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The Institutional Progress Clause

*Jake Linford**

ABSTRACT

There is a curious anomaly at the intersection of copyright and free speech. In cases like Citizens United v. Federal Election Commission, the United States Supreme Court has exhibited a profound distaste for tailoring free speech rights and restrictions based on the identity of the speaker. The Copyright Act, however, is full of such tailoring, extending special rights to some copyright owners and special defenses to some users. A Supreme Court serious about maintaining speaker neutrality would be appalled.

A set of compromises at the heart of the Copyright Act reflects interest-group lobbying rather than a careful consideration of what kinds of institutions best realize the goal of the Progress Clause—the provision that expressly empowers Congress to provide copyright protection. Assuming the democratic process is flawed for predictable public-choice reasons, how might the Court address these problems in the Copyright Act?

The answer is institutional analysis. First Amendment scholars have for some years used institutions as analytical and normative tools. This framework considers how different social institutions may serve First Amendment goals—like creating a robust marketplace of ideas—through their structure and function. This Article is the first to explore how the Progress Clause can serve a similar role and provides a

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framework to consider whether certain institutions are particularly well-suited to enable the creation, dissemination, or preservation of valuable expression. Inasmuch as Congress has granted special privileges to institutions that serve Progress Clause values, the speaker-based tailoring is constitutionally acceptable—even if the process by which it occurs is suspect. Applying this institutional framework can help clarify not only the extent to which the current Copyright Act achieves the constitutional goals it was crafted to reach, but also when Congress should adopt or reject amendments and extensions to the Copyright Act.

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Article I, Section 8, Clause 8 of the Constitution—sometimes referred to as the “Progress Clause”—authorizes Congress to grant “to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,”¹ i.e., copyright and patent protection. This power is internally limited by the Progress Clause, which authorizes the grant of an exclusive right only “for limited times” and for the stated purpose of “promot[ing] the progress of Science and useful Arts.”² The First Amendment also limits the authority to grant copyright protection because, as the Court has recognized, “some restriction on expression is

1. U.S. CONST. art. I, § 8, cl. 8.

2. *Id.*; see, e.g., Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1810–16 (2006).

the inherent and intended effect of every grant of copyright.”³ While commentators have argued that copyright laws should be subject to “procedural and substantive” First Amendment constraints,⁴ the Supreme Court has not applied searching First Amendment scrutiny to any provision of the Copyright Act to date.⁵

There is something nevertheless puzzling about the relationship between copyright protection and free expression. The Supreme Court has repeatedly invalidated statutes that discriminate among classes of speakers.⁶ For example, in *Citizens United v. Federal Election Commission*, the Court held unconstitutional a federal statute barring independent expenditures in elections based on the speaker’s corporate identity.⁷ But the Copyright Act is filled with provisions that run counter to this principle of speaker neutrality, instead providing a broader range of copyright protections to certain classes of speakers,⁸ which this Article, following the relevant literature, refers to as “institutions.”⁹ Scholars and courts have acknowledged the speech-

3. *Golan v. Holder*, 132 S. Ct. 873, 889–90 (2012) (noting that Congressional activity will not trigger First Amendment scrutiny so long as Congress does not alter the traditional contours of copyright law that provide “built-in First Amendment accommodations” (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003))).

4. See Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 47 (2001) [hereinafter Netanel, *First Amendment Skein*]; see also Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 59 (2002) (“Copyright is today in the same position, vis-à-vis the First Amendment, as libel was before *New York Times v. Sullivan*. Just as the Court in *Sullivan* finally began issuing a set of special constitutional rules confining the reach of libel law, so the courts must eventually do for copyright.”).

5. See *Golan*, 132 S. Ct. at 890 (2012) (rejecting a call to engage in “heightened [First Amendment] review” because the provision under review did not disturb traditional speech-protective contours built into the Copyright Act like the idea-expression distinction or the fair use defense); see also Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1783 [hereinafter Schauer, *Boundaries*] (2004) (“Copyright law, especially recently, has been the subject of some criticism, but its pervasive regime of content regulation and prior restraint remains largely unimpeded by the First Amendment.”). Indeed, until fairly recently, constitutional law scholars tended to overlook the Progress Clause. See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 955 n.7 (2007).

6. See *infra* Part I.A.

7. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372 (2010).

8. For example, Congress recently restored copyright protection to the works of foreign nationals whose works fell into the public domain without restoring the copyright of works by US authors. 17 U.S.C. § 104A (2012); see also *infra* Part III.B. Other provisions grant unique defenses to certain institutions against the copyright owners’ exclusive right. See, e.g., 17 U.S.C. § 108 (2012) (granting specific exceptions to copyright liability to libraries and other archives); see also *infra* Parts III.A, III.C.

9. In the article that launched the field of new institutional economics, Douglass C. North defined institutions broadly, as “the humanly devised constraints that structure human interaction,” including formal and informal constraints. Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994). Some intellectual property scholars have taken

restrictive potential of copyright protection,¹⁰ which raises the possibility that much of the current Copyright Act may be unconstitutional because it favors groups in a way inconsistent with the Court's commitment to speaker neutrality in the free speech arena.¹¹

Many scholars have pushed back on the Court's resistance to institutional tailoring in interpreting the Speech Clause.¹² As argued by scholars like Frederick Schauer, institutions like libraries, universities, and the professional press might deserve "special solicitude" under the Speech Clause because in their typical operation, they advance First Amendment goals.¹³ The Court has rejected institutional tailoring in the speech domain,¹⁴ but it has been more sympathetic to institutional tailoring when justified on other constitutional grounds. For example, in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*, the

a similarly broad approach in defining First Amendment institutions—like best practices in content-creating and content-using industries—that might deserve deferential treatment from Congress and the courts. *See, e.g.*, Michael J. Madison, *Some Optimism About Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y U.S.A. 351, 358 (2010). This Article instead follows Paul Horwitz and uses a narrower construction that defines institutions as organizations, focusing more on the entities that can embody "institutional norms," rather than the norms themselves. *See* PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 11 (2013).

10. *See supra* notes 4–5 and accompanying text; *see infra* notes 101–114 and accompanying text.

11. *See, e.g.*, *Citizens United*, 558 U.S. at 392–93 (Scalia, J., concurring) ("[The text of the First Amendment] offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals . . ."); Peter DiCola, *Copyright Equality, Free Speech, Efficiency, and Regulatory Parity in Distribution*, 93 B.U. L. REV. 1837, 1891–92 (2013) (arguing that courts should review copyright's unequal regulatory provisions to the same First Amendment scrutiny that other media regulations receive).

12. *See, e.g.*, Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 471 (2005) [hereinafter Horwitz, *Grutter's*] (suggesting that *Grutter v. Bollinger*, 539 U.S. 306 (2003), can be read as the rare case in which the Supreme Court takes institutions seriously); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1765 (2007) [hereinafter Schauer, *Categories*] ("[M]ost of the arguments against using institution-specific categories in law in general and in constitutional law in particular do not carry the day."); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 97 (1998) [hereinafter Schauer, *Principles*] (arguing that apparent departures from standard First Amendment analysis in the cases of *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), which held that a public broadcaster can reasonably exclude an independent candidate from a presidential debate, and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), which held that a regulation that required the NEA to take general standards of "decency and respect" for religious beliefs into account in denying grant applications was not facially invalid or unconstitutionally vague, can be explained and justified "in terms of institutionally specific rules and principles").

13. *See infra* Part II.A.

14. *See, e.g.*, Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. (forthcoming 2014) (manuscript at 6) (noting that "the Court has [ignored the textual directive of the Press Clause and] extended to the press no protection beyond the rights guaranteed to all by the Speech Clause").

Court held that the Free Expression Clause of the First Amendment extends “special solicitude” to the rights of religious institutions.¹⁵

This Article adds to that literature by arguing that institutions may also have the potential to inherently serve “Progress” values. For example, some institutions, like universities, include among their traditional functions the progress value of increasing and cataloging the storehouse of human knowledge. Others institutions may serve key roles in disseminating new works to the public and providing a reward for creators. Some disparate treatment might thus be justified under the Progress Clause even if it is not justified under the First Amendment.

Part I sets the stage by describing the limits that the Progress Clause and the First Amendment place on Congressional authority to enact copyright protection and discussing how the disparate treatment built into the Copyright Act may run afoul of the Court’s First Amendment bar against speaker-based regulation. Part II builds on existing literature in the First Amendment sphere to argue that the Copyright Act may be partially redeemed by identifying institutions that externalize three key “Progress Clause values”: incentivizing creation and dissemination, expanding knowledge, and providing public access. Part III applies the proposed institutional review framework to several provisions of the Copyright Act, highlighting examples of more- and less-appropriate tailoring. Part IV identifies how the institutional review framework shows potential to improve judicial review, encourage public activism, and shape interest-group behavior and congressional activity.

I. COPYRIGHT PROTECTION AND DISPARATE TREATMENT

This Part discusses the Court’s recognition of the value of speaker neutrality in First Amendment law, particularly in the recent decisions in *Citizens United v. FEC* and *Sorrell v. IMS Health, Inc.* It then sketches some of the problematic disparate treatment in the Copyright Act, and addresses some less-feasible solutions to the problem before introducing the potential of institutional tailoring driven by Progress Clause values.

15. *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 706 (2012); Zoë Robinson, *What is a “Religious Institution”?*, 55 B.C. L. REV. (forthcoming 2014).

A. The Trouble with Speaker-Based Distinctions

The First Amendment proclaims that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹⁶ That pronouncement is not as absolute as a simple textual analysis would indicate.¹⁷ While restrictions on some “well-defined and narrowly limited classes of speech . . . have never been thought to raise any Constitutional problem,”¹⁸ the Court applies some level of constitutional scrutiny to the regulation of protectable speech.¹⁹ In particular, the Court discourages inequitable, speaker-based abridgments of free speech. It has repeatedly held that restrictions that discriminate against or favor certain groups of speakers and not others are unconstitutional.²⁰ This is due in part to the potential of speaker-

16. U.S. CONST. amend. I.

17. See, e.g., *Members of the City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (“The incidental restriction on expression which results from the City’s attempt to [reduce visual clutter] is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest.” (citing *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 61, 68–71 (1981); *Carey v. Brown*, 447 U.S. 455, 470–71 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 115–17 (1972); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 98 (1972))). Note that an absolutist view of the First Amendment is likely unworkable, and would render unconstitutional “all of contract law, most of antitrust law, and much of criminal law.” Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981). The same would likely be true if an absolutist view were applied to copyright law. *But see, e.g.*, DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 2 (2009) (arguing that a correct interpretation of the First Amendment would make unconstitutional the grant of an exclusive right in the reproduction of expression).

18. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”); *United States v. Stevens*, 559 U.S. 460, 478 (2010) (“From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations.” (internal quotations and alterations omitted) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992))); see *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (incitement); *Roth v. United States*, 354 U.S. 476, 483 (1957) (obscenity); *Chaplinsky*, 315 U.S. at 572 (fighting words).

19. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2737 (2011) (noting that a state law restricting the sale of violent video games to minors “is invalid unless [the state] can demonstrate that [the law] passes strict scrutiny” (citing *R.A.V.*, 505 U.S. at 395)); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661–62 (1994) (applying intermediate scrutiny to content-neutral regulation of cable providers).

20. Often, when the Court addresses constitutionally problematic disparities in the law, it applies the Equal Protection Clause. See, e.g., *Police Dep’t of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (“[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”). This Article instead considers the Court’s rationale for a speaker-neutral First Amendment. See also Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1329 (1983) (“[C]ourts [are required] with certain subject matter exceptions, to be strictly neutral with regard to a speaker’s identity and

based restrictions on speech to slide into content-based or viewpoint-based discrimination,²¹ which are also disfavored forms of speech restrictions.²²

The Court first articulated a principle of speaker neutrality in *Police Department v. Mosley*.²³ In *Mosley*, the Court held unconstitutional the city of Chicago's regulation that banned picketing in front of schools during school hours, except for "peaceful picketing of any school involved in a labor dispute."²⁴ In finding the picketing ban unconstitutional, the Court closely connected the barred speaker-based distinction with invidious content-based distinctions designed to keep certain topics out of the public forum.²⁵

Mosley was a watershed case because it was the first time the Court had described First Amendment protections in terms of equality.²⁶ Cases following *Mosley* clarified how discrimination against groups of speakers could be problematic, even without an invidious underlying content- or viewpoint-based goal.²⁷ The Court invalidated

message in determining whether behavior satisfies the disruptive potential test."); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26–29 (1975); Schauer, *Principles*, *supra* note 12, at 98–99 (noting that in the typical government enterprise cases, the concern is not access, but discriminatory treatment, and concluding that "content-based discriminatory treatment is appropriate in some [First Amendment] contexts but not in others"); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Law, Campaign Finance Reform, and Telecommunications Regulations*, 42 B.C. L. REV. 1, 63 (2000) ("Various aspects of First Amendment law are structured to minimize disparate effects on identifiable groups").

21. See *Turner*, 512 U.S. at 678 (1994) (O'Connor, J., concurring in part and dissenting in part); see also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 249 (1987) [hereinafter Stone, *Content Regulation*].

22. See *R.A.V.*, 505 U.S. at 396 (holding unconstitutional a prohibition on "bias-motivated" fighting words because it was viewpoint based, even though a viewpoint neutral prohibition on those words would be valid because the fighting words themselves are not protected speech).

23. *Mosley*, 408 U.S. at 100; see also Karst, *supra* note 20, at 26–27, discussed in Geoffrey R. Stone, *Kenneth Karst's Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37, 37–39 (2008) (noting that, after *Mosley*, if the government "allow[s] more speech than it is constitutionally required to allow, the government creates an inequality that cases like *Schacht v. United States*, 398 U.S. 58 (1970)] and *Mosley* hold must be independently justified").

24. *Mosley*, 408 U.S. at 92–93.

25. See *id.* at 100.

26. See Karst, *supra* note 20, at 28. In the words of Justice Marshall's majority opinion, which blended equal protection and First Amendment analysis, "the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Mosley*, 408 U.S. at 95 (citing *Reed v. Reed*, 404 U.S. 71, 75–77 (1971); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972)). Justice Marshall went on to note that "the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (citations omitted).

27. See, e.g., *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194 (1999) ("[Government] decisions that select among speakers conveying virtually identical messages are

bans on political speech by banks and corporations,²⁸ struck down regulations that distinguished among media companies,²⁹ and rejected rules that prevent government employees from receiving an honorarium for speaking, teaching, or writing articles on topics not related to their employment.³⁰

While there were indications that the Court was backing away from a speaker-neutral First Amendment in cases like *Turner Broadcasting System, Inc. v. FCC*,³¹ the Court recently took a sharp turn back toward the principle of a speaker-neutral First Amendment. In *Citizens United v. Federal Election Commission*, the Court invalidated a ban on election advertising by corporations.³² The Court concluded that Congress could not constitutionally treat corporations differently than other speakers.³³ Doing so would “tak[e] the right to speak from some and giv[e] it to others . . . depriv[ing] the

in serious tension with the principles undergirding the First Amendment.” (citing *Carey v. Brown*, 447 U.S. 455, 465 (1980); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777, 784–85 (1978)).

28. *First Nat’l Bank of Bos.*, 435 U.S. at 793; *see also* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372 (2010); *infra* notes 71–75 and accompanying text.

29. *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (noting that a tax could not constitutionally target “a small group within the press,” even though it did not target particular viewpoints); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585, 592 (1983) (holding unconstitutional a tax that targeted the largest not only publishers for taxation). *But see* *Leathers v. Medlock*, 499 U.S. 439 (1991). In *Leathers*, the Court held that a sales tax on cable television (and later) satellite services that exempted newspapers and magazines did not violate the First Amendment. In distinguishing *Arkansas Writers’* and *Minneapolis Star*, the Court concluded the tax in *Leathers* was acceptable precisely because it targeted an entire media branch—cable operators (and later, satellite operators)—and not a smaller subset of a particular media branch. *Id.* at 447–48. The Court in *Leathers* tried unsuccessfully to recast both earlier cases as rejecting “a tax scheme that targets a small number of speakers” as dangerous because such a tax “runs the risk of affecting only a limited range of views,” *id.* at 448, 453, but there was, however, nothing content- or viewpoint-based about the taxes rejected in *Minneapolis Star* or *Arkansas Writers’*.

30. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 468–70 (1995) (concluding the regulation, while neither content- nor viewpoint-based, nevertheless “impose[d] a significant burden on expressive activity” by the employees, and “on the public’s right to read and hear what the employees would otherwise have written and said”).

31. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994). Scholars initially hailed *Turner* as a vanguard of a new era, moving away from the principle of speaker neutrality. *See, e.g.*, Erik Forde Ugland, *Cable Television, New Technologies and the First Amendment After Turner Broadcasting System, Inc. v. F.C.C.*, 60 MO. L. REV. 799, 831 (1995) (“After *Turner*, it is no longer certain that regulations targeting particular media or organizations will be found unconstitutional.”).

32. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 318 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1989)).

33. *Id.* at 349 (“If the antidistortion rationale [propounded in an earlier case] were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.”); *see also* James Iannelli, *Noncitizens and Citizens United*, 56 LOY. L. REV. 869, 885–86 (2010) (“[T]he Court [in *Citizens United*] showed that a principal concern with speaker-based restrictions is that they deprive citizens of their right to hear from certain subsets of speakers . . .”).

disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."³⁴ In his concurrence in *Citizens United*, Justice Scalia reiterated that the First Amendment "is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker"³⁵

Speaker-based preferences in the marketplace of ideas present a variety of problems. They can distort public debate.³⁶ They may be motivated by the impermissible but not readily apparent goal of enacting content- or viewpoint-based restrictions on speech.³⁷ Speaker-based preferences might also produce disparate effects whose restrictive impact can be difficult to measure in some cases.³⁸ The imposition of speaker-based regulation might indicate either that a stated government interest motivating the speech restriction is somewhat exaggerated,³⁹ or that Congress has failed to take into account the broader effects a certain benefit will have on nonbenefitted speakers.⁴⁰ The state may even silence speakers when it denies benefits to those who speak out in certain ways but grants those same benefits to those who remain silent or advocate in a different way.⁴¹

34. *Citizens United*, 558 U. S. at 341 ("The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."); *see also id.* at 394 (Stevens, J., concurring in part and dissenting in part) ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation.").

35. *Id.* at 392–93 (Scalia, J., concurring); *but see id.* at 420–21 (Stevens, J., concurring in part and dissenting in part) ("[I]n a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems." (citations omitted)).

36. *Turner*, 512 U.S. at 676 (O'Connor, J., dissenting) ("Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome. Laws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions." (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 584, 591–92 (1983); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991))).

37. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 454 (1996) ("So long as a content-neutral law has differential effects on particular ideas—even assuming those effects are widely dispersed—it may bear the taint of improper motive.").

38. *See* Stone, *Content Regulation*, *supra* note 21, at 218.

39. *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2423 (1996) (defining copyright law as a "content-based restriction[] on high-value speech imposed by the government acting as sovereign").

40. *See* Netanel, *First Amendment Skein*, *supra* note 4, at 59, 62.

41. *But see* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 96 (1988) (refuting that argument as presented by striking union workers in *Lyng v. Int'l Union, UAW*, 485 U.S. 360, 369 (1988)).

Speaker-based tailoring can easily slide into viewpoint-based tailoring, especially when the identified group benefitting from or restricted by the tailoring holds certain views in common. For example, if Congress passes a law that abridges the ability of identified members of the Tea Party to gather in public places, it might indicate that those in political opposition to the Tea Party, or those who disagree with ideas typically associated with the Tea Party, were attempting to silence dissenting views. On the other hand, a law that provides extra privileges to members of the Tea Party might raise the specter of legislative capture that can also distort speech by granting disparate access.⁴²

While it might be tempting to limit strict scrutiny of speaker-based tailoring to political activity in light of the focus in *Citizens United* on election advertising, the Court also recently applied it to speaker-based restrictions on commercial speech. In *Sorrell v. IMS Health*, the Court applied heightened scrutiny to strike down a regulation barring the sale of information about doctors' habits in prescribing medicines to pharmaceutical detailers.⁴³ Justice Kennedy, writing for the Court, noted that the law contained a content-based restriction that disfavored marketing.⁴⁴ But Justice Kennedy also expressed concern about the law's speaker-based effects, independent of content.⁴⁵ For example, under one provision of the statute at issue in *Sorrell*, pharmacies could sell prescribing information to private or academic researchers, but not to pharmaceutical marketers.⁴⁶

The decisions in *Citizens United* and *Sorrell* signal a continuing commitment by the Court to a speaker-neutral First Amendment in

42. *But see* *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101–02 (1982) (holding campaign disclosure requirements could not be applied to the Socialist Workers Party because such disclosure would expose Party members to harassment, threats and reprisals); Geoffrey R. Stone & William P. Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 583 (querying whether the “First Amendment compel[s] the government to exempt particular speakers from an otherwise constitutional law of general application”).

43. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011).

44. *Id.* at 2663–64.

45. *See id.* at 2667 (comparing Vermont's bar on selling information to detailers to a hypothetical statute, based on *Minneapolis Star*, that would prohibit “trade magazines from purchasing or using ink”); *see also* Marcias M. Boumil, *Pharmaceutical Gift Laws and Commercial Speech Under the First Amendment in the Wake of Sorrell v. IMS Health, Inc.*, 8 J. HEALTH & BIOMEDICAL L. 133, 161 (2012) (“The regulation was . . . speaker-based because it allowed purchase and use by some recipients (such as researchers and public health professionals) but not others (specifically pharmaceutical companies and their marketing departments).”).

46. *See Sorrell*, 131 S. Ct. at 2662–63 (noting that the regulation was content-based, and “[m]ore than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers”).

both the political and commercial arenas.⁴⁷ As identified in the next subpart, the Copyright Act as currently constituted manifests substantial institutional tailoring.⁴⁸ Under the Court's speaker-neutral interpretation of the Speech Clause, much of this tailoring appears unconstitutional.

B. Constitutional Implications of Copyright Tailoring

The Copyright Act boasts provisions that provide specific advantages—and disadvantages—to different institutions or interest groups. For example, Congress restored copyright protection to works that had fallen out of protection in the United States because of a failure to observe certain formalities.⁴⁹ This restoration is available for works created or initially owned by foreign residents or domiciliaries, but not residents of the United States.⁵⁰ In addition, the owner of the copyright in a musical composition holds an exclusive right to publicly perform the work—and therefore license that right to others—while the owner of copyright in a sound recording has only the more limited right to perform publicly the work through digital audio transmission.⁵¹ Thus, terrestrial radio stations (i.e., over-the-air or broadcast stations) must pay for the right to broadcast musical compositions, but not the sound recordings embodying those compositions.⁵² Cable and satellite radio stations and Internet radio stations both must pay a compulsory license rate for the right to broadcast the sound recording as well. While cable and satellite radio stations pay a relatively low license rate, Internet radio stations pay a much higher rate.⁵³

Defenses or exceptions to the reach of an author's exclusive right are also often institution-specific. Libraries and archives benefit from specific exceptions to the copyright owner's exclusive right to reproduce the work.⁵⁴ Likewise, veterans' organizations and nonprofit fraternal

47. The Court in *Sorrell* tried to cast its rejection of this regulation as consistent with what it continues to construe as a ban on laws that target a "narrow class" of speakers, like *Arkansas Writers'* and *Minneapolis Star*. See *id.* at 2668 (noting that a ban on the speech of pharmaceutical companies throughout the state is more reminiscent of the tax held constitutional in *Leathers* that targets whole industries like cable operators without taxing other media industries, like newspaper and magazine publishers); see also *supra* note 29 (describing how the Court unsuccessfully attempted to distinguish *Leathers* from the earlier precedents); DiCola, *supra* note 11 at 1886. Thus, like *Citizens United*, *Sorrell* signals a strong shift away from the speaker-based tailoring tolerated in *Leathers*.

48. See *infra* Part I.B.

49. See *infra* Part III.B.

50. 17 U.S.C. § 104(A)(g) (2012).

51. Compare *id.* § 106(4), with *id.* § 106(6).

52. See *infra* Part III.C.

53. See *infra* Part III.C.

54. 17 U.S.C. § 108 (2012).

organizations can include performances of nondramatic literary or musical compositions in their social functions, so long as they donate any profits to charity.⁵⁵

Disparities like those mentioned above might give little cause for alarm, if not for the capacity of the copyright system to chill desirable expression.⁵⁶ Copyright protection is economic regulation, a limited monopoly that gives authors and owners of copyrighted expression exclusive rights to make or authorize public performance or display of the expression,⁵⁷ as well as exclusive rights to copy, distribute, or make new adaptations of copyrighted expression.⁵⁸ Exercising these rights without the permission of the copyright owner can trigger both criminal and civil liability,⁵⁹ and statutory damages for civil infringement can reach \$150,000 per work infringed.⁶⁰ Additionally, courts frequently grant preliminary and permanent injunctions against unauthorized users,⁶¹ even though the Court generally considers speech-restricting preliminary injunctions unconstitutional “prior restraints.”⁶² Thus, granting copyright

55. *Id.* § 110(10) (specifically excluding college fraternities and sororities).

56. *See, e.g.*, Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 423–33 (1989).

57. 17 U.S.C. § 106(4)–(6) (2012).

58. *Id.* § 106(1)–(3).

59. *Id.* § 501 (violating the rights under § 106 infringes copyright protection, and subjects the violator to civil remedies under 17 U.S.C. §§ 502–505); *id.* § 506 (criminalizing willful copyright infringement).

60. *Id.* § 504(e) (describing statutory damages as a remedy for copyright infringement).

61. *See id.* § 502; *see also* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165 (1998); Volokh, *supra* note 39, at 2459.

62. The fact that private actors bring copyright complaints does not bar the application of First Amendment scrutiny on the ground that the First Amendment does not apply to private individuals. If the application of the remedies of copyright protection restricts First Amendment freedoms, the action of the courts is the action of the federal government. For example, the Court held, in *Cohen v. Cowles Media*, that the First Amendment would apply to a state court's enforcement of a promissory estoppel claim, because promissory estoppel is a state-law doctrine creating legal obligations never explicitly assumed by the parties, but enforceable through the official power of the state's courts. *See Cohen v. Cowles Media*, 501 U.S. 663, 668 (1991). Likewise, in *New York Times v. Sullivan*, the Court held that a civil lawsuit between private parties could impose invalid restrictions on the First Amendment freedoms of one of the parties. *See New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). While the Court has not explicitly addressed it, the exercise of federal power pursuant to the Copyright Act that allows a copyright owner to bring a private action in federal court and secure an injunction against otherwise protectable behavior would also amount to state action, and potentially trigger First Amendment protections. David McGowan argues that the First Amendment provides no justification for dealing with disputes between authors. David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 285 (2004). But when Congress sets baseline rules that preference one institutional group over another, it is troubling to conclude that the playing field has been leveled in a way that satisfies speaker-neutral First Amendment restrictions on government activity.

protection to the author of an expressive work allows the author to restrict subsequent uses of the work.⁶³

The Supreme Court has acknowledged the speech-restrictive potential of copyright protection in articulating its rationale for not applying heightened First Amendment scrutiny in two recent cases that challenged amendments to the Copyright Act.⁶⁴ In *Eldred v. Ashcroft*, the Court rebuffed a challenge to a twenty-year extension to the term of copyright protection, concluding it was unnecessary to apply searching First Amendment review.⁶⁵ The Court supported its conclusion by focusing on the two “traditional contours” of copyright law encoded in the Copyright Act—the idea-expression dichotomy that prevents Congress from extending copyright protection to ideas,⁶⁶ and the fair use defense, which allows some uses of protected works without securing the author’s permission or paying the author a royalty.⁶⁷ The Court noted that Congressional action that altered those traditional contours would trigger First Amendment scrutiny.⁶⁸ In *Golan v. Holder*, the Court rejected another First Amendment challenge to a statute that restored copyright protection to the works of foreign authors that had fallen into the public domain, on the ground that Congress left “undisturbed the ‘idea/expression’ distinction and the ‘fair use’ defense.”⁶⁹

Thus, the Court expressly recognized two elements of the Copyright Act that may not be altered without triggering First

63. See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 4 n.12 (1987) (allowing the author “to control access to the copyrighted work” once it is published “is the essence of censorship”).

64. See Neil Weinstock Netanel, Melville B. Nimmer Memorial Lecture, UCLA School of Law, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1086 (2013) [*hereinafter* Netanel, *Constraints After Golan*].

65. *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (“[C]opyright law contains built-in First Amendment accommodations” allowing free use of ideas and providing a fair use defense, which “affords considerable ‘latitude for scholarship and comment’”) (citing and quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)). Both the idea-expression dichotomy and the fair use provision are also described as implementations of Progress Clause values. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1166 (2000); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 305 (1988); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602 (1982).

66. See 17 U.S.C. § 102(b) (2012); *Golan v. Holder*, 132 S. Ct. 873, 890 (2012); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349–50 (1991) (copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by their work).

67. The fair use defense is codified at 17 U.S.C. § 107 (2012). See also *Golan*, 132 S. Ct. at 890.

68. *Eldred*, 537 U.S. at 221. See also Netanel, *Constraints After Golan*, *supra* note 64, at 1086.

69. *Golan*, 132 S. Ct. at 890–91.

Amendment scrutiny. Additionally, scholars and jurists argue that the Copyright Act is properly subject to more fulsome First Amendment constraints.⁷⁰ In light of the potential chilling effects of copyright protection, it is puzzling that the Copyright Act—filled to the brim with rights that certain groups of copyright owners but not others can exercise, limitations on the rights of a subset of copyright owners that do not fall upon the majority, and defenses accessible only by certain institutional groups—is treated by the Court as consistent with First Amendment values as articulated in cases like *Citizens United* and *Mosley*.

If the Copyright Act has speech-restricting effects,⁷¹ one might wonder how courts should apply First Amendment standards to evaluate this speaker-based institutional tailoring. If the First Amendment provides any substantive limitations on the scope of granted copyright protection, can it tolerate the systematic disparity in speaker-based grants of both exclusive rights and defenses against those rights? One potentially drastic response is “No.” If the Court cannot permit Congress to restrict political advertising by corporations, may it allow Congress to restore copyright protection to the authors and owners of foreign works whose works fell out of protection because of a failure to observe now-invalid formalities, while denying that restoration to authors and owners of works created by American domiciliaries?⁷² If the Court applied strict scrutiny to every speaker-

70. See *Golan*, 132 S. Ct. at 908 (Breyer, J., dissenting) (noting that speech related harms caused by restoring copyright protection to works by foreign authors “show the presence of a First Amendment interest” sufficiently important “to require courts to scrutinize with some care the reasons claimed to justify the Act in order to determine whether they constitute reasonable copyright-related justifications for the serious harms, including speech-related harms, which the Act seems likely to impose.”); *Eldred*, 537 U.S. at 266 (Breyer, J., dissenting) (arguing that the extension of copyright protection would cause “serious expression-related harm” without any “benefit [to] the public”); Lemley & Volokh, *supra* note 61, at 169 (citing Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984)).

71. See Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 813 (2010); Sigmund Timberg, *A Modernized Fair Use Code for the Electronic as Well as the Gutenberg Age*, 75 NW. U. L. REV. 193, 229 (1980); see also *Eldred*, 537 U.S. at 266 (Breyer, J., dissenting) (observing that the scope of Congress’s legislative power must be discerned by reading the Copyright Clause “in light of the First Amendment”).

72. This Article does not address the major differential treatment in the Copyright Act, which grants the author the exclusive right to copy, adapt, distribute, publicly perform, and publicly display the work, while the public may generally copy, adapt, distribute, publicly perform, or publicly display a copyrighted work only when the author grants permission. There is also a difference, here, between statutory grants and exceptions, which are the subject of this article, and fair use, which is not. Fair use is the backstop to every exclusive right granted by the Copyright Act, but when one starts from a position where one activity falls outside the copyright grant, and the other doesn’t unless a fair use defense applies, the first activity will occur more often, and be subject to less potential chilling than the latter.

based inequality in the Copyright Act, there would be little Copyright Act left.

One might also argue that copyrighted expression and its alleged infringement are sufficiently distant from the core of First Amendment values that any potential slippage from speaker-based to content- or viewpoint-based effects is inconsequential.⁷³ That argument is problematic for at least two reasons. First, from *44 Liquormart, Inc. v. Rhode Island* to *Sorrell v. IMS*, the Court has collapsed the boundaries between commercial and political speech.⁷⁴ Second, sometimes the most effective political speech is grounded upon commercially valuable copyrighted expression. For example, Alice Randall appropriated the characters of Margaret Mitchell's *Gone with the Wind* in her novel *The Wind Done Gone*, which cast as heroes the slaves on Mitchell's fictional plantations.⁷⁵ By criticizing a book that romanticizes the antebellum South, Randall challenged America's racist past.⁷⁶ Her goal was simultaneously political and expressive.⁷⁷ Granting authors like Mitchell the ability to silence critiques like *The Wind Done Gone* would reduce access to viewpoints unpopular to copyright owners, some of which will be as close to the core of political speech as electioneering.⁷⁸

It might be sensible to try to avoid constitutional questions entirely, and some institutional tailoring is justified under traditional economic rationales.⁷⁹ For instance, Joseph Liu notes that the

73. See *supra* notes 35–42 and accompanying text; see also, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 814–16 (1999) (arguing that an intratextual analysis of constitutional text would properly limit the First Amendment injunction that Congress shall make no laws abridging freedom of speech to Congressional action that restricts political discourse).

74. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 484 (1996); see, e.g., Fazal Khan & Justin Holloway, *Verify, Then Trust: How to Legalize Off-Label Drug Marketing*, 117 PENN ST. L. REV. 407, 439 (2012) (“[I]t appears [in light of *Citizens United* and *Sorrell*] that the Court is fundamentally rethinking the lower level of protection afforded to commercial speech under *Central Hudson*.”).

75. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

76. See, e.g., David Roh, *Two Copyright Case Studies from a Literary Perspective*, 22 L. & LIT. 110 (2010).

77. As Henry Louis Gates stated in support of Randall, *The Wind Done Gone* “constitutes both an original work of art and a moving act of political commentary, deconstructing as it does a text that many scholars believe to be racist.” Declaration of Henry Louis Gates, Jr. ¶ 7, *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001) (No. 1:01-CV-701-CAP), available at http://www.houghtonmifflinbooks.com/features/randall_url/pdf/Declaration_Henry_Louis_Gates.pdf.

78. Cf. Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 253 (1997) (“Tyrannical governments have long attempted either to suppress art or to channel it into politically correct themes and statements.”).

79. Economic theory is frequently used to critique or justify the scope of copyright protection. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

increasingly complex institutional tailoring in the Copyright Act indicates that Congress is intervening “more substantially into the nature and structure of copyright markets, as opposed to leaving these details to the market.”⁸⁰ Michael Carroll argues the economic case that uniform protection for copyrights is often inefficient, necessitating some type of differentiation among copyright owners to reduce uniformity costs.⁸¹

While neither Liu nor Carroll tackle the First Amendment implications of industry-specific copyright law, they acknowledge that different institutional groups in the copyright can require different levels of protection.⁸² Such differential treatment may provide better clarity, at least for those regulated parties.⁸³ It may also cure market failures and bring relative parties to the bargaining table with each other, or members of Congress.⁸⁴

Complexity presents downsides, however, including increased statutory complexity, decreased transparency, increased lobbying,⁸⁵ and perhaps too much deference to a Congress that is too busy fund-raising to take seriously its role as a constitutional gatekeeper.⁸⁶ As Neil Netanel and Jessica Litman have argued, certain interest groups can regularly and reliably turn to Congress for special benefits.⁸⁷ Congress’s expansion of protections under the Copyright Act has inspired criticism that industries that benefit from broad copyright protections have captured the legislative body.⁸⁸ It may thus be reasonable, in light of that dynamic, to distrust any manifestation of disparate treatment in the language of the Copyright Act.⁸⁹ While there

80. Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 105 (2004).

81. See Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361, 1389–94 (2009).

82. See Liu, *supra* note 80, at 153; Carroll, *supra* note 81, at 1364.

83. See Liu, *supra* note 80, at 134.

84. See *id.*

85. See *id.*

86. See generally LARRY LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT* (2011); Oliar, *supra* note 2, at 1830 (noting the Court’s review in *Eldred* was “characterized by substantial deference to Congress’s subjective judgment”).

87. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 869–79 (1987) [*hereinafter* Litman, *Compromise*]; Netanel, *First Amendment Skein*, *supra* note 4, at 67.

88. See, e.g., Tushnet, *supra* note 20, at 67 (arguing that in setting the threshold for Congressional activity that affects speech, “if the standard is too low, interest groups may capture the legislature and overprotect some speech at the expense of other speech,” which Tushnet argues happened during the recent extensions of copyright protection).

89. See, e.g., CHRISTINA BOHANNAN & HERBERT HOVENKAMP, *CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION* 134–35 (2012) (“Even when legislators are dedicated to service the public interest, much of the information they receive comes from interest groups seeking to maximize their own welfare.”); Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 532 (2000) (“Congress in

are reasonable arguments in favor of institutional tailoring on economic grounds,⁹⁰ constitutional values are sufficiently important that economic rationales alone cannot justify the institutional tailoring in the Copyright Act.⁹¹

While the Court has resisted speaker-based tailoring in its Speech Clause jurisprudence, there may be justifications for preferential treatment grounded in other constitutional provisions. For example, in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*, the Court recently held that the Free Expression Clause of the First Amendment extends “special solicitude” to the rights of religious institutions.⁹² The Court’s holding in *Hosanna-Tabor* failed to define religious institutions, leaving scholars the challenge of creating a framework for determining which religious institutions qualify for that special solicitude.⁹³ This Article undertakes a similar goal in the copyright context, identifying characteristics that institutions particularly deserving of solicitude under the Progress Clause may possess.

II. PROGRESS CLAUSE VALUES

As discussed above, speaker-based tailoring of speech protections has met with a chilly reception in the Supreme Court.⁹⁴ However, such disparate treatment may nevertheless be constitutionally permissible, so long as Congress picks the right institutions for favorable treatment. Constitutional scholars have argued that courts should handle First Amendment inquiries along institutional lines by identifying institutions that promote speech values or externalize valuable speech in their typical operations and

recent years seems to have abdicated its role in setting intellectual property policy to the private interests who appear before it.”).

90. See, e.g., Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It the Best Incentive System*, 2 INNOVATION POL’Y & THE ECONOMY 51, 71 (2002). Scholars have also noted that the institutional tailoring in the Copyright Act may better assign rights *ex ante* to the parties best able to exploit them, see Carroll, *supra* note 81, at 1361, 1364, or increase clarity for regulated parties. See Liu, *supra* note 80, at 134. While economic analysis generally does not consider constitutional limits on institutional tailoring, it does suggest that not all instances of institutional tailoring lead to pernicious effects, or necessarily stem from misguided goals.

91. Cf. *Reece v. Gragg*, 650 F. Supp. 1297, 1303 (D. Kan. 1986) (“[The] economic motive [of stretching inadequate prison resources] is an impermissible justification for the resulting constitutional violations.”).

92. *Hosanna-Tabor Evangelical Lutheran Church v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 704 (2012); see also generally Robinson, *supra* note 15.

93. *Id.*; see also *infra* Part III.A.

94. See *supra* Part I.A.

ensuring that Congress does not abridge the ability of those institutions to contribute to our general speech infrastructure.⁹⁵

Advocates for institutional tailoring of the First Amendment suggest that these lines should be drawn to favor “group[s] or organization[s] whose recognized function [is] to obtain information for the purpose of public dissemination.”⁹⁶ Thus, an institutionally driven First Amendment regime would best promote speech values if courts could clearly identify institutions that serve as “repositor[ies] for certain constitutionally important values” and the extent to which “protecting those institutions would have the tendency to serve those values.”⁹⁷ Well-drawn institutional lines could provide safe harbors against chilling valuable speech provided or intermediated by those institutional actors who can rely on their preferred First Amendment status.⁹⁸ That in turn could allow courts to decide some cases earlier, potentially lowering litigation costs for First Amendment institutions.⁹⁹ It might also make courts more sensitive and responsive to the context in which public discourse occurs.¹⁰⁰

While the Court to date has not embraced special treatment of institutions under the Speech or Press Clauses, it has applied a ministerial exception, drawn from the Free Exercise and Establishment Clauses of the First Amendment, to insulate the hiring decisions of religious institutions from governmental regulation.¹⁰¹ While extending these privileges to religious institutions can run counter to principles of speech neutrality,¹⁰² the decision to do so is grounded in other

95. See generally HORWITZ, *supra* note 9; Schauer, *Categories*, *supra* note 12. Schauer suggests that these institutions will merit First Amendment solicitude because of characteristics that are “prelegal” or “extralegal,” existing regardless of legal rules. *Id.* at 1748–49.

96. Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 350–51 (2004) (suggesting that journalists, academic or scientific researchers employed by universities or the government, and researchers employed by public policy groups or think tanks would qualify).

97. Schauer, *Categories*, *supra* note 12, at 1764. Paul Horwitz argues that First Amendment institutions are institutions which occupy a stable, central place in public discourse, and that engage in self-regulatory practices that arguably merit deference from courts. See HORWITZ, *supra* note 9, at 15; Horwitz, Grutter’s, *supra* note 12, at 589.

98. See e.g., Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1268 & n.63 (2005) [*hereinafter* Schauer, *Towards*] (“[A]n institutional account of the First Amendment might yield more of a genuine privilege (that is, immunity from an otherwise applicable requirement, analogous to a reporter’s privilege) of academic freedom than now exists in current doctrine.”).

99. See *id.*

100. See HORWITZ, *supra* note 9, at 92.

101. See *Hosanna-Tabor Evangelical Lutheran Church v. Equal Emp’t Opportunity Comm’n* 132 S. Ct. 694, 704 (2012).

102. Cf. Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1353 (2012) (noting that the Government argued in *Hosanna-Tabor* “that religious groups are not

constitutional values co-equal with the speaker-neutrality principle drawn from the Speech Clause.

Core principles can be similarly drawn from the text and history of the Progress Clause,¹⁰³ which can aid in identifying institutions that might reasonably merit preferential treatment. Indeed, the Progress Clause grants Congress specific authority subject to substantive limits, both in its requirement that exclusive rights last for limited times and its overarching purpose that exclusive rights are secured to “promote the Progress of Science and useful Arts.”¹⁰⁴ The Progress Clause rests on three overlapping values—incentivizing creation and dissemination, expanding knowledge, and providing public access. “Progress institutions” that externalize these values may merit particularly solicitous treatment under the Copyright Act.¹⁰⁵

A. The Progress Clause as a Substantive Limit on Congressional Authority

Article I, Section 8 of the Constitution—which includes the Progress Clause—spells out the enumerated powers of Congress and provides it with the authority to enact laws “necessary and proper” to exercise those powers.¹⁰⁶ Congress’s core regulatory power stems from the Commerce Clause.¹⁰⁷ The Progress Clause provides Congress with a specific—but limited—power to craft protection for copyrighted expression and patented inventions. Specifically, it authorizes Congress “[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.”¹⁰⁸

Some scholars, like Professor Nimmer, have argued that the “progress” phrase is merely a preamble that provides no substantive limit on congressional authority.¹⁰⁹ Others, like Thomas Nachbar, have argued instead that the progress requirement is too ambiguous to

entitled to protections beyond those available to nonreligious expressive associations under the Free Speech Clause”).

103. U.S. CONST. art. I, § 8, cl. 8; *see supra* notes 1–2 and accompanying text.

104. U.S. CONST. art. I, § 8, cl. 8; *see infra* Part II.A.

105. *See infra* Parts II.B.–II.D.

106. U.S. CONST. art. I, § 8.

107. *Id.* cl. 3.

108. *Id.* cl. 8.

109. *See* MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 1.03[A] (Matthew Bender, Rev. Ed.) (“[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.”).

justify judicial intervention,¹¹⁰ or that the concept of progress denies definition and thus provides courts with too little guidance to overturn congressional regulation in the intellectual property space.¹¹¹

It is, however, the work of courts to provide meaning for ambiguous or uncertain constitutional language.¹¹² Arguing that the Progress Clause provides no substantive limit is problematic precisely because such an argument ignores the unique structure of the Intellectual Property Clause. That structure makes the clause the sole Article I, Section 8 power that describes a particular means to accomplish its particular end: promoting progress through an exclusive grant to authors and inventors.¹¹³ Likewise, to construe the “progress” phrase as merely preambular makes a nullity of constitutional language. Reading the progress requirement out of the Clause thus runs afoul of the principles of constitutional interpretation that the Court employs.¹¹⁴

More critically, one must understand what the Intellectual Property Clause empowers Congress to do. Compare the Intellectual Property Clause with the Commerce Clause. The Commerce Clause of Section 8 grants Congress power “to regulate Commerce.”¹¹⁵ The power granted under the Intellectual Property Clause is not the power to secure an exclusive right to authors and inventors,¹¹⁶ but the power “[t]o

110. See Thomas B. Nachbar, *Judicial Review and the Quest to Keep Copyright Pure*, 2 J. ON TELECOM & HIGH TECH L. 33, 55 (2003) (arguing that calls to treat the public choice problems in creating copyright law as unique are a misguided attempt to “respond to a problem with representative government by discarding it”).

111. See *id.* at 67 (“Application of the Progress Phrase involves a nested imponderable: Not only is the net effect on progress of virtually any change in the copyright law imponderable, but the very nature of progress is itself imponderable.”).

112. See *e.g.*, *Barker v. Wingo*, 407 U.S. 514, 522, 528 (1972) (noting the difficulty in defining or construing the boundaries of the right to a speedy trial, but nevertheless providing a test for assessing the point at which the right to a speedy trial must be asserted or waived).

113. Compare Nachbar, *supra* note 110, at 55 (“Other than an awkwardly worded clause in the Constitution to provide a textual hook, what makes copyright so special?”), with Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft*, 44 IDEA 331, 378 (2004) (“If the words of Chief Justice Marshall in *Marbury v. Madison* have any meaning, then the phrase ‘To promote the Progress of Science and useful Arts’ in the Science and Useful Arts Clause cannot be merely a meaningless preamble.” (citing *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (“The powers of the legislature are defined and limited; and that these limits may not be mistaken or forgotten, the constitution is written.”))).

114. See, *e.g.*, *Eldred v. Reno*, 239 F.3d 372, 381 (D.C. Cir. 2001) (Sentelle, J., dissenting) (“The clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress.”); see also Heald & Sherry, *supra* note 65, at 1160–66 (arguing that limitations on Congressional activities taken pursuant to its respective Section 8 enumerated powers must be grounded in the justification for that power).

115. U.S. CONST. art. I, § 8, cl. 3.

116. *Id.* cl. 8.

promote the Progress of Science and useful Arts.”¹¹⁷ And the power to promote the progress of science is by definition narrower than the power to regulate commerce.¹¹⁸

One might accept the limiting function of the Progress Clause and still be concerned about the difficulties posed by institutional line-drawing regimes more generally. Like other line-drawing or rule-creating regimes, an institutional framework could be both over- and underinclusive. Some members of an institutional group might fall short in externalizing constitutional values.¹¹⁹ Likewise, some actors that externalize constitutional values might be left without certain privileges because they cannot be slotted into a particular institutional frame.¹²⁰

In addition, to the extent institutional line drawing requires identifying an “existing social institution” with “moderately identifiable” boundaries,¹²¹ it is important to recognize those identifiable boundaries may be due as much to legal structures as any prelegal reality.¹²² For example, Aereo offers subscribers access to a remote antenna that captures broadcast signals and reroutes them to the subscriber’s compatible device for viewing.¹²³ The Supreme Court has granted certiorari and will soon determine whether Aereo’s services

117. *Id.* But see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 93 (1997) (arguing that the Intellectual Property Clause does not confer “a general power to ‘promote the progress of science and the useful arts,’ but only the power to grant limited exclusive rights in order to accomplish that goal”).

118. See *e.g.*, Oliar, *supra* note 2, at 1844 (“[T]he ‘progress’ language in the Clause provides a textual basis for the negation of the implication that the power to ‘promote’ progress implies the grant of power to ‘retard’ progress of arts and sciences.”); see also Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC’Y U.S.A. 585, 595–604 (2011) [hereinafter Linford, *First Publication*] (critiquing the Court’s limited view of the Progress Clause requirement).

119. Cf. Joshua G. Hazan, Note, *Stop Being Evil: A Proposal for Unbiased Google Search*, 111 MICH. L. REV. 789, 792, 819 (arguing that while Google “spearheaded the net neutrality movement,” its own behavior “has begun to threaten the very openness and diversity it once championed”).

120. See, *e.g.*, Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1058–60 (2011) (noting that accepting special protection for an institutional press might leave some actors without Press Clause protections, but arguing the Speech Clause provides a sufficient backstop to minimize the concern); see also HORWITZ, *supra* note 9, at 168–69 (arguing that instead of expanding the definition of institutional press to include bloggers, we “should define blogs’ institutional autonomy in a way that is appropriate to [their] unique institutional features and practices”); RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 612 (2011) (arguing that even if disaggregated media entities can provide the public with news, those entities “are unlikely to take on all of the roles [like litigating to shape and enforce free speech law] that newspapers once unitarily played in American society.”).

121. Schauer, *Towards*, *supra* note 98, at 1275.

122. See *supra* note 95 and accompanying text.

123. *About Aereo*, AEREO, <https://aereo.com/about> (last visited Feb. 27, 2014).

violate a provision of the Copyright Act.¹²⁴ The particular structure of Aereo's features, however, appear to have been made to qualify for a safe harbor from copyright liability carved out for a similar service by the United States Court of Appeals for the Second Circuit in *Cartoon Network v. CSC Holdings, Inc.*¹²⁵ The development of Aereo's business mode seems to be driven as much by legal constraints as by technological capacity or consumer need.¹²⁶

It is true that an institutional review framework cannot catch every problematic change in the Copyright Act.¹²⁷ In some cases, institutional or speaker-based tailoring might be preferable than some speaker-neutral provisions of the Copyright Act.¹²⁸ Finally, there is at least some danger that a line-drawing regime based on institutions could make the wrong determination and create bright lines within which "courts allow heavy speech restrictions and defer to government officials."¹²⁹

But while the institutional framework is no panacea for all that ails copyright law, it is nevertheless a clear step in the right direction. As this Article details more fully in Part IV, the application of some level of searching review would kick-start a more productive conversation about the values our copyright policy should embody.¹³⁰ In

124. WNET, *Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *cert. granted sub nom. Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 896 (2014) (No. 13-461) (mem.).

125. See *The Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 139–40 (2d Cir. 2008).

126. James Grimmelmann, *Copyright Arbitrage in Action*, THE LABORATORIUM (Mar. 4, 2012, 1:00 PM), http://laboratorium.net/archive/2012/03/04/copyright_arbitrage_in_action.

127. The Work Made For Hire and Copyright Corrections Act of 2000 included a "housekeeping" amendment that added sound recordings to the list of works that could be works made for hire, even though the author was not an employee. This change would have hamstrung efforts by recording artists to terminate transfers of copyrighted works to record labels. Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 410 (2002). The amendment was considered problematic at the time, and almost immediately repealed, but it would not have triggered heightened constitutional scrutiny under the institutional review framework proposed by this Article.

128. For example, the Copyright Term Extension Act, codified at 17 U.S.C. § 302(a)–(c) [hereinafter CTEA], added twenty years to the term of both existing works and works not yet created. See generally *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Some critics argued that *disparate* treatment was more consistent with progress or speech values than uniformity, and *uniform* extension of the copyright term was the signal that something was rotten in the CTEA. See, e.g., Brief of Amici Curiae George A. Akerlof et al. at 15, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) ("Comparing the main economic benefits and costs of the CTEA, it is difficult to understand [copyright] term extension for both existing and new works as an efficiency-enhancing measure.").

129. Scott Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635–1658–59 (2007) (finding that relative to three institutions—public schools, workplaces, and prisons—institutional line drawing has led to problematic heightened deference).

130. See *infra* Part IV.

addition, evaluating the preferential treatment in the Copyright Act with an eye to locating progress institutions will lead to copyright laws more in harmony with their constitutional justification.

The remainder of this Part discusses three overlapping goals—incativizing creation and dissemination, expanding knowledge, and providing public access—that copyright protection must serve if it is to meet the agenda set by the Framers in the Progress Clause.¹³¹ And just as certain institutions may be particularly well-suited to promote the values underlying the Speech Clauses, some institutions, in their typical operation, are well-placed to promote the fundamental purposes of the Progress Clause.¹³² Those three core values drawn from the text and the historical context of the Progress Clause provide some indication of institutions that might merit special solicitude because, in their typical operation, they provide public benefits commensurate with one or more of these values.¹³³

B. Promoting Progress by Incentivizing Creation and Dissemination

The exclusive right Congress grants to authors is often described as public facing, i.e., “the ultimate aim” of allowing an author to “secure a fair return” on her “creative labor” is “to stimulate artistic creativity for the general public good.”¹³⁴ As reported by Edward Walterscheid, the Framers saw Congress’s authority to promote progress as a narrow power, limited to securing an exclusive right to authors and inventors in their writings and discoveries.¹³⁵ For example, James Madison was

131. See, e.g., Wendy J. Gordon, *Fair Use Markets: On Weighing Potential License Fees*, 79 GEO. WASH. L. REV. 1814, 1856, n.118 (2011) [hereinafter Gordon, *License Fees*] (noting that even if “Progress” is left undefined, one can make “preliminary assessments” about whether potential changes to the Act are consistent with the Progress clause); see also Olliar, *supra* note 2, at 1836 (“‘Progress,’ of course, is not a clearly defined concept. It would not be straightforward, and it would perhaps even be difficult, for courts to determine which grants of intellectual property rights ‘promote[] progress.’”).

132. See *infra* Part II.E.

133. See *infra* Part II.E.

134. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

135. See, e.g., Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J.L. & TECH. 87, 104–05 (1999) [hereinafter Walterscheid, *General Welfare*]; see also Jeanne C. Fromer *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329, 1332 (2012) (arguing that both the textual structure and historical application of the Intellectual Property Clause bars Congress from using means other than securing an exclusive right to others and inventors to promote the specified end of promoting the progress of science and useful arts). *But see* Walterscheid, *General Welfare*, *supra*, at 102–03 (arguing that Alexander Hamilton may have had the better of the argument that Congress had the power, pursuant to the General Welfare Clause, to pay directly for research and development); Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 32–33 (1994) (“The Clause was intended not so much as an express authority to promote the

convinced that Congress perceived itself as tied down: “to the single mode of encouraging inventions by granting the exclusive benefit of them for a limited time.”¹³⁶ This relatively narrow reading suggests that Congress was empowered to provide for the public good in the copyright context by providing a means to incentivize creative labor through profitable dissemination. Seeking “the promotion of progress” through a grant of exclusive rights to authors is consistent both with the prehistory of the Progress Clause and what little we can glean from the Constitutional Convention and contemporary sources about its adoption.

The historical antecedents of the Constitution and the first federal copyright act in the United States illustrate the Framers’ view that an exclusive right—and the profit it secures—was designed to motivate creative expression.¹³⁷ The Statute of Anne, England’s first copyright act, was ostensibly crafted “for the encouragement of learning” by preventing the printing of books “without the consent of the authors or proprietors.”¹³⁸ In other words, Britain would promote knowledge by using exclusive rights to “encourage . . . learned men to compose and write useful books.”¹³⁹

The committee of the Continental Congress in charge of suggesting what type of copyright protection states might reasonably grant instead embraced a natural rights rationale.¹⁴⁰ The committee

progress of science and the useful arts, but rather as a means of ensuring authority to do so in a particular way . . .”).

136. See Letter from Tench Coxe to James Madison (Mar. 21, 1790), in 13 THE PAPERS OF JAMES MADISON, 128 (Charles F. Hobson et al. eds., 1981).

137. See e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (“The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” (internal quotation marks omitted) (quoting *Twentieth Century Music Corp.*, 422 U.S. at 156)); *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992) “[C]opyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.”); Bruce Abramson, *Promoting Innovation in the Software Industry: A First Principles Approach to Intellectual Property Reform*, 8 B.U. J. SCI. & TECH. L. 75, 93–94 (2002) (“Most people looking for an investment venue will choose to put their time, effort, and/or capital into tangible property that can be resold at a personal profit rather than into ideas that will benefit society at large but whose promised personal returns are limited. . . . IP rights thus represent a societal attempt to harness the profit motive in order to motivate innovation.”); Zi Wong, *The Experimental Stage Doctrine: The Quiet Death of an Experimental Use Heresy*, 82 J. PAT. & TRADEMARK OFF. SOC’Y 691, 692 (2000).

138. The Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). For a more detailed discussion of the relationship between authors and stationers in the period leading up to the passage of the Statute of Anne and its subsequent enforcement, see Linford, *First Publication*, *supra* note 118, at 635.

139. The Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

140. The historical record suggests that the Committee took testimony only from authors, which may make this an early example of successful interest group lobbying to secure copyright protection. *But see* Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection*

concluded that “nothing is more properly a man’s own than the fruit of his study.” But as often occurs, the natural rights rationale bled into utilitarian goals.¹⁴¹ The committee noted that “the protection and security of literary property would greatly tend to encourage genius [and] to promote useful discoveries.”¹⁴² And those states that extended copyright protection to their citizens primarily modeled their statutes on the Statute of Anne, which ostensibly protected the author’s profit incentive rather than an identity-based moral right.¹⁴³ Some of the proffered language, however, reflected a Lockean concept of natural rights.¹⁴⁴

The limited historical record from the Constitutional Convention suggests that the Framers were convinced that there was a relationship between the grant of an exclusive right and the stimulation of desired output. In addition to the language of the Progress Clause, the Constitutional Convention contemplated direct subsidies to universities or artists.¹⁴⁵ For example, the Convention considered empowering Congress to “establish a University,” or “establish seminaries for the promotion of literature and the arts and sciences.”¹⁴⁶ Those direct subsidies were ultimately not included in the Progress Clause,¹⁴⁷ an omission that was likely intentional.¹⁴⁸

of Nonfiction Literary Works, 81 COLUM. L. REV. 516, 519–20 (1981) (“Notions of a natural right to the fruit of one’s labor, and of the injustice of the enrichment that falls to the taker are as much a part of copyright as the careful balancing of incentive and dissemination.”).

141. See 24 JOURNALS OF THE CONTINENTAL CONGRESS 211 (entry for May 2, 1783).

142. See *id.* at 326–27, cited by 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, 783–84, n.147 (2001).

143. See, e.g., L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 933 n.61 (2003) (“The state statutes were directed at the protection of authors’ profits, rather than any moral rights she or he might have. The author, while the focus of the statutes, could pass the right to profit by publishing and vending to heirs or assigns.”).

144. See, e.g., ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 236 (Boston 1781–1783):

Whereas the Improvement of Knowledge, the Progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, greatly depend of the Efforts of learned and ingenious Persons in the various Arts and Sciences: As the principal Encouragement such Persons can have to make great and beneficial Exertions of this Nature must exist in the legal Security of the Fruits of their Study and Industry to themselves; and as such Security is one of the natural Rights of all Men, there being no Property more peculiarly a Man’s own than that which is produced by the Labour of his Mind.

145. See Oliar, *supra* note 2, at 1777.

146. See e.g., *id.* at 1789.

147. *Id.* at 1792–93 (noting that Congress rejected President Washington’s call to establish a university, and proposing that the decision not to include the power to establish a university meant the Framers intended not to provide that power).

148. *Id.* at 1792.

There are no records about why the Constitutional Convention selected the language chosen, but James Madison embraced individual protection of copyrighted expression as necessary for the public good.¹⁴⁹ Madison asserted, “the public good fully coincides . . . with the claims of individuals.”¹⁵⁰ And in one public essay, Madison equated control over one’s thoughts as a property right in the same way that control over one’s real estate was a property right—both necessary for a properly functioning government.¹⁵¹ Finally, when the first Congress passed the Copyright Act of 1790, the Act looked much like the aforementioned Statute of Anne—“[a]n Act for the encouragement of learning,” accomplished “by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”¹⁵²

This rough glimpse of the historical background of the Framers’ views gives some general guidance regarding the “progress of science and useful arts” that copyright protection must promote. As Dotan Oliar has noted, the decision to limit Congressional scope to securing exclusive rights to authors and inventors was most likely intentional.¹⁵³ Jeanne Fromer has concluded that Congress may not promote progress in any way other than securing exclusive rights to authors.¹⁵⁴ Given the centrality of the exclusive right to the constitutional text, for progress to have meaning in light of that text, it must be progress that can be promoted by securing exclusive rights for authors to their writings. The Progress Clause, and the Copyright Act enacted to accomplish its goals, envisioned an exclusive right to incentivize the creation and distribution of new expression.¹⁵⁵ The author is not rewarded in the abstract for her efforts but for her creative output—and even then only to the extent she can find a (paying) audience

149. THE FEDERALIST NO. 43 (James Madison) (C. Rossiter ed., 1961).

150. *Id.* at 272. *But see* Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 771 (2001) (arguing that Madison misunderstood or misrepresented English precedent of the day, and that Madison did not embrace a natural rights justification for copyright protection).

151. James Madison, *Property*, in 1 THE FOUNDERS’ CONSTITUTION Ch. 16, Doc. 23 (2000) (originally dated Mar. 29, 1792) (“[A] man has a property in his opinions and the free communication of them.”), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.

152. Copyright Act of 1790, 1 Stat. 124.

153. *See supra* notes 146–148 and accompanying text.

154. *See* Fromer, *supra* note 135 at 1332 (arguing that “[t]he IP Clause’s text and placement within the constitutional structure suggest that Congress” may only promote progress by “securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” and may promote progress by no other means).

155. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

receptive to it.¹⁵⁶ Exclusive rights of some sort must therefore be a part of the US copyright system. To conclude otherwise would do considerable harm to the constitutional language.

C. Promoting Progress by Expanding Knowledge

The Progress Clause is also boundary defining. The accepted wisdom is that it protects only two distinct types of addition to human knowledge: inventions, which receive patent protection, and writings, which receive copyright protection.¹⁵⁷ The category of writings that qualify for protection today is much broader than those protected by the Copyright Act of 1790.¹⁵⁸ Nevertheless, the Progress Clause builds in a natural limit recognized by the courts, as articulated in the idea-expression dichotomy.¹⁵⁹ Some things fall outside of both copyright and patent protection, and are free for all to use.¹⁶⁰ Congress may not grant perpetual protection, so that the authors' writings are eventually released to the public.¹⁶¹ The public can freely exploit, reproduce, and resell works for which protection has expired at their marginal cost of reproduction.¹⁶²

Through both its subject matter limitations and the grant of an exclusive right only for limited times, the Progress Clause provides a substrate of freely accessible material on which any person can build his or her own creative expression or novel invention.¹⁶³ This substrate, often called "the public domain," is comprised of information that once was protected as intellectual property and information that may never

156. *See id.*

157. *See, e.g.,* *Golan v. Holder*, 132 S. Ct. 873, 887–88 (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."); *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (holding that federal trademark protection cannot be justified under the Progress Clause because unlike copyright or patent protection, securing trademark rights does not "depend upon novelty, invention, discovery," but only upon "priority of appropriation").

158. *Compare, e.g.,* 17 U.S.C. § 102(a) (2012), with Copyright Act of 1790, 1 Stat. 124.

159. *See, e.g.,* *Baker v. Selden*, 101 U.S. 99, 105–06 (1879); *see also supra* note 41 and accompanying text.

160. *See* Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 *CARDOZO ARTS & ENT. L.J.* 215, 294 (1996) (defining the public domain as "the works and uses that are free for all to use").

161. *See* *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003) (noting that Congress may not "create[] a species of perpetual patent [or] copyright").

162. This marginal cost nears zero in the Internet age.

163. *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 368 (2005); Dennis S. Karjala, *Copyright and Misappropriation*, 17 *U. DAYTON L. REV.* 885, 887 (1992) ("Because knowledge, technology, and culture advance by building on an existing base, too much protection for particular works can inhibit social progress rather than enhance it. One object of the game, at least insofar as it is based on incentive theories, is to determine where the protective lines are optimally drawn.").

be protected as intellectual property.¹⁶⁴ While this description might suggest that the public domain is an essential part of the constitutional scheme outlined in the Progress Clause, the Supreme Court in *Golan v. Holder* indicated that the concept of a public domain held little constitutional significance.¹⁶⁵

As discussed above, the Progress Clause's statutory predecessors provided an exclusive right to authors and inventors, in part to increase the available store of knowledge.¹⁶⁶ Founding-era state copyright statutes expressed goals like "the improvement of knowledge, the progress of civilization, and the advancement of human happiness."¹⁶⁷ Promoting the progress of science and useful arts might thus be effectively reducible to "encouragement of learning."¹⁶⁸

The Supreme Court has articulated a fairly low Constitutional threshold for "creative" or "original" expression,¹⁶⁹ and thus, increasing creative expression is not necessarily the same thing as increasing knowledge.¹⁷⁰ Scholars disagree whether the Progress Clause requires an increase in quality of the knowledge base,¹⁷¹ a numerical increase in new inputs into the knowledge base,¹⁷² or the value of the knowledge base judged economically,¹⁷³ but many argue that copyright protection

164. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 350 (1991) ("Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted.")

165. *Golan v. Holder*, 132 S. Ct. 873, 888 n.26 (2012) (dismissing the argument that copyright legislation that restores protection to works in the public domain must also provide new incentives to create, "[e]ven assuming the public domain were a category of constitutional significance"); see also Lyle Denniston, *From Plyler v. Doe to Trayvon Martin: Toward Closing the Open Society*, 69 WASH. & LEE L. REV. 1799, 1815 (2012) ("[T]he Supreme Court essentially destroyed—at least in constitutional terms—the concept of a 'public domain.'").

166. See *supra* notes 137–142 and accompanying text; see also BOHANNAN & HOVENKAMP, *supra* note 89, at ix (defining "innovation" as "any human idea that adds something important to what we already have").

167. See Oliar, *supra* note 2, at 1807.

168. See Lawrence Solum, *Congress's Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 45 (2002).

169. See, e.g., *Feist*, 499 U.S. at 362 ("The standard of originality is low, but it does exist.")

170. Cf. Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259 (arguing that "Science," as used in the Progress Clause, means a system of knowledge comprising distinct branches of study, and in light of that meaning, Congress may not be empowered to extend copyright protection to expression that the First Amendment does not protect).

171. See Fromer, *supra* note 135, at 1374 (stating that a law promotes progress "if it seeks to encourage advancement in areas of systematic knowledge, including cultural knowledge or technology."); Solum, *supra* note 168, at 57 (proposing that the question to ask, before any statute is enacted is whether it will "encourage systematic knowledge and learning of enduring value?").

172. See Heald & Sherry, *supra* note 65, at 1163.

173. Compare Fromer, *supra* note 135, at 1373, with Pollack, *supra* note 143, at 756. But see Heald & Sherry, *supra* note 65, at 1163 (noting that the "quid pro quo" principle they locate in the constitutional text "does not authorize a court to invalidate legislation simply because it does not increase wealth").

is justified only when the protection results in an advance in knowledge, however defined.¹⁷⁴

In fact, the Progress Clause's discernable focus on increasing knowledge has led some scholars to question whether the Framers would have been interested in the creation of the entertainment tent poles that currently drive much of Congress's legislative agenda with regard to copyright protection.¹⁷⁵ An increase in knowledge, properly defined, may be limited to an increase in things that are inherently valuable.¹⁷⁶ Under this view, copyright protection for books as artifacts that promote the progress of science might be overinclusive if it protects copyrights in trashy literature, but would nevertheless be justifiable so long as an increase of knowledge was the end goal, not just a side benefit.¹⁷⁷ There is danger, however, in trying to protect only works of a certain artistic or cultural value.¹⁷⁸ While many scholars recognize the importance of the collective increase in knowledge, some suggest that intellectual property protection was always too blunt a policy instrument to promote "innovation and cultural progress."¹⁷⁹

Despite the challenge of such line drawing, as Justin Hughes has identified, it is not far a stretch to conclude the "primary objective of intellectual property" is "to 'promote the Progress of Science and useful Arts' by increasing society's stock of knowledge."¹⁸⁰ Institutions that play a central role in cataloging and categorizing that stock of knowledge, broadly defined, might therefore merit special solicitude.

D. Promoting Progress by Providing Access

The Supreme Court has stated that ensuring access to copyrighted expression is the primary goal of copyright protection.¹⁸¹ Some scholars suggest that the access aspect of the Progress Clause requires maximizing the broadest possible dissemination of copyrightable expression.¹⁸² Under that definition, any change in copyright protection would be merited only to the extent that it "increase[s] public access to writings."¹⁸³ But a commitment to

174. See e.g., Olliar, *supra* note 2, at 1801 n.191.

175. See Solum, *Power*, *supra* note 168, at 54.

176. See Snow, *supra* note 170, at 264.

177. See, e.g., Solum, *Power*, *supra* note 168, at 57–59.

178. See *Bleistein v. Donaldson Lithographic Corp.*, 188 U.S. 239 (1903).

179. See Carroll, *supra* note 81, at 1361.

180. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 295 (1988).

181. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); see also *supra* note 134 and accompanying text.

182. See Pollack, *supra* note 142, at 760.

183. *Id.* at 766.

dissemination does not necessarily require early or permanent absorption of a work into the public domain, so long as there is relatively affordable access for the public during the term of copyright protection. Often, the owner of the work will offer different versions of a work, or in different formats, at different price points over time.¹⁸⁴ For example, publishers sell both hardback and paperback versions of the same book at different times,¹⁸⁵ catching more price-sensitive purchasers with the more affordable paperback copy, which is released later than the hardback version.¹⁸⁶ Libraries purchase copies that are lent to patrons at no cost, and publishers take the phenomenon into account when pricing volumes.¹⁸⁷ Note that this price discrimination across versions can facilitate the production of public goods.¹⁸⁸ Indeed, if the commitment to free access trumps the ability of copyright owners to charge a desired price for their expression, some potential authors will be dissuaded from spending the time to create new expression.¹⁸⁹

Accessibility does not require a copyrighted work to be free.¹⁹⁰ The Progress Clause provides for two types of public access: paid access—guaranteed by the exclusive right secured to the author—and access through the public domain once a work crosses the threshold of limited times.¹⁹¹ While copyright protection subsists, the copyright owner can withhold access to the work unless the public pays for it.¹⁹²

184. See Linford, *First Publication*, *supra* note 118, at 635.

185. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1031 (7th Cir. 2002) (Posner, J).

186. See Julie Bosman, *Paperback Publishers Quicken Their Pace*, N.Y. TIMES, July 26, 2011 (reporting that publishers had shortened the delay in releasing paperback editions from one year to six months in response to pressure created by the availability of e-book editions).

187. See Linford, *First Publication*, *supra* note 118, at 639.

188. See, e.g., John P. Conley & Christopher S. Yoo, *Nonrivalry and Price Discrimination in Copyright Economics*, 157 U. PA. L. REV. 1801, 1810–11 (2009) (describing how public goods tend to be underprovided in the absence of price discrimination because the rational user will underreport the utility she derives from a public good, and thus the provider of a public good may underestimate its value (citing Paul A. Samuelson, *Aspects of Public Expenditure Theories*, 40 REV. ECON. & STAT. 332, 334–36 (1958))); see also *In re Brand Name*, 288 F.3d at 1031 (“The publishing industry is extremely competitive but, as just noted, price discrimination is the norm in it.”).

189. See, e.g., *Cake: Flying High After a Record Low*, NPR MUSIC (Mar. 3, 2011, 4:59 PM), <http://www.npr.org/2011/03/03/134233768/cake-tk> (quoting John McCrea, lead singer and songwriter for Cake, who stated “I see music as a really great hobby for most people in five or [ten] years,” with “everybody I know, some of them really important artists, studying how to do other jobs”).

190. See e.g., Conley & Yoo, *supra* note 188, at 1805 (arguing that the standard economic analysis that pits incentives for efficient creation against efficient access might be misguided); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 ORE. L. REV. 19, 32–33 (1996) (“Public access is surely not necessary to the progress of science. . . . If we measure the progress of science by the profits of scientists, secrecy may greatly enhance the achievements we find.”).

191. U.S. CONST. art. I, § 8, cl. 8.

192. See *Golan v. Holder*, 132 S. Ct. 873, 893 (2012) (requiring would-be users to pay for access to a work did not deprive them of access to that work).

Engaging in certain uses of the work without the copyright owner's authorization will infringe the owner's exclusive right.¹⁹³ In that case, the owner can seek monetary and injunctive relief,¹⁹⁴ while the state may bring criminal charges.¹⁹⁵ It is the author's ability to determine the price of the work that provides the reward. The more a given member of the public values a given work, the higher the price she will be willing to pay to consume it.¹⁹⁶ Once the work falls out of copyright protection (or if some information never qualifies for protection in the first instance), anyone can utilize the work in any way, free of cost.¹⁹⁷

The limited term of protection provides for a second type of public access. Once the work is in the public domain, the public can use the work for free. Distributors, no longer required to meet the copyright owner's price, can reproduce and distribute the work for the marginal cost of production.¹⁹⁸

We can interlace the three progress values identified above to suggest two types of institutional actors that might merit Progress Clause solicitude. Because promoting progress means providing access to copyrighted expression, there exist two broad categories of access intermediaries, and it may be justifiable for Congress to treat institutions with those characteristics favorably.

The first type of institutional actor is a collection intermediary, like a library or a university that serves as a repository for expression. These institutions can fulfill the access-promoting function in different ways. Some, like public libraries, might use funds from the state to acquire a cache of materials that the public can use at little or no cost.¹⁹⁹ Others, like private universities, might also cache materials, with access reserved for tuition paying students or fee-paying

193. 17 U.S.C. § 106 (2012).

194. *Id.* §§ 501–505.

195. *Id.* § 506.

196. *See, e.g.,* Conley & Yoo, *supra* note 188, at 1809–10 (“Although every consumer necessarily consumes [the same quantity of a copyrighted work], different consumers may derive different levels of utility from doing so . . . and can only signal the intensity of their preferences by paying different prices.”).

197. *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) (“[W]hen an article is unprotected by a patent or a copyright[, for state law to] forbid copying would interfere with the federal policy, found in Art. I, [§] 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”).

198. *See* Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1318 (2003).

199. *Cf.* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 918 (2002). State funded libraries by their nature are funded with taxes. *Cf. Federal Funding*, AMERICAN LIBRARY ASSOCIATION, <http://www.ala.org/advocacy/libfunding/fed> (last visited Feb. 28, 2014).

members.²⁰⁰ In either case, the institution would serve as an intermediary—purchasing works and making them available to the public (or at least the portion of the public that subsidizes the private library).²⁰¹ These actors would simultaneously provide incentive, knowledge, and access benefits to the public.

The second category of access intermediaries is distribution intermediaries, who lower the cost of distributing or publishing copyrighted works.²⁰² Historically, copyrighted works did not reach the public without the movie industry, publishers, and record labels to move physical copies.²⁰³ Indeed, it is possible that the copyright system as it exists today is optimized to incentivize the efforts of distributors, not creators.²⁰⁴ One might therefore reasonably question whether it makes sense to craft copyright legislation at the request of, or with the goal of protecting, such institutions.²⁰⁵ While some scholars have criticized the central role of middlemen and aggregators in the content industries, others have noted that, despite these flaws, some works still require significant precreation funding and centralized postcreation distribution, which these intermediaries provide.²⁰⁶

Internet providers can also serve as distribution intermediaries.²⁰⁷ Recall that collection intermediaries generally pay for a copy of a work and share it with customers.²⁰⁸ In contrast, a

200. Cf. Werner Cohn, *Private Stacks, Public Funding*, 24 No. 2 AM. LIBRARIES 182–84 (Feb. 1993), available at <http://wernercohn.com/Libraries.html>. The materials selected by these institutions might look somewhat different than those selected by public libraries. *Id.*

201. See *Trivits v. Wilmington Inst.*, 417 F. Supp. 160, 163–64 (D. Del. 1976) (noting the different tax status of free and private subscription libraries under Delaware law).

202. See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 311 (2002) (noting that among other virtues, “the Internet and digital technology . . . reduce the transaction costs associated with connecting artists to the public”).

203. Jessica Litman, *War and Peace: The 34th Annual Donald C. Brace Lecture*, 53 J. COPYRIGHT SOC’Y U.S.A. 1, 11 (2006) (conceding that at least until the Internet enabled distribution without a significant capital investment, “profit-making intermediaries, who understandably need[ed] a business model calculated to produce profits . . . [were] absolutely necessary parties in the distribution chain”).

204. See generally Jonathan M. Barnett, *Copyright without Creators*, 9 REV. L. & ECON. 389 (2013) (arguing that even if copyright does not induce authors and artists to create, it may be justified because it induces profit-motivated intermediaries to create).

205. See, e.g., John Quiggin & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L.J. 203, 245 (2008) (“[H]ighly capitalized intermediaries are no longer necessary for the creation, production, dissemination, and use of culturally significant content, and copyright is no longer the only mechanism for ensuring that content moves from the author into society.”).

206. See Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. L. REV. 623, 672–73 (2012) (creating some types of copyrighted expression like movies and television programs still requires a significant capital investment and necessitates copyright protection or some other mechanism to cover the costs of production and distribution).

207. Cf. Linford, *First Publication*, *supra* note 118, at 587.

208. Cf. Baker, *supra* note 199, at 918.

distribution intermediary provides means to move a copy of a work from purchaser A to user B.²⁰⁹ Section 512 of the Copyright Act is designed to insulate Internet Service Providers (ISPs) from secondary liability for copyright infringement, so long as they merely serve as conduits between individuals and do not infringe copyright in the work in their own right.²¹⁰

Some institutions might serve as collection and distribution intermediaries, and might thus merit special solicitude. Peter Menell argues, for example, that Congress should have stepped in early in the Google Book Search litigation to provide a safe harbor for companies working with libraries to scan their archives because of the importance of “making the vast knowledge of the Internet,” as well as the contents of library archives, accessible “to the public at large.”²¹¹ There is a difference, however, between intermediaries who pay for the material they redistribute and those who do not. For example, under the current statutory regime, whether one has purchased or merely leased a copy will determine the subsequent right to use the copy.²¹² Likewise, a library which purchases the copies it distributes to the public might have a better claim to solicitude under the Copyright Act than a business built on redistributing copies it duplicates without compensating the copyright owner—unless maximizing free access is the priority.

In conclusion, these rough guidelines suggest that we can identify progress institutions that typically promote the values embodied in the First Amendment or the Progress Clause. This institutional framework can provide some assistance in determining whether a given incident of institutional tailoring by Congress is in harmony or conflict with Progress principles. For example, libraries are institutions that provide access and catalog knowledge, in part by making purchases of copyrighted works. Identifying progress institutions is work that courts are particularly well suited to handle, because it is the type of inquiry that builds on expertise developed in

209. Cf. Linford, *First Publication*, *supra* note 118, at 587. Historically, distribution channels moved unique copies of works from one location to another. *See id.* Digital distribution through the Internet alters that dynamic by enabling the instantaneous distribution of multiple, effectively perfect copies from a single original. *See id.*

210. 17 U.S.C. § 512 (2012); *see also* Capitol Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 649 (S.D.N.Y. 2011) (finding that while the allegedly infringing cloud storage service qualified for the § 512 safe harbor in many respects, the owner of the company was liable for direct infringement).

211. Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1018, 1046 (2007).

212. *See* Aaron Perzanowski & Jason Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067 (2012); Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 910–11 (2011).

making factual assessments in speech cases.²¹³ In addition, to the extent that copyright legislation is subject to agency capture,²¹⁴ a financially independent judiciary may also best ensure that the requirements of the Progress Clause are met in regulation involving copyrighted expression.²¹⁵ And it is a responsibility the Supreme Court will soon need to undertake in the free exercise context in light of *Hosanna-Tabor*.²¹⁶

III. IDENTIFYING PROGRESS CLAUSE INSTITUTIONS

The institutional review framework offers an opportunity to focus on where Congress engages in overt and potentially problematic tailoring. Law-making parties—defined broadly to include the executive branch, the public, and the interests that typically lobby Congress for copyright protection, in addition to courts and Congress—should pay attention to the disparate treatment codified in the Copyright Act. Disparate treatment is important precisely to the extent that it signals something is amiss in the legislative process that will lead to constitutionally unjustifiable results. That treatment may indicate public-choice effects, but not all public choice effects are pernicious.²¹⁷ Under the interest-group account of public-choice theory, statutory outcomes reflect the bargains struck by the groups that lobby Congress.²¹⁸ Sometimes, Congress can reach the right results through imperfect processes, particularly if there is an equilibrium created by interest groups lobbying for mutually exclusive desired outcomes.²¹⁹

213. See, e.g., Note, *Deference to Legislative Fact Determinations in First Amendment Cases after Turner Broadcasting*, 111 HARV. L. REV. 2312, 2319 (1998) (describing the “norm of accuracy” which imposes a duty on appellate courts to conduct an independent review of fact records developed by lower courts or administrative agencies).

214. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) (citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971)).

215. Cf. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1151 (1991) (arguing that to the extent the focus of the First Amendment has “shifted to protection of unpopular, minority speech,” an insulated judiciary arguably best protects it).

216. See generally Robinson, *supra* note 15, at 181.

217. See, e.g., Brian Galle, *The Role of Charity in a Federal System*, 53 WM. & MARY L. REV. 777, 804 (2012).

218. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) (citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971)).

219. See Galle, *supra* note 217, at 804. In addition, it has been noted that some lobbying for targeted funds by groups that provide mixed goods, like education, can provide public benefits like an increase in education overall. See *id.*

Therefore, any solution must focus more on problematic results than potentially flawed processes.²²⁰

When institutional tailoring is apparent on the face of the statute, the proper question is whether the disparity is justified on progress grounds. When reviewing statutory language granting rights or exceptions to rights to certain institutions, a court should ask: “if we uphold this statute as constitutional, will the protection granted to the particular institution support one or more of the values embodied in the Progress Clause?” If not, i.e., if the group does not externalize progress values in its typical operation, it is likely that Congress has overstepped its authority under the Progress Clause in light of the chilling effect that copyright protection can have on speakers who wish to make use of copyrighted expression.²²¹ Thus, the court should hold the statute unconstitutional unless Congress has something akin to “a compelling government interest” in treating the institution in question differently from others and the tailoring is sufficiently narrow to meet that purpose.²²² On the other hand, where the institution externalizes progress values, a court can safely assume that Congress has made its decision with an eye toward those values—or at least got lucky—and rarely, if ever, should it upset the statutory regime.

The institutional review framework also provides a structure for analyzing flaws in a proposed law before enactment. Courts engage only in *ex post* review; however, Congress and the President can consider whether apparent disparities might signal Progress Clause

220. See *id.* This is a key difference between this Article’s proposed intervention and the one proposed by Neil Netanel. Professor Netanel is concerned with “highly organized, amply funded, and politically influential speech industries,” Netanel, *supra* note 4, at 65, and so his proposal focuses on looking for evidence of interest-group capture of the drafting process, and applying strict scrutiny to the resulting legislation. See *id.* at 77. Focusing on disparate bargaining power cannot resolve every conflict. The Copyright Act of 1976 was primarily a negotiation between interest groups, subsequently presented to Congress for its approval. It seems difficult to say, for example, that the cable industries had less clout than broadcasters, or publishers than the movie industry. See, e.g., Litman, *Compromise*, *supra* note 87, at 880–81. What matters most is the fruit born by the negotiation, not the negotiation itself.

221. See, e.g., Yen, *supra* note 57, at 423–33.

222. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012). This is the “strict scrutiny” standard that the Supreme Court uses to describe the review it undertakes when considering whether a content-based or viewpoint-based speech restriction violates the First Amendment. See *id.* (“When content-based speech regulation is in question . . . exacting scrutiny is required.”); see also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 71 (1987) (“Laws having severe effects ordinarily trigger strict scrutiny; laws having significant effects ordinarily trigger intermediate scrutiny; and laws having relatively modest effects ordinarily trigger deferential scrutiny.”). There is no reason to be particularly wedded to the traditional categories. For the public and members of Congress, it will likely be easier to focus on whether disparity is present, and whether the institution receiving preferential treatment is a valuable link in our national speech or progress infrastructures. Given, however, that this Article also aims to signal to courts when it is most useful to engage in a serious constitutional inquiry, it can be helpful to couch the discussion in language with which the Court is familiar.

problems. Even if neither the legislative nor the executive branch take the strictures of the Progress Clause seriously, it is possible that the institutional review framework will trigger bottom-up or crowd-sourced engagement with problematic legislative enactments.²²³

The Copyright Act contains pervasive institutional tailoring.²²⁴ It would take volumes to analyze the entire act through the institutional review framework. Instead, it is illustrative to consider a handful of representative cases, suggesting potential revisions and potential responses to recently proposed legislation.

A. “Easy” Cases

There are some relatively easy cases where Congress reached the right result in favor of an institution that promotes speech and progress values. For example, the institutional review framework suggests little cause for alarm in regard to the special defenses afforded to libraries and archives under section 108 of the Copyright Act.²²⁵ Section 108 gives libraries and archives fairly narrow exceptions to the copyright owner’s section 106(1) duplication and section 106(3) distribution rights.²²⁶ The section also specifies when and how many copies a library can make for archival purposes;²²⁷ whether the library can disseminate digital works to its patrons and how it must handle the dissemination;²²⁸ and how a library is to deal with the problem of “orphan works.”²²⁹

If constitutionally grounded solicitude toward an institution should ever trump Congress’s grant of exclusive rights to the author, a library seems like the sort of institution that should get a pass.²³⁰ Libraries have historically served as information nexuses for the public to discover a broad swath of information at a low cost of entry. Consider, for example, the New York Public Library, which aspires to provide “true centers of educational innovation and service, vital community hubs that provide far more than just free books and

223. See *infra* Part IV.

224. See, e.g., Liu, *supra* note 80, at 105.

225. 17 U.S.C. § 108 (2012).

226. *Id.* § 108(a).

227. See, e.g., *id.* § 108(b) (allowing “three copies or phonorecords of an unpublished work”).

228. See, e.g., *id.* § 108(b)(2) (reproductions in digital format can be distributed or made available to the public “outside the premises of the library or archives”).

229. See, e.g., *id.* § 108(h). Orphan works are works “protected by copyright but whose rights holders theoretically cannot be located.” *Authors Guild, Inc. v. HathiTrust*, No. 11-CV-6351, 2012 WL 4808939, at *2 (S.D.N.Y. Oct. 10, 2012).

230. See Schauer, *Principles*, *supra* note 12, at 84; HORWITZ, *supra* note 9, at 205–09.

materials” and “to clos[e] the digital divide” for New Yorkers without personal internet access.²³¹ The institution aspires to not only provide access to copyrighted works, but also to contribute to the expansion and refinement of knowledge by collecting and categorizing the “distinct branches of study” that comprise some classical definitions of science.²³² From a progress perspective, libraries are a primary institution providing affordable public access to copyrighted works.²³³ In addition, libraries are among the best customers for some classes of authors and publishers.²³⁴ They can also serve as public-use intermediaries—disseminating information to the public by paying the copyright owner’s asking price so individual members of the public need not do so.²³⁵

It is possible, however, in our new world of costless digital reproduction, that there is no real difference between libraries and other sources of free copyrighted material, like a BitTorrent feed.²³⁶ Online distributors of individually posted works copied by customers have repeatedly been on the losing end of copyright litigation.²³⁷ But the institutional library differs in part because “each geographically located, paper-text library effectively serves a limited number of people.”²³⁸ Furthermore, libraries have a distinct editorial stance, reflected in the works they purchase and provide to the public.²³⁹ Based on these distinctions, Congress can reasonably provide special solicitude for libraries without running afoul of the speaker-neutrality requirement of the Speech Clause because libraries are institutions that externalize Progress Clause values.

On the other hand, Congress also makes some indefensible missteps in its institutional tailoring. Section 110 provides exceptions to one or more of the copyright owner’s exclusive rights to several

231. *About The New York Public Library*, NEW YORK PUBLIC LIBRARY, <http://www.nypl.org/help/about-nypl> (last visited Feb. 28, 2014).

232. See Snow, *supra* note 170, at 259.

233. See *About The New York Public Library*, *supra* note 231.

234. Cf. Aaron S. Edlin & D.L. Rubenfield, *Exclusion or Efficient Pricing? The “Big Deal” Bundling of Academic Journals*, 72 ANTITRUST L.J. 119, 125–26 (2004) (reporting that academic journal prices have increased faster than inflation and that libraries have responded in part to the pressure by cutting down on acquisitions of books and monographs).

235. The ability of libraries to loan books to the public is protected in part by the first sale right, codified at 17 U.S.C. § 109, which allows purchasers of authorized copies to lend them to others.

236. See Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in A Peer-to-Peer World*, 53 UCLA L. REV. 977, 986–87 (2006) (explaining that the differences “good” libraries and “bad” file-sharers are fewer than one might first imagine).

237. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 545 U.S. 913, 918 (2005).

238. Baker, *supra* note 199, at 918.

239. See *id.*; see also Linford, *First Publication*, *supra* note 118, at 639–42 (describing the differences between print and digital distribution of copyrighted works and their relative effects on copyright owners in network theory terms).

groups that do not externalize progress values.²⁴⁰ For example, section 110(6) insulates governmental bodies or nonprofit agricultural or horticultural organizations from liability for infringing performances by concessionaires during “an annual agricultural or horticultural fair exhibition.”²⁴¹ Similarly, section 110(10) insulates nonprofit veterans’ or fraternal organizations from liability for unlicensed performances, so long as the performance is to members, and not the general public, and so long as profits after reasonable expenses are used “exclusively for charitable purposes.”²⁴² Congress granted this additional protection to veterans’ and fraternal organizations notwithstanding section 110(4), which insulates charitable performances where the performers are not paid.²⁴³ As is frequently the case, this particular provision came about as a direct result of lobbying.²⁴⁴

Special protections for veterans’ and fraternal organizations are indefensible from a progress perspective. While the Court has correctly recognized that fraternal organizations can engage in activity that has First Amendment value for its members, this is no different than any other organizations.²⁴⁵ These organizations do not serve an access-promoting or knowledge-aggregating function, and insulating them from the requirement to pay the price other citizens pay to use copyrighted expression is not justifiable on the exclusive-right axis. Thus, denying copyright owners the ability to secure licenses for these public performances seems to reflect nothing more than a successful lobbying effort benefitting veterans and fraternal organizations.²⁴⁶ Similarly, Congress should scrap the specific exceptions extended to government organizations and county fairs, as there is no progress justification for the preferential treatment those institutions either. They serve neither access nor knowledge aggregation functions. Thus, under the institutional review framework this is an easy call. At first glance, it might seem that the game is not worth the candle. It is perhaps unsurprising that veterans’

240. See 17 U.S.C. § 110(6) (2012).

241. *Id.*

242. *Id.* § 110(10). This protection excludes college fraternities and sororities. *Id.*

243. See *id.* § 110(4). Jon Garon argues instead that in the context of defenses, Congress has the power to “play favorites,” and as there is no economic justification for that favoritism, concludes that the subsection 4 exception for charitable organizations and the subsection 5 exception for radio stations, *id.* at § 110(5), “can only be justified from the progress perspective.” Garon, *supra* note 198, at 1326.

244. See Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 ORE. L. REV. 275, 313 n.210 (1989). See also generally Litman, *Compromise*, *supra* note 87, at 880.

245. See *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964).

246. See Alvin Deutsch, *Politics and Poker—Music Faces the Odds*, 34 J. COPYRIGHT SOC’Y U.S.A. 38, 48–49 (1986) (arguing that the § 110(10) exception is evidence of “an erosion of the rights of copyright proprietors”).

organizations have the ear of Congress, but the lack of potential progress values to support the carve-out is indicative of a problem that requires focused public attention. This is especially true if we desire copyright protection to operate on something like an equal playing field or desire the inequities to be constitutionally justifiable.

B. 104A Restoration of Foreign Works

Not every statute will be uniformly consistent or inconsistent with the demands of proper institutional tailoring. For example, applying the institutional tailoring framework shows that when Congress passed the Uruguay Round Agreement Act (URAA) in 1994, it engaged in both constitutional and unconstitutional tailoring. The URAA, codified at 17 U.S.C. § 104A, restored copyright protection to works for which protection had expired because the authors failed to observe then-necessary formalities.²⁴⁷ Only works by foreign authors were eligible.²⁴⁸ The statute granted no restoration to works by US authors.²⁴⁹

Congress passed the URAA ostensibly to meet international intellectual property treaty obligations.²⁵⁰ As Justice Ginsburg recounted in *Golan v. Holder*, Congress was attempting to secure extra copyright protection for American authors in foreign jurisdictions by extending this protection to foreign authors here.²⁵¹ However, Congress did not use the least speech-restrictive means to accomplish this goal.²⁵²

247. 17 U.S.C. § 104A (2012). Failure to observe formalities like including a copyright notice on the work no longer deprives a work of copyright protection. *Id.* § 408(a). Prior to 1989, failing to observe proper formalities could result in a work falling out of copyright protection, which happened to many foreign works restored under § 104A. *See also* Linford, *First Publication*, *supra* note 118, at 606–07. The URAA also “restored” copyright protection to foreign works that never qualified for protection in the first place either because the author’s home country did not have “copyright relations” with the United States, or because the work was a sound recording fixed before 1972. *See Golan v. Holder*, 132 S. Ct. 873, 881–82 (2012); *see also* Jake Linford, *Trademark Owner as Adverse Possessor*, 63 CASE W. RES. L. REV. 703, 738–39 (2013) [*hereinafter* Linford, *Adverse Possessor*].

248. 17 U.S.C. § 104A(h)(6) & (8) (2002).

249. *Id.*

250. *See Golan*, 132 S. Ct. at 879–81. *But see id.* at 911 (Breyer, J., dissenting) (arguing that Congress could have met its treaty obligations in a way that did not cause “so much damage to public domain material”); Elizabeth Townsend Gard, *In the Trenches with § 104A: An Evaluation of the Parties’ Arguments in Golan v. Holder as it Heads to the Supreme Court*, 64 VAND. L. REV. EN BANC 199, 203–09 (Oct. 3, 2011).

251. *See Golan*, 132 S. Ct. at 878 (“Members of the Berne Union agree to treat authors from other member countries as well as they treat their own.” (citing Berne Convention, Sept. 9, 1886, as revised in Stockholm on July 14, 1967, Art. 1, 5(1), 828 U.N.T.S. 221, 225, 231–33)).

252. *See id.* at 911–12 (Breyer, J., dissenting).

The dispute in *Golan* centered on whether the First Amendment or the Progress Clause required such effort.²⁵³

Lawrence Golan and similarly situated plaintiffs had made expressive use of some foreign works that had fallen out of protection and would regain protection under the URAA.²⁵⁴ Golan sued for declaratory and injunctive relief on the grounds that the URAA violated both the Progress and Speech Clauses.²⁵⁵ After two rounds of litigation in the United States District Court for the District of Colorado and the Tenth Circuit, the Supreme Court ultimately rejected Golan's claims.²⁵⁶

The Supreme Court concluded that the restoration of copyright protection to foreign works was not an unconstitutional violation of the Progress Clause requirement that an exclusive right be for a limited time.²⁵⁷ The First Amendment argument, however, was a closer call. During the second round of litigation, the plaintiffs convinced the District Court that Golan and his co-plaintiffs had exercised their First Amendment rights by creating new expression from then-unprotected works.²⁵⁸ The Supreme Court rejected that First Amendment argument as well, concluding that the expressive use by Golan and his co-plaintiffs did not justify "exceptional First Amendment solicitude" of their use or create an inviolable public domain.²⁵⁹

Scholars have criticized the Court's holding in *Golan* broadly on both speech or progress grounds.²⁶⁰ Applying the institutional review framework allows us to focus solely on the statutory disparity in the URAA that restores copyright protection to works by foreign authors but not American authors. From a progress perspective, foreign authors are not more deserving of profit from their work or more

253. See *id.* at 878.

254. See *id.* at 878; see also *id.* at 906 (Breyer, J., dissenting).

255. See *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1216 (D. Colo. 2004), *aff'd sub nom. Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

256. See *Golan v. Holder*, 132 S. Ct. 873, 883–84 (2012).

257. See *id.* at 889.

258. See *Golan v. Holder*, 611 F. Supp. 2d 1165, 1177 (D. Colo. 2009), *rev'd*, 609 F.3d 1076 (10th Cir. 2010), *aff'd*, 132 S.Ct. 873 (2012).

259. *Golan v. Holder*, 132 S. Ct. 873, 891–92 (2012).

260. See e.g., Fromer, *supra* note 135, at 1403–05 (concluding that the URAA might have exceeded the authority granted under the Progress clause); Linford, *Adverse Possessor*, *supra* note 247, at 738–39 (noting that *Golan* inverted the standard notion that the public domain is the baseline over which copyright protection is imposed); Jessica W. Rice, Case Note, "*The Devil Take the Hindmost*": *Copyright's Freedom from Constitutional Constraints After Golan v. Holder*, 161 U. PA. L. REV. ONLINE 283, 298–300 (2013) (stating *Golan* "has issued so broad a license to Congress that ostensibly there remain no principled constitutional safeguards against the public domain's continued erosion."). *But see* Netanel, *Constraints After Golan*, *supra* note 64, at 1103 (arguing that although the opinion in *Golan* narrowly defines the traditional contours of copyright protection, it nevertheless "fortifies and gives First Amendment import to the idea/expression dichotomy and the fair use defense").

dependent than US residents on the incentive effects attributable to copyright protection.²⁶¹ The failure to restore protection to works created by US authors might be justifiable, however, if we could identify a public-access or knowledge-expansion ground to leave US authors less protected.²⁶² If we assume that the general American public has a limited understanding of foreign languages, it is possible that progress for US citizens is optimized by providing the broadest access to the most valuable knowledge in English.²⁶³ That would justify distinguishing between works based on the language in which they were written, but not on the residency of the author.²⁶⁴ Many foreign residents also write or sing in English.²⁶⁵ Other forms of copyrightable expression are not language dependent at all.²⁶⁶ Thus, the disparity between foreign and domestic authors under the URAA lacks a progress clause justification.²⁶⁷

That is not to say that the Supreme Court would necessarily recognize the constitutional implication of denying copyright protection to some classes of speakers. Under the Copyright Act of 1790—the first federal copyright provision—no protection was provided foreign authors.²⁶⁸ The Court assumes the constitutionality of laws enacted by the earliest Congresses because those legislative bodies were comprised of the Framers who drafted the Constitution.²⁶⁹ The URAA is, in some ways, the mirror image of the Copyright Act of 1790, protecting foreign works in disparate ways from domestic works in an effort to secure protection for domestic works on foreign shores.²⁷⁰ Consistent with its

261. See, e.g., Rice, *supra* note 260, at 298–300.

262. See *id.*

263. See Josh Hill, *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669, 700–01, 703 (2009).

264. See *id.*

265. See Juan F. Perea, *Killing Me Softly, with His Song: Anglocentrism and Celebrating Nouveaux Latinas/os*, 55 FLA. L. REV. 441, 442 (2003).

266. See Copyright Act of 1790, ch. 15 § 1, 1 Stat. 124.

267. A broad construction of Congress's treaty powers might be seen to justify the URAA. See, e.g., Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 332 (2002) (“As a practical matter, it would be virtually impossible for the United States to play a leadership role if each individual element in each negotiation had to independently promote the progress of science in order to make implementing legislation constitutional. And if the only way to promote the progress of science were to provide incentives to create new works, we would lose all flexibility.”). But as Heald & Sherry have noted, the Supreme Court has recognized Constitutional limits on Congress's treaty powers in the past, and a limitation grounded in the Progress Clause is equally justified. Heald & Sherry, *supra* note 65, at 1181–83 (citing *Missouri v. Holland*, 252 U.S. 416 (1920)); see *Reid v. Covert*, 354 U.S. 1, 17–18 (1957).

268. See Copyright Act of 1790, ch. 15 § 1, 1 Stat. 124; see also Tyler T. Ochoa, *Copyright Protection for Works of Foreign Origin*, 2 IUS GENTIUM, 167, 167–68 (2008).

269. See, e.g., *Golan v. Holder*, 132 S. Ct. 873, 886 (2012).

270. See *id.* at 889.

general reliance on founding-era statutes to illuminate the scope of constitutional restrictions, the Court could conclude that extending different levels of protection to foreign and domestic authors is standard—or at least one permissible—operating procedure.²⁷¹ One could nevertheless be more confident in the constitutionality of the result reached by Congress if the Court had deigned to ask the question. Thus, while this Article concludes that the differential protection of foreign and domestic authors is not justified on progress grounds, it is more important that courts engage in the institutional review than that they reach the outcomes proposed by the author. The process itself has value.

There are, however, Progress Clause justifications for a different disparity in the URAA. Congress granted certain “ameliorating accommodations” for “reliance” parties who used foreign works before the URAA restored protection.²⁷² Reliance parties may continue to exploit new works derived from a foreign work, pursuant to a compulsory license, so long as the derivative work was created before its copyright was restored.²⁷³ The more the derivative work differs from the restored work, the lower the compensation should be under the compulsory license.²⁷⁴ In addition, the URAA obligates the owner of the foreign work to notify the public of its intent to enforce a restored copyright.²⁷⁵

These special privileges for users of restored works are consistent with the progress values of increasing the knowledge base and rewarding authors.²⁷⁶ The public gets access to the reliance party’s new work, and the owner of the restored work gets the compulsory license as a limited incentive to provide notice to the reliance party.

271. *Cf. id.* at 886–87 (concluding that because federal protection has been extended multiple times to specific patents or copyrights, as well as classes of patent and copyright holders, the URAA is constitutional); *Eldred v. Ashcroft*, 537 U.S. 186, 200–01 (2003) (reaching a similar conclusion).

272. 17 U.S.C. § 104A(h)(4) (2012) (defining reliance party); *Golan*, 132 S. Ct. at 878, 891; *see also* Linford, *Adverse Possessor*, *supra* note 247, at 738, n.164.

273. 17 U.S.C. § 104A(d)(3) (2012).

274. *Id.* § 104A(d)(3)(B) (in the absence of an agreement, compensation is to be set by a district court judge taking into account “the relative contributions of expression of the author of the restored work and the reliance party to the derivative work”).

275. *Id.* § 104A(e).

276. The Court in *Golan* was willing to discount the First Amendment challenge in part because § 104A made some allowance for reliance parties to continue using the restored works, subject to a compulsory license. *See* Linford, *Adverse Possessor*, *supra* note 247, at 738 n.164.

C. Compulsory Licenses for Radio Broadcasts

Prior to Thomas Edison's invention of the phonograph, there was no way to technologically record and reproduce sounds.²⁷⁷ Soon after, phonographs and radio broadcasts made it possible to broadly disseminate performances that first occurred somewhere else.²⁷⁸ For nearly the first hundred years of their existence, sound recordings did not qualify for federal copyright protection, and the artists who produced and distributed them relied on the laws of the several states for protection.²⁷⁹ Congress first extended an exclusive federal right to reproduce and distribute to sound recordings in 1972,²⁸⁰ which continued with the passage of the Copyright Act of 1976.²⁸¹ Sound recordings were not covered by the performance right under the 1976 Act because radio broadcasters were accustomed to paying only the owners of musical works.²⁸² The owner of the sound recording still receives no royalty from "terrestrial" radio stations.²⁸³

Congress later crafted a narrower exclusive right to publicly perform the sound recording via digital audio transmission.²⁸⁴ The digital-audio-transmission performance right granted to sound recordings falls into three tiers, based on the nature of the service that performs the work.²⁸⁵ Internet radio stations that stream content without any listener input, while technically delivering content by digital audio transmission, are treated like terrestrial radio stations and are not required to license a performance right from the owner of the sound recording.²⁸⁶ At the other extreme, the owner of the sound

277. Apparently, the idea of magnetic tape recording was first posited by Sir Francis Bacon in 1627, but Edison was the first to make a feasible technology for recording sound that could be reproduced as such. See Jordan S. Gruber, *Foundation for Audio Recordings as Evidence*, 23 AM. JUR. PROOF FACTS 3d 315 § 7, n.33 (originally published in 1993, updated Feb. 2014).

278. See Alan Korn, *Renaming That Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321 (1992).

279. See Linford, *First Publication*, *supra* note 118, at 614–16.

280. Act of Jan. 21, 1971. Pub. L. No. 92-140, 85 Stat. 391 (amending 17 U.S.C. §§ 1(f), 5(n), 19, 20, 26, 101(e)); 37 C.F.R. § 202.8(b) (1972).

281. Compare 17 U.S.C. § 106(1)–(2) (2012), with *id.* § 106(4).

282. See Erich Carey, *We Interrupt This Broadcast: Will the Copyright Royalty Board's March 2007 Rate Determination Proceedings Pull the Plug on Internet Radio?*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 257, 264 (2008) ("By the time a sound recording copyright was created in 1972, radio broadcasters had enough political influence to persuade Congress to exclude sound recordings from claiming a performance right.")

283. Carey, *supra* note 282, at 266–67 ("Effectively this maintains the status quo; a broadcast of a sound recording on traditional AM or FM radio still does not constitute a compensable performance under the Copyright Act after the enactment of the DPRA.")

284. 17 U.S.C. § 106(6) (2012).

285. Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1629–30 (2001).

286. 17 U.S.C. § 114(d)(1) (2012).

recording can secure a property-like injunction against digital performance by a limited class of operators—those that provide customers with interactive digital transmissions,²⁸⁷ i.e., systems that allow users to pick songs online and play them upon request.²⁸⁸ Thus, to avoid liability for infringing the digital performance right, operators of interactive services must pay the owner’s asking price.²⁸⁹

In the middle ground, the exclusive right to publicly perform the sound recording via digital audio transmission is subject to a compulsory license.²⁹⁰ Operators of subscription services that limit playback requests may perform the sound recording without negotiating with the owner of the sound recording, upon payment of a compulsory license.²⁹¹ Digital subscription services are available over cable or satellite, or over the Internet.²⁹² For the former, the compulsory license rate is calculated pursuant to 17 U.S.C. § 801(b).²⁹³ The rate for Internet radio stations is calculated pursuant to 17 U.S.C. § 112(e)(4), known as the “willing buyer, willing seller standard.”²⁹⁴ Under both standards, the Copyright Royalty Board—a body comprised of copyright judges on rotating appointments—makes the rate determination according to standards set out in the respective statutes.²⁹⁵ The standards differ, and to date, the § 801(b) rate has been much lower than the “willing buyer, willing seller” rate.²⁹⁶ When setting a compulsory license rate for satellite and cable radio stations, § 801(b) requires Copyright Royalty Judges to take into account the interests of all relevant parties potentially affected by copyright protection, including members of the public.²⁹⁷ The “willing buyer, willing seller”

287. *Id.* § 114(j)(7).

288. *Id.*

289. Carey, *supra* note 282, at 287 (“Interactive services do not qualify for statutory licensing, and hence such services must negotiate privately with record labels for the right use of sound recordings.”).

290. *See* 17 U.S.C. § 106(6) (2012); Recording Indus. Ass’n of Am. v. Librarian of Congress, 176 F.3d 528, 530 (D.C. Cir. 1999) (copyright owner of sound recording is required to grant a license “to those who seek to transmit sound recordings”).

291. *See* Andrew Stockment, Note, *Internet Radio: The Case for a Technology Neutral Royalty Standard*, 95 VA. L. REV. 2129, 2138 (2009).

292. *See id.*

293. Cable and satellite broadcasters can opt out of the compulsory license by negotiating directly with owners of sound recordings. *See id.* at 2166.

294. *See* 17 U.S.C. § 112(e)(4) (2012); *see also* Stockment, *supra* note 291, at 2138–39.

295. *See id.* at 2131.

296. *See id.* at 2161–62, 2166.

297. 17 U.S.C. § 801(b)(1) (2012) (compulsory license rates are to maximize the availability of creative works to the public; secure a fair return to the copyright owner; reflect the relative contributions, creative and otherwise, by the owner and distributor; and to minimize disruptive impact on current industry practices).

standard, which governs Internet radio stations, effectively takes into account only the needs of the copyright owner.²⁹⁸

Recently, two proposed corrections began wending their way through Congress. One, the Internet Radio Fairness Act (IRFA), proposes to reduce the amount that Internet stations pay to the lower cable and satellite rate under § 801(b).²⁹⁹ Pandora, one of the largest Internet radio stations, firmly supports the IRFA.³⁰⁰ This is unsurprising, as passage of the IRFA could save Pandora significant licensing fees.³⁰¹ The other, the Interim FIRST Act (FIRST Act), proposes to bring everyone up to the “willing buyer, willing seller” standard, ostensibly to insure that artists and record labels receive the compensation to which they are entitled.³⁰²

Assuming that licensing uniformity is desirable, and one act or the other should pass, the IRFA is better suited to serve progress goals.³⁰³ Satellite and cable stations that charge customers for subscriptions would need to pass an increased license rate required by the FIRST Act on to consumers, while subscription-based Internet radio stations could pass savings on to consumers under the IRFA. Nonsubscription stations would have pass costs, or could pass savings, on to advertisers. If it proves difficult to recoup the increased licensing fees, satellite stations that rely on advertising dollars to provide free Internet music service would need to charge consumers, or work with smaller profit margins. Implementing the FIRST Act could thus reduce the number of satellite and cable radio providers, which in turn would reduce access to less popular programs, as advertisers are more likely to gravitate to top-40 programming.³⁰⁴ Thus, access to some Internet programming would be restricted.

298. See *id.* § 114(f)(2)(B); Stockment, *supra* note 291, at 2165–66.

299. Internet Radio Fairness Act of 2012, S. 3609, 112th Cong (2d Sess. 2012).

300. See Ben Sisario, *Proposed Bill Could Change Royalty Rates for Internet Radio*, N.Y. TIMES, Sept. 23, 2012, <http://www.nytimes.com/2012/09/24/business/media/proposed-bill-could-change-royalty-rates-for-internet-radio.html>.

301. See Andrew Richards, *Opinion: Are Pandora’s Music Genome Operational Costs Worth It?*, O MUSIC AWARDS BLOG (Dec. 5, 2012), <http://blog.omusicawards.com/2012/12/opinion-are-pandoras-music-genome-operational-costs-worth-it>.

302. See Jerry Nadler, *Interim Fairness in Radio Starting Today Act of 2012* (Aug. 7, 2012, 3:36 PM), http://www.nab.org/documents/newsRoom/pdfs/082012_Nadler_streaming_rates_bill.pdf; see also Jennifer Martinez, *Nadler Circulates Draft Legislation on Music Royalties*, THE HILL: HILLICON VALLEY (Aug. 20, 2012, 6:59 PM), <http://thehill.com/blogs/hillicon-valley/technology/244413-nadler-circulates-draft-legislation-on-music-royalties>.

303. *But see* DiCola, *supra* note 11 at 1895-99 (arguing that neither IRFA nor the FIRST Act sufficiently meets a principle grounded in the First Amendment that requires equal treatment of music distributor).

304. *Cf.* Steve Johnson, *Top 40 Radio is Back on Top*, POPMATTERS (Oct. 9, 2009), <http://www.popmatters.com/article/112858-top-40-radio-is-back-on-top>.

In addition, while the owners of musical compositions and sound recordings would recoup more licensing fees per use under the FIRST Act, a high compulsory licensing fee is no more consistent with a natural-right justification for copyright protection than a low one, regardless of the value of the compulsory license. Furthermore, the IRFA uses the §801(b) standard, which requires Copyright Royalty Judges to take into account not only the needs of copyright owners, but also radio stations as access intermediaries and the public as listeners.³⁰⁵ As either compulsory license ignores autonomy interests, Congress should choose the process that better applies progress values and also leads to lower costs.³⁰⁶ Here, the institutional review framework gives us a fairly clear indication of which statutory enactment the public should support.

IV. PUBLIC INSTITUTIONAL REVIEW

When invited to consider First Amendment critiques of the Copyright Act, the Court has been reluctant to apply traditional First Amendment scrutiny, although it has continued to recognize that First Amendment values are inherent in the copyright regime.³⁰⁷ The Rehnquist and Roberts Courts have even stepped back from the active policing of intellectual property protection demonstrated by the Warren Court. For example, in *Graham v. John Deere Co.*,³⁰⁸ the Court held that the state could not secure to an inventor a patent on an invention already in the public domain.³⁰⁹ Turning again to the question of the permeability of the public domain in *Golan*, the Court characterized as dicta the oft-cited perspective from *Graham* that the Progress Clause limits Congress's power to craft intellectual property protections.³¹⁰ The Court in *Golan* found the *Graham* holding that an invention was not eligible for patent protection entirely unrelated to the question of

305. See *supra* notes 293–298 and accompanying text.

306. But see DiCola, *supra* note 11 at 1897 (criticizing IRFA's focus on drastically lowering royalty rates for webcasters because "[e]qual treatment [of music distribution services] has economic benefits that have nothing to do with reducing the level of royalties, which is a separate policy choice.").

307. See *supra* notes 64–68 and accompanying text.

308. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966).

309. See *id.* at 6 (holding that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available"); see also *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229–30 (1964) (patents may issue, under the Progress Clause, only when "a genuine 'invention' or 'discovery' [can] be demonstrated," and limitations on the exercise of the patent must be "strictly enforced" (internal citations omitted)).

310. See *Golan v. Holder*, 132 S. Ct. 873, 887 (2012).

Congress' power to increase a patent's duration.³¹¹ As the Tenth Circuit noted in its review of *Golan*, "Congress has expansive powers when it legislates under the [Progress] Clause, and this court may not interfere so long as Congress has rationally exercised its authority."³¹²

One way to read *Golan*, and its predecessor *Eldred*, is that together they suggest that the current Court is simply uninterested in claims that congressional activity in the intellectual property sphere should remain within the boundaries set by the Progress Clause and the First Amendment.³¹³ The Supreme Court's deferential stance in *Eldred* and *Golan* leaves the public without an effective ex post check on congressional activity. Any amendments to the Copyright Act that cross the President's desk with a signature may be effectively immune from institutional review.

While this Article makes the case for carefully scrutinizing institutional tailoring, it is possible that the Court cannot be moved from looking at copyright as the kind of regime "that does not need to be subjected to normal First Amendment [or Progress Clause] analysis."³¹⁴ But pressing the issue, even on the losing side, has some inherent value. As Professor Schauer notes, "winning is better than losing publicly, but losing publicly is perhaps still preferable to being ignored."³¹⁵ Ideally, a renewed focus on disparate treatment will encourage the Supreme Court to apply more searching constitutional analysis of the Copyright Act, at least where the disparate protection signals potential public choice problems.³¹⁶ And there has been some positive motion—eight of the Justices in *Eldred* "acknowledged that the First Amendment was not totally irrelevant."³¹⁷

Furthermore, public losses can motivate public responses. For example, when the Supreme Court decided, in *Kelo v. City of New London*, that using eminent domain to seize the homes of residents to build a business complex was a "public use" under the Takings Clause, state and local law-making bodies responded quickly to mollify public

311. See *id.* (citing *Eldred v. Ashcroft*, 537 U.S. 186, 202, n.7 (2003)).

312. *Golan v. Gonzales*, 501 F.3d 1179, 1187 (10th Cir. 2007) (citing *Eldred*, 537 U.S. at 213).

313. Subsequent courts construing *Eldred* conclude that the case stands "for the proposition that it is for Congress, not courts, to determine what promotes progress." Oliar, *supra* note 2, at 1834 (citing *Figueroa v. United States*, 66 Fed. Cl. 139, 150–52 (2005)).

314. Adrian Liu, *Copyright as Quasi-Public Forum: Reinterpreting the Conflict Between Copyright and the First Amendment*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 397 (2008).

315. Schauer, *Boundaries*, *supra* note 5, at 1799.

316. See *id.* at 1800.

317. See *id.* at 1799. See also Netanel, *Constraints After Golan*, *supra* note 64, at 1096–97 (arguing that the Court's talk of traditional contours provides a stronger standard for First Amendment than is apparent at first).

disapproval.³¹⁸ David Fagundes has noted that the public outcry to the Court's decision in *Eldred* was relatively muted.³¹⁹ More recently, however, the public has been motivated to respond to proposed legislation that looks like a congressional overreach in the intellectual property realm. In 2011, the Stop Online Piracy Act (SOPA) was introduced in the House of Representatives,³²⁰ and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA) was introduced in the Senate.³²¹ The bills included "highly technical DNS blocking provisions that were strongly opposed by engineers, Internet founders, and law professors."³²² The opposition of informed parties was a starting point, but the passage of SOPA and PIPA seemed *fait accompli* until the general public—tipped off by a day of Internet blackouts on popular services like Wikipedia—responded en masse to protests the bills.³²³ While the public response was certainly encouraged by ISPs and intermediaries who viewed it as a threat to the operation of the Internet,³²⁴ it was the public response, not the centralized opposition, that sent legislators of all political stripes scurrying to distance themselves from the bill.³²⁵

There are two problems facing public advocacy on copyright policy. The institutional review framework can help ameliorate both. First, statutory language can be complex, particularly for recent revisions to the Act.³²⁶ This complexity tends to exacerbate the second problem: it is difficult for a diffuse populace to mobilize as effectively as a smaller, concentrated group with similar goals. This collective action problem makes public advocacy difficult, demonstrably so when we

318. See *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005); David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 652–53 (2010).

319. See *id.* at 653–54.

320. Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (1st Sess. 2011).

321. PROTECT IP Act of 2011, S. 968, 112th Cong. (1st Sess. 2011).

322. David S. Levine, *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105, 137 (2012). "DNS" is an acronym for the Internet's Domain Name System. *Id.* at 112.

323. See, e.g., Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html?_r=1& (reporting that more than 10 million voters contacted lawmakers to voice opposition to the bills).

324. See Maayan Y. Vodovis, Note, *Look over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet*, 40 HOFSTRA L. REV. 811, 824–25, n.120 (2012).

325. See Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, 30 CARDOZO ARTS & ENT. L.J. 153, 154 (2012) ("Neither SOPA nor PIPA will become law as they were initially drafted . . ."); Stephanie Condon, *PIPA, SOPA Put on Hold in Wake of Protests*, CBS NEWS (Jan. 20, 2012), http://www.cbsnews.com/8301-503544_162-57362675-503544/pipa-sopa-put-on-hold-in-wake-of-protests.

326. See, e.g., Joseph Liu, *supra* note 80, at 89, 110.

consider the way copyright law is shaped in favor of copyright owners, often without considering the needs of copyright users.³²⁷

The institutional review framework can facilitate activism, encouraging both copyright critics and enthusiasts to ask at an early stage whether new additions to the Copyright Act are consistent with the congressional mandate. If the Court plans to continue its historical hands-off approach when reviewing copyright enactments for constitutional validity, perhaps the public can crowd source some hands-on responses.³²⁸ The institutional review framework will provide a way to think about when action might be required. With luck, pressure from both courts and the public will encourage the legislative and executive branches to consider the impact of copyright legislation on our constitutional values of preventing the abridgement of speech and promoting of progress. At all stages, applying the institutional review framework can flush out the most obvious and problematic cases of institutional tailoring.

It is hard to imagine frequent negative public responses to copyright legislation like those that met SOPA and PIPA. Nevertheless, the institutional review framework can give the public something relatively obvious to watch for.³²⁹ Where a copyright provision gives extra protection to certain copyright holding institutions rather than all copyright holders, or provides a defense to one institutional user rather than the public as a whole, society should collectively ask whether the disparate treatment is consistent with constitutional values. If not, this could serve as a signal that a bottom-up, crowd-sourced response is appropriate.

Drawing the attention of courts and the public to disparate treatment does not prevent either group from giving careful scrutiny to situations where disparate treatment is not apparent on the face of a statute. The Supreme Court's First Amendment jurisprudence, for example, is full of cases where a statute that is content-neutral on its face is held unconstitutional because it provides too much discretion to the executive.³³⁰ The Court is capable of locating problematic discretion in those cases and would be able to apply the same skill set to determine

327. See Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 535–36 (1998).

328. See *supra* notes 64–67, 307–313 and accompanying text.

329. Unlike the response to *Kelo*, however, there is no direct appeal that the public can make to local jurisdictions to resolve problematic copyright enactments, where the federal statute preempts the field. See 17 U.S.C. § 301 (2012). Still, to the extent members of Congress are at all sensitive to public pressure, some localized displeasure voiced in the right cases is more likely to cause members of Congress to reconsider their stance than no response at all. See *supra* notes 323–327 and accompanying text.

330. See, e.g., *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133, n.10 (1992).

if statutes that are ostensibly egalitarian nevertheless threaten critical constitutional values. The institutional review framework simply provides a structure to consider problematic disparity in the Copyright Act.

CONCLUSION

This Article lays bare the tension between the Supreme Court's extreme distrust of speaker-based speech restrictions and the Court's extremely deferential embrace of Congress's authority to pass copyright legislation that differentiates between institutions. Consistency might suggest stripping all disparate treatment from the Copyright Act, but some disparity may promote the goals embodied in the Progress Clause. At a minimum, examining the institutional tailoring in the Copyright Act by asking which, if any, favored institutions externalize Progress Clause values should sharpen judicial review, shape congressional activity, and provide a path for public action with regard to copyright reform.