

ORIGINALISM AND THE IP CLAUSE: A COMMENTARY ON
PROFESSOR OLIAR’S “NEW READING”

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In his New Reading article, Professor Oliar set forth a detailed and, in many respects, plausible reconstruction of the Framers’ intent when drafting the Intellectual Property (IP) Clause. But it is a reconstruction predicated on conjecture and supposition in the absence of any historical record actually setting forth such intent. He contends that the Framers’ intent is important because it has been recently highlighted by the U.S. Supreme Court in Eldred v. Ashcroft in the context of interpreting the Clause. This Commentary demonstrates that rather than highlighting the Framers’ intent, the Eldred Court relied almost entirely on original public understanding in interpreting the copyright provision of the Clause.

Oliar hypothesizes that there are four open questions of constitutional interpretation involving the Clause that are at least partially amenable to resolution under his analytical reconstruction of the Framers’ intent. For reasons set forth in this Commentary, I am not nearly as sanguine as he is that (1) he has “set the Convention’s IP-related record straight” and that (2) his “findings contribute to resolving” the four questions that he sets forth.

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INTRODUCTION

In his article, *The (Constitutional) Convention on IP: A New Reading*,¹ Professor Dotan Oliar provides a follow-up to his earlier work analyzing the

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1. Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. REV. 421 (2009).

origins of the Intellectual Property (IP) Clause.² He states that in interpreting the meaning of the Clause, “courts—and especially the Supreme Court—have accorded the Framers’ intent and the Clause’s original understanding considerable weight.”³ Oliar places particular emphasis on certain language in *Eldred v. Ashcroft*⁴ as supporting this view.⁵ Because he believes it is relevant to future interpretation of the Clause, Oliar now seeks to justify assumptions he made in his earlier article and to explicate several additional implications via an analytical matrix detailing proposals presented at the Constitutional Convention. Oliar believes this analytical matrix provides an explanation of the Clause’s content.⁶

Because I have published a book discussing the history of the Clause,⁷ I am happy to have the opportunity to comment on his *New Reading* article. Before addressing the article, however, I need to make clear my position regarding originalism and the Clause. Perhaps inadvertently, Oliar mischaracterizes me as one of the “commentators [who] widely accept the importance of originalist and intentionalist considerations in constitutional intellectual property interpretation.”⁸ I have expressly emphasized that my work regarding the Clause “is not an attempt to establish original meanings, but rather an effort to understand the intellectual property clause as it has been perceived since its inception.”⁹

In particular, I do not believe that attempting to ascertain original intent regarding the Clause is a particularly meaningful exercise. Aside from the fact that there is no historical record setting forth the intent of any Framers regarding the Clause, whose intent would be determinative even if it could be ascertained? Is it that of the Framers collectively, that of the Committee of Eleven from which the Clause came, or that of the unknown Framers who actually drafted it?¹⁰ It is with this skepticism that I explore Oliar’s contention that

2. Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771 (2006).

3. Oliar, *supra* note 1, at 422.

4. 537 U.S. 186 (2003).

5. Oliar, *supra* note 1, at 450 n.106.

6. *See id.* at 424–26.

7. EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* (2002).

8. Oliar, *supra* note 1, at 450–51, 450 n.107.

9. WALTERSCHEID, *supra* note 7, at 23.

10. The *Eldred* Court has quoted an allegation on behalf of Attorney General John Ashcroft that James Madison drafted the Clause, 537 U.S. 186, 203 n.8 (2003), but there is no historical record that supports such an allegation. While I have speculated that it is “quite conceivable” that Madison may have been the author, I have also pointed out that “[t]here is no record” to indicate how the Clause came about. WALTERSCHEID, *supra* note 7, at 107.

through the use of his analytical matrix, the intent of the Framers not only can be derived but should play a significant role in interpretation of the Clause.¹¹

I. FRAMERS' INTENT AND ORIGINAL UNDERSTANDING

Oliar states that courts, the U.S. Supreme Court in particular, place considerable weight on both the Framers' intent and original understanding when interpreting the Clause. However, his entire emphasis in the *New Reading* is on the Framers' intent, and he makes little attempt to address the role of original understanding in such interpretation. Oliar does not define what he means by "Framers' intent" or "original understanding," but I will assume that they largely equate to original intent and original meaning as used in the literature relating to constitutional interpretation.

It is unclear why Oliar focuses so much on original intent rather than original meaning¹² since the two terms have quite different connotations. Jack Rakove has clearly delineated the difficulties inherent in establishing original meanings in the Constitution, much less the original intent of the Framers.¹³ Initially at least, the Framers would have argued that the Constitution should be interpreted on the basis of its text and structure and that their diverse individual intents in creating it are simply irrelevant to its interpretation.¹⁴ We do not know with any certainty how the IP Clause came about or from what specifically it was derived. Those who seek to establish the origins of the Clause, including both Oliar and myself, are engaging in conjecture to a great degree. It may be plausible and to some degree informed conjecture, but it is still conjecture.

In addition, Oliar places far too much emphasis on *Eldred* as exemplifying Supreme Court reliance on what he calls "originalist and intentionalist considerations" in interpreting the IP Clause.¹⁵ As I will demonstrate, the *Eldred* Court relied almost entirely on original public understanding to justify its interpretation of the Clause and essentially ignored what he calls "Framers' intent."

11. It appears that the intent he refers to is that of the Committee of Eleven, Oliar, *supra* note 1, at 446, although how the Convention as a whole was somehow made aware of this intent, or agreed with it, is not indicated. It should be noted that the Clause was adopted without dissent and without debate.

12. He tends to call this "original understanding." See, e.g., *id.* at 450 n.106.

13. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

14. The most obvious evidence of this perspective was their decision to keep the records of the Convention a secret. See *also id.* at ch. I, XI.

15. Oliar, *supra* note 1, at 450–51.

II. OLIAR'S TWO "PUZZLES"

According to Oliar, there are two issues that have perplexed those commentators addressing the origins of the Clause. The first involves whether, in a plan of government submitted to the Convention on May 27, 1787 (known as the South Carolina Plan), Charles Pinckney proposed "an Authority to the National Legislature . . . to secure to Authors the exclusive rights to their Performances and Discoveries."¹⁶ Pinckney appeared to allude to the proposal in a pamphlet published shortly after the Convention ended.¹⁷ The issue arises because no copy of the original South Carolina Plan survived the Convention and no reference to it mentions a proposed grant of authority to the national legislature regarding intellectual property.

I have argued that there is no evidence other than Pinckney's own self-serving claim that the language quoted above was actually included in the South Carolina Plan.¹⁸ After an exhaustive review of just about everything that has been written on the subject, Oliar persuasively shows that Pinckney's pamphlet did not in fact allege that such a proposal was presented in the South Carolina Plan. Oliar argues that Pinckney was instead referring to the intellectual property proposals he presented to the Convention on August 18, 1787.¹⁹ Although this argument may resolve a somewhat esoteric historical debate, it adds nothing of interest to the future interpretation of the Clause.

The second issue revolves around the question of whether James Madison proposed that Congress should have power to issue patents. This issue arises because Madison's notes, which provide the most detailed and complete report of the Convention's activities, initially declared that on August 18th, he proposed that Congress have the power "[t]o secure to the inventors of useful machines and implements the benefits thereof for a limited time."²⁰ But as published after Madison's death, his notes contained no mention of this proposal nor did the Journal of the Convention. The quoted language was similarly absent from any of at least seven other sets of printed notes from the Convention.²¹ Why then did Madison at some later date edit the quoted language from his notes?

16. *Id.* at 427 (alteration in original) (quoting Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia* (May 28, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106, 122 (Max Farrand ed., 1911)).

17. *Id.*

18. WALTERSCHEID, *supra* note 7, at 82.

19. Oliar, *supra* note 1, at 431–34.

20. *Id.* at 436.

21. WALTERSCHEID, *supra* note 7, at 102.

Oliar once again methodically explores this issue and provides plausible explanations. He suggests that Madison's edited version was drafted in his old age when his memory of actual events had faded, that he used poor editorial judgment, and that he relied on the untrustworthy journal of the Convention. The journal itself was not a good record of the delegates' activities, and for unknown reasons it failed to mention all of the proposals submitted on August 18th concerning additional congressional powers.²² I reserve judgment on this issue, but as I indicate below, if Madison actually made such a proposal, it will not influence in any significant way the future interpretation of the Clause. Nonetheless, I will assume *arguendo* that Madison proposed a patent power for Congress.

III. OLIAR'S ANALYTICAL MATRIX

Oliar's interpretation of the origin of the Clause is predicated on an analytical matrix developed from eight proposals presented to the Convention on August 18, 1787. Four of these were presented by Pinckney, and four by Madison. Both Pinckney and Madison advocated that Congress have what Oliar calls a patent power,²³ a copyright power, an education power, and a power to grant encouragements.²⁴ Oliar defines "encouragements" to mean "monetary payments and nonmonetary honors."²⁵ But on their face, the "encouragement" powers proposed by Madison and Pinckney encompass much more than this definition.²⁶ Be that as it may, Oliar assumes that all eight of these proposals played a role in the origin of the Clause. Nonetheless, his own analysis gives no indication that Madison's education power influenced the language of the Clause in any way.²⁷

Oliar clearly accepts the modern interpretation of the Clause as having an end-means structure with "to promote the progress of science and useful arts" as the ends and "by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" as the means.²⁸ In this

22. Oliar, *supra* note 1, at 441–44.

23. Here he includes what he calls Madison's "Missing Power." *Id.* at 438.

24. *Id.* at 447 tbl.1.

25. *Id.* at 446 n.97.

26. Madison's encouragement power reads: "to encourage by proper præmiums and provisions the advancement of useful knowledge and discoveries," and Pinckney's reads: "to establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures." *Id.* at 447 tbl.1. "Proper præmiums and provisions" encompass much more than simply monetary payments and honors; so too does "public institutions, rewards and "immunities." *See id.*

27. *See id.* at 447. However, Oliar states that he demonstrated this in his earlier work. *Id.*

28. *Id.*

view, the “by securing” language constitutes the grant of power to Congress, and the “to promote” language sets forth the purpose or object of the grant of power.²⁹ But in his interpretation of the textual construction of the Clause, Oliar relies only on the grammatical structure of the Clause itself and ignores that it is one of eighteen clauses setting forth the enumerated powers of Congress.³⁰ These clauses all exhibit a uniform parallel grammatical structure in which the grant of power in each is set forth as an infinitive verb form. It is only in the interpretation accepted by Oliar that one clause, namely the IP Clause, is treated as though the infinitive verb form does not constitute the grant of power but instead is merely an “ends,” a statement of purpose or object. If intent is relevant, as Oliar argues, why would the Framers use an identical grammatical structure in all the clauses enumerating congressional power but intend that structure to have a very different meaning in only the IP Clause?³¹

I readily concede that the Clause appears narrower on its face than certain of the proposals from which it came. Had it stated simply that Congress is given the power “to promote the progress of science and useful arts,” it would have encompassed essentially all of the proposals set forth by Madison and Pinckney, including those pertaining to patents and copyright. Why then does it include the “by securing” language at all, and why was that language included in such a way as to appear limiting?³² Oliar only addresses these issues indirectly in his *New Reading* article.³³

29. Oliar refers to the “to promote” language as the Progress Clause and the “by securing” language as the Exclusive Rights Clause. *Id.* It is somewhat odd to refer to “clauses” within the Clause. Moreover, the Clause refers to “the exclusive right” rather than “exclusive rights.” I note that at least one commentator refers to the Clause taken as a whole as the Progress Clause, so that Oliar’s use of the term in reference only to a particular subset of words in the Clause is confusing. Herein I will simply refer to the “to promote” language and the “by securing” language when referring to these two portions of the Clause.

30. U.S. CONST. art. I, § 8.

31. I have addressed this issue in detail, see WALTERSCHEID, *supra* note 7, at ch. 5, but Oliar does not apparently deem it to be of sufficient importance to make any mention of it in his *New Reading* article. See also Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J. L. & TECH. 87 (1999).

32. As far I am aware, no commentator, including Oliar, has ever provided a satisfactory explanation as to why the Framers would seek to deliberately limit the authority of Congress to promote the progress of science and useful arts to *only* authority regarding patents and copyrights.

33. He speaks of these issues in this fashion: “Why would Madison and Pinckney make their Encouragements Powers in addition to ones respecting patents and copyrights? Are grants of encouragement and intellectual property rights not redundant? The answer is no.” Oliar, *supra* note 1, at 457. But this does not really answer the questions concerning the Clause itself as opposed to Madison and Pinckney’s proposals. Simply put, under Oliar’s interpretation of the Clause, there is no grant of encouragement in it. As I have suggested, the “by securing” language was included in the Clause because the Framers viewed patents and copyrights as monopolies and for that reason were not at all convinced that Congress would consider them as authorized by the “to promote” language unless they were specifically declared to be so in the Clause. See WALTERSCHEID, *supra* note 7, at 5–7, 95. In addition, Hamilton and Washington’s views on congressional authority to fund both premiums to encourage

I question Oliar's statement that "the text of the Clause is much closer to Madison's patent proposal than to Pinckney's patent proposal."³⁴ The evidence is much more equivocal than Oliar indicates. Pinckney's proposal reads: "to grant patents for useful inventions."³⁵ According to Oliar, both the Clause and Madison "use the verb 'to secure' and the terms 'inventors' and 'for a limited time,' whereas Pinckney[] . . . uses the verb 'to grant,' does not use an explicit time limitation, and does not use 'inventors.'"³⁶ What Oliar fails to point out is that the patent power given to Congress by the Clause is semantically much closer to the power proposed by Pinckney than it is to that proposed by Madison.

Whereas Madison's proposal limited patents to only "useful machines and implements,"³⁷ both the Clause and Pinckney's proposal are much broader, each covering useful inventions without limitation. Oliar contends that Pinckney's proposal does not set forth "an explicit time limitation," but neither does the Clause. The Framers, however, would have recognized that implicit in the term "patents" as used by Pinckney *was* a time limitation, because patents under the common law could not be granted for unlimited times. Likewise, they would have recognized that "inventions" as used by Pinckney required "inventors." That is to say, an invention is, by definition, made by an inventor. The Framers would also have recognized that under the common law, patents were granted only to inventors.³⁸

Aside from the fact that Madison's patent proposal was narrower in scope than Pinckney's proposal, its use of the term "to secure" also introduced an ambiguity into the Clause that did not exist with Pinckney's "to grant." At the time the Constitution was drafted, "secure," when used in the context of a legal right, had two very different and opposite meanings:

One meaning was "to obtain" or "to provide" which in essence would mean a grant of authority to create [a] property right[] with respect to patents and copyrights. A second meaning had a decidedly legal

invention and a national university could only have been consonant with a broad interpretation of the Clause treating it as though it read: "To promote the progress of science and useful arts [including] by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *Id.* at 196.

34. Oliar, *supra* note 1, at 445.

35. *Id.* at 447 tbl.1.

36. *Id.* at 445 n.92.

37. See *supra* text accompanying notes 20–22.

38. See Statute of Monopolies, 1623–24, 21 Jac., c. 3, §§ 5–6 (Eng.) (providing patent protection only "to the first and true Inventor or Inventors"). But unlike what would occur in the United States, the common law would interpret "inventor" as used in the Statute to include the first introducer or importer of a new technology or industry into the realm. See *Edgeberry v. Stephens*, (1691) 90 Eng. Rep. 1162 (K.B.) 1162; 2 Salk. 447 ("[I]f the invention is new in England, a patent may be granted for it, though the thing was practised beyond sea before . . .").

connotation, to wit, “to insure” or “to affirm and protect” which in turn suggested not an authority to create a right but rather an obligation to protect an existing right in the writings of authors and the discoveries of inventors.³⁹

Oliar makes no mention of this ambiguity that remained unresolved until 1834 when, in *Wheaton v. Peters*,⁴⁰ the Supreme Court held that “securing” as used in the Clause refers only to a grant of authority to Congress to create a future right and not to the protection of an existing right.⁴¹ In essence, the Court interpreted “securing” to mean “to grant.”

Oliar declares that various proposals by Madison and Pinckney were adapted primarily from state copyright statutes “that the ratifiers and the public at large could reasonably expect the Framers to consult.”⁴² He provides absolutely no evidence to support the emphasized language⁴³ but goes on to present an argument predicated on similarities in language between Madison’s and Pinckney’s proposals and North Carolina’s and Virginia’s copyright statutes, as well as that of the Massachusetts constitution. Oliar suggests that the proposals were derived from “these publicly available state enactments.”⁴⁴ While it is certainly possible that both Madison and Pinckney relied on the state sources Oliar cited, there is no conclusive evidence of this aside from certain similarities in terminology. The extent to which Madison and Pinckney actually had access to the state sources cited is not evident from the records of the Convention or from anything either Framer ever wrote about the Constitution.

IV. *ELDRED V. ASHCROFT*

At issue before the Supreme Court in *Eldred* were two questions: (1) whether the 1998 extension of the term of all existing copyrights for twenty years exceeded Congress’s power under the IP Clause and (2) whether the 1998 extension of the term of existing and future copyrights violated the First

39. WALTERSCHEID, *supra* note 7, at 213.

40. 33 U.S. (7 Pet.) 591 (1834).

41. *See id.* at 684.

42. Oliar, *supra* note 1, at 470 (emphasis added).

43. I have found nothing in the ratification debates or any other contemporaneous public writing that supports this contention by Oliar. Indeed, how could the ratifiers or the public at large even know of the existence of the proposals that Madison and Pinckney put forth, much less expect them to rely on the documents that Oliar sets forth?

44. Oliar, *supra* note 1, at 470–73.

Amendment.⁴⁵ In a 7–2 opinion, the Court ruled that neither the IP Clause nor the First Amendment were violated.⁴⁶

Oliar would have us believe that the Supreme Court in *Eldred* “gave much weight to the Framers’ intent and the Clause’s original understanding.”⁴⁷ What the *Eldred* Court actually gave weight to was what it called “text, history, and precedent.”⁴⁸ The text it was referring to was that of the Clause itself, and the history it referred to was what it called “an unbroken congressional practice of granting to authors of works with existing copyrights the benefits of term extensions”⁴⁹

Moreover, the *Eldred* Court reiterated that “[t]his Court has repeatedly laid down the principle that a contemporaneous *legislative* exposition of the Constitution *when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years*, fixes the construction to be given [the Constitution’s] provisions.”⁵⁰ The emphasized language would appear both to roughly define the Court’s view of original understanding as public understanding and to set boundaries as to when it has considered such understanding to be relevant. Thus, original understanding does not extend beyond the time when the Founders and Framers were active in public affairs and certainly not past about 1820 when this was no longer the case. In addition, it is relevant only if original understanding is set forth legislatively by Congress and only if it has been “acquiesced in for a long term of years.” More critically, the *Eldred* Court did not declare or in any way infer that certain state enactments and delegate proposals made before the drafting of the Clause have relevance when interpreting it today.

Oliar cites to numerous *Eldred* references purporting to show intent,⁵¹ but none of these references actually refers to “Framers’ intent.” Rather, they are addressed to original public understanding or the Court’s interpretation thereof. Consider the one reference that comes closest (yet is not very close) to supporting intent:

Respondent points to a better “demonstrat[ion]” . . . of Madison’s and other Framers’ understanding of the scope of Congress’ power to extend patents: “[T]hen-President Thomas Jefferson—the first administrator of the patent system, and perhaps the Founder with the narrowest view of the

45. *Eldred v. Ashcroft*, 537 U.S. 186, 198 (2003).

46. *Id.*

47. Oliar, *supra* note 1 at 450 n.106.

48. *See, e.g., Eldred*, 537 U.S. at 199, 204.

49. *Id.* at 200.

50. *Id.* at 213 (alteration in original) (emphasis added) (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)).

51. *E.g., Oliar, supra* note 1, at 450 n.106.

copyright and patent powers—signed the 1808 and 1809 patent term extensions into law; . . . James Madison, who drafted the Constitution’s ‘limited Times’ language, issued the extended patents under those laws as Secretary of State; and . . . Madison as President signed another patent term extension in 1815.”⁵²

It should be noted that Jefferson was not a Framers, so what he did more than twenty years after the drafting of the IP Clause has no relevance to “Framers’ intent.” Nor does what Madison did more than twenty years after the drafting indicate what “other Framers’ understanding” of the Clause was at that time of the drafting. Moreover, the passage indicates nothing about what Madison’s actual intent was at the time the Clause was drafted. Instead, it only allows one to infer how he viewed the Clause at this much later time.⁵³

This is not to suggest that the Court may not take a more expansive view in that the future. However, to date it has not. Moreover, my comments regarding *Eldred* should not be taken to mean that I am enamored of that opinion. I have sharply challenged both the methodology used by the *Eldred* Court⁵⁴ and the historical accuracy of its interpretation of the original understanding embodied in the Copyright Act of 1790.⁵⁵

V. OLIAR’S HYPOTHESES

Oliar hypothesizes that there are four open questions of constitutional interpretation involving the IP Clause that are at least in part amenable to resolution by his interpretive approach to originality. Two of these questions involve patentable subject matter, namely, whether business methods and products of nature are constitutionally patentable. The first has now been at least implicitly decided by the Supreme Court in *Bilski v. Kappos*;⁵⁶ the second is almost entirely of academic interest only.

The Supreme Court granted certiorari in *Bilski* in part to interpret the patentability of business methods in the context of a particular test applied by the Federal Circuit. However, the Court did so only in the context of the inter-

52. *Eldred*, 537 U.S. at 203 n.8 (alterations in original).

53. If Madison had actually addressed Congress’s constitutional authority to extend the terms of patents at any time when he signed the extended-term patents, this type of argument would have much more persuasive force.

54. See Edward C. Walterscheid, *Musings on the Copyright Power: A Critique of Eldred v. Ashcroft*, 14 ALB. L.J. SCI. & TECH. 309 (2004); Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft*, 44 IDEA 3314 (2004).

55. See Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC’Y U.S.A. 313, 340–45 (2006).

56. 130 S. Ct. 3218 (2010).

pretation to be given to Sections 101 and 273 of Title 35.⁵⁷ That is to say, the Court granted certiorari to resolve questions of statutory interpretation rather than questions of constitutional interpretation. Both the parties and various amici, however, still addressed the constitutionality of business method patents in their briefs.

Those raising the constitutionality issue agreed that the key determination involved the interpretation to be given to “useful arts” in the Clause. Those arguing against constitutionality contended that “useful arts” means technological arts and that this meaning was so understood at the time the Clause was drafted, while those arguing for constitutionality contended that “useful arts” had a much broader meaning when the Clause was drafted. Although I have not exhaustively reviewed the briefs (more than seventy-five have been filed), I have not found an argument by those favoring a broad interpretation of useful arts that is predicated on Oliar’s suggested approach. Pinckney’s Encouragements Proposal evinces that useful arts encompasses commerce and trade and that business methods plausibly fall under commerce and trade.⁵⁸ Nor is there any argument for constitutionality predicated on Oliar’s alternative suggestion that “the Framers plausibly intended Congress to have the power to award patents to advancements in ‘science’ as well as in the ‘useful arts.’”⁵⁹

Justice Stevens (with three other justices joining him) argued that business methods were unpatentable. He seemed to infer—but did not expressly state—that such patents are unconstitutional. Although he explored the history of process patents in great detail and made several references to the language of the IP Clause, Stevens made no attempt to address the “Framers’ intent” in his discussion.

In addressing the second open question about patentable subject matter, Oliar offers several reasons why he believes that the Constitution *may* allow patents for products of nature.⁶⁰ I will briefly address only one of them here, namely, the use of the term “discoveries” in the Clause. Oliar is not the first to suggest this. Oliver Evans did it in 1813.⁶¹ The term “discoveries” is very broad and would appear to give Congress very broad discretion to define what is and is not patentable subject matter. Oliar, however, ignores the fact that “discoveries” as used in the Clause refers specifically to the discoveries of “inventors.” At the time the Clause was drafted, the common dictionary meaning of “inven-

57. The case was originally styled *Bilski v. Doll*.

58. Oliar, *supra* note 1, at 453–54.

59. *Id.* at 455.

60. *Id.* at 457–60.

61. WALTERSCHEID, *supra* note 7, at 361–63.

tor” was “one who creates or devises something new.”⁶² Thus, the Clause grants Congress the authority only to vest an exclusive right in an “inventor” whose discovery is something new created or devised by the inventor: an invention. That is presumably why Congress, from the inception of patent law, has treated discovery and invention as synonymous, and why natural products are not deemed patentable. They are not created or devised. In any case, the *Bilski* Court reiterated the view that such products are not patentable.⁶³

I would tend to agree with Oliar’s statement that “[a]lthough the grant of exclusive rights may promote basic scientific research only in a limited manner, the Framers were perhaps willing to empower Congress to spend on encouragements for that purpose.”⁶⁴ However, that was not the way early Congresses interpreted the Clause. The first congressional interpretation of the meaning of the Clause arose out of a request for government funding in 1789 of what would now be termed research and development. No action was taken then or when the request was later renewed because Congress believed that the Clause precluded providing funding.⁶⁵ It is interesting to note that Madison favored granting the requested funding, which would seem to suggest that he initially viewed the IP Clause as granting more power to Congress than the mere authority to govern patents and copyrights.⁶⁶

In his third hypothesis, Oliar suggests, or at least infers, that the provision in the 1790 Copyright Act allowing copyright in charts or maps arises out of Framers’ intent and that the holding in *Feist Publication, Inc. v. Rural Telephone Service Co.*⁶⁷ is inconsistent with this intent and therefore wrong.⁶⁸ He apparently equates maps and charts with what he calls “natural discoveries.” I am at a loss to understand Oliar’s statement that “it is still informative that the Framers did not see a problem in giving an exclusive right (of the kind available under copyright law) under the IP Clause for natural discoveries by authors who dis-

62. Seidel points out that the most authoritative English dictionary of its day was Samuel Johnson’s *A Dictionary of the English Language* and that the fourth edition of this dictionary, published in 1818, carried the word meanings of the late 1700’s. See Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC’Y 5, 10 & n.11 (1966). Johnson defined inventor as “one who produces something new; a devisor of something not known before.” *Id.* at 13 n.17.

63. *Bilski v. Kappos*, 130 S. Ct. 3218, 3231 (2010).

64. Oliar, *supra* note 1, at 458.

65. WALTERSCHEID, *supra* note 7, at 166–68.

66. I have pointed out, however, that “it appears that initially Madison gave little thought to the constitutional implications” of the request for funding of research and development. *Id.* at 167. I note here that it is just as likely that in signing off on patent term extensions in 1808 and 1809, Madison also gave little thought to the constitutional implications. See *supra* text accompanying notes 52–53.

67. *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

68. Oliar, *supra* note 1, at 461–62.

closed these discoveries through publication.”⁶⁹ I am not aware that copyright law has ever given an author the exclusive right to “natural discoveries” disclosed in a copyrighted work, and the sole case cited by Oliar does not in my view support copyright of “natural discoveries.”⁷⁰

It is interesting the Oliar makes no mention of the term “writings” as used in the Clause in presenting this hypothesis, nor does he refer to his analytical matrix for support. This is probably because the term “writings” does not appear in any of the proposals put forth by Madison and Pinckney on which he so heavily relies. But just as with their use of the term “discoveries,” the Framers created a significant interpretational problem when they chose to use the term “writings” in the Clause. I have previously discussed this issue in some detail. While the 1790 Copyright Act authorized copyright of maps and marine charts (as did the copyright acts of several of the states), reading maps and charts within the ambit of “writings” in the Clause requires a significant legal fiction.⁷¹

Finally, Oliar hypothesizes that Madison’s and Pinckney’s proposals by Madison and Pinckney set forth in his analytical matrix “give reason to doubt that the Clause should be read disjunctively.”⁷² He also suggests that there was no original public meaning treating arts and sciences disjunctively.⁷³ Oliar argues that because Congress used the term “science” once in a bill that became the Patent Act of 1790 (but not in the Act itself) and once in the 1793 Patent Act but failed to use it in the early copyright acts, the early Congress did not treat the patent power and the copyright power disjunctively.⁷⁴

In response, I merely point out that the title to the first two patent acts, the 1790 and 1793 Acts, is not “An Act to Promote the Progress of Science and Useful Arts” but rather “An Act to Promote the Progress of Useful Arts.” Moreover, the early copyright acts make no mention of “useful arts.” The content and titles of the early patent and copyright acts taken together provide evidence of an early congressional disjunctive treatment of the patent power and the copyright power. Although Oliar cautions against giving the disjunctive reading of the Clause “much operative effect,” both Congress and the

69. *Id.*

70. Oliar cites to *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845). See Oliar, *supra* note 1, at 461 n.156. Contrary to what Oliar apparently believes, copyrighted maps under the 1790 Copyright Act could not be literally copied without infringement. This was not because an exclusive right was given in the “natural discoveries” shown in the map, but rather because the map represented a form of expression that was copyrightable. See Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790).

71. WALTERSCHEID, *supra* note 7, at 424–29.

72. Oliar, *supra* note 1, at 465.

73. *Id.* at 466.

74. *Id.* at 468.

Supreme Court have read the Clause disjunctively. Oliar's analysis is unlikely to change this reading in the future.

VI. MY OWN PERSPECTIVE

Professor Oliar has set forth a detailed and, in many respects, plausible reconstruction of what he conceives as the Framers' intent when drafting the IP Clause. But, it is a reconstruction predicated on conjecture and supposition in the absence of any historical record actually setting forth such intent. It relies almost entirely on eight proposals for congressional power advanced by two delegates, Madison and Pinckney, at the Constitutional Convention and assumes that the IP Clause was developed out of all of them. It is my personal view that the Clause was most likely developed from the patent and copyright proposals and from Madison's encouragements proposal because the Clause most closely resembles these particular proposals.

Oliar argues that the "Framers' intent is important because it is one that the Supreme Court has highlighted recently in the context of interpreting the IP Clause."⁷⁵ He refers only to *Eldred*, and I have shown that what he considers as highlighting Framers' intent in that case is almost entirely directed to original public understanding. Moreover, the original public understanding that the Supreme Court relied on in *Eldred* (albeit in a highly questionable interpretation) is that of the early Congress, rather than that of the ratifiers or the public at large. This is not surprising in that the IP Clause was not an issue in the ratifying conventions, nor was it an issue to the public at large.⁷⁶ Accordingly, there is almost no historical record documenting how the ratifiers or the public interpreted the Clause. Only with the early Congress is there any public record indicating action or inaction on the basis of interpretation of the Clause.

Oliar also contends that the Convention's debates are critical because they set forth Framers' intentions and hence "are an important source illuminating the text's original understanding."⁷⁷ But this contention is a non sequitur. Its premise is that the IP Clause was actually debated at the Convention, but there is no known record indicating this to be the case, much less indicating the content of such a debate if one actually occurred. No one actually knows why the Framers collectively approved the Clause *nemine contradicente*, meaning no one dissenting, much less how they collectively interpreted it.

75. *Id.* at 474.

76. EDWARD C. WALTERSCHEID, TO PROMOTE THE PROGRESS OF USEFUL ARTS 58–59 (1998).

77. WALTERSCHEID, *supra* note 7, at 474.

It, of course, remains to be seen how courts will respond in the future to arguments about interpretation of the IP Clause predicated on original intent. I wish I could be as sanguine as Professor Olin when he contends that he “set the Convention’s IP-related record straight” and his “findings contribute to resolving four current matters of constitutional interpretation.”⁷⁸ But I tend to agree with Justice Stevens, dissenting in *Eldred*, that “[f]airly read, the Court has stated that Congress’ actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable.”⁷⁹ And I would be more than a bit surprised if the Court should, based on the arguments Professor Olin put forth, overrule its *Feist* holding that at least a modicum of originality is constitutionally required for copyright,⁸⁰ or its declaration in *Diamond v. Chakrabarty* (and now in *Bilski*) that products of nature are unpatentable,⁸¹ or even its own disjunctive treatment of the IP Clause.⁸²

78. *Id.* at 425.

79. *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Stevens, J., dissenting).

80. *See Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363–64 (1991).

81. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

82. *See Eldred*, 537 U.S. 186; *Graham v. John Deere Co.*, 383 U.S. 1, 5 & n.1 (1966).