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Copyright Lawmaking Authority: An (Inter)nationalist Perspective on the Treaty Clause (symposium)

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INTRODUCTION

Scholars have long questioned the compliance of various aspects of copyright law with the demands of the United States Constitution. Over the past fifteen years, however, these questions have been asked with increasing frequency about increasingly diverse aspects of the copyright statute (both existing and proposed). Many of those constitutional questions have also been raised in litigation, and during that period, the United States Supreme Court has on more than one occasion directly tackled the constitutionality of copyright legislation.[1]

The debate surrounding these constitutional questions, both in the literature and in the courts, has centered on three core sets of inquiries.[2] First, does copyright protection in certain instances violate general restraints on governmental action, such as the First Amendment?[3] Second, does the primary authority for federal copyright legislation, the Copyright Clause of the United States Constitution, authorize Congress to enact particular provisions of U.S. copyright law, a question requiring interpretation of the language of the Copyright Clause[4] itself (e.g.,

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1. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991); Eldred v. Ashcroft, 537 U.S. 186 (2003).

2. During that time, the Supreme Court has tackled other constitutional questions in copyright cases that did not relate to lawmaking authority. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (finding Seventh Amendment right to trial by jury in cases seeking statutory damages notwithstanding lack of express right in the statute).

3. *See, e.g.*, *Eldred*, 537 U.S. 186 (First Amendment); Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (First Amendment); Golan v. Gonzales, 74 U.S.P.Q.2d 1808 (D. Colo. 2005) (Substantive Due Process); Kahle v. Ashcroft, 72 U.S.P.Q.2d 1888 (N.D. Cal. 2004), *aff'd sub nom.*, Kahle v. Gonzales, 474 F.3d 665 (9th Cir. 2007) (First Amendment); United States v. Elcom, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (First Amendment, Due Process).

4. *See* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . . Writings . . .").

"writings" or "authors") in order to identify its internal limits?[5] Third, to the extent that, because of those limits, Congress lacks authority to enact legislation under the Copyright Clause, can it act pursuant to an alternative grant of authority (such as the Commerce Clause)?[6] This paper addresses the third set of inquiries, namely, alternative sources of lawmaking authority.

When seeking an alternative source of copyright lawmaking authority, Congress, courts and scholars have focused primarily on the Commerce Clause.[7] Given the near-unlimited expansion of the scope of the Commerce Clause in the six decades leading up to the *Lopez* decision in 1995, this is hardly surprising.[8] And copyright, as one of the leading instruments of U.S. commerce in the information economy, is a natural object of regulation under that Clause.

Despite this intense focus on the Commerce Clause, it remains unclear whether Congress can evade limits in the Copyright Clause by acting pursuant to the

5. *See, e.g., Feist*, 499 U.S. 340 (authors of writings); *Eldred*, 537 U.S. 186 (limited times, progress); Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262 (D.C. Cir. 2005) (progress); *Golan*, 74 U.S.P.Q.2d 1808 (progress); United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999) (writings); KISS Catalog v. Passport Int'l Prods., 350 F. Supp. 2d 823 (C.D. Cal. 2005) (writings); United States v. Martignon, 346 F. Supp. 2d 413 (S.D.N.Y. 2004) (writings, limited times); Kahle v. Ashcroft, 72 U.S.P.Q.2d 1888 (N.D. Cal. 2004), *aff'd sub nom*. Kahle v. Gonzales, 474 F.3d 665 (9th Cir. 2007) (limited times, progress).

6. *See e.g. Moghadam*, 175 F.3d 1269 (Commerce Clause sufficient because anti-bootlegging law not fundamentally inconsistent with the Copyright Clause even assuming arguendo that Congress was strictly unable to enact the law under the Copyright Clause); *KISS Catalog*, 350 F. Supp. 2d 823, *vacated*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005) (Commerce Clause sufficient because limits of the Copyright Clause do not constrain the Commerce Clause); *Martignon*, 346 F. Supp. 2d 413 (finding Commerce Clause insufficient because statutes designed to promote the progress of science and the useful arts must comply with the limits of the Copyright Clause); *Elcom*, 203 F. Supp. 2d at 1140 (Commerce Clause sufficient to sustain the anti-trafficking provisions of the DMCA because those provisions were intended to promote the same purposes as copyright and thus were not "fundamentally inconsistent with the" Copyright Clause). The Supreme Court has also addressed whether Congress can abrogate sovereign immunity for patent infringement, and in so doing rendered a decision relevant to whether limits imposed on copyright lawmaking by a constitutional principle outside the Copyright Clause can be circumvented by relying on the Commerce Clause or the Fourteenth Amendment. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav., 527 U.S. 627 (1999) (holding that the Fourteenth Amendment does not authorize Congress to hold States liable for money damages for patent infringement, a decision consistent with the parallel copyright decision of the Fifth Circuit in Chavez v. Arte Publico Press, 139 F.3d 504 (5th Cir. 1998)). The decision of the *Chavez* court was in part based upon concerns about Congress effecting an "end run" around limitations in Article I powers. The Supreme Court in Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) had overruled relatively recent precedent and held that Congress could not override State sovereign immunity acting pursuant to the Commerce Clause. The *Chavez* court rejected the alternative invocation of Section 5 of the Fourteenth Amendment because to permit such an argument would avoid the limits on Congress' Article I powers that *Seminole Tribe* established. The *Florida Prepaid Postsecondary Educ. Expense Bd.* patent decision would appear to vindicate the Fifth Circuit, *see* Chavez v. Arte Publico Press, 204 F.3d 601 (5th Cir. 2000), although the decision of the Court rests as much on the character of "property" and the lack of adequate legislative findings as on the argument of constitutional circumvention. *Cf. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 654 (Stevens, J., dissenting).

7. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

8. *See* United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free Zones Act); Printz v. United States, 521 U.S. 898 (1997) (finding certain provisions of the Brady Act imposing obligations on state officers not within the scope of Congress' Commerce Clause power).

Commerce Clause.[9] One line of case law holds that the legislative powers granted to Congress by the Constitution are not mutually exclusive but operate instead as alternative lawmaking authorities.[10] Indeed, that argument was implicitly endorsed by the Supreme Court in an intellectual property case, *The Trade-Mark Cases*, in the nineteenth century when the Court hinted that although federal trademark legislation could not be adopted under the Copyright Clause, it might be valid under the Commerce Clause.[11] Congress took that hint, and the legitimacy of the Lanham Act, enacted pursuant to the Commerce Clause, has not been seriously questioned.[12] On the other hand, a more recent decision of the Court, *Railway Labor Executives' Ass'n v. Gibbons*, suggests that the doctrine of enumerated powers, which helps to implement the notion of a federal government of limited power, requires that the Commerce Clause not be used to circumvent limits in other Article I powers.[13] The Court has not offered a reconciliation of these divergent lines of authority.

This paper addresses the relationship between the Copyright and Commerce Clauses only instrumentally, in order to help establish the scope of lawmaking authority under a further alternative constitutional provision, namely the Treaty Clause.[14] The Treaty Clause has only infrequently been mentioned by courts and litigants in this ongoing debate.[15] Yet, it has been raised in the briefs submitted in an appeal to the Second Circuit of *United States v. Martignon*, the only decision to date finding that the limits in the Copyright Clause render unconstitutional a provision of the copyright statute because of their horizontal effect on the Commerce Clause power.[16] Moreover, scholars are now beginning to analyze the

9. *See infra* text accompanying notes 45-48, 53-54.

10. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964). In *Heart of Atlanta Motel*, the Supreme Court upheld the public accommodation provisions of the Civil Rights Act of 1964 as an exercise of Congress's Commerce Clause power notwithstanding that an earlier Court had struck down predecessor legislation containing similar provisions as beyond Congress's power under Section 5 of the Fourteenth Amendment. *See* 379 U.S. at 250; *see also* Civil Rights Cases, 109 U.S. 3 (1883) (invalidating the Civil Rights Act of 1875 because it regulated private conduct not capable of regulation under Section 5 of the Fourteenth Amendment). Thus, the Court implicitly accepted that the limits contained in one grant of authority do not necessarily constrain Congress's ability to act under other grants.

11. *See* Trademark Cases, 100 U.S. 82 (1879) (invalidating trademark protection legislated under the Copyright-Patent Clause because trademarks are not original).

12. *See* 15 U.S.C. §§ 1051-1141n (2005).

13. 455 U.S. 457 (1982).

14. Section 2 of Article II affords the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art II, § 2.

15. *See, e.g.*, Memorandum in Support of Defendant's Motion to Dismiss at 30-31, Golan v. Gonzales, Civil Action No. 01-B-1854 (D. Colo. Dec. 13, 2001).

16. *See Martignon*, 346 F. Supp. 2d 413; U.S. Government brief to CA2 in *Martignon; see also* Brief of Brief of *Amici Curiae* UMG Recordings, Inc.; EMI Music North America d/b/a Capitol Records, Inc.; Warner Music Inc.; Univision Music LLC d/b/a Univision Music Group; National Academy of Recording Arts & Sciences, Inc.; Recording Artists Coalition; American Federation of Musicians of the United States and Canada: American Federation of Television and Radio Artists; and National Music Publishers Association, Inc, at 27. Other cases have noted the possible horizontal effect, but have concluded that the challenged provision still passed constitutional muster. *See, e.g.*, United

Treaty Clause as an alternative source of copyright lawmaking authority in much the same way that they have studied the relationship between the Copyright Clause and the Commerce Clause over the past fifteen years.[17]

In some respects, this expansion in scholarly horizons is not surprising. Despite Tom Nachbar's masterful defense of the autonomous authority of the Commerce Clause in the copyright field,[18] the majority of scholars view the authority to enact laws under the Commerce Clause as circumscribed by the limits in the Copyright Clause.[19] And such a reading of the Constitution may comport with the broader efforts of the growing conservative majority on the Supreme Court to rein in the scope of Congress' Commerce Clause powers. Contraction of Commerce Clause authority will encourage lawmakers to look elsewhere to support legislation.

Moreover, a large number of the provisions of the Copyright Act that have been challenged in recent years can be traced to some international influence. The plaintiffs in *Golan* and *Luck's Music* questioned the restoration of copyright in works that had fallen into the public domain through failure to comply with formalities under Berne Convention-inconsistent U.S. law.[20] Restoration was enabled by Section 104A of the Copyright Act, implementing Berne obligations to which the United States committed itself in the TRIPS Agreement.[21] The TRIPS Agreement was also the impetus for the amendment of the Copyright Act to provide protection against bootlegging, challenged as unconstitutional in *Moghadam, KISS Catalog* and *Martignon*.[22] The legislation that prompted the *Eldred* litigation was in large part designed to harmonize copyright terms with the European Union and thus ensure equal protection for American authors in Europe, which had previously been denied by the reciprocity clause of the EU Term

States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999).

17. *See, e.g.*, Richard B. Graves, III, *Globalization, Treaty Powers, and the Limits of the Intellectual Property Clause*, 50 J. COPYRIGHT SOC'Y U.S.A. 199 (2003); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119 (2000); Timothy R. Holbrook, *The Treaty Power and the Patent Clause: Are There Limits on the United States' Ability to Harmonize?*, 22 CARDOZO. ARTS & ENT. L.J. 1(2004); Ruth L. Okediji, *Through the Years: The Supreme Court and the Copyright Clause*, 30 WM. MITCHELL L. REV. 1633, 1649-1656 (2004); Caroline T. Nguyen, Note, *Expansive Copyright Protection for All Time? Avoiding Article I Horizontal Limitations Through the Treaty Power*, 106 COLUM. L. REV. 1079 (2006); John O'Connor, Note, *Taking TRIPS to the Eleventh Amendment: The Aftermath of the* College Savings Cases, 51 HASTINGS L.J. 1003 (2000); Angela T. Howe, *Note,* United States v. Martignon & KISS Catalog v. Passport International Products*: The Anti-Bootlegging Statute and the Collision of International Intellectual Property Law and the United States Constitution*, 20 BERKELEY TECH. L.J. 829 (2005).

18. *See* Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004).

19. *See infra* text accompanying notes 45-55.

20. *See* 17 U.S.C. § 104A (2000).

21. *See* Berne Convention for The Protection of Literary and Artistic Works art. 18, (1971 Paris text), 1161 U.N.T.S. 3; General Agreements on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, art. 9(1) Dec. 15, 1993, 33 I.L.M. 81 (1994).

22. *See* TRIPS Agreement, art. 14, Apr. 15, 1994, 33 I.L.M. 1202.

Directive.[23] The group of reforms reducing copyright formalities, which the *Kahle* plaintiffs characterized as effecting an unconstitutional switch from an "opt-in" system of copyright to one of "opt-out," reflected an attempt to bring the United States into line with the requirements of the Berne Convention.[24] Finally, the anti-circumvention provisions introduced by the Digital Millennium Copyright Act 1998 (DMCA) and challenged in *Corley* and *Elcom* purported to implement obligations assumed by the United States in the WIPO Copyright Treaty in 1996.[25]

Even *proposed* legislation for which a constitutional challenge has been readied in the event of enactment has an international dimension.[26] Like the term extension legislation, the as-yet-unenacted database protection bill is in part motivated by the desire to ensure equal treatment for Americans in Europe. The European Union has conditioned any protection for foreign databases on equivalent protection in the country of the foreign database maker.[27] This reciprocity requirement is, however, hard for the United States to meet with legislation enacted under the Copyright Clause because the Supreme Court in *Feist* imposed a constitutional threshold of originality on laws resting on the Copyright Clause.[28]

To be sure, Congress can enact laws that have an international dimension or motivation under the Commerce Clause, which authorizes the promulgation of laws that regulate commerce with foreign nations.[29] And the international genesis of the laws challenged over the last decade has not prevented defenders of the legislation from successfully invoking the Commerce Clause.[30] But the international dimension almost *invites* attention to the Treaty Clause. And once lawmakers focus on the Treaty Clause, they might find its invocation strategically opportune. Although some scholars suggest that the same arguments that justify a transposition

23. *See* Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright And Other Related Rights, 1993 O.J. (L 290) art. 7(1) (conditioning full protection of foreign works for complete terms on reciprocal protection); Berne Convention, *supra* note 21, art. 7(8) (permitting signatory nations to apply the rule of the shorter term, that is, to limit foreign works to the term of protection offered in their country of origin).

24. The *Kahle* litigation challenged a series of provisions, including the Copyright Renewal Act of 1992, the Sonny Bono Copyright Term Extension Act, and the Berne Convention Implementation Act. *See* Kahle v. Ashcroft, 72 U.S.P.Q.2d 1888 (N.D. Cal. 2004), *aff'd sub nom.* Kahle v. Gonzales, 474 F.3d 665 (9th Cir. 2007); *see also* Berne Convention, *supra* note 21, art. 5(2) ("[t]he enjoyment and the exercise of these rights shall not be subject to any formality").

25. *See* Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter the DMCA]; WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997) (ratified by the United States Feb. 1999).

26. *See* J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997); Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151, 173 (1997).

27. *See* Directive 96/9/EC of The European Parliament and of the Council of 11 March, 1996, on the Legal Protection of Databases, art. 11, 1996 O.J. (L 77), art. 11.

28. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991).

29. *See supra* note 7.

30. *See e.g.* United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999); KISS Catalog v. Passport Int'l Prods., 350 F.Supp.2d 823 (C.D. Cal. 2004), *vacated*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005) (Commerce Clause sufficient because limits of the Copyright Clause do not constrain the Commerce Clause); United States v. Elcom, 203 F. Supp. 2d 1111, 1140 (N.D. Cal. 2002).

of limits from the Copyright Clause to the Commerce Clause would support a parallel transposition to the Treaty Clause, there is arguably broader support for viewing the Treaty Clause as an autonomous lawmaking authority. In 1920, the Supreme Court held in *Missouri v. Holland* that the Treaty Clause permitted Congress to do what (at that time) was beyond its enumerated Article I powers.[31]

Although no court has yet addressed the problem directly, there is a wide range of views among intellectual property scholars regarding whether *Missouri*, if still good law, offers an alternative source of lawmaking authority where the Copyright Clause is unavailable. With some over-simplification on my part, the scholarship suggests three paradigmatic positions regarding the potential of the Treaty Clause in copyright lawmaking. First, some scholars view the Treaty Clause as conferring a power whose content is subservient to the limits of the Copyright Clause in much the same way that the Commerce Clause is purportedly limited by the terms of the Copyright Clause.[32] For some, this subservience emanates from the plenary control that the Copyright Clause exercises over the grant of all exclusive rights in information. Others reach the same position by acknowledging that *Missouri v. Holland* allows the Treaty Clause to justify some legislation that would otherwise be without a constitutional basis, but treat the limits of the Copyright Clause as sufficiently fundamental that such limits fall within the ambit of the plurality opinion in *Reid v. Covert*, in which the Court held that the Treaty Clause did not permit the violation of individual Sixth Amendment rights.[33]

A second group of scholars sees the Treaty Clause as offering an alternative lawmaking authority, but one that is substantially limited by the internal limits of the Treaty Clause.[34] Although this grouping of scholars is harder to force into a single model, some would find limits in the subject matter that might appropriately be treated under the Treaty Clause, while others argue that the form of the international agreement upon which the invocation of the Treaty Clause relies might limit its application.[35]

Finally, some commentators and litigants have read the Treaty Clause as an expansive autonomous lawmaking power that is largely unconstrained by internal limits and wholly unconstrained by the external limits found in the Copyright Clause. For these commentators, the primary (and perhaps only) limits on the

31. *See* Missouri v. Holland, 252 U.S. 416 (1920). The continued vitality of *Missouri* has been questioned by several constitutional and international law scholars. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 394-95 (1998); *see also* Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 422 n. 302 (1997) (reporting views of Larry Lessig); Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1331 (2006); Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 255-56 (2006).

32. *See infra* Part I.A.

33. *See* Reid v. Covert, 354 U.S. 1 (1957). Some proffer both arguments in support of their conclusion. *See infra* text accompanying note 62

34. *See infra* Part I.C.

35. *See id.*

Treaty Clause would be affirmative prohibitions (such as the First Amendment).[36] Again, this proposition might reflect at least two separate arguments. One could formalistically apply the notion that federal lawmaking powers are equal alternatives to each other, and should as a result be unconstrained by each other. A more cautious analysis, recognizing that *Reid* limits *Missouri*, treats the limits of the Copyright Clause as insufficiently fundamental in comparison to the individual (Sixth Amendment) rights at stake in *Reid*.

This paper adopts none of the three paradigmatic positions. I argue that those seeking to make the Treaty Clause subservient to the Copyright Clause both overstate the constitutional weight of the Copyright Clause and underestimate the autonomous role of the Treaty Clause in the American governmental structure. Even if the limits in the Copyright Clause *are* sufficiently fundamental to impose constraints on Commerce Clause authority, the arguments for their horizontal effect are less persuasive in the Treaty Clause context. And the arguments that support deference to congressional policy decisions pursuant to the Commerce Clause are arguably even stronger when viewed in the international environment of treaty-making.

By the same token, however, the argument that the Treaty Clause should operate wholly unaffected by the limits in the Copyright Clause may suggest too great a lawmaking latitude for two reasons. First, the tension between the two relevant lines of constitutional thought is not helpfully resolved by the distinction that scholars supporting expansive autonomy draw between "affirmative prohibitions" (that the Treaty Clause cannot circumvent) and "mere limits on authority" (which it can). This distinction is too slender a reed on which alone to rest a demarcation of constitutional authority.[37] Second, the robust vision of the Treaty Clause that these scholars present fails to acknowledge the multitude of ways through which international law and policy influences and informs domestic American copyright law. Many of these influences are much less formal than the Treaty Clause contemplates and are given effect through mechanisms barely distinct from the process by which Copyright Clause authority is exercised. Thus, support for autonomous lawmaking authority under the Treaty Clause must be tempered by the contemporary political reality that international processes may simply be an inappropriate end-run around the limits of Copyright Clause authority rather than occasional operation of an independent and different political process.

As a result, judicial policing of Treaty Clause authority cannot be as deferential as suggested by the expansive autonomous view of the Treaty Clause; it must take account of the inevitable domestic regulation that international copyright instruments effect. On the other hand, the subservient view of the Treaty Clause ignores the separate and different role that the Clause serves, quite apart from the domestic legislative grants. The appropriate role for the Treaty Clause lies somewhere between these two positions. Such a modified reading of Treaty Clause authority might appear to fit most closely with the third group of scholars, who

36. *See infra* Part I.B.
37. *See infra* text accompanying notes 110-11.

argue that the Treaty Clause does operate as an autonomous source of lawmaking authority, but that the Clause contains internal limits that constrain the circumstances in which it can be used. In particular, for these scholars, Treaty Clause authority would subsist only with respect to matters of international concern.[38]

This division of authority has some initial attraction. Surely, the appropriate basis upon which to develop international law is the means explicitly designed by the Framers for that purpose. International (copyright) law should be developed under and circumscribed by the provisions of the Treaty Clause; (domestic) copyright law should be conditioned by the legislative power contained in the Copyright Clause. But the limited autonomous view is entirely framed by internal limits. Because of the entanglement between domestic and international lawmaking that now characterizes the copyright lawmaking process, reliance upon the traditional internal limits of the Treaty Clause will prove largely unavailing.[39] Almost every copyright provision will bear the hint of internationalism, bringing this position extremely close in practice to the expansive autonomous position.[40]

The only way to make the restrictions on the Treaty Clause real is to develop a jurisprudence of judicial policing that reflects both the policy values that support the autonomy of the Treaty Clause and the realities of the contemporary copyright lawmaking process. Incorporating some regard for the substantive limits found in the Copyright Clause, which define domestic innovation policy imperatives, into the scope of Treaty Clause authority will reflect the integration of the domestic and international lawmaking processes.

Thus, I propose a standard of review for laws adopted pursuant to the Treaty Clause that forswears the easy polarities of subservience or unfettered autonomy. A provision of copyright law that exceeds the limits of the Copyright Clause is not, by virtue of its grounding in the Treaty Clause, *ipso facto* constitutionally immune from challenge. Likewise, the demands of domestic innovation policy embodied in the Copyright Clause do not constrain the ability of the United States to enter into international arrangements, enforceable in domestic law, that reflect and reconcile more diverse international concerns.[41] Such is the essential messiness of modern

38. For example, Tim Holbrook argues that the Patent and Copyright Clause does not constrain the authority of the Treaty Clause *within* the appropriate realm of operation of that Clause. Thus, Holbrook would afford wide latitude to laws that were international in nature (in his discussion, for example, the creation of a supranational patent). *See* Holbrook, *supra* note 17, at 35-40. This approach is consistent with that adopted by Laurence Tribe toward the Treaty Clause in another context. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1261 n.133 (1995) (the treaty power is "legitimate only for international agreements fairly related to foreign relations").

39. Tribe has acknowledged as much regarding lawmaking generally. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 228 (2d ed. 1988).

40. *See generally* Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L. J. 733 (2001) (discussing international influences on domestic copyright reform); Graeme B. Dinwoodie, Essay: *The Integration of International and Domestic Intellectual Property Lawmaking*, 23 COLUM.-VLA J.L. & ARTS 307 (1999).

41. On occasion (and typically in intellectual property parts of bilateral trade agreements), Congress's contribution to congressional-executive agreements expressly disclaims any effort to change

life, where copyright is commerce and global and domestic cultures mix.

In doctrinal terms, I suggest that courts faced with reviewing copyright laws reliant upon the Treaty Clause for their constitutional legitimacy examine a matrix of at least three variables. First, reflecting the important role of the Treaty Clause in giving domestic effect to international obligations of the United States, the *strength of the international obligation* with which domestic actors seek to comply should be relevant. Some domestic laws are adopted in order to implement international obligations. Others are adopted to improve the negotiating posture of the United States in the international environment. Yet others reflect a desire to protect the interest of Americans abroad. Finally, some international motivations can only be described as a desire to be in the vanguard of international standards regardless of international obligations. Treaty Clause-grounded laws should be most constitutionally favored when seeking to ensure domestic compliance with real international obligations.

Second, courts should consider the political process by which international norms are adopted and expressed in U.S. law. In particular, they should give more latitude to a law adopted through a process involving real *political checks* on legislative lawmaking. While judicial policing by the U.S. courts can most easily and appropriately encompass assessment of domestic political checks, I suggest that the international process by which the instrument was adopted should also be considered. Concretely, I argue that formal multilateral treaty-making involves substantial checks on lawmaking at both the domestic and international levels, and should thus receive greatest judicial deference. But modern forms of international lawmaking are much broader than formal multilateral treaty negotiation. The use of alternative processes, which do not include equivalent political checks on the lawmaking process, such as bilateral trade agreements or soft law commitments, which do not include equivalent political checks on the lawmaking process, should raise the level of judicial scrutiny.

Finally, some of the *limits in the Copyright Clause* should be more effective than other limits in constraining alternative lawmaking grants. The argument that the judiciary is ill-equipped to engage in the policy assessments underlying the adoption of particular laws is arguably particularly strong in the case of international calculations. But it is also surely the case that some limits implicate harder and more uncertain policy choices than others. Thus, for example, judicial review of the "limited times" language should be stricter than assessment of whether a particular provision of the copyright statute "promotes the progress of science and the useful arts."

As discussed in Part II, these different considerations should be weighed against each other; no one is determinative. Moreover, additional considerations may need to be incorporated into the analysis. This may not appear a recipe for certainty.

U.S. law. *See, e.g.*, United States-Australia Free Trade Implementation Act, Pub. L. No. 108-286, § 102, 118 Stat. 919, 921 (2004). However, the scenario presented in this paper will more likely arise where a treaty ratification instrument is silent about self-execution, or where the government argues that changes in law *are* supported by or are in implementation of international commitments.

However, that the simplicity of the respective theories of subservience or expansive autonomy fails to reflect the inevitable entanglement of discrete domestic and international lawmaking authorities. A matrix of considerations, though less certain, more honestly maps to the appropriate scope of treaty-making authority in an integrated global lawmaking process.

I. THE RELATIONSHIP BETWEEN THE TREATY CLAUSE AND THE COPYRIGHT CLAUSE

Although courts have not yet issued any opinions regarding the relationship between the Copyright and Treaty Clauses, scholars are now beginning directly to confront the possibility that the Treaty Clause might offer an alternative source of lawmaking authority in the field of copyright.[42] The range of positions that scholars have adopted on this question is conceptually wide, reflecting in part political preferences regarding the reinvigoration of the doctrine of enumerated powers and its emphasis on limited federal government, and in part the level of commitment to a different lawmaking apparatus in matters of international concern.

Yet, despite diverse starting points, much of the disagreement pivots on a topic addressed in other sessions of this Symposium, namely, the nature and content of the limits in the Copyright Clause itself. For those who see such limits as central to the American political system (or a climate of innovation), the doctrinal devices discussed in the scholarship leave ample room for re-asserting one's preconceptions about the importance of those limits. Likewise, those with a pre-commitment to the implementation of the values of the Copyright Clause primarily through the political system are well able to construct a theory of judicial deference through a number of avenues.

As a result, some of the arguments that are advanced in this context turn on the same first principle assertions that determine scholars' positions in the other two sets of inquiries that are confronting courts in this field, namely, the limits of the Copyright Clause itself, and the constraining effect of those limits on Commerce Clause authority.[43] In some respects, the narrowing of these separate inquiries to

42. Some of the scholarship discussed in this Part of the paper is structured by analysis of the parallel question in the Commerce Clause context, generating conclusions that on their face purport to be applicable also to the Treaty Clause. I hope to show that at least some of the arguments claimed for the transposition of limits in the Copyright Clause to the Commerce Clause are less persuasive when advanced in the Treaty Clause context. Thus, where conclusions attributed to scholars are stated broadly by them but have been generated by analysis of the Commerce Clause context alone, I have noted this in the text or in a footnote.

43. Although no court has opined on the relationship between the Treaty Clause and the Copyright Clause, those opinions addressing the parallel Commerce Clause/Copyright Clause relationship can be divided into a similar tripartite scheme. *Martignon* adopts the position that the Copyright Clause controls in the copyright sphere; *KISS Catalog* treats the powers as independent alternatives; and *Moghadam* and *Elcom* accept that the Copyright Clause may constrain Commerce Clause lawmaking, but only in a very limited manner. Again, this somewhat oversimplifies. *Martignon* arguably adopts a doctrinal test not unlike the Eleventh Circuit in *Moghadam* (namely, that some limits transfer) but characterizes the limits at issue in more fundamental terms than did the Eleventh Circuit. The court in *Martignon* also examined more than the "Writings" limit, over which there may be a less clear

one essential question should be quite deflating for those of us who believe that the international dimension to a problem should inevitably be of relevance to the legitimacy of lawmaking. Thus, one of the (more difficult) tasks I set for this paper is to demonstrate that the Treaty Clause should change the equation. I can only hope that *my* preconceptions about *that question* do not drive me to the false and unduly intricate separation of what might, contrary to my instincts, be a much simpler dilemma: do the limits in the Copyright Clause rise to the level of fundamental constitutional principle warranting intrusive judicial scrutiny?[44]

A. THE TREATY CLAUSE AS SUBSERVIENT

1. The Argument for Subservience

As noted above, the majority of scholars view the Commerce Clause as limited by the constraints on congressional activity found in the Copyright Clause. This position rests in large part upon the doctrine of enumerated powers a device by which the Court has ensured limited federal government (a commitment which the Supreme Court has over the past decade sought to imbue with more justiciable content).[45] If the limits contained in the Copyright Clause are to mean anything, they cannot be circumvented simply by the device of relying on an alternative grant of lawmaking authority.[46]

As discussed below, much of the recent case law that buttresses the constraints on Congress' Commerce Clause authority, and which might inspire confidence in those who wish to restrict lawmaking beyond the Copyright Clause, was part of the Rehnquist Court's highly contested efforts to restore values of federalism as a constitutional (and not merely political) touchstone. But, at least in the context of the Commerce Clause, adherents to this view can also find support in a slightly older unanimous opinion of the Court authored by then-Justice Rehnquist. In *Railway Labor Executives' Ass'n v. Gibbons*, the Court struck down a statute that

understanding than the Limited Times limit. *See infra* Part II.C (strength of limits). The conceptual similarity between the range of analytical approaches prompts the question whether the Treaty Clause analysis simply repeats the Commerce Clause inquiry.

44. In either instance, much turns on the (often unreasoned) characterization of the limits of the Copyright Clause as fundamental or otherwise. How free does information want to be? And (according to some interpretive methodologies, of which I am not a fan) how free did it want to be in the late eighteenth century? The centrality of this question to the analysis on all sides may explain why there is a substantial convergence between the views of scholars on the wisdom of certain copyright laws and their views on the constitutionality of such laws. *See* Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 U. DAYTON L. REV. 159, 159-60 (2002) (noting convergence of policy and constitutional views).

45. *See* United States v. Morrison, 529 U.S. 598, 609 n.3 (2000).

46. *See* Rochelle C. Dreyfuss, *A* Wiseguy*'s Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195, 230 ("Restrictions on constitutional grants of legislative power, such as the Copyright Clause, would be meaningless if Congress could evade them simply by announcing that it was acting under some broader authority.")

Congress sought to defend under the Commerce Clause but which addressed what the Court characterized as a bankruptcy law directed at a particular debtor.[47] Such a law would not have been permissible under the Bankruptcy Clause in Article I, which authorizes Congress to enact "uniform" bankruptcy laws. Although the challenged statute clearly affected interstate commerce, and could have been enacted under that authority had the Bankruptcy Clause not existed, the Court refused to permit Congress to do under the Commerce Clause what it could not under the Bankruptcy Clause. Justice Rehnquist wrote that "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."[48]

One group of scholars applies much the same reasoning to the Treaty Clause, and likewise makes the Treaty Clause subservient to the limits of the Copyright Clause. If the Copyright Clause does indeed exercise sole control over the grant of exclusive rights in information, as the majority of scholars argue in eviscerating Commerce Clause authority, then it arguably should operate similarly[49] in controlling the Treaty Clause.[50]

47. 455 U.S. 457, 466-67 (1982).

48. *Id.* at 468-69.

49. Indeed, some authors might go even further and would make Treaty Clause based laws subject to greater scrutiny. *See* Okediji, *supra* note 17, at 1655 (arguing that "[t]he fact that [Section 104A] is based on an exercise of the Treaty Power makes the restoration regime more—not less—constitutionally suspect, and certainly calls for a higher level of judicial scrutiny" but acknowledging that under current law *Missouri v. Holland* may "become a more powerful agency of legislative change"); *cf.* Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information,* 15 BERKELEY TECH. L.J. 535, 558-75 (2000) (suggesting that First Amendment scrutiny should be higher when the constitutional basis for a law lies outside the Copyright Clause). *See infra* text accompanying notes 134-37 (discussing political checks on international lawmaking).

50. *See, e.g.*, Peter A. Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT'L. L. 595, 608-09 (1996) (noting that "[j]ust as the commerce power or the treaty power could not be used to create copyrights of perpetual duration without running afoul of a specific limitation rooted in [the Copyright Clause], legislation that does not fulfill the mandate to promote science and the useful arts also may be outside congressional competence, whatever the source of authority being invoked" and suggesting that, even with the restoration of foreign copyrights, the crux of the matter is whether Congress could enact protection in furtherance of the Copyright Clause); Heald & Sherry, *supra* note 17, at 1181-1183 (arguing that the Copyright Clause imposes absolute constraints on other lawmaking powers because the limits in the Copyright Clause are more akin to those at issue in *Reid v. Covert,* 354 U.S. 1 (1957), than those addressed in *Missouri v. Holland*, because they are "limits on otherwise valid congressional power rather than examples of an enumerated power running out"); Benkler, *supra* note 49, at 538, 600 (noting that the constraints imposed by the Copyright Clause extend to all other powers); Malla Pollack, *Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp.*, 18 SEATTLE U. L. REV. 259 (1995) (statements in context of Commerce Clause analysis). Some international law scholars would reach the same result as a matter of analysis unconfined to intellectual property, but rather out of a belief that *Missouri v. Holland* is no longer good law and that the Treaty Clause must, as a result of recent federalism case law, be revisited. *See, e.g.*, Bradley, *supra* note 31, at 450 ("the federal government should not be able to use the treaty power (or executive agreement power) to create domestic law that could not be created by Congress").

Of course, there is the awkward matter of *Missouri v. Holland*, which allowed the Treaty Clause to justify legislation that would otherwise be without a constitutional basis under Article I. But in the Commerce Clause context, supporters of the subservience argument were also confronted by apparently countervailing precedent, namely, *Heart of Atlanta Motel* and *The Trade-Mark Cases*.[51] Both of those cases permitted Congress to adopt laws under the Commerce Clause that could not have been justified under alternative powers (in the latter case, under the Copyright Clause).[52]

Without rehearsing all the arguments why these two cases might not prevent the transposition of limits from the Copyright Clause to the Commerce Clause,[53] the characterization of the limits in the Copyright Clause as embodying "fundamental" constitutional norms is key to many scholars.[54] Their fundamental character requires them to apply horizontally throughout the Constitution as an almost structural matter.[55] That characterization of the importance of the limits in the Copyright Clause also enables supporters of the subservience theory to avoid the full effects of *Missouri v. Holland*.

Even if *Missouri v. Holland* is still good law (which some challenge, as discussed below),[56] the Court's later decision in *Reid v. Covert* affirmed that the Treaty Clause could not permit the circumvention of *all* constitutional limits.[57] Indeed, the *Missouri* Court itself had stressed that there were some limits on lawmaking under the Treaty Clause, even if those caveats were not fully appreciated at the time of the decision.[58] In particular, the Court noted that the treaty challenged in that case did not "contravene any prohibitory words to be found in the Constitution."[59]

Subservience scholars connect the limits in the Copyright Clause to these derogations from the full constitutional autonomy of the Treaty Clause power. Thus, although *Reid* involved individual constitutional rights, scholars focus on the fundamental nature of the Sixth Amendment rights that were denied by treaty in *Reid* and tie them to the importance of limits on copyright to a free and democratic society. Both set of rights are, one could say, essential to maintaining the fabric of

51. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964); Trademark Cases, 100 U.S. 82 (1879).

52. In the *Trademark Cases*, the court also adverted to the possibility of acting under the Treaty Clause. *See* Trademark Cases, 100 U.S. 82, 99 (1879).

53. *See* Nachbar, *supra* note 18.

54. Tom Nachbar has convincingly contested this view of the *constitutional* importance of the limits in the Copyright Clause outside the Clause itself. *See* Nachbar, *supra* note 18, at 361.

55. *Cf.* Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 J. INT'L ECON. L. 431 (2004) (arguing for limits on the horizontal and structural use of provisions in the TRIPS Agreement because such extensions unduly constrain national legislative choices).

56. *See* Graves, *supra* note 17, at 255 (concluding that the current Court is likely to follow strictly the doctrine of Enumerated Powers and limit the scope of Treaty Clause lawmaking because the *Holland* rule "would in essence make the federal government . . . the judge of its own legislative power").

57. *See* Reid v. Covert, 354 U.S. 1 (1956).

58. *See* Thomas Reed Powell, *Constitutional Law in 1919-20*, 19 MICH. L. REV. 1, 13 (1920).

59. *See* Missouri v. Holland, 252 U.S. 416, 433-34 (1920)

American democracy.[60]

Heald and Sherry, who also emphasize the "constitutional weight" of four principles that they derive from the Copyright Clause, such that those principles apply horizontally to other grants of authority, deal separately with the Treaty Clause by picking up on the language of "prohibitory words" in *Missouri*. They argue that the Copyright Clause imposes absolute constraints on the Treaty Clause because the limits in the Copyright Clause are "limits on otherwise valid congressional power rather than examples of an enumerated power running out."[61] The Copyright Clause is, in effect, more like the Sixth Amendment (*Reid*) than the Commerce Clause (*Missouri*).

These somewhat more nuanced arguments, which allow the theoretical possibility that some limits might not possess the necessary constitutional heft and thus be avoidable under *Holland*, appear at least as a backup to most full-voiced endorsements of the Copyright Clause as the lodestar of all lawmaking in this field.[62]

2. A Critique of the Subservience Argument

The argument for the subservience of the Treaty Clause is thus closely tied, despite the use of some different doctrinal vehicles, to the reasoning that has swayed the majority of scholars to support subservience of the Commerce Clause. Given the persuasive force of those arguments to a majority of scholars (if not, however, courts), it is perhaps unsurprising that advocates of limited lawmaking authority under the Treaty Clause assimilate the two inquiries.

However, when the roots of the arguments that support subservience in the Commerce Clause context are exposed, it becomes apparent that those arguments

60. *See* Benkler, *supra* note 49, at 558-75 (nature of limits in the Copyright Clause); *see also* Malla Pollack, *The Right to Know? Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 72 (1999) (same); Heald & Sherry, *supra* note 17, at 1167 (extracting four principles of "constitutional weight" from the Copyright Clause—the Suspect Grant Principle, the Quid Pro Quo Principle, the Authorship Principle, and the Public Domain Principle—and applying those principles horizontally to other grants of authority).

61. Heald and Sherry, *supra* note 17, at 1181-83. The viability of this line is discussed below in critiquing the expansive interpretation of the Treaty Clause as an autonomous lawmaking source; supporters of that view place the limits found in the Copyright Clause on the other side of the same line.

62. In the copyright context, this is largely theoretical as all the principal limits of the Copyright Clause are seen as fundamental by these scholars. Yet, most do recognize that the Commerce Clause may have some role in targeted areas of regulation, *see, e.g.*, Benkler, *supra* note 49, at 600 (finding one database proposal constitutional under the Commerce Clause), and would likely find the Treaty Clause as a source of some additional lawmaking authority. Indeed, although the expansion of several legislative authorities means we might need to accept some greater redundancy in the constitutionally sanctioned lawmaking powers, *see* Nachbar, *supra* note 18, at 350, even a fully subservient reading of the *content* of permissible lawmaking under the Treaty Clause would not necessarily render the clause irrelevant. It would, at the very least, provide an alternative *process* (avoiding the House, and with greater Senate control) by which to create federal law that could alternatively be adopted as legislation under Article I. Of course, that argument is more persuasive with respect to self-executing treaties. Very few copyright treaties are in fact self-executing. *See infra.*

are less persuasive in supporting the subservience of the Treaty Clause. This is especially true when the arguments are grounded in the originalist and structuralist understandings that were used by the Rehnquist court to develop recent constraints on the Commerce power.[63]

a. Structural Arguments and Federalist Values in Copyright Lawmaking

Many of the subservience arguments advanced in the Commerce Clause debate rely on the idea that the structure of the Constitution mandates that the limits of the Copyright Clause trump the Commerce power.[64] Tom Nachbar persuasively makes the point that the structural constraints that have been derived recently by the Court from the Tenth and Eleventh Amendments and imposed on the ability of Congress to legislate pursuant to its Commerce Clause (and other) powers are not constraints that flow from the mere structure of the language of the Constitution. They are constraints that flow from the structure of government contemplated by the Framers of the Constitution, such that they would persist even absent express textual command.[65] Indeed, in recent years these structural principles have been applied beyond what many scholars would regard as the textual limit of the Tenth or Eleventh Amendments. Thus, Nachbar argues, claims of structural constraint depend in large part upon the fundamental relationship of those constraints to the system of constitutional governance. He concludes that the constraints found in the Copyright Clause do not rise to that level and thus do not limit Commerce Clause authority.

The same arguments apply with even greater force when considered in the context of the Treaty Clause. First, the structural constitutional value that drives

63. Much of the commentary trying to understand the relationship between the Copyright Clause and other clauses of the Constitution has focused on the historical meaning of the clauses. Of course, the methodology of original intent is a topic in and of itself. *See* STEPHEN BREYER, ACTIVE LIBERTY 25 (2005) (commenting that the Constitution begins "with the words 'We the People' . . . not 'we the people of 1787'"). Although history is often a very useful guide, it is a very dangerous master, in part because elevating the past may be normatively undesirable and in part because defining the past is itself a contested endeavor. But the current Supreme Court (like the Rehnquist Court before it) clearly values history as an interpretive tool. Without stepping into that broader debate, it is enough here to suggest that because the historical significance of the Copyright Clause is unclear, we must consider other interpretive devices.

64. *See, e.g.*, William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359 (1999); *cf.* Lawrence B. Solum, *Congress's Power to Promote the Progress of Science*: Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1, 19 (2002) (discussing textual structure).

65. *See* Nachbar, *supra* note 18, at 287-88. If we are focusing on overall *textual* structure, might the mere location of the Treaty Clause in a later provision of the Constitution support a different conclusion (even if it were persuasive with respect to the Commerce Clause)? Probably not. Although this textual methodology has been used by the Court to explain the relationship between a number of constitutional provisions, this typically has between where the two clauses were not adopted contemporaneously, thus offering some clues into the relationship that the constitutional drafters (of the amending provision) contemplated between the two clauses. *See* Daniel J. Cloherty, *Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise*, 82 CAL. L. REV. 1287, 1306 (1994) (discussing Eleventh Amendment abrogation).

relevant recent Supreme Court case law limiting congressional power is federalism. The scope of the Commerce Clause has become an important determinant, after many years of effective sequestration, of the allocation of powers between state and federal government.[66] Most international law scholars do not see the Treaty Clause in the same light, although one group of federalist international law scholars has recently sought to reject the so-called "nationalist" conception of the Treaty Clause (embodied, in part, in *Missouri v. Holland*) and to redirect some of that lawmaking authority to the States. They argue that because "[t]he treaty power . . . is a power to make supreme federal law . . . [i]f such law can be made on any subject, without regard to the rights of states, then the treaty power gives the federal government essentially plenary power vis-à-vis the states."[67] Thus, in order to prevent what they see as the demise of States' traditional authority, they have sought to revise the nationalist conception of the Treaty Clause (just as the Court has done with the Commerce Clause).[68]

If one adopts an outward-looking view of the Constitution, surely consistent with the character and disposition of its Framers, and analyzes the Treaty Clause in light of its external (international) effects as well as its internal allocation of power to different levels of government, the concern for federalism suggests that the relationship between the Treaty Clause and the Copyright Clause contemplated by *Holland* needs no *radical* revision.[69] There are no federalist principles that, as a matter of domestic law, structure the relationship between national and international lawmaking (even if some of us wish to develop neo-federalist principles as an interpretive device in the international system).[70] And no full-fledged federation of international states is likely to develop in the near future other than in very discrete regional trading areas.

Moreover, critics of the nationalist conception of the Treaty Clause that informs *Holland* are seeking to vindicate the rights of States in a federalist scheme, not the substantive political values that inform the Copyright Clause. Although elevating the role of States is not likely the goal of subservience scholars, finding kinship

66. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free Zones Act).

67. Bradley, *supra* note 31, at 394; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312 (1997).

68. *See* Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY. J. INT'L L. 137, 173 (2005).

69. *See* Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C.L. REV. 257 (2000).

70. Globalization might well increase the desire for "local democracy and experimentation and thus make federalism even more attractive," Bradley, *supra* note 31, at 461, but in matters of copyright these values will in the future best be served by national experimentation in the face of international pressures. This sentiment embodies values of neo-federalism that are worthy of endorsement as a matter of international copyright law. *See* Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *WTO Dispute Resolution and The Preservation of The Public Domain of Science Under International Law*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Maskus & Reichman eds., 2005) (Cambridge Univ. Press); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000) (critiquing premature entrenchment of fundamental norms as a matter of international law).

with scholars that limit federal authority in order to pursue a federalist agenda risks emphasizing the reservation of lawmaking authority in the field to the States.[71] And States have on several occasions offered protection that many scholars assume to be outside the scope of congressional copyright authority. This is true both with respect to protectable subject matter (e.g., ideas, or sound recordings prior to 1971) and the nature of protection (e.g., perpetual protection of unpublished works prior to 1978).[72]

This result might be unattractive even in the purely domestic context, where the efficacy of Congress regulating authors' rights nationally partially provoked the Copyright Clause in the first place.[73] But the use of analogy to structural arguments that would by logical extension force regulation to the State level, and foreclose lawmaking at a higher authority, is even more troubling in the context of

71. *See* Nachbar, *supra* note 18, at 290-91 ("the most obvious implication of the Copyright Clause's limitation that exclusive rights be granted only to 'Writings' of 'Authors' is not that the federal government may not protect facts (by granting exclusive rights under some other power), it is that States can."). To be fair to scholars who make the structural argument, although the logical extension of their kinship with federalists is the empowerment of State lawmaking, most of these scholars would separately disavow that conclusion. This is because, although the structural argument that they invoke connects with values of federalism, they ground their ultimate argument in substantive intellectual property values. *See supra* text accompanying notes 54-55. Indeed, other than in *Feist* and the patent decision *in Graham v. John Deere & Co.*, 383 U.S. 1, 5 (1966), some of the leading articulations of these intellectual property values by the Supreme Court has come in cases challenging the validity of state intellectual property protection under the Supremacy Clause. *See, e.g.*, Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989). Although every one of these cases involves the application of the Supremacy Clause, which provides a rule of recognition applicable in the case of vertical conflict, these cases are routinely over-read for their broader articulation of substantive, constitutional principles of intellectual property law.

72. The objection to protection of ideas is long-standing and unquestioned. *See* Baker v. Selden, 101 U.S. 99, 103 (1879); 17 U.S.C. § 102(b); *see generally* Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes From Its Scope of Protection*, 85 TEX. L. REV. (forthcoming 2007). It is a harder question whether that exclusion has a constitutional pedigree. Some argue that ideas are unprotected because they are unoriginal; like facts, they are discovered, not created. *See* Nguyen, *infra* note 96, at 1087; *cf.* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 347 (1991). However, while some basic ideas are indeed pre-existing (like objective facts), and thus arguably do not evince the creativity to meet the constitutional standard of originality, other ideas surely are original with an author. As a normative matter, we do not protect ideas both because some are insufficiently original and because others may be too important (and thus should be kept free for use by others). But it is not clear that the latter group is *constitutionally* free for use by others. And certainly, State law has provided protection, albeit of uncertain scope, to some ideas.

73. *See* THE FEDERALIST NO. 43 (James Madison) (noting that "the States cannot separately make effectual provisions for either of the cases" covered by the Copyright-Patent Clause). Indeed, in *Goldstein v. California*, the Supreme Court suggested that the need for a national response to the protection of sound recordings might enable Congress to preempt state regulation based upon a combination of the Commerce Clause and the Copyright Clause. *See* Goldstein v. California, 412 U.S. 546, 559 (1973) ("Where the need for free and unrestricted distribution of a writing is thought [by Congress] to be required by the national interest, the Copyright Clause and the Commerce Clause would allow Congress to eschew all [state] protection."); *see also* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 365-367 (1992) (discussing problems of state intellectual property laws in national economy, especially as regards digital products).

international lawmaking contemplated by the Treaty Clause. And in the copyright context, where the unimpeded global flow of digital products has made international approaches increasingly essential, it is downright perverse. Although some federalist scholars have recently sought to re-assert the role of the States in pursuing the U.S. national interest, the prevailing and more persuasive view is that foreign affairs and the exercise of power under the Treaty Clause are matters for the national government. The suggestion that the structure of federal government supports limiting the use of the Treaty Clause in matters of copyright is thus particularly unpersuasive.

Second, the Treaty Clause presents a weaker case for the imposition of structural constraints not only because the limits in the Copyright Clause appear unrelated to the structure of government, but also because the independent exercise of the Treaty Clause appears affirmatively supportive of a governmental vision contained in the Constitution. As discussed more fully below, the political checks involved in treatymaking were consciously designed to be different from those operating in a purely domestic process, and reflect the persistent difficulties that the Framers knew would arise when the national government sought to engage in matters of foreign relations. For example, the local political sensitivities of the House of Representatives were consciously excluded. This political structure is not less democratic; it is differently democratic, just as international lawmaking among nation-states is democratic in a different sense than one might find in local political communities.[74]

b. Finding the Lex Specialis*.*

If one accepts that the different authority-conferring provisions of the Constitution have to be read as an integrated whole, and that the limits in one clause operate externally to constrain other ostensibly valid exercises of power, two further questions arise. First, what is the scope of subject matter to which the limits apply? Thus, for example, we know that Congress cannot grant perpetual rights under the Copyright Clause, but how far does that limit extend horizontally? It clearly does not prohibit Congress conferring (potentially) perpetual rights on the owners of trademarks. Trademarks are seen as functionally different from copyrights and thus not within the scope of the Copyright Clause's grant[75] (or limit).[76]

But would *sui generis* database rights granted to material falling below the constitutional threshold of originality imposed by the Copyright Clause be protectable under the Commerce or Treaty Clauses?[77] According to most scholars, the horizontal or external application of the limits of the Copyright Clause will

74. *Cf.* Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004).

75. *See* Trademark Cases, 100 U.S. 82 (1879).

76. *See* 15 U.S.C. §§ 1051-1141n (2005).

77. *See* Reichman & Samuelson, *supra* note 26, at 96; Benkler, *supra* note 49, at 600; Ginsburg, *supra* note 73.

depend upon whether the rights conferred are "copyright-like," a determination that may be made by reference to a number of considerations such as purpose, effects or function.[78] That is, it becomes important to demarcate the "dead zone" that the constitutional limit creates as well as the active authority that it grants; these, strangely, are not, commensurate.

Second, which of the two clauses involved in this constraining dynamic should limit which? Throughout discussion of the relationship between the Commerce Clause and the Copyright Clause, it is assumed without much discussion that the limits in the Copyright Clause determine the scope of congressional authority under the Commerce Clause. But why should the limits in the Commerce Clause (e.g., "commerce with foreign nations, and among the several States") not constrain copyright lawmaking? After all, the Rehnquist Court clearly wished to revive the importance of the limits in the Commerce Clause. Alternatively, when lawmaking authority potentially exists under two grants, why should the limits of each clause not operate on the other, confining legislative authority to instances authorized by both grants? This approach would comport with the double actionability rule that applied in conflicts rules imposed in tort cases in many common law countries.[79]

The first of these questions is difficult even in the context of the Commerce/Copyright relationship. But the second has always been seen as straightforward: the Copyright Clause controls the commerce clause. In part, this may be because the Copyright Clause is seen as the *lex specialis*.[80] As a matter of general interpretation, the *lex specialis* excludes laws of more general application: *lex specialis derogat legi generali.* However, if the superiority of the Copyright Clause in the contest between Commerce and Copyright depends upon its classification as a *lex specialis*, it is not clear which provision is the *lex specialis*

78. Provisions not conferring exclusive rights on authors, but clearly addressing the protection of copyrighted works, have been sustained under the Commerce Clause. *See* Authors' League of Am., Inc., v. Oman, 790 F.2d 220, 224 (2d Cir. 1986) (upholding manufacturing clause of 1976 Copyright Act under Commerce Clause); United States v. Elcom, 203 F. Supp. 2d 1111, 1140 (N.D. Cal. 2002) (Commerce Clause sufficient to sustain the anti-trafficking provisions of the DMCA because those provisions were intended to promote the same purposes as copyright and thus were not "fundamentally inconsistent with the" Copyright Clause).

79. Basil Markesinis et al., *Concerns and Ideas about the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133, 193 (2004).

80. *See* Dan T. Coenen & Paul J. Heald, *Means/Ends Analysis in Copyright Law:* Eldred v. Ashcroft *in One Act*, 36 LOY. L.A. L. REV. 99, 99 (2002) ("the Court has held that a *specialized* grant of power – like the bankruptcy power—may restrain Congress from regulating the subject matter of that power under other grants like the Commerce Clause," (emphasis added)); Dreyfuss, *supra* note 46, at 230 ("Restrictions on constitutional grants of legislative power, such as the Copyright Clause, would be meaningless if Congress could evade them simply by announcing that it was acting under some *broader* authority") (emphasis added); Patry, *supra* note 64, at 375-76 ("*Gibbons* supports the proposition that constitutional limitations placed on Congress by a *specific* clause do not act only as a limitation on Congressional power when Congress is legislating under that clause; such limitations also serve, in at least some circumstances, to bar Congress from circumventing their application by legislating under a different clause.") (emphasis added); Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 U. DAYTON L. REV. 159, 171 (2002) (constructing the argument around the proposition that "the enumerated power in the [Copyright Clause], like each enumerated power, applies to a particular, discrete area of possible legislative activity").

(or whether there is one) in the battle between the Copyright Clause and the Treaty Clause.[81]

The text of the respective clauses is not determinative. The Treaty Clause may be broader than the Copyright Clause in that it governs subject matter other than copyright, but it may be narrower if one reads it as conferring authority only in matters of international affairs (the historical, if now disputed, reading). The Treaty Clause appears directed at a separate lawmaking task and objective in ways that are not so obvious with the Commerce Clause. The historical record is also insufficient to provide definitive guidance. The context of the late eighteenth century suggests that the Copyright Clause sought to empower Congress to regulate authors' rights in order to accommodate purely local objectives.[82] So, in the Treaty Clause context, there is no obvious reason derived from text, history or logic why the one lawmaking function should control the exercise of the other. At the very least, there may be *no lex specialis*.

Indeed, Laurence Tribe has argued that the limits of the Treaty Clause (i.e., the ratification of treaties through a separate, defined procedure) should limit the operation of the Commerce Clause in the field of operation of the Treaty Clause. As a result, he argued that Congress cannot ignore the Treaty Clause requirement of a two-thirds vote of the Senate and ratify treaties by the same bicameral majority vote required for legislation.[83] Extended to a logical extreme, one might in fact find that the Treaty Clause would establish limits on the authority conferred by the Copyright Clause. Might all copyright with an international derivation be capable of incorporation within U.S. law only by following the procedures set out in the Treaty Clause? Are matters of international copyright to be pursued via the Treaty Clause and domestic matters only to be subject to the constraints of the Copyright Clause? There is no reason to think so. This argument would extend Tribe's proposition well beyond the purpose for which it was originally advanced, and perhaps ignore differences between substantive and procedural limits on constitutional authority.

In any event, the integration of domestic and international copyright lawmaking is such that separating the two lawmaking grants would be impossible. Given their intermeshing, we may have to accept that the limits of the Copyright Clause might

81. It is not uncommon for courts to develop a hierarchy where rights overlap. *See, e.g.*, Vornado v. Duracraft, 58 F.3d 1498, 1510 (10th Cir. 1995); *cf.* Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611 (1999) (disputing patent/trade dress hierarchy).

82. *See* Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 38-42 (2002) (persuasively demonstrating that the focus of the framers and early lawmakers was on domestic authors and domestic works); Nguyen, *infra* note 96, at 1079 (describing the original copyright scheme as "a system to protect copyright domestically"). And, as discussed below, there is good reason why international lawmaking might need to be less constrained.

83. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1225-26 (1995). Tribe also suggests that his holistic approach to the Constitution prevents Congress from pursuing amendment of the Constitution through any device other than that set out in Article V. That is, he sees the Constitution as an "interconnected whole" which would be disrupted by allowing one provision readily to substitute for another.

at some point have relevance for international copyright; otherwise, there would appear to be little to constrain Congress from unlimited domestic regulation under the Treaty Clause. But likewise the Treaty Clause may offer lawmaking authority in the international arena, with local effects, in ways that do not exist under the Copyright Clause with respect to purely local regulations.

c. Framing Fundamental Values in the International Environment

As discussed above, perhaps the most dominant argument that allows proponents of subservience to the Copyright Clause to limit other lawmaking authority, almost regardless of the doctrinal mechanism with which they are confronted, is that the limits in the Copyright Clause embody a set of fundamental values regarding essential freedoms and the nature of American society.[84] Let us put aside for now whether this analysis of the fundamental nature of the limits in the Copyright Clause holds up in the context of domestic regulation. It is at least more open to question in the context of international copyright relations. As Graeme Austin has explored in careful detail, the American copyright system at the time of the Framers (and for a substantial time thereafter) paid little heed to questions of international copyright.[85]

It is not impossible to justify a more internationalist vision within the instrumentalist rubric of the Copyright Clause, as some legislators did as early as the nineteenth century[86] and as the Supreme Court accepted as plausible in *Eldred*.[87] But it may be, alternatively, that extensive international copyright relations that offered protection beyond local interests were not at the time of the Framers deemed consistent with the promotion of progress of science and the useful arts. And, perhaps, most likely, the Framers probably gave it little if any thought. We simply do not know. While recent constitutional litigation has caused the development of a fuller historical record of eighteenth century debates, there is still little to be gleaned from this scholarship (without pure speculation) as regards international copyright law. [88]

Whatever the cause of initial lack of attention in the United States to international copyright matters, that has changed—though, in its fullest form, this American focus on the international dimension occurred relatively recently.[89] It is clearly now the case that domestic copyright objectives are pursued in part through regard for protection internationally. But once the international variable is introduced into the copyright equation, the policy calculus is altered. Perhaps the

84. *See supra* text accompanying notes 54-55.

85. *See* Austin, *supra* note 82, at 36-43, 50-51, 58-59.

86. *See id.* at 40 (discussing legislative proposals as far back as 1837).

87. *See* Eldred v. Ashcroft, 537 U.S. 186, 195 (2003).

88. *See, e.g.*, Tyler T. Ochoa, *Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 28-29 (2001).

89. *See* Jane C. Ginsburg & John M. Kernochan, *One Hundred And Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM. J.L. & ARTS 1 (1988); Dinwoodie, *supra* note 70, at 477-78.

constitutional analysis of lawmaking options should be too?[90] Traditional domestic objectives may be achieved, and domestic values vindicated, through international agreements that contemplate norms and processes foreign to local law. If foreign legal cultures vindicate those same values in different ways, securing the broader international endorsement of traditional American copyright ideals might require more leeway to negotiate and (invoking the Treaty Clause) to legislate. More unsettling for some, the complexity of foreign relations may demand short-term compromises on specific local values in order to pursue objectives that are consistent over the long haul with the domestic national interest and domestic constitutional values.[91]

Of course, some might argue that the very essence of a national constitution is to preserve distinct political ideals in the face of the immense pressures of globalization.[92] Collisions between domestic laws that seek to respond to the demands of internationalization, on the one hand, and the dictates of existing national principles, on the other, are becoming more frequent. Measuring the validity of internationally motivated laws by reference to constitutional norms is likely to maximize the prospect of incongruence. Constitutions are uniquely nationalistic in nature.[93] But the Framers well understood the value of international trade, notwithstanding an inability to predict the internationalization of copyright.[94] The larger question raised by this debate is how we are to read the United States Constitution in a way that permits copyright law to develop in a fashion respectful of both the demands and legitimate claims of international lawmaking, on the one hand, and the domestic political values that are reflected in the Constitution, on the other.

Assessing whether the limits of the Copyright Clause embody values so profound that they should trump the pursuit of international agreements under the more generous authority of the Treaty Clause appears a harder question than the parallel inquiry in the Commerce Clause context. Likewise, the judicial task in second-guessing complex international copyright policy decisions for compliance with the requirements of the Copyright Clause is doubly difficult. The Supreme Court has stressed that even in the domestic context "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[95]

90. *Cf. Eldred*, 537 U.S. at 186.

91. *See* Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 332 (2002) (arguing that the United States could not "play a leadership role" in the give-and-take evolution of the international copyright system, indeed it would "lose all flexibility," "if the only way to promote the progress of science were to provide incentives to create new works") (*quoted* in *Eldred*, 537 U.S. at 206).

92. *See, e.g.*, Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 658-659 (1996); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANS. L. 613 (1996).

93. *See* Brian F. Havel, *In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust*, 80 IND. L.J. 605, 641 (2005); Hamilton, *supra* note 92, at 659.

94. *See* Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C.L. REV. 257 (2000).

95. *See Eldred*, 537 U.S. at 212.

That counsel needs to be taken even more seriously in the international environment in which the Treaty Clause operates.

B. AN EXPANSIVE AUTONOMOUS TREATY CLAUSE

1. The Argument for Expansive Autonomous Treaty Clause Authority

There are at least two ways in which one could defend the position that the limits in the Copyright Clause do not constrain the Treaty Clause. First, one could argue that the Treaty Clause is simply autonomous and not subject to constraints emanating from other constitutional grants of authority. Thus, the argument goes, the analysis of conflicts between two clauses setting out legislative power in Article I (such as the Commerce Clause and the Copyright Clause) has little bearing on the relationship between a legislative power under Article I and an executive power under Article II. A second approach, that is at first blush more cautious, is simply to claim that, whatever limits might be imposed horizontally upon the scope of the Treaty Clause, the limits in the Copyright Clause do not rise to the level of constitutional significance necessary to extend beyond their own place in the Constitution and thereby curtail other grants of authority. When pursued through this reasoning, however, the expansive autonomous view of the Treaty Clause differs from the subservient view only in the characterization of the nature of the limits found in the Copyright Clause.

The critique of subservience in the preceding part of this paper suggests that the Treaty Clause should not be *wholly* constrained by the limits in the Copyright Clause. The international dimension of copyright lawmaking undermines the arguments supporting horizontal application of Copyright Clause limits (regardless of whether the limits *do* transfer to constrain the Commerce Clause). The international variable makes it harder to argue that the values of the Copyright Clause are so fundamental that they *ipso facto* override the ordinary presumption of alternate lawmaking authorities. The basic rule of *The Trade-Mark Cases* (in which the Court hinted not only at the alternative use of the Commerce Clause, but also less obviously at the relevance of the Treaty Clause) thus remains the starting point for analysis.

But some commentators have gone further. For example, Caroline Nguyen argues that the Treaty Clause represents an autonomous and expansive source of lawmaking authority.[96] Relying in large part on *Missouri v. Holland*, Nguyen argues that the Treaty Clause is not in any way constrained by limits in the Copyright Clause. In order to accommodate *Reid v. Covert*, where the Court held that the Treaty Clause could not be used to deny Sixth Amendment rights, Nguyen

96. *See* Note, *Expansive Copyright Protection For All Time? Avoiding Article I Horizontal Limitations Through the Treaty Power*, 106 COLUM. L. REV. 1079 (2006); *cf.* Michael B. Gerdes, *Comment, Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L.J. 1461 (1992) (relying on *Holland* by analogy to argue for use of Copyright Clause powers).

distinguishes between laws that violate affirmative constitutional prohibitions (e.g., the First Amendment and the Sixth Amendment) and laws that exceed enumerated Article I powers (such as the Copyright Clause).[97] Only the former, Nguyen argues, are unconstitutional. As a result, she concludes that the anti-bootlegging provisions introduced into U.S. copyright law in 1994 as part of the TRIPS implementation legislation are a constitutional exercise of lawmaking authority under the Treaty Clause.[98]

However, the rule of *Missouri v. Holland* on which an expansive, autonomous reading of the Treaty Clause is based has itself been subject to substantial critique. This part of the paper thus examines whether that foundation for an expansive reading of the Treaty Clause is sufficiently open to question that copyright lawmaking should not occur under the Treaty Clause in an unfettered fashion.

Let us start by reconsidering, in the specific context of the Treaty Clause, the question that prompted some scholars to argue for subservience of the Commerce Clause to the limits of the Copyright Clause: what is the point of limits in one clause if these can easily be circumvented by reliance on another broader grant?[99] Indeed, this question may in one sense seem more urgent in the Treaty Clause context, because an unlimited Treaty Clause might allow international activities of the national government to expand the scope of its constitutional authority. This raises the prospect of negotiators seeking an international agreement with as broad a scope as possible in order to confer on themselves unbounded constitutional authority.

Such a reading of the Constitution shows little fealty to the notion of an enduring *Grundnorm*, a troubling thought for those who find reassurance in traditional values.[100] For others, this possibility might be seen as a benefit rather than a detriment, enabling the evolution of constitutional authority in line with the demands of globalization. Such a dynamic approach to constitutional authority, which transfers some of the political policing of the lawmaking remit to the international arena, might perhaps represent an inevitable and appropriate retrofitting of the lawmaking process for an era of global inter-dependence.[101] Moreover, the idea that contemporary realities of international relations might effectively expand the scope of congressional lawmaking authority is fully

97. *See* Reid v. Covert, 354 U.S. 1 (1956).

98. Nguyen accepts that there are both substantive and structural limitations on the Treaty Clause but finds that none of these requires the transposition of limits found in the Copyright Clause. *See* Nguyen, *supra* note 96, at 1105.

99. Or, to state the question more affirmatively, why might we allow a Treaty-Clause-based law where such a law would transgress a limit in the Copyright Clause?

100. It is striking, at least to Europeans who come to the United States, that "the highest American political ideals" that are invoked by advocates on both sides do not openly include the capacity and willingness to change. These attributes are (whether good or bad) essential aspects of American culture and, among other things, arguably differentiate the United States from what some have mockingly called "old Europe." Static ideals are arguably what drained European power and gave rise to the United States in the first place.

101. *See infra* Part II.

consonant with the majority opinion in *Eldred*.[102]

However, the moral hazard that confronts treaty negotiators under this view should make us sensitive to the extent of authority that this approach confers, and requires fresh consideration of the values underlying *Missouri v. Holland*.[103] In rejecting the challenge to the Treaty in *Missouri*, the Court declined to subject the Treaty Clause to federalism limits. Thus, although Congress would not (at that time) have been able to adopt the challenged law under the Commerce Clause, the law could be valid under the Treaty Clause.[104] However, the Court did not say that the Treaty Clause was unlimited, notwithstanding that some commentators initially read the opinion in that fashion. Instead, the Court observed that any limits on the treaty power "must be ascertained in a different way" from limits on domestic powers.[105]

Why might that be so? Substantively, as noted above, the values that lawmakers might need to pursue at the international level, or the means through which they might pursue them, might depart from those ends or means that are desirable domestically. As a matter of process, the Constitution put in place different political checks on excessive treaty-making power. The Framers contemplated the Senate and House fulfilling different responsibilities.[106] Members of the House are expected to represent the passions of the people and to be the voice of popular opinion. The Senate was intended to operate at a greater remove from citizens and to legitimate its after-acquired sobriquet as "The World's Greatest Deliberative Body." Such detachment might be necessary in matters of foreign affairs lest the heat of immediate national preferences overwhelm the cooler calculus of long-term international compromise. Moreover, matters of foreign affairs have always implicated more directly hard political questions that were thought to be inappropriate subjects for judicial policing. In the case of the Treaty Clause, policing would be political and not judicial.[107]

2. A Critique of an Expansive, Autonomous Treaty Clause

Even were this scheme ideal in theory, the holding in *Missouri* was regarded by many as an improperly blank check to award lawmakers. A constitutional amendment (the Bricker Amendment) seeking to overrule *Missouri* was introduced and made some progress before losing steam in the face of the *Reid* decision and expanding congressional authority under the Commerce Clause (which rendered

102. *See also* Golan v. Gonzales, 74 U.S.P.Q.2d (BNA) 1808, 42-43 (D. Colo. 2005).

103. *Cf.* Graves, *supra* note 17, at 251-52 (expressing concern about creating own authority).

104. *Cf.* United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996) (upholding wildlife legislation as a valid exercise of Congress's commerce power).

105. *See* Missouri v. Holland, 252 U.S. 416, 433 (1920)

106. *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1776-1787) 575-79 (1969).

107. The Senate was also intended to be the voice of the States, thus effectuating federalist concerns through political checks. But the policing of federalism politically in the domestic realm has given way to judicial oversight, and attacks on *Missouri* represent efforts to extend that judicial oversight of federalism.

the Treaty Clause less relevant). However, the renewed attention to federalism by the Rehnquist Court brought new pressures on the *Missouri* principle. As the scope of the Commerce Clause has contracted, other lawmaking authorities once again become more relevant. And as federalist scholars saw that the Court was willing to police federalism judicially, rather than through the political checks upon which the Court had relied for the majority of the twentieth century, they re-asserted the notion that broad federal power under the Treaty Clause impinged upon State rights.[108]

Although the federalist critique of *Missouri* has little direct significance for copyright law,[109] some of the developments that lend the critique weight are particularly pronounced in the realm of copyright law. Without fully endorsing the federalist attack on *Missouri*, analysis of the proper relationship between the Treaty Clause and the Copyright Clause must account for these developments, which weaken the substantive and procedural arguments for the full-blown *Missouri* approach.

a. Prohibitions and Limits

The line drawn by proponents of an expansive Treaty Clause between "affirmative prohibitions" and mere "limits on authority" is less helpful than scholars (on either side) suggest. Nguyen, for example, asserts that the Copyright Clause contains "mere limits on authority," which would not constrain Treaty Clause lawmaking; scholars critical of the expansion of copyright protection have described the limits of the Copyright Clause as "prohibitions."[110]

Supporters of expansive autonomous Treaty Clause authority (for whom this line is especially important in rebutting claims of unchecked power) simply have not explored this dividing line in any depth. At the very least, one should not simply rely on the form in which the limits are expressed. Would the Treaty Clause offer as expansive an alternative if the Copyright Clause provided that Congress "shall not offer perpetual protection," as most scholars read the effect of the Limited Times language of the Clause? The entire constitutionality of a copyright law surely should not be dependent upon whether the syntax of the limit in the Copyright Clause occasions a positive or negative statement.

If the happenstance of the Framers' grammar can turn a "mere limit on authority" into an "affirmative prohibition," the distinction upon which both Nguyen, on the one side, and Heald and Sherry, on the other, rely must and does evolve into a more substantive inquiry, namely, whether the limit in question is "fundamental" to the constitutional scheme. Although this is preferable to a parsing of syntax, it effectively assimilates the Treaty Clause inquiry to the same

108. *See* Bradley, *supra* note 31, at 434-435; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1965-1966 (1999).

109. *See supra* text accompanying notes 66-68.

110. *See* Heald & Sherry, *supra* note 17, at 1123; *see also* Railway Labor Execs' Ass'n v. Gibbons, 455 U.S. 457, 473 (1982).

question that determines the scope of Commerce Clause authority. I am largely persuaded by Tom Nachbar's assessment of the constitutional significance of the limits, and thus I reach a similar conclusion on the transposition question in the Treaty Clause context. But it is trite to say that the dilemma is avoided by the distinction between "affirmative prohibitions" and "mere limits on authority." Those asserting that the Treaty Clause offers expansive lawmaking opportunities beyond the Commerce Clause must do more than reargue the character of the limits of the Copyright Clause.

b. Political Process Checks: New Forms of "International" Lawmaking

Constitutional lawmaking grants are allocations of power. A theory of checks and balances might confer independent alternative authority on different institutional actors who operate as a constraint on one another. The Treaty Clause and the Copyright Clause allocate power to different institutions and thus the check is real, and the justification for separate lawmaking constraints more plausible. In contrast, the Copyright Clause and the Commerce Clause allocate power in the same proportions to the same institutions, namely, the bicameral Congress subject to Presidential veto. Viewed in terms of checks on power, it makes sense that the limits on what Congress can do under one clause inform what it can do under another. It is less obvious that what Congress can do under the Commerce Clause is intended to limit what the treaty-makers can do under another power. Indeed, such a reading *reduces* the checks established by the allocation of dueling authority to different institutions.[111]

However, the robust and independent vision of the Treaty Clause that this argument presents fails to acknowledge the multitude of ways by which international law and policy influences and informs American copyright law. The scope of the Treaty Clause has been interpreted in an increasingly liberal fashion, accommodating within its confines activities that do not conform with the political dynamic that theoretically sets the treaty-making process apart from ordinary domestic lawmaking. For example, the leading multilateral intellectual property agreement, the TRIPS Agreement, is not a treaty in the formal sense used by the U.S. Constitution. It is a congressional-executive agreement.[112]

A congressional-executive agreement is an executive agreement (i.e., an agreement concluded by the President) to which Congress gives its assent either in advance or after the international agreement is concluded. That assent takes the form of a majority of both houses of Congress, avoiding the Treaty Clause requirement of a two-thirds vote in the Senate and involving the House of Representatives.[113] The Supreme Court has over the years adopted a permissive

111. When the political checks are reduced, one might expect enhanced judicial oversight. *See infra* Part II.

112. *See generally* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998).

113. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1987).

attitude to what forms of law can be sustained by invocation of the Treaty Clause. In particular, the Court has extended the benefit of Treaty Clause authority to congressional-executive agreements, treating them as federal law that is valid under the Clause.[114]

More generally, international obligations are increasingly assumed using more diverse devices, and in ways that are more supportive of executive lawmaking authority. Thus, in addition to law made through fast track or trade promotion authority (which alters the balance of power toward the President, but also imbues the House with relatively greater power than it has in the Treaty process and the Senate with less), perhaps of greatest significance in recent years in copyright has been the use of bilateral trade agreements.[115] The Treaty Clause encompasses this type of lawmaking activity, even though it involves actors quite different from those contemplated in the text of the Clause. Thus, treaty-making—or, more properly, the lawmaking that seeks to take advantage of the authority conferred by the Treaty Clause—comes to look more like ordinary domestic lawmaking. Indeed, commentators have even noted that international agreements are increasingly negotiated and concluded in a manner that approximates the legislative process, through mechanisms such as multilateral drafting conferences.[116]

As a result, the political checks that might be thought to exist under this separately-designed process may not exist. Thus, support for autonomous lawmaking authority under the Treaty Clause must be tempered by the contemporary political reality that international processes may simply be an inappropriate end-run around limits on Copyright Clause authority rather than operation of an independent and different political process.[117]

c. Elimination of Subject Matters Limits on the Treaty Clause

At one point, the Treaty Clause was understood to confer lawmaking authority

114. *See* United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936); *see also* Made in the USA Found. v. United States, 56 F.Supp.2d 1226 (N.D.Ala. 1999) (upholding NAFTA); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805 (1995). Some congressional-executive agreements (like some formal treaties) explicitly disclaim any direct effect on U.S. law. *See supra* note 41, United States-Australia Free Trade Implementation Act, Pub. L. No. 108-286, § 102, 118 Stat. 919, 921 (2004).

115. Graeme B. Dinwoodie *The International Intellectual Property Law: New Actors, New Institutions, and New Sources*, in PROCEEDINGS OF THE 98TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 213 (2004), *reprinted in* 10 MARQ. INTELL. PROP. L. REV. 205 (2006). To the extent that these are assumed as obligations of the United States vis-a-vis other members of the World Trade Organization, the obligations are multilateralized via the most favored nation provision in Article 4 of the TRIPS Agreement. *See* TRIPS Agreement, *supra* note 22, art 4. Although the United States typically disclaims any direct effect of such bilateral trade agreements, most other countries give the provisions direct effect. *See, e.g.*, Proposed U.S.-Korea Free Trade Agreement.

116. *See* Bradley, *supra* note 31, at 440; Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 217 (2006).

117. Recognizing the consequent need for greater judicial policing of the international process would simply bring to this question the parallel evolution in the policing of other constitutional values, such as the relationship between state and federal government.

only with respect to matters that truly were international in nature. The Second Restatement of Foreign Relations took this view,[118] but by the time of the Third Restatement, the view had become discredited.[119] Although this reversal has been criticized,[120] it reflects inevitable changes in lawmaking practices.[121] Increasingly, with the growing interdependence of nations, international matters have direct impact on domestic interests, and domestic regulation has substantial territorial spillover. Nowhere is this more true than in copyright law, where digital communication technologies have made it more difficult for private parties or lawmakers to separate domestic regulation from international policy.

Thus, it would be unwise (if not impractical) to seek to reestablish the subject matter limit on the Treaty Clause. However, some of the deference that was owed to treaty-making under the Treaty Clause flowed from the subject matter of the treaties as much as from the separate process by which treaties were to be concluded. If, both in subject matter as well as in form, treatymaking has come to resemble domestic law-making, then the theoretical basis for deferential review of treaties has been eroded. It will be necessary to introduce some of the safeguards of judicial policing (and to animate the political checks) that are built into the domestic lawmaking process.

C. A LIMITED BUT AUTONOMOUS TREATY CLAUSE

The foregoing critique of an unfettered Treaty Clause brings into focus the view of a small group of scholars who see the Treaty Clause as offering an alternative lawmaking authority, but one that is substantially limited by the internal limits of the Treaty Clause. Although this group is harder to force into a single model, some would find limits in the subject matter that might appropriately be treated under the Treaty Clause, while others argue that the form of the lawmaking that seeks to rely on the Treaty Clause might limit its application.

Thus, Tim Holbrook has argued that the Treaty Clause will operate free from the limits of the Patent and Copyright Clause if the subject matter of the law in question is truly international.[122] He would essentially reestablish the position of

118. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117(1)(a) (1965) (limiting the treaty power to matters "of international concern").

119. *See* THIRD RESTATEMENT, *supra* note 113, at § 302 cmt. c. ("[c]ontrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'").

120. *See, e.g.*, Bradley, *supra* note 31, at 431-432.

121. Indeed, given the increased entanglement of domestic and international concerns, one might as plausibly read the subject matter limit today as forbidding Treaty Clause authority only when there is *no* international implication, that is, when the matter regulated is purely local. This might be seen as the parallel evolution in the Treaty Clause that occurred with the Commerce Clause.

122. *See, e.g.*, Holbrook, *supra* note 17, at 41 ("The Treaty Power implicates international relationships and grants of rights to foreigners within the United States and U.S. citizens abroad. This aspect of the Treaty Power thus requires pause before the limitations of the Patent Clause are automatically imported into the Treaty Power."); *see also* Howe, *supra* note 17, at 848-50 (arguing that the Treaty Clause can be a source of lawmaking authority and that the courts should show particular deference where the subject matter involves foreign relations and international commerce, as when a

the Second Restatement of Foreign Relations. As suggested above, the principal criticism of this position is that the distinction between international policy and domestic copyright policy is illusory. And this line has become less distinct with every passing year. Copyright policy is an important part of the United States foreign relations policy, and the international dimensions to the discipline increasingly dictate the content of domestic copyright law. Thus, one cannot simply assign jurisdiction between the two lawmaking powers based upon that division of subject matter.

Indeed, if one sought to do so, but accepted the legitimate demands for increased international lawmaking in copyright, the view of the Treaty Clause as a limited autonomous lawmaking authority might approximate the expansive view of the Clause discussed earlier in this paper. Thus, while Nguyen and Holbrook afford different degrees of latitude to lawmaking under the Treaty Clause, this is not because of different approaches to external limits incorporated from the Copyright Clause. As a doctrinal matter, both Nguyen and Holbrook conclude that the limits that flow from the qualified nature of the grant of authority in the Copyright Clause in Article I do not confine Article II powers, even if they might constrain other Article I powers such as the Commerce Clause. Because Holbrook also finds internal limits on the subject matter of the Treaty Clause, this allows him to constrict the scope of the clause more than Nguyen; but only in theory. The integration of domestic and international lawmaking makes this an ineffective constraint (at least, if not especially, in the copyright context).

Other scholars have argued that the Treaty Clause should operate only when a treaty has formally been adopted in accordance with the procedures of the Clause itself.[123] However, this might be a restraint not only on abuse of the Treaty Clause, but also on necessary international copyright lawmaking.[124] Some scholars who have called for a moratorium on public international lawmaking might find this attractive.[125] But the political economy of international intellectual property lawmaking has reached an impasse at a time when some degree of international

statute implements an international trade agreement).

123. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.09 (2006); Jaszi, *supra* note 50, at 602, 607 & n.19 (1996) (arguing that the anti-bootlegging law could not be justified under the Treaty Power because the TRIPS Agreement was not a Treaty and was not presented to the U.S. Senate for ratification, but acknowledging that under *Holland* a formal treaty could effect lawmaking not open to Congress; but the restoration provisions may be grounded in the authority of Congress to implement treaties . . . . were it not for arguable over-implementation). Some commentators might reach a similar position through different doctrinal mechanisms. *See, e.g.*, O'Connor, *supra* note 17, at 1039, 1044 (arguing that, subject to an argument of pretext, "the treaty power can give Congress powers not explicitly contained in the Constitution even when the document at issue isn't really a treaty.").

124. *Cf.* BREYER, supra note 63, at 34 (noting that "our constitutional history has been a quest for workable government, workable democratic government, workable democratic government protective of individual personal liberty").

125. *See* Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods, in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3 (Keith E. Maskus & J. H. Reichman eds., Cambridge U. Press) (2005).

progress is essential, either to address global enforcement problems or guarantee user rights in the face of bilateral trade pressures or private ordering.[126] Internationalization will occur in any event through private ordering, and technological, corporate and diplomatic avenues; policed and monitored public international lawmaking is a preferable technique.[127]

II. A PROPOSED APPROACH: FINDING A MIDDLE GROUND

I have argued in Part I of this paper that the subservient view of the Treaty Clause ignores the separate and different role that the Clause serves apart from grants of domestic legislative authority. As a result, there must be deference to lawmaking under the Treaty Clause that exceeds that given to laws adopted under the Commerce Clause. On the other hand, judicial policing of Treaty Clause authority cannot be as deferential as suggested by the expansive autonomous view of the Treaty Clause; there has to be effective judicial review that reflects new forms of lawmaking. And that enhanced scrutiny, for practical reasons, cannot consist of simply requiring that those seeking to invoke the Treaty Clause comply with the substantive or procedural limits contemplated by the Framers. This would be either meaningless or too constricting, depending upon how courts interpreted those limits.

Thus, I propose a standard of review for laws adopted pursuant to the Treaty Clause that avoids the extremes of subservience or unfettered autonomy. A provision of copyright law that exceeds the limits of the Copyright Clause is not, by virtue of its grounding in the Treaty Clause, *ipso facto* constitutionally immune from challenge. Likewise, the demands of domestic innovation policy embodied in the Copyright Clause do not constrain the ability of the United States to enter into international arrangements, enforceable in domestic law, that reflect and compromise more diverse international concerns.

In doctrinal terms, I suggest that courts faced with reviewing copyright laws reliant upon the Treaty Clause for their constitutional legitimacy examine a matrix of at least three variables: (1) the strength of the international obligation with which domestic actors seek to comply; (2) the extent to which the process of developing the international norm and incorporating it into U.S. law contained real political checks on lawmaking; and (3) the particular limits in the Copyright Clause that the Treaty Clause-based law is alleged to have violated. I also raise the question, not unique to Treaty Clause issues, whether the closeness of the violation of Copyright

126. *See* Graeme B. Dinwoodie, *The International Intellectual Property System: Treaties, Norms, National Courts, and Private Ordering*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT (Gervais ed. 2007) (Oxford) (forthcoming).

127. *See* Graeme B. Dinwoodie. *Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring*, 160 J. INSTIT. & THEOR. ECON. 161 (2004); Graeme B. Dinwoodie, *The Institutions of International Intellectual Property Law: New Actors, New Institutions, and New Sources*, in PROC. OF THE 98TH ANN. MEET. OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 213 (2004); Ruth L. Okediji, *The Institutions of Intellectual Property: New Trends in an Old Debate*, PROC. OF THE 98TH ANN. MEET. OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 219 (2004).

Clause limits should be an additional relevant consideration.

A. STRENGTH OF THE INTERNATIONAL OBLIGATION

Some domestic copyright laws are adopted in order directly to implement international obligations. But the internationally-rooted motivation for a copyright law might be something other than immediate compliance with international obligations. Copyright laws might be adopted to improve the negotiating posture of the United States in the international environment by demonstrating leadership on a particular issue. Yet others reflect a desire to enhance the protection of American authors abroad, either directly by enacting the law necessary to fulfill a reciprocity requirement or indirectly by ensuring participation in an international system. Treaty Clause-grounded laws should be most constitutionally favored when seeking to ensure domestic compliance with real international obligations.[128]

The Treaty Clause plays an important role in giving domestic effect to international obligations of the United States. American national interests would suffer if international commitments were dishonored by domestic inaction in "bringing international law home."[129] Thus, the Supreme Court has exhibited deference in allowing Congress to act pursuant to the Necessary and Proper Clause to adopt legislation implementing international treaty obligations. Of course, the surest way to ensure that U.S. law is fully consistent with the international obligations of the United States is either to adopt a monist approach to international law or revert to the use of self-executing treaties as the primary form of international lawmaking. While the use of self-executing treaties has much to commend it in terms of its capacity both to conform domestic and international law as well as to maintain the currency of international law by effectively incorporating legal evolutions that occur in international institutions, current political realities preclude such an option. Throughout history, the United States has rarely treated copyright agreements as self-executing, and the trend in U.S. attitudes to the form of international instruments generally has been to limit the number of self-executing treaties.

128. In both *Eldred* and *Golan*, the court held that involvement in international lawmaking assisted in providing a rational basis for the adoption of the legislation in question *under the Copyright Clause*. However, it should be noted that the law at issue in *Golan* was clearly necessary to secure *compliance* with international *obligations.* In *Eldred* in contrast, the Court allowed the desire of Congress to be a leader in international lawmaking and place American authors on an equal footing abroad—a policy objective far less weighty than compliance with international obligations—to inform judicial assessment of whether the extension of the copyright term of existing works was a rational exercise of congressional power under the Copyright Clause. For Treaty Clause purposes, the explanation in *Golan* should confer greater constitutional immunity (at least under this variable). Similarly, legislators might argue, for example, that the United States was acting to move toward norms prevailing internationally but upon which there was no current international agreement. Giving full deference to such a lawmaking exercise suggests too liberal a reading of Treaty Clause authority. Such a motivation weighs less heavily in favor of constitutionality than a compulsion to implement international obligations.

129. *Cf.* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

The motivation of international compliance does, however, go to the heart of foreign affairs' concerns—concerns that underlie historical deference to Treaty Clause action and thus should justify greater constitutional latitude. This is not to say that the Treaty Clause should be unavailable as a constitutional basis for enacting laws not directly necessary for compliance with international obligations. Adoption of such a standard would create unhealthy incentives on the part of American participants in international negotiations. The current system of international copyright law is constructed around the principles of *minimum* substantive standards of protection. If American negotiators were required to obtain an explicit treaty statement mandating the terms of a particular law, this might cause the premature entrenchment of a more intrusive than necessary norm internationally.

Moreover, incentivizing detailed treaties that track desired domestic legislation runs counter to another essential principle of international copyright law, reflected in both the general operation of the Berne Convention and the text of the TRIPS Agreement. Countries retain substantial latitude as to the means by which they implement international obligations in their domestic system. Such a principle shows respect for the different cultures that pertain in different countries and contributes to the efficient implementation of international norms in ways that command respect on the ground where enforcement is sought.

Requiring a one-to-one mapping between the treaty obligation and the domestic implementing legislation for which the Treaty Clause is asserted as a constitutional authority would also encourage the adoption of treaties that resemble U.S. statutes in both content and level of detail. This might compound the present perception among some in the international intellectual property community that the United States exerts too much diplomatic pressure to have its own *ideal* copyright laws adopted internationally. This perception has been particularly prevalent among countries negotiating bilateral trade agreements with the United States, during the course of which they have been asked to enact the detailed equivalent of U.S. statutes rather than commit to compliance with multilateral treaty standards. I have elsewhere protested recent developments in international intellectual property that have assimilated the processes of international lawmaking and domestic legislation, an assimilation which undermines the argument that treaties offer an *alternative* lawmaking process and thus operate as a check on the domestic process.[130] Doctrinal standards that accelerate that trend are to be discouraged.[131]

Finally, jeopardizing the constitutionality of domestic legislative action under

130. *See* Graeme B. Dinwoodie, *The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking*, 57 CASE WES. RES. UNIV. L. REV. (forthcoming 2007).

131. Indeed, as the present experience with bilateral agreements demonstrates all too well, it is not difficult for the United States to identify particular countries with which to negotiate bilaterally. A detailed obligation undertaken in such a negotiation becomes, by virtue of the most favored nation commitment in Article 4 of the TRIPS Agreement, an obligation owed to all members of the World Trade Organization. Requiring American negotiators to develop a basis in *some* international agreement as the basis for Treaty Clause legislation would be a minor hurdle with potentially devastating effects in terms of international norms.

the Treaty Clause because it deviated from the terms of a treaty would further consolidate power in the executive. It would constrain the discretion that national legislators typically enjoy to amend or modify implementing legislation, which is another window through which to introduce local values. This phenomenon has also been a feature of recent international lawmaking, as seen most notably in the fast track and trade promotion authority systems. And it too has weakened the notion of the Treaty Clause process as an alternative check on lawmaking.

These concerns caution against requiring a direct treaty basis for domestic legislation. Even so, placing a positive thumb on the constitutional scale for the correlation between the international obligation and domestic implementation may after all have countervailing benefits. Causing U.S. legislators (contemplating proposed implementation) and U.S. courts (assessing that correlation in assessing constitutionality) to engage with the content of international copyright agreements would probably be a salutary development, and one that might counteract the prevailing inward perspective of American political institutions. Moreover, highlighting the precise content of treaty obligations could assist in framing the political process in ways that might help police the possible abuse of the more generous Treaty Clause authority to achieve policy goals. Despite raising the level of judicial scrutiny, the primary check against inappropriate lawmaking will remain political; constitutionalization of copyright law risks minimizing the importance of that democratic mechanism. [132]

Requiring some correlation between the domestic means of pursuing international ends (which might effect constitutional scrutiny that resembles intermediate level scrutiny of domestic laws) will help prevent negotiators using a treaty as an opportunity to push through an aggrandizement of their lawmaking authority. "Over-compliance" with international obligations is not uncommon in recent copyright history.[133] But some over-compliance should not in and of itself be fatal to the constitutionality of a law. For the reasons discussed above, it might be helpful for treaties to be drafted in general language that is capable of detailed implementation in different ways in different countries. National legislators should benefit from some margin of appreciation in assessing the connection between the international obligation and domestic implementation.[134]

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132. *Cf.* Hughes, *supra* note 44, at 193; Nachbar, *supra* note 18, at 317-18.

133. *See* Pamela Samuelson, *Intellectual Property And The Digital Economy: Why The Anti-circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 530-33 (1999) (discussing implementation of WIPO Copyright Treaty); *see also* Samuelson, *supra* note 31, at 373-74 (discussing conclusion of WIPO Copyright Treaty); *cf.* Jaszi, *supra* note 50 at 602, 607 & n.19 (acknowledging that under *Holland* a formal treaty could effect lawmaking not open to Congress; but the restoration provisions may be grounded in the authority of Congress to implement treaties . . . . were it not for arguable over-implementation).

134. If the question of compliance with international obligations is a close case, one might afford some deference to the lawmakers. But, on the other hand, courts should not be reluctant to engage in objective analysis of the content of treaty obligations. Thus, in 1998, the U.S. Congress arguably sought to (over) implement the WIPO Copyright Treaty in the form of the Digital Millennium Copyright Act. If the constitutionality of the U.S. statute had been dependent upon the Treaty Clause (which courts have since held it was not), courts should have been willing to find the implementation legislation beyond the compulsion of international law obligations and thus give less weight to the nature of international

Moreover, some forms of over-implementation may be more sustainable than others. It is a current fashion, derived from the somewhat odd relationship between the national treatment obligation and minimum standards in the Berne Convention, to propose that only foreign authors and foreign works receive the benefit of rights guaranteed by international copyright law. Of course, this approach to minimalist international compliance has been used by the United States before, most notably with respect to the continuing relevance of registration after the enactment of the Berne Convention Implementation Act.[135] Thus, academic and legislative proposals to shorten the term of some copyrighted works below the Berne minimum, or to reimpose some formalities and "re-institute" an "opt-in" copyright scheme, have excepted foreign works and foreign authors from their scope of application. These legislative devices would be sufficient to ensure compliance with international law because the rights guaranteed by the Berne Convention would be made available without formality for the full term to foreign works.

But enabling domestic and foreign works to compete on an equal footing within the United States is surely a plausibly rational legislative decision, consistent with the basic purposes of U.S. copyright law and the broader thrust of the principle of national treatment around which international copyright law is built. National legislators should not be compelled to discriminate against American interests in order to comply with international law, though this would surely test the theoretical resilience of the Senate in not succumbing to short-term local interest.

Rather, the more worrying forms of over-implementation might be such things as providing perpetual protection (in the face of the "limited times" language in the Copyright Clause) where this is not required, as was the case with the implementation of Article 14 of TRIPS. Likewise, Article 6*bis* of the Berne Convention, which requires protection of certain moral rights and only for the length of copyright, should not be sufficient to cut in favor of the constitutionality of a comprehensive suite of perpetual moral rights along the lines that might represent the high-water mark of moral rights protection internationally.

Of course, even giving weight on the scale for the strength of obligation may incentivize negotiators in all the harmful ways discussed above as reasons to reject *requiring* a mapping of international obligation and domestic implementation. That is why this factor alone cannot determine the constitutionality of the Treaty Clause-based legislation. Among other things, attention to the political process through which the norm was adopted will also be important.

B. POLITICAL PROCESS

The formal treaty-making process puts in place a distinct mechanism, with its

obligation. The same is true of *Eldred*. Congress did not *need* to enact the term extension, and to the extent that there were incentives to enact legislation in order to ensure equal protection for American authors, this could have been achieved by simply providing an extra twenty years of protection for foreign authors. *But see infra* text accompanying notes 135-36 (discussing relevance of limiting protection to foreigners).

135. Berne Convention Implementation Act 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

own political checks, by which treaties are adopted. This alternative political process has contributed to the deference shown lawmaking under the Treaty Clause. However, the modern forms of international lawmaking are much more expansive, and include processes that are not substantially different from domestic lawmaking process under the Copyright Clause. Although it is unlikely that the Court will roll back the Treaty Clause jurisprudence to limit Treaty Clause authority to the formal conclusion of treaties, the use of alternative processes that do not include equivalent political checks on the lawmaking process should raise the level of judicial scrutiny. As treaty-making comes to approximate the domestic lawmaking process, it should receive judicial scrutiny that more closely approximates the scrutiny that domestic legislation receives.

In the context of political checks, the question arises whether the courts should have regard to the political checks that exist at the international or merely national level. Current scholarship would suggest that the constitutionality of U.S. legislation should probably depend upon judicial scrutiny of domestic political checks. National courts might seem particularly unsuited to assessing international processes and the balance of the international intellectual property system has always depended in part upon the operation of accountable local political processes.

Yet, the contemporary political process, and the fears that attend international lawmaking, might suggest that courts should look at the international lawmaking process as well as the national implementation stage. Certainly, that is where claims of undemocratic lawmaking are raised most fiercely. Indeed, given the criticism that copyright-skeptics express toward the international process, turning the spotlight of the U.S. judiciary on international processes (and the play between the domestic and international political process) might carry advantages for the system as a whole.[136] The United States has, in fact, been one of the leaders in seeking to open up some parts of the international intellectual property lawmaking process (such as the early publication of documents filed in the World Trade Organization). But there is no harm in providing further incentive for behavior that facilitates political policing as the price for reduced domestic judicial policing. In the long term, as international lawmaking occupies a greater share of policy space, it will be important for international democracy that the world community address the importance of political checks at the international level. Adoption of this approach as a matter of domestic law might thus contribute to the development of the international legal system.

One concrete application of regard for the checks in play at the international level might be to privilege laws enacted through the vehicle of multilateral treaties over bilateral trade agreements. As noted above, it is not difficult for the United States to secure an agreement with a single country regarding a slew of copyright commitments, and such bilateral obligations are effectively made multilateral through the mechanism of the most favored nation provision of the TRIPS Agreement. Such a lawmaking mechanism contains close to no political checks at

136. *See* Dinwoodie, *supra* note 126, at 22.

the international level.[137] The United States may effectively have purchased the agreement using promises of foreign aid or other concessions entirely unrelated to intellectual property. And the political realities of one-on-one negotiating afford the United States substantial power to dictate the terms of the agreement.[138] Indeed, in some instances involving patent law, the Office of the United States Trade Representative has allegedly sought particular provisions in violation of valid executive orders instructing it to refrain from pursuing such guarantees. Such is the nature of current international power.

In contrast, multilateral treaties are concluded through a process of consensus that has, in recent years, made formal treaties almost impossible to conclude. While other aspects of the international system might suggest a democracy deficit, the check of international consensus is an important and powerful constraint that might provide courts some assurance that a genuine international concern has been addressed in a rational manner. Of course, some advocates of user interests are skeptical of placing over-much reliance on the capacity of the international system to contain rapacious copyright owners. The historical explanations for this attitude are complex.[139] But it should be noted that the political checks in international copyright law may be stronger than those that exist domestically. Thus, extending the international copyright term to life plus seventy years was shelved by WIPO in 1996, but the Copyright Term Extension Act was passed in the United States two years later. Likewise, copyright minimalists celebrated the approach to digital copyright embodied in the WIPO Copyright Treaty, but bemoaned the domestic implementation that followed. It may be that international checks are now more real than domestic, and in an era of integrated lawmaking, these political realities may inform the need for domestic judicial policing.

C. THE DIFFERENT LIMITS IN THE COPYRIGHT CLAUSE

To the extent that the limits in the Copyright Clause *do* embody principles of constitutional weight, those domestic principles are increasingly affected by international lawmaking. Thus, those substantive domestic principles should inform our analysis of the constitutionality of Treaty Clause-based legislation even if, for the reasons discussed in Part I, they should not control that constitutional determination. However, as suggested by exploration of the relationship between

137. Regard for international checks is not intended to preclude consideration of the domestic processes through which the provision was introduced into the trade agreement. For quite some time, these agreements rarely saw the light of day, though recent reforms of congressional oversight have improved the situation. Indeed, the Court could adopt legal doctrines such as "clear statement" rules that would encourage greater domestic participation in the lawmaking process.

138. Likewise, soft law instruments such as nonbinding recommendations of the WIPO Assembly are secured often over the objections of numerous countries, without the consensus check that operates as a brake on multilateral hard law processes. These obligations, though non-binding, are then used as leverage in bilateral trade agreements. But their genesis in soft law instruments might legitimately be considered in assessing whether the checks operating at the international level should provide comfort about their substantive legitimacy.

139. *See* Dinwoodie, *supra* note 126.

the Copyright and Commerce Clauses, some of the limits in the Copyright Clause are arguably more effective than other limits on alternative lawmaking grants. One might establish a hierarchy of limits by reference to the differing fundamental status of different limits on Copyright Clause authority. Thus, one might argue that a particular limit is more crucial to the essence of American government than others.

The lens through which I wish to consider the weight of the Copyright Clause limits here is, however, different. One of the arguments against intrusive judicial policing of legislative and legislative/executive lawmaking is that the judiciary is ill-equipped to engage in the policy assessments underlying the adoption of particular laws. The argument of judicial incompetence is arguably stronger in the case of international calculations. But it is also surely the case that some limits implicate harder and more uncertain policy choices than others.[140] Thus, for example, *Eldred* notwithstanding, identifying a transgression of the "limited times" language surely taxes judicial competence less than assessment of whether a particular provision of the copyright statute "promotes the progress of science and the useful arts." As Graeme Austin has written, assessing the "bargain" between the public and the author that is claimed to underlie the grant of a copyright under U.S. law becomes intolerably complex when one places that public-author relationship in an international environment.[141] At the very least, it looks very much like an inquiry as to which national judges are particularly ill-suited to second guess legislators acting in implementation of an international agreement.

D. OTHER POSSIBLE CONSIDERATIONS

To some extent, many of the considerations that informed the capacity of Congress to enact laws pursuant to the Commerce Clause will also be potentially relevant to analysis of the Treaty Clause question. Here, I mention only a couple.

140. *Eldred* effectively expanded the scope of congressional authority by allowing rational basis scrutiny to include deference to the international relations environment in analyzing whether the challenged legislation promoted the progress of science and the useful arts. Assessing compliance with the policies that emanate from the progress language in the Constitution is an extremely complex calculation, and one on which the judiciary are apt to give the other branches of government substantial latitude. Deference might, however, have been insufficient to save a law that clearly transgressed less complex limits such as the Limited Times Clause. That is, the degree of deference that was afforded in *Eldred* may be as much a function of the limit that was involved (on which substantial deference is properly warranted, *particularly* in the international context) as a result of the weightiness of the international leadership consideration (which might have been relatively weak in a Treaty Clause context where more defined processes for lawmaking are laid down in the Constitution). But I mean to suggest here that the combination of these factors needs to be taken into account. Thus, the degree of deference may be a product of the limit involved and the weightiness of the international consideration. An international obligation and formal treaty implementation would trigger more deference than a mere desire to serve a leadership role in international copyright. *See supra* text accompanying notes 128-33.

141. *See* Graeme W. Austin, *International Copyright Law and Domestic Constitutional Doctrines*, 30 COLUM. J.L. & ARTS 337 (2007).

1. Closeness or Difference as a Constitutional Plus

Most scholars and courts operate on the assumption that Commerce Clause-based legislation will be most likely to pass muster when it enacts protection that is substantially *different* in kind from copyright. This is a normal rhetorical move when the argument being advanced is that no "end-run" is being performed around an otherwise applicable set of principles. It is seen, for example, in opinions justifying federal trade dress protection for useful designs notwithstanding the lack of federal patent protection. These courts stress the difference in purpose, legislative motivation, or nature of the right to support the validity of trade dress protection.

On the other hand, where there is a conflict between two laws, and some secondary rule of recognition identifies which law will prevail in the event of conflict, those seeking to sustain the law of "inferior" stature tend to stress the concordance between the two laws. Thus, for example, in analysis of whether a State intellectual property protection is pre-empted under the Supremacy Clause,[142] the Supreme Court has consistently articulated a standard that asks whether the second (State) law stands as an obstacle to the accomplishment of the objectives of the "superior" law.[143]

Extended to the reconciliation of constitutional provisions, should the constitutionality of copyright legislation enacted pursuant to a legislative authority other than the Copyright Clause depend on that other law being substantially different from the copyright law, or (as *Moghadam* might suggest) sufficiently similar such that it can be said that the second law does not stand as an obstacle to the accomplishment of the objectives of the copyright law?[144]

These are of course questions considered thus far primarily in the context of the Commerce Clause. But should the international nature of the law affect the assessment of congruence, especially when relying on the Treaty Clause? It may well be that, although scholars seeking to defend a statute under the Commerce

142. The Supreme Court's modern preemption analysis, beginning with *Sears-Compco* and concluding twenty-five years later in *Bonito Boats*, has been extremely muddled. *See* Ginsburg, *supra* note 73, at 362-63 (discussing different sources of court's preemption analyses).

143. *See* Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 479 (1974); *see also* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 156-57 (1989) ("A state law that substantially interferes with the enjoyment of an unpatented utilitarian or design conception which has been freely disclosed by its author to the public at large impermissibly contravenes the ultimate goal of public disclosure and use which is the centerpiece of federal patent policy").

144. The Eleventh Circuit in *Moghadam* would appear to have been influenced in large part by the fact that the anti-bootlegging law offered protection not substantially different from that provided by the copyright legislation, suggesting that the performers could have obtained copyright protection by the simple device of simultaneously recording their performance. The Eleventh Circuit appears to depart from most efforts to justify Commerce Clause-based legislation by noting the similarity of the Commerce Clause-based law to copyright. (Of course, performers would not have obtained perpetual protection; indeed, one of the few examples upon which almost copyright scholars agree is that perpetual protection would violate the Copyright Clause. But the defendant had not preserved the Limited Times argument before the Eleventh Circuit.)

Clause look for a radically different purpose, invocation of the Treaty Clause might be stronger where there is affinity between the Treaty-Clause based law and the limits of the Copyright Clause. As noted above, international compromise often recognizes that different countries, for reasons related to historical culture, reach similar objectives in slightly different ways. For example, continental European countries protect the creative interests of a number of groups through the grant of so-called neighboring rights, whereas the United States offers protection through copyright proper. Similarly, whereas civilian systems grant rights to individual authors rather than the corporate employer, U.S. practice vindicates some of the same individual interests through contract and labor agreements. Such differences might, on occasion, test the limits of constitutional propriety. But some latitude is perhaps appropriate in assessing an internationally-motivated law under the Treaty Clause for the reasons discussed above, especially if other variables cut in favor of constitutionality.

2. Form

Although the form of legislation should not ultimately determine the scope of constitutional authority, the form of lawmaking matters because the form assumed by a law may be relevant to activating the political and other checks upon which the system is premised.[145] In particular, certain forms may aid transparency. Thus, Paul Heald and Suzanna Sherry have argued, for example, that the copyright term extension legislation was unconstitutional as an exercise of the Copyright Clause, but that if Congress had enacted a tax or subsidy redistributing wealth to the copyright industries (as Heald and Sherry conceptualized the extension law), that surely could have been justified under other Article I powers. But that characterization would, they believe, trigger a different political dynamic that would have served as a check on legislative activity.[146] This argument thus reflects to some extent discussion in the case law as to whether the right granted by challenged legislation is in the nature of an exclusive right, thus triggering the need for compliance with Copyright Clause limits.

III. CONCLUSION

The question of the scope of copyright authority will be pressed in U.S. courts over the next few years, as the dictates of our national constitution come into conflict with the broader vision of the international system. Courts will need to read the United States Constitution in a way that permits copyright law to develop in a fashion respectful of both the demands and legitimate claims of international lawmaking, on the one hand, and the domestic political values that are reflected in the Constitution, on the other. Existing approaches to the scope of copyright

145. The form might also go to questions of "intent to circumvent," an arguably relevant consideration that might also work its way into the analysis through consideration of the purpose of the legislation.

146. *See*, Heald & Sherry, *supra* note 17, at 1174.

lawmaking authority under the Treaty Clause are insufficiently attentive to the realities of modern copyright lawmaking. Subservience theory ignores the distinct concerns of the international process; autonomy theory presumes a separateness of domestic and international regulation that is illusory. This paper has offered a framework through which to escape the dangers of either extreme.