ESSAY

INDIVIDUALISM AND REPUBLICANISM IN THE INTELLECTUAL PROPERTY CLAUSE

Stuart V. C. Duncan Smith[*]

ABSTRACT

The Intellectual Property Clause (the "IPC") presents a microcosm of the founding of the Federal government. Paralleling the venerable mechanisms of the U.S. Constitution, the IPC is a careful balance between power and liberty: the people ceded power to the central government in order to secure the remainder of their liberty. The Founders tuned the balance in the IPC, as they did in the Constitutional as a whole, to allow individuals to pursue self-interested ends under the assumption that this private behavior yields public benefits. A historical analysis suggests that the primary public benefit the Founders sought by including the IPC was the creation and dissemination of new public knowledge. This knowledge was of value to the Founders because it better equips the people to carry out one of their responsibilities in the new republic: to elect wise representatives who could make enlightened decisions on the people's behalf. The conclusions of this Essay are not merely historical trivialities, because they bear on several recent cases from the Supreme Court and suggest that the Court resolved those cases incorrectly.

I. OLD ANSWERS TO NEW QUESTIONS

The law of intellectual property has an unsettled relationship with history. One prominent scholar of this field of law noted in 2001 his surprise to discover that the U.S. Supreme Court had created a "revisionist . . . pseudohistory" of intellectual property law to support its historical arguments in *Graham v. John Deere Co.*, a seminal patent law case from 1966.[1] As patents follow the advancing frontiers of science and copyrights embrace the evolving creativity of an evermore connected culture, the historical law's relationship with history has grown only more tenuous. One commentator's wry words from 1987 seem more true today: "U.S. patent law was first written in 1790, and its principal author, Thomas Jefferson, didn't have much to say

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[1] Edward C. Walterscheid, *The Nature of The Intellectual Property Clause: A Study in Historical Perspective (Part 1)*, 83 J. Pat. & Trademark Off. Soc'y 763, 763 (2001) (describing Graham v. John Deere Co., 383 U.S. 1 (1966)).

about monoclonal antibodies, erythropoietin or tissue plasminogen activator."[2] One could add most any other modern invention or manner by which contemporary culture is created or disseminated to that list. However, despite being utterly ignorant of how science and culture would evolve, the Founders' historical views of intellectual property law find recurrent application in modern case law.[3] The simple reason is that while society eternally renews the subject matter of patents and copyrights, the text and the policies of intellectual property law persist largely unperturbed. Thus, some new questions have very old answers.

One such question for which Jefferson and his fellow Founders might have been able to offer an answer is whether Congress has the constitutional authority to retroactively extend the duration of the protections under patent or copyright law. The U.S. Constitution provides that "Congress shall have power to . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[4] Two recent Supreme Court cases challenged Congress's authority to extend the duration of copyright protection of works about to enter the public domain or to restore copyright protection of works already in the public domain. First, in *Eldred v. Ashcroft*, the Supreme Court affirmed the constitutionality of the Sonny Bono Copyright Term Extension Act, which advanced the expiration of any existing copyrights by twenty years.[5] Then, in *Golan v. Holder*, the Supreme Court rejected a constitutional challenge to the Uruguay Round Agreements Act, which extended copyright protection to several types of preexisting international works that were already in the public domain.[6] Despite spirited dissents,[7] the majorities in both cases

[2] Rick Weiss, *How Do You Patent a New Elephant*, Washington Post, Sept. 20, 1987, *available at* 1987 WLNR 2240758. Jefferson was not actually the author of the Patent Act of 1790, though he was the author of the Patent Act of 1793. *Graham*, 383 U.S. at 7.

[3] *See, e.g.*, Golan v. Holder, 132 S. Ct. 873, 885–87, 889 n.28 (2012); Eldred v. Ashcroft, 537 U.S. 186, 200–04 (2003); *Graham*, 383 U.S. at 6–10.

[4] U.S. Const. art I, § 8, cl. 8.

[5] *Eldred*, 537 U.S. 186 (affirming the constitutionality of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, sec. 102, 112 Stat. 2827, 2827–28 (1998) (codified in relevant portion at 17 U.S.C. §§ 302–304 (2006))). This act is also referred to as the Mickey Mouse Protection Act, since it had the effect of preventing Mickey Mouse from entering the public domain. *See* Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001); Damien Cave, *Mickey Mouse vs. The People*, SALON (Feb. 21, 2002, 6:38 PM), http://www.salon.com/2002/02/21/web_copyright/.

[6] *Golan*, 132 S. Ct. 873 (affirmed the constitutionality of the Uruguay Round Agreements Act, Pub. L. No. 103-465, sec. 514, 108 Stat. 4976, 4976–81 (1994) (codified in relevant portion at 17 U.S.C. § 104A (2006))).

[7] *See Eldred*, 537 U.S. at 222 (Stevens, J., dissenting); *id*. at 242 (Breyer, J., dissenting); *Golan*, 132 S. Ct. at 899 (Breyer, J., dissenting). See *infra* notes 125–127 and

declined to apply any meaningful review, instead deferring to Congress's means[8] and defining the ends so copiously as to leave little meaning to the IPC.[9]

What is perturbing about these decisions is that they give Congress what amounts to a plenary power over intellectual property while the language of the IPC suggests that the power is something less than that. The Founders would not have employed the unique structure of the IPC, a structure found nowhere else in the Constitution,[10] without intending some relationship between "promot[ing] the Progress of Science and useful Arts" and "securing . . . exclusive Right[s]."[11] That is not to say that the language of the IPC is not ambiguous. Scholars debate the meaning of its phrases and relationship of the IPC with the rest of Congress's enumerated powers.[12] However, regardless of how one resolves those questions, the language of the IPC does clearly indicate that the there is some relationship between the phrases and that the Founders intended to do something by associating them. The Supreme Court has in the past recognized that the IPC is "is both a grant of power and a limitation."[13] And yet, the majorities in *Eldred* and *Golan* made no attempt to give that relationship applicable meaning. Although forceful application of the constitutional language may require some difficult line drawing, as Justice Breyer noted in dissent in both cases,[14] that does not

accompanying text for further discussion regarding these dissenting opinions.

[8] *Eldred*, 537 U.S. at 222 (holding that the IPC "empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause."), *quoted approvingly in Golan*, 132 S. Ct. at 888.

[9] *Eldred*, 537 U.S. at 222 (including as appropriate ends securing reciprocal copyrights terms in Europe and encouraging investment in restoration and dissemination of old works); *Golan*, 132 S. Ct. at 888 (including encouragement of dissemination and expansion of the market for U.S. creative works as proper ends for a retroactive extension of copyright protection to works in the public domain).

[10] The IPC is unique in that is both defines a power or policy in the first phrase and identifies the means to achieve that in the second phrase. *See* U.S. Const. art I, § 8. No other enumerated power is structured in this manner. *Id.*

[11] *Id.*

[12] *See, e.g.*, Jeanne C. Fromer, *The Intellectual Property Clause's External Limitations*, 61 Duke L.J. 1330 (2012); 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 (2006); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 Colum. L. Rev. 272 (2004); Lawrence B. Solum, *Congress's Power to Promote the Progress of Science:* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1 (2002).

[13] Graham v. John Deere Co., 383 U.S. 1, 5 (1966); *accord* Trade-Mark Cases, 100 U.S. 82, 93–94 (1879) (invalidating an act for transgressing the Clause's internal limitations).

[14] *See Eldred*, 537 U.S. at 265 (Breyer, J., dissenting); *Golan*, 132 S. Ct. at 906 (Breyer, J., dissenting)

justify abdication of the "duty of the judicial department to say what the law is."[15]

This dissatisfying analysis throws the value of a historical perspective into sharp relief. In this Essay, I argue that the provenance of the IPC furnishes an interpretation of its language and a standard which the courts can apply. This standard is applicable beyond merely originalist arguments since it reflects policies that remain as salient today as they did when the Founders wrote and the people ratified the Constitution. In Part II, I describe how the Founders sought to secure the liberty to pursue individualistic self-interest with the IPC. In Part III, I contend that public knowledge was the primary goal of the IPC due to its relationship with republicanism. Finally, in Part IV, I apply this historic perspective to *Eldred* and *Golan*, concluding that history undermines the majority's conclusions about Congress's unrestrained powers.

II. LIBERTY, POWER, & INDIVIDUALISM

A. The Founders recognized that giving up some power was necessary to protect liberty.

A key precept of the founding of the United States is that the people initially possess all of their liberties. The Constitution's invocation of "We the People of the United States" as the originators of the federal government evidences this conceptual, inceptive state.[16] Analogously, well near 100 years before the delegates began penning the new Constitution, John Locke described the people's "natural[]" position as "a state of perfect freedom to order their actions and dispose of their possessions and persons, as they see fit, within the bounds of the law or nature, without asking leave, or depending upon the will of any other man."[17] Locke's description is an expression of individual sovereignty.[18] James Madison employed this concept and argued in *The Federalist* that a republic is the only "defensible" form of government,[19] in part because the federal and state governments act only on behalf of and through the sovereignty of the people.[20] Thus, this powerful concept of the

[15] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[16] U.S. Const. pmbl.

[17] 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 4, at 189 (London, Whitmore & Fenn, William C. Brown, 1821) (1689) (emphasis omitted).

[18] *Id.* § 27, at 209 ("Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this is no body has any right to but himself.").

[19] *See* The Federalist No. 39 (James Madison).

[20] *See* The Federalist No. 46 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes . . . . [T]he ultimate authority, wherever the derivative may

founding venerates the people as the initial source of all authority.

If the first precept of the founding is the people's individual sovereignty, then the second is that the people can cede some liberty to create governmental powers so as to better secure the remainder. Again, this concept has roots in the preamble of the Constitution, in which the people "ordain and establish this Constitution" including its delegations of authority for the purpose of "form[ing] a more perfect Union."[21] Locke describes this process in the ambiguous term of "consent,"[22] which others would later describe as a "social contract."[23] Of course, a contract is an imperfect description of the process of creating a government. For example, David Hume argued that one can rarely describe the legitimacy of the government in contractual terms and that individual interest in stability is as relevant as any moral obligation attendant to some abstract contract.[24] Similarly, Jefferson expressed other doubts in a letter to Madison in which he questioned how one generation could bind future generations.[25] However, Madison responded astutely that such narrow reasoning disregarded Locke's tacit contract required by equity and the mutual good.[26] Whatever the strength of the contractual metaphor, the principle it alludes to is salient: when forming a government, it is the people who must decide how to balance their retained liberties with those sacrificed to entrust the government with its powers.[27]

The relevance of this balance of centralized power and individual liberty is evident by considering the Constitution as a response to the country's travails under the Articles of Confederation. Madison's notes on the failures of the Articles highlighted a laundry list of deficiencies of the Congress of the Confederation that precipitated a net loss of liberty: states ignored the authority of the central government, states invaded each other's rights, states failed to

be found, resides in the people alone . . . .").

[21] U.S. Const. pmbl.

[22] *See* 2 Locke, *supra* note 17, § 119, at 291 ("*Every man* being, as has been shewed [sic], *naturally free*, and nothing being able to put into subjection to any earthly power, but only his own *consent*; it is to be considered, what shall be understood to be a *sufficient declaration* of a man's *consent, to make him subject* to the laws of any government.").

[23] *See, e.g.*, DAVID HUME, *Of the Original Contract* (1752), *in* ESSAYS AND TREATISES ON SEVERAL SUBJECTS 444, 444 (Edinburgh, James Walker 1825).

[24] *See id*. at 453–54.

[25] *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd ed., 1958).

[26] *See* Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *in* 5 THE WRITINGS OF JOHN MADISON 437, 437–439 (Gaillard Hunt ed., 1904).

[27] *See* Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447, 447–48 (Max Farrand ed., 1911) (arguing that the relevant original understanding is that of "the people in their respective State Conventions where [the Constitution] [received] all the Authority which it possesses.").

engage concerted action though the public interest demanded it, and so on.[28] Indeed, as Alexander Hamilton explained, the very purpose of *The Federalist* was to explicate the failures of the balance struck in the Articles of Confederation and the superior balance the proposed Constitution created—a balance featuring decidedly more central power.[29] Patrick Henry stated clearly the nature of the new balance of power and liberty when he asked, "[w]ill the abandonment of your most sacred rights tend to the security of your liberty?"[30] Of course, Henry failed to draw sufficient support to his position that the new balance skewed too far toward power to the detriment of liberty,[31] and the people acting in their states consented to the Constitution.[32]

While these two precepts of the founding help to explain the macro-scale formation and reformation of the United States, they also illuminate the more particularized scope of the IPC. Prior to the Constitution, intellectual property was not among the prerogatives of the central government.[33] Rather, rights of the intellectual property sort were the haphazard product of state law.[34] As a consequence, these rights had limited territorial application, lacked consistency state-to-state, and created unpredictable rights within each state.[35] Madison recognized both the inefficacy of this fragmented state-by-state approached and the necessity of greater central authority to administer intellectual property rights—ceding power to secure liberty.[36] He wrote in *The Federalist* No. 43 that the "States cannot separately make effectual provision for [patents or copyrights], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."[37] Other Founders at the Constitutional Convention must have agreed since the delegates adopted IPC *nemine contradicente*, meaning without any debate noted in the official

[28] James Madison, Vices of the Political System of the United States, *in* 9 THE PAPERS OF JAMES MADISON 345, 348–58 (Robert A. Rutland et al. eds., 1962).

[29] *See* The Federalist No. 1 (Alexander Hamilton) (noting "the inefficacy of the subsisting federal government" and the "formidable" task of counter those in state governments who "resist all changes which may hazard a diminution of the power").

[30] Patrick Henry at the Virginia Ratifying Convention (June 5, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST 211, 212 (Herbert J. Storing ed. 1981).

[31] *See id*.

[32] U.S. Const. (ratified June 21, 1788).

[33] *See* Articles of Confederation of 1781, art. II (replaced June 21, 1788) ("Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

[34] *See* Edward C. Walterscheid, The Nature of the Intellectual Property Clause 76 (2002).

[35] *Id*. at 76–77.

[36] *See* The Federalist No. 43 (James Madison).

[37] *Id*.

record.[38] In this way, the IPC reflects the Constitution's shifting balance of power and liberty.

The emergence of the language that would become the IPC casts some light on the nature of that new balance. And of course, the nature of that new balance is relevant to defining the proper scope of Congress's authority under the IPC. Intellectual property rights were not at the forefront of the delegates' minds when they convened in May of 1787.[39] None of the state plans included mention of federal powers in this area, and going into the Convention, only Madison noted the benefits of uniform intellectual property laws,[40] but he described such concerns as "[i]nstances of inferior moment."[41] Thus, when the delegates turned to the enumeration of Congress's authorities, they began with prototypes of the resplendent Commerce Clause and the Necessary & Proper Clause, neither of which explicitly created rights for authors and inventors.[42] However, subsequently, the delegates did focus on intellectual property rights, unanimously adopting language adapted by the Committee of Eleven from proposals by Charles Pinckney and Madison.[43] This order of events summons an intriguing question: why would the delegates add the IPC when the other powers would have been sufficient?[44]

This question engenders contemporary debate. However, regardless of whether one concludes that the IPC imposes internal limitations on itself[45] or imposes external limitations on Congress's other powers,[46] the unavoidable observation is that the Founders saw the addition of the IPC as having some

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[38] 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, 26 (1994–1995).

[39] *Id*. at 25–26.

[40] *Id*. at 24.

[41] Madison, *supra* note 28.

[42] Walterscheid, *supra* note 38, at 44.

[43] *Id*. at 44–47, 50–51.

[44] *See* Walterscheid, *supra* note 38, at 29, 33–34. U.S. trademark law lies in the Commerce Clause. *See* The Trade-Mark Cases, 100 U.S. 82 (1879).

[45] *Compare, e.g.*, Paul J. Heald & Suzanna Sherry, *Implied Limits on Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119 (2000) (arguing that several implied principles derived from the IPC constrain Congress), *with* 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 (2002) (concluding that the IPC accommodates the benefits of participation of international markets).

[46] *Compare, e.g.*, Fromer, *supra* note 12 (arguing that the IPC limits Congress's authority to pursue these ends with other enumerated powers), *with* Nachbar, *supra* note 12 (arguing that no such limit exists).

consequence.[47] The reciprocal nature of the balance between power and liberty necessitates a level of care when adjusting that balance, which refutes any argument that the Founders accomplished nothing by adding the IPC. They surely intended some effect on the balance. Whether it was a hard, judicially enforceable limitation on congressional authority, or it expressed a core policy motivating intellectual property rights, their actions should be given the meaning and the consequences they deserve.

B. One end of liberty that the Founders found worth protecting was a meaningful opportunity for individualistic pursuits.

Individualism in the nascent United State owes its origins to many sources, including the Americans' experiences as a frontier colony, but the Founders found the idea expressed well in the work of Scotsman, Adam Smith.[48] Jefferson described Smith's *The Wealth of Nations* as "the best book extant" on "political economy" and that Madison referenced it with some frequency.[49] In addition, John Adams, Robert Morris, Edmund Randolph, and Alexander Hamilton—among others of similar influence—were also known to have read Smith's work in the years preceding the Constitutional Convention of 1787.[50] In fact, the Founders were among the earliest readers of Smith's work.[51] One scholar argued that was *The Wealth of Nations* was an "American book" since Smith "drew so much on the American experience" and he completed it "just as the American crisis was coming to a head."[52] All of this is testament to its influence on the Founders and signals its aptness in describing the sentiments pervading the founding era. Thus, Smith's book provides a strong foundation to understand the role of individualism in the founding of the country.

Smith's prescriptions for the individualistic, market-based path toward prosperity has direct application to the founding of the country and helps to explain the IPC. He wrote that one who directs his industry for "only his own gain" will be "led by an invisible hand to promote an end which was no part of his intention. By pursuing his own interests he frequently promotes that of the

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[47] *Cf*. Walterscheid, *supra* note 38, at 33 (arguing that Congress has as much authority under the Commerce and Necessary & Property Clauses as it does under the IPC). For example, Congress created the federal trademark system with its authority under the Commerce Clause. *See* 15 U.S.C. § 1051–1141n (2012).

[48] Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 Wm. & Mary Q. 897, 901 (2002).

[49] *Id*. at 903 (referring to ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (London, W. Strahan & T. Cadell 1776)).

[50] Fleischacker, *supra* note 48, at 901.

[51] *Id*. at 897.

[52] *Id*. at 903 (internal quotation marks in the first quotation omitted).

society more effectually than when he really intends to promote it."[53] One relevant consequence of this renowned passage is that it suggests certain role for government in promoting individual prosperity: government should facilitate individualistic, self-interested decisions but not direct them. This role of government finds application in *The Declaration of Independence*, in which Jefferson invokes the individualistic rights of "life, liberty, and the pursuit of happiness" while reasoning that that "Governments are instituted among Men" to secure these rights.[54] The influence of Smith's individualism is all the more apparent by the diversion from Locke's property-centric "life, liberty and estate."[55] Thus, Smith provides a mechanism to understand the American aspirational ethos of opportunity and social mobility flowing from individual effort.

A second relevant consequence of Smith "invisible hand" passage is that it suggests a certain role for government in promoting *social* prosperity: carefully crafted institutions can harness individualistic self-interest for society's benefit. However, the Founders recognized that the solution was not unrestrained self-interest. For example, Madison identified the unjust power of impassioned majoritarian factions in *The Federalist* No. 10.[56] Jefferson feared dependence on government if people were allowed to push individualistic self-interest into politics.[57] Even Washington embittered to individualistic pursuits, and he described the inefficacy of the Congress of the Confederation to prevent the harms wrought by the States' self-interested behavior.[58] In response to these concerns regarding individualistic self-interest in politics, the Founders viewed the republic form of government as the solution. John Adams argued that a republic promotes virtue in leadership, which counteracts the trend toward individualistic self-interest.[59] Jefferson agreed that republics have strength due

[53] Adam Smith, *Book IV: Of Systems of Political Economy*, *in* An Inquiry into the Nature and Causes of the Wealth of Nations, *supra* note 49, at 423.

[54] The Declaration of Independence para. 2 (U.S. 1776). Jefferson is, of course, merely articulating the notion discussed *supra* in Part II.A, that a new balance of power and liberty was needed.

[55] Compare *id*., *with* 2 LOCKE, *supra* note 17, § 87, at 259 (noting one's "natural power . . . to preserve [one's] property, that is, [one's] life, liberty and estate"), *and id*. bk. 2, § 222, at 377 (describing "[t]he reason why men enter into society, is the preservation of their property . . . .").

[56] The Federalist No. 10 (James Madison).

[57] *See* Gordon Wood, The Idea of America 219 (2012); Thomas Jefferson, Notes on the State of Virginia 176 (J. W. Randolph 1853) (1784) ("Dependance [sic] begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition.").

[58] Letter from George Washington to James Warren (Oct. 7, 1785), *in* 3 THE PAPERS OF GEORGE WASHINGTON 298 (W. W. Abbot ed. 1992).

[59] John Adams, Thoughts on Government (Apr. 1776), *reprinted in* JOHN ADAMS:

to virtuous leaders.[60] Madison took the defense of the American republic one step further. He argued in *The Federalist* Nos. 10 & 81 that the carefully crafted institutions of the proposed American republic counterposed individualistic self-interest for the socially beneficial goal of stymying majoritarian attempts to trammel liberties.[61] Madison's celebrated political theory finds its roots in Smith's description of competing religious sects.[62] Thus, a depiction of the Founders' application of Smith's "invisible hand" to government emerges. Whether by mixing in virtue or opposing self-interest with self-interest, the Founders sought to create institutions that would channel individualistic behavior toward socially beneficial ends.

Here again the broad strokes of the Constitution paint a cohesive picture of the IPC. Just as Madison envisioned the republic harnessing individualist self-interest to society's advantage, the language of the IPC describes an analogous impetus. Notably, the IPC allows Congress "[t]o promote the Progress of Science and useful Arts," rather than 'to promote science and the useful arts' or 'to progress science and the useful arts.'[63] In contrast to the actual language, which characterizes Congress's role as supportive of some extrinsic process of advancement, the latter two versions would cast Congress's role as the financer and patron or even the inventor and author. The transformation of the language through the Constitutional Convention evidences this distinction. Among the initial proposals for clauses in Section 8 of Article III relating to Congress's authority to influence science and the useful arts that the Convention received on August 18th were those that would give Congress the power to "establish a[] University" and "seminaries," dispense governmental "premiums," and create "rewards."[64] These proposed powers rely more on government patronage rather and less on individualistic self-interest than those conferred in the IPC. That distinction thus recalls Madison's more general defense of the republic.

In addition to dispensing with the other federal powers related to Congress's proprietary authority to influence science and the useful arts, the final, narrowed language of the IPC ties together a specific purpose—"To promote

REVOLUTIONARY WRITINGS 49, 49–53 (Gordon Wood ed., 2011).

[60] *See* Wood, *supra* note 57, at 219 (2012); Jefferson, *supra* note 57, at 176 ("Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue.").

[61] The Federalist Nos. 10 & 51 (James Madison).

[62] *See* Fleischacker, *supra* note 48, at 909.

[63] *See* U.S. Const. art. I, § 8, cl. 8.

[64] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 321–22. In addition, the Convention received proposals that resembled those that would become the IPC. *See id*. at 322 ("To secure to authors exclusive rights for a certain time"); *id*. ("To grant patents for useful inventions").

the Progress of Science and useful Arts"—and method—"by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[65] Notably, the IPC is the only congressional power of this sort.[66] The rationale of the IPC's distinct phrases plays out in a debate between Jefferson and Madison during the Convention. While in France, Jefferson suggested to Madison that the Bill of Rights ought to abolish monopolies "in all cases."[67] Madison responded that while monopolies were "justly classed among the greatest nusances [sic]," limited monopolies for inventors and authors are "too valuable" as "encouragements to literary works and ingenious discoveries" to give up.[68] Madison's point is the same one told by the language of the IPC: patents and copyrights are valuable to society by turning individualistic self-interest into socially beneficial behavior, even though other monopolies *for other purposes* are deleterious. He reiterated in *The Federalist* No. 43 when arguing that the "public good fully coincides in both cases [of patents and copyrights], with the claims of individuals."[69] This is, of course, the same point he made in *The Federalist* Nos. 10 and 51: individualist self-interest makes the republic function for socially beneficial ends.[70]

Thus the IPC draws on the same sentiment that provoked Jefferson to declare the self-evident right to pursue one's happiness and that drew Madison to defend the proposed Constitution's republican form of government. The American sense of individualistic pursuits, informed by Adam Smith's market analysis and theories on religious competition, led the Founders to craft a government that complements, supports, and employs self-interested behavior as means to serve social aims. The Founders made the IPC in this mold, emphasizing individualist self-interest to motivate behavior with private and public benefits.

C. The Intellectual Property Clause employs individualistic self-interest for a myriad of distinct societal benefits.

In drafting the IPC to take advantage of individualistic self-interest, the Founders created a robust engine for invention and creativity that would radiate a multitude of benefits. Rather than imposing a top-down system of governmental "rewards" and "premiums,"[71] the IPC adapts the lessons of

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[65] *See* U.S. Const. art. I, § 8, cl. 8.

[66] *See id*. art. I, § 8; Walterscheid, *supra* note 34, at 11.

[67] Walterscheid, *supra* note 34, at 6 (quoting Letter from Thomas Jefferson to James Madison (July 31, 1788)).

[68] *Id*. at 6–7 (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788)).

[69] The Federalist No. 43 (James Madison).

[70] *See supra* note 61.

[71] *See supra* note 64 and accompanying text.

Smith and Madison to establish social institutions that harness individualistic self-interest to secure public benefits.[72] Historic evidence suggests that the Founders were keenly aware of these public benefits.

Among the public benefits of the IPC was the economic development resultant from the commercialization of new inventions and creative works. One scholar posited that the Founders' intent was to transplant to the United States the Industrial Revolution already underway in England.[73] That scholar further asserted that the Founders thought it was "the duty of enlightened government to aid in the development of . . . new trades and industry."[74] Indeed, of the initial proposals for Congressional powers, one proposal for the IPC made explicit the goal of "promotion of agriculture, commerce, trades, and manufactures."[75] Though the Convention declined to include that language, its consideration indicates the Founders' recognition of its development goals. Hamilton asked, "In what can it be so useful as in prompting and improving the efforts of industry?"[76] Similarly, in a letter to Jefferson, James Rumsey—an inventor notable for his application of steam power in a boat—defended a broad patent act "because I wish my Countrymen to have such Encouragement given to them, as to Cause them to out Strip the world in arts and Sciences."[77] Thus, the Founders were cognizant of the public benefits of commercialization and economic development.

Another public benefit of the IPC was to facilitate a system with which the government could validate the efforts of inventors and authors. This harkens to Locke's labor theory of property which rewards labor with rights.[78] Lord Mansfield cautioned that copyright law should not be bent such that authors "be deprived of their just merits, and the reward of their ingenuity and labour."[79] Madison gave this purpose credence in *The Federalist* No. 43, describing copyright as "a right of common law" and arguing such a right in

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[72] *See supra* Part II.B.

[73] Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 14 (2003).

[74] Walterscheid, *supra* note 34, at 11.

[75] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 322.

[76] Alexander Hamilton, The Report on the Subject of Manufactures (1791), *reprinted in* THE PAPERS OF ALEXANDER HAMILTON 338, 340 (Harold C. Syrett ed. 1966).

[77] Letter from James Rumsey to Thomas Jefferson (June 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 25, at 170, 171; *see* Walterscheid, *supra* note 34, at 98 (noting Washington's support for Rumsey's claim to the invention of the steamboat).

[78] *See* 2 Locke, *supra* note 17, § 27, at 209 ("Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.").

[79] Cary v. Longman, [1801] 102 Eng. Rep. 138 (K.B.) 140 (Lord Mansfield, C.J., explaining the per curium opinion).

inventions was similarly warranted.[80] Justice Joseph Story reiterated this description of copyright as "a common law right" some forty-five years later in his *Commentaries on the Constitution of the United States*.[81] Similarly, one scholar argued that with the patent system, the Founders "intended to reward inventors."[82] Thus, the Founders were aware of the public benefit of validating the efforts of inventors and authors.

Finally, the Founders fashioned the IPC mindful of how the creation of new inventions and creative works unlocks and spreads new knowledge to the public. Nearly a decade prior to the Constitutional Convention, the Massachusetts Constitution of 1780 noted the value of "[w]isdom and knowledge, as well as virtue, diffused generally among the body of the people" when describing the justification for the state's intellectual property provisions.[83] Promotion of public knowledge was within the contemplation of a number of the proposed powers the Convention received on August 18th.[84] Though the Committee of Eleven dispensed with them, their consideration at the Convention suggests awareness of their purposes rather than rejection thereof. As one scholar noted, the ratified language "harmoniously combines the several proposals for congressional authority," as the primary eighteenth century meaning of "science" was knowledge or learning.[85] Thus, the Founders were additionally aware of the IPC's public benefit of spreading public knowledge. As discussed in Part III below, the spread of public knowledge stands above the other justifications for intellectual property rights.

III. KNOWLEDGE & REPUBLICANISM

A. The Founders structured the country's fledgling intellectual property

[80] *See* The Federalist No. 43 (James Madison).

[81] *See* 3 Joseph Story, Commentaries on the Constitution of the United States § 1147 (Boston, Hilliard, Gray & Co.1833).

[82] Walterscheid, *supra* note 34, at 18.

[83] Mass. Const. of 1780, ch. 5, § 2 ("Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth . . . *to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country* . . . ." (emphasis added)).

[84] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 27, at 321–22 ("To establish a University," "To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries," "To establish seminaries for the promotion of literature and the arts and sciences").

[85] Walterscheid, *supra* note 38, at 51.

system to spread public knowledge.

Of all the public benefits noted above, the accretion of public knowledge stands alone for its ability to rationalize and justify the history of the IPC. Only new public knowledge was actually necessary to secure an intellectual property right under the statutory schemes for patents and copyrights enacted during the very first Congress.[86] The Patent Act of 1790 required disclosure of the new invention with sufficient detail such "that the public may have the full benefit thereof."[87] Under the Copyright Act of 1790, disclosure of the map or book—the only subject matter protected by that act[88]—was inherent to any subsequent use of the creative work, meaning that to profit from the creative work the author had to publish it.[89] Furthermore, no author was entitled to a benefit unless first depositing a copy of the creative work with the clerk of the District Court and publishing an announcement of work in a newspaper.[90] And finally, the author had to deliver a copy of the work "to the Secretary of State . . . to be preserved."[91] Thus, while disclosure of the invention or creative work was either required or inherent, thereby ensuring the societal benefit of increased public knowledge, commercialization of the invention or creative work into a good for public consumption that would foster economic development was not required.[92] Rather, both 1790 acts punished commercialization prior to public disclosure by withholding protection in such circumstances.[93] Nor was commercialization alone ever sufficient to engender patent or copyright protection.[94] The temporal proximity between the drafting of the IPC and the enactment of the 1790 acts suggest that their focus on spreading public knowledge reflected the policy of the times.

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[86] Patent Act of 1790, ch. 7, 1 Stat. 109–12; Copyright Act of 1790, ch. 15, 1 Stat. 124–26.

[87] Patent Act of 1790, ch. 7, § 2, 1 Stat. at 110. The most direct modern analog to this language can be found in 35 U.S.C. § 112(a) (2006), which states that the disclosure must include "such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains."

[88] Copyright Act of 1790, ch. 15, § 1–3, 1 Stat. 124–25.

[89] *See* Eldred v. Ashcroft, 537 U.S. 186, 216–217 (2003) ("For the author seeking copyright protection, . . . disclosure is the desired objective, not something exacted from the author in exchange for the copyright.")

[90] *See* Copyright Act of 1790, ch. 15, § 3, 1 Stat. 125.

[91] *Id*. § 4, 1 Stat. 125.

[92] *See* Patent Act of 1790, ch. 7, 1 Stat. 109–12; Copyright Act of 1790, ch. 15, 1 Stat. 124–26.

[93] *See* Patent Act of 1790, ch. 7, § 1, 1 Stat. at 110; Copyright Act of 1790, ch. 15, § 3, 1 Stat. at 125.

[94] *See* Patent Act of 1790, ch. 7, 1 Stat. 109–12; Copyright Act of 1790, ch. 15, 1 Stat. 124–26.

In contrast to the central role of spreading public knowledge, the other public benefits of the IPC suffer from countervailing policies which undermine their ability to explain the history of the IPC. The goal of economic development was important to some of the Founders, notably Hamilton,[95] but not to all. Jefferson resisted economic development, favoring a pastoral vision for the United States.[96] He wrote that "[w]hile we have land to labour then, let us never wish to see our citizens occupied at a work-bench, or twirling a distaff," and he suggested that "for the general operations of manufacture, let our workshops remain in Europe."[97] These misgivings regarding development, and especially government's role in development, might be a reason Jefferson initially opposed any intellectual property right in the United States.[98] One scholar noted that to the Founders, "[t]he modern view that '[t]he patent law is directed to the public purposes of technological progress, [etc.]' would have been almost completely foreign."[99] For example, the first Congress gave the first Copyright Act the simple and direct title of "An Act for the encouragement of learning."[100] Thus the economic development made possible by the commercialization of goods embodying new inventions and creative works is not a sound place to ground the Founders' interpretation of the IPC.

Finally, the theory that intellectual property rights validated the just desserts of inventors and authors had only limited influence in the United States. Of course, hard work was neither sufficient nor necessary for patent or copyright protection.[101] Furthermore, the language of the Constitution prescribes a utilitarian purpose of intellectual property rights: "To promote the Progress of Science and useful Arts."[102] Jefferson in particular ridiculed the idea that Locke's theory would have any effect in American law, challenging the whole notion of property rights in inventions and creative works in the first place. Noting the non-rivalrousness of an idea, he argued that "[i]f nature has made any one thing less susceptible than all others of exclusive property, it is the

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[95] *See* Hamilton, *supra* note 76.

[96] *See generally* Jefferson, *supra* note 57, at 175–77.

[97] *Id.* at 176. For inquiring minds, a distaff is a stick on which wool was wound for spinning. *See Distaff*, Merriam-Webster, http://www.merriam-webster.com/dictionary/distaff (last visited Jun. 28, 2013).

[98] *See, e.g.*, Walterscheid, *supra* note 34, at 6 (quoting Letter from Thomas Jefferson to James Madison (July 31, 1788)).

[99] *Id.* at 18 (quoting Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512, 1536 (Fed. Cir. 1995) (Newman, J., concurring)).

[100] Copyright Act of 1790, ch. 15, 1 Stat. 124.

[101] *See* Patent Act of 1790, ch. 7, 1 Stat. 109–12; Copyright Act of 1790, ch. 15, 1 Stat. 124–26.

[102] U.S. Const. art I, § 8, cl. 8.

action of the thinking power called an idea."[103] Rather, he explained that "[s]ociety may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody."[104] The Supreme Court came to the analogous conclusion that the Copyright Act created those rights possessed by authors and did not merely recognize preexisting common law rights.[105] Thus, while Lockean views of property do support the creation of quasi-property rights in inventions and creative works, it too is not an end unto itself that the Founders saw as worth pursuing. Rather, only the rationale of fostering new public knowledge emerges without significant qualification.

B. Public knowledge was the primary goal of the intellectual property system because of its relationship with republicanism.

The foregoing discussion, describing the cession of power to protect liberty, the importance to the public of the liberty to pursue individualistic self-interest in government as in innovation and creativity, and the singular nature of new public knowledge as an end of the IPC, traces a narrative that situates the IPC in the general constitutional scheme. However, it also begs the question: why was new public knowledge such a sought after goal? In this Essay, I propose that a principle answer to that question was the relationship between new public knowledge and the people's duties in the republican government.

Republican government relies on public knowledge in two interrelated ways. First, effective representation relies on enlightened, virtuous representatives.[106] The Founders felt that the benefit of electing representatives was not only to meet the pragmatic concerns with continental-scale direct democracy but also included the substantive benefit of government by enlightened, virtuous, and dispassionate leaders. Adams argued that there is "no good government but what is Republican" and explained that "[t]he first necessary step then, is, to depute power from the many, to a few of the most wise and good."[107] He asserted that virtue could best "support a frame of government productive of human happiness,"[108] and reasoned:

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[103] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 8 The Writings of Thomas Jefferson, 326, 334 (Andrew A. Lipscomb ed., 1903).

[104] *Id.*

[105] Wheaton v. Peters, 33 U.S. 591, 661–62 (1834).

[106] The main feature of a republic is representation. *See* The Federalist No. 10 (James Madison) (describing a republic as "a Government in which the scheme of representation takes place").

[107] Adams, *supra* note 59, at 50.

[108] *Id.*

> The foundation of every government is some principle or passion in the minds of the people. The noblest principles and most generous affections in our nature then, have the fairest chance to support the noblest and most generous models of government.[109]

Madison also saw the benefit of virtuous leadership, and even as he articulated his theory on the utility of conflicting self-interest, he reasoned that a republic form of government yields leaders "whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."[110] Thus, both Adams and Madison saw the wisdom of representative leaders as a central merit of the republican form of government.

The second manner by which republican government relies on public knowledge is that it enables the people to wisely choose their representatives. For this reason, Jefferson advocated for universal public education in Virginia: "[b]ut of all the views of this law [for free public schooling] none is more important, none more legitimate, than that of rendering the people the safe, as they are the ultimate, guardians of their own liberty."[111] The Massachusetts Constitution of 1780, written by John Adams, makes the link between public knowledge and virtuous government even more explicit, describing "[w]isdom and knowledge, as well as virtue, diffused generally among the body of the people" as "being necessary for the preservation of their rights and liberties."[112] Adams wrote that "[p]ublic Virtue cannot exist in a Nation without private, and public Virtue is the only Foundation of Republics."[113] Furthermore, the link between public knowledge and virtuous government is as important in the states as it is for the federal government, which might be one reason for the Republican Guarantee clause.[114] This link also operates independently of the pragmatic concerns the Founders had about direct democracy and Madison's view of counterbalancing self-interest—both of which are less relevant in the relatively local state governments. Therefore, a principle of republicanism emerges: the public applies its knowledge to elect the wisest representatives who then make better decisions for the people than the people could make for themselves.

Intellectual property rights are so central to the principle of republicanism

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[109] *Id*.

[110] The Federalist No. 10 (James Madison). Madison does note that this effect is not always sufficient, leading into his second and more novel discussion of conflicting factions. *Id*.

[111] Jefferson, *supra* note 57, at 271–75.

[112] Mass. Const. of 1780, ch. 5, § 2.

[113] Letter from John Adams to Mercy Otis Warren (Apr. 16 1776), *in* JOHN ADAMS: REVOLUTIONARY WRITINGS, *supra* note 59, at 49, 61.

[114] See U.S. CONST. art. IV, § 4.

that the former cannot be evaluated without reference to the latter. The very same sentence of the Massachusetts Constitution describing the necessity of public knowledge for liberty went on to describe "the duty of the legislature[]" to intellectual property rights.[115] That the initial proposals for Congress's authorities and the ultimate language in the Constitution so mirrors the language in this progenitorial state constitution suggests strongly their congruent purposes. Even Jefferson, who initial was skeptical of intellectual property rights,[116] came around on the utility of patents, describing some inventions as "worth to the public the embarrassment of an exclusive patent."[117] The reason for his transformation was "[t]hat ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature."[118] Thus, the Founders saw that the intellectual property rights authorized by the Constitution foster the creation and spread of new public knowledge that serves the same ends of public education—namely, a knowledgeable electorate capable of carrying out their responsibilities in this principle of republicanism.

IV. CONTEMPORARY APPLICATIONS

A. The goal of promoting knowledge and republicanism provides the courts with a framework to evaluate congressional action.

This historical analysis reveals a standard that the courts could apply to evaluate the constitutionality of acts grounded on the IPC. Though this Essay notes a variety of policies, the historical analysis suggests that the creation of new public knowledge was the primary policy that motivated the Founders to include the IPC in the Constitution.[119] The purpose of that new public knowledge was to inform the people and improve their ability to carry out their responsibilities in the nascent republic.[120] However, though the goal of new public knowledge is central to the republican form of government, the IPC is a careful balance between power and liberty.[121] Therefore, Congress stands on the firmest constitutional ground when its laws respecting intellectual property encourage the central policy of encouraging new public knowledge. Conversely, Congress's justification for exercising its authority drops

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[115] Mass. Const. of 1780, ch. 5, § 2.

[116] WALTERSCHEID, *supra* note 34, at 6.

[117] Letter from Thomas Jefferson to Isaac McPherson, *supra* note 103, at 334.

[118] *Id.*

[119] *See supra* Part III.A.

[120] *See supra* Part III.B.

[121] *See supra* Part II.A.

precipitously when it strays too far from those ends. Far from endorsing a judicial incursion into Congress's authority, this standard merely informs the confines of the legitimate ends prong of the rational basis test.[122]

This standard notably differs from that in any of the opinions in *Eldred* and *Golan*. The majority in *Eldred* dodged the issue, responding to petitioners' argument regarding the proper ends of legislation pursuant to the IPC with an evasive conclusion about Congress's authority to choose the proper means: "it is generally for Congress, not the courts, to decide how best to pursue the [IPC's] objectives."[123] Then in *Golan*, the majority recognized that the ends of the IPC included "the creation and spread of knowledge and learning" but concluded unconvincingly that dissemination of existing works qualified.[124] In both case, the majorities effectively gave Congress plenary authority to legislate on matters relating to intellectual property.

Justice Stevens, dissenting in *Eldred*, argued that the extension the copyright term was unconstitutional because it serves neither the purpose of "encouraging new *works*" nor of "adding to the public domain."[125] Similarly, Justice Breyer dissented in *Eldred* and argued that the law was unconstitutional because it fails to "act as an economic spur encouraging authors to create new *works*."[126] Justice Breyer again dissented in *Golan*, this time with Justice Alito, and reiterated that an act that restored copyright protection to foreign works already in the public domain was unconstitutional because it "does not encourage anyone to produce a single new *work*."[127] Though the standards employed by the dissents are very close to what I propose in this Essay, the ends are different. While the dissenters focus on the *new work*, the historical analysis here suggests that the proper end to consider is the *new public knowledge*, which can be in a new work or not and can be in the public domain or not. This proposed standard is more nuanced but also more respectful to the constitutional history.

A total of twelve Justices of the United States Supreme Court considered the issues in *Eldred* and *Golan* and did not apply the standard proffered in this Essay.[128] However, the proposed standard exposited in this Essay may still

[122] Whether the explicit language of the IPC limits Congress to use certain means—namely, securing rights to inventions and creative works for limited times—is outside the scope of this Essay.

[123] Eldred v. Ashcroft, 537 U.S. 186, 212 (2003).

[124] Golan v. Holder, 132 S. Ct. 873, 888–89 (2012).

[125] *Eldred*, 537 U.S. at 227 (Stevens, J., dissenting) (emphasis added).

[126] *Id*. at 254 (Breyer, J., dissenting) (emphasis added).

[127] *Golan*, 132 S. Ct. at 900 (Breyer, J., dissenting) (emphasis added).

[128] The Court in *Eldred* consisted of Chief Justice Rehnquist and Associate Justices Ginsberg, O'Connor, Scalia, Thomas, Kennedy, Souter, Breyer, and Stevens. By the time of *Golan* the Court had four new members, Chief Justice Roberts and Associate Justices

have relevance. The Court may find its noticeable lack of analysis unsettling and decide to use such a standard in some future case. This standard does not rely on judicial application. Congress may find reason to justify its actions on constitutional principles. Although the decided trend illustrated in *Eldred* and *Golan* has been to extend copyright terms, and this standard offers a novel perspective in the debate over whether these extensions are good policy. Furthermore, this proposed standard is general enough to be applicable to many other questions regarding congressional authority to legislate on matters of intellectual property—whether related to patent law or copyright law.

B. The bare extensions of copyright terms in Golan and Eldred are not justified by the constitutional history of the Intellectual Property Clause.

Under the standard articulated in this Essay, Congress stood on extremely shaky ground when enacting the laws at issue in *Eldred* and *Golan*. The central problem with the laws is their retroactivity. Extending or restoring existing copyrights has no effect on the creation of new public knowledge, since the public already has access to the knowledge. In *Eldred*, the government argued that the retroactive extension of copyright terms would encourage restoration of old works, thereby increasing public awareness and access to the works.[129] Similarly, in *Golan*, the government argued that restoring copyright protection to works in the public domain encourages the owners of those copyright to invest in distribution and in a market for the works with advertising, again increasing public awareness and access to the works.[130] However, awareness and access to an old, existing work is not the same as encouraging the creation of new public knowledge. The knowledge in question in these two cases was old and available, its age suggesting it had permeated society for decades. In these cases, Congress cannot employ the IPC's central justification of creating and disseminating new public knowledge. Thus, the Court erred in concluding that the IPC justified Congress's actions.

V. CONCLUSIONS

In this Essay, I employ a parallel between the U.S. Constitution as a whole and the history of its enactment on one hand and the IPC on the other. The historical analysis herein reveals that the Founders' thoughts on the former transfer well to the latter. Just as the Founders created the Constitution to adjust the power ceded to the central government so as to preserve the people's

Alito, Sotomayor, and Kagan, though Justice Kagan took no part in the consideration or decision of the case.

[129] *See Eldred*, 537 U.S. at 239 (Stevens, J., dissenting).

[130] *See Golan*, 132 S. Ct. at 909 (Breyer, J., dissenting).

residual liberty, the same process occurred with the IPC and informs the proper scope Congress's authority. Just as the Founders sought to employ individualistic self-interest with properly formed government institution, they sought the same public benefits by fostering the individualistic self-interest of inventors and authors. This study of the congruence of the Constitution and the Intellectual Property Clause reveals also a more fundamental relationship: the Founders saw the primary ends of the IPC as being a primary input necessary for the success of the broader constitutional scheme. New public knowledge—that necessary product of intellectual property laws—drives the principle of republicanism and contributes to the ongoing process of refining that "more perfect Union." The consequence is that Congress's authority wanes when it legislates outside of this relationship. While the path demarcated herein is not the only one that one might follow—after all, the Supreme Court had thus far taken a different route—the analysis of this Essay imparts a cohesiveness to an otherwise disjointed area of law and provides policy considerations applicable well outside the context of their historical genesis.