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Barring Immoral Speech in Patent and Copyright

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BARRING IMMORAL SPEECH IN PATENT AND COPYRIGHT

*Ned Snow**

ABSTRACT

In the past three years, the Supreme Court has twice ruled that Congress's moral bars to trademark protection violate the First Amendment. Those rulings raise a simple question in other areas of intellectual property. Does the First Amendment preclude Congress from denying patent or copyright protection based on a moral reason? Congress, for instance, might deny patent protection for inventions directed toward the consumption of marijuana. Inventors would accordingly choose not to disclose knowledge about those inventions to the public, and the denial would chill their speech. Similarly, Congress would chill speech if it denied copyright protection for moral reasons. A copyright bar to statues of the Confederacy, for instance, would deter artists from speaking such content. Hence, through patent and copyright, Congress might seek to influence speech in accord with its moral viewpoint. This Article considers whether that use of intellectual property would violate the First Amendment.

The Article concludes that moral denials in patent and copyright may be constitutionally permissible in certain instances. On the patent side, Congress's choices about which invention to patent may plausibly be construed as government speech, suggesting the absence of any First Amendment violation. Yet even if those choices are not government speech, they represent Congress's attempt to regulate conduct relating to the embodiments of the inventions—not the knowledge about the inventions. That suggests that the incidental effect on an inventor's speech is permissible.

Copyright law is a different matter. The copyright system appears to comprise a limited public forum, which implies that moral denials of copyright protection must be viewpoint neutral to pass First Amendment muster. In other words, moral denials of copyright protection may be permissible but only if the reason for denial is not related to the expression's message or effects responsive to that message. This principle severely limits Congress's power. Thus, for moral denials of patent protection, the

* Ray Taylor Fair Professor of Law, University of South Carolina School of Law. The author expresses appreciation for helpful input from Professors Derek Black, Josie Brown, Tun-Jen Chiang, Jake Linford, Laurent Sacharoff, Joe Seiner, David Taylor, and Fred Yen. Comments provided by participants at the 2019 Texas A&M IP Scholars Roundtable were also very helpful. Thanks to Andi McDonald for her valuable research and editorial assistance.

First Amendment affords Congress broad discretion whereas for moral denials of copyright protection, it affords Congress very limited discretion.

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I. INTRODUCTION

IN the midst of the Covid-19 pandemic, Congress might believe it wise to deny patent protection for inventions that cause infectious diseases in humans. That makes sense. Intellectual property should not support outcomes that are bad for society, so Congress should remove the economic incentive to create inventions that further human suffering. Yet this simple proposition has broad implications: it suggests that Congress might deny intellectual property protection for other morally controversial intellectual creations. Suppose that Congress were to deny copyright protection for certain expressions that cause social harm. For instance, the recent public uproar over statues of the Confederacy might lead Congress to deny them copyright protection.¹ Other moral denials might include patent denials for abortion instruments,² marijuana devices,³ or human-torture methods,⁴ and copyright denials for pornography,⁵ fake news,⁶ or mass-shooting videos.⁷ In short, Congress might seek to define the scope of patentable inventions and copyrightable expression based on moral judgments about certain subject matters.

The question that follows is whether such denials of intellectual property would violate the First Amendment. From one perspective, denying

1. See Alisha Ebrahimji, Artemis Moshtagian & Lauren M. Johnson, *Confederate Statues Are Coming Down Following George Floyd's Death. Here's What We Know*, CNN (July 1, 2020, 3:45 PM), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html> [<https://perma.cc/F8VC-2FUL>].

2. Cf. Born-Alive Abortion Survivors Protection Act, S. 311, 116th Cong. § 3 (2019).

3. Cf. 21 U.S.C. § 812(b)(1)(B), (c)(c)(10) (2016) (listing marijuana as a schedule I drug that “has no currently accepted medical use in treatment in the United States”).

4. Cf. Paul LeBlanc, *Pelosi Says a Police ‘Chokehold Is a Lynching’ and She’s Confident Republicans Will Agree to Ban Them*, CNN (June 15, 2020, 10:37 PM), <https://www.cnn.com/2020/06/15/politics/pelosi-police-reform-chokehold-cnntv/index.html> [<https://perma.cc/V3UB-79KF>].

5. Cf. Eliminating Pornography from Agencies Act, H.R. 680, 115th Cong. § 2 (2017).

6. Cf. Opposing Fake News and Alternative Facts, H.R. Res. 284, 116th Cong. (2019).

7. Cf. James N. Meindl & Jonathan W. Ivy, *Mass Shootings: The Role of the Media in Promoting Generalized Imitation*, 107 AM. J. PUB. HEALTH 368, 368–70 (2017).

protection does not seem relevant to free speech.⁸ Restricting patent protection affects the manufacturing and sale of inventions—not speech.⁹ Restricting copyright protection affects a speaker’s ability to exclude others from copying or publishing her speech, but it does not imply any punishment or penalty for speaking.¹⁰ Hence, denials of intellectual property protection arguably do not present First Amendment problems.

For decades, this was the prevailing view.¹¹ Congress, for instance, has barred patent protection for inventions “directed to or encompassing a human organism.”¹² The bar apparently reflects Congress’s moral judgment about the sanctity of human life.¹³ When Congress passed this bar in 2011, no one thought to argue that it might abridge free speech.

Two recent trademark cases call this view into question. In 2017, and again in 2019, the Supreme Court ruled that Congress’s denial of trademark protection for a moral reason violated the First Amendment.¹⁴ In *Matal v. Tam*, the Court considered Congress’s denial of trademark registration for marks that could “disparage” people,¹⁵ and in *Iancu v. Brunetti*, for marks that comprised “immoral” or “scandalous” subject matter.¹⁶ These denials of protection, the Court held in both cases, amounted to an abridgment of free speech.¹⁷ Although the Court never explained how a denial of trademark protection constituted an act of abridgment, the apparent implication of its holdings is that denying the economic benefit of an intellectual property right chills speakers from expressing certain content. A trademark owner is less likely to use a disparaging, immoral, or scandalous mark if she cannot register it for protection. Both cases imply that such a chilling represents an unconstitutional restriction of free speech.

Based on this implication of *Tam* and *Brunetti*, denying protection for copyright and patent may arguably be viewed as a speech-restrictive act. Clearly, copyright denials restrict speech. Congress specifically targets expressive content when denying copyright protection for a certain subject

8. See discussion *infra* Part II.

9. See generally 35 U.S.C. § 271(a) (listing rights of a patent).

10. See generally 17 U.S.C. § 106 (listing rights of a copyright).

11. See *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981) (“With respect to appellant’s First Amendment rights, it is clear that the PTO’s refusal to register appellant’s mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant’s First Amendment rights would not be abridged by the refusal to register his mark.” (emphasis omitted) (citation omitted)), *overruled by Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

12. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 33(a), 125 Stat. 284, 340 (2011) (codified as amended in scattered sections of 35 U.S.C.) (“[N]o patent may issue on a claim directed to or encompassing a human organism.”).

13. See Dennis Crouch, *Patents Encompassing a Human Organism*, PATENTLYO (Dec. 2, 2012), <https://patentlyo.com/patent/2012/12/ex-parte-kamrava.html> [<https://perma.cc/FQ8G-GYMU>] (“The language of Section 33(a) was initially pushed by Representative Dave Weldon as a measure to support the sanctity of life.”).

14. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019); *Tam*, 137 S. Ct. at 1751.

15. *Tam*, 137 S. Ct. at 1751.

16. *Brunetti*, 139 S. Ct. at 2297.

17. *Id.*; *Tam*, 137 S. Ct. at 1751.

matter. And speakers seeking a copyright are not likely to speak uncopyrightable content. Hence, denying the economic benefit of a copyright abridges free speech—just as in *Tam* and *Brunetti*.¹⁸

In the patent context, though, the argument is not as strong. On the one hand, the speech of inventors does seem to be affected by a patent denial, for an invention constitutes technical knowledge about a device or process.¹⁹ By denying patent protection for a particular invention, Congress appears to chill inventors from sharing their knowledge about devices or processes. On the other hand, Congress's granting of patent protection might be viewed as Congress adopting inventors' speech as its own.²⁰ If that view is correct, Congress's choice not to grant patents for a certain subject matter would not be an unconstitutional abridgment of inventors' speech. It would reflect Congress's choice of which speech to adopt, which seems plausible. Nevertheless, the conclusion is not absolutely certain.

Even if not an act of government speech, the denial of patent protection for a moral reason is justifiable on the grounds that Congress is seeking to regulate conduct—not speech—by the denial.²¹ The conduct that Congress is attempting to regulate is the manufacturing, use, and sale of embodiments of the invention. That is to say, Congress is seeking to regulate the actual physical things or processes invented. By denying patent protection, then, Congress attempts to control an activity relating to the physical thing or process. Such regulation of conduct that affects speech implies a test under *United States v. O'Brien*, which Congress would likely be able to satisfy in most cases of moral denials.²²

Copyright denials, by contrast, do not constitute government speech or regulation of conduct. Nevertheless, an exception to free speech doctrine should apply in examining copyright denials: the limited public forum doctrine.²³ That doctrine allows the government flexibility in regulating speech that occurs either on physical property or through an economic resource that the government has extended to private speakers.²⁴ As a government resource that facilitates private speech, copyrights appear to constitute a limited public forum, consistent with Supreme Court jurisprudence.²⁵ The limited public forum doctrine requires speech restrictions to be reasonable in light of the forum's purpose and to be viewpoint neutral.²⁶ The reasonableness requirement will likely always be satisfied

18. See Ned Snow, *Content-Based Copyright Denial*, 90 IND. L.J. 1473, 1479–83 (2015) (reciting Supreme Court precedent suggesting that copyright denial is a speech-suppressive act).

19. See DANIEL BREAN & NED SNOW, *PATENT LAW: FUNDAMENTALS OF DOCTRINE AND POLICY* 9 (2020).

20. See discussion *infra* Section II.A.2.

21. See discussion *infra* Section II.A.3.

22. See discussion *infra* Section II.A.3.

23. See discussion *infra* Section III.A.

24. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

25. See discussion *infra* Section III.A.

26. See *Rosenberger*, 515 U.S. at 829.

because the intellectual property power gives Congress broad discretion to select the sort of creations that will promote progress in society.²⁷ However, the viewpoint-neutrality requirement severely limits the scope of moral reasons for which Congress might deny copyright protection.²⁸ Any moral reason that is related to the message of the expression or effects that are responsive to that message would be viewpoint discriminatory.²⁹ Congress, for instance, could not deny protection for statues of the Confederacy on the ground that those statues increase racial tensions.

Congress could deny copyright protection for other content based on moral reasons that are nonresponsive to either the message or effects of that message. Such denials would not be viewpoint discriminatory.³⁰ For instance, the moral reason of encouraging lawful behavior would support a denial of protection for content whose creation necessitated the commission of a criminally violent act. The reason would apply regardless of whether the content portrayed the criminal act, so it would be viewpoint neutral. Hence, only a limited category of moral denials would be permissible in copyright law.

This Article thus examines whether the First Amendment precludes Congress from relying on moral reasons to withhold patent or copyright protection for specific subject matter. It considers both the patent regime and the copyright regime because they both arise under the same constitutional clause. Their similarities and distinctions inform their respective analyses under speech law.

Part II considers whether a denial of patent or copyright protection would constitute a government restriction that targets private speech. It concludes that patent denials would not constitute such a restriction, owing to doctrines relating to government speech and regulation of conduct, but that copyright denials would. Part III considers whether the speech restrictions that follow from copyright denials are constitutionally justifiable. It argues that relatively few instances of copyright denials are constitutionally justifiable if those denials are analyzed under the limited public forum doctrine, which requires viewpoint neutrality. Part IV lastly examines whether the conclusions of this Article are consistent with free speech case law, including the recent trademark cases of *Matal v. Tam* and *Iancu v. Brunetti*.

II. RESTRICTIONS ON PRIVATE SPEECH

When considering whether Congress may choose not to extend intellectual property protection for certain inventions or expressions, we may not immediately recognize any problem with the freedom of speech. Why would it matter that Congress has chosen not to patent inventions relat-

27. See discussion *infra* Section III.B.2.

28. See discussion *infra* Section III.C.2.

29. See discussion *infra* Section III.C.2.

30. See discussion *infra* Section III.C.2.

ing to nuclear weapons³¹ or the human organism?³² Or that Congress might yet deny protection for hard-core pornography? The First Amendment states simply that “Congress shall make no law . . . abridging the freedom of speech.”³³ At first glance, discouraging intellectual creations by selectively awarding intellectual property protection might not seem to reflect any abridgment of free speech. Indeed, a denial of protection does not seem like a suppression of speech because the denial is merely withholding a benefit rather than imposing a penalty. Moreover, in the patent context, speech may not even seem present: Congress’s denial of patent protection seems to discourage inventions rather than speech. For many, then, denying protection for intellectual property may seem irrelevant to upholding the protection of free speech. However, this reasoning does not prevail under the law. This Part explains why.

This Part thus examines whether a denial of intellectual property protection would be a restriction of free speech. More specifically, does Congress restrict the speech of an author or an inventor when Congress chooses not to extend copyright or patent protection for certain subject matter? I consider this question separately for patent and copyright in the two sections below. Concluding that only a denial of copyright (and not patent) protection would be a restriction of speech, I then examine in Part II whether the denial would be justified under the First Amendment.

A. PATENT

Courts and scholars have recognized a First Amendment tension with patent law in the enforcement of patent rights.³⁴ Specifically, a patentee’s right to exclude others from making and using the subject matter of an invention may affect others’ choices about which inventions to conceive of and speak about. That is, enforcement of patent rights influences others’ thoughts and speech about which inventions to make and use. Yet what about on the incentive side? If Congress were to deny protection for certain subject matter, would that denial cause inventors to conceive of and speak about inventions that are different than they might otherwise choose to conceive of and speak about? It would seem so. As discussed in Subsection 1, inventors’ speech does appear to be affected by Congress’s denial of patent protection. Nevertheless, for two reasons, the denial

31. See 42 U.S.C. § 2181(a) (“No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon.”).

32. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 33(a), 125 Stat. 284, 340 (2011) (codified as amended in scattered sections of 35 U.S.C.) (“[N]o patent may issue on a claim directed to or encompassing a human organism.”).

33. U.S. CONST. amend I.

34. See, e.g., *Intell. Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1325 (Fed. Cir. 2016) (Mayer, J., concurring) (“Most of the First Amendment concerns associated with patent protection could be avoided if this court were willing to acknowledge that *Alice* sounded the death knell for software patents.”); Dan L. Burk, *Patents and the First Amendment*, 96 WASH. U. L. REV. 197 (2018); Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99, 102 (2000); Tun-Jen Chiang, *Patents and Free Speech*, 107 GEO. L.J. 309 (2018).

would not be a restriction of inventors' speech under the First Amendment. First, the government's process of issuing patents likely constitutes the government adopting an inventor's speech as its own. Second, the speech-restrictive effects of denying a patent appear to be incidental to Congress's purpose of regulating inventive conduct. The sections below discuss these points.

1. *The Presence of Speech*

When Congress denies patent protection for certain subject matter of inventions, the effect on speech might not be apparent. Inventions would seem to be devices and methods that accomplish practical tasks. Consider an example of an inventor creating a novel stovetop and receiving patent protection for that invention; speech does not seem present in the invention of the stovetop. The invention does not seem to be a means for communicating thought (at least not at first glance), so there would not seem to be any speech occurring.

This understanding is not correct. As a preliminary point, an invention is distinct from an embodiment of the invention. As Professor Edmund Kitch recognized in his landmark article: "[T]he invention as claimed in the patent claims and the physical embodiment of the invention are two quite different things. 'A claim is an abstraction and generalization of an indefinitely large number of concrete, physical objects.'"³⁵ An invention thus represents an abstraction of a physical embodiment.³⁶ That abstraction represents an idea, and an idea constitutes knowledge.³⁷ The invention, then, comprises the technical knowledge about how to make and use

35. Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 268 (1977) (quoting PETER D. ROSENBERG, *PATENT LAW FUNDAMENTALS* 39 (1975)).

36. Scholars have debated how to define the boundaries of the abstraction that comprises the invention. Professor Oskar Liivak has argued that the invention consists of the set of embodiments disclosed in a patent, including "a generalized embodiment that defines the 'principle of the invention.'" Oskar Liivak, *Finding Invention*, 40 FLA. ST. U. L. REV. 57, 63 (2012). He has recognized a distinction between the invention and the actual thing built by inventors: "some may refer to the invention or the actual invention when they are instead referring to the actual, physical thing built by the inventors." *Id.* at 65. Professor Christopher Cotropia has argued that an invention "exists independently of the patent document and prior to the filing of the patent application," and this fact "requires the inventor to conceive of the invention prior to filing." Christopher A. Cotropia, *What Is the "Invention"?*, 53 WM. & MARY L. REV. 1855, 1876 (2012); cf. Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341, 356 (2010) ("[A] patent will usually disclose just one or a few 'embodiments' of the invention in the patent's specification, but will often claim thousands of different embodiments in a claim."); Tun-Jen Chiang, *Defining Patent Scope by the Novelty of the Idea*, 89 WASH. U. L. REV. 1211, 1228 (2012) ("The rule limiting patent claims to the embodiments taught by the specification . . . would eviscerate patent incentives."). These interpretations contrast with actions of courts that have defined the invention according to boundaries in the claim. See, e.g., *Tex. Digit. Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1203 (Fed. Cir. 2002).

37. See generally *Abstraction*, OXFORD ENGLISH DICTIONARY (3d ed. 2011) (defining *abstraction* as "something which exists only as an idea or in theory; an abstract concept or idea"); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 995-96 (1997) ("[The] government has created intellectual property rights in an effort to give authors and inventors control over the use and distribution of their *ideas* . . .") (emphasis added).

certain subject matter—not the embodiment of that knowledge.³⁸

This simple fact suggests that the government premises patent rights on an inventor's speech. Specifically, to gain patent protection, the inventor must disclose her invention to the Patent and Trademark Office (PTO), and disclosure of her invention means sharing her technical knowledge.³⁹ Disclosure does not involve providing a physical embodiment of the invention to the PTO. Indeed, an inventor can receive a patent on her invention without actually constructing it at all. Insofar as she discloses to the PTO knowledge that meets the patent requirements, the government will validate her claims to patent rights.⁴⁰ Hence, the government provides patent protection for an inventor's disclosure of knowledge, and disclosure of knowledge is an act of speech.

An example illustrates this concept. Suppose that an inventor creates a new type of ice-making machine. If the inventor has built the actual ice-making machine, that physical machine is the embodiment of the invention. The invention consists of the technical knowledge about how to create the machine and how to use it to accomplish ice-making tasks. The patent provides the inventor rights to exclude others from making, using, selling, and importing embodiments of the invention, i.e., actual ice-making machines.⁴¹ Therefore, if a consumer purchases one of the actual ice-making machines at a store, that consumer would own an embodiment of the invention, but he would not own the invention itself nor the patent for the invention. The invention, then, represents the technical knowledge; the physical thing created represents the embodiment of that knowledge; and the patent represents the legal right to exclude others from engaging in actions that involve embodiments of the invention. This is all to say that in awarding a patent, the PTO is providing a benefit in exchange for the inventor's disclosure of knowledge (in the example, knowledge about how to make and use the ice-making machine).⁴² Ac-

38. See BREAN & SNOW, *supra* note 19, at 9 (“The invention is the technological knowledge as applied to a given product, not the physical product itself.”).

39. See generally 35 U.S.C. § 112.

40. See generally 35 U.S.C. §§ 101, 102, 103, 112; *Nonprovisional (Utility) Patent Application Filing Guide*, U.S. PATENT & TRADEMARK OFF. (Jan. 2014), <https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/nonprovisional-utility-patent#heading-1> [<https://perma.cc/YNC3-YAXW>].

41. See generally 35 U.S.C. § 112; *id.* § 271(a) (defining rights in a patent). Admittedly, the Patent Act does not employ this “embodiments” language; instead, it states that “whoever without authority makes, uses, offers to sell, or sells *any patented invention* . . . infringes the patent.” *Id.* § 271(a) (emphasis added). Nevertheless, the context of embodiments—actual instantiations of the invention—seems to be implied in this statutory language.

42. See *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1345 (Fed. Cir. 2010) (“Every patent must describe an invention. It is part of the *quid pro quo* of a patent; one describes an invention, and, if the law’s other requirements are met, one obtains a patent. . . . A description of the claimed invention allows . . . the public to understand and improve upon the invention and to avoid the claimed boundaries of the patentee’s exclusive rights.”).

Even if an inventor does not communicate her technical knowledge to anyone other than the PTO, that is sufficient to constitute speech. Once the inventor discloses her invention to the PTO, the PTO makes the inventor’s knowledge available to the public. See

cordingly, denying patent protection for inventions related to ice-cream machines could affect the sort of knowledge that inventors would choose to speak to the PTO.

2. *Government Speech*

Although the subsection above argues that the disclosure of inventions to the PTO constitutes speech of inventors, it is still possible that Congress's denial of protection would not be considered an impermissible restriction of that speech. If Congress's choice to extend or deny patent rights represents a means through which Congress engages in its own speech, adopting the private speech of inventors as its own, the First Amendment has no application.⁴³ So, does the denial of patent protection represent the government choosing its own speech?

Case law suggests that the answer to this question is yes. Consider *Pleasant Grove City v. Summum*.⁴⁴ There, a city had chosen to display in a park a monument of the Ten Commandments, which had been donated by a private group.⁴⁵ A different organization requested permission to erect a stone monument displaying its own religious tenets.⁴⁶ After the city denied that request, the religious organization argued that the denial amounted to a restriction of its speech: the city had favored the Ten Commandments monument of the other private group over the monument of the religious group.⁴⁷ The Supreme Court rejected this argument, holding that the city had adopted the Ten Commandments monument as the city's own speech.⁴⁸ The Court explained: "By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own. But while government entities regularly accept privately funded or donated monuments, they have exercised selectivity."⁴⁹ The Court noted that government entities long had a practice of exercising "selective receptivity" as to the sort of monuments that it accepted.⁵⁰

Like the monument that private speakers donated to the city in *Pleasant Grove*, inventions that private speakers submit to the PTO may be seen as speech that the government adopts (if the PTO approves the patent application). In the course of promoting the progress of useful arts, Congress exercises selectivity in deciding which inventions it will reward.

Official Gazette for Patents, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/learning-and-resources/official-gazette/official-gazette-patents> [https://perma.cc/EU2C-7DGW]. Through the PTO, the inventor's speech reaches the public. In this way, the disclosure process of the invention to the PTO an act of speech.

43. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").

44. 555 U.S. 460 (2009).

45. *Id.* at 465–66.

46. *Id.*

47. *Id.* at 466–67.

48. *Id.* at 470.

49. *Id.* at 471.

50. *Id.*

The PTO denies protection for inventions that it deems unqualified for protection according to Congress's direction—such as inventions that are not novel, useful, or nonobvious.⁵¹ Moreover, in the patent system, Congress promotes innovative technologies by providing property rights, which saves tax dollars that would have otherwise been necessary to subsidize the research and development of those technologies. In this way, Congress seems to adopt inventions that it deems will promote the useful arts.

Another case instructive on this issue is *Walker v. Texas Division, Sons of Confederate Veterans*.⁵² There, the State of Texas allowed citizens to propose designs for specialty license plates, and the State disapproved of the specific design of the Confederate flag.⁵³ The Supreme Court ruled that Texas's issuance of design plates constituted government speech, so the State's denial of the design for the plate did not abridge private speech.⁵⁴ In reaching this holding, the Court applied three factors: first, whether there exists a history of the practice by the government (the State had long used license plates to convey messages); second, whether an observer would ordinarily associate the speech with the government (observers usually associate license plate designs with the State); third, whether the government exercises control over the speech (the State directly controlled messages on its license plates).⁵⁵ Together, these factors suggested that the State had adopted the private speech on a license plate as its own.

Applied to the patent context, these three factors suggest that Congress's decision to deny patent protection for subject matter represents a decision not to adopt an inventor's speech as its own. First, the government has a long history of exercising selectivity in granting patent protection for inventions.⁵⁶ It has established standards of novelty, nonobviousness, and utility that call for content discrimination in evaluating patent applications.⁵⁷ Similarly, for over 150 years, courts have denied protection for inventions that constitute physical phenomena, natural laws, or abstract ideas.⁵⁸

Second, an observer of an issued patent appreciates that the government has issued the patent. Although the inventor created the speech, the issued patent signifies that the PTO has not found reason to believe an inventor's assertions to be invalid.⁵⁹ For this reason, issued patents carry

51. See 35 U.S.C. §§ 101, 102, 103 (setting forth requirements for patent protection).

52. 576 U.S. 200, 216 (2015).

53. *Id.* at 203.

54. *Id.* at 219–20.

55. *Id.* at 209–14.

56. See 35 U.S.C. §§ 101, 102, 103.

57. See *id.*

58. See *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014); *Diamond v. Chakrabarty*, 447 U.S. 303, 316 (1980).

59. See BREAN & SNOW, *supra* note 19, at 58–59.

a stamp of government imprimatur.⁶⁰

Third, the government exercises a high degree of control over patent applications containing the inventor's speech. Claims to the invention must be drafted with sufficient definiteness; specifications must describe the invention with sufficient specificity to enable an ordinary person to make and use the invention.⁶¹ Taken together, these three factors suggest that the government is speaking when the PTO grants patent protection to certain subject matters of inventions.

Thus, the PTO's decision to grant patent protection may plausibly be understood as government speech. But this understanding is not necessarily the only plausible one. Not everyone would agree that the technical knowledge in a patented invention represents the knowledge or views of the government.⁶² It is thus possible that Congress is incentivizing inventors to disclose their inventions without adopting inventors' speech as its own. Hence, the conclusion of government speech is only a plausible possibility.

3. Regulation of Conduct

Assuming that the government is not speaking when it issues patents, Congress's denial of protection appears to represent a regulation of conduct that has an incidental effect on speech of creators. Construed in this way, the patent denial would not constitute an impermissible restriction of speech. The law on regulating conduct that incidentally affects speech is set forth in the Supreme Court case of *United States v. O'Brien*.⁶³ Before reciting that law, I examine whether Congress is in fact attempting to regulate conduct in denying patent protection for a certain subject matter.

The conclusion that Congress is regulating conduct is based on the fact that a denial of patent protection reduces incentives for inventors (or licensees) to make, use, or sell *embodiments* of a particular invention. Recall that an invention represents technical knowledge, an embodiment of an invention represents the actual thing or process, and patent rights comprise rights to control embodiments of an invention.⁶⁴ A patent on an ice-making machine, for instance, provides rights to exclude others from making, using, and selling actual ice-making machines, which are the embodiments of the technical knowledge that comprises the invention.⁶⁵ So by denying patent protection, Congress is denying inventors rights to con-

60. *See id.* at 39 ("In essence, a patent is just a patent application that has been approved by the government."); *see also Walker*, 576 U.S. at 218 ("[E]ach specialty license plate design is formally approved by and stamped with the imprimatur of Texas.").

61. *See generally* 35 U.S.C. §§ 101, 102, 103, 112.

62. *Cf. Walker*, 576 U.S. at 221–22 (Alito, J., dissenting) (arguing that a simple test to determine whether the government is speaking is to ask whether an observer would think that the government is expressing its views in the speech).

63. 391 U.S. 367 (1968).

64. *See discussion supra* Section II.A.1.

65. *See generally* 35 U.S.C. § 271 (listing rights in a patent).

trol invention embodiments. Without those rights, inventors are less likely to create either the invention (the technical knowledge) or its embodiments (the actual things and processes).

Because denial of patent protection decreases both the technical knowledge and the embodiments of that knowledge, we must ask what Congress is attempting to affect by denying patent protection—the knowledge or the embodiments? The target of Congress’s patent denial is likely the embodiments, i.e., the actual things and processes. That is, if Congress were to object to the patenting of a certain device or method, Congress would most likely be objecting to the use, manufacture, or sale of the physical device or actual method. The device or method itself (or its commercialization) would be deemed harmful to society—not the knowledge about how to make or use it. Hence, the purpose of Congress’s denial of patent protection would appear to be to control the production of invention embodiments—the actual things and processes.

In support of this understanding of a patent denial, consider Congress’s denial of protection for inventions that are directed toward the human organism.⁶⁶ Congress appears to have objected to actual human organisms being treated as property of an inventor.⁶⁷ On the record, members of Congress expressed concern that human beings could be considered “an invention” subject to licensing for financial gain if human organisms were patentable.⁶⁸ Notably, an actual member of the human species amounts to an *embodiment* of an invention. This suggests that Congress was concerned about embodiments of the invention being subject to property rights—not about the proliferation of technical knowledge.

The same may be said of Congress’s invalidation of tax strategies. In 2011, Congress legislated that tax strategies for reducing, avoiding, or deferring tax liability lack novelty.⁶⁹ The effect of the legislation is to deny protection for tax strategies.⁷⁰ This denial reflects Congress’s desire to reduce the *practice* of such tax strategies. In the history leading up to the 2011 legislation, one congressman commented: “No one should have sole ownership of how taxes are paid.”⁷¹ The congressman thus objected to monopolizing the practice of tax strategies. Congress was concerned about controlling conduct relating to tax strategies—not reducing speech about those strategies.

Hence, in denying patent protection for certain subject matter, Congress appears to be seeking to control the manufacture of physical things, the practice of actual methods or processes, or the commercialization of

66. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 33(a), 125 Stat. 284, 340 (2011) (codified as amended in scattered sections of 35 U.S.C.) (“[N]o patent may issue on a claim directed to or encompassing a human organism.”).

67. See Crouch, *supra* note 13.

68. See 157 CONG. REC. E1177-04 (daily ed. June 22, 2011) (speech of Hon. Christopher H. Smith).

69. See Leahy-Smith America Invents Act § 14.

70. See generally 35 U.S.C. § 102 (requiring claimed inventions to be novel).

71. See 153 CONG. REC. 23903, 23930 (2007) (statement by Rep. Boucher).

those physical things or actual processes. This means that the patent denial constitutes an attempt by Congress to regulate conduct rather than speech. Certainly, though, Congress's denial of patent protection would affect the private speech of inventors. Inventors choose their speech about technical knowledge (i.e., their inventions) according to the subject matter for which Congress offers patent protection.⁷² Yet that effect on their speech is incidental to the purpose underlying Congress's denial of patent protection. Congress makes its denial in order to target actions related to the physical embodiments of the invention—not the discovery of the technical knowledge itself or the publication of that knowledge.

Construed in this light, a moral denial of patent protection would be subject to the standard of review in *United States v. O'Brien*.⁷³ The *O'Brien* Court explained that regulation of conduct that incidentally affects speech is justified if the regulation: (1) "is within the constitutional power of the Government;" (2) "furthers an important or substantial governmental interest;" (3) "is unrelated to the suppression of free expression;" and (4) restricts free speech "no greater than is essential to the furtherance of that interest."⁷⁴

These four elements suggest that Congress's denial of patent protection for immoral subject matters is justified. First, the denial would fall within its power to promote the progress of useful arts. As discussed below in Section III.B.2, the Intellectual Property Clause provides Congress discretion to decide which sorts of works fulfill its constitutional mandate. Second, the government's interest in denying patent protection for certain subject matter would likely be at least "important" based on Congress's assessment of the harms that a particular device or process poses to society. For instance, a government interest in promoting the health and safety of its citizens would likely support a denial of protection for technologies leading to environmental pollution or the consumption of illicit drugs. Third, as explained above, Congress's denial of patent protection would be aimed at the conduct of manufacturing devices and practicing processes—not speech. Fourth, the denial of patent protection would still allow for inventors to engage in their speech about technical knowledge. Although the denial of the monopoly might affect their practical means for gaining that knowledge, they would still legally be able to do so. As a result, the restriction would not be greater than necessary to further the interest in reducing the manufacture, practice, or commercialization of an invention embodiment. Thus, Congress's regulation of conduct through patent denial would, in most instances, pass the *O'Brien* test for its effect on an inventor's speech.⁷⁵

72. See discussion *supra* Section II.A.

73. See 391 U.S. 367, 376–77 (1968).

74. *Id.* at 377.

75. Of course, it is logically possible that Congress could deny patent protection solely to decrease the production of technical knowledge with respect to a particular technology. It is also logically possible that Congress could lack a substantial interest in seeking to

In sum, denying patent protection for subject matters based on a moral value does not appear to violate the First Amendment. As discussed above in Section II.B.3, the denial can be viewed as Congress choosing its own speech to adopt. If that is correct, it would negate any First Amendment argument. Yet, even if patent grants are not construed as government speech, by denying patent protection, Congress would be seeking to control conduct relating to embodiments of an invention. In either scenario (government speech or government regulation of conduct), Congress would be justified in discriminating against the subject matter of an invention that it deems to be immoral.

B. COPYRIGHT

The speech issues in denying copyright protection are very different from those discussed above in the patent context. The three points discussed in the patent analysis above (i.e., the presence of speech, government speech, and regulation of conduct) do not raise the same issues in copyright. Unlike in the patent context, the presence of speech is obvious in the copyright context; the speech at issue is not government speech; and the government's extension of copyright protection is not a regulation of conduct. These simple points are summarily addressed in Section II.B.1, all supporting the conclusion that Congress targets private speech of authors when it denies copyright protection. Nevertheless, this conclusion does not necessarily imply that a denial of copyright protection represents a *restriction* of speech. A complicating issue is whether the act of denial constitutes a government restriction. In the words of the First Amendment, is Congress "abridging" speech by refusing to extend the copyright monopoly? The answer to this question is yes, although that is not apparent to everyone. The issue is addressed in Section II.B.2.

1. Regulation of Private Speech

a. The Presence of Speech

Unlike in the patent context, the presence of protectable speech is straightforwardly obvious in the copyright context. Copyright serves to incentivize the creation of expression that is original and that exists in a tangible medium.⁷⁶ Quite obviously, the First Amendment protects this sort of expression, along with speech that is not original and not in a tangible medium.⁷⁷ There is no distinction in free speech law between publishing an original novel (copyrightable) and yelling out loud what someone else had told you (not copyrightable). Both receive protection

regulate embodiments of certain inventions. If these situations arose, the denial would not pass the *O'Brien* test. Yet, as a practical matter, these possibilities seem unlikely.

76. See 17 U.S.C. § 102(a).

77. Compare *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) ("[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment."), with *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112, 114 (1991) (protecting autobiographical book about criminal activity).

as speech. Hence, potentially copyrightable expression is speech for purposes of analyzing First Amendment law.⁷⁸

b. Non-Government Speech

Unlike the patent grant, the copyright grant cannot be construed as the government adopting speech as its own. For many years, Congress has extended copyright protection for all subject matter that is original and in a tangible medium.⁷⁹ This means that there is a long history of Congress not exercising selective receptivity of expression for the copyright grant. With such a minimal content requirement for copyright eligibility (i.e., content must be original), an observer would not likely believe that the government has stamped its imprimatur on copyrighted expression.⁸⁰ Moreover, Congress has extended copyright to expression without any requirement that the author even register the expression with the copyright office.⁸¹ This means that the content of copyrightable expression may disserve the government's own interest. Indeed, the government need not be aware that the copyrighted expression even exists for it to receive protection.⁸² This all indicates that Congress has merely set up a system for incentivizing private speech without adopting that speech as its own.

The Supreme Court has suggested this conclusion in the recent case of *Matal v. Tam*.⁸³ There, the Court unanimously rejected the argument that

78. See Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 37 (2000) ("What the 'engine of free expression' argument means, simply enough, is that there are First Amendment interests on both sides of a copyright case.").

79. See 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . ."); *id.* § 4 (repealed 1976) ("[T]he works for which copyright may be secured under this Act shall include all the writings of an author.").

80. Perhaps one might argue that courts exercise control over content by deciding whether certain works qualify as copyrightable material. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991) (denying copyright protection for telephone book arrangement of names, owing to lack of originality); *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011) (denying protection for a wildflower display, owing to lack of fixation); *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008) (denying copyright protection for digital designs of an automobile, owing to lack of originality). However, this argument is not convincing. It reflects merely the fact that Congress has set minimal requirement for eligibility. Courts deny protection only in cases where a speaker has not met those minimal requirements. So even though there may be many cases where courts decide the eligibility of a work, that fact does not diminish the broad scope of content that Congress has made eligible for protection. See 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . ."). The broad scope of protectable content—even content against the government's interests—suggests that the government is not speaking.

81. See 17 U.S.C. § 102.

82. See *id.*

83. 137 S. Ct. 1744, 1760 (2017). Although part of the Court's opinion consisted of a plurality, all members of the Court joined Part III-A, which rejected the government-speech argument. *Id.* at 1751, 1760.

the trademark system represented government speech.⁸⁴ In rejecting the argument, the Court suggested that if it were to recognize the trademark grant as government speech, then that could imply that the copyright grant was also government speech.⁸⁵ This implication the Court labeled as “the most worrisome.”⁸⁶ Hence, the Court has signaled that it is not prepared to recognize the extension of copyright as government speech.

c. Regulation of Speech (Not Conduct)

When Congress denies copyright protection for certain content, Congress is not regulating the conduct of authors with only an incidental effect on speech. To be sure, such a denial represents Congress attempting to influence expression of private speakers. As contrasted with a patent denial, a copyright denial does not represent Congress attempting to influence an author’s control over a physical embodiment of the subject matter of thought, for a copyright does not provide its author with any right to control such physical embodiments.⁸⁷ Accordingly, when Congress attempts to deny a copyright for certain expression, Congress can only be attempting to control the expression itself.

It is also worth noting that a copyright includes rights that consist of speech acts. Specifically, a copyright includes a right to publicly distribute the work as well as a right to publicly perform or display the work.⁸⁸ This implies that if Congress were to deny copyright for the purpose of controlling the exercise of copyright rights, Congress would be seeking to control specific acts of speech. Hence, copyright denial cannot be viewed as an attempt to regulate conduct. The *O’Brien* test discussed above in the patent context would not apply to the copyright context.

2. *An Abridgment by Congress*

Does the act of denying copyright protection constitute a speech restriction that would fall within the meaning of “abridging the freedom of speech” in the First Amendment?⁸⁹ For many, the denial of copyright may not seem to restrict speech because authors are still free to speak their expression. However, the denial of copyright may present an economic cost that influences their choice of content, and that influence triggers First Amendment scrutiny. These two arguments are discussed in the subsections below.

84. *Id.*

85. *Id.* at 1760.

86. *Id.*

87. A copyright in a book about a marijuana device, for example, does not provide the author any rights to control the device itself. *See Baker v. Selden*, 101 U.S. 99 (1880) (recognizing that copyright in expression does not extend to the subject matter of the expression).

88. *See* 17 U.S.C. § 106.

89. *See* U.S. CONST. amend. I.

a. Absence of Penalty

Not every act of Congress that affects speech constitutes a restriction of speech.⁹⁰ Consider the reasoning of a trademark case, *In re McGinley*, decided decades ago by the Court of Customs and Patent Appeals.⁹¹ The *McGinley* court considered whether Congress's denial of trademark registration for "immoral" and "scandalous" speech would abridge the speech rights of persons applying for trademark registration.⁹² The *McGinley* court ruled that the denial was not an act of abridgment.⁹³ In the court's words: "No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant's First Amendment rights would not be abridged by the refusal to register his mark."⁹⁴

From one perspective, then, the argument makes sense that denying copyright protection would not constitute an act that restricts speech.⁹⁵ Congress does not impose any penalty on a speaker when Congress refrains from extending that protection. If an author fails to satisfy the content-based criteria for protection, the author is not any worse off for creating her expression. Even without a copyright, authors can still speak, publish, and profit from their expression. The author would simply lack rights to exclude others from making certain uses of the expression, and those rights the author was never entitled to in the first place.⁹⁶ Thus, by denying intellectual property rights, Congress would not seem to be abridging an author's speech.

This view draws support from the incentive theory of intellectual property. Under that theory, the government grants intellectual property rights for the purpose of incentivizing the creation of otherwise under-produced intellectual works.⁹⁷ The government intervenes in the commercial marketplace in order to subsidize certain creators with a

90. See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (ruling constitutional the government's content-based "standards of decency and respect" employed to decide grant applications for artistic works).

91. *In re McGinley* 660 F.2d 481 (C.C.P.A. 1981), *overruled by* *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

92. *Id.* at 482.

93. *Id.* at 484.

94. *Id.*

95. See Snow, *supra* note 18, at 1476–79 (explaining the argument that denying copyright is not a speech-suppressive act).

96. In the context of explaining the relationship between free speech and copyright, Professor Edwin Baker stated:

Most importantly, the Speech Clause's protection of individual liberty guards a person's right to engage in the activity of communicating, not a right to profit from or receive economic return for the activity. . . .

. . . .

. . . Freedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech.

C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 901, 903 (2002).

97. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13–14, 19 (2003).

monopoly over their works.⁹⁸ An implication of this theory is that by denying protection for an intellectual work, the government is simply choosing not to intervene in the commercial market for that work. At the same time, the First Amendment does not compel the government to extend artificial monopolies in any commercial market.⁹⁹ Stated differently, an author's right to speak her intellectual creation does not imply a right to a monopoly in the commercial marketplace for that creation. Viewed through the framework of the incentive theory, the government's choice to refrain from protecting certain creations does not appear to restrict an author's right to speak.¹⁰⁰

b. Economic Coercion

Although the above argument makes sense, it is not likely to prevail under modern free speech jurisprudence. In various contexts, the Supreme Court has recognized that denying an economic benefit because of speech content may coerce a speaker enough to restrict his speech. In the Court's words: "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."¹⁰¹ Under this principle, the Court has recognized a speech restriction where the government has conditioned funding on not speaking certain content (e.g., funding for public-broadcasting stations conditioned on not broadcasting editorial content;¹⁰² funding for student publications conditioned on not publishing content about religious beliefs;¹⁰³ funding for legal-assistance organizations conditioned on refraining from challenging certain policies in court;¹⁰⁴ funding for nongovernmental organizations conditioned on not advocating for the legalization of prostitution or sex-trafficking¹⁰⁵). Similarly, the Court has recognized speech restrictions where the government has denied or provided economic benefits based on speech content (e.g., providing preferential tax treatment to certain magazine genres;¹⁰⁶ denying school facilities for after-hours discussion of certain topics;¹⁰⁷ and denying prof-

98. *Id.* at 20–21.

99. *See generally* *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 546 (1983) ("We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959))).

100. Even though intellectual property provides its owner a market advantage over use of the speech, the strength of that monopoly advantage is debatable. *See* Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 *Geo. L.J.* 2055, 2104–07 (2012).

101. *See* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

102. *See* *FCC v. League of Women Voters*, 468 U.S. 364, 366, 400–02 (1984).

103. *See* *Rosenberger*, 515 U.S. at 826–27.

104. *See* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536–37 (2001).

105. *See* *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330–32 (2013).

106. *See* *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987).

107. *See* *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386, 394 (1993).

its for books written by criminals about their own criminal activities¹⁰⁸). Hence, the principle is well established that negative economic consequences that follow from speaking certain content are restrictions on speech.

This principle likely applies in the copyright context. Many copyrightable expressions require funding for their creation and distribution.¹⁰⁹ In the absence of copyright, authors would not realize as much revenue from their works, so many works would simply not exist. Although the actual effect of denying protection will depend on the particular motives and means of an individual author, it seems certain that in many instances the absence of the copyright monopoly will decrease speech production and dissemination. Simply put, by denying copyright protection for certain content, Congress could achieve some speakers' silence. For instance, suppose that Congress denied protection for all science-fiction novels. Even though authors could still write science-fiction novels without incurring any penalty (and some probably would), some authors probably would not. Authors who rely on book royalties for their living would likely start writing novels in a different genre so as to realize the economic gain that science-fiction topics no longer provide. In that way, the denial of copyright protection would coerce their speech.

Of course, Congress need not subsidize the exercise of free speech. The First Amendment does not require Congress to give money to authors so that they have economic means to write a book, nor does it require Congress to give money to authors' intended audience to purchase the book.¹¹⁰ Yet Congress may not use its copyright power to achieve an outcome that Congress could not otherwise constitutionally achieve. The Supreme Court has noted as much, stating: "The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly."¹¹¹ Applying this principle to copyright, the question becomes whether denying copyright protection better enables Congress to achieve an author's silence on a topic than Congress would otherwise be able to command directly (i.e., without using its copyright power).

It appears so. Suppose that Congress were to deny copyright protection for all content. Suppose further that a profit-seeking moviemaker was planning to create a movie about a certain subject (say, a highly violent war movie). The absence of copyright protection for all content may or

108. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 116 (1991).

109. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) ("[N]o man but a blockhead ever wrote, except for money." (quoting 3 JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON 19 (G. Hill ed., 1934))); see also Tushnet, *supra* note 78, at 37 ("[C]opyright aids free speech because [e]ffective dissemination of creative work costs money." (second alteration in original) (quoting Leonard W. Wang, Note, *The First Amendment Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158, 1178)).

110. See generally *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983).

111. *Elrod v. Burns*, 427 U.S. 347, 361 (1976).

may not result in the moviemaker creating the movie. It is possible that she might still create it and do so with the intent to realize profit; she might plan to protect against unauthorized distribution through a private contract or technological encryption. Alternatively, the absence of copyright might completely dissuade her from creating the movie. Now suppose that Congress denies copyright protection only for movies with violent content. In that situation, is the same moviemaker just as likely to create the violent war movie? Of course not: she would now be less likely to create the war movie because other genres still receive copyright protection. That is, the moviemaker is less likely to create the war movie than if no copyright protection existed at all because she can realize a greater economic benefit by choosing a different genre. In short, by selectively denying copyright, Congress imposes an opportunity cost on speakers. The cost of speaking that which does not receive protection becomes greater than speaking that which does receive protection. That opportunity cost creates a stronger reason to refrain from speaking the unsubsidized content than if Congress were to extend copyright protection to no content at all. Simply put, selective denial makes specific content less attractive to speak. Congress would be using its copyright power to achieve speakers' silence that it could not command directly, which amounts to a speech restriction.

The Supreme Court has recently ruled in a way that supports this conclusion. In *Matal v. Tam* and *Iancu v. Brunetti*, the Court held that certain content bars to trademark registration were unconstitutional under the First Amendment.¹¹² Although trademark is not copyright, both trademark and copyright provide an economic benefit for speakers in the form of rights to exclude others from using an expression, so the reasoning of these trademark cases would seem applicable to copyright. In *Tam*, Congress had barred trademark registration for marks that disparage groups, and in *Brunetti*, for marks that are immoral or scandalous.¹¹³ Concluding in both cases that Congress violated the First Amendment, the Court implicitly relied on the premise that denying trademark protection constitutes a restriction of speech.¹¹⁴ The premise straightforwardly suggests that denying copyright protection would also be a speech-restrictive act.

Finally, although the Court has not specifically stated this conclusion for copyright denials, the Court has repeatedly described copyright as “the engine of free expression.”¹¹⁵ Indeed, the Court has portrayed copyright as playing a special role in furthering free speech. Because copyright incentivizes speech, the Court views copyright as an integral part of achieving First Amendment goals. That view, expressly adopted by the Court, suggests that restricting specific content from receiving copyright

112. See *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017).

113. *Brunetti*, 139 S. Ct. at 2297; *Tam*, 137 S. Ct. at 1751.

114. See *Brunetti*, 139 S. Ct. at 2297; *Tam*, 137 S. Ct. at 1751.

115. *Golan v. Holder*, 565 U.S. 302, 328 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

protection would be offensive to its interest in promoting free speech. Under this “engine of free expression” view of copyright, restricting copyright would be a restriction of speech.

Thus, denying specific content (on moral grounds or otherwise) from receiving copyright protection appears to constitute a restriction of free speech. Even though such a denial would not directly suppress the speech, it would be economically coercive. Therefore, such a denial appears to be an abridgment under the First Amendment.

III. JUSTIFICATION FOR MORAL RESTRICTIONS ON COPYRIGHT PROTECTION

As discussed in Part I, restrictions on the subject matter of patent protection would not constitute restrictions of free speech within the scope of the First Amendment. But content-based restrictions on copyright protection would. This would seem damning for the argument to restrict copyright protection, for no doctrine of First Amendment law is more firmly established than the doctrine that government may not restrict speech based on its content.¹¹⁶ The Supreme Court has repeatedly taught: “[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹¹⁷ The Court has further explained that “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹¹⁸ The fact that society deems content undesirable does not give reason for the government to discriminate against it.¹¹⁹ Under normal rules of free speech, then, the fact that Congress finds the content of expressive works to be objectionable cannot be the reason for denying those works copyright protection. Normal rules of free speech condemn such a denial.

This is not to say, though, that any restriction on copyrightable content necessarily violates the First Amendment. Speech law recognizes that some circumstances may justify an exception to the normal rule that content-based restrictions are unconstitutional. Whether circumstances justify such an exception often depends on which standard of review courts employ to evaluate the restriction. A stringent standard demands that the reason for restriction be compelling, whereas a less stringent standard is more flexible in recognizing a permissible reason for justifying the restriction. I argue below that the copyright context calls for applying the standard of review under a special speech doctrine called the limited public forum. That standard allows for content discrimination that is reasonable

116. *See* *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790–91 (2011).

117. *Id.* at 790–91 (alteration in original) (quoting *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 573 (2002)).

118. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (quoting *United States v. Eichman*, 496 U.S. 310, 319 (1990)).

119. *See id.*

and that does not favor or disfavor particular viewpoints.¹²⁰ In the copyright context, that standard suggests that Congress has limited discretion to impose certain viewpoint-neutral moral criteria for copyright protection, but that most moral criteria would be unconstitutional.

Section III.A sets forth the argument for construing the copyright system as a limited public forum. Section III.B considers whether moral restrictions on copyright eligibility would satisfy that doctrine's first requirement: that restrictions be reasonable. Section III.C considers whether those moral restrictions would satisfy that doctrine's second requirement: that restrictions be viewpoint neutral. Section III.D discusses why other standards of review should not apply

A. COPYRIGHT AS A LIMITED PUBLIC FORUM

The Supreme Court has developed a body of law that sets review standards for speech regulations that occur in the context of the government providing physical forums or economic resources that make possible private speech.¹²¹ The forums or resources may be physical in nature (e.g., a library or a city hall) or they may be "metaphysical" in nature (e.g., university resources, such as funding for a student publication).¹²² Insofar as the government is extending its physical property or an economic resource for use by private citizens, the regulation of their private speech on that property or through that resource may be subject to a forum analysis.

Copyright appears to be a government resource that should be subject to this forum analysis. In the copyright system, the government extends a resource that results in individuals speaking. That is, Congress's extension of copyright protection for original expression in a tangible medium serves to incentivize the production and dissemination of speech by private individuals. Much speech would not exist without the copyright monopoly. Therefore, as an economic benefit that facilitates private speech,

120. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

121. See *id.*; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). From one perspective, copyright might be viewed as analogous to benefits that the government extends as a subsidy or program. See Snow, *supra* note 18, at 1490–94 (arguing that copyright may be analyzed under case law treating government subsidies that restrict speech); cf. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2316–17 (2019) (Sotomayor, J., dissenting in part) (arguing that trademark ban for certain content could be analyzed under government-subsidy or -program line of cases). The Court has developed a body of case law that treats speech restrictions in that context. E.g., *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 573, 585–587 (1998) (government extended grants for furthering the arts based on "decency and respect" criterion); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009) (state law allows payroll deduction for payment of union dues but not political organization). However, the plurality in *Matal v. Tam* opined that this line of cases applies where the government provides "cash subsidies or their equivalent." 137 S. Ct. 1744, 1761 (2017) (plurality opinion). On that ground, the Court distinguished those cases from Congress denying trademark protection to certain content. *Id.* For this reason expressed in *Tam*, the cases do not seem applicable to a content-based denial of copyright protection.

122. See *Rosenberger*, 515 U.S. at 830 (recognizing university funding as "a forum more in a metaphysical than in a spatial or geographic sense").

copyright appears to be a sort of metaphysical forum.¹²³

This conclusion matters because, in the forum speech analysis, some types of forums apply a standard of review that is more lenient than the normal standard of strict scrutiny (discussed below in Section III.D). As I argue below, the copyright system reflects the specific forum called the limited public forum. The subsections below examine the various forums and argue that copyright should be analyzed as a limited public forum.

1. Types of Forums

The Court has outlined four types of forums relevant to content regulation of speech.¹²⁴ Two are very similar, so I address them first together. The first one is the traditional public forum. The Court has defined traditional public forums as “places which by long tradition or by government fiat have been devoted to assembly and debate.”¹²⁵ That forum allows citizens to assemble and freely communicate their thoughts about any subject; it would include such places as a public park, street corner, or public square.¹²⁶ Its traditional nature suggests that it is usually a physical forum.¹²⁷ The second type of forum is the designated public forum, which “consists of public property which the state has opened for use by the public as a place for expressive activity.”¹²⁸ Like the traditional public forum, the designated public forum exists for citizens to assemble and communicate their thoughts about any subject. An example would be a city building that has been designated for the public to speak about any subject. Under either of these forums, government restrictions of speech are subject to a stringent review standard—strict scrutiny—which is discussed in Section III.D.¹²⁹

These first and second types of forums are distinguishable from the copyright context, and for the same reason. Copyright does not exist to enable citizens to freely communicate thoughts about any subject matter. It exists to promote speech that effectuates the progress of science and is creative.¹³⁰ Deceitful speech and unoriginal speech, for instance, do not

123. See Snow, *supra* note 18, at 1487–89 (arguing that copyright falls with the limited public forum doctrine).

124. See *Perry*, 460 U.S. at 45–47. For a concise statement on the law of public forums, see Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979–92 (2011).

125. *Perry*, 460 U.S. at 45.

126. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

127. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998).

128. *Perry*, 460 U.S. at 45.

129. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009); *Perry*, 460 U.S. at 45.

130. See U.S. CONST. art. I, § 8, cl. 8; *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)); *id.* at 347 (describing originality or creativity as “the touchstone of copyright protection”).

fulfill the purpose of copyright.¹³¹ Hence, because the constitutional directive of copyright concerns the subject matter of speech, the traditional or designated public forums cannot apply to intellectual property.¹³²

The third forum is the nonpublic forum. This is a forum that the government owns or controls for a purpose that is not public communication by private speakers.¹³³ An example is a military installation, which exists to train soldiers rather than to facilitate speech by private members of the public.¹³⁴ Here again, copyright does not fit this sort of forum because copyright exists specifically to facilitate speech by private members of the public.¹³⁵ As the “engine of free expression,” the copyright system cannot be a nonpublic forum.¹³⁶

The fourth and final forum is the limited public forum. The limited public forum represents a forum created “for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.”¹³⁷ In this way, the purpose of the forum inherently limits the forum to certain speakers or to the discussion of certain subject matters. The Court has explained: “The necessities of confining a forum to the limited and legiti-

131. For further explanation on reasons why deceitful speech falls outside the scope of the Intellectual Property Clause, see Ned Snow, *Intellectual Property and Immorality* 164–77 (Mar. 8, 2021) (unpublished manuscript) (on file with author) (arguing that deceitful and pornographic expression fall outside the scope of the Intellectual Property Clause). Relatedly, Professor Cathay Smith has persuasively argued that the factual estoppel doctrine should apply where an author holds out false statements as factually true, consistent with the practice of some courts. See Cathay Y.N. Smith, *Truth, Lies, and Copyright*, 20 NEV. L.J. 201 (2019).

132. One scholar has argued that copyright should be construed as either a traditional or designated public forum for the reason that “[a]nyone can access the copyright system.” See Alfred C. Yen, *Rethinking Copyright’s Relationship to the First Amendment*, 100 B.U. L. REV. 1215, 1256 (2020). Although it is true that anyone can access the copyright system, this fact alone does not imply a public forum. In *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, the Court recognized that a traditional or designated public forum does not exist where the state “reserve[s] the forum for its intended purposes.” 460 U.S. 37, 45–46 (1983) (“[T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”). Again in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court made clear that where a purpose of a forum dictates discussion of certain topics, the forum is not a traditional or designated public forum. 515 U.S. 819, 829 (1995) (explaining a limited public forum as occurring where “[the] limited and legitimate purposes for which [a forum] was created . . . justify the State in reserving it for certain groups or for the discussion of certain topics”). Application of this simple principle to the copyright context implies that copyright should not be construed as a public forum: the government necessarily reserves copyright for the purpose specified in the Progress Provision of the Intellectual Property Clause—“[t]o promote the Progress of Science.” U.S. CONST. art. I, § 8, cl. 8. That Provision calls for discussion of content that will not impede the realization of that purpose. Hence, a traditional or designated public forum would not be the correct classification for the copyright system.

133. *Perry*, 460 U.S. at 46.

134. See *Greer v. Spock*, 424 U.S. 828, 838 (1976) (“[T]he business of a military installation . . . [is] to train soldiers, not to provide a public forum.”).

135. *Golan v. Holder*, 565 U.S. 302, 328 (2012) (describing copyright as “the engine of free expression” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003))); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (same).

136. See *supra* note 135.

137. *Perry*, 460 U.S. at 46 n.7.

mate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”¹³⁸ An example is the resources of a university.¹³⁹ The Court has observed that a “university differs in significant respects from public forums such as streets or parks or even municipal theaters.”¹⁴⁰ Recognizing the educational mission of a university, the Court has allowed universities “to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.”¹⁴¹

From a descriptive standpoint, the limited public forum lines up well with copyright. Like a university, copyright exists to encourage discussion of topics that will promote knowledge, learning, and the fruits thereof.¹⁴² Stated differently, copyright exists to promote original speech that advances knowledge and its fruits.¹⁴³ This purpose thereby limits the sort of speech that the resources of copyright may incentivize, and accordingly, it justifies Congress in reserving copyright for the discussion of certain subjects. In short, copyright is not a forum that exists to encourage any and all speech. The Intellectual Property Clause sets forth the specific purpose of encouraging a certain sort of speech, i.e., that which “promote[s] the Progress of Science.”¹⁴⁴ The Clause suggests that copyright should be viewed as a limited public forum.

2. *Reasons for Copyright as a Limited Public Forum*

In addition to the descriptive basis for construing copyright as a limited public forum, other reasons support this conclusion. The Intellectual Property Clause implies discretionary authority for Congress to decide which intellectual creations may receive copyright and patent protection.¹⁴⁵ If the First Amendment were interpreted to imply a standard of review that precludes Congress from making those judgments in the copyright domain, Congress could not exercise that discretionary authority under the Clause with respect to copyright. Yet general constitutional canons of interpretation call for interpreting clauses consistently if possible.¹⁴⁶ And an interpretation that respects both the First Amendment and

138. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

139. See, e.g., *id.* at 874–75 (funding of student activities related to the educational purpose of the university); *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 668–69 (2010) (funding of student organization).

140. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); see also *Rosenberger*, 515 U.S. at 829 (funding of student activities related to the educational purpose of the university); *Martinez*, 561 U.S. at 668 (funding of student organization).

141. *Id.*

142. See U.S. CONST. art. I, § 8, cl. 8; *supra* Section III.A.1.

143. See *Snow*, *supra* note 18, at 1491.

144. See U.S. CONST. art. I, § 8, cl. 8.

145. See *Snow*, *supra* note 131, at 179–89 (interpreting Intellectual Property Clause as providing Congress discretion to judge which works promote the progress of science); *Snow*, *supra* note 18, at 1491 (same).

146. See generally *Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840) (“In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”).

the Clause appears possible: neither the freedom of speech nor the power to discretionarily grant copyright protection are absolute doctrines that lack any flexibility. Doctrines of free speech can protect against the government suppressing ideas while still maintaining some of the discretion that the Clause reserves for Congress to grant or deny protection. The limited public forum is such a speech doctrine that allows flexibility in application, preserving some discretion for Congress while also ensuring significant speech protection.

A second reason for construing copyright as a limited public forum lies in the fact that the means of restricting speech is through extending a subsidy rather than imposing a penalty. The Supreme Court relied on this rationale to apply the limited public forum doctrine in *Christian Legal Society v. Martinez*.¹⁴⁷ There, a student organization, the Christian Legal Society (CLS), sought to exclude students from its organization based on homosexual conduct or religious beliefs.¹⁴⁸ Because of these exclusions, Hastings Law School refused to give CLS official recognition as a student organization, which made CLS ineligible for a variety of privileges (e.g., funding, facility use).¹⁴⁹ At issue was whether CLS's right to speak its views on homosexual conduct and religion, so as to exclude members from joining, precluded Hastings from denying the benefit of official recognition as a student organization.¹⁵⁰ In deciding this question, the Court applied a limited public forum analysis. The Court explained that one reason for applying the limited public forum was that the speech restriction took the form of a subsidy rather than a prohibition.¹⁵¹ The Court explained:

[T]his case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. . . .

In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. Application of the less restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its [student organization] program, is dangling the carrot of subsidy, not wielding the stick of prohibition.¹⁵²

Simply put, because the absence of an economic subsidy poses a restriction on speech that is less forceful than a criminal or civil penalty, a less demanding standard of review is appropriate.

This principle suggests that the limited public forum is an appropriate framework for denials of copyright protection. The copyright denial rep-

147. 561 U.S. 661 (2010).

148. *Id.* at 672.

149. *Id.* at 669–70.

150. *Id.* at 678–80.

151. *Id.* at 682.

152. *Id.* at 682–83 (citations omitted).

resents an absence of an economic subsidy that only indirectly restricts speech: speakers can still speak and even profit from uncopyrighted content.¹⁵³ Accordingly, the fact that speech restrictions under copyright represent an indirect means for bringing about silence suggests that free speech should allow the government some degree of content-based discretion in employing its copyright power. For this reason, the limited public forum appears to be the appropriate framework.

A third reason is that some Justices of the Court have indicated that the limited public forum may be the correct framework for speech restrictions in trademark law. Given that trademark and copyright both facilitate private speech through the extension of exclusive rights, the Justices' comments are instructive on whether the limited public forum applies in the copyright context. As discussed above, the Court recently decided *Matal v. Tam* and *Iancu v. Brunetti*, both of which addressed whether certain content bars to trademark registration constitute speech abridgments.¹⁵⁴ In neither case did the Court rule on which standard of review should apply, for in both cases, the content bars were held to be viewpoint discriminatory, and viewpoint discrimination is unconstitutional under any review standard.¹⁵⁵ Yet in *Tam*, Justice Samuel Alito suggested that the limited public forum could be the correct framework for evaluating the content bars. After rejecting arguments for construing the trademark system under other speech frameworks, Justice Alito wrote the following for a plurality of the Court:

Potentially more analogous [to the present case] are cases in which a unit of government creates a limited public forum for private speech. When government creates such a forum, in either a literal or "metaphysical" sense, some content- and speaker-based restrictions may be allowed. However, even in such cases, what we have termed "viewpoint discrimination" is forbidden.¹⁵⁶

153. See discussion *supra* Section II.B.2.a (explaining the argument that denial of copyright protection does not suppress speech).

154. See *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017).

155. See *Brunetti*, 139 S. Ct. 2298–99 ("The eight-Justice Court [in *Tam*] divided evenly between two opinions and could not agree on the overall framework for deciding the case. . . . But all the Justices agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. And second, the disparagement bar was viewpoint-based."); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220–21 (2013) (finding viewpoint discrimination under review standard for government-subsidy program); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565, 572 (2011) (applying intermediate scrutiny to find First Amendment violation based on speech regulations "aimed at a particular viewpoint"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (applying strict scrutiny to strike down ordinance as viewpoint discriminatory); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (finding viewpoint discrimination under limited public forum doctrine).

The government may choose a viewpoint in choosing its own speech. See *Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").

156. *Tam*, 137 S. Ct. at 1763 (citations omitted).

Alito thus opened the door to the possibility that the limited public forum doctrine governs evaluation of content-based bars to trademark protection.

In *Brunetti*, two Justices contemplated that the limited public forum could be the correct framework.¹⁵⁷ In his concurring opinion, Justice Stephen Breyer stated: “[O]ne can find some vague resemblance between trademark registration and what this Court refers to as a ‘limited public forum’ created by the government for private speech.”¹⁵⁸ Justice Sonia Sotomayor opined a similar sentiment when describing the system of trademark registration:

When the Court has talked about governmental initiatives like this one before, it has usually used one of two general labels. In several cases, the Court has treated such initiatives as a limited public (or nonpublic) forum. In other situations, the Court has discussed similar initiatives as government programs or subsidies. In each of these situations, a governmental body established an initiative that supported some forms of expression without restricting others. Some speakers were better off, but no speakers were worse off.

Regardless of the finer distinctions between these labels, reasonable, viewpoint-neutral content discrimination is generally permissible under either framework.¹⁵⁹

Thus, Justices Breyer, Sotomayor, and Alito (who was writing for Justices Roberts, Thomas, and Breyer) have each signaled that the trademark system may be a limited public forum. This signaling supports construing the analogous intellectual property regime of copyright under that framework as well.

3. *Criticisms of Copyright as a Limited Public Forum*

Despite these reasons for construing copyright as a limited public forum, there are reasons to disagree. Professor Alfred Yen has introduced three reasons to doubt the application of the limited public forum doctrine to copyright law.¹⁶⁰ First, he argues that the limited public forum doctrine exists for the government “to manage its own property and operations.”¹⁶¹ Second, he contends that applying the doctrine to copyright

157. *Brunetti*, 139 S. Ct. at 2305 (Breyer, J., concurring in part and dissenting in part); *id.* at 2316 (Sotomayor, J., concurring in part and dissenting in part).

158. *Id.* at 2305 (Breyer, J., concurring). Justice Breyer stated the following on potentially applying a public-forum analysis to trademark restrictions:

What about the concept of a “public forum”? Trademark registration has little in common with a traditional public forum, as the register of trademarks is not a public park, a street, or a similar forum for public debate. But one can find some vague resemblance between trademark registration and what this Court refers to as a “limited public forum” created by the government for private speech.

Id. (citations omitted).

159. *Id.* at 2316–17 (Sotomayor, J., concurring in part and dissenting in part) (citations omitted).

160. Yen, *supra* note 132, at 1256–57.

161. *Id.* at 1256.

would enable Congress “to hinder a disfavored form of expression under the guise of promoting the progress of art.”¹⁶² Third, he argues that applying the doctrine whenever legislation subsidizes speech would invalidate many precedents that apply a more stringent standard of review.¹⁶³ Each of these reasons merits discussion.

On the first reason, I do not disagree that the limited public forum doctrine exists for the government to manage its own property and operations. Yet the meaning of “operations” (Yen’s term) must encompass more than activities on physical property. The Court has applied the limited public forum doctrine when the government extends economic resources to private speakers.¹⁶⁴ In the copyright domain, Congress’s operation is to promote the progress of science, and selectively extending the economic resource of a copyright monopoly is the constitutionally designated means for doing so. That is, Congress’s operation under the Intellectual Property Clause is to promote advancements in knowledge and learning; to manage that operation, Congress must be able to control how it bestows copyrights.¹⁶⁵ Therefore, the constitutional directive in the Clause implies that Congress must manage its operation of the copyright power, and the limited public forum enables Congress to fulfill that role.

On the second reason, I respectfully disagree that the limited public forum doctrine would make it too easy for Congress to hinder a disfavored form of expression. The limited public forum exclusion of viewpoint-discriminatory restrictions places a significant restraint on Congress’s ability to deny protection. As I discuss in Section III.B, the Court in *Brunetti* and *Tam* clarified the meaning of viewpoint discrimination in a way that expanded its breadth of coverage. Essentially, if a content-based denial exists because Congress is disagreeing with or responding to an idea or message within the content, the denial would amount to viewpoint discrimination.¹⁶⁶ Suppose, for instance, that Congress were to deny protection for depictions of teen drug use on the basis that the content does not promote progress.¹⁶⁷ Congress would be responding to the idea of teen drug use, which is a message within the content, so the denial would be viewpoint discriminatory. Hence, the limited

162. *Id.* at 1257.

163. *Id.* at 1256.

164. *See, e.g.*, *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 669, 682 (2010) (applying forum analysis for economic privileges of student-group registration); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822–23, 830 (1995) (applying forum analysis of funding for student publication); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–47 (1983) (applying forum analysis of a school mail system).

165. Of course, if one interprets the “Progress of Science” as providing Congress only the power to promote all content, then the argument is much weaker: Congress need not be able to select which content to subsidize in order to manage its operation of promoting all content. Thus, my contrary view on this first reason depends on the meaning of the Progress Provision.

166. *See discussion infra* Section III.C.

167. *But see Yen, supra* note 132, at 1257 (suggesting that Congress could deny protection for teen drug-use depiction under the limited public forum).

public forum’s prohibition of viewpoint discrimination would keep Congress from denying protection on the basis that an idea or message within the content fails to promote progress. The reach of Congress would be severely limited.

That said, in discerning between viewpoint-neutral discrimination and viewpoint-based discrimination, the Court has recognized that “the distinction is not a precise one.”¹⁶⁸ As a result, this second reason for objecting to the limited public forum should not be ignored. Without broad application of the viewpoint-discrimination doctrine, Congress could disfavor specific ideas within content, which would effectively transform the Intellectual Property Clause into a license to violate a core tenet of free speech. That must not occur. Accordingly, the Court must apply the viewpoint-discrimination exclusion liberally, much like it did in *Brunetti* and *Tam*.

Yen’s third reason is that applying the limited public forum doctrine whenever legislation subsidizes speech would invalidate precedents that apply a more stringent standard of review, i.e., the strict scrutiny standard.¹⁶⁹ This conclusion appears to assume that the basis for applying the limited public forum doctrine to the copyright context is the sole fact that copyright subsidizes speech. Certainly that fact is relevant, but it is not the only reason for applying the doctrine in this context. Once again, the Intellectual Property Clause implies authority for Congress to choose which content will promote progress. The Clause therefore calls for the application of a speech doctrine through which Congress may exercise discretion to deny specific content (although not based on any idea within that content). Copyright, then, is especially different from precedents applying strict scrutiny: the basis for the discrimination in copyright derives from the Constitution itself—not only from the fact that legislation subsidizes speech.¹⁷⁰

168. *Rosenberger*, 515 U.S. at 831.

169. Yen, *supra* note 132, at 1256–57 (“If courts begin to characterize general legislation that selectively subsidizes speech as a limited public forum, the result will be invalidation of many precedents applying strict scrutiny to content-based regulation.” (citing *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987), as examples of precedents that could be invalidated)).

170. For example, in *Arkansas Writers’ Project*, the Court applied strict scrutiny to strike down a state statute that exempted certain content from a sales tax on magazines. 481 U.S. at 234 (“[The state] has advanced no compelling justification for selective, content-based taxation of certain magazines, and the tax is therefore invalid under the First Amendment.”). The effect of the tax was to subsidize certain categories of content that were not subject to the tax, or in other words, the State had legislated a content-based subsidy. However, the State had not enacted its content-based scheme under authority from the federal Constitution. Unlike in the copyright context, there was no constitutional authority for the State in *Arkansas Writers’ Project* to exercise content discrimination. Therefore, the argument for applying the limited public forum doctrine would not be nearly as strong in that case as in the copyright context.

Reed v. Town of Gilbert, 576 U.S. 155, is another case that has been cited as one that would be decided differently if the copyright context were viewed under the limited public forum doctrine. See Yen, *supra* note 132, at 1257. In *Reed*, a town adopted a code that governed the manner in which people could display outdoor signs, and in particular, directional signs relating to qualifying events. *Reed*, 576 U.S. at 159. The Court applied strict

B. REASONABLENESS OF MORAL RESTRICTIONS

Having concluded that copyright should be viewed as a limited public forum, we now examine that forum's standard of review for evaluating moral restrictions on copyright eligibility. Speech restrictions in a limited public forum must meet two conditions: first, the restrictions must be reasonable in light of the forum's purpose; and second, the restrictions must be viewpoint neutral.¹⁷¹ This Section examines the first requirement of reasonableness.

1. Court Statements on Reasonableness

The Supreme Court has stated the reasonableness requirement in its general description of the limited public forum doctrine. In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court stated:

The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," nor may it discriminate against speech on the basis of its viewpoint.¹⁷²

Once the government creates a forum for a purpose, the government is bound by that purpose as to the speech that may be restricted in the forum. For this reason, the reasonableness of a speech restriction is assessed in relation to the forum's purposes. Correlatively, the purposes of a forum must be "limited and legitimate."¹⁷³ The Court, however, has never explicated criteria for determining whether a purpose is limited and legitimate.

The Court provided further explanation on the meaning of reasonableness in another case, *Cornelius v. NAACP Legal Defense and Educa-*

scrutiny to strike down the code. *Id.* at 172. Important to this discussion is the fact that the code reflected a zoning regulation; it did not provide any sort of economic subsidy for speech. Hence, *Reed* would not be decided any differently even if the test for whether to apply the limited public forum doctrine was the presence of an economic subsidy for speech.

171. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) ("Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

172. *Id.* at 829 (citation omitted) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804–06); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (emphasis added)).

173. *Rosenberger*, 515 U.S. at 829.

tional Fund, Inc., which concerns a speech restriction in a “nonpublic” forum.¹⁷⁴ Although *Cornelius* is not a limited public forum case, the nonpublic forum test imposes the same criteria for speech restrictions (reasonableness and viewpoint neutrality); hence, the Court’s explanation of reasonableness in *Cornelius* would appear to apply to the limited public forum.¹⁷⁵ The *Cornelius* Court observed:

The Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated.¹⁷⁶

In the quotation, the Court signaled that the reasonableness requirement should be applied flexibly. The requirement does not mean “the most reasonable or the only reasonable” restriction.¹⁷⁷ Furthermore, the nature of the speech being restricted need not be strictly incompatible with the purpose of the forum. In short, the requirement of reasonableness preserves discretion for the government to assess whether a category of speech will fulfill the forum’s purpose.

2. Reasonableness of Moral Restrictions on Copyright Eligibility

As discussed above, the reasonableness standard requires that the purpose of the forum be both “legitimate” and “limited.”¹⁷⁸ The purpose of the copyright forum is to promote the progress of science, or in other words, to further knowledge and its fruits.¹⁷⁹ That this purpose is legitimate cannot be doubted given that it derives from the Constitution.¹⁸⁰ That this purpose is limited, though, may not be immediately apparent. If one construes “the Progress of Science” as having no limiting effect on Congress, the purpose of copyright’s forum would be unlimited in nature, allowing Congress to discriminate among content for any reason at all. Under this erroneous construction of the Intellectual Property Clause, Congress could discriminatorily grant or deny copyright protection in order to further any purpose, regardless of its effect on promoting the progress of science. Without a meaningful purpose, granting copyright to reward certain campaign contributors or to favor certain segments of the economy would be reasonable. But Congress cannot exercise its powers under the Intellectual Property Clause for such purposes.¹⁸¹ The purpose

174. *Cornelius*, 473 U.S. at 808–09 (1985).

175. *Id.* at 806 (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”).

176. *Id.* at 808.

177. *Id.*

178. *Rosenberger*, 515 U.S. at 829

179. *See supra* note 145.

180. *See* U.S. CONST. art. I, § 8, cl. 8.

181. *See* Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1 (2013) (arguing that “the

of promoting the progress of science limits Congress to enact only legislation that furthers the public store of knowledge and its fruits. The forum of copyright is therefore limited.

Although the progress of science represents a limited purpose, the purpose is nevertheless broad in scope. As I have written elsewhere, the Intellectual Property Clause provides Congress authority to make reasonable judgments in fulfilling its constitutional purpose of promoting the progress of science.¹⁸² Put simply, Congress has discretion to deny protection for that which it reasonably believes will not promote progress, meaning expression that can reasonably be understood to cause harmful consequences.¹⁸³ Moreover, according to the language quoted above from *Cornelius*, a restriction may still be reasonable even if the subject matter of the restriction is not entirely incompatible with the purpose of the forum. So, the fact that a subject of content (say, libelous content) may promote some knowledge (say, knowledge about fabricating news accounts) does not necessarily mean that denying that subject is unreasonable. The reasonableness requirement would not be difficult to satisfy.

C. VIEWPOINT ANALYSIS OF MORAL RESTRICTIONS

Assuming that Congress's denial of copyright protection would usually be reasonable under its broad discretionary authority of the Intellectual Property Clause, the application of the limited public forum doctrine to intellectual property comes down to the second requirement—Congress's restriction must be viewpoint neutral. The effect of the First Amendment on Congress's copyright power would thus amount to a prohibition of viewpoint-discriminatory criteria. Therefore, the inquiry into viewpoint discrimination is critically important to the speech analysis. It *is* the speech analysis.

1. Law on Viewpoint Discrimination

The Supreme Court has explained that viewpoint discrimination occurs when the government “give[s] one side of a debatable public question an advantage in expressing its views to the people.”¹⁸⁴ This definition might suggest that viewpoint discrimination has a narrow application, occurring only in situations where the government restricts speech that overtly prescribes a position on a debatable issue—for instance, restricting speech that specifically advocates in favor of gun control. In application,

Progress of Science” of the Intellectual Property Clause limits Congress’s copyright power).

182. See Ned Snow, *Discrimination in the Copyright Clause*, 67 ALA. L. REV. 583, 592 (2016).

183. See Snow, *supra* note 131, at 179–89, 225 (arguing that Congress may deny protection for expression that results in harmful outcomes for society, insofar as the criteria for denial are viewpoint neutral).

184. *McCullen v. Coakley*, 573 U.S. 464, 483 (2014) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994)).

however, the meaning of viewpoint discrimination is anything but simple or narrow. Viewpoint discrimination occurs where the government's reason for restricting speech is a speaker's message, opinion, ideology, or perspective. It also occurs where that reason is to restrict all viewpoints on an issue (not just a specific viewpoint). Lastly, it occurs where the government's reason for the restriction is to prevent a harmful effect that follows from the message in the speech. The subsections below explain these points.

a. Speaker Viewpoint as a Rationale for the Restriction

The inquiry into viewpoint discrimination necessarily examines why the government is restricting speech.¹⁸⁵ The meaning of "viewpoint" is broad: the Court has explained that viewpoint includes "the specific motivating ideology or the opinion or perspective of the speaker."¹⁸⁶ The Court has also described viewpoint as the "message" within the content.¹⁸⁷ Hence, if the government's rationale for restricting the speech is a disagreement with the opinion, perspective, ideology, or message of the content, the restriction is viewpoint discriminatory.

Two cases with opposing conclusions demonstrate viewpoint-discriminatory and viewpoint-neutral rationales for content discrimination. In *Rosenberger v. Rector and Visitors of the University of Virginia*, a university refused to fund student publications that "promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality."¹⁸⁸ The Court held that the reason for imposing the restriction was to target the students' viewpoints about the existence of a deity or an ultimate reality.¹⁸⁹ In the Court's words: "[the university] selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."¹⁹⁰ The rationale for the restriction—disagreement with the expression of specific viewpoints—demonstrated that the restriction was viewpoint discriminatory.

By contrast, in *Christian Legal Society v. Martinez*, a law school adopted a policy that conditioned recognition of student-organization status on allowing any and all students to become a member. This "all comers" policy prevented students from speaking their viewpoints; in particular, the plaintiff student organization, Christian Legal Society (CLS), could not speak their views on homosexual conduct or religious beliefs as a basis for excluding students from membership.¹⁹¹ Nevertheless, the Court held the policy to be viewpoint neutral.¹⁹² According to

185. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 831 (1995) (defining the viewpoint inquiry as an examination into "the rationale for the restriction").

186. See *id.*

187. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–2300 (2019).

188. *Rosenberger*, 515 U.S. at 825, 827 (1995) (alteration in original).

189. *Id.* at 831.

190. *Id.*

191. *Id.* at 672–73.

192. *Id.* at 694–95.

the Court, the law school's rationale for its all-comers policy was "to redress th[e] perceived harms' of exclusionary membership policies . . . [rather than] mere disagreement with [any student group's] beliefs or biases."¹⁹³ The Court pointed out that this reason for the restriction was different than the restriction in *Rosenberger* because the law school was targeting effects of the conduct of excluding students from membership, as contrasted with the university's targeting religious viewpoints in *Rosenberger*.¹⁹⁴ In other words, the reason for restricting speech in *Martinez* related to the conduct of CLS (specifically, the act of excluding students from membership)—not any viewpoint of CLS (specifically, its religious views). The restriction was therefore viewpoint neutral.

What about a restriction of a general category of speech? The answer is that whether a restriction on a general category is viewpoint discriminatory depends on the reason for the restriction. If the reason is to restrict certain viewpoints (or all viewpoints) that fall within the general category, the restriction is viewpoint discriminatory.¹⁹⁵ If the reason does not relate to the viewpoints within that category, then the restriction is viewpoint neutral. Thus, whether a restriction on a general category of speech is viewpoint discriminatory comes down to whether the government is seeking to silence multiple viewpoints, or instead, is furthering a reason that is distinct from any viewpoint in the content.

The Court's recent trademark cases mentioned above, *Matal v. Tam* and *Iancu v. Brunetti*, exemplify this principle.¹⁹⁶ Recall that in *Tam*, Congress had barred registration of marks that could "disparage" others,¹⁹⁷ and in *Brunetti*, Congress had barred registration of marks that were "scandalous" or "immoral."¹⁹⁸ None of these bars singled out specific viewpoints: they neither prevented disparagement of specific people nor prevented specific immoral or scandalous views. Hence, from one perspective, the bars in *Tam* and *Brunetti* seemed viewpoint neutral because they applied to general categories of speech. Nevertheless, both the *Tam* and *Brunetti* Courts held these bars to be viewpoint discriminatory.¹⁹⁹ The Court explained that Congress was targeting all viewpoints within the respective categories of content.²⁰⁰ The upshot is that viewpoint discrimination occurs when the government targets messages within content, regardless of whether the messages consist of a single viewpoint,

193. *Id.* at 696 (first and third alteration in original) (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993)).

194. *Id.* at 694–96.

195. *Id.* at 829, 831 ("If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.").

196. See *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017).

197. *Tam*, 137 S. Ct. at 1751.

198. *Brunetti*, 139 S. Ct. at 2297.

199. *Id.* at 2299; *Tam*, 137 S. Ct. at 1763 (plurality opinion).

200. *Brunetti*, 139 S. Ct. at 2299–2301; *Tam*, 137 S. Ct. at 1763 (plurality opinion).

many viewpoints, or even contradictory viewpoints.²⁰¹

b. Speech Effects as a Rationale for the Restriction

Suppose that the government restricts speech because of the effects that follow from the speech, rather than a disagreement with the viewpoint within the speech. Does that rationale for restricting the speech imply that the discrimination is viewpoint neutral? Not necessarily. If the reason for the restriction is the listener's reaction to a message in the speech, that reason is viewpoint discriminatory. As Justice Kennedy explained, "a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message."²⁰²

The case of *R.A.V. v. City of St. Paul* further enforces this teaching.²⁰³ In *R.A.V.*, a city ordinance penalized persons who placed a burning cross on property with knowledge that the act would arouse anger, alarm, or resentment in others on the basis of race or color.²⁰⁴ The city argued that the ordinance was constitutional because it targeted only the effects of the speech (i.e., viewers' emotional responses to a burning cross).²⁰⁵ Rejecting this argument, the Court explained that "[l]isteners' reactions to speech," and in particular "the emotive impact of speech on its audience," would not count as a permissible justification.²⁰⁶ The restriction was viewpoint discriminatory.²⁰⁷

Another case that applied this principle is *Agency for International Development v. Alliance for Open Society International, Inc.*²⁰⁸ There, Congress had funded nongovernmental organizations on the condition that none of their programs would promote the legalization of prostitution or sex trafficking.²⁰⁹ The condition for the funding represented an attempt to prevent harmful effects (the actual activities of prostitution and sex trafficking) that follow from the viewpoint that prostitution and sex trafficking should be legal. As harmful as those effects are, the Court held that the condition was viewpoint discriminatory.²¹⁰ Listeners' actions in response to the viewpoint was not a permissible reason for the restriction. Hence, if the reason for restricting the speech constitutes a listener's response to the message of the speech, the reason is viewpoint discriminatory.

201. Part IV further discusses these cases.

202. *Tam*, 137 S. Ct. at 1767 (Kennedy, J., concurring).

203. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

204. *Id.* at 380.

205. *Id.* at 394.

206. *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 321, 334 (1988)).

207. *Id.* at 391.

208. 570 U.S. 205 (2013).

209. *Id.* at 208.

210. *Id.* at 220–21.

On the other hand, if the reason for copyright denial is an effect of the speech that is not based on a viewpoint or a response to a viewpoint in the message, that reason would be viewpoint neutral. Consider the *Martinez* case, discussed in the subsection above, where the law school conditioned its recognition of student-organization status on an all-comers policy.²¹¹ The Court explained that the condition existed because “[the law school] ‘desire[d] to redress th[e] perceived harms’ of exclusionary membership policies.”²¹² The reason for the restriction was the “perceived harms,” which is an effect of speech (i.e., the effect of telling students that they cannot join the group). Yet the Court was careful to point out that the perceived harms did not follow from any viewpoint in CLS’s speech at issue (i.e., CLS’s views on homosexual conduct or its religious beliefs). Rather, the perceived harms followed from the *act* of barring the students from joining the group.²¹³ In other words, the Court noted that the perceived harms followed from the conduct of denying membership and not from the students’ perspective or views that would lead to the denial.²¹⁴ Because the effects of the speech (i.e., the perceived harms) were not directly related to any specific views of the student organization, they were viewpoint neutral.

Other speech-forum cases illustrate this principle. In *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, a school board excluded all but one union from communicating with teachers via an interschool mail system for teachers.²¹⁵ In a forum analysis, the Court held that the preferential treatment of the union was viewpoint neutral because the reason for its exclusive use of the mail system was that the union had been elected the exclusive bargaining representative for teachers.²¹⁶ Importantly, the Court also approved another reason for excluding rival unions—the exclusion prevented schools “from becoming a battlefield for inter-union squabbles.”²¹⁷ This other reason reflects a potential negative effect of the speech at issue: the speech could create an environment ripe for articulating disputes between unions and that effect would be inconsistent with the purpose of the teachers’ mail system. Because that potential effect was not specific to any message by any union, it was viewpoint neutral.

In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, the nonpublic forum case mentioned above, the government had excluded certain organizations from participating in a charity campaign aimed at

211. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 672–73 (2010).

212. *Id.* at 696 (third alteration in original) (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993)).

213. *Id.* (“The Law School’s policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior CLS’s conduct—not its Christian perspective—is, from [the law school’s] vantage point, what stands between the group and RSO status.” (citation omitted)).

214. *Id.*

215. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 39 (1983).

216. *Id.* at 49.

217. *Id.* at 52 (quoting *Haukedahl v. Sch. Dist. No. 108*, No. 75-C-3641 (N.D. Ill. May 14, 1976)).

federal employees.²¹⁸ The Court noted acceptable rationales for the exclusion of those organizations' speech:

We conclude that the Government does not violate the First Amendment when it limits participation in the [charity campaign] in order to minimize disruption to the federal workplace, to ensure the success of the fund-raising effort, or to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups.²¹⁹

Like the previous rationales, these rationales for restricting speech constitute the effects of the speech: specifically, the excluded organizations' speech could disrupt the workplace, harm the success of the fundraising effort, or create an appearance of political favoritism. Because the effects were not in response to any particular message or opinion of speakers, the regulation was viewpoint neutral.

In sum, if the rationale for restricting speech is disapproval of a message within the content—whether or not the disapproval is of one message or multiple messages—the restriction is viewpoint discriminatory. Likewise, if the rationale is based on effects that are in response to a message within the content, the restriction is viewpoint discriminatory. However, if the rationale is unrelated to the message, including the effects of speech that are nonresponsive to the message, the restriction is viewpoint neutral.

With these principles in mind, we now consider whether denying copyright protection for a moral reason would constitute viewpoint discrimination.

2. *Moral Denials of Copyright Protection*

The viewpoint-neutrality requirement severely limits Congress's ability to implement moral values through denying copyright protection. In most instances, a denial of protection because of Congress's moral viewpoint would target the speaker's moral viewpoint. More precisely, if the rationale for the denial is that Congress believes the message within the content does not promote the progress of science, the rationale would be viewpoint discriminatory. Congress would be judging that a message is not worth promoting. For example, consider hypothetical denials for content specifically advocating against abortions, gun rights, or mail-in voting. The reason for the denial is Congress's moral view on these subjects, which necessarily contradicts the view of the speaker. Congress would be denying protection because of its contradictory belief.

What about denials of copyright protection for content that does not advocate for any position, but rather, only portrays a certain expression? For instance, suppose that Congress were to deny protection for content

218. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 790 (1985).

219. *Id.* at 813. The Court ultimately remanded the case for a determination on whether the government had excluded certain groups because of their viewpoints rather than this purported reason. *Id.* at 812–13.

that portrays teen pregnancy or depictions of teen drug use. Although the denial might not explicitly state a position on those situations, the Court would consider the rationale for the denial. Likely, the rationale is to prevent the messages of teen pregnancy or drug use from influencing teenage audience members. If that is the rationale, Congress would be targeting the effects of the messages on their audiences, so the denial would be viewpoint discriminatory. Furthermore, the argument that viewpoint discrimination is occurring becomes even stronger in the absence of evidence that the content causes harmful effects that are unrelated to their messages. Hence, the denial would be viewpoint discriminatory.

The question thus arises as to whether Congress may ever apply a moral value to deny copyright protection. Can a moral reason for denial ever be viewpoint neutral? The answer is yes. A moral reason that is viewpoint neutral would be one that does not relate to the speaker's message or the effects that are responsive to that message.²²⁰ The first subsection below provides examples of such viewpoint-neutral denials, and the next subsection provides further examples of viewpoint-discriminatory denials.

a. Viewpoint-Neutral Examples

i. Expression Necessitating the Commission of a Violent Crime

Suppose that Congress denies protection for expression that necessitates the author committing a violent crime while creating the expression. The denial would apply where the author commits the criminal act for the purpose of creating the expression. Whether a person murders someone in order to photograph a murdered corpse, films himself committing the murder in order to create a video of the act, or murders someone simply to steal the victim's camera and photograph the sunset—this bar to copyright protection would apply. The expression need not include any portrayal of the violent act to be barred from protection.

The denial of copyright protection for such content would be viewpoint neutral because the rationale would be to refrain from rewarding criminal actions with the economic benefit of copyright. That rationale would not relate specifically to anything in the content itself; rather, it would relate to the actions involved in creating the content. Regardless of whether the content of the expression portrays the criminal act, the denial would apply. Hence, the rationale would be viewpoint neutral.

ii. Trade Secrets

Congress might deny protection for content that comprises another

220. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 394–95 (1992).

person's trade secret.²²¹ The denial would apply to persons who lack permission to reproduce or publish the trade-secret information. If I learn of confidential information that trade secret law protects, and I lack authority to disclose it, I would not be able to receive copyright protection for my expression of the information.

The rationale for this denial would be to prevent unfair business practices and unlawful behavior.²²² This reason would stem from the illegality of exercising the copyright right of public distribution: specifically, public distribution of the trade secret would be unlawful.²²³ The denial, then, would be based on the unlawful effects of exercising a copyright right. Importantly, though, the reason would not be to prevent the public from learning the information contained within the trade secret. That reason would be viewpoint discriminatory because it essentially seeks to prevent listeners from learning the messages within the content of trade secrets. Instead, the reason for the denial would be to reduce the incentive to commit an unlawful act. Unrelated to any message within a trade secret, that reason for the denial would be viewpoint neutral.

iii. Virtual Reality

Suppose that Congress were to deny copyright protection for virtual-reality games. As a matter of policy, this seems imprudent. Nevertheless, there could be a viewpoint-neutral reason for denying protection. Studies indicate that virtual realities can cause some users to experience vertigo, nausea, or dizziness.²²⁴ Certainly this is debatable.²²⁵ Yet, assuming it is at least a reasonable basis for Congress to refrain from extending protection under its power to promote the progress of science,²²⁶ the basis

221. See generally Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified as amended in scattered sections of 18 and 34 U.S.C.).

222. See *Abbott Labs v. Norse Chem. Corp.*, 147 N.W.2d 529, 533 (Wis. 1967) ("The law concerning trade secrecy developed as common law. The basis of the doctrine is an attempt to enforce morality in business.").

223. See generally Defend Trade Secrets Act of 2016.

224. See, e.g., Hironori Akiduki, Suetaka Nishiike, Hiroshi Watanabe, Katsunori Matsuoka, Takeshi Kubo & Noriaki Takeda, *Visual-Vestibular Conflict Induced by Virtual Reality in Humans*, 340 NEUROSCIENCE LETTERS 197, 199 (2003); Huw Jones, *Virtual Reality: Panacea or Pandora's Box?*, 2 VIRTUAL REALITY 147, 148 (1996).

225. See, e.g., Chun-Chia Lee, Kuo-Lun Hsiao & Chia-Chen Chen, *Exploring the Benefit and Sacrifice Factors of Virtual Reality Gameplay*, FRONTIERS PSYCH., Mar. 10, 2020, at 1, 2.

226. The Supreme Court has opined that it affords Congress wide discretion in exercising its power under the Copyright Clause. In *Eldred v. Ashcroft*, the Court explained: [W]e 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.

...
... [W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. ...

...
... [I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.

537 U.S. 186, 204, 208, 212 (2003).

would be viewpoint neutral. The purported effects of the games are unrelated to any message contained within the virtual-reality games. Any viewpoints contained in the virtual realities are irrelevant to the reason for denial.

Now suppose that Congress were to deny protection for those games on the basis that they are a waste of time, leading many adults to lead unproductive lives.²²⁷ This basis would be viewpoint discriminatory. The judgment that virtual-reality games are a waste of time implicitly challenges a viewpoint inherent in those games—namely, that they are worth viewing. Indeed, if the waste-of-time rationale were deemed to be viewpoint neutral, Congress could deny protection for any view with which it disagreed on the basis that the message is a waste of time, or in other words, that it is not worth listening to. Obviously, that cannot be the case. Hence, the moral reasons of unproductivity or waste of time would imply viewpoint discrimination.

These two hypothetical bases for denial illustrate that the reason for denial must be clear.²²⁸ As explained above, viewpoint discrimination hinges on the government's rationale for restricting speech.²²⁹ The same denial could be either viewpoint neutral or viewpoint discriminatory depending on the objective rationale for denial. For this discussion though, we assume that the government can make the requisite showing to establish the rationale for its denial.

iv. Pornography

Congress might deny protection for pornographic works. This speech receives First Amendment protection.²³⁰ Pornographic expression represents content that is sexually explicit in a way that indicates an intent of the creator to stimulate a sexual experience in his or her audience.²³¹ It encompasses content that may include more than that which is legally obscene.²³²

Two reasons support the denial of protection for pornographic content.

227. See Maeve Duggan, *Gaming and Gamers*, PEW RSCH. CTR. (Dec. 15, 2015), <https://www.pewresearch.org/internet/2015/12/15/gaming-and-gamers> [<https://perma.cc/4TYA-QBFU>] (finding the public is closely split on the issue of whether video games are a “waste of time”).

228. See generally *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968) (“Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in [this circumstance is thought sufficient to risk the possibility of misreading Congress’ purpose.”).

229. See discussion *supra* Section III.C.1.

230. See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 324–325 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

231. See Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL’Y REV. 119, 121 n.8 (2012).

232. See *Miller v. California*, 413 U.S. 15, 23–24 (1973) (defining obscenity as content “which, taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value”).

The first is to discourage acts of violence against women.²³³ The creation of pornography often involves committing such violent acts. Congress might desire to avoid supporting such violence. This reason, then, is much like the example cited at the beginning of this subsection—denying protection where an author commits a violent crime as part of the creative process. Unlawful activity or violent acts in the creative process represent reasons that do not concern the message in the pornographic content. Whether or not that content actually portrays those acts is not the reason for denial. Rather, the reason is the fact that those actions often occur as part of the creative process.

The second reason is that consumption of pornography often leads to detrimental effects on the public. Consumption leads to decreased sexual satisfaction,²³⁴ increased likelihood of divorce,²³⁵ increased likelihood of casual sexual encounters by adolescents,²³⁶ and increased occurrences involving sexual aggression.²³⁷ Hence, both the creative process and the consumption of pornography result in harmful effects that serve as reasons for denial.²³⁸

Importantly, these two reasons do not condemn or otherwise respond to any viewpoint within pornographic content.²³⁹ Indeed, the reasons that condemn the effects of producing and viewing pornography are entirely consistent with the idea of sexual activity, which pornographic content portrays. Those who object to pornography usually do not object to sex.²⁴⁰ Therefore, the reasons for denial appear viewpoint neutral.

233. See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 818–20 (2008).

234. Dolf Zillmann & Jennings Bryant, *Pornography's Impact on Sexual Satisfaction*, 18 J. APPLIED SOC. PSYCH. 438, 449–50 (1988).

235. Samuel L. Perry & Cyrus Schleifer, *Till Porn Do Us Part? A Longitudinal Examination of Pornography Use and Divorce*, 55 J. SEX RSCH. 284, 292 (2018).

236. See generally Jochen Peter & Patti M. Valkenburg, *Adolescents and Pornography: A Review of 20 Years of Research*, 53 J. SEX. RSCH. 509, 519, 523 (2016) (finding that pornography use was strongly correlated to permissive sexual attitudes, gender-stereotyping, earlier experimentation with sexual intercourse, increased experience with casual sex, and higher instances of sexual aggression).

237. *Id.* at 523.

238. To be clear, my argument here does not rely on or adopt the reasoning of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *City of Renton*, the Court held constitutional a local zoning ordinance that prohibited adult-film theaters “from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.” *Id.* at 43. Puzzlingly, the Court deemed the zoning ordinance to be content neutral, even though the ordinance specifically noted that it was restricting businesses that sold, rented, or showed “sexually explicitly materials.” *Id.* at 44, 48. On this basis, the decision has been criticized by judges and academics alike. See, e.g., *Boos v. Barry*, 485 U.S. 312, 334–38 (1988) (Brennan, J., concurring in part); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 484–91 (1996). In contrast to *City of Renton*, my argument does not rely on the premise that copyright denial of pornographic material is content neutral.

239. See John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 314 (2009) (“[P]ornography does not typically express any concrete viewpoint (although it may be used to do so), but rather, is characterized by its sexual explicitness.”).

240. See Ned Snow, *Denying Trademark for Scandalous Speech*, 51 U.C. DAVIS L. REV. 2331, 2335–36 (2018) (observing that the public does not disagree with the idea of sex in pornographic portrayals).

One might argue that pornographic expression implicitly asserts that using pornography to experience sexual stimulation is good for society. Yet the presence of such an implicit viewpoint is dubitable. The view that using pornography is moral is not necessarily (perhaps not even usually) implicit within pornographic content.²⁴¹ And even if it were, that would not matter. The reason for denying pornography is not because of anything that the speaker is saying. The reason is because of pornography's harmful effects that are unrelated to the content's message. So regardless of what pornographers might be asserting through their content, Congress is simply seeking to avoid supporting creations that harm society. That is the reason.

b. Viewpoint-Discriminatory Denials

Denying copyright for expression that is related to criminal activity would likely be a popular choice by Congress. Below are three such hypothetical denials. All would likely be viewpoint discriminatory.

i. Live Depictions of Murder

Congress might consider denying copyright protection for live recordings of murderous behavior. Unlike the first example in the subsection on viewpoint-neutral examples, this denial would apply to any author of such expression, regardless of whether the murderer created the film. The moral reason for this denial is likely that such depictions are upsetting to much of the population. That reason would be viewpoint discriminatory because it is based on listeners' reaction to the message of the content.²⁴² The offensiveness would be in direct response to the message, and as the Court has recently noted: "Giving offense is a viewpoint."²⁴³ Hence, the offensiveness of content cannot be a viewpoint-neutral reason.

This example contrasts with the viewpoint-neutral example introduced at the beginning of this subsection—namely, denying protection for expressions that necessitate the author committing a violent crime. In that example, denying protection because of an unlawful act in the creative process is not contingent upon any message within the expression, so the denial would be viewpoint neutral. By contrast, in this example, denying protection for recordings of unlawful acts does require an examination of the content; the denial reflects a disagreement with the acts portrayed, so it would be viewpoint discriminatory. Thus, the seemingly small distinc-

241. Creators of pornography likely believe and portray just the opposite view, seeking to capitalize on the moral suggestion that content should *not* be consumed. Indeed, the immoral nature of content appeals to a certain audience. A reputation of immorality yields curiosity that fuels demand. Hence, pornographic content itself does not imply a view that its consumption is appropriate or moral. To the contrary, it often suggests just the opposite view.

242. *Cf.* *United States v. Stevens*, 559 U.S. 460, 464, 482 (2010) (holding unconstitutional a statute that criminalized "depictions of animal cruelty").

243. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion).

tion in scope between these two examples makes a constitutional difference under the First Amendment.

ii. Recordings of Mass Shootings

Related to the above example, Congress might consider denying protection for live recordings of mass shootings, regardless of whether the perpetrator creates the recording. The reason for this denial could not be to refrain from rewarding unlawful actions, for the mere act of recording is not unlawful, and the person who records the atrocity is not likely the person who is responsible for it.²⁴⁴ Hence, refraining from supporting unlawfulness would not seem to be a reasonable basis for denying this content.

A different reason though, is that when such recordings become public, they increase the likelihood of perpetrators mimicking the violent behavior. The theory is called mass shooting contagion.²⁴⁵ The reason for denial, then, relates to the message's behavioral effect on other potential mass shooters. This reason would therefore seem directly related to the message of the content, akin to restricting speech because certain views might result in civil unrest. Simply put, a viewer's tendency to mimic a message or to act inappropriately because of the message appears to be an effect that is directly responsive to the viewpoint in the message—killing people. Therefore, this denial would not be viewpoint neutral.

iii. Crime-Facilitating Speech

Congress might consider denying copyright protection for speech that facilitates certain types of criminal activity. In his landmark article, *Crime-Facilitating Speech*, Professor Eugene Volokh considers First Amendment issues that surround this sort of speech, i.e., speech that provides information that makes it easier for people to engage in unlawful conduct.²⁴⁶ Volokh argues that, with few exceptions, crime-facilitating speech should receive First Amendment protection.²⁴⁷ An example of such speech is *The Anarchist Cookbook*, which provides instructions on how to commit a variety of crimes, from creating bombs to manufacturing illicit drugs.²⁴⁸

A copyright denial for this material would be viewpoint discriminatory. Congress would be denying copyright protection because Congress disagrees with authors advocating for or providing information about crimi-

244. See, e.g., David Heinzmann, *Home Security Video Captures Close-Up Images of Gunman Killing Companion at Point-Blank Range in Rogers Park*, CHI. TRIB. (July 3, 2020, 7:50 PM), <https://www.chicagotribune.com/news/breaking/ct-shooting-video-rogers-park-20200704-2fpy43zaevfbroacna33yrjkym-story.html> [<https://perma.cc/22LX-YQ76>].

245. See Adam Lankford, *Fame-Seeking Rampage Shooters: Initial Findings and Empirical Predictions*, 27 AGGRESSION & VIOLENT BEHAV. 122, 127–28 (2016).

246. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1096–1102 (2005).

247. See *id.* at 1106.

248. See generally WILLIAM POWELL, *THE ANARCHIST COOKBOOK* (1971).

nal activity. Even though Congress would not disagree with the truth of the matter asserted within crime-facilitating content—for instance, a description about how to make a bomb—Congress would be objecting to that message because of consequences that supposedly follow directly from the message. In particular, readers might engage in unlawful conduct in direct response to the viewpoints asserted in the material. Hence, Congress’s disagreement with that consequence, which follows directly from the viewpoint in the message, would be viewpoint discriminatory. Accordingly, Congress could not deny copyright protection for crime-facilitating speech.²⁴⁹

D. OTHER STANDARDS OF REVIEW

This Part examines whether other standards of review might better apply in evaluating moral restrictions on copyright eligibility. It considers strict scrutiny, rational basis, and intermediate scrutiny.

1. *Strict Scrutiny*

The strict scrutiny standard of review represents the normal framework for evaluating whether content-based restrictions on speech are constitutionally permissible. Strict scrutiny sets a high bar for the government to justify its content restriction: the government must demonstrate that the restriction is narrowly tailored to serve a governmental interest that is compelling.²⁵⁰ To that end, the government “must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution.”²⁵¹ Public disapproval of content cannot be the problem,²⁵² and the means of curtailing the speech

249. A specific type of crime-facilitating speech raises a complication. Malware consists of a computer program that gives instructions for the computer to carry out, often employed to hack into or cause harm to another computer. *Malware*, FED. TRADE COMM’N: CONSUMER INFO., <https://www.consumer.ftc.gov/articles/0011-malware> [https://perma.cc/96LZ-TSLV]. The reason for denying copyright protection would be to protect against such harmful effects of the malware, which are usually unlawful. *See, e.g.*, N.Y. PENAL LAW §§ 156.00–.50 (McKinney 2019); S.C. CODE ANN. § 16-16-20 (2020); WIS. STAT. ANN. § 943.70 (West 2020). This reason relates directly to the message of the software in that the message consists of instructions to a computer. The instructions are intended to effectuate the bad results, and the denial is in response to those results. On this basis, the denial would seem viewpoint discriminatory. Nevertheless, the reason for denying protection to malware could be to restrict the criminal activity itself—not merely speech about the activity. Expressing the malware code to a computer is part of the criminal act. Arguably, then, Congress is targeting the criminal action by restricting the code, which may suggest a different standard of review under *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”). If targeting the criminal action itself, the denial of copyright protection would not be unconstitutional.

250. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

251. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (citations omitted) (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822–23 (2000)).

252. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

must be the least restrictive available.²⁵³ Hence, given the rigidity of the strict scrutiny standard, the Court has observed: “It is rare that a regulation restricting speech because of its content will ever be permissible.”²⁵⁴

In the copyright context, any content restriction (moral or otherwise) would not satisfy the strict scrutiny standard. Consider the established copyright doctrine that denies protection for expression that is factual in nature or that is not otherwise sufficiently creative.²⁵⁵ According to Supreme Court precedent, denial of protection for this content reflects a constitutional requirement under the Intellectual Property Clause.²⁵⁶ That is to say, the Clause values the production of creative expression over factual or non-creative expression. Nevertheless, this reason for denying protection does not suggest an actual problem that warrants speech suppression. Specifically, the “problem” of not enough creative speech does not appear to be sufficiently compelling so as to justify restricting all non-creative speech. Indeed, there does not appear to be any actual problem in need of solving. Thus, a fundamental content-based requirement of copyright protection—content must be creative—would fail a strict scrutiny analysis. And if this content-based requirement cannot pass strict scrutiny, the First Amendment would be inconsistent with the Intellectual Property Clause. This seeming contradiction suggests the appropriateness of adopting a more lenient standard of review.

Professor Yen has argued that copyright’s restrictions cannot be subject to a blanket strict-scrutiny standard. He points to the 1790 Copyright Act’s content-based copyright protection for any “map, chart, book or books,” and the fact that the 1790 Act continued in effect even after the First Amendment was ratified in 1791.²⁵⁷ This is strong evidence that the Framers did not intend for the First Amendment to preclude content-based legislation under the Intellectual Property Clause. Hence, the history of copyright appears to preclude the strict scrutiny standard of review for content-based restrictions in copyright.

2. *Rational Basis*

The rational basis standard of review cannot apply to moral restrictions on copyright eligibility. The standard is highly deferential, requiring only that a statute be rationally related to a legitimate government interest.²⁵⁸ It does not apply where a statute implicates a First Amendment interest.²⁵⁹ As argued in Section II.B, moral restrictions on copyright protec-

253. See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

254. *Brown*, 564 U.S. at 799 (quoting *Playboy*, 529 U.S. at 818).

255. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) (opining that copyright does not protect facts or unoriginal expression).

256. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884); *Feist*, 499 U.S. at 346–47.

257. See Yen, *supra* note 132, at 1258–59.

258. See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

259. See generally *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (“[T]he law does not implicate a fundamental right and is therefore subject only to ordinary rational basis review.”).

tion implicate the speech rights of authors. Hence, rational basis cannot apply.

This conclusion is not disturbed by Supreme Court case law applying rational basis review in copyright cases that have raised speech issues. In *Eldred v. Ashcroft*, the Court considered Congress's extension of the copyright term for an additional twenty years, which applied to works that authors had already created under a shorter term.²⁶⁰ In *Golan v. Holder*, the Court considered Congress's similar act of re-copyrighting works whose term had already expired.²⁶¹ In both cases, petitioners challenged Congress's acts on First Amendment grounds: Congress arguably restricted speech of people who desired to repeat expressions that were about to enter, or had already entered, the public domain.²⁶² In other words, petitioners argued that Congress had restricted speech of copiers. The Court dismissed those challenges on the basis that the constitutional purpose of copyright—to incentivize free speech—justified Congress's expansion of the monopoly protection, even though that meant restricting copiers' speech.²⁶³

Eldred and *Golan* are inapposite to the situation where Congress targets immoral content in denying copyright protection. Unlike moral restrictions on copyright protection, the legislative acts in *Eldred* and *Golan* did not target specific content. Extending the copyright term and re-copyrighting public domain works are not content-based statutes.²⁶⁴ Moreover, the Court in both cases was faced with speech interests of copiers—not authors. Indeed, the *Eldred* Court noted: “The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”²⁶⁵ The Court thus recognized a free speech distinction between speech rights of copiers and authors. Lastly, the *Eldred* Court relied on speech-protective doctrines (fair use and the idea-expression dichotomy) that address speech interests of copiers to justify its less demanding speech analysis.²⁶⁶ Therefore, the Court’s

260. *Eldred v. Ashcroft*, 537 U.S. 186, 192–93 (2003).

261. *Golan v. Holder*, 565 U.S. 302, 307 (2012).

262. *See id.* at 307–08; *Eldred*, 537 U.S. at 193, 218.

263. *Golan*, 565 U.S. at 327–28; *Eldred*, 537 U.S. at 219. The *Eldred* Court stated: We reject petitioners’ plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to *promote* the creation and publication of free expression. 537 U.S. at 218–19.

264. *See generally* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 48, 49 (2001) (“[Copyright’s] target is not the viewpoint, subject matter, or even communicative impact of the infringer’s speech, but rather the infringement’s deleterious impact on the copyright incentive.”); Erwin Chemerinsky, *Balancing Copyright Protection and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 93 (2002) (agreeing with and quoting same).

265. *Eldred*, 537 U.S. at 221.

266. *Id.* at 219–20.

deference to Congress in *Eldred* and *Golan* should not be interpreted as justifying a less restrictive speech standard for evaluating content-based restrictions for copyright eligibility.

3. *Intermediate Scrutiny*

The last standard of review to analyze is intermediate scrutiny. A speech restriction is justifiable under intermediate scrutiny only if the restriction directly advances a substantial government interest and is narrowly tailored to achieve that interest.²⁶⁷ This standard governs speech regulations in the commercial context. It provides the government more flexibility to regulate speech in the commercial context than the strict scrutiny standard would otherwise provide.²⁶⁸

Professor Yen has argued for applying this standard in evaluating content restrictions on copyright eligibility.²⁶⁹ In my view, that argument makes sense to a certain extent, even though expression that may be eligible for copyright protection is not necessarily commercial speech per se.²⁷⁰ Yen has observed that copyright protection enables commercial markets for the sale of copyright rights, and legislatures need flexibility to fine-tune the commercial incentives that copyright protection creates.²⁷¹ For this reason, copyright has a clear commercial component. Yen further observes that intermediate scrutiny is consistent with Congress's copyright power under the Progress Provision: the standard is less stringent than strict scrutiny, allowing Congress some discretion in deciding the subject matter of copyright protection.²⁷² These reasons make sense, so I agree that the intermediate standard could apply.²⁷³

267. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

268. See *Cent. Hudson*, 447 U.S. at 566.

269. Yen, *supra* note 132, at 1257–60. Professor Yen also argues that strict scrutiny should apply for content-based regulations that are viewpoint discriminatory in the Copyright Act. *Id.* at 1260–62. Such heightened scrutiny for viewpoint discriminatory regulations is inherent in the intermediate scrutiny analysis. In other words, if commercial speech is viewpoint discriminatory, it is invalid even under the intermediate scrutiny standard. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565, 572 (2011) (applying “heightened judicial scrutiny” to speech regulations that “are aimed at a particular viewpoint,” within the context of applying intermediate scrutiny where “the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest”).

270. See generally *Cent. Hudson*, 447 U.S. at 561, 563 (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience” and “speech proposing a commercial transaction”).

271. Yen, *supra* note 132, at 1258–59.

272. *Id.* at 1258.

273. Professor Neil Weinstock Netanel and Erwin Chemerinsky have argued for intermediate standard in reviewing speech restrictions that incidentally follow from the Copyright Act. See Netanel, *supra* note 264, at 54–69 (arguing for intermediate scrutiny in evaluating speech-restrictive effects of the Copyright Act on the public); Chemerinsky, *supra* note 264, at 93–94. Professor Eugene Volokh has also opined on the appropriate standard for reviewing copyright restrictions, arguing that content-based restrictions in intellectual property law must be subject to strict scrutiny unless they fit within a First Amendment exception. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred*, 44 *Liquormart*, and Bartnicki, 40 *HOUS. L. REV.* 697, 712

I nevertheless maintain that the limited public forum doctrine is a better fit for content-based restrictions on copyright eligibility. The reason is that copyright's constitutional purpose would moot much of the intermediate scrutiny analysis. Consider the government's interest in denying copyright protection for specific content that it considered to be immoral: the interest would be to refrain from incentivizing expression that is contrary to the progress of science. This interest must necessarily be substantial given the Progress Provision's grant of discretionary authority to Congress to incentivize content that promotes progress.

The next question in the intermediate scrutiny analysis is whether a denial of protection for that content would directly advance this interest. The answer will depend on whether the rationale for the denial is that the content does not, in fact, promote progress. In that regard, a rationale that is viewpoint discriminatory would not be an acceptable one because intermediate scrutiny requires viewpoint neutrality.²⁷⁴ Rather, the rationale must be based on the content's harmful effects that are nonresponsive to any message in the content, like those discussed above in Section III.C.2.a. Only if the content gives rise to such effects would denying copyright directly advance the government interest of not incentivizing content that fails to promote progress.

Assuming the government can demonstrate such harmful effects, the government would also satisfy the requirement that the restriction be narrowly drawn. Under the Intellectual Property Clause, denying copyright protection for content represents a constitutionally endorsed means of refraining from incentivizing content that fails to promote the progress of science.²⁷⁵ That is, to deny copyright protection is to refrain from exercising the power to promote progress. Accordingly, as the constitutionally prescribed means for not incentivizing content that would fail to promote progress, the copyright denial would necessarily be narrowly drawn.

(2003). Their arguments, however, are not relevant to this analysis because they contemplate restrictions that result from *enforcing* a copyright. Specifically, copyright owners can compel other speakers not to publish, display, or perform their copyrighted expression. *See* 17 U.S.C. § 106. Enforcing a copyright means that those other speakers face court orders, hefty monetary fines, and even jail time for speaking the copyrighted expression. *See id.* §§ 502, 504, 506. This speech restriction is very different from the indirect economic pressure that speakers face when deciding what original expression to speak. The absence of copyright protection for speaking content is not the same as an injunction, weighty damages, or a prison term. Denying copyright protection for a speaker is like denying an artist a grant for their artwork, whereas punishing a copyright infringer is like punishing a spy for speaking secrets. *Compare* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998) (considering effect of “decency and respect” criteria for artistic grant), *with* 18 U.S.C. § 798 (criminalizing disclosure of classified information). Although copyright's two types of speech restrictions arise under the same Copyright Act, the restrictions employ different methods of influencing speech, so they should have different standards of review. This is all to say that other professors' conclusions on the standard of review for restrictions in the Copyright Act are not directly relevant to this analysis.

274. *See Sorrell*, 564 U.S. at 565, 572.

275. *See* discussion *supra* Section III.B.2 (observing that the Intellectual Property Clause provides Congress direction to decide whether to copyright content).

Thus, application of intermediate scrutiny comes down to showing harmful effects that follow from, but are nonresponsive to, the specified content. Intermediate scrutiny would therefore be very similar to the test for whether the restriction is viewpoint neutral, discussed in the Section above.²⁷⁶ In view of this fact, the limited public forum seems to be a better fit for copyright than intermediate scrutiny because its viewpoint neutrality requirement essentially captures the import of the intermediate scrutiny analysis. Indeed, much of the intermediate scrutiny test is superfluous in view of the Intellectual Property Clause. Specifically, the Clause implies that the government's interest is substantial, that denying protection for harmful content directly advances that interest, and that the denial of copyright protection is a narrowly drawn restriction of speech. Limited public forum seems to be a better fit.

IV. CASE LAW

Several cases seem relevant to the examples of viewpoint-neutral copyright denials discussed above. Taken out of context, the cases could appear to stand in conflict with those examples. This Section, therefore, discusses these free speech cases.

A. *SIMON & SCHUSTER, INC. v. MEMBERS OF NEW YORK STATE CRIME VICTIMS BOARD*

In 1991, the Supreme Court considered the constitutionality of a “Son of Sam” law in the case of *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*.²⁷⁷ The New York legislature had passed a statute that required a criminal's income from works that described his crimes to be placed into an escrow account for the victims of the crime.²⁷⁸ The Supreme Court held that the statute violated the First Amendment.²⁷⁹ By forcing criminals to place their profits into the escrow account, “the statute plainly impose[d] a financial disincentive only on speech of a particular content.”²⁸⁰ The Court never stated whether the content discrimination was viewpoint neutral or discriminatory, although scholars have suggested that it is viewpoint neutral.²⁸¹ This conclusion appears to be correct because the rationale underlying the statute was to compensate victims for criminal acts, and that rationale does not depend on any specific message within the criminal accounts.²⁸²

276. See discussion *supra* Section III.C.2 (analyzing whether moral restrictions on copyright eligibility would be viewpoint discriminatory).

277. 502 U.S. 105, 108 (1991).

278. *Id.*

279. *Id.* at 123.

280. *Id.* at 116.

281. See e.g., Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 446 (1995) (classifying *Simon & Schuster* as a viewpoint-neutral case).

282. It is even possible that the legislature could have desired for more criminals to write narratives (and generate income) so as to increase the compensation for victims.

Simon & Schuster should not be interpreted as suggesting that copyright denials for any reason related to criminal activity would violate the First Amendment. This was not a limited public forum case; instead, the Court applied strict scrutiny.²⁸³ Therefore, assuming that the discrimination in *Simon & Schuster* is viewpoint neutral, the case is still consistent with the viewpoint-neutral copyright denial contemplated above, i.e., where Congress denies protection for persons who commit violent acts in the process of creating expression.²⁸⁴ One could argue, however, that the discrimination in *Simon & Schuster* is viewpoint discriminatory on the grounds that the New York legislature was targeting the criminal's perspective about committing a crime. Yet even if the restriction in *Simon & Schuster* is viewpoint discriminatory, the reason for denying copyright protection for persons who commit violent acts while creating expression is not to disagree with a criminal's portrayal of his violence. The copyright denial would apply regardless of whether the criminal portrays any unlawful action in the content of his expression: unlawful behavior is the reason for the copyright denial, not a *portrayal* of unlawful behavior. Hence, *Simon & Schuster* should not be understood as prohibiting Congress from denying copyright protection because of an author's criminal behavior.

B. *AMERICAN BOOKSELLERS ASS'N V. HUDNUT*

In 1985, the Seventh Circuit decided *American Booksellers Ass'n v. Hudnut*, a case in which the court struck down a city ordinance that prohibited various uses of "pornography."²⁸⁵ Although *Hudnut* is not binding Supreme Court authority, the Supreme Court affirmed the decision in a memorandum opinion.²⁸⁶ Three other federal appellate courts have cited to it, so it may be described as a well-established "pornography" decision.²⁸⁷ Its reasoning should therefore be considered in light of the copyright restriction on pornography that this Article contemplates.

Like this Article's hypothetical denial of copyright protection for pornography, the ordinance in *Hudnut* did not define pornography according to the legal definition of obscenity.²⁸⁸ Rather, the ordinance defined pornography as the presentation of women in one of several specified manners that would constitute "graphic sexually explicit subordination."²⁸⁹ In a decision by Judge Frank Easterbrook, the Seventh Circuit held the ordinance to be an unconstitutional restraint of free speech.²⁹⁰

283. *Simon*, 502 U.S. at 118.

284. See discussion *supra* Section III.C.2.a.i.

285. 771 F.2d 323, 324–25 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

286. *Hudnut v. Am. Booksellers Ass'n*, 475 U.S. 1001, 1001 (1986) (mem.).

287. See, e.g., *Annex Books, Inc. v. City of Indianapolis*, 740 F.3d 1136, 1138–39 (7th Cir. 2014); *Free Speech Coal. v. Reno*, 198 F.3d 1083, 1093 (9th Cir. 1999), *aff'd sub nom. Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); *Amatel v. Reno*, 156 F.3d 192, 200 (D.C. Cir. 1998).

288. *Hudnut*, 771 F.2d at 324.

289. *Id.*

290. See *id.* at 334.

In the opinion, Easterbrook accepted the claims that pornography tends to lead to harmful consequences. He accepted that pornography leads to the subordination of women, which in turn leads to effects such as “affront and lower pay at work, insult and injury at home, [and] battery and rape on the streets.”²⁹¹ Easterbrook did not dispute that pornography fosters aggression and contempt toward women and harms their opportunities for equality.²⁹² All these effects, however, did not matter to Easterbrook; instead, the effects “simply demonstrate[d] the power of pornography as speech.”²⁹³ The effects of pornography, explained Easterbrook, are akin to the persuasive effects of religious ideals or political movements, or to the problems that some believe come from watching too much television.²⁹⁴ Furthermore, the fact that an audience’s response to pornography is often subconscious did not bother Easterbrook.²⁹⁵ He opined that the subconsciousness of pornography’s effects merely illustrates that pornography conditions its audience to act and think in a certain way.²⁹⁶ Easterbrook concluded that the effect of subconscious conditioning is no reason to refrain from protecting the speech that causes it.²⁹⁷

Perhaps one might infer from the court’s treatment of the ordinance in *Hudnut* that Congress cannot deny copyright protection for pornography. *Hudnut* contemplates two factual circumstances that are similar to the copyright-denial context. First, both the copyright denial and the *Hudnut* ordinance define the content at issue, pornography, with a meaning that depends on, at least in part, expression that is “sexually explicit” as opposed to low-value obscenity that is unprotected by the First Amendment.²⁹⁸ Second, both rely on the effects of pornography as a basis for their respective restrictions of speech.²⁹⁹ Based on these two points of similarity, one might reason that because pornography is protected by the First Amendment, its harmful effects should not be reason to restrict it, and therefore, copyright cannot be denied for it.

This conclusion is wrong. It is true that *Hudnut* establishes that pornography, as contrasted with obscenity, receives First Amendment protection. *Hudnut* establishes that pornography cannot be restricted in the absence of a compelling government interest (outside of a context that implies a less restrictive standard).³⁰⁰ And *Hudnut* emphasizes that the socially harmful effects of pornography do not rise to the level of a compelling government interest.³⁰¹ But that is all that *Hudnut* stands for.

291. *Id.* at 329.

292. *Id.*

293. *Id.*

294. *Id.* at 329–30.

295. *See id.*

296. *Id.* at 330.

297. *Id.*

298. *See id.* at 331–32.

299. *See id.* at 328.

300. *See id.* at 326.

301. *See id.* at 334.

Hudnut does not suggest that pornography receives stronger speech protection than any other sort of protected speech.

These simple points about *Hudnut* are important because the fact that speech is protected by the First Amendment does not place it outside the scope of content for which Congress may deny copyright protection. Congress's authority to deny copyright protection is not in any way based on whether the content under consideration receives free speech protection. Rather, its authority is based on the constitutional directive that content should promote the progress of science.³⁰² If there is a rational basis to conclude that the content does not promote progress, and if Congress's reason is viewpoint neutral, Congress can deny it, regardless of whether the content receives First Amendment protection.³⁰³ Put another way, the First Amendment does not mandate a copyright monopoly for all speech within its scope of protection.

Of course, the Intellectual Property Clause is still subject to restraints of the First Amendment. The context of the copyright denial dictates those restraints—in particular, the restraints that inhere in a limited public forum.³⁰⁴ As discussed above, that doctrine allows for the government to restrict speech protected by the First Amendment insofar as specific conditions are met. Therefore, the fact that *Hudnut* establishes First Amendment protection for pornography does not alter the fact that pornography is subject to less speech protection from government restrictions under the limited public forum doctrine. Like any other speech protected by the First Amendment, Congress may deny copyright protection to pornography within the confines of that doctrine.

What about *Hudnut's* discussion about pornography effects—namely, that pornography's effects are evidence of its power as speech, so those effects should not serve as a basis for government restriction?³⁰⁵ Does that conclusion upset the analysis for denying copyright protection for pornography, which is premised on pornography's harmful effects? It does not. Here again, context is dispositive. In considering whether certain categories of speech promote the progress of science, Congress must consider the effects of speech. Indeed, the word *Progress* implies an evaluation of effects.³⁰⁶ Promoting progress contemplates an evaluation of whether the effects of speech or inventions are socially beneficial.

This is not to say that Easterbrook's point about the effects of speech is entirely irrelevant. As discussed above, effects of speech as a reason for restricting speech are relevant in analyzing whether the restriction is viewpoint discriminatory. Specifically, disagreement with effects that are responsive to the viewpoint within a message suggests a disagreement

302. U.S. CONST. art. I, § 8, cl. 8.

303. See discussion *supra* Part III (discussing the limited public forum's application to the copyright context).

304. See discussion *supra* Part III.

305. See *Hudnut*, 771 F.2d at 329.

306. See Snow, *supra* note 131, at 180 (arguing that *Progress* provides Congress discretion to achieve specific goals).

with the message itself.³⁰⁷ But where the government's objection is to effects that are nonresponsive to the message, this does not suggest any disagreement with the viewpoint.³⁰⁸ Hypothetically, if pornography caused blindness, the government's objection to the effect would certainly not discriminate based on any viewpoint in the pornography. The harmful effects that actually do follow from pornography are no different. They are non-responsive to the message.

C. TRADEMARK CASES

Two recent Supreme Court cases in the trademark context are relevant to denying copyright protection for moral reasons. In both trademark cases, the Court held that certain statutory bars to trademark protection violated the First Amendment. Specifically, in *Matal v. Tam* the Court struck down a bar that had denied protection to marks that could “disparage” others,³⁰⁹ and in *Iancu v. Brunetti* the Court struck down a bar that had denied protection for “immoral” and “scandalous” marks.³¹⁰ In both cases, the Court held the statutory bars to be viewpoint discriminatory.³¹¹

The cases do not address copyright specifically, yet they are still valuable for that context simply because they concern speech restrictions in an intellectual property regime. The cases are instructive for copyright denials in particular because trademark affects a spectrum of speech that is similar to that affected by copyright. Trademarks serve as brand names for goods or services, and through them, mark owners may communicate ideas on any subject matter.³¹² Their subject matters include politics, science, artwork, entertainment, education, commerce, and everything else—just like the subject matters of copyright.³¹³ *Matal* and *Brunetti* therefore likely suggest principles that the Court would apply in evaluating moral restrictions on copyright protection.

1. *Matal v. Tam*

The facts of *Matal v. Tam* consisted of an individual, Mr. Simon Tam, choosing the name, “THE SLANTS,” as a trademark for his band in order to “reclaim” or “take ownership” of stereotypes associated with persons of Asian descent.³¹⁴ The PTO found that the term was offensive to Asians and thereby denied Mr. Tam's application under the statutory bar of the federal trademark statute, the Lanham Act, which precluded registration of disparaging marks.³¹⁵ The Supreme Court reversed the denial of registration, unanimously concluding that the disparagement bar was

307. See discussion *supra* Section III.C.2.

308. See discussion *supra* Section III.C.2.

309. *Iancu v. Brunetti*, 137 S. Ct. 1744, 1751 (2017).

310. 139 S. Ct. 2294, 2297 (2019).

311. *Id.* at 2299; *Tam*, 137 S. Ct. at 1763.

312. *Tam*, 137 S. Ct. at 1751–52.

313. See *id.* at 1768. (Kennedy, J., concurring).

314. *Id.* at 1754 (majority opinion).

315. *Id.*

viewpoint discriminatory in violation of the First Amendment.³¹⁶

Although the Court overwhelmingly reached the conclusion that the disparagement bar was viewpoint discriminatory, that conclusion is, in one sense, puzzling. The disparagement bar did not appear to target any specific ideology, opinion, or perspective of the speaker. It did not give a particular side an advantage in a public debate; neither side was allowed to disparage. Justice Samuel Alito wrote a plurality opinion that recognized this fact, specifically noting: “[The disparagement bar’s restriction] evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue.”³¹⁷ Stated differently, the disparagement bar did not seem to discriminate based on any specific viewpoint or opinion.

Alito, however, provided a resolution to the apparent problem that the disparagement bar did not seem viewpoint discriminatory. He explained: “Giving offense is a viewpoint.”³¹⁸ A person might desire to offend others for the sake of being offensive—not because the person cares about any specific opinion that he or she is asserting but merely because the person desires to be disagreeable. In that situation, the disparagement bar seems viewpoint discriminatory: it forecloses the specific perspective of a person who seeks to be offensive for the very sake of being offensive (not for the sake of furthering the underlying idea that offends).

Justice Anthony Kennedy wrote a concurring opinion, joined by three other Justices, that is also helpful to understand the Court’s reasoning.³¹⁹ He too recognized the viewpoint-discriminatory nature of the disparagement bar.³²⁰ Rejecting the argument that the bar was viewpoint neutral because it applied equally to all trademarks that offend, Kennedy pointed out that “[t]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.”³²¹ He explained that viewpoint discrimination was apparent from the government’s disapproval of a subset of messages it finds offensive.³²² Like Alito, then, Kennedy objected to offensiveness as a reason for the government to deny protection. That the bar applied to all viewpoints did not mean that it was viewpoint neutral.

Tam thus teaches a principle about the viewpoint-discrimination analysis. A bar to protection cannot be based on the offensiveness of expression. That an author seeks to offend others is no reason to deny protection. Even if a bar denies protection for a seemingly broad scope of expression, the bar is not viewpoint neutral if the reason for denial is Congress’s offense at, or disagreement with, the content.

316. *Id.* at 1754, 1765.

317. *Id.* at 1763.

318. *Id.*

319. *See id.* at 1765 (Kennedy, J., concurring).

320. *Id.*

321. *Id.* at 1766.

322. *Id.* at 1767.

This conclusion supports the explanation of viewpoint discrimination in Section III.C above, which interprets Supreme Court jurisprudence as implying that Congress may not deny copyright protection on the ground that Congress finds any message within the expression offensive. A message's offensiveness cannot be the reason for the denial.

2. *Iancu v. Brunetti*

In *Iancu v. Brunetti*, a business owner had applied to register a mark that closely resembled the F-word as a brand name for his clothing line.³²³ The PTO denied his application under the Lanham Act's bars that precluded registration of terms that were "immoral" or "scandalous."³²⁴ Reversing the PTO, the Court struck down these bars as viewpoint discriminatory.³²⁵

The Court unanimously held that the "immoral" bar was viewpoint discriminatory.³²⁶ The Court split, however, on the issue of the "scandalous" bar.³²⁷ The majority interpreted *scandalous* as having an overlapping meaning with *immoral*, so the same reasoning underlying the immoral bar also applied.³²⁸ The other Justices had a different interpretation of *scandalous* that is not relevant to the issues under consideration here.³²⁹ For ease of reference, I refer to both the immoral and scandalous bars collectively as "the immoral bar."

Writing the Court's majority opinion, Justice Kagan explained the reason for concluding that the immoral bar was viewpoint discriminatory:

[T]he Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. . . . [T]he statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former and disfavors the latter.³³⁰

The immoral bar thus enabled, and indeed required, the government to pass judgment on whether particular ideas were morally acceptable. Stated differently, the immoral bar required the government to suppress ideas that it deemed inappropriate. This was viewpoint discriminatory.³³¹

Importantly, the *Brunetti* Court never suggested that a specific moral reason cannot serve as the basis for denying protection. The problem in *Brunetti* was not the fact that moral grounds were the basis for denial, but

323. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

324. *Id.* at 2298.

325. *Id.* at 2297.

326. *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part).

327. *See id.* at 2302 (majority opinion).

328. *Id.* at 2300.

329. *See id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 2304 (Breyer, J., concurring in part and dissenting in part); *id.* at 2309 (Sotomayor, J., concurring in part and dissenting in part).

330. *Id.* at 2299–2300 (majority opinion).

331. *See id.* at 2300.

rather, the problem was the fact that the immoral bar called for a judgment about the message within the content. To be sure, the Court never suggested that a moral reason is an inappropriate basis for denying protection. Indeed, several Justices opined that bars denying protection for obscene, vulgar, or profane marks would be constitutional because they do not target any viewpoints within the expression (instead targeting the mode of expression). Chief Justice John Roberts stated: “[R]efusing registration to obscene, vulgar, or profane marks does not offend the First Amendment.”³³² Justice Alito stated: “Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas.”³³³ Justice Breyer stated: “[I]t is hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on ‘viewpoint.’”³³⁴ Justice Sotomayor stated: “Adopting a narrow construction for the word ‘scandalous’—interpreting it to regulate only obscenity, vulgarity, and profanity—would save it from unconstitutionality.”³³⁵ According to these four Justices, bars to obscene, profane, or vulgar marks would not be viewpoint discriminatory. The fact that such bars would be based on the moral viewpoint that those sorts of marks are harmful to society would not imply their unconstitutionality.

The majority opinion in *Brunetti* is consistent with this conclusion. In condemning the morality bar, the majority noted: “We say nothing at all about a statute that covers only [marks that offend by their mode of expression]—or, in the Government’s more concrete description, a statute limited to lewd, sexually explicit, and profane marks.”³³⁶ The majority was thus careful to preclude from its holding bars that specifically target lewd, sexually explicit, and profane content. Even though such bars would be effectuating a moral viewpoint of Congress, this language in *Brunetti* is consistent with the conclusion that such bars would not be viewpoint discriminatory.

Thus, neither *Tam* nor *Brunetti* suggest that the First Amendment precludes Congress from denying copyright protection to expression on moral grounds.³³⁷ Consistent with the analysis in Part IV, the cases suggest that protection may not be denied in response to a speaker’s message.

332. *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part).

333. *Id.* (Alito, J., concurring).

334. *Id.* at 2306 (Breyer, J., concurring in part and dissenting in part).

335. *Id.* at 2313 (Sotomayor, J., concurring in part and dissenting in part).

336. *Id.* at 2302 n.* (majority opinion).

337. *Cf.* Gary Myers, *It’s Scandalous!—Limiting Profane Trademark Registrations after Tam and Brunetti*, 27 J. INTELL. PROP. L. 1, 20 (2019) (interpreting *Brunetti* as allowing Congress to “preclude the registration of obscene, vulgar, and profane marks”); Ned Snow, *Immoral Trademarks After Brunetti*, 58 HOUS. L. REV. 401, 450 (2020) (arguing that trademark bars to vulgar, profane, and obscene content would be constitutional under *Brunetti* and *Tam*).

V. CONCLUSION

Intellectual property incentivizes ideas. It is a means to facilitate creativity and knowledge for the broader purpose of promoting progress in society.³³⁸ To further that broader purpose, Congress has chosen, and yet may choose, not to extend intellectual property protection to certain subject matters.³³⁹ According to the moral views of Congress, certain subject matters may be detrimental to that broad purpose. Yet because denying intellectual property protection affects the production of creative expression and innovative knowledge, the denials necessarily affect speech.³⁴⁰ A denial chills the potential speech of authors and inventors. Hence, a tension exists between Congress's power to promote progress through legislating copyright and patent and the people's right to freely speak without government interference.

The tension may be resolved by applying the correct doctrines of free speech law. On the patent side, those speech doctrines suggest that Congress's restrictions on eligible subject matters do not violate the First Amendment. This is because the effects on inventors' speech that subject-matter restrictions introduce are likely manifestations of the government adopting private speech as its own. Furthermore, even if the restrictions do not reflect speech choices by the government, they likely reflect government regulation of conduct related to embodiments of inventions. The regulation's incidental effect on free speech would be permissible under the *O'Brien* test. Hence, in most circumstances, subject matter restrictions on patent protection would be constitutional.

On the copyright side, moral restrictions on eligibility should be analyzed under the limited public forum doctrine. Under that doctrine, restrictions of content are permissible if, first, they are reasonable in light of the forum's purpose, and second, they are viewpoint neutral.³⁴¹ The first requirement will usually be satisfied because the Intellectual Property Clause provides Congress discretion to determine which content promotes the progress of science.³⁴² By contrast, the second requirement imposes a severe limitation on Congress's ability to discriminate under its copyright power.³⁴³ Specifically, Congress's reason for denial must not concern the message within the content or the effects that are responsive to that message.

Congress, then, can deny patent protection for human organisms, marijuana devices, abortion methods, and many more inventions that stir

338. See U.S. CONST. art I, § 8, cl. 8.

339. See 42 U.S.C. § 2181(a) ("No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon."); Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 33(a), 125 Stat. 284, 340 (2011) (codified as amended in scattered sections of 35 U.S.C.) ("[N]o patent may issue on a claim directed to or encompassing a human organism.")

340. See discussion *supra* Part II.

341. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

342. See discussion *supra* Section III.B.

343. See discussion *supra* Section III.C.

moral controversy.³⁴⁴ Congress can also deny copyright protection for limited categories of content, such as pornography, trade secrets, and expression involving unlawful actions in its creation.³⁴⁵ This is not to say, though, that such denials would reflect good policy. That is a question for another day. Today, I conclude that in certain circumstances, Congress may exercise its intellectual property power to effectuate moral judgments about speech.

344. See discussion *supra* Section II.A.

345. See discussion *supra* Section III.C.2.