

ESSAY

THE PROPER SCOPE OF THE COPYRIGHT AND PATENT POWER

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In 1998, Congress passed the Sonny Bono Copyright Term Extension Act, extending the duration of copyright protection from the life of the author plus fifty years to the life of the author plus seventy years. The constitutionality of this extension has been challenged on First Amendment and other grounds. In this Essay, the authors argue that the language of Article I, Section 8, Clause 8 contains judicially enforceable limits on Congress's power to protect intellectual property and suggest that the 1998 Extension Act exceeds those limits.

Property, these days, is increasingly likely to be intellectual property (IP). As more and more people make their living in the “information economy,” intellectual property sounds like a more and more reasonable proposition. As one of our law professors once said, “I used to think that all property was theft—but that was before I had anything worth stealing.”

As an increasing amount of society's wealth is tied up in intangible assets, strong, clear property rights can make a good deal of sense. But it is also possible to have too much of a good thing, and our society is in danger of reaching that point. Recent scholarship suggests as much: a growing body of literature details the expansion of particular doctrines,¹ the rising burden of IP-related transaction costs,² or the pressing need for collective

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¹ See, e.g., Kenneth L. Port, *The Illegitimacy of Trademark Incontestability*, 26 IND. L. REV. 519 (1993) (arguing that since 15 U.S.C. § 1115(b) speaks of a conclusive presumption of the trademark holder's “ownership of the mark,” trademark incontestability creates what is in effect an unprecedented property right in trademarks).

² See, e.g., Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 700 (1998).

institutions to mediate between individual firms and the mushrooming pile of IP rights they must traverse to do business.³

In this Essay, we approach one part of this problem at the source. We argue that there are limits on Congress's power to create and extend intellectual property interests. Such limits are "internal" in the sense that they are the result of the very same constitutional provision giving rise to Congress's power in the first place, the Copyright and Patent Clause of the Constitution which grants the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁴

We argue that the language of the Copyright and Patent Clause may restrict some of Congress's more far-reaching efforts at promoting intellectual property in recent years, particularly in passing *ad hoc* extensions of copyrights and patents for the benefit of individual companies. We then suggest some approaches that courts might take in evaluating, and perhaps striking down, congressional actions in this area.

In one sense, there is nothing novel about our approach. From the earliest days of our nation to the present era, courts have repeatedly stressed that Congress's intellectual property powers under the Copyright and Patent Clause are limited. Courts, however, have been somewhat reticent when the question of defining those limits has arisen. We hope to encourage a less deferential approach in the future.

I. SOME HISTORY AND BACKGROUND

One characteristic of legally granted monopolies is their tendency to be misused by those in power. The grant of a legal monopoly, after all, constitutes an easy way for the state—or those in control of state power—to reward friends without spending state money.⁵

³ See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1301 (1996).

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ See Robert P. Merges, *The Economic Impact of Intellectual Property Rights: An Overview and Guide*, 19 J. CULTURAL ECON. 103, 110–11 (1995). For an account featuring this factor in the genesis of our own intellectual property regime, see 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.

Not surprisingly, the grant of monopolies becomes particularly attractive to politically embattled leaders faced with government revenues that are inadequate for their purposes. Monopolies for intellectual property are not immune from this tendency. Indeed, our modern system of copyrights and patents arose in reaction to exactly this state of affairs. Cries of unfair influence led English subjects to protest the grant of royal monopolies under Queen Elizabeth I and King James I:

[In the late sixteenth century,] malpractices began to creep in that were to bring [the patent system] into disrepute and ultimately threaten its existence . . . [Finally,] a bill in 1624 [was] enacted as the Statute of Monopolies.

Courtiers who extorted large sums from petitioners as the price of advancing their claims were roundly condemned. But most offensive of all was the granting of monopoly powers in established industries . . . to courtiers whom the crown could not otherwise afford to reward.

These abuses parliament sought to eradicate in 1624 by the restriction of letters patent, conferring monopoly powers, to first inventors alone. The validity of royal licenses would henceforth be liable to trial at common law, and anyone aggrieved by them could sue for relief.⁶

The Founding Fathers did not forget this history lesson. The constitutional clause enabling Congress to pass patent laws explicitly states that patents shall be granted to “inventors” for their “discoveries” and that these grants shall be “for limited times.”⁷ Thus, the grant of copyright and patent power in the Constitution was intended to provide a positive incentive for technological and literary progress while avoiding the abuse of monopoly privileges.⁸ As Joseph Story put it:

It is beneficial to all parties, that the national government should possess this power; to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy the value of their rights; to the public, as it will promote the progress of science and the useful arts, and admit the people at large,

PROP. L. 1, 34–35 (1994) [hereinafter *To Promote the Progress of Science*].

⁶ CHRISTINE MACLEOD, *INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660–1800* (1988), 14–15.

⁷ U.S. CONST. art. I, § 8, cl. 8.

⁸ *See id.* (setting forth Congress’s power to grant copyrights and patents in order to “Promote the Progress of Science and the Useful Arts”).

after a short interval, to the full possession and enjoyment of all writings and inventions without restraint

It has been doubted, whether [C]ongress has authority to decide the fact, that a person is an author or inventor in the sense of the [C]onstitution, so as to preclude that question from judicial inquiry. But, at all events, such a construction ought never to be put upon the general terms of any act in favour of a particular inventor, unless it be inevitable.⁹

Story's characterization seems to mesh with our own: that the general evils of monopoly are overcome, in this specific instance, by the benefits accruing to the public from encouraging authors and inventors to create and invent, and to make their works public. Story makes another important point in discussing congressional power: he doubts that Congress has the power to make the question of authorship or invention a purely legislative one, beyond judicial review, and is suspicious of special—as opposed to general—legislation on the subject.

General legislation, of course, often requires administration, and even before the drafting of the Constitution, the need for a special patent administration was becoming apparent. This was due in no small part to the controversy over steamboat patents raging at the time.¹⁰ In the 1770s and 1780s two rival inventors, James Fitch and Charles Rumsey, each claimed invention of a workable steamboat.¹¹ As was the custom in colonial times, they sought protection for their inventions at the state level.¹² The result was that, as each presented his case to a new state legislature, conflicting and overlapping monopolies were granted.¹³ To

⁹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 558–559 (RONALD D. ROTUNDA & JOHN E. NOWAK eds., 1987).

¹⁰ The following account draws on JAMES THOMAS FLEXNER, STEAMBOATS COME TRUE: AMERICAN INVENTORS IN ACTION (1944).

¹¹ See *id.* at 73–76 (discussing Fitch) and 66–69 (discussing Rumsey).

¹² See *id.* at 87–100 (describing various state patents granted in Virginia, Pennsylvania, New York, and Delaware).

¹³ See Walterscheid, *To Promote the Progress of Science*, *supra* note 5, at 22–23:

Although the states in their individual capacities had sought to provide some form of limited-term exclusive rights to inventors and authors, by early 1787 the defects in the state copyright and patent customs were obvious. The most singular defect was that states only could legislate with respect to their own territory. Thus, state patents and copyrights could be infringed with impunity in adjoining states. Obtaining multiple state patents or copyrights was time consuming, expensive, and frequently frustrating. Moreover, consistency in terms and conditions varied from state to state. With regard to patents, no guarantee of consistency from patent to patent existed even within a particular state because each patent required a private legislative act. Furthermore, what a state could grant, it could also take away, and on occasion did so.

clarify their rights, each inventor sought special legislation from the federal government, then operating under the Articles of Confederation.¹⁴

The situation rapidly became quite confused, and the factors surrounding each inventor's claim were hotly disputed. The battle for credit as to priority of invention was fought in individual meetings with each state's representatives, as well as by publishing pamphlets purporting to set forth the "true" story of the steamboat's invention.¹⁵ Even George Washington became involved as a supporter of Rumsey.¹⁶ But because the status of federal grants at the time was unclear, not much progress was made. Nevertheless, the steamboat case, with its complex facts pleaded to inexperienced legislators, was an important impetus behind the call for a uniform national patent system in the Constitution and then in the first Congress. Consequently, the 1790 Patent Act was among the first orders of business taken up in the new federal legislature.¹⁷

The steamboat case shows, among other things, that the complicated and idiosyncratic facts associated with patent disputes are ill-suited to resolution in a legislative forum. Busy legislators, with little expertise in steamboat technology, were called upon to resolve a complex dispute between rival claimants based on little more than their innate sense of justice. And John Fitch, a somewhat untutored frontiersman, always felt that the better connected and courtier James Rumsey had a distinct advantage in the arena of legislative influence.¹⁸ Both the real and potential unfairness of such an *ad hoc* approach was understood at the time to militate in favor of the creation of a nonpolitical system.¹⁹

In tracing the next step in the development of a professional, specialized patent agency, the experience of Thomas Jefferson is instructive. He was the only President to serve as a patent examiner, something that speaks volumes about the perceived im-

¹⁴ See *id.* at 124 (discussing Fitch's proposed bill before Congress in 1787 and 1788).

¹⁵ See *id.* at 122–24.

¹⁶ See *id.* at 82 (describing Washington's influence in obtaining state protection, and his role in Rumsey's steamboat company).

¹⁷ See P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC'Y 237, 240 (1936).

¹⁸ See Flexner, *supra* note 10, at 132–33.

¹⁹ See Edward C. Walterscheid, *Priority of Invention: How the United States Came to Have a "First-to-Invent" Patent System*, 23 AM. INTEL. PROP. L. ASS'N Q.J. 263, 265 (1995) [hereinafter Walterscheid, *Priority of Invention*].

portance of patent scrutiny two centuries ago.²⁰ As Secretary of State, Jefferson devoted a great deal of energy to examining the patent applications that came before him. It soon became apparent, however, that a Secretary of State—even one as interested in technology as Jefferson—simply lacked the time to do the job properly.²¹ In response to this problem, a new patent system was enacted in 1793 that allowed inventors to register their patents in Washington without examination, leaving questions of patent validity to the courts.²² This, too, proved unworkable as the system became flooded with spurious patents.²³ The final step in establishing today's patent system came in 1836, when the forerunner of today's Patent Office was established to examine each application and pass on its merits.²⁴

Taken together, the steamboat example and Jefferson's experience demonstrate that there is considerable wisdom behind the notion of a patent *system* with administrative regularity. Such a system is not only fairer to applicants and more regular in its results, but also—because professional patent examiners are likely to be far more expert than legislators, judges, or Secretaries of State—more efficient.

II. THE POLITICAL ECONOMY OF PATENT EXTENSIONS

Nobel prize-winner Douglass North has argued that governments very rarely define property rights in ways that maximize economic growth.²⁵ Great Britain, in this view, was fortunate enough to evolve efficiency-enhancing institutional structures (including property rights) that in turn set the stage for economic growth.²⁶ Such is the case, North argues, with the emergence of modern patent systems.²⁷ For North, the sovereign abuses of mo-

²⁰ *See id.*

²¹ *See* Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 JOHN MARSHALL L. REV. 269, 293 (1995) (quoting a letter from Jefferson describing the burdens of patent examination duty).

²² *See id.* at 292–97 (describing the origin and passage of the 1793 Act).

²³ *See* Edward C. Walterscheid, *The Winged Gudgeon—An Early Patent Controversy*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 533 (1997) (describing the origins of the 1836 Act).

²⁴ *See* Patent Act of July 4, 1836, ch. 357, § 6, 5 Stat. 117, 119; *see also* Edward C. Walterscheid, *To Promote the Progress to Useful Arts: American Patent Law and Administration, 1787–1836 (Part I)*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 61 (1997).

²⁵ *See* DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 147–48 (1973).

²⁶ *See id.* at 155.

²⁷ *See id.* at 152–53.

nopoly grants in the sixteenth and early seventeenth centuries are examples of wealth-reducing property rights.²⁸ The Anglo-American patent systems that succeeded the old monopoly privileges, on the other hand, exemplify the brighter, pro-growth side of the property rights picture.²⁹

North's view is consonant with two other traditions in constitutional theory that bear on this Essay: (1) the view, associated with legal historians J. Willard Hurst and Stanley I. Kutler, that the Constitution embodies a spirit of economic dynamism and growth;³⁰ and (2) the more recent "public choice"-inspired literature describing the Constitution as a bulwark against rent-seeking³¹ by special interests.

A. Economic Dynamism and Growth Perspective

The economic dynamism perspective is best exemplified by Stanley I. Kutler's famous account of the *Charles River Bridge* case.³² Kutler described this cornerstone case as a contest between the forces of the privileged and well-positioned holders of an old state charter to operate a ferry crossing and the dynamic new forces that led a group of entrepreneurs to propose building a bridge.³³ Faced with the choice of upholding the original charter against a claim of impairment of state contracts and allowing the new bridge, the Supreme Court chose the latter.³⁴ The general lesson was the defeat of the entrenched charter-holders' rent-seeking and the liberation of vigorous economic forces of

²⁸ See *id.* at 148–49. Cf. WILLIAM J. BAUMOL, ENTREPRENEURSHIP, MANAGEMENT, AND THE STRUCTURE OF PAYOFFS 1 (1995) (arguing that entrepreneurs will innovate either productively or, alternatively, via rent-seeking schemes, depending on the incentives they face).

²⁹ See DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 164–65 (1981) (“It is only with the Statute of Monopolies in 1624 that Britain developed a patent law.”).

³⁰ See STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971); JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH (1964).

³¹ Economists define “rent” as a supra-normal return, i.e., revenue higher than would be necessary to justify a given investment, taking into account a “normal” level of profit. See Alan W. Evans, *On Monopoly Rent*, 67 LAND ECON. 1, 2–4 (1991). Rent-seeking is the expenditure of resources in an effort to capture these supra-normal returns; lobbying for special legislative privileges is a classic example. See JAMES M. BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 7 (1980).

³² STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

³³ See *id.*

³⁴ See *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

change.³⁵ Kutler's antinomic title—"Privilege and Creative Destruction"—describes what is at stake in many proposals to extend intellectual property rights. Our appeal is to maintain the early nineteenth-century, pro-growth conception of the Constitution.³⁶

B. Public Choice Literature on Rent-Seeking

The second literature, on public choice, sees the Constitution as a mechanism designed to prevent well-organized interest groups from obtaining special favors from the government.³⁷ In scholarship extending back to the mid-1980s, authors such as Jonathan Macey have argued that the Constitution was designed primarily as a bulwark against rent-seeking. It is tempting to agree with some of Macey's critics, however, and argue that the Constitution did not enact James Buchanan's *The Calculus of Consent*.³⁸ Cass Sunstein, in particular, sees the Constitution as a "republican" means of transcending interests, rather than simply a well-oiled mechanism for reconciling them.³⁹ But for our purposes, it is not necessary to enter deeply in this debate. Regardless of whether the Copyright and Patent Clause represents a larger theme in the design of the Constitution, it does limit one specific congressional power. This limit originated in British analogues that were explicitly designed to eliminate rent-seeking abuses. In at least this context, the limit on Congress, and the abuses that informed it, dictate a concrete constitutional approach.

Against this backdrop, we claim that the constitutional footing for intellectual property protection was constructed with inherent

³⁵ Cf. Robert E. Mensel, *Privilege Against Public Right: A Reappraisal of the Charles River Bridge Case*, 3 DUQ. L. REV. 1 (1994) (arguing that the *Charles River Bridge* case introduced Jacksonian themes of economic dynamism and democratic egalitarianism into constitutional discourse).

³⁶ Cf. Charles K. Rowley et al. eds., *Rent-Seeking in Constitutional Perspective*, in THE POLITICAL ECONOMY OF RENT-SEEKING 447, 462–63 (1988).

³⁷ See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247–50 (1986) (discussing ways in which the structure of the Constitution impedes rent-seeking by interest groups); Robert D. Tollison, *Symposium on the Theory of Public Choice: Public Choice and Legislation*, 74 VA. L. REV. 339 (1988) (giving an overview of the "economic theory of legislation").

³⁸ JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962).

³⁹ See, e.g., Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690–91 (1984).

limitations, as well as with a grant of power. The specific language (“to promote progress,” and “for limited times”), the history, and the context of the Clause dictate that the congressional power to create property rights does not extend to non-productive rent-seeking. Congress exceeds its authority to grant property rights when those rights do not promote progress, or are not sufficiently limited in time. Members of Congress should keep this in mind when considering the many bills for “private relief” and term extensions that they now receive. And, failing that, the courts must exercise their authority to enforce constitutional limits on the Copyright and Patent power. To ignore this duty is to risk the kinds of abuses that threatened the economic progress of seventeenth-century Britain, and to turn our backs on the historical transformation of *ad hoc* grants of rent-seeking privileges into rule-based systems for recognizing intellectual property rights.

This history is of particular relevance now, as special legislation extending individual patent terms has become more common. Occasionally, efforts to secure such legislation overreach, as when Swiss pharmaceutical giant Hoffman-LaRoche attempted to sneak a patent extension rider covering its drug Toradol into legislation providing relief for Midwest flood victims.⁴⁰ However, they sometimes succeed, as when G.D. Searle slipped language extending the patent on its drug Daypro into an emergency budget bill.⁴¹ Nor is the matter limited to patents: the Disney copyright on Mickey Mouse was poised to enter the public domain in 2003, but the Walt Disney Company decided that procuring legislation extending that copyright for an additional twenty years was to be its “highest priority.”⁴² The Disney request was folded into a general bill that recently became law,

⁴⁰ *Roche Taradol Patent Language Removed from Senate Appropriations Bill*, PINK SHEET, May 12, 1997, Vol. 59, Issue 19, available in 1997 WL 16952572.

⁴¹ Jim Drinkard, *Drug Firm Seeking Rider on Flood Relief; Hoffman-LaRoche Finds Friends in Senate*, CINCINNATI ENQUIRER, May 3, 1997, at B10.

⁴² The Hotline (American Pol. Network), Aug. 12, 1998, at 41. See also Steve Zeitlin, *Strangling Culture with a Copyright Law*, N.Y. TIMES, Apr. 25, 1998, at A15 (“Dennis Karjala, law professor at the University of Arizona, has noted that under the new law our roly-poly Santa Claus, originally created by the 19th-century cartoonist Thomas Nast, would not have gone into the public domain until 1973. Even the United States Government would have had to pay royalties to use Nast’s Uncle Sam in all of this century’s wars. Just as Uncle Sam and Santa eventually became part of the public domain, available for anyone to use in any season, so eventually should Mickey Mouse and Bugs Bunny take their places in our free-to-all pantheon of cultural icons.”).

and is thus not a classic private bill.⁴³ Still, some experts fear that in today's freewheeling political-funding culture it will not be long until a copyright-reliant company discovers the magic of private intellectual property protection.⁴⁴ Such departures from the norm could well become the norm, with wealthy corporate interests securing by legislative influence what they would not be able to obtain in the normal course of business.

Such extensions raise the standard political collective action problem: the gains to the drug companies or Disney (even after subtracting political contributions and lobbying costs) are enormous and obvious, while the additional harms to consumers are relatively small on a per-person basis and not at all obvious. This is the classic situation in which economic theory tells us government will be over-responsive to the entreaties of well-organized parties:

[S]mall groups have a greater likelihood of being able to organize for collective action, and can usually organize with less delay, than large groups. It follows that the small groups in a society will usually have more lobbying . . . power per capita . . . than the large groups.⁴⁵

This phenomenon certainly has been appreciated by politicians regardless of their degree of economic training, yet what is seldom appreciated is that success in organizing a special interest and pursuing its claims costs society in several ways. In addition to redistributing wealth from society to the small group (in the case of patent extensions, from consumers to the patentee), successful special-interest organizing also increases the likelihood that others similarly situated will seek their own special legislation. As Jonathan Rauch puts it:

In the economy, as in nature, a parasite is set apart from a mere freeloader by its ability to force its target to fend it off. This is the sense in which transfer-seekers are, not so loosely speaking, parasitic: they are not only unproductive themselves, *they also force other people to be unproductive* A bad stockbroker or a pesky real-estate agent can take

⁴³ See The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

⁴⁴ Cf. *United Christian Scientists v. First Church of Christ*, 829 F.2d 1152, 1166 (D.C. Cir. 1987) (invalidating private copyright bill for certain works of the Christian Science religion, but under the Establishment Clause, rather than under the Copyright and Patent Clause).

⁴⁵ MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 41 (1982).

your money if you do hire him, but only a transfer-seeker can take your money if you *don't* hire him.⁴⁶

Thus, political parasites are a double danger: they not only pursue their own self-interested agenda, but also force others into a political “arms race” to protect their own interests. “What is peculiar about the parasite economy, then, is its ability to suck in resources that people would rather invest elsewhere. Activism on one side draws counteractivism on another.”⁴⁷ And, of course, efforts aimed at the political redistribution of wealth make society poorer, not richer. To the extent that people are investing in lobbyists, lawyers, and public relations firms instead of, say, research and development, they are foregoing investments that might benefit society as a whole. In the language of the economic literature on “rent seeking” that describes these behaviors, one must consider “the resource costs of individuals seeking privileges from the government.”⁴⁸

As this literature makes clear, the decision to shift resources in the direction of lobbying is quite rational if there is even a modest chance of success. When the return on lobbying is greater than the average returns on research and development expenditures, lobbying may well turn out to be the more lucrative investment option.

This, of course, is only from the firm’s point of view. From society’s point of view, any expenditure on lobbying that might instead have been invested in research and development is a loss. This is due to the fact that the return from lobbying accrues only to the patent holder, while the return from research and development accrues in good part to society as well. Studies consistently show that, at least for major technological advances, society as a whole gains a very large share of the total value generated by an invention.⁴⁹ Indeed, it is the need for firms to capture

⁴⁶ JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT 72–73 (1994).

⁴⁷ *Id.* at 75. See also Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635 (1995) (discussing costs to society of transfer-seekers and ways constitutional structure may reduce such costs); Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991) (same).

⁴⁸ THRAINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS 278 (1990).

⁴⁹ See, e.g., Zvi Griliches, *Research Expenditures, Education, and the Aggregate Agricultural Production Function*, 54 AM. ECON. REV. 961, 961 (1964) (asserting that the social rate of return on agricultural research is at least 150% greater than the private rate of return to the researchers); Robert E. Evenson & Yoav Kislev, *Research and Productivity in Wheat and Maize*, 81 J. POL. ECON. 1309, 1309 (1973) (arguing that the social return is up to 300% greater than private return); Edwin Mansfield *et al.*, *Social*

some of the value they create through research and development that lies at the heart of private property rights over inventions in the first place. Where lobbying activities are concerned, there is no need to ensure a fair return to firms—the nature of the activity dictates that most of the returns will accrue to them in any event.

This point can be pushed a bit further, for the contrast between a patent system and individual requests for patent extensions is quite striking. Patents encourage *new things*, while requests for patent extensions attempt to preserve *old markets*. Patents are forward-looking, growth-oriented, entrepreneurial—almost (if such a word can apply to a legal construct) optimistic in nature. By contrast, many requests for special treatment are backward-looking, fearful of losing ground, and pessimistic or reactionary in character. Why protect yesterday's breakthroughs for a longer period if there is something new just around the corner? Obviously, efforts to protect old discoveries seem most urgent as excitement about new ones ebbs. Putting aside economic theory, this attitude of impending decline is perhaps the most discouraging thing about such requests; they betray the very spirit of the patent system.

III. TAKING THE COPYRIGHT AND PATENT CLAUSE SERIOUSLY

And perhaps more than just its spirit. For while the Copyright and Patent Clause was certainly drafted without the benefit of modern economic theory, the concerns it embodies mesh closely with the analysis above. Monopolies are bad for the public welfare, both because they impose a “deadweight loss” on society and because they encourage the sort of special-interest maneuvering that consumes valuable resources and tends to corrupt the political system. Although monopolies are generally undesirable, monopolies that “promote the progress of science and the useful arts” by securing to inventors and authors property rights “for a limited time” are the exception. They are monopolies that pay

and Private Rates of Return from Industrial Innovations, 91 Q.J. ECON. 221, 221 (1977) (concluding that the social rate of return on 17 major products was between 77% and 150% greater than the private rate of return); Timothy F. Bresnahan, *Measuring the Spillovers from Technical Advance: Mainframe Computers in Financial Services*, 76 AM. ECON. REV. 742, 753 (1986) (demonstrating very large social gain from mainframe computers, 1.5 to 2.0 orders of magnitude above cost of inventing them).

their own way with new knowledge and creation. The competition that they inspire—because of their limited character—serves the public good by sponsoring invention and creation, rather than competition aimed at corrupting the public's representatives.

Indeed, these sentiments were also held by the Framers, judging from an exchange between James Madison and Thomas Jefferson. Jefferson wrote to Madison arguing in favor of a provision outlawing government-created monopolies, and repeated his position in a second letter: "It is better . . . to abolish . . . Monopolies, in all cases, than not to do it in any."⁵⁰

Madison did not quite disagree, but rather argued that monopolies for intellectual property were a special case. As Madison put it, "With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries they are not too valuable to be wholly renounced?"⁵¹ Of course, for Madison's argument to hold, the monopolies in question must in fact serve as "encouragements" and not simply as political rewards. If the latter, they would seem to be more accurately classed with Madison's "nuisances."

For this to be true, of course, the monopolies must be those described in the Copyright and Patent Clause. They must be "for a limited time" because part of the public's payback is that the invention or creation will eventually enter the public domain. They must also be reasonably calculated to "promote the progress of science and the useful arts," meaning that they must bear some relationship to creativity, not simply political clout.

As the Supreme Court put it in *Graham v. John Deere Co.*:

The [Copyright and Patent] [C]lause is both a grant of power and a limitation It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or

⁵⁰ Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON, 1788, at 442–43 (Julian P. Boyd ed., 1958).

⁵¹ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON, 1788–1789, at 17 (Julian P. Boyd ed., 1956).

social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must “promote the Progress of . . . useful Arts.” This is the *standard* expressed in the Constitution and it may not be ignored.⁵²

This passage clearly states a principle latent in other Supreme Court cases: Congress may not obviate settled administrative practices by overriding constitutional requirements for protection, such as originality in copyright law⁵³ or non-obviousness in patent law.⁵⁴ Not to put too fine a point on it, this means that special legislation extending the patents and copyrights of favored individuals or corporations is often a dubious constitutional proposition. Arguably, at least, legislation extending a particular copyright or patent fails both prongs of the test. First, as an *ad*

⁵² 383 U.S. 1, 5 (1966) (citation omitted). In *Graham* the Court did not discuss the copyright provision, “which we omit as not relevant here.” *Id.* at 5 n.1. There seems to be no reason for interpreting the provision differently given the parallel structure of the clause.

The quoted passage is in stark contrast to the early views of Justice Story, who wrote (in his capacity as a circuit judge):

The [constitutional] power is general, to grant to inventors; and it rests in the sound discretion of congress to say, when and for what length of time and under what circumstances the patent for an invention shall be granted. There is no restriction, which limits the power of congress to enact, [only to] where the invention has not been known or used by the public.

Blanchard v. Sprague, 3 Fed. Cas. 648, 650 (Case No. 1,518) (C.C.D.Mass. 1839). We are indebted to Edward C. Walterscheid for this citation.

⁵³ See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991) (holding that copyrights in factual compilations, such as phone directories, are invalid under the “originality” requirement of the Constitution).

⁵⁴ See 35 U.S.C. § 103 (1998). See also *Trademark-Cases*, 100 U.S. (10 Otto) 82, 94 (1879) (invalidating Trademark Act passed by Congress under Copyright and Patent Clause authority of Constitution):

[A trademark] is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that act. If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, originality is required. And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*; embodied in the form of books, prints, engravings and the like.

Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm’n, 483 U.S. 522, 532 (1987) (“There is no need in this case to decide whether Congress ever could grant a private entity exclusive use of a generic word.”).

hoc (actually, a *post hoc*) reward, it seems unlikely to “promote the progress of science and the useful arts.”⁵⁵ Second, as an extension of a previously granted patent or copyright, it undercuts any constitutionally significant notion of “limited time.”

With respect to the first of these failings, two issues are important. First, the value of intellectual property is that it encourages authors, inventors, and investors, to take risks “on the front end” with the expectation of reaping profits later. A *post hoc* reward, granted on the basis of legislative whim or influence, is unlikely to provide such encouragement as effectively as a regularized system. The vagaries of the political process dictate that extensions will not always be available, and that when they are, they may not always be granted for the most significant inventions or copyrighted works.⁵⁶ In addition, an important aspect of the copyright and patent system’s promotion of creativity lies in the way it ensures that ideas will eventually enter the public domain. Walt Disney, after all, drew on public-domain folk tales when he created such classics as *Snow White* and *Cinderella*. Presumably, future creators will draw on Disney’s work once it enters the public domain. The same is true of pharmaceutical research, or any other field of technology in which cumulative invention is the rule. Such opportunities are frustrated by legislation that keeps creative or inventive works out of the public domain for years or decades beyond those needed to encourage innovation.

Second, special legislation extending patents and copyrights does violence to the constitutional time limits that apply to the grant of intellectual property rights. Patents and copyrights are granted for a “limited time.” The length of that time, of course, is discretionary, and Congress has fixed copyright and patent

⁵⁵ It must be admitted, though, that at least under some theories of innovation, megawards to highly successful inventors may serve as the primary spur to further invention and innovation. For more on this “home run” theory of invention, see F.M. Scherer, *The Innovation Lottery* (June 25, 1998), paper presented at NYU Law School Conference on Intellectual Products: Novel Claims to Protection and Their Boundaries, Florence, Italy (June 25, 1998) (on file with the authors).

⁵⁶ See, e.g., Library of Congress, Congressional Research Service, *The History of Private Patent Legislation in the House of Representatives*, Jan. 31, 1978, reprinted in *Hearings on Private Patent Litigation (H.R. 2882) before the House Committee on the Judiciary, Subcomm. On Courts, Civil Liberties, and the Admin. Of Justice*, 98th Cong., 2d sess. (Sept. 13, 1984) (written by Christine P. Benagh), at 97, 102 [hereinafter *Library of Congress Report*] (patent extension denied to Oliver Evans, a very important early nineteenth century inventor; yet granted for many minor inventions).

terms at varying lengths throughout our history.⁵⁷ Yet while the length of the generally applicable term is largely at Congress's discretion (including, under the Patent Act in effect for part of the nineteenth century, a renewal term), once the patent or copyright has been granted we know the length of its maximum "limited time." When the term is subsequently extended, that "limit" is abolished because, in principle, there is no reason that it cannot be extended more than once. Can anyone doubt that now that Disney has the twenty-year extension on Mickey Mouse that it wanted, it will be back in 2023 asking for another? If the language of the Clause is to mean anything, the grant of an intellectual property right that can be extended by special, *post hoc* legislation can hardly be considered "limited" for constitutional purposes.⁵⁸

Just how radical is our proposal? On the one hand, it would appear to call into question a longstanding practice. A Library of Congress study commissioned in 1984 shows that modest numbers of patent extensions have been part of the patent scene almost from the time of the first Patent Act in 1790.⁵⁹ But the study also shows that most requests for patent extensions traditionally have been denied.⁶⁰ Of the few that were successful, the lion's share involved cases of government infringement.⁶¹ Before contemporary doctrine softened the impact of traditional principles of sovereign immunity, inventors were forced to make special requests for relief when their inventions were, in effect, taken by the government for some public purpose.⁶² A large group of such requests came, for example, in the aftermath of World War II.⁶³ Inventors argued that they had allowed and even encouraged royalty-free government use of valuable war technologies until the war was over, which in some cases meant that

⁵⁷ See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*, 131 n.23 (1997); William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 *CARDOZO ARTS & ENT. L.J.* 661, 669–79 (1996) (reviewing history of copyright term up until 1995).

⁵⁸ Cf. Joseph A. Lavigne, Comment, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act Of 1996*, 73 *U. DET. MERCY L. REV.* 311, 313 (1996) (arguing that the copyright term extension under GATT amendments in 1996 violated the "for a limited time" language of the Copyright and Patent Clause).

⁵⁹ See Library of Congress Report, *supra* note 56, at 102.

⁶⁰ See *id.* at 102–04.

⁶¹ See *id.* at 105.

⁶² See *id.*

⁶³ See *id.*

the patent in question had expired before any compensation could be earned.⁶⁴

It is likely that such requests would today take the form of claims for compensation under the Takings Clause of the Fifth Amendment. Under this approach fair compensation would be paid for the past value of the invention used by the government, and there would be no need for a prospective extension of the patent term.

The 1984 Library of Congress Report is instructive for another reason: it recounts in detail a tradition of congressional unease with the legislation of private patent bills. In particular, the Report shows that Congress consistently acted to consolidate related special requests into new administrative practices, beginning with the first Patent Act itself, which pre-empted a number of special requests for the reward of particular inventions (including the Rumsey-Fitch dispute referred to earlier).⁶⁵ A similar consolidation occurred in the early nineteenth century when the process of ruling on many particular requests for private relief was replaced with an administrative procedure that would determine which patents should be extended for a single, final, seven-year term.⁶⁶ Congress pre-empted another category of special relief when it passed an amendment to the Patent Act permitting alien citizens to file patent applications.⁶⁷ In each case, the evolution of *ad hoc* legislation into a system of regularized procedures subject to judicial review recapitulated the evolution of the modern patent system from its origins as a tangle of royal privileges.⁶⁸ The emergence of administrative regularity does not necessarily show that Congress considered special legislation

⁶⁴ See *id.*

⁶⁵ See *id.* at 101; Edward C. Walterscheid, *Priority of Invention*, *supra* note 19, at 265 (describing disposition of Rumsey-Fitch dispute under 1790 Patent Act).

⁶⁶ See Act of July 4, 1836, ch. 361, § 18, 5 Stat. 117, 124–25 (1846) (granting a seven-year extension for patentees who showed they had failed to obtain “reasonable remuneration for the time, ingenuity, and expense [of the invention], and the introduction thereof into use.”). The 1836 Act reflected its Jacksonian origins in that it established, in the words of Jacksonian Senator Ruggles, not a “regal prerogative” but “a general law . . . without discrimination.” *Report of the Select Committee Appointed To Take into Consideration the State and Condition of the Patent Office*, 24th Cong., 1st sess. (1936), reprinted in 6 NEW AMERICAN STATE PAPERS, SCIENCE AND TECHNOLOGY 47 (1973).

⁶⁷ See Library of Congress Report, *supra* note 56, at 103, (noting that between 1808 and 1836, when the law was changed, Congress passed eighteen special acts allowing aliens to file patent applications).

⁶⁸ See *id.* at 104 (“The principal reasons underlying the passage of the earlier private patent bills [i.e., from 1790 to 1836] had been addressed through general legislation.”).

unconstitutional under the Copyright and Patent Clause.⁶⁹ But it certainly shows consistent congressional doubts regarding the wisdom of excessive legislative treatment. It is our view that the Framers shared these doubts and imposed implicit limits on copyrights and patents.

It is true, of course, that the extension of existing copyrights and patents differs in one way from the discredited practice outlawed by the Statute of Monopolies. Under the old English system, monarchs rewarded court favorites with monopolies on goods that, in the Supreme Court's words, "had long before been enjoyed by the public."⁷⁰ When a patent or copyright is extended, on the other hand, it deals with goods that have previously been "enjoyed by the public" only in accordance with the patent- or copyright-holder's monopoly.

This distinction, however, is not as great as it may seem. In fact, the extension of a patent or copyright interest *prospectively* removes items from the public domain. When a patent or copyright is granted, the creation in question will automatically—by action of law—enter the public domain when the patent or copyright expires. Prior to that grant, the public has no right to the creation in question; the owner could have kept it as a trade secret and secured protection of indefinite length. Upon the granting of a patent or copyright, however, the statutory protection is vested, as is, arguably, the entry of the creation into the public domain when the protection expires. In many cases business plans will be drawn based on that expiration. And even when they are not, it is not too fanciful to characterize the movement

⁶⁹ Indeed, a Congressional Report from 1879 details a number of convincing prudential reasons to deny private patent bills, but does not express the opinion that such extensions are unconstitutional in general. Private bills of various kinds have been upheld as constitutional. *See, e.g.,* *Williams v. Norris*, 25 U.S. (12 Wheat.) 117 (1827) (holding the Court has no jurisdiction over an essentially private act under state law that does not raise federal constitutional issues); *United States v. Gettysburg Electric Realty Co.*, 163 U.S. 427 (1896) (upholding constitutionality of private bill to pay claims on government under expired and later renewed sugar bounty acts). And indeed, there are some very old cases upholding private patent extensions in the face of constitutional challenges. *See* *Evans v. Jordan*, 13 U.S. (9 Cranch) 199, 203–04 (1815); *Evans v. Weiss*, 8 Fed. Cas. (No. 4,572) (C.C.D.Pa. 1809); *Evans v. Robinson*, 8 Fed. Cas. (No. 4,571) (C.C.D.Md. 1813) (all involving congressional statutes extending patents of Oliver Evans). Note that in each case, however, objection of the special bill was premised on the Constitution's prohibition of *ex post facto* laws, not on the copyright and patent clause. Note also that Thomas Jefferson strenuously objected to the outcome in these cases. *See* Letter from Thomas Jefferson to Issac McPherson (Aug. 13, 1813) in *THE WRITINGS OF THOMAS JEFFERSON*, at 326–27 (A.A. Lipscomb ed., 13th ed., 1903). We thank Edward C. Walterscheid for the cites and information in this footnote.

⁷⁰ *Graham*, 383 U.S. at 5.

of the protected interest into the public domain as creating a remainder interest in the public. In this sense, the extension of an already-granted patent or copyright, by depriving the public of the remainder interest it already holds by statute, is in fact the deprivation of a right “enjoyed by the public.” Indeed, a number of rules and doctrines in patent and copyright law are designed precisely to protect the public’s “reliance interest” in fixed expiration dates.⁷¹

We would be remiss if we did not answer one other possible objection to our argument: can’t Congress just extend patents and copyrights by invoking the Commerce Clause, thus rendering our argument beside the point? Certainly some commentators have argued that, in the absence of the Copyright and Patent Clause, Congress would have the power to create a patent and copyright system under its authority to regulate commerce among the several states.⁷²

There is much to this position, but as a criticism of our approach it has one key failing. Instead of the absence of a copyright and patent clause, we have the presence of the Copyright and Patent Clause. That Clause is generally understood to serve as a limit on congressional power, not simply a grant thereof. To allow Congress to do things under its general commerce power that it is forbidden to do under its specifically applicable copyright and patent power would in essence read the Copyright and Patent Clause out of the Constitution. Such an approach could hardly be said to be faithful to the text of the Constitution or the intent of the Framers.

Nor is this observation merely an example of academic curmudgeonism at work. We grant that, at least in the post-*Wickard*⁷³ era, one could argue that Congress possesses the

⁷¹ See, e.g., 35 U.S.C. § 154(c)(2)(A) (Supp. 1998) (failing to provide for remedies against infringers whose activities began before or within six months of passage of Act extending patent term from 17 years from patent grant to 20 years from patent filing); 17 U.S.C. § 104A (Supp. 1998) (giving “reliance parties” a grace period of 12 months to end uses of previously uncopyrighted works whose copyrights were restored under 1995 amendments to the Copyright Act).

⁷² U.S. CONST. art I, § 8, cl. 3. Cf. *Chamberlin v. Uris Sales, Inc.*, 150 F.2d 512 (2d Cir. 1945). Indeed this very theory underlies recent bills aimed at protecting computer databases under copyright-like federal law. See *Collections of Information Antipiracy Act*, H.R. 2652, 105th Cong. (1998).

⁷³ The high-water mark of congressional power under the Commerce Clause is often said to be *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, the Court upheld the regulation of wheat grown upon a farmer’s own land and consumed upon his property by his family and livestock as an exercise of Congress’s power to regulate commerce among the several states—the theory being that such wheat took the place of wheat that

power to regulate intellectual property under the Commerce Clause. The Supreme Court rejected a similar argument made with regard to the bankruptcy power in *Railway Labor Executives Association v. Gibbons*.⁷⁴ “[I]f,” said the Court, “we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.”⁷⁵ “To hold otherwise,” the Court continued, “would allow Congress to repeal the uniformity requirement from Art. I, § 8, cl. 4, of the Constitution.”⁷⁶ The same argument should apply to efforts to override the restrictions imposed upon Congress by the Copyright and Patent Clause.

IV. A FAIRLY MODEST PROPOSAL

As should be obvious, we believe that special legislation to extend copyrights and patents for individuals or corporations should receive the strictest of scrutiny from the courts.

There is an additional value to our approach. As humorist P.J. O'Rourke has said, when buying and selling are controlled by legislation, the first things to be bought and sold will be legislators. Control of corruption was an important goal of our constitutional system, and there is no doubt that the Framers believed that a system of limited and enumerated powers was a significant check on corruption. There also seems little doubt that copyright and patent extension bills—granted almost uniformly to wealthy corporations and big contributors, rather than to struggling basement inventors—constitute exactly the kind of corruption that the limits in the Copyright and Patent Clause were designed to prevent.

As a result, we believe that courts should strictly scrutinize laws extending copyrights and patents that have already been granted. Although it would be difficult, and probably impossible,

would otherwise be purchased on the interstate market for wheat. *But see* United States v. Lopez, 514 U.S. 549, 559–60 (1995) (stressing that the regulation in *Wickard* was economic in character, and that so was wheat growing, and denying that this logic might render the commerce power effectively unlimited). For more on the limits imposed by *Lopez* see David B. Kopel and Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 Conn. L. Rev. 59 (1997) (arguing that Congress may not regulate abortion practices under the commerce power).

⁷⁴ 455 U.S. 457 (1982).

⁷⁵ *Id.* at 468–69.

⁷⁶ *Id.* at 473.

to formulate a satisfactory *per se* rule, we suggest some factors that courts should consider. The first might be called the “extent of the extension”—how many companies or individuals qualify, and how long is the extension? The fewer who benefit, the greater is the likelihood that the extension represents special-interest graft of the sort that the Copyright and Patent Clause was intended to prevent. The longer the extension, the greater is the inroad it represents into the “limited time” prescribed by the Copyright and Patent Clause.

Similarly, statutes that set up a regularized process for extending patents—without naming the beneficiaries explicitly (or implicitly via too-narrow criteria)⁷⁷—are far less suspect than those that merely set up a procedure whereby the Patent and Trademark Office may extend patents held up by lengthy regulatory (typically, Food and Drug Administration) review.⁷⁸ Where extensions are based on some specific and identifiable government error (say a failure to notify a patentee that a patent has been granted, or inordinate delay in processing claims), they are less suspect than they would be if based on other considerations.

One possible approach to the constitutional test we advocate would be to examine a proposed extension from the hypothetical perspective of an author or inventor who is at the very outset of his or her creative work—that is, to ask: could the term of protection possibly serve as additional motivation to set pen to paper, or to sit down at the lab bench? Or does it stretch out so far in time that the latter years of the term are irrelevant to any potential creator? This approach essentially translates proposed patent extensions into the “present value” calculations familiar to accountants. The constitutional rationale for such an approach is simple: the phrase “to promote the progress of science and the

⁷⁷ Cf. 35 U.S.C. § 155A (Supp. 1998) (granting a *very* specific “general” extension, applying for example to a patent for a product “which . . . if during regulatory review . . . the [FDA] notified the patentee, by letter dated February 20, 1976, that such product’s new drug application was not approvable . . . [but] the [FDA] approved, by letter dated December 18, 1979, the new drug application for such product . . .”). This was a patent extension for the drug Lopid, manufactured by Warner-Lambert Pharmaceuticals, Inc.

⁷⁸ Compare 35 U.S.C. § 156 (Supp. 1998), codifying Pub. L. No. 100-418, §§ 9201–9202, 102 Stat. 1107 1569–70; S. Rep. No. 83, 100th Cong., 1st sess. (1987) (describing reasons for special legislative relief for Lopid) with Drug Price Competition and Patent Term Restoration Act of 1984, codified at 35 U.S.C. § 156 (Supp. 1998) (regular extension procedure for general classes of patents). See generally Richard M. Cooper, *Legislative Patent Extensions*, 8 FOOD & DRUG L.J. (1993) (reviewing legislative history of Lopid Bill, and arguing that private bills such as this are well-accepted, constitutional, and in effect, a growth industry).

useful arts” is inherently prospective. It states a utilitarian, incentive-based rationale for intellectual property protection. If the term of protection could not, under any plausible set of assumptions, serve as an incentive, it fails the constitutional requirement of a forward-looking grant of property rights.⁷⁹ When the absence of a plausible incentive is joined by the presence of firm-specific legislation, the conclusion must be that the proposed bill amounts to rent-seeking, pure and simple.⁸⁰ Since we know—based on the closely contemporaneous experience of British abuses of the patent monopoly—that the Framers wanted to avoid just such abuses, we also know that these extensions fail the constitutional test.⁸¹

One argument typically made on behalf of patent extensions is that the invention in question has contributed enormously to the general social welfare.⁸² This is joined in many cases by the assertion that for one reason or another the inventor has not received a commensurate or adequate reward.⁸³ Both arguments

⁷⁹ Extensions only serve as an incentive if they are anticipated at the time a work is created; given how rare they are, this is unlikely. And for many proposed extensions, particularly in the copyright realm, an additional term of protection adds next to nothing in present value terms because of the powerful effect of discounting over time. See, e.g., Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1223 n.115 (1996) (demonstrating the effects of discounting over time).

⁸⁰ Of course, there must be some room for the classic case of a private bill to relieve government oversight or mistake. See Library of Congress Report, *supra* note 56, at 105 n.101 (affording patent protection where Patent Office had misplaced patent application); *id.* at 106 (restoring patent invalidated as a result of judicial corruption). One way to preserve this traditional congressional safety valve, while at the same time cutting off rent-seeking, is to characterize the government oversight as a taking and grant compensation under the Fifth Amendment.

⁸¹ At the same time, it is clear that even a general intellectual property statute should be invalidated if it extends protection for an absurdly long period. For a good example of proposed legislation that would surely qualify for this treatment, consider a proposal made in the U.S. House of Representatives. The Hon. Mrs. Sonny Bono (R-Cal.) wanted Congress to extend the copyright term to forever minus one day. See 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998), reprinted in 56 PAT. TRADEMARK & COPYRIGHT J. (BNA) 740 (1998). One recently filed complaint even alleges that a series of recent copyright term extensions violate the Constitution. See Hiawatha Bray, *Net Publisher Challenges Law; Harvard Law Faculty, Firm Join Copyright Fight*, BOSTON GLOBE, Jan. 13, 1999, at C1.

⁸² See Library of Congress Report, *supra* note 56, at 105 (requesting patent extension for Samuel Colt's invention of the revolver); U.S. Senate Committee on the Judiciary, Subcommittee on Patents, Copyrights and Trademarks, *Patent Extension Hearing*, 102d Cong., (1991) at 9 [hereinafter 1991 Senate Extension Hearings] (1991 Senate Extension Hearings statement of Sen. John Glenn in support of S. 1506, "A Bill to Extend the Term of the Olestra Patents, and for Other Purposes": "Olestra may be one of the most important food additives in history").

⁸³ See Library of Congress Report, *supra* note 56, at 104–05 (describing numerous extensions granted to inventors who alleged they had not sufficiently recouped investments); 1991 Senate Extension Hearings, *supra* note 82, at 281 (declaring that a ten-year patent extension is required for the Olestra food additive in order to justify needed

beg the question whether Congress has the authority to exercise independent judgment in individual cases. By settling on a generally available patent term (the current statutory source for which, incidentally, has built-in relief for excessive administrative delay),⁸⁴ Congress has exercised its constitutional role of “securing” rights via a systematic administrative procedure. To grant perpetual patents or copyrights would clearly violate the Constitution’s “for limited times” language, even if Congress thought the default statutory term an inadequate reward in a particular case. The same limits on Congress’s ability to “balance” social costs and benefits (under the watchful eyes of a bevy of well-heeled lobbyists) are latent in the remaining language and historical context of the Copyright and Patent Clause. Surely progress will not be “promoted” if every successful invention spawns a lobbying effort aimed at patent extension. And just as surely, the British experience of the late sixteenth and early seventeenth centuries was in the minds of the Framers as they adopted a prudent, limited form of state-backed monopoly for significant “writings and discoveries.”

The key in all these cases is to ensure that Congress is living up to its constitutional duty as spelled out in the Copyright and Patent Clause. Taking this duty and its corresponding limit on congressional power seriously will no doubt require judicial interpretation, just as determining the extent of Congress’s power under the Commerce or Bankruptcy Clauses has required extensive judicial interpretation.⁸⁵ This task should be easier here than it has been elsewhere, however, because of the relatively clear history and text of the Copyright and Patent Clause.

As the Supreme Court has made clear in cases like *United States v. Lopez*,⁸⁶ constitutional limitations do matter, and it is

investment in manufacturing facilities).

⁸⁴ See 35 U.S.C. § 154(b) (Supp. 1998) (granting extensions for excessive patent examination time and appeals of rejected applications).

⁸⁵ Cf. Richard Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 10 (1987) (pointing out that it may be difficult for the judiciary to tell the difference between rent-seeking and efficiency-enhancing legislation: “[C]ourts cannot readily identify purely redistributive legislation, in part because much redistributive legislation may be defensible on efficiency grounds by reference to problems of social peace, free-rider problems, and so forth.”). Of the enumerated grounds, only free riding could plausibly create difficulties for a judge sorting redistributive from efficient private IP legislation. Note that Congress presumably strikes the appropriate balance between appropriation and free riding when it sets the uniform term of protection under copyright and patent law. See generally Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487 (1996).

⁸⁶ 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act as outside

the job of courts to locate and enforce those limitations. The Supreme Court has already recognized such limitations in the Copyright and Patent Clause. Enforcing these limitations will not only uphold both the letter and the spirit of the Clause, but will also remove one source of persistent corruption from the legislative arena.

Congress's Commerce Clause power). *See also, e.g.,* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down Religious Freedom Restoration Act as outside Congress's Fourteenth Amendment enforcement power).