President Ramo: Among the things that The American Law Institute has done, none have been harder in terms of the sheer volume of work, nor have had I think more impact on our future, than the institution of the Young Scholars Medal of The American Law Institute.

I have asked specially Judge Willy Fletcher, who was the Chair of the Committee that chose the first two Young Scholars, to come and introduce and present the work of our second Young Scholar. I wanted to thank him in particular, and most of you know about Judge Fletcher, but this is a man who was a Rhodes Scholar, a brilliant jurist, but also a teacher. I was very grateful when he agreed to chair this first Committee. What he didn't know, and I didn't know, was whether there would be any submissions at all, and it turned out that we had not one or two but, as I recall, Lance or Willy will remember, 70-some-odd submissions.

Now let me explain to you that these submissions were not simply letters of nomination, we are talking about law-review articles of significant length, many of them that came with each one. We had so much to do that we ended up having to expand our Committee. But at the end of the day, one person read everything and that was Willy Fletcher, and for that I want to laud him, thank him, and tell him to come to my house and I will make dinner. Judge Fletcher. (*Applause*)

Judge William A. Fletcher (Cal.): Well, thank you, Roberta. There was a time, about a year ago, when I would not have thanked you. (*Laughter*)

President Ramo: I am just glad we are speaking again.

Judge Fletcher: I want to emphasize the hard work done by the Committee. You know how much work it is to get through a single law-review article, not the writing but even the reading of it.

Let me give a little context for this Young Scholars Award, which was not my idea. It is a fabulous idea, and I want to put it into the context of the history and the work of the Institute.

As you know, the Institute was begun in 1923. The primary function of the Institute, at that time, was law reform with a small rather than a capital R. The primary problem in private law at the time was the problem that Swift v. Tyson [41 U.S. (16 Pet.) 1 (1842)] had successfully dealt with up to the Civil War, which is to say the disuniformity of state law. In the early years of Swift v. Tyson, the federal courts performed a wonderful role of providing a uniform body of common law to which the states could, if they chose, adhere. Most of them did so willingly, even gratefully.

That system broke down after the Civil War, as the federal courts, primarily staffed by former railroad lawyers, became increasingly different ideologically from the state courts, and as the states became more and more numerous. The mechanisms for coordinating state law were few and far between. The primary purpose of The American

Law Institute in 1923 was the Restatements, which would provide a ready resource prepared by judges, scholars, and practitioners to show what the rules were. It was useful just to have a law book so you knew what the general rule was. In marginal ways, the Restatements gave their view as to the better rule.

The Restatements have been an enormous success, as we all know, and the Institute over the years has moved to reform, I am not sure with a capital R, but the R is larger. We now have had several projects of model codes; I think the most successful is probably the Model Penal Code. We have also had a number of projects stating principles of law, some of them highly contested. I remember the debates that surrounded Principles of Corporate Governance. We have also had other projects of this nature—Aggregate Litigation recently, Family Dissolution, and Transnational Civil Procedure, in which I have been most interested because I am a proceduralist.

We have seen the Institute evolve as the needs of the legal community have evolved. The Young Scholars Award is at the leading edge of our quest to be useful. How do we engage the new generation of legal scholars with projects that have real-world impacts? As we all know, one of the abiding problems with the academy is its tendency to give us high theory and low usefulness. (*Laughter*)

Our Committee was enormously impressed by the quality of work that was submitted to us. Ordinarily we don't read the names of all the participants on these committees, but because of the enormous amount of work I would like to recognize all the members of the Committee: Judge Arnold from the Eighth Circuit; Professor Bartlett from Duke; Sheila Birnbaum from Skadden, Arps; George Davidson of Hughes Hubbard; Professor Donohue from Stanford; Professor Dreyfuss from NYU; Professor Fallon from Harvard; Conrad Harper from everywhere; (*laughter*) Justice Jacobs from the Supreme Court of Delaware; Michele Kane from the Walt Disney Company; Professor Richman from Columbia; Professor Stephan from the University of Virginia; and, she needs no introduction, Roberta Ramo.

We had two winners. We did the work for two years. The first winner was Professor Bar-Gill of NYU, who writes on behavioral economics, known more familiarly as freakonomics. He has written papers primarily on consumer credit, credit cards, and the behavior on both sides—the behavior of the banks and the behaviors of the consumers. He spoke at last year's Meeting in San Francisco.

This year, I am pleased to introduce the other winner—this is not a first and second place; these are two winners whom we present sequentially—Jeanne Fromer. Jeanne did her undergraduate work in Computer Science, *summa cum laude* at Barnard. She then did a Masters at MIT in Electrical Engineering and Computer Science. And then she decided she wanted to do something easy, so she went to Harvard Law School, where she graduated *magna cum laude* in 2002.

She was a law clerk first to Judge Robert Sack on the Second Circuit, and then with Justice David Souter. She is now a professor at the Fordham Law School, visiting

this year at NYU and I think visiting next spring at Harvard Law School. Maybe one day you will come out to Berkeley, too. (*Laughter*)

Jeanne is an expert in patent law and various forms of intellectual property, and Jeanne has a lecture prepared. (*Applause*)

Professor Fromer.

Professor Jeanne C. Fromer (N.Y.): Thank you. Thank you very much. I am delighted to be here for the second time, and hopefully the second of many times. I am here today as an academic. I think I will throw some high theory at you, but hopefully it will have some useful aspects to it. I am going to be talking about the Intellectual Property Clause's external limitations, and I have been working on a broader project about the extent of Congress's powers and states' powers in matters of intellectual property. Today's subject that I will be focusing on is whether there are limitations on Congress's power to enact intellectual-property provisions, both within the Intellectual Property Clause itself and with regard to its other powers. [See Jeanne C. Fromer, *The Intellectual Property Clause's External Limitations*, 61 DUKE L.J. 1329 (2012).] The reason I am focusing on this is because of what I have been observing over time is Congress's increasing use of legislative power at the fringes, if not beyond what seem to be the Intellectual Property Clause's powers.

And so let me start out with the text of the Clause itself, which gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [U.S. CONST. art. I, § 8, cl. 8.]

Looking at the Clause on its own suggests that there are some internal limitations on the power that is conferred by this Clause, for example, "limited Times."

Now the question remains—and until now it has not been head-on addressed, at least by the courts—whether Congress can circumvent what seem to be the limitations here using its other perhaps more expansive powers. Some hypothetical examples, first, are can Congress legislate perpetual protection with patents and copyrights, which would seem to contravene the "limited Times" provision?

Can Congress grant rights to those who did not create the works in the first place, when the IP Clause specifies that the rights have to be given "to Authors and Inventors"?

Can Congress grant rights in unfixed performances, say, against bootlegging, when the Clause itself requires that the rights be given for "Writings," which I will explore more in depth?

And the reason to think about this is because some other powers that Congress has, particularly the Commerce Clause [U.S. CONST. art. I, § 8, cl. 3], the Spending

Clause [Id. art. I, § 8, cl. 1], and the treaty powers [Id. art. II, § 2, cl. 2] have been given very expansive interpretations in our time.

So I am going to try to answer this question about whether there are external limitations that the Intellectual Property Clause imposes, or, at the very least, give an analytical framework pursuant to which to assess the constitutionality of such laws.

And then I will analyze a number of recent laws that Congress has passed or has been thinking about passing that are potentially constitutionally problematic. So with some more nuances I will develop, I am going to try to make the case that if Congress is seeking "To promote the Progress of Science and useful Arts," it only can use the means that the Intellectual Property Clause permits to it, "securing for limited Times to Authors and Inventors the exclusive Right to their . . . Writings and Discoveries."

And I am going to turn to the various forms of evidence that constitutional analysts tend to use, the constitutional texts and structure, the history, Supreme Court doctrine, and policy to build the case that the IP Clause so externally limits Congress from using its powers in other ways.

Let's start out with the text and the structure itself. You've got this Clause, "To promote the Progress of Science and useful Arts, by securing for limited Times," etc. Some scholars say that this first part, about promoting "the Progress of Science and useful Arts," is a nonbinding preamble.

Now that is hard to swallow, it is hard to read it this way without evidence of this, because it would read that first part of the Clause unnaturally as a nullity, and it would give a different grammatical understanding to it than to the other Article I, Section 8 powers, which are understood to provide a grant of power after the "To."

In that sense, it is like the other powers in Section 8, but there is a way in which it is different than the other ones. It is the only clause in the Constitution that specifies the means for carrying out the allotted powers. It's got this unique means-end structure, "To" _____, "by" _____, and so the implication is that Congress has—and I think this is a clear textual implication—the power "To promote the Progress of Science and useful Arts," using only the means set out, just based on the grammatical structure. Or you compare that to the Commerce Clause, for example, which gives Congress power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," a different structure, or the Postal Clause [U.S. CONST. art. I, § 8, cl. 7], "To establish Post Offices and post Roads." With the IP Clause, by contrast, you've got here the end, "To promote the Progress of Science and useful Arts," and the means of doing so, "securing for limited Times to Authors and Inventors the exclusive" rights.

Some scholars have suggested that there ought to be a case that the Intellectual Property Clause limits Congress from using its other powers, such as the Commerce Clause in particular, when the IP Clause's power seems to end, because the IP Clause is

more specific and the Commerce Clause is more general, and more specific ought to dominate over the general.

That is problematic reasoning, just on its own, because there are some ways in which the Commerce Clause is more specific than the Intellectual Property Clause, because it only applies to interstate commerce, not intrastate commerce. That reasoning would suggest that the IP clause similarly cannot be used to regulate intrastate behavior, and I don't think anyone thinks that is the case.

And so there is some sense from looking at the constitutional text itself and the structure of the provision that suggests that there are particular means that are supplied to Congress to promote this particular end, and it ought not use other ones. But it is only suggestive, it is not that ironclad, and I think we get better evidence when we look at the history of this Clause.

Let me turn then to what happened at the Constitutional Convention, rewinding a bit, and we've got the Framers that want to federalize intellectual property. Until then, the states had been passing different intellectual-property provisions, and this was seen as increasingly problematic because of the conflicting rights, the conflicting durations, conflicting assignments in different states, the fact that you couldn't control what was seen as infringement or reproduction at least in other states, and it was costly to file in multiple states. This was the classic case for federalization. James Madison and Charles Pinckney, in particular, were concerned about this, and they decided to put forth some proposals. They each put forth four on the same day, so we had eight proposals altogether about intellectual property, and they used different language, but they each covered the same four topics. They each proposed a patent power, a copyright power, power to establish a national university, and the power for the federal government to give grants and prizes to promote scientific and cultural progress. This was referred to the various committees that were looking at this, and we don't have much more information, without any recorded debate. A third committee of 11 recommended the inclusion of the Intellectual Property Clause exactly as I showed it to you on that second slide up there, exactly as it appeared in the final version.

Before that happens, Madison and Pinckney make some final attempt to get this university power back in, but that is dismissed, it is rejected. Then, the Intellectual Property Clause is approved as you saw it.

But despite the near silence in the record, there are a number of inferences that can be drawn. First of all, the Intellectual Property Clause, as ultimately adopted, is more limited than the plenary patent and copyright powers that they proposed, because you've got this preface: "To promote the Progress of Science and useful Arts, by" doing this, as opposed to the power to Congress to grant patents and copyrights. There is an extra wrinkle there. Similarly, it is more limited than if Congress had been granted the power to promote the progress of science and useful arts period.

What is particularly interesting is that the language that was ultimately adopted is derived in an interesting way from these proposed eight powers. It is very clear if you look at the blue highlighted language to see how this turned into the means aspect of the Intellectual Property Clause, you see aspects of the language are synonyms that end up in the means aspect. What is really interesting is that the language for that ends part comes mostly from the rejected powers. That's the highlighted green language there, and you see how that ends up turning into the "promote the Progress of Science and useful Arts," and this implies strongly that the Framers rejected other ways of promoting progress of science and useful arts.

They kept the language similar to that associated with the rejected proposals, without giving the means that were associated with them, and strongly implying just from a textual analysis that they don't have those means. This evidence emphasizes that the other means were considered but were not included, and the implication is that they were rejected.

Most strongly confirming this understanding is what then happened early on in Congress. You've got the Framers actively participating in public affairs at that time, and we can see what they thought the Constitution meant in operation. The first Congress comes around and it thinks that providing legislative copyright and patent laws is quite important, it is one of the first things that Congress does. There are a number of things that they did that indicate that they thought they couldn't do anything other than use the means that were provided in the Intellectual Property Clause, even when another constitutional provision might provide them the power to do so.

The first example I will give you is with patents of importation. The first draft of the Patent Act of 1790 [H.R. 41, 1st Cong. § 6 (1790)] included a provision granting exclusive rights for limited times to the first person to import foreign technologies that were not previously known or used in the United States. Such technologies had already been invented by someone else.

This provision was removed from the final act [See Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (repealed 1793)] because of doubts as to its constitutionality. And one example that I have put up here is a letter from Tench Coxe, the Assistant Secretary of the Treasury, to James Madison discussing this matter, and Tench Coxe is saying, I see the truth of your apprehension, James Madison, that we can't do this. The only way we would be able to do this is if we struck out the whole clause that says "by securing [exclusive rights] for limited Times to Authors," because that means is not at our disposal. Why not? Because you would be granting rights to someone who is not the inventor in order "To "promote the Progress of Science and [the] useful Arts." So the thought was that this wasn't allowed. But what is interesting about this is it is not allowed even though if you excise the IP Clause and you look at the other powers that were given to Congress, it likely would have been allowed, particularly under the Foreign Commerce Clause, even under the narrower understanding that the Commerce Clause had at the time.

There are other examples of this. At this point, Tench Coxe is frustrated. He wants there to be patents of importation, but he sees that there are constitutional problems with it. He corresponds further with James Madison, and he suggests granting instead federal land to encourage the importation of inventions. And so James Madison writes back to him and says no, that's going to be unconstitutional too. We don't have the means to do that. We can "promote the Progress of Science and [the] useful Arts" using only the means that we have. Again, interesting because Article IV otherwise gives Congress the authority to dispose of federal lands [U.S. CONST. art. IV, § 3, cl. 2].

Here, then, is another instance of James Madison seeing the IP Clause as an external limitation on what Congress can otherwise have the authority to do. It seems, then, that the Intellectual Property Clause limits the other means that are available to Congress to use, and this goes on in a number of ways early on in the nation's history.

George Washington comes in, in his first annual message to Congress in 1790, and asks Congress to create a national university. Members of Congress debate it, but they decide they have no power to do it, again, because of the IP Clause's limitations. They say we have rejected that means of promoting "the Progress of Science and [the] useful Arts."

You then have an inventor that comes into Congress, John Churchman. He wants Congress to fund an expedition to help him develop his invention for determining longitude based on the magnetic variation at places of known latitude. And here again Congress says, okay, we will give you a patent, that's no problem, that sounds great, but we don't think we can fund you, they say. They debate this long and hard, and they say there are constitutional concerns, the same ones that were expressed in the correspondence with Madison and Tench Coxe, and they table it, and they ultimately deny the request for very much the same reason.

What we are seeing overall is a very clear understanding early on that the means that the IP Clause provides are the only means that Congress thinks it has "To promote the Progress of Science and [the] useful Arts." Supreme Court doctrine has never addressed this squarely, but it is quite consistent with this understanding. There are a number of cases interpreting the Intellectual Property Clause, and there are constant references that the Supreme Court makes to the IP Clause as both a grant of power and a limitation on that power.

First, there is the *Trade-Mark Cases* in 1879 [100 U.S. 82 (1879)], which decided that Congress cannot enact trademark protection under the Intellectual Property Clause, which it initially had done. The reason for that, although the reasoning is not one hundred percent clear, seems to be that trademark law is not about promoting "the Progress of Science and useful Arts," but is about something else. And if it is not about that, then you are not even in the realm of the Intellectual Property Clause. The Supreme Court suggests that Congress go and reenact trademark protection under the Commerce Clause, which is what Congress proceeds to do, and this is suggestive of a certain framework that if something is about promoting "the Progress of Science and [the] useful Arts," Congress

has got to comply with the IP Clause's means. If it's not, Congress needs to find another power and enact it there.

Eldred v. Ashcroft [537 U.S. 186 (2003)], decided in 2003, about the constitutionality of copyright term extension for already-existing works, set up a framework for analyzing the constitutionality of provisions under the Intellectual Property Clause. And it said it's not going to give deference to Congress in interpreting the language of the Clause, but as long as Congress acts within that, then the Court will defer to Congress. But the Court was willing to look at the structure and motivation of the legislation to see what it was about to assess the constitutionality. There, they upheld that legislation.

So we don't have Supreme Court precedent squarely addressing this issue, but understanding this as a restriction or as a limitation on Congress's other powers seems to be consistent with that. There are some consistent cases that the Supreme Court has decided on the interrelationship of constitutional powers. Most prominent is Heart of Atlanta Motel v. United States [379 U.S. 241 (1964)], in 1964, which upheld federal legislation banning racial discrimination in public accommodations. [Id. at 261-262.] There, the Court held that the legislation was a valid exercise of Commerce Clause power, even though the Civil War amendments hadn't expressly granted the power to enact this law. Some have read this case to suggest analogously that what is not permitted by the Intellectual Property Clause can be done under the Commerce Clause. But I would suggest that given the evidence that I have just laid out, no such implication ought to arise as in the *Heart of Atlanta Motel* case, where there was no implication from the Civil War amendments not to allow Congress to use other powers to to enact legislation like that at issue in that case. But the evidence I have presented is otherwise in the intellectual-property context.

More strongly on point is a 1982 case, a bankruptcy case, a railway labor case [Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982)], which involved a law regulating the economic benefits for railroad companies that had declared bankruptcy. [Id. at 461-463.] There, the Supreme Court said that's not a valid exercise of the bankruptcy power because it made the bankruptcy laws nonuniform, which is contrary to the Bankruptcy Clause [U.S. CONST. art. I, § 8, cl. 4]. [Id. at 468-471.] The suggestion from that case was that if you violate some limitation of the Clause, you may not be able to do it under another power, and I think this reasoning applies even more strongly to the intellectual-property context because of the evidence that the other powers ought not to be used.

This understanding is remarkably consistent with intellectual-property policy as it ties back to the Intellectual Property Clause itself. In the United States, copyright and patent law are seen as utilitarian. It's all about weighing the costs and the benefits between granting a reward to creators and giving a great benefit to society by disseminating works, by inspiring further creation of works, and by allowing people to learn from works. The thought is that the benefit of the intellectual-property right ought to exceed the costs. In fact, people see this from the Intellectual Property Clause itself,

which says it is about promoting "the Progress of Science and [the] useful Arts" by giving these rights, in that we give these rights only for the good of society.

This vantage point, too, suggests that you've got these carefully calibrated means set out in the Intellectual Property Clause, and if you contravene them, then that would be problematic, because it upsets this balance. For example, if you grant rights that are perpetual, you will upset this balance to reward creators more heavily than you are benefiting society.

Now it doesn't suggest the same thing, though, with regard to using means that have nothing to do with what's set out in the Intellectual Property Clause, such as offering grants and prices. That's not contravening particular aspects, it is just offering another way of doing it. So in that sense, the policy doesn't line up entirely with this analysis and suggests that we ought to be more careful when the means are being contravened rather than using other means.

All in all, what does this discussion suggest? I think what this does suggest is that if the law is about promoting the progress of science and the useful arts, it has to use the means of the IP Clause. And how do you measure that? Well, you could look for structural purpose, that's often how we assess what the law is about, and so laws with that sole purpose have to comply with the IP Clause's means.

Now it gets more complicated when you've got laws that have multiple purposes, as they often legitimately do. There may be laws that are about improving foreign relations and also are about promoting the progress of science and the useful arts, or laws that are about regulating commerce and also about promoting progress of science and the useful arts. I would like to suggest that laws that have multiple purposes ought to be analyzed using a presumption framework, in that laws that exceed the IP Clause's means ought to be presumed unconstitutional, unless there is clear and convincing evidence that Congress actually considered superseding the IP Clause's means and Congress thought it was important, due to other legitimate material constitutional interests. So it thought that, say, the commerce interests predominated, and it really considered that it was going beyond the means and it thought it was important to do so.

Now this ought to be, in light of the analysis, harder to overcome for laws that contravene the IP Clause's means directly—granting perpetual protection, for example—than for those that employ means that are not contained in the IP Clause, like giving out grants.

This analysis would recognize that Congress does have valid non-IP reasons for enacting laws, but it puts the burden on Congress to weigh the different issues as a political matter, which alleviates pressure on courts that would otherwise need to make a political determination. What it does is it converts the constitutional question into more of a statutory question, which is easier for the courts to handle.

And so this has been a little bit abstract. Let me try to start making this more concrete. I think there are a number of potential conflicts that the IP Clause has with other clauses of the Constitution, and then I will discuss concerns with a number of different laws.

You often get a direct collision easily, possibly with the Commerce Clause, so I think that's pretty clear cut.

The Spending Clause, giving Congress the power to provide for the general welfare, well, this is another possible form of tension. There was a fight early in the nation's history over whether to key this to the other Article I, Section 8 powers, as Madison suggested, or not to, as Hamilton did. The Supreme Court ultimately sided with Hamilton on this, and the Spending Clause, as now understood, is quite a broad power. What otherwise might have been more direct tension with the IP Clause, it is harder to make that case in light of the broader understanding that the Supreme Court has read for the Spending Clause, although I think you can make the case that given the understanding of the Intellectual Property Clause, the Spending Clause is limited in important ways as well.

Now consider the Necessary and Proper Clause [U.S. CONST. art. I, § 8, cl. 18.]. It is about giving Congress power to do things that are necessary and proper to achieve other laws under other powers. In this context, you can see a conflict to the extent that Congress would use this power to go beyond the means. I think the way to understand this Clause, in relation to the IP Clause, is about giving Congress the power to do things to achieve ends via the particular means that are set out. You can, say, set up a patent office to examine patents to grant them, but you may not be able to reach very far beyond to do other means.

Director Liebman: Jeanne.

Professor Fromer: Yes.

Director Liebman: Not too much more, because we want to have time for questions.

Professor Fromer: Sure. Sure. And I will just note that the treaty powers also give a form of conflict, particularly with congressional executive agreements that are enacted pursuant to Article I. Article II is more tricky, because that is not about Congress's powers per se, and we don't have a lot of evidence on the IP Clause's external limitations there.

Let me just note quickly a few federal laws that have been enacted in recent years which led me to this project in the first place, and the fact that Congress is increasingly pushing to legislate at these boundaries.

The first is the trade-secrecy provision, the Economic Espionage Act of 1996 [Pub. L. No. 104-294, 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831-1839 (2006))]. There Congress said it is legislating pursuant to the Commerce Clause and the IP Clause. They talked about maintaining commercial ethics but also encouraging invention, and so it protects things that are otherwise patentable but also things that would not be, like customer lists and other valuable economic information.

The constitutional concern here is that theoretically protection can last, can be of infinite duration. However, if no one ends up reverse engineering or independently discovering the information, protection lasts forever. Now that seems problematic in light of the "limited Times" restriction in the Intellectual Property Clause, and Congress didn't express any concern about that, so there's quite a concern there.

Another provision is the antibootlegging provision of the Uruguay Round Agreements Act [Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended in scattered sections of the U.S. Code] in 1994 where, pursuant to TRIPS [Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization annex 1C, 1869 U.N.T.S. 299], Congress enacted civil and criminal prohibitions on bootlegging musical performances. Again, this is constitutionally problematic if you understand writings to protect only fixed work, so things that are not ephemeral, like a musical performance is, and in that sense it is constituted problematic. When this law was challenged on this constitutional ground in a number of courts prosecuting people, the courts upheld it when the executive branch came in and said that the law was enacted pursuant to the Commerce Clause even if Congress said it was using the IP Clause to enact the law. But according to the analysis I have just given, that's still problematic. Congress never considered that it was going beyond the IP Clause's means.

Copyright restoration, in which Congress restored copyright protection for certain foreign works that had fallen into the public domain in the United States, due, among other things, to noncompliance with formalities that had been imposed at the time, which the Supreme Court just upheld in the Golan v. Holder case [132 S. Ct. 873 (2012)], also seems to be somewhat problematic if you understand "limited Times" to mean that once something falls into the public domain it stays in the public domain.

Now the Supreme Court held otherwise just a few months ago, and a number of people, myself included, think that maybe it did this to avoid this hard question of a collision between the treaty powers and the Intellectual Property Clause powers.

And then just quickly, database-protection laws raise similar issues. Federal funding of artistic and scientific works is a huge question. That is probably fine, and interestingly enough, it is probably fine either under the expansive understanding of the Spending Clause but also under the Necessary and Proper Clause, because this can lead to works that can be patented and copyrighted and very directly so. There are still some other means that are allowed, despite these restrictions, that are not in conflict with intellectual-property policy, and I look forward to your questions. (*Applause*)

President Ramo: Thank you. (*Applause*)

Professor David J. Seipp (Mass.): Very, very interesting paper. I wonder if there might be some dangers in taking the Intellectual Property Clause too seriously. (*Laughter*)

I understand that 19th-century judges and some very modern scholars think that the word "Progress" in the Intellectual Property Clause should apply to copyrights, as well as to patents, and that we should have judges taking a serious look at whether some things that are copyrighted actually represent progress in any real sense. Justice Holmes seems to have taken us off the right track in Bleistein v. Donaldson Lithographing Company [188 U.S. 239 (1903)] in 1903, and perhaps you think we should take the word "Progress" and give it some greater meaning in the Intellectual Property Clause?

Professor Fromer: I think it is a very important question, and Justice Breyer has been making motions in this regard, in recent dissents in intellectual-property cases, that we ought to investigate whether the laws actually promote the progress that we want. I think the way I read it is consistent with that, but it doesn't have to be the understanding, because I think that that invokes a number of concerns about whether we want courts judging what constitutes progress. Obviously, I think we want Congress to think about that when they are enacting provisions, and I'm very fine with that, but I don't know that we want courts doing that, especially because they may not have the best evidence to do that.

One of the weird things is that copyright and patent law don't have agencies making substantive rules, which we have in so many other contexts, where we would get that evaluation about whether the benefits exceed the costs of enacting particular laws. And this absence leaves us stuck in this odd place. It almost is an argument for agencies to be working in this space, because they would be able to evaluate whether particular legal rules promote progress in ways that I am nervous about the courts doing and some people suspect Congress might not be doing.

President Ramo: Just because we have limited time, we will do 5 and then, is that 3, whatever that is.

Mr. John K. Roedel, Jr. (Mo.): I am a new member, and I gather that I am probably one of the very few patent lawyers in this group, and I certainly commend your presentation. I kind of took it, to some degree, as more the limitation that the IP Clause has on the other clauses, rather than vice versa, but I can't help but make two comments.

One is that the Supreme Court has made it very clear, in the context of patents, that there is a constitutional limitation on the Congress's authority to authorize the grant of patents or the Hotchkiss against Greenwood case [52 U.S. (11 How.) 248 (1850)] in 1850. And then it was emphasized in the A & P case [Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950)], in 1950, and then finally in the

Marbury against Madison [5 U.S. (1 Cranch) 137 (1803)] of patent law, which has Graham against John Deere [383 U.S. 1 (1966)] in 1966, where the Congress, before they decided whether the invention was obvious under § 103 [35 U.S.C. § 103], they first had to interpret what § 103 meant. But before that, they had to decide whether the Congress had the authority to enact § 103, and they finally decided that it did, but fairly narrowly, by saying that the emphasis on obviousness was one of inquiry, not quality, so they very much limited the scope of what the Congress could do.

And I can't help but take this occasion to mention that my former partner, Jordan Cherrick, suggested here, a year ago, that ALI undertake a project in intellectual-property law, and he was invited to send in a memorandum on this topic. He came down, and since Jordan is not personally a patent lawyer, he met with several of us in the firm, and we turned out a memorandum proposing such a project, not in intellectual-property law, because I don't know what that is, but in patent law. So I am hopeful that maybe—

Director Liebman: We certainly appreciate the document and getting comments on it, and we are thinking about it, absolutely.

Mr. Roedel: Anyway, I very much commend your presentation.

President Ramo: And also you should know, as Lance said before, that part of the award to the Young Scholar is to have a meeting on whatever topic he or she is interested in, and Jeanne is going to have a meeting in this general area in the fall and will hopefully refine things from then.

Mr. Michael Greenwald (Pa.): Hi. I was worried until the very end of your talk that you were going to exclude all the arts legislation as somehow not fitting in. I am glad you did touch on that.

So that only leaves me with one quick question that puzzles me a little bit. I am sure there is an answer for it. What exactly are the useful arts? Are they to be distinguished from not useful arts or (*laughter*) do we know?

Professor Fromer: They definitely didn't want to promote the progress of the nonuseful arts in the same way, but useful arts are the things you think about as engineering these days, or applied sciences.

Mr. Greenwald: So the useful arts do not include the kind of artistic works that are included in the other legislation?

Professor Fromer: No. Oddly enough, at the time, science meant art and art meant science.

Mr. Greenwald: Okay. Thank you.

President Ramo: Jeanne, thank you very much.

Professor Fromer: Thank you. (*Applause*)

President Ramo: I have to note for the group that yesterday Justice Stevens left me his notes. This shows generational change. (*Laughter*)

Professor Fromer: I didn't have a printer.

President Ramo: Thank you very much.

Let me just say we are thrilled with the quality of what has come to us through the Young Scholars program. I want to tell all of you, because everybody here—lawyers, scholars, and judges—need to speak to the law-school deans you know. Justice Goodwin Liu of the California Supreme Court is the Chair of the Committee that will choose the next two Young Scholars. Submissions will come in the fall. A letter will go out from him, sometime early this summer. But those of you that know law-school deans need to talk to them about finding the very best Young Scholars on their faculties that are interested in law reform and proposing them, so that they can join the distinguished company of scholars like you just heard from Professor Fromer. So thank you, Willy, and thank you again, Jeanne, for this wonderful lecture.