



# Constitutional Concerns with NO FAKES and Similar Bills

## *Congress Lacks Authority To Enact This Legislation Under the Intellectual Property Clause or the Commerce Clause*

The recently introduced NO FAKES Act seeks to create an intellectual property right in an individual's voice or visual likeness, giving individuals a property right over the creation and distribution of digital replicas. However, Congress lacks authority under the Constitution to enact such legislation.

Congressional authority to enact new intellectual property rights was a central issue in the 1996-2004 debate over legislation concerning protection for databases. Scholars and government officials concluded that because copyright could not protect facts under the IP Clause, a new quasi-copyright for facts could not be created under the Commerce Clause. Key precedent in these arguments:

- In *Feist v. Rural Telephone*, the Supreme Court ruled that facts cannot be copyrighted, rejecting the "sweat of the brow" doctrine. This decision was grounded in the Constitution's Intellectual Property Clause, which requires originality for copyright protection.
- The Court ruled in *Railway Labor Executives' Ass'n. v. Gibbons* that when a law involves exercise of a particular constitutionally-defined power, the Commerce Clause can't be used to avoid limitations on that power.

**Accordingly, Congress does not have the power to grant an intellectual property right in an individual's voice or visual likeness, because they are facts and thus Constitutionally barred from protection under both the IP Clause and the Commerce Clause.**

Additional Supreme Court decisions that reinforce limits on congressional power over intellectual property rights:

- In *The Trademark Cases*, the first federal trademark laws were ruled unconstitutional because they were passed as an exercise of the Intellectual Property Clause. They survived scrutiny only when they were recast as consumer protection laws, with appropriate limits on scope and purpose.
- In *Dastar v. Twentieth Century Fox*, the Supreme Court ruled that Section 43(a) of the Lanham Act could not create a cause of action for the use of public domain works and inventions without attribution, saying this would be a "species of mutant copyright law that limits the public's federal right to copy and to use expired copyrights."

## What Congress CAN Do On Digital Replicas

Congress can enact targeted legislation **prohibiting the creation and distribution of digital replicas that cause identified harm to the individual or the public at large.** This includes legislation to prohibit their use in non-consensual intimate imagery, voter suppression, or fraud.

**To avoid constitutional challenge, policymakers should abandon the property right approach and instead focus on the specific harms they seek to address.**

