

The Dormant IP Clause

Jeanne C. Fromer

This Article relies on the text, structure, and history of the IP Clause, as well as subsequent governmental activity and Supreme Court doctrine, to show that the IP Clause dormantly operates to forbid Congress from using its other powers “To promote the Progress of Science and useful Arts” through laws that reach beyond the extent of the IP Clause’s power to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” That is, this evidence shows that if Congress seeks, via legislation, to promote the progress of science and the useful arts, the only way it can do it is by enacting laws that secure to authors and inventors exclusive rights in their writings and discoveries for limited times. I provide an analytical framework in which courts, legislators, and others might assess the constitutionality of federal legislation. This framework suggests that a number of current federal laws, such as federal trade secrecy provisions and anti-bootlegging laws, are unconstitutional. The framework also suggests how to assess the constitutionality of laws that would protect databases, laws passed pursuant to treaties with other countries, and federal funding for scientific and artistic works.