reviewing the statutes he looked at just prior to August 18, or these terms may have been still fresh in his mind prior to September 5, 1787.

¹²⁸ See, e.g., L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 47-48 (1991) (“The 1710 Statute of Anne is the direct ancestor of American copyright law: its full title identified the fundamental ideas (...) of the copyright clause of the Constitution (...) [T]he Statute of Anne provided sound policies for copyright that the framers incorporated into the copyright clause.”).

¹²⁹ In the body of the Statute of Anne the term “to be secured” appears once. That we find the word “writings” in the Clause and in the Statute of Anne, and not in the immediate proposals, should not lead to the opposite conclusion. This fact has little weight because the word appears in the text of the Statute of Anne, rather than in the title and because the word “writings” appears also in the text of many of the state statutes. See *supra* note 125 and accompanying text.

¹³⁰ The titles of the Statute of Anne and of the state copyright statutes are:

State	Act’s Title
Connecticut	An act for the encouragement of literature and genius
Georgia	An act for the encouragement of literature and genius
Maryland	An act respecting literary property
Massachusetts	An act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years
New Hampshire	An act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions, for twenty years
New Jersey	An act for the promotion and encouragement of literature
New York	An act to promote literature

influenced directly from the title of the Statute of Anne than from several of the titles of the state statutes. On the contrary, the text of the Clause matches many state statutes' titles better than the title of the Statute of Anne.¹³¹ While the Statute of Anne most likely did not serve as a direct origin of the Clause, it probably served as a third-order source: It was a source of the state statutes that were the sources of Pinckney and Madison's August 18 proposals, which were the direct origins of the Clause.¹³²

3. REMARK IN THE CONVENTION

August 18, 1787, was not the first day in which comments relating to mental labor were made in the Convention: On July 13, after the delegates agreed that the primary objective of government was the guarantee of property, delegate Wilson - whose role regarding Pinckney's Plan was mentioned above - rose and spoke. Madison registered his words:¹³³

he could not agree that property was the sole or the primary object of Govern. & Society. The cultivation & improvement of the human mind was the most noble object.

This statement is not a direct source of the Clause. It was made in a discussion relating to the general goals of government, agreed to and incorporated in that context, and these seem to be its direct consequences. Two things are important regarding Wilson's statement. First, it was agreed to almost unanimously – with all “ayes” but for one “divided” vote. Second, Wilson's emphasis on the “cultivation & improvement” of the collective mind anticipates the portion in Madison and Pinckney's proposals that was eventually incorporated into the Progress Clause.

North Carolina	An act for securing literary property
Pennsylvania	An act for the encouragement and promotion of learning by vesting a right to the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned
Rhode Island	An act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years
South Carolina	An act for the encouragement of arts and sciences
Virginia	An act securing to the authors of literary works an exclusive property therein for a limited time
Statute of Anne	An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned

¹³¹ The hypothesis that the Clause was influenced by any particular state statute's title would seem unlikely for the same reasons above. Also, textual indicia tend against this conjecture as well. Although The Exclusive Rights Clause bears a striking similarity to the title of the Virginian copyright statute, for example, this similarity is also present in M1 and M2. The title of the South Carolina statute is reminiscent of the Progress Clause, but P3 is even closer to the Progress Clause because it refers to the promotion of arts and sciences. The word “discoveries,” appearing in M4 and the Intellectual Property Clause, does not appear in any of the titles of the state statutes.

¹³² The investigation concerns the texts before the Framers. The general cultural, historical and ideological English influences are certainly not denied. Thus, the objection to socially detrimental monopolies expressed in the Statute of Anne was certainly shared in the American colonies and states and similarly enacted. *See infra* notes 150-154 and accompanying text.

¹³³ *See* 1 FARRAND 605 (Madison's Journal for July 13, 1787).

C. CONCLUSION

Taking notice of the full list of the immediate sources of the Clause and the sources they relied on makes several contributions to current knowledge about the origins of the Clause. The literature has been only partially informed about the immediate sources of the Clause.¹³⁴ It was also largely unaware that the Clause's formation drew primarily on American enactments.¹³⁵ These findings may facilitate future research into the meaning of words in the Clause. These findings also serve as one indication that the Founders' mindset was one of breaking away with English experience and relying on their own experience and values to erect a new intellectual property system aimed at promoting progress of human knowledge.¹³⁶

The first three Parts thus culminate in identifying Pinckney's proposals P1, P2, P3, and P4 and Madison's proposals M1, M2, M3, and M4 as the origins of the Clause to the extent suggested by currently available evidence. The Article will now move to examine the way in which the Clause was formed from these eight proposals.

IV. THE TEXTUAL CONSTRUCTION OF THE CLAUSE AND THE INTENT BEHIND IT

The Clause has a unique textual structure: Whereas all of Congress' other enumerated powers comprise of a simple "to..." clause, the Clause also has a "by ..." clause. The "to ... by ..." language creates an "ends" / "means" structure where the Progress Clause is

¹³⁴ Unawareness of the full sources led to the conclusion that the words "science" and "useful arts" were not mentioned in Pinckney and Madison's proposals. *See, e.g.,* WALTERSCHEID, *supra* note 38, at 125 ("The terms 'Science' and 'useful Arts' are not to be found in any of the proposals set forth by Madison and Pinckney."); Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 763, 779 (2001) ("Where did the words 'science' and 'useful arts' come from and why are they included in the clause? (They are not found in any of the proposals which are argued to have resulted in the intellectual property clause.)"). *But see supra* P3 in Table 1. The meaning of the word "progress" in the Progress Clause has similarly been looked for in remote places. *See infra* note 182 and accompanying text; *infra* Table 2 (the word "progress" in the Progress Clause traceable to M4 in Table 1 and state copyright statutes). Scholars have generally highlighted different subsets of Pinckney and Madison's eight proposals. *See, e.g.,* PATTERSON, *supra* note 108, at 192-96 (noting P1, P2, M2, P3, M3, M4 as being of "particular interest"); WALTERSCHEID, *supra* note 38, at 117 (noting P1, P2, M2, M4); Fenning, *supra* note 38 (noting P1, M1, P2, M2 and M4); Ginsburg, *supra* note 10, at 999 (noting M2, M4 as origins of the copyright portion of the Clause); Lyman Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. REV. 719, 788 n.231 (1989) (noting P2, M2 as the sources of the copyright portion of the Clause); Malla Pollack, *Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp.*, 18 SEATTLE U. L. REV. 259, 275 & n.96 (1995) (analyzing P1, M1, M2 as the origins of the Clause); Schwartz & Treanor, *supra* note 8, at 2375, 2381 (noting P1, M1, P2 and M2 as the direct origins of the Clause; rejecting M4 as a possible source, respectively).

¹³⁵ *See, e.g.,* PATTERSON, *supra* note 108, at 192 ("the copyright of the American states' statutes" was "ignored, in the subsequent development of copyright, to the extent that [it] became historical curiosit[y] for the purposes of copyright law.").

¹³⁶ *See* discussion *supra* Part III.B.2; discussion *infra* Part V.B.

ends and the Exclusive Rights Clause is means.¹³⁷ Five of Pinckney and Madison’s eight proposals – P1, M1, P2, and M2 that relate to patents and copyrights and M3 - comprise of a “to” clause solely. The three other proposals – P3, P4, and M4 – have an “ends” / “means” structure like the Clause. Out of these three, only M4 uses the “to ... by ... ” language that appears in the Clause.

No recorded debate survived the Convention to explain the process that the Framers went through, starting with Pinckney and Madison’s eight proposals and ending with the current text of the Clause. However, a close examination of the text of these proposals and the Clause and of related historical evidence enables this Part to reconstruct the process the Framers went through and their intent.

A. MEANS REJECTED, MEANS ADOPTED

None of the seven means mentioned in P3, M3, P4, and M4 - seminaries, university, public institutions, rewards, immunities, premiums, and provisions - appears in the “means” part of the Clause. Only the two means mentioned in P1, M1, P2, and M2 – patents and copyrights – were incorporated into this part. This should make one assume, at least as a rebuttable presumption, that the means included were intended, and those excluded unintended. The discussion below shows positively that this was, indeed, the Framers’ intent.

1. MEANS REJECTED

a. Power over University and Seminaries

The Framers did not want to confer upon Congress a power to establish a university or seminaries. On August 18, Pinckney and Madison proposed P3 and M3 to that effect, but they were not adopted. On September 14, 1787, Pinckney and Madison moved again, this time jointly, to empower Congress to establish a university. 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.¹³⁸ In 1790, George Washington urged the first federal Congress to establish a national university,¹³⁹ but none was established. One of the arguments made against Washington’s initiative was that the Convention had explicitly rejected such a power, preferring to leave it to the

¹³⁷ See, e.g., *Goldstein v. California*, 412 U.S. 546, 555 (1973) (“The clause thus describes both the objective which Congress may seek and the means to achieve it. The objective is to promote the progress of science and the arts. (...) To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works.”) (footnote omitted).

¹³⁸ 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 2 Farrand 616 (Madison’s Journal for September 14, 1787). 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 motion was proposed. See *infra* note 140.

¹³⁹ See, e.g., U.S. House Journal, 8 Jan. 1790, 1st Cong., 2d sess., pp. 135-36 (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.”).

states.¹⁴⁰ This all suggests that the Exclusive Rights Clause does not mention a university power because there was real and persistent objection to vest in Congress a power to establish a university.

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. Madison and Pinckney knew why the Framers objected to a federal university power, certainly when they reintroduced their joint university power proposal on September 14. In this reintroduced proposal, they probably tried to overcome the reason that had prevented P3 and M3 from passing earlier. The September 14 university power proposal was more qualified than M3: It suggested a power to establish a university that would make no distinction among its students based on religion.¹⁴¹ This suggests that a major source for 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 mark,¹⁴² and that the Framers did not want the federal government to endorse religion.¹⁴³ Read in this light, Pinckney's P3 proposal seems to already have been an attempt to deal with this concern: P3 does not suggest to empower the government to establish seminaries whatsoever including religious ones, but rather only those that promote arts and sciences. This would be proper to assume as Pinckney notably advanced the separation of church and state in the Convention.¹⁴⁴ The "ends" part of P3, thus, serves as a limitation on the proposed seminaries power.

¹⁴⁰ See also Roger Sherman in the House of Representatives, in 3 FARRAND 362 ("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 negated. It was thought sufficient that this power should be exercised by the States in their separate capacity.").

¹⁴¹ See 2 FARRAND 616 ("to establish an University, in which no preferences or distinctions should be allowed on account of religion.") (Madison's Journal for Sep. 14, 1787); *Id.* at 620 ("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.") (McHenry's Journal for Sep. 14, 1787). See also Roger Sherman in the House of Representatives, *supra* note 140.

¹⁴² P3, and potentially M3, drew on Massachusetts's Constitution of 1780 that anchored the status of Harvard University as a religious institution. See MASSACHUSETTS CONST. of 1780, ch. 5, § 1 art. 1. Other state constitutions bundled their universities with religious studies. See PENNSYLVANIA CONST. of Sep. 28, 1776, §§ 44-45; VERMONT CONST. of July 8, 1777, §§ XL-XLI; VERMONT CONST. of 1786, art. 38 (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 ENACTMENTS, *supra* note 113, at 29. Religious knowledge was contemporaneously understood to be a form of useful knowledge. See 4 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 114, at 269 (April 10, 1776) (detailing an address from the Continental Congress to the Delaware Indians that purports to advance useful knowledge including religion among them).

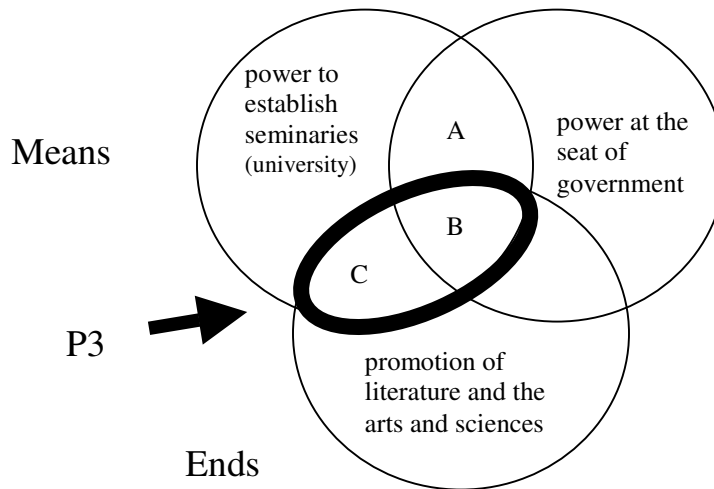
¹⁴³ See U.S. CONST., art. 6, cl. 3; *Id.* at amend. I.

¹⁴⁴ See 2 FARRAND 342, 468 (Madison's Journal for Aug. 20, Aug. 30, 1787) (proposals of Charles Pinckney).

Pinckney and Madison's qualified proposal of September 14 still did not pass, which suggests that there was another objection. This one seems to be that the Framers did not want the federal government to encroach on states' power in education: States' power under the Constitution is residual, and a federal education power had at least the potential to take power from the states.¹⁴⁵

The objection to a federal university power and its two accompanying concerns are manifested 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.¹⁴⁶ This discussion enables us to depict the Framers' intent as follows:

Figure 2 – Text and Original Intent Regarding Federal Education Power



In M3, Madison proposed to confer upon Congress plenary power to establish a university, namely the legislative area within the top left circle. This proposal was rejected. In P3, Pinckney suggested to confer upon Congress a more qualified power in education, limited to the ends of promoting literature and arts and sciences, namely the legislative area depicted by areas B + C. This proposal was rejected too. By rejecting P3 and M3, the Framers did not wish to forestall Congress from establishing any university at all: They did not wish to take from Congress the power to establish one at the seat of government, namely power depicted by areas A + B.

b. Power over Encouragements

The Founders did not wish to empower Congress to use any of the seven types of pecuniary encouragements mentioned in P4 and M4. The meaning of these seven measures is best explicated by the *Report on Manufactures* ("Report").¹⁴⁷ In 1790, the

¹⁴⁵ See *supra* note 138.

¹⁴⁶ See <http://www.gwu.edu/~ire/history.htm> (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").

¹⁴⁷ See 3 ANNALS OF CONG. 971-1034 (Nov. 4, 1791) (2d Cong., 1st Sess.).

United States was an agrarian country, its economy weak and its industry undeveloped. Washington saw the need for a change. He addressed Congress and encouraged it to promote American manufactures (industries) by all possible means. Secretary of Treasury Alexander Hamilton studied possible ways of doing so, 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,¹⁴⁸ and the encouragement of invention by monetary rewards, exclusive rights, and importation franchises, and establishing 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 map onto the measures included in P4 and M4.

As is clear, these measures would have empowered Congress to intervene in the operation of markets and society in a direct way and to confer commercial and pecuniary benefits upon specific industries. The Framers rejected P4 and M4. These measures would have endangered newly earned political and economic freedoms: 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 were restricted in selling their produce to and in importing manufactured goods from entities but England. The Founders came from young and at last independent states: They were not going to reinstate an oppressive regime upon themselves again.

The anti-monopolistic background for the Framing was recognized by the Supreme Court in *Graham v. John Deere*.¹⁴⁹ The Court noted that the popular anti-monopolistic sentiment the Founders felt dated back to the British 1623 Statute of Monopolies. This was more than a mere sentiment: It was embodied in the basic legal norms of many of the colonies.¹⁵⁰ An anti-monopolistic sentiment was present in the Convention’s debates,¹⁵¹

¹⁴⁸ The report defined premiums as “honorary and lucrative” rewards, made in a small number of cases, for particular excellence or extraordinary exertion of skill.”

¹⁴⁹ *Graham v. John Deere Co. of Kansas City*, 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.”).

¹⁵⁰ Massachusetts had an anti monopoly provision in its “Body of Liberties” of 1641. See BUGBEE, *supra* note 17, at 61. Connecticut imitated Massachusetts’ provision with a similar statute in 1672. See *id.* at 69. Maryland and North Carolina enacted a similar measure in their Bills of Rights. See Maryland Declaration of Rights, Nov. 11, 1776, art. 39 (“That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered.”); North Carolina Declaration of Rights of Dec. 18, 1776, art. 23 (“That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed”).

¹⁵¹ See, e.g., 2 FARRAND 616 (Madison’s Journal for Sep. 14, 1787) (opinion of King) (noting popular objection to “mercantile monopolies”); 2 FARRAND 632-33 (Madison’s Journal for Sep. 15, 1787) (opinion of Gerry); 2 FARRAND 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); 2 FARRAND 635 (King’s journal for September 15, 1787) (noting Gerry’s objection that the Congressional power over

which seems to be the reason why P5 and M5 were rejected as well.¹⁵² Madison tried to reintroduce on September 14, 1787 a power similar to M5, which was rejected again.¹⁵³ The sentiment was also present in the state conventions ratifying the Constitution.¹⁵⁴

Just as the Founders were unwilling to adopt the seven measures in P4 and M4, so too were the Report's recommendations rejected four years later in Congress. It is not that the Founders were indifferent to the national interest in strengthening manufactures or to the American balance of trade. Rather, they probably thought that other means were better-suited and less prone to abuse to reach these ends. The Founders did empower 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.¹⁵⁵

This inaction by the first Congress in response to the Report, in defiance of its warm endorsement by Washington, supports the conclusion that these measures were intentionally not incorporated into the Constitution. Debates in Congress further demonstrate the contemporaneous understanding that Congress did not have the power to issue encouragements.¹⁵⁶

The Report provides a good glimpse into the reasons for the rejection of its recommendations as Hamilton was trying to address them. The report acknowledges 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";¹⁵⁷ that "it can hardly ever be wise in a Government to attempt to give a

commerce will enable it to create corporations and monopolies.). For a discussion of the anti-monopolistic sentiment among the framers, see generally Ochoa & Rose, *supra* note 13.

¹⁵² 2 FARRAND 616 (Madison's Journal for Sep. 14, 1787) (opinions of King, Mason). *See also* references *supra* note 151.

¹⁵³ 2 FARRAND 615 (Madison's Journal for Sep. 14, 1787).

¹⁵⁴ In ratifying the Constitution, Massachusetts, New Hampshire, North Carolina and Rhode Island suggested that it be amended as not to allow federal charters conferring "exclusive advantages of commerce." New York suggested that all monopolies be outlawed. *See, e.g.,* Simeon Baldwin, *American Business Corporations Before 1786*, 8 AM. HIST. REV. 449, 464 (1903).

¹⁵⁵ *See* Douglas A. Irwin, *The Aftermath of Hamilton's "Report on Manufactures"* (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 lie within Congress' Constitutional ambit.

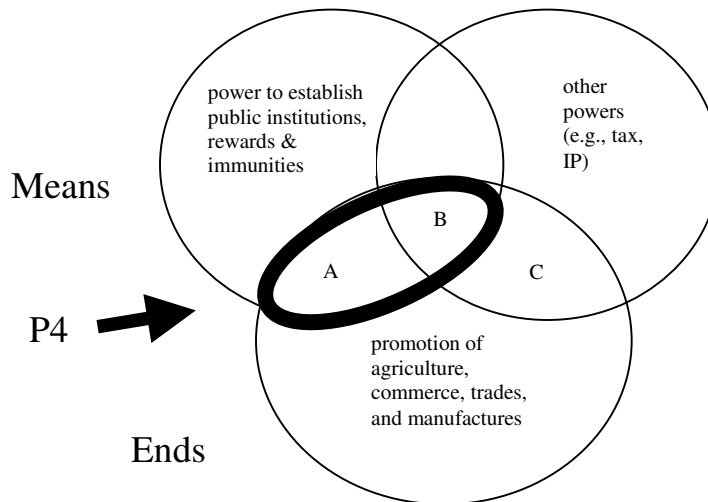
¹⁵⁶ *See, e.g.,* 3 ANNALS OF CONG. 393-94 (Feb. 7, 1792) (2d Cong., 1st Sess.) ("The framers of the Constitution guarded so much against a possibility of such partial preferences as might be given, if Congress had the right to grant them, that, even to encourage learning and useful arts, the granting of patents is the extent of their power. [...] the 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, misplace 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.") (statement of Mr. Page).

¹⁵⁷ *See id.* at 972 (Nov. 4, 1791) (2d Cong., 1st Sess.).

direction to the industry of its citizens,” which, if left to itself, would “infallibly find its own way to the most profitable employment”;¹⁵⁸ that his proposals would “sacrifice the interest of the community to those of particular classes,” which would enjoy a “virtual monopoly.”¹⁵⁹ Since Hamilton’s proposals were rejected, it is reasonable to assume they were rejected because of the reasons he was trying to explain away.

The Framers’ intent regarding Pinckney’s P4 proposal can be summarized as follows:

Figure 3 – Text and Original Intent Regarding Encouragements



In proposing P4, Pinckney suggested that Congress be empowered to act in legislative areas A and B. He suggested that Congress be empowered to use the means in the top left circle for the ends at 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 certain means to achieve them. Other means they thought more appropriate. Both the Convention and Congress after the Report was issued thought it proper to use other Congressional powers, such as taxation and intellectual property, to achieve these ends. Thus, the Framers supported the conferral of power in areas B and C upon Congress.¹⁶⁰ It thus seems that proposal P4 was rejected because the Framers opposed area A, not B.¹⁶¹

The Framers’ rejection of encouragements and other means to promote progress of knowledge other than exclusive rights is supported by a letter of James Madison in which he responded to a plea that he would support public land grants as means of encouraging manufactures:¹⁶²

¹⁵⁸ See *id.* (Nov. 4, 1791) (2d Cong., 1st Sess.). See also *id.* at 988 (same).

¹⁵⁹ See *id.* at 972-73 (Nov. 4, 1791) (2d Cong., 1st Sess.). See also *id.* at 1001 (same).

¹⁶⁰ U.S. CONST., art. I, § 8, cl. 1; *Id.* cl. 8.

¹⁶¹ Note that the analysis relating to Figure 3 is simplified. See discussion *infra* Part V.C.3.a (highlighting the difference between the “promote” language used in P3 and Figure 3, and the “promote progress” language used in the Clause).

¹⁶² See Letter from James Madison to Tench Coxe (Mar. 28, 1790), in 13 THE PAPERS OF JAMES MADISON 128 (Charles F. Hobson and et al. eds., 1981).

Congress seems 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 wished for was strongly urged and expressly rejected.

Madison's response seems to suggest that the issue of pecuniary governmental encouragements was "strongly urged" and rejected during the debates in the Convention that were not recorded.¹⁶³

Lastly, Madison's first inaugural speech refers to exclusive rights as "authorized means" to promote progress of knowledge, which suggests that other means were not authorized.¹⁶⁴ These seem to have been a federal university and encouragements.

2. MEANS ADOPTED

Despite their objection to monopolies the Founders saw intellectual property rights as "good" monopolies. A monopoly was defined at the time as depriving the public of something it had previously enjoyed.¹⁶⁵ Since patents and copyrights are something new, the Founders might have thought, the public was not deprived of anything.¹⁶⁶ Moreover, they might have thought the public was rather enriched by the availability of new goods both during a short term monopoly and during the longer term free access to them, once the protection expired.

In the colonies and later 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 of the Convention, 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.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. It is believed that many of these statutes were never

¹⁶³ See also *supra* note 156.

¹⁶⁴ See James Madison, First Inaugural Address (Mar. 4, 1809), in 8 THE WRITINGS OF JAMES MADISON 47, 49 (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) ("The only limitations contained in the patent clause are these: (...) (3) The 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.").

¹⁶⁵ 4 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, ch. 12, § 9.

¹⁶⁶ Cf. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 178-82 (New York: Basic Books, 1974) (suggesting that patent grants do not violate the Lockean sufficiency proviso if they regard inventions that would not otherwise exist); William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 170-71 (Stephen R. Munzer ed., 2001) (analyzing Nozick's argument).

¹⁶⁷ BUGBEE, *supra* note 17, at 65-66, 107.

acted upon.¹⁶⁸ South Carolina that had a generic patent provision, would still issue its patents by private legislative acts.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 they would continue to examine and approve of each patent or copyright. The delegates thus believed that practical circumstances as well as their own future supervision would limit such monopolies.

Indeed, prior to the Convention the Founders had taken measures to ensure that the exclusive rights would not rise to the level of “harmful” monopoly. Many of the state copyright statutes allowed courts to issue compulsory licenses and compel authors to provide the public with adequate supply of copies at reasonable prices.¹⁷⁰ Control of price and quantity are among the key instruments of antitrust regulation to this day.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 1788 exchange between Madison and Jefferson surrounding the adoption of the Clause.¹⁷² Jefferson wrote:¹⁷³

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, as of 14. years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.

Madison replied:¹⁷⁴

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.

Jefferson took a more anti-monopolistic position than Madison, but the Clause struck middle ground between their positions. The Clause includes the Progress Clause limitation on power that M1 and M2 did not include. Madison also shared the anti-monopolistic sentiment, but assumed that the risk of abuse was small and manageable.

¹⁶⁸ See PATTERSON, *supra* note 108, at 181, 187-88.

¹⁶⁹ See BUGBEE, *supra* note 17, at 93; See also *id.* at 93-95 (noting that these acts were influenced by South Carolina’s generic patent provision).

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 113, at 9-27.

¹⁷¹ See, e.g., W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 298-99 (3d ed. 2000).

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 that Jefferson’s views are of relevance 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. of Kansas City*, 383 U.S. 1, 7-8 (1966). See also *infra* note 213 and accompanying text.

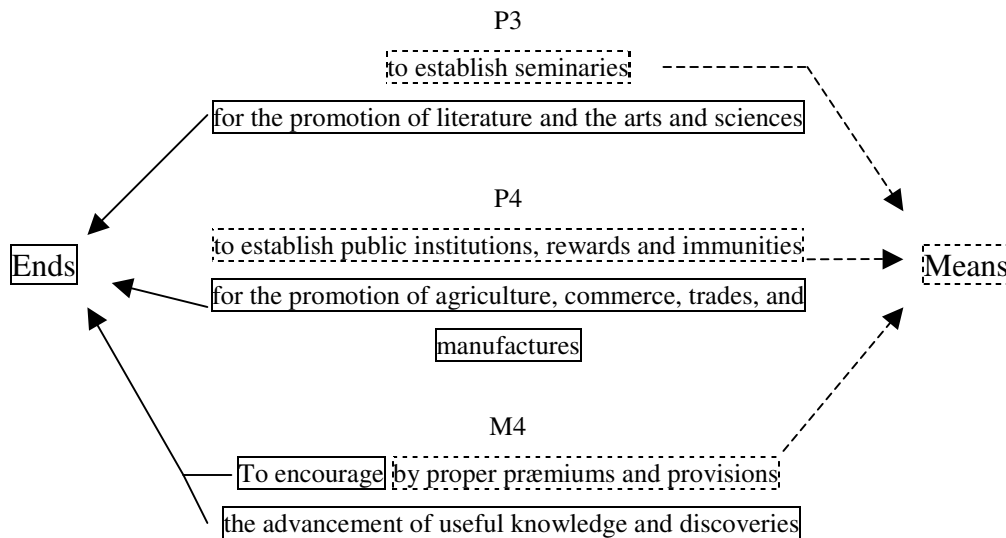
¹⁷³ See Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 1 THE FOUNDERS’ CONSTITUTION, *supra* note 69, ch. 14, Doc. 46.

¹⁷⁴ See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 269, 274-75.

B. ENDS REJECTED, ENDS ADOPTED

P1, M1, P2, and M2 are not the sole sources of the Clause because they cannot account for the text of the Progress Clause. These four proposals are outright grants of power to Congress to issue patents and copyrights, and had these been the only sources of the Clause, it would have not looked much different than the Exclusive Rights Clause. An “ends” / “means” structure exists in P3, P4, and M4 as follows:

Figure 4 - Ends / Means Structure of P3, P4, and M4



The ends parts of these three proposals explain, first, 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 P3 regards the promotion of literature, arts and sciences. The ends part of P4 mentions the promotion of various useful arts. The ends part of M4 regards advances of knowledge and discoveries.

The text of the ends part of P3 comes very close to the text of the Progress Clause: It relates to the promotion of arts and sciences. The Clause’s overall structure builds on M4. The Clause and M4 use a “To ..., by ...” structure, where the “To ...” part delineates the ends and the “by ...” part delineates the means. This structure is different from the structures of P3 and P4, which have a “To ..., for ...” structure, where the “To ...” part delineates the means, and the “for ...” part delineates the ends. The means part of M4 is structurally similar to the means part in the Clause, in the sense that the means in both are qualified.¹⁷⁵ The similarity between M4 and the Clause is clearly demonstrable in the “ends” part. If we rearranged M4 by moving the “by” part to the end, it would read: “to

¹⁷⁵ M4 allows “proper” premiums and provisions, but not any type of premiums and provisions. The Exclusive Rights Clause similarly contains limitations on the means allowed, such as the limitation that authors and inventors be granted exclusive rights for “limited times.” Both of these limitations may prove to be 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. Nonetheless, even a non-strict limitation on a power is still more restrictive than having no restriction at all.

encourage the advancement of useful knowledge and discoveries by proper premiums and provisions.” The structural similarity of the rearranged M4 to the Clause is clear, since both bear the familiar “to ... by ...” structure. Table 2 compares the “ends” portions of M4 and the Clause:

Table 2 – The Literal Meaning of the Progress Clause

“Ends” of M4	Progress Clause
To encourage	To promote
The advancement	The progress
Of useful knowledge	Of science
And discoveries	And useful arts

Words on the same line in Table 2 bear a very close, often identical, meaning. Regarding the first line, the Supreme Court has recognized that “the terms ‘to promote’ are synonymous with the words ‘to stimulate,’ ‘to encourage,’ or ‘to induce.’”¹⁷⁶

Regarding the second line, the word “progress” appears in a paragraph that is repeated almost verbatim in the state copyright statute of Massachusetts, New Hampshire, and Rhode Island:¹⁷⁷

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 ...

The following is the part relating to “progress,” rearranged and compared with the relevant part of the Progress Clause:

Table 3 - The Meaning of Progress

Progress Clause	Preamble I	Preamble II	Preamble III
To promote			
The progress	the improvement	the progress	the advancement
Of science	of knowledge	of civilization	of human happiness
and useful arts			

The preamble mentions as the goals of the copyright statute the furtherance of three objectives. Its structure and repetitiveness suggest that the word “progress” is equivalent with “advancement” and “improvement”. Moreover, it suggests that the predominant objective of copyright law, the improvement of knowledge bears a close connection to the progress of civilization and the advancement of human happiness. Other state

¹⁷⁶ See *Goldstein*, 412 U.S. at 555. See also *Mitchell v. Tilghman*, 86 U.S. (19 Wall.) 287, 418 (1873) (supporting the interpretation of “encourage” and “stimulate” as synonyms); *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 10 (1913) (supporting the use of “encourage” as a synonym).

¹⁷⁷ See Copyright Act of New Hampshire (Nov. 7, 1783), reprinted in *COPYRIGHT ENACTMENTS*, *supra* note 113, at 16.

copyright statutes express this relation in a similar way, such as by finding that the publication of writings would do “service to mankind”¹⁷⁸ and by noting that “learning tends to the embellishment of human nature (...) and the general good of mankind.”¹⁷⁹ This resonates with delegate Wilson’s remark that a primary objective of government is the cultivation and improvement of the human mind.¹⁸⁰ Seven of the twelve copyrights 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 condition is also present in Madison’s inaugural speech.¹⁸¹ 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 for its preference to its two equivalents.¹⁸²

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 18th century meaning of “science” was close to the meaning of “knowledge”.¹⁸³ Table 2 seems to suggest that the meaning of “science” was leaning more towards “useful” knowledge and away from more abstract types of knowledge.¹⁸⁴ 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.¹⁸⁵ Useful knowledge at the time of the Framing seems not to have been limited to what is currently engulfed by copyrightable expression, nor was it equivalent to the sense conveyed by the

¹⁷⁸ See copyright acts of Connecticut (Jan. 1783), Georgia (Feb. 3, 1786), and New York (Apr. 29, 1786), reprinted in COPYRIGHT ENACTMENTS, *supra* note 113, at 9-29.

¹⁷⁹ See Copyright Act of New Jersey (May 27, 1783), reprinted in COPYRIGHT ENACTMENTS, *supra* note 113, at 14.

¹⁸⁰ See *supra* note 133 and accompanying text.

¹⁸¹ See *supra* note 164.

¹⁸² *But cf.* Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001) (suggesting that “progress” under the Clause means “spread”). Pollack’s theory is based on the assumption that the wording of the Progress Clause did not follow from any of the suggestions made at the 1787 federal Constitutional Convention. *Id.* at 781. As this sub-Part has shown, the Progress Clause follows the wording and structure of P3, P4, and M4. She also claims that the Progress Clause “does not quote any ancestral document”. *Id.* As Part III.B has shown, these three proposals reference the Massachusetts 1780 Constitution and North Carolina’s copyright statute.

¹⁸³ See generally Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 47-53 (2002). See also PATTERSON & LINDBERG, *supra* note 128, at 48 (“the word *science* retains its eighteenth-century meaning of ‘knowledge or learning’”); Pollack, *supra* note 10, at 376 (“‘Science’ means ‘knowledge’ in an anachronistically broad sense.”); 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, 51 (1994) (“in the latter part of the eighteenth century ‘science’ was synonymous with ‘knowledge’ and ‘learning.’”).

¹⁸⁴ See Solum, *supra* note 183, 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.”).

¹⁸⁵ Early decisions considered immoral and obscene works as not copyrightable arguing that they promoted neither science nor useful arts. This trend has stopped after *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). See generally 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[B] (Mathew Bender, 2004).

“utility” bar in patent law. Instead, it seems to have included a set of discoveries which would today be unpatentable as basic laws or principles of nature, but which were then considered useful to mankind.¹⁸⁶

Lastly, the word “discoveries” in the fourth line is not synonymous with “useful arts,” but the two terms are related. Discoveries generally promote progress in useful arts.

In choosing the final wording of the Progress Clause, the Convention largely followed the structure and meaning of M4, but seems to have borrowed the words “science” and “arts” from P3 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 P3, P4, and M4, and to emphasize the sense of advancement in knowledge as mankind’s progress.

M4 that refers to ‘promotion of progress’ is discernable from the non-repetitive P3 and P4. These two refer to the mere “promotion” of “literature and the arts and sciences” (P3) and the mere “promotion” of “agriculture, commerce, trades, and manufactures” (P4). P3 and P4 do not carry a necessary sense of advancement in the level knowledge. P4, for example, relates to the encouragement of industry. These were not the ends chosen by the Framers. By following M4, the Framers expressed their desire that exclusive rights were to be issued only if there were some socially desirable advancement in knowledge.¹⁸⁷

C. CLAUSE’S TEXTUAL CONSTRUCTION: OVERVIEW AND CONTEXT

Pinckney and Madison proposed to vest five types of powers in Congress: Patents, copyrights, university, encouragements and corporations. Their patents and copyrights proposals were plenary, as they were not qualified by ends.¹⁸⁸ However, at least one of the two chose to qualify his proposal for university, encouragements, and corporations by the use of ends to which the power should be exercised. The text of the proposals, Pinckney and Madison’s personal views, the Convention’s general view, and the eventual disposition of the proposals suggest that when “ends” language appears, it is (1) intended to serve as a limitation on the power conferred, and (2) indicative of the level of concern for congressional abuse of power that the party supporting it felt.

Pinckney and Madison were Federalists: Madison authored many of The Federalist Papers. He also authored a pamphlet just prior to the convention in which he detailed the vices of the Confederation and the need for a stronger central government.¹⁸⁹ Pinckney wished to strengthen the central government too.¹⁹⁰ Among the Framers were also Anti-

¹⁸⁶ For more on this point, see *infra* notes 312, 353 and accompanying text.

¹⁸⁷ See *Graham*, 383 U.S. at 6 (“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”) (first two emphases added).

¹⁸⁸ These powers were, of course, for “limited times”, which is included analytically in the term patents of and copyrights and is not an end for its exercise.

¹⁸⁹ See *supra* note 123.

¹⁹⁰ ROSSITER, *supra* note 43, at 132 (noting that Pinckney “was a relentless advocate of steps to strengthen the central government, whether by amending the Articles of Confederation to grant additional powers to Congress or by invoking a ‘grand convention’ to draft an entirely new charter.”).

Federalists who wished for a weaker federal government than the one Pinckney and Madison had in mind.

Of the five pairs of congressional powers Pinckney and Madison proposed on August 18, two were accepted eventually – relating to patents and copyrights – and three were rejected – relating to universities, encouragements and corporations. Of these five pairs, the same two were unqualified by ends – copyrights and patents – and the same three were qualified by ends – universities, encouragements and corporations. The ends qualifying the three rejected powers are indicative of the Framers’ objection to them. The fact that Pinckney and Madison chose to qualify precisely those proposals that were most strongly objected and eventually rejected suggests that they tried to lessen potential resistance to these proposals, or similarly felt that an unqualified power would be a source for a potential abuse of power.

Regarding federal power in education, Madison did not see any problem with empowering the federal government to establish a university. Also, he probably did not foresee any material objection on the part of the other delegates, for he did not qualify his university power proposal M3 by ends. Pinckney wanted to empower the federal government to establish seminaries, but probably saw some potential for abuse or anticipated objection on the part of other delegates. He thus qualified his seminaries proposal P3 to the promotion of arts and sciences. He may have anticipated the major objection of religious intervention in education, for these ends clarify that he did not intend to establish theological seminaries. Their September 14 proposal was explicitly addressing the religious discrimination concern, of which they must have already been aware after their previous proposals were rejected.

Regarding charters of incorporations, Pinckney did not qualify his P5 proposal, for he probably did not see a cause for concern in so empowering Congress or did not foresee any substantial objection. Madison, however, qualified his corporations’ proposal M5 to “cases where the public good may require them, and the authority of a single State may be incompetent”. When Madison reintroduced his corporations’ power on September 14, he reintroduced it qualified in the same way.

None of Pinckney and Madison reintroduced a congressional power to grant encouragements. This suggests that they both thought this would be futile in light of the resistance they sensed to such reintroduction. Supporting the high level of resistance is the fact that each qualified his August 18 proposal – P4 and M4 – to the ends of promoting manufactures and knowledge. Madison’s later correspondence suggests that the resistance to the encouragement power was fierce.¹⁹¹

Both Madison and Pinckney probably thought it was desirable to grant the federal government a plenary patent and copyright power. Their proposals – P1, M1, P2 and M2 – were certainly qualified in time, but this has become a standard condition of all copyright and patent grants in the states. The time limitation was the thing that made intellectual property rights exceptions to monopolies. Their proposals, however, were not qualified by certain ends. They also did not foresee any particular resistance, as this

¹⁹¹ See *supra* note 162 and accompanying text (suggesting that the grant of encouragements was “strongly urged and expressly rejected” in the Convention).

power was previously enjoyed by the states and was suggested to be moved to the federal government for uniformity and efficiency reasons.¹⁹² There is nothing in M1, P2, or M2 to suggest that Madison or Pinckney anticipated any particular objection.

The cumulative opinion of the Convention can be inferred from the eventual disposition of Pinckney and Madison's proposals. The Convention's cumulative view was less federalist than the one of Pinckney and Madison, and it saw more potential for abuse of power than the more suspicious of Pinckney and Madison. Before adopting Pinckney and Madison's intellectual property proposals, the Convention limited them to the promotion of progress of knowledge. In adopting this limitation, the Convention took the limiting "ends" language in P3, P4, and M4, and tacked it onto Pinckney and Madison's patent and copyright power proposals. The powers that at least one of Pinckney and Madison qualified, namely those regarding universities, encouragements and corporations, the other delegates thought inappropriate to vest in the federal Congress even in their qualified form. This discussion is summarized as follows:

Table 4 – Proposals, perceived potential for abuse, and disposition

Power	Potential For abuse as perceived by				Convention's Disposition of Proposal
	Pinckney	Madison	The more suspicious of Pinckney, Madison	Convention	
1	Low	Low	Low	Intermediate	Adopted with added limitation
2	Low	Low	Low	Intermediate	Adopted with added limitation
3	Intermediate	Low	Intermediate	High	Rejected
4	Intermediate	Intermediate	Intermediate	High	Rejected
5	Low	Intermediate	Intermediate	High	Rejected

V. APPLICATIONS, OR BACK TO THE PRESENT

A. FROM ORIGINAL TO CURRENT MODEL OF LIMITATIONS UNDER THE CLAUSE

The Clause is unique among the enumerated powers in having both a "to" part and a "by" part. This textual uniqueness poses an interpretive challenge regarding the way in which the Progress Clause and the Exclusive Rights Clause interact to delineate Congress' power. *Graham* noted:¹⁹³

¹⁹² See James Madison, Vices of the Political System of the United States (Apr. 1787); THE FEDERALIST NO. 43 (James Madison); BUGBEE, *supra* note 17, at 84-103 (reviewing parallel patent applications and grants in the states).

¹⁹³ See *Graham*, 383 U.S. at 5-6.

The clause is both a grant of power and a limitation. This qualified authority [...] is limited to the promotion of advances in the ‘useful arts.’ [...] The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose.

Graham saw the Exclusive Rights Clause as a grant of power, and the Progress Clause as a limitation on it. This interpretive approach preceded *Graham*,¹⁹⁴ and remained common in subsequent cases.¹⁹⁵ *Graham* is a seminal case, and its instruction that “[t]he clause is both a grant of power and a limitation” (“*Graham’s* Instruction”), is unanimously accepted both in patents and copyrights.¹⁹⁶

A plain reading of the Clause turns *Graham’s* Instruction on its head: It suggests that the Progress Clause is a grant of power and that the Exclusive Rights Clause is a limitation on it. It is also supported by a comparison of the Clause’s text to the other enumerated powers, all starting with “to” language.¹⁹⁷ When enumerated powers are qualified, the limitation comes after the grant of power.¹⁹⁸ The plain reading approach is supported by the Framers’ intent to limit the exercise of the power to intellectual property rights and exclude other means, namely a federal university and encouragements.¹⁹⁹

A third approach, characteristic of D.C. Circuit case law and notable commentators, sees the Progress Clause as a non-binding preambular statement.²⁰⁰ *Eldred*, which reached the Supreme Court from the D.C. Circuit, assumed this construction. Since it also accepted *Graham’s* Instruction about the existence of a power and a limitation in the Clause, it analyzed the case as if the grant of power and its limitation resided in the Exclusive Rights Clause. The three readings are thus as follows:

¹⁹⁴ *Graham* relied on *Great Atlantic & Pac. Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 154 (1950) (Douglas, J., concurring; Black, J., joining) (“Article I, § 8, contains a grant to the Congress of the power to permit patents to be issued. But, unlike most of the specific powers which Congress is given, that grant is qualified. [...] The Congress acts under the restraint imposed by the statement of purpose in Art. I, § 8. The purpose is ‘To promote the Progress of Science and useful Arts’”).

¹⁹⁵ *See, e.g.*, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“the limited grant is a means by which an important public purpose may be achieved”).

¹⁹⁶ For its applicability in copyright, *see, e.g.*, *Eldred*, 537 U.S. at 212.

¹⁹⁷ *See also* *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972) (suggesting that the Progress Clause is a grant of power).

¹⁹⁸ *See* *Solum*, *supra* note 183, at 13-21. *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).

¹⁹⁹ *See supra* Part IV.A; *In re Bergy*, 596 F.2d 952, 958 n.2 (C.C.P.A. 1979) (“The only restraints placed on Congress pertained to the Means by which it could promote useful arts, namely, through the device of securing ‘exclusive rights’”).

²⁰⁰ *See* *Eldred v. Reno*, 239 F.3d 372, 378 (C.A.D.C. 2001) (“we rejected the argument ‘that the introductory language of the Copyright Clause constitutes a limit on congressional power’”) (quoting *Schnapper v. Foley*, 667 F.2d 102, 112 (1981)); 1 NIMMER ON COPYRIGHT, *supra* note 185, § 1.03 (“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” (footnotes omitted)).

Table 5 – Understandings of the *Graham* Instruction

	Power	Limitation
<i>Graham</i>	Exclusive Rights Clause	Progress Clause
Textual reading	Progress Clause	Exclusive Rights Clause
<i>Eldred</i>	Exclusive Rights Clause	Exclusive Rights Clause

Eldred's approach will be discussed in Part V.C.1 below in greater detail. For the time being, this sub-Part will suggest a way to reconcile the first two approaches.

Part IV's review of the Clause's textual construction process shows that each of the Exclusive Rights Clause and the Progress Clause confers a power upon Congress – the former confers the power to grant limited-time exclusive rights, as was suggested in P1, M1, P2 and M2, and the latter confers the power to advance knowledge, as was suggested in M4. At the same time, each Clause limits the power granted by the other. The Exclusive Rights Clause limits the “means” by which the “ends”, detailed in the Progress Clause, may be achieved. Conversely, the Progress Clause limits the ends to which the powers in the Exclusive Rights Clause can be put. Congress can issue patents and copyrights only to promote progress of science and the useful arts, not as mere encouragements to industry. The power granted to Congress under the Clause is thus the intersection of the two clauses, each serving as both a power and a limitation upon the other. This can be represented graphically:

**Figure 5 – Simple Model of the Clause
(Structural Relation between Progress Clause and Exclusive Rights Clause)²⁰¹**

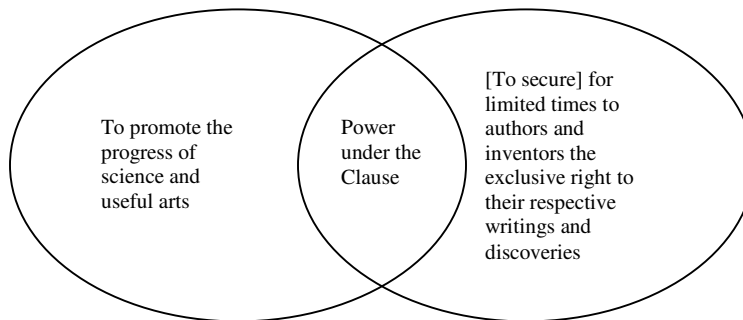


Figure 5 reconciles the seemingly contradictory approaches expressed in the first two lines of Table 5. It makes clear that they are not exclusive of one another: *Graham*'s approach in Table 5 interprets Figure 5 by looking at it from the right-hand side, since the Clause is seen as the power to grant exclusive rights to the extent it is limited by the Progress Clause. The textual reading approach in Table 5 interprets Figure 5 by looking at it from the left-hand side, since the Clause is seen as the power to promote progress of knowledge to the extent it is limited by the Exclusive Rights Clause. Both approaches are

²⁰¹ The Figure represents only the structural relation between the parts of the Clause, but does not suggest their relative sizes.

correct, but none conveys the intent behind the Clause in full. Rather, the intent behind the Clause is best encapsulated by joining the two together.²⁰²

Having an accurate model of the Clause is important because the way we think about the Clause affects the way we interpret it and apply it. The third approach in Table 5 above, for example, is misinformed. Courts adhering to it while reviewing the Constitutionality of intellectual property statutes will probably give the question whether these statutes “promote the progress of science and useful arts” little weight. The first two approaches, however, may seem formally indistinguishable, as the intersection of two groups would remain the same even if we switched the order of the groups’ notation: $a \cap b$ is clearly equal to $b \cap a$. Both, indeed, depict the area in the middle of Figure 5. However, each of the first two approaches makes Courts assume, when they review intellectual property statutes, that Congress enjoys different powers, and each draws Courts’ attention to different limitations. As will be shown below regarding *Eldred*, a Court focused on one limitation may be blind to others.

The text of the Clause is also unique because it contains three pairs of related words, namely “science and useful arts,” “authors and inventors,” and “writings and discoveries.” The relationship between the terms in each pair and the relationship among the pairs pose a second interpretive difficulty. The conventional answer to this problem, which divides the Clause dichotomously into a copyright power and a patent power, is presented and doubted in sub-Part V.D. below. The rest of this sub-Part details an alternative way of solving this difficulty.

The simple model best captures the structural relation between the Progress Clause and the Exclusive Rights Clause, and seems well suited to depict the original meaning. Over time, Congress²⁰³ and the Court highlighted various portions of the Clause’s text as limitations on Congress’ power. The Court noted that protection under the Clause is restricted to authors and inventors,²⁰⁴ extends only to “writings” and discoveries,²⁰⁵ and lasts only for limited times.²⁰⁶ The incorporation of these limitations into the basic structure of the Clause can be depicted as follows:

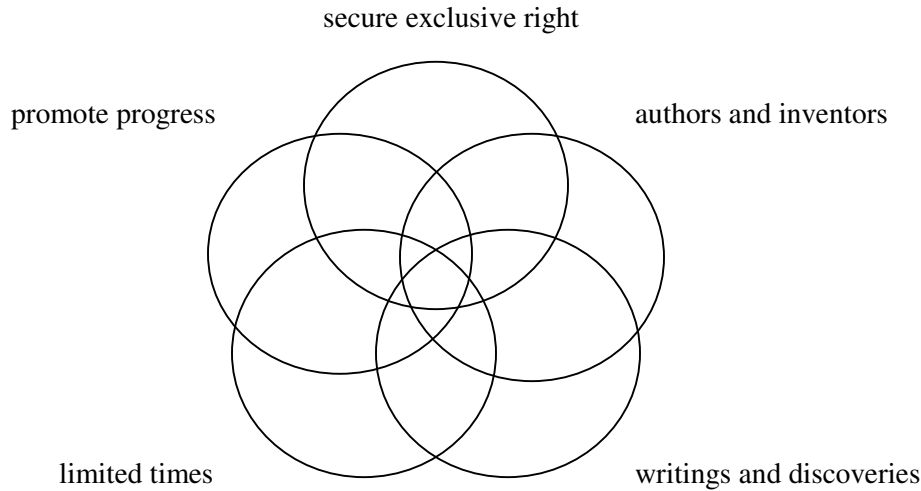
²⁰² Note that the model demonstrates graphically Madison’s contemporaneous formulation of the Clause in THE FEDERALIST NO. 43 that “[t]he public good fully coincides in [intellectual property] with the claims of individuals”. Madison expresses the intent to confer upon Congress the middle area in Figure 5 above since only there does the public good fully coincide with the private interests of those who are granted intellectual property rights.

²⁰³ Comm. on Patents, The House Report on the Copyright Act of 1909, H.R. Rep. No. 60-2222, at 6-7 (1909) (“It will be noticed that the language of this authority limits the power of Congress by several conditions. The object of all legislation must be (1) to promote science and the useful arts; (2) by securing for limited times to authors the exclusive right to their writings; (3) that the subjects which are to be secured are ‘the writings of authors.’ It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.”).

²⁰⁴ See *Burrow-Giles*, 111 U.S. at 57-58.

²⁰⁵ See *In re Trademark Cases*, 100 U.S. 82, 94 (1879).

²⁰⁶ See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (“limited copyright duration required by the Constitution”); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989)

Figure 6 – Advanced Model of the Clause (Power and Limitations)²⁰⁷

This advanced model of the Clause underscores the fact that the power under the Clause is defined by the intersection of multiple powers and limitations. The Clause confers upon Congress a power that is defined by five boundaries, none of which Congress may overreach. The advanced model highlights the existence of a multiplicity of powers and limitations in the Clause, which is not encapsulated by the simple model and *Graham's* Instruction. Although this multiplicity was recognized in various instances by Courts, Congress and commentators,²⁰⁸ the singular form of *Graham's* Instruction is the one most often quoted and referred to. As a reference point, it shapes jurists notions of the nature of the Clause. As will be discussed below, *Graham's* Instruction's singular form may have had its effect in limiting the *Eldred* Court to examining only one limitation under the Clause.

The simple and advanced models illustrate that no part in the Clause is only a “power” or a “limitation”. In contrast, the previous approaches summarized in the first two lines of Table 5 above were both influenced by the strong rhetoric force of *Graham's* Instruction, and implicitly shared the assumption that one of the Progress Clause and the Exclusive Rights Clause had to be a power and the other a limitation. Instead, the simple and advanced models relax that assumption. The simple and advanced models also illustrate that the various limitations on congressional power are independent of one another. They thus serve as a useful conceptual framework to think about the Clause.

(“As we have noted in the past, the Clause contains both a grant of power and certain limitations upon the exercise of that power. Congress may not create patent monopolies of unlimited duration”) (referring to *Graham*).

²⁰⁷ The Figure represents only the structural relation between the parts of the Clause, but does not suggest their relative sizes.

²⁰⁸ See, e.g., *Graham*, 383 U.S. at 6 (stating that Congress “may not overreach the *restraints* imposed by the stated constitutional purpose” (emphasis added); *supra* discussion accompanying Table 5; Karl B. Lutz, *Are the Courts Carrying Out Constitutional Public Policy on Patents?*, 34 J. PAT. OFF. SOC'Y 766, 774 (1952) (recognizing three limitations under the Clause).

B. PROGRESS CLAUSE: TEXT, INTENT, AND STATUTORY MANIFESTATIONS

There are four conspicuous phenomena about the nascent American intellectual property system. The most conspicuous is the American concept of novelty in patent law. At the time of the Founding, the internationally accepted novelty concept among all patenting nations was territorial. Thus, these nations would issue “patents of importation”, limited-time exclusive franchises conferred upon the first to import an art, technique or manufacture not known domestically. Such patents were issued by major patenting nations well into the nineteenth century.²⁰⁹ The Founders were the first to divert from this practice. Despite intense interest group pressures, and although the bill for the Patent Act of 1790 first allowed importation patents, the language providing for them was deleted eventually. Although the reasons for this deletion were not noted, it is believed that these patents were thought at least Constitutionally suspect if not prohibited.²¹⁰

The Second is the American examination system, instituted by the Patent Act of 1790. Under it, every invention was examined for its merit before a patent would issue. The examination system, internationally unprecedented in its scope, filtered out trivial and non-novel inventions.²¹¹ The examination system broke sharply with the English practice: The U.K. instituted an examination system only as late as 1902.²¹² The American patent system also included expansive disclosure requirements, ensuring that for each patent a detailed description of the invention would be deposited.

The third notable characteristic is the direction given to the patent system by Thomas Jefferson.²¹³ Jefferson was exceptional in his scientific curiosity, belief in open and free inquiry, and aversion to monopolies in knowledge. In an often-quoted letter of his, he expressed eloquently his resentment to exclusive ownership of ideas, depicting them as a flame passing from one person’s mind to another, illuminating mankind without one

²⁰⁹ Patents of importation are still recognized: The major international treaty for the protection of patents has recognized patents of importation from its inception in 1883 to this day. *See* Paris Convention for the Protection of Industrial Property, art. 1(4).

²¹⁰ *See generally* WALTERSCHEID, *supra* note 38, at 313-27.

²¹¹ The examination system, which consumed a lot the Commissioners of Patents triumvirate’s time, was replaced by a registration system in the Patent Act of 1793, but was restored by the Patent Act of 1836.

²¹² *See, e.g.,* Christine MacLeod et al., *Evaluating Inventive Activity: The Cost of Nineteenth-Century UK Patents and the Fallibility of Renewal Data*, 56 *ECON. HIST. REV.* 537, 541 (2003). It is unclear to what extent the examination system was internationally unique. *See* Edward C. Walterscheid, *To Promote the Progress to [sic] Useful Arts: American Patent Law and Administration, 1787-1836* (PART 1), 79 *J. Pat. & Trademark Off. Soc’y* 61, 71 (1997) [hereinafter Walterscheid, *American Patent Law*] (“[The Patent Act of 1790] was the first statutory enactment by any country obligating any form of examination to determine whether a patent should be granted.”). *But see* Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part I)*, 76 *J. Pat. & Trademark Off. Soc’y* 697, 712 (1994) (the American examination system was copied from France).

²¹³ *See, e.g.,* *Graham*, 383 U.S. at 7 (recognizing Jefferson’s important mark on the patent system). *But cf.* 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 (1999) [hereinafter Walterscheid, *The Use and Abuse of History*] (suggesting that the Court overstated Jefferson’s contribution to the American patent system); Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 *J. MARSHALL L. REV.* 269 (1995) (same).

person's use depriving another of their light.²¹⁴ His views and activities merit attention because being aware of them, the Founders made him in effect the "first administrator of the patent system."²¹⁵ Jefferson's standard of patentability was extremely high, probably the highest one propelled by any of his successors in office to this day.²¹⁶ It is thus noteworthy that the first administrator of the patent system was the one least disposed to grant exclusive rights and the most public-regarding of them.

The Fourth characteristic is the unique text of the Progress Clause, unanticipated by its English predecessors. Neither the Statute of Monopolies (1623) nor the Statute of Anne (1710) related to "progress"²¹⁷ or posed its promotion as a limitation on power. This word and the ideology behind it entered the Clause as an adaptation and extension of post-revolutionary American state legislation.²¹⁸

These four phenomena are manifestations of the intellectual property concept the Framers had. They manifest a desire to break away with English and international intellectual property practices and to institute a system that promotes knowledge. The mindset of not looking back to England but rather to construct an improved system is manifested in Pinckney and Madison's reliance on the text of American state legislation in making their proposals rather than directly on English law.²¹⁹ These all manifest a paradigm shift away from the English discretionary grant of monopolies towards celebrating the public's interest in advancement of knowledge. The Founders did not only distill their intent into the Constitution by subjecting the Exclusive Rights Clause to the

²¹⁴ See Letter from Thomas Jefferson to Isaac McPherson (13 Aug., 1813), in 3 THE FOUNDERS' CONSTITUTION, *supra* note 69, at 42-43 ("If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body.").

²¹⁵ See P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC. 237, 238 (1936). Jefferson, then Secretary of State, was the moving spirit in the three-person Board of Commissioners (that also included the Secretary of the Department of War and the Attorney General), the consent of two of which was necessary for a patent to issue. He was also one of the authors of the Patent Act of 1793. See *Graham*, 383 U.S. at 7-10. See also Walterscheid, *American Patent Law*, *supra* note 212, at ("[Jefferson's] views at the time [of the early 1790's] were most likely determinative.").

²¹⁶ See *Graham*, 383 U.S. at 9; Walterscheid, *The Use and Abuse of History*, *supra* note 213, at 215-16.

²¹⁷ See also BUGBEE, *supra* note 17, at 145 ("the intellectual property clause of the Constitution showed little resemblance to the major English legislation on the subject").

²¹⁸ See *supra* note 177 and accompanying text.

²¹⁹ See *supra* Part III.B.

Progress Clause, but also put it to practice by shaping the intellectual property system accordingly.

Patent and copyright laws' requirements of novelty, nonobviousness, disclosure, and originality are manifestations of the Framers' concept of intellectual property. They ensure that knowledge be advanced. The reason for their insertion into the patent and copyright acts is the same reason that led to the insertion of the Progress Clause into the Clause: The Framers' intent to grant intellectual property rights only to the extent that it promoted progress of knowledge. These requirements should thus be associated conceptually with the text of the Progress Clause, whose ideology they share, rather than with the Exclusive Rights Clause that they limit. The fact that the Framers put the Progress Clause in the "to ..." part of the Clause and the Exclusive Rights Clause in the "by ..." part rather than the other way around shows the primacy they gave to the progress consideration over the instrumental value they gave to the means to achieve it.

This recognition may solve interpretive difficulties the Court is facing. The Court could not decide whether the Constitutional originality requirement in copyright law derived from the word "authors" or "writings" in the Clause. Both, it concluded, suggest it.²²⁰ The Court's view is difficult to sustain even when examined in its own right: It is hard to see how the words "authors" or "writings" entail originality by necessity. These words can bear another meaning: Lockean theories of authorship would see factual writings, found unoriginal by the Court, as works of authorship.²²¹ The Court also assumes that these words have a clear, fixed meaning, whereas the development of the concept of authorship and writings in copyright over time shows that their meaning has changed.²²² The Court's inability to discern the textual source of the originality requirement may suggest that it was looking for it in the wrong place. Rather, the originality requirement is founded, primarily, on the text of the Progress Clause and the intent behind it. The same can be said regarding the novelty and nonobviousness requirements in patent law. The Court seems to hold that "novelty" and "non-obviousness" are Constitutional requirements.²²³ The words "invention" and "discovery"

²²⁰ See generally *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (reading *In re Trademark Cases*, 100 U.S. 82, 94 (1879) as finding the originality pre-requisite to derive from the term "writings" and reading *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) as finding it to derive from the term "authors."); See also 1 NIMMER ON COPYRIGHT, *supra* note 185, § 1.03 ("Even though largely nonoperative, it has suggested that the phrase "To promote the progress of science and useful arts" does at least require that a copyrighted work contain some substantial, and not merely trivial, originality. However, the requirement of originality is more generally regarded as due to this use of the term "authors" in a subsequent phrase of the Copyright Clause.") (footnotes omitted).

²²¹ Lockean concepts of authorship, influential at the time of the Founding, would emphasize the labor element in authorship and tend to recognize the "sweat of the brow" doctrine in copyright, rejected in *Feist*.

²²² The word "author" has been extended to cover an employer or the commissioner of a work made for hire. It is a non-intuitive use of the word author: such employers were not regarded as authors until the Copyright Act created this legal fiction; and they are not regarded in Europe as authors to this day, but rather as the proprietors of an ancillary right. The meaning of the word "writings" changed from maps, books, and charts to include also music, photos, fine arts, sculptures, architecture, and other works.

²²³ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989) (noting that the rationale behind the novelty and nonobviousness requirements in patent law is implicit in the Clause); *Lee v. Runge*,

similarly do not entail these requirements by necessity. The text of the Statute of Monopolies was stricter than the Clause, for it spoke of the “first and true inventor”. Nevertheless, English courts interpreted “inventor” to include first importer of a new art.²²⁴ These requirements, thus, draw primarily on the same ideology behind the Progress Clause.

The above tends to refute D.C. Circuit precedent that the Progress Clause does not limit Congress’ power. Rather, the originality, novelty, and non-obviousness limitations suggest that the Progress Clause serves as a substantial limitation on Congress’ power. In interpreting the Clause, Courts are often blind to the fact that these requirements stem primarily from the Progress Clause. Had only the Exclusive Rights Clause been written into the Constitution, there would have been nothing in its text to suggest a change from English intellectual property principles.

C. ENFORCING WHAT THE CLAUSE MEANS

Knowing what powers and limitations the Clause expresses does not tell us how they will be enforced and by which branch of government. The answer to these questions lies primarily in the standard courts use to review the Constitutionality of intellectual property enactments. Standards of review differ in the level of deference Courts pay to Congress in interpreting and enforcing Constitutional limitations.

This sub-Part first discerns what this standard is by examining what the Supreme Court has done in the four major cases regarding the interpretation and enforcement of limitations in the Clause to date. This examination shows that the Court is not deferential to Congress in interpreting and enforcing Constitutional limitations. Then, this sub-Part suggests considerations that support such an approach. Lastly, it discusses ways in which courts could interpret and enforce the limitation set in the Progress Clause in pending and future cases.

1. WHAT THE STANDARD OF REVIEW IS

The four major cases manifesting the Court’s level of deference are as follows:

a. *In Re Trademark Cases*²²⁵

In this case, the Court struck down the first Congressional attempt to protect trademarks as a part of a revision of the patent and copyright acts.²²⁶ The question the Court confronted was whether the trademark provisions were within Congress’ power

404 U.S. 887, 891-92 (1971) (Douglas, J., dissenting) (noting the “constitutional standard of ‘novelty’” and the “constitutional requirement of novelty”); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966) (noting that the Progress Clause embodies a Constitutional standard of advancement).

²²⁴ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 173 (1824) (Wirt, Attorney General) (“The statute of [monopolies] uses the same word with the constitution, ‘inventors;’ and the decisions upon the construction of this statute might be referred to, in order to show that it has been considered as embracing discoveries imported from abroad.”). See also WALTERSCHEID, *supra* note 38, at 49-51, 371.

²²⁵ *In re Trademark Cases*, 100 U.S. 82 (1879).

²²⁶ An Act to revise, consolidate, and amend the statutes relating to patents and copyrights, 16 STAT. 198 (Jul. 8, 1870).

under the Clause. The Constitutionality issue boiled down to deciding whether trademarks were “writings of authors”.

The Court was not deferential in answering this question. It realized that Congress believed it was acting within the contours of its power under the Clause,²²⁷ but nevertheless rejected Congress’ view by finding the trademark provisions unconstitutional. A deferential *Trademark Cases* Court would have probably asked whether Congress could have possibly intended to foster creativity by these provisions and would strike down the provisions only if there were no way in which trademark legislation could foster original expression. But if this had been the test, the act would not have been struck down, since a non-trivial amount of trademarks pass the minimal level of originality copyright law requires.²²⁸ Additionally, the relevant trademark provisions included registration pre-requisites that enhanced the likelihood that protected trademarks in fact would be original.²²⁹ Since the possibility that Congress wished to foster original creation by the act cannot be ruled out, a deferential review would have most likely upheld it.

The reason the Court held the trademark provisions unconstitutional was that in its assessment, most trademarks were unoriginal.²³⁰ The Court did not have to go as far as finding that all trademarks were unoriginal to strike down the provisions. The Court used its own judgment to evaluate the effects of Congress’ act on creativity, and once it reached with a high level of certainty – but not absolute – a conclusion that Congress overreached the limitations on its powers, it struck down the provisions.

Congress most likely approved of *Trademark Cases*’ standard of review. When it revised the copyright act substantially in 1909, Congress wrote about the Clause:²³¹

It will be noticed that the language of this authority limits the power of Congress by several conditions. The object of all legislation must be (1) to promote science and the useful arts; (2) by securing for limited times to authors the exclusive right to their writings; (3) that the subjects which are to be secured are “the writings of authors.” It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.

²²⁷ In re *Trademark Cases*, 100 U.S. at 93 (inferring, based on the title of the act, that its part relating to trademarks “was, in the opinion of Congress, an exercise of the power found in that clause [the Clause] of the Constitution. It may also be safely assumed that until a critical examination of the subject in the courts became necessary, it was mainly if not wholly to this clause that the advocates of the law looked for its support.”).

²²⁸ See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that copyrightable expression requires only a modicum of creativity).

²²⁹ See An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights (Jul. 8, 1870), 16 Stat. 210, 212, § 79 (“[ineligible trademark under the act is that] which is merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons, or which is identical with a trade-mark appropriate to the same class of merchandise and belonging to a different owners, and already registered or received for registration”).

²³⁰ In re *Trademark Cases*, 100 U.S. at 94 (“The ordinary trade-mark has no necessary relation to invention or discovery.”).

²³¹ Comm. on Patents, The House Report on the Copyright Act of 1909, H.R. Rep. No. 60-2222, at 6-7 (1909).

Among the three Constitutional limitations on its power Congress recognized, the first two simply restate the Progress Clause and the Exclusive Rights Clause respectively, and the third limitation seems to refer directly to the holding of *Trademark Cases*. This case was the only one that struck down an intellectual property statute because of an overreach of Congress power, and the limitation “the writings of authors” was at its heart. Congress’ language after *Trademark Cases* cannot be reasonably interpreted but as approving of the Court’s review.

The quote also expresses Congress’ view about the appropriate standard of review: Intellectual property enactments must be designed to promote the progress of science and useful arts and must in fact achieve this goal. In other words, Congress set a joint objective and subjective standard to examine whether intellectual property enactments promote progress of science and useful arts. The objective part in Congress’ test further manifests consent for judicial review, as the objective part of the test can have meaning only in cases where Congress believes that its act promotes progress but this is not really the case. Clearly, Congress cannot enforce objective limitations upon itself when it believes subjectively that it did not overreach them. Again, this sense is conveyed especially after *Trademark Cases*.

b. *Graham*²³²

Graham, the next major case exploring Congress’ power and limitations under the Clause was given in the context of patent infringement. As the Court recently opined, the infringement context does not seem to reduce its importance,²³³ especially since it was followed by many Courts, including *Eldred*’s.

Graham continued the non-deferential approach toward construing and enforcing the limitations on Congress’ power. *Graham* analyzed the limitation in the Progress Clause:²³⁴

The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the “useful arts.” It was written against the backdrop of the practices [...] of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. [...] The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must “promote the Progress of . . . useful Arts.” This is the *standard* expressed in the Constitution and it may not be ignored. And it is in this light that patent validity “requires reference to a standard written into the Constitution.” [citation omitted]

²³² *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966).

²³³ *Eldred*, 537 U.S. at 221 n.24 (“We are not persuaded by petitioners’ attempt to distinguish *Harper & Row* on the ground that it involved an infringement suit rather than a declaratory action of the kind here presented. As respondent observes, the same legal question can arise in either posture”).

²³⁴ *Graham*, 383 U.S. at 5-6.

Graham made clear that courts have an active role in enforcing the Constitutional limitations embodied in the Progress Clause,²³⁵ and thus made clear that the Progress Clause is not an unenforceable preambular statement.²³⁶

Trademark Cases showed that if the Court, using a non-deferential approach, found that Congress overreached its limitations under the Clause, the statute would be found unconstitutional. *Graham* extended the analysis by elaborating on the procedure courts should follow if at the first stage of investigation Congress were found not to be overreaching its Constitutional power. In such cases, courts would defer to Congress regarding the means to serve ends that fell within that scope of power:²³⁷

Within 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. This is but a corollary to the grant to Congress of any Article I power. (...) Within the scope established by the Constitution, Congress may set out conditions and tests for patentability. (...) It is the duty of the Commissioner of Patents and of the courts in the administration of the patent system to give effect to the constitutional standard by appropriate application, in each case, of the statutory scheme of the Congress. [citations omitted]

As Richard Epstein has noted, the Court's language exhibits a substantial increase in deference when the Court moves from construing the limits on Congress' power with regard to the ends to be achieved (stage one) to examining the appropriateness of the means to achieve the ends (stage two).²³⁸ The second stage deference is reminiscent of Court case law that allows Congress latitude in acting under the Necessary and Proper Clause to choose means to effectuate goals that lie within its Constitutional power.²³⁹

²³⁵ *Id.* at 6 ("It is the duty of [...] the courts in the administration of the patent system to give effect to the constitutional standard by appropriate application, in each case, of the statutory scheme of the Congress."). Appropriate application in light of the constitutional standard might include voiding the statutory enactment.

²³⁶ Thus, the Court of Appeals for the D.C. Circuit seems to have ignored *Graham*. See *Eldred v. Reno*, 239 F.3d 372, 378 (C.A.D.C. 2001) ("we rejected the argument 'that the introductory language of the Copyright Clause constitutes a limit on congressional power'") (quoting *Schnapper v. Foley*, 667 F.2d 102, 112 (1981)).

²³⁷ *Graham*, 383 U.S. at 6.

²³⁸ See Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 135-38 (2002) (arguing that *Graham* was alternating between intermediate scrutiny and rational basis scrutiny).

²³⁹ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421-23 (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. (...) Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted 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. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire

c. *Feist*²⁴⁰

This case regarded a copyright infringement claim in residential phone directories. The question was whether facts – subscribers’ contact information – are copyrightable. The Court declared originality to be a Constitutional prerequisite for copyrightability. Since facts are not original to the author, the Court concluded, they cannot be copyrighted. This case is authoritative not only because of reasons similar to those mentioned above regarding *Graham*,²⁴¹ but also because the Court made a conscious effort²⁴² to reach the Constitutional cause and base its decision on it.²⁴³

In elaborating on the Constitutional originality requirement, *Feist* was not deferential to Congress. It ruled, in effect, that even if Congress wanted to extend copyright protection to facts it could not do so.²⁴⁴ The Court did not reach this conclusion based on its belief that facts could never promote progress of science and useful arts. On the contrary: The Court recognized the utility of factual works.²⁴⁵ Had its approach been deferential, the Court would have likely not taken factual works outside Congress’ ambit of power.²⁴⁶ Recognition that factual works are useful means that a rational Congress could reasonably wish to promote progress of knowledge by extending protection to facts. Instead, the Court gave its independent judgment that factual works do not overall promote progress substantial and overriding weight.

into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

²⁴⁰ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

²⁴¹ Much like *Graham* in patents, *Feist* is one of the most pervasive analysis of the Clause in the copyright context and has been followed by many Courts. Also, the remark made above about how little the infringement context detracts from the authority of the constitutional analysis applies here as well. See *supra* note 233.

²⁴² See Paul Goldstein, Copyright, 38 J. COPYRIGHT SOC’Y USA 109, 119 (1991) (noting that the Court mentioned the constitutional basis for the originality requirement not less than thirteen times); Jane C. Ginsburg, “No Sweat”? Copyright and Other Protection of Works of Information After *Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 382 & n.207 (1992) [hereinafter Ginsburg, *No Sweat*] (analyzing the Court’s unnecessary reach to constitutional grounds); Thomas B. Nachbar, *Judicial Review and the Quest to Keep Copyright Pure*, 2 J. TELECOMM. & HIGH TECH. L. 33, 37 n.20 (2003) (noting the Court’s zeal in reaching the constitutional grounds).

²⁴³ *Feist*, 499 U.S. at 362 (“[t]he selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection.”); See also *id.* at 363-64 (basing its non-infringement finding both on statutory and constitutional grounds).

²⁴⁴ See Ginsburg, *No Sweat*, *supra* note 242, at 378 (“the Court stretched to reach the abstract constitutional issue; its determination in effect declares that had Congress sought to protect the white pages (or similarly noncreative productions) or should Congress so seek, the Constitution would not permit Congress to extend copyright protection to that subject matter”). See also Nachbar, *supra* note 242, at 37 (same).

²⁴⁵ *Feist*, 499 U.S. at 362-63 (“Rural expended sufficient effort to make the white pages directory useful”).

²⁴⁶ This is not to say that factual works should, or should not, be copyrightable; instead, the point is to highlight the level of deference the Court manifested in this case.

d. *Eldred*²⁴⁷

Eldred was decided under the assumption that the Progress Clause posed no limitation on Congress.²⁴⁸ *Eldred* also recognized the authority of *Graham*'s Instruction.²⁴⁹ These two assumptions entail that the Court must have decided the case assuming that both the power and the limitation in the Clause were to be found in the Exclusive Rights Clause. The decision's text supports this conclusion: The Court seems to have thought that the power in the Clause was to issue copyrights, and the only limitation the Court examined was that they endure for "limited times".

Eldred's analysis seems to follow *Graham*'s two-stage approach. In the first stage,²⁵⁰ the Court examined whether Congress overstepped its limitations. Different from the three aforementioned cases, *Eldred*'s first stage of examination reviewed only whether Congress, in enacting CTEA, overreached the "limited times" boundary. The Court concluded this inquiry in finding that Congress did not.²⁵¹

The simple model above helps clarify the Court's analysis visually. The Court made sure that by enacting CTEA, Congress acted within the power demarcated by the right-most circle in Figure 5. That is, it only verified that CTEA gave authors exclusive rights for limited times. It did not examine whether Congress acted within the power demarcated by the middle area. That is, it did not verify that CTEA promoted progress. The Court's analysis can be better exemplified by the use of the advanced model:

²⁴⁷ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

²⁴⁸ See *Eldred*, 537 U.S. at 211 ("petitioners do not argue that the Clause's preamble is an independently enforceable limit on Congress' power"). Petitioners argued that "limited times" served as a limitation on power that should be interpreted in light of the Progress Clause. See Brief For Petitioners at 19-22, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

²⁴⁹ *Eldred*, 537 U.S. at 212.

²⁵⁰ *Eldred*, 537 U.S. at 199-204.

²⁵¹ This first stage of analysis begins as follows: "We address first the determination of the courts below that Congress has authority under the Copyright Clause to extend the terms of existing copyrights. Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future." *Id.* at 199.

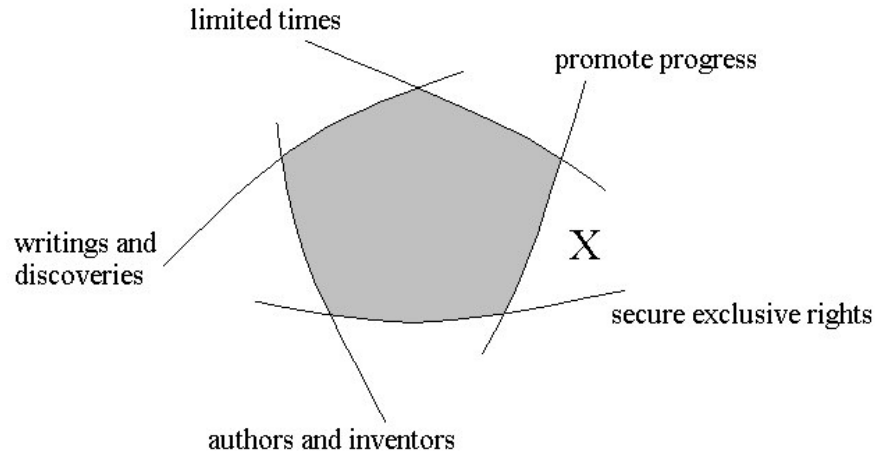
Figure 7 – Eldred’s Analysis in Light of Advanced Model

Figure 7 zooms in on the center of Figure 6. To be Constitutional, acts of Congress must fall within the gray area. Thus, to determine whether an act is Constitutional, courts should check that it conforms to all five limitations on power. In *Eldred*, the Court ensured only that the “limited times” limitation was not violated. This finding only means that CTEA lies below and to the left of the “limited times” boundary in Figure 7. *Eldred* did not answer the more general question of whether CTEA lies in the gray area, which would mean that it is Constitutional. CTEA could lie, for example, at the point marked with an X, which would mean that although the act comports with four of the limitations it does not meet the “promote progress” limitation.

Although the Court concluded that CTEA did not overreach the “limited times” boundary, it did not come to this conclusion by showing deference to Congress’ judgment regarding the nature of the limitations on its power and whether they were overreached. The Court reviewed a series of considerations that it thought were relevant to assessing whether CTEA overreached the “limited times” boundary. It looked in three different dictionaries dating more than two hundred years back in order to find out the meaning of the word “limited,”²⁵² it exercised its independent judgment to make logical inferences with regards to the relation between the prospective and retroactive copyright term extensions,²⁵³ it looked at the practices of past Congresses,²⁵⁴ it examined the legal status quo in England in 1710,²⁵⁵ it drew analogies from patent law,²⁵⁶ and the Court satisfied

²⁵² *Id.* at 199.

²⁵³ *Id.* (“a timespan appropriately ‘limited’ as applied to future copyrights does not automatically cease to be ‘limited’ when applied to existing copyrights”).

²⁵⁴ *Id.* at 200 (“History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.”).

²⁵⁵ *Id.* at n.5.

²⁵⁶ *Id.* at 201-04.

itself that Congress was not attempting to camouflage an overreach of power.²⁵⁷ Only when all these considerations suggested to the Court that the extended term was still limited, did the Court conclude that Congress acted within its Constitutional boundaries.

This is not to argue that the Court was either right or wrong in upholding CTEA. Rather, it is to emphasize the lack of deference the Court manifested in deciding whether Congress overreached the “limited times” limitation. If the Court were being deferential to Congress, then it would find CTEA unconstitutional only if it found that no Congress could possibly believe that life plus seventy years was still a limited time. But in *Eldred*, the Court did not end its inquiry by finding that Congress could believe that; instead, the Court plunged itself into various inquiries to assure itself that the boundary was not overreached independent of Congress’ potential or subjective belief. Its approach agrees with Congress’ view that to be Constitutional, intellectual property enactments should pass both a subjective and an objective test for Constitutionality.²⁵⁸

The Court ended its stage-one inquiry when it found that the “limited times” limitation was not overreached. Since at this point there was no other challenge to Congress’ power on the table, the Court concluded that Congress was acting within its Constitutional scope of power. The Court then moved to the second phase of the analysis,²⁵⁹ where it inquired whether CTEA was a rational means to achieve ends that have been found to be permissible in the first stage. The contrast between the level of deference the Court used in examining the limitation on Congress’ power and the one it used in reviewing the means is striking:²⁶⁰

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.

The Court’s deferential approach toward examining the appropriateness of CTEA resulted in it finding the act Constitutional under the second stage. After the Court passed these two hurdles, the deferential approach generally carried over to dismiss several residual issues the Court discussed.

e. Taking Stock

Under the four cases discussed above, Supreme Court jurisprudence on the standard of review appropriate for analyzing Constitutional challenges consists of two stages. In the first, the Court ensures that Congress did not overreach its Constitutional scope of power. That is, it verifies that Congress did not overreach any of the limitations depicted in Figure 6 above. In this stage, the Court is not deferential to Congress, but instead uses its own judgment to construe the meaning and extent of the limitations on Congress’ power and to evaluate whether Congress acted within them. The Court reviews whether

²⁵⁷ *Id.* at 199-200 (“there is no cause to suspect that a purpose to evade the ‘limited Times’ prescription prompted Congress to adopt the CTEA”). *Accord* quote *supra* note 239 (“should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted 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.”).

²⁵⁸ See *supra* note 231 and accompanying text.

²⁵⁹ *Eldred*, 537 U.S. at 204-18.

²⁶⁰ *Id.* at 204.

Congress overreached its power both from Congress' subjective viewpoint and objectively. When the Court finds that Congress overreached its power it declares acts unconstitutional. When the Court finds that the limits were not overreached, it allows Congress discretion in choosing means to effectuate its power. The aforementioned contributes to the literature that generally assumed that the Court deferred to Congress regarding the definition and enforcement of the limitations on Congress' power.²⁶¹

2. ON NON-DOCTRINAL JUSTIFICATIONS FOR THE STANDARD

The purpose of this sub-Part is not to give a full account of the reasons that justify non-deferential standards of review generally on regarding the Clause. The task of this sub-Part is to expand the analysis regarding the intellectual property standard of review beyond the descriptive level, and suggest considerations that justify non-deference in limitations' construction and enforcement. It highlights three types of considerations: Systematic discrimination, protection of fundamental interests, and protection of the institutional balance of power among Constitutional actors.

a. Systematic Discrimination – Public Choice

But for CTEA, Mickey Mouse would have fallen into the public domain in 2003. Foreseeing this possibility, Disney was lobbying Congress heavily throughout the 1990's. Just prior to the bill's passing in Congress, Disney's lobbying peaked. CTEA was passed by a voice vote, making it hard to see who voted for it and who voted against.²⁶²

Intellectual property law-making suffers from systematic political economy market failures. As demonstrated by CTEA, small, organized and well-financed interest groups capture the legislative process through lobbying. They propel legislation whose effect is to transfer money to them from the diffuse public. In addition to distributive concerns, the transfer is inefficient: Interest groups would reduce the size of the social pie just because their own share will grow as a result. These concerns are important in intellectual property beyond the regular weight they have in other fields of economic regulation.

Any heightened standard of judicial review runs against the counter-majoritarian difficulty, which is that judges are not chosen to make policy. However, the choice of a standard of review should take account of the extent to which the majority's view is systematically absent from the end result of the political system.²⁶³ One might guess about what percentage of the population supports the twenty-year retroactive and prospective extensions of the copyright term. An overwhelming majority probably would be opposed to the prospective extension: There was no discernable shortage of supply of works before the passage of the Act in 1998 and no discernable increase in them

²⁶¹ See, e.g., Schwartz & Treanor, *supra* note 8, at 2334 (“the Court applied a deferential form of rational basis scrutiny ... The purpose of this Essay is to develop the case for deferential review”); Nachbar, *supra* note 242, at 71 (suggesting that *Eldred's* test for constitutionality is “whether a piece of copyright legislation could conceivably further any conceivable definition of ‘progress.’”)

²⁶² See, e.g., http://en.wikipedia.org/wiki/Sonny_Bono_Copyright_Term_Extension_Act.

²⁶³ See Michael H. Davis, *Extending Copyright and the Constitution: “Have I Stayed Too Long?”*, 52 FLA. L. REV. 989 (2000) (applying John Ely's theory to copyright legislation and arguing that courts should intervene vigorously when the legislative process is non-representative).

afterwards, the social costs of CTEA are substantial, and the extension supplies only a very small additional incentive to create. All these factors weigh against the prospective extension. A higher majority would object to the retroactive extension, which entails a huge social cost in terms of foregone years of widespread use of copyrighted works that were already created based on the promise of a shorter term of protection. The benefits of the retroactive extension are almost non-existent: The extended protection does not induce future creation, but is rather a transfer to heirs and assigns of authors.²⁶⁴ More importantly, it exacerbates the monopoly-related social cost of the copyright system by creating an artificial shortage of works the rights in which their authors do not use that would have been free and would have competed with more recent works. Widespread resistance to the extension should bother proponents of the counter-majoritarian difficulty, because here, much like in the case that alarms them, the political system fails to effectuate the will of the people. To the extent this failure is chronic to intellectual property and politically insurmountable,²⁶⁵ it tends to support a non-deferential review.

Supporters of a deferential approach assume that Congress has a better institutional capacity to set intellectual property policy than the Court. However, as Jessica Litman has shown,²⁶⁶ Congress does not actually exercise its own judgment in setting copyright policy, but instead allows interest groups negotiate deals that are later rubber-stamped by Congress. The public's interest, which Congress is supposed to promote and protect under a public interest view of government, is generally absent from the negotiation table. Thus, deference to Congress would often in practice mean showing deference toward non-representative interest groups. There is little reason to trust interest groups over the institutional capacity of courts.

The counter-majoritarian difficulty is alleviated as far as intellectual property enactments are concerned since Congress, as the representative of the people, approved of the process of judicial review and of the heightened standard. As detailed above, Congress, in reaction to *Trademark Cases*, accepted the limitation imposed upon it by Congress, its enforcement in form of an unconstitutionality finding, and recognized the suitability of joint subjective and objective criteria for testing whether intellectual property legislation promotes progress by the Court.²⁶⁷

Of relevance to the discussion is that the Framers intended the political system to be immune to intellectual property public choice concerns. In the famous correspondence between Jefferson and Madison,²⁶⁸ the former thought it would be better to prohibit all monopolies than to allow an exception for intellectual property rights. Madison alleviated

²⁶⁴ For authors who created after 1978, CTEA's protection applies to the twenty years that commence fifty years after their death. For authors that created before 1978, the twenty-year extension commences seventy-five years after publication, so that the transfer in this case may accrue to a few authors themselves.

²⁶⁵ Since 1962, copyright owners have had great success in extending the copyright term. Between 1962 and 1974, nine short term extensions were passed. In 1976 the term was extended by 19 years. The CTEA extended it by 20 more. *See generally Eldred*, 537 U.S. at 194-96.

²⁶⁶ *See* JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* (2001).

²⁶⁷ *See supra* discussion accompanying note 231.

²⁶⁸ *See supra* notes 173-174 and accompanying text.

Jefferson's public choice concerns. Monopolies, he admitted, were "justly classed among the greatest nuisances in Government", but intellectual property rights were the only exception the Constitution would allow.²⁶⁹ As monopolies, intellectual property rights are "sacrifices of the many to the few." There would have been a cause for concern had the few had the power "to sacrifice the many to their own partialities and corruptions." Under the Constitution, Madison wrote while its ratification was pending, where the power is "in the many not in the few the danger cannot be very great that the few will be thus favored."²⁷⁰ Although Madison supported allowing these types of monopolies, he was clear about the manner in which their limitations should be enforced: Monopolies, he wrote, must be "guarded *with strictness* agst [sic] abuse" (emphasis added).²⁷¹ Thus, a non-deferential review would conform to the text of the Clause and the intent behind it.

Public choice concerns are important because they contribute materially to the two other considerations for non-deferential construction and enforcement, listed below.

b. Protection of Fundamental Interests – Freedom of Speech

Alice Randall, a female African-American resisted the romanticization of the antebellum Old South as enshrined in American memory by cultural icons such as Margaret Mitchell's "Gone with the Wind". She chose to express her criticism by writing a book retelling the story from the perspective of Scarlet O'Hara's mulatto half-sister, Cynara. Mitchell's estate sued Randall for copyright infringement and secured a preliminary order that enjoined Randall from publishing her book, "The Wind Done Gone". After Randall appealed, the order was reversed as a prior restraint.²⁷²

Randall's story exemplifies the clash between the Intellectual Property Clause and the First Amendment, a jurisprudential area in which heightened scrutiny is exercised to protect the fundamental interest in free speech.²⁷³ Copyright law hampers free speech because it prevents people from writing, copying, publishing, disseminating, or performing forms of speech that would have been otherwise permissible.²⁷⁴ The fact that

²⁶⁹ James Madison, Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments., in Elizabeth Fleet, *Madison's "Detached Memoranda"*, 3 WM. & MARY Q. (3d s.) 534, 551 (1946).

²⁷⁰ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 269, 274-75.

²⁷¹ Madison, *supra* note 269, at 551.

²⁷² See *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001).

²⁷³ See, e.g., Nachbar, *supra* note 242, at 45-51 (recognizing that "[t]he most likely candidate for a fundamental interest affected by copyright is the interest in free speech" while arguing against heightened review).

²⁷⁴ For a few recent discussions of the clash between the Clause and the First Amendment, see, e.g., Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart, Saderup, and Bartnicki*, 40 HOUS. L. REV. 697 (2003); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002); Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

intellectual property statutes undermine free speech interests is an additional justification for non-deferential review.²⁷⁵

Eldred analyzed the free speech interest as a part of the First Amendment challenge to CTEA rather than as part of the intellectual property challenge. Independent First Amendment review is beyond the scope of the current discussion; however, the way the Court framed copyright doctrine while analyzing its conflict with the First Amendment understated the extent to which these two conflict. This suggests that the Court underestimates the extent to which this clash is a consideration for a heightened review under the Clause. Three refinements are thus offered regarding the tension between copyright protection and the First Amendment.

First, the Court argued that the Clause was enacted almost contemporaneously with the First Amendment and that the Framers saw copyright as an engine of free speech.²⁷⁶ The Framers' concept of copyright protection, however, was much narrower than ours in terms of its duration, scope, and eligible subject matter.²⁷⁷ Thus, to the extent the Court took historical considerations into account, it should have contemplated what the Framers would have thought about the conflict as it exists today, rather than consider what the Framers thought the danger to free speech was in 1787. Regardless of the answer, *Eldred* did not ask this question.

Second, the Court stated that copyright law makes a distinction between ideas and expression by allowing speakers to copy others' ideas, while prohibiting only the copying of particular expressions thereof.²⁷⁸ The Court underestimated the dichotomy's adverse effect on free speech because copyright law prevents future authors from making derivative works, not only full copies. Even if the ability to copy an existing work does not implicate a great free-speech interest, adding some original expression to it and transmitting it back to the marketplace of ideas implicates free speech interests but nevertheless infringes copyright. Also, the idea versus expression distinction is not very clear.²⁷⁹ The more one approaches the murky line separating the two, the less certain she becomes about the character of her speech. This creates a chilling effect: A speaker who wishes to build on another's work, but is unsure if what she wishes to take is an idea or expression, is likely to weigh the costs and benefits of making a mistake. Since the

²⁷⁵ The Court refused to subject the CTEA to an independent First Amendment review of the magnitude accorded to content-neutral regulation of speech. *Id.* at 218-19.

²⁷⁶ See *Eldred*, 537 U.S. at 219; *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

²⁷⁷ Compared to present times, protection lasted for a minimum of 14 years rather than 70; works were protected mainly against copying rather than also against the making of derivative works and public performances and displays; applied to maps, books, and charts rather than also applying to musical compositions, pictorial works, sculptural works, and architectural works; and many of the state copyright statutes included compulsory license provisions that served as a check on price and quantity restrictions.

²⁷⁸ See *Eldred*, 537 U.S. at 129.

²⁷⁹ The outcome of the doctrinal tests that tell idea from expression are not easy to predict. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (applying the distinction to the protection of plot lines and suggesting that the line should be drawn through a series of abstractions of plot details).

private benefits of speech are often very small and since an error may lead to civil and criminal liability,²⁸⁰ some socially valuable speech is likely to be hampered.

Third, the court argued that free speech interests are guaranteed in copyright law by the “fair use” doctrine.²⁸¹ This argument underestimates the extent of the clash for two reasons. The first is that the fair use doctrine is one of the least predictable and doctrinally confused areas in copyright law.²⁸² This murkiness is likely to cause chilling effects of a greater magnitude than the one discussed above. The second is that the Court’s fair use argument is even weaker than the one regarding the idea versus expression dichotomy. In the latter case, copyright owners bear the burden of proving that the part copied was expression. In contrast, fair use is an affirmative defense, and thus the party speaking bears the burden of proving that her use was fair. If speakers are assumed to be infringing and have to make the case for an affirmative defense to speak, it seems that this does not satisfactorily protect the fundamental interest in speech.

Non-deferential review is also desirable because of the important role the institution of copyright protection plays in a democratic society.²⁸³ Although some level of protection makes copyright law an “engine of free expression”,²⁸⁴ excessive protection to some increases the costs and thus reduces the ability of others to speak.²⁸⁵ By changing the relative costs and benefits of speaking for different types of speakers, copyright protection changes the content and type of the speech produced and available in the marketplace of ideas. A democratic society should strive to enable all to participate in social meaning making.²⁸⁶ Since public choice pressures push Congress to protect commercial and organized speakers at the expense of independent and non-commercial speakers, courts should construe and enforce the limitations on Congress power as to enhance all people’s ability to participate in the process of social meaning making.

c. Protection of Institutional Balance of Power - Federalism

Illinois Governor Rod Blagojevich had enough with the federal government. In mid-August 2004 he announced that Illinois would become the first state in the nation to assist its residents in buying affordable and safe prescription drugs from wholesalers in Canada and the UK.²⁸⁷ Importation of prescription drugs is illegal under federal law, and the FDA

²⁸⁰ Willful copyright infringement entails statutory damages of up to \$150,000 and imprisonment of up to ten years. See 17 U.S.C. 504(c)(2); 17 U.S.C. 506(a)(1); 18 U.S.C. 2319(b)(2).

²⁸¹ See *Eldred*, 537 U.S. at 219-20.

²⁸² See generally William Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

²⁸³ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

²⁸⁴ See *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

²⁸⁵ See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 394-412 (1999) (analyzing the disparate impact that the expansion of copyright protection entails for the authorship costs of different types of authors).

²⁸⁶ See William Fisher, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217-18 (1998) (elaborating the concept of semiotic democracy). See also Fisher, *supra* note 282, at 1751-52 (noting that the good society would encourage cultural and intellectual innovativeness).

²⁸⁷ See <http://www.affordabledrugs.il.gov/> (providing information about Illinois’s sponsorship of prescription drugs importation from Canada, the UK and Ireland).

has already announced that it is considering taking matters to Court.²⁸⁸ Blagojevich's announcement followed a year in which he tried to work with the federal government in order to allow more competition in the domestic pharmaceuticals market, but failed. He is bothered by the fact that American consumers are paying the highest prices in the world for prescription drugs. At least ten other states share Illinois' concerns.²⁸⁹ Although the official reason for the prohibition on importation regards safety, there is room to doubt whether this is really the reason.²⁹⁰

Some people may approve of Blagojevich's initiative, while others may not. The point is that states and their people may have material differences of opinion with the federal government about the form intellectual property rights should take. Before the states entered the union, each would shape its intellectual property laws as it saw fit. The states' copyright statutes had non-trivial differences.²⁹¹ Similarly, state legislatures would tailor patent grants for the same inventions differently.²⁹² Similar divergence in states' views exists today in intellectual property areas that are not governed by the Clause. The right of publicity, namely a celebrity's right to control the use of her name and likeness, is a case in point: One third of the states do not recognize such right. Two thirds of the states have some form of protection, but they vary considerably in its extent. The different treatment makes sense: The benefits of a right of publicity in a celebrity-rich state may outweigh its costs, such as perhaps is the case in California, but in other states it may be just the opposite. States, of course, have an interest in some uniformity in intellectual property matters. But this interest exists only up to a certain level. The states and their people agreed to transfer to the federal government only qualified power in intellectual property. If Congress expands the scope of intellectual property legislation it may encroach on a legislative area left to the states.

²⁸⁸ Christopher Bowe, *States warm to reimport of drugs into US*, FIN. TIMES, Aug. 23, 2004, at 6, 2004 WL 90108719.

²⁸⁹ Minnesota, New Hampshire, North Dakota, Rhode Island, and Wisconsin also have operating drug importation plans. Connecticut, West Virginia, California and the District of Columbia are looking into the subject. Iowa and Michigan have proposed plans. *See id.*

²⁹⁰ *See* Tim Craig, *Surprise Support For Drug Importing: Pfizer Official Backs Montgomery Plan*, Wash. Post, Sept. 14, 2004, at B01, 2004 WL 93176034 (reporting on Maryland's Montgomery County's plan to allow county employees to buy lower-cost prescription drugs from Canada and quoting Pfizer vice president Peter Rost that "[t]he real concern about safety is about people who do not take drugs because they cannot afford it. The safety issue is a made-up story.").

²⁹¹ In Connecticut, copyrights lasted for fourteen years, and could be extended by fourteen more if the author was still alive at the end of that term. COPYRIGHT ENACTMENTS, *supra* note 113, at 10. In Massachusetts, the term was fixed to twenty-one years. *Id.* at 12. In New Hampshire, the term was 20 years. *Id.* at 16. In North Carolina, the term was fourteen years. *Id.* at 23. Other differences existed as well: Connecticut, for example, would issue compulsory licenses if the authors neglected to provide the public sufficient editions at a reasonable price. *Id.* at 10-11.

²⁹² For example Oliver Evans, the inventor of flour-mill machinery, was granted a seven-year patent in New Hampshire, fourteen-year patent in Philadelphia and a fifteen-year one in Delaware. New-Hampshire's grant required Evans to arrange for a trained milling machines builder to reside in the state until the grant lapsed, Delaware's grant exempted a local milling firm from infringement and Philadelphia kept itself the option to revoke Evans' grant by paying him £5,000. *See* BUGBEE, *supra* note 17, at 99-100.

Although the federal government has power over patents and copyrights, the states have regulatory powers in this area as well.²⁹³ Regarding so-called industrial property, the states retain power to regulate nonpatentable innovation and information, such as through trade secret and unfair competition law.²⁹⁴ Regarding copyrights, the states have power to regulate non-copyrightable expression, such as the contents of published news,²⁹⁵ and to confer upon authors moral rights beyond those granted by the Copyright Act.²⁹⁶ The Supreme Court has noted the “peaceful co-existence” between the federal and the state systems of protection.²⁹⁷ When states encroached on the federal government’s power, courts struck down such statutes.²⁹⁸ Similarly, courts should guard against encroachments on legislative power in the other direction to maintain the Constitutional balance of power. This guarding is especially important as the aforementioned public choice concerns push towards expansion of federal intellectual property power.²⁹⁹

3. NOTES TO FUTURE COURTS INTERPRETING THE PROGRESS CLAUSE

The heightened standard of review is in the midst of being formed in courts at an unprecedented rate: The last five years saw four Constitutionality challenges under the Clause. Perhaps the major interpretive challenge for Courts today regarding the Clause is to develop a concept of progress as a limitation on Congress’ power. Among the various limitations in the Clause, this limitation is the least clear. It is also the most litigated: All four recent cases claimed in one way or another that the statutes they challenged overreached the progress limitation. Of these four two were recently decided: *Eldred* and *Luck’s Music*.³⁰⁰ These two cases did not elaborate much on the meaning of the Progress Clause: *Eldred* chose not to deal with the question, as it was not necessary to deciding the case. *Luck’s Music* dismissed the challenge under the Progress Clause because, as noted

²⁹³ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989) (noting that “the Patent and Copyright Clauses do not, by their own force or by negative implication, deprive the States of the power to adopt rules for the promotion of intellectual creation within their own jurisdictions.”).

²⁹⁴ See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

²⁹⁵ See *International News Service v. Associated Press*, 248 U.S. 215 (1918) (recognizing a quasi-property right in non-copyrightable published news against its misappropriation by direct competitors).

²⁹⁶ See generally Amy L. Landers, *The Current State of Moral Rights Protection for Visual Artists in the United States*, 15 HASTINGS COMM. & ENT. L.J. 165 (1992).

²⁹⁷ *Bonito Boats*, 489 U.S. 167.

²⁹⁸ See, e.g., *Bonito Boats*, 489 U.S. 141 (finding a Florida statute that prohibited the duplication of vessel hulls by direct molding preempted by the Supremacy Clause since the statute granted patent like protection for unpatentable subject-matter); *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999) (en banc) (finding a section of a Pennsylvania statute that limited exclusive licenses of first-run movies to a period of forty-two days preempted by the Copyright Act since the statute impinges on authors’ exclusive rights).

²⁹⁹ See also *Nachbar*, *supra* note 242, at 56-61 (arguing that maintaining the relative power of Congress vis-à-vis the states is one recognized reason for a heightened standard of review, but concluding that this consideration is irrelevant in intellectual property because the “exercise of the copyright power does not in any way impinge on the authority of the States”).

³⁰⁰ See *Eldred*, 537 U.S. 186; *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004) (dismissing a constitutionality challenge to the Uruguay Round Agreements Act of 1994 that restored copyright protection for foreign works that fell into the public domain in the U.S.).

above, D.C. Circuit precedent holds wrongly that the Progress Clause does not pose a limitation on Congress' power.³⁰¹ The two cases to date that will take a fresh look at the question are still pending.³⁰² This sub-Part highlights the need for creating a coherent approach to the meaning of the Progress Clause. Because the available case law provides only limited guidance for future as well as pending cases, this sub-Part examines ways in which courts could approach the task they are facing.

a. Progress' Place in the Review Process

Historical considerations suggest Progress Clause should be given effect. By subjecting the Exclusive Rights Clause to the Progress Clause the Founders expressed their intent that only intellectual property rights that “promote the progress of science and useful arts” should be protected by congressional grants. Thus, the Founders thought that an unchecked congressional power to issue short-term monopolies was prone to abuse and wished to guard against this possibility. This intended textual truncation of power should be given effect in courts' review of the power.

Textual Considerations suggest Progress Clause should be given effect. The Progress Clause contains a unique syntactic repetitive structure that has not been given interpretive attention -- promote progress. It contains a repetition in meaning since one of the meanings of “to promote” is “to advance”.³⁰³ As is evident from Table 2 and Table 3, one of the meanings of “progress” is “advancement.”³⁰⁴ Additionally, the repetition is evident esthetically from the common prefix “pro,” which derives etymologically from the word forward. Hence, “promote” comes from “pro” (forward) “movere” (to move) and “progress” comes from “pro” “gredi” (to go). Thus understood, “to promote the progress” is literally “to advance the advancement”. To use a speed analogy, it means “to accelerate”. Failing to give meaning to this conspicuous repetition without reason would be interpretively questionable according to common rules of construction and Court precedent.³⁰⁵

³⁰¹ See *supra* note 200 and accompanying text.

³⁰² *Golan v. Ashcroft*, No. 01-B-1854 (D. Colo. filed Sept. 19, 2001) (arguing that the Uruguay Rounds Agreements Act of 1994 violates the Progress Clause) (briefs at http://cyberlaw.stanford.edu/about/cases/golan_v_ashcroft.shtml); *Kahle v. Ashcroft*, No. C 04-1127 BZ (N.D. Cal. filed Mar. 30 2004) (arguing that the Copyright Act of 1976, the Berne Convention Implementation Act of 1988, and the Copyright Renewal Act of 1992 are unconstitutional because they violate the Progress Clause, and that CRA and CTEA violate the “limited times” limitation) (briefs at http://cyberlaw.stanford.edu/about/cases/kahle_v_ashcroft.shtml).

³⁰³ See 12 J.A. SIMPSON & E.S.C. WEINER, *THE OXFORD ENGLISH DICTIONARY* 616 (2d ed. 1989). See also Solum, *supra* note 183, at 44-45 & n.131 (discussing the word's lexicographic definition and containing illustrative uses).

³⁰⁴ See also 12 SIMPSON & WEINER, *supra* note 186, at 593. See also Solum, *supra* note 183, at 45-47 & n.133 (discussing the word's lexicographic definition and containing illustrative uses).

³⁰⁵ See *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) (Taney, C.J.). See generally 16 AM. JUR. 2D *Constitutional Law* § 61 (2004) (“Giving effect to every word and part”). See also *Alaska Dept. of Environmental Conservation v. E.P.A.*, 124 S. Ct. 983, 1002 n.13 (2004) (noting that it is “‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant’”) (quoting *TRW, Inc. v.*

In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning

This is not an absolute rule, however: Whenever this rule against surplusage constructions results in an ambiguous meaning and the plain if repetitive meaning is clear, then it would be inappropriate to apply the rule.³⁰⁶ The exception, however, should be applied only when the repetition renders the meaning ambiguous or unintelligible and the plain meaning suggests that the surplusage was unintended.

In the case of the Progress Clause, however, the repetition was demonstrably intended and makes sense. As a consequence, turning to the exception to the rule against surplusage constructions seems unwarranted. It seems that the repetition was intended because the same repetitive structure in the Clause is evident in Madison's M4 proposals from which it originated. There it is expressed in slightly different words: "to encourage the advancement." Additionally, this same repetition appears again in Madison's restatement of the Progress Clause in his inaugural speech as "to promote (...) improvements."³⁰⁷ This repetition was specifically repeated in *Graham*, in which the Court stated that the power under the Clause "is limited to the *promotion of advances* in the 'useful arts.' (emphasis added)"³⁰⁸

The use of this structure also makes perfect sense. It stemmed from M4. M4 relates to "premiums" for the "advancements of useful knowledge and discoveries." The word "premiums" in the late 18th century meant honorary and lucrative rewards for ingenious inventiveness and originality of thought. Thus, for example, America's first and oldest scientific award is called "The Magellanic Premium"³⁰⁹ was first awarded in 1786 by the American Philosophical Society, one year before M4 was proposed, and has since been awarded only thirty-two times.³¹⁰ As "premiums" were defined in the Report on Manufactures, this is indeed an honorary and lucrative award. It was, and still is, granted for special excellence in scientific research. Its benefactor, Magellan, "envisioned the premium being awarded for the best discovery or useful improvement in the areas of

Andrews, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted)).

³⁰⁶ See *Lamie v. U.S. Trustee*, 124 S. Ct. 1023, 1031 (2004).

³⁰⁷ See *supra* note 164.

³⁰⁸ *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966). Although this case arose in the context of patents, *Eldred* applied this point in the copyright context.

³⁰⁹ See <http://www.amphilsoc.org/library/exhibits/magellan/>.

³¹⁰ The full name of the Society is "American Philosophical Society Held at Philadelphia for Promoting Useful Knowledge." See <http://www.amphilsoc.org/>. It was founded by Convention delegate Benjamin Franklin in 1743 and many of the Founders were among its members, including George Washington, John Adams, Thomas Jefferson, Alexander Hamilton, Thomas Paine, Benjamin Rush, James Madison, and John Marshall. See <http://www.amphilsoc.org/about/>.

navigation or natural philosophy.”³¹¹ Thus, M4 included a clear emphasis on advancement of knowledge.³¹²

The fact that the Founders preferred the language of “promote the progress” over the lesser check on power of “promote,” which they also considered, and the fact that they chose progress language to form the primary power under the Clause, may suggest that the Founders had a substantial fear of abuse of intellectual property powers, rather than only a concern. Since the Constitution expresses textually this suspicion of the potential abuse of power by requiring clear advancement in knowledge, judicial review of enactments under the Clause should give this language effect.

Doctrinal considerations suggest Progress Clause should be given effect. The need to answer the question of what limits the Progress Clause places on Congress stems from the process of judicial review. Analytically, courts go through several stages to adjudicate Constitutionality challenges. As a preliminary matter, courts form an opinion of the scope of the regulatory power that the Constitution entrusts to Congress. Then, as a first stage of review, they need decide whether the ends Congress is trying to achieve lie inside that scope or extend beyond it. This decision is made with some level of deference to Congress. Then, courts determine whether the statutory means Congress used are appropriate. This, again, is decided using some measure of deference to Congress.

Courts have to conduct the preliminary stage: They have to form an opinion as to the scope of power the Constitution confers upon Congress in order to apply to it any standard of review they choose. The Progress Clause serves to define, positively and by way of limitation, Congress’ scope of power. Its function is not different from that of the terms “exclusive rights”, “limited times”, and “authors and inventors,” which the Court interpreted in the past. There is little reason why the Court should not similarly determine the meaning of the Progress Clause. Although this task may not be straightforward, “progress” is not necessarily more difficult to define than the other words in the Clause,³¹³ nor is it qualitatively more difficult to define than other terms the Court has already interpreted, such as “due process” or “equal protection”.

³¹¹ See <http://www.amphilsoc.org/library/exhibits/magellan/magprem.htm>.

³¹² It seems that at the time of the Federal Convention the term “useful knowledge” included what would be now considered a non-patentable scientific discovery of scientific principles not brought down to practice. This latter standard of usefulness today seems to differ from the contemporary usefulness standard, which included discoveries “useful to mankind” even if only over the long run.

³¹³ The word “authors” in copyright law, for example, has expanded since the Founding to include employers and people who commission works for hire. Previously, they could only be assignees of the copyright, which has significance for the underlying entitlement. This new sense of “authors” was accepted until the late nineteenth century. See, e.g., *Atwill v. Ferrett*, 2 F. Cas. 195, 197-98 (C.C.S.D.N.Y. 1846) (No. 640) (noting that to be an author, rather than assignee, one must apply one’s own intellectual labor). The current, expanded sense of “authors” is not intuitive also because it is not internationally accepted. For example, in the European Union, employers are owners of “ancillary rights”, rather than owners of “authors’ rights”. Similarly, the word “writings” in copyright law includes sound recordings, motion pictures and sculptures, which again is far from being an intuitive understanding of the word. The Court supported these interpretations, but did not accept Congress’ view that trademarks are writings, even though trademarks may seem more like writings than sound recordings or sculptures. Thus, the argument that the meaning of other words in the Clause can be readily ascertained is far from evident.

Courts should guard against terminological confusion that may stem from the fact that each of the intellectual property standard of review and the Clause has “ends” and “means”. In the first analytical stage of review, when courts examine whether the legislative “ends” fall within the Constitutional scope of power, that scope is defined by both the “ends” and “means” parts of the Clause, namely the area depicted graphically at the center of Figure 6. Thus, the relation between limited-time exclusive rights and the promotion of progress should be examined in the first stage of review, characterized by non-deference. Although the second stage of review examines the relation between “ends” and “means”, it does not examine the relation between the Progress Clause and the Exclusive Rights Clause. Rather, it examines the relation between the statute whose Constitutionality is challenged and its ends. This stage is characterized by greater deference.

Since the intellectual property standard is one that exhibits a non-deferential approach in determining when Congress has overstepped its limitations, courts are expected to review whether Congress’ ends do indeed promote progress. Congress may, “under the pretext”³¹⁴ of exercising its power under the Clause, adopt legislation that does not promote the progress of knowledge. Congress may believe subjectively but wrongly that its action promotes progress when in fact it does not. In these cases, “it would be the unfortunate duty” of the Court “to say that such law was not the law of the land.”³¹⁵ This would conform to Congress’ proviso that for intellectual property statutes to be Constitutional, they should promote progress in effect.³¹⁶

In the second analytical stage of review, courts should notice that the permissible objectives of intellectual property enactments are only those that promote the progress of science and useful arts. Thus, achieving international uniformity, in and of itself, is not a legitimate end under the Clause.³¹⁷ Of relevance to this point is that when the Framers wrote the Clause, the weight they gave harmonization was tiny at best, since the Clause dis-harmonized the American intellectual property system with that of the rest of the world.³¹⁸ Similarly, improving the balance of trade, which is a legitimate government objective generally, is not a legitimate objective justifying the issuance of intellectual property rights.³¹⁹

³¹⁴ Cf. quote from *McCulloch supra* note 239.

³¹⁵ Cf. *id.*

³¹⁶ See *supra* note 203.

³¹⁷ Indeed, international uniformity may promote progress of knowledge. This might have been the case with the Copyright Act of 1976, which was necessary for U.S. adherence to the international Berne Convention for the Protection of Literary Works. Some believe that this was also the case with the CTEA. See Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323 (2002). Others disagree. See *Eldred*, 537 U.S. at 257-60 (Breyer, J., dissenting). Regardless of CTEA, international uniformity is important in intellectual property only if it promotes progress and to the extent that it does.

³¹⁸ See *supra* Part V.B.

³¹⁹ See *Eldred*, 537 U.S. at 262-63 (Breyer, J., dissenting).

b. Towards a Judicial Concept of Progress for the Clause

There are two conceptual ways in which courts can approach the construction and enforcement of the Progress Clause limitation. The first is to define what progress is not.³²⁰ Thus, courts would not have to define the specific contours of progress, but rather would only have to identify instances that clearly retard progress. This seems to be the approach *Graham* took: It found that enlarging the patent monopoly without regard to the social benefit gained or taking available knowledge out of the public domain do not promote progress.³²¹ As more decisions of this type are handed down, a judicial concept of progress will form as to which limited-time exclusive rights retard progress.

Alternatively, courts could come up with a positive concept of what promoting progress means. Courts could take a case-by-case approach. *Feist* comes closest to this approach, since it found that allowing future generations to use facts freely promotes progress of knowledge. Although this is a positive definition, it is a relatively modest one, since while it defines progress in a specific context it does not attempt to define a general concept of progress. Again, as case law adopting this approach accumulates, the contours of what advances knowledge will become clearer.

Another way to define progress positively would be for courts to develop standards and criteria in order to assess whether intellectual property enactments overstep the boundaries set by the Progress Clause. One standard falling into this category--variants of which have been suggested by Congress,³²² Justice Breyer in *Eldred*,³²³ and commentators³²⁴ is to consider, among other things, the positive and negative effects of statutes on human creativity.

The position advanced is not that Courts should conduct a strict cost-benefit analysis and strike down statutes whenever their costs seem to outweigh their benefits. Rather, courts should take this approximate calculation into account, and to give it weight that is

³²⁰ This approach may be the more prudent one because it recognizes the counter-majoritarian difficulty and the institutional limitations of courts in weighing progress positively.

³²¹ See *supra* note 234 and accompanying quote.

³²² Comm. on Patents, The House Report on the Copyright Act of 1909, H.R. Rep. No. 60-2222, at 7 (1909) (“In enacting a copyright law Congress must consider, as has been already stated, two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public. The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.”).

³²³ See *Eldred*, 537 U.S. at 248-54, 254-63 (analyzing CTEA’s costs and benefits, respectively). Justice Breyer may have been in the minority in *Eldred* because the Court may have viewed this approach as ill-suited for an analysis of the “limited times” boundary, but failed to see the suitability of this approach for examinations under the Progress Clause.

³²⁴ See Wendy Gordon, *Authors, Publishers and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159 (2002) (assessing the desirability of CTEA according to its effects on creativity); Avishalom Tor and 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) (assessing the desirability of CTEA according to a cost-benefit analysis of its behavioral effects on creativity relative to the pre-existing term.).

proportional to the amount by which the costs outweigh the benefits. When the net effect would be of a clear retardation of progress, this consideration may be given primacy.

It was shown that text, history and precedent suggest that “promote progress” should be given meaning by courts, and that these three considerations as well as accepted rules of construction suggest that this meaning should be different from the non-repetitive “promote”. There are several and interrelated ways in which courts could do so, all of which are ways to see the “promote” knowledge as a lesser limitation of power than “promote progress” of knowledge. One way would be to see the repetition as greater emphasis: Courts reviewing challenges under the Progress Clause should reach a relatively higher level of certainty that an enactment indeed advances knowledge than if the Progress Clause spoke only of “promote knowledge”. Courts could, for example, require more evidence tending to show or predict positive effects on creativity and knowledge. A second way of giving meaning that would differentiate promote knowledge from promote progress of knowledge would be that the first would require only a subjective belief on Congress’ part about positive effect on knowledge whereas the second would require both a subjective and objective assessment of the advancement in knowledge. A third way would be to interpret “promote” useful arts as encourage industry and “promote progress of useful arts” as a requirement that improvements in the art, or additions to knowledge, would be manifested.

The last interpretive way to give “promote progress” meaning that dovetails with a creativity cost-benefit approach would be to use a speed analogy. It exemplifies best the differences both in the power conferred and in the limitation on it. An authority to promote knowledge would be an authority to “advance” knowledge. This would be an authority to keep a positive velocity. Such grant of power would be associated with a limitation against having a negative velocity or going backwards. Such grant of power would not be violated if speed were reduced somewhat but still kept above zero. Here unconstitutionality would be found only in the clear-cut cases of moving backwards. The grant of power to “promote progress” on the other hand would mean to “advance the advancement” of knowledge or to “accelerate” it. This grant of power entails a greater limitation, namely one against slowing down the pace of advancement of knowledge. Here, slowing down, or enacting statutes that induce some to create at a greater disincentive to create for others would be unconstitutional. The “accelerate” sense naturally correlates better with less deferential review and calls for an objective assessment of the effects on creativity.

The heightened standard of review, the various possible ways of giving progress meaning and especially the speed analogy suggest that *Eldred* was wrong on one point. *Eldred* noted in dictum that the limitation the Progress Clause embodies is that the system as a whole result in advancement.³²⁵ Such approach would seem to uphold the Constitutionality of intellectual property rights that would diminish the value of the intellectual property system to an only marginal value by, for example, conferring upon some intellectual property rights that would deter all others from creating. This is a gross

³²⁵ See *Eldred*, 537 U.S. at 212 (“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.’”)

diversion from text, history, precedent but especially common sense. Compare, for example, the *Trademark Cases*: The Court there assessed the value of the trademark provisions in themselves. It did not strike them down because they drove the entire intellectual property system out of value.

D. DICHOTOMOUS READING OF THE CLAUSE DOUBTED

This Article suggested a model of meaning that explicates the power and limitations in the Clause. This model challenges the model currently accepted by the literature (“Dichotomous Reading”). The Dichotomous Reading model emanated from De Wolf’s 1925 observation that the Clause contains three pairs of similar terms: [science, useful arts], [authors, inventors], and [writings, discoveries].³²⁶ The Clause was identified as “an example of the balanced style of composition so much used in the days of the colonial worthies.” It was suggested that the Clause should be read “disjunctively.” According to this reading, the Clause consists of two independent congressional powers spliced together in one sentence: “to promote progress of science, by securing for limited times to authors the exclusive right to their writings” (a copyright power) and “to promote progress of useful arts, by securing for limited times to inventors the exclusive right to their discoveries” (a patent power).³²⁷ De Wolf’s observation was propagated by an influential article,³²⁸ was adopted by subsequent commentators,³²⁹ Congress,³³⁰ and the courts.³³¹ In short, it has become the accepted wisdom.³³²

³²⁶ See RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 14-15 (1925).

³²⁷ *Id.* at 15. De Wolf was not the first to suggest that the Clause should be read “disjunctively”. See *infra* note 346.

³²⁸ Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 18 GEO. WASH. L. REV. 50, 51 (1949). See also Karl B. Lutz, *Are the Courts Carrying Out Constitutional Public Policy on Patents?*, 34 J. PAT. OFF. SOC’Y 766, 789 (1952) (“This is indeed a perversion of the Constitution. (...) If they were really interested in ascertaining the original meaning of the Constitutional clause why did they not take a serious look into history? Had they done so they would have found that the word ‘science’ belongs with the copyright clause”).

³²⁹ See, e.g., Kenneth J. Burchfiel, *The Constitutional Intellectual Property Power: Progress of Useful Arts and the Legal Protection of Semiconductor Technology*, 28 SANTA CLARA L. REV. 473, 501 (1988); Giles S. Rich, *Principles of Patentability*, 28 GEO. WASH. L. REV. 393 (1960); PATTERSON & LINDBERG, *supra* note 128, at 48 (“Since the intellectual-property clause also empowers Congress to grant patents, one must read the passage distributively”); Solum, *supra* note 183, at 11-12; WALTERSCHEID, *supra* note 38, at 116-18.

³³⁰ Comm. on the Judiciary, Revision of Title 35, United States Code “Patents”, H.R. Rep. No. 82-1923, at 4 (1952); Comm. on the Judiciary, Revision of Title 35, United States Code, S. Rep. No. 82-1979, at 3 (1952).

³³¹ See, e.g., *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 & n.1 (1966); *Eldred*, 537 U.S. at 192-93 (“The [Clause] provides as to copyrights: ‘Congress shall have Power ... [t]o promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings.’”)

³³² See, e.g., 1 DONALD S. CHISUM, CHISUM ON PATENTS § 1.01 (Mathew Bender, 2004) (“The Constitution and the statutes limit patents to ‘useful arts,’”); 1 *id.* § 2 (“The clause intermixes copyright and patent concepts. The patent concepts are ‘useful arts’, ‘inventors’ and ‘discoveries.’”); 1 NIMMER ON COPYRIGHT, *supra* note 185, § 1.03 & nn.1, 21 (generally accepting the exclusive association of “science”, “authors” and “writings”).

Courts that employ a Dichotomous Reading in copyright cases ignore the parts they think are irrelevant because of their purported application to patent law and vice-versa.³³³ This approach believes that a strict dichotomy exists between the parts of the Clause pertaining to copyrights (“science,” “authors,” and “writings”) and those pertaining to patents (“useful arts,” “inventors,” and “discoveries”).³³⁴ This argument is presented by the use of Figure 8:

Figure 8 – Potential Readings of the Clause

A	To promote	1 science	B	by securing	3 Authors	C	The exclusive	5 Writings
	the	2 useful Arts		for limited	4 Inventors		right to their	6 Discoveries
Progress of			Times to			respective		

Although there are twenty-seven³³⁵ possible ways of readings the Clause, the Dichotomous Reading argues that only two of them are interpretively legitimate, namely, A1B3C5 (connecting “science”, “authors” and “writings”) and A2B4C6 (connecting “useful arts”, “inventors” and “discoveries”).³³⁶ This argument is based on original intent: It argues that people at the time of the Founding would read the Clause while separating it in their minds into two independent clauses. This sub-Part suggests that evidence of the kind necessary to support a Dichotomous Reading has not been provided yet. It also presents evidence that tends against a Dichotomous Reading of the Clause. Ultimately, it doubts that there is reason to take the disjunctive reading much beyond the anecdotal sense suggested by De Wolf.³³⁷

The Dichotomous Reading, as a model of meaning for the Clause, can be important only to the extent that it highlights the powers and limitations set in the Clause. As such, it suggests, for example, that copyright protection of statutes whose goal is to promote useful arts and patent statutes whose goal is to promote science (or knowledge) are unconstitutional. This harsh practical consequence would be enough for many to reject this approach. Its subsistence is thus surprising, and probably can be attributed only to a misconception of the original intent, which this sub-Part clarifies.

³³³ See, e.g., *Eldred*, 537 U.S. at 192-93 (“The Copyright and Patent Clause of the Constitution, Art. I, § 8, Cl. 8, provides as to copyrights: ‘Congress shall have Power ... [t]o promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings.’”); *Graham*, 383 U.S. at 5 (“the federal patent power stems from a specific constitutional provision which authorizes the Congress ‘To promote the Progress of ... useful Arts, by securing for limited Times to ... Inventors the exclusive Right to their ... Discoveries.’”); *Id.* at n.1 (“The provision appears in the Constitution spliced together with the copyright provision, which we omit as not relevant here.”).

³³⁴ See, e.g., WALTERSCHEID, *supra* note 38, at 122 (finding a “careful dichotomy between the patent and copyright provisions of the clause”).

³³⁵ There are three junctions on this graph ([science, useful arts], [authors, inventors] and [writings, discoveries]). In each junction either element or both can be chosen. Thus there are 3³ or 27 different ways of reading the Clause.

³³⁶ See *Solum*, *supra* note 183, at 11-12 & tbl. 2.

³³⁷ DE WOLF, *supra* note 326, at 14-15 (making his observation “for the consideration of the curious”).

This sub-Part reviews the Dichotomous Reading approach. It first examines the arguments made to support it and argues that they suffer from various shortcomings. It presents a multiplicity of evidence of contemporaneous readings other than those suggested by a Dichotomous Reading, which tend against this approach. Although to reject the Dichotomous Reading it is enough to show that one additional reading of the Clause is interpretively sound, this sub-Part presents evidence supporting several such readings.

1. OVERVIEW OF ARGUMENTS SUPPORTING A DICHOTOMOUS READING

The basis for a Dichotomous Reading has not been given in a coherent manner, making it difficult to examine it. Through the years, it was given different names and was associated with different historical times.³³⁸ Its linguistic bases can be reduced to two: One is that the Clause embodies a grammatical structure of a “balanced sentence.” None of the scholars invoking this label explained what it meant exactly or referenced to a source for that matter. The Clause, however, does not seem to fit the definition of a “balanced sentence” supplied by at least two sources.³³⁹ The other is the *reddendo singula singulis* rule of statutory construction (“Reddendo Rule”),³⁴⁰ suggested by Crosskey.³⁴¹ This rule, however, does not necessarily demand a Dichotomous Reading:

³³⁸ De Wolf originally termed it a “balanced style of composition so much used in the days of the colonial worthies.” Lutz termed it a “balanced sentence” and argued that it was “much used by sixteenth century writers.” See Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 18 GEO. WASH. L. REV. 50, 51 (1949). See also Robert I. Coulter, *The Field of the Statutory Useful Arts (Part II)*, 34 J. PAT. OFF. SOC'Y 487, 491 (1952) (claiming the Clause to be an example of the “so-called ‘balanced sentence,’” and to have “followed 18th century practice.”). Crosskey based it on the *reddendo singula singulis* rule of legal construction that will be analyzed below, which he claimed applies to many eighteenth century provisions. WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION* 413, 486 (University of Chicago Press, Chicago: 1953); See also Anthony W. Deller, *An Inquiry into the Uncertainties of Patentable Invention and Suggested Remedies*, 38 J. PAT. OFF. SOC'Y 152, 161-62 (1956) (quoting correspondence with William Crosskey, in which the latter explains that he took the Clause *reddendo singula singulis*); Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 5, 9 n.10 (1966) (claiming the Clause to be a “balanced sentence,” whose taking *reddendo singula singulis* was a rule of construction at common law). Walterscheid followed De Wolf, calling it “a balanced style of composition much favored in the eighteenth century. WALTERSCHEID, *supra* note 38, at 116.

³³⁹ See, e.g., Nancy Huddleston-Packer and John Timpane, *WRITING WORTH READING: THE CRITICAL PROCESS* (3d ed. 1997) (“Balance is a stylistic variation on parallelism. In a balanced sentence, the length and rhythm, as well as the grammatical elements, are the same in both parts. We could find no better illustrations of balance than in the orations of Brutus and Mark Anthony over the body of Caesar in Shakespeare’s *Julius Caesar*. As he was valiant, I honor him; but as he was ambitious, I slew him.”); WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 206 (G. & C. Merriam Company, Springfield, MA: 1939) (defining a “balanced sentence” as “[a] compound sentence in which the co-ordinate clauses (and their respective dependants when present) are correspondent in structure.”).

³⁴⁰ See 53 C.J. 663 (1931) (“Literally, ‘By referring each to each; referring each phrase or expression to its appropriate object.’ A rule of construction.”); 50 AM. JUR. *Statutes* § 267 (1944) (“referring each phrase or expression to its appropriate object. Under this doctrine ... words or clauses in a statute are taken distributively where the sense requires it”) (footnotes omitted).

³⁴¹ See 1 CROSSKEY, *supra* note 338, at 413, 468 (reading the Clause as comprised of two distinct powers). Further applications of this rule followed Crosskey’s. See, e.g., Anthony W. Deller, *An Inquiry into the*

Where it applies, interpreters should connect those words that are appropriate according to context.³⁴² Crosskey believed, for dubious reasons,³⁴³ that under the original meaning the word “science” could only relate to copyrights and that “useful arts” could only relate to patents; thus, his application of the Reddendo Rule resulted in a Dichotomous Reading. Below, it will be shown that although the context allows these readings, it is not exclusive of others. For example, a Dichotomous Reading does not follow from an application of the Reddendo Rule if Congress can Constitutionally issue patents to promote the progress of knowledge.³⁴⁴

Four major pieces of evidence are provided in the literature in support of the Dichotomous Reading. First, it was argued that such a reading is necessitated by the language of The Federalist No. 43 that reads: “[t]he copyright of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions seems with equal reason to belong to the inventors.”³⁴⁵ A close reading of the Federalist, however, does not provide the necessary support for Dichotomous Reading. The Federalist does not refer to either “science” or “useful arts” and therefore cannot support a disjunctive reading of the Progress Clause. Regarding the Exclusive Rights Clause, the federalist refers to “inventions” of “inventors” whereas according to Dichotomous Reading the Clause refers to “discoveries” of “inventors”. The Federalist, thus, does not provide support argued for, nor does it suggest a lack of intent to protect the writings of inventors. Also, the Federalist refers to the “copyrights” of “authors”

Uncertainties of Patentable Invention and Suggested Remedies, 38 J. PAT. OFF. SOC'Y 152, 161-62 (1956). It is possible, however, that this rule was intended by Justice Thompson. *See supra* note 327.

³⁴² *See* 2 CROSSKEY, *supra* note 338, at 717 (explaining that the term *reddendo singula singulis* designates a way of distributing words in one part of a sentence to words in another part of it as might be appropriate. *See also* references *supra* note 340.

³⁴³ Crosskey's dichotomous reading of the Clause resulted mainly from a distinction he drew between the reasons for empowering Congress to issue patents versus copyrights. Since there is room to doubt Crosskey's analysis, there is room to doubt his conclusion. Crosskey assumed that the patent power was formerly an executive power (a Royal prerogative), and that an intended delegation of this power to the legislature had to be done explicitly. In contrast, he assumed that the copyright power was enumerated in order to limit common law copyrights. *See* 1 CROSSKEY, *supra* note 338, at 421, 486. Regarding the division of power among the constitutional players, moving the power from the states to the federal government was significantly more important than delineating the division of powers among the three branches. It is also unclear why Crosskey analyzes the writing of the Clause against the English rather than the American backdrop. In the American colonies and states patents were almost always granted by private enactments of the colonial legislatures rather than by an executive order. *See generally* BUGBEE, *supra* note 17, ch. 3. *See also id.* at 57. Lastly, THE FEDERALIST NO. 43 (James Madison) explains the reasons behind the Clause and tends to show that the Framers made no distinction between the legal bases for granting copyrights and patents, an understanding that differs from Crosskey's hypothesis.

³⁴⁴ The Reddendo Rule is only one of many rules of construction and it does not necessarily take precedence over all the others. Specifically, a major rule of constitutional construction is that within the boundaries of reason the Constitution should be interpreted broadly as delineating general principles rather than be constricted to a narrow, overly literal, or pedantic grammatical meaning. Thus, there is room to question whether the Reddendo Rule should take precedence over all others, as well as to doubt its appropriateness in a constitutional, as opposed to a statutory or contractual context.

³⁴⁵ *See* THE FEDERALIST NO. 43 (JAMES MADISON) (part relating to intellectual property quoted in full *supra* note 124).

whereas according to Dichotomous Reading the Clause refers to “writings” of “authors”. The Federalist, thus, does not suggest that copyrights are not to be given for discoveries. Regarding this last point, it seems that the Framers intended to protect discoveries in copyrights: The word discoveries in the Clause came from proposal M4. “Discoveries” seems to include a sense of basic scientific research since Madison proposed the protection of inventions that have market value by the grant of exclusive rights in his M1 proposal. When he talked about “discoveries” in M4 through government encouragements, the text and logic suggest that he meant basic scientific research that cannot be rewarded by the market. If such knowledge is to be protected by exclusive rights, it seems that it would be by writings referring to it.

Second, the Dichotomous Reading is based on the assumption that Congress treated copyrights and patents separately beginning with the Patent and Copyright Acts of 1790.³⁴⁶ The separate statutory treatment of patents and copyrights is argued to have resulted from the Framers’ separate conceptualization of the two areas.³⁴⁷ The separate treatment of patents and copyrights, however, started only in 1790, three years after the Clause had been already written. Before, during, and after the Clause was written, the general protection of patents and copyrights was joint. Before the Convention, South Carolina, the only state that granted statutory protection for both patents and copyrights, did so in the same statute. Moreover, it conferred upon inventors the same rights and subjected them to the same restrictions as authors. During the Convention, patents and copyrights were bound together in the Clause. After the Convention, the first attempt to legislate under the Clause was a joint patent and copyright bill, H.R. 10.³⁴⁸ The statutory separation of patents and copyrights in 1790 did not result from a substantial ideological or theoretical difference in their subject-matters. Rather, it was the result of arbitrary, time-specific constraints: Representative Burke wished to hurry the protection of literary property, arguing before the House that there were valuable books being copied and printed surreptitiously. He also believed that such protection would be relatively easy to legislate and that a short bill would suffice. On the other hand, property rights with regard to inventions were much harder to define and would require a longer discussion.³⁴⁹ This led to the introduction of two bills. Ironically, the Patent Act of 1790 eventually passed before the Copyright Act of 1790 did. One may hypothesize that had Burke foreseen this

³⁴⁶ 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.”).

³⁴⁷ See, e.g., WALTERSCHEID, *supra* note 38, at 119 (“In enacting the first patent and copyright laws, the first and second federal Congresses certainly understood that the clause granted two separate and distinct powers, the one directed to promoting the progress of science and the other to promoting the progress of useful arts.”); *Id.* at 120.

³⁴⁸ See 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 513 (L. G. De Pauw et al. eds., 1979) [hereinafter DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS]. In that bill, as opposed to South Carolina’s statute, the rights of authors differ from those of inventors. *But see* P. J. Federico, *The First Patent Act*, 14 J. PAT. OFF. SOC’Y 237, 238 (1932) (arguing that this bill was “making very little distinction between these two species of property and, in general, treating them in the same fashion.”).

³⁴⁹ See 1 ANNALS OF CONG. 1117-18 (Joseph Gales, ed. 1789) (Jan. 25, 1790) (H.R., 1st Cong., 1st Sess.).

outcome and not asked for the separation of patents and copyrights, the two might have been protected under the same statute for many years.

Third evidence supporting a Dichotomous Reading is the use of the word “respective”. It has been argued that the word serves in the same sense as “respectively”.³⁵⁰ This is problematic for two reasons: First, words are to be given their regular meaning generally, and the meaning of respective is different from that of respectively. The regular reading of “respective” in the Clause would allow protection for the writings and discoveries of inventors and for the writings and discoveries of authors if they promote progress of knowledge. This sense is exactly the one expressed by the model this paper suggests. Second, this meaning was suggested by a scholar who supports the “balanced sentence” thesis. However, together they are superfluous: If a Dichotomous Reading would have been clear to readers of the Clause at the time of the Founding, there seems to have been little need to add the word “respectively”. Indeed, many proponents of a Dichotomous Reading read “respective” in its usual sense.³⁵¹ Lastly, even if the word “respective” were to read “respectively” it would not support reading the Progress Clause disjunctively.

Lastly, Dichotomous Reading is arguably supported by the titles of the Patent Acts of 1790, 1793, and 1836 which read “An Act to Promote the Progress of Useful Arts.” These titles are indeed evidence that patents are related to the promotion of the useful arts. Such evidence only supports portions of the “positive” prong of the Dichotomous Reading argument associating patents with useful arts, but fails to support the other half of the positive prong -- that copyrights relate to science -- and does not prove the negative prong of the argument that forestalls other readings.

2. EVIDENCE TENDS AGAINST A DICHOTOMOUS READING

To prove that the Clause should be read a dichotomously, it is not enough to show that it can be reasonably read A1B3C5 and A2B4C6 without more. Rather, it is also necessary to show a clear and consistent intent to foreclose additional readings. As the evidence below shows, not only is such negative intent absent, but also a clear intent to read the Clause in additional ways present.

The way the Clause was drafted out of Pinckney and Madison’s proposals shows that the Progress Clause should not be read dichotomously. For example, it can be read A(1or2)B3C5 and A(1or2)B4C6.³⁵² The Progress Clause resulted from joining together the “ends” of powers P3, P4, and M4. The ends of these three proposals relate to the promotion of scholarly, scientific, and technological pursuits. These three proposals do not suggest a dichotomous distinction between “science” and “useful arts”.³⁵³ Moreover,

³⁵⁰ See WALTERSCHEID, *supra* note 38, at 116, 213.

³⁵¹ See, e.g., 1 CROSSKEY, *supra* note 338, at 413, 468 (reading the two powers as one securing “to authors the exclusive right to their respective writings” and another relating “to inventors the exclusive right to their respective discoveries.”).

³⁵² In words “to promote the progress of science and useful arts, by securing for limited times to authors the exclusive right to their respective writings” and “to promote the progress of science and useful arts, by securing for limited times to Inventors the exclusive right to their respective discoveries”.

³⁵³ The goals of P3, P4 and M4 seem to be somewhat different. The goals of P3 (promotion of literature, arts and sciences) are closest to the goals of current copyright law. The goals of P4 are closest to current

these three proposals do not manifest an exclusive association of “science” with copyrights and of “useful arts” with patents. Indeed, they manifest a generally indistinct association of both “science” and “useful arts” with federal education and governmental encouragements, which makes the Dichotomous Reading’s case even less plausible. According to its construction, the Progress Clause seems to apply to both patents and copyrights as an “end” tacked onto two means.

Dichotomous reading is encumbered by the fact that there was no clear distinction between “science” and “useful arts” in 1787 as there is none today.³⁵⁴ These two terms complement each other in describing a large swath of human knowledge, rather than clearly delineating two components of it. Thus, the utility in insisting that an absolute distinction exists between the two and forcing legal doctrine to conform to such imaginary gulf seems questionable. For example, the Massachusetts’ 1780 Constitution from which P3 and P4 were taken highlighted the importance of promoting three sciences and four arts moving indistinctly from art to science and back again.³⁵⁵ Moreover, the inability of scholars, courts, and dictionaries to precisely distinguish knowledge, useful knowledge, science, art, and useful art from one another further proves the point that these two terms cannot be completely severed from one another.³⁵⁶ Tending against the existence of a clear conceptual dichotomy is the fact that current case law often views the promotion of both “science” and “useful arts” as the goal of patent and copyright laws.³⁵⁷

Contemporaneous evidence shows that at the time of the Founding, protection of literary property was intended also to promote “useful arts”, supporting an A2B3C5 reading of the Clause. North Carolina’s Copyright Act of 1785, for example, stated in its preamble that the “security of literary property must greatly tend to encourage genius, to

patent law (protection of various useful arts). The goals of M4 (encouragement of advancement of useful knowledge and discoveries) are most related to the protection of what we would call today basic scientific research. Since this kind of research is not directly remunerable from the market, governmental encouragements – such as present day National Science Foundation grants - are needed. At that time, however, the Framers seem to have feared that such power would be abused by the federal government and seem to have believed that basic science would be relatively more remunerable compared with how we view it today, perhaps because then basic scientific research was far more connected with everyday life. It seems that over time, as the fear of abuse of power against various states faded away and as the market became less able to fund basic scientific research, Congress allowed the federal government to fund it through organizations like the NSF or National Institution of Health.

³⁵⁴ Samuel Johnson’s 1818 dictionary, which was “probably the most authoritative dictionary for the day”, and which “carries the word meanings of the late 1700’s,” defines the word “science” by the use of the word “art”, and the word “art” by the use of the word “science”. See Rich, *supra* note 329, at 396; Seidel, *supra* note 338, at 10.

³⁵⁵ It spoke of the “promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country,” creating the following sequence: A, S, S, A, A, A, S. This classification was done according to the conventional wisdom: ‘A’ stands for “useful art,” ‘S’ for “science” in the sense of knowledge, learning. One may disagree with the classification of the terms above as either ‘art’ or ‘science,’ which only serves to further prove the point that there is no clear demarcation.

³⁵⁶ See generally Solum, *supra* note 183, at 47-53 and references therein.

³⁵⁷ See, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (“The subject-matter provisions of the patent law have been cast in broad terms to fulfill the constitutional and statutory goal of promoting ‘the Progress of Science and the useful Arts’”).

promote useful discoveries, and to the general extension of arts and commerce”.³⁵⁸ The Copyright Act of 1802 extended the 1790’s Act protections to several useful arts.³⁵⁹ Moreover, the Court saw the promotion of “useful arts” as a specific Constitutional goal of copyright law.³⁶⁰

Contemporaneous evidence shows that at the time of the Founding, “inventors” was not a word disassociated dichotomously from copyright law, supporting an A1B4C5 reading of the Clause. While extending copyright protection to various useful arts, the Copyright Act of 1802 protected any person “who shall invent (...) historical or other print or prints” and to one who “from his own works and inventions” shall cause the same to be made.³⁶¹ Inventors were explicitly named as a protected class in further major revisions of the law such as in the Copyright Act of 1831,³⁶² Copyright Act of 1870,³⁶³ and mentioned in an amendment to the Act as late as 1905.³⁶⁴

Contemporaneous evidence supports an original understanding of copyright law as aimed to protect “discoveries”, supporting an A1B3C6 reading of the Clause. For example, the preamble of North Carolina’s Copyright Act of 1785 stated that the protection of literary property tends to “promote useful discoveries”.³⁶⁵ Additionally, the second intellectual property petition to Congress was by John Churchman who “hath invented several different methods” by which the longitude of a place can be determined

³⁵⁸ See COPYRIGHT ENACTMENTS, *supra* note 113, at 23.

³⁵⁹ See *id.*, at 32 (extending copyright protection “to the arts of designing, engraving, and etching historical and other prints”).

³⁶⁰ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (both the majority and dissent agreed that copyright law should promote the progress of the “useful arts”); *Quality King Distributors, Inc. v. L’Anza Research International*, 523 U.S. 135, 151 (1998) (“In construing the statute, however, we must remember that its principal purpose was to promote the progress of the ‘useful Arts.’”). In many other instances, this goal was mentioned together with the promotion of science. See, e.g., *Feist*, 499 U.S. at 349 (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

³⁶¹ See Copyright Act of 1802 § 2, 2 Stat. 171 (1802), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 113, at 33 (“*And be it further enacted*, That from and after the first day of January next, every person, being a citizen of the United States, or resident within the same, who shall invent and design, engrave, etch or work, or from his own works and inventions, shall cause to be designed and engraved, etched or worked, any historical or other print or prints, shall have the sole right and liberty of printing, re-printing, publishing and vending such print or prints”).

³⁶² See Copyright Act of 1831 § 1, 4 Stat. 36 (1831), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 113, at 35 (granting protection to anyone “who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving”); *Id.* § 2 (providing a copyright renewal term of fourteen years to any such “author, inventor, designer, engraver” still living at the expiration of the initial term); *Id.* § 16 (mentioning the term “inventor” five times while extending the initial copyright protection term to 28 years).

³⁶³ See Copyright Act of 1870 § 86, 16 Stat. 212 (1870), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 113, at 44 (granting protection to any “author, inventor, designer, or proprietor” of protected works); *Id.* § 88 (granting copyright renewal rights to “the author, inventor or designer”).

³⁶⁴ See Copyright Act of 1905 § 4952, 33 Stat. 1000 (1905) (“An amendatory act relating to the protection of books in foreign languages first published abroad”).

³⁶⁵ See COPYRIGHT ENACTMENTS, *supra* note 113, at 23.

given its latitude.³⁶⁶ The committee to which his petition was passed reported on April 20, 1789 that Churchman had found a way to apply his ingenious ideas to practice by the use of a map, a globe, and tables, and recommended “that a law should pass to secure to Mr. Churchman, for a term of years, the exclusive pecuniary emoluments to be derived from the publication of these several inventions.”³⁶⁷ Churchman’s petition was made on April 15, 1789, the first date on which Congress heard intellectual property petitions. It was read more than two months before H.R. 10, the first joint copyright-patent bill was presented, and more than a year before the copyright and patent acts of 1790 were passed. Thus, it is representative of the common understanding of the Clause before H.R. 10 and the acts of 1790 affected that understanding. Churchman’s petition and its grant by Congress combine elements that we would now classify as relating separately to patents (a method put down to practice) and copyrights (protection of published works), but which may have not been so separated when the Convention sat.

Perhaps the most difficult question for Dichotomous Reading proponents to answer is why does this reading forestall an A1B4C6 reading of the Clause, namely, why should the promotion of knowledge be a goal disassociated from patent law. Such reading entails that patent acts that promote knowledge or learning should be unconstitutional.³⁶⁸ This would not only be difficult to maintain normatively, but also prescriptively: Whenever there is progress in the ‘useful arts’, it means that ‘artisans’ have learnt something new. Patent law aims to induce people to invent, discover, research, and develop new, useful, and non-obvious articles and processes. These various activities are certainly aimed at acquiring and producing new knowledge. Dichotomous Reading proponents argue that the word “science” in the eighteenth century meant “knowledge” or “learning” rather than its current sense. Contemporary evidence, however, shows that the areas of study that we call “scientific” today were still included in that term.³⁶⁹ The flip side of this difficulty is that if the word “science” back then was associated in the Founders’ minds with copyright protection, why does the word “science” not appear in the early copyright

³⁶⁶ 1 ANNALS OF CONG. 149 (Joseph Gales, ed. 1789) (April 15, 1789) (1st Cong., 1st Sess.).

³⁶⁷ *Id.* at 178 (April 20, 1789). Churchman petitioned “that a law may pass for vesting in the petitioner, his heirs and assigns, an exclusive right of vending spheres, hemispheres, maps, charts, and tables, on his principles of magnetism, throughout the United States”. *Id.* at 149 (April 15, 1789). Churchman’s protection was in copyright: He got the same protection given to David Ramsay for his two books on the American Revolution. *Id.* at 180 (April 20, 1789).

³⁶⁸ Indeed, a major Dichotomous Reading approach proponent concedes as much. *See* Coulter, *supra* note 326, at 492 (“all patented inventions do advance ‘Science’ in its broad sense of ‘learning’”); *Id.* at 498.

³⁶⁹ *See, e.g.*, Letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (Aug. 27, 1786), *in* THOMAS JEFFERSON: WRITINGS 860 (Merrill D. Peterson ed., 1984) (listing, among others, mathematics, astronomy, physics, anatomy, botany and chemistry as branches of science); Letter from Thomas Jefferson to the Rev. James Madison (Jul. 19, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON 379 (Julian P. Boyd ed., 1956) (reporting from France about various recent scientific theories, discoveries, and experiments regarding electricity, optics, chemistry, and physics); Letter from Thomas Jefferson to Joseph Willard (Mar. 24, 1789), *in* THOMAS JEFFERSON: WRITINGS, *supra* at 947 (referring to mathematics, the principles of mechanics and chemistry as sciences).

acts? Interestingly, the word “science” appears in a draft of the Patent Act of 1790,³⁷⁰ and in the Patent Acts of 1793,³⁷¹ 1836,³⁷² and 1870.³⁷³ In these four instances, it appeared in a sense generally indistinguishable from “useful art”.³⁷⁴

Contemporaneous evidence shows that the word “authors” was much closer in its sense to the word “inventor” at the time of the Founding than it is today. It thus suggests that the Founders would not have objected to an A2B3C6 reading of the Clause. The Convention’s Journal referred to God as the “author of man”,³⁷⁵ which would be unusual phraseology for a present day speaker. Today, authorship is generally not used to refer to physical creation. Moreover, Pinckney’s Observations restated the Clause as “to secure to Authors the exclusive rights to their Performances and Discoveries.”³⁷⁶ In this rephrasing of the Clause, which occurred contemporaneous to the Founding, “authors” encompassed both what we would today call authors and inventors. This duality of meaning continued in common legal speech for several decades. In 1832, Chief Justice Marshall wrote “the settled purpose of the United States” was “to confer on the authors of useful inventions an exclusive right for the time mentioned in their patent.”³⁷⁷

3. DICHOTOMOUS READING UNAPPEALING PRACTICALLY

Dichotomous Reading does not seem to be a helpful tool to clarify legal analysis or doctrine for academics, judges or lawyers. Copyright law and patent law overlap in their protection of several subject matters. Therefore, an interpretive approach that argues for a dichotomy between the two is not only descriptively erroneous, but also hazardous to the

³⁷⁰ See Patent Bill H.R. 41 § 2 (Feb. 16, 1790), in 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 348, at 1627 (requiring patentees to deliver a written specification that will “enable a workman or other person skilled in the art, science or manufacture whereof it is a branch, or wherewith it may be nearest connected, to make, construct or use the same”). The House struck out “science.” See *id.* n.19.

³⁷¹ See Patent Act of 1793 § 3, 1 Stat. 318-23 (1793) (requiring patentees to deliver a written description of their inventions as “to enable any person skilled in the art or science, of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same”).

³⁷² See Patent Act of 1836 § 6, 5 Stat. 117 (1836) (requiring patentees to deliver a written description of their inventions “as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same”); *Id.* § 7 (relating to a patent examiner who has “knowledge and skill in the particular art, manufacture, or branch of

³⁷³ See Patent Act of 1870 § 26, 16 Stat. 198-217 (1870) (requiring patentees to file a writing description of their inventions “as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same”).

³⁷⁴ Moreover, the 1837 Patent Act had the word “science” in its title. See Patent Act of 1837, 5 Stat. 117 (1837) (“An Act in addition to the act to promote the progress of science and useful arts.”). This title is clearly erroneous, since there was no such previous patent act. This fact, however, further cuts against the existence of a clear dichotomy between “science” and “arts”.

³⁷⁵ See 1 FARRAND 113 (Madison’s Journal for July 25, 1787) (“Such is the nature of man, formed by his benevolent author no doubt for wise ends”) (transcription of Governor Morris’ comments). See also 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 114, at 140 (record for Jul. 6, 1775) (John Dickinson’s Draft of Declaration on Taking Arms) (“the Divine Author”).

³⁷⁶ See *supra* note 37.

³⁷⁷ Grant v. Raymond, 31 U.S. (6 Pet.) 218, 241 (1832).

extent that judges, legislatures, and lawyers would attempt to decide cases and form policy based on this arguable dichotomy.

Computer software, for example, can be both copyrighted and patented.³⁷⁸ The aesthetic features of useful objects can be simultaneously protected in copyright and by a design patent.³⁷⁹ Both patents³⁸⁰ and copyrights³⁸¹ can promote progress in the art (or science) of business. It is not always possible to categorize a creation as either an “invention” or a “writing”. It is not always possible to categorize an area of human creativity as either a “science” or a “useful art”. Sometimes it can be either one or both; sometimes it may be hard to tell. Since the boundary line between patents and copyrights, “science” and “useful arts”, and between “writings” and “discoveries” is not always clear, there seems to be no doctrinal reason to insist on such a clear line of separation. Certainly, formal lexicographic taxonomies should not be the ultimate source of legal policy; this is particularly true when the definitions of the words are themselves unclear.

In conclusion, the argument is not that there was no distinction between authors, inventors, and their products of mind and industry; rather, it is only a weak argument that an absolute dichotomy between these words did not exist at the time of the Founding. An argument for a dichotomous construction of the Clause should thus be made anew rather than by reference to original intent. The case for such argument, however, seems weak.³⁸²

CONCLUSION

This Article clarified the text, history and precedent relating to the Intellectual Property Clause using a combined historical and quantitative methodology. It started the investigation by exploring the debates in the federal Constitutional Convention that led to the adoption of the Clause. It concluded from available evidence that the Pinckney Plan of Government did not relate to intellectual property. It found that James Madison made a patent power proposal in the Convention. It found that the Clause originated from eight proposals made by Charles Pinckney and James Madison, and that Pinckney and Madison derived their proposals from American states’ enactments. It concluded that the Progress Clause serves as a limitation on Congress’ power to grant intellectual property rights. It concluded that the Supreme Court construes and enforces the limitations on Congress’ intellectual property power using a non-deferential approach, and supplied various justifications for this approach. Lastly, as the courts and the legal community will

³⁷⁸ See generally ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 911-1059 (2d ed. 2000).

³⁷⁹ See generally *id.* at 333-39, 386-97, 401.

³⁸⁰ See, e.g., *State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) (holding that business methods are patentable).

³⁸¹ See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (holding that commercial advertisements are copyrightable).

³⁸² The model *supra* Figure 6 can be useful, with slight adaptations, to Dichotomous Reading proponents. The Clause would be depicted as granting two powers, each represented by an adapted Figure 6 – one would relate only to “authors” and “writings” and the other to “inventors” and “discoveries”. In a similar way, adaptations can be made to depict a disjunctive reading that would apply only to the Exclusive Rights Clause.

have to spell out the nature of the limitation the Progress Clause imposes on Congress' power, it suggested an array of interpretive possibilities of giving the Progress Clause meaning that dovetail with the Clause's text, history, and precedent.

In the last years, several statutes that expand the boundaries of intellectual property protection have been enacted, of which the Copyright Term Extension Act of 1998 is one. The social, cultural and economic costs of these statutes are substantial. The social benefits are often very small. At the time of this writing, bills before Congress call for future expansion of intellectual property rights. In *Eldred*, an uninformed Court used textual, historical, and doctrinal considerations to avoid taking a look at the social costs of CTEA. This Article has shown that these considerations rather suggest that courts should take the social effects of intellectual property statutes into account.

APPENDIX – HYPOTHESES TESTING RE: SOURCE OF MADISON’S EDITED JOURNAL

The Appendix conducts a statistical test to determine whether James Madison proposed on August 18, 1787 in the Federal Convention that the future Congress would have power to issue patents. Table 6 below contains the proposals for Congressional power Madison made that day as recorded in three sources: The Convention’s Journal (“CJ”), Madison’s Journal (“MJ,”) and Madison’s Edited Journal (“JME”). JME stands for the contents of a sheet of paper Madison pasted over his original record when he prepared his journal for posthumous publication.³⁸³ For ease of reference, Table 6 lists the three sources one above the other, with the character “>” inserted in various places to align their conforming parts.

As Table 6 shows, Madison’s proposal that Congress shall have power “[t]o secure to the inventors of useful machines and implements the benefits thereof for a limited time” is recorded in MJ but neither in CJ nor in JME. Conventional wisdom assumed that since JME does not mention this patent proposal, Madison “admitted” that he did not make it. In contrast, this Article suggests that Madison made this patent proposal, for reasons detailed in Part II. This Appendix serves as one link in the argument, by showing that Madison was not editing MJ in writing JME, but rather was copying the contents of CJ.

The first line above the three texts, DFR, notes places where the three records are not identical. The line above that, SBSTN, indicates the substantiality of the difference. Slight differences, such as in punctuation, capitalization, or enumeration,³⁸⁴ were given a value of 1, medium differences, such as in the middle of words, were given a value of 5, and substantial differences, such as in words, were given a value of 9.

The next line up, SMLR, notes which two of the three records are in accord: “M” designates that JME is the same as MJ, which supports the conventional wisdom; “C” designates that JME is the same as CJ, which supports the argument in this Article. Where JME is different from MJ and CJ, the letter I (irrelevant) appears in the SMLR line.³⁸⁵ The SBSTN value of I’s is set to 1, as they are all of little textual significance. The patent power is left out of the analysis.³⁸⁶

The three rightmost columns total the M, C, and I indications in each line, taking account of the their SBSTN values. For example, if there are two M indications in a line with SBSTN values of 1 and 5 respectively, the M column for that line would have a value of 6. The bottom line of Table 6 totals the M, C and I indications over the whole text.

³⁸³ See generally *supra* Part II.

³⁸⁴ Another invisible character is the carriage-return, making each proposal start on a new line in JME and CJ, but not MJ. It was not counted as an independent textual difference, but rather assumed to be included in the numeral appearing before each proposal.

³⁸⁵ In some cases marked by an I, CJ and MJ are identical. The Appendix does not check the improbable hypothesis that one served the basis for the other.

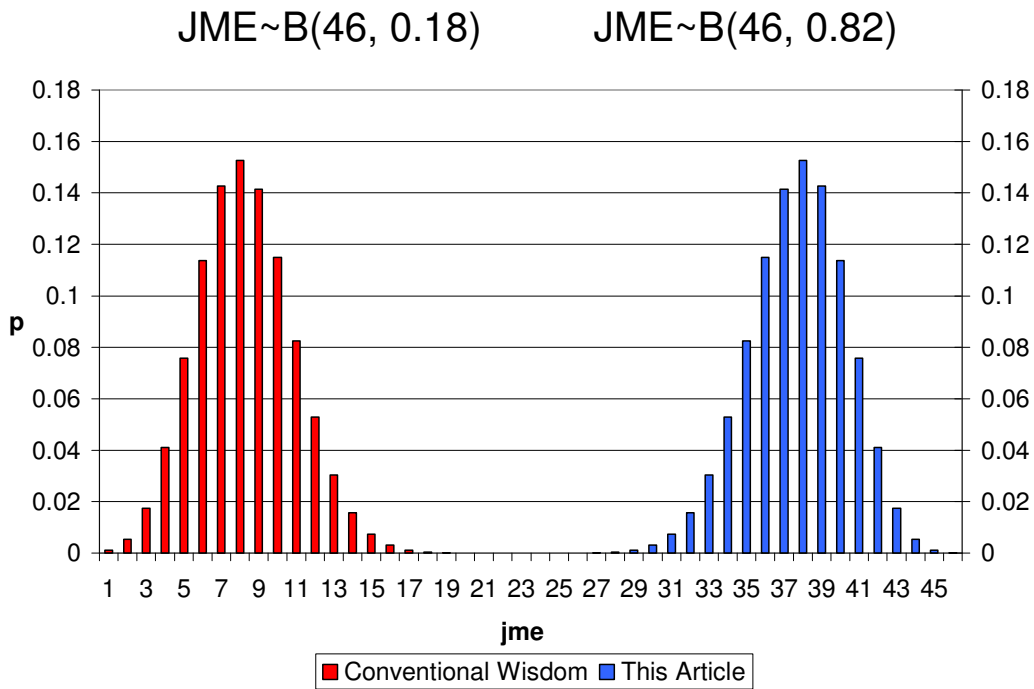
³⁸⁶ This is because the Appendix wishes to find the reasons for the omission of the patent power from JME by examining textual indication surrounding this omission. Also, the test evaluates two hypotheses regarding the source of JME, and the patent power does not appear in JME.

As the bottom line in Table 6 shows, this Article’s hypothesis that JME was based on CJ got a score of 60, while the conventional wisdom that JME was based on MJ got only 14. This result would not be materially different if SBSTN were to receive only values of 1 rather than 1, 5 or 9. This type of counting would result in 36 C’s, 10 M’s, and 10 I’s.

The Appendix uses binomial distribution to assess the statistical significance of the latter score.³⁸⁷ It focuses on the 46 times in which JME is equal to either MJ or to CJ. In these cases, MJ will be assumed to have generated a value of “0” and CJ will be assumed to have generated a value of “1”. JME gets the value of the source to which it is identical.

Neither the conventional wisdom nor this Article assumes, however, that JME is a perfect copy of either MJ or CJ. There is noise in the sample, reflected by SMLR values of I. This noise is about 18 percent of the text’s length, as there are ten I’s among the fifty-six C’s, M’s and I’s. Thus, this Article’s assumption is that JME would be identical to CJ eighty-two percent of the time, rather than a hundred percent of the time. This hypothesis can be written as $JME \sim B(46, 0.82)$. Conversely, the conventional wisdom would not expect JME to be equal to CJ zero percent of the time, but rather eighteen percent of the time. Thus, the conventional wisdom’s hypothesis can be written as $JME \sim B(46, 0.18)$. Their distributions are as follows.

Figure 9 – Two Hypotheses Regarding Source of JME



³⁸⁷ $X \sim B(n, p)$ notes that X has a binomial distribution with parameters n and p . This distribution serves to calculate the number of heads one would expect if she flipped a coin n times when the probability of getting heads each time is p . The mean of X is pn and the variance is $pn(1-p)$. Binomial distribution was chosen as it is an approximation of normal distribution, it is suitable for discrete rather than continuous probability distribution, and is suitable for a series of binary events.

Since $p(\text{JME} \geq 36 \mid \text{JME} \sim \text{B}(46, 0.18)) < 0.00000001$,³⁸⁸ conventional wisdom's assumption can be rejected with a p-value of 0.000001 percent. At the same time, the hypothesis suggested by this Article is likely: $p(\text{JME} \geq 36 \mid \text{JME} \sim \text{B}(46, 0.82)) = 0.81$ ³⁸⁹; $p(\text{JME} \leq 36 \mid \text{JME} \sim \text{B}(46, 0.82)) = 0.31$.³⁹⁰ Obviously $E(\text{JME} \sim \text{B}(46, 0.82)) = 37.72$, which is very close to the observed 36.

³⁸⁸ In words: The probability of observing thirty-six or more cases of identity between CJ and JME out of forty-six observations is less than 1 in one hundred million, assuming that they should be identical eighteen percent of the time.

³⁸⁹ In words: The probability of observing thirty-six or more cases of identity between CJ and JME out of forty-six observations is eighty-one percent, assuming that they should be identical eight-two percent of the time.

³⁹⁰ In words: The probability of observing thirty-six or less cases of identity between CJ and JME out of forty-six observations is thirty-one percent, assuming that they should be identical eight-two percent of the time.

Table 6 – Comparison of Three Records for August 18, 1787

Source	Contents	I	M	C
SMLR	C C			2
SBSTN	1 1			
DFR	xxxx			
MJ	1. to dispose of the unappropriated lands of the			
JME	>>>To dispose of the unappropriated lands of the			
CJ	>>>To dispose of the unappropriated lands of the			
SMLR	M C		1	1
SBSTN	1 1			
DFR	xxxxxx xxxxx			
MJ	U.>>>>S.>>>>			
JME	U.>>>> States			
CJ	United States			
SMLR	C M I	1	1	1
SBSTN	1 1 1			
DFR	xxx x x			
MJ	2. To institute temporary Governments for new			
JME	>>>To institute temporary Governments for New			
CJ	>>>To institute temporary governments for new			
SMLR	I C	1		1
SBSTN	1 1			
DFR	x x			
MJ	States arising thereon.			
JME	States arising therein>			
CJ	States arising thereon>			
SMLR	C C			2
SBSTN	1 1			
DFR	xxx			
MJ	3 to regulate affairs with the Indians as well			
JME	>>To regulate affairs with the Indians as well			
CJ	>>To regulate affairs with the Indians as well			
SMLR	M C		1	1
SBSTN	1 1			
DFR	xxxxx x			
MJ	within as without the limits of the U.>>>> States.			
JME	within as without the limits of the U.>>>> States>			
CJ	within as without the limits of the United States>			

Source	Contents	I	M	C
SMLR	C C M		5	2
SBSTN	1 1 5			
DFR	xxxxx x			
MJ	10. to authorize the Executive to procure and hold			
JME	>>>>To authorize the Executive to procure and hold			
CJ	>>>>To authorise the Executive to procure and hold			
SMLR	M I	1	1	
SBSTN	1 1			
DFR	xxxxx xxxxx			
MJ	for the use of the U.>>>> States landed			
JME	for the use of the U->>>> S.>>>> landed			
CJ	for the use of the United States landed			
SMLR	I C I C	2		2
SBSTN	1 1 1 1			
DFR	x x x x			
MJ	property for the erection of forts. magazines> and			
JME	property for the erection of Forts, Magazines, and			
CJ	property for the erection of forts, magazines, and			
SMLR	C			1
SBSTN	1			
DFR	x			
MJ	other necessary buildings.			
JME	other necessary buildings>			
CJ	other necessary buildings>			
Total:		10	14	60