

A Legitimate Interest in Promoting the Progress of Science: Constitutional Constraints on Copyright Laws

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I. INTRODUCTION

Golan v. Holder raises interesting questions about the Progress Clause¹ and First Amendment limits on copyright laws. The case

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1. The Supreme Court uses the shorthand term “Copyright Clause” to refer to Article I, Section 8, Clause 8 of the Constitution. *See Eldred v. Ashcroft*, 537 U.S. 186 (2003). I join Larry Lessig in referring to this Clause as the “Progress Clause.” *See, e.g.,* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 130–31 (2004). I believe that “Progress Clause” is a better description for two reasons. First, the Clause is not limited to copyright; it also serves as Congress’s grant of power to enact patent laws. Second, the Clause states, at its beginning, that Congress has the

stems from section 514 of the Uruguay Round Agreements Act of 1994 (“URAA”), which implemented the treaty agreements made at the Uruguay Round of negotiations in the General Agreement on Tariffs and Trade (“GATT”).² Prior to the United States joining the Berne Convention in 1989,³ works from certain countries were ineligible for copyright in the United States, and authors were required to comply with certain formalities in order for copyright to attach to their works.⁴ Accordingly, a number of foreign works became part of the public domain in the United States as soon as they were published, or were subject to copyright for a time, but fell into the public domain when their authors failed to renew their copyrights. Many of these works were then part of the U.S. public domain for decades, until the URAA removed them. Under the Uruguay Round of negotiations, U.S. trade representatives agreed to “restore” copyright for foreign works that were out of copyright in the United States due to a lack of a copyright treaty with the foreign authors’ home countries or because the foreign authors failed to comply with U.S. copyright formalities or renewal requirements.⁵ This was the first time that Congress passed a law removing any significant material from the public domain.⁶ The URAA grants no new rights to U.S. authors.⁷

The Supreme Court certified two questions in *Golan v. Holder*: (1) Does the URAA violate the Progress Clause of the Constitution? (2)

power to grant authors and inventors exclusive rights “to promote the Progress of Science and useful Arts.” U.S. CONST. art. I, § 8, cl. 8. As I argue *infra* Part II, I believe that this language is a limitation on Congress’s power to grant exclusive rights.

2. Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976–81 (1994) (codified as amended at 17 U.S.C. § 104A (2006)).

3. Berne Convention for the Protection of Artistic and Literary Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986), available at www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf.

4. See *Golan v. Holder*, 609 F.3d 1076, 1081 (10th Cir. 2010) (describing the effects of the section 514 restoration provision).

5. See 17 U.S.C. § 104A(a)(1)(A) (referring to “restored” works). Some of the works granted copyright retroactively by the URAA had been in copyright in the United States, but then lost copyright status because the foreign author failed to file for copyright renewal. In many other cases, however, the works granted retroactive copyright by the URAA had never been subject to copyright in the United States, and thus saying that copyright was “restored” to these works is incorrect. In an effort at clarity, I refer to the URAA as providing retroactive grants of copyright rather than as “restoring” copyrights.

6. See *Golan v. Gonzales*, 501 F.3d 1179, 1192 (10th Cir. 2007) (“Based on the foregoing, we see no tradition of removing works from the public domain. Indeed . . . removal was the exception rather than the rule. Thus, § 514 deviates from the time-honored tradition of allowing works in the public domain to stay there.”).

7. See Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976–81 (1994) (codified as amended at 17 U.S.C. § 104A (2006)).

Does the URAA violate the First Amendment? In this Essay, I will consider these two questions in turn.

The parties' arguments about the Progress Clause question in *Golan* revolve around whether the URAA meets the "limited Times" restriction in the Clause. That issue is thoroughly discussed in the briefs and need not be repeated here. Instead, Part II of this Essay focuses on another aspect of the Progress Clause. Specifically, I argue that section 514 violates the Progress Clause's requirement that copyright laws "promote the Progress of Science." This is because the statute bequeaths copyright status without in return achieving any net increase in the creation or dissemination of creative works. Even if the Government relies on other constitutional authorities to justify section 514—such as the Commerce Clause or the Treaty Power—the limitations of the Progress Clause still must apply. I address the First Amendment question in Part III. Since First Amendment analysis turns, in part, on whether the speech restriction in question violates any constitutional limitations on the federal power under which the law is passed, I argue that the URAA must fail. Any law that violates constitutional restrictions on federal power cannot, by definition, serve a legitimate government interest.

II. THE PROGRESS CLAUSE REQUIRES COPYRIGHT LAWS TO PROMOTE THE CREATION OR DISSEMINATION OF KNOWLEDGE

A. *The Original Meaning of the Progress Clause*

At the time of the constitutional convention, the word "science" was understood to have a broad meaning, certainly broader than current definitions referring to areas of research that rely on the scientific method. "Science" referred more generally to knowledge and the liberal arts.⁸ "Progress," in addition to meaning forward motion, also meant "advance in knowledge."⁹ Accordingly, one should interpret the phrase "promote the Progress of Science" to mean promote the creation and dissemination of knowledge at large.

In its *Golan* briefing, the Government argues that the "promote the Progress of Science" language of the Progress Clause is a

8. See WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), available at <http://machaut.uchicago.edu/?resource=Webster%27s&word=Science&use1828=on> (defining "science" as "in a general sense, knowledge" and "any art or species of knowledge").

9. *Id.*, available at <http://machaut.uchicago.edu/?action=search&word=progress&resource=Webster%27s&quicksearch=on>; SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1775).

meaningless preamble.¹⁰ While some analysts support the Government's position,¹¹ most who have analyzed the issue seem to think that this introductory language is, in fact, a meaningful limitation.¹² Likewise, while the D.C. Circuit has held that the introductory language of the Progress Clause is nonlimiting,¹³ it did so by relying on dicta from an earlier case rather than by engaging in a detailed analysis.¹⁴ But neither the Supreme Court nor any circuit

10. Brief for the Respondents at 16, *Golan v. Holder*, No. 10-545, (U.S. Aug. 2011).

11. See, e.g., Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L. REV. 253, 299 (2002) (suggesting that the Progress Clause is not a limitation); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1781 (2006) (“Therefore, the phrase . . . must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise.” (quoting 1 NIMMER ON COPYRIGHT § 1.03[A] (2004))); Ralph Oman, *The Copyright Clause: “A Charter for a Living People,”* 17 U. BALT. L. REV. 99, 104 (1987) (suggesting that the Progress Clause “is mainly explanatory of the purpose of copyright”).

12. See, e.g., Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 287 (2004) (“Several commentators have attempted to resolve the problems posed by the Intellectual Property Clause/Commerce Clause overlap by relying on the ‘structure’ of the Constitution. Some have sought to demonstrate that other generally applicable limitations on congressional power (and specifically the commerce power) can be implied from the structure of the Constitution and consequently that the limits contained in the Intellectual Property Clause must also limit Congress’s authority under the Commerce Clause.”); Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. REV. 421, 423 (2009) (“The Framers intended the progress language in the Clause—to promote the progress of science and useful art—to limit Congress’s power to grant IP rights.”); Oliar, *supra* note 11, at 1844 (“The Clause empowers Congress to ‘promote the Progress of Science and the useful Arts’ rather than to ‘regulate’ the arts and sciences, or to ‘make Rules for the Government and Regulation’ of the arts and sciences. Whereas the latter language implies a power to pass laws and abolish them as Congress sees fit, the ‘progress’ language in the Clause provides a textual basis for the negation of the implication that the power to ‘promote’ progress implies the grant of power to ‘retard’ progress of arts and sciences.”); cf. Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 34 (2001) (“We do not know what the immediate reasoning for this particular formation and wording of the clause was. Its second part, that which elaborates the means to achieve the goal (‘by securing . . .’), resembles the Continental Congress’s charge to a committee to draft a resolution in 1783. But the final proposal had at least three novel elements in comparison to previous copyright law. One is the decision to combine the power to enact patent legislation with the power to protect copyrights.”); Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” In Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 758–59 (2001) (“The review standard should be higher because (i) Congress has never bothered to take the limits in the Clause seriously, (ii) Congress is treading close to textual limits on its power, and (iii) copyright statutes are limitations on speech.”).

13. *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (“Here the plaintiffs run squarely up against our holding in *Schnapper v. Foley*, 667 F.2d 102, 112 (1981), in which we rejected the argument that the introductory language of the Copyright Clause constitutes a limit on congressional power.”).

14. See *id.* at 381 (Sentelle, J., dissenting) (arguing that consideration of the “to promote” language in *Schnapper v. Foley* was dicta, and that “[t]he [Progress] clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress. The means by

court adheres to this holding.¹⁵ Instead, the Supreme Court frequently refers to the “promote the Progress of Science” language as limiting Congress’s copyright powers.¹⁶ Moreover, when analyzing the Sonny Bono Copyright Term Extension Act (“CTEA”)¹⁷ in *Eldred v. Ashcroft*, the majority opinion expressly noted that the CTEA *could* promote the progress of science,¹⁸ yet the Court deferred to Congress on *how* the copyright laws should promote the progress.¹⁹

But deference is not abdication; it is simply another way of stating that, when reasonable minds disagree, Congress may decide the best way to promote progress. Given the Petitioners’ argument that the statute at issue in *Golan* retards rather than promotes progress, the Court cannot avoid addressing how Congress’s power arising from the “to promote” language is limited.

When the Court decides this question, it should hold that the “to promote” language both guides and limits Congress’s power to craft copyright and patent laws. First, the most natural reading of the Progress Clause is that Congress is granted the power to give exclusive rights to authors “to promote the Progress of Science.” To read the “to promote” language of the Clause as a nonrestrictive preamble is, in effect, to read the meaning out of the Constitution.²⁰

which that power is to be exercised is certainly the granting of exclusive rights—not an elastic and open-ended use of that means, but only a securing for limited times.”).

15. In *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003), the majority, while discussing the Petitioners’ argument, cites *Eldred v. Reno* for the proposition that “the preamble of the Copyright Clause is not a substantive limit on Congress’ legislative power.” But this is either an acknowledgement that the Petitioners did not raise the issue, or, at most, dicta.

16. See *Eldred v. Ashcroft*, 537 U.S. at 212 (“As petitioners point out, we have described the Copyright Clause as ‘both a grant of power and a limitation,’ and have said that ‘the primary objective of copyright’ is ‘to promote the Progress of Science.’” (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 349 (1991) and *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966)); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (“The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’ As we have noted in the past, the Clause contains both a grant of power and certain limitations upon the exercise of that power.”).

17. Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 101, 108, 203, 301–304 (2006)).

18. *Eldred v. Ashcroft*, 537 U.S. at 213 (“The justifications we earlier set out for Congress’ enactment of the CTEA . . . provide a rational basis for the conclusion that the CTEA ‘promotes the Progress of Science.’”).

19. *Id.* at 204 (“Satisfied that the CTEA complies with the ‘limited Times’ prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress.”).

20. See Edward C. Walterscheid, *Musings on the Copyright Power: A Critique of Eldred v. Ashcroft*, 14 ALB. L.J. SCI. & TECH. 309, 355 (2004) (“By accepting the premise that the ‘to promote’ language of the Clause is merely a preamble that does not substantively limit the legislative power of Congress, and that this language has no relevance in interpreting

Such a reading is at odds with the generally accepted interpretive approach to the Constitution in which every word serves a purpose.²¹ Had the founders wanted to grant Congress a general patent and copyright power, they could have done so easily by eliminating the Clause's preamble. All the other clauses in Section 8 of the Constitution outline generic grants of power without limitations.²² Thus, the fact that the Progress Clause contains a limiting preamble deserves attention. As a matter of common sense, it should mean something. The meaning is obvious: the Progress Clause is both a grant of power to Congress and a limitation on its use.²³

It makes sense that the founders would limit the grant of copyright and patent powers in the Constitution given England's experience with royal grants of monopolies in copyright and patents to friends of the Crown.²⁴ In seventeenth-century England, patents and copyrights were dispensed not to inventors and authors, but to favored courtiers who profited from monopoly pricing.²⁵ These monopolies did

other language of the Clause, the *Eldred* Court effectively interpreted the Clause as though it reads: 'Congress shall have Power . . . To secure to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'").

21. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed, that any clause in the constitution is intended to be without effect."); James Monroe, *Views of the President of the United States on the Subject of Internal Improvements, May 4, 1822*, in II MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 144, 163 (James D. Richardson ed., 1909) ("[N]o part of the Constitution can be considered useless; no sentence or clause in it without a meaning.").

22. U.S. CONST. art. I, § 8, cl. 8 (granting Congress power, *inter alia*, "to lay and collect Taxes," "to borrow money," "to regulate Commerce," "to coin Money," "to declare War," and "to provide and maintain a Navy").

23. *Goldstein v. California*, 412 U.S. 546, 555 (1973) (stating that the Progress Clause "describes both the objective which Congress may seek and the means to achieve it"). *Cf. Marbury*, 5 U.S. (1 Cranch) at 176–77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."); EDWARD WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 157 (2002) ("[P]owers are both granted and limited in the Constitution, and . . . limitations may not be ignored.").

24. See Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 439 (2003) ("[T]he framers of the Constitution and drafters of various copyright statutes were cognizant of copyright's roots in licensing and publishing monopolies, and were wary of repeating the mistakes of England.").

25. See William F. Dana, "Monopoly" Under the National Anti-Trust Act, 7 HARV. L. REV. 338, 340 (1894) ("[Queen Elizabeth] granted her servants and courtiers patents for monopolies; and these patents they sold to others, who were thereby enabled to raise commodities to what price they pleased, and who put invincible restraints upon all commerce, industry, and emulation in the arts."); 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.

nothing to encourage innovation and only resulted in higher prices. Due to the unpopularity of this practice, Parliament eventually enacted statutes to prohibit such monopoly grants to anyone other than inventors and authors.²⁶ These statutes also limited the terms of patents and copyrights. In 1623, Parliament passed the Statute of Monopolies, which invalidated all exclusive privileges except those granted to “true and first Inventor[s].”²⁷ In 1710, Parliament passed the Statute of Anne, which vested copyrights only in authors and only for a limited term of fourteen years.²⁸ This replaced the royal grant of monopoly in book printing that the Stationers’ Company had held for over one hundred years.²⁹ Hence, by the eighteenth century, England had replaced monopolistic patent and copyright laws with limited-term grants of exclusive rights to inventors and authors in order to encourage innovation and creation.³⁰ The founders of the United States were well aware of this English history. Set against this historical backdrop, it is hard to view the text of the Progress Clause as anything other than delimiting.

The question of whether the URAA promotes the progress of science should be read according to the founders’ understanding of the Progress Clause. While the Supreme Court should defer to Congress’s determinations of how best to promote the creation and dissemination of creative works, the Court cannot abdicate its responsibility to

REV. 1119, 1169 (2000) (“[T]he term extension looks very much like the same sort of abuse condemned by Parliament and the English courts in the two centuries before the Constitutional Convention. Queen Elizabeth granted a number of monopolies to successful courtiers.”).

26. See Nachbar, *supra* note 12, at 330 (“In response to what it considered to be abuse of monopolies by the crown, Parliament in 1623 passed the Statute of Monopolies, which prohibited the granting of royal monopolies.”); E. Thomas Sullivan, *The Confluence of Antitrust and Intellectual Property at the New Century*, 1 MINN. INTELL. PROP. REV. 1, 6 (2000) (“Although the Statute of Monopolies abolished the royal power to create monopolies, the Statute allowed Parliament to grant patents to inventors for new inventions.”).

27. Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § VI (Eng.) available at <http://www.legislation.gov.uk/aep/Ja1/21/3>.

28. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at <http://www.copyrighthistory.com/anne.html>.

29. See Nachbar, *supra* note 12, at 332 (“Some have argued that the Statute of Anne represented a fundamental shift in English intellectual property law that was intended to, and did, lead to the eventual collapse of a particular monopoly: the publishing monopoly enjoyed by the English Stationers’ Company.”).

30. See Ghosh, *supra* note 24, at 433 (“By securing authors’ rights, the Statute of Anne made possible the category of literary property, or rights in books and literary works akin to rights in land. The case law . . . represented attempts by the booksellers to regain their exclusive rights from authors in order to maintain their market position against publishers in Scotland . . . By creating incentives for the introduction of new books, the recognition of copyright as a statutory right (and not a perpetual right) reduced the publishers’ monopoly in the publication of the old, most profitable works.”).

ensure that copyright laws actually promote such creation and dissemination.

B. Section 514 Does Not Promote the Creation or Dissemination of Knowledge

Petitioners argue that the URAA does not “promote the Progress of Science” because it fails to provide any additional incentive to create new works. Instead, it merely grants economic rights—monopoly rights in retroactively copyrighted works—to authors and their heirs.³¹ Petitioners argue that granting such economic rights to foreign authors and their estates in the hope that foreign countries will grant similar economic rights to American authors does nothing to promote the progress of science and useful arts.³² The Government does not contest that the URAA provides no incentive to create new works. Instead, the Government argues that, even if the preamble to the Progress Clause is a limitation, it does not restrict Congress to passing only copyright laws that encourage the creation of new works.³³ The Government points to historical examples of Congress granting copyrights for preexisting works³⁴ or extending the term of existing works.³⁵

This argument that Congress may satisfy the “promote the Progress of Science” limitation by means other than simply encouraging creation of new works seems correct, within certain bounds.³⁶ As explained above, at the time the Constitution was

31. Brief for the Petitioners at 30, *Golan v. Holder*, No. 10-545 (U.S. June 14, 2011).

32. *Id.* at 24. Note that the URAA is different from the CTEA, which was at issue in *Eldred v. Ashcroft*. In *Eldred* the Supreme Court held that the CTEA, which retroactively increased copyright terms for existing works, was constitutional because it may increase incentives to create and disseminate works. *Eldred v. Ashcroft*, 537 U.S. 186, 206 (2003).

33. Brief for the Respondents, *supra* note 10, at 17 (“As this Court recognized, ‘if the only way to promote the progress of science were to provide incentives to create new works,’ then ‘the United States could not “play a leadership role” in the give-and-take evolution of the international copyright system.’”). But note that this may be a bit of a straw man, because Petitioners never argue that providing incentives to create new works is the only way to promote progress. Rather, Petitioners simply argue that the URAA does not promote progress.

34. *Id.* at 21 (“Against this backdrop, the First Congress conferred federal copyright protection upon all ‘books,’ ‘maps,’ and ‘charts’ ‘already printed.’ The effect of that enactment was to remove a number of existing works from the public domain.”).

35. *Id.* at 23 (“The clear practical effect of the 1790 Act was to confer federal copyright protection upon many works that were previously subject to unrestricted exploitation by the public. Enactment of a law having that effect reflects Congress’s implicit understanding that its powers under the Copyright Clause extended to works in the public domain.”).

36. The Government might have argued, however, that the URAA *actually does* incentivize new works. In rare cases, authors of retroactively copyrighted works may be motivated to create derivative works if they believe that publication of the new work will drive additional sales of the

drafted, “progress” of “science” referred to the creation and dissemination of knowledge.³⁷ Accordingly, copyright laws that encourage either the creation *or dissemination* of creative works will survive constitutional scrutiny, so long as Congress obeys the remainder of the Progress Clause.

Unfortunately for the Government, the net effect of the URAA is to *discourage* dissemination of existing works to a much greater extent than it encourages dissemination. It is true that grants of retroactive copyrights to authors or their heirs may encourage those authors and heirs to seek greater dissemination of their existing works, so that they may benefit from the monopoly pricing that copyright allows. If the expected returns are high enough, the authors may even be motivated to incur costs to advertise and promote their works—and thus will promote the public good by providing more information to people who might use their works. But these benefits are far outweighed by a general loss of access, because the public is no longer allowed to freely reproduce and disseminate the works. The above-market pricing that monopoly allows will leave those who are unwilling to pay the additional costs without the benefit of owning or using the works. And if the works are valuable, a publisher will be motivated to print and sell them without any need for exclusive rights.³⁸ Because of this net effect, the URAA irretrievably fails to comport with the meaning of the Progress Clause discussed in Part II.A.

If the Court holds that the URAA fails under the Progress Clause, as I believe it should, may the Court uphold the statute under another grant of power in the Constitution? The Government argues that the URAA can pass muster as Commerce Clause or Treaty Power legislation, and it recommends that the Court remand the case for consideration of these issues if it finds the URAA unsupportable under the Progress Clause.³⁹ But this argument is wrong for the reasons explained convincingly in both the Petitioners’ brief and the amicus brief by the Cato Institute.⁴⁰ Congress cannot purport to rely on a

retroactively copyrighted work. If sales of the new work alone suffice to compensate the author for her creation, then the retroactive copyright will not drive new creation. Thus, an additional incentive to create will only be present in the very rare case where the creation of the new work does not pay for itself. Rather, creation of the new work must drive enough sales of the old work so that creation of the new work is profitable when sales are combined.

37. See *supra* Part II.A.

38. Penguin Classics are examples of public domain works of “classic” literature that sell for low prices, yet remain profitable enough for the publisher to meet market demand.

39. Brief for the Respondents, *supra* note 10, at 33 n.15.

40. Brief for the Petitioners, *supra* note 31, at 62–65; Brief for the Cato Institute as Amicus Curiae in Support of Petitioners at 12–14, *Golan*, No. 10-545 (U.S. June 21, 2011).

more general constitutional grant of power to avoid limitations in a specific grant of power.⁴¹ If the government could do so, it would make the specific limitations meaningless.⁴²

III. SECTION 514 IS NOT SUPPORTED BY A LEGITIMATE GOVERNMENT INTEREST

Another independent limitation on government action is the First Amendment. I will not address whether the URAA is sufficiently narrowly tailored to the purported government interests, as this issue is well briefed by the parties. Instead, I will focus on the first part of the First Amendment analysis—whether the Government has offered a legitimate interest for passing the URAA. I argue that any “legitimate government interest” must comply with relevant constitutional limitations on federal power. Because the URAA is a copyright law governed by the limitations of the Progress Clause, the URAA may not be said to serve a “legitimate government interest” if it does not “promote the Progress of Science.” In other words, the legitimacy of copyright laws such as the URAA must be measured by whether they conform to the limits of the Progress Clause.

In an earlier appeal in this case, the Tenth Circuit held that the URAA is not within the traditional contours of copyright legislation; thus, the statute required First Amendment scrutiny.⁴³ On remand, the District Court for the District of Colorado held that the URAA is content neutral in that it does not discriminate based on the substance of a work. As a result, the court applied intermediate scrutiny.⁴⁴ The court ruled that under intermediate scrutiny, the URAA violated the First Amendment because the URAA was not sufficiently narrowly tailored to the Government’s legitimate interest.⁴⁵ The Tenth Circuit reversed on appeal, holding that the statute was tailored narrowly enough to the Government’s interest to

41. See *Ry. Labor Execs. Ass’n v. Gibbons*, 455 U.S. 457, 469 (1982) (holding that Congress could not rely on the Commerce Clause to pass a bankruptcy law that violated the Bankruptcy Clause’s requirement that bankruptcy laws be “uniform”).

42. See *Reid v. Covert*, 354 U.S. 1, 16 (1957) (“[N]o agreement with a foreign nation can confer power on the Congress . . . free from the restraints of the Constitution.”).

43. *Golan v. Gonzales*, 501 F.3d 1179, 1187–88 (10th Cir. 2007).

44. *Golan v. Holder*, 611 F. Supp. 2d 1165, 1170 (D. Colo. 2009). The intermediate scrutiny standard, as applied in First Amendment analysis, requires that a statute “advance[] important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

45. *Golan v. Holder*, 611 F. Supp. 2d at 1177.

survive scrutiny.⁴⁶ Yet neither court analyzed whether the asserted government interests were “legitimate” under the Progress Clause.⁴⁷

The Government put forth three separate interests purportedly served by the URAA: (1) an interest in securing reciprocal retroactive copyright protection for U.S. authors overseas; (2) an interest in attaining “indisputable compliance” with international treaties; and (3) an interest in “remedying past inequities of foreign authors who . . . never obtained copyrights in the United States.”⁴⁸ At first blush, each of these interests seems to qualify as an important government goal. Thus, one might think that Congress could enact the URAA without regard to the Progress Clause’s limitations, so long as the speech burdened by the law is narrowly tailored to one of these interests. As I discuss above, however, copyright laws cannot be constitutional unless they conform to the limits of the Progress Clause, even if Congress claims to pass the laws under a general grant of power. And none of the interests advanced by the Government serves the purposes behind the Progress Clause.

It is notable that the government interests underlying the URAA are distinct from the typical government interests subject to First Amendment scrutiny. For one thing, most First Amendment cases involve evaluating whether laws passed under the state police power unduly burden speech. Because the states—unlike the federal government—have general police powers, the Court need not evaluate whether the law is legitimate vis à vis a particular constitutional grant and restriction on power. Instead, the law merely needs to comply with proper legislative procedures for ratification into state law. If the state law restricts speech in some way, then the restriction must be narrowly tailored to the government interest justifying the law. In some cases, the Court even refers to the underlying government interests as “the evils the [government] seeks to eliminate” by enacting the speech-restrictive statute.⁴⁹ Examples include parade and protest permit requirements,⁵⁰ limitations on

46. *Golan v. Holder*, 609 F.3d 1076, 1083 (10th Cir. 2010).

47. The District Court found an important interest in adhering to Berne, *Golan v. Holder*, 611 F. Supp. 2d at 1172, and the Tenth Circuit found one in the protection of American interests abroad, *Golan v. Holder*, 609 F.3d at 1083. However, neither court addressed the impact of the Progress Clause on the First Amendment analysis.

48. *Golan v. Holder*, 609 F.3d at 1083.

49. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989) (“[F]ocus[ing] on the source of the evils the [government] seeks to eliminate . . . without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils . . . is the essence of narrow tailoring.”).

50. *Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir. 2007).

roadway signage to improve traffic safety,⁵¹ and aesthetic zoning laws that prevent some forms of signs and advertising,⁵² to name but a few.

The URAA is unlike any of these state laws. In the typical state-law speech-restriction case, speech is regulated to avoid problems caused by the speech, like unsafe driving due to distracting roadway signs. In the case of copyright laws, Congress restricts some speech so as to encourage even greater speech.⁵³ The particular problem that copyright laws are designed to address is the “public goods problem” that results in limited innovation if reproducibility of creative works is easy.⁵⁴ Copyright law attempts to solve this problem by granting authors exclusive control over their original works for limited times. The Progress Clause authorizes Congress to create patent and copyright laws subject to several restrictions. “Exclusive rights” may be granted only to “authors” of original works⁵⁵ for “limited Times.”⁵⁶ In addition, as I explain above, the Progress Clause’s preamble requires that copyright laws must “promote the Progress of Science.”⁵⁷ The government’s interest must respect these restrictions in order to be legitimate for the purposes of the First Amendment.

51. *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005).

52. *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

53. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (describing copyright law as “the engine of free expression” by providing economic incentives to create new works of speech); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192 (1970) (“In some degree [copyright] encroaches upon freedom of speech . . . but this is justified by the greater public good in the copyright encouragement of creative works.”).

54. See Brian D. Johnston, *Rethinking Copyright’s Treatment of New Technology: Strategic Obsolescence as a Catalyst for Interest Group Compromise*, 64 N.Y.U. ANN. SURV. AM. L. 165, 166 (2008) (“With the invention of the printing press and movable type, the effort required to reproduce a literary work became significantly less than the effort required to author the work. Copyright law intervenes in the name of the public good to protect the author from the inexpensive copying made possible by technology and to preserve authors’ incentives to create new works, as well as publishers’ incentives to disseminate those works.”); Gideon Parchomovsky & Peter Siegelman, *Towards an Integrated Theory of Intellectual Property*, 88 VA. L. REV. 1455, 1466–67 (2002) (“Copyrights and patents are predicated on the need to provide an economic incentive for the creation of public goods such as inventions and expressive works. Since expressive works and inventions contain information—the quintessential public good—absent legal protection, competitors would copy such works without incurring the initial costs of producing them. Unauthorized reproduction would drive down the market price to the cost of copying, original authors and inventors would not be able to recover their expenditures on authorship and R&D, and, as a result, too few inventions and expressive works would be created.”).

55. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (discussing the constitutional requirement of originality in copyrightable works, and denying copyright to a set of telephone-book white pages due to lack of originality).

56. U.S. CONST. art. I, § 8, cl. 8.

57. *Id.*

A consideration of the Government's three proposed interests suggests that the "evil" being eliminated by the URAA is not the problem of insufficient creation and dissemination of copyrightable works, which is the problem the Progress Clause sanctions Congress to remedy.

First, as to the Government's interest in achieving reciprocal retroactive copyrights for U.S. authors abroad, the only "evil" is a lack of exclusive ownership rights. Under this rationale, the URAA secures exclusive rights abroad for previously published works by U.S. authors in exchange for providing foreign authors the same rights in the United States.⁵⁸ The Progress Clause does not condone exclusivity as an end in itself.

Correcting the Government's second claimed "evil"—past inequitable treatment of some foreign authors—requires giving monopolies to those authors or their estates over works that were once in the public domain and free to all. As discussed in Part II.B, removing works from the public domain does not comport with the proper understanding of promoting progress.

Similarly, the Government's need to achieve its third interest—"indisputable compliance" with the Berne Convention—cannot justify action that violates the Progress Clause. While adhering to international treaty obligations is a legitimate government interest, treaties are inferior to the Constitution. The argument that constitutional restrictions should be ignored simply because of the government's international agreements should never be a sufficient justification for subverting the Constitution.⁵⁹

In short, the Government's three proposed interests fall short of justifying the URAA's restriction on speech. As I explain above, the Progress Clause requires that copyright laws "promote the Progress of Science." Each of the Government's purported interests in passing the

58. The Government may believe that it has a legitimate interest in securing these exclusive rights for U.S. authors. After all, the monopoly pricing from such exclusive rights may lead to greater profits for U.S. residents, and thus to higher GDP and tax revenue. It is true that U.S. residents will also have to pay higher prices for the retroactive copyrights granted in the United States, but according to congressional testimony, more retroactive copyrights would be granted to U.S. authors abroad under the URAA than would be granted to foreign authors in the United States. Thus, Congress may have thought of the retroactive copyrights and limited reliance rights as a net plus to the U.S. economy. See *Golan v. Holder*, 609 F.3d 1076, 1089 (10th Cir. 2010) (reviewing testimony before Congress about foreign response to the United States' approach to copyright restoration).

59. See Karen B. Brown, *Allowing Tax Laws to Cross Borders to Defeat International Tax Avoidance: The Convention on Mutual Administrative Assistance in Tax Matters*, 15 BROOK. J. INT'L L. 59, 96 (1989) ("[T]he federal government may not ignore the strictures of the United States Constitution in exercising its treaty power.").

URAA involves creating private benefits for authors. Yet none of the Government's purported interests in passing the URAA promote the net spread of knowledge by encouraging the creation or dissemination of creative works. This is a fatal problem for the Government's argument, because when it comes to copyright law, the only legitimate interest Congress may pursue is encouraging the diffusion of knowledge by promoting the creation and dissemination of creative works. Accordingly, the Government's justifications cannot qualify as legitimate government interests that surmount the hurdle of the First Amendment and justify restricting speech by removing works from the public domain.

IV. CONCLUSION

Even under the most generous arguments for the URAA, the statute is unconstitutional. The Supreme Court should hold that the URAA violates the "promote the Progress of Science" limitation of the Progress Clause. The URAA is also unconstitutional under the First Amendment because the only legitimate government interest in passing copyright laws is to promote the progress of science. This conclusion is bolstered by the fact that each purported government interest supporting the URAA serves goals other than promoting the progress of science. The separate questions presented in *Golan* merge the Progress Clause and First Amendment issues into one analysis. After completing this intertwined analysis, the URAA is invalid under both constitutional mandates.