The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (a.k.a. Copyright and Patent Clause)

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ABSTRACT: Empirical investigation of public usage of the word "progress" in the United States of 1789 demonstrates that the word meant "dissemination." The original meaning of art. I, sec. 8, cl. 8, therefore, is that Congress has the right to grant only such temporally limited exclusive rights in writings and new technology as encourage the dissemination of knowledge and new technology to the population. This article explains the major differences between current United States positive intellectual property law and the logical dictates of this original constitutional meaning. Additionally, the article asserts that the original meaning of clause 8 supports modern calls for a public-empowering First Amendment doctrine, as suggested by scholars such as Jack M. Balkin.


Professor Balkin's call for a First Amendment jurisprudence fit for a digital age tacitly reinvokes
the usually overlooked original meaning of *24 U.S. Constitution, article I, section 8, clause 8. [FN1] This essay demonstrates how the Supreme Court's delay in interpreting the Constitution led to a serious misreading.

Enter the world of what should-have-been by simply reading the Constitution. Axiomatically, when reading statutes, one starts with the text and reads each section in context. The Constitution is not always treated as sensibly. [FN2] This essay demonstrates the interesting outcome of actually reading article I, section 8, clause 8 (a.k.a. the Progress Clause or the Copyright and Patent Clause) in pari materia with the First Amendment. If the Progress Clause had been construed when its original meaning was still obvious, United States law would be far different. In this area, at least, the Drafters' Constitution was much less aristocratic than the modern (mis)reading. The original meaning of the Progress Clause should have stimulated a more communitarian First Amendment, the type of First Amendment currently being suggested by leading First Amendment scholars, such as Jack Balkin. [FN3]

This article does not make the radical claim that the United States should jettison all departures from the original public meaning of the Progress Clause. [FN4] We should question, however, those departures and carefully consider any further out migration.

I. READING THE ORIGINAL TEXT

The words in article I, section 8, clause 8 give Congress the power "to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [FN5] Oddly, for over two hundred years, no one performed any scholarly research on the 1789 American meaning of the word "progress." Early readers knew; later readers (mis)assumed.

*25 "Progress" in the United States of 1789 meant geographical movement, spread, dissemination. [FN6] If asked to quickly finish the phrase "the progress of the *26 ____________," a 1789 American might have said "fire." Fire spreads in all directions. A spreading fire is a bad thing,
not an inherent part of social advancement. Similarly, 1789 Americans spoke of the "progress" of devastating hoards of insects, the "progress" of epidemic diseases, and the attempt to halt the "progress" of invading troops. Asking how many of the 1789 residents of the United States believed in what 1850 Americans called "the Idea of Progress," that is, that the world was getting better, or that such betterment was a natural process (divine or scientific), is not the same as asking the meaning or usage of the word "progress" in the United States of 1789. [FN7]

Even in the 1780s, the word "progress" was sometimes used by some (usually highly educated) speakers to mean "qualitative improvement." This meaning seemed to slip into elite usage from the French; that meaning, however, does not work in the Progress Clause. First, it renders part of the Clause redundant. The legislative goal of "promoting the improvement of knowledge" is no different than "promoting knowledge." More importantly, science in the eighteenth century included the study of moral philosophy; no sane politician in 1787 America would have burdened a controversial referendum with the implication that mere humans could improve on Jesus' moral teachings. [FN8]

Because the word "progress" means "spread" or "distribution," the Progress Clause sets Congress the goal of promoting the distribution of knowledge and new technology among the populace. [FN9] The Progress Clause allows Congress to give authors short-term exclusive rights in their writings (the expressions in which nonprotected ideas and facts are dressed) to promote the distribution of ideas and facts ("science," currently called knowledge). "Authors" is a very broad term, properly not limited to originators of literary works. [FN10] *27* By contrast, Congress may give inventors short-term rights over their discoveries, not just their explication of these discoveries. Technology protection, however, is limited to improvements. I agree with the Supreme Court's conclusion that the words "inventors" and "discoveries" require patents be granted only when the invention is a noticeable advancement over prior technology, [FN12] "nonobvious to a person of ordinary skill" in the relevant "art." [FN13] The Clause limits Congress, demonstrating that the base right is in the public, not in the government, the inventors, nor the...
writers. The *28 Clause bars some government actions by negative implication, [FN14] but does not go so far as to prevent use of the spending power to reward authors or inventors. [FN15]

The Clause, however, supports both distribution and improvement of knowledge. Quality improvement in the human knowledge base is built into the Clause because the reward of "exclusive right[s]" is obtainable only by those diffusing new technology, res worthy of being named "discoveries" of "inventors." [FN16] As for knowledge, or "science," the Clause does not limit its reward to substantively improved material, but does require a modicum of originality; merely reproducing a pre-existing writing is not sufficient underpinning for an "exclusive right." [FN17]

Since rights are, at least originally, granted to authors and inventors, these valuable members of society are rewarded for their contributions and provided with an incentive for creation through the transformation of their writings and discoveries into marketable products. Authors and inventors obtain saleable "exclusive right [s]." Without creation, nothing would exist to distribute. However, as history both pre- and post-1789 demonstrates, both authors and inventors are apt to sell their entire bundle of rights for a bowl of pottage. [FN18] High monetary rewards for distribution of knowledge and technology are likely to enrich middlemen, such as publishers and venture capitalists. By capping "exclusive right[s]" at "limited times" and by limiting Congress's legitimate goals to "promot[ing] the [diffusion] of knowledge and the useful arts," the Clause prevents any group from siphoning off most of the social value produced by technological improvement and information transfer. In sum, while the word "progress" means dissemination, the Clause does encourage the quality improvement of knowledge. The Clause is more than a subsidy to book wholesalers.

Furthermore, diffusion, the Progress Clause's immediate goal, should independently lead to the quality improvement of human society and the human knowledge base--the now-assumed meaning of "progress." The original Progress Clause rests on the hypothesis that social betterment is triggered by wide dissemination of knowledge and technology. This spread-education theory of social improvement is a core doctrine of the early Enlightenment. Natural *29 processes assure...
improvement in human knowledge if, and only if, the work of improving knowledge is shared by all humans. Thought must be fixed in writing, [FN19] making it shareable at a distance in time and space. All of humankind must have the opportunity both to read and to add to the written storehouse of knowledge. Then, and only then, any group's stumbles have little power to halt the species' forward journey. [FN20] The early Enlightenment "Idea of Progress" was not aristocratic. Faith in the future was not based on faith in a few super-achievers. [FN21]

Consider the contrasting aristocratic slant of the English Statute of Anne, enacted "for the Encouragement of Learned Men to Compose and Write useful Books." [FN22] Even if the general populace is illiterate, ill-informed, and unheard on the issues of the day, learned men can continue to write useful books. Learning may improve with such a policy because the most informed persons in the society will push the frontiers of human knowledge. The original language of the Constitution, however, does not support this aristocratic approach to social improvement. [FN23]

Recognizing the original meaning of the Progress Clause helps explain why the Drafters did not acknowledge any tension between the Progress Clause and the First Amendment. Copyright statutes would be enacted only to encourage the dissemination of knowledge; copyright was not allied with censorship. The Progress Clause, on the contrary, should be viewed as the pre-First Amendment First Amendment. The dissemination reading of the Progress Clause makes sense of James Madison's championing of a Constitution without a bill of rights, even though "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both." [FN24]

The Drafters were not being obtuse or hypocritical; they merely defined "progress" differently than we do. Nor did they have any need to discuss the then obvious meaning of a common word during the ratification debates. No wonder the Progress Clause did not raise anti-Federalist hackles; it was barely mentioned *30 in the ratification brouhaha. [FN25] The copyright power had no potential to support censorship [FN26] because Congress was empowered only to enact copyright statutes that disseminated knowledge. The distributive function of the Progress Clause
meshes with the democratic discussion theory of the First Amendment. In this sense, copyright is correctly viewed as an engine of free expression. However, recognizing the full force of distribution includes recognizing that free expression is not only for leaders. All persons partake in distribution and, hopefully, share in the self-realization aspects of speech.

The original congruence between the First Amendment and the Progress Clause is not visible in the case law because the First Amendment and the Progress Clause remained judicially unconstrued as the everyday meaning of words changed, especially the word "progress." The so-called Idea of Progress is a completely different concept than the belief in natural improvement through universal education. The later Idea of Progress evokes the triumph of the most economically astute, of social Darwinism, and of the rule of a small band of natural aristocrats. Turgot and Condorcet would not have recognized this perverse mutation of their theory of social improvement through universal education and universal empowerment.

The dissemination reading of the Progress Clause centralizes the now-beleaguered public domain. Absent optional statutes, all humans have the right to use written or publicly practiced knowledge. They are common owners in a shared resource pool, a resource pool which grows best when shared, a network. They, not Congress, own the public domain in the Lockian sense that each person has the right not to be excluded. The author or inventor has earned some return for his work and for his sharing, but an author or inventor has no right to hoard an improvement if granted a reasonable remuneration. Congress may give private parties power to temporarily bar the public from using some writings or inventions, but only if the system of temporary exclusions promotes dissemination. Because the public, not Congress, owns the public domain, retrospective extension of copyright holders' power to exclude the public is an illegitimate attack on the public's rights.

The dissemination reading of the Progress Clause renders central "limited times," fair use, and the idea-expression dichotomy. These doctrines are neither the grudged crumbs supported by market failure theory, nor the distant downstream possible outcome of incentive
theory. [FN41] L. Ray Patterson was correct--copyright is a law of users' rights. [FN42]

This democratic reading of the Progress Clause bears little resemblance to current case law, though several Justices have taken the first step by including dissemination within the Clause's goals. [FN43] Even when the Supreme Court issues pro-public domain decisions, the Court seems motivated by a desire to protect competition, not the cultural autonomy of the general public. [FN44] The Court's fundamental misunderstanding is typified by its brush-off of the First Amendment argument made by petitioners in Eldred v. Ashcroft, [FN45] the recent failed attack on the Sonny Bono Copyright Term Extension Act. The majority recognized no First Amendment support for "speakers assert[ing] the right to make other people's speeches." [FN46]

The tie between dissemination and societal improvement mocks the current First Amendment empowerment of speakers over listeners and of creative speakers over mere repeaters. Repetition of others' speech should be encouraged. How else can the populace learn about competing ideas and important facts? In *33 the marketplace of ideas, as in the marketplace for soda, repetition-based recognition and wide distribution are important keys to market power. [FN47]

II. OUTCOMES OF READING THE ORIGINAL TEXT

How would the United States' positive law have differed if the Supreme Court had reached the Progress Clause when its original meaning was still clear? [FN48]

First, intellectual property may never have been born. Copyright and patent would have been viewed as claims for payment, not property rules. [FN49] Dissemination is core, therefore non-use is mis-use. Patent infringement would not be enjoined if the patent holder wishes to suppress improved technology to enhance market position, rather than put the invention to practice. A circuit split on this issue reached the Supreme Court in 1908 in a case involving an improved machine for manufacturing paper bags. [FN50] The Court refused the defendant's argument that the equitable remedy was damages, not an injunction. The Court's refusal was supported solely by the property nature of patents. [FN51]
Copyright non-use is more problematic. First, the decision of when to release work to the public relates somewhat to personality issues. Not all works, however, embody the copyright holder's personality in any meaningful sense. Perhaps the proper copyright rule would bar injunctions on the equitable ground of non-use if, and only if, the suppressed work is not personal to the copyright holder; injunctions could issue, despite non-use, if the allegedly infringed work was an autobiography, but not a circus poster, a lamp base, or the packaging of a tooth-whitening product. But what of works that are personal to multiple persons? Hegelian objectification of personal will in objects is possible only when the specific property or object is not already the reification of another's will. Whatever the philosophical correctness of that position, it does not mesh with reality. One obvious example: many people have deep personal bonds to religious texts. Furthermore, what of works disseminated for the purpose of exposing their fallacies? Even the current, impoverished law of fair use is kindest to criticism.

Second, downstream use must be protected from upstream blockage. The anti-circumvention provisions of the Digital Millennium Copyright Act stand the Progress Clause on its head. Pursuant to the dissemination reading, fair use should expansively limit not only copyright, but patent and all other intellectual property. Similarly, if the Progress Clause is fully realized, derivative work rights would be enforceable only by payment of reasonable royalties. A derivative work that does not earn a profit for its (re)creator would be unencumbered. The original meaning of the Progress Clause disallows copyright holders current ability to stifle derivative works. In many circumstances, the second author might be required to pay some royalty to the previous author. Neither transaction costs nor unilaterally set fees, however, should be allowed to block dissemination of new works. Unlike David Lange, my sympathy is not centered on later creators; my central concern is the public, even those who are the most passive content consumers. The original Progress Clause protects every person's ability to choose among the things of imagination, bond with some, and then share the bond with others. The public domain is the tool-kit of the highly creative, but it is also the shared ima-
ginative realm of the entire public. [FN69] Society is a network; sharing creates value. Professor Balkin makes the identical point from First Amendment theory:

    Freedom of speech is thus both individual and cultural. It is the ability to participate in an on-going system of culture creation through the various methods and technologies of expression that exist at any particular point in time. Freedom of speech is valuable because it protects important aspects of our ability to participate in the system of culture creation.

    ....

    ... The Internet teaches us that the free speech principle is about, and always has been about, the promotion and development of a democratic culture.

    ....

    [A] democratic culture is a participatory culture. [FN70]

Like copyright, the patent statute would be drastically changed by the dissemination reading. Under current law, a patent is a right to exclude others, not a right to practice one's own invention. An invention may be an improvement. Practicing an improvement requires permission from the holder of any patents covering underlying inventions. Patents have neither a fair use exception [FN71] nor an independent creation defense. Even the judicially created experimental use exception from infringement may be defunct in practice. [FN72] As with copyright, taking seriously the dissemination goal of the Progress Clause and its underlying theory that everyone should be encouraged to build on existing knowledge, patent holders should not be allowed to block derivative works (improvement patents). Certainly research should be encouraged. [FN73]

*37 As for trademark and related doctrines, the dissemination meaning of the Progress Clause should limit infringement to cases where the mark is viewed by the public at the time of the alleged infringement as the mark-holder's indicia of origin. Without such "secondary meaning," confusion is impossible. [FN74] Only provable likelihood of confusion justifies giving copyright-like protection without copyright limitations. Why? While marks are not required to be copyrightable subject matter, [FN75] they commonly are either copyrightable subject matter or
similar res failing the minimal originality standard required for copyright protection, such as individual words and short phrases. [FN76] This means the end of dilution doctrine [FN77] and the end of the non-rebuttable presumption that incontestably registered marks are not merely descriptive. [FN78] Similarly, trade-dress, mark rights in product configurations, must be limited to prohibit temporally unlimited patents, especially for res below the inventive level of inventions. At the expiration of a patent, all would-be competitors would be allowed to market the identical product marketed under the patent privilege, provided they attach an accurate label. [FN79] Even some possibility of confusion should not be allowed to extend the constitutionally limited patent term.

*38 Third, since constitutionally legitimate protection for "writings" and "discoveries" differs in scope, the line between patent and copyright must be maintained. [FN80] This constitutional distinction underlies the fights over software protection. Software is a machine built of text. [FN81] Was copyright for software an error? How far does software copyright protection protect? Should software be patentable instead of copyrightable? Both? Neither? [FN82]

Fourth, courts should always make presumptions and decide doubtful cases against would-be excluders. This would end, for example, the almost universal rule that a prima facie showing of copyright infringement triggers a presumption of irreparable harm and, hence, a preliminary injunction. [FN83]

Fifth, as discussed above, congressional expansions of the term of existing copyrights or patents would be void attempts to take constitutionally protected rights from the general public. [FN84]

Sixth, enforcement of copyrights in a work should require placement by the holder of a conspicuous notice on every dissemination of the work. Absent such advance notice, a copyright holder should be eligible for, at the very most, money damages limited to a royalty commensurate with the defendant's profits, if any. Perhaps worse than term expansion, worse than rights expansion, joining the Berne Convention [FN85] has harmed the public's ability to use commercially nonvi-
able copyrightable materials by optionalizing the "c" in the circle. [FN86] The *39 dissemination core of the Progress Clause deplores the chilling effect of possible multiple unknown holders of copyright power. [FN87] Similarly, in patent, the requirement of notice would end the doctrine of infringement by equivalents. [FN88]

In sum, reading the Progress Clause as originally written would revolutionize American "intellectual property" and, to some degree, First Amendment doctrine by prioritizing access to writings and discoveries by everyday non-intellectual, non-investing people, the posterity for whose general welfare and liberty the Constitution was ratified. [FN89] This is precisely the lesson Professor Balkin learns about free speech principles from the Internet.

"We cannot get out. We cannot get out." [FN90] Not true. Berne, [FN91] TRIPS, [FN92] domestic statutes, [FN93] case law, and solicitude for prior investments [FN94] block full implementation of the Drafters' outline. We can, however, choose to turn in the right direction at each future fork in the road. [FN95] Many are coming.

[FNa1]. Visiting Associate Professor of Law, University of Idaho College of Law. The author thanks the University of Oregon School of Law for research support, Diane Zimmerman for sparking this piece by sharing a draft of her case intensive article, Is There a Right to Have Something to Say? One View of the Public Domain (forthcoming) (draft on file with author), and Edward C. Walterscheid for his learned criticism of earlier drafts. This piece merely sets out a general theory. Full discussion will require further articles.

[FN1]. See generally Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U.L. REV. 1 (2004) (arguing that the Internet changes the First Amendment's focus from the right of a few privileged speakers, such as broadcasters, to address the masses to the right of each person to participate in a "democratic culture").

[FN2]. For example, consider Eleventh Amendment jurisprudence. The amendment's text pre-
vents suits brought against States (of the United States) only by "Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI (emphasis added). In Hans v. Louisiana, 134 U.S. 1 (1890), the Supreme Court admitted that the language of the amendment did not mention suits brought against States by their own citizens. 134 U.S. at 11. Nevertheless, the Court refused to allow such suits. See id. at 15, 21. This counter-textual decision has never been overruled. See Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 754 (2002) (citing Hans in opinion holding that Federal Maritime Commission may not adjudicate a private person's complaint against a state agency).

[FN3]. See, e.g., Balkin, supra note 1.

[FN4]. Looking for the original public meaning, "textualism," involves asking how the text would have been read by a member of the ratifying public, as opposed to asking the discredited question of what the text's Drafters subjectively intended. See, e.g., Randy E. Barnett, An Originalism for Nonoriginalists, 45 LOY. L. REV. 611 (1999) (supporting constitutional textualism while recognizing illegitimacy of subjective originalism).


Solum claims that:

[m]ost of [Pollack's] evidence involves cases in which the term "progress" has a geographic or spatial meaning, but this usage is most frequently associated with linear movement (from point A to B), rather than spread in the sense of diffusion (from the center outwards). One might say that the beetle progressed from the center of the table to the edge, but it would be odd, although not
inconceivable, to say that the spilled milk progressed to cover the whole table.

Id. at 45. Solum ignores fire, insects, and diseases. I also disagree with his belief, see id., that the subjective intent of the Drafters is more important than the perception of the ratifiers. My conclusion has also been publicly disagreed with by historian Edward C. Walterscheid, who believes that "the language of the introductory phrase is derived from Madison's proposal 'to encourage ... the advancement of useful knowledge and discoveries.'" Edward C. Walterscheid, To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power, 43 IDEA I, 17 n.60 (2002) [hereinafter Walterscheid, Anatomy]. Along with Solum, Walterscheid gives great importance to both the Drafters' discussion of the text during their secret composition sessions, to preserved statements by prominent politicians of 1789, and to dictionaries, none of which were based on empirical evidence of then current everyday usage of words, see Pollack, Progress, supra, at 796-97 (discussing background of Johnson's and Webster's dictionaries). I, on the contrary, prioritize the everyday meaning of the words to the general public. On this basic issue of constitutional interpretive strategy, I respectfully but firmly disagree. See also Barnett, supra note 4, at 611-14 (admitting that Paul Brest and H. Jefferson Powell's critiques of subjective originalism are both "familiar and widely accepted" and suggesting an objective version of originalism based on the Constitution's meaning to the ratifying generation).

My lack of enthusiasm for Walterscheid's argument from Madison's suggestion is also premised on the legal aphorism that choice of a different word raises a strong presumption of choice of a different meaning. See, e.g., Doe v. Chao, 124 S. Ct. 1204, 1214 (2004) (Ginsburg, J., dissenting) ("Nor, when Congress used different words ... should a court ordinarily equate the two phrases."); United States v. Bean, 537 U.S. 71, 76 n.4 (2002) (quoting 2A SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (Norman J. Singer ed., 6th ed. 2000) ("The use of different terms within related statutes generally implies that different meanings were intended.")). Madison suggested "encourage ... advancement of," and the convention chose "promote the progress of." Therefore, I assume the choice of different words involves the choice of a different meaning. My empirical investigation, not this statutory construction
aphorism, convinces me that the meaning of progress in 1789 North America did not include the quality improvement meaning of advancement. The "different word, therefore, different meaning" aphorism does not of itself prevent meaning overlap between the two words (as opposed to meaning identity). Pursuant to the aphorism, the different meaning may even include the meaning of the discarded word. For example, pursuant to the "different word, therefore, different meaning" aphorism, I have argued that the use of "exclusive right" gives Congress a power to enact a set of possible statutes different from, but inclusive of, the 1789 technical meaning of "patents" and "copyrights." See Malla Pollack, Unconstitutional Incontestibility? 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, 289-91 (1995) [hereinafter Pollack, Unconstitutional Incontestibility] (suggesting terms "Authors' Exclusive Rights" and "Inventors' Exclusive Rights" for the rights Congress is constitutionally allowed to create, as opposed to the included, but narrower, "copyright" and "patent"). Walterscheid seems to agree with my use of the aphorism for these words of the Clause. See Edward C. Walterscheid, Divergent Evolution of the Patent Power and the Copyright Power (forthcoming) (manuscript at 43, on file with author) [hereinafter Walterscheid, Divergent Evolution] ("The first federal Congress assumed that the Clause gave it authority to provide for both patents and copyrights in accordance with the prevailing British practice albeit with discretion to vary therefrom."). Walterscheid, therefore, fails to undercut my analysis when he opines:

Also, if the failure of the Framers to incorporate specific terms from proposals out of which the Clause resulted means that terms actually used cannot be interpreted to mean the same thing as those found in the original proposals, then clearly "the exclusive Right" cannot refer to patents and copyrights which are what Madison and Pinckney proposed that Congress be authorized to grant. This, of course, is an absurdity.

Edward C. Walterscheid, The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft, 44 IDEA 331, 376 (2004) [hereinafter Walterscheid, Preambular Argument]. Walterscheid's opening clause does not support his conclusion. The application of the "different word,
therefore, different meaning" aphorism supports only the narrower, and hopefully uncontroversial, proposition that by using "exclusive right" the Clause provides Congress with the power to enact a legal regime different in some aspect than the sum of "copyrights" and "patents."

[FN7]. For support and fuller argument, see Pollack, Progress, supra note 6.

[FN8]. For support and fuller argument, see Pollack, Progress, supra note 6.

[FN9]. In this essay, I will not reiterate the arguments against congressional power to bypass the Progress Clause's limits by invoking the Commerce or Necessary and Proper Clauses. See, e.g., 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 (discussing these arguments).

[FN10]. I accept the Court's choice of possible 1789 definitions for "secure." See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661-62 (1834) (choosing to read "secure" to give Congress the power to create exclusive rights for authors, as opposed to making existing rights safer). As the Court points out, while some eighteenth century lawyers argued for common law rights for authors, no one believed inventors had been protected by similar common law rights. See id. Johnson's definitions of the verb "to secure" do not focus on whether the res secured preexists the security. See II SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1732 (1978 Librarie du Liban facsimile reprint of 1773 ed.). Johnson's first definition of "to secure" includes "to make certain, to put out of hazard, to ascertain." Id. Johnson illustrates this meaning, inter alia, with the following quotation from Locke: "Actions have their preference, not according to the transient pleasure or pain that accompanies or follows them here, but as they serve to secure that perfect durable happiness hereafter." Id. I cannot make sense of this Lockean explanation on the theory that "secure" may only refer to making safe preexisting res.

[FN11]. For example, God was termed the author of the world and Satan the author of both sin and death. See John Milton, Paradise Lost, in THE POETICAL WORKS OF JOHN MILTON 1,
"Author," like most words, had multiple dictionary definitions in the late eighteenth century. Johnson lists four:

1. "The first beginner or mover of any thing; he to whom any thing owes its original."
2. "The efficient; he that effects or produces any thing."
3. "The first writer of any thing; distinct from the translator or compiler."
4. "A writer in general."

I JOHNSON, supra note 10, at 133 (emphasis in original). Walterscheid prefers the last two of these definitions as more in keeping with Madison's and Pinkney's respective suggestions to the constitutional drafting convention for some type of protection to "literary authors" or "authors." See Walterscheid, Divergent Evolution, supra note 6 (manuscript at 64). Walterscheid also relies on Johnson's definitions of "writing." See id. (manuscript at 66).

To my knowledge, no one has performed empirical research on the actual use of the words "authors" and "writings" in the 1789 United States. Since the wide meaning follows a 1789 definition, comports with current legal practice, and seems to fulfill the general purpose of the Clause, I currently forbear from challenging the Court's choice of meanings for this word.


[FN13] See Graham v. John Deere Co., 383 U.S. 1, 6 (1966) (holding that this wording in the 1952 Patent Act represents a constitutionally required standard. But see Edward C. Walterscheid, "Within the Limits of the Constitutional Grant": Constitutional Limitations on the Patent Power, 9 J. INTELL. PROP. L. 291, 318-28 (2002) (arguing against constitutional basis for this requirement). As with the word "author," the Court's choice of definitions is within those possible and seems to mesh well with the policy behind the Clause; therefore, I choose not to challenge these
definitions at this time.

[FN14]. See Pollack, Unconstitutional Incontestibility, supra note 6, at 270-326 (discussing negative implication at length).

[FN15]. See Walterscheid, Anatomy, supra note 6, at 26-27 (agreeing that Congress may use Spending Power to promote science and art). Some comments in the first session of Congress, however, expressed doubt that Congress had power to encourage science by any action other than providing the inventor with limited rights to exclude. See Debates in the House of Representatives, in 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES 211-20 (Charlene Bangs Bickford et al. eds., 1992) (remarks of Rep. Tucker during discussion of possible funding for exploration of Baffin's Bay).

[FN16]. See Graham, 383 U.S. at 6 (holding that Constitution limits patents to improvements not obvious to a person of ordinary skill in the relevant art).


[FN18]. Genesis 25:29-34 (King James) (describing how the pangs of hunger led Essau to sell his birthright to Jacob for a meal of bread and red pottage of lentils).

[FN19]. The 1976 Copyright Act is, therefore, quite proper to begin copyright at fixation. See 17 U.S.C. § 102(a) (2000) ("Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression ....") (emphasis added).

[FN21]. Professor Balkin reaches the same conclusion about free speech theory: "Freedom of speech is more than the freedom of elites and concentrated economic enterprises to funnel media products for passive reception by docile audiences." Balkin, supra note 1, at 42.

[FN22]. 8 Ann., e. 19 (1710) (Eng.).

[FN23]. Fear of such a society was presumably behind the public attacks on RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (Free Press pbk. ed. 1996). The Bell Curve describes the United States as controlled by an elite that is superior in all of education, intelligence, money, and power--a separately living elite which fears the underclasses it rules. See HERRNSTEIN & MURRAY, supra, at 509-25.


[FN26]. The early United States copyright statute set a very short term, covered very few types of works, and gave copyright holders very limited exclusive rights. See Copyright Act of 1790, 1 Stat. 124 (repealed 1831). In censorship potential, it was nothing like the current content of Title 17 of the United States Code. Similarly, since Congress could only grant patents that disseminated improved technology, the Progress Clause was not a replay of English law before the Statute of Monopolies. See generally Pollack, supra note 25, at 1-147 (providing detailed historical account of relationship between Statute of Monopolies and the Progress Clause).

pression)).

[FN28]. See Balkin, supra note 1, at 9-10 (explaining how the Internet empowers more people to fashion culture by routing around or glomming onto mass media).

[FN29]. The Idea of Progress was axiomatically invoked in the nineteenth century United States to legitimize destroying the natural environment, overworking wage employees, invading neighboring states, giving public land to railroad companies owned by robber barons, and decimating the native population.

[FN30]. See supra note 20.

[FN31]. See supra note 20.


[FN33]. The Progress Clause gives Congress the power to pass statutes. It does not require their enactment.

[FN34]. A thinker or inventor could prevent sharing by preserving secrecy.

[FN35]. Do not let the drift between "property" and "rights" confuse; the rights-property dichotomy was created after the Drafters' era. See John O. McGinnis, The Once and Future Property-Based Vision of the First Amendment, 63 U. CHI. L. REV. 49 (1996).

[FN36]. See, e.g., Mark A. Lemley & David McGowan, The Legal Implications of Network Er-
gonomic Effects, 86 CAL. L. REV. 479 (1998) (explaining how networks become more valuable to each member as membership increases).

[FN37] See JOHN LOCKE, TWO TREATISES OF GOVERNMENT: THE SECOND TREATISE § 193, at 413 (Peter Laslett ed., 2d ed. 1970) (defining property as something "that without a Man's own consent it cannot be taken from him"). As Balkin recognizes, Internet glomming on is "nonexclusive appropriation." Balkin, supra note 1, at 10.

[FN38] John Witherspoon, James Madison's mentor, taught that the public has certain rights over every person in society. Society may demand that each person be useful and has "a right to the discovery of useful inventions, provided an adequate price be paid to the discoverer." John Witherspoon, Lectures on Moral Philosophy, in THE SELECTED WRITINGS OF JOHN WITHERSPOON 152, 228 (Thomas Miller ed., 1990). Garry Wills interprets similarly the following language in Hutchinson (whom Wills finds central to the Declaration of Independence):

A like right we may justly assert to mankind as a system, and to every society of men, even before civil government, to compel any person who has fallen upon any fortunate invention, of great necessity or use for the preservation of life or for a great increase of human happiness, to divulge it upon reasonable terms.

GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 250-55 (1978) (quoting 2 FRANCIS HUTCHINSON, A SYSTEM OF MORAL PHILOSOPHY 109 (1755). "As a man cannot hoard useful ideas, he cannot destroy his own property if it is still useful to the community." Id. (quoting FRANCIS HUTCHINSON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY 246-47 (1747)). This moral theory stands in obvious tension with trade secret doctrine, but I leave that to a different article. But see Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (finding no conflict between federal patent regime and state trade secret law).

[FN40]. But see Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 929-31 (2d Cir. 1994) (holding that copying articles from professional journals was not fair use because a market system had been organized allowing payment for such copies). As for the idea-expression dichotomy and related merger doctrine, the Fifth Circuit needed to go en banc to save the most obvious of applications, the wording of enacted law. See Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 805-06 (5th Cir. 2002) (en banc) (reversing panel affirmation of injunction preventing Internet posting of model building code as enacted).

[FN41]. But see Eldred, 537 U.S. at 207 (stating Congress "rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works").


[FN43]. Both Breyer's and the majority's statements in Eldred accept at least part of my thesis; they recognize dissemination as one goal of the Progress Clause. Compare Eldred, 537 U.S. at 207 (asserting that Congress "rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works") (majority opinion), and id. at 260 ("The Clause assumes an initial grant of monopoly, designed primarily to encourage creation, followed by termination of the monopoly grant in order to promote dissemination of already-created works.") (Breyer, J., dissenting), with Walterscheid, Preambular Argument, supra note 6, at 374 n.226 (reading these words of Breyer's opinion as rejecting my thesis). The Eldred Court did not, however, define the word "progress" or acknowledge that the Progress Clause allows only those exclusive rights in writings and discoveries which further a limited set of goals.

[FN44]. See, e.g., Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 213 (2000) (refusing to accept a forced reading of the Lanham Act because "[c]onsumers should not be deprived of the
benefits of competition ... by a rule of law that facilitates plausible threats of suit.

[FN45]. See 537 U.S. at 218-19 (rejecting argument "that the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment").

[FN46]. See id. at 221. This concept has recently become a focus of academic consideration. See, e.g., Balkin, supra note 1, at 5 ("Even when people repeat what others have said, their reiteration often carries an alteration in meaning or context."); Randall P. Bezanson, Speaking Through Others' Voices: Authorship, Originality, and Free Speech, 38 WAKE FOREST L. REV. 983, 1110 (2003) (arguing that acts of speech selection should not receive First Amendment protection unless inter alia the message communicated is the selector's own message); Diane Leenheer Zimmerman, Is There a Right to Have Something to Say? One View of the Public Domain (forthcoming) (draft on file with author).

[FN47]. This claim requires much further expansion, but not in this article. It undermines, for example, the standard judicial noninterest in censorship by powerful private interests. CBS refused to sell Move-On time to air an anti-Bush commercial during broadcast of the Super Bowl. See Eli Pariser, MoveOn.org, CBS Censors Winning Ad, available at http://www.moveon.org/news/2278.html (last visited Oct. 30, 2004). CBS's refusal to air is presumably protected by CBS's First Amendment right to "decide for [itself] the ideas and beliefs deserving of expression." Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994). Such legality clashes with the need for dissemination of multiple points of view in a representative polity. See also, e.g., William Safire, The Five Sisters, N.Y. TIMES, Feb. 16, 2004, at A19 (attacking media consolidation and stating that "[y]ou don't have to be a populist to want to stop this rush by ever-fewer entities to dominate both the content and the conduit of what we see and hear and write and say"). Government intervention to preserve balance in free speech, however, seems to perversely empower the entity limited by the First Amendment. Additionally, scholarship needs a better account of the relationship between free speech theory and artistic materials. See, e.g., Marci A. Hamilton, Art Speech, 49 VAND. L. REV. 73 (1996) (arguing that art is instrumentally useful in
fostering democracy); Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 YALE L.J. 1, 37-48 (2002) (positing a "freedom of imagination" within the First Amendment). Rubenfeld's theory, however, seems to protect only those who do their own imagining. See id. at 48-59 (advocating different protections for literal copying versus creation of a derivative work).

[FN48]. Of course, this analysis assumes that Congress would have followed the spirit of the Clause or that the Court aggressively would have policed the Clause's bounds. But see Eldred, 537 U.S. at 212 ("We have also stressed ... that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.").

[FN49]. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972) (providing classic explanation of difference between property rules and liability rules). I say "claims for payment" rather than the more standard "liability rule" because I agree with David Lange in disputing the tone of condemnation. See Lange, supra note 32, at 470 n.22.


[FN51]. See id. at 424 ("It is his absolute property."); id. at 425 ("[I]n the three last cases cited it was decided that patents are property, and entitled to the same rights and sanctions as other property."); id. at 429 ("[I]t is the privilege of any owner of property to use or not use it, without question of motive.").

[FN52]. See, e.g., Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985) (holding that the unpublished nature of a work is "critical element" of fair use analysis because of "the author's right to control the first public appearance of his expression").

[FN53]. See, e.g., id. at 542 (former President Gerald Ford's personal memoirs).

[FN54]. See, e.g., Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (circus
poster).


[FN56]. See, e.g., Am. Direct Mktg. v. Azad Int'l, Inc., 783 F. Supp. 84, 97 (E.D.N.Y. 1992) (concluding "that the proper remedy for infringement of the copyright in the images on a package [of a tooth-whitening system] which has withstood a trade dress claim between the same parties [for lack of secondary meaning] is most likely a fee based on the shown value of the image").

[FN57]. As David Nimmer said of the secretive official group of scholars studying the Dead Sea Scrolls:

   The committee, with its obsessive secrecy and cloak and dagger scholarship, long ago exhausted its credibility with scholars and laymen alike.

   The two Cincinnatians [who published a facsimile of the ancient text without permission] seem to know what the scroll committee forgot: that the scrolls and what they say about the common roots of Christianity and Rabbinic Judaism belong to civilization, not to a few sequestered professors.

   David Nimmer, Copyright in the Dead Sea Scrolls: Authorship and Originality, 38 HOUS. L. REV. 1, 64 (2001) (quotation marks omitted) (quoting Breaking the Scroll Cartel, N.Y. TIMES, Sept. 7, 1991, at 22L). Recently, however, the Israeli Supreme Court affirmed, on the basis of Israeli law, a judgment of copyright infringement against those responsible for the facsimile publication. See id. at 71-73 (discussing C.A. 2790/93, Eisenman v. Qimron, 54(3) P.D. 817 (no official English translation available)). Despite the Israeli court's ruling, the illicit publication was instrumental in enabling wider scholarly access to the material, thus resulting in a new "efflorescence" of related work. See id. at 76. I agree with Nimmer that copyright would not have existed under United States law, although perhaps not with each detail of his analysis. See id. at 81.

[FN58]. See, e.g., Justin Hughes, The Philosophy of Intellectual Property, 77 GEO. L.J. 287, 334
(1988) (claiming that according to Hegel "the will can only occupy a res nullius--either a virgin object or something that has been abandoned").

[FN59]. See, e.g., Justin Hughes, The Personality Interest of Artists and Inventors in Intellectual Property, 18 CARDOZO ARTS & ENT. L.J. 81, 82 (1998) (providing a more complex notion of possible personal ties to intellectual property res including creativity, intentionality, and identification as source).

[FN60]. Religious materials have been central in many intellectual property disputes employing many different legal theories. See, e.g., Walter A. Effross, Owning Enlightenment: Proprietary Spirituality in the "New Age" Marketplace, 51 BUFF. L. REV. 483 (2003) (presenting detailed account of several major sets of cases); Nimmer, supra note 57 (presenting detailed account of intellectual property disputes over recreations and translations of ancient religious texts unearthed in Israeli desert). But see Thomas F. Cotter, Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism, 91 CAL. L. REV. 323, 391 (2003) (arguing for greater court sensitivity to Free Exercise Clause values in copyright disputes, including granting damages as opposed to injunctions, that is, using "a liability rule instead of ... the more common property rule regime.").


[FN62]. See 17 U.S.C. § 107 (2000) (allowing "the fair use of a copyrighted work ... for purposes such as criticism [and] comment"). But see Religious Tech. Ctr., 923 F. Supp. at 1249 ("Although criticism is a favored use, where that 'criticism' consists of copying large portions ....with often no more than one line of criticism, the fair use defense is inappropriate.").

[FN64]. David Lange and Jennifer Anderson voiced such a vision at the Duke Fair Use Conference of November 2001, but then withheld their work-in-progress from publication pending further thought. I look forward to their insightful explication. See Lange, supra note 32, at 479-82.

[FN65]. The doctrine of fair use was created by Justice Story in Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841), which also gave authors the right to block derivative works. See, e.g., L. Ray Patterson, Folsom v. Marsh and Its Legacy, 5 J. INTELL. PROP. L. 431 (1998); John Tehranian, Et Tu, Fair Use? The Triumph of Natural Law Copyright (2004), at http://papers.ssm.com/sol13/papers.cfm?abstract_id=486283 (last visited Oct. 28, 2004). Absent the extension of authors' power, fair use would have been unnecessary. The challenged downstream works would not have been infringing.

[FN66]. See 17 U.S.C. § 106 (2000) ("Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following ... (2) to prepare derivative works ....").

[FN67]. See Lange, supra note 32, at 465.

[FN68]. As Internet public projects have demonstrated, the public is not composed of merely passive consumers. Working together in a network, furthermore, the relatively non-creative can make substantial contributions to the dissemination of culture. See generally Yochai Benkler, Coase's Penguin, or, Linux and The Nature of the Firm, 112 YALE L.J. 369 (2002) (explaining how the Internet allows successful completion of large, complex projects by networking multiple small inputs).


[FN70]. Balkin, supra note 1, at 5-6, 34, 35.

[FN71]. See Maureen A. O'Rourke, Toward a Doctrine of Fair Use in Patent Law, 100 COLUM. L. REV. 1177, 1179-80 (2000) (arguing that patent statutes should be modified due to growing likelihood that patent holders will refuse to license technology for socially efficient uses).

[FN72]. See Madey v. Duke Univ., 307 F.3d 1351, 1361-63 (Fed. Cir. 2002) (holding that exception did not apply to use of invention in a non-profit university laboratory researching free electron lasers with no immediate commercial application). While the Federal Circuit purported not to delegitimize the experimental use defense, see id. at 1360, it limited the exception to investigations pursued "solely for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry," id. at 1363. A research university's research was held not to be "idle curiosity," but rather "furtherance of the alleged infringer's legitimate business" objectives of "educating and enlightening students and faculty[,] increas[ing] the status of the institution," and perhaps "lur[ing] lucrative research grants, students and faculty." Id. at 1362.

[FN73]. The concern over patent-holders' blockade power against further research is not mere idle speculation. The ability to block research was one of the core motives behind agribusiness's push for utility patents to be available on sexually reproducing plants. See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 129 n.1 (2001) (allowing utility patents as well as Plant Variety Protection Act (PVPA) certificates on sexually reproducing plants, including basic food crops such as corn, while acknowledging that the most notable difference between utility patent and PVPA protection is that "the PVPA provides exemptions for research and for farmers to save seed from their crops for replanting"). For detailed discussion of the seed wars and their importance, see the forthcoming publication of papers in the Journal of Environmental Law & Litigation from "Malthus, Mendel, and Monsanto: Intellectual Property and the Law and

[FN74]. See, e.g., Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 210 (2000) ("[W]ithout distinctiveness [a mark] would not cause confusion ... as the [statute] requires.") (internal quotation marks omitted); Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 164 (1995) ("It is the source-distinguishing ability of a mark ... that permits it to serve [a mark's] basic purposes.").

[FN75]. See The Trademark Cases, 100 U.S. 82, 94 (1879) (holding that trademark statute is not within Progress Clause power of Congress because most marks are neither copyrightable works nor patentable inventions).

[FN76]. See Feist Pub'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 358 (1991) (holding that "writing" of an "author" requires only a "minimal level of creativity").


[FN78]. See Park N' Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 199-202 (1985) (holding that Lanham Act creates irrebutable presumption that incontestibly registered marks have secondary meaning, even if marks are descriptive).

[FN79]. See Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 118, 122 (1938) (holding that at expiration of a patent the public acquires "the right to make the article as it was made during the patent period, ... the right to apply thereto the name by which it had become known," and "the good will of the article"); see also Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S.

[FN80]. See Baker v. Seldon, 101 U.S. 99, 102 (1879) ("To give the author of the book an exclusive property in the art described therein, when no examination of novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.").

[FN81]. See Pamela Samuelson et al., A Manifesto Concerning the Legal Protection of Computer Programs. 94 COLUM. L. REV. 2308, 2316 (1994) ("[P]rograms are, in fact, machines (entities that bring about useful results, i.e., behavior) that have been constructed in the medium of text (source and object code.").


[FN88]. But see Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 29 (1997) (refusing to limit patent infringement to literal form even though "[t]here can be no denying that the doctrine of equivalents, when applied broadly, conflicts with the definitional and public-notice functions of the statutory claiming requirement").

[FN89]. See U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").


[FN91]. See, e.g., Berne Convention, supra note 85, art. 5, § 2 ("The enjoyment and the exercise of these [copy]rights shall not be subject to any formality ....").
[FN92]. See, e.g., Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods of the General Agreement on Tariffs and Trade, April 15, 1994, art. 9, § 1, 33 I.L.M. 1198 (1994) ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971) ....").

[FN93]. See, e.g., 35 U.S.C. § 261 (2000) ("Subject to the provisions of this title, patents shall have the attributes of personal property."); id. § 271(d) ("No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: ... (4) refused to license or use any rights to the patent.").

[FN94]. See, e.g., Warner-Jenkinson Co. v. Hilton David Chem. Co., 520 U.S. 17, 41 (1997) (Ginsburg, J., concurring) ("I address in particular the application of the presumption in this case and others in which patent prosecution has already been completed. The new presumption, if applied woodenly, might in some instances unfairly discount the expectations of a patentee who had no notice at the time of patent prosecution that such a presumption would apply.")

[FN95]. For example, we can decline to enact the currently pending Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong.; Database and Collections of Information Misappropriation Act, H.R. 3261, 108th Cong. (2004); and Author, Consumer, and Computer Owner Protection and Security Act of 2003, H.R. 2752, 108th Cong. As of October 31, 2004, S. 2560 was in the Senate Judiciary Committee, H.R. 2752 was sitting in the Subcommittee on Courts, the Internet, and Intellectual Property, of the House Committee on the Judiciary. See http://thomas.loc.gov. H.R. 3261 as amended was on the Union Calender (unmoved since March 11, 2004), after having been reported out favorably by the House Committee on the Judiciary, see H.R. Rep. No. 108-421, pt. 1 (2004), but voted down by the House Committee on Energy and Commerce, id. at pt. 2.

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