

# 1. A Response to Professor Benkler

2. *By Marci A. Hamilton*

## Abstract

Professor Hamilton explores the constitutional complexity uncovered by Professor Benkler in his piece, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*. Specifically, Professor Hamilton highlights that our democratic structure is characterized by representation rather than self-rule. In doing so, she refocuses the role of information in the political process and highlights that different types of information require different levels of access. Professor Hamilton's analysis further illustrates how an imprecise use of terminology may lead to incorrect conclusions regarding information jurisprudence. Through her more refined lens, Professor Hamilton reconsiders the proposed database legislation under the Copyright and Commerce Clauses and under First Amendment doctrine. While critiquing Benkler's underdeveloped theoretical and doctrinal approaches, she concludes that he does correctly find the Collections of Information Antipiracy bill constitutionally deficient; however, he is incorrect in finding the Consumer and Investor Access to Information bill constitutionally sound. Indeed, Professor Hamilton's response emphasizes that a broad-brush approach cannot draw the fundamental fine line between constitutionally acceptable and unacceptable regulations of information.

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### 1. Introduction

There is much to like in Professor Benkler's article on Congress's pending database bills. I agree with his conclusion that the Collections of Information Antipiracy Act bill is constitutionally deficient, and significantly more so than the Consumer and Investor Access to Information Act bill.<sup>1</sup> I do not find persuasive, however, the constitutional rhetoric in which he has wrapped this analysis. His constitutional terminology is emotionally charged—"democracy," "autonomy," and "information"—but it proves too much, at least in this iteration. Moreover, he does not employ this constitutional terminology to examine the two database statutes he analyzes, but rather turns to a doctrinal approach.

The two competing threads in Professor Benkler's article—theoretical and doctrinal analysis—are worth detangling. First, I will turn to his constitutional rhetoric and express my

concern that it is too expansive at this stage to assist reliably with drawing the constitutional line between information that should be accessible to the people and information that is less constitutionally significant. Second, I will address his doctrinal analysis, which although quite sound on many grounds, also suffers from too broad a brush in certain parts.

## 1. **Constitutional and Theoretical Rhetoric**

Professor Benkler postulates an alliance between democracy, autonomy, and information, and concludes that one database proposal is constitutional and the other is not.<sup>2</sup> The rhetorical force of these words is hard to resist. The rhetoric, though, because it is ill-defined, does not ineluctably lead to the conclusions he draws. The central problem with Professor Benkler's *theoretical* approach is that he intends these terms to have dispositive implications, but does not stop to define what each term means.

In his defense, Professor Benkler is working in largely uncharted territory and is writing for a symposium directed primarily at intellectual property issues. Nevertheless, because the constitutional and intellectual property issues affecting data protection are so intertwined, the failure to define core constitutional terms requires some discussion.<sup>3</sup>

### 1. **Democracy**

Professor Edwin Baker has correctly pointed out that it is necessary to define the Constitution's scheme of government before one can assess speech or information regulations.<sup>4</sup> Benkler elides this important step, however, and thereby leaves unexamined presuppositions at the foundation of his theory of information regulation. Without satisfactory explanation, Benkler repeatedly assumes that the United States Constitution institutes a system of self-rule and democracy. In particular, he asserts that this is a "democratic society" and refers to "democratic discourse" and "democratic self-governance."<sup>5</sup>

I have addressed in other fora the fact that the governmental structure created by the Framers is not a system of self-rule, but rather a system of representation that rejects democracy and precludes self-rule.<sup>6</sup> I will not replay at length those arguments for this symposium, but suffice it to say that the people do not rule. The democracy of the United States's constitutional experiment is highly mediated, because the Framers, frankly, distrusted the people.<sup>7</sup> Representatives are not instructed by the people, which is a proposal plainly rejected at the Convention.<sup>8</sup> Rather, representatives' decisions are constitutionally legitimate regardless of how the people judge those decisions. The people's role is to predict which governors will act in their best interests the majority of the time. They are given two means of controlling who the governors will be and how they govern: the voting booth and a two-way communication pathway.<sup>9</sup>

The legal analysis of information regulation, thus, should not rest on a presumption that the people make the law, but rather on the knowledge that the people's power in the public sphere is limited to choosing who will do so. This distinction has profound implications, because it makes some information especially crucial in the effective operation of the Constitution.

Accordingly, the Constitution identifies and makes available crucial information regarding the decisions reached by governors. Congress is under plain obligations to make their deliberations and actions known to the public. It is required to keep a public record of its proceedings and to report its votes when at least one-fifth of the members request such a report.<sup>10</sup> To ensure a fuller public exchange of their positions, the Speech and Debate Clause immunizes representatives from liability for anything said during legislative debate.<sup>11</sup>

The Speech and Press Clauses of the First Amendment foster the two-way pathway of information between representatives and the people. First, the First Amendment reinforces the information running from governors to the people by protecting the press that reports on their activities. Second, it opens a pathway from the people to their government by protecting expression in the press, which is made public.<sup>12</sup> Thus, the Constitution already identifies a privileged subset of information that must be as free as possible if the system is to work.<sup>13</sup>

Information about the character of rulers also becomes crucial because these representatives are independent of the people during their term of representation. In the absence of a right to instruct on particular issues, the people need to choose individuals who have the integrity to adhere to the positions they took during their campaigns and whose judgment can be trusted on the myriad of issues that were never discussed during the campaign but that will need to be decided. The Framers premised the Constitution's representative system on the belief that the system would only work when some virtuous individuals found their way into positions of power.<sup>14</sup> This situation is a direct result of having instituted a system in which the people do not make the law but rather select those who do.

Other information, while important, is not as critical to the operation of a representative system. For example, there is no obligation on the part of the government to educate every citizen on the intricacies of each piece of legislation, like the Clean Air Act, or on the machinations of various agencies, such as the Central Intelligence Agency. Indeed, the very premise of a representative system is that the people can be free to live their own lives and attend to their own callings, while the elected representatives take care of the business of the country.<sup>15</sup>

Benkler, though, rests his conclusions about information regulation on the assumption that the United States constitutional scheme institutes a system of democratic self-government, saying, *inter alia*, that, “[f]or a community to be democratically self-governing its members must have access to information.”<sup>16</sup> Benkler further states that “[i]nformation . . . is central . . . to democratic

self-governance.”<sup>17</sup> In his defense, “self-rule” is part of the misguided constitutional rhetoric of contemporary constitutional legal scholars.<sup>18</sup> As Benkler has deployed the term here, it is impossible to differentiate between different types of information requiring different degrees of access, and hence to find a limiting principle on the “right of access.” Though he seems to deny that he is crafting an absolute rule of access, nothing in Benkler’s use of “democracy” would carve such a limit.

## 1. **Autonomy**

Like “democracy,” “autonomy” is a term from the liberal tradition that loses its clear edges once examined closely. There is no such thing as pure autonomy, a principle with which I am sure Professor Benkler would agree. There can only be mediated autonomy. We are all bound to some degree by law, history, family, jobs, abilities, disabilities, and fortune. Benkler, though, speaks as though autonomy can be pure and total, and assumes without argument that autonomy is the primary goal of the Constitution. He refers to “autonomous individuals,” “personal autonomy,” and “individual autonomy,” and equates being an “autonomous individual” with being the “author [] of [one’s life],” as though pure freedom were possible.<sup>19</sup> Like Benkler’s use of the term “democracy,” “autonomy” in his article is a romantic, liberal ideal, but it is not a well-defined constitutional concept that can meaningfully guide constitutional results.

Having assumed the centrality of (an ill-defined) autonomy to the constitutional scheme, Benkler then concludes that autonomy is dependent on information: “The quantum of autonomy people can have and do actually enjoy is partly a function of the information they have about the world as it is, and the options open to them to live their lives.”<sup>20</sup> Indeed, “information . . . is central . . . to personal autonomy.”<sup>21</sup> On the one hand, such statements are truisms with which few could disagree. On the other hand, they are too empty of context to help answer the question of when “information” can be propertized or owned.

There is a lacuna in Benkler’s reasoning here that demands closer examination. He seems to demonize information ownership as an evil to the constitutional value of autonomy. On his reasoning, then, propertized information (i.e., information that would be available if paid for) should not be as problematic as secret information. To be the “author” of one’s own life, one needs as much information as possible, regardless of how the information has to be obtained. Closely held, secret information causes ignorance and therefore would create impediments to one’s autonomy in Benkler’s theory. Nevertheless, the Constitution allows information to be kept secret.<sup>22</sup> If secret information is constitutionally acceptable, then *access* to all information may not be the sine qua non of constitutional analysis, and propertized information may not be the necessary constitutional evil Benkler’s rhetoric implies.

The private control of information—through propertization or secrecy—is not necessarily a

constitutional evil. It depends, at least in part, on the type of information and on the context in which that information is used. There is a vast universe of information that is currently privately controlled, but that should not pose any constitutional difficulty. In the arena of intellectual property, for example, trade secrets long have been held constitutional.<sup>23</sup> But trade secrets are only a fraction of the privately controlled information in this society. Each of us holds a depository of unpublished information about family members, fellow workers, and past experiences. Others carry intellectual knowledge, religious revelation, or sophisticated political understanding. The robust right to access for which Benkler argues seems to conflict with the ability of these information-holders to hold on to their collections of information through government-sanctioned contract or societal norms. Professor Benkler seems to imply that no one can have exclusive rights to even such kinds of information, because information must be free for all.

Rather than mandating that all information be free, however, some accounts of autonomy would seem to require that private information must be amenable to secrecy. Indeed, this is the yin of the First Amendment defamation cases<sup>24</sup> that balances the yang of Benkler's assumption that information must be free for there to be autonomy. Benkler's analysis, however, makes no nod to this constitutional sphere of privacy rights that permit individuals to bring claims based on the misappropriation of their private information.<sup>25</sup> This is due surely to an underdeveloped concept of autonomy. Further, this oversight results from Benkler's use of the term "information."

## 1. Information

The central problem in Professor Benkler's rhetorical and theoretical strategy is his undifferentiated use of the term "information." He does not stand alone here.<sup>26</sup> In this new era, finer reticulations of core terms are needed and are only just beginning to take shape. In the context of the First Amendment, however, this lack of precision falsifies broad conclusions.

### 1. *Information as a Term of Art*

"Information" is a loaded term. One of the most used terms in this technological era, it has become a motley cast of different elements, including facts, data, news, report, comment, statement, message, opinion, history, secrets, expression, or works of authorship, to name a few.<sup>27</sup> There are many gradations within each category as well: there can be private facts, public facts, political facts, historical facts, discovered facts, uncovered facts, expensive facts, or cheap facts. There can be artistic opinion, malicious opinion, baseless opinion, religious opinion. The taxonomy is seemingly endless.

Moreover, the same information can be used in strikingly different ways. For example, the fact that Senator Squeamish flunked constitutional law in law school can be found in the school's grade records, in a newspaper article on the Senator, as part of a political advertisement during a

political race, or in an Internet attack orchestrated by interest groups who are unhappy with his votes and who package this fact with false information about his other grades. Each context invites a different constitutional analysis, which depends on how the information is being used and by whom.

Benkler never distinguishes the various types of information that might be at stake under a statute creating rights in information. Nor does he address the different constitutional consequences that will be triggered depending on the type of information at issue, how it is being used, and who will be using it. If his opening example—a statute that propertizes information in news, history, and scientific information<sup>28</sup>—is any indication, he is thinking only in terms of constitutionally weighty information employed in contexts where its constitutional value is at its highest. Benkler does not address how the analysis might change—and it will—if some or all of the information being propertized is low-value information from a First Amendment perspective, such as fighting words, pornography, or defamation of a private figure. Nor does Benkler account for the differences that will arise depending on who is using the information for what purpose.

### 1. **“Information” in the Supreme Court’s Cases**

Benkler’s broad-brush approach to “information” also leads to an over-reading of Supreme Court cases that will be interpreted as an information jurisprudence emerges. He treats “information” as a defined category in the cases and assumes the existence of an information jurisprudence that does not yet exist. In discussing the *Trade-Mark Cases*<sup>29</sup> decided in 1879, he says the Court held that there are limits on the extent to which Congress, pursuant to the Intellectual Property Clause, may “create exclusive rights in information.”<sup>30</sup> This statement is not quite accurate. The conclusion regarding a limit on Congress in the Clause is inescapable, but the attempt to turn the holding into a pronouncement on information overstates it. The Court’s focus was on congressional power over trademarks, not information. Although the *Trade-Mark Cases* opinion employs the term “information,” it is not in the sense used by Benkler. Rather, the Court’s discussion of the copyrightability of trademarks talks in terms of “invention,” “discovery,” and the “writings of authors.”<sup>31</sup> When the case does use the term “information(s),” it uses the term to mean “indictment.”<sup>32</sup>

The truth is that the Court has not rendered a conscious information jurisprudence to date. The beginnings of such a jurisprudence exist in the cases Benkler cites,<sup>33</sup> but even when taken together they do not justify the certainty ascribed by him.

The slippage in Benkler’s use of the term “information” also is apparent when he cites to Thomas Jefferson as a source for the proposition that information should not be broadly protected.<sup>34</sup> However, Jefferson did not speak in terms of the contemporary usage of “information,” but rather in terms of atomistic “ideas” that originate from an “individual brain” and that are “incapable of

confinement or exclusive appropriation.”<sup>35</sup> In contrast, the debate about database protection has been sparked by the technological possibility that ideas and other aspects of information *can* be propertized. Thus, Jefferson would seem particularly inapplicable here. Yet, Benkler moves from Jefferson’s quote to conclude that the “free exchange of information, rather than its enclosure, is the presumed beneficial state.”<sup>36</sup>

Benkler’s line of reasoning proves too much. Although he correctly concedes that some regulation of information is permissible under the Court’s cases, his concession seems out of place in the context of his pro-dissemination discussion. His information theory is simply too broad to draw the line between acceptable and unacceptable regulations of information. Despite the fact that Benkler argues his analysis is a “robust system of judicial review,”<sup>37</sup> it is couched in a way that makes it sound as if it were an absolute standard of review that would invalidate any legislation touching on information.

## 1. Proposed United States Database Legislation

Although I do not find Professor Benkler’s theoretical rhetoric terribly helpful, I do think he has reached the right conclusion on the Collections of Information Antipiracy Act bill (“Antipiracy bill”).<sup>38</sup> Yet, I am not as persuaded that the Consumer and Investor Access to Information Act bill (“Consumer Access bill”)<sup>39</sup> is free of constitutional difficulties. I will begin with a brief history and explanation of the bills and then turn to an examination of each bill in response to Professor Benkler’s doctrinal analysis.<sup>40</sup>

In May 1996, the first database protection bill in the United States was introduced in Congress.<sup>41</sup> It defined “database” as “a collection, assembly or compilation, in any form or medium now or later known or developed, of works, data or other materials, arranged in a systematic or methodical way.”<sup>42</sup> The bill, which proposed protection for a term of twenty-five years,<sup>43</sup> did not make it out of committee.

Since then, the proposals for database protection before Congress have proliferated. During the spring of 1999, Senator Orrin Hatch took the highly unusual step of entering three different legislative database proposals into the Senate record. Two were drafted by interest groups while the third was drafted as a middle ground by Senate staffers. Hatch did not endorse any one of these in particular, but stressed the necessity of curbing “database piracy.”<sup>44</sup>

While the Senate was reviewing these three proposals, the House of Representatives had before them two proposals that mark the ends of the spectrum. Representative Howard Coble introduced the Antipiracy bill (H.R. 354) and Representative William “Bill” Bliley introduced the Consumer Access bill (H.R. 1858). The names of these bills alone indicate the disparity in their approaches.

## 1. The Antipiracy Bill

As Professor Benkler points out, the sweep of the Antipiracy bill is quite broad and its provisions sound in property rights rather than misappropriation.<sup>45</sup> The Antipiracy bill would protect not only the database owner's primary market, but also any related market.<sup>46</sup> Its definition of "information" is rapacious, including "facts, data, works of authorship, or any other intangible material capable of being collected and organized in a systematic way."<sup>47</sup> To be eligible for protection, a database creator must have invested "substantial monetary or other resources" in the creation of the database.<sup>48</sup>

A user is liable to the database owner if he causes "material harm" to the "primary or related market" of the database by making a "substantial" portion available to the public or by extracting a substantial part.<sup>49</sup> Through indirection, the bill also permits a database owner to claim that a substantial portion of the database has been taken by showing that as little as two items of information were taken: By the terms of the Antipiracy bill, "individual" items of information are not "substantial," but any other taking apparently including as few as two pieces of information may be.<sup>50</sup>

The Antipiracy bill exempts certain "nonprofit education, scientific, or research purposes" from liability as long as such uses do not "materially harm the primary market."<sup>51</sup> There is also a provision permitting individual acts done for "purposes such as illustration, explanation, example, comment, criticism, teaching, research, or analysis . . . if [they are] reasonable under the circumstances."<sup>52</sup> Factors to determine whether acts are reasonable include whether the amount of information made available or extracted is appropriate for the purpose.<sup>53</sup> Users in this category enjoy this preference if their work is for nonprofit purposes, if the person using the database is acting in "good faith," if the new database or work generated is significantly different from the database, *and* if the user is not in the same "primary market" as the database maker.<sup>54</sup> There is also protection for news reporting, including "news gathering, dissemination, [and] comment."<sup>55</sup>

The Antipiracy bill does not set a term limit *per se*, but rather sets a "limitation" on when actions can be maintained under the bill. "No criminal or civil action shall be maintained . . . for making available or extracting all or a substantial part of a collection of information that occurs more than 15 years after the portion of the collection that is made available or extracted was first offered in commerce . . . ."<sup>56</sup>

## 1. The Consumer Access Bill

The Consumer Access bill is considerably more friendly to the information user and less so to the database producer than the Antipiracy bill would be. Like most database protection formulations,

the database maker must have made a substantial investment to be eligible for protection.<sup>57</sup> The “information” that would be protected under the Consumer Access bill includes “facts, data, or any other intangible material” but excludes “works of authorship.”<sup>58</sup> On this issue alone, its reach is significantly more restrained than the Antipiracy bill.<sup>59</sup>

User liabilities are considerably narrower under the Consumer Access bill than under any other proposal to date. A user is prohibited from duplicating, selling, or distributing another’s database if he is distributing the copy “in commerce in competition” with the original database.<sup>60</sup> The bill defines “in competition” as the displacement of “substantial sales or licenses of the database of which it is a duplicate” and a significant threat to the “opportunity to recover a return on the investment.”<sup>61</sup> There is no talk of “related” markets, as in the Antipiracy bill. Moreover, there must be proof both that substantial sales or licenses have been displaced *and* that the duplicate has negated the opportunity to obtain a return on the investment.

The Consumer Access bill also provides more explicit exceptions from the bill’s reach. Rather than creating a multi-part test permitting some “reasonable” uses as the Antipiracy bill does, the Consumer Access bill expressly excludes news reporting, law enforcement, scientific research, and educational uses from the scope of the bill.<sup>62</sup>

Despite its generally information user-friendly approach, the Consumer Access bill institutes no time limitation. All databases, whether new or established, can be protected against commercial competitors for an infinite term.

Both bills indicate some discomfort on the part of Congress in entering this potentially constitutionally dangerous fray. The Antipiracy and Consumer Access bills both contain a reporting requirement, which reflects how tentatively the United States is approaching this legislation. Indeed, the Consumer Access bill calls for a report to Congress within thirty-six months of enactment to ascertain the state of the database market, including the availability of databases and information, the extent of competition between producers, and the amount of investment in the industry.<sup>63</sup> As Professor Benkler notes, this may be the single most important aspect of the bill, given that the economic case has yet to be made to prove that such legislation is necessary or good for the market.<sup>64</sup> The Antipiracy bill further reflects Congress’s discomfort—it also requires a report to Congress within thirty-six months of enactment on whether certain defenses to the unauthorized uses of collections of information can be extended.<sup>65</sup>

## 1. Constitutional Analysis of the Two Database Bills

As Professor Benkler’s article makes clear, on the basis of the existing case law, the most significant barriers to information enclosure are likely to arise from the enumerated powers doctrine and various doctrines under the First Amendment. Privacy doctrines are likely to be

relevant as well, but for this piece, I will limit my comments to the cases discussed by Professor Benkler.

## 1. ***The Copyright Clause and the Pending Database Bills***

Professor Benkler argues that *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>66</sup> draws on the Intellectual Property Clause to create a right in information access and a rule against “enclosure” of aspects of the public domain.<sup>67</sup> This interpretation needs to be nuanced rather significantly.

I completely agree with Professor Benkler’s implicit point that the new bills raise the question of whether any federal database legislation is *in fact* an attempt to create copyright-like rights in data.<sup>68</sup> The more the legislation resembles copyright protection, the more likely courts will find it to be an inappropriate enactment pursuant to the Copyright Clause. Congress has clearly received this message because both bills expressly postulate that they are not copyright statutes and do not affect copyright law or other intellectual property law.<sup>69</sup> Despite the disclaimer, though, and as Benkler argues, the Antipiracy bill, with its expansive protection, looks more like a copyright-based, property right than does the Consumer Access bill.<sup>70</sup> Indeed, it is so close that it is likely to be held unconstitutional.

Under the *Feist* vision of the constitutional structure of copyright law, all citizens may be authors, and therefore the demand for the building blocks to make new works is intense. In the words of the Court,

The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.” To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.<sup>71</sup>

Conversely, in a system where few are likely to be authors, having fewer building blocks available might be acceptable. But under a system that identifies every individual, from child to adult, as a potential author, there must be many building blocks to avoid repetition and frustration and to foster a diverse market. Thus, the *Feist* reading of the Copyright Clause presupposes the necessity of a diverse and rich public domain of facts and works of authorship that have exceeded their copyright term.

However, the necessity for a rich public domain does *not* necessarily mean that information cannot or should not be enclosed. It sets no goal of having *all* information free to the public. Rather, a significant amount needs to be free. Conceivably, even more information than is currently free could be unavailable, while leaving the public domain sufficiently diverse. Thus,

some enclosure may be tolerable. Indeed, this point was made by the Court in *International News Service v. Associated Press*,<sup>72</sup> which involved quintessentially important information under the First Amendment—news.<sup>73</sup> In sum, complete enclosure of the entire public domain would violate the strictures of the Copyright Clause. Limited enclosure, though, under another congressional power is a viable constitutional possibility. The key question is what limits are appropriate and feasible.

One plausible limit on the enclosure of information intimated by the *INS* decision would be a durational limitation, which already exists in copyright and patent law. The Consumer Access bill contains no limitation on the term of protection. This omission may have resulted from an overabundance of caution in ensuring that the bill not appear to be a copyright bill. Yet this is a wrongheaded approach. The point in *INS* was that news could be temporarily owned by a news reporting organization and therefore competitors could be prohibited from using it, during an extremely brief time of ownership.<sup>74</sup> Thus, a term of limitation is not peculiar to copyright law nor is it a sign that the law in question must be a copyright-like law.

I do not mean to argue against the value of a rich public domain. My point is simply that the argument in favor of a vital public domain does not justify a conclusion that all or even most information must be free. The difficult question is which information, in which circumstances, needs to be free for the goals of the Constitution to be served.

### 1. ***The Commerce Clause and Database Legislation***

As Professor Benkler notes, those defending federal database legislation in the United States argue that it can be passed pursuant to Congress's power under the Commerce Clause. They concede, as they must, that *Feist* precludes Congress from enacting database protection under the Copyright Clause, but argue that the Commerce Clause opens another avenue.<sup>75</sup> Benkler does not address, however, the limitations on the Commerce Clause that will plague any attempts at congressional information regulation.

There was a time in United States constitutional jurisprudence when the Commerce Clause was thought to be a catch-all for essentially any of Congress's schemes. In recent years, however, the Court has been building a series of fences around federal congressional power to protect the states against federal overreaching.<sup>76</sup> Thus, any database legislation passed pursuant to the Commerce Clause will face significant federalism challenges to the extent it addresses the states.

The Commerce Clause, by its terms, gives Congress power over *interstate* commerce, not *intrastate* commerce.<sup>77</sup> The Court recently held that Congress must have proof that the activity being regulated “substantially affects” interstate commerce.<sup>78</sup> It is not enough if the activity being regulated only creates a *de minimis* impact on interstate commerce.<sup>79</sup>

As discussed above, though, Congress cannot use the Commerce Clause as a *pretext* for creating database legislation that would create copyright rights in information. To be on the safe side, therefore, the legislation must be directed at commerce, in this instance, commerce in databases, rather than at investing individuals with property rights in information. The safest route would be for Congress to enact a species of unfair competition legislation. Indeed, the decision in *Feist* opens the door for such legislation, stating that “[p]rotection for the fruits of [data] research . . . may in certain circumstances be available under a theory of unfair competition.”<sup>80</sup> Still, this statement raises the question of what “circumstance” would justify protection of information? Benkler is correct that, from the Court’s reading of the Copyright Clause and the First Amendment, the circumstances must be exceedingly narrow.<sup>81</sup>

As Benkler points out, the Antipiracy bill may be unconstitutional because it is neither narrowly tailored nor does it rest on a factual base that indicates a definite market evil in need of federal legislative action.<sup>82</sup> It permits individuals to hoard information for up to fifteen years, but rests on no fact-finding by Congress that would indicate the necessity for such legislation. Indeed, the absence of fact-finding regarding the database industry, its economic base, its growth, and the conditions for further growth, is quite striking in the congressional record. There is a generalized sense that “pirates” should not be able to “steal” databases that others have invested in, but there is no economic analysis of any substance.<sup>83</sup>

It is informative to compare the *reference* to unfair competition in the Court’s unanimous copyright law decision in *Feist* with the *discussion* of unfair competition law in the Court’s unanimous decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,<sup>84</sup> both of which were written by Justice Sandra Day O’Connor. In *Bonito Boats*, the Court described unfair competition law as being concerned “with protecting *consumers* from confusion as to source. While that concern may result in the creation of ‘quasi-property rights’ in communicative symbols, the focus is on the protection of consumers, not the protection of producers as an incentive to product innovation.”<sup>85</sup> The Antipiracy bill does not fare well under this standard, because it is not a narrowly drafted unfair competition law intended to protect consumers, but rather an attempt, on its face, to protect producers who have invested in databases. The Consumer Access bill is narrower in scope and more tailored to a goal of fair competition, but its infinite term undercuts the claim that it is necessarily constitutional.

Commerce Clause doctrine raises other hurdles. In a series of cases interpreting the Eleventh Amendment, the Court recently clarified that Congress may not employ the Commerce Clause to enact a private right of action against a state.<sup>86</sup> Thus, Congress could not provide relief for database owners against the states or their officers acting in their official capacity.<sup>87</sup> With state universities and public libraries being large data consumers, this is a significant limitation.

In sum, the Copyright Clause is forbidden territory for propertizing information and the Commerce Clause offers limited options.<sup>88</sup> As Professor Benkler points out, even if database legislation could pass muster under the Commerce Clause, the First Amendment will serve as a further limitation on the reach of such legislation.<sup>89</sup> Although he is not explicit on this point, Benkler focuses on facial challenges. It is my view, however, that as-applied challenges will play an even greater role and will pose the most interesting questions.

### 1. ***First Amendment Doctrine and Database Legislation***

The initial question to ask under First Amendment doctrine is whether a particular piece of database legislation is content-based. Benkler rejects this possibility in a footnote.<sup>90</sup> I am not persuaded, however, that the issue is so free from doubt.

While database legislation is, in general, viewpoint neutral, it is aimed at a particular type of content: facts and information.<sup>91</sup> Content-based legislation is traditionally subject to strict scrutiny under First Amendment doctrine.<sup>92</sup> As a result, a content producer defending the database bill in court would have to prove that Congress had a compelling interest in passing the bill and that it narrowly tailored the bill to fit its goal.<sup>93</sup> In other words, the means (the provisions of the bill) must fit tightly with the end intended to be achieved. This requirement is a nearly intolerable burden to bear based on the current state of the record in Congress. As Benkler points out, Congress has not demonstrated that there is a compelling need for database protection. Aside from the fact that the European Union now has such protection which does not provide for national treatment,<sup>94</sup> there is precious little evidence that such legislation is crucial to the industry or in the interests of the United States polity. Nor have any of the proposals' proponents demonstrated that either measure is closely tailored to the particular evil at which it is aimed. The debate has been premised on presupposition rather than fact. Hence, under either intermediate or strict scrutiny, each bill lacks an empirical basis that justifies its enclosure of significant parts of the public domain.

Based on the supposition that the bills are not content-based, Benkler would apply the intermediate scrutiny standard of *United States v. O'Brien*.<sup>95</sup> Further, Benkler solely addresses the First Amendment challenges likely to arise out of facial challenges to database laws. While both are ripe for invalidation under the enumerated powers doctrine, First Amendment jurisprudence will more likely be used to narrow the reach of the current and future bills in as-applied circumstances.

Existing constitutional theory requires courts to read ambiguous statutes in a way that ensures that they do not violate the Constitution.<sup>96</sup> The plain meanings of the new terms introduced by the database bills, including "primary or related market," "substantial monetary investment," and "substantial part," may be sufficiently open to permit the courts to interpret them narrowly in

favor of the user, hence avoiding First Amendment invalidation. However, when applied under particular circumstances, the bills may be found unconstitutional.

First Amendment doctrine also offers the possibility of challenging database legislation as being “void for vagueness,” a possibility Benkler does not consider. If a database statute is so vague that a user cannot properly tell whether or not the information is available to her, it would lead to an intolerable chilling of speech, and the courts should invalidate the vague and severable provisions of the statute.<sup>97</sup>

In sum, while I agree with Benkler’s conclusion that the Antipiracy bill is vulnerable under existing case law, I am not persuaded the Consumer Access bill necessarily scales all constitutional hurdles. The enumerated powers doctrine along with the First Amendment will pose both facial and “as-applied” challenges to the range of legislative proposals currently being considered in Congress.

## 1. Conclusion

In this era of new challenges in intellectual property law, it is necessary to ensure that emerging answers rest on a solid constitutional foundation. While I do not disagree, from a doctrinal standpoint, with Professor Benkler’s conclusion that the Antipiracy bill is plainly unconstitutional and the Consumer Access bill is more narrowly tailored,<sup>98</sup> the theoretical, rhetorical construct on which he builds his argument cannot stand, and his doctrinal analysis requires further elaboration.

In Benkler’s defense, however, the parameters for constitutional analysis of information regulation at this stage are only presently being defined. Information jurisprudence will be built incrementally, but it will be built on the Constitution we have.

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1 . See Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L.J. (2000). See generally the important work by J.H. Reichman and Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 Vand. L. Rev. 51 (1997). See also William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 Geo. Wash. L. Rev. 359 (1999); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 Cardozo Arts & Ent. L.J. 47 (1999).

- 2 . See Benkler, *supra* note 1, at . He begins with the broad claim that “two cumulative constitutional constraints [the enumerated powers doctrine and the First Amendment] . . . prevent enclosure of the public domain so extensive as to be detrimental to our information environment.” *Id.* at .
- 3 . For a more detailed analysis of the constitutional parameters affecting regulations of information, see generally Marci A. Hamilton, *Information Speech* (unpublished manuscript, on file with author).
- 4 . See C. Edwin Baker, *The Media That Citizens Need*, 147 U. Pa. L. Rev. 317, 318-19 (1998).
- 5 . Benkler, *supra* note 1, at , , n., nn. , .
- 6 . See Marci A. Hamilton, *The Reformed Constitution: Representation, Calvinism, and Congressional Responsibility*, ch. 4 (unpublished manuscript, on file with author) [hereinafter *Hamilton, Reformed Constitution*]; Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 479-80 (1994) [hereinafter *Hamilton, Discussion and Decisions*]; Marci A. Hamilton, *Power, Responsibility, and Republican Democracy*, 93 Mich. L. Rev. 1539, 1541 (1995).
- 7 . See Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. Chi. L. Sch. Roundtable 1 (1996-1997).
- 8 . See Hamilton, *Discussion and Decisions*, *supra* note 6, at 536 n.262.
- 9 . See Hamilton, *Reformed Constitution*, *supra* note 6, at ch. 4. See generally Hamilton, *Discussion and Decisions*, *supra* note 6, at 480, 529-30 (describing the relationship between citizen and legislator in the attorneyship model of representative democracy).
- 10 . See U.S. Const. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings . . . and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”).
- 11 . See U.S. Const. art. I, § 6, cl. 1 (“The Senators and Representatives . . . for any Speech or Debate in either House, they shall not be questioned in any other place.”).
- 12 . See U.S. Const. amend. I.
- 13 . The Constitution does not absolutely protect such information, however. If less than 1/5 wish to publicize their votes, the Congress need not report the names of those who voted and how they voted. See U.S. Const. art. I, § 5, cl. 3. This has turned into a large loophole for the House to engage in oral votes on politically difficult legislation and should be trimmed back to permit such unreported voting only when national security is at stake. See Hamilton, *Reformed Constitution*, *supra* note 6, at ch. 6. The Speech and Debate Clause protects the member of Congress from arrest for views spoken; it does not institute a right of information per se. See U.S. Const. art. I, § 6, cl. 1. Thus, it leaves open the possibility of secret substantive discussions on matters of national importance.
- 14 . See Hamilton, *Reformed Constitution*, *supra* note 6, at ch. 4.

15 . See generally Hamilton, Reformed Constitution, *supra* note 6.

16 . Benkler, *supra* note 1, at .

17 . *Id.* at .

18 . See generally Hamilton, *Discussions and Decisions*, *supra* note 6 (providing taxonomy of legal schools of thought that have misinterpreted the Constitution's relationship to self-rule, including public choice, civic republicanism, and dynamic statutory interpretation).

19 . See Benkler, *supra* note 1, at .

20 . *Id.* at .

21 . *Id.* at .

22 . See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474, 493 (1974) (upholding Ohio's trade secret protection law and concluding that trade secret law is consistent with and complementary to patent law).

23 . See *id.*

24 . See *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (affirming defamation judgment where non-media defendant's defamatory statements did not involve an issue of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that a newspaper that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim a constitutional First Amendment privilege against liability for those statements); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (holding the *New York Times v. Sullivan* standard applicable to "public figures" as well as "public officials"); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that a public official cannot recover damages for a defamatory falsehood relating to his official conduct absent a showing of "actual malice").

25 . See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (acknowledging the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society," but holding that when private information is legally obtained from public court records, press freedom prevails (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975)); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488-91 (1975) (reviewing and recognizing the right to privacy and its relation to First Amendment rights); *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) (protecting privacy interests where the offending publication made some use of the plaintiff's unpublished letters, held to be a violation of copyright law).

26 . See, e.g., James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (1996) (applying the term information to a wide range of items, including shamans and spleens).

27 . See, e.g., *Collections of Information Antipiracy Act*, H.R. 354, 106th Cong. § 1401(2) (1999) (defining

“information” as “facts, data, works of authorship, or any other intangible material capable of being collected and organized in a systematic way.”); Consumer and Investor Access to Information Act, H.R. 1858, 106th Cong. § 101 (3) (1999) (defining “information” as “facts, data, or any other intangible material capable of being collected and organized in a systematic way, with the exception of works of authorship”).

28 . See Benkler, *supra* note 1, at .

29 . 100 U.S. 82 (1879).

30 . See Benkler, *supra* note 1, at .

31 . See *Trade-Mark Cases*, 100 U.S. 82, 93-94 (1879).

32 . See *id.* at 91, 92 (employing the contemporary English common law usage of the term “information” which referred to a formal accusation of a crime made by a prosecuting officer).

33 . See, e.g., *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that mere effort cannot transform facts into copyrightable property); *Graham v. John Deere Co.*, 383 U.S. 1 (1966) (holding that obviousness is to be one of the three requirements of patentability); *Trade-Mark Cases*, 100 U.S. at 94 (stating that “while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are original, and are founded in the creative powers of the mind.”).

34 . See *id.* at n. .

35 . *Id.* I will leave aside for now the question whether Jefferson, who was not even in the country at the time of the Convention, is a reliable source of the meaning of Article I of the Constitution.

36 . *Id.* at .

37 . *Id.* at .

38 . H.R. 354, 106th Cong. (1999).

39 . H.R. 1858, 106th Cong. (1999).

40 . For purposes of this symposium, I limit my remarks to Professor Benkler’s themes.

41 . See Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong. (1996) [hereinafter Database Investment bill].

42 . See *id.* § 2.

43 . *Compare* World Intellectual Property Organization, Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference, CRNR/DC/6, art. 8 (Aug. 30, 1996) [http://www.wipo.org/eng/diplconf/6dc\\_all.htm](http://www.wipo.org/eng/diplconf/6dc_all.htm)? (considering whether the term of protection shall expire twenty-five or fifteen years from the date of completion of the making of the database) *with* Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong. (1996) § 6(a) (stating that the database shall remain protected “for a period of twenty-five years”).

44 . *See* Database Antipiracy Legislation, 145 Cong. Rec. S31, 601-17 (1999) (statement of Sen. Orrin Hatch).

45 . *See* Benkler *supra* note 1, at .

46 . *See* H.R. 354, 106th Cong. §§ 1402, 1401(3)-(4) (1999).

47 . *Id.* § 1401(2).

48 . *Id.* § 1402(b).

49 . *Id.*

50 . *Id.* § 1403(c).

51 . *Id.* § 1403(b).

52 . *Id.* § 1403(a).

53 . *See id.* § 1403(a)(2).

54 . *Id.* § 1403(a)(1), (3)-(5).

55 . *See id.* § 1403(e).

56 . *Id.* § 1409(c).

57 . *See* H.R. 1858, 106th Cong. § 101(1) (1999) (defining database as “information . . . collected and organized . . . through the investment of substantial monetary or other resources”).

58 . *Id.* § 101(3) (defining “information” as “facts, data, or any other intangible material capable of being collected and organized in a systematic way, with the exception of works of authorship”).

59 . “Works of authorship” is a significant exclusion, because it precludes database legislation from removing copyrighted works of authorship from the public domain.

- 60 . *See* Consumer and Investor Access to Information Act, H.R. 1858, 106th Cong. § 102(2) (1999).
- 61 . *Id.* § 101(5).
- 62 . *See id.* § 103. Like most other database proposals, the Consumer Access bill also permits independent gathering of the same information already collected in an existing database.
- 63 . *See id.* § 108(1)-(4).
- 64 . *See* Benkler, *supra* note 1, at -.
- 65 . *See* Collections of Information Antipiracy Act, H.R. 354, 106th Cong. § 1410 (1999) (“No later than 3 years after the date of the enactment of this chapter, the Register of Copyrights and the Assistant Attorney General, Antitrust Division of the Department of Justice, shall conduct a joint study and submit a joint report to Congress on whether the defense provided for in section 1408(c) should be expended [sic] to include collections of information that do not incorporate all or a substantial part of a government collection of information where the extracted information is not publicly available from any other source.”).
- 66 . 499 U.S. 340 (1991).
- 67 . *See* Benkler, *supra* note 1, at -.
- 68 . *See id.* at .
- 69 . *See* H.R. 354, 106th Cong. § 1405(a) (1999) (stating “nothing in this chapter shall affect rights, limitations, or remedies concerning copyright, or any other rights or obligations relating to information, including laws with respect to patent, trademark, design rights”); H.R. 1858, 106th Cong. § 105(a) (stating “nothing in this title shall affect rights, limitations, or remedies concerning copyright, or any other rights or obligations relating to information, including laws with respect to patent, trademark, design rights”).
- 70 . *See* Benkler, *supra* note 1, at -.
- 71 . *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (citations omitted).
- 72 . 248 U.S. 215 (1918).
- 73 . *See id.* at 241-43 (upholding injunction restraining defendant from appropriating news from plaintiff’s bulletins and in doing so recognizing a limited property right in news).
- 74 . *See id.* at 245-46 (expressing concern that the injunction be of reasonable length to protect the complainant’s interests but not so long as to be indefinite).

75 . See *Collections of Information Antipiracy Act: Hearing on H.R. 354 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. (1999), available at <http://www.house.gov/judiciary/106-wino.htm>? (summary of statement of Ms. Marilyn Winokur, Executive Vice President of Micromedex, on Behalf of the Coalition Against Database Piracy); *Collections of Information Antipiracy Act: Supplemental Statement on H.R. 2652*, 105th Cong. (1998) (statement of Jane C. Ginsburg, Professor of Law, Columbia University School of Law), available in 1998 WL 62976 (F.D.C.H.); Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. Cin. L. Rev. 151, 153 (1997) (“It is clear after *Feist* that copyright protects only the selection or arrangement of information contained within a compilation. The ‘facts themselves’ remain free, as do the other elements that § 102(b) of the Copyright Act excludes from the subject matter of copyright. These include ideas, processes, and methods of operation.”).

76 . See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (holding that the Age Discrimination in Employment Act’s abrogation of the states’ Eleventh Amendment sovereign immunity exceeded Congress’s authority under the Commerce Clause); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999) (holding that the state’s sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the state’s activities in interstate commerce); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999) (holding that neither the Commerce Clause nor the Patent Clause provided Congress with authority to abrogate state sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act because the Fourteenth Amendment’s authorization for “appropriate legislation” to protect against deprivations of property without due process of law did not provide Congress with authority to abrogate state sovereign immunity); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress’s enforcement powers under section 5 of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (holding that an obligation to conduct background checks on prospective handgun purchasers imposed unconstitutional obligation on state officers to execute federal laws); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacked authority under the Indian Commerce Clause to abrogate the states’ Eleventh Amendment immunity); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded Congress’s Commerce Clause authority since possession of a gun in a local school zone was not an economic activity that substantially affected interstate commerce).

77 . See U.S. Const. art. I, § 8, cl. 3 (Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”). The Supreme Court has held that Congress’s power to regulate commerce is specifically limited to regulating interstate commerce. See *Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that the Commerce power is “restricted to that commerce which concerns more States than one”); *U.S. v. E. C. Knight Co.*, 156 U.S. 1, 17 (1895) (holding the application of the Sherman Act to a specific business acquisition in the State of Pennsylvania invalid because the acquisition “bore no direct relation to commerce between the states or with foreign nations”).

78 . See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

79 . See *id.* at 566.

80 . *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991) (quoting *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (1966)).

81 . See Benkler, *supra* note 1, at .

82 . See *id.* at .

83 . Of course, this is not peculiar to database legislation. Congress is capable of passing a mind-boggling array of laws on the basis of extremely little information. When the constitutionality of congressional power is at stake, though, the Court has required some evidence of the necessity for such legislation. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 650 (2000) (“Congress’ failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.”); *College Savings Bank v. Florida Prepaid Postsec. Educ. Expense Bd.*, 119 S. Ct. 2219, 2225 (1999) (referencing the question required by *City of Boerne* whether the prophylactic measure taken under purported authority of section 5 was genuinely necessary to prevent violation of the Fourteenth Amendment); *Florida Prepaid Postsec. Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2202 (1999) (“The legislative record thus suggests that the Patent Remedy Act does not respond to a history of ‘widespread and persisting deprivation of constitutional rights’ of the sort Congress has faced in enacting proper prophylactic § 5 legislation.”); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (“The appropriateness of remedial measures must be considered in light of the evil presented.”); *City of Richmond v. Croson*, 488 U.S. 469, 510 (1989) (“Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.”).

84 . 489 U.S. 141 (1989).

85 . *Id.* at 157 (emphasis added).

86 . See generally *Alden v. Maine*, 527 U.S. 706 (1999) (holding that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts); *College Savings Bank*, 119 S. Ct. 2219 (holding that a state’s sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act (TRCA), nor voluntarily waived by the state’s activities in interstate commerce); *Florida Prepaid*, 119 S. Ct. 2199 (holding that neither the Commerce Clause nor the Patent Clause provided Congress with authority to abrogate state sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act because the Fourteenth Amendment’s authorization for “appropriate legislation” to protect against deprivations of property without due process of law did not provide Congress with authority to abrogate state sovereign immunity).

87 . See *Alden*, 527 U.S. 706; *College Savings Bank*, 119 S. Ct. 2219; *Florida Prepaid*, 119 S. Ct. 2199. It seems likely that given this line of cases, the Court would invalidate any attempt by Congress to abrogate state sovereign immunity and provide a remedy for database owners against state misappropriation or infringement of database property.

88 . See generally William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 Geo. Wash. L. Rev. 359 (1999) (exploring the scope of Congress’s power to legislate intellectual property with particular attention to the Commerce Clause power). There may also be an argument that database legislation could be enacted pursuant to the so-called “foreign affairs power.” See, e.g., Marina Lao, *Federalizing Trade Secrets Law in an Information Economy*, 59 Ohio St. L.J. 1633, 1682-85 (1998) (discussing foreign affairs power with respect to trade secrets law).

89 . Because Professor Benkler does not address it, I will leave aside the question of Congress's power vis-à-vis section 5 of the Fourteenth Amendment to enact property rights in data. Suffice it to say that section 5 limits Congress to enacting laws that enforce constitutional rights. *See Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid*, 119 S. Ct. 2199 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997). There would have to be a showing of widespread constitutional violation by the states to justify it, and it would have to be proportional and congruent to those existing violations. *See Kimel*, 120 S. Ct. at 650; *Boerne*, 521 U.S. at 530. *See generally* Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 *Cardozo L. Rev.* 469 (1999). Thus, the entire subject would turn on a finding that the states had violated the property rights of citizens with respect to information.

90 . *See* Benkler, *supra* note 1, at n..

91 . *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L.J.* 147, 186 (1998) (positing that intellectual property law, while view-point neutral, is not content-neutral).

92 . *See, e.g.*, *Buckley v. American Constitutional Law Found., Inc.*, 119 S. Ct. 636, 649 (1999) (Thomas, J., concurring) (recognizing the Colorado regulation at issue as content-based, and thus applying strict scrutiny and requiring narrow tailoring); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 783 (1996) (applying strict scrutiny to content-based restrictions on public access cable stations); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (applying “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content”).

93 . *See* *New York v. Ferber*, 458 U.S. 747, 756-57, 773 (1982) (requiring the state to demonstrate a compelling interest and finding that New York had a compelling interest in banning child pornography and determining that its approach was neither underinclusive nor overbroad); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (“In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”).

94 . *See* Council Directive 96/9/EC of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20. The Directive, like United States law, draws a line between copyright protection for databases and other protection. Like U.S. law, the Directive limits copyright protection to the “selection or arrangement of [database] contents” resulting from the “author’s own intellectual creation.” *Id.* at art. 3(1). Also consistent with U.S. law, the copyright protection of databases under the Directive does not “extend to their contents.” *Id.* at art. 3(2). Nevertheless, the Directive does not leave database protection at copyright law. In its most important provisions, it institutes a system of sui generis database protection, which arguably is not controlled by the international intellectual property treaties such as the Berne Convention’s reciprocity requirement. Therefore, the EU has attempted to enact database protection that is non-reciprocal. Under the Database Directive, the EU countries need not provide protection to nationals owning databases within their borders if their home country does not provide database protection. *Id.* at art. 11 (stating that the right shall apply to “database[s] whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community”). *See generally* M. Nimmer & P. Geller, *International Copyright Law and Practice* (1998) (discussing implementation of database provisions in foreign countries’ laws).

95 . *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public*

*Domain*, 74 N.Y.U. L. Rev. 354, 372 n.83, 413 n.230 (1999).

96 . See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (“[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.”).

97 . See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (invalidating California loitering statute for vagueness and explaining that “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement”); *Smith v. Goguen*, 415 U.S. 566, 572-74 (1974) (invalidating for vagueness Massachusetts flag desecration statute); *Gooding v. Wilson*, 405 U.S. 518, 519-20 (1972) (invalidating for vagueness Georgia statute prohibiting opprobrious words and abusive language); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”).

98 . For an introductory discussion of international database legislation, see Marci A. Hamilton, *Database Protection and the Circuitous Route around the United States Constitution*, in *International Intellectual Property and the Common Law World* 24-30 (Charles E. Rickett & Graeme Austin eds., forthcoming 2000).