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## Discrimination in the Copyright Clause

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DISCRIMINATION IN THE COPYRIGHT CLAUSE

Ned Snow\*

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## ABSTRACT

*Does Congress have power to deny copyright protection for specific content? The Copyright Clause grants Congress power to “promote the Progress of Science” by legislating copyright laws. Certainly some content may reasonably be viewed as failing to promote the progress of science. Violent video games or pornography, for instance, may reasonably be viewed as not promoting progress in science, even though they receive protection as free speech under the First Amendment. So even if the Free Speech Clause bars Congress from banning content, does the Copyright Clause provide Congress a permissible means to discourage production of that content?*

*This Article considers whether such content-based copyright denial is permissible under Congress’s copyright power. Neither courts nor scholars have considered this question, despite the fact that lawmakers are presently seeking to control negative effects of specific content. This Article posits that the copyright power provides Congress that means. The Copyright Clause’s mandate to promote the progress of science suggests a power to exercise content discrimination. At the same time, denying copyright to content would not prevent content creators from engaging in, and even profiting from, any speech protected by the First Amendment. The Article concludes that the Copyright Clause provides a constitutional tool for fixing content-based problems.*

## I. INTRODUCTION

In the aftermath of recent school shootings, violent video games have become subject to public criticism.<sup>1</sup> This raises an obvious question: can Congress do anything to control the proliferation of such games? At first glance, it would seem that Congress cannot. The Supreme Court has recently recognized First Amendment protection for violent video games, overturning a state ban on their sale.<sup>2</sup> Nevertheless, the Court’s holding does not end the discussion. The Court never suggested that free-speech protection from government censorship entitles those games to copyright protection from private copying.<sup>3</sup> And copyright protection is important for

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1. See, e.g., Lou Kesten, *Shooting Renews Argument over Video-Game Violence*, U.S. NEWS & WORLD REP. (Dec. 19, 2012, 1:04 PM), <http://www.usnews.com/news/business/articles/2012/12/19/shooting-renews-argument-over-video-game-violence>.

2. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

3. See Ned Snow, *Content-Based Copyright Denial*, 90 IND. L.J. 1473, 1478 (2015) (concluding that scope of the Free Speech Clause is distinct from the scope of the Copyright Clause).

their proliferation.<sup>4</sup> Reducing copyright reduces profits, and reducing profits reduces production. So although Congress cannot ban violent video games as unprotected speech, whether Congress must incent them through copyright is an entirely different question—though one with similar implications.

The Constitution appears to answer this question through the Copyright Clause.<sup>5</sup> That Clause suggests that copyrightable content must “promote the Progress of Science.”<sup>6</sup> Because it seems reasonable to believe that violent video games fail to promote such progress, the Copyright Clause appears to provide Congress justification to deny those games a copyright. To be clear, the fact that the law protects violent video games from free-speech abridgments does not imply that the law recognizes their promotion of progress.<sup>7</sup> This Article therefore examines the Copyright Clause to conclude that Congress may deny copyright for specific content in an effort to decrease its production.

Of course this question is not unique to violent video games. There are several categories of content that, although protected by the First Amendment, come under scrutiny for various reasons. Consider hate speech, pornography, or crime-facilitating material. Some First Amendment scholars have argued for government to control these categories of content for various social-policy reasons.<sup>8</sup> Surprisingly, though, their arguments ignore a very practical means for doing so: copyright law. Copyright scholars have similarly ignored the issue of whether the Copyright Clause gives Congress power to pursue social policies through a content-based copyright regime.<sup>9</sup> The literature is silent on this fundamental question: does the Copyright Clause allow Congress to exercise content discrimination in defining copyright eligibility?

This Article proposes an interpretation of the Copyright Clause that allows Congress to exercise content discrimination in legislating copyright

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4. See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 332 (1989); cf. Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 45–47 (2011) (suggesting that creators will overvalue works that embody greater creativity).

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

6. See *id.*

7. See Snow, *supra* note 3, at 1479–83, 1485.

8. See, e.g., Rosalie Berger Levinson, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided Snyder*, 46 SUFFOLK U. L. REV. 45, 45 (2013); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16–17 (1985); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1217 (2005).

9. Professor Ann Bartow has argued that Congress should deny copyright for pornographic works. See Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 19–25, 48 (2012). She makes persuasive policy arguments. This Article, by contrast, addresses the constitutional issues relating to the Copyright Clause inherent in her proposal.

law. Importantly, this Article does not consider whether the First Amendment permits such an exercise of the copyright power. That question I have addressed in another work, ultimately concluding that the First Amendment does not prevent content discrimination in the copyright context insofar as the discrimination is viewpoint-neutral.<sup>10</sup> Here, I take up the question of whether the Copyright Clause contemplates such discrimination, and whether such an interpretation of the Copyright Clause makes sense as a matter of constitutional policy.

In Part II, I examine the text of the Copyright Clause as well as its treatment by Congress and the Judiciary. The text of that Clause provides support for content discrimination: the Clause premises Congress's power on promoting "the Progress of Science,"<sup>11</sup> and *Progress* suggests a power to determine which copyrightable content will effect advancements and improvements in knowledge.<sup>12</sup> Additionally, congressional history provides limited support for this interpretation; specifically, the Copyright Act designates criteria for copyright eligibility that requires content examination.<sup>13</sup> Supreme Court case law lends only minimal support for the interpretation, although the case law certainly does not preclude it: in particular, a 1903 Supreme Court decision—*Bleistein v. Donaldson Lithographing Co.*<sup>14</sup>—dealing with copyright eligibility is consistent with the interpretation, and statements by the modern Court in *Golan v. Holder*<sup>15</sup> and *Eldred v. Ashcroft*<sup>16</sup> may be construed either way, supporting or opposing the interpretation.<sup>17</sup>

In Part III, I consider policy reasons for and against this interpretation of the Copyright Clause. I recite two reasons in support of the interpretation.<sup>18</sup> First, Congress has a collective perspective that individuals lack in assessing content value.<sup>19</sup> This is particularly relevant because the purpose of the copyright power is to serve a collective end—namely, promoting the progress of science.<sup>20</sup> Second, Congress has institutional means that can minimize wasteful effects of the copyright monopoly.<sup>21</sup> Such wasteful effects often depend on the particular content under

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10. See Snow, *supra* note 3, at 1489.

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

12. See discussion *infra* Part II.A.

13. See 17 U.S.C. § 102 (2012); discussion *infra* Part II.B.

14. 188 U.S. 239, 250–52 (1903).

15. 132 S. Ct. 873, 888 (2012).

16. 537 U.S. 186, 222 (2003).

17. See discussion *infra* Part II.C.

18. See discussion *infra* Part III.A.

19. See discussion *infra* Part III.A.1.

20. See U.S. CONST. art. I, § 8, cl. 8; discussion *infra* Part III.A.1.

21. See discussion *infra* Part III.A.2.

consideration.<sup>22</sup> Lastly, I discuss policy arguments against the interpretation: specifically, an untrustworthy Congress, industry capture, and the subjective nature of identifying value in expression.<sup>23</sup> Recognizing merit in these arguments, I nevertheless conclude that they do not counsel against a content-based interpretation of the Copyright Clause.

In Part IV, I consider two examples of content for which Congress might prospectively deny copyright—violent video games and pornography. I briefly summarize policy arguments specific to those examples which might suggest or discourage the denial. I then analyze the constitutionality of their respective denials.

## II. THE CONSTITUTIONAL POWER

Congress's copyright power derives from the Intellectual Property Clause. That Clause gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>24</sup>

With respect to copyright law specifically, the Supreme Court has interpreted the following language from the Intellectual Property Clause as representing Congress's copyright power (as distinct from its patent power): "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ."<sup>25</sup> The quoted language is referred to as the Copyright Clause, which is part of the Intellectual Property Clause.<sup>26</sup>

Like all powers of Congress, the copyright power is discretionary: Congress may choose to promote the progress of science through the means of extending copyright.<sup>27</sup> The issue that this part examines is the scope of discretion that this power affords Congress.<sup>28</sup> On the one hand, the

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22. See discussion *infra* Part III.A.2.

23. See discussion *infra* Part III.B.

24. U.S. CONST. art. I, § 8, cl. 8.

25. *Id.*

26. The modern Supreme Court has construed the initial phrase, "To promote the Progress of Science," as corresponding to Congress's copyright power. See *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) ("Perhaps counterintuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts.").

27. See *id.* at 903–04.

28. It might be argued that my interpretation of the Copyright Clause incorrectly infers a negative power to deny copyright from the Clause's affirmative power to grant copyright. The power to grant does not imply a power to take away. This argument, however, misrepresents my interpretation of the Clause. My interpretation does not recognize a power to deny copyright to authors who have already received a copyright, but rather to prospectively change eligibility criteria. In short, denying copyright

discretion may be narrow, such that Congress has only a binary choice in exercising the power: namely, the choice of whether to extend copyright to all original content or none whatsoever. On the other hand, the discretion may be broad, such that Congress may choose among categories of content in deciding whether to extend copyright protection, and for that matter, how much protection to extend. This part argues for the latter interpretation—a broad discretionary power that allows Congress to engage in content discrimination in extending copyright.

Section A interprets the text of the Copyright Clause to suggest the latter interpretation. Section B recites the history of Congress in further support. Section C analyzes Supreme Court precedent that indirectly addresses the issue.

### A. *Textual Interpretation*

This section interprets the Copyright Clause as suggesting that Congress has constitutional discretion to determine copyrightable categories of content, and at the same time, that courts have power to restrain that discretion. In offering this interpretation, I divide the Copyright Clause into two distinct phrases for ease of identification: the first phrase is “[t]o promote the Progress of Science,” which I refer to as *the Progress Clause*; the second phrase is “by securing for limited Times to Authors . . . the exclusive Right to their respective Writings,” which I refer to as *the Writings Clause*.<sup>29</sup> Subsection 1 argues that in view of the Writings Clause, the Progress Clause must grant Congress discretion to determine content eligibility for copyright. Subsection 2 argues that the discretionary power of Congress follows from the meaning of *Progress*. Subsection 3 argues that the meaning of *Science* suggests the judicial power to restrain that discretion.

#### 1. *The Progress Clause as a Meaningful Power*

The Supreme Court and several scholars have recognized that the language in the Progress Clause—“[t]o promote the Progress of Science”—represents a grant of power.<sup>30</sup> So as a grant of power, the Progress Clause

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involves Congress refraining from exercising its power; it does not involve Congress exercising a negative power.

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

30. See *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5–8 (1966); WILLIAM F. PATRY, 2 PATRY ON COPYRIGHT § 3:9 (2014); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promoting Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1810–16 (2006); Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1 (2013) [hereinafter *Regressing Progress*];



must contain a power that Congress could not otherwise perform under the Writings Clause. That is, instead of giving Congress power to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings,” the Constitution gives Congress the power to “promote the Progress of Science.”<sup>31</sup> Why? What is the power in the Progress Clause that is distinct from the Writings Clause? The answer is simple: the Progress Clause gives Congress power to *direct* the means designated in the Writings Clause toward the end of the copyright power designated in the Progress Clause. Congress has power to determine the best way to use copyright in order to effectuate progress in science. And on the assumption that “the Progress of Science” suggests a content-based end (which assumption I explore in Subsection 2 below), the power within the Progress Clause appears to include a power to direct authors toward content that promotes progress in science. Thus, as distinct from the Writings Clause, the Progress Clause appears to give Congress authority to direct authors toward certain content.

The strength of this interpretation becomes evident when considering the contrary interpretation. The contrary interpretation would deny Congress the power to discriminate among content in extending copyright. Such an interpretation would suggest that the Progress Clause is unnecessary. That is, the Progress Clause would not grant any power to Congress that the Writings Clause did not already provide—meaning that a power to secure exclusive rights to authors of writings would be sufficient for Congress to extend copyright to all original content, leaving the phrase “[t]o promote the Progress of Science” as unnecessary surplusage.<sup>32</sup> Hence, if the Progress Clause does actually grant a power to Congress, it must provide Congress the discretion to direct the means contained in the Writings Clause.

In addition to making the Progress Clause seem unnecessary, the contrary interpretation would suggest the absence of the very power specified in the Progress Clause. If Congress could only copyright all content, Congress’s power would amount to a power to promote an increase in the output of any and all original expression. Yet more expression does not necessarily lead to progress in science. Defamatory content, for instance, may be highly creative but entirely false—not likely to lead to progress in science. More is not always better. Indeed, more content that is false, that is harmful, or perhaps simply distracting, could

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Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science*: Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1 (2002).

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

32. See *id.* See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”).

lead to *regress* in science.<sup>33</sup> If Congress can only copyright all content, Congress would be impotent to stop such a regress. Therefore, interpreting the Copyright Clause as compelling Congress to extend copyright to all categories of content suggests the absence of a power that enables Congress to promote progress in science.

Of course these arguments rely on the premise that the Progress Clause is in fact a grant of power and not merely a meaningless preamble that introduces the actual power in the remaining Writings Clause. Although some courts and commentators have—without any reasoned analysis—labeled the Progress Clause as a preamble in the Copyright Clause, none have asserted that the phrase fails to grant power.<sup>34</sup> Those courts and commentators have simply argued that the Progress Clause does not *restrain* Congress. Moreover, Professor Lawrence Solum has argued that the grammatical structure in all the powers granted to Congress under Article I, Section 8 of the Constitution implies that “[t]o promote the Progress of Science” is a grant of power.<sup>35</sup> He has concluded that “the promotion of science is the power granted and the securing of exclusive rights operates as a limitation on the means that may be used in employing this power.”<sup>36</sup> Professor William Patry has agreed with this conclusion, relying on the constitutional principle that every word of the Constitution must have meaning.<sup>37</sup> Given the arguments that others, and I, have made elsewhere on this issue concerning the Progress Clause as a grant of power, I do not address it here.<sup>38</sup> I merely observe that my argument that *Progress*

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33. See Snow, *supra* note 30, at 42–46.

34. See, e.g., *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (rejecting the argument that “the introductory language of the Copyright Clause constitutes a limit on congressional power”); *Hutchinson Tel. Co. v. Frontier Directory Co. of Minn.*, 770 F.2d 128, 130 (8th Cir. 1985) (“We agree with Professor Nimmer that although the promotion of artistic and scientific creativity and the benefits flowing therefrom to the public are purposes of the Copyright Clause, those purposes do not limit Congress’s power to legislate in the field of copyright.”); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.03[A] at 1-88.19–1-88.20 (2011) (“[T]he phrase ‘To promote the progress of science and useful arts . . .’ must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise.” (footnotes omitted)); Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253, 299 (2002) (construing “promote the Progress of Science” as indicating mere purpose without any limiting force on the actual power).

35. See Solum, *supra* note 30, at 12–25.

36. *Id.* at 23.

37. 2 PATRY, *supra* note 30, § 3:9 (characterizing the preambular construction as an “absurd” approach that serves only to “render [the Progress Clause] meaningless, the equivalent of mottos on license plates; that is contrary to the general theory of interpretation that insists on giving every word meaning” and noting that “[n]o clause in Article I, Section 8 has a preamble”).

38. See Snow, *supra* note 30, at 42–46; Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 B.Y.U. L. REV. 259, 276–306 (2013). In addition to me, Professors Lawrence Solum, Dotan Oliar, and William Patry have advocated the non-preambular interpretation. See 2 PATRY, *supra* note 30, § 3:9; Oliar, *supra* note 30, at 1810–16; Solum, *supra* note 30, at 12–25.

gives content-based discretion to Congress relies on the premise that the initial Progress Clause of the Copyright Clause represents a grant of power to Congress.

## 2. *Progress as Suggesting Congressional Discretion*

The argument that Congress has discretion to determine whether specific content is eligible for copyright draws support from the meaning of *Progress*. The Progress Clause sets forth the purpose of copyright as promoting “the Progress of Science.” In the subparts below, I argue that *Progress* in that context means an improvement or advancement in knowledge. If that meaning is correct, it implies that some knowledge is qualitatively better than other knowledge. That is to say, some knowledge is to be considered an improvement or advancement as compared to other knowledge. So, if Congress has power to promote progress—improvements and advancements in knowledge—then it would seem that Congress has power to promote some knowledge over other knowledge. Stated differently, *Progress* as an improvement or advancement in knowledge suggests that Congress has power to target which sort of knowledge it will promote. Congress, then, would have power to exercise content-based discrimination in order to achieve progress.

One might argue that even if *Progress* means improvement or advancement in knowledge, the ultimate realization of progress turns on the public’s preference for content, rather than on the whims of Congress. Under this argument, the public would decide whether content effectuates progress in the course of the public’s choosing which content to consume. Such an interpretation would not leave Congress room to discriminate in extending copyright. The public would decide progress.

This argument, however, is unpersuasive as a matter of constitutional interpretation. The phrase “*Congress* shall have Power . . . [t]o promote the Progress of Science” indicates that the power of promoting progress is given to Congress—not to the public.<sup>39</sup> Moreover, as a general matter, where a constitutional grant of power to Congress includes a term that contemplates different means of application, Congress is given discretion to judge the best means to apply that term.<sup>40</sup> Only a rational-basis review by the Judiciary restrains Congress’s discretion in exercising power under such a broad term.<sup>41</sup> For instance, consider Congress’s discretion under the

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39. See U.S. CONST. art. I, § 8, cls. 1, 8 (emphasis added).

40. See generally *United States v. Comstock*, 560 U.S. 126, 134 (2010) (“[W]e look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”).

41. See generally *id.*

General Welfare Clause.<sup>42</sup> Congress determines the best means to provide for general welfare—not the public. Indeed, if that Clause were construed so that the application of general welfare were left to the public rather than to Congress (which construction would be analogous to interpreting the Copyright Clause in a way that the application of progress were left to the public), then Congress would only be able to provide cash subsidies to the public; only then would the public be able to decide which expenditures provide for the general welfare. But of course this cannot be. Congress—not the public—determines which expenditures will best provide for the general welfare. Accordingly, Congress—not the public—determines which expression will best promote the progress of science.<sup>43</sup>

Thus, to the extent that the Progress Clause allows for qualitative judgments, Congress must make them.<sup>44</sup> More specifically, the meaning of *Progress* as improvements and advancements in knowledge—a content-based end<sup>45</sup>—appears to vest Congress with discretion to determine which categories of content will fulfill that end. Some commentators, however, have interpreted *Progress of Science* in a way that suggests that the copyright power enables Congress only to increase the output of expression, rather than to seek qualitatively superior content.<sup>46</sup> This interpretation I reject. The subsections below present and respond to this interpretation.

42. U.S. CONST. art. I, § 8, cl. 1.

43. See generally *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (holding that spending power implies broad discretionary power for Congress and that general welfare has a dynamic meaning).

Examples abound of Congress exercising discretion under broad terms of its constitutional grant. For instance, Congress has exercised discretion under its tax power to penalize citizens who fail to obtain health insurance, see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593–95 (2012), and under its commerce power to protect threatened wildlife, see *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176–77 (9th Cir. 2011). Public opinion on a particular issue does not change the validity of Congress's exercise of judgment under a broad term. See, e.g., *57% View Health Care Law Unfavorably*, RASMUSSEN REPORTS (July 28, 2014), [http://www.rasmussenreports.com/public\\_content/archive/health\\_care\\_update\\_archive/july\\_2014/57\\_view\\_health\\_care\\_law\\_unfavorably](http://www.rasmussenreports.com/public_content/archive/health_care_update_archive/july_2014/57_view_health_care_law_unfavorably).

44. Cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250–52 (1903) (recognizing congressional choice to deny copyright to “prints or labels designed to be used for any other articles of manufacture,” while construing the discriminatory term *fine arts* for pictorial illustrations as giving too much discretion to judges).

45. See generally C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 923 (2002). (“[C]opyright has a content-based purpose, specifically good or more valued content.”).

46. See Orrin G. Hatch & Thomas R. Lee, “To Promote the Progress of Science”: The Copyright Clause and Congress's Power to Extend Copyrights, 16 HARV. J.L. & TECH. 1 (2002); Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001).

a. *Commentators on Progress*

There are two positions in the academic literature on the meaning of *Progress* in the Copyright Clause. Professor Laurence Solum has construed *Progress* to mean “advances in learning,” such that “[t]o ‘promote the Progress of Science’ would be to encourage the advancement of science or . . . scientific activity.”<sup>47</sup> This construction implies, according to Professor Solum, a “focus on the results of scientific activity.”<sup>48</sup> I refer to this interpretation as the advancement interpretation. Its followers include Professor Jeanne Fromer,<sup>49</sup> Professor William Patry,<sup>50</sup> and historian Edward Walterscheid.<sup>51</sup> Professor Patry echoes the point that the advancement interpretation “focuses on encouraging particular results,” and specifically on “what the public will learn.”<sup>52</sup> Professor Fromer observes that the advancement interpretation entails an improvement in either the quantity or the quality of knowledge.<sup>53</sup>

The contrary position is that *Progress* means a physical movement, spread, or distribution of knowledge.<sup>54</sup> Professor Malla Pollack has articulated this examination based, in large part, on her examination of the eighteenth-century editions of the *Pennsylvania Gazette*.<sup>55</sup> Her interpretation rejects both a quantitative and qualitative advancement in knowledge, and it is thereby inconsistent with the advancement interpretation.<sup>56</sup> I refer to her interpretation as the spread interpretation. Its followers include Professor Thomas Lee and Senator Orrin Hatch.<sup>57</sup>

The spread interpretation appears problematic because it does not account for the specific context surrounding *Progress* within the Copyright Clause—namely, its description of science.<sup>58</sup> Pollack appears correct,

47. Solum, *supra* note 30, at 45.

48. *Id.* at 45–46.

49. Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329, 1373–74 (2012).

50. 2 PATRY, *supra* note 30, § 3:6.

51. Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft*, 44 IDEA 331, 374 (2004).

52. 2 PATRY, *supra* note 30, § 3:6.

53. Fromer, *supra* note 49, at 1373.

54. Pollack, *supra* note 46, at 809.

55. *See id.* at 798–803.

56. *Id.* at 788–89.

57. Hatch & Lee, *supra* note 46, at 8–10 & n.42 (agreeing with Professor Pollack’s spread interpretation of Progress).

58. *See* 2 PATRY, *supra* note 30, § 3:6 (noting this problem with the spread interpretation). Pollack also dismisses well-respected lexicographers of the time. *See* Pollack, *supra* note 46, at 796–97. She rejects Samuel Johnson on the grounds that he was “upper class and inherently English—as opposed to American.” *See id.* at 797. She rejects Noah Webster as unreliable because he published his dictionary fifty years after the convention, despite the fact that he was a contemporary of the Framers

though, in her assertion that the *Pennsylvania Gazette* more often employed the word *progress* to mean physical movement, with the most common occurrence being the “progress of a fire.”<sup>59</sup> Likewise, Lee and Hatch appear correct that in a Federalist Paper, Alexander Hamilton meant physical movement when discussing the progress of travel through a field.<sup>60</sup> The Copyright Clause, however, does not give Congress power to promote the progress of fire or travel.<sup>61</sup> It gives Congress the power to promote the progress of science.<sup>62</sup> As discussed in the subsection below, this context of science indicates a meaning of *Progress* suggesting the advancement interpretation over the spread interpretation.<sup>63</sup>

### *b. Evidence of the Meaning of Progress*

The literature setting forth the advancement interpretation has evinced little textual or historical evidence suggesting that interpretation.<sup>64</sup> Yet such evidence does exist. Dictionary definitions of the time, the legislative history of the Copyright Clause, and writings of James Madison make clear that the advancement interpretation best reflects the meaning of *Progress* in the Copyright Clause. Because of the contrary scholarship on this point, and because the meaning of *Progress* is essential to my argument, I provide this historical evidence in the three subsections below.

#### *i. Dictionary Meaning*

Before analyzing dictionary entries, I should note that lexicographers at the time of the Framing did not usually list entries in order of most

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and had a keen interest in copyright prior to the constitutional convention. *Compare id.*, with HARRY R. WARFEL, NOAH WEBSTER: SCHOOLMASTER TO AMERICA 53–59 (1936).

59. See Pollack, *supra* note 46, at 799. This makes sense for a newspaper, such as the *Pennsylvania Gazette*, that is attempting to objectively portray factual events, as opposed to commenting on qualitative advancements of abstract subjects such as science and knowledge.

60. See Hatch & Lee, *supra* note 46, at 9 (quoting THE FEDERALIST NO. 15 (Alexander Hamilton)).

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

62. *Id.*

63. Other objections to the spread interpretation may be found in the works of Professors Patry and Solum. See 2 PATRY, *supra* note 30, § 3:6; Solum, *supra* note 30, at 46.

64. Scholarship adopting the advancement position has recited minimal historical evidence to support the meaning, perhaps because it is so evident from the context of the Copyright Clause. In a single sentence, Walterscheid observed the similarity between the Copyright Clause and one of the proposals of Madison that employed the word advancement. See Walterscheid, *supra* note 51, at 376. Professor Solum relied on one of the definitions for progress in the Oxford English Dictionary, but he did not fully explain his reason for choosing that particular definition, other than “the context of the Intellectual Property Clause” suggesting it. Solum, *supra* note 30, at 45. Professors Patry and Fromer cite no historical evidence. See 2 PATRY, *supra* note 30, § 3:6; Fromer, *supra* note 49, at 1373–74.

common usage.<sup>65</sup> So rather than assuming that the first entry of a dictionary reflects the meaning of *Progress* in the Copyright Clause, I search for entries that suggest how *Progress* would describe *Science*, as in the phrase, “the Progress of Science.”<sup>66</sup> As discussed below, dictionaries at the time of the Framing indicate that the meaning of *Progress* in the Copyright Clause is an advancement or improvement in knowledge or intellect.

The most authoritative dictionary at the time of the Framing is arguably Dr. Samuel Johnson’s *Dictionary of the English Language*.<sup>67</sup> His dictionary employs five entries to define *progress*.<sup>68</sup> Of the five entries, only one references knowledge or intellectual activity.<sup>69</sup> That entry states: “intellectual improvement; advancement in knowledge; proficiency.”<sup>70</sup> This entry is the most applicable to the meaning of *Progress* in the Copyright Clause because intellectual activity and knowledge correspond to the meaning of *Science* in that Clause.<sup>71</sup> Therefore, “intellectual improvement; advancement in knowledge; proficiency” appears the most likely entry in Dr. Johnson’s dictionary that corresponds to the meaning of *Progress* in the Copyright Clause: the entry’s reference to knowledge and intellect refer to the same sort of subject matter that *Progress* describes in the Clause—namely, science.

Noah Webster’s definition of *progress* is also noteworthy given that he was a contemporary of the Framers who, prior to the Constitutional Convention, had been an ardent copyright advocate in the colonies.<sup>72</sup> This fact suggests that at the time that he wrote his dictionary in 1828, he would have been aware of the significance of the meaning of *progress* as it relates to the Copyright Clause. Webster’s dictionary employs six entries to define

65. See, e.g., 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE preface at 6 (London, J.F. & C. Rivington, 7th ed. 1785) (explaining that words are listed in order of progress in meaning, passing from its primitive to its remote and accidental meanings).

66. But see Hatch & Lee, *supra* note 46, at 8 & n.36 (citing only the first two entries of the four in Webster’s 1828 *Dictionary*, and the first two entries of the five in Johnson’s 1773 *Dictionary*, without explaining any reason for preferring the first two entries in either case).

67. See 1 JOHNSON, *supra* note 65 (unpaginated). The Supreme Court regularly relies on Dr. Johnson’s *Dictionary*. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008); *Dep’t of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 347 (1999).

68. See 2 JOHNSON, *supra* note 65 (unpaginated).

69. See *id.* The five entries are:

1. Course; procession; passage.
2. Advancement; motion forward.
3. Intellectual improvement; advancement in knowledge; proficiency.
4. Removal from one place to another.
5. A journey of State; a circuit.

*Id.*

70. *Id.*

71. See Snow, *supra* note 38, at 306.

72. See WARFEL, *supra* note 58, at 53–59.

*progress*.<sup>73</sup> Of the six entries, only one references knowledge—again, the subject matter of *Science* in the Copyright Clause.<sup>74</sup> That entry states: “Advance in knowledge; intellectual or moral improvement; proficiency.”<sup>75</sup> Like Dr. Johnson’s dictionary, Webster’s reference to knowledge in only one entry suggests that the meaning of *Progress* in the Copyright Clause corresponds to an advance in knowledge, or intellectual or moral improvement.

The Oxford English Dictionary (OED) indicates the same meaning at the time of the Framing.<sup>76</sup> Among its many definitions for *progress*, it provides the following: “Advancement to a further or higher stage, or to further or higher stages successively; growth; development, usually to a better state or condition; improvement; an instance of this.”<sup>77</sup> Under this definition, it cites as an example of this meaning a use by Benjamin Franklin: “The rapid Progress true Science now makes, occasions my regretting sometimes that I was born so soon.”<sup>78</sup> The statement provides meaning for *progress* within the context of *science*, and the statement is made by an influential Framers, Benjamin Franklin.<sup>79</sup> The OED, then, recognizes that *progress* as meaning advancement or improvement reflects the meaning that Franklin intended in the quotation, and Franklin’s use of *progress* with *science* suggests that he employed the same meaning as found in the Copyright Clause.

## ii. *Constitutional Convention*

The history of the Constitutional Convention also informs the meaning of *Progress*. Two delegates, Charles Pinckney and James Madison, made

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73. 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (unpaginated). The six entries are:

1. A moving or going forward; a proceeding onward.
2. A moving forward in growth; increase; as the progress of a plant or animal.
3. Advance in business of any kind; as the progress of a negotiation; the progress of arts.
4. Advance in knowledge; intellectual or moral improvement; proficiency.
5. Removal; passage from place to place.
6. A journey of state; a circuit.

*Id.*

74. *See id.*

75. *Id.*

76. *See Progress, n.*, OED ONLINE, <http://www.oed.com/view/Entry/152236?rskey=zHHBQF&result=1e&id> (last updated June 2007).

77. *Id.*

78. *Id.* (emphasis deleted).

79. *See* Sean M. O’Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733, 803–05 (2015) (looking to Benjamin Franklin, among others, as a Framers whose view could have influenced the meaning of the IP Clause).



proposals relevant to the wording of the Intellectual Property Clause.<sup>80</sup> Pinckney proposed the following: “To establish seminaries for the promotion of literature and the arts & sciences”; “To secure to Authors exclusive rights for a certain time”; and “To grant patents for useful inventions.”<sup>81</sup> Madison proposed the following: “To secure to literary authors their copy rights for a limited time”; and “To encourage by premiums & provisions, the advancement of useful knowledge and discoveries.”<sup>82</sup>

Together these proposals account for all the words (or variations thereof) comprising eight of the eleven key terms in the Intellectual Property Clause. Recall that the Intellectual Property Clause sets forth both the copyright and patent powers of Congress.<sup>83</sup> The eleven key terms of the Intellectual Property Clause consist of the following: *promote*, *Progress*, *Science*, *useful Arts*, *securing*, *limited Times*, *Authors*, *Inventors*, *exclusive Right*, *Writings*, *Discoveries*.<sup>84</sup> Of these, the key terms not mentioned in their proposals are *Writings*, *Inventors*, and *Progress*.<sup>85</sup> Although *Writings* and *Inventors* do not appear in the proposals, their analogues do: *authors* and *inventions*. Authors (found in the proposals) create writings (not found in the proposals) just as inventors (not found in the proposals) create inventions (found in the proposals). Thus, two of the three terms not in the proposals (*Writings* and *Inventors*) follow naturally from the meanings of terms in the proposals (*Authors* and *inventions*). The only term not referenced in the proposals (either by specific mention or by analogue) is *Progress*. Yet like *Writings* and *Inventors*, *Progress* does have a corresponding term in the proposals: *advancement*. The term *advancement* is found in Madison’s proposal, “the advancement of useful knowledge and discoveries.”<sup>86</sup> And as discussed in the section above, advancement was one of the meanings for *progress* at the time of the Framing.<sup>87</sup> It is therefore reasonable to conclude that *Progress* in the Copyright Clause

80. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 563–64 (Charles Tansill ed. 1927) [hereinafter FORMATION OF THE UNION].

81. *Id.* at 564.

82. *Id.* at 563.

83. The Intellectual Property Clause states that Congress shall have power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. *See also* discussion *supra* Part II (explaining that the Copyright Clause derives from the Intellectual Property Clause).

84. *See* U.S. CONST. art. I, § 8, cl. 8. I do not consider the word *respective* to be a key substantive term because it merely provides structure to the substantive key terms within the Intellectual Property Clause.

85. *See* FORMATION OF THE UNION, *supra* note 80, at 563–64.

86. *Id.* at 563.

87. *See* discussion *supra* Part II.A.2.a.

means advancement in view of the following three facts: first, advancement was a meaning for *progress* at the time; second, the term *advancement* appears in one of Madison's proposals where *progress* could have otherwise appeared; and third, every other key term in the Intellectual Property Clause is found in those proposals.<sup>88</sup>

Further evidence that *Progress* means advancement is apparent from the structure and meanings of words within one of Madison's proposals: specifically, "To encourage by premiums & provisions, the advancement of useful knowledge and discoveries."<sup>89</sup> Structurally, Madison's phrase "the advancement of useful knowledge and discoveries" has the same grammatical arrangement as the phrase "the Progress of Science and useful Arts," with *advancement* corresponding to the placement of *Progress* in that arrangement. Also with regard to structure, Madison's proposal sets forth a means ("by premiums and provisions") to accomplish an end ("the advancement of useful knowledge and discoveries"). This is the only proposal of either Madison or Pinckney that employs a means–ends structure, similar to the ends–means structure of the Intellectual Property Clause.<sup>90</sup> Within the ends portion of Madison's proposal ("the advancement of useful knowledge and discoveries") and the ends portion of the Intellectual Property Clause ("To promote the Progress of Science and useful Arts") are corresponding word meanings: *useful knowledge* in Madison's proposal corresponds to the meaning of *Science*, and *discoveries* in Madison's proposal corresponds to *useful Arts*, the focus of patent.<sup>91</sup> These corresponding meanings appear in the same order in the ends portions of both Madison's proposal and the Intellectual Property Clause. So because *advancement* in Madison's proposal appears in the same order as *Progress* in the Clause, *advancement* appears to have the same meaning as *Progress* as well—just like the corresponding order and meanings of the other words in the ends portions of Madison's proposal and the Intellectual Property Clause. Thus, the history of the Constitutional Convention suggests that *Progress* means advancement.

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88. Ironically, then, Madison appears to have elucidated the meaning of Progress in the Copyright Clause by *failing* to include the word in his proposal.

89. See FORMATION OF THE UNION, *supra* note 80, at 563.

90. The ends portion of the Copyright Clause is found in the initial phrase, "To promote the Progress of Science and useful Arts"; the means for accomplishing those ends are found in the remainder of the Copyright Clause "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." See U.S. CONST. art. I, § 8, cl. 8.

91. See Snow, *supra* note 38, at 306; Oliar, *supra* note 30, at 1798, 1809.

*iii. Writings of Madison*

Writings of James Madison should be considered in examining the meaning of *Progress* because Madison was the only member of the constitutional committee that drafted the verbiage of the Copyright Clause who also proposed the copyright power.<sup>92</sup> Given this fact, it is not unreasonable to conclude that Madison likely had the greatest influence on the wording of the Clause.

In a letter to Archibald Stuart, a fellow politician from Virginia, Madison referred to *progress* as it relates to a particular science: “The diversity of opinions on so interesting a subject, among men of equal integrity & discernment, is at once a melancholy proof of the fallibility of the human judgment, and of the imperfect *progress* yet made in the science of Government.”<sup>93</sup> This use is particularly noteworthy because Madison employed *progress* in the context of describing a science, similar to the Copyright Clause’s employment of *Progress* to describe *Science*. Specifically, Madison explained that diverse opinions lead to imperfect progress in the science of government. The progress that one would associate with the science of government seems more likely to suggest improvements or advancements in government (advancement interpretation of *Progress*) than the spread of government (spread interpretation of *Progress*). Indeed, it seems clear that Madison employed *progress* here to suggest a qualitative improvement or advancement—not a spread.

Other writings of Madison suggest the same meaning of *progress*. In another letter to Archibald Stuart, Madison referred to the progress of the new constitutional government as follows: “It is impossible indeed to trace the *progress* and tendency of this fond experiment without perceiving difficulty and danger in every Stage of it.”<sup>94</sup> To Thomas Jefferson, Madison wrote about the confederation as a feudality of republics, each with its own constitution, and asked about the progress of that system: “And what has been the *progress* and event of the feudal Constitutions? In all of them a continual struggle between the head and the inferior members . . . .”<sup>95</sup> Although neither of these uses of *progress* directly refers to Science or knowledge, they refer to democratic government, which, in Madison’s

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92. See Snow, *supra* note 38, at 289–90 (detailing history of Madison at the Constitutional Convention and his involvement in passing the Virginia copyright statute).

93. Letter from James Madison to Archibald Stuart (Oct. 30, 1787), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 135, 135 (John P. Kaminski et al. eds., 1988) [hereinafter DOCUMENTARY HISTORY].

94. Letter from James Madison to Archibald Stuart (Dec. 14, 1787), in 8 DOCUMENTARY HISTORY, *supra* note 93, at 237, 238 (emphasis added).

95. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 8 DOCUMENTARY HISTORY, *supra* note 93, at 97, 101 (emphasis added).

view, likely reflected a product of the knowledge that arose through the Enlightenment.<sup>96</sup> And both these examples show his use of *progress* to suggest a qualitative improvement.

Thus, the meaning of *Progress* in the *Progress of Science* of the Copyright Clause suggests a qualitative improvement or advancement in science. This means that the assumption is reasonable that the copyright power provides Congress a power to promote a qualitative end. And that assumption supports my argument that Congress has a power to direct authors to content that is likely to promote a qualitative end. In short, the power to promote the qualitative end of progress in science suggests power to designate content that will best effectuate such an end.

### 3. *Science as Restricting Progress*

Although the meaning of *Progress* appears to provide Congress discretion to make qualitative decisions about copyrightable content, the meaning of *Science* appears to restrain that discretion. *Progress* is relative to the meaning *Science*.<sup>97</sup> The Progress Clause restricts the expansive meaning of progress to a specific subject matter—science.<sup>98</sup> This means, then, that Congress may not employ the copyright power for the purpose of promoting progress in some other subject, such as commerce. Congress may promote only that progress which specifically pertains to science. The term *Science* in the Progress Clause restricts Congress's discriminatory power of promoting progress.

Of course, in grammar and perhaps in theory the term *Science* may be restrictive of the term *Progress* in the Progress Clause, but what does this mean as a practical matter? How does *Science* actually restrict Congress's power to discriminate in deciding copyrightable content? The answer is twofold: first, *Science* precludes Congress from exercising viewpoint discrimination in defining copyright; and second, *Science* precludes Congress from granting copyright to certain categories of content. These conclusions follow from the meaning of *Science*, which I discuss below.

Courts and scholars recognize the meaning of *Science* as knowledge or learning.<sup>99</sup> That knowledge or learning, however, does not denote cognitive

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96. See generally I. BERNARD COHEN, *SCIENCE AND THE FOUNDING FATHERS* 267–68 (1995) (explaining Madison's view of science as a product of the Enlightenment).

97. See 2 PATRY, *supra* note 30, § 3:6 (observing that *Progress* must refer to something that may be advanced or encouraged).

98. Indeed, Congress's power to promote progress is not unrestricted, in contrast to Congress's power to promote general welfare. Compare U.S. CONST. art. I, § 8, cl. 8, with *id.* cl. 1.

99. See, e.g., *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) ("The 'Progress of Science,' petitioners acknowledge, refers broadly to 'the creation and spread of knowledge and learning.'"); *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (explaining the public benefit of copyright as "the

awareness of anything.<sup>100</sup> As I have written in another article, *Science* in the Progress Clause means knowledge and learning that arises through the process of reason and experience, ultimately leading to truth.<sup>101</sup> The advancements of science follow from trial and error, as well as from reason and logic.<sup>102</sup> And progress in science necessarily follows from, and only from, the method of science. This is important because it means that Congress's attempts to promote progress in science must accord with this general process of gaining knowledge through reason and experience. More specifically, it means that Congress cannot dictate which particular views represent truth or effect worthwhile outcomes.<sup>103</sup> Congress could not, for instance, grant copyright only to views that promote the Republican party. This would not accord with the method of science. Science would require a diversity of viewpoints, with a time for testing, so that the best viewpoint could prevail. Competition among viewpoints, with trial and error, reflects the method of science.<sup>104</sup> As a result, *Science* precludes Congress from using its copyright power to favor particular viewpoints. So while the term *Progress* enables Congress to choose which subject-matter categories to promote, the term *Science* restricts Congress from passing judgment on specific ideas or views.

The meaning of *Science* also may restrict Congress from granting copyright to some specific categories of content. Just as when Congress exercises any other congressional power,<sup>105</sup> Congress's judgment about whether a category of content will promote progress in science must be

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proliferation of knowledge" which would "ensure[] the progress of science"); *id.* at 243 (Breyer, J., dissenting) (explaining undisputed premise that by "'Science' . . . the Framers meant learning or knowledge"); 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 123 (1994) ("The term 'science' as used in the Constitution refers to the eighteenth-century concept of learning and knowledge."); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 48 (1991) ("[T]he word *science* retains its eighteenth-century meaning of 'knowledge or learning.'"); O'Connor, *supra* note 79, at 778–79, 784 ("Thus, by the beginning of the seventeenth century, the basic ideas of 'art' and 'science' were entrenched. 'Science' meant the 'systematic study' of anything. 'Art' meant the manipulation of changeable aspects of the world."); Snow, *supra* note 38, at 265 (listing courts and commentators interpreting the constitutional purpose of copyright as mandating an increase in knowledge).

100. See Snow, *supra* note 38, at 317.

101. See *id.*

102. See 1 JOHNSON, *supra* note 65 (unpaginated) (defining science as "Certainty grounded on demonstration"); Snow, *supra* note 38, at 277–78 (describing reason and experience as part of the process of science at the Framing).

103. The Free Speech Clause also restricts Congress from extending copyright to specific viewpoints. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); Snow, *supra* note 3, at 1517–18.

104. For a discussion on how content-based copyright denial furthers the marketplace of ideas theory of free speech, see Snow, *supra* note 3, at 1504–09.

105. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

reasonable.<sup>106</sup> That is, Congress's judgment about granting copyright to a category of content must bear a rational relationship to the improvement of knowledge and learning.<sup>107</sup> Under this rational-basis standard for judging Congress's discretionary acts, the question arises whether it would be unreasonable to grant copyright for particular categories of content. That is: are some categories of content so contrary to the progress of science that it would be unreasonable for Congress to grant them a copyright? Perhaps.<sup>108</sup>

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106. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 218–22 (2003) (rejecting higher level of scrutiny in examining changes to Copyright Act).

107. Cf. *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (seemingly applying a rational-basis review of amendment to Copyright Act).

108. The expansive subject matter of knowledge or learning, as well as the subjective standards necessary to determine improvement and advancement, arguably suggests that courts might not be able to apply any meaningful criteria to determine whether Congress's choice is unreasonable. The scope of knowledge and learning seems unbounded, and the standard of improvement and advancement seems to depend on subjective opinion. All content enables audiences to learn something—even if only the existence of the content itself—and all content turns on subjective opinion as to whether it effects advancements and improvements in knowledge. Therefore, *Progress of Science* could be construed as allowing Congress to grant or deny copyright to any content on the grounds that—in Congress's view—the content does or does not advance the general store of knowledge. Thus, at first glance, the Copyright Clause does not seem to provide any meaningful standard against which to determine whether Congress has acted reasonably in granting or denying copyright.

This conclusion begs history and precedent. As I have written elsewhere, history well establishes content-based boundaries to the Copyright Clause. See Snow, *supra* note 30, at 6–33. In 1790, the first Copyright Act was content neutral, extending protection to “map[s], chart[s], . . . or books.” See Copyright Act of 1790, ch. 15, 1 Stat. 124 (amended 1831). Yet the public sought copyright protection mostly for scholastic and instructional works. See Snow, *supra* note 38, at 300–03. Fictional works were noticeably underrepresented, suggesting a public understanding that the scope of the Copyright Clause was fairly narrow in content. *Id.* Similarly, in 1829 a Supreme Court Justice, sitting by designation in the Southern District of New York, opined that Congress's copyright authority extended only to content that exhibited a “fixed, permanent and durable character,” and on that basis, denied copyright protection for a daily publication on the stock market. See *Clayton v. Stone*, 5 F. Cas. 999, 1003 (S.D.N.Y. 1829) (Thompson, J.). The Supreme Court later recited this limited scope of the Copyright Clause in the 1879 case of *Baker v. Selden*. See 101 U.S. 99, 105–06 (1879). Early copyright history thus indicates that much content would not have reasonably fallen within the meaning of promoting the progress of science.

As cultural values changed over time, the scope of copyrightable content expanded. Snow, *supra* note 30, at 10–33. The categories of content that could reasonably be construed as promoting progress in science expanded with shifts in cultural understandings of value in content. *Id.* Continuing to extend protection to the full extent of the Copyright Clause, Congress extended copyright protection to all content categories that could reasonably be construed as promoting progress in science. *Id.* Courts, in turn, recognized copyright protection in entertainment, advertisements, and personal letters, which content would not have been copyrightable under earlier applications of the Copyright Clause. See *id.* What could reasonably be thought to improve or advance knowledge and learning dramatically increased over time. See *id.*

Despite this increase in coverage, for most of the twentieth century courts refrained from recognizing that the Copyright Clause extended to pornographic works. See *id.* Congress's silence on whether protection extended to such works indicated that courts, in denying copyright to pornography, viewed such content as falling outside the scope of content that could reasonably be construed as promoting progress in science. See *id.* As one court stated,

[C]ongress is not empowered by the constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of ‘science and useful

Some categories of content may be so contrary to cultural understandings of promoting progress that they cannot reasonably fall within the scope of copyrightable works. An example might be unprotected speech, such as libel.<sup>109</sup> Similarly, protected speech that the culture generally recognizes as lacking value might lie outside the boundaries of copyrightable subject matter, such as hate speech,<sup>110</sup> pornography,<sup>111</sup> or crime-facilitating speech.<sup>112</sup> Although I do not argue the merits of such specific examples here, I do observe the possibility that *Science* might restrict Congress from extending copyright to some categories of content.<sup>113</sup> And more practically speaking, the terms *Progress* and *Science* provide Congress ample authority to deny copyright for these examples of content. Such content could reasonably be construed as failing to promote improvements in knowledge and learning.

In sum, *Progress of Science* indicates that Congress may decide which general category of content may be copyrighted, and the public decides the success or demise of the viewpoints within that content.

### B. History of Congress

This section examines the history of Congress practicing content discrimination in extending copyright. This history is relevant because, if existent, it would serve as evidence that the Constitution gives Congress

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arts.' . . . [A] dramatic composition which is grossly indecent, and calculated to corrupt the morals of the people . . . neither 'promotes the progress of science or useful arts,' but the contrary.

*Martinetti v. Maguire*, 16 F. Cas. 920, 922 (No. 9173) (C.C.D. Cal. 1867). Some content, including pornographic and libelous works, would be unreasonable to construe as promoting progress in science. *See id.* This view was challenged, however, in 1979. In *Mitchell Bros. Film Group v. Cinema Adult Theater*, the Fifth Circuit held that pornography, and specifically legal obscenity, was reasonable to construe as promoting progress in science. 604 F.2d 852, 854–60 (5th Cir. 1979). The *Mitchell* court did not, however, declare that Congress could copyright any and all content, or alternatively, declare that Congress must copyright all content. *See id.* Rather, the court asked whether it was reasonable for Congress to grant copyright to legal obscenity. *Id.* at 860 (“We cannot say this judgment was so unreasonable as to exceed congressional power.”). Thus, history teaches that Congress’s decision to copyright content is subject to an inquiry as to whether content could reasonably promote the progress of science. And that inquiry is subject to changing cultural values.

109. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (opining that some expression has “such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality”).

110. *See, e.g., Levinson, supra* note 8, at 45.

111. *See infra* notes 215, 216 and accompanying text.

112. *See Volokh, supra* note 8, at 1217.

113. *See Snow, supra* note 30, at 56–61 (“Simply put, the [Progress] Clause limits Congress in extending copyright to that which promotes Progress, but no more than that.”) (contemplating narrow and obvious limits of copyright protection, and citing hate speech, extremely violent video games, gambling software, and pornography as possible examples of content falling outside the scope of the Progress Clause).

the power to perform that action.<sup>114</sup> With regard to the history of Congress extending copyright based on content, from one perspective Congress has done so for several decades.<sup>115</sup> Since its enactment in 1976, the present Copyright Act has barred copyright for ideas, and as an extension of ideas, facts also have not received copyright.<sup>116</sup> Congress has also denied copyright for expression that is not original, lacking sufficient creativity.<sup>117</sup> Prior to the 1976 Copyright Act, these exceptions of idea, fact, and originality existed as matters of constitutional and common law, dating back into the nineteenth century.<sup>118</sup> Importantly, these exceptions to copyright require an examination of content to determine whether expression contains ideas, facts, and originality.<sup>119</sup> They require courts to examine *what* an author is saying. It might seem, then, that this lengthy history of determining copyright eligibility based on content suggests that Congress may continue to do so using other criteria that examine content—pornography<sup>120</sup> and violent video games, for instance.<sup>121</sup>

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114. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (reciting long history of Congress granting authors term extensions on existing works as evidence of constitutionality of act).

115. See Baker, *supra* note 45, at 922 (“[C]opyright laws involve content-based suppression of speech in the simplest and most direct sense.”); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 186 (1998) (“Copyright liability turns on the content of what is published.”).

116. See Copyright Act of 1976, Pub. L. 94-553, § 102(b), 90 Stat. 2541, 2545 (codified at 17 U.S.C. § 102(b) (2012)); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (indicating that copyright’s restriction against copyrighting ideas also restricts copyrighting facts).

117. See 17 U.S.C. § 102; *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–50 (1991). Perhaps more subtly, Congress appears to have exercised content discrimination in extending copyright protection through the fair-use doctrine. Fair use calls for greater copyright protection for works that are more creative in nature. See 17 U.S.C. § 107(2) (2012). Specifically, the second factor in the fair-use doctrine considers whether the original work is creative, or alternatively, factual in nature. *Id.* (examining “the nature of the copyrighted work”); *Harper & Row*, 471 U.S. at 563–64 (explaining that the second fair-use factor distinguishes between “factual works” and “works of fiction or fantasy”); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 200 (3d Cir. 2003) (relying on *Harper & Row*’s interpretation of the second fair-use factor to draw a distinction between creative works and factual works).

118. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (explaining originality doctrine as constitutional requirement); *Baker v. Selden*, 101 U.S. 99, 102–03 (1879) (exempting process idea from copyright protection).

119. See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 50 (2001) (recognizing that “on a broad, macro level copyright law might be seen to discriminate out of concern for communicative impact” because it favors original over nonoriginal expression).

120. See Bartow, *supra* note 9, at 19–25 (arguing that because much of copyright law determines rights based on content, Congress barring protection for pornography would be consistent with existent content-based discriminators in copyright).

121. Consistent with the interpretation of *Science* in Part II.A.3 above, the sort of content discrimination that Congress has exercised through these discriminators has not included viewpoint discrimination. Congress’s past practice of content discrimination suggests the power to target only general categories of content—not viewpoints. The discriminators of idea, fact, and originality are themselves so abstract from the actual content that they do not approach the specific ideas contained



It might be argued that although these discriminators of idea, fact, and originality call for an examination of content, they are not altogether persuasive to conclude that Congress's existent practice of content discrimination suggests its power to target other categories of content. The Supreme Court has held that the Copyright Clause itself mandates the idea, fact, and originality doctrines.<sup>122</sup> Hence, the presence of these discriminators in the Copyright Act represents a codification of constitutional requirements—not a choice by Congress. It is unclear, then, that these content-based discriminators establish a history of *Congress* (as distinct from the Constitution) choosing content-based categories to promote.

Congress has, however, exercised content discrimination in defining copyright eligibility without a constitutional obligation to do so. For decades, Congress has denied copyright to expression that functions as a useful article, where aesthetic design cannot be distinguished from utilitarian function.<sup>123</sup> Mannequins, for instance, are non-copyrightable useful articles because their expressive elements cannot be distinguished from their utilitarian function.<sup>124</sup> The useful-article doctrine could be construed as a statutory denial of copyright for content that serves a useful purpose.

Similarly, Congress has adjusted the rights of copyright holders based on categories of content. Specifically, Congress has designated that nondramatic musical works are subject to a compulsory licensing scheme,<sup>125</sup> that sound recordings lack a right of public performance,<sup>126</sup> that certain visual arts have moral rights,<sup>127</sup> and that photographs of buildings that are visible to the public do not violate the copyright in the building's

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within the content. Cf. Netanel, *supra* note 119, at 50 (viewing copyright's "broad-brush concern with communicative impact" as analogous to a structural regularity designed to promote expressive diversity and widespread availability). Because the fact, idea, and originality discriminators are sufficiently abstract from the content—encompassing content that is so wide-ranging—Congress is not targeting specific viewpoints through these discriminators. That said, Professor Tushnet aptly observes that copyright does cause systematic effects on content and viewpoint. See Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 49 (2000).

122. See *Feist Publ'ns*, 499 U.S. at 349–51. With respect to content examination in fair use, see *supra* note 117, the Supreme Court has observed that fair use represents a doctrine with "speech-protective purposes and safeguards," thereby ostensibly required by the Free Speech Clause of the First Amendment. See *Eldred v. Ashcroft*, 537 U.S. 186, 218–19 (2003).

123. See 17 U.S.C. § 101 (2012).

124. *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985); cf. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993–94 (2d Cir. 1980) (holding that design of belt buckle to be copyrightable on grounds that the design is conceptually separable from functionality).

125. See 17 U.S.C. § 115 (2012).

126. See *id.* § 106.

127. See *id.* § 106A.

architecture.<sup>128</sup> Arguably these criteria indicate a pattern of content discrimination by Congress.

Yet these criteria are not entirely persuasive that Congress has a history of exercising content discrimination. To begin with, the useful-article doctrine may be distinguished from the sort of discriminators that this Article contemplates. The useful-article doctrine exists to prevent copyright from interfering with the domain of patent—not to discourage the production of useful articles.<sup>129</sup> Arguably, the useful-article doctrine is permissible as a division between copyright and patent, as distinct from a discriminator that discourages the production of certain content.

As for the other content-based criteria mentioned, they, too, seem weak evidence of Congress having exercised the sort of content discrimination that this Article contemplates. The discriminators mentioned—nondramatic musical works, sound recordings, visual arts, photographs of buildings—seem to discriminate based more on form than on subject-matter content. Congress has designated forms of copyrightable content since the original 1790 Copyright Act, which specified protection only for “map[s], chart[s] . . . or books.”<sup>130</sup> Similarly, the 1909 Act designated the following categories for which protection existed:

- (a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations;
- (b) Periodicals, including newspapers;
- (c) Lectures, sermons, addresses, prepared for oral delivery;
- (d) Dramatic or dramatico-musical compositions;
- (e) Musical compositions;
- (f) Maps;
- (g) Works of art; models or designs for works of art;
- (h) Reproductions of a work of art;
- (i) Drawings or plastic works of a scientific or technical character;
- (j) Photographs;
- (k) Prints and pictorial illustrations.<sup>131</sup>

Likewise, the current 1976 Copyright Act lists similar categories of protection.<sup>132</sup> So on the one hand, such categories do call for an

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128. *See id.* § 120.

129. *See Mazer v. Stein*, 347 U.S. 201, 217 (1954).

130. Copyright Act of 1790, ch. 15, 1 Stat. 124 (amended 1831).

131. Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 5, 35 Stat. 1075, 1076–77 (repealed 1976).

132. *See* 17 U.S.C. § 102 (extending copyright protection to “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4)

examination of content: a court must examine expression to judge whether it does in fact constitute a designated category. On the other hand, the categories may be viewed as representing mere *forms* of expression. For instance, an author's sentiments might be expressed through a book, a musical composition, a sermon, a photograph, or a work of art. The designated categories might indicate different formats to engage in expression. Viewed in this light, the categories do not seem to target subject matter as much as they seem to recognize means through which an author expresses content. They seem to focus more on *how* a work is expressed more than they focus on *what* is being expressed. They thus seem weak support of historical evidence where Congress has exercised content discrimination.

The sort of content discrimination that this Article contemplates is rare, where Congress has excluded specific content from copyright protection either in an attempt to decrease content production or in recognition that content simply fails to promote progress. But instances do seem to exist. In 1856, when Congress introduced the right to perform dramatic compositions, Congress described the right as applying to works "suited for public representation."<sup>133</sup> Arguably, the word "suited" suggests that dramatic compositions must comprise suitable content to be copyrightable.<sup>134</sup> This interpretation, of course, is weak. Congress provided no guidance as to the meaning of *suited*, and moreover, the word appears only in a passing description of dramatic compositions.<sup>135</sup>

In 1874, Congress specified that engravings, cuts, and prints were copyrightable only if they were "pictorial illustrations or works connected with the fine arts."<sup>136</sup> In the same sentence, Congress continued: "no prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law."<sup>137</sup> Hence, in two instances of the 1874 Act Congress referred to types of content ineligible for copyright. Nevertheless, Congress removed the discriminatory language in passing the 1909 Copyright Act.<sup>138</sup>

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pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works").

133. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139 (repealed 1870).

134. See *Martinetti v. Maguire*, 16 F. Cas. 920, 922–23 (No. 9173) (C.C.D. Cal. 1867).

135. Nevertheless, one court construed that word to suggest that Congress intended that dramatic compositions be eligible for copyright only if they adhered to a moral standard. See *id.*

136. Act of June 18, 1874, ch. 301, 18 Stat. pt. 3 78, 79 (repealed 1909).

137. *Id.*

138. See Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

To sum up, in exercising its copyright power, Congress has a history of employing content discriminators.<sup>139</sup> And this fact may serve as evidence that the Copyright Clause enables Congress to target specific content. But the support is lacking in some respects. The idea, fact, and originality content discriminators are (according to the Court) required by the Copyright Clause; the useful-article discriminator allocates property rights between copyright and patent law; other categories of content that Congress has designated seem to target form rather than content. The only instances where Congress seems to have targeted content consist of two mere blips during the nineteenth century. Thus, support for content-based content discrimination draws mixed support from Congress's history.<sup>140</sup>

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139. Congress's power to define copyright eligibility draws indirect support from its history of content discrimination in the areas of patent law. Congress's patent power arises in the same constitutional clause as its copyright power. *See* U.S. CONST. art. I, § 8, cl. 8 (providing Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). That patent power enables Congress to incentivize expression that discloses inventions. *See* 35 U.S.C. § 112(a) (2012) (requiring a written description of invention to receive a patent). Under that power, Congress has legislated to discourage the expression of certain content by denying patent protection for inventions directed toward human organisms, *see* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 634, 118 Stat. 3, 101, and for inventions relating to nuclear energy or atomic bombs, *see* 42 U.S.C. § 2181(a) (2012) (originally enacted as Atomic Energy Act of 1946, ch. 724, § 11, 60 Stat. 755, 768–70). More recently, Congress has denied patent protection for "any strategy for reducing, avoiding, or deferring tax liability." 35 U.S.C. § 102 note (2012) (Tax Strategies Deemed Within the Prior Art). Admittedly, the focus of Congress's patent power is distinct from its copyright power. *See* *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5–6 (1966) (recognizing that the focus of patent law is "useful Arts" in the Intellectual Property Clause). Patent exists to encourage new, useful, and nonobvious inventions, *see* 35 U.S.C. § 101. Therefore, content discrimination in patent law does not necessitate the conclusion that content discrimination in copyright is permissible. Yet patent law is relevant to a certain extent because it demonstrates Congress discouraging certain categories of content by denying a subsidy under the Intellectual Property Clause. Hence, denying rights to discourage content does not reflect an unprecedented use of Congress's intellectual property power.

140. At least one federal circuit has interpreted Congress's silence on copyrightable content as a choice that all content should be copyrighted. *See* *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 854–58 (5th Cir. 1979). The *Mitchell* court viewed Congress as refraining from exercising its existent power to discriminate based on content. *Id.*; *see also* *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406 (9th Cir. 1982) (agreeing with the *Mitchell* court's reasoning that Congress's silence suggests a choice not to exercise its content-discriminatory power).

Relevant to the history of Congress exercising content discrimination are any congressional actions directed toward patent, which arise under the Copyright Clause. If Congress has practiced content discrimination in defining patent eligibility, this fact might suggest that Congress may also do so in defining copyright eligibility. It is debatable, however, whether content discrimination in patent would raise the same speech issues as copyright, given that the subject matter of patent is directed to objects or processes rather than speech. Putting aside that issue, patent history does not indicate a lengthy practice of discrimination that is not abstract (unlike the requirements for utility, novelty, non-obviousness) or that is for the purpose of discouraging the production of particular works. *See* 35 U.S.C. § 101. Congress has only recently introduced a content-based criterion in patent law—a preclusion for patents directed to human organisms. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 634, 118 Stat. 3, 101. Since 1946, however, Congress has precluded the patentability of inventions relating to nuclear energy or atomic bombs—an ostensible content-based restriction. *See* 42 U.S.C. § 2181(a) (2012) (originally enacted as Atomic Energy Act of 1946, ch. 724, § 11, 60 Stat. 755, 768–70). But that

### C. Supreme Court Statements

The Supreme Court has never directly addressed the question of whether the Copyright Clause allows Congress to discriminate in extending copyright for the purpose of discouraging certain content. It has, however, made statements that may shed light on this issue, both in the older case of *Bleistein v. Donaldson Lithographing Co.*<sup>141</sup> and the more modern cases of *Eldred v. Ashcroft*<sup>142</sup> and *Golan v. Holder*.<sup>143</sup> This section examines those cases.

#### 1. *Bleistein v. Donaldson Lithographing Co.*

Perhaps the most influential opinion on the subject of content discrimination in copyright is the Supreme Court's decision in *Bleistein v. Donaldson Lithographing Co.*<sup>144</sup> Writing for the majority, Justice Oliver Wendell Holmes, Jr., set forth a nondiscrimination principle that precluded a determination of copyright eligibility based on a work's content.<sup>145</sup> The issue under consideration was simple: whether the apparent lack of artistic value in circus posters precluded their eligibility for copyright protection.<sup>146</sup> Holding that they were eligible for copyright, Holmes preached against content discrimination.<sup>147</sup> He applied this principle to the governing Copyright Act, which specified that engravings, cuts, or prints were copyrightable only if they constituted "pictorial illustrations or works connected with the fine arts."<sup>148</sup> That same Act denied copyright for "prints or labels designed to be used for any other articles of manufacture."<sup>149</sup> Holmes read *fine arts* to mean anything that Congress had not specifically exempted, i.e., "prints or labels designed to be used for any other articles of manufacture."<sup>150</sup> If *fine arts* were construed to mean anything else, Holmes

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action seems necessary to carry out its power to "provide for the Common Defence and general Welfare of the United States." See U.S. CONST. art. I, § 8, cls. 1, 18. Hence, the common-defense power appears to justify the content-based restriction that Congress imposed in exercising its patent power under the Copyright Clause. Congress's history of discriminatory action in patent thereby provides only weak evidence in support of the argument for a power to discriminate in exercising its copyright power under the Copyright Clause.

141. 188 U.S. 239 (1903).

142. 537 U.S. 186 (2003).

143. 132 S. Ct. 873 (2012).

144. 188 U.S. 239.

145. *Id.* at 251–52.

146. *Id.* at 248.

147. See *id.* at 251–52.

148. *Id.* at 250 (quoting Act of June 18, 1874, ch. 301, 18 Stat. pt. 3 78, 79 (repealed 1909)).

149. *Id.* at 251 (quoting Act of June 18, 1874, ch. 301, 18 Stat. pt. 3 78, 79 (repealed 1909)).

150. *Id.* (quoting Act of June 18, 1874, ch. 301, 18 Stat. pt. 3 78, 79 (repealed 1909)).

taught, then great works would surely go unappreciated.<sup>151</sup> Content discrimination was an evil to be avoided at all costs.<sup>152</sup>

Some commentators may read the nondiscrimination principle in *Bleistein* as suggesting that Congress lacks authority to discriminate under the Copyright Clause. But this would be incorrect. Holmes directed his warning to judges—not Congress.<sup>153</sup> He specifically directed his most famous articulation of the nondiscrimination principle to the Judiciary: “It would be a dangerous undertaking for *persons trained only to the law* to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”<sup>154</sup> Persons trained only to the law are judges—not members of Congress, who come from all walks of life. Holmes further specified to whom he was directing this admonition in his subsequent sentences: “At the one extreme, some works of genius would be sure to miss appreciation. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than *the judge*.”<sup>155</sup> The judge, then, is the actor against whom Holmes warned of failing to appreciate works of genius or overlooking the public’s preference. It is the Judiciary for which Holmes’s warning is meant—not Congress.

Holmes’s language also makes clear that Congress may discriminate. In articulating the principle that originality is found in every expression, Holmes stated: “[Personality] expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright *unless there is a restriction in the words of the act*.”<sup>156</sup> According to Holmes, then, Congress may restrict expression that is eligible for copyright. Tellingly, in articulating this principle of restriction, Holmes was careful to specify that the restriction must come from “the words of the act,” which can only be interpreted as a choice by Congress—not by judges.<sup>157</sup> Congress is the only institution that Holmes recognized as having authority to restrict the scope of copyright.

Of course this language does not indicate whether such congressional discrimination may be based on content or not. But other language in the *Bleistein* opinion does. Holmes recognized a content-based restriction when he endorsed the validity of Congress’s choice to deny copyright for “prints

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151. *Id.* at 251–52.

152. *See id.*

153. *See id.* at 251–52.

154. *Id.* at 251 (emphasis added).

155. *Id.* at 251–52 (emphasis added).

156. *Id.* at 250 (emphasis added).

157. *See id.*

or labels designed to be used for any other articles of manufacture.”<sup>158</sup> The restriction targets specific content, and Holmes adhered to that congressional choice.<sup>159</sup> So just as Holmes is known for deferring to Congress in other matters, copyright is no different.<sup>160</sup> Congress may discriminate on content; judges may not—so taught Holmes in *Bleistein*.

Given that Holmes respected Congress’s discretion not to copyright certain content, the question arises: Why didn’t Holmes adhere to Congress’s choice to deny copyright for pictorial works that were not connected with the fine arts? If Holmes adhered to congressional discrimination over content relating to articles of manufacture, why not over content relating to the fine arts? The answer is simple. It’s much easier to identify prints that are designed for an article of manufacture than prints that are fine art. In Holmes’s view, fine art is simply art that its beholder prefers, so the *fine arts* restriction would introduce unfettered judicial discretion into questions of copyright eligibility.<sup>161</sup> There would not be any intelligible principle for judges to objectively apply in determining which prints were copyrightable.<sup>162</sup> At bottom, then, Holmes appeared concerned with an unconstitutional delegation of power from Congress to the courts. Congress has authority to exercise its qualitative judgment to determine that which promotes progress. But the Judiciary does not. Hence, Holmes’s concern echoes the modern nondelegation doctrine, which the Supreme Court eventually articulated after *Bleistein* while Holmes was still on the Court.<sup>163</sup> In *Bleistein*, Holmes simply foretold the evil of Congress failing

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158. *See id.* at 251.

159. *See id.*

160. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting) (“[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”); *Otis & Gassman v. Parker*, 187 U.S. 606, 609 (1903) (opining that only a “clear, unmistakable infringement of rights secured by the fundamental law” would justify a court interfering with legislative law) (quoting *Booth v. Illinois*, 184 U.S. 425, 429 (1902)); JEREMY COHEN, CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING 70 (1989) (explaining that Holmes believed the court justified in interfering with a legislative law only if that law constituted an explicit violation of the Constitution); DORSEY RICHARDSON, CONSTITUTIONAL DOCTRINES OF JUSTICE OLIVER WENDELL HOLMES 20–22 (1924) (observing Holmes’s restrictive view of the Court in reviewing legislative law).

161. *See Bleistein*, 188 U.S. at 251–52.

162. *Cf. Touby v. United States*, 500 U.S. 160, 165 (1991) (articulating intelligible-principle requirement in nondelegation doctrine, stating that “Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’” (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))).

163. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Touby*, 500 U.S. at 164–65 (“Congress may not constitutionally delegate its legislative power to another branch of Government.”).

to offer the Judiciary any intelligible principle in applying the power of content discrimination.

*Bleistein* should, therefore, not be read to preclude Congress from engaging in content discrimination. If anything, *Bleistein* tacitly calls for Congress to be specific in exercising content discrimination—as specific as “prints or labels designed to be used for articles of manufacture” rather than the more general “fine arts.” Or for that matter, “graphically violent video games” rather than “offensive entertainment.” So noted.

## 2. *Eldred v. Ashcroft and Golan v. Holder*

The modern Supreme Court has made statements that might be interpreted as either allowing or precluding Congress from exercising content discrimination in defining copyright. These statements have arisen in the cases of *Eldred v. Ashcroft*<sup>164</sup> and *Golan v. Holder*.<sup>165</sup>

### a. *Support for Content Discrimination*

Under one interpretation, these modern Supreme Court decisions would be consistent with construing the Copyright Clause as providing Congress the power to exercise content discrimination. In both *Eldred* and *Golan*, the Court made clear that Congress may do what it pleases in crafting copyright policy.<sup>166</sup> In *Eldred*, the Court considered the Copyright Term Extension Act (CTEA), where Congress extended the term of copyright an additional twenty years and applied that extension to works that had already been created under the previous term.<sup>167</sup> In *Golan*, the Court considered the Uruguay Round Agreements Act (URAA), where Congress had re-copyrighted works that had already entered the public domain.<sup>168</sup> In both cases, the Court held that Congress had acted within the scope of the Copyright Clause.<sup>169</sup>

These cases exemplify the extent to which the Court defers to congressional judgment in setting copyright policy. Both in extending the term of existing works (*Eldred*) and in taking works out of the public domain (*Golan*), Congress had retroactively extended copyright, suggesting

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164. 537 U.S. 186 (2003).

165. 132 S. Ct. 873 (2012).

166. See *Golan*, 132 S. Ct. at 888 (“[T]he [Copyright] Clause ‘empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.’”) (quoting *Eldred*, 537 U.S. at 222)).

167. 537 U.S. at 192–93.

168. 132 S. Ct. at 878–79.

169. *Golan*, 132 S. Ct. at 889; *Eldred*, 537 U.S. at 194.



the practical possibility of a perpetual copyright.<sup>170</sup> Such an outcome seems contrary to the Copyright Clause's restraint that copyrights must exist only for "limited Times."<sup>171</sup> Nevertheless, the Court deferred to Congress's judgment, holding the acts to be rationally related to promoting the Progress of Science.<sup>172</sup> The *Eldred* Court explained:

[W]e turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress. . . . [W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. . . . [I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives. . . . [T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause.<sup>173</sup>

Thus, *Eldred* made clear that the Court greatly defers to Congress's judgment as it pursues copyright policies.<sup>174</sup>

Adding to this argument is the *Golan* Court's explanation that promoting the Progress of Science does not necessarily entail incentivizing new works.<sup>175</sup> Purposes other than incentivizing new works promote progress, taught the Court.<sup>176</sup> The purpose under consideration was Congress's attempt to conform to an international agreement, which necessitated re-copyrighting works in the public domain.<sup>177</sup> According to the *Golan* Court, that purpose promoted progress because a well-functioning international copyright system might induce greater investment in creativity in the United States.<sup>178</sup> The purpose thereby indirectly promoted progress. Hence, the *Golan* Court recognized that even indirect

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170. See Howard B. Abrams, *Eldred, Golan, and Their Aftermath*, J. COPYRIGHT SOC'Y U.S.A., Summer 2013, at 491, 495–98.

171. See U.S. CONST. art. I, § 8, cl. 8 (defining the means of promoting the Progress of Science as "securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings" (emphasis added)); Abrams, *supra* note 170, at 495–98.

172. *Golan*, 132 S. Ct. at 889; *Eldred*, 537 U.S. at 204–05.

173. *Eldred*, 537 U.S. at 204–05, 208, 212, 222; see also *Golan*, 132 S. Ct. at 888–89.

174. See Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2334 (2003) (describing *Eldred* as providing deferential review to Congress).

175. *Golan*, 132 S. Ct. at 888–89; see also *Eldred*, 537 U.S. at 212–13.

176. *Golan*, 132 S. Ct. at 889 ("The provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning. We hold, however, that it is not the sole means Congress may use '[t]o promote the Progress of Science.'").

177. *Id.*

178. *Id.*

possibilities of progress may support the reasonableness of Congress's action under the Copyright Clause.<sup>179</sup>

These teachings from *Eldred* and *Golan* support an interpretation of the Copyright Clause that allows Congress to exercise content discrimination in copyright. Such discrimination would represent a policy that, in Congress's judgment, best effectuates the aim of promoting progress. Under this principle, Congress would determine which particular content promotes progress more so than other content. And such discrimination appears reasonable against the standard of *Golan*, where potential indirect effects of a congressional act were deemed sufficient to find the congressional act a reasonable exercise of promoting progress. Thus, from the standpoint of congressional deference, *Eldred* and *Golan* open the door for interpreting the Copyright Clause as allowing congressional content discrimination.

*b. Opposition to Content Discrimination*

Despite the great deference that the Supreme Court provided Congress in *Eldred* and *Golan*, other aspects of these cases suggest that the Court might not read the Copyright Clause as allowing for content discrimination. To begin with, both *Eldred* and *Golan* deal with Congress expanding copyright coverage, whereas content discrimination involves shrinking that coverage. In theory this should not make a difference: the Court made clear that it will not second-guess the “delicate balance” that Congress achieves in drawing lines of copyright.<sup>180</sup> But it remains to be seen whether the Court would be as deferential to Congress where Congress decreases protection.<sup>181</sup>

Some reasoning in *Eldred* also does not support content discrimination. The *Eldred* Court reasoned that it would be unfair for the author of yesterday's work to receive a different reward than the author of tomorrow's work, so a retroactive application of the term extension was justified.<sup>182</sup> Yet this seemingly unfair situation is exactly what my interpretation would lead to. The author of yesterday's pornography could receive life-plus-seventy years of copyright, whereas if Congress removes protection for that content, the author of tomorrow's pornography would

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179. *Id.*

180. *Eldred*, 537 U.S. at 205 n.10.

181. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 543 (2004) (observing that “copyright has been a one-way ratchet, covering more works and granting more rights for a longer time”).

182. *Eldred*, 537 U.S. at 204.

receive no copyright. Discrimination that discourages content may therefore lead to the unfair outcome that *Eldred* rejected.

Another point about *Eldred* and *Golan* that stands in contrast to content discrimination is the Court's subtle focus on a quantitative, rather than a qualitative standard, for reviewing congressional actions under the Copyright Clause.<sup>183</sup> As discussed above, an interpretation of the Copyright Clause that is consistent with content discrimination requires *Progress* to mean advancement or improvement in knowledge, which would thereby enable Congress to make qualitative judgments relating to particular expression.<sup>184</sup> This interpretation is absent in the Court's explanation of the Copyright Clause. Specifically, in explaining that the Copyright Clause allows Congress to legislate for a purpose other than the creation of new works, the *Golan* Court cited dissemination as another important purpose supporting the promotion of progress.<sup>185</sup> The Court also read "Progress of Science" as meaning "the *creation* and *spread* of knowledge and learning."<sup>186</sup> Its emphasis on creation, dissemination, and spread implicitly suggests that the term *Progress* denotes only that which results in a quantitative increase of works. In short, the Court's quantitative framework is inconsistent with an interpretation of *Progress* that would allow for content discrimination.

The upshot of *Eldred* and *Golan* is that in one respect the Court left the door open for content-based discrimination by Congress, articulating a lenient standard of deferential review. But the Court's paradigmatic understanding of the Copyright Clause might give Congress trouble. The Court seems prepared to support congressional acts that *extend* copyright coverage and aim to increase *quantitative* output of works. It remains to be seen whether the Court would read the Copyright Clause as consistent with decreasing the output of works in support of a qualitative interpretation of *Progress*.<sup>187</sup>

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183. See *Golan*, 132 S. Ct. at 888 (emphasizing dissemination); *Eldred*, 537 U.S. at 206 (construing CTEA as providing incentive to create and disseminate works).

184. See discussion *supra* Part II.A.2.

185. *Golan*, 132 S. Ct. at 888; *Eldred*, 537 U.S. at 206.

186. *Golan*, 132 S. Ct. at 888 (emphasis added); see also *Eldred*, 537 U.S. at 206.

187. A Fourth Circuit decision might be interpreted as suggesting against content discrimination in copyright. See *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001). There, Congress imposed a "carry one, carry all" rule under the Intellectual Property Clause. *Id.* at 367. The rule became relevant when satellite carriers invoked a statutory copyright license for any broadcasts they carried from any particular stations in a local market. *Id.* at 343. Specifically, the rule required such a carrier to broadcast all requesting stations within that market—in addition to the one it had chosen to carry under the statutory copyright license. *Id.* The satellite companies argued that the rule was unconstitutional on the grounds that it violated the Free Speech Clause. *Id.* at 352. The Court disagreed, holding that the rule was content-neutral and thereby not subject to strict scrutiny analysis. *Id.* at 354–55. This portion of the court's ruling suggests, then, that if Congress were to award copyright based on

### III. POLICY

Even if the text of the Copyright Clause and the history of Congress suggest the constitutionality of content-based copyright denial, policy considerations are another matter. Simply put, does constitutional policy favor an interpretation of the Copyright Clause that allows Congress to engage in content-based copyright denial? This part argues that policy does support this interpretation. Section A sets forth two reasons: first, Congress's collective perspective is more valuable in achieving copyright's collective end than is an individual's perspective; and second, Congress's ability to tailor copyright law according to content enables more efficient monopolies, avoiding wasteful content suppression. Section B considers arguments against the interpretation: specifically, the untrustworthy nature of Congress; the difficulties of assessing content; and the effects of industry capture.

#### A. *Policy Supporting Content Discrimination*

##### 1. *A Collective Perspective*

The purpose of copyright is to benefit the collective society—not individuals.<sup>188</sup> Copyright functions by preventing persons from copying an author's work, not because the author has an inherent right to the copyright monopoly, but rather because the monopoly enables society to achieve a collective end. In particular, the societal end of copyright is to improve and advance knowledge and learning.<sup>189</sup>

Despite this collective end of copyright law, copyright law relies on decisions of individuals. Individual preferences determine the success or failure of copyrighted content in the commercial marketplace. Individuals decide whether to purchase the copyrighted content, and that decision dictates the success of particular content. This individual-evaluation system is desirable because individual assessments are inherently trustworthy:

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a speaker's content, the copyright legislation would be subject to a strict scrutiny analysis, and thereby unconstitutional.

188. The premise that copyright exists to further the collective good is fundamental in both ancient and modern copyright jurisprudence. *See generally* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353–57 (1991) (rejecting Lockean sweat-of-the-brow argument as basis for copyright, and implicitly recognizing that copyright exists as a statutory right for Congress to define within constitutional bounds); *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837, 846–47; 2 Bro. P.C. 129, 143–45 (overturning *Millar v. Taylor* (1769) 98 Eng. Rep. 201; 4 Burr. 2303, which had recognized common law basis for copyright, on basis that copyright is subject to the instrumental will of Parliament). Indeed, the Copyright Clause specifies the purpose of copyright as an instrumentalist reason—promoting the progress of science. *See* U.S. CONST. art. I, § 8, cl. 8.

189. *See* discussion *supra* Part II.A.2–3.

individual preferences of the public reflect genuine opinion about the particular content under consideration, as opposed to potential political agendas of individual government actors.<sup>190</sup> Hence, copyright law relies on individual assessments of content to reach its collective end of promoting the progress of science.

This reliance on individual assessments can be problematic, however. Individual assessments do not always account for the utility or harm that particular content may pose to the collective.<sup>191</sup> Even if collectively the public would prefer an increase in content that promotes the progress of science, individual preferences do not always reflect that collective goal. On average, individual consumers more often prefer mindless video games to thoughtful scholarship; pointless pornography to serious documentary; or defamatory mud-slinging to principled opinion.<sup>192</sup> Individuals often focus on the immediate and pleasant effects of content rather than its long-term effects on advancing knowledge. Indeed, the commercial marketplace does not promise that consumers will base their preferences on the goal of improving knowledge or learning; rather, that marketplace promises only efficiency in the matching of consumer with content. In short, individual preferences in the commercial marketplace seem particularly ill fitted as the means for promoting the collective end of progress in science.

There is thus a gap between the end and means of copyright: the end is collective; the means are individual. Congress bridges the gap. As a collective institution for deciding social policy, Congress brings collective values to content evaluation that individuals lack.<sup>193</sup> Congress can account for social utility and harm across society. This is not to say, however, that copyright law should rely exclusively on Congress for determining whether specific views can receive a copyright. To be sure, individuals should still determine the value of particular copyrighted works.<sup>194</sup> Yet Congress should be able to channel those individual determinations toward certain categories of content that are more valuable from a collective perspective.<sup>195</sup> So although copyright law relies on individual preferences to determine particular content's value, the benefit of a collective perspective in assessing that value may be realized from Congress defining copyright eligibility for general categories of content. In short, Congress

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190. See Snow, *supra* note 3, at 1512–13.

191. Copyright employs a commercial incentive structure that relies on individual choice. See generally Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 14–15 (1995) (“Copyright is about helping copyright owners make money.”).

192. See Snow, *supra* note 3, at 1511–12.

193. *Id.* at 1512–13.

194. See discussion *supra* Part II.A.3 (explaining that the public, rather than Congress, chooses among competing views of content).

195. See Snow, *supra* note 3, at 1512–13.

should determine which content individuals may evaluate in the commercial marketplace.

Congress is also better positioned than individuals to account for negative externalities of content. Individual authors and consumers may fail to account for harms to innocent third parties that follow from content.<sup>196</sup> For instance, commentators argue that some violent video games may cause aggressive behavior, possibly leading to serious social harms in extreme cases.<sup>197</sup> Similarly, commentators argue that pornography harms women both generally and specifically (in the production process).<sup>198</sup> Yet these facts would not likely affect the behavior of their authors and consumers. Authors and consumers of such content presumably do not consider these effects when deciding which content to create and consume. As with any market, the financial marketplace for content is not immune from individual decisionmakers failing to internalize the social costs of individual decisions. Congress, on the other hand, is better equipped to recognize and assess those externalities.

Related to the problem of negative externalities is the problem of imperfect information. Assuming that some content may lead to harmful effects for the individual consumer, such consumers may lack this knowledge. Their individual means of acquiring information restrains their knowledge: some information is known best through collective means, such as studying multiple persons who have consumed the content.<sup>199</sup> Suppose, for instance, that certain pornographic content leads some consumers to behave in a manner that is destructive to family relationships. For an individual consumer of pornography, the fact that consuming the content could damage his family relationships would likely be relevant to his purchasing decision. Yet that likelihood may be unknown to the individual consumer. Individual consumers lack resources to gather and assess data relating to the consequences of pornography consumption.<sup>200</sup>

Thus, Congress as a collective institution provides a distinct advantage over individuals for realizing the collective end of copyright—promoting progress in science. Congress has both a collective perspective and collective resources to assess content value. By allowing Congress to determine which content should receive copyright, Congress can exercise the perspective and implement the resources best able to yield social advancements in knowledge.

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196. *See id.*

197. *See infra* note 258 and accompanying text.

198. *See* MARTHA C. NUSSBAUM, *Objectification*, in *SEX AND SOCIAL JUSTICE* 213, 234–36 (1999); MacKinnon, *supra* note 8, at 16–18.

199. *See* Snow, *supra* note 3, at 1513.

200. *See id.* at 1514.

## 2. *An Efficient Suppression of Copying*

Defining copyright eligibility according to content makes good sense because not all content requires the same rights of exclusion to realize the purpose of copyright. That is, not all content requires the same set or term of exclusive rights to incentivize its creation and dissemination. For instance, it is possible that the copyright term for computer programs need not be as long as the term for full-length feature films.<sup>201</sup> Or the term necessary to incent news stories may be considerably shorter than the term necessary to incent academic textbooks. In view of this practical reality, if Congress must set the same term with the same rights for all content, Congress would be extending the copyright monopoly longer than is necessary for certain content. A lengthy copyright duration—and for some content, even the very existence of a copyright—would be wasteful. Thus, a uniform set of property rights granted to all content suggests that some copiers of content must remain silent longer than necessary to incentivize content creation. And the unnecessary suppression of content repetition slows content dissemination, which hampers the purpose of copyright.

In selecting the copyright term and scope of rights, Congress should balance the public's interest in incenting the particular content against the public's interest in gaining access to that content. That balance may vary according to content. Some content that unquestionably promotes progress may not need any copyright to exist.<sup>202</sup> This might include, for instance, scholarly research or academic papers.<sup>203</sup> To the extent that this sort of content is self-producing, society gains no social benefit for the cost of imposing an artificial monopoly, so the copyright is wasteful. Such a content-based copyright denial would support its further dissemination, thereby promoting progress in science.

Some categories of content might promote progress, but their overlap with other forms of intellectual property may not require as long a term as other content categories. The social costs of monopolizing such content

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201. *See id.* at 1514–15.

202. *See generally* Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 624 (2012) (questioning copyright's assumption that external incentives are necessary); Rebecca Tushnet, *Economics of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) (“[T]he desire to create can be excessive, beyond rationality, and free from the need for economic incentive. . . . [A] copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote.”).

203. *See* Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 782 (2006) (“The role of copyright in the dissemination of scholarly research is in many ways curious, since neither authors nor the entities that compensate them for their authorship are motivated by the incentives supplied by the copyright system.”). Denying copyright for such works would implicate a means of distribution different from the current publication regime. *See id.* at 782–83.

through two distinct intellectual-property regimes might justify adjusting the term of copyright. This category might include industrial design or applied art that substantially serves a utilitarian purpose, potentially qualifying for a patent.<sup>204</sup> Similarly, certain content might arise because of the opportunity to exploit only some of the exclusive rights available in a copyright. Film and musical content may be an example of this phenomenon: it may be the case that only the rights of distribution and public performance incentivize their production and dissemination. If this is so, Congress might curtail the right of reproduction for these categories of content: consumers would then be able to create personal copies of films and music without violating copyright.<sup>205</sup> In short, although these examples may not reflect an accurate assessment of the particular lines that Congress should draw, the examples illustrate that content-based flexibility in extending copyright would allow Congress to efficiently structure the suppressive monopoly of copyright.<sup>206</sup>

### *B. Arguments Against Content Discrimination*

Practical concerns may be raised that suggest against Congress exercising content-based discrimination in copyright. First and foremost, Congress does not seem a trustworthy actor for the purpose of determining which content furthers social policy. Second, and related to the first point, giving Congress the power of discrimination over content could further the influence of large corporate actors in the legislative process. Third, even assuming pure motives, Congress seems incompetent both to assess subjective values that copyright should encourage and to identify the influence of copyright's monopoly on expressional output. These concerns are discussed in turn.

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204. Cf. Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 738–48 (1983) (arguing for discriminatory determinations of copyrightable industrial design based on influence of functional considerations in design process).

205. Cf. 17 U.S.C. § 115 (2012) (imposing compulsory license scheme for “nondramatic musical works”).

206. Some expression may be difficult to incent without a longer term. Perhaps authors of private diary entries need assurance that their works will receive copyright protection well beyond their death. Cf. *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987) (recognizing author's right to first publication of private works outweighs usual claim of fair use). But see 17 U.S.C. § 107 (stating that unpublished nature of work does not bar finding of fair use).



### 1. *An Untrustworthy Congress*

Congress has a history of acting for political gain rather than for the good of collective society.<sup>207</sup> In the face of this history, the benefits of content-based copyright denial seem nothing more than a distant possibility. Although Congress *might* exercise its discretion to benefit the collective good, practical history suggests that Congress will not. At best, members of Congress seem to act for their own constituencies; at worst, they act for their personal interests. Either way, a bare possibility that Congress could exercise discretion to benefit the entire collective good of society seems unpersuasive as a reason to allow the discretion in the first place. Why should we trust Congress with a power of discrimination if, as a practical matter, Congress would use that power to further the interests of individuals rather than the collective? Indeed, to justify giving power to an actor that has a faulty record of performance, there must be an actual problem worth fixing—a problem that reflects more than mere inefficiencies and inaccuracies. There must be a problem with content that is so harmful that even Congress would act in the best interest of the collective to fix it.

This argument certainly has merit. But it is not as powerful as it may first seem. As an initial matter, Congress's power to discriminate through denying copyright is not a power to act as a gatekeeper for ideas. And this is because copyright gives Congress only limited influence over content. Congress can affect only content that requires government-backed rights of exclusion as a justification for production or dissemination. Those rights are often not necessary. In an age of digital encryption, the absence of a government monopoly would not likely be fatal to a category of content.<sup>208</sup> Indeed, in some instances, architectural rights of exclusion may represent more efficient means than government rights of exclusion.<sup>209</sup> Denying copyright for violent video games, for instance, would not affect gamemakers' ability to profit from selling apps through iTunes. Moreover, content that does not rely on a financial incentive would be completely unaffected by a copyright denial. Where content creators do not seek to profit, the copyright denial would be irrelevant. Pornography on YouTube, for instance, would not go away in the absence of copyright. Hence, content-based copyright denial does not deny authors access to the

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207. See generally Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 760 (2012) (observing public's perception of Congress as an untrustworthy actor).

208. See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 514–15 (1999); Snow, *supra* note 3, at 1520.

209. See Snow, *supra* note 3, at 1520.

financial marketplace (or the marketplace of ideas for that matter)<sup>210</sup>—it denies authors only a government monopoly within that marketplace.<sup>211</sup>

In addition to the limited nature of Congress's influence over content, very real problems justify the risk of allowing Congress a power of content discrimination. Serious social harms follow from certain content. Consider pornography, violent video games,<sup>212</sup> hate speech,<sup>213</sup> and crime-facilitating material.<sup>214</sup> Some scholars observe great social harms that follow from these categories of content. Some have argued that pornography harms the social institutions of marriage and family;<sup>215</sup> harms women both generally and specifically (in the production process);<sup>216</sup> provokes bad norms; and damages children's moral development.<sup>217</sup> Some have argued that violent video games increase aggressive tendencies of their consumers.<sup>218</sup> Some have argued that hate speech can cause psychological injury to victims as well as harm competing constitutional values of equality, privacy, and human dignity.<sup>219</sup> Some have argued that crime-facilitating material can lead to terrorist harms on many innocent victims.<sup>220</sup> If accurate, these effects of content would be highly destructive for the social infrastructure of society. Although the scope of this Article prevents me from offering a meaningful assessment on the likelihood and actuality of these harms, I do observe others who forcefully argue that socially destructive harms derive from certain categories of content.<sup>221</sup>

Admittedly, these harms cannot always be proven as directly caused by the content at issue; they do not necessarily occur in every instance; or they are not immediately apparent. As a result, the harms do not justify altogether banning or otherwise punishing the content: the content still receives protection under the Free Speech Clause.<sup>222</sup> The content, then, may

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210. *See id.* at 1521.

211. Even then, the strength of that monopoly advantage is debatable. *See* Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055, 2104–07 (2012) (explaining how doctrines of substantial similarity, derivative works, and fair use may reduce monopoly power of copyright).

212. *See, e.g.,* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011); *see id.* at 2761–71 (Breyer, J., dissenting).

213. *See, e.g.,* Levinson, *supra* note 8, at 45.

214. *See* Volokh, *supra* note 8, at 1217.

215. *See* Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 17–18 (2000).

216. *See* Nussbaum, *supra* note 198, at 213; MacKinnon, *supra* note 8, at 16–17.

217. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1647–72 (2005).

218. *See infra* note 258.

219. *See* Levinson, *supra* note 8, at 77–78.

220. *See* Volokh, *supra* note 8, at 1217.

221. *See supra* notes 212–217; Snow, *supra* note 3, at 1522.

222. *See* Snow, *supra* note 3, at 1523.

be compared to a subtle cause of cancer: its harmful effect often cannot be proven and usually is not immediate, so the law cannot ban it.<sup>223</sup> Nevertheless, the destructive harm continues.<sup>224</sup> What can be done? The answer is copyright: copyright represents a limited means for controlling harmful content where more effective means of control are simply not permitted because of uncertainty relating to causality and immediacy of harm.<sup>225</sup> Copyright is the compromise.<sup>226</sup>

## 2. *Industry Capture*

It might be argued that Congress practicing content discrimination would only exacerbate an existent problem of industry capture. Professor Jessica Litman has convincingly mapped the history of content industries capturing Congress's copyright power.<sup>227</sup> Calling for Congress to extend and curtail copyright rights based on the content of particular expression would only further expand the dominion of wealthy copyright holders. Commercial industry would extend its hold over public policy.

This argument certainly has strength in its factual assessment of Congress. I agree that one effect of Congress imposing content-based discrimination may be to strengthen the hand of commercial industry in policy-making decisions. And I further agree that this commercial influence is not healthy in deciding matters of public policy—at least not in copyright, which exists to promote the progress of science. I disagree, however, that this is a reason for Congress to refrain from exercising content-based discretion in forming copyright law. For one thing, discrimination would likely make the influence of commercial industry more transparent. If Congress were to adjust copyright protection for specific categories of content, the reason for that adjustment would become more evident than if Congress were to make the very same adjustment for all content. For instance, a retroactive extension of the copyright term by twenty years for children's animated characters and movies would raise questions regarding Congress's rationale for targeting that particular

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223. *See id.*

224. *See id.*

225. *See id.* at 1523.

226. It is important to note that I am *not* arguing that copyright denial will necessarily reduce content production in every case. The effect of copyright will depend on the content at issue. Denying copyright for some content—academic papers, for instance—might actually increase content production and dissemination. My argument is simply that Congress should be able to examine, and act on, the issue. Congress should be able to ask whether granting or denying copyright for a particular category of content furthers the progress of science.

227. *See, e.g.,* JESSICA LITMAN, *DIGITAL COPYRIGHT* 22–32 (2001); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870–79 (1987).

expression, much more so than if Congress had extended the term across the board.<sup>228</sup> Hence, even assuming industry capture of copyright, the influence of particular industries would likely become more apparent with content-based discrimination than the influence presently is.

Related to facilitating transparency, discrimination would likely limit the effects of content-industry lobbying on the Copyright Act as a whole. By exercising discrimination according to content that reflects commercially driven influences, Congress would—perhaps unintentionally—preserve remaining content from the effects of those influences. For instance, suppose again that in response to industry pressure, Congress retroactively extended the copyright term for children’s animated characters and movies. Other forms of expression would not be subject to the imbalance that a content-specific industry had introduced into copyright. That is to say, the industry-capture effect would at least be limited to the content of the industry seeking special treatment. On the assumption, then, that particular industries are presently influencing Congress’s exercise of the copyright power, content discrimination would appear to aid in limiting the scope of that influence.

### 3. *Difficulties in Identifying Values and Incentives*

Even assuming the purest congressional motives in attempting to promote progress, it might be argued that Congress simply lacks the competency to make value-based distinctions among content. It is arguable that the market better reflects public preferences of content than does the heavy hand of government. Let the public discourage the production of pornography by failing to purchase it, rather than the government through dictating its moral judgment—so the argument goes.<sup>229</sup> This argument, then, is one that paints a paternalistic picture of Congress imposing its values over the public’s content.

I appreciate these problems relating to the subjectivity of values. They should not be ignored. Yet they are insufficient to excuse Congress from its role of determining content that promotes and impedes progress. Congress represents the institution charged with deciding policy that will promote progress. Its resources enable value judgments—the same value judgments

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228. Cf. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 101–514) (adding twenty years to term of all works).

229. Cf. *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 861 (5th Cir. 1979) (extending copyright to legally obscene material on grounds that “it is inappropriate for a court . . . to interpose its moral views between an author and his willing audience”).

that are relevant to social-policy choices in other contexts.<sup>230</sup> Congress uses the people's money to subsidize value-laden activities and programs.<sup>231</sup> Using property rights to subsidize expression should not be any different.<sup>232</sup> Indeed, if public preferences were necessary to determine resources that Congress expended under the Spending Clause, Congress would only be able to provide cash subsidies to the public rather than fund programs directly.<sup>233</sup> Only with cash subsidies could members of the public determine which activities best promoted their own general welfare.<sup>234</sup> But this, of course, ignores reality. Congress determines which values to promote through its use of public funds. Congress, then, should determine which values to promote through copyright.

Simply put, Congress is charged with, and has the competency for, implementing social policy. Although varying value systems and uncertain incentive structures can make the question of content evaluation a difficult one, that fact does not mean that Congress should never ask the question. Congress represents the branch of government that is responsible for identifying circumstances and implementing policy with available resources. Copyright is one of those resources—even where policy choices may be difficult.

#### IV. APPLICATION EXAMPLES

The Copyright Clause should thus be interpreted as enabling Congress to exercise content discrimination in defining copyright eligibility. Congress may deny copyright where the criterion for denial is viewpoint neutral and it may grant copyright to content where that content is consistent with a cultural understanding of improving or advancing knowledge.<sup>235</sup> This part analyzes two examples of content categories where Congress might choose to restrict copyright protection: pornography and violent video games. I touch on whether policy and political attractiveness suggest that Congress should and could deny copyright for these categories

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230. See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (explaining necessity of favoring speech in funding decisions for art program); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) (“Congressional selection of particular entities or persons for entitlement to this sort of largesse is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find.” (internal quotations omitted)).

231. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (placing abortion restrictions on funding of family-planning programs).

232. See Snow, *supra* note 3, at 1490–96 (comparing rationale of restrictions of funding with restrictions of extending copyright).

233. See discussion *supra* Part II.A.2.

234. See discussion *supra* Part II.A.2.

235. See discussion *supra* Part II.A.3.

of content, and then I briefly address the constitutional requirements under the Copyright Clause.

### A. *Pornography*

#### 1. *Policy and Politics*

The first example involves Congress denying copyright for adult pornography. Policy arguments over pornography are extensive in the literature.<sup>236</sup> I observe only a few here. Against pornography is the argument that it causes moral harm to society. Pornography, it is argued, harms the social institutions of marriage and family life;<sup>237</sup> objectifies humans;<sup>238</sup> causes harmful treatment of women both generally and in the pornography-production process specifically;<sup>239</sup> provokes bad norms; and damages children's moral development.<sup>240</sup> If these effects are accurate, they indicate strong reasons to reduce its proliferation.

Critics of pornography regulation most often rely on a policy argument of free speech.<sup>241</sup> It is argued that speakers and their willing audiences should be able to engage in their own private conversations, indecent or otherwise.<sup>242</sup> This argument has proven sufficiently strong to merit speech protection from government censorship, but it is lacking as a reason to establish copyright protection from private copying. Indeed, the literature lacks arguments relating to social value that pornography brings to collective society. From a social-collective perspective, the value of pornography is absent.

Perhaps a stronger argument against copyright denial is not based on the merits of pornography, but rather the effect of the denial.<sup>243</sup> Professors Christopher Cotropia and James Gibson have argued that removing

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236. E.g., NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995); George, *supra* note 215, at 17–18; Koppelman, *supra* note 217, at 1647–72; John Copeland Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939, 940 (2011) (summarizing arguments of pornography opponents); see also Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why Miller Should Survive Lawrence*, 15 GEO. MASON L. REV. 611, 637–42 (2008) (reciting social-science research on pornography effects).

237. See George, *supra* note 215, at 17–18.

238. See NUSSBAUM, *supra* note 198, at 213.

239. See MacKinnon, *supra* note 8, at 16–17.

240. See Koppelman, *supra* note 217, at 1647.

241. See, e.g., STROSSEN, *supra* note 236.

242. See generally *United States v. Am. Library Ass'n*, 539 U.S. 194, 234–35 (2003) (Souter, J., dissenting); *Ashcroft v. ACLU*, 535 U.S. 564, 602–07 (2002) (Stevens, J., dissenting).

243. See Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 961–66 (2010).

copyright from pornography would likely *increase* its proliferation.<sup>244</sup> Their argument is straightforward: by denying copyright, the law would decrease front-end creation of pornography only marginally, owing to a dramatic increase in web-based pornography created by amateur pornographers who don't enforce their copyright rights.<sup>245</sup> Moreover, by denying copyright, the law would dramatically increase back-end dissemination of pornography, as consumers would be able to freely distribute existent pornography without legal restraint.<sup>246</sup> Denying copyright, then, would seem to only marginally decrease front-end creation, but dramatically increase back-end dissemination.

To a certain extent, this conclusion makes sense in the context of a court denying copyright for pornography. In that setting, the court's denial would affect the copyright validity for pornography content already created.<sup>247</sup> But the conclusion is dubitable in the context of Congress denying copyright only prospectively.<sup>248</sup> A prospective denial would enable copyright to continue to restrain copying of existent pornography. The denial, then, would only decrease the front-end creation of pornography by creators who rely on copyright, having no effect on back-end copying of existent pornography, and for that matter, on either front-end creation or back-end copying of pornography created by amateur pornographers who don't rely on copyright. Therefore, under a prospective copyright denial of pornography, back-end copying would not increase while front-end creation would decrease. Denying copyright prospectively would seem to introduce a net decrease in pornography production.<sup>249</sup>

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244. *See id.*

245. *See id.*

246. *See id.*

247. *Cf. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991) (denying copyright for already-existing white pages).

248. A congressional retroactive denial of copyright could raise takings issues that would be prohibitively costly. *See Roberta Rosenthal Kwall, Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685, 692–93 (1989) (examining takings issue that would arise if Congress exercised eminent domain over copyrighted works).

249. On the other hand, some pornographers have used copyright to pressure aggregator websites into policing for unauthorized content, leading the aggregators to adopt policies that excessively block distribution of all pornographic content—a point raised by Professors Cotropia and Gibson. *See Cotropia & Gibson, supra* note 243, at 965–66. This fact suggests that even a prospective denial of copyright would hinder reducing pornography dissemination. But since the article of Professors Cotropia and Gibson, this factual premise has been called into doubt. Courts have refrained from imposing liability on aggregator websites for unauthorized content. *See Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 32 (2d Cir. 2012) (requiring “actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement” for aggregator-website liability); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013) (“[M]erely hosting a category of copyrightable content, such as music videos, with the general knowledge that one’s services could be used to share infringing material, is insufficient to meet the

In the end, however, the actual effect of denying copyright for pornography cannot be known until Congress does so. For pornography in particular, the issue is highly circumstantial. So in view of the uncertainty, the effect of copyright denial on content production should not dictate a course of action that is contrary to the constitutional presumption of copyright's effect. The Copyright Clause relies on the presumption that content production increases with copyright.<sup>250</sup> Unless evidence establishes a contrary effect, copyright should be denied for pornography.<sup>251</sup>

From a political standpoint, support for denying copyright to pornography would likely be strong. Lawmakers are continually criticizing its proliferation.<sup>252</sup> In 2013, for instance, forty-two Senators—Republicans and Democrats alike—called for an increase in adult-pornography criminal prosecution.<sup>253</sup> Congress also has a history of implementing conditions for funding programs that restrict pornography dissemination.<sup>254</sup> It therefore seems likely that Congress would find it politically attractive to deny copyright for pornography.

## 2. *Constitutionality*

As discussed in Part II.A.3, a constitutional denial of copyright for content would necessitate that the designated category be viewpoint neutral. This is debatable. Pornography as a criterion for copyright denial seems to target the viewpoint that women should be portrayed in a certain manner.<sup>255</sup> A value-based criterion of content—such as indecent, lewd, or immoral—would imply that Congress disagrees with the pornographer's portrayal of women, or in other words, the message communicated. Such criteria suggest viewpoint discrimination.<sup>256</sup>

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actual knowledge requirement . . ."). In view of this reluctance to attach liability for those websites, copyright law would not seem to introduce an unproductive bottleneck for disseminating pornography.

250. See Snow, *supra* note 38, at 314.

251. See *id.* In short, pornography is not the proper vehicle to promote the progress of science, so copyright is not the proper vehicle to deal with the problems of pornography. Congress should not employ copyright as a means to resolve social harms of pornography—through either denial *or* grant. If pornography causes social harm, let it happen without the copyright subsidy.

252. See Nagle, *supra* note 236, at 941 n.14 (reciting statements by congressional lawmakers relating to pornography).

253. See Letter from 42 Senators to Eric Holder, U.S. Attorney Gen. (Apr. 4, 2011), [http://www.politico.com/static/PPM153\\_obsc.html](http://www.politico.com/static/PPM153_obsc.html).

254. See *infra* note 257.

255. See Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 463 (1986) ("[A]nti-pornography legislation expressly discriminates on the basis of viewpoint . . .").

256. If Congress were to define pornography as "indecent expression," the word *indecent* suggests that pornographic works are offensive, improper, or undesirable—or in other words, that this sort of expression is wrong. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 593 n.1 (1998).



The line between viewpoint and content, however, is never clear. Pornography may also be considered as a general category of content—specifically, content that is likely to arouse sexual stimulation or content that appeals to the prurient interest. Such descriptions do not appear to target the portrayal of women as much as they target effects that follow from content. And as between the two constructions of pornography—viewpoint-based or neutral—the Supreme Court has a history of treating pornography as viewpoint neutral.<sup>257</sup> Denying pornography would likely be constitutional under the Copyright Clause.

## B. Violent Video Games

### 1. Policy and Politics

On the question of copyright denial for violent video games, policy arguments are mixed. On the one hand, several studies conclude that playing such games leads to aggressive behavior, at least in the short term.<sup>258</sup> So for the sake of protecting innocent third parties from that aggressive behavior, copyright should be denied. On the other hand, other

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(Scalia, J., concurring) (assuming that discriminating term “decency” imposes viewpoint). Similarly, if Congress were to define pornography as expression that portrays women “as submissive in matters sexual or as enjoying humiliation,” the discriminating criteria would represent disapproval of a viewpoint about women—an approach expressly rejected by the Seventh Circuit in *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985).

257. The Supreme Court allowed Congress to refrain from extending subsidies to pornographic works in both *National Endowment for the Arts v. Finley*, 524 U.S. at 574–75, and *United States v. American Library Ass’n*, 539 U.S. 194, 209 (2003) (plurality). Tellingly, Congress’s definition of pornography in both these cases could be construed as viewpoint based, i.e., “decency and respect” in *Finley*, 524 U.S. at 572, and “harmful to minors” in *American Library*, 539 U.S. at 201. Under spending-power doctrine, viewpoint-discriminatory funding is permissible only if Congress is speaking or transmitting its own message through private speakers. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). Neither situation applies in *Finley* or *American Library*. Yet in both cases, the Court upheld the pornography criterion. *Finley*, 524 U.S. at 589–90; *Am. Library*, 539 U.S. at 210. Ostensibly, then, the pornographic criteria were viewpoint neutral. Hence, pornographic works appear likely to constitute a permissible category of content for which Congress may deny copyright.

258. See, e.g., Brad J. Bushman & Craig A. Anderson, *Violent Video Games and Hostile Expectations: A Test of the General Aggression Model*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1679–86 (2002) (“[T]he present study supports the General Aggression Model-based prediction that exposure to violent media can influence the amount of aggressive expectations that people conjure up in response to potential conflict situations.”); Youssef Hasan et al., *The More You Play, the More Aggressive You Become: A Long-Term Experimental Study of Cumulative Violent Video Game Effects on Hostile Expectations and Aggressive Behavior*, 49 J. OF EXPERIMENTAL SOC. PSYCHOL. 224–27 (2013) (testing cumulative effect of violent video games and concluding that “aggressive behavior and hostile expectations increased over days for violent game players, but not for nonviolent video game players”).

studies conclude that such games actually reduce crime.<sup>259</sup> Potential criminals apparently vent their aggressive tendencies in virtual reality rather than in real-space crime situations.<sup>260</sup> The evidence, then, does not seem to dictate a clear policy position on whether Congress should discourage violent video games.

From a political standpoint, denying copyright for violent video games would likely garner substantial support. The seeming increase in public shootings has created significant public outcry against those games.<sup>261</sup> Often cited as a contributing factor in the shootings, such games have come under intense public and political scrutiny.<sup>262</sup> And given the political controversy surrounding gun control, copyright denial seems much more politically attractive as a means of decreasing violent outbursts.

## 2. *Constitutionality*

As discussed above, the Copyright Clause would require viewpoint neutrality.<sup>263</sup> Like pornography, the viewpoint neutrality of violent video games as a criterion for denying copyright is debatable. Such a criterion suggests that Congress does not agree with the particular message of violence. In *Brown v. Entertainment Merchants Ass’n*, the Supreme Court recognized that objections to violence in video games constitute objections to the message itself—not merely the category of content.<sup>264</sup> Thus, the *Brown* decision presents a formidable challenge to construing a violent-video-games criterion for discrimination as viewpoint neutral.

Yet despite *Brown*’s recognition of viewpoint discrimination, the context of copyright provides a distinct basis for construing a copyright denial to violent video games as viewpoint neutral. Key to the viewpoint-neutrality inquiry is the reason that Congress discriminates.<sup>265</sup> Under its copyright power, Congress may identify categories of content that are less likely to promote the progress of science.<sup>266</sup> With regard to video games

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259. E.g., A. Scott Cunningham et al., *Understanding the Effects of Violent Video Games on Violent Crime* 1 (Apr. 7, 2011) (unpublished manuscript), <http://ssrn.com/abstract=1804959> (“[A] one percent increase in violent games is associated with up to a 0.03% decrease in violent crime . . .”).

260. See Benedict Carey, *Shooting in the Dark*, N.Y. TIMES (Feb. 11, 2013), <http://www.nytimes.com/2013/02/12/science/studying-the-effects-of-playing-violent-video-games.html>.

261. See, e.g., Kesten, *supra* note 1.

262. See *id.*

263. See discussion *supra* Part II.A.3.

264. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011).

265. See *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (examining whether *intent* of government is to discourage viewpoint); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining that “[t]he government’s purpose is the controlling consideration” in deciding whether speech is content-based).

266. See discussion *supra* Parts II–III.

generally, some types seem less likely to fulfill that purpose than do others. For instance, games that stimulate audiences through graphic violence seem much less likely to promote advancement in knowledge than do scholastic-educational games. Hence, Congress may identify that video games that have a purpose of stimulating audiences through engaging participants in graphically violent play are less likely to effect results that advance knowledge. The designated category of violence may serve to better identify content that fails to fulfill the mandate of the Copyright Clause, rather than to communicate disagreement with the message of violence itself. Thus, denying copyright for that category of video games could be construed as a viewpoint-neutral exercise of the copyright power.

## V. CONCLUSION

Much like the spending power gives Congress power to promote general welfare through subsidizing activities with money, the copyright power gives Congress power to promote progress and advancements in knowledge through subsidizing expression with property rights.<sup>267</sup> The copyright power represents a constitutional tool for Congress to promote certain content over other content.<sup>268</sup> Indeed, the Copyright Clause mandates that Congress exercise its copyright power solely to promote the progress of science—a content-based end.<sup>269</sup> That mandate provides sufficient discretion for Congress to extend, deny, or marginally adjust copyright protection for certain categories of content.<sup>270</sup> The text of the Copyright Clause therefore supports content-based copyright denial.

This interpretation draws support from policy considerations.<sup>271</sup> Congress as a collective institution has an advantage over individual members of the public in assessing the value of content. Congress has resources and perspectives that reflect collective society; individuals do not.<sup>272</sup> Congress is more likely to account for negative externalities of expression; consumers are not.<sup>273</sup> Congress has means to adjust the suppression of copying for efficiency of content dissemination; individuals do not.<sup>274</sup> Congress can reduce the copyright term where the standard

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267. See Snow, *supra* note 3, at 1490–96 (comparing the Spending Clause with the Copyright Clause).

268. See discussion *supra* Part II.

269. See U.S. CONST. art. I, § 8, cl. 8; discussion *supra* Part II.A.

270. See discussion *supra* Part II.

271. See discussion *supra* Part III.

272. See discussion *supra* Part III.A.

273. See discussion *supra* Part III.A.1.

274. See discussion *supra* Part III.A.2.

length would be wasteful for certain content; individuals cannot.<sup>275</sup> In short, Congress brings a perspective and an ability that individuals lack, which enables Congress to more effectively attain the collective purpose of promoting the progress of science.<sup>276</sup>

Of course there are limitations to this power—just like any other constitutional power. Doctrinally, Congress may never discriminate against viewpoints.<sup>277</sup> More practically, the absence of copyright does not preclude creators from creating and even profiting from expression.<sup>278</sup> In short, the copyright power does not give Congress power to forbid creators access to the financial marketplace. It merely gives Congress a power to deny creators a government-backed monopoly within that marketplace.

Yet despite these limitations of the copyright power, that power does represent a means for influencing public discourse. Subject to its constitutional and practical limitations, the power enables Congress to further policy ends that depend on expressional content. Thus, the Copyright Clause gives Congress the power to grant or deny copyright for content that promotes or impedes the progress of science.

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275. See discussion *supra* Part III.A.2.

276. See discussion *supra* Part III.A.

277. See discussion *supra* Part II.A.3 (interpreting Copyright Clause as imposing viewpoint-neutrality restriction on copyright denial); Snow, *supra* note 3, at 1517–18 (interpreting Free Speech Clause as imposing viewpoint-neutrality restriction on copyright denial).

278. See discussion *supra* Part III.B.1.