Eldred v. Ashcroft: International Influences and the Outer Limits of the Copyright Clause

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Cover Page Footnote
International Law; Commercial Law; Law

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I. Introduction

It was “Mickey Mouse vs. The People” according to one headline,¹ and another described Walt Disney’s famous creation as “The Mouse that Ate the Public Domain.”² While Mickey Mouse was not a party to the suit, his fate is very much at the center of the Supreme Court’s recent decision in Eldred v. Ashcroft.³ At issue is whether a host of copyrights, including Mickey’s debut in Steamboat Willie,⁴ George Gershwin’s Rhapsody in Blue,⁵ and F. Scott Fitzgerald’s The Great Gatsby,⁶ would remain under copyright or pass into the public domain.⁷ There is no doubt the Court’s decision will draw more colorful criticisms from some members of the public. Instead of being decried as a ‘kangaroo court,’ the nation’s highest court may instead become known as a ‘Mickey Mouse outfit,’ complicit in upholding some of Congress’s own “Mickey Mouse legislation.”⁸ Though terse public criticism is hardly new to the Court, this decision may earn these phrases a measure of sardonic appropriateness that even


⁴ STEAMBOAT WILLIE (Walt Disney Studios 1928).

⁵ GEORGE GERSHWIN, RHAPSODY IN BLUE (Warner Brothers 1924).


⁷ See generally Eldred, 123 S. Ct. at 769.

hardy Justices would rather live without.

_Eldred v. Ashcroft_ asked the Court to consider the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA), a statute passed by Congress in 1998 that generally lengthened copyright protection by twenty years. The CTEA allowed copyrights to grow from the life of an author plus fifty years to the author’s lifetime plus seventy years. In the case of works made for hire, those authored anonymously or under a pseudonym, protection remains for 95 years from date of publication or 120 years from creation, whichever expires first. The CTEA is the latest in a long history of congressional copyright extensions, including acts passed in 1831, 1909, and 1976.

The petitioners advanced two basic challenges to the law, one under the Copyright Clause and another under the First Amendment’s Free Speech Clause. They argued the law did not comply with the Constitution’s “limited Times” requirement on two grounds. First, although the law declared a definite term of years, history indicated that congressional renewal of copyrights had in effect become incrementally perpetual. Second, they contended that providing longer protection to works copyrighted under previous statutes like the 1976 Act allowed works set to

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10 _Eldred_, 123 S. Ct. at 774.


14 _Eldred_, 123 S. Ct. at 775.

15 _Id_. This note will address only the First Amendment argument and holding in _Eldred_ to the extent that it is necessary for a basic understanding of the Court’s decision. The emphasis will remain on the case’s copyright elements and will specifically address the international justifications and influences surrounding the copyright issues.

16 U.S. CONST. art. I, § 8, cl. 8.

17 _See Eldred_, 123 S. Ct. at 775.
expire to be granted infinite copyright on a post hoc basis. Petitioners’ First Amendment argument suggested the law improperly restricted certain speech and could not survive heightened scrutiny. Writing for a seven member majority, Justice Ginsburg rejected all these claims, holding Congress was within its constitutional authority and had not exceeded the bounds of the limited times requirement.

*Eldred v. Ashcroft* provides a glimpse into the Court’s view on the progressive internationalization of intellectual property laws and the proper role of international norms for intellectual property law. This international (and predominantly European) influence comes against a backdrop of evolving twenty-first century technology and ever-increasing globalism. In all respects, this note focuses primarily on the international aspects of copyright law and the *Eldred* decision. Part II summarizes the facts and procedural history of *Eldred*. Part III surveys the background law, including past and current copyright acts. Part IV analyzes the

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18 See id. at 777.

19 Id. at 775.

20 Id. (Stevens, J. and Breyer, J., dissenting).

21 The *Eldred* decision is provocative in a number of ways and will undoubtedly generate scholarship from a multitude of sources. First, the Court’s apparent deference to Congress in the current context is in strong contrast to conventional wisdom suggesting the Rehnquist Court has been ready and willing to limit congressional and executive powers. See e.g., United States v. Lopez, 514 U.S. 549 (1995) (limiting Congressional power under the Commerce Clause); see also Clinton v. City of New York, 524 U.S. 417 (1998) (limiting executive power of line item veto); City of Boerne v. Flores, 521 U.S. 507 (1997) (limiting Fourteenth Amendment power); New York v. United States, 505 U.S. 144 (1992) (Tenth Amendment limitations). Second, the intellectual property community will likely have substantial follow-up commentary on the case for its precedential and technical impact within that specialty. See Symposium, Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution, 36 Loy. L.A. L. Rev. 1 (2002) (prospectively discussing the issues and impact of *Eldred* prior to the current decision). This note necessarily confines itself to the international justifications for the CTEA and seeks to answer whether the Court will tend to permit or restrict the progressive internationalization of intellectual property law. See generally Symposium, Symposium on Constructing International Intellectual Property Law: The Role of National Courts, 77 Chi.-Kent L. Rev. 989 (2002) (hereinafter Chicago Symposium) (providing a historical and advisory discussion on the emergence and development of international norms by and through domestic bodies of law).

22 Part III gives only a brief overview of past Copyright Acts and relevant treaties. A useful critique of the Court’s opinion requires a substantive discussion of the background law, which is analyzed in Part IV.
holding and rationale of Eldred and considers more deeply the impact of foreign treaties and the relevant legislative history upon the case's holding. This analysis illustrates how the Supreme Court has taken a highly deferential approach to the current statutory regime. It suggests that Congress and the President have almost unlimited discretion in creating international intellectual property norms, provided they do not run afoul of the most glaring bright lines. This note concludes that the majority contradicts itself in light of groundbreaking federalism cases like Lopez and Chadha.\(^2\) Finally, this article maintains that the Court's Copyright Clause jurisprudence is retracing a history similar to trends in the history of the Commerce Clause.

II. Statement of the Case

A. Facts and Parties

Eric Eldred is a small bookseller who utilizes the Internet and materials from the public domain to help promote his business.\(^2\) He has maintained a website publishing popular works by literary icons like Nathaniel Hawthorne and Robert Frost since 1995.\(^2\) Mr. Eldred published both derivative works and copies of texts online that allowed international and around-the-clock access to materials previously available only through brick and mortar libraries.\(^2\) Unlike libraries, however, Eldred is unable to freely circulate a book and take full advantage of the "first sale doctrine"\(^2\) in the same way a conventional library can. Instead,

\(^2\) See supra note 21; infra notes 43, 187-89 and accompanying text.
\(^2\) See generally Brief for Petitioners at *3, Eldred v. Ashcroft (No. 01-618), 2002 WL 1041928.
\(^2\) Cave, supra note 1, at *1.
\(^2\) Brief for Petitioners at *5, Eldred v. Ashcroft (No. 01-618), 2002 WL 1041928.
\(^2\) Id. (citing 17 U.S.C. § 109(a) (2002)). The 'first sale doctrine' allows the owner of a copy to freely sell, distribute, or dispose of the copy in her possession without needing permission from the original author. 17 U.S.C. § 109(a). Recent amendments to the Copyright Act have maintained an express exclusion of certain digital media from the first sale doctrine:

unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program . . . , and in the case of a sound recording in the musical works embodied therein, neither the owner . . . nor any person in possession of a particular copy . . . may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the
his materials are more extensively regulated under copyright laws, and in order to build a collection comparable to that of a print library, Eldred must secure the permission of each author's estate before publishing the works online. Collectively, petitioners claimed their efforts to cultivate and enhance materials available in the public domain were harmed by the new copyright regulation. Eldred, in particular, had to remove publications previously posted on the Internet to avoid potential liability, including old books with unknown copyright ownership. He was joined in the suit by a host of other businesses and individuals who "allege that they each use, copy, reprint, perform, enhance, restore or sell works of art, film, or literature in the public domain." The plaintiffs included commercial publishers and non-profit organizations representing community orchestras, choirs, historians, and preservationists. The plaintiffs brought suit seeking declaratory and injunctive relief from the CTEA provisions imposing substantial civil liability and related laws creating criminal penalties for violations.

B. Procedural History

After the CTEA's lengthened protection was passed, Eldred and his fellow plaintiffs filed a federal suit against the government

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28 Brief for Petitioners at *5-6, Eldred v. Ashcroft (No. 01-618), 2002 WL 1041928.
29 Id. at *6.
30 Cave, supra note 1, at *1.
31 Eldred v. Reno, 74 F. Supp. 2d 1, 2 (D.D.C. 1999). The original suit named Attorney General Janet Reno as a defendant in her official capacity representing the United States. After appeal to the D.C. Circuit, the case was renamed to reflect the current Attorney General, John Ashcroft.
32 Brief for Petitioners at *3-5, Eldred v. Ashcroft (No. 01-618), 2002 WL 1041928.
33 Reno, 74 F. Supp. 2d at 1-2.
34 Id. at 1-2 n.2 (citing No Electronic Theft Act of 1997, Pub.L. No. 105-147, 111 Stat. 2678, amending 17 U.S.C. § 506(a)). Violations bring potential fines of $500,000 and up to five years imprisonment. Cave, supra note 1, at *1.
in the District of Columbia challenging the constitutionality of the law on its face. Each side submitted its own motion for summary judgment, and the district court ruled in favor of the government. The plaintiffs appealed the decision to a three-judge panel of the D.C. Circuit, asserting error under the First Amendment and Copyright Clause. In a split decision, the majority affirmed the district court’s judgment upholding the constitutionality of the CTEA and found that copyrighted speech is “categorically immune from challenges under the First Amendment.” The D.C. Circuit held that the law does not curb the flow of ideas; it merely limits specific and proprietary forms of expression. Judge Sentelle’s dissent challenged legislative authority to incrementally extend copyright protection time and time again: “Congress can extend the protection of an existing work . . . [repeatedly] and in effect can [indirectly] accomplish precisely what the majority admits it cannot do directly.” He found the absence of “some definable stopping point” contrary to the Supreme Court’s federalism principles as espoused in Lopez.

There was also disagreement among the circuit judges about whether or not the Constitution’s language was simply hortatory or whether the copyright power required statutes actually “[t]o promote the Progress of Science and useful Arts.” The D.C. Circuit declined to rehear the case en banc, so the Supreme Court

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36 Id. at 7; see also Reno, 74 F. Supp. 2d at 1.

37 See supra notes 9-19 and accompanying text (discussing the basic claims).


39 Id. at 375 (paraphrasing United Video, Inc. v. Fed. Communications Comm’n, 890 F.2d 1173 (D.C. Cir. 1989)).

40 See id.

41 Id. at 382.

42 Id.

43 See United States v. Lopez, 514 U.S. 549 (1995). Lopez limited Congress’s Commerce Clause power by invalidating the Gun-Free School Zones Act of 1990. The Court held that although the Constitution gave Congress the authority to regulate commerce, such power remained subject to some outer limits. See id. at 551, 556-57.

44 U.S. CONST. art. I, § 8, cl. 8.

granted certiorari to resolve the role of the First Amendment and the limited times boundary on Congress’s copyright authority.\textsuperscript{46} To understand the Court’s decision, it is first necessary to examine the history of copyright law preceding the CTEA and \textit{Eldred}.

\section*{III. Background Law\textsuperscript{47}}

The CTEA is the latest federal statute to extend copyright protection, but it is hardly the first to do so. Congress first exercised its copyright power in 1790.\textsuperscript{48} The 1790 Act granted a term providing protection for fourteen years from the date of publication, which was renewable for an additional fourteen years if the author survived the initial period and actively sought renewal.\textsuperscript{49} Like many laws of the early republic, the 1790 Act largely reflected the English practice of the time, which was governed by the Statute of Anne, enacted in 1710.\textsuperscript{50}

In 1831, Congress lengthened the primary grant to twenty-eight years and maintained the secondary renewal at fourteen years.\textsuperscript{51} Another extension in 1909 kept the primary period of twenty-eight years and prolonged the renewal to a matching

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} Due to its limited scope, this note will review only the relevant history of the various copyright acts and the international laws and treaties that have influenced domestic copyright law. The background law and First Amendment claims in \textit{Eldred}, having little to no international aspects, are better reserved for a more generalized discussion of the case.
\item \textsuperscript{48} Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790) [hereinafter 1790 Act].
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} Eldred v. Ashcroft, 123 S. Ct. 769, 778 n.5 (2003) (citing 8 Ann., c. 19). Interestingly, the Statute of Anne appears to be more than simply a basis for the first copyright act; it is an apparent ancestor of the Copyright Clause itself. It was entitled “An Act for the Encouragement of Learning by . . . Vesting the Copies of Printed Books in the Authors or Purchasers.” \textit{Id.} (referencing Goldsmiths'-Kress Library of Economic Literature, Segment 1: Printed Books Through 1800, Microfilm No. 7300 (reel 460)). This language is very similar in form and substance to the clause granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Both seem on their face to emphasize the advancement of knowledge as a foundational justification for granting proprietary protection to writings.
\item \textsuperscript{51} Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (1831) [hereinafter 1831 Act].
\end{itemize}
\end{footnotesize}
Thus, the 1790, 1831, and 1909 Acts permitted copyrights for, at most, twenty-eight, forty-two, and fifty-six years respectively. Both the 1831 and 1909 Acts conferred copyright protection to existing and future works, as does the CTEA. The 1831 Act’s extension was slightly different, though, as it required all existing works to be within their initial copyright term when the extension was enacted in order to qualify. By comparison, the 1909 Act allowed existing works to qualify for an additional extension even if they were in the twenty-eight year renewal period.

Congress undertook a major revision of copyright law in 1976, significantly departing from the existing structure and statutory scheme in a number of important ways. The 1976 Act established rights based on the nature of the author, with differing standards for named authors and anonymous works or those made for hire. If an author was an identified natural person, the work was protected until fifty years after the author’s death. Works authored by more than one person were protected fifty years from the death of the last surviving author, so long as the writing was not made for hire. “In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first.” Thus, if a named author were to write and publish a work early in life, the 1976 Act could easily provide legal protection a full century longer than the meager fourteen years offered by the first Copyright Act in 1790.

The CTEA went further than the 1976 Act when it extended protection for another twenty years. Under the CTEA, copyrights

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53 Eldred, 123 S. Ct. at 775 (citing 1831 Act §§ 1, 16; 1909 Act §§ 23-24).
54 Id. (citing 1831 Act §§ 1, 16).
55 Id. (citing 1909 Act §§ 23-24).
57 Id. § 302.
58 Id. § 302(a).
59 Id. § 302(b).
60 Id. § 302(c).
survive for the author's life plus seventy years, and in the case of "a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first." This extension represents nearly a ten-fold increase in the duration of copyright when compared to the terms of the initial grant by the First Congress.

IV. Analysis and Significance

A. The First Amendment

As previously noted, the petitioners in Eldred asserted First Amendment and Copyright Clause challenges to the CTEA. The Supreme Court unequivocally and perhaps unsurprisingly rejected the suggestion that there was an unconstitutional impairment of free speech. "We reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards." Though not clearly stated, the Court appeared unanimous in this respect. Neither Justice Stevens nor Justice Breyer mentioned the First Amendment holding in his dissent, leading one to believe there was no disagreement among members of the Court. This position is further supported by consensus among members of the

61 CTEA § 302.

62 Although the Court first addresses the copyright issues in Eldred, this paper's areas of emphasis are better served by first quickly addressing the free speech claims and reserving the copyright discussion for subpart B.

63 See supra notes 15-19 and accompanying text.


65 Id.

66 See id. at 790-801 (Stevens, J., dissenting), 801-14 (Breyer, J., dissenting) (demonstrating the absence of any First Amendment disagreement). Justice Breyer's dissent, however, uses First Amendment goals of encouraging expression to animate his understanding of the Copyright Clause. Id. "The Copyright Clause and the First Amendment seek related objectives—the creation and dissemination of information. When working in tandem, these provisions mutually reinforce each other, the first serving as an 'engine of free expression,' the second assuring that government throws up no obstacle to its dissemination." Id. at 801-02 (citations omitted). Nonetheless, he remains silent as to the suggestion of a free speech right to the particular form of expression, but is instead concerned about the CTEA's broad limits on communication. Id. at 813. "This statute will cause serious expression-related harm." Id.
D.C. Circuit panel on the First Amendment issue with the exception of Judge Sentelle who wrote, "[w]hile I concur with much of the majority's opinion, insofar as it holds constitutional the twenty-year or more extension of copyright protection for existing works, I dissent."67

Justice Ginsburg's opinion reaffirmed the Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,68 which held that there was a "definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."69 The Court also emphasized free speech protections built directly into the Copyright Act:

First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. Specifically, 17 U.S.C. § 102(b) provides: 'In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.'70

Justice Ginsburg also cited the "fair use" defense, which allows limited use even of copyrighted forms of expression, as providing additional speech protection.71

The Court also observed that particular features of the CTEA comport with free speech principles:

The CTEA itself supplements these traditional First Amendment safeguards. First, it allows libraries, archives, and similar institutions to 'reproduce' and 'distribute, display, or perform in facsimile or digital form' copies of certain published works 'during the last 20 years of any term of copyright... for purposes of preservation, scholarship, or research' if the work is not already being exploited commercially and further copies are unavailable at a reasonable price.72

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70 Id. at 788-89.
71 Id. at 789.
72 Id. (quoting 17 U.S.C. § 108(h)).
While it is significant that the CTEA supplements traditional First Amendment safeguards, one must also note that this exemption only applies if the work is within the “last 20 years of any term of copyright” and if “further copies are unavailable at a reasonable price.”\textsuperscript{73} This understanding is somewhat circular, since it assumes the CTEA twenty-year extension of copyright protection is itself constitutionally permissible. Standing alone, this reliance on the CTEA exceptions might undermine the First Amendment determination, but when considered as only one part of the reasoning, it remains fairly evident that the majority’s conclusion is sound. This finding is reinforced only by the observation that “the case petitioners principally rely upon for their First Amendment argument, \textit{Turner Broadcasting System, Inc., v. FCC},\textsuperscript{74} bears little on copyright.”\textsuperscript{75} That case, the Court ruled, was distinguishable as compelling unwanted speech through mandatory broadcasting requirements.\textsuperscript{76} Accordingly, very different speech interests are involved in copyright. “The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”\textsuperscript{77} With the First Amendment claim rather conclusively resolved, \textit{Eldred}'s copyright issues come to the forefront and offer the most fertile ground for purposes of this discussion.

\textbf{B. The Copyright Clause}

In what might come as somewhat of a surprise, there is a dearth of cases that address the constitutional boundaries of the Copyright Clause. “There is no well-developed body of constitutional law that defines Congress’s power to promote the progress of science. There are no clearly defined criteria for what constitutes a limited time.”\textsuperscript{78} The Court implicitly acknowledges a vacant copyright case history and featureless precedential landscape when it construes copyright power exclusively through

\begin{footnotes}
\item[73] 17 U.S.C. § 108(h).
\item[74] 512 U.S. 622 (1994).
\item[75] \textit{Eldred}, 123 S. Ct. at 789 (citations omitted).
\item[76] \textit{Id}.
\item[77] \textit{Id}.
\item[78] Solum, \textit{supra} note 35, at 81.
\end{footnotes}
its discussion of patent cases.\textsuperscript{79} If nothing else, the sudden importance of congressional power to make laws affecting the rights and protections for intellectual property reflects the modern value of these intangible knowledge-based assets in an increasingly information intensive world economy.

\textit{1. Persistent Extensions as Limited Times}

As previously discussed, Congress has repeatedly extended the protections of the Copyright Act by passing legislation in 1831, 1909, 1976, and again in 1998 via the CTEA. After the Court considered the petitioners' challenge to the CTEA, its answer was plain: "the Copyright Clause empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future."\textsuperscript{80} The principal question remained; what represents a "limited time"?

Justice Ginsburg began her analysis with the observation that "CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a 'limited Tim[e]' as applied to future copyrights."\textsuperscript{81} Eldred and his fellow plaintiffs contended, however, that even if a twenty year extension "is literally a 'limited Tim[e],' permitting Congress to extend existing copyrights allows it to evade the 'limited Times' constraint by creating effectively perpetual copyrights through repeated extensions."\textsuperscript{82} Justice Ginsburg refuted this argument by echoing the judgment of the D.C. Circuit panel that "a regime of perpetual copyrights 'clearly is not the situation before us.'"\textsuperscript{83} Justice Ginsburg also found that "petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, and 1976 Acts did not."\textsuperscript{84} This reasoning suggests that so

\textsuperscript{79} See \textit{Eldred}, 123 S. Ct. at 779. To be sure, the analysis is effectively the same since "the Clause empowering Congress to confer copyrights also authorizes patents." \textit{Id.} Nonetheless, it is remarkable that the Court has had so few occasions to consider the meaning of limited Times.

\textsuperscript{80} \textit{Id.} at 778.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 783.

\textsuperscript{83} \textit{Id.} (quoting \textit{Eldred v. Reno}, 239 F.3d 372, 379 (D.C. Cir. 2001)).

\textsuperscript{84} \textit{Id.}
long as Congress mirrors its tactics in passing prior copyright acts and is able to articulate a rational reason, it is essentially unfettered in its ability to extend protection.

It is somewhat troubling that previous copyright extensions are actually used to justify the latest one, representing a type of inverted logic. Here, the majority seems to have said that "Congress has done this before, so it must be constitutional." The Court should have made a more rigorous analysis, one that the petitioners and dissenters all advocated. The dissents suggest that precisely because Congress has done this before, the Court should be somewhat more skeptical of the legislation - not less. Again, Judge Sentelle's critique is illuminating: "The Congress that can extend the protection of an existing work from 100 years to 120 years, can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300; and in effect can accomplish precisely what the majority admits it cannot do directly." The fact that the Court has approved of congressional action to incrementally extend copyrights only serves to encourage present or future surreptitious attempts by Congress to legislate beyond the scope of its authority. This portion of the decision indirectly promotes subterfuge of federalism principles and enhances the likelihood of precisely the type of situation our system of separation of powers is intended to prevent.

Beyond using prior legislative action to buttress current law, the majority fails to offer much discernible insight into what could be a "constitutionally significant threshold with respect to 'limited Times.'" So long as Congress is sophisticated enough to pass copyright laws that are incremental and not blatantly indefinite, it seems the Court will remain unwilling to support a facial constitutional challenge. Absent any contrary indication in

85 Cf. Alexander Bickel, The Least Dangeroius Branch 15-16 (1962). Justice Holmes stated:

[It is] revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. Id.


87 Id.

88 Eldred, 123 S. Ct. at 783.

89 See id. at 782-84 (recognizing an explicitly perpetual copyright is not within the
Eldred, one can only assume that if there is a breach of the constitutional threshold embedded in the Copyright Clause, the Court will know it when it sees it. Indeed, it seems that "limited Times" will merely require copyright statutes to be "confine[d] within certain bounds," 'restrain[ed],' or 'circumscribed' as understood now, and as the term was known at the time of the framing.

In addition to being definitionally "limited," the Court's decision also declares that nothing "warrants construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint." The opinion considered the legislative history and intent of the CTEA and vests great trust in the apparent self-restraint possessed by Congress:

The House and Senate Reports accompanying the CTEA reflect no purpose to make copyright a forever thing. Notably, the Senate Report expressly acknowledged that the Constitution 'clearly precludes Congress from granting unlimited protection for copyrighted works,' and disclaimed any intent to contravene that prohibition. Members of Congress instrumental in the CTEA's passage spoke to similar effect. Thus, the implication from Eldred is that Congress can enact any copyright or patent legislation it chooses so long as it enunciates a term of years or comparably definable period. Furthermore, absent the clearest expression of an impermissible congressional intent to create a perpetual copyright, Congress can act as it pleases.

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90 See Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Here Justice Stewart's concurrence recognized the futility of an attempt to judicially describe sexually explicit speech that may be prescribed under the First Amendment when he famously quipped, "I know it when I see it, and the motion picture involved in this case is not that." Id.

91 Eldred, 123 S. Ct. at 778 (quoting authoritative dictionaries, citations omitted) (alterations by the Court).

92 Id. at 783.

93 Id. at 783 n.16 (quoting S. REP. NO. 104-315, at 11 (1996)) (internal citations omitted).

94 Id. at 772-84.
2. Retroactive Extensions as Limited Times

While there were few cases that squarely tackled what constituted a limited time, the majority was able to marshal some meaningful precedent to answer the claim that retroactive copyright extensions were appropriate. Justice Ginsburg invoked past decisions from Justices Story and John Marshall suggesting there has never been "any doubt of the constitutional authority of Congress to enact a 14-year patent extension that 'operates retrospectively.'" The same basic premise of what connotes a limited time for future copyrights is used in permitting retrospective extensions. Properly "understood, a time span appropriately 'limited' as applied to future copyrights does not automatically cease to be 'limited' when applied to existing copyrights."

The majority also makes the simple assertion that "Congress'[s] unbroken practice since the founding generation thus overwhelms petitioners' argument that the CTEA's extension of existing copyrights" violates the Constitution. This claim, however, is subject to the same questions previously raised in this note: it is somewhat unsatisfactory merely to invoke history as the principle defense of what may have been a constitutionally suspect practice even at the time of the founding. The Court answers such a critique by citing precedent. "Such consistent congressional practice is entitled to 'very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive.'" But to its credit, the majority shored up its position by recounting the policy judgment animating the

95 See supra notes 78-79 and accompanying text.
96 Eldred, 123 S. Ct. at 779 (quoting Blanchard v. Sprague, 3 F. Cas. 648, 650 (C.C. Mass. 1839) (no. 1,518) (Story, J)).
97 Id.
98 Id. at 785-86. For a thorough analysis of the views of the Founders, see L. Ray Patterson & Craig Joyce, Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8 of the U.S. Constitution, 52 EMORY L.J. 909 (2003).
99 See supra notes 83-87 and accompanying discussion.
100 Eldred, 123. S. Ct. at 786 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884)) (alterations by Justice Ginsburg).
retroactive application of copyrights since the very first act.\footnote{Id. at 780-81.} Equity demands that the law not put yesterday’s author in a worse position than today’s author, who can claim a new copyright the day after a new act takes effect.\footnote{Id. (citing Representative Huntington, 7 CONG. DEB. 424 (1831)).} This justification has persisted since 1790, when Congress implemented the policy “that the author of yesterday’s work should not get a lesser reward than the author of tomorrow’s work just because Congress passed a statute lengthening the term today.”\footnote{Symposium, The Constitutionality of Copyright Term Extension: How Long is Too Long? 18 CARDOZO ARTS & ENT. L.J. 651, 694 (2002) (panel discussion comments of Professor Arthur Miller) (cited favorably in Eldred, 123 S. Ct. at 780-81) [hereinafter Cardozo Symposium].}

The decision in Eldred dismissed other claims made by petitioners, “all premised on the proposition that Congress may not extend an existing copyright absent new consideration from the author.”\footnote{Eldred, 123 S. Ct. at 784.} One argument claimed the CTEA did not sufficiently require originality.\footnote{Id.} The Court held the originality it spoke of in Feist Publications Inc. v. Rural Telephone Service Co.\footnote{499 U.S. 340 (1991).} requires a “creative spark”\footnote{Id. at 346.} for a work “to be eligible for copyright protection at all.”\footnote{Eldred, 123 S. Ct. at 784.} Feist in no way defined what was a limited time “for which a work may be protected, and the originality requirement has no bearing on that prescription.”\footnote{Id. at 786.}

The second set of arguments were closely related to each other.\footnote{Id.} Taken together, the petitioners claimed that the language of the Copyright Clause requires acts of Congress to actually “promote the Progress of Science and useful Arts,”\footnote{U.S. CONST. art. I, § 8, cl. 8.} and creates a quid pro quo whereby authors receive the benefit of an “exclusive Right”\footnote{Id.} to their writings in exchange for contributing original
expression to the public discourse and domain. The majority was unwilling to declare the “preambular language” of the Copyright Clause as anything more than hortatory. Instead, the majority affirmed that the preamble states only a primary objective and not a constitutional command. “The ‘constitutional command,’ we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a ‘system’ to promote the progress of science and useful arts. The majority’s opinion suggests that every legislative action need not advance scientific or artistic aims individually, so long as the overarching system of intellectual property protection does so.

The Court’s analysis and the preceding discussion involved only the facial, and to some extent the definitional, examination as to what power the Constitution grants Congress concerning copyrights. The standard of review can only be described as de minimis. The opinion confirmed that this examination is merely a threshold analysis when it concluded, “[g]uided by text, history, and precedent, we cannot agree with petitioners’ submission that extending the duration of existing copyrights is categorically beyond Congress’[s] authority under the Copyright Clause.” With the ‘outer limits’ thus prescribed, the Court then addressed whether the CTEA is a “rational exercise of the legislative authority conferred by the Copyright Clause.”

3. Rational Basis Analysis

The majority examined the policy interests allegedly advanced by the CTEA and found that Congress’s legislative decisions easily satisfied minimum rationality. The justices cited two prominent and legitimate justifications for the CTEA. The first

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113 Eldred, 123 S. Ct. at 786.
114 See id. at 784.
115 Id. at 784-85.
116 Id. at 785 (quoting Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966)).
117 See supra discussion of subsection 2 and accompanying notes 92-116.
118 Eldred, 123 S. Ct. at 781 (emphasis added).
119 See United States v. Lopez, 514 U.S. 549, 556-57 (1995); see also supra note 43.
120 Eldred, 123 S. Ct. at 781.
121 Id. at 782 (“In sum, we find that the CTEA is a rational enactment[.]”).
was the congressional interest in bringing the CTEA into parity with prevailing European standards.\textsuperscript{122} The second was that Congress was merely responding to evolving technological and demographic realities.\textsuperscript{123}

The majority of the \textit{Eldred} Court ruled, "a key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years."\textsuperscript{124} The Court agreed with the respondents' view that Congress was trying to assure that domestic authors would receive copyright privileges comparable to those of European authors and creators.\textsuperscript{125} The Court drew attention to the ample documentation and legislative findings to support this conclusion.\textsuperscript{126} Such evidence revealed that the Register of Copyrights had testified before a congressional subcommittee, saying "[t]he reason why you're going to life-plus-70 today is because Europe has gone that way."\textsuperscript{127}

The twenty-year extension granted under the CTEA was not the first of its kind to mirror a prevailing international copyright standard. The 1976 Act did precisely the same thing.\textsuperscript{128} The 1976 Act "aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works."\textsuperscript{129} The CTEA, the Court believed, was merely the latest adjustment in an ever-evolving system of international copyright protection, and it was fully within Congress's discretion to judge the standard as requiring the conformity of American law.\textsuperscript{130}

\begin{footnotes}
\item[122] \textit{Id.} at 781-82.
\item[123] \textit{Id.} at 782 n.14.
\item[125] \textit{Id.}
\item[126] \textit{Id.} at 781-82.
\item[127] \textit{Id.} at 781-82 n.11 (quoting Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et al. before the Subcomm. on Courts and Intellectual Property of the House Committee on the Judiciary, 104th Cong., 1st Sess. 230 (1995)).
\item[128] \textit{Id.} at 775-76.
\item[130] \textit{Eldred}, 123 S. Ct. at 782-83 ("[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order . . . .").
\end{footnotes}
The Berne Convention was not a new feature of international law, and there is a long history of international copyright regulations. The original Convention in 1886131 was the result of a series of negotiations begun in Brussels nearly thirty years earlier.132 The majority in Eldred embraced CTEA's congressional acceptance of copyright parity with European partners - a choice the legislature had declined to make as far back as 1837.133 A failed bill from that year "disclosed a remarkably internationalist perspective on the Copyright Clause" among some early law makers, but American publishers were nonetheless able to forestall meaningful harmonization with foreign standards until the amendments of the 1976 Act.134 The United States did not become a part of the Berne Convention until 1998 with the passage of the CTEA, although the 1976 Act made domestic standards roughly equivalent to those required by treaty adherents.135

Beyond the strong international evidence, the Eldred Court found that Congress had sufficient reason to pass the CTEA based on increased human longevity and evolving media.136 The decision cited statements in the record by many well-known lawmakers corroborating demographic shifts and significant changes in technology while crediting Congress for "fashion[ing] the new rules that technology made necessary."137 The majority also made somewhat unenthusiastic acknowledgements that copyright protection can encourage investment in the restoration of aging works.138 Though sufficient to support a rational

133 Id. at 39-42.
134 Id.
135 Id. at 42. The period from 1976 to 1998 allowed American authors to indirectly gain copyright protection by jointly publishing in the United States and Canada, which did adhere to the Convention. Id. This practice "ensured [that] many of the benefits of the Convention accrued to American copyright industries . . . [with] few of its burdens." Id.
137 Id.
138 Id. at 782-83.
relationship affirmation by the Court, this justification is somewhat dubious when considering the petitioners' suggestion that any incentive for an author to create new material surely cannot survive for decades beyond one's death.\footnote{139}

Justice Breyer's dissent offered a more robust standard than mere rationality. He would have found that "the statute lacks the constitutionally necessary rational support if (1) the significant benefits that it bestows are private, not public; (2) it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) it cannot find justification in any significant Clause-related objective."\footnote{140} Though he declined to refer to this standard as a measure of heightened scrutiny,\footnote{141} it is difficult to perceive Justice Breyer's criteria as being anything but substantially more demanding than the familiar rational basis test. This position is defensible, because "it is necessary only to recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression," as Justice Breyer asserts.\footnote{142} While his approach is a novel one, he remains alone in his dissent on these expression-related grounds. As previously observed, there is virtually universal agreement that no First Amendment right to expression in a particular proprietary form exists. Justice Breyer's test, "would look harder than does the majority at the statute's rationality—though less hard than precedent might justify."\footnote{143}

\footnote{139} Id. at 807. Justice Breyer wondered in his dissent, "[h]ow will extension help today's Noah Webster create new works 50 years after his death?" Id.

\footnote{140} Id. at 802.

\footnote{141} Id. at 781. The majority finds the proposed test to be a heightened form of judicial scrutiny; "Justice Breyer's stringent version of rationality is unknown to our literary property jurisprudence." Id. at 781 n.10.

\footnote{142} Id. at 802.

\footnote{143} Id. The Constitution grants an affirmative power when it declares that Congress shall have the power to promote progress by securing to authors the exclusive use of their writings. U.S. CONST. art. I, § 8, cl. 8. The precedent to which Justice Breyer refers is a line of Equal Protection cases that do not fit well into the affirmative grant of the Copyright Clause. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-50 (1985); Plyler v. Doe, 457 U.S. 202, 223-24 (1982); Dept. of Agric. v. Moreno, 413 U.S. 528, 534-38 (1973). By comparison, the Equal Protection clause creates negative rights and is restrictive of government power. "No state shall.... deprive any person...." U.S. CONST. amend. XIV, § 1. A more appropriate analogue is the
This novel test falls in an awkward no-man’s land, artificially trying to extend greater scrutiny on rational basis grounds.\textsuperscript{144} As discussed previously, a more frontal assault on the categorical power of Congress to wield its copyright power would be easier to support.\textsuperscript{145}

Justice Stevens did not appear to be disturbed by the rational basis approved by the majority. Rather, his dissent was more in keeping with Judge Sentelle’s from the D.C. Circuit.\textsuperscript{146} He found the majority conclusion based “on the mistaken premise that this Court has virtually no role in reviewing congressional grants of monopoly privileges to authors, inventors, and their successors . . . .”\textsuperscript{147} He was most troubled by the foundational analysis of what constituted a limited time, and believed that “insofar as the . . . [CTEA] purported to extend [existing] copyrights,” it is invalid.\textsuperscript{148} Justice Stevens’s dissent is simply an honest matter of disagreement with the members of the majority on the limited times interpretation, but he raises a compelling argument in his conclusion:

Fairly read, the Court has stated that Congress’[s] actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure. It is not hyperbole to recall the trenchant words of Chief Justice John Marshall: ‘It is emphatically the province and duty of the judicial department to say what the law is.’\textsuperscript{149}

This invocation reveals the majority’s most glaring defect in that the Court has essentially refused to meaningfully define or

\textsuperscript{144} See generally Eldred, 123 S. Ct. at 790, 802.

\textsuperscript{145} See generally discussion supra Part IV.B §§ 1-2.

\textsuperscript{146} Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001) (Sentelle, J., dissenting).

\textsuperscript{147} Eldred, 123 S. Ct. at 790.

\textsuperscript{148} Id.

\textsuperscript{149} Id. at 801 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
interpret the Copyright Clause of the Constitution.\textsuperscript{150}

\textbf{V. Conclusion}

This note has thus far described how the Court framed the discussion of the various issues in \textit{Eldred} and how it analyzed the case within that framework. The First Amendment challenge raised in the case was summarily rejected by effectively unanimous judgments from the D.C. Circuit and the Supreme Court.\textsuperscript{151} The \textit{Eldred} opinion rightly cited the substantially different interests and balance between free-speech and laws that protect particular forms of expression.\textsuperscript{152} It is significant that the various copyright acts have consistently sought to protect free expression and fair use of protected material.\textsuperscript{153} From the long interplay between these two interests, it cannot be considered novel or surprising that the Court followed its precedent from \textit{Harper & Row}\textsuperscript{154} and declined to invoke the First Amendment to invalidate the CTEA.\textsuperscript{155} There are some compelling underlying principles worth considering, and Justice Breyer's dissent captures some of them in his emphasis on indirect inhibitions on expression.\textsuperscript{156} Professor Erwin Chemerinsky has made an even

\textsuperscript{150} See Paul M. Schwartz & William Michael Treanor, \textit{Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property}, 112 \textsc{Yale L.J.} 2331, 2332-34 (2003). Professors Schwartz and Treanor contemporaneously arrived at a similar conclusion, describing how the Court “did not offer a satisfactory... conception of the Copyright Clause and how the courts should construe it.” \textit{Id}. Their article provides an excellent analysis of conceptual underpinnings and the level of review applied by the Court. They offer a coherent argument for deferential judicial review and support it with “a new paradigm for understanding the Copyright Clause.” \textit{Id}. For a differing yet similarly compelling discussion of copyright theory, see Jon M. Garon, \textit{Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics}, 88 \textsc{Cornell L. Rev.} 1278 (2003). These and other emerging scholarly contributions will add value and insight to the vibrant debate of where the law should develop from here.

\textsuperscript{151} See \textit{supra} notes 64-67 and accompanying text.

\textsuperscript{152} \textit{Eldred}, 123 S. Ct. at 789 (citing \textit{Harper & Row, Publishers, Inc. v. Nation Enters.}, 471 U.S. 539, 556 (1985)).

\textsuperscript{153} See \textit{supra} notes 70-72 and accompanying text.

\textsuperscript{154} \textit{Harper & Row}, 471 U.S. at 539.

\textsuperscript{155} See \textit{supra} notes 64-67 and accompanying text.

\textsuperscript{156} \textit{Eldred}, 123 S. Ct. at 777. “Copyright, ... does not impermissibly restrict free speech, for it grants the author an exclusive right only to the specific form of expression; it does not shield any idea or fact contained in the copyrighted work, and it allows for
more persuasive argument,\textsuperscript{157} echoing, in part, the \textit{quid pro quo} concepts of the petitioners, but in the end the majority has found a comfortable balance in the gaps between these occasionally antagonistic concepts.\textsuperscript{158}

As to copyright principles, \textit{Eldred} does not fully confront the repeated extension of copyright as a violation of the limited times mandate. The Court suggests there are only two possible ways for the Congress to breach the Constitution: first, a law must not be overtly perpetual, but this amounts to requiring nothing more than a stated term of years.\textsuperscript{159} Absent lawmaking buffoonery, which some may contend is par for the course, Congress can pass a copyright protection of any length if it can place it in some definable limit.\textsuperscript{160} The second pitfall can only come by way of similar malfeasance: Congress must not admit in the record or legislative history that it aims to create a copyright with a \textit{de facto} perpetual duration.\textsuperscript{161} Barefaced improper congressional intent is not likely to be forthcoming and will only encourage pretextual justifications intended to obscure otherwise improper aims. These negligible requirements are meaningless and offer no greater constitutionally significant threshold than before the case was heard.\textsuperscript{162} The Court's holding has drawn the brightest of lines, but those lines have no practical relevance and do not provide the necessary boundaries to genuinely frame the copyright

\begin{itemize}
  \item \textit{fair use} even of the expression itself.” \textit{Id.} (citing \textit{Eldred} v. Reno, 239 F.3d 372, 375-76 (D.C. Cir. 2001)).
  \item \textsuperscript{157} \textit{See generally} Erwin Chemerinsky, \textit{Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional}, 36 \textit{LOY. L.A. L. REV.} 83 (2002) (arguing that copyright is tolerated because it encourages speech, but that extending protection after the initial expression fails to meet the same function and therefore unduly inhibits protected communication).
  \item \textsuperscript{158} \textit{Eldred}, 123 S. Ct. at 777-78.
  \item \textsuperscript{159} \textit{See id.} at 782-84 (declaring the CTEA's protection for a stated term of years is a limited time).
  \item \textsuperscript{160} \textit{Id.}
  \item \textsuperscript{161} \textit{See id.} at 781-82 (stating that Congress had proper and rational justifications for the CTEA).
  \item \textsuperscript{162} \textit{Id.} at 782-84. The interpretation that limited Times prohibits only facially perpetual copyright was widely conceded. \textit{Id.} “The CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a “limited Tim[e]” as applied to future copyrights.” \textit{Id.} at 778.
\end{itemize}
Similar criticisms are available when considering the majority's treatment of retroactive copyright extensions. An unbroken historical practice alone does not make an act any more or less constitutional. Any justification that retroactivity was consistent with the intent of the Founders is offset by the recognition that the copyright system they enacted in 1790 has now been exceeded roughly by a factor of ten. Going from fourteen years to a copyright term that could span 140 years and suggesting that the same ideas apply, strains the boundaries of credibility.

The policies that supported early nineteenth-century retroactive extensions are, by comparison, much more robust and convincing. It is a very reasonable policy judgment for legislators to consider parity among past and present authors and creators an important goal. This justification helps to salvage the majority's infirm historical justification. Petitioners' contention that the CTEA does not require originality is as misplaced as the historical practice premise, and the Court correctly treats it as such by dismissing the originality claim out of hand.

Eldred and his fellow plaintiffs' innovative construction of the language of the Copyright Clause would impose a heavy burden on laws to prove that each statute actually "promote[s] the progress of science and useful arts." A more balanced

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163 Id.
164 Id. at 785.
165 Id. at 785. "Such consistent congressional practice is entitled to 'very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centuries, it is almost conclusive.'" Id. (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 57, 59 (1883)). This type of reasoning has been used to justify some of our nation's most scurrilous practices. It is as if saying slavery was right and constitutional merely because things have always been that way.
166 See 1790 Act.
167 Id.
168 See supra notes 164-65 and accompanying text.
169 Eldred, 123 S. Ct. at 784. "Petitioners' 'originality' argument draws on [Feist] . . . . [That] decision did not construe the 'limited Times' for which a work may be protected, and the originality requirement has no bearing on that prescription." Id.
170 Id. at 784-85 (declining to construe the preamble of the Copyright Clause as a controlling limit on power).
understanding, as the Court properly ruled, requires merely that Congress create a copyright system to advance this constitutionally articulated interest.\textsuperscript{171} Mandating that each individual statute or particular application of law must meet this standard would be cumbersome and ill-suited to the judicial process. The preambular language is better understood as hortatory, placing a burden of constitutional proportion merely on the broader intellectual property protection apparatus.

Like the issue of creating parity for past authors, there is room for sensible disagreement on the question of whether the Copyright Clause presumes a \textit{quid pro quo}.\textsuperscript{172} It is perfectly fair to suggest that copyright protection inherently supposes an exchange based on reciprocal benefits and sacrifices between a private author and the public domain.\textsuperscript{173} This concept recognizes the costs and benefits to both creators and the public.\textsuperscript{174} Striking such a delicate balance calls for difficult judgments as to where those interests intersect, where they begin to overlap, or when they start to overwhelm each other.\textsuperscript{175} Parity, the public/private balance, and how to achieve the fundamental aims of the copyright clause require the type of judgments and balancing that are well-suited to legislators – especially when those lawmakers are democratically accountable to an electorate.

One factor that helps tip the scale in favor of deference toward legislative policy making remains that the Copyright Clause is an enumerated and affirmative grant of power to the first branch.\textsuperscript{176} Were the Clause a restrictive decree reserving power elsewhere rather than a permissive allocation, the analysis would call for closer judicial inquiry. For example, there is merit in the suggestion that little incentive remains to author a new writing merely from the existence of a prior writing. While it is true that an author might use resources from the first copyright to support his continued labor, the mere fact of copyright protection for volume one of a book does not inherently encourage dedication to

\textsuperscript{171} \textit{Id.} (citing Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1965)).

\textsuperscript{172} \textit{Id.} at 786.

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} \textit{Id.}

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{See id.}
the drafts of volume two. It is especially difficult to suggest that one's heirs are driven to create new work merely because a prior work is copyrighted. Instead, it is easy to recognize the financial benefit of extending valuable copyright, but there remains nothing to suggest those resources will go toward new expression or inventions that enhance public discourse or science and the useful arts. If the Copyright Clause was a restriction against certain copyright power comparable to the prohibition against ex post facto laws, the balance might tilt against the constitutionality of the CTEA. Nevertheless, as a permissive grant of power to the Congress, the Court properly exercises deference once navigating within the outer bounds of the Copyright Clause's constitutionality.

One issue bubbling beneath the surface in Eldred is generally absent from the reserved discussion of the justices - political influence. There is little reason to doubt the observation shared by many popular and expert political observers alike; the CTEA is a fine example of Congress doing the bidding of some of the world's most powerful and politically active media conglomerates. The legislative history, Justice Breyer recounted, "refers frequently to the financial assistance the statute will bring the entertainment industry," but it does little to protect any interests of having works in the public domain. "I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to

177 Id. at 807 (Breyer, J., dissenting).
178 Id. (Breyer, J., dissenting) ("How will extension help today's Noah Webster create new works 50 years after his death?").
179 U.S. CONST. art. I, § 9, cl. 3.
180 See Eldred, 123 S. Ct. at 786.
181 Id. at 777 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).
182 See, e.g., supra notes 1-2.
183 Sprigman, supra note 2.
Disney and its friends - a group of Hollywood studios, music labels, and PACs representing content owners - told Congress that they wanted an extension bill passed. Prompted perhaps by the Disney group's lavish donations of campaign cash - more than $6.3 million in 1997-98... Congress passed and President Clinton signed the [CTEA].

184 Eldred, 123 S. Ct. at 811 (Breyer, J., dissenting).
existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear."\(^{185}\)

The fact that there is so much benefit for such a narrow class of special interests and so little regard for the benefits of the public domain suggests the Court may later regret not giving the limited times provision more teeth. The majority opinion endorsed a minimalist reading of the requirements of the Copyright Clause that (1) does little to illuminate the meaning of what qualifies as a limited time and (2) fails to restrain potential abuse or subterfuge by Congress. At some future point the Court is likely to find its precedent too relaxed to provide any boundaries to prevent untoward congressional action. One can fairly argue that in not striking down the CTEA the Court failed to put the brakes on a legislature already careening out of control.

The circumstances after \textit{Eldred} are strikingly reminiscent of the post-World War II period in Commerce Clause jurisprudence.\(^{186}\) During the sixty years before \textit{Lopez},\(^{187}\) the judiciary unquestioningly deferred to congressional action authorized by the Constitution’s grant of commerce power.\(^{188}\) When Congress filled the vacuum with ever-expanding legislation under the auspices of its commerce authority, the Court eventually found it necessary to reclaim constitutional limits to a similarly enumerated power in \textit{Lopez} and later in \textit{Morrison}.\(^{189}\) It seems that the \textit{Eldred} decision sets in motion a similar dynamic that may or may not end in the Court revisiting its articulation of the basic requirements of the Copyright Clause.

Rather than acting as the arbiter of what the law is, the Court has declined to assume a role of any importance in determining the bounds of American intellectual property law. The justices have chosen not to utilize their role as a national court to demarcate how our country’s limited times provision may impair copyright law when compared in the international arena to bodies like the

\(^{185}\) \textit{id.} at 813 (Breyer, J., dissenting).


\(^{188}\) \textit{id.} at 555-57.

European Union, which are not similarly restricted.190

There are undoubtedly good rational bases for the twenty year extension granted by the CTEA. It is apparent from even a cursory look at both American and foreign legal history that there has been a progressive internationalization of intellectual property laws.191 Even when the United States declined to be a direct party to international standards like the Berne Convention for over a century, it was still acting and legislating with international impacts in mind.192 Professor Arthur Miller made the point well: "Congress did not give a fig about Europe.... Congress was trying to create a regime that would make it easier for Americans to market in Europe, to disseminate in Europe, and to make sure American authors would receive [the same] protection in Europe..."193 Even if not concerned with the interests of Europe, the increasing cross-border implications and occasional interdependence brought by a global economy is essentially what has driven U.S. copyright policy since the passage of the 1976 Act.194 The same international pressures existed for the CTEA, and they have only been enhanced by the technological difficulties of protecting digital media that are infinitely fluid and reproducible. Taken as a whole, these factors support a judicially restrained approach to invalidating congressional enactments – but the Supreme Court’s decision in Eldred v. Ashcroft sets the constitutional bar too low. Because of this, the judiciary will probably be forced to revisit questions on the scope of the Copyright Clause. Since Eldred does not solve the riddle, the Court will have to resolve whether legislative action making copyright effectively perpetual comports with "limited Times." We shall see.

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190 See generally Chicago Symposium, supra note 21, at 991.
192 Cardozo Symposium, supra note 103, at 706.
193 Id.
194 Eldred v. Ashcroft, 123 S. Ct. 769, 781-82 (2003) (recounting the CTEA’s international influences as demonstrated by the legislative history).