

**DEALING WITH OLD FATHER WILLIAM, OR
MOVING FROM CONSTITUTIONAL TEXT TO
CONSTITUTIONAL DOCTRINE: PROGRESS
CLAUSE REVIEW OF THE COPYRIGHT TERM
EXTENSION ACT**

*by Malla Pollack**

*“You are old, Father William,” the young man said,
“And your hair has become very white;
And yet you incessantly stand on your head—
Do you think, at your age, it is right?”
“In my youth,” Father William replied to his son,
“I feared it might injure the brain;
But, now that I’m perfectly sure I have none,
Why, I do it again and again.”*

.....

*“You are old,” said the youth, “one would hardly suppose
That your eye was as steady as ever;
Yet you balanced an eel on the end of your nose—
What made you so awfully clever?”*

*“I have answered three questions, and that is enough,”
Said his father; “don’t give yourself airs!
Do you think I can listen all day to such stuff?
Be off, or I’ll kick you downstairs!”¹*

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I. INTRODUCTION

This Article suggests a *textually* appropriate, high standard of review for legislation enacted pursuant to the Copyright and Patent Clause, more properly the Progress Clause.² It is part of a written symposium prompted by *Eldred v. Ashcroft*,³ a case awaiting argument before the United States Supreme Court that questions the constitutionality of the Copyright Term Extension Act of 1998 (CTEA).⁴ If the Court holds for the government, it will need to reach both the First Amendment⁵ and the Progress Clause⁶ issues. It can hold for Eldred by reaching only one. Assuming a ruling for Eldred, judicial economy⁷ and restraint may counsel the Court to discuss only the First Amendment, because the Court has ample precedent in

1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 64-68 (1866), available at <http://etext.lib.virginia.edu/modeng/modengC.browse.html> (last visited July 30, 2002). "Old Father William" parodied a poem which was well known to Carroll's contemporaries. See PARODIES: AN ANTHOLOGY FROM CHAUCER TO BEERNBOHM—AND AFTER 277-93 (Dwight MacDonald ed., 1960).

2. "Congress shall have the power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8 (a.k.a. "Copyright and Patent Clause," "Intellectual Property Clause," or "Exclusive Rights Clause," but more properly the "Progress Clause"). See Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing The Progress Clause* 80 NEB. L. REV. (forthcoming Spring 2002) (manuscript at 1 n.1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304180 and <http://eon.law.harvard.edu/openlaw/eldredvashcroft/progress.html>).

3. *Eldred v. Ashcroft*, No. 01-618 (U.S. oral argument Oct. 9, 2002).

4. Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

5. See Brief Amici Curiae of Copyright Law Professors in Support of Petition, *Eldred v. Ashcroft*, No. 01-618 (Questions Presented, "2. Are copyright laws 'categorically immune' from First Amendment scrutiny?").

6. See *id.* (Question Presented "1. Does the language of Art. 1, Sec. 8, cl. 8 of the Constitution, giving Congress 'power . . . To promote the Progress of Science and useful Arts' impose substantive constraints on Congress's enactments under that clause?").

7. See, e.g., Richard H. Fallon, *Forward: Implementing the Constitution*, 111 HARV. L. REV. 54, 113-14 (1997) ("The task of crafting a new rule or test—or even a serious proposal for one—is hard work And a failed effort can be costly.").

that area. I hope, however, that the Court will use *Eldred* to construe the Progress Clause because Congress needs assistance with this important area of legislation.

From the point of view of the legal academician, both Congress and the Supreme Court strongly resemble Old Father William. First, both have power that they do not hesitate to use. Second, both repeatedly get things upside down and backwards—though, of course, different legal academicians would disagree on the set of statutes and cases within the offending group. Third, the Supreme Court answers only those questions it chooses to answer.⁸

In my opinion, Congress has been standing the Progress Clause on its head for quite some time.⁹ Like Old Father William, Congress has abandoned earlier caution. The first Congress stepped gingerly into this area,¹⁰ but more recent sessions of Congress have enacted drastic changes with relative rapidity and little empirical study.¹¹

8. See *U.S. Airways v. Barnett*, 122 S. Ct. 1516, 1520 (2002) (describing grant of certiorari as the Court's "agree[ing] to answer [petitioners'] question"); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (declining to reach fully briefed issue of whether the Twenty-First Amendment prevents Congress from enacting a national, minimum drinking age); *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (listing situations in which the Court should decline to reach constitutional issues); CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 4-6, 262-63 (1999) (arguing that the Court generally should, and generally does, rule narrowly); Fallon, *supra* note 7, at 113-16 (discussing practical problems leading to judicial minimalism). *But see* Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 *IND. L.J.* 297, 353 (1995) ("[T]he Supreme Court's unique role in providing guidance and promoting uniformity justifies more frequent departures from the rule of measured steps . . . in constitutional adjudication.").

9. See U.S. CONST. art. I, § 8, cl. 8.

10. The second session of the first Congress provided only a short term of narrow exclusive rights for a few types of works. See Copyright Act of 1790, ch. 15, 1 Stat. 124.

11. See generally Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *STAN. L. REV.* 1, 67-81 (2001) (analyzing recent acts over protecting copyright for rent-seeking purposes). Congress notoriously does not look at the facts allegedly supporting industry cries for greater rights to exclude. See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *HARV. L. REV.* 281, 281 (1970); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17

Currently, Congress is focused on increasing the economic reward to copyright holders.¹² The underlying congressional power, however, is “To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹³ The Supreme Court has repeatedly taught that the prime objective of this Clause is to benefit the public, not reward authors.¹⁴ Congress has the Clause standing on its head.

My recent empirical research,¹⁵ furthermore, revealed that the 1789 word “progress” means “spread.” Congress was granted power to pass *only* those copyright and patent statutes that promote the dissemination of knowledge and technology to the public. Therefore, the Clause is rightly called the “Progress Clause” because its core purpose is the spread (“progress”) of knowledge and technology to all persons within the protection of the Constitution. Emphatically, Congress has the Clause standing on its head.

CARDOZO ARTS & ENT. L.J. 47, 89-97 (1999) (discussing lack of evidence supporting Congress’s “factual findings” in proposed database protection bill).

12. See S. REP. NO. 104-315, at 3 (1996) (reciting purposes of CTEA).

13. U.S. CONST. art. I, § 8, cl. 8.

14. See, e.g., *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (Copyright’s core purpose is “promoting broad public availability of literature, music, and other arts.”); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 164 (1989) (clarifying that the Court’s earlier preemption cases “protect more than the right of the public to contemplate the abstract beauty of an otherwise unprotected intellectual creation—they assure its efficient reduction to practice and sale in the marketplace.”); see also, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574-76 (1994); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 354 (1991); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558, 563 (1985); *id.* at 580, 589 (Brennan, J., dissenting); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480-81, 484 (1974); *Goldstein v. California*, 412 U.S. 546, 555 (1973); *Lee v. Runge*, 404 U.S. 887, 890-93 (1971) (Douglas, J., dissenting); *Graham v. John Deere Co.*, 383 U.S. 1, 5-6, 9, 10 (1966); *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 155 (1950) (Douglas, J., concurring); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932); *Kendall v. Winsor*, 62 U.S. (21 How.) 322, 327-29, 330 (1858); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654, 668 (1834); *Shaw v. Cooper*, 32 U.S. (7 Pet.) 292, 320 (1833); *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 13, 19, 21 (1829).

15. See Pollack, *supra* note 2.

This Article looks at a related problem,¹⁶ one the Supreme Court has yet to answer: What is the correct standard for judicial review of a federal statute's propriety pursuant to Congress's "progress power"? I will attempt to distance this issue from my own reading of the Clause.¹⁷ Because this is a virgin area of constitutional theory, my ambition is limited to suggesting a possible textual approach.¹⁸ I will assume a Supreme Court acting in good faith, saying what it means, and doing what it says.¹⁹

My approach is textual in the sense that I am basing the choice of review standard on the structure of a document,²⁰ our written Constitution.²¹ My approach is textual for many reasons. First, the

16. *See id.* at 7 n.22 (reserving review standard issue for this Article).

17. Structural issues, however, require some integration. *See infra* notes 72-86, 195-203 and accompanying text.

18. The written U.S. Constitution may, of course, be interpreted in light of the unwritten. *See generally, e.g.,* Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 291 (2001) (discussing various versions of the unwritten constitution including the Framers' possible belief in an ancient unwritten English constitution of natural law, American fundamental values theory, and Rehnquist Court federalism; any "no-unwritten-law proposition would be nothing other than a proposition of unwritten constitutional law.").

19. *See* Fallon, *supra* note 7, at 126 (arguing that second best nature of many Supreme Court decisions "may help to explain why some of the best constitutional theory literature explicitly offers an idealized or reconstructed account of constitutional adjudication, not a descriptive theory of what actually happens.").

20. *But see* Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 129 (2002) ("Identifying the right standard is of necessity an extra-textual act . . .").

21. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1236 (1995) (arguing that proper interpretation of the Constitution "put[s] . . . great emphasis upon text *and* structure, both the structure *within* the text—the pattern and interplay in the language of the Constitution itself and its provisions—and the structure (or architecture) *outside* the text—the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels."); *see also* MICHAEL CONANT, CONSTITUTIONAL STRUCTURE AND PURPOSES 2 (2001) (calling for more judicial consideration of "[c]onstitutional structure [which] requires treating the Constitution as a unified whole."); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (calling for "intratextualism" which "tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."). *But see* Jed Rubenfeld, *Reading the*

only unquestionable starting point is the text of the Constitution; it constitutes the common denominator.²² Second, turning to text is relatively unproblematic because the Progress Clause contains

Constitution as Spoken, 104 YALE L.J. 1119 (1995) (arguing that “writteness” of the Constitution requires a temporally expanded, “commitmentarian” approach which supports consideration of the purported evil leading to the provision and judicial concentration on paradigm cases); *see also* JED RUBENFELD, FREEDOM AND TIME (2001) (expanding on the same thesis). Accepting Professor Rubinfeld’s approach, however, I am not sure that any American paradigm cases exist. Perhaps *Eldred v. Ashcroft* will fill that niche. Backtracking to Rubinfeld’s concern with the perceived evil, my substantive view of the Progress Clause would make the CTEA unconstitutional. *See, e.g.*, Pollack, *supra* note 2 (arguing that distribution to the public is the core intent of the Clause); Malla Pollack, *Purveyance and Power or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of Government*, 30 SW. U. L. REV. 1 (2000) [hereinafter Pollack, *Purveyance and Power*] (arguing that the Clause’s tie to the Statute of Monopolies makes it the enemy of “corruption,” for example, wealth transfers to those allied with the politically powerful); Malla Pollack, *The Owned Public Domain*, 22 HASTINGS COMM. & ENT. L.J. 265, 283-87 (2000) [hereinafter Pollack, *The Owned Public Domain*] (arguing that the “property right” underlying the Clause is the public’s right to the public domain); *see also* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1135-36 (1998) (arguing that Rubinfeld’s temporal-extension view of the Constitution should lead to textualism as the proper interpretive mode).

22. “[W]e begin with [the] text.” *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (providing the Court’s starting place for determining scope of Congress’s power under the Fourteenth Amendment); *see also, e.g.*, *Printz v. United States*, 521 U.S. 898, 905 (1997) (looking at history only after explaining the absence of any constitutional text precisely on point); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 319, 324 (1997) (discussing importance of textual basis for the Court’s acceptance or rejection of a statute’s purpose). *But see, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 988-89 (1987) (complaining that under the now-standard balancing approach “the Court largely ignores the usual stuff of constitutional interpretation—the investigation and manipulation of texts (such as constitutional language [etc.].)”; Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 919-20 (1988) (arguing that constitutional basis of government interests is just as shaky, or as firm, as the individual rights they are balanced against); Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-9 (1972) (discussing the Warren Court’s willingness to protect fundamental individual interests not expressly mentioned in the Constitution).

unusually detailed constitutional text. Third, what little the Court has stated about the fundamental goals of the Clause matches my reading of its text.²³ Fourth, my view of the metavalues and social theory supporting the Clause also matches my reading of its text.²⁴ Fifth, any approach based on the drafting or ratification discussions stumbles on the thinness of the record,²⁵ as well as the record's possible unreliability.²⁶ Sixth, a wider historical view also supports my textual analysis.²⁷ Seventh, a textual approach to the review standard might be useful even if the Court disagrees with my reading of the Clause's words and the policy choices underlying them.²⁸ Eighth, the textual approach has higher relevance because this Article focuses on judicial review of federal statutes²⁹—legislation

23. See Pollack, *supra* note 2, at text accompanying notes 58-63 (collecting Supreme Court holdings based on Progress Clause limits).

24. See Pollack, *supra* note 2, at Parts I.C.1., I.C.2. (discussing the Progress Clause in the context of federalist belief structures and an evolving Constitution).

25. See Pollack, *Purveyance and Power*, *supra* note 21, at 99-116 (discussing available information on Progress Clause issues in the drafting and ratifying of the U.S. Constitution and drafting of the *Bill of Rights*).

26. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986) (discussing possible inaccuracy of basic documents; "some [documents] have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans. To recover original intent from these records may be an impossible hermeneutic assignment.").

27. I have already written at length on the ancestral Statute of Monopolies. The Framers' whig vision of government emerged from Parliament's fight for control with the early Stuart monarchs. Central to Parliament's ability to control Crown policy was its ability to control the Crown's purse. The Statute of Monopolies was the first win in Parliament's battle to cut the Crown off from sources of supply outside Parliament's control. These same indirect taxation methods, furthermore, were inefficient at funding government projects. They excelled, however, at lining private pockets. See Pollack, *Purveyance and Power*, *supra* note 21, *passim*.

28. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (Amy Gutman ed., 1997) (defining his own constitutional analysis as textual). *But see* Rubinfeld, *supra* note 18, at 292-93 (arguing that current allegedly textualist justices "are prepared to invoke unwritten law when it suits a 'conservative' agenda"; but adding that "unenumerated constitutional rights are not per se illegitimate.").

29. *Cf.* Thompson v. Oklahoma, 487 U.S. 781, 876-77 (Scalia, J., dissenting) ("I know of no authority whatever for [the Supreme Court's]

enacted by institutions created and, therefore, defined and limited by the Constitution.

The first Section of this Article discusses four types of constraints imposed on federal statutes by the Constitution. Three are textual: jurisdiction, form, and fence. A fourth consists of limits implied from the intended structure of the government institutions created by the document. This Article's second Section presents a highly generalized flow chart of judicial review of federal statutes, distinguishing three moves: definition, identification of the statute's means and goals, and comparison of the statute to the Constitution. Section three applies both analytic approaches to the language of the Progress Clause. Section four argues that *Eldred*, like *Brown v. Board of Education*,³⁰ is a proper case for the Supreme Court to provide more than minimal guidance to the other branches of government.

The main thesis of this Article is that the Constitution's drafters chose uniquely limiting text for the Progress Clause, signaling the appropriateness of strong judicial review of statutes enacted pursuant to this tightly cabined power.

II. STRUCTURE OF THE TEXT

The Supreme Court may review a federal statute for different types of unconstitutionality, including problems with jurisdiction, form, fence, and institutional structure. This Section proposes five conclusions related to this topology:

- A. *Eldred* does not raise a jurisdictional issue;
- B. *Eldred*'s form issue is not novel;
- C. The constitutional text closest to the Progress Clause's fence structure is the Appropriate Legislation Formula of various post-Civil War amendments;
- D. However, no well-litigated constitutional provision shares the full architecture of the Progress Clause; and
- E. The importance of the Clause's unusual design is supported by both structural concerns and historical background.

specifying the precise form that state legislation must take, as opposed to its constitutionally required content.”).

30. 347 U.S. 483 (1954).

Let us now consider my support for these five intermediate conclusions.

A. Jurisdiction

“Jurisdiction” is the scope of Congress’s reach under the constitutional power being exercised. What subset of the world may Congress regulate?³¹ The most litigated constitutional jurisdiction issue is probably the scope of “commerce among the several states.”³²

The Court has discussed some of the jurisdictional hedges in the Progress Clause. In 1879, the Court held that use-based trademarks were outside the jurisdictional scope of the Clause because such marks are neither the “Writings” of “Authors” nor the “Discoveries” of “Inventors.”³³ Much more recently, the Court placed facts and “sweat works” outside the Clause’s reach.³⁴

Eldred, however, does not present a jurisdictional issue. The CTEA merely extends terms for works that are already covered by other federal copyright enactments; it does not determine which *res* are copyrightable.

B. Form

“Form” refers to constitutional requirements on formal or technical aspects of the statutes Congress may enact. For example, bankruptcy laws and naturalization rules must be “uniform.”³⁵

31. Whether Congress may regulate the material outside the scope of one clause in reliance on another power is discussed below as implied external fencing. *See infra* Part II.C.2.

32. U.S. CONST. art. I, § 8, cl. 3. *But see* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807-08 (1995) (pointing out that the New Deal Court actually expanded the Necessary and Proper Clause as applied to the Commerce Clause).

33. *See* The Trademark Cases, 100 U.S. 82 (1879) (holding that use-based trademarks are not protectable pursuant to Congress’s copyright power because they are not the “Writings” of “Authors”).

34. *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (stating that facts and mere sweat works are not copyrightable because they are not the “Writings” of “Authors”).

35. *See* U.S. CONST. art. I, § 8, cl. 4.

Appropriations of money for supporting “Armies” may not extend “for a longer Term than two years.”³⁶

Eldred does raise a form issue: the meaning of “limited Times.” As discussed below,³⁷ based on Bankruptcy Clause cases, I believe *Eldred*’s form issue is solvable in the first step of review: definition of terms.

C. Fences

A “fence” is a policy-based limit that affirmatively blocks congressional action.³⁸ Using textual categories, constitutional powers may be fenced in multiple ways. This Article discusses four: express external fences, implied external fences, express internal fences, and the Appropriate Legislation Formula. This last category is a distinct textual structure first employed in the Reconstruction Amendments: sections empowering Congress (or Congress and the states) to enforce the amendment by appropriate legislation.³⁹ The Constitution is also bounded by “structural fences,” which are those fences constructed by the intended interaction of the government institutions created by the Constitution.

The fence issue in *Eldred* involves the section of the Clause that the D.C. Circuit held powerless: “To promote the Progress of Science and the useful Arts.”⁴⁰ This phrase is both an express internal fence and a structural fence.

1. Express external fences

First, powers may be expressly fenced by *other* clauses. The paradigmatic external fence issue is a conflict between individual

36. *Id.* cl. 12.

37. *See infra* Part III.A.

38. “Jurisdiction,” in contrast, refers to locating the point where Congress runs out of power despite the absence of blocking fences. *See* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause As An Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1181-83 (2000) (contrasting Congress’s running out of power with Congress’s power being affirmatively blocked).

39. *See* U.S. CONST. amends. XIII, XIV, XV, XVIII, XIX, XXIII, XXIV, XXVI.

40. *See Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001), *cert. granted sub nom. Eldred v. Ashcroft*, 122 S. Ct. 1072 (2002).

rights and government interests.⁴¹ For example, the Commerce Clause gives Congress the power to enact a statute regulating how commodity *X* may be marketed in interstate commerce. The Takings Clause of the Fifth Amendment may prevent Congress from confiscating large stockpiles of *X* without compensation. The equal protection component of the Fifth Amendment may prevent Congress from treating stockpiles of *X* differently based on the race of their respective owners. For express external fences, the Court has developed a three-tier review system: rational basis, intermediate scrutiny, and strict scrutiny.⁴²

2. Implied external fences

Second, clauses may be *implicitly* fenced in by other clauses. For example, database legislation presents the implied external fence issue of whether the jurisdictional limit announced in *Feist Publications, Inc. v. Rural Telephone Service Co.*⁴³ may be bypassed by legislation enacted pursuant to the Commerce Clause.⁴⁴

41. See, e.g., Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711 (1994) (“Contemporary constitutional law presents most constitutional conflicts as ones between individual rights and state interests.”).

42. The common three-tier description is a simplification. See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 226 (2002) (asserting that the Court has six to seven levels of review). Much of this doctrine reduces to forbidding certain types of action taken for impermissible purposes. See Pildes, *supra* note 41, at 712; see also, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 91 (2001) (“As with other forms of heightened scrutiny, legislative record review appears designed to smoke out illegitimate purposes.”).

43. 499 U.S. 340 (1991) (announcing that Congress may not protect facts or sweat works pursuant to the Progress Clause).

44. See, e.g., Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 539-52 (2000) (discussing constitutional problems with proposed database statutes); Pollack, *supra* note 11, at 56-79 (discussing the same constitutional problems). But see Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151 (1997) (arguing that additional database protection is unnecessary); Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protection of Works of Information After*

The general rule is that a limit in one clause may not be bypassed by congressional action supposedly taken under another. In *Railway Executives Ass'n v. Gibbons*, the unanimous Court disallowed use of the Commerce Clause as authority to enact a statute governing the insolvency of one named railroad: "Thus, if we were to hold that Congress had the power to enact non-uniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."⁴⁵ This general principle,⁴⁶ of course, does not foreclose arguments over the particular extent of each purported "limitation on the power of Congress."⁴⁷

Feist v. Rural Telephone, 92 COLUM. L. REV. 338 (1992) (arguing that a Commerce Clause-based database statute is constitutionally allowable if it is distinguishable from copyright statutes).

45. *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982). While the judgment was unanimous, two justices concurred on a possibly narrower basis.

I conclude that the Clause permits such legislation if Congress finds that the application of the law to a single debtor (or limited class of debtors) serves a national interest apart from the economic interests of that debtor or class, and if the identified national interest justifies Congress's failure to apply the law to other debtors.

Id. at 474 (Marshall, J., concurring, joined by Brennan, J.). I read the concurrence as allowing a more flexible definition of "uniform."

46. *Eldred* deals with a form limit: "limited Times." However, *Feist* announced a jurisdictional limit: the boundaries of what *res* are copyrightable. 499 U.S. 340 (1991). Currently, I see no reason to treat the implied external fence issue differently as to the form and jurisdiction limits of the Progress Clause.

47. Some courts have read *Gibbons* narrowly or overlooked it. Downgrading *Gibbons* allows a court to read *The Trademark Cases*, 100 U.S. 82 (1879), as allowing Congress to use the now-widened Commerce Clause power to augment the progress power. See *United States v. Moghadam*, 175 F.3d 1269, 1273-81 (11th Cir. 1999) (upholding federal statute criminalizing unauthorized fixation of unfixed public performances despite claim that Progress Clause's term "Writings" of "Authors" bars protection of unfixed works; holding that statute was authorized by the Commerce Clause despite *Gibbons*); *Authors League of America, Inc. v. Oman*, 790 F.2d 220, 224 (2d Cir. 1986) (holding that manufacturing clause of the Copyright Act, 17 U.S.C. § 601 is constitutional as exercise of the Commerce Power, without mentioning *Gibbons*); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1137-42 (N.D. Cal. 2002) (holding that, even though the statute protects works of authors by a means other than one listed in the Progress Clause, the Commerce Clause is a sufficient basis for Digital Millennium Copyright Act's

The Necessary and Proper Clause is, presumably, also bound by implied external fences. Chief Justice Marshall clarified that this clause may not be used to “adopt measures which are prohibited by the constitution” or “pass laws for the accomplishment of objects not entrusted to the government.”⁴⁸ As Madison explained, the Necessary and Proper Clause expands Congress’s choice of means.⁴⁹ While he did not expound further, the best reading is that the Necessary and Proper Clause expands *only* the allowable *means* of reaching already constitutionally legitimate goals; it may not be used as permission to target a goal not included in the Constitution. Otherwise, *Gibbons* should have included a separate discussion of the Necessary and Proper Clause.⁵⁰

3. Express internal fences

An express internal fence is, as its name indicates, a fence stated by the language of the clause being limited. The Progress Clause contains an express internal fence: “To promote the Progress of Science and useful Arts” Such a fence is quite rare in the original Constitution.⁵¹ The fence, therefore, deserves high value for its unusually emphatic textual placement—even without reaching policy issues.

ban on manufacturing and distributing certain circumvention technology, relying on *Moghadam*).

48. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

49. See 1 ANNALS OF CONG. 455 (Joseph Gales ed., 1789) (According to Madison when presenting his suggestions to the first Congress, a Bill of Rights might be useful because the Necessary and Proper Clause allows Congress “certain discretionary powers with respect to the means, which may admit of abuse to a certain extent . . .”).

50. The D.C. Circuit did invoke the Necessary and Proper Clause to support its holding that the CTEA is valid. See *Eldred v. Reno*, 239 F.3d at 378-79 (asserting that even if preamble to Copyright Clause has impact, the CTEA would still be justified as a necessary and proper application of the Copyright Clause power). But that circuit used the Necessary and Proper Clause to allow a more flexible reading of “limited Times,” not to bypass that requirement by locating an additional power within the Necessary and Proper Clause.

51. See *Goldstein v. California*, 412 U.S. 546, 555 (1973) (describing the Progress Clause as only subpart of Article I that “describes both [its] objective . . . and [its] means . . .”).

Inside Article I, the closest text may be the Militia Clauses,⁵² but these powers exist within a web of interacting directions that include both other congressional powers and express limitations on the states.⁵³ The Second Amendment opens with text that discusses purpose,⁵⁴ but that amendment does not create a governmental power.

52. The Congress shall have power . . .

. . . .

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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

U.S. CONST. art. I, § 8, cls. 15, 16.

53. The other relevant federal powers include U.S. CONST. art. I, § 8, cls. 10-14. The states are relevantly limited by U.S. CONST. art. I, § 10, cls. 1-3. As for the inter-relationship of these provisions, see *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990) (upholding federal power to order state National Guard to training exercises outside the borders of the United States); *Cox v. Wood*, 247 U.S. 3 (1918) (upholding Congress's power to order a draftee to serve outside the United States.); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (holding the Selective Service Act constitutional).

54. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The meaning of the Second Amendment's purpose-language is unsettled. See *Printz v. United States*, 521 U.S. 898, 937-38 (1997) (Thomas, J., concurring) (pointing out unsettled nature of right created by Second Amendment); see also *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (creating circuit split by construing Second Amendment to create a personal right to keep weapons, a right which is not limited to individuals enrolled in any militia or military unit, but which may be regulated), *cert. denied*, 122 S. Ct. 2362 (June 10, 2002) (including Question No. 3, a Second Amendment challenge to 18 U.S.C. § 922(g)(8)); Brief for the United States in Opposition to Petition for Certiorari, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (No. 01-8780), available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.html> (agreeing that the Second Amendment creates individual right, but denying its violation by 18 U.S.C. § 922(g)(8)); Brief for the United States in Opposition to Petition for Certiorari, *United States v. Haney*, 264 F.3d 1161 (10th Cir. 2001) (No. 01-8272), available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8272.resp.html> (same).

4. The power to enforce an amendment by appropriate legislation

Eight amendments to the Constitution contain a subpart giving Congress “power to enforce [the amendment] by appropriate legislation,”⁵⁵ or “the Appropriate Legislation Formula” (ALF). This formulation appears for the first time in the Enforcement Clause of the Thirteenth Amendment. The Appropriate Legislation Formula is the constitutional text-structure closest to the Progress Clause. Amendments containing the Appropriate Legislation Formula are similar to the Progress Clause because they contain both the grant of a power and an express internal fence. Such amendments differ from the Progress Clause in the nature of the fence. The text of the express internal fence in the Progress Clause specifies one (and only one) legitimate goal; the ALF expressly allows an unspecified set of means. This distinction, however, should not be pushed too far. Means and goals are addressed in the text of the Progress Clause; means and goals are addressed within each of the ALF amendments.

The meaning of the Appropriate Legislation Formula reflects its template, the Necessary and Proper Clause.⁵⁶ According to the Court, “[b]y including § 5 [of the Fourteenth Amendment,] the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18.”⁵⁷ Preliminary drafts of the Fourteenth Amendment had used the words “necessary and proper” as opposed to “appropriate legislation.”⁵⁸

55. U.S. CONST. amends. XIII, § 2, XIV, § 5, XV, § 2, XVIII, § 2, XIX, § 2, XXIII § 2, XXIV, § 2, XXVI, § 2. One also gives this power to the states. See U.S. CONST. amend. XVIII, § 2.

56. U.S. CONST. art. I, § 8, cl. 18 (“Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

57. *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

58. *Id.* at 650 n.9; see also, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-44 (1968) (relating the Appropriate Legislation Formula of the Thirteenth Amendment to the Necessary and Proper Clause); *Lambert v. Yellowley*, 272 U.S. 581, 596-97 (1926) (relating the Appropriate Legislation Formula of the Eighteenth Amendment to the Necessary and Proper Clause); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL’Y 107, 116-17 (1998) (“[T]he Enforcement Clause [of the Fourteenth Amendment] was

Chief Justice Marshall's explication of "necessary and proper" included "appropriate."⁵⁹ According to the Court, the change in the Enforcement Clause's language from "necessary and proper" to "appropriate" did not limit the breadth of the power granted to Congress by the Fourteenth Amendment.⁶⁰

The Necessary and Proper Clause expands the set of means available to Congress to reach already legitimate goals. The Appropriate Legislation Formula also deals with allowable *means* for a specified end: the realization of the institutional change required or allowed by the specific amendment. Arguably changing course sharply, the Court recently limited Congress's discretion under the Appropriate Legislation Formula of the Fourteenth Amendment.⁶¹ The Court has yet to clarify if this constriction will carry over to the ALF within the seven other amendments or to the ALF's template, the Necessary and Proper Clause.

The relevant express internal fence in the Progress Clause limits the range of *legitimate goals* to one: "promot[ing] the Progress of Science and useful Arts."⁶² Of course, the Clause also names specific means: "securing"⁶³ "exclusive Right[s]" which exist only for "limited Times" and are granted to "Authors" and "Inventors" in

crafted in explicit analogy to the Necessary and Proper Clause . . ."). *But see* Amar, *supra* note 21, at 823 (viewing *Jones* as largely inconsistent with *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

59. "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." *M'Culloch*, 17 U.S. (4 Wheat.) at 421.

60. *See Katzenbach*, 384 U.S. at 650 n.9.

61. *See City of Boerne*, 521 U.S. at 519-20 (limiting Congress's Fourteenth Amendment Enforcement Clause power to the enforcement of pre-existing constitutional rights).

62. U.S. CONST. art. I, § 8, cl. 8.

63. "Secure" would be another express internal fence if it meant "to protect pre-existing rights." *Cf.* U.S. CONST. amend. VII ("[T]he right of trial by jury shall be *preserved* . . .") (emphasis added); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 459 (1977) (relying on "preserved" to reiterate that the Seventh Amendment "did not purport to require a jury trial where none was required before"). "Secure," however, gives Congress power to create new rights. *See Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834).

“their respective Writings and Discoveries.”⁶⁴ The major difference between the eight amendments containing the ALF and the Progress Clause is the flexibility of the walls around Congress’s power.

None of these amendments are as tightly cabined as the Progress Clause. All of them contain expandable words. At the very least, each contains the flexible word “appropriate.” “Appropriate,” like that protean word “reasonable,” changes meaning with circumstances. A writer uses “reasonable” (or “appropriate”) as opposed to “five percent over retail cost” *because* the written document has temporal extension into a world the writer cannot imagine and does not want to stifle with anachronistic assumptions. The set of circumstances within the word’s meaning is relative, related to (thus, dependent on) the changeable facts of the world, sometimes including the opinions of people. Relative words such as “due care” in tort law are the core of many legal doctrines.⁶⁵ True, “five percent over retail cost” does change monetary value as the retail cost varies. “Five percent over retail cost,” however, is not as flexible as “a reasonable rate” or “an appropriate rate.” Similarly, while the words in the Progress Clause have some play, they are not as flexible as “appropriate,”⁶⁶ “due process,”⁶⁷ or “equal protection of the law.”⁶⁸

Certainly, some constitutional commands are clearer and more exact than the Progress Clause. Generally, however, these are

64. U.S. CONST. art. I, § 8, cl. 8.

65. [C]onformity to custom is not in itself the exercise of due care . . .

[S]ince negligence is the failure to do that which an ordinarily prudent man would do, or the doing of that which an ordinarily prudent man would not do, under the same circumstances, an ordinary custom, while relevant . . . is not conclusive [on the issue of negligence].

Moody v. Southland Inv. Corp., 190 S.E.2d 578, 583 (Ga. Ct. App. 1972) (reversing directed verdict for defendant landlord who used sheet glass in a door, like many landlords of similar buildings).

66. U.S. CONST. amends. XIII, § 2, XIV, § 5, XVIII, § 2, XIX, § 2, XXIII, § 2, XXVI, § 2.

67. U.S. CONST. amends. V, XIV, § 1.

68. U.S. CONST. amend. XIV, § 1. *But see* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 190-97 (2d ed. 1997) (arguing that “due process” and “equal protection of the law” had precise, technical meaning for drafters of the Fourteenth Amendment).

commands to perform (or not perform) discrete acts,⁶⁹ such as not blocking eighteen-year-olds from voting,⁷⁰ or assembling Congress each year on a prescribed date.⁷¹ For a discretionary constitutional power, the progress power is extraordinarily cabined.

5. Structural fences

The Constitution's text creates institutional structures. Different understandings of the intended power configuration impact readers' disparate understandings of the document.⁷² A thin majority of the current Court is strongly protective of state prerogatives.⁷³ Textually,⁷⁴ however, the Court has no more right to expand the language of the Eleventh Amendment⁷⁵ than to add penumbras to the

69. See Charles Fried, *Types*, 14 CONST. COMMENT. 55, 56-68 (1997) (dividing constitutional cabining of Congress into commands regarding intents, effects, and discrete acts).

70. See U.S. CONST. amend. XXVI, § 1.

71. See U.S. CONST. art. I, § 4, cl. 2 ("first Monday in December, unless they shall by Law appoint a different Day"); *id.* amend. XX, § 2 ("at noon on the 3d day of January, unless they shall by law appoint a different day").

72. See, e.g., Tribe, *supra* note 21, at 1249-1302 (providing example of how to integrate textual analysis with respect for structure of intended government institutions).

73. Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (resting on votes of these five justices); *Alden v. Maine*, 527 U.S. 706 (1999) (same); *Printz*, 521 U.S. 898 (same). See generally, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 78-80 (2001) (discussing with approval the Court's post-1994, more protective attitude towards federalism).

In addition to voiding congressional action so as to preserve federalism, the Court commonly requests a clear congressional statement before reading a federal statute as intending to tread on the states' toes. See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1603-30 (2001).

74. *But see*, e.g., Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 65 (1996) ("The traditional view of the Ninth Amendment... can only be understood when placed against the backdrop of the arguments used to defend the decision of the Constitution's framers to omit a bill of rights.").

75. See U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). *But see* *Bd. of Trs. v. Garrett*, 531

Bill of Rights.⁷⁶ The Court's federalists, however, view the states' sovereignty as fifty structural fences—foundational supports whose repair is required to preserve the architectural design of the government constructed in 1789 (albeit with fewer states):

[E]ven as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of the concept of a central government that would act upon and through the States in favor of a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, the only proper objects of government.⁷⁷

My current point is not to approve or disapprove any specific claim of government design. My point is that analysis based on institutional structure is less constrained than analysis based on the structure of the written *text*. I have chosen, therefore, to discuss the structural approach only secondarily, while pointing out its amorphousness.⁷⁸

U.S. 356, 363 (2001) (admitting that the Court has enforced broader sovereign immunity for the states than granted by the text of the Eleventh Amendment).

76. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

77. *Alden*, 527 U.S. at 714 (internal citations and quotation marks omitted). Justice Kennedy delivered the opinion of the Court, stating:

[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.

Id. at 713; see also *id.* at 728 (“[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.”); *id.* at 729 (“[I]t follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.”).

78. The Supreme Court's doctrine on the interrelationship between the Militia Clauses and the other constitutional provisions relating to military matters might be read to demonstrate that text trumps arguments of implied structure.

In structural terms, the Progress Clause is a foundational command that knowledge (“Science”), technology (“useful Arts”), writings, and discoveries may not be treated as mere commercial products; the creation and dissemination of these *res* are necessary to the continued viability of a republican polity.⁷⁹ As a structural matter, therefore, Congress’s power to enact copyright statutes does not include the power to enact statutes for merely economic purposes. The textual hook for this structural argument is the contrast between clause 8 and the relatively unfenced powers created by other clauses of Article I, Section 8. True, the inclusion of a separate power over writings and inventions could rest on the desire to have national treatment of all such *res*, including those not moving in interstate, foreign, or Indian commerce. Such intent, however, would support only much simpler language, such as “Congress shall have the Power . . . To promote Writings and Discoveries.”⁸⁰

Were it not for the Militia Clauses [U.S. CONST. art. I, § 8, cls. 15, 16], it might be possible to argue on like [structural] grounds that the constitutional allocation of powers precluded the formation of organized state militia. The Militia Clauses, however, subordinate any such structural inferences to an express permission while also subjecting state militia to express federal limitations.

Perpich, 496 U.S. at 353-54 (footnotes omitted). However, I must conclude the text/structure relationship is unsettled (and unsettling) in light of the Court’s less textual reading of, e.g., the Eleventh Amendment. *See, e.g., Garrett*, 531 U.S. at 363 (admitting that the Supreme Court’s case law has extended the language of the Eleventh Amendment).

79. “[I]t has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 192 (1997) (internal citations and quotation marks omitted). Many scholars have highlighted the Court’s control of outcomes through undiscussed categorization of information as commercial product or nexus of First Amendment protected speech. *See, e.g., James Boyle, A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

80. “Promote” must be used rather than the “regulate” of the Commerce Clause in order to satisfy federalist claims that Congress had no power to muzzle the press even without a bill of rights. *See THE FEDERALIST NO. 38* (James Madison), NO. 84 (Alexander Hamilton).

Thinking structurally, later amendments to the Constitution reinforce the *limitations* cabining Congress's Progress Clause power. The First Amendment gives special protection against government interference with speech and press—increasing the acknowledged importance of distributing knowledge and writings for reasons unrelated to economics. The Fourteenth Amendment both expands the First Amendment's protection to bar action by the states,⁸¹ and inserts into the Constitution the Declaration of Independence's equality axiom. The Thirteenth Amendment supports this change in the relative constitutional importance of people and private property.⁸² Under the original Constitution, states received some voting power based on the number of slaves within their borders.⁸³ By outlawing slavery, the Thirteenth Amendment theoretically ended all congressional representation of property. The tilt towards people was enhanced by each extension of the franchise,⁸⁴ by the end of poll

81. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). The Court has held that the Progress Clause does not cabin the states. *See Goldstein*, 412 U.S. at 560-61 (1973). *But see* 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, 300-26 (1995) (arguing that the Progress Clause—a.k.a. the “Intellectual Property Clause”—should be read to restrict the states).

82. The Framers' belief in the importance of preserving imbalances in private property is (in)famous. *See, e.g.,* JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 3 (Univ. of Chicago Press 1990) (asserting that the Framers' “effort to protect property and [wealth] inequality from democratic revisions . . . has had distorting consequences.”).

83. *See* U.S. CONST. art. I, § 2, cl. 3 (“Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).

84. *See* U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.”); *id.* amend. XIX, § 1 (“on account of sex”); *id.* amend. XXIII, § 1 (allowing residents of District of Columbia to vote for president and vice-president); *id.* amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age.”).

taxes,⁸⁵ and the gradual enlargement of public participation in choosing officials.⁸⁶ The simultaneous input of these constitutional clauses should result in much higher judicial protection for the public's right not to be excluded *for merely economic reasons* by holders of statutory grants over "Writings" and "Discoveries" in "Science and useful Arts."

* * *

This entire Section has provided a basic taxonomy of textual constrictions that the Court might compare to a statute. The next Section presents a highly abstract flow chart of judicial review. Both analyses will then be applied to the Progress Clause in Section IV.

III. PERFORMING CONSTITUTIONAL REVIEW OF A STATUTE

The Supreme Court's logic tree⁸⁷ includes three basic moves: defining terms, identifying the statute's means and goals, and finally, comparing what Congress has done⁸⁸ with what Congress has been empowered (or commanded) to do by the Constitution. The key to the third step is the level of independent decision-making the Court will employ. Stated in reverse, the key is the level of deference the Court will give Congress.⁸⁹

85. See U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay poll tax or other tax.").

86. See *id.* amend. XII; *id.* amend. XVII (making election of senators more direct); *id.* amend. XX, §§ 1, 2 (cutting down power of lame-duck Congresspersons); *id.* amend. XXII, § 1 (providing presidential term limit); *id.* amend. XXVII (preventing congresspersons from raising their own salaries without electoral feedback).

87. The suggested logic tree is not tied to any specific type of doctrinal test. See, e.g., Fallon, *supra* note 7, at 77-87 (discussing eight types of tests and their relationships to the practical problems of collegial adjudication in areas of reasonable disagreement).

88. "What Congress has done" may be judged in terms of purpose, effects, or discreet acts. See Fried, *supra* note 69, at 56-68 (explaining these "types").

89. See Buzbee & Schapiro, *supra* note 42, *passim* (arguing that the Court's recent hard looks at the legislative record are inappropriate carry-overs from the different institutional setting of reviewing rule making by administrative agencies).

A. First Step: Definitions

The Supreme Court's first step is defining the terms in the Constitution.⁹⁰ In many cases no definition is at issue. The Court, however, is the institution that chooses whether a seemingly quiescent word is due for examination. Furthermore, as the Court has recently emphasized, the Court, not Congress, has the power and duty to define constitutional words.⁹¹ Sometimes definition by itself is sufficient to resolve a constitutional puzzle.⁹²

Defining a previously overlooked constitutional word is a potent power. The Court started a revolution in doctrine when it recently defined "enforce," in the fifth clause of the Fourteenth Amendment, as providing Congress with merely remedial power.⁹³ Congress was

90. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478 (2002) (In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word "taken." When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.); *id.* at 1483 (refusing petitioner's "circular" suggestion that the "property" interest taken be defined temporally to match the "terms of the very regulation being challenged").

91. If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "Under this approach, it is difficult to conceive of a principle that would limit congressional power." *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

92. Policy decisions may be hidden inappropriately within the undiscussed formation of some definitions, but as discussed above, this Article purposely eschews such issues. Legal definition is not, *per se*, inappropriate judicial activity. As Charles Fried has so aptly pointed out, legal definition may be constitutive of values and may involve analogy from paradigms. See Fried, *supra* note 69, at 81-82. Definition by analogy may allow the Court to bypass the theoretical problems of judicial interest balancing. See, e.g., Aleinikoff, *supra* note 22, at 945 ("[H]op[ing] to raise enough questions about the form and implications of balancing to force a re-opening of the balancing debate.").

93. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimmel*, 110 *YALE L.J.* 441, 522 (2000) (arguing that the Court is illegitimately imposing

admonished that it could not “alter” the life, liberty, or property rights protected by the Amendment; it could merely enforce them by appropriate legislation, meaning legislation with “congruence and proportionality” between injury and statutory remedy.⁹⁴ Later cases explicated “appropriate legislation” as requiring the judiciary to put factual bite into the requirement of congruence and proportionality.⁹⁵

As for the Progress Clause, the Court has never defined “limited Times.” “Limited Times” is a form issue; the same type of issue raised by “uniform” in the Bankruptcy Clause. The Bankruptcy Clause cases demonstrate that the Court is most likely to solve the “limited Times” issue at the definitional first step, and to do so without admitting the complexity of the underlying policy choices. To support this conclusion, I now discuss the relevant Bankruptcy Clause cases in chronological order.

Under the Bankruptcy Clause, Congress has the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”⁹⁶ The first Supreme Court case discussing “uniform” in this clause is *Ogden v. Saunders*, which

constraints on Congress that were originally constructed to constrain the anti-democratic process of judicial review: “the Court is now embarking on a project that it has not pursued since the first Reconstruction: the task of cabining and inhibiting democratic vindication of equality values.”)

94. *City of Boerne*, 521 U.S. at 519-20. *But see* *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 439 (1968) (allowing broader power to Congress under identically worded clause in the Thirteenth Amendment).

95. *See generally* *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000). These new definitions have added importance because of the Court’s recent announcement that Congress lacks the power to abrogate state sovereign immunity under its Article I powers; it may only force states to stand suit pursuant to the now-narrowed power to enforce amendments by appropriate legislation. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *see also* *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1868 (2002) (holding “that state sovereign immunity bars” a federal administrative agency “from adjudicating a private party’s complaints” against unconsenting states); *Alden v. Maine*, 527 U.S. 706, 759-60 (1999) (holding that Congress may not force states to hear private law suits against themselves in their own state courts).

96. U.S. CONST. art. I, § 8, cl. 4.

dealt with how much power remained in states to enforce their insolvency statutes.⁹⁷ In dicta, Justice Johnson explained:

The general tendency of the legislation of the States at that time [1780s] to favour the debtor, was a consideration which entered deeply into many of the provisions of the constitution. And as the power of the States over the law of their respective forums remained untouched by any other provision of the constitution; when vesting in Congress the power to pass a bankrupt law; it was worthy of the wisdom of the Convention to add to it the power to make that system uniform and universal.⁹⁸ Yet, on this subject, the use of the term *uniform*, instead of *general*, may well raise a doubt whether it meant more than that such a law should not be *partial*, but have an equal and *uniform* application in every part of the Union.⁹⁹

The same construction is proffered in *Nelson v. Carland*.¹⁰⁰ In *Nelson*, Chief Justice Taney announced the Court's dismissal of the case for lack of statutorily granted appellate jurisdiction.¹⁰¹ Dissenting, Justice Carton expressed his belief that the Framers placed bankruptcy power in Congress because otherwise no "uniform" law would exist; instead, each state would go its own way.¹⁰² As then administered by separate judicial districts without the Supreme Court's "revising power," Justice Carton believed that "[s]o far from being 'a uniform system of bankruptcy,' in its

97. See *Ogden v. Saunders*, 25 U.S. (12 Wheat) 213 (1827). The reporter includes long summaries of the parties' arguments and seriatim opinions by several Justices.

98. Interestingly, Justice Johnson here implies that Congress may be allowed, but not required, to make federal bankruptcy statutes "uniform." None of the later cases in this line, however, expressly rests the Court's willingness to allow great flexibility within the word "uniform" on the claim that "uniform" is not a binding limitation. See *id.* at 274 (Johnson, J., concurring).

99. *Id.* at 274 (Johnson, J., concurring) (footnote added).

100. 42 U.S. (1 How.) 265 (1843).

101. See *id.* at 265-66 (dismissing on ground that Congress had not granted appellate jurisdiction to the Supreme Court).

102. See *id.* at 269 (Carton, J., dissenting) ("It was apprehended, at least, that [bankruptcy laws] would not be uniform, unless Congress had the power to make them so.").

administration, it has become, by the various and conflicting constructions put upon it, little more uniform than the different and conflicting state insolvent laws.”¹⁰³ Therefore, Justice Carton wanted to construe the federal statute as intending to grant the Court appellate jurisdiction.¹⁰⁴

The Supreme Court’s first relevant holding is *Hanover National Bank v. Moyses*.¹⁰⁵ The questioned statute led to geographically varying results because it incorporated state law in certain particulars.¹⁰⁶ The *Hanover* Court asserted that the laws allowed by the Constitution “must . . . be uniform throughout the United States, but that uniformity is geographical and not personal”¹⁰⁷

We . . . hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different States.¹⁰⁸

103. *Id.* at 276.

104. *See id.*

105. 186 U.S. 181 (1902).

106. *See id.*; *see also* *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918) (“Notwithstanding this requirement as to uniformity[,] the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States.”).

107. *Hanover*, 186 U.S. at 188.

108. *Id.* at 190. *Hanover* relied on two lower court opinions expressing the same conclusion without any explanation beyond (i) the interaction between local law and all contracts, and (ii) the allegedly obvious meaning of the constitutional phrase. *See In re Deckert*, 7 F. Cas. 334 (C.C.E.D. Va. 1874) (No. 3728); *In re Beckerford*, 3 F. Cas. 26 (C.C.D. Mo. 1870) (No. 1209). Justice Frankfurter later repeated this conclusion without adding any substantive analysis:

The Constitutional requirement of uniformity is a requirement of geographical uniformity. It is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the State in which the bankruptcy court sits. To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions These differences [between state laws] inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after.

Next, in *International Shoe Co. v. Pinkus*, in 1929, the Court held that Congress preempted the field when it passed bankruptcy statutes, thus superceding existing state laws as opposed to providing debtors with a choice between state and national systems.¹⁰⁹ “The enforcement of state insolvency systems, whether held to be in pursuance of statutory provisions or otherwise, would necessarily conflict with the national purpose to have uniform laws on the subject of bankruptcies throughout the United States.”¹¹⁰

Nothing was said about the somewhat similar lack of uniformity that *Hanover* allowed. Neither *Hanover* nor *International Shoe* discussed the possibility that the Constitution requires Congress to level differences between what “the trustee takes in each State”¹¹¹ as the *quid pro quo* for enacting a national bankruptcy code which preempts state insolvency laws.

In *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co.*, the Court upheld a federal statute allowing reorganization (as opposed to liquidation) of railroads. The Court declared the statute within the bankruptcy power—but without discussing uniformity.¹¹² Later, in the *3R Act Cases*, the Court unanimously allowed a new bankruptcy scheme for railroads—even though the challenged statute was facially limited to one section of the country and its provisions greatly varied from the bankruptcy treatment allowed for other industries.¹¹³ The Court asserted that *Continental Illinois* already had allowed “uniformity” to stretch to different treatment for an industry with distinct problems,¹¹⁴ without admitting that *Continental Illinois* had not

Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172-73 (1946) (Frankfurter, J., concurring) (citations omitted).

109. See *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 266 (1929).

110. *Id.* at 268.

111. *Hanover*, 186 U.S. at 190.

112. See *Cont'l Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 669-73 (1935).

113. See *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102 (1974) (popularly known as “The 3R Act Cases”).

114. See *id.* at 158-59. The district court had found one possible use of one section of the challenged act to violate the constitutional mandate of uniformity. The Court declined to reach the issue because that eventuality had not materialized. See *id.* at 157-58.

mentioned the uniformity issue.¹¹⁵ Next, the Court redefined “uniformity” to allow Congress to deal specially with merely “local” problems.¹¹⁶ Uniformity’s meaning morphed into matching the scope of the statute with the scope of the perceived evil. Allegedly, no other railroad system at a different location had this problem when the challenged statute had been enacted.¹¹⁷ Justice Douglas, joined by Justice Stewart, dissented, pointing out that the challenged statute did not meet the Court’s established geographic definition of uniformity.¹¹⁸

Gibbons, currently the final Supreme Court case on the uniformity aspect of the Bankruptcy Clause, disallowed a statute that provided tailored treatment to one named railroad.¹¹⁹ While briefly mentioning the Framers’ alleged concern with private relief acts and

115. *But see, e.g.*, *Texas v. Cobb*, 532 U.S. 162, 169 (2001) (“Constitutional rights are not defined by inferences from opinions which did not address the question at issue.”); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”). *See also, e.g.*, *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2391-92 (2002) (declining to follow its own earlier “statements . . . intended to guide further proceedings” pursuant to its “customary refusal to be bound by dicta”) (internal citations and quotation marks omitted).

116. *See The 3R Act Cases*, 419 U.S. at 159 (asserting that this issue had already been decided by *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 463 n.7 (1937)). This is another interesting and undiscussed stretch. *Wright* did not deal with a bankruptcy statute with any provision applicable to a limited section of the country. Congress had passed a statute helping distressed farmers retain their land despite mortgage problems. *See Wright*, 300 U.S. at 444-45. The Court voided the first statute as allowing uncompensated takings of mortgage holders’ property. *See id.* at 446. *Wright* upheld the revised form of the Act that had been drafted to address the Court’s concerns. *See id.* at 470. One provision of the new Act bordered on a taking by allowing foreclosure sales to be delayed several years. *See id.* at 467. The Court attempted to limit that potential defect by pointing out that the new Act was an emergency measure and allowed each controlling court to shorten the delay if the emergency had lifted locally. *See id.* at 462-64. This regional variation was conclusorily stated to be legally identical to the allowed incorporation of varying state laws. *See id.* at 462-64, 463 n.7.

117. *See The 3R Act Cases*, 419 U.S. at 159-61. The Court ignored that a different railroad in a different section of the country might later develop the same problem, yet not be entitled to the same special bankruptcy protections.

118. *See id.* at 180-85 (Douglas, J., dissenting).

119. *See Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982).

the pro-debtor stance of some states in the 1780s, the Court refused to foreclose the type of limited statute allowed in the *3R Cases*—even though (crediting the Court’s descriptions) the recited, alleged original concerns should have undermined the statute at issue in the *3R Cases*, and even though that statute dealt in fact with only one railroad system.¹²⁰

In sum, the form limit requiring uniformity for bankruptcy statutes has consistently been dealt with at the definition stage, and with shallow opinions. The Court, furthermore, failed to enforce the uniformity limit until Congress became so complacent about the limit’s manipulability that it targeted one debtor by name.¹²¹ The Court’s willingness to stretch the term “uniform,” however, seems tied to perceived crises.

The Court used a similar, shallow definitional analysis when it first discussed the jurisdictional constraints in the Progress Clause.¹²² In the *Trade-Mark Cases*, in 1879, the Court asserted that the writings of authors and the discoveries of inventors both required

120. The two Justices in concurrence made clear that a better legislative record demonstrating the special national need for this very limited relief would have satisfied their understanding of “uniform.” See *Gibbons*, 455 U.S. at 474-77 (Marshall, J., concurring, joined by Brennan, J.).

121. Congruently, two major bankruptcy treatises have no index entry for a constitutional issue regarding uniformity of federal laws. See COLLIER ON BANKRUPTCY at 180, 1388-1389 (Alan N. Resnick et al. eds., 15th ed., rev. 1996) (index pages released March 2002 with no relevant entry under “Constitutional Issues,” “Uniform,” or “Uniformity”); 7 WILLIAM J. NORTON, NORTON BANKRUPTCY LAW & PRACTICE 2D. at Index-58, Index-59, Index-335, Index-336 (undated index pages with no relevant entry under “Constitutional Matters,” “Uniform,” or “Uniformity”).

122. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) (holding that a photograph of Oscar Wilde is copyrightable); *United States v. Steffens*, 100 U.S. 82, 93-94 (1879) (popularly known as “The Trade-Mark Cases”) (holding that use-based trademarks are not proper subjects for Congress’s power to enact either copyrights or patents because they are neither the “Writings” of “Authors” nor the “Discoveries” of “Inventors”). The Court handled “secure” by a slightly different, but still textual analysis. While the Court did discourse broadly on other matters, the determinative point was textual parallelism. “Secur[e]” refers textually to both “Authors” and “Inventors,” but inventors had never received common law, perpetual protection under Anglo-Saxon common law. See *Wheaton v. Peters*, 33 U.S. 591, 661 (1934).

“originality.”¹²³ “Writings” was pronounced to be an expansive term, but one still limited “to such [works] as are *original*, and are founded in the creative powers of the mind,” the “fruits of intellectual labor.”¹²⁴ The Court produced absolutely no authority for these presumably self-evident propositions. Nor did it engage in any discussion of the Progress Clause’s historical background. In *Sarony*, in 1884, the Court deigned to produce an authority, “Worcester,” for the assertion that an “author” is “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.”¹²⁵ “Writings,” congruently, include “the literary productions of those authors . . . [including] all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression.”¹²⁶ The Court’s longest historical or theoretical discussions occur in two cases that rely on constitutional theory to help explicate statutes.¹²⁷ Never, however, has the Court held a federal copyright or patent statute unconstitutional because it breached the limits of the Progress Clause.¹²⁸

Based on the Bankruptcy Clause model (even with an eye on the Court’s analysis of the “Writings” of “Authors”), therefore, the Court is likely to treat “limited Times” with similar shallow, definitional moves. Considering the lack of financial crises in the copyright industries,¹²⁹ Congress has no excuse for its willingness to overlook

123. *The Trade-Mark Cases*, 100 U.S. at 94.

124. *Id.*

125. *Sarony*, 111 U.S. at 57-58 (citing “Worcester”).

126. *Id.* Presumably, the Court relied upon Worcester’s Dictionary. See Brief on the Part of the Defendant in Error at 3, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (quoting “Worcester’s Dict.” as defining “author” to mean “he to whom anything owes its origin; originator; creator; maker; first cause.”).

127. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-51 (1991) (construing Congress’s allowance of copyright on factual compilations); *Graham v. John Deere Co.*, 383 U.S. 1, 5-10 (1966) (construing Congress’s formulation of the inventiveness required for patentability).

128. The Court did void the first federal trademark statute as outside both the Progress Clause and the Commerce Clause (as then narrowly construed). That statute, however, did not enlarge common law substantive rights. See *The Trade-Mark Cases*, 100 U.S. at 82.

129. Rhetoric about crises abounds. See generally Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996) (arguing that

the “limited Times” form limit. This form limit may be treated with more judicial respect, additionally, because it is reinforced with both (i) an express internal fence stipulating the policy Congress must pursue, and (ii) sharply defined jurisdictional limits; the Bankruptcy Clause has neither structure.¹³⁰

B. Second Step: Means and Goals

Current balancing-approach cases work with a recognized hierarchy of goals. The government may be required to target a goal judicially labeled as legitimate,¹³¹ substantial/important,¹³² or compelling.¹³³ Earlier “categorical” cases also look at means and goals. For example, *Lochner v. New York* inquires whether New York’s maximum hour statute is within the state’s police power.¹³⁴ In order to be within this power the statute has to pursue a “legitimate [police power] end” and the gains to the legitimate goal need to be more than “fanciful.”¹³⁵ However, some means and some goals are themselves illegitimate. For example, the federal

rhetoric is used as mere tactic to mask desire for more money and power). However, the wish to make even more money does not render one near bankruptcy. When discussing and enacting the CTEA, Congress made no finding that any copyright industry was in financial danger. *See* Brief of College Art Association et al. as Amici Curiae in Support of Petitioners at 23, *Eldred v. Ashcroft*, No. 01-618 (pointing out this hole in the legislative history of the CTEA).

130. The word “bankruptcy” was not a well-defined term of art in 1789 British or American jurisprudence. *See Hanover*, 186 U.S. at 184-88 (discussing expansiveness of word “bankruptcies”). The Constitution, furthermore, reads “on the subject of bankruptcies.” U.S. CONST. art. I, § 8, cl. 4. Under the no surplusage canon, this phrase should mean something wider than “bankruptcy laws.”

131. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (asserting that rational basis review requires only a legitimate purpose or combination of purposes).

132. *See, e.g., Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002) (requiring “substantial” purpose); *Kimel*, 528 U.S. at 84 (characterizing intermediate scrutiny as necessitating “important government objectives”).

133. *See, e.g., Kimel*, 528 U.S. at 84 (characterizing strict scrutiny as requiring “compelling government interests”).

134. 198 U.S. 45 (1905): Aleinikoff, *supra* note 22, at 951 (describing *Lochner* as the “Bete-noire of modern constitutional law”).

135. *See Lochner*, 198 U.S. at 57-64. This example is culled from Aleinikoff, *supra* note 22.

government may use a conditional offer of funds to cajole state action in many areas, but it cannot directly order non-judicial state officers to perform the identical action.¹³⁶ As for illegitimate purposes, no state may take otherwise legitimate action if its goal is to burden a group commonly subject to majority animus.¹³⁷ Furthermore, the government has no legitimate “interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.”¹³⁸

Eldred raises an extraordinarily rare issue concerning constitutional goals. Does the Progress Clause require that Congress use the listed means *only* when it seeks the listed end? The Progress

136. Compare *Printz v. United States*, 521 U.S. 898, 932, (1997) (holding that the federal government may not “direct the functioning of the state executive” by ordering state law enforcement agencies to perform checks on would-be purchasers of guns), with *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may condition some highway funds on state enactment of a minimum drinking age). However, some offers of funding are unacceptable unconstitutional conditions. “[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” *Dole*, 483 U.S. at 211. The unconstitutional conditions doctrine itself is hardly unproblematic. “The Supreme Court’s failure to provide coherent guidance on the subject is, alas, legendary.” Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001). See generally, e.g., *id.* at 6-8 (presenting a “new unified theory of unconstitutional conditions” based on a “conceptual analysis” of coercion viewed against “all three dimensions of constitutional restraint: effects, purposes, and conduct”); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 352-53 (1935) (presenting a classic argument for centrality of germaneness); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1345-50 (2002) (arguing that unconstitutional conditions cases are problematic because they turn on untheorized decisions concerning which harms and benefits should be aggregated); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1506 (1989) (asserting that recognized theories do not support shape of the unconstitutional conditions doctrine and suggesting that the doctrine should be used to block distributional harms caused by government overreaching).

137. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding that ALA. CONST. of 1901, art. VIII, § 182 which disenfranchises persons who had committed crimes of moral turpitude violates equal protection because the purpose of its 1901 enactment was disenfranchising African Americans).

138. *Thompson*, 122 S. Ct. at 1507.

Clause gives Congress “Power . . . To promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹³⁹ The CTEA unquestionably uses the means indicated in this Clause.¹⁴⁰ The means/goals issue in *Eldred* asks what goals may Congress legitimately address by this specific means.¹⁴¹ The D.C. Circuit panel majority denied any goal limitation

139. U.S. CONST. art. I, § 8, cl. 8, a.k.a., “Copyright and Patent Clause,” “Intellectual Property Clause,” or “Exclusive Rights Clause,” but more properly the “Progress Clause.” See Pollack, *supra* note 2, at 1 n.1.

140. The anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) raise the related means problem. May Congress use a different means—statutory prohibition of technology—for the goal of “promot[ing] Progress”? See Brief of *Amicus Curiae* Intellectual Property Law Professors in Support of Defendants-Appellants, Supporting Reversal, Argument I-III [Julie Cohen], *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001), available at http://jurist.law.pitt.edu/amicus/universal_v_reimerdes_cohen.htm (last visited Aug. 27, 2002) (arguing Congress may not prohibit circumvention technology under Progress Clause, Necessary and Proper Clause or Commerce Clause). But see *Corley*, 273 F.3d 429 (affirming injunction based on DMCA, but without discussing Progress Clause/Commerce Clause junction), *aff’g sub nom.* *Universal City Studios v. Riemerdes*, 111 F. Supp. 2d , 346 (S.D.N.Y. 2000) (issuing injunction against defendants). Depending on how the Court decides *Eldred*, the issue with the anti-circumvention provisions may morph into whether Congress may use the Commerce Clause to enact statutory prohibition of technology for the purpose of rewarding copyright holders in a way not allowed by the Progress Clause.

141. A possibly similar issue was raised concerning the now-defunct manufacturing clause of Title 17. See *Authors League of America v. Oman*, 790 F.2d 220, 224 (2d Cir. 1986) (holding that 17 U.S.C. § 601 was a constitutional exercise of commerce power). The opinion is suspect, however, because it overlooked the relevance of *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982). See *supra* notes 119-121 and accompanying text. Furthermore, one could distinguish the issues by arguing (i) that the manufacturing clause merely involved Congress’s choice among possible beneficiaries and survived equal protection analysis under rational basis review, (ii) that the manufacturing clause merely involved Congress conditioning a benefit on the grantees’ helping a different constitutionally allowable goal (without being an “unconstitutional condition” because of the congruence between printers and disseminating works of authorship), or (iii) that the manufacturing clause promoted a “useful art,” the printing art, in the United States. The requirement that a copy (or copies) of some works be deposited with the Library of Congress in 17 U.S.C. § 407, has been held a “necessary and proper” expansion of the progress power because it “sustains a national library for the public use” which fosters the Progress Clause’s

by declaring the Progress Clause's goal language to be merely a non-binding "preamble."¹⁴²

C. Third Step: Comparison

At this step, the Court asks if Congress has gotten close enough to the constitutional ideal. *Lochner* asked if health gains were more than merely fanciful.¹⁴³ Rational basis review looks for a reasonable relationship between the means chosen and some legitimate governmental goal.¹⁴⁴ Intermediate scrutiny requires that the regulation at issue both serve a significant governmental interest and leave open ample alternative channels for communication of the information.¹⁴⁵ Alternatively, intermediate scrutiny demands a substantial government interest that is directly advanced by the challenged limitation; furthermore, the limitation may not be more extensive than necessary to serve the asserted substantial government interest.¹⁴⁶ Strict scrutiny requires narrow tailoring to achieve a compelling government purpose.¹⁴⁷ The harshness of the comparison stage largely depends on the Court's approach to

"primary purpose . . . to promote the arts and sciences for the public good, not to grant an economic benefit to authors and inventors." *Ladd v. Law & Tech. Press*, 762 F.2d 809, 812 (9th Cir. 1985) (upholding deposit requirement as within Congress's power and not a violation of either the First or Fifth Amendments, but failing to mention *Gibbons*), *cert. denied*, 475 U.S. 1045 (1986).

142. *See Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001), *cert. granted sub nom. Eldred v. Ashcroft*, 122 S. Ct. 1062 (2002).

143. *See Lochner v. New York*, 198 U.S. 45, 57-58 (1905).

144. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) ("[W]hen conducting rational basis review 'we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.'" (citation omitted) (brackets in original)).

145. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 122 U.S. 1728, 1745 (2002) (Souter, J., dissenting on other grounds).

146. *See, e.g., Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1498 (2002).

147. *See, e.g., Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2534-35 (explaining strict scrutiny as requiring the prohibition to be "narrowly tailored, to serve . . . a compelling state interest," which includes showing "that it does not unnecessarily circumscribe protected expression.") (internal citation, quotation marks, and editing marks omitted).

legislative facts. Sometimes the Court is willing to hypothesize their existence; sometimes the Court nitpicks through supporting congressional documents.¹⁴⁸

The Progress Clause's fit requirement has never been discussed by the Supreme Court. This Article attempts to fill that gap, as well as others.

We now have both a basic taxonomy of types of constitutional commands constraining federal statutes, and a generalized flow chart of judicial review of a statute's constitutionality. In the next Section, I shall apply both analyses to the text of the Progress Clause as it impacts the CTEA.

IV. APPLICATION TO *ELDRED V. ASHCROFT*'S PROGRESS CLAUSE ISSUES

A. "Limited Times"

The Court can decide *Eldred* under the Progress Clause with a quite narrow opinion. It need only define the form provision, "limited Times." *Eldred* wins if the Court adopts a definition of "limited Times" that requires the length of the term to be set *ex ante*: the bargain theory of copyright.¹⁴⁹ Congress could be told that it has the power to grant copyrights only for a term already set by statute at the time the work first obtains statutory protection.¹⁵⁰

148. See, e.g., *Thompson*, 122 S. Ct. at 1507 ("[W]e have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational."). But see Coenen, *supra* note 73, at nn.442-48 (collecting articles criticizing Court's requirement of legislative findings).

149. See Heald & Sherry, *supra* note 38, at 1162-64 (asserting that the Copyright Clause includes a *quid pro quo* principle); see also Pollack, *The Owned Public Domain*, *supra* note 21, at 291-99 (explaining and providing authorities for the "bargain theory of patent").

150. An *ex ante* definition of "limited Times" would void the retrospective extensions but not the prospective ones. The prospective ones, however, would still be at risk from severability analysis; the proponents of the CTEA were only interested in the legislation because of the retrospective extensions. Both the legislative history and basic current value calculus support this conclusion. See Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 FLA. L. REV. 989, 1032 (2000); Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 202-05 (2002).

Such a definition is not barred by the Progress Clause's use of the plural noun "Times." The plural may have been chosen to allow both different length terms for different types of rights to exclude (e.g., utility patents, design patents, copyrights), and renewal terms (obtainable under a scheme enacted before the work became protected).¹⁵¹

The textual support for the *ex ante* reading is that any other definition reduces "limited Times" to a straw barrier. If "limited Times" means that Congress may at any time extend existing copyrights by a calculable number of years¹⁵² (i.e., if the Court allows terms to be re-set *ex post*), "limited Times" is vanishingly weak. The phrase, however, would not be mere surplusage; in order to reach the functional equivalent of eternal copyrights, Congress continuously would have to pass new statutes expanding existing copyright terms. That possibility, however, is the most troublesome of the possible outcomes when viewed against the Framers' dislike of corruption. If the "limited Times" may be set *ex post*, economically rational holders of soon-to-expire copyrights in valuable works would repeatedly encourage legislation by donating to congresspersons' campaign war chests—classic rent seeking behavior.¹⁵³ The constitutionality of such an outcome would be extremely odd because the Progress Clause of the Constitution is the political descendent of the Statute of Monopolies, known to the Framers' generation as the first win in the Whigs' fight against corruption and monarchical over-reaching.¹⁵⁴ The Framers' and Whigs' pejorative term "corruption," of course, translates into

151. See also Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYR. SOC'Y 19, 102 (2002) (supporting same construction).

152. "Calculable" includes terms such as "fourteen years" and "fourteen years after the death of the author."

153. See Brief Amicus Curiae of the Free Software Foundation in Support of Petitioners at 16, *Eldred v. Ashcroft*, No. 01-618; see also, e.g., Davis, *supra* note 150, at 998 n.30 (listing several major campaign contributions which seem related to passage of CTEA); Christina N. Gifford, Note, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 385-86 (2000) (same).

154. See Brief of Pollack, *supra* note * (providing fuller discussion and supporting authority).

Madison's despised "faction" and into the "agency failure" and "rent seeking" of modern economic-speak.¹⁵⁵

A narrow definitional solution might be very attractive to the Court because it would leave open most of the complex policy and fact-related issues possibly raised by the words "To promote the Progress of Science and useful Arts."¹⁵⁶ Even if the Court has a low-protectionist majority, it might wait to see if the public spotlight would deflect Congress from tinkering around a narrow ruling. Database legislation, after all, has not yet been enacted, even though *Feist* was decided ten years ago.¹⁵⁷ Such a narrow decision, however, has a significant downside. Congress and numerous interested parties would expend enormous resources on drafting, lobbying for, and lobbying against statutes that the Court might later void.¹⁵⁸

155. *See id.*

156. *See* Washington v. Glucksburg, 521 U.S. 702, 736-37, 752 (1997) (calling for more political debate on constitutional right to die); *see also* Ruth Bader Ginsburg, *Speaking In a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) ("Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.") (footnotes omitted). Disagreeing with my view of which issue is more difficult, one amicus brief argues for judicial restraint to be embodied in a decision striking retrospective extensions as not promoting progress and prospective extensions as not severable, thus not reaching "limited Times," which the brief considers more suited to legislative, than to judicial, decision. *See* Brief Amici Curiae of the Progressive Intellectual Property Law Association and the Union for the Public Domain in Partial Support of Petitioners at 6-7, *Eldred v. Ashcroft*, No. 01-618.

157. *See, e.g.*, Collections of Information Antipiracy Act, S. 2291, 105th Cong. § 2 (1998).

158. Similarly, the Court's expanding protection of state sovereign immunity was first announced as a clear statement rule. *See* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). Lobbyists converged on Congress, which eventually passed many clearer statutes abrogating state sovereign immunity. *See, e.g.*, 15 U.S.C. § 1122(b) (2000) (purporting to waive states' Eleventh Amendment immunity for violation of federal trademark statute, the Lanham Act); 17 U.S.C. § 511 (2000) (purporting to abrogate states' sovereign immunity for copyright infringement); 35 U.S.C. § 296 (2000) (purporting to abrogate states' sovereign immunity for patent infringement). The Court then announced that clear statements were not enough; abrogation could not be accomplished pursuant to Article I Powers; Congress needed to rely on post-Eleventh Amendment powers. *See* *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Third, the Court declared that the Appropriate Legislation Formula

Alternatively, the Court could defer completely (or almost completely) to Congress on the meaning of “limited Times.” “[L]imited Times” could be judicially set at any non-eternal period that Congress might (theoretically)¹⁵⁹ have found to have a rational relationship to “promot[ing] the Progress of Science and the useful Arts.” Such a decision, however, would require the Court to go beyond a single definitional move. It would, at a minimum, have to (i) define the goal section of the Progress Clause, and (ii) adopt the toothless version of rational basis review. Any higher standard for the comparison stage would, I believe, require Congress to supply more empirical support for its choice of term length. These two moves would collapse into one if the Court agrees with the D.C. Circuit that the phrase “promote the Progress of Science and the useful Arts” is mere surplusage,¹⁶⁰ despite the Court’s repeated dicta to the contrary.¹⁶¹

B. “Promote”

“Promote” in the Progress Clause is the language relating the means to the goal, the equivalent of “enforce” in the phrase, “enforce . . . by appropriate legislation.”¹⁶² “Promote,” therefore, should be the textual locus for the Court’s choice on the independence/deference continuum.

“Promote” is a word of virgin constitutional import. It appears only twice in the Constitution: the Preamble¹⁶³ and the Progress

was much narrower than clearly visible in earlier cases. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

159. “Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.” *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 809 (1969).

160. *See Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001), *cert. granted sub nom. Eldred v. Ashcroft*, 122 S. Ct. 1062 (2002).

161. *See cases cited supra* note 14.

162. Eight constitutional amendments contain a clause giving Congress (or Congress and the states) “power to enforce [the amendment] by appropriate legislation.” U.S. CONST. amends. XIII, XIV, XV, XVIII, XIX, XXIII, XXIV, XXVI.

163.

We the People of the United States, in Order to form a more perfect

Clause. According to Supreme Court dicta, “[a]s employed [in the Progress Clause], the terms ‘to promote’ are synonymous with the words ‘to stimulate,’ ‘to encourage,’ or ‘to induce.’”¹⁶⁴ This

Union, establish Justice, insure domestic Tranquility, provide for the common defence, *promote the general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl. (emphasis added). The possibly precatory nature of the Preamble does not devalue the use of the word “promote” in the Progress Clause because only the latter expressly confers a “power.” The Supreme Court has yet to base any substantive holding on the sole force of the Preamble to the U.S. Constitution. *See* *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (holding that Massachusetts statute requiring small pox vaccination is not unconstitutional; “[a]lthough th[e] [p]reamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the [g]overnment of the United States or on any of its [d]epartments,” relying on 1 Story’s Const. § 462). Justice Douglas did, however, include the Preamble in his list of constitutional provisions supporting a right to privacy. *See* *Doe v. Bolton*, 410 U.S. 179, 210-11 (1973) (Douglas, J., concurring). The Supreme Court has relied on preambles to help explain both the Constitution and other legal documents. *See, e.g.,* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783-84 (1995) (relying in part on the preamble to proposed Amendment 73 to the state constitution of Arkansas to determine its purpose); *Greer v. Spock*, 424 U.S. 828, 837 & n.8 (1976) (holding that commander of Fort Dix may prevent candidates from entering to speak and personally distribute campaign literature; “[o]ne of the very purposes for which the Constitution was ordained and established was to ‘provide for the common defence.’”); *id.* at 852 (Brennan, J., dissenting) (“But the Court overlooks . . . one of the very purposes for which the First Amendment was adopted was to ‘secure the Blessings of Liberty to ourselves and our Posterity.’”); *Cole v. Young*, 351 U.S. 536, 552, 555, 557 n.20 (1956) (relying *inter alia* on preambles to executive orders in determining that they went beyond bounds of enabling statute); *Price v. Forrest*, 173 U.S. 410, 427 (1899) (allowing use of statutory preamble as an aid to construction); *see also* Raymond B. Marcin, “*Posterity*” in the Preamble and a Positivist Pro-Life Position, 38 AM. J. JURIS. 273, 279-80 (1993) (arguing that the Preamble to the Constitution, by invoking “the Blessings of Liberty to . . . our Posterity,” counsels against allowing abortions unless the mother’s life is in danger); Eric M. Axler, Note, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People’s Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431 (2000) (arguing that the Preamble should guide court recognition of unenumerated rights protected by the Ninth Amendment).

164. *Goldstein v. California*, 412 U.S. 546, 555 & n.10 (1973) (citing *Kendall v. Winsor*, 62 U.S. (21 How.) 322, 328 (1859); *Bauer & Cie v.*

seeming-definition is supported only by citations to three earlier Supreme Court cases, none of which pretend to provide the meaning of the specific words, “To promote.”¹⁶⁵

Turning to dictionaries, as the Court often does,¹⁶⁶ provides no help.¹⁶⁷ According to Johnson, “To promote” means “[t]o forward; to advance,” as in the sentence: “He that talks deceitfully for truth, must hurt it more by his example, than he promotes it by his arguments.”¹⁶⁸ Webster agrees with Johnson and adds “to contribute to the growth, enlargement or excellence of any thing valuable, or to the increase of any thing evil; as to promote learning, knowledge, virtue or religion”¹⁶⁹ These examples demonstrate that “promote” provides no firm basis for choosing between review for actual effects and review for legislative purpose or among levels of

O’Donnell, 229 U.S. 1, 10 (1913)); *Mitchell v. Tilghman*, 86 U.S. (19 Wall.) 287, 418 (1874); .

165. “[The current patent statute] was passed for the purpose of *encouraging* useful invention and promoting new and useful improvements by the protection and *stimulation* thereby given to inventive genius, and was intended to secure to the public, after the lapse of the exclusive privileges granted, the benefit of such inventions and improvements.” *Bauer & Cie*, 229 U.S. at 10 (providing no citation in support of this statement) (emphasis added). “Patent laws have for their leading purpose the *encouragement* of useful inventions.” *Mitchell*, 86 U.S. (19 Wall.) at 418 (citing CURTIS ON PATENTS 4th ed. § 331) (emphasis added). As for “to induce,” someone’s eye seems to have slipped while copying out the citation. The passage cited actually reads: “The true policy and ends of the patent laws . . . are disclosed in that article of the Constitution . . . (Vide Constitution of the United States, art. I, sec. 8, clause [8].) By correct *induction* from these truths” *Kendall*, 62 U.S. (21 How.) at 328.

166. See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Remains a Fortress: An Update*, 5 GREEN BAG: ENT. J. L. 51, 51-52 (2001) (providing figures on the Court’s massive use of dictionaries).

167. See also Pollack, *supra* note 2, at Part V.A. (discussing why dictionaries are not good sources for the meaning of words in the U.S. Constitution).

168. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1534 (1978 Librairie Du Liban facsimile of 4th ed. 1773). Johnson’s second definition is irrelevant. See *id.* (“[t]o elevate; to exalt; to prefer,” as in “I will *promote* thee unto very great honor.”).

169. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE at unnumbered page headed PRO PRO PRO (Foundation for American Christian Education, 1998 facsimile of 1st ed. 1828). Webster adds a third definition, “to excite; as, to *promote* mutiny.” *Id.*

deference to Congress. In order to learn more we need to consider what Congress is allowed “To promote.” We need to explicate “the Progress of Science and useful Arts.”¹⁷⁰

C. “*Progress of Science and Useful Arts*”¹⁷¹

Is this key phrase an enforceable limit or an unenforceable aspiration?¹⁷² If it is an enforceable limitation, it is an express internal fence. As for the included words, “Science” means “knowledge” in an anachronistically broad sense.¹⁷³ “[U]seful Arts” means “technology.”¹⁷⁴ “Progress” has long been assumed to mean “The Idea of Progress,” i.e., qualitative improvement in human

170. U.S. CONST. art. I, § 8, cl. 8.

171. *Id.*

172. *See, e.g.,* Fried, *supra* note 69, at 76-78 (asserting that “aspirational provisions are relatively few in the Constitution”; pointing out that the level of scrutiny locates a provision on the continuum between limit and aspiration); Tribe, *supra* note 21, at 1246 (comparing “[c]onstitutions that merely proclaim political aspirations, like those of the former Soviet Union and its satellites” with the U.S. Constitution which “create[s] an edifice of law” and “calls certain institutions into being”).

173. *See* WEBSTER, *supra* note 169, at unnumbered page headed SCI SCI SLA:

SCIENCE, *n.* . . . (1) In a general sense, knowledge . . . (2) In philosophy, a collection of the general principles or leading truths relating to any subject . . . (3) Art derived from precepts or built on principles. . . (4) Any art or species of knowledge . . . (5) One of the seven liberal branches of knowledge, viz. grammar, logic, rhetoric, arithmetic, geometry, astronomy, and music . . .

Id.; *see also* 2 JOHNSON, *supra* note 168, at 1715 (providing even broader definition of “science”). In 1789, “science” included moral philosophy, logic, the nature of G-d, the nature of the human mind, metaphysics, physics, and ontology); ADAM SMITH, *THE WEALTH OF NATIONS* 397 (Modern Lib. ed. n.d.). Literature, poetry, and drama were “sciences” as subparts of “rhetoric.” *See, e.g.,* Pollack, *supra* note 2, at Part IV & nn.175-78 and accompanying text (discussing breadth of “science” in 1789).

174. *See* John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. REV. 1139, 1169-75 (1999) (arguing that “useful Arts” means “technology”); *see also* Robert I. Coulter, *The Field of the Statutory Useful Arts, Part II*, 34 J. PAT. OFF. SOC’Y 487, 495-96 (1952) (arguing that “useful Arts” means “mechanical arts”); Malla Pollack, *The Multiple Unconstitutionality of Business Method Patents: Common Sense, Congressional Consideration, and Constitutional History*, 28 RUTGERS COMPUTER & TECH. L.J. 61, 86-90 (2002).

knowledge.¹⁷⁵ The Supreme Court, however, has never adopted any definition.¹⁷⁶ My research strongly evidences that the 1789 American word “progress” means “spread” and that alternative readings are problematic in the context of the Progress Clause. I read the Progress Clause as allowing Congress to pass only such copyright and patent statutes as promote the diffusion of knowledge and technology throughout the population.¹⁷⁷

Whatever the word “Progress” means, the Clause’s odd structure should imbue its opening phrase with great authority. “To promote the Progress of Science and useful Arts” is one of the few express goal-limitations textually integrated into a grant of power in the original Constitution.¹⁷⁸ The Court has already recognized it as the only subpart of Article I which specifies both means and goals.¹⁷⁹

The government is arguing for mere toothless rational basis review with almost no limit on the goals Congress may pursue.¹⁸⁰ Many commentators have assumed or argued that the Court would automatically use rational basis review for this type of issue.¹⁸¹ This position approaches copyright as an economic regulation with a merely incidental (if any) impingement on fundamental rights and no relationship to any suspect class or goal. The Progress Clause,

175. See Pollack, *supra* note 2, at Part I.B.

176. See *id.* at nn.58-63 and accompanying text.

177. See *id. passim* (providing full argument). Qualitative improvement is required by the constitutional word pairs author/writings and inventor/discoveries. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346-47 (1991) (holding that originality is constitutionally required for copyright protection); *Graham v. John Deere Co.*, 383 U.S. 1, 13 (1966) (holding that non-obviousness is constitutionally required for patent protection).

178. See Lawrence Lessig, *Copyright’s First Amendment*, 48 *UCLA L. REV.* 1057, 1062 (2001) (asserting that Progress Clause is the only power granting clause which specifies both means and purpose); see also *supra* Part II.C.3. (discussing other somewhat similar subparts of the Constitution).

179. See *Goldstein v. California*, 412 U.S. 546, 555 (1973).

180. See Brief for the Respondent, *Eldred v. Ashcroft*, No. 01-618 at 8-9 (“Congress has reasonably concluded that its consistent practice *does* promote creativity and progress: . . . secures appropriate international protection for United States copyright holders’ works . . .”) (emphasis in original); *id.* at 19 (calling for “ordinary ‘necessary and proper’ standard of review”).

181. See, e.g., Davis, *supra* note 150, at 1021-22; Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 *CARDOZO ARTS & ENT. L.J.* 491, 528 (1999).

however, does not fit the textual paradigm of constitutional commands under-enforced by mere rational basis review.

Rational basis review of federal statutes usually occurs when an express external policy fence interacts with congressional action taken under a separately granted power. In such situations, the statute was not enacted for the purpose of impinging on the external policy fence; the statute is one of general applicability. Purposefully targeting the right protected by the policy fence results in a higher standard of review.¹⁸² The CTEA, however, was enacted for the specific purpose of expanding authors' rights to exclude (including rights already transferred to non-authors). The CTEA has no other more "general" applicability.

Furthermore, rational basis review occurs predominately where the policy fence and the power were not drafted as a unit by the same statesmen. The most important external fences are vague barriers such as "due process,"¹⁸³ and "no law" meaning not-some-laws.¹⁸⁴ Presumably, therefore, the drafting statesmen (and the ratifying public) were unlikely to foresee many or most of the clashes between these fences and later statutes. *Brown v. Board of Education*¹⁸⁵ is a thundering case precisely because, when drafted and ratified, the Reconstruction Amendments had been measured against segregated schools and announced not to require their integration.¹⁸⁶

182. See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640-41 (1994) (holding that must-carry provisions of Cable Television Consumer Protection & Competition Act of 1992 are "laws . . . singl[ing] out the press, or certain elements thereof, for special treatment" thus requiring "some degree of heightened First Amendment scrutiny") (internal citations and quotation marks omitted); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 534 (1987).

183. U.S. CONST. amends. V, XIV.

184. U.S. CONST. amend. I.

185. 347 U.S. 483 (1954).

186. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (asserting that legislative history made "obvious" that the Amendment was originally understood not to reach education, jury service, or voting); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950-53 (1995) (stating that almost all scholarly investigators agree that the original understanding of the Fourteenth Amendment did not include school desegregation). *But see id.* at 953 ("The thesis of this Article is that the

Additionally, the Article I power being fenced by mere rational basis review generally is a power that was enumerated in the Constitution primarily for the purpose of locating it institutionally—with Congress, as opposed to allowing the power to be wielded by the executive or reserved to the states.¹⁸⁷ The power is usually legitimate as a means toward an almost infinite number of constitutionally legitimate policy goals.

Textually, the Progress Clause is quite different. It involves an express internal fence; both the power and the fence on the power simultaneously were placed inside the same clause by the same drafters. The same drafters also curtailed the power with an internal form provision: “limited Times.” The power was enumerated, not only to locate it institutionally, but primarily to cabin its strength.¹⁸⁸ The drafters and ratifiers presumably had a clearer understanding of how this power, this fence, and this form provision would interact in practice. The absence of controversy over the Clause supports this thesis; we have clear records of ratification debate over extensive federal commerce power and over the possibility of a federal power to grant “monopolies” other than those hedged in by the Progress Clause.¹⁸⁹

consensus is wrong. . . [T]he belief that school segregation does in fact violate the Fourteenth Amendment was held during the years immediately following ratification by a substantial majority of political leaders who had supported the Amendment.”).

187. See I WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 411-15 (1953).

188. See *id.* at 486 (“It is clear that [the Copyright] power of Congress was enumerated in the Constitution *for the purpose* of expressing its limitations.”) (emphasis in original); see also Karjala, *supra* note 150, at 221-22.

189. See Pollack, *Purveyance and Power*, *supra* note 21, at 99-116 (discussing drafting and ratification); see also LINDA LEVY PECK, *COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND* 220 (1990) (asserting fight against early Stuart corruption and related monopolies was central to American revolutionary thought); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 623 (paperback ed. 1998) (same); Michael Conant, *Anti-Monopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 789-801 (1982) (reviewing anti-monopoly tradition of Britain and Colonial America; concluding that the right to be protected against government-supported monopolies is an unenumerated right protected by the Ninth Amendment and incorporated against the states under the Privileges and Immunities Clause of the Fourteenth Amendment). The extent of Congress’s

In short, the choice of this odd textual format signals a much deeper original suspicion of legislative action pursuant to Article I, Section 8, Clause 8, than of legislative action taken under other congressional powers. We have no reason to believe that the drafters or ratifiers considered cabinining the allowable “exclusive Right[s]” for “Authors” and “Inventors” to be an unimportant, merely economic regulation, or an area in which reasonable policy choices spread around all 360 degrees of various historical British practices. On the contrary, the public’s rights against patent and copyright ‘monopoly’ were part of the doctrinal core of Whiggery; they were important protections against tyranny¹⁹⁰ and censorship.¹⁹¹ As James Madison agreed, “That is not a just government . . . where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations”¹⁹²

To highlight the textual oddity of the Progress Clause, compare the actual Commerce Clause which merely specifies Congress’s jurisdiction¹⁹³ with the following textually more limited substitute: “Congress shall have the power . . . to promote a civil, agrarian

power over commerce was one of the key differences between the Articles of Confederation and the Constitution. *See, e.g.*, I GEORGE TICKNOR CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES 186-95* (Da Capo Press 1974, reprint of 1897 ed.) (discussing failure of Continental Congress to promote commerce); II JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1057 at 2 (3rd ed. 1958) (“The want of this power [to regulate commerce] . . . was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the [C]onstitution.”). The overly extensive federal power over commerce, which might be used to disadvantage agricultural states, was one of George Mason’s leading objections to the Constitution. *See* GEORGE MASON, *OBJECTIONS OF THE HON. GEORGE MASON TO THE PROPOSED FEDERAL CONSTITUTION. ADDRESSED TO THE CITIZENS OF VIRGINIA. PRINTED BY THOMAS NICOLAS, reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 327, 331* (Paul L. Ford ed., 1968).

190. *See generally* Pollack, *Purveyance and Power*, *supra* note 21, *passim*.

191. *See, e.g.*, LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE 21-57, 114-42* (1968).

192. James Madison, *Property*, 29 Mar. 1792, *reprinted in* I *THE FOUNDERS’ CONSTITUTION 598-99* (Philip B. Kurland & Ralph Lerner eds., 1987).

193. “Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

society, by regulating Commerce with foreign Nations, and among the several states, and with the Indian Tribes” If the Constitution read thus, would it have limited Congress’s discretion to set customs duties? To decide on farm subsidies? To regulate railroads? Would the Constitution have been neutral in the 1790s dispute over whether holders of federal securities should receive face value regardless of whether they were speculators who had bought the paper at a gigantic discount from citizen-soldiers faced with losing their farms for non-payment of taxes?¹⁹⁴ Flat negative replies are incompatible with respect for text or for original meaning in any guise. The Progress Clause is much more textually cabined than this hypothetical clause. Besides a goal limitation,¹⁹⁵ the Progress Clause recites a specific means, allows the means to be deployed only for limited time periods, and has much sharper jurisdictional borders.

In order to discuss structural fences, I need to abandon my attempt at substantive neutrality and embrace a policy reading of the Clause. As the Court has often said, “limited Times” demonstrates that eventual unlimited public use is the core goal of the Clause. Accepting my reading of “Progress” as “spread” or “diffusion,” the express internal fence and the form provision of the Progress Clause even more strongly should force copyright to function somewhat the way the First Amendment has evolved. On either reading, copyright is *required* to move dialogue into the public arena. Accepting my translation, the Clause becomes *primarily* an “engine of free expression.”¹⁹⁶ This stronger reading of the Progress Clause defuses tension between Madison’s twin claims: first, that free information flow was necessary to successful, republican government;¹⁹⁷ second,

194. See PELATIAH WEBSTER, *A Plea for the Poor Soldiers*, in POLITICAL ESSAYS ON THE NATURE AND OPERATION OF MONEY, PUBLIC FINANCES AND OTHER SUBJECTS PUBLISHED DURING THE AMERICAN WAR, AND CONTINUED UP TO THE PRESENT YEAR, 1791, 306 (B. Franklin ed., reprint 1969) (1791) (arguing against paying speculators face value because of such circumstances).

195. Hopefully, any perceived vagueness in the announced goal is clarified by Pollack, *supra* note 2 (providing empirical information on 1789 uses of the word “progress” and analyzing the goal limitation).

196. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

197. See Letter from James Madison to W.T. Barry (Aug. 4, 1822), in THE COMPLETE MADISON 314 (Saul K. Padover ed., 1953) (“Knowledge will forever govern ignorance.” *Id.* at 337 “A popular Government without

that the Constitution did not require a bill of rights.¹⁹⁸ On either of these views, reading the *text* of the Constitution, knowledge (or “Science”) is *not* merely “commerce”—Congress’s power over “Science” is much more constrained *textually* than is its power over interstate commerce.¹⁹⁹

If the Progress Clause is a pre-First Amendment First Amendment, a statute aimed at monetary reward of authors and publishers is a statute passed for an impermissible purpose; therefore, the review standard should be close to *per se* unconstitutionality. Perhaps the first case to reach the unconstitutionality of a repeated congressional gambit is unlikely to provoke emphatic judicial slamming of constitutional doors²⁰⁰—but the Court did exactly that in *INS v. Chadha*,²⁰¹ and *City of Boerne v. Flores*.²⁰² To public domain theorists, *Eldred* has a strong resemblance to the Court’s view of both *Chadha* and *Boerne*. All three involve congressional trifling with the Constitution—and the Constitution’s supreme guardian, the Supreme Court. The Court *has* repeatedly advised Congress that the main purpose of the Progress Clause is *not* to enrich copyright holders.²⁰³

popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.” *Id.*)

198. See THE FEDERALIST NO. 38 (James Madison); see also *id.* NO. 84, at 579 (Alexander Hamilton) (“For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”).

199. Cf. Tribe, *supra* note 21, at 1249 (asserting in another context that “each of the Constitution’s numerous grants of power must be interpreted in light of the others.”).

200. See Coenen, *supra* note 73, at 1587-96 (arguing that “structural” or “quasi-structural” rules which ask the political branches to reconsider their actions with more deliberation “now occupy a large and prospering territory in our constitutional [Supreme Court case] law.”).

201. 462 U.S. 919, 944-45 (1983) (holding “legislative veto” unconstitutional even though it was part of 196 statutes, some of which had been in force since 1932).

202. 521 U.S. 507, 519 (1997) (curtailing sharply Congress’s power under the Fourteenth Amendment).

203. See, e.g., *Feist Publ’ns*, 499 U.S. 340, 349-50 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ Art. I, § 8, cl. 8.”). For other examples, see the cases listed *supra* note 14.

D. Summary of Application Insights

On *textual* grounds, the Progress Clause should require a type of review similar to the unnamed, but quite potent, method used by the Court in *United States v. Morrison*²⁰⁴ to decide if Congress had “enforce[d]” the Fourteenth Amendment with “appropriate legislation.”²⁰⁵ Constitutionality should require both a tight fit and a tight supporting record.²⁰⁶

The Court generally chooses to speak narrowly and take one small doctrinal step at a time. Will the Court be more than

204. 529 U.S. 598 (2000).

205. *Id.* at 619.

206. Eldred did not take a clear position on the standard of review for the Progress Clause issue in either briefs or oral argument to the D.C. Circuit. *See* Appellant’s Opening Brief, *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430) (Appellant’s opening brief to the D.C. Circuit Court of Appeals); Oral Argument of Mr. Lawrence Lessig on Behalf of Eric Eldred, Appellant, *Eldred*, 239 F.3d 372 (D.C. Cir. 2001). However, Eldred and several supporting *amici* have asked the Supreme Court to employ some form of heightened review for the Progress Clause issue. *See* Brief for Petitioners at 31, *Eldred v. Ashcroft*, No. 01-618 (“Petitioners advance a *per se* rule banning blanket retrospective extensions of copyright terms At a minimum, this Court should adopt a rule of heightened review, requiring that any extensions be ‘congruent and proportional’ to proper Copyright Clause ends,” a standard similar to that used in *City of Boerne*); Brief Amici Curiae of the American Association of Law Libraries et al. in Support of Petitioners at 5, *Eldred v. Ashcroft*, No. 01-618 (“*Amici* believe that there must be a ‘congruence and proportionality’ between the ‘limited’ time of copyright protection and the need for such protection ‘to promote’ the progress of science and useful arts.”); *id.* at 14 (“In addition, there must be an adequate record to support the rationale [suggested by Congress.]”); Brief of Amici Curiae National Writers Union et al. at 16-17, *Eldred v. Ashcroft*, No. 01-618 (requesting that the Court “carefully scrutinize[]” all “proffered congressional justifications for the CTEA with . . . care.”); Brief of Pollack, *supra* note *, at 2, 13 (requesting “a high standard of review” including “some version of proportionality and congruence review based on this Court’s independent perusal of the legislative record” such as used in *Kimel* and *Morrison*). As I have already argued, under almost any meaning of “progress,” the CTEA may fail even rational basis scrutiny. *See* Pollack, *supra* note 2, at nn.33-57 and accompanying text; *see also* Karjala, *supra* note 150, at 201. (“The CTEA, at least insofar as it applies retroactively to works already in existence, cannot survive any test for review that is stronger than a rubber-stamp version of ‘rational basis’ (if, indeed, it can survive rational basis analysis.)”) (internal footnote omitted). Professor Karjala also supports a high standard of review. *See id.* at 201-03 (calling for some form of heightened scrutiny).

commonly forthcoming in *Eldred*? Will it answer more questions more fully than absolutely necessary to a decision? Or will it play Old Father William and assert its power to refuse answers? As discussed next, *Eldred* is a case where fuller answers are particularly appropriate.

V. ELDRED AS ANOTHER BROWN

Eldred has the potential to be the *Brown v. Board*²⁰⁷ of public discourse theory—a Supreme Court opinion insisting on a novel, “general welfare”²⁰⁸—enhancing, understanding of a constitutional mandate. *Brown*, of course, is the paradigm of judicial activism correctly applied.²⁰⁹ No one, however, can doubt that *Brown* was anathema to a large segment of the contemporary population and placed a major obligation on unwilling government players.²¹⁰ The cases differ because *Brown* castigated mainly the states,²¹¹ while *Eldred* would castigate Congress. *Eldred*, nevertheless, has substantial similarities to *Brown*, which, I hope, will lead the Court to again take an active role in pushing legislative compliance. The comparison below is based on Professor Fallon’s approving contrast

207. 347 U.S. 483 (1954) (holding so-called “separate but equal” state public education unconstitutional).

208. U.S. CONST. pmb.

209. See McConnell, *supra* note 186, at 952 (“Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”); see also, e.g., Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 WASHBURN L.J. 1, 1 (2000) (providing various positive readings of *Brown*, “the most famous case of the twentieth century”); SUNSTEIN, *supra* note 8, at 36 (noting that *Brown v. Board of Education* “may well be the most celebrated” decision in the Court’s history”).

210. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 248 (2d ed. 1986) (providing brief overview of practical problems of implementing *Brown*); Bickel, *supra* note 186, at 2 (“The [*Brown*] Court knew, of course, that its judgment would have an unparalleled impact on the daily lives of a very substantial portion of the population, and that the response of many of those affected would be in varying degrees hostile.”).

211. *Bolling v. Sharpe*, 347 U.S. 497 (1954), of course, issued the same integration order to schools in the District of Columbia, a non-state.

of *Brown*'s proper judicial activism with the proper judicial minimalism of *Glucksberg* and *Quill*.²¹²

Fallon asserts that "[i]n *Brown*, the underlying value of equality was clearly articulated in the constitutional text" ²¹³ The underlying value of access to knowledge and disparate opinions is "clearly articulated" in the First Amendment as well as in the Progress Clause.²¹⁴ According to Fallon, "widely shared understandings confirmed the 'suspect' quality of race-based discrimination" delegitimized in *Brown*.²¹⁵ In *Eldred*, "widely confirmed understandings confirm[] the 'suspect' quality" of allowing special interests to control access to knowledge and disparate opinions.²¹⁶ According to Fallon, "school segregation

212. See Fallon, *supra* note 7, at 144-47 (comparing right to die cases from 1996 Term with *Brown* and concluding that the Court acted properly in both instances).

213. *Id.* at 146.

214. The value of wide access is supported by both the Madisonian deliberative-democracy type of Free Speech theory and its main rival, the Holmesian marketplace-of-ideas concept. See SUNSTEIN, *supra* note 8, at 175-80 (explaining this basic duality).

215. See Fallon, *supra* note 7, at 146.

216. See, e.g., Garon, *supra* note 181, at 585-98 (discussing the negative social aspects of media convergence and oligopoly).

The "press" in 1791 was not the *New York Times* or the *Wall Street Journal*. It did not comprise large organizations of private interests, with millions of readers associated with each organization. Rather, the press then was much like the Internet today. The cost of a printing press was low, the readership was slight, and anyone (within reason) could become a publisher

LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 183 (1999); see Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945-54 (1997) (attacking the Communications Act of 1996 as a corrupt bargain between the economically and the politically powerful which will perpetuate public lack of informed input into political decision-making). The communication giants' power is premised on government commodification (such as allocation of broadcasting spectrum and creation of copyright "property") combined with government refusal to regulate content chosen by the empowered "private" entities. This power configuration has been challenged at many different points. See LESSIG, *supra*, 184-85 (arguing that originalist reading of First Amendment translated to deal with modern technology would prevent government empowerment of large communication entities premised on government regulation of spectrum use); JESSICA LITMAN, DIGITAL COPYRIGHT 172-75 (2001) (arguing that Congress's expansion of copyright and related statutes protect current holders of large market share while

presented a paradigmatic case of the ‘prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry’²¹⁷—representational reinforcement.²¹⁸ The public domain presents a paradigmatic case of collective action failure—a now well-understood political phenomenon that the Court has not yet recognized.²¹⁹ While the Court may not be ready to correct all

perversely hurting public access to works and delaying expansion of new technology); CASS SUNSTEIN, *REPUBLIC.COM* 146-59 (2001) (arguing against large communications businesses being exempt from content regulation in the name of the First Amendment; arguing for reading the First Amendment as encouraging regulation of the communications markets in order to promote deliberative democracy); see also RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* 107-19 (paperback ed. 1996) (tying commercial culture to destruction of deliberation and deliberative-self, a destruction that commercial interests cloak with the mythic designation of “freedom”); SUNSTEIN, *supra*, at 143, 150 (arguing against the growing modern identification of the First Amendment with “government respect[ing] consumer sovereignty,” which he likens to the *Lochner* Court’s protection of wage earners’ “choice” to work long hours for low wages).

217. Fallon, *supra* note 7, at 146 (quoting the famous fourth footnote in *United States v. Caroline Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . .”)); see also Ginsburg, *supra* note 156, at 1206-07 (asserting that judicial activism was proper in *Brown* because the disadvantaged were institutionally blocked from redress through congressional action).

218. In this situation (where well-healed special interests push for commercialization of a key component of representational government) representational reinforcement (speaking for persons under counted by the political process) is equivalent to the other main reason for judicial review, speaking for constitutional values forgotten in the heat of political dispute. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88-104 (Harvard University Press 1980) (discussing judicial help for politically under valued citizens); Bickel, *supra* note 186, at 23-28 (discussing judicial support for constitutional values). *But see* Aleinikoff, *supra* note 22, at 985 (arguing that these alleged flaws in the legislative process support no more than a judicial remand to Congress); Coenen, *supra* note 73, at 1582 (asserting that the Court often “in effect ‘remands’ constitutionally controversial programs to the political branches . . .”).

219. See, e.g., Dennis Karjala, *Copyright Protection of Operating Software, Copyright Misuse, and Antitrust*, 9 CORNELL J.L. & PUB. POL’Y 161, 181-82 (1999) (discussing Congress’s inability to lower copyright holders’

collective action failure, the Progress Clause was drafted with limits triggered by the history of English corruption. In this one clause, the Framers left textual commands supported by clear historical material demonstrating a deep distrust of special interest legislation *in this specific area of government action*.²²⁰ Judicial activism seems required by the unusually tight crafting of this one small piece of the Constitution.

In *Brown*, the Court moved ahead of the public despite “disagreement” about constitutional limits. As with *Brown*, in *Eldred*, “[t]he Court [may] justifiably hope, and even anticipate, that its ruling w[ill] help to sway opinion and forge an informed consensus on the reasonableness, and ultimately the rightness, of its decision.”²²¹ Both Congress and the so-called Copyright Industries recognize that the American public has not internalized current copyright statutes as moral norms—hence the repeated calls for copyright “education.”²²² Therefore, in *Eldred*, as in *Brown*, the Court can easily craft “a morally compelling interpretation of an accepted norm.”²²³

entitlements); Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 532-33 (recognizing Congress’s institutional problems in protecting the public domain as the major catalyst of the “constitutionalization” of copyright scholarship); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989) (same); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996) (detailed discussion of collective action failures); Netanel, *supra* note 11, at 66 n.278 (2001) (summarizing collective action failures); William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139 (1996) (discussing his personal experience with influence of special interests).

220. See generally Pollack, *Purveyance and Power*, *supra* note 21, *passim* (providing detailed discussion of historical tie between proto-intellectual property grants and government corruption, a.k.a agency failure).

221. Fallon, *supra* note 7, 146.

222. See, e.g., *Education Programs Needed to Combat Consumer Piracy, Experts Say*, in 64 BNA’S PAT. TRADEMARK & COPYRIGHT J. No. 1571, at 12-14 (May 3, 2002) (reporting statements favoring public education made by numerous industry spokespersons during “Copyright Conference,” Wash. D.C., April 24 & 25, 2002, sponsored by PTO and Copyright Office, including representatives of the Software & Information Industry Assn., Business Software Alliance, Assn. of Am. Univs.).

223. Fallon, *supra* note 7, at 146.

Finally, the real world settings are as well known in *Eldred* as they were in *Brown*. According to Fallon, in 1954, no one could doubt that segregation's "social meaning" involved "wall[ing]" African-Americans into "a position of . . . inferiority."²²⁴ Today, no one can doubt that the "social" meaning of the CTEA is permitting major corporate copyright holders the power to wall-off the public from both a massive quantity of cultural material *and* to render impotent a newly available engine of free expression, the Internet, which might otherwise allow any concerned citizen to be a potent publisher and distributor.²²⁵

VI. CONCLUSION

The Court in *Eldred* may create a review standard *de novo*. In this Article, I try to form a standard by inspecting the structure of the unusual, and unusually detailed, text of Article I, Section 8, Clause 8 of the Constitution while remaining relatively detached from the meaning of its words. The Court may decide the Progress Clause issue with a narrow opinion merely supplying a partial definition of "limited Times." If the Court reaches the congruence of means and goals, respect for the Constitution's text requires both a tight fit

224. *Id.* at 147.

225. The Copyright Act's dampening effect on the democratic impact of the Internet is enhanced by other new pseudo-copyright statutes such as the DMCA and UCITA. The sources recognizing the potential of the Internet are legion, even within United States judicial opinions.

The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity . . . While "surfing" the World Wide Web, the primary method of remote information retrieval on the Internet today . . . individuals can access material about topics ranging from aardvarks to Zoroastrianism. One can use the Web to read thousands of newspapers published around the globe, purchase tickets for a matinee at the neighborhood movie theater, or follow the progress of any Major League Baseball team on a pitch-by-pitch basis. *Ascroft v. ACLU*, 122 S. Ct. 1700, 1703 (2002) (internal citations and footnotes omitted); *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 409 (E.D. Pa. 2002) ("In providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics."; holding invalid under strict scrutiny a federal statute conditioning funding on library's use of Internet filtering).

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between the means chosen and the Constitution's required goal of "promot[ing] the Progress of Science and useful Arts," and a targeted congressional record demonstrating the non-speculative nature of the tight fit.

The Supreme Court, furthermore, should provide unstinted analysis of the Progress Clause issues in *Eldred*. Without firm, full guidance, Congress, like Old Father William, will "do it again and again."²²⁶

226. See CARROLL, *supra* note 1, at 65.