

The Intellectual Property Clause and Judicial Review: The Case for Deference
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Outline

I. Overview

Scholarship on intellectual property has been dominated by what Professor Paul Schwartz and I have elsewhere called “IP restrictors,”¹ academics who oppose the propertization of intellectual property and who argue that courts should use the Constitution - and, in particular, the Intellectual Property Clause and the First Amendment - to overturn legislation that advances that trend. This talk will take issue with one part of this broad agenda - the standard for judicial review under the Intellectual Property Clause - and argue that judicial review under the Intellectual Property Clause should be deferential. In making the case for deferential review, I will draw on standard metrics of constitutional analysis: original understanding, text, and analysis of appropriate judicial competence and overall constitutional structure.

This deferential approach would have a range of significant consequences. It provides a firmer basis for the Supreme Court’s decision in *Eldred* than was offered by the majority and suggests that the holding in that case should be read broadly. It suggests that *Feist* was wrongly decided and that the Court should not aggressively review congressional statutes to determine whether the intellectual property protected is original. Finally, it indicates that the Intellectual Property Clause implicitly constrains other constitutionally granted congressional powers (such as the commerce clause power) only in a very limited way.

My point is not to weigh in to the policy debates involving intellectual property questions, but, rather, to argue that consistency with the fundamental principles of constitutional law requires that courts should defer to the ways in which Congress resolves those debates.

II. Original Understanding and Text

While IP restrictors place great emphasis on the original understanding, the original understanding, correctly viewed, supports deferential review. The same point can be made about the text of the clause.

There is, it should be noted, very little evidence from the framing and the ratification debates as to the contours of the clause. In arguing that the clause should be read to incorporate a robust requirement for originality and powerful limits on the period for which rights could be granted, IP restrictors have appealed to background understanding and, in particular, have read into the clause concern about Crown abuses (involving grants of extensive intellectual property

¹Paul M. Schwartz and William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 Yale L.J. 2331, 2331 (2003).

rights to the politically powerful) and the founding generation's supposed deep-seated opposition to monopolies.

The IP Restrictors' views about background understanding are deeply flawed. I do not know of any statements from the founders linking concerns about Crown practices with the contours of the clause, which would, after all, limit Congress, rather than the King. Indeed, the few statements from the founding focus on the importance of the grant of power in the clause, and do not accord significance to the limitations. With regard to monopolies, the IP restrictors place primary reliance on the opposition to monopolies of George Mason (who opposed the Constitution) and Thomas Jefferson (who was not a participant at Philadelphia or in the ratification debates) - hardly the most relevant commentators. At the same time, they miss the complexity of Madison's views (who was more tolerant of monopolies of Jefferson); they also wholly ignore the views of the Federalists, who were supportive of appropriate monopolies and who were in the ascendant politically in the first years of the Republic, and whose position is thus entitled to particular weight.

Given the dearth of the comments from the framing, early practice is particularly important, and it supports a broad reading of Congress' power under the clause. The Copyright Act of 1790 operated retroactively, protecting works already created. Moreover, three times in the Early Republic, Congress passed acts extending protection for patents for existing inventions. In other words, early practice was consistent with the practice challenged in *Eldred*, the practice of extending intellectual property protection for existing works. In addition, as Jane Ginsburg has pointed out, the first Copyright Act protected maps and charts, and this suggests a low threshold for originality. Even Madison favored protections for maps, charts, and books of calculation. Thus, the founders took a broad view of Congress' powers under the clause, rather than viewing the clause as establishing a high threshold of originality and as establishing rigorous limits to the period of protection through the phrase "limited times."

To the extent that such readings are seen as reflecting a capacious reading of the Intellectual Property Clause, they were consistent with the dominant interpretive practice in the Early Republic. As a general matter, modern textualists assume that they are recovering original meaning when they read constitutional text closely. Many of the founders, however, did not have such a constrained approach to constitutional text. In particular, the Federalists took a broad view of federal powers. For example, the statutes establishing the Carriage Tax and the Bank of the United States - to pick two of the most important and controversial pieces of early legislation - reflected generous readings of the text of constitutional grants of power to Congress. Of course, Republicans generally took a more constrained view of constitutional grants of authority, but the Federalists read constitutional text broadly. As previously noted, since the Federalists were politically dominant in the first years of the Republic, their approach should be accorded primary weight in assessing the original understanding.

More fundamentally, the text of the Intellectual Property Clause itself - "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Discoveries" - is not very constraining, if read fairly. The text does not make explicit reference to originality. The phrase "limited Times" bars Congress from granting intellectual property rights for an eternity, but it does not bar a series of decisions to

extend a right for a series of “limited Times.” The clause speaks in the preamble of “promot[ing] the Progress of Science and useful Arts” in an open-ended way that indicates that Congress has a broad authority to decide how to advance those ends.

While early practice and text suggest a broad scope of congressional power under the clause, it is equally important, from an originalist perspective, that the conception of judicial review that was part of the original understanding was a limited one. There was a surprisingly large body of pre-Marbury caselaw in state and federal courts in which judicial review was exercised, but the cases in which statutes were invalidated involve, without exception, interference with the powers of courts and juries or state incursions on federal authority. There was, in contrast, marked deference to legislative assertions of substantive powers; no statutes in this category were invalidated.² Thus, the early scope of judicial review reinforces the notion that intellectual property legislation - substantive legislation - should be reviewed deferentially.

In sum, the original understanding (both of the clause itself and of judicial role) and a careful reading of the Intellectual Property Clause all indicate that courts should be deferential in reviewing intellectual property legislation.

III. Judicial Competence and Constitutional Structure

The core area in which courts engage in deferential scrutiny is economic legislation that does not employ a suspect classification or infringe on a fundamental right. Deference has traditionally been justified on two grounds. The first is that courts have limited competence to engage in the balancing required in economic decisionmaking. From an institutional perspective, legislatures are in a better position to gather and assess relevant facts. The second is that, given the superior claim to democratic legitimacy of legislatures, courts should defer to legislative decisions unless there is a particular reason to second guess those decisions. In economic decisionmaking (unlike legislation involving suspect classification), there is no such reason. Legislatures may make decisions that are unwise, but courts should not be in the business of overturning statutes simply because they find the underlying policy misconceived.

These same arguments suggest that judicial scrutiny of congressional legislation involving intellectual property should also be deferential. Academics have often decried the propertization of intellectual property, but, regardless of whether one accepts the accuracy of this description or the force of the critique, intellectual property legislation is, and always has been, economic legislation. While IP Restrictors would move courts to a position of strong constitutional oversight of intellectual property legislation, courts are poorly situated to determine the proper balance to strike between incentives to create and free competition. Similarly, there is no particular reason to suspect the existence of political process failure that would lead one to conclude that courts have a particular duty to second guess congressional legislation in the intellectual property area.

²See William Michael Treanor, *Judicial Review before Marbury*, 58 *Stanford L. Rev.* 455 (2005).

I anticipate that the counter to this will be that, given the economic stakes and the political power of the corporate actors involved in intellectual property legislation like the CTEA, strong judicial oversight is critical. But this is an argument without limiting principle. As anyone exposed to public choice theory (or political realities) would acknowledge, a great deal of legislation is special interest legislation. The arguments for scrutinizing intellectual property legislation are equally applicable to all economic legislation. Particularly in view of the text of the Intellectual Property Clause and the original understanding of the clause described above, there is no warrant for scrutinizing intellectual property legislation more closely than other economic legislation. Respect for democratic decisionmaking - and consistency with our judicial system's premise of deference to economic statutes - leads to the conclusion that deferential review of intellectual property legislation is appropriate.

IV. Applications

Original understanding, text, and consistency with the standard applied in judicial review of other economic legislation all support the conclusion that courts should review intellectual property legislation deferentially. Use of this approach would have a number of important consequences.

First, it suggests that challenges being mounted to restrict the reach of *Eldred* should be rejected. Most significantly, there have been claims - thus far unsuccessful, see, e.g., *Golan v. Gonzalez*; *Luck's Music Library v. Ashcroft* - that legislation enacted pursuant to the Uruguay Round Agreements could not constitutionally restore copyright protection to foreign creators whose works had entered the public domain in this country. Original understanding indicates these claims should be denied: Early Congresses protected patents that had entered the public domain, and so there is relevant evidence of how the Intellectual Property Clause was initially understood. More fundamentally, the challenged statute (17 U.S.C. §104A) passes muster because Congress could have rationally decided that bringing federal copyright law into concord with our treaty obligations was consistent with promoting the progress of science and the useful arts.

Second, this argument advanced here indicates that Feist's reading of a strong originality requirement into the Intellectual Property Clause was erroneous. Feist is inconsistent with the original understanding (under which Congress had broad authority to enact legislation under the Intellectual Property Clause), not warranted by text, and at odds with the overarching approach to economic legislation that informs our constitutional case law.

Finally, the approach argued for here indicates that the Intellectual Property Clause should only minimally limit congressional assertions of authority based on powers such as the Commerce Clause. Academics and policymakers have debated whether the restrictions found in the Intellectual Property Clause - such as "limited times" and the originality requirement articulated in Feist - can be circumvented by congressional reliance on other powers, and there has been a small body of caselaw on the subject in recent years. This debate has focused on, in particular, the anti-bootlegging statutes (which provide protection for concert performances, even though they have not been "fixed" by the performer), the anti-piracy provisions of the DMCA, and proposed database legislation. Although it has been argued to the contrary, the Intellectual Property Clause should have *some* preemptive power. In particular, the "limited

times” restriction would be wholly meaningless if Congress could use the commerce clause power to create permanent intellectual property rights (as, for example, was involved in some proposed database statutes). At the same time, the general principle of deference suggests that, where there is no fundamental inconsistency, Congress can use its other powers to create intellectual property-like protection (such as is involved in the anti-bootlegging statutes).