RECONCILING WHAT THE FIRST AMENDMENT FORBIDS WITH WHAT THE COPYRIGHT CLAUSE PERMITS: A SUMMARY EXPLANATION AND REVIEW

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We need education in the obvious more than investigation of the obscure.

Oliver Wendell Holmes[1]

I

INTRODUCTION

At least since an early article by Professor Melvin Nimmer in the 1970s,[2] there has been some general agreement that Congress is fully *within* its proper power to enact, pursuant to the Copyright Clause of Article I,[3] an act that may nonetheless be of a kind it is *forbidden* to enact because of the restraints placed upon it by the Speech-and-Press Clause of the First Amendment.[4] But just how or why that can be so (or even that it is in fact so[5]) is not all that easy to explain. Indeed, on the face of each respective clause, the First Amendment may well quite reasonably be read to acknowledge that the Copyright Clause is a part of the *same* Constitution. And, since it is, insofar as Congress stays within *its* boundaries (that is, the "boundaries" furnished by the Copyright Clause itself), it would arguably be perverse for a court to read the First Amendment as for-

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1. OLIVER WENDELL HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS 291, 292-93 (1920).

2. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

3. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." U.S. CONST. art. I, § 8, cl. 8.

4. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

5. The Supreme Court has never held that an act of Congress adopted pursuant to the Copyright Clause was either void on its face or invalid as applied on First Amendment grounds (as distinct from being void on its face because of not being within the power actually granted by the clause). *See also* Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 3 n.8 (2001) ("Recent cases have followed the view that copyright requires *no* external First Amendment scrutiny.") (emphasis added).

bidding what the Copyright Clause declares is precisely within the authority of Congress to do.

Of course, the First Amendment is later in time. But nothing on the face of the First Amendment purports to affect the power granted to Congress pursuant to the Copyright Clause. So, again, one may say that whatever is *properly* done by Congress within the permission of the Copyright Clause ought not be said at the same time to be *forbidden* by some other part of the Constitution, at least unless that "other part" so declares, or unless its express provisions are simply incompatible with an earlier part it necessarily displaces and amends. We have already noted that the First Amendment contains no such declaration putting it at odds with the Copyright Clause. And certainly nothing on its face suggests that it in any respect "amends" (that is, displaces) that clause.[6] The First Amendment is a general admonition—namely, that Congress shall make no law abridging the freedom of speech or of the press. The Copyright Clause on the other hand is a very specific, enumerated power, expressly granting Congress discretion simply to secure to authors the exclusive right to their respective writings, albeit for limited times rather than in perpetuity. It would seem again, on this basis as well, puzzling to declare that the First Amendment may forbid something the more specifically "targeted" clause empowers Congress to do. One may well suggest that this is another clear case where the useful maxim, *expressio unius, exclusio alterius est*, appropriately applies.[7]

It happens I fully agree with those who say the First Amendment "limits" what Congress may do pursuant to the Copyright Clause, despite the preceding, introductory thoughts. Still, it has seemed to me that the obvious reason that this is so has not yet been adequately explained or expressed. It is to that end that this brief essay, and these quite summary remarks, are meant to be addressed, with suitable thanks (and apologies) to Justice Holmes.

II

THE FIRST AMENDMENT AND CONGRESSIONAL POWER

Consider the following approach to relating the First Amendment to the powers granted to Congress. We proceed in the following way—by noting that the Constitution provides that: "Congress shall make no law . . . abridging the

6. There are of course amendments that do precisely this. Compare, for example, the provision in the Seventeenth Amendment that Senators from each State shall be "elected by the people thereof," with the provision it displaces, in Article I, Section 3, that Senators from each State shall be "chosen by the Legislature thereof." Here, in the example just given, the respective provisions *are* at odds, and the later in time means to displace the original provision. In contrast, the First Amendment does not appear to be at odds, or in displacement of, the Copyright Clause (rather, it may be wholly "accepting" of that clause).

7. Here, adapting the maxim appropriately, it would stipulate that "what is *expressly* given to Congress to do, is by necessary implication excluded from the provision specifying what Congress is *forbidden* to do."

freedom of speech, or of the press . . . ."[8] Although, to be sure, we note that the Constitution also provides that: "The Congress *shall* have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[9] As we readily agree, as well, that according to the Constitution, Congress shall *also* 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 . . . ."[10]

So, now to start in the simplest way, with our first case. If the act of Congress is one that presumes to abridge "the freedom of speech or of the press," we agree that it is void pursuant to the prohibitory terms of the First Amendment (that is, the law is one prohibited to Congress and such a law, *being* prohibited, is to be given no force of law in the courts). If, on the other hand, the act of Congress is merely one that presumes to regulate some aspect of commerce—whether "with foreign nations," or "among the several states," or "with the Indian Tribes"—it is an act plainly authorized by the Constitution, within the grant of power expressly conferred upon Congress, and it *is* to be given the force of law in the courts. So far so good. The clauses simply speak to different kinds of laws. Nor is there any difficulty in reconciling these clauses. It is simply a matter of identifying the type of law, as fitting either under one of these clauses or under the other, and that is our essential task. It is the task, moreover, if just because, quite plainly, a law may be of *either* type ("a law prohibited" or "a law expressly authorized") but it could hardly, at least *at-one-and-the-same-time*, be *both*.[11]

The necessary rub comes, however, when the act of Congress is concededly one that *does* presume to "regulate" some aspect of commerce (among the several states), *neither more nor less*, and thus is utterly unexceptional (and unexceptionable) as *plainly* within the scope of the positive power thus conferred. But the "commerce" thus "regulated" is itself a product, say, of "*the press*" (for example, a book, a newspaper, a journal, or a leaflet), sent by freight or via some other commercial medium from one state to addresses or recipients in other states or abroad. *And* the manner in which the book (newspaper, leaflet, etc.) is "regulated" is to *forbid* its participation in that commerce, such as it is. So, now, what shall one do about that?

One easy, clean way of resolving this seeming (but perhaps *merely* "seeming") problem is to resolve it directly and simply, that is, without any "clause conflict," and to do so in just the following way: to say that there frankly is no

8. U.S. CONST. amend. I. In brief, merely to paraphrase the Amendment if just for suitable emphasis: "Congress is granted *no* power, indeed, *is hereby denied any power*, to make any law abridging the freedom of speech or of the press."

9. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

10. U.S. CONST. art. I, § 8, cl. 8.

11. Indeed, for how can it be both? For to say that it is "both" is to say that it is "authorized" but also that it is "forbidden," though each is necessarily an exclusion of the other, and thus our assertion would appear to be a mere contradiction in terms.

conflict in the case just put. Rather, the conflict was utterly in one's mind, and it was a conflict *wholly contrived*. There is no conflict, we might well say, because:

> A. The act in question *confines* itself to regulating an aspect of "commerce among the several states," no less here, in a case where it merely involves books, than in any other case (for example, a case involving steel products, pork, beef, drugs, lottery tickets or kitchen sinks); *and*
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> B. That the commerce is, or happens to be, "commerce *in books*," rather than "commerce *in wheat*," or "commerce *in steel*," may be true—but *being* true, how does that bear upon the question? That is to say, is there *anything* to suggest that the power thus expressly given ("to regulate commerce . . . among the several states") is given *only* in respect to *some* kinds of commerce but *not* in respect to other kinds? *But what makes one imagine that that is so?* Nothing on the face of the clause so suggests. Nothing found *elsewhere* in the Constitution, moreover, appears to do so either.[12]

May one yet complain that the act is *nonetheless* "void" or unenforceable because it *is* a law made by Congress, and that *this* law, as made by Congress (and applied as it is) is one that "abridg[es] the freedom of speech, or of the press"? Yes, of course one may *say* this, but then, one may say anything one likes. Saying it, in short, does not make it so. Moreover, the assertion that this *is* just such a law, is, as such, merely what it appears to be: simply an assertion, nothing more. One may even say straightforwardly that, taken *as* an assertion, without something more to back it up, it assumes its own conclusion. It begs the very question, in that it *assumes* that "*the* freedom of the press" extends to a freedom of "marketing books in commerce among the states *even when Congress forbids it to be done*." But *does* it? Why does one suppose that this is so? Isn't this the burden for the person so asserting? And if that person cannot discharge that burden, isn't it obvious that *they have no First Amendment claim even to assert*?

And, surely, this much is plainly right. Unless the freedom of the press extends to, or includes, a freedom to engage in commercial trade (in books) across state lines, *even when Congress decides by law that it shall not be done*, we would say there is no conflict between what Congress has presumed to do on the one hand, pursuant to the power to regulate commerce among the several states, and what the First Amendment forbids on the other. So, let that be conceded as obviously correct.

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12. "Nothing," that is, including the First Amendment as well. The First Amendment obviously does *not* declare that "Congress shall have no power to regulate commerce in books among the several states."

Yet, if that much is so, so also may the obverse be equally true. If the freedom of the press *does* so extend, then the act of Congress must *necessarily* fail, for by stipulation, that the act was conditionally, or even "*apparently* authorized" insofar as it regulates (an aspect of) "commerce among the several states," so it does not fail *merely* under the doctrine of enumerated powers,[13] it turns out *not* to be *finally* or "ultimately authorized" after all, but rather, "prohibited" instead, and prohibited because it runs afoul of the specific "prohibitory words" of the First Amendment which apply (even) in respect to every power given to Congress, whatever that power may be.

In short, and quite consistent with this *latter* view, the "enactment" of the First Amendment (that is, its proposal subsequent to ratification of the Constitution by more than two-thirds of the first Congress in 1789, and its swift ratification within two years by more than three-fourths of the states by 1791) signaled a rejection of Alexander Hamilton's advice that no point would be served by providing an express provision forbidding Congress to make any law abridging the freedom of the press.[14] Instead, the enactment of the First Amendment, rejecting Hamilton's counsel, meant expressly to put affirmative restrictions on the "enumerated" powers of Congress (for example, those of regulating commerce,[15] of taxation,[16] of spending,[17] establishing a post office,[18]

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13. *See*, *e.g.*, Kansas v. Colorado, 206 U.S. 46, 89 (1907) ("[T]he proposition that there are legislative powers . . . not expressed in the grant of powers [to Congress], is in direct conflict with the doctrine that this is a government of enumerated powers."); United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) (Marshall, C.J.) ("[U]nder a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised."); a*pplied in* Trade-Mark Cases, 100 U.S. 82 (1879) (Holding act of Congress providing for registration of trademarks and civil and criminal sanctions for infringers unconstitutional under the enumerated powers doctrine; the act could not be sustained under the Copyright and Patent Clauses because both clauses required some degree of creativity or invention, and many trademarks involved neither one; nor could it be sustained under the Commerce Clause because, on its face, it reached trademarks not involved in any commerce "among the several states" or "with foreign nations."). In brief, the act failed for want of any power vested in Congress pursuant to any of the enumerated powers given to Congress, whether in Article I, Section 8, or elsewhere in the Constitution.

14. *See* THE FEDERALIST NO. 84, at 513-15 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"). Then, albeit in a manner seemingly very much at odds with what he has just declared, Hamilton also went on to say: "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all . . . must we seek for the only solid basis of all our rights." *Id.* at 514.

15. *See*, *e.g.*, Reno v. ACLU, 521 U.S. 844 (1997) (holding congressional restrictions imposing special requirements for posting and accessing "patently offensive" and "indecent" material on the Internet an instrumentality of interstate and of foreign commerce, violates the First Amendment). *See also* the discussion of *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) in note 20 *infra.*

16. *See*, *e.g.*, (albeit in these cases, state taxes), Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding four percent gross receipts tax exempting newspapers and some other publications, but not "general interest" magazines, violates the First Amendment's guarantee of freedom of the press); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (same, re: two percent gross receipts tax from advertising revenue of publications with more than 20,000 weekly circulation).

etc.). Moreover, it did so with an expressed expectation that the courts would honor those restrictions as such in cases where, though the act of Congress *was* one otherwise clearly "within" the scope of some enumerated power, it nonetheless was not consistent with the First Amendment freedoms meant to be preserved from congressional abridgment. So, for example, Jefferson suggested that "a declaration of rights," once added as amendments to the Constitution, would "put into the hands of the judiciary" a "legal check" against Congress when popular sentiment flagged.[19] And likewise, in summing up his reasons for favoring the addition of amendments as a means of forestalling Congress from using any of its enumerated powers in any way inconsistent with respect to the rights and freedoms memorialized in these amendments, James Madison observed: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . ."[20]

III

TENTATIVENESS IN THE FIRST AMENDMENT

And all of this would seem to be quite correct, and quite convincing, too. *Unless*, to be sure, just as there is a tentativeness in respect to whether, say, the power "to regulate commerce among the several states" extends to a certain thing, and Congress may not do so insofar as *that* power may be qualified in some respect by some *other* provision (for example, a provision in the First

17. *See*, *e.g.*, Legal Servs. Corp. v. Valasquez, 531 U.S. 533 (2001) (holding congressionally mandated restriction on use of grants provided pursuant to spending power for certain legal services by grantee organizations inconsistent with, and forbidden by, the First Amendment).

18. *See*, *e.g.*, Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (holding act of Congress requiring Postmaster to intercept and detain certain mail and then destroy it unless addressee registered an affirmative request for its delivery violates the First Amendment).

19. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in part in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 462, 462-64 (Adrienne Koch & William Peden eds., 1944).

20. Address by James Madison before the United States House of Representatives (June 8, 1789), *reprinted in* V THE WRITINGS OF JAMES MADISON 370, 385 (Gaillard Hunt ed., 1904). *See also* I WILLIAM BLACKSTONE, COMMENTARIES pt. 2, app. at 29 (St. George Tucker ed., 1803) ("The danger justly apprehended by those states which insisted that the federal government should possess no power, directly *or indirectly*, over the subject, was, that those who were entrusted with the administration might be forward in considering every thing as a crime against the government, which might operate to their own personal disadvantage; it was therefore made a fundamental article of the federal compact, that no such power should be exercised, or claimed by the federal government, leaving it to the state governments to exercise such jurisdiction and control over the subject, as their several constitutions and laws permit.") (emphasis added); Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (Marshall, C.J.) ("These amendments demanded security against the apprehended encroachments of the general government . . . ."). For merely the most recent example of the Supreme Court applying the First Amendment to strike down an act of Congress otherwise (that is, but for the First Amendment) plainly *within* its enumerated power to enact pursuant to the commerce clause, see *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (holding void on its face a prohibition on consumer advertising of "compounded" drugs—drugs lawful for pharmacies to prepare and to sell, pursuant to a physician's prescription, albeit drugs not submitted for FDA approval pursuant to rigorous FDA testing requirements).

Amendment) so that we cannot know what the power in the Commerce Clause "finally" includes until we have determined what the First Amendment "keeps back" from its ultimate reach, *unless*, I say, *there is also a similar "tentativeness" in respect to the First Amendment itself*, a tentativeness, moreover, of just the very same sort. A "tentativeness" we cannot resolve until we look even *further* to see whether there is something some *other* clause recovers, or reserves (or "keeps back") from the First Amendment, even as we found in the First Amendment in its "keep back" provision qualifying (that is, limiting) the power given Congress to regulate commerce among the several states.

This possibility may strike us as unlikely, even as highly implausible, to be sure. For what might such an additional provision having *this* effect look like, or say?! That's a fair question. Well, perhaps it could look like—and even *say*—something very much like this:

> The 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.

And so, to the extent that Congress enacts legislation pursuant to such power as it *is* so specifically granted *within* the four corners of *this* separate, distinct, freestanding clause, it—Congress—shall surely *not* be thought to have made a law abridging "the freedom of the press." We should surely say this, for indeed, to say otherwise *would* seem now to construe the Constitution "against itself," that is, to read one clause (the First Amendment) to forbid that which another clause (the Copyright Clause) *expressly* declares is *quite all right to do*.[21] On this understanding, then, we should logically conclude, that if Congress has acted "within" this clause, it has made no law that can be said to be a law "abridging the freedom of speech, or of the press." Rather, it has merely made a law that the Constitution itself deems *compatible* with the freedom of the press, *as it takes express care so straightforwardly to declare*.

The logic of this position seems to me to be quite strong, even quite compelling, and it tends, I think, to explain why both commentators and courts still exhibit some genuine uncertainty in this particular area of constitutional law. If Congress *has* acted *within* (and not in excess) of whatever the scope of power expressly granted it by this clause, then whatever provisions securing to the authors the *exclusive* right to *their* respective writings are contained in affirmative legislation, insofar as those provisions are well grounded in the express power as granted by this clause so to enact them, this clause (implicitly) declares

21. Namely, "to do" *what*? To do this: merely by legislation to secure to "authors and inventors, the *exclusive* right to *their* respective writings and discoveries," neither more *nor less*; albeit, to be sure, to secure those exclusive rights for "limited times," rather than in perpetuity (as, without this limitation, Congress might otherwise be inclined—but is not permitted—to do).

that legislation *not* to be a law "abridging the freedom of speech, or of the press."[22]

Of course, many eminently reasonable persons may well feel that proceeding in the manner that this clause provides Congress an authority to pursue (namely, to secure "for limited Times to Authors and Inventors [an] *exclusive* Right to their respective Writings and Discoveries"), may not be as effective as proceeding by some other means, even to stimulate the production (and distribution) of "new" works. Indeed, some may feel that proceeding in this manner may actually be far less effective—and far less conducive to the public good—than proceeding in other ways. So, for example, they may reasonably believe that proceeding instead by providing for "public subsidy" of authors, artists, inventors and other creative people, without, however, granting them any subsequent "*exclusive* right" to control, charge for, or limit copies (rather, the incentive to be creative is the incentive of the subsidy thus provided—set at a level one thinks just right to do its work well), will be the better recourse. Discovery, creative work, etc., are thus "appropriately" encouraged and stimulated—and the product at once becomes released into the public domain. The system is superior by far, one may well conclude, better "balancing" incentives for creative endeavors that also promptly enrich, and become a part of, the public domain.

Such persons may well be right. And I'll grant that they may well be. Moreover, in their favor, we may note in passing that absolutely nothing in the Constitution forbids that this means of "stimulating" "new knowledge" be pursued,[23] even as we know it already is and, indeed, on a very large scale. Let it be so. Moreover let it be admitted they may even be "right" in suggesting that the

22. The D.C. Circuit Court seems to treat the matter in just this way, although it is not entirely clear. *See*, *e.g.*, United Video, Inc. v. FCC, 890 F.2d 1173, 1190 (D.C. Cir. 1989) (rejecting a claim that an FCC ban on broadcasters from carrying materials exclusively licensed by the copyright holder to others was subject to *some* (minimal) measure of First Amendment review, and declaring that "the [FCC] was correct to find that the rules are not subject to *such* scrutiny," evidently meaning even minimal, or weak, First Amendment scrutiny, and then explaining why in the following terms: "The Constitution grants Congress the power to secure for limited times to authors the exclusive right to their works, and *this power generally supersedes the first amendment rights of those who wish to use another's copyrighted work*.") (emphasis added); Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001), *cert. granted sub nom*, Eldred v. Ashcroft, 534 U.S. 1126, *and cert. amended*, 534 U.S. 1160 (2002) ("[W]e held in United Video that copyrights are *categorically immune from challenges under the First Amendment*.") (emphasis added). Not that they may sometimes—or even usually—prevail against challenges under the First Amendment, rather, that they are "categorically *immune*" from such challenges.

23. The relevant enumerated power is merely the spending power in Article I, Section 8, generously interpreted by the Supreme Court as conferring on Congress a virtually nonjusticiable breadth of discretion to determine for itself what grants in aid, or appropriations from tax revenues, are sufficiently consistent with providing for the "general Welfare of the United States," as to be within its authority under this clause. *See*, *e.g.*, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 156 (Johnny H. Killian & George A. Costello eds., 1996) (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) and *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976), and quite accurately summarizing: "[G]reat deference is judicially accorded Congress' decision that a spending program advances the general welfare, and the Court has suggested that the question whether a spending program provides for the general welfare may not even be judicially noticeable.")

manner in which the Copyright Clause proceeds is not only *not* the "best" way, but may in some measure even be a "dysfunctional" way, in that it, and Congress by employing it, may miss the "proper balance" between the end (stimulation and distribution of new knowledge) and the means (vesting exclusive rights, of "monopoly" control, in the author for a rather lengthy—albeit "limited"—period of years).

But we may also properly note that if Congress wishes to agree with us, it may not merely modify and trim back the protection its sundry copyright laws now (too generously?) enact. Rather, it may repeal them in part or in whole, indeed, *repeal them all*, and then just go forward to "substitute" wholly public subsidy means of stimulating creativity, the products of which would at once "drop" into the public domain. In short, it is open to Congress even now to agree with Thomas Macaulay that vesting copyrights in the "creator-monopolist" is, or may be, in some manner of speaking, a highly undesirable "tax on knowledge,"[24] a "tax" levied in such amount as each "author" (*given* exclusive rights by statute) decides to extract for anyone's right to copy his or her work, or any part thereof, payable to himself or herself, albeit a "tax" of a sort that, in a sense, merely provides delayed compensation for the author's creative work (and contribution to the public fund of knowledge).[25] Maybe the "tax" allowed thus to be imposed (by each author or by those to whom he assigned his right to determine the conditions of copying his or her work) is "too high," maybe not. *But that is up to Congress to determine*, as it does by setting the metes and bounds of the author's "exclusive" rights, consistent with its enumerated power to do so, *as conferred by this clause*. Our objections to the manner in which it works out the calculus, however, are, at this level, merely political objections (for example, we think it succumbed to utterly false representations by various corporate copyright interests), not constitutional ones, as long as it is clear that however Congress worked things out, it nonetheless stayed *within* the "four corners" of the power confided to it by this clause.[26]

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24. Thomas B. Macaulay, A Speech Delivered in the House of Commons (Feb. 5, 1841), *in* VIII THE LIFE AND WORKS OF LORD MACAULAY 201 (London, Longmans, Green, and Co. 1897).

25. For discussion (and references to other cases) elaborating this view, see, for example, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). "[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.*

26. *See*, *e.g.*, Gibbons v. Ogden, 22 U.S. 1, 196-97 (1824) (Marshall, C.J.) (addressing this same sort of issue as it may be raised in respect to how Congress uses is power "to regulate commerce . . . among the several states"). Marshall eschewed any role for the judiciary in second-guessing the wisdom of an act of Congress, even respecting the extremes of congressional use of its various enumerated powers:

> This power [referring in the particular instance to the power to "regulate commerce . . . among the several states"], like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied,

The point remains, that if it *did* stay within those four corners of authorized law-making, its act cannot then be said to be invalid under the First Amendment. For, again, "the First Amendment provision on 'the freedom of the press' should not be interpreted or applied to forbid what the Copyright Clause itself *expressly* permits."

The question is, where is the flaw, or fundamental error, if there be one, in this reasoning?

IV

PERPETUATING UNCHECKABLE PLURALISM

Perhaps it resides in the following different, and more constrained, view of what the Copyright Clause is about—that what it is about, essentially, is pretty much just this and nothing more.

We noted already that the Constitution takes care to provide a power in Congress to "regulate commerce among the states," albeit a power all do concede is itself subject to First Amendment limitations in respect to how that power may, in turn, be used by Congress. And we know that *that* power was provided in order to enable the national legislature to establish uniform norms in respect to the commerce to which the power attaches ("commerce among the states"), in order that such commerce as this must not be left to such differing regimes as each state might presume to enact; rather, it was to be dealt with as the national legislature should feel disposed so to do.

But, at the time, neither this new and express power (to "regulate commerce among the states") nor any other proposed enumerated power would per se grant—or was seen as granting—to Congress an authority to establish a uniform rule in respect to what was patentable or not, or what was subject to copyright or not, and nationally established exclusive "ownership" rules of a like sort. And, indeed, *absent* establishing a *separate* power, *distinctly* entrusting to Congress an authority so to provide, then all such "rules" would be whatever rules (however conflicting and differing) one would find by consulting the patchwork statute books, and common law, of each particular state.[27]

The manifest undesirability of *perpetuating this uncheckable pluralism*, that is, that the extent to which an author's work could or could not lawfully at once be copied (and such copies sold by the copier) would just depend upon what each state legislature—or the common law of the state—might provide, is what "drives" (that is, *essentially accounts for*) the provision in Article I. And, in brief, the provision in the clause stands in relation to *its* particular subject, *in the same way* that the commerce power stands in relation to *its* subject in turn. It *is*

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to secure them from its abuse. They are the restraints on which the people most often rely solely, in all representative governments.

Id.

27. At least, that is, all such rules as would be beyond the reach of Congress to preempt merely by its (limited) power to regulate "commerce" among the several states.

meant to empower Congress to provide *a pre-emptive uniformity of law*, in respect to the subject embraced by the clause (and to the extent the subject is embraced by the clause), thus pre-empting what would, absent use of this power by Congress, be the varying kinds of laws controlling within each state.[28]

But note as to such laws (that is, state laws, statutory or common), we would not doubt that each, whatever *its* particular scope, and whatever *its* provisions, would be subject to full First Amendment review.[29] So, for example, supposing there were no federal copyright law in the field[30] and that, in North Carolina, the legislature provided by statute that:

> **N.C.G.S. §2001.** No one shall within 120 years of its publication, make any copy, or distribute or sell any copy, of an author's original work, in whole or in any part, absent written permission or license granted by the author, his assigns, or his heirs.

We would not doubt that the North Carolina act would be subject to full First Amendment review in an appropriate case pressing the issue. To be sure, depending upon how one might add certain features to this North Carolina

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28. *See, e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 681-84 (1834). The Court noted that under the Articles of Confederation, the most that Congress could do was to recommend to the several states certain measures securing to authors and publishers exclusive copyrights for "not less than fourteen years." Some states adopted variable statutes on the subject (some of which provided protection for authors who were citizens of other states only if the state of their citizenship reciprocated by providing a like protection), while other states applied varying understandings of common law rights. The Court concluded that "under the existing governments of the United States, before the adoption of the present constitution, adequate protection could not be given to authors throughout the United States, by any general law." *Id.* at 684. *See also* THE FEDERALIST No. 43, at 271-72 (James Madison) (Clinton Rossiter ed., 1961) (Madison, after quoting the proposed, separate constitutional clause on "authors and inventors," proceeds to explain it: "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. *The States cannot separately make effectual provision for either of the cases*, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.") (emphasis added); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 558, 402-03 (Carolina Acad. Press 1987) (1883) ("It is beneficial . . . to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject . . . ."). Moreover, that the commerce power was *not* regarded as per se sufficient to grant this kind of pre-emptive power to Congress, incidentally, is merely well reflected in the Supreme Court's holding later on, in the original *Trade-mark Cases*, 100 U.S. 82 (1879), holding that the act of Congress did not meet the requirements of the Copyright Clause, because a "trademark" as such may represent no original creativity at all but may merely borrow a familiar image or figure to use, to identify one's product, and neither could it alternatively be sustained under the commerce power, because it presumed to extend to trademarks identified to goods and services whether or not involved in commerce among the several states.

29. Well, strictly speaking, Fourteenth Amendment review (but "Fourteenth Amendment" review applying full First Amendment standards). *See*, *e.g.*, Bridges v. California, 314 U.S. 252, 268 (1941) (Black, J.) ("Not until 1925 . . . did this Court recognize in the Fourteenth Amendment the application to the states of the *same standards* of freedom of expression as, under the First Amendment, are applicable to the federal government.") (emphasis added).

30. As there might not be, indeed, if no power were given to Congress to enact such legislation (and, of course, the Commerce Clause power were itself not understood to be sufficiently far-reaching to enable Congress simply to rely upon it).

statute (for example, a long list of "exceptions," with respect to which no permission need be sought before one made copies and either sold or simply gave them away), perhaps the act could be sustained. We need not tarry to see whether that might be so.

But we have said enough to show plainly where this discussion must now carry us. The clause in Article I is meant to (and certainly does) empower Congress to preempt that North Carolina statute, indeed, to provide a uniformity of law to control, within the field of the subject thus expressly confided to its preemptive power, as both described and boundaried in the four corners of the clause setting it forth. But it does no more work than *this* work. That is, *the* power thus vested in Congress now "stands in lieu of" the swath of legislative power formerly held, severally, in the states. It is a power enabling Congress to set the norms to govern the field covered by the clause, in lieu of, or in exclusion of, different regimes within each state. Whatever each of those regimes might be (or might have been), obviously each would yet have to "answer" to the First Amendment (as applied to each state and in each state, through the Fourteenth Amendment). And so, likewise, whatever regime Congress enacts within its authority so to preempt this field from the states in such degree as it is inclined to do—and indeed is given power so to do by this clause—is itself in turn answerable to the First Amendment. And as much as this, then, is true of every part, section, word, and punctuation point of the current act as well.

The point here, then, is that just as the Commerce Clause provision "answers" Federalism questions but not First Amendment questions, *the same is exactly true in respect to the Copyright Clause as well*. When Congress acts "within" the clause (generously,[31] albeit not too generously[32] construed), that

31. "Generously" (rather than grudgingly, or narrowly), in merely the *same* manner as befits the construction of each other enumerated power provided in the Constitution, that is, *in the "federalism" understanding of the clause.* In *this* regard, the "federalism" regard, for the Court to construe the clause more grudgingly than, say, the Court has construed the Commerce Clause, or the Spending Clause, or Tax Clause, in respect to each of their respective "fields" of national legislative discretion of "enactment authority," would be wholly misplaced, and it would merely raise a fair question of its own bias were it to presume to do so (that is, in picking and choosing among clauses, reading "generously" those clauses providing authority for kinds of acts of Congress it—the Court—may think desirable to have Congress enjoy a suitable power to enact, but less generously those clauses providing authority for other kinds of acts of Congress to which the Court is somehow itself frankly opposed (and thus inclined to find no suitable power granted to Congress to enact)). Simply to provide a single example: That "motion pictures" ("movies") are regarded as within the discretion of Congress to qualify for copyright protection may certainly seem to stretch the meaning of a critical term as it appears in Article I, Section 8, in the crucial clause granting the power to benefit "authors" in respect to their "writings" (for few persons would straightforwardly and ordinarily describe a motion picture as itself a "writing"). Still, it is not remarkable, given the general understanding of the place and the purpose of the clause—any more than it is remarkable that the Supreme Court has systematically accepted "movies" as equally within the understanding of "*speech*" embraced by the First Amendment as well. *See* Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). So, quaintly but sensibly, even "silent" movies may be "*writings*" on the one hand (for copyright purposes) and "*speech*" (for First Amendment purposes) on the other hand as well.

32. *See*, *e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991); Trade-Mark Cases, 100 U.S. 82 (1879) (noting *some* discernible creativity, *some* modicum of originality, must characterize a qualifying work).

puts to rest any question respecting the controlling authority of its act vis-à-vis that of some inconsistent, or incongruent state or local law. It answers the "federalism question." It answers no other question, however, any more than in a Commerce Clause case, and none arising under the First Amendment as such.

The proposition is easily tested, simply by supposing that the act Congress adopted were of the extreme sort illustrated by our hypothetical North Carolina law. Reproducing it here, as an act of Congress, may aid us to see how that is so:

> ___ **U.S.C. §2001.** No one shall within 120 years of its publication, make any copy, or distribute or sell any copy, of an author's original work, in whole or in any part, absent written permission or license granted by the author, his assigns, or his heirs.

The act "fits" snugly and well *just as it appears*, as to be clearly *within* the tight phrasing of the relevant clause in Article I. And it does so, though it provides no exceptions whatever, in particular no exceptions of "fair use" (for example, copying and republishing some part of an author's original work *without the author's permission*, in the course of producing a published, highly critical, review of the author's opus). The omission of such a "permitted" exception obviously does not put the adoption of the statute "beyond" the power of Congress to enact it (for nothing in the clause suggests that any such "exception" *need* be provided for). Plainly, just as it is, it appears to be easily within the boundaries of the authorizing constitutional clause.[33]

So much being conceded, however, it does not answer to the First Amendment in the least. When the author seeks to invoke his right, *exactly* in keeping with the terms of the act, against the person who, without his permission, presumed to copy a part of his or her work, albeit "merely" incidental to writing and publishing a critical review, the infringer will "lift up" the First Amendment as his or her "shield," rather than invoke anything *within* the act. And it is virtually beyond controversy that the First Amendment would readily shield a

33. Nor could the decision of Congress *not* to make any exception for securing the author's permission to copy and reprint "selected lines" or "paragraphs," etc., by one who seeks to use the copied portions "merely" within the body of some critical review of the author's work, be thought to be inconsistent in some way with the essential purpose of the Copyright Clause as such. To the contrary. Authorship as such would surely be *more* encouraged by assuring to each original author that *no one*, without their permission, could cull, quote, and copy selected parts of their original work as part of a critical review, the publication of which may well impair (or even destroy) the market for their work, as well as bring them into a discouraging and depressing disrepute. In brief, authorship is clearly encouraged by confiding to each author the "*exclusive* right to their respective writings," allowing each to ration downstream licensed copiers in exactly such manner as each author believes will best promote his or her work. Of course, such strengthened copyright protection could not forestall critical reviews as such, but it would nonetheless assure authors that spiteful critics could not, without their consent, presume to use *their own words* "against" them, or cull, elide, and thus (by selective quotation) misrepresent the excellence of their work by that device. So, to *that* extent, each prospective author may be encouraged and comforted by being assured, by act of Congress, that without their consent, no rival, or self-promoting critic, or other person, may make any copy, or use any copy, or publish any copy, of any part of their work, without their consent (on such terms as they, as author, deem best).

critic's use of quoted parts of an author's work, quite without the author's consent, to give both example and point to the review in concrete form, that no mere paraphrase could manage to do. Insofar as the copyright holder relied on the act of Congress, in brief, the action would fail not because the act was improperly invoked, but because it was useless to serve as a basis for suing to enjoin, or to seek damages, for the knowingly copied and republished portions of the author's work. "Useless" because the First Amendment will not permit Congress to grant to authors a true monopoly power over even their "own" works—despite the appearance on the face of the clause exactly as it appears in Article I, even when the unconsented-to uses may well destroy both the market for their work, and pretty well destroy their own repute and incentives for future authorship as well. Some may find this folly and paradox. Others, however, will understand, and celebrate it as part of the American view of the meaning of freedom of speech and of the press.[34]

V

CONCLUSION

Here, we have but tried to put the matter in some repose merely on the early question of how to regard the clause itself, as to whether it "excepts" a certain area of legislation from the First Amendment. It does not. The clause, again, is meant to put an end to one more kind of federalism question, and on that front, it deserves to be generously interpreted and applied in what it may confide to the discretion of Congress to legislate as it thinks best to do, in preemption of various regimes that might otherwise riddle the field. It "preempts" nothing within the protection of the First Amendment, however, and any feature of any portion of any act Congress has, or may in the future, provide under sanction of this clause, may always be brought into question respecting whether, on its face or as applied, it offends against the larger freedom of speech and of the press provided constitutional sanctuary in the First Amendment still unfolding in the United States.

34. For two excellent, contemporary examples of cases in which, were the "fair use" provisions of the current act *not* interpreted themselves to permit the infringing uses at stake, the First Amendment itself might easily have compelled the same result, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), concerning commercial parody of Roy Orbison's "Pretty Woman," and *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986), where the "infringing" party copied and distributed in excess of *700,000* copies of the particular original work (a parody cartoon), without the copyright holder's consent. *See also* 71 U.S.L.W. 3258 (Oct. 15, 2002) (reporting oral argument of Oct. 9, 2002, in Eldred v. Ashcroft, No. 01-618) ("O'Connor pointed out that the Supreme Court on several occasions has avoided the invocation of the First Amendment in copyright cases." It has indeed done just this, by managing to "interpret" the fair use provisions to deny the relief sought by the copyright holder against the infringing use.) And for a near-equivalent case, involving a state law (akin to copyright, but based on a state tort law notion of "right of publicity" for commercial gain, and a Lanham Act claim), where it is strongly arguable First Amendment *should* have protected the "copied" features of the plaintiff's persona, despite the circuit court's (majority) view, see *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).