

CONSIDERING COPYRIGHT RULEMAKING: THE CONSTITUTIONAL QUESTION

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ABSTRACT

This Article addresses anew the question whether rulemaking by the U.S. Copyright Office is constitutional. Formally, the Copyright Office is part of the legislative branch of the federal government; it is a subsidiary unit of the Library of Congress, rather than a freestanding independent agency or a part of the executive branch. The thesis here is that faithful application of Supreme Court precedent could plausibly proscribe not just prospective grants of public-facing regulatory authority to an “Article I” agency like the Copyright Office, but also certain existing rulemaking responsibilities that the Copyright Office regularly carries out in conjunction with the Library of Congress. The Article then goes on to discuss implications of that putative constitutional problem for the rulemaking provisions of the Digital Millennium Copyright Act’s anti-circumvention regime, in particular. The claim in this latter portion of the Article is that if the triennial rulemaking mandated by 17 U.S.C. § 1201(a)(1)(B)–(C) is unconstitutional, then the statutory ban on the act of circumventing access-control technological protection measures in 17 U.S.C. § 1201(a)(1)(A) should be deemed invalid as well. Prevailing constitutional remedies doctrine dictates that the rulemaking process, which creates temporary exemptions from the circumvention ban, cannot be “severed” from the ban itself.

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I. INTRODUCTION

It is no secret that American copyright policy has its share of imperfections. Scholars have criticized the federal copyright statute in recent years for being, among other things, too long, too complicated, divorced from the normative underpinnings of intellectual property ideals, counterproductive to technological progress, and generally ill-suited both formally and substantively to serving valid social welfare goals.¹ In addition

1. See generally Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 551 (describing the federal copyright statute as an “[o]bsolete [a]malgam” that is “much too long, . . . far too complex, incomprehensible to a significant degree, . . . imbalanced in important ways[, and] lack[ing] normative heft”); John Tehranian, *Infringement*

to revisions of particular provisions of the law, some commentators have proposed a change in the way that the federal government formulates and adopts copyright policy: maybe things would be better, the idea goes, if Congress made less copyright law and an administrative agency made more.²

The soundness of such proposals depends on a set of relatively wide-ranging considerations. Some are a function of subject-matter-specific facts concerning the particular mechanics and political economy of copyright law and policy. Others are a function of broader truths (or, perhaps more safely, contested truths) about the relative merits of policymaking by administrative bureaucracy versus policymaking by legislature. And others, still, may depend on the constitutional permissibility of imbuing the existing American administrative agency with principal copyright policy responsibility—the U.S. Copyright Office—with enhanced, public-facing lawmaking authority.³

In the interest of squarely evaluating the latter concern, this Article takes up anew the question—already addressed to some degree by others—

Nation: Copyright Reform and the Law/Norm Gap, 2007 UTAH L. REV. 537, 539 (“[T]he vast disparity between copyright law and copyright norms . . . ha[s] highlighted the need for reform.”); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 139 (2004) (“[T]he current situation represents the worst of both worlds. . . . Copyright law is caught awkwardly halfway between a judicially administered property rights regime and an agency administered regulatory regime.”); David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1315 (2004) (“Wading through interminable pages of opaque, contradictory, and indecipherable regulations in Title 17 is no longer the exclusive province of a ‘highly litigious D.C. subculture’; it is now the lot of citizens everywhere who wish to follow copyright laws.”).

2. See, e.g., Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007) (advocating the establishment of an administrative agency to adjudicate fair use disputes); Liu, *supra* note 1, at 93; Arielle Singh, Note, *Agency Regulation in Copyright Law: Rulemaking Under the DMCA and Its Broader Implications*, 26 BERKELEY TECH. L.J. 527, 570 (2011); see also Nimmer, *supra* note 1, at 1381–82 (describing a trend since the 1990s whereby “each amendment [to the Copyright Act] outdoes its predecessor, not only for incoherence that commands national attention, but for pioneering new methods of bringing the legislative process into disrepute”); cf. Lawrence Lessig, *Reboot the FCC*, NEWSWEEK (Dec. 22, 2008), <http://www.newsweek.com/id/176809> (“President Obama should get Congress to shut down the FCC and similar vestigial regulators, which put stability and special interests above the public good. In their place, Congress should create something we could call the Innovation Environment Protection Agency (iEPA), charged with a simple founding mission: ‘minimal intervention to maximize innovation.’”).

3. This Article uses the term “public-facing policymaking authority” in contradistinction to the authority that the Copyright Office wields to establish rules governing its own internal operation, along with other essentially ministerial powers the agency enjoys. See Walter Dellinger, Office of Legal Counsel, Memorandum, *The Constitutional Separation of Powers Between the President and Congress: May 7, 1996 Memorandum for the General Counsels of the Federal Government*, 63 LAW & CONTEMP. PROBS. 513, 563 (2000) [hereinafter Dellinger Memo]; see *infra* note 40.

whether rulemaking by the Copyright Office is constitutional. The inquiry is not merely theoretical. The Copyright Office presently makes, or comes perilously close to making, public-facing, substantive copyright law in a number of respects—most notably in a role prescribed by the anti-circumvention regime of the Digital Millennium Copyright Act (“DMCA”).⁴ In view of the prominence of that regime,⁵ this Article presents research and analysis regarding a question that follows from the principal, constitutional matter it addresses: if rulemakings under the DMCA’s anti-circumvention provisions are actually unconstitutional, is the proper remedy to *sever* the rulemaking regime from its statutory parent, leaving in full force and effect the DMCA’s blanket ban on circumventing technological protection measures that control access to copyrighted works? The answer is no; if the rulemaking regime in 17 U.S.C. § 1201(a)(1)(C)–(D) is unconstitutional, then the circumvention ban in 17 U.S.C. § 1201(a)(1)(A) should be deemed invalid as well. Finally, the Article concludes by outlining a research agenda to address related matters relevant to the institutional design of U.S. copyright policymaking.

In the grand scheme of things, no one would (or at least should) mistake questions about the constitutionality of quasi-legislative delegations to an administrative body charged with copyright policymaking as matters of urgent national concern. That said, copyright legislation—both existing and pending—has certainly emerged in recent months as a contentious issue in the popular consciousness.⁶ The more that the existing copyright policymaking apparatus attracts public scrutiny and dissatisfies regulated firms, the more likely constitutional challenges to elements of its operation become. And as DMCA rulemakings, in particular, increasingly implicate

4. See 17 U.S.C. § 1201(a)(1)(A), (C) (2010). The DMCA establishes a blanket proscription against the circumvention of technological protection measures that prevent unauthorized access to copyrighted works. The Copyright Office is charged with carrying out a rulemaking every three years to identify and recommend needed carve-outs from that default prohibition, subject to final ratification by the Librarian of Congress. *Id.*

5. See, e.g., Jenna Wortham, *In Ruling on iPhones, Apple Loses a Bit of Its Grip*, N.Y. TIMES, July 26, 2010, at B3 (reporting on the 2010 rule allowing iPhone users to “unlock” their devices).

6. See, e.g., Jonathan Weissman, *In Fight over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES, Jan. 18, 2012, at A1; *Stopping SOPA: A Backlash from the Internet Community Against Attempts To Rein in Content Thieves*, ECONOMIST (Jan. 21, 2012), <http://www.economist.com/node/21543173>; Roger Yu, *Support for Anti-piracy Bills Wanes*, USA TODAY, Jan. 18, 2012, <http://usat.ly/Mz13SF> (“Bowing to the power of the Internet, several key lawmakers withdrew support for anti-piracy legislation after a 24-hour blackout by thousands of websites Wednesday, likely quashing any chance the bills would pass in their current form.”).

hugely significant technology markets,⁷ the incentives grow stronger, in turn, for adversely affected enterprises to invest the resources necessary for (and bear the risk of) sustained lawsuits challenging the regulatory framework as a whole.

II. IS COPYRIGHT OFFICE RULEMAKING CONSTITUTIONAL?

The plausible constitutional obstacle to Congress delegating rulemaking authority to the Copyright Office arises from the agency's position in the federal government. Because the Copyright Office sits as a division within the Library of Congress, which is part of the legislative branch, delegations from Congress to the Copyright Office may amount to unlawful delegations from Congress to a sub-unit of itself. To date, no court has held that the Copyright Office in particular may not execute rulemaking authority to the same extent as executive or independent agencies. A series of Supreme Court decisions casts doubt, however, on the constitutional permissibility of Congress empowering any Article I agency with relatively broad authority to make public-binding regulations.⁸

A. OVERVIEW OF THE COPYRIGHT OFFICE

The Copyright Office is and always has been largely a ministerial agency. It came into existence in 1897 as a department within the Library of Congress charged with implementing the United States' copyright registration and deposit systems.⁹ To this day, many of its responsibilities concern the administration of those and similar regimes: reviewing submitted works for compliance with prevailing rules, maintaining related records (including a card catalogue with nearly forty-five million entries), and otherwise orchestrating the logistics of the day-to-day operation of the federal copyright machinery.¹⁰ The Copyright Office has also historically advised Congress on copyright-related matters by generating draft legislation, policy recommendations, and reports regarding the state of domestic and international copyright affairs.¹¹

7. See Wortham, *supra* note 5.

8. See Dellinger Memo, *supra* note 3, at 562–63 (discussing “The Paradox of Congressional Agencies”).

9. See *United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html> (last visited May 15, 2012). The U.S. copyright system has included a registration and deposit regime since its inception in 1790. *Id.*

10. *Id.*

11. *Id.*; see also 17 U.S.C. § 701(b)(1)–(4) (2010).

Congress has never delegated to the Copyright Office any blanket authority to promulgate binding interpretations of U.S. copyright laws.¹² The Copyright Office can and does establish regulations related to “the administration of the functions and duties” it carries out¹³—and those rules, to be sure, do effectively determine the scope of substantive copyright rights in some respects.¹⁴ But that particular delegation does not allow the Copyright Office to set policy that affects copyright-related matters altogether divorced from the agency’s ministerial role.

In several narrow areas, though, Congress has departed from the norm that substantive copyright policymaking in this country is the responsibility of the legislature, not an administrative body. One way Congress has done so is by giving the Librarian of Congress—who supervises the head of the Copyright Office (known as the “Register of Copyrights”)—public policy responsibility of various sorts for certain copyright matters. For example, the Librarian of Congress appoints the three Copyright Royalty Judges charged with setting rates and terms for compulsory licenses under a handful of Copyright Act provisions.¹⁵ And as discussed at length in Part III, *infra*, Congress has also given the Librarian of Congress direct authority to ratify

12. *See* *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 490 n.9 (3d Cir. 2003); *cf.* *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Interim Rule and Request for Comments*, 73 Fed. Reg. 66,173, 66,174–75 (Nov. 7, 2008) (discussing the issue and tentatively, though not particularly persuasively, suggesting otherwise).

13. 17 U.S.C. § 702 (2010).

14. *See, e.g., Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978) (dismissing a challenge to a Copyright Office regulation making typeface designs unregistrable); 37 C.F.R. § 202.1 (2011) (“Material Not Subject to Copyright”).

15. *See* 17 U.S.C. § 801(a)–(b) (2010); *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1222 (D.C. Cir. 2009). Today’s system of Copyright Royalty Judges replaced the now-defunct Copyright Arbitration Royalty Panels—in place from 1993 to 2005—in which the Librarian of Congress similarly appointed the rate-setters (who then served on an ad-hoc, rather than full-time, basis). *See* Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, § 2(a)(2), 107 Stat. 2304, 2304 (establishing the Copyright Arbitration Royalty Panels); *id.* § 2(f), 107 Stat. at 2308. In the preceding period, starting in 1978, those responsibilities had fallen on a body called the Copyright Royalty Tribunal, whose members were appointed directly by the President (with dubious results)—and before that, the only compulsory license in the federal copyright regime was set at the same statutory rate for the first sixty-nine years after its inception in 1909. *See* William Patry, *Why There Is No Copyright Royalty Tribunal*, PATRY COPYRIGHT BLOG (May 26, 2005, 1:10 PM), <http://williampatry.blogspot.com/2005/05/why-there-is-no-copyright-royalty.html>. At the time of this writing, the D.C. Circuit is currently reviewing the constitutionality of the appointments of the Copyright Royalty Judges. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, Case No. 11-1083 (D.C. Cir. argued Feb. 7, 2012).

exceptions from the DMCA's ban on circumventing certain technological protection measures.

In some other domains, the Register of Copyrights herself enjoys targeted delegations of authority to promulgate regulations.¹⁶ The rulemakings that the Copyright Office carries out pursuant to these mandates tend to be narrow, industry-specific affairs implementing the complex compulsory licensing frameworks that make up some of the Copyright Act's more "impenetrable" provisions.¹⁷ By and large, though, notwithstanding these select exceptions, the Copyright Office's *raison d'être* is not, and never has been, to forge rules concerning what acts copyright law does or does not proscribe and what rights it does or does not convey.

B. METROPOLITAN WASHINGTON, BOWSHER, AND CHADHA

The "formalist" doctrine that the Supreme Court has embraced to staunch perceived legislative encroachments on executive power¹⁸ is the principal source of potential constitutional trouble for any effort to imbue the Copyright Office with meaningful rulemaking authority.¹⁹ The most recent opinion in this line of cases is *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, in which the Court found constitutional infirmities in a Board of Review composed of members of Congress exercising power over "key operational decisions" of airports in the Washington, D.C. area.²⁰ The root of the problem, according to Justice

16. See, e.g., 17 U.S.C. § 115(b)(1) (2010) (authorizing the Register of Copyrights to prescribe certain regulations related to compulsory licenses for the distribution of phonorecords); *id.* § 111(d) (authorizing the Register of Copyrights to prescribe certain regulations related to mechanics of the royalty regime for so-called "Secondary transmissions by cable systems"); see also Interim Rule and Request for Comments, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Docket No. RM 2000-7, 73 Fed. Reg. 66,173, 66,174-75 (Copyright Office Nov. 7, 2008).

17. See sources cited *supra* note 16 and accompanying text; JESSICA LITMAN, DIGITAL COPYRIGHT 55 (2006).

18. See generally Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225 (2007); see also Matthew J. Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L. REV. AM. U. 961, 1001-02 (1994). These cases are also described as establishing an "anti-aggrandizement" principle. See Dellinger Memo, *supra* note 3, at 521-23.

19. Another constitutional concern related to Copyright Office policymaking is rooted in Article II's Appointments Clause. See, e.g., *SoundExchange*, 571 F.3d at 1226-27 (Kavanaugh, J., concurring); *Intercollegiate Broad. Sys.*, Case No. 11-1083. That objection challenges the legitimacy of the appointment of delegates of the Librarian of Congress, rather than the permissibility of Copyright Office rulemaking in itself.

20. 501 U.S. 252, 277 (1991); see also Stephen Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167 n.62 (1992) (describing *Metropolitan Washington* as "formalist"). A more recent case, *Free Enterprise Fund v.*

Stevens's analysis for the majority, was that the Board constituted an "agent" of Congress, in that it was "an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials."²¹ In light of the Board's status as a congressional "agent," its constitutional fate was effectively sealed; although the Board's responsibilities might reasonably have been characterized as either "executive" (in that it executed responsibility delegated by Congress) or "legislative" (in that it could effectively legislate the policies of the regional airport authority), either classification raised a separation-of-powers problem.²² "If the power is executive," the Court wrote, "the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Article I, § 7."²³

Metropolitan Washington represented a triumph of the separation-of-powers theory that Justice Stevens had articulated previously in his concurrence in *Bowsher v. Synar*.²⁴ In that case, the Court's majority reasoned that provisions of the Gramm-Rudman-Hollings Act, assigning important budgetary responsibilities to the U.S. Comptroller General, were unconstitutional because Congress had usurped the President's proper role.²⁵ The particular functions the Comptroller played in the statutory scheme were executive, yet Congress had made itself, rather than the President, responsible for

Public Company Accounting Oversight Board, is relevant to the same issues inasmuch as it embraces principles previously articulated in *Metropolitan Washington*, *Chadba*, and *Bowsher*. See 130 S. Ct. 3138, 3156 (2010). *Free Enterprise Fund*, though, concerns the constitutionality of an effort to insulate the leaders of a regulatory agency from *both* congressional and executive control. See *id.* at 3147, 3162. The *Metropolitan Washington* line of cases, by contrast, deals with regimes in which Congress has endeavored to assert or maintain control *for itself* of an administrative agency or another regulatory actor.

21. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 251, 269 (1991).

22. *Id.* at 269–76.

23. *Id.* at 276.

24. 478 U.S. 714 (1986).

25. *Id.* at 734 ("Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion."). The Comptroller General heads the federal Government Accountability Office, formerly called the General Accounting Office, which is "an instrumentality of the United States Government independent of the executive departments." *Id.* at 715 (quoting 31 U.S.C. § 702(a) (2010)).

supervising his performance via a statutory requirement that the Comptroller could be removed from office only by joint resolution of both houses.²⁶

Justice Stevens agreed that the Comptroller General's role in the statutory framework was constitutionally impermissible, but offered a different reason why. He explained:

I am convinced that the Comptroller General must be characterized as an agent of Congress . . . ; that the powers assigned to him under the . . . Act require him to make policy that will bind the Nation; and that, when Congress, or a component or an agent of Congress, seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution—through passage by both Houses and presentment to the President.²⁷

The problem, in other words, was not that Congress had “aggrandized” itself at the executive's expense; it was instead that Congress had effectively attempted to make law using a procedure other than the one the Constitution prescribes.²⁸

Both *Metropolitan Washington* and Justice Stevens's *Bowsher* concurrence draw doctrinal support from *Immigration & Naturalization Service v. Chadha*.²⁹ There, the Court held unconstitutional the “one-house veto”—Congress's practice of reserving the right to overrule certain administrative agency actions by resolution of either the House or the Senate.³⁰ *Chadha* reasoned that because the House's attempted use of the veto to overturn a decision of the Attorney General (suspending a particular alien's deportation) “was essentially legislative in its character and effect,” the Constitution required that Article I's bicameralism and presentment procedures be followed.³¹ In his *Bowsher* concurrence, Justice Stevens quoted *Chadha* to argue that “[i]f Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade ‘the carefully

26. *Bowsher*, 478 U.S. at 720. The statute did not, of course, foreclose the constitutional process of impeachment. See U.S. CONST. art. II, § 4.

27. *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring).

28. Justice Stevens distinguished the delegation to the Comptroller General from run-of-the-mill delegations by Congress to entities *outside* Article I, thus shielding the bulk of the federal bureaucracy from constitutional condemnation under his theory. “[I]t is well settled that Congress may delegate legislative power to independent agencies or to the Executive,” he wrote, but “when it elects to exercise such power itself, it may not authorize a lesser representative of the Legislative Branch to act on its behalf.” *Id.* at 757–58.

29. 462 U.S. 919 (1983).

30. *Id.* at 959.

31. *Id.* at 952.

crafted restraints spelled out in the Constitution.’³² That same passage then made its way into Justice Stevens’s opinion for the Court in *Metropolitan Washington*, as a footnote supporting the blanket assertion that “Congress may not delegate the power to legislate to its own agents.”³³

The upshot of the *Chadha/Bowers/Metropolitan Washington* trilogy is a straightforward rule: when Congress “makes binding policy, it must follow the procedures prescribed in Article I.”³⁴ A “congressional agent” may not “set policy that binds the Nation. Rather than turning the task over to its agent, if the Legislative Branch decides to act with conclusive effect, it must do so through . . . enactment by both Houses and presentment to the President.”³⁵ To be sure, the Court’s contemporary separation-of-powers opinions have been widely criticized.³⁶ But, as Harold Bruff has written, the doctrine in this narrow area is unambiguous: “[T]he courts have made it clear that Congress may not administer the law it enacts, either directly through its own members . . . or indirectly by appointing persons who thereby become its agents.”³⁷

C. IMPLICATIONS FOR THE COPYRIGHT OFFICE

1. Past Assessments

It is far from novel to suggest that it may be constitutionally problematic for the Copyright Office to exercise rulemaking authority. The Department of Justice’s Office of Legal Counsel (“OLC”) effectively concluded as much in a 1996 memorandum assessing constitutional limits on the separation of powers between the legislative and executive branches (widely known as the “Dellinger Memo,” for its attributed author, former OLC head, Walter

32. *Bowers*, 478 U.S. at 755 (Stevens, J., concurring) (citing *Chadha*, 462 U.S. at 959).

33. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 251, 275 n.20 (1991).

34. *Id.* at 274 n.19 (quoting *Bowers*, 478 U.S. at 758 (Stevens, J., concurring)).

35. *Id.* (quoting *Bowers*, 478 U.S. at 758–59 (Stevens, J., concurring)).

36. *See, e.g.*, Bruff, *supra* note 18, at 225 (“American legal scholars, after examining our separation of powers jurisprudence, have deemed it a mess.”); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1366 (1994) (“There is general agreement that the Supreme Court’s separation of powers decisions are hopelessly contradictory”); Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) (discussing the “[u]nanimity among constitutional scholars” on the point that “the Supreme Court’s treatment of the constitutional separation of powers is an incoherent muddle”); *Bowers*, 478 U.S. at 759 (White, J., dissenting) (“[T]he Court’s recent efforts to police the separation of powers have rested on untenable constitutional propositions leading to regrettable results.”).

37. Bruff, *supra* note 18, at 256.

Dellinger).³⁸ In a section entitled “The Paradox of Congressional Agencies,” the memo noted that entities like the Smithsonian Institution, the Office of the Architect of the Capitol, and indeed the Library of Congress, “exercise authority that seems incompatible or at least difficult to reconcile with the Supreme Court’s anti-aggrandizement decisions.”³⁹ The analysis sounded a cautionary note for *prospective* Article I “aggrandizements,” in particular. “[W]e think it highly doubtful,” Dellinger wrote, “that Congress constitutionally could create new legislative agencies with operational powers, or afford existing agencies novel powers, with respect to executive officials or private persons.”⁴⁰

The passage of the DMCA in 1998 sparked a flurry of concern over the constitutionality of a new policymaking delegation involving the Copyright Office. The statute required (and indeed still requires) the Copyright Office to conduct triennial rulemaking proceedings concerning exceptions to the Act’s anti-circumvention provisions,⁴¹ generating recommendations to be ratified as law by the Librarian of Congress—an arrangement which, several commentators have pointed out, seems constitutionally questionable under the *Bonsher* line of cases.⁴² President Clinton was, evidently, sufficiently

38. Dellinger Memo, *supra* note 3.

39. *Id.* at 562 (referring to the *Bonsher* line of cases).

40. *Id.* at 563. The qualifier “with respect to executive officials or private persons” distinguishes away legislative agency responsibilities which are “in aid of the legislative process,” and therefore permissible under *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 202 (1928). *See* Dellinger Memo, *supra* note 3, at 563. The memo found the scope of the existing entities’ responsibilities circa 1996 to be “constitutionally harmless” in light of “the historical lineage of, and long-standing acquiescence of Presidents in, these legislative agencies.” *Id.* As to the Copyright Office in particular, Dellinger mentioned only that the (now defunct) Copyright Royalty Arbitration Panels were permissible under the theory of the *Bonsher* majority opinion; he inferred that the President retained “the formal power to remove the Librarian [of Congress, who oversaw the panel] at will” from the absence of any statute dictating the circumstances in which the agency head could be fired, and by whom—which in turn meant that Congress had not encroached on the executive’s freedom to carry out tasks assigned by the legislature. *Id.*

41. 17 U.S.C. § 1201(a)(1)(C) (2010). *See infra* Section III.A for more details.

42. *See* Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUR. INTEL. PROP. REV. 236 (1999) (noting, in a discussion citing *Bonsher*, that portions of the DMCA regime “may violate the constitutionally mandated separation of powers”); JeanAne Marie Jiles, Comment, *Copyright Protection in the New Millennium: Amending the Digital Millennium Copyright Act To Prevent Constitutional Challenges*, 52 ADMIN. L. REV. 443, 446 (2000). It should be said that Jiles’s analysis of *Bonsher* elides distinctions between the concurrence by Justice Stevens, which is not binding precedent, and the majority opinion, which is—but which embraces a different rationale altogether from the Stevens opinion. Moreover, *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 473 (2001), has now foreclosed Jiles’s argument that the DMCA’s delegation to the Librarian of Congress is unconstitutional for failing to state an intelligible principle.

concerned that he included the following remarks in a “signing statement” accompanying his formal approval of the DMCA bill: “I am advised by the Department of Justice that certain provisions of H.R. 2281 and the accompanying Conference Report regarding the Register of Copyrights raise serious constitutional concerns. Contrary to assertions in the Conference Report, the Copyright Office is, for constitutional purposes, an executive branch entity.”⁴³

The next Section discusses the plausibility of the President’s position. The point here is simply that prominent legal actors have recognized the danger that separation-of-powers principles might preclude the Copyright Office from effectively making substantive policy decisions.⁴⁴

2. *Applying the Court’s Doctrine*

In the terminology of *Metropolitan Washington*, Congress may not delegate the authority to “set policy that binds the nation” to the Copyright Office if the Copyright Office is an “agent” of Congress.⁴⁵ There are two principal arguments why this doctrine does *not* present a separation-of-powers obstacle to Copyright Office rulemaking, notwithstanding the concerns discussed in the preceding Section: first, the claim that the Copyright Office should not be considered part of the legislative branch at all for constitutional purposes; and second (and more plausibly), the claim that even if the Copyright Office does sit in the legislative branch, it does not fall within the class of “agents” of Congress that *Metropolitan Washington* condemns.⁴⁶

43. William J. Clinton, Statement on Signing the Digital Millennium Copyright Act, 2 PUB. PAPERS 1902 (Oct. 28, 1998), available at <http://1.usa.gov/KL9h4U>. The statement continues: “Accordingly, the Congress may exercise its constitutionally legitimate oversight powers to require the Copyright Office to provide information relevant to the legislative process. However, to direct that Office’s operations, the Congress must act in accord with the requirements of bicameralism and presentment prescribed in Article I of the Constitution.” *Id.*

44. See also C.H. Dobal, Note, *A Proposal To Amend the Cable Compulsory License Provisions of the 1976 Copyright Act*, 61 S. CAL. L. REV. 699, 722 (1988) (arguing that the Register of Copyright’s administration of the Copyright Act’s cable compulsory licensing scheme is unconstitutional under *Bowsher*). In late 2006, a cellular phone company filed suit alleging, inter alia, that the Librarian of Congress’s rulemaking authority under the DMCA violates the constitutional separation of powers doctrine. See Complaint at 11, *Tracfone Wireless, Inc. v. Billington*, No. 06-22942 (S.D. Fla. Dec. 5, 2006), available at http://w2.eff.org/IP/DMCA/tracfone_v_billington_complaint.pdf. The suit settled shortly thereafter. See Stipulation of Dismissal at 1, *Tracfone*, No. 06-22942 (June 1, 2007).

45. See *supra* Section II.B.

46. Cf. *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97, 100 (D.C. Cir. 1994), *cert denied*, 513 U.S. 1126 (1995) (“Following the approach adopted by the Supreme Court in [*Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264–70 (1991)], we first determine whether the Board is an agent of Congress.”).

a) Is the Copyright Office Really a Legislative Branch Agency?

President Clinton's assertion that the Copyright Office is, "for constitutional purposes," part of the executive branch does have some support—albeit of questionable ongoing validity—in the case law. In 1978, the Fourth Circuit addressed a challenge to the denial of copyright registration for a typeface design, based partly on the argument that the Copyright Office could not constitutionally issue regulations defining registrable "work[s] of art" (and excluding typefaces therefrom) because of its status as a legislative, rather than executive, agency.⁴⁷ Affirming the district court's dismissal of the suit, the appellate panel in *Eltra Corp. v. Ringer* explained that the Copyright Office's functions, rather than its formal location in the federal government, determined what kind of entity it was. Because its operations were "executive or administrative," the court wrote, "the Copyright Office is an executive office"—adding that it was "irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as part of the legislative appropriation."⁴⁸

For a number of reasons, however, both President Clinton's signing statement and *Eltra* are likely wrong to conclude that for separation-of-powers purposes, the Copyright Office is not part of the legislative branch at all. A district court in the Third Circuit planted itself in that skeptical camp in *United States v. Brooks*, which explicitly rejected *Eltra*'s analysis, albeit outside the context of a constitutional challenge.⁴⁹ Federal prosecutors had alleged

Hebinger was the follow-on case to the Supreme Court's *Metropolitan Washington* decision. In response to the Court's ruling, Congress had changed the rules governing membership in the regional airport authority Board of Directors. The D.C. Circuit concluded that the changes were insufficient to remedy the separation-of-powers problem, and the Supreme Court denied certiorari.

47. *Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978). *Eltra* predates *Chadha* by five years.

48. *Id.* at 301. It bears mention that the court prefaced its analysis of the constitutional question by describing what it perceived to be a few oddities about the case—including that appellant's counsel seemed to be testing a theory that he had previously articulated in a law review article, and that the suit effectively amounted to "a belated challenge to the 1909 revision of the Copyright Act and an attempt to confine the Register to the narrow range of duties exercised by him prior to the 1909 Act." *Id.* at 299. The latter observation inspired the court to remark that "it seems incredible that, if there were a constitutional infirmity in the 1909 Act, it would have so long escaped notice by either the Supreme Court or the bar"—in a sense presaging the "historical lineage" argument that the Dellinger memo would make eighteen years later. *Id.*; see *supra* note 40.

49. See *United States v. Brooks*, 945 F. Supp. 830, 833 (E.D. Pa. 1996) ("The status of the Copyright Office is an open question in the Third Circuit, and I do not find *Eltra* persuasive.").

that a cable television executive lied in several filings with the Copyright Office, and charged him with violations of 18 U.S.C. § 1001—a statute that the Supreme Court had held prohibited false statements to executive branch agencies, but not to other divisions of government.⁵⁰ The Department of Justice expressly advocated the position that “the Copyright Office is part of the executive branch,” but the court was not persuaded.⁵¹ “Acting similarly to an executive agency is not the same as being part of the executive branch,” Chief Judge Cahn wrote, embracing a straightforward syllogism: “The Copyright Office is a division of the Library of Congress, which is a part of the legislative branch, and thus the Copyright Office is a part of the legislative branch.”⁵²

Brooks illustrates one problem with the argument that the Copyright Office is an executive agency: the claim rests on a legal fiction. Notwithstanding the suggestion in *Eltra* that the Copyright Office’s classification as executive or legislative might depend on what the agency does, it is not an open question which branch the Copyright Office actually sits in.⁵³ President Clinton’s DMCA signing statement does not, of course, purport to effect a reorganization of government. It simply asserts a legal interpretation: the Copyright Office is an executive agency merely “for constitutional purposes.”⁵⁴ To be sure, legal fictions do exist (and occasionally thrive) in American constitutional law.⁵⁵ But it seems safe to say that the Clinton/*Eltra* argument suffers to some degree from its dependence on a constitutional conclusion at odds with facts in the world.

More importantly, the argument that the Copyright Office is “an executive branch entity” because it acts like an executive agency seems inconsistent with the Court’s reasoning in *Bowsher* and *Metropolitan Washington*.

50. *Id.* at 830–31.

51. *Id.* at 833–34.

52. *Id.* at 834.

53. See 17 U.S.C. § 701(a) (2010) (establishing that the Register of Copyrights directs “the Copyright Office of the Library of Congress” and is supervised by the Librarian of Congress); 2 U.S.C. § 171(1) (2010) (noting that Congress “established *for itself* a Library of Congress”) (emphasis added); Leon Ulman, Assistant Att’y Gen., Application of the Privacy Act to the Personnel Records of Employees in the Copyright Office, 4B U.S. OPINIONS OFF. LEGAL COUNSEL 608, 610 (1980) (“The Copyright Office . . . is a part of the Library of Congress. It has been firmly established that the Library of Congress, and consequently its subdivision the Copyright Office, are in the legislative and not in the executive branch of the government.”); see also Jiles, *supra* note 42, at 455 n.66 (collecting examples from case law asserting that the Copyright Office is part of the legislative branch).

54. See *supra* note 43 and accompanying text.

55. See, e.g., *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) (describing the “fictional distinction” at the heart of the *Ex parte Young* exception to Eleventh Amendment sovereign immunity).

Bowsher famously embraced a “formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government ([leading the Court] to draw rather sharp boundaries)”⁵⁶ *Eltra*’s decidedly functionalist means of classifying the Copyright Office is hard to reconcile with *Bowsher*’s rigidity.⁵⁷ Like *Bowsher*, *Metropolitan Washington* condemned an arrangement that was arguably harmless in itself⁵⁸ but that established “a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role.”⁵⁹ The Clinton/*Eltra* position that the Copyright Office might permissibly execute delegated rulemaking authority because it somehow enjoys executive branch status “for constitutional purposes” appears untenable in light of that dictum; the legally fictitious reclassification of a legislative agency seems a “blueprint” for impermissible “expansion of legislative power” if ever there was one.

b) Is the Copyright Office Congress’s “Agent”?

The second principal argument for the constitutional permissibility of Congress’s delegating rulemaking authority to the Copyright Office—the contention that the Copyright Office is not an “agent” of Congress for separation-of-powers purposes even if it is an agency that sits within Congress—is more plausible, but suffers several important weaknesses.

To begin, it is worth highlighting a little-noticed discord in the literature regarding which part of the Court’s doctrine would condemn Copyright Office rulemaking. At least three commentators have cited mainly or exclusively to *Bowsher* for the proposition that the Constitution might or likely would forbid the Copyright Office from engaging in rulemaking or rate-setting.⁶⁰ Yet, as the Dellinger Memo suggests, *Bowsher*’s holding arguably does nothing to prevent the Copyright Office from setting policy that binds the public, for the simple reason that the President may apparently fire at will the Librarian of Congress, who oversees the Register of

56. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

57. See *id.* at 502 (noting Justice White’s characterization of the *Bowsher* majority’s position as “rigid dogma”); Dobal, *supra* note 44, at 720 (“The persuasiveness of the fourth circuit’s argument in [*Eltra*] has been significantly undermined by the Supreme Court’s decision in *Bowsher v. Synar*.”).

58. See *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 286 (1991) (White, J., dissenting) (noting that neither Congress nor the executive branch opposed the Board of Review that the Court found unconstitutional).

59. *Metro. Wash.*, 501 U.S. at 277; see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) (approvingly reciting this passage from *Metropolitan Washington*).

60. See sources cited *supra* notes 42, 44.

Copyrights.⁶¹ The particular constitutional infirmity that the *Bowsher* majority found in the Gramm-Rudman-Hollings Act—that Congress had impermissibly “retained control over the execution of the Act” by virtue of statutory restrictions on the regulatory actor’s removal—does not pertain to the Copyright Office at all.⁶²

It is *Metropolitan Washington*—and the reasoning from Justice Stevens’s *Bowsher* concurrence that *Metropolitan Washington* incorporates—that lends real credence to the suggestion that separation-of-powers doctrine might prohibit the Copyright Office from executing rulemaking authority to the same extent as bona fide executive agencies or independent regulatory commissions. For the operative logic in *Metropolitan Washington*, unlike in *Bowsher*, does not turn on the presence or absence of removal restrictions that give Congress rather than the President effective authority over the key player in a regulatory regime.⁶³ That said, the holding of *Metropolitan Washington* condemned a delegation to members of Congress—who are clearly not subject to termination by the President and so are outside his political control—rather than a delegation to a political appointee. Could the head of a legislative agency, like the Register of Copyrights or the Librarian of Congress, simultaneously be subject to at-will firing by the President (or by a superior officer subject to at-will firing by the President) *and* constitute an “agent” of Congress to whom policymaking delegations are prohibited?

The answer could be yes.⁶⁴ First, the persuasive authority of Justice Stevens’s *Bowsher* concurrence suggests that a regulatory actor may serve two discrete supervisors—both Congress and the executive—and still count as a congressional “agent” in the relevant sense. “Obligations to two branches are not . . . impermissible,” Justice Stevens wrote, “and the presence of dual obligations does not prevent the characterization of the official with the dual obligations as part of one branch.”⁶⁵ It would follow from that principle that

61. For more on Dellinger’s theory, see *supra* note 40. The Librarian of Congress is appointed by the President with the Senate’s advice and consent. See 2 U.S.C. § 136 (2010); *Free Enter. Fund*, 130 S. Ct. at 3161 (“Under the traditional default rule, removal is incident to the power of appointment.”). The Register of Copyrights, in turn, is appointed by the Librarian of Congress, and is subject to the Librarian of Congress’s “general direction and supervision.” See 17 U.S.C. § 701(a) (2010).

62. See *Bowsher v. Synar*, 478 U.S. 714, 734 (1986).

63. See *supra* Section II.B.

64. Cf. *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97, 101 (D.C. Cir. 1994) (concluding that the revamped airport authority board remained Congress’s “agent” even though its members “are no longer required to be Members of Congress, and . . . may now be removed for cause by the Directors”).

65. *Bowsher*, 478 U.S. at 746 (Stevens, J., concurring). The Comptroller General was in many respects beholden to the President as well as Congress, but the fact that he was not an

the Register of Copyrights might be a proscribed congressional “agent” even though she and her superior, the Librarian of Congress, both effectively serve at the pleasure of the President.

Second, the argument that the Copyright Office is Congress’s “agent” has more going for it than just the entity’s location in the federal government. Although the President appears to retain the ability to influence the Register of Copyrights *indirectly* with the threat of firing her supervisor, Congress has the statutory authority to *directly* dictate at least a portion of the Copyright Office’s agenda and activities. 17 U.S.C. § 701(b)(5) provides straightforwardly that in addition to an itemized list of duties, “the Register of Copyrights shall perform . . . such other functions as Congress may direct . . .” Regardless of whether or to what extent Congress actually wields that power, even the latent ability to prescribe the “functions” of the Register of Copyrights affords some measure of influence over the office she runs.⁶⁶ If the Copyright Office is to avoid being Congress’s “agent” in the doctrinal sense, then it must escape that label despite being not just an agency that formally sits in Congress, but also one unambiguously subject to Congress’s orders.⁶⁷

“agent of the Congress in quite so clear a manner as the Doorkeeper of the House” did not salvage the constitutionality of the public-binding responsibilities that Congress had assigned to the Comptroller General, in Justice Stevens’s view. *Id.* at 745.

66. Congress does actually exercise supervisory control over the Copyright Office. *See, e.g., U.S. Copyright Office and Sound Recordings as Work Made for Hire, Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. 1 (2000) (statement of Rep. Howard Coble, Chairman) (“The House Judiciary Committee is charged with the responsibility of overseeing the administration and operation of the Copyright Office of the United States. To that end, we will be reviewing the administrative activities and the funding and expenditures of the Copyright Office to ensure that it is utilizing its resources effectively.”). To be sure, though, Congress reviews the activities and expenses of countless administrative agencies housed in the executive branch without impermissibly usurping responsibility for those agencies’ operations. *See* Lisa S. Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1753 (2007) (“Congress creates agencies . . . and then seeks to control their decisionmaking, just as the President does. In essence, agencies are subject to *two* political principals.”).

67. By contrast, the Copyright Office is *not* subject to the prevailing Executive Order establishing principles and procedures for “Regulation and Regulatory Review” for most federal agencies. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011). That Executive Order identifies the agencies it covers by cross-reference to Executive Order 12,866, which in turn identifies the agencies *it* covers by reference to 44 U.S.C. § 3502 (2010). *See* Exec. Order No. 12,866, § 3(b), 3 C.F.R. 638 (1994). Section 3502, in turn, defines the operative term “agency” to mean, in relevant part, “any *executive* department, military department, Government corporation, Government controlled corporation, or *other establishment in the executive branch of the Government* (including the Executive Office of the President), or any independent regulatory agency . . .” (emphasis added). The Copyright

Third, a rulemaking delegation to the Copyright Office seems to implicate some of the very normative concerns that the Court has said justifies its formalistic intolerance of putative legislative “encroachments” on executive power. Among the given reasons for the unforgiving holdings in *Metropolitan Washington* and its predecessors is the challenge of *identifying* legislative usurpations of authority that are properly executive. “The legislature ‘can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments,’ ” the *Metropolitan Washington* majority noted, quoting Madison.⁶⁸ For that reason, the idea goes, the judiciary must be especially vigilant to nip in the bud even nascent legislative self-aggrandizements at the executive’s expense, when they come to courts’ attention at all. Consistent with that imperative, the Court has repeatedly articulated the need for aggressive policing of the separation of powers regardless of the apparent harmlessness of any given unorthodox allocation of responsibility between Congress and the executive. As noted above, a legislative self-aggrandizement may be constitutionally untenable if it merely establishes a “blueprint” by which Congress could “use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process” of analogous administrative regimes going forward.⁶⁹

To the extent that these really are the Court’s guiding principles, a delegation of public-facing rulemaking authority to the Copyright Office apparently poses constitutional problems. If the Court’s formalism is dictated by the fear that Congress might “mask” its usurpation of executive authority with “complicated and indirect measures,” then Congress’s relationship with the Copyright Office should raise judicial hackles. Identifying the line between permissible congressional oversight⁷⁰ and impermissible congressional control of an Article I agency, if it can be achieved at all, requires a convoluted exercise in untangling opaque relationships.⁷¹ Whether the combination of the Copyright Office’s location in government and Congress’s authority to direct the Copyright Office’s functions suffices to make it Congress’s “agent”—even though the President, not Congress, apparently retains the right to fire the Register of Copyrights’ boss, the Librarian of Congress—is a question that probably neighbors, and possibly

Office is, however, generally subject to the Administrative Procedure Act. See 17 U.S.C. § 701(e) (2010).

68. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 277 (1991).

69. *Id.*

70. See Bressman, *supra* note 66.

71. See *supra* note 66.

enters, the metaphysical realm. But in the face of such uncertainty, the Court's instruction in *Metropolitan Washington* and its predecessors certainly appears to be to err on the side of enforcing strict separation between legislative and executive responsibilities, even at the cost of condemning perfectly "workable" regulatory arrangements.⁷²

Commentators have been hesitant to take the Court's justifications of its separation-of-powers jurisprudence at face value, largely because different and seemingly conflicting principles of constitutional interpretation have won majority support across a range of cases in this area.⁷³ Even so, the alternative explanatory frameworks that dot the law review literature also, at least in several notable instances, confirm that the Court tends not to look kindly on apparent congressional power plays. Michael Froomkin has argued that the following basic rule distinguishes the cases in which the Court has adopted a stricter, formalist separation-of-powers jurisprudence from those in which it has taken a more functionalist, permissive approach:

Overall, the Court's decisions fit a pattern in which Congress's power to check the other branches by determining their structure is very great, but Congress is checked by the requirements that it act through persons outside the legislature (which usually means persons in the executive [branch] or the judiciary) and that Congress not aggrandize its own powers.⁷⁴

Froomkin's discussion does not, of course, focus on the question of whether the head of an Article I agency counts as a person "outside the legislature" or not. But his comprehensive assessment of the Court's seemingly inconsistent doctrines suggests that formalism prevails where concern for congressional self-dealing is strongest.⁷⁵

72. See *Metro. Wash.*, 501 U.S. at 276.

73. See Froomkin, *supra* note 36, at 1368 (distinguishing formalist opinions including, among others, *Buckley v. Valeo*, 424 U.S. 1 (1976), *Chadba, Bowsber*, and *Metropolitan Washington* from functionalist opinions including, among others, *Morrison v. Olson*, 487 U.S. 654 (1988), *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), and *Mistretta v. United States*, 488 U.S. 361 (1991)).

74. Froomkin, *supra* note 36, at 1368.

75. The term "self-dealing" is particularly appropriate in the substantive area of copyright law, where the available evidence suggests that Congress's delegating policymaking authority to the Copyright Office is occasionally motivated by an interest in expected campaign donations to the congressional committees that oversee it. See LITMAN, *supra* note 17, at 144 (suggesting that the DMCA's delegation of rulemaking authority to the "Librarian of Congress in consultation with the Copyright Office and the Commerce Department" would result in both "Commerce and Judiciary Committee jurisdiction and the associated generous campaign contributions").

Abner Greene offers a similar unifying theory: “Congress may give away legislative power and insulate such delegated power from total presidential control, but Congress may neither draw executive power to itself nor seek to legislate outside the Article I, Section 7 framework.”⁷⁶ Again, Greene has not weighed in on the issue whether Copyright Office rulemaking, in particular, amounts to Congress’s “draw[ing] executive power to itself.” The point is simply that a range of commentators has cautioned that when the Court is confronted with arrangements in which Congress seems to have arrogated to itself classically executive responsibility, the result has typically been unfavorable to Congress.

A comprehensive review of commentary on the Supreme Court’s separation-of-powers jurisprudence is outside the scope of this Article. Broadly speaking, though, this much can be said of the contention at issue in this Section—that the Copyright Office can permissibly execute public-facing rulemaking authority on the ground it is not the kind of “agent” of Congress that *Metropolitan Washington* condemns: the argument appears to some degree inconsistent, not only with the Court’s doctrine taken on its own terms, but also with alternative explanatory paradigms that some theorists have proposed.

By the same token, however, it bears repeating that neither *Bowsher* nor *Metropolitan Washington* confronts rulemaking by an Article I actor whom the President may effectively fire at will. And in light of longstanding, widespread dissatisfaction with the “barren literalism”⁷⁷ that pervades *Chadha* and its progeny, a reform-minded court might find a determinative constitutional significance in the fact that the Register of Copyrights is directly subject to a powerful form of executive control, unlike the analogous Article I actors in past cases. In other words, as a predictive rather than a normative matter, while a court inclined to hold Copyright Office rulemaking unconstitutional would have no trouble doing so, a court with more functionalist leanings might find grounds on which to distinguish away seemingly problematic precedent.

In conclusion, the line of Supreme Court decisions discussed here—imposing harsh limits on even minor legislative “encroachments” into the realm of executive responsibility, and strictly forbidding Congress or its agents from making rules that bind the public by any means other than those prescribed in Article I, § 7—presents the possibility of a genuine

76. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 126 (1994) (emphasis omitted).

77. E. Donald Elliot, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 522 (1989).

constitutional problem for a rulemaking delegation to an agency that is itself formally a subsidiary to Congress rather than the President. Unless and until the Court changes or clarifies its separation-of-powers jurisprudence, a prospective grant of rulemaking authority to the Copyright Office would be, at the very least, a risky proposition.⁷⁸ Moreover, as dissatisfaction with the method and substance of the Copyright Office's DMCA rulemaking proceedings grows,⁷⁹ a sustained constitutional challenge in a federal court to that existing regime becomes more likely.⁸⁰

III. IMPLICATIONS FOR THE DMCA'S ANTI-CIRCUMVENTION REGIME

The preceding analysis addresses whether rulemaking by the Copyright Office, as a general matter, is constitutionally permissible. This Part considers implications of that analysis for the rulemakings presently carried out under the DMCA's anti-circumvention provisions. The argument here is that if the DMCA's rulemaking regime is unconstitutional, the proper remedy would be to invalidate not just the rulemaking regime, but also (at a minimum) the rulemaking regime's statutory parent—the blanket ban on circumventing technological protection measures (“TPMs”) that prevent access to copyrighted works codified in 17 U.S.C. § 1201(a)(1)(A).

A. FRAMING THE SEVERABILITY ISSUE: THE ROLE OF THE RULEMAKING REGIME IN THE DMCA'S ANTI-CIRCUMVENTION RULES

The discussion that follows requires a more detailed overview of the DMCA's anti-circumvention regime and the Copyright Office's role in it. In 1998, as part of a larger legislative compromise between the telecommunications and computer industries, on the one hand, and copyright's “content” industries, on the other, Congress passed a statute that added legal fortification to the otherwise purely technological tools that content industries deploy to protect certain copyrighted materials they

78. As noted at the outset, several commentators have proposed expanding Copyright Office rulemaking authority as an alternative to policymaking by the legislature as a whole. See sources cited *supra* note 2.

79. See, e.g., Elizabeth F. Jackson, *The Copyright Office's Protection of Fair Uses Under the DMCA: Why the Rulemaking Proceedings Might Be Unsustainable and Solutions for Their Survival*, 58 J. COPYRIGHT SOC'Y U.S.A. 521 (2011).

80. Cf. Complaint, *Tracfone Wireless, Inc. v. Billington*, No. 06-22942 (S.D. Fla. Dec. 5, 2006), available at http://w2.eff.org/IP/DMCA/tracfone_v_billington_complaint.pdf, discussed *supra* note 44.

produce.⁸¹ The new provisions made it illegal to “circumvent a technological measure that effectively controls access to a [copyrighted] work,” and (separately) to traffic in tools that allow others to carry out such circumventions.⁸² Not only would breaking through a digital rights management wrapper to listen to a song or watch a movie be technologically daunting, but the circumvention would also be illegal, separate and apart from any copyright infringement incident to the same acts.

Congress subjected the DMCA’s flat ban on circumventing TPMs to two kinds of exceptions. First, the statute enumerates certain specific acts of circumvention that are allowed, notwithstanding the default proscription.⁸³ Second, it provides for a triennial rulemaking process intended to add incremental exceptions, when warranted, in order to protect the public’s rights to make non-infringing uses of works protected by TPMs.⁸⁴ More

81. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 BERKELEY TECH. L. J. 519, 522 (1999) (“It would oversimplify the facts—although not by much—to say that the battle in Congress over the anti-circumvention provisions of the DMCA was a battle between Hollywood and Silicon Valley.”); Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 359 (2004).

82. 17 U.S.C. § 1201(a)(1)–(2) (2010). The Statute also proscribes trafficking in tools that circumvent technological measures that impose *copying* restrictions, as opposed to *access* restrictions, see § 1201(b)(1)—but does not proscribe the mere act of circumventing copying restrictions. See JULIE COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 662 (2010).

83. See § 1201(d)–(j) (exempting certain types of encryption research, reverse-engineering, circumventions by law enforcement, and so on).

84. The statute says:

(C) During the 2-year period [after ratification of the law], and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding . . . whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the [blanket circumvention] prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

precisely, the point of the rulemaking is to figure out “whether persons who are users of a copyrighted work” are somehow “adversely affected” by the DMCA’s blanket circumvention ban in their ability to do “non-infringing” things with the work. If so, then the statutory mandate is to set aside a corresponding “class” of works that will be exempt from the ban for three years.⁸⁵

In practice, the Copyright Office is the agency that carries out the rulemaking.⁸⁶ Based on information submitted by interested parties, the Register of Copyrights recommends a set of categorical exemptions for the Librarian of Congress to instantiate into law as carve-outs from the prohibition on circumventing access-control TPMs. And the Librarian of Congress in turn typically (though not invariably) ratifies the recommendations with a cursory statement published in the Federal Register.⁸⁷ In the rulemaking that concluded in the summer of 2010, six exempted “classes” of works made their way into the Code of Federal Regulations.⁸⁸ The classes are generally defined by reference to particular uses of particular types of work, and draw boundaries between exempted and non-exempted uses at a relatively fine level of granularity. By way of illustrative example, the first class of exempted works in 2010 consisted of movies on lawfully acquired DVDs whose users circumvent TPMs to include

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

(v) such other factors as the Librarian considers appropriate.

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

§ 1201(a)(1).

85. *Id.*

86. See Notice of Inquiry and Request for Comments, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (*Access Control Technologies Exemption*), Docket No. RM 2011-7, 76 Fed. Reg. 60,398, 60,398 (Copyright Office Sept. 29, 2011) (“The United States Copyright Office is preparing to conduct proceedings in accordance with provisions added by the Digital Millennium Copyright Act . . .”).

87. See Final Rule, *Access Control Technologies Exemption*, Docket No. RM 2005-11, 71 Fed. Reg. 68,472, 68,479 (Copyright Office Nov. 27, 2006) (ratifying the 2006 recommendations of the Register of Copyrights in a single sentence). *But see* Final Rule, *Access Control Technologies Exemption*, Docket No. RM 2008-8, 75 Fed. Reg. 43,825, 43,838 (Copyright Office July 27, 2010) (rejecting one of the Register of Copyrights’ 2010 recommendations).

88. Final Rule, *Access Control Technologies Exemption*, 75 Fed. Reg. at 43,838.

portions of the films in documentaries, in noncommercial videos, or in “[e]ducational uses by college and university professors and by college and university film and media studies students.”⁸⁹ All told, the 2010 rulemaking process took nearly two years to complete, featuring several rounds of written submissions and counter-submissions and three days of public hearings. The Register of Copyrights’ final 2010 recommendation to the Librarian of Congress ran to 262 pages.⁹⁰

The separation-of-powers analysis in Part II, *supra*, addressed rulemaking by the Copyright Office itself, not rulemaking by the Librarian of Congress based on the Copyright Office’s recommendation. Assuming that the Copyright Office’s role in the DMCA’s rulemaking regime is sufficiently insulated from the act of lawmaking to avoid any constitutional problems that might arise from a delegation directly to the Register of Copyrights, the glaring outstanding question is whether a delegation to the Librarian of Congress is any safer. Both the Copyright Office and the Library of Congress are, after all, Article I entities, which raises at least a *prima facie* constitutional concern.⁹¹ By the same token, neither agency’s head is subject to the kind of removal restrictions that offended the Constitution in the Comptroller General statute at issue in *Bowsher*.⁹² Yet rulemaking by either the Copyright Office or the Library of Congress poses the risk of a problem under the reasoning of *Metropolitan Washington*, which condemns public-facing lawmaking by any congressional “agent” that purports to shortcut bicameralism and presentment to the executive.⁹³

The argument that the Librarian of Congress counts as a proscribed congressional “agent” is roughly the same as the argument that the Register of Copyrights does, differing principally in the statutory mechanics of Congress’s control over the agency. The Library of Congress is subject to the oversight of the Congressional Joint Committee on the Library, which consists of ten members of Congress.⁹⁴ That Committee clearly exercises

89. *Id.* at 48,839.

90. Letter from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress, Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (June 11, 2010), *available at* <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>.

91. *See* discussion *supra* Section II.C.1.

92. *See supra* text accompanying notes 60–62.

93. *See supra* Section II.B.

94. *See* 2 U.S.C. § 132b (2010) (“The Joint Committee of Congress on the Library shall . . . consist of the chairman and four members of the Committee on Rules and Administration of the Senate and the chairman and four members of the Committee on House Oversight of the House of Representatives.”).

substantial authority over major decisions that the Library of Congress makes.⁹⁵ Just as it remains ultimately uncertain whether Congress's statutory power to "direct" the Copyright Office's "functions" suffices to make the Copyright Office Congress's "agent" in the constitutional sense, it is hardly a foregone conclusion that the Congressional Joint Committee's oversight of the Library of Congress creates the kind of agency relationship that *Metropolitan Washington* condemns. It is, however, safe to say that the suite of doctrinal concerns that makes Copyright Office rulemaking constitutionally questionable applies equally to Library of Congress rulemaking. Both raise the specter of an arrangement in which Congress has a closer-than-usual relationship with a regulator housed in the legislative branch and executing public-facing policymaking authority. The Court has tended to treat similar arrangements with a skepticism that verges on hostility.⁹⁶

B. IS THE RULEMAKING FRAMEWORK SEVERABLE FROM THE REST OF THE ANTI-CIRCUMVENTION RULES?

If a court determined that the rulemaking delegation in the DMCA's anti-circumvention provisions were actually unconstitutional, the question of the proper remedy would arise. Should the rest of the anti-circumvention framework simply stand unaffected, even absent the carve-outs Congress intended the Copyright Office to identify and recommend to the Librarian of Congress every three years? Or would it be more faithful to prevailing doctrine to conclude that the DMCA's rulemaking regime is not cleanly severable from the rest of the anti-circumvention provisions—with the result that some broader swath of the statute should be deemed invalid or unenforceable on constitutional grounds? Here, the answer is clearer: the DMCA's anti-circumvention rulemaking regime should not be treated as severable in itself. If the rulemaking regime goes down on constitutional grounds, then at least the blanket proscription against circumventing access-control TPMs goes with it.

When a court finds a portion of a statute unconstitutional, the preferred remedial solution is to "sustain its remaining provisions 'unless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid].'"⁹⁷ More broadly, whether an

95. See, e.g., *Business Meeting, Hearing Before the Joint Comm. on the Library of Congress*, 108th Cong. 6 (2004) (statement of James H. Billington, Librarian of Congress) (discussing plans for initiatives that the Library of Congress "submitted and the Congress approved").

96. See *supra* Section II.C.2.

97. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (alteration in original) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

unconstitutional portion of a statute should be “severed” from the portions that do not in themselves pose constitutional problems is a function of an analysis typically framed as an inquiry into congressional intent: in the hypothetical world in which Congress had recognized *ex ante* that a portion of its legislation would later be deemed unconstitutional, would Congress nevertheless have proceeded to enact the constitutional portions, absent the unconstitutional one?⁹⁸ Although the Supreme Court has recently instructed that a presumption in favor of “severing” the invalid provision is warranted,⁹⁹ the presumption can, of course, be overcome with sound evidence that the invalid provision was in some respect a *sine qua non* of the legislation.¹⁰⁰ As with so many constitutional doctrines, this prevailing approach to severability is hardly free from academic criticism—but the prescribed inquiry into counter-factual legislative outcomes is, for better or worse, the present state of the law.¹⁰¹

The DMCA’s rulemaking regime was the product of lobbying by digital technology firms, consumer advocacy groups, libraries, and universities, who asserted an interest in preserving the public’s historical ability to engage in fair uses of copyrighted works notwithstanding the impending statutory ban on circumventing TPMs. That bloc had sought substantially more robust protections for fair use in the DMCA’s anti-circumvention provisions, but its

98. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); Kevin Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 740 (2010) (“As the doctrinal formula for determining severability reveals, the required inquiry into legislative intent is unlike many other interpretive inquiries, in that it asks what the legislature would have done, not what the legislature actually did.”). The inquiry is, of course, somewhat easier when Congress has taken it upon itself to include a “severability” provision in the legislation itself, in anticipation of constitutional challenges, though the Court’s prevailing doctrine has it that such provisions create only a rebuttable presumption, not a conclusion, in favor of severability. *See* Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 230 (2004). The DMCA contains no severability provision.

99. Historically, the presumption has occasionally run in the other direction. *See* Shumsky, *supra* note 98, at 237 (discussing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

100. *See Free Enter. Fund*, 130 S. Ct. at 3161; *see also Alaska Airlines v. Brock*, 480 U.S. at 684.

101. *See, e.g.,* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 206 (1993) (“By speculating about what the legislature would have intended if it had considered the question of severability, rather than seeking to determine what the legislature did intend as evidenced by the statute itself, *Alaska Airlines* substitutes an unanswerable question for one applied by the Court in most other statutory construction cases.”); Walsh, *supra* note 98, at 741 (“Those who trust the judiciary to work things out by discerning the legislature’s unstated intent about a matter it never addressed when legislating can take heart from the current approach to partial unconstitutionality. The rest of us should be concerned. The problem is not simply that severability doctrine vests courts with substantial discretion, but that it does so in an area of the law in which the stakes are high.”).

grander ambitions were thwarted by the more powerful lobby of content producers. The rulemaking regime emerged as Congress's preferred balance between the competing sides' interests. To be clear, the contention here is not that the balance Congress struck was a *good* one.¹⁰² As an empirical matter, though, the reason the DMCA's rulemaking regime exists is that certain Senators and Representatives recognized the utility—possibly only the political utility, but the utility just the same—of a visible regulatory safety valve, of sorts, nominally designed to prevent the anti-circumvention access-control rules from altering the effective availability of fair uses too dramatically.¹⁰³ And the legislative record suggests that Congress simply would not have passed the anti-circumvention access-control rules without *any* sop, of the kind that the rulemaking regime provided, to fair use advocates.¹⁰⁴

1. *Legislative History*

More complete recitations of the legislative history of the DMCA's anti-circumvention rules are available elsewhere.¹⁰⁵ What follows is a narrowly

102. *Cf.* Samuelson, *supra* note 81, at 537–46 (criticizing the statutory carve-outs from the DMCA's act-of-circumvention ban as “unduly narrow”).

103. *See generally* H.R. REP. NO. 105-551, pt. 2 (1998).

104. Herman and Gandy argue that the chief reason the rulemaking regime made its way into the final legislation was precisely its likely ineffectiveness as a mechanism for preserving or defending fair uses in the face of the circumvention ban. *See* Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 147 (2006). The content industries did not thwart its inclusion, the argument goes, largely because they saw it as “only a minor threat.” *Id.* Though I agree that the content lobby effectively succeeded in limiting the scope of the exemptions that the rulemaking process could ultimately generate, a more ambitious version of the Herman and Gandy claim seems at best incomplete and at worst overstated. It is hard to believe that, left to its unfettered discretion, Hollywood and the Recording Industry Association of America (“RIAA”) would have affirmatively *preferred* a triennial fight to limit the scope of proposed exceptions to the circumvention ban, over no rulemaking regime at all. To the extent that Hollywood and the RIAA backed the rulemaking regime, that strategic decision reflected the political advantage they derived from the legislation's at least appearing to include a mechanism for protecting fair use, going forward.

Regardless, the Herman and Gandy thesis is not inconsistent with the broader one I advocate here. As discussed in more detail in Section III.B.2, *infra*, the notion that the rulemaking regime was effectively embraced by the politically dominant lobbying bloc *supports* the contention that Congress would not have passed the § 1201(a) circumvention ban without the rulemaking regime or something like it.

105. *See, e.g.*, LITMAN, *supra* note 17; David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909 (2002); Samuelson, *supra* note 81.

targeted review of the provenance of the rulemaking provision, in particular.¹⁰⁶

Five months before it passed Congress, drafts of the DMCA had progressed to the point that the bill, at least in its broader structure, looked roughly like the one that would ultimately become law.¹⁰⁷ By a vote of 99–0, the Senate had endorsed a version that contained, among other things, the three essential anti-circumvention proscriptions that would end up as §§ 1201(a)(1), 1201(a)(2), and 1201(b)(1)—the prohibitions on the act of circumventing access controls and on the distribution of devices for circumventing access controls and copy controls, respectively.¹⁰⁸ The blanket “act” proscription in the then-current § 1201(a)(1) was softened only by four reasonably narrow exceptions and clarifications, codified in § 1201(e)–(k); these provided limited relief for certain non-profit libraries and archives, for law enforcement, and for several other would-be circumventers.¹⁰⁹ But § 1201 contained neither a broad exemption for circumventions of TPMs intended to enable fair uses, nor any formalized procedure for creating new carve-outs from the default circumvention ban going forward.¹¹⁰ The House bill at the time (late May 1998) looked more or less the same, although it contemplated fewer itemized exemptions than the Senate version did.¹¹¹

From this point on, the history of the rulemaking regime, in a nutshell, is as follows: The House Commerce Committee introduced it in July; it was included in the version of the bill that the full House passed in August; the version of the bill that the full Senate passed in September did not incorporate the House’s innovation; and in October 1998, the conference committee adopted a version slightly modified from the one in the House bill. The Conference Report does not explain why the House’s preference for an anti-circumvention rulemaking regime carried the day. But—at the risk of tautology—the legislative record leading to that event suggests that Congress opted for a forward-looking mechanism to create limited exemptions from the circumvention ban because omitting one would have been politically unappealing.¹¹²

106. For another take on this history, see Herman & Gandy, *supra* note 104.

107. See S. REP. NO. 105-90, at 25–62 (1998) (overview of the then-existing draft).

108. *Id.* at 25; LITMAN, *supra* note 17, at 137.

109. See S. REP. NO. 105-90, at 31–34.

110. *Id.*

111. See H.R. REP. NO. 105-551, pt. 2, at 5 (1998).

112. A finer-grained theory is that Congress opted for a rulemaking delegation, in particular, as the mechanism for identifying needed exemptions from the circumvention ban principally as an accountability-shifting measure. See Herman & Gandy, *supra* note 104, at 147 (“[T]his delegation of authority is perfect to effectuate credit claiming and blame

A more detailed history: On June 5, 1998, the House Commerce Committee effectively injected itself into the process of shaping the DMCA.¹¹³ The record of the hearing conducted that day (and the following one) by the Subcommittee on Telecommunications, Trade, and Consumer Protection includes statements from various lobbyists and industry representatives both advocating¹¹⁴ and opposing¹¹⁵ broader legislative carve-outs from the draft circumvention ban than either house had been willing to embrace to date. Subcommittee members clearly appreciated both sides of the argument.¹¹⁶

shirking.”). Regardless of whether that understanding is right or wrong, the point here is simply that Congress evidently saw a net political advantage in including *an* exemption-creating mechanism in the final bill.

113. Representative Tauzin, presiding over a subcommittee hearing on the latest House version of the bill, explained that although the House Judiciary Committee had been responsible for the draft legislation to date, “the members of the Commerce Committee, and the members of this subcommittee, have unique expertise on technology issues which is unparalleled in the House or other committees.” *The WIPO Copyright Treaties Implementation Act, Hearing on H.R. 2281 Before the Subcomm. on Telecomms., Trade, and Consumer Prot. of the H. Comm. on Commerce*, 105th Cong. 2 (1998) [hereinafter *Commerce Committee Hearing*].

114. See, e.g., *Commerce Committee Hearing*, *supra* note 113, at 41 (letter from the Consumers Union) (“We urge Members to vote NO on this bill, unless it is amended to permit the fair use of technologically-protected copyrighted materials.”); *id.* at 48 (statement of Walter H. Hinton, Computer and Communications Industry Ass’n) (“The approach of H.R. 2281 is to say that circumvention per se should be illegal. ‘Circumvention’ is a word with an ominous tone. However, there are some very legitimate reasons to circumvent . . .”).

115. See, e.g., *id.* at 43 (statement of Hilary B. Rosen, President and CEO, Recording Industry Ass’n of America) (“Today you are going to hear from a lot of people. . . . One [group] I will call sort of the loophole creators. Those are the ones who support the concept of the bill, they just want a few changes and they justify those loopholes by inventing hypotheticals that may or may not ever come to a reality, but they just need to go to the absurd to justify the loophole.”); *id.* at 53–54 (statement of Steven J. Metalitz, Motion Picture Ass’n of America) (“[T]he anti-circumvention provision, section 1201, has been addressed. . . . [Critics’] concerns have been spoken to, provisions have been narrowed for the benefit of libraries, the benefit of schools, the benefit of manufacturers of equipment, the benefit of competitive computer software developers, the benefit of individual Internet users who want to protect their privacy or protect their children against pornography. These changes have been made and we have to again watch the baseline as provided by the [WIPO] treaties to make sure it doesn’t slip below it.”).

116. See, e.g., *id.* at 3–4 (statement of Rep. Boucher) (“There is no debate about the need to afford adequate protection from theft to creative works. I would also acknowledge that in the digital network environment these works are at greater risk than before. . . . But it is essential that we legislate these new protections for copyright owners in a manner that is narrowly targeted to achieve the intended purpose and in a manner that does not undermine traditional fair use principles. . . . Unfortunately, H.R. 2281, as reported from the House Judiciary Committee, does not meet that test. It intrudes greatly upon the established doctrine of fair use, to the detriment of libraries, universities and potentially every American citizen. . . . For example, the bill prohibits and imposes felony punishment on any circumvention of a technological protection measure. This provision is truly astonishingly

They responded the following month with a series of proposed amendments designed (at least ostensibly) to make the draft anti-circumvention rules less hostile to user privacy and fair use.¹¹⁷ Among these was an amendment from Representative Klug proposing the first version of a rulemaking regime designed to carve out future exemptions from a blanket ban on circumventing access-control TPMs. It passed the full Commerce Committee by voice vote on July 17, 2008.¹¹⁸

This initial version of the anti-circumvention rulemaking program was similar to the one that ultimately made its way into the final version of the DMCA, but differed in one significant respect. Like the final version, it contemplated only temporary exemptions; the exemptions were to be circumscribed by “class of copyrighted work”; they were to be generated through a rulemaking on the record whose purpose was to determine “whether users of copyrighted works have been, or are likely to be . . . , adversely affected by the implementation of technological protection measures that effectively control access to [copyrighted] works”; and the determination was to be made using a prescribed set of five considerations almost identical to the ones in 17 U.S.C. § 1201(a)(1)(C).¹¹⁹ Unlike the final version, though, the Commerce Committee contemplated delegating

broad. The circumvention does not have to be for the purpose of infringing a copyright for the prohibitions and the criminal penalties of that provision to apply.”); *id.* at 7 (statement of Rep. Bliley) (“[W]e need to understand precisely what impact this legislation will have on the, quote, fair use doctrine. Educators and researchers rely on fair use to enrich all of us. Consumers rely on it as well. And I know these groups have concerns with the legislation. We therefore need to explore whether the anti-circumvention provisions reach too broadly”); *id.* at 6 (statement of Rep. Dingell) (“Another concern that has been raised about this bill, particularly by libraries and electronic—rather, and users of electronic services, as well as academic institutions is that the legislation will greatly diminish the availability of the fair use doctrine, currently well established as a part of copyright law. If that were to happen, I believe it would be extremely unfortunate. The concern of these people stems from the prohibition in the bill against a circumvention of protective features that allow access to copyrighted works. . . . A producer of a creative work does not need to provide access to his or her work to anyone who wants it free of charge. . . . Allowing the public to gain access to the works, without necessary authorizing steps, would strip copyright law of its very essence. These proprietary interests need to be protected. But we must at the same time ensure that the public’s fundamental right to make fair use of these works is not diminished in any way.”).

117. *See* H.R. REP. NO. 105-551, pt. 2, at 30 (2008).

118. *Id.*

119. *Id.* at 2. In this initial proposed version, the exemptions were to last two years, not the three years that the final version settled on.

rulemaking authority not to the Librarian of Congress, but to the Secretary of Commerce.¹²⁰

The accompanying committee report does not leave to the imagination the *policy*-based (distinct from the political) legislative motivation for adding the rulemaking regime. In two pages under the subject heading, “Fair Use in the Digital Environment,” the report explains that the circumvention ban in the preceding version of the House bill threatened to “erode fair use” and “dramatically diminish public access to information.”¹²¹ The report continues:

The Committee on Commerce felt compelled to address these risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a “pay-per-use” society. At the same time, however, the Committee was mindful of the need to honor the United States’ commitment to effectively implement the two WIPO treaties [which served as part of the justification for the anti-circumvention rules], as well as the fact that fair use principles certainly should not be extended beyond their current formulation. The Committee has struck a balance that is now embodied in Section 102(a)(1) [the portion of the bill that consisted of the circumvention prohibition and the rulemaking regime]. The Committee has endeavored to specify, with as much clarity as possible, how the right against circumvention would be qualified to maintain balance between the interests of content creators and information users. The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law.¹²²

The report goes on to feature a section-by-section analysis of the Commerce Committee’s proposed bill, replete with several more pages that discuss the rulemaking regime, in particular. The gist of that discussion is as follows:

Given the threat of a diminution of otherwise lawful access to works and information, the Committee on Commerce believes that

120. *Compare id.* (“[T]he Secretary of Commerce, in consultation with the Assistant Secretary of Commerce for Communications and Information, the Commissioner of Patents and Trademarks, and the Register of Copyrights, shall conduct a rulemaking on the record to determine whether users of copyrighted works . . .”) *with* 17 U.S.C. § 1201(a)(1)(C) (2010) (“[T]he Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding . . . whether persons who are users of a copyrighted work . . .”).

121. *See* H.R. REP. NO. 105-551, pt. 2, at 25–26 (approvingly quoting an editorial from the *Richmond Times-Dispatch*, and a letter from the Consumers’ Union, respectively).

122. *Id.* at 26.

a “fail-safe” mechanism is required. This mechanism would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.

Section 102(a)(1) of the bill creates such a mechanism. It . . . creates a rulemaking proceeding in which the issue of whether enforcement of the [prohibition on the act of circumvention] should be temporarily waived with regard to particular categories of works can be fully considered and fairly decided on the basis of real marketplace developments that may diminish otherwise lawful access to works.

...

The primary goal of the rulemaking proceeding is to assess whether the prevalence of these technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful.¹²³

In sum, the original public rationale for a rulemaking regime in the DMCA’s anti-circumvention provisions was clear: the House Commerce Committee concluded that in light of the likely “prevalence of . . . technological protections,” “a ‘fail-safe’ mechanism [was] required . . . to prevent a diminution in the ability of individuals to use [copyrighted] works in ways that are otherwise lawful.” The rulemaking regime “creates such a mechanism.”¹²⁴

To be sure, various consumer groups and other content-industry opponents had advocated stronger protections for fair use than they would likely receive in a relatively narrow, then-to-be biennial rulemaking process.¹²⁵ But as a separate statement by Representatives Klug and Boucher explained later in the Commerce Committee’s report, the Klug amendment introducing the regime “represent[ed] a compromise between those on the content side and ‘fair use’ proponents.” Politically, it “was a means to eliminate the stalemate that existed.”¹²⁶

123. *Id.* at 36–37.

124. *Id.*

125. *See, e.g., Commerce Committee Hearing, supra* note 113, at 61 (statement of Seth Greenstein, Digital Media Ass’n); *see also* H.R. REP. NO. 105-551, pt. 2, at 2 (noting that the original proposal was for biennial, not triennial, rulemakings).

126. *Commerce Committee Hearing, supra* note 113, at 86. The statement continues: “The compromise amendment that Representative Klug ultimately offered at full committee . . .

On August 4, 1998, the full House passed a version of the DMCA that included a rulemaking regime substantially similar to the one in the Klug amendment.¹²⁷ Before the vote, Representative Bliley argued that the new version of § 1201(a)(1)—which added the rulemaking process to the blanket circumvention ban¹²⁸—was “one of the most important provisions of this legislation, and one that must be included in any version of this bill eventually sent to the President for signature.”¹²⁹ Notwithstanding that admonition, in September the Senate again passed its own version of the DMCA that contained neither a rulemaking delegation nor any similar “fail-safe” in its stead (though, to be fair, the bill had been introduced before the August 4th House vote).¹³⁰

The final version of the rulemaking regime emerged, then, in the conference convened to reconcile the House and Senate versions of the DMCA. On the day the conference committee promulgated its report, Senator Ashcroft took to the Senate floor to walk through the version that Congress would send to the President. He explained:

give[s] ‘information users’ the ability to argue that the application of technological protection measures adversely impacts their ability to access information. . . . Our expectation is that the rulemaking will also focus on the extent to which exceptions and limitations to this prohibition are appropriate and necessary to maintain balance in our copyright laws.” *Id.*

127. *See* H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES 6 (Comm. Print 1998). In this draft, the rulemaking proceeding was to take place every three years, not every two years as in the preceding version. *Id.* The rulemaking delegation is also worded differently from the one in the preceding version—but the drafting changes appear to be effectively cosmetic. *See* 144 CONG. REC. H7074, H7075–76 (daily ed. Aug. 4, 1998).

128. *See* 144 CONG. REC. H7074, H7075–76 (daily ed. Aug. 4, 1998) (reciting the text of the proposed § 1201(a)(1)).

129. *Id.* at 7094. Bliley added:

It was crafted by the Commerce Committee to protect “fair use” and other users [sic] of information now lawful under the Copyright Act. Let us make no mistake about the scope of what we are doing here today in adopting H.R. 2281, about the tremendously powerful new right to control access to information that we are granting to information owners for the very first time.

If left unqualified, this new right, as the Commerce Committee heard in testimony from the public and private sectors alike, could well prove to be the legal foundation for a society in which information becomes available only on a “pay-per-use” basis. That’s why this bill assures that institutions like schools and libraries, and the public, will have an opportunity in a credible and permanent process to make the case that the new right we’ve adopted is interfering with fair use and other rights now enjoyed by information users under current law.

Id.

130. *See* H.R. 2281, 105th Cong. § 1201 (1998).

[W]ith respect to “fair use,” the conferees adopted an alternative to [both the House and the Senate versions of] section 1201(a)(1) that would authorize the *Librarian of Congress* to selectively waive the prohibition against the act of circumvention to prevent a diminution in the availability to individual users (including institutions) of a particular category of copyrighted materials. As originally proposed by the Administration and adopted by the Senate, this section would have established a flat prohibition on the circumvention of technological protection measures to gain access to works for any purpose, and thus raised the specter of moving our Nation towards a “pay-per-use” society. Under the compromise embodied in the conference report, the Librarian of Congress would have authority to address the concerns of libraries, educational institutions, and other information consumers potentially threatened with a denial of access to categories of works in circumstances that otherwise would be lawful today.¹³¹

In a single sentence, the Conference Report explained that the delegates had eschewed the House’s designation of the Secretary of Commerce as the actor to carry out the rulemaking in order to leverage the Register of Copyrights’ subject matter expertise.¹³² The conference committee appears

131. 144 CONG. REC. S11,887 (daily ed. Oct. 8, 1998) (statement of Sen. John Ashcroft) (emphasis added). The rulemaking regime is not the *only* feature of the DMCA’s anti-circumvention provisions that (at least theoretically) might mitigate the statute’s impact on the availability of fair uses. First, as noted above, unlike the portion of the DMCA dealing with TPMs that control *access* to copyrighted works, the portion of the DMCA dealing with TPMs designed to control *copying* proscribes only *trafficking* in tools to carry out circumventions, not *the act* of circumventing TPMs. See generally R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619 (2003). In principle, this distinction leaves it perfectly legal to engage in the act of circumventing copy-control TPMs protecting works the user has already lawfully acquired—though in practice, the distinction may have little effect. *Id.* And there has been healthy debate, in both the scholarly literature and the courts, regarding whether § 1201(c) effectively allows some circumventions of *access-control* TPMs carried out for the purpose of making fair uses of the underlying works. See, e.g., Jane C. Ginsburg, *Essay: From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC’Y U.S.A. 113, 128–130 (2003); *Universal City Studios, Inc. v. Remeirdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff’d sub nom.* *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001) (finding no fair use defense); *Chamberlain Grp. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202–03 (Fed. Cir. 2004) (distinguishing *Remeirdes*, finding fair use defense); *MDY Indus., L.L.C. v. Blizzard Entm’t*, 629 F.3d 928, 951 (9th Cir. 2010) (rejecting *Chamberlain*, finding no fair use defense). To say that the issue remains unsettled is probably an understatement.

132. See H.R. REP. NO. 105-796, at 64 (1998) (Conf. Rep.) (“It is the intention of the conferees that, as is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce

not to have recognized, at least publicly, that this choice might present a constitutional problem—though as noted above, President Clinton flagged the issue when he signed the law less than three weeks later.¹³³

2. *Implications for Severability*

a) The Court's Doctrine

The Court's "leading contemporary opinion on severability" is *Alaska Airlines v. Brock*.¹³⁴ At issue were two sections of the Airline Deregulation Act of 1978: one that provided for an "Employee Protection Program" intended to shield certain airline workers from adverse effects of deregulation, and one that gave either house of Congress a "legislative veto" over agency regulations promulgated to implement the program.¹³⁵ After *Chadha* deemed one-house vetoes unconstitutional, the question arose whether the Airline Deregulation Act's veto provision could be severed from the provisions establishing the Employee Protection Program.¹³⁶ The district court in *Alaska Airlines* held that it could not,¹³⁷ the D.C. Circuit held that it could,¹³⁸ and the Supreme Court affirmed.¹³⁹

The rule, in the Court's phrasing, was that "the unconstitutional provision must be severed *unless the statute created in its absence is legislation that Congress would not have enacted.*"¹⁴⁰ The Court applied that counter-factual standard by looking to the statute's text, purpose, and legislative history. The

and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian." (emphasis added)); see also 144 CONG. REC. S11,891 (daily ed. Oct. 8, 1998) (statement of Sen. Patrick Leahy) ("Given [the Copyright Office's] expertise in copyright law, they will play a significant role in the implementation of the legislation, particularly with regards to the rulemaking on the circumvention of technological measures that effectively control access to a copyrighted work and the studies mandated by the bill."). Commentators have argued that the switch was in fact motivated by an interest in rent-seeking among the congressional committees that oversee the Copyright Office. See Herman & Gandy, *supra* note 104, at 128 n.34, 149 n.150 (citing Jessica Litman's seminal book, *Digital Copyright*, *supra* note 17). A related theory is that content industries felt more confident in their ability to dictate outcomes in proceedings orchestrated by the Copyright Office, with which they had historically had strong ties, than by the Commerce Department. See *id.* at 128 n.33.

133. See *supra* note 43.

134. See Shumsky, *supra* note 98, at 241 (discussing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987)).

135. *Alaska Airlines v. Brock*, 480 U.S. at 680–83.

136. *Id.* at 680.

137. *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 96 (D.D.C. 1984), *rev'd and remanded*, 766 F.2d 1550 (D.C. Cir. 1985).

138. *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1565 (D.C. Cir. 1985).

139. *Alaska Airlines v. Brock*, 480 U.S. at 697.

140. *Id.* at 685 (emphasis added).

underlying Senate bill had included a legislative veto, but the House bill had not.¹⁴¹ Although the Conference Committee ultimately went with the Senate's approach, the Court concluded that omitting the legislative veto would not have been a deal-breaker:

The debate on the final bill . . . illustrates the relative unimportance of the legislative-veto provision in this legislation. The only discussion of the EPP [that is, the Employee Protection Program] reflected wholesale approval of the program, with many Members stressing their support for the provisions, or regrets that the EPP provisions were not even stronger. One comment alone—in fact, the only such comment made during the entire deliberation on the Act—concerned the Legislative veto. This was an endorsement of the provision by Representative Levitas, which is best understood as an expression of his general support for legislative-veto provisions rather than a judgment that oversight was particularly important to the EPP.¹⁴²

In the Court's view, the "language and structure" of the EPP also suggested that Congress would have intended the legislative veto to be severable.¹⁴³ Among other indicators of that hypothetical preference, Congress had secured for itself an *alternative* "mechanism for the expression of its disapproval" with agency regulations implementing the EPP, in the form of a "report and wait" provision that required the Secretary of Labor to forward proposed rules to responsible Congressional subcommittees thirty days before issuing them as final regulations.¹⁴⁴ The reasoning here is that the "report and wait" regime and the legislative veto were, in a sense, a belt-and-suspenders approach to addressing the same concern for agency action inconsistent with congressional preference—which tended to suggest, in the Court's view, that the legislative veto was to some degree superfluous.

Since *Alaska Airlines*, the Court has purported to use the same "well-established" approach to evaluate severability on a number of occasions.¹⁴⁵ In *United States v. Booker*, for example, the Court excised from the criminal Sentencing Act the provision that made the Federal Sentencing Guidelines

141. *See id.* at 694–95.

142. *Id.* at 696.

143. *Id.* at 697.

144. *Id.* at 689–90.

145. *See id.* at 684. In addition to the cases discussed here, see, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality opinion); *New York v. United States*, 505 U.S. 144, 186–87 (1992); *see also* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 884 (2005) ("Although not always applied consistently, the standard rules governing severability are fairly well established.").

mandatory, after concluding that that provision produced results precluded by the Sixth Amendment's jury-trial right.¹⁴⁶ Severing the unconstitutional portion of the Sentencing Act, the Court said, was "what Congress would have intended in light of the Court's constitutional holding."¹⁴⁷ And in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court severed restrictions that Congress had imposed on the removal of certain agency officials from the statute establishing the agency, after concluding that the removal restrictions interfered with the President's duties under Article II of the Constitution.¹⁴⁸ "[N]othing in the statute's text or historical context," Chief Justice Roberts wrote, "makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will."¹⁴⁹

b) Applying the Court's Doctrine

Assume that the rulemaking delegation to the Librarian of Congress in the DMCA is unconstitutional. One argument that Congress *would* have enacted the DMCA's circumvention ban without its accompanying rulemaking regime is rooted in the observation that the content industries' political clout vastly outweighed the sway of the "fair use proponents." This is undeniably true. The idea, then, is that if the only two possible legislative outcomes were a circumvention ban without the rulemaking process, or no circumvention ban at all, the content industries would have exercised their effective prerogative to push through the circumvention ban. If this were the right way to conceive of the severability inquiry—as an investigation into which lobbying faction would likely have had to the power to prevail in a circumscribed, binary contest—the answer would be that the content industries would have trounced their opponents.¹⁵⁰ The rulemaking regime

146. 543 U.S. 220, 245 (2005); *cf.* Walsh, *supra* note 98, at 751 (noting the charge that Justice Breyer's majority opinion on the remedies issue "had created a new kind of severance analysis"); Metzger, *supra* note 145, at 891 ("The majority's facial invalidation of the mandatory provisions of the Sentencing Act provoked the most sustained criticism from the dissents—but from a methodological perspective at least, unwarrantedly so").

147. *Booker*, 543 U.S. at 246 (citing *Denver Area v. FCC*, 518 U.S. at 767 (internal quotation marks omitted)).

148. 130 S. Ct. 3138, 3160–62 (2010).

149. *Id.* at 3162 (citing *Alaska Airlines v. Brock*, 480 U.S. at 684).

150. *See, e.g.*, Samuelson, *supra* note 81, at 536 ("[The] digital economy groups exhausted their political capital on getting critical [itemized statutory] exceptions to the act-of-circumvention ban.").

would be severable, because Congress would have preferred¹⁵¹ it to no circumvention ban at all.

But the preceding conception of counter-factual congressional intent is critically different from the hypothetical question that the Court's severability doctrine actually poses. The touchstone of the proper inquiry is not how prevailing political pressures might have *shifted* had interested parties believed *ex ante* that the only available legislative choices were enacting the circumvention ban without the rulemaking regime or enacting no circumvention ban at all. It is instead whether the rulemaking regime was a *sine qua non* of the legislative bargain that Congress actually brokered. In *Alaska Airlines*, the Court went out of its way to note that the requisite analysis probed not "whether Congress would have enacted *some* form of protection" for the interests its legislation served,¹⁵² but rather "the importance of the veto in *the original legislative bargain*."¹⁵³ The relevant consideration was Congress's hypothetical legislative preference against a baseline reflecting the political trade-offs that were, in fact, necessary to get the law passed in the first place.

The DMCA's rulemaking regime was a hard-fought part of "the original legislative bargain" over the statute's circumvention ban. The balance of the bargain may have been skewed in favor of the content industries, who throughout the legislative process sought (with marked success) to minimize exemptions and carve-outs from the ban.¹⁵⁴ But the legislative record shows that Congress touted the rulemaking regime as a necessary "fail-safe," however modest, against the danger that the simultaneously-enacted circumvention proscription might over the years excessively diminish "access to categories of works in circumstances that otherwise would be lawful [in 1998]."¹⁵⁵

To be sure, one plausible explanation for Congress's settling on the rulemaking process in 17 U.S.C. § 1201(a)(1)(C)–(D), in particular, is that its

151. The inevitably "elusive" concept of hypothetical congressional "preference" may be particularly slippery in the context of the DMCA—a law notorious for the degree to which its final text reflected interest-group pressure, and little else. *See, e.g.*, LITMAN, *supra* note 17, at 144–45 ("There is no overarching vision of the public interest animating the Digital Millennium Copyright Act. None. Instead, what we have is what a variety of different private parties were able to extract from each other in the course of an incredibly complicated four-year multiparty negotiation."); *see also* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 932 (1983) (characterizing the counter-factual legislative preference that the severability analysis targets as "elusive").

152. *Alaska Airlines v. Brock*, 480 U.S. at 685 n.7.

153. *Id.* at 685 (emphasis added).

154. *See supra* note 115 (discussing the June 1998 Commerce Committee hearing).

155. *See* H.R. REP. NO. 105-796, at 64 (1998) (Conf. Rep.).

erstwhile opponents cynically embraced it precisely for its likely impotence. More specifically, the suggestion here is that the rulemaking mandate in the statute is so narrow, and its range of possible effects so non-threatening to the content industries, that they chose to back the triennial-exemptions regime as an ultimately harmless throw-away concession to vocal, but relatively powerless, fair use proponents.¹⁵⁶ But such a theory is perfectly consistent with the idea that Congress would have been loath to pass a version of the DMCA without so much as throwing a legislative bone to the constituency advocating for relief from the burdens of the circumvention ban. On this view, *even the content industries* saw the value of including, for political purposes, a rulemaking delegation that is effectively a one-way ratchet in the direction of diminishing the scope of the prohibition. To the extent that Hollywood, the RIAA, and their brethren really could dictate the outcome of the political process, they evidently decided—given the prevailing climate—that the best law they could feasibly pass needed to account for the concerns of Representatives Klug, Bliley, and others, at least superficially.¹⁵⁷

In light of that political reality, it seems perverse to conclude that Congress would have settled for a circumvention ban with no mechanism at all to soften it going forward. Notwithstanding the power and preferences of the content industries, the record shows that once the House Commerce Committee inserted itself into the legislative process in June 1998, the structure of the law that ultimately emerged would invariably look different from the structure of the bills under consideration to date: although the final version would continue to include a circumvention ban, it would also include *some* provision for allowing a flexible range of legitimate uses of copyrighted works protected by TPMs. The rulemaking regime may not be everything fair use advocates hoped for—but the operative political forces (on balance) would not have tolerated an *even less fair-use-friendly* outcome. In this sense, it is perfectly “evident that the Legislature would not have enacted [the anti-circumvention ban] . . . independently of [the rulemaking regime].”¹⁵⁸ The political will simply was not there.

There is no question that divining hypothetical congressional intent is in many respects an artificial analytical enterprise. But if in fact a court held the DMCA’s rulemaking regime unconstitutional, the severability inquiry that the Supreme Court has prescribed would be unavoidable. The purpose of this

156. See Herman & Gandy, *supra* note 104, at 147, and accompanying discussion.

157. See H.R. REP. NO. 105-551, pt. 2, at 86 (2008).

158. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010).

Part of this Article has been to explore considerations relevant to that inquiry, “elusive” though it may be, principally by reviewing the origins of 17 U.S.C. § 1201(a)(1)(C)–(D).¹⁵⁹ The salient facts are that the DMCA’s rulemaking regime was a heavily negotiated part of the legislative bargain that Congress brokered, and one that key members of Congress at least purported to see as important and valuable. Although the Court’s prevailing severability doctrine asserts a preference for invalidating only the portions of a statute that are themselves unconstitutional, it nevertheless recognizes that, in limited circumstances, leaving intact fragments of partially unconstitutional laws may contravene congressional intent. In view of the role the rulemaking regime plays in the DMCA’s anti-circumvention provisions, and in light of the regime’s legislative history, the best conclusion is that Congress would not have intended that the circumvention ban survive the rulemaking regime’s invalidation.¹⁶⁰

IV. TOPICS FOR FURTHER RESEARCH

This Article began by noting that commentators have for years been advocating increased copyright policymaking by an administrative agency.¹⁶¹ Some of their proposals would directly expand the Copyright Office’s policymaking mandate.¹⁶² Others endorse broader copyright policymaking by a regulatory agency of some sort, but ultimately advocate a delegation to an agency other than the Copyright Office out of a generalized fear that rulemaking by the Copyright Office may be unconstitutional.¹⁶³ The analysis in Part II of this Article will, ideally, inform those and similar ideas going forward. Simply put, the Court’s contemporary separation-of-powers opinions depend on reasoning that plausibly proscribes public-facing policymaking by the Copyright Office.

159. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 962 (1983).

160. In light of this conclusion, an additional relevant question is whether a court invalidating the rulemaking regime and the circumvention ban, together, would also need to invalidate a broader swath still of the DMCA. A comprehensive answer would address Congress’s hypothetical preference for preserving other portions of the statute, absent the circumvention ban and the rulemaking regime. That analysis is outside the scope of this Article. It bears reiterating, though, that the Court has repeatedly instructed that it prefers to invalidate as little of a statute as possible when part of the statute is unconstitutional. See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–31 (2006); cf. *Walsh*, *supra* note 98, at 753 (posing the hypothetical of an ultimately unconstitutional provision that was necessary to attract congressional “swing votes” to pass an omnibus law, and arguing that severability doctrine would require invalidation of the entire law).

161. See *supra* note 2 and accompanying text.

162. See *Liu*, *supra* note 1, at 148–54.

163. See *Singh*, *supra* note 2, at 570.

Constitutional issues aside, though, the question whether it makes sense to generate a greater portion of domestic copyright policy in an administrative agency warrants substantial additional research and analysis. Thoroughly evaluating any copyright rulemaking proposal entails wrestling with decades' worth of thinking by administrative law scholars and political scientists regarding the advantages and disadvantages of bureaucratic policymaking.¹⁶⁴ Beyond merely noting that agencies' alleged "expertise" and "flexib[ility]" have historically been used to justify delegations to the bureaucracy, a comprehensive assessment of plans to consolidate copyright authority in the administrative state would stake out and defend a vision of the goals that agency regulation actually serves or does not serve.¹⁶⁵ Perhaps more pragmatically, weighing the desirability of copyright policymaking by a bona fide executive agency ultimately requires assessing the costs and benefits of the thicket of procedural steps that the rulemaking process typically contains.¹⁶⁶

164. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 108 (1997) ("[T]he legal literature bristles with claims concerning the normative purposes of administrative process, ranging from 'fairness' to 'efficiency' and utilizing a host of other ideas as well—'openness,' 'accountability,' 'legitimacy,' 'rationality,' to name but a few.").

165. Cf. Liu, *supra* note 1, at 148–49. See DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 18–19 (1993) (arguing that delegations of political decisionmaking to agencies "reduces government's capacity both to protect us from the harms about which we care the most and to effect compromises and therefore resolve disputes about what the law should be"); MASHAW, *supra* note 164, at 23 (noting that in one vision of bureaucratic functioning, "[t]he democratization of the regulatory process, far from solving the problems of regulatory capture, is . . . depicted as having merely provided a no-holds-barred domain for special interest pleading"). But see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 6 (1998) ("[S]cholars writing on the political economy of regulation routinely generalize on a plane of abstraction far above the administrative process, without much attention to the legal institutions that shape regulatory decisionmaking in many crucial ways, just as scholars of administrative law routinely focus on particular judicial doctrines without clearly situating their work in any larger theory of regulation or explaining how the doctrines they identify and the reforms they espouse fit into some broader understanding of what regulation is and which interests regulatory decisions advance.").

166. See Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 533 (2000); Sidney Shapiro, *Pragmatic Administrative Law*, 2005 ISS. IN LEG. SCHOL., art. 1, at 16 (counting 111 steps in Seidenfeld's table); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) ("By the end of the 1980s, it was becoming increasingly clear that informal rulemaking was not faring very well. Its great virtue had been the efficiency with which federal agencies could implement regulatory policy and the degree to which affected members of the public could participate in the policymaking process. Throughout the late 1970s and early 1980s, however, the executive branch and, to a more limited extent, Congress added analytical requirements and review procedures, often at the behest of the

And of course, the relative merits of delegating copyright rulemaking authority to an administrative agency invariably depends on details of the agency at issue. In many countries, an agency charged with formulating or adopting copyright policy is housed in the Ministry of Culture or an analogous department.¹⁶⁷ The location of the U.S. Copyright Office in the Library of Congress offers, in a sense, a similar symbolic recognition that copyright policy defines not just rules of trade, but also modes and practices for the creation and transmission of culturally significant works. And yet in view of the massive contribution of copyright industries to the American economy,¹⁶⁸ conceiving of copyright policymaking as (at least partly) industrial policy or even a form of competition law¹⁶⁹ is clearly necessary in any analysis of whether a particular administrative body is staffed with the right resources and structured with the right institutional design to wield copyright policymaking authority effectively.

Considering copyright rulemaking comprehensively, in other words, is a much broader project than merely thinking through where Congress can *permissibly* delegate rulemaking authority. It seems likely that proposals to give the Copyright Office or another agency enhanced copyright policymaking responsibility will continue to surface in years to come—and when they do, deeper analysis of the theories, problems, and competing desiderata identified here would be useful to have in hand.

regulated industries. These initiatives and the continuing scrutiny of reviewing courts . . . caused the rulemaking process to ‘ossify’ to a disturbing degree. By the mid-1990s, it has become so difficult for agencies to promulgate major rules that some regulatory programs have ground to a halt”). A non-profit group called “OMB Watch” has independently compiled a flow chart of steps in the notice-and-comment rulemaking process. The PDF version, whose type is in twelve-point font, runs to five pages. *See Flowchart of Notice-and-Comment Rulemaking*, OMB WATCH (2007), <http://www.ombwatch.org/files/regs/images/rc/flowchartprt.pdf>. For a discussion of similar issues concerning certain responsibilities discharged by the Patent and Trademark Office, see Stuart Minor Benjamin & Arti K. Rai, *Who’s Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269 (2007).

167. *See, e.g.*, Heba A. Raslan, *Shari’a and the Protection of Intellectual Property—The Example of Egypt*, 47 IDEA: INTEL. PROP. L. REV. 497, 540 (2007); Geoffrey R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT’L & COMP. L.J. 283, 312 (2006); Richard P. Sybert, *IP Protection and Counterfeiting in China*, 20 INTEL. PROP. & TECH. L.J., no. 7, 2008, at 12, 15.

168. *See* COHEN ET AL., *supra* note 82, at 29 (citing Siwek study estimating the contribution of “core” copyright industries to gross domestic product at \$889.13 billion in 2007—nearly 6.5% of that year’s GDP).

169. *See, e.g.*, Randal C. Picker, *Copyright and the DMCA: Market Locks and Technological Contracts*, in ANTI-TRUST, PATENTS AND COPYRIGHT: EU AND US PERSPECTIVES 180 (François Lévêque & Howard Shelanski eds., 2005); HERBERT HOVENKAMP, INNOVATION AND COMPETITION POLICY: CASES AND MATERIALS (2011).

V. CONCLUSION

For years, a constitutional cloud has hung over the prospect of substantial public-facing policymaking by the Copyright Office. The thesis of this Article is that such concern could certainly be well-founded. The fear that Copyright Office rulemaking violates the separation-of-powers doctrine that the Supreme Court has articulated and occasionally enforced since the early 1980s is not some alarmist rumor planted by nefarious enemies of the agency or opponents of proposals to expand its mandate. To the contrary, the possibility that a well-informed federal court might strike down any grant of meaningful rulemaking authority to the Copyright Office, or its supervisory agency, the Library of Congress, is very real (though not a foregone conclusion).

That prospect includes the legitimate possibility that the existing rulemaking delegation to the Librarian of Congress in the DMCA's anti-circumvention provisions is unconstitutional. If so, this Article has argued, that rulemaking regime should not be deemed severable from the provisions of the statute from which it carves out exceptions. If the DMCA's triennial rulemakings are unconstitutional, then the ban on circumventing access-control TPMs in 17 U.S.C. § 1201(a)(1)(A) should be held invalid as well. Although such collateral damage would amount to a significant change in prevailing anti-circumvention law, it would be the result of Congress's disregarding the pre-existing advice of the Office of Legal Counsel, which committed itself in 1996—two years before the DMCA's enactment—to the view that it was “highly doubtful that Congress constitutionally could create new legislative agencies with operational powers, *or afford existing agencies novel powers*, with respect to . . . private persons.”¹⁷⁰

170. Dellinger Memo, *supra* note 3, at 563 (emphasis added).

