

Copyright Term Extension and the Scope of Congressional Copyright Power

Eldred v. Ashcroft

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I. BACKGROUND

In 1998, the U.S. Congress extended the term of both unexpired and future copyrights by 20 years. The U.S. Supreme Court recently upheld that extension against constitutional challenge in the case of *Eldred v. Ashcroft*.¹ Understanding *Eldred* requires familiarity with the evolution of the term of protection over the history of U.S. copyright law. In 1790, the U.S. Congress adopted the first U.S. Copyright Act, providing an initial term of protection of 14 years from publication and registration. If the author was alive at the end of the initial term she could renew the copyright for another 14 years, giving a total possible term of 28 years.² For nearly 200 years, U.S. copyright law retained this basic structure, granting an initial term of protection, usually from the date of publication, with the possibility of a second, renewal term of protection once the initial term expired. Congress, however, twice expanded the total duration of such protection, first to 42 and then to 56 years.³ Both times it granted the longer term not only to works copyrighted after the new law took effect, but also to any work that had already been copyrighted, as long as the copyright had not yet expired.⁴

In the 1976 Copyright Act, effective on 1 January 1978, Congress altered the structure of the copyright term. Works created on or after 1 January 1978 were protected for a unitary copyright term. That term started with the work's creation and, in most cases, lasted for the life of the author plus an additional 50 years, as required by

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The author would like to thank Graeme Dinwoodie, Paul Goldstein, Doug Laycock, Christopher Leslie and Neil Netanel for comments on earlier drafts, and Beth Youngdale for research assistance. He may be contacted at: <treese@mail.law.utexas.edu>.

¹ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

² § 1, 1 Stat. 124 (1790). Protection was available both for works published after the law was passed and for works that had been previously published (but which, of course, could not have enjoyed any federal copyright protection before the 1790 Act was adopted).

³ In 1831, Congress extended the initial term from 14 to 28 years, for a total possible term of 42 years: § 1, 4 Stat. 436 (1831). It extended the renewal term in 1909, from 14 to 28 years, for a total possible term of 56 years: § 23, 35 Stat. 1080-81 (1909).

⁴ § 16, 4 Stat. 436, 439 (1831); § 24, 35 Stat. 1080-81 (1909).

the Berne Convention.⁵ Where the work was made for hire or was anonymous, the single term generally lasted for 75 years from the date of publication.⁶ For works copyrighted before 1 January 1978 and still under copyright protection at that date, the 1976 Act did not alter the traditional structure of two terms of protection, but it did once again extend the duration of copyright protection to a maximum possible term of 75 years from publication.⁷

In 1993, the European Community (EC) adopted a Directive on harmonizing the term of copyright protection.⁸ The Directive's basic provision requires protection for the author's life plus 70 years. The Directive further provides a "rule of the shorter term", requiring that for works authored by someone other than an EC national, the Member States shall not protect the work for longer than it is protected in its country of origin. Because works originating in the United States were, at the time, protected in the United States for only 50 years after the death of the author, European nations, under the Directive, would protect such works only for a life-plus-50 term.

This situation led to efforts to extend the copyright term in the United States. In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act (CTEA) and again extended the copyright term, basically adding 20 years to all of the copyright terms established by the 1976 Act.⁹ Works created on or after 1 January 1978 are now generally protected from creation until 70 years after the author's death;¹⁰ anonymous and made-for-hire works are generally protected for 95 years after publication.¹¹ Works copyrighted before 1978 were again not left behind by this legislation. As long as the copyright in such a work had not expired before the CTEA took effect in 1998, the work would enjoy a 28-year initial term and a 67-year renewal term, for a maximum total term of protection of 95 years. Thus, during the course of the twentieth century, the renewal copyright term for works created before 1978 was extended from 14 years to 28 years to 47 years to 67 years.

⁵ § 101, 90 Stat. 2541, 2572 (1976). Joint works were protected for 50 years after the last surviving author's death. The life-plus-50 term also applied to works created before 1 January 1978, but neither copyrighted nor in the public domain on that date—essentially works unpublished as of 1978.

⁶ *Id.* This term actually was the *shorter* of 75 years from publication or 100 years from creation, and also applied to made-for-hire and anonymous works created but neither copyrighted nor in the public domain before 1978. The 75-year term was thought to roughly approximate the length of protection that most works would get under the life-plus-50 term: H.R. Rep. No. 94-1476 (94th Cong.) (1976), at 138.

⁷ This was done by extending the renewal term from 28 to 47 years.

⁸ Council Directive 93/98/EEC of 29 October 1993, 1919 O.J. L 290.

⁹ Congressman Sonny Bono, a musician and actor in the 1960s and 1970s, strongly supported term extension, and when he died in a skiing accident during the bill's consideration, the law was officially named in his honour.

¹⁰ 17 U.S.C. § 302(a). For joint works, the term runs for 70 years after the last surviving author's death: *ibid.*, at § 302(b). The life-plus-70 term also now covers works created before 1978 but not copyrighted or in the public domain on that date: *ibid.*, at § 303(a). Because the extension applied to all works in which copyright had not expired as of its effective date of 27 October 1998, and because all works created under the 1976 Copyright Act (that is, created on or after 1 January 1978) had not expired by that date (a work created on 1 January 1978 would be protected at a minimum until 2028, even if the author died the same day that the work was created, while a work made for hire published on 1 January 1978, would be protected until 2073), the CTEA extended the term for all works created under the 1976 Act.

¹¹ 17 U.S.C. § 302(c). Again, the term actually runs for the *shorter* of 95 years from publication or 120 years from creation.

Shortly after Congress enacted the CTEA, several parties sued to challenge the law's constitutionality. Eric Eldred, the principal named plaintiff, operates a Website that posts public domain novels and short stories.¹² Had Congress not enacted the CTEA, Eldred would have been able, on 1 January 1999, to post on his Website any literary work that had first been copyrighted in the United States in 1923; but under the CTEA such works will not expire until the end of 2018. The constitutional challenge to the CTEA centered on the extension of the term of works created before the law was passed, not on the additional time granted to subsequently created works. The plaintiffs asserted that the CTEA exceeded Congress's copyright power under the U.S. Constitution and violated the Constitution's guarantee of freedom of speech. The trial court upheld the CTEA as constitutional, and the Court of Appeals for the District of Columbia Circuit affirmed that decision (though one judge dissented).¹³ The Supreme Court granted review on two questions: whether the CTEA exceeded the scope of Congress's copyright power, and whether it violated the First Amendment. In January 2003, seven Justices (in an opinion by Justice Ginsburg) upheld the CTEA, while Justice Stevens and Justice Breyer each wrote a separate dissenting opinion.¹⁴

The federal government of the United States is one of limited powers; it has only the powers conferred upon it by the Constitution. In the Copyright Clause, the Constitution grants Congress the power:

“... to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Any federal copyright (or patent) law must be enacted pursuant to this grant of power. Only a handful of Supreme Court cases have ever interpreted the scope of Congress's power under the Copyright Clause, and none involved copyright duration or the “limited Times” provision.¹⁵ The *Eldred* Court rejected the argument that extending the term of existing copyrights was beyond Congress's authority. The Court followed a two-step approach in determining the extent of Congress's power under the Clause. First, the Court asked whether the Copyright Clause, and in particular the “limited Times” restriction, gives Congress the power to extend existing copyrights. Once the Court decided that the CTEA was within the scope of Congress's copyright power, it then considered whether the CTEA was a rational exercise by Congress of that power. This approach is consistent with what one U.S. constitutional expert calls:

“... the primary standard for judicial review of legislative action ... permitting Congress to employ all means not prohibited by the Constitution and rationally related to ends within the compass of constitutionally enumerated national powers.”¹⁶

¹² See: <http://209.11.144.65/eldritchpress/>.

¹³ *Eldred v. Reno*, 239 F. 3d 372 (2001); *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999).

¹⁴ *Supra*, footnote 1.

¹⁵ In *Goldstein v. California*, 412 U.S. 546, 560-61 (1973), the Court ruled that the “limited Times” requirement did not apply to *state* laws protecting author's writings.

¹⁶ Laurence H. Tribe, 1 *American Constitutional Law* 805, third edition, Foundation Press, New York, NY, 2000.

This article analyses the *Eldred* decision in three parts. Section II considers whether the Constitution empowers Congress to extend the term of existing copyrights. The majority concluded that it did, and that such extensions did not run afoul of the “limited Times” requirement. This conclusion is examined in light of the Court’s sparse historical Copyright Clause precedents, as well as in connection with two recent series of cases in other areas that have limited Congress’s authority to legislate. Justice Stevens’s dissent, which concluded that the Constitution simply prohibits Congress from extending the life of an existing copyright or patent beyond its original expiration date is then reviewed, before Section III examines the majority’s conclusion that Congress exercised its copyright power rationally in enacting the CTEA. Next, Justice Breyer’s dissent, which adopts a more searching standard of review, is examined. Section IV then reviews the Court’s rejection of the free-speech challenge to the term extension Act. The conclusion follows in Section V.

II. THE SCOPE OF CONGRESS’S COPYRIGHT POWER

A. THE MAJORITY OPINION

1. *Congress Can Extend Existing Copyrights*

Does the power granted Congress to protect authors’ exclusive rights in their writings for “limited Times” include the power to extend the duration of copyright protection for existing copyrighted works? The majority began its analysis with this question, and in answering it the Court looked to the text of the Copyright Clause, the history of Congressional practice, and judicial precedent. As to the text, the Court viewed the meaning of the word “limited”, both when the Constitution was written and in current English use, as merely “confine[d] within certain bounds” or “restricted in extent, number, or duration”.¹⁷ The plaintiffs had conceded that the copyright terms established by the CTEA for works created after that Act took effect—life plus 70 years in most cases; 95 years from publication in certain cases—were in that sense “limited Times”. The Court concluded that the exact same term “does not automatically cease to be ‘limited’ when applied to existing copyrights.”¹⁸ The Copyright Clause’s language, the Court concluded, seemed to allow Congress to extend the term of existing copyrights, as long as the extended term qualified as a “limited Time”.¹⁹

The Court then looked beyond the Clause’s text to the history of Congressional practice thereunder, suggesting that “a page of history is worth a volume of logic.” Because the “limited Times” language of the Copyright Clause also applies to Congress’s patent power, the Court considered the history of both copyright and patent practice. The Court pointed to two historical facts to support the conclusion that the

¹⁷ *Eldred*, *supra*, footnote 1, at 199.

¹⁸ *Id.*

¹⁹ The Court also suggested that Congress could not be acting “to evade the ‘limited Times’ prescription.”: *id.* See *infra*, text accompanying footnote 27.

Copyright Clause allows Congress to extend the term of existing copyrights. First, looking to the original 1790 Copyright Act and the term extensions of 1831, 1909 and 1976, the Court found:

“... an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.”²⁰

Indeed, the Court pointed several times to the need for parity between new and existing copyrights as evidence that Congress had the power to extend the term for existing copyrights.²¹ Second, the Court noted numerous instances early in U.S. history when Congress extended the duration of individual existing patents and copyrights.²²

Finally, the Court observed that judicial precedents involving term extensions under patent law also supported interpreting the “limited Times” language to allow extending the copyright term for existing works. Most importantly, several early court cases upheld patent terms renewed or extended by Congress.²³

Thus, the Court found that the language of the Copyright Clause, the history of Congressional practice in legislating copyright and patent terms, and judicial precedents finding no constitutional objection to legislative expansions of existing patents all led to the conclusion that:

“... extending the duration of existing copyrights is [not] categorically beyond Congress’ authority under the Copyright Clause.”²⁴

Subject to further decisional interpretation, “limited Times” means only that the copyright term must have some boundary. But the Court was unwilling to suggest any particular outer boundary beyond which Congress could not go in establishing the copyright term. In particular, the Court did not see how the CTEA, with its life-plus-70 and 95-year terms, “crosses a constitutionally significant threshold with respect to ‘limited Times’.” that earlier copyright statutes—providing maximum terms of 42 years, 56 years, 75 years, or life-plus-50 years—did not cross.²⁵ Similarly, the Court declined to indicate whether other common durational limits in property law, such as 99-year leases and the rule against perpetuities, marked any “outer boundary of ‘limited Times’.”²⁶

²⁰ Ibid., at 200.

²¹ See, for example, *ibid.*, at 200–202; and *ibid.*, at 204.

²² *Ibid.*, at 201–202.

²³ *Id.*, citing 1813, 1815 and 1839 circuit court decisions, including decisions by Chief Justice John Marshall and Justice Joseph Story. The Court also relied on an 1843 patent decision, *McClurg v. Kingsland*, 42 U.S. 202 (1843), holding that a patent’s validity was to be judged by “the law as it stood at the emanation of the patent, together with such changes as have been made since” and concluded that the retrospective operation of such changes was “not a sound objection to their validity” as long as they did not “take away the rights of property in existing patents”.

²⁴ *Ibid.*, at 204.

²⁵ *Ibid.*, at 210.

²⁶ *Ibid.*, at 210 n. 17. The rule against perpetuities is a common-law rule of property law that requires that any future contingent interest in property must finally vest no later than 21 years after the death of some life in being at the time the interest is created.

The Court rejected the suggestion that upholding repeated term extensions allowed Congress in effect to grant perpetual copyright protection and thus evade the “limited Times” constraint, finding that nothing before it justified viewing the CTEA as such an attempt at evasion. While the Court suggested that it might more carefully scrutinize a law passed in an attempt to circumvent the restriction, the Court’s treatment of this argument suggests that future challengers may have difficulty showing that Congress enacted any particular term extension law in an effort to get around the “limited Times” restriction.²⁷

Those challenging the CTEA had also argued that the extension of the copyright term for already-created works was outside the scope of Congress’s authority because the Copyright Clause permits Congress to act only, as stated in the Clause’s preamble, “[t]o promote the Progress of Science”, and such an extension would not, in fact, promote progress because it would not stimulate the creation of new works but rather would simply reward owners of copyright in existing works. The challengers argued that the Court should interpret the “limited Times” restriction in the light of the preambular statement of purpose and therefore strike down the CTEA provisions governing works created before its passage. The Court acknowledged that this was one of the challengers’ more forceful arguments. It pointed out that prior decisions had described the Clause as “both a grant of power and a limitation”²⁸ and had recognized that if Congress exercises its copyright power it must “create a ‘system’ that ‘promote[s] the Progress of Science’.”²⁹ Here again, however, the Court decided that the order of the day was deference to Congress: “[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” And the deferential Court found that Congress could rationally have believed that enacting the CTEA would promote the progress of science, by promoting international harmonization of the copyright term and by responding to demographic and technological changes. In addition, the Court again looked to Congress’s “unbroken practice since the founding generation”³⁰ of applying term extensions to both past and future works as evidence of the rationality of a Congressional view that a system in which the term of past works was extended would achieve the copyright power’s purpose of promoting the progress of science.

2. *Consistency with Historic Copyright Clause Interpretation*

The Court’s reading of the “limited Times” prescription as imposing only minimal limits on Congressional power to enact copyright laws is largely consistent with the

²⁷ Given the Court’s discussion of using legislative history to measure a Congressional purpose of evasion—*ibid.*, at 209–210 n. 16—such a showing might require express statements that Congress would like to grant protection in perpetuity but cannot, and so instead is repeatedly extending the term of protection.

²⁸ *Graham v. John Deere Co. of Kansas City*, 388 U.S. 1, 5 (1996).

²⁹ *Eldred*, *supra*, footnote 1, at 212, quoting *Graham*, *ibid.*, at 6.

³⁰ *Eldred*, *ibid.*, at 213–214.

overall trend of Supreme Court interpretation of the Copyright Clause.³¹ In general, the Court has interpreted the Clause so as to give Congress very broad power to enact copyright laws.

In 1879, the first Supreme Court case to address the meaning of the words of the Copyright Clause³² found that the language indeed imposed some limit on Congress's power to legislate under the Clause. *The Trade-Mark Cases* involved a law granting federal protection to trademarks. The Court determined that Congress passed the law pursuant to its Copyright Clause authority. But the Court held that trademarks did not necessarily qualify as the "writings" of "authors" that Congress could use its copyright power to protect, because a trademark could be protected even if the trademark owner did not create the mark but merely adopted something that already existed and acquired rights through use of the mark. Such a mark could not qualify as the writing of an author, the Court explained, because a "writing" in the constitutional sense included only those creations that were "original" to the author and "the fruits of intellectual labor".³³ Thus, the trademark law was not a legitimate exercise by Congress of its copyright power. Congress later enacted federal trademark laws pursuant to its power to regulate commerce.

Aside from invalidating Congress's use of the copyright power to enact a trademark law, however, the Court, in its first 200 years, otherwise interpreted the Copyright Clause quite broadly. In 1884, the Court decided a case challenging Congress's authority to grant copyright protection to photographs. The challenger argued that because a photograph was merely "a reproduction on paper of the exact features of some natural object or of some person", it was not "a writing of which the producer is the author", and since the Copyright Clause only authorized Congress to protect the "Writings" of an "Author", the attempt by Congress to grant copyright in photographs was invalid.³⁴ The Court rejected the challenge by giving the constitutional terms very broad definitions. An "Author", the Court said, is "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature", and a "Writing", in the constitutional sense, was held to mean "the literary productions of ... authors" and to include "all forms of writing, printing, engraving, etching [etc.], by which the ideas in the mind of the author are given visible expression."³⁵ As long as such

³¹ Prior to *Eldred*, only six Supreme Court cases interpreted the language of the Copyright Clause. See Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference* (2000), 47 J. Copr. Soc'y 317, 335–340 and 362–363; noting five cases, omitting *The Trade-Mark Cases* (see text at footnote 32, *infra*) as a non-copyright decision. In a seventh case, *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911), the Court construed the Copyright Act's grant of the exclusive right to dramatize a literary work as including the right to make a motion picture, and it very briefly rejected the argument that, so construed, the Act exceeded Congress's power. The argument, however, appears to have been that the Court's construction would extend copyright to the author's idea, rather than his expression, and the Court rejected that characterization and said that its construction of the Act conferred no monopoly over ideas: 222 U.S., at 63.

³² In 1834 in *Wheaton v. Peters*, 33 U.S. 591, the Court briefly discussed the Copyright Clause, but did not offer any interpretation of it. See Hamilton, *ibid.*, at 336.

³³ 100 U.S. 82, 94 (1879).

³⁴ *Burrow-Giles Litho. Co. v. Sarony*, 111 U.S. 53, 56 (1884).

³⁵ *Ibid.*, at 58.

a writing represents “original intellectual conceptions of the author”, the Court said, Congress may protect it by copyright, as it had in the case of photographs, though the Court suggested that the “ordinary production of a photograph” might not represent such intellectual conception. In sum, the Court read the words of the Copyright Clause—and Congress’s power under it—quite broadly, not narrowly.

In 1973, the Court again considered the meaning of the Copyright Clause’s language, and again read the words broadly. *Goldstein v. California*³⁶ involved a challenge to the constitutionality of a state law against copying sound recordings, on the ground that the state law conflicted with the federal copyright power. At the time California’s law was enacted, sound recordings were not subject to federal copyright protection. As part of its analysis, the Court considered whether Congress had the power to protect sound recordings under copyright. The Court held that the “Writings” that Congress could protect did include sound recordings:

“[A]lthough the word ‘writings’ might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”³⁷

In keeping with its earlier decisions, the Court chose the latter interpretation, viewing Congress’s copyright power as quite broad rather than reading the words of the Copyright Clause in a narrow, literal way.

In 1991, however, for the first time since *The Trade-Mark Cases*, the Court read the Copyright Clause as a limit on Congressional power to enact copyright laws. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, involved the copyrightability of a standard telephone directory as a factual compilation.³⁸ The Court analysed the standards that a work must meet to obtain copyright protection and concluded, as in *The Trade-Mark Cases*, that the work must be “original” to the author. The Court went further, however, stating that to be original a work must not be copied and must possess “at least some minimal degree of creativity.”³⁹ This creativity requirement marked “a significant departure from precedent” according to a leading commentator.⁴⁰ While the decision could have been justified on the basis of the language of the 1976 Copyright Act,⁴¹ the Court instead went out of its way to emphasize that originality, with its element of minimal creativity, was a constitutional requirement for copyright protection.⁴² The constitutional dimension of the originality requirement sprang from

³⁶ *Supra*, footnote 15.

³⁷ *Ibid.*, at 561–562.

³⁸ 499 U.S. 340 (1991).

³⁹ *Ibid.*, at 345.

⁴⁰ Paul Goldstein, *Copyright*, at 2:8 n.12, second edition, Aspen Publishers, New York, NY, 1996. See also Hamilton, *supra*, footnote 31, at 339: describing decision as “dramatic change” based on “rather fleeting references” in precedents.

⁴¹ See, for example, Hamilton, *ibid.*, at 339.

⁴² “Justice O’Connor referred to the originality requirement’s constitutional underpinning at no fewer than thirteen places in her opinion for the Court.”: Goldstein, *supra*, footnote 40, § 2.2.1, at 2:9 n. 12 1996, and 2003 Supp.

the Copyright Clause's terms "authors" and "writings", as the Court held that an author's writings in the context of the Copyright Clause encompassed only independently created *and* at least minimally creative works. Thus, for the first time in over a century, the Supreme Court interpreted the Copyright Clause to limit Congress's power: Congress could not protect any work that was not minimally creative (though the Court stressed that this threshold was quite low).

If *Feist* might have been thought to signal a change in the Court's traditional approach of interpreting the scope of Congress's copyright power very broadly,⁴³ the *Eldred* decision could certainly be seen to signal a return by the Court to that traditional approach. *Eldred*, after all, involved the meaning of the phrase "limited Times"—the only express textual restriction in the Copyright Clause on Congress's power (the Court in *The Trade-Mark Cases* and *Feist* having inferred limits from the words "authors" and "writings"). But the majority in *Eldred* showed no more inclination to read those express words of limitation restrictively than the Court had shown before *Feist* to read the words "writings" and "authors" narrowly in determining Congress's power under the Clause. Indeed, the *Eldred* majority rejected the argument that the CTEA ran afoul of *Feist*'s originality requirement because existing works to which the CTEA granted additional years of protection were not "original" at the time when the additional protection was granted. The Court showed no inclination to apply *Feist*, or its apparently more vigorous interpretive method, beyond the issue of originality presented in that case.

The *Eldred* Court's use of the Copyright Clause's preamble in interpreting the Clause is also consistent with its historic behaviour. The Court first discussed the preamble in some detail in *Higgins v. Keuffel*, an 1891 case involving a claim of copyright in a label that apparently constituted only a bare three-word description: "water-proof drawing ink". The Court expressed doubt that copyright protection for such a label could be granted under the Copyright Clause because such protection would not serve the purpose stated in the Clause of "promot[ing] the progress of science and useful arts". The Court described the plaintiff's label as having "no possible influence upon science or the useful arts"; the use of a descriptive label on the product it described had "no connection with the progress of science and the useful arts" and "nothing to do with such progress".⁴⁴ As a result, the Court concluded, "[i]t cannot ... be held by any reasonable argument that the protection of mere labels is within the purpose of the clause."⁴⁵ Despite this language, the Court actually decided the case on the much narrower ground that the label did not qualify for protection under the statute because the plaintiff had not complied with the strict notice formalities required of copyright

⁴³ See Hamilton, *supra*, footnote 31, at 339: "If the case was a harbinger of things to come, the Court in *Feist* instituted a new relationship with Congress *vis-à-vis* copyright law, one in which it was no longer inclined to be deferential to the point of servility."

⁴⁴ 140 U.S., at 431.

⁴⁵ *Id.*

owners at the time.⁴⁶ As a result, the Court did not need to rule definitively as to the impact of the Copyright Clause's preamble on the scope of Congress's power.

Less than a decade later, the Court decisively declined to read the Copyright Clause's preamble to limit Congress's copyright power. *Bleistein v. Donaldson Lithographing Co.* involved copyright in posters advertising a circus. The lower court, relying in part on the *Higgins* opinion, ruled that if a work had no use other than advertising, "it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the 'author' in the exclusive use thereof."⁴⁷ In the Supreme Court, although the dissent adopted the lower court reasoning that "a mere advertisement of a circus" did not promote progress and therefore could not be protected pursuant to the Copyright Clause, only two Justices supported that position. The Supreme Court majority, instead of following the path suggested by the language in *Higgins*, treated the preamble argument dismissively:

"We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs."⁴⁸

Thus, the only Supreme Court decision before *Eldred* that actually decided the question interpreted the Copyright Clause's preambular goal of promoting progress as broadly as the Court had interpreted the terms "writings" and "authors". *Eldred's* deference to Congress in determining whether the copyright system it enacts will promote progress thus continues the Court's past approach.

3. *Eldred and Recent Decisions Restricting Congress's Power*

The *Eldred* Court's interpretation of the Copyright Clause as broadly empowering Congress may reaffirm the Court's traditional attitude of deference to Congressional action in this area and is consistent with much of the Court's modern jurisprudence on Congressional power.⁴⁹ But the Court's broad reading of the Copyright Clause does contrast with two areas in which the Court has recently adopted a more restrictive interpretation of Congress's constitutional authority: Congress's powers to regulate interstate commerce and to enforce certain constitutional guarantees of individual rights.

The Constitution grants Congress the power to regulate "commerce . . . among the several States." Starting in the late nineteenth century, the Supreme Court read this

⁴⁶ *Ibid.*, at 434–35.

⁴⁷ *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 996 (1900).

⁴⁸ 188 U.S. 239, 249 (1903).

⁴⁹ As one treatise on U.S. constitutional law summarizes, the Court accords Congress "great deference in [its] interpretation and implementation of [its] powers" and will find a law within Congress's power "[so] long as it would be reasonable for the Congress to view a problem [addressed by the law] as connected to one of the Constitution's grants of power.": Ronald D. Rotunda and John E. Nowak, 1 *Treatise on Constitutional Law: Substance and Procedure* 346, third edition, West Group, St Paul, Minnesota, 1999. Of course, the law must also not run afoul of any specific restriction or prohibition in the Constitution.

grant restrictively by defining commerce narrowly (for example, to exclude manufacturing or mining a product, as opposed to transporting or trading it) and by insisting that the Clause must be read to leave substantial authority to the individual states.⁵⁰ Using this approach, the Court held unconstitutional numerous significant federal laws regulating the economy.⁵¹ Starting in 1937, however, in the midst of the Great Depression, the Court adopted a new approach, interpreting the commerce power—together with Congress’s power to enact all laws necessary and proper to the execution of its specifically enumerated powers—as allowing Congress to regulate activity if that activity in the aggregate affected interstate commerce.⁵² In addition, the Court was extremely deferential to Congress’s own determinations of a regulated activity’s effect on interstate commerce, “upholding them as long as they could be said to rest upon some rational basis.”⁵³ Under that approach, the Court did not once find a Congressional enactment to exceed the scope of the power. Since 1995, however, the Court has begun taking another approach to determining the scope of Congress’s commerce power, and has struck down two laws as beyond that power.⁵⁴ The Court has clarified that Congress can regulate an activity under the Commerce Clause only if the activity substantially affects interstate commerce.⁵⁵ Further, the Court has suggested that Congress may not have the power to regulate intrastate activity that substantially affects interstate commerce unless that activity is “economic in nature.”⁵⁶ And the Court has scrutinized Congressional determinations far more carefully than in previous years:

“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”⁵⁷

Thus, the Court has started to read Congress’s commerce power somewhat more narrowly (though the power remains quite broad).⁵⁸

A second area in which the Supreme Court has recently limited Congress’s power to legislate is in enforcing the guarantees of the Constitution’s Fourteenth Amendment.

⁵⁰ See generally Tribe, *supra*, footnote 16, at 809–811; Erwin Chemerinsky, *Constitutional Law: Principles & Policies* 243–250, second edition, Aspen Law & Business, New York, NY, 2002.

⁵¹ See Tribe, *id.*; and Chemerinsky, *id.*

⁵² There was some uncertainty during this period as to whether the activity merely had to affect commerce or whether it had to do so substantially. See Chemerinsky, *ibid.*, at 255; *United States v. Lopez*, 514 U.S. 549, 559 (1995).

⁵³ Tribe, *supra*, footnote 16, at 814–815, 811–817; Chemerinsky, *ibid.*, at 250–259.

⁵⁴ *United States v. Morrison*, 529 U.S. 598 (2000): striking down civil damages provisions of Violence Against Women Act; *U.S. v. Lopez*, *supra*, footnote 52: striking down Gun-Free School Zones Act of 1990, which outlawed possession of a firearm within 1,000 feet of a school.

⁵⁵ *U.S. v. Lopez*, *ibid.*, at 559.

⁵⁶ *U.S. v. Morrison*, *supra*, footnote 54, at 613; see also *U.S. v. Lopez*, *ibid.*, at 559–560.

⁵⁷ *U.S. v. Lopez*, *ibid.*, at 557 n. 2: quoting *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring); see also *U.S. v. Morrison*, *ibid.*, at 614: “The existence of Congressional findings is not sufficient, by itself, to sustain the Constitutionality of Commerce Clause legislation.”

⁵⁸ See, for example, *Citizens Bank v. Alfabco, Inc.*, 539 U.S. (2 June 2003): requiring the enforcement of arbitration clauses in contracts pursuant to statute governing arbitration in transactions affecting commerce because, in the aggregate, the activity represents a general practice subject to federal control, noting the broad economic impact of commercial lending and Congressional power to regulate it.

That Amendment, adopted after the Civil War, prohibits any state from depriving any person of life, liberty, or property without due process of law and from denying any person equal protection of the laws. These guarantees have been read by the Court to incorporate many of the rights expressly guaranteed by the Constitution only against federal intrusion, so that the Fourteenth Amendment protects those rights against state intrusion as well. Section 5 of the Amendment empowers Congress “to enforce [its provisions] by appropriate legislation.” Since 1997, the Court has read Congress’s Section 5 power as relatively limited, in contrast to earlier, apparently more expansive readings.

The watershed Section 5 case was *City of Boerne v. Flores*,⁵⁹ involving the Religious Freedom Restoration Act (RFRA). In 1990, the Supreme Court had decided that generally applicable state laws that burden an individual’s exercise of religion do not violate the Constitution’s protection of freedom of religion.⁶⁰ In 1993, Congress passed the RFRA, which invalidated any generally applicable federal, state, or local law that substantially burdened religious exercise unless the law was the least-restrictive means of furthering a compelling state interest, traditionally a difficult standard of review to satisfy. In restricting state law-makers, Congress relied on its Section 5 authority to enforce the Fourteenth Amendment’s guarantee that the states not interfere with people’s free exercise of religion.

The Supreme Court, however, read Section 5 narrowly, focusing on the grant to Congress of power “to enforce” the Amendment’s provisions. The Court majority determined that the RFRA did not enforce the Constitution’s guarantee of religious liberty as interpreted by the Court, but rather sought to define that guarantee, and to do so more broadly than the Court had done in its own decisions. That, the Court held, was beyond the scope of Congress’s power under Section 5, which the Court viewed only as authorizing laws to “prevent or remedy violations of rights already recognized by the Supreme Court.”⁶¹ The Court further indicated that in passing such laws, Congress must act in ways that bear “a congruence and proportionality [to] the injury to be prevented or remedied.”⁶²

In three subsequent cases, the Court has struck down laws that allowed individuals to sue state governments for violations of federal statutory rights against patent infringement, age discrimination and disability discrimination.⁶³ In each case, the Court

⁵⁹ 521 U.S. 507 (1997).

⁶⁰ *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

⁶¹ *Chemerinsky*, *supra*, footnote 50, at 291.

⁶² *City of Boerne v. Flores*, *supra*, footnote 59, at 520. The opinion offered little guidance as to how the Court should evaluate whether a law met that requirement.

⁶³ *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999): patent infringement; *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000): age discrimination; *University of Alabama v. Garrett*, 531 U.S. 356 (2001): disability discrimination. On the impact of the Supreme Court decisions on state sovereign immunity on intellectual property law, see Mitchell N. Berman, R. Anthony Reese and Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)*, 79 *Tex. L. Rev.* 1037 (2001).

concluded that Congress's action was not proportionate and congruent to any constitutional injury, because Congress had not sufficiently established a pattern of constitutional violations by state governments and because the laws swept more broadly than necessary to prevent or remedy such injury.

The Court's increasingly strict review of Congress's actions under the commerce and Section 5 powers, and its reaffirmation in *Eldred* of its extremely deferential review of exercises of the copyright power, might be understood on several grounds. An extremely broad interpretation of Congress's power under the Commerce Clause or Section 5 means a concomitant narrowing of the power of individual states, as well as a reduced ability for the federal judiciary, particularly the Supreme Court, to police the actions of the federal legislature. Thus, decisions in those areas involve concerns over appropriately dividing power between federal and state governments and between Congress and the Court, concerns perhaps much less present in the copyright context.

(a) *Federalism*

The Commerce Clause and Section 5 decisions address concerns about the relative power of federal and state governments. Because federal law is supreme over state law, the more broadly that Congress exercises its commerce power, the narrower is the room left to individual states to legislate. The Court in the recent Commerce Clause cases clearly saw enforcing limits on Congress's commerce power as a mechanism to protect state power from federal encroachment, noting that the Clause "requires a distinction between what is truly national and what is truly local",⁶⁴ with Congress empowered to legislate only as to the former. Similarly, because the Fourteenth Amendment guarantees individuals' rights against the states, Congressional enforcement legislation under Section 5 directly restricts states. Indeed, all of the recent Section 5 cases have involved direct challenges to actions by either state or local government entities, and the Court has been explicit in its opinions in those cases about its desire to protect state sovereignty from federal interference.

The specific issue in *Eldred* raised no federalism question. Once a work of authorship is protected by federal copyright, states have no role to play in determining the term of protection for that work.⁶⁵ And, more generally, Congress's copyright power seems to raise far fewer concerns about federal intrusion on state power. The Court has long seemed comfortable with the notion that the Constitution entrusts the federal government with primary responsibility in the area of patents and copyrights,

⁶⁴ *U.S. v. Morrison*, *supra*, footnote 54, at 617–618. See also *U.S. v. Lopez*, *supra*, footnote 52, 567–568.

⁶⁵ The Court has made it clear that states may not protect works that have entered the public domain under federal patent and copyright law. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989): "[A]fter the expiration of a federal patent, the subject-matter of the patent passes to the free use of the public as a matter of federal law ... [T]he states may not ... offer ... patent-like protection to the subject-matter of the expired patent."; *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964): state cannot enforce unfair-competition claim based solely on copying unpatented and uncopyrighted design.

and federal and state law in these fields have in general peacefully coexisted for over 200 years. Indeed, to the extent that federalism concerns have arisen in intellectual property law, the Court has focused on protecting Congress's copyright and patent laws from interference by the states, not on protecting state power from federal interference.⁶⁶ Thus, the *Eldred* Court's deferential approach toward Congress may not have set off any alarms for those Justices concerned about protecting state power, because the Court has long been comfortable with federal primacy in this field.

(b) *Enumerated power and judicial authority*

In addition to concerns about federalism, the Court's recent cases restricting Congressional power respond to concerns about limiting Congress's authority to the Constitution's enumerated powers and about dividing authority between Congress and the Court. In the Commerce Clause cases, the Court majority was concerned about the ability to impose any limits on Congressional power. If Congress can regulate any activity that in the aggregate affects the national economy, the Court worried that Congress could regulate *any* activity, since an argument could be made that almost any activity, in the aggregate, could affect the nation's economy in the modern, interconnected world. In *Lopez*, the first of the recent cases to find Congress acted beyond its commerce power, the government argued that Congress had the power to ban guns within 1,000 feet of schools because "the presence of guns in schools poses a substantial threat to the educational process" which "in turn, will result in a less productive citizenry", which "in turn would have an adverse effect on the Nation's economic well-being."⁶⁷ The Court in these cases clearly worried that allowing Congress to exercise its commerce power on such a basis would essentially give Congress the plenary police power to regulate all activity in the nation, contrary to the Constitution's federal structure; the *Lopez* Court noted that if it accepted the government's argument, then it could not imagine "any activity by an individual that Congress is without power to regulate."⁶⁸ Those decisions can thus be seen as the Court's attempt to reassert its own ability to place some limits in practice on Congress's power under the Commerce Clause. Similarly, in the Section 5 cases, the Court has been asserting that the ultimate interpretation of the scope of individual constitutional rights, and Congress's ability to protect them against state encroachment, belongs to the Court and not to Congress.

⁶⁶ See, for example, *Bonito Boats*, *ibid.*; *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Sears, Roebuck*, *ibid.*; *Compco Corp.*, *ibid.*

⁶⁷ *U.S. v. Lopez*, *supra*, footnote 52, at 564.

⁶⁸ *Id.* See also *ibid.*, at 566: noting that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."; *ibid.*, at 567–568: upholding challenged law "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated ... This we are unwilling to do."; *U.S. v. Morrison*, *supra*, footnote 54, at 618: noting that the Founders denied the national government the police power.

The Copyright Clause, in contrast, grants Congress a power that is inherently far more limited than regulating interstate commerce or enforcing due process and equal protection. Even the most expansive and deferential readings of “Authors”, “Writings”, and “exclusive Right” could not justify most of the legislation that Congress enacts, let alone regulation of potentially any activity. In addition, the Court has recently signalled its belief in its ability to find limits in the express terms of the Copyright Clause, when it repeatedly stated in *Feist* that a work must be minimally creative in order to qualify as a “writing” of an “author” that Congress is empowered to protect. In the context of the copyright power, then, the Court may have perceived less danger that deference to Congress would, in effect, hand legislators unbridled authority than it did in the cases involving the commerce and Section 5 powers.

B. JUSTICE STEVENS’S DISSENT

Justice Stevens’s dissent focused on the scope of Congress’s copyright power and concluded, contrary to the majority view, that the Copyright Clause did not authorize Congress to extend the term of copyright protection once a work existed and was protected by federal copyright. He drew on a series of contemporary Supreme Court opinions that have stressed the importance of the public domain and freedom to copy as the essential backdrop of intellectual property protection.⁶⁹ For Justice Stevens, the CTEA’s provisions on existing copyrights were simply beyond the power granted to Congress by the Copyright Clause.

Justice Stevens analysed the language of the Clause in terms of its purpose, which he observed had two dimensions. The first was to encourage authors and inventors to create by granting them exclusive rights, but those grants must serve the second, overriding, “ultimate purpose of promoting the ‘Progress of Science and useful Arts’ by guaranteeing that those innovations will enter the public domain as soon as the period of exclusivity expires.”⁷⁰ In the case of both patents and copyrights, retrospectively extending the term of protection, in Justice Stevens’s view, did not even arguably serve either to encourage new creation or to “advanc[e] progress by adding knowledge to the public domain.”⁷¹ As Congress could act under the Copyright Clause only to further those purposes, and as retroactive extensions did not do so, such extensions would be outside Congress’s copyright power.

Unlike the majority, Justice Stevens rejected the view that history or precedent supported Congress’s power to extend copyright protection retroactively. He considered Congress’s numerous extensions of the terms of individual patents in the 1800s, as well as the copyright revision Acts, starting in 1831, in which Congress applied new terms of

⁶⁹ See, for example, *Bonito Boats*, *supra*, footnote 65 at 151; *Graham*, *supra*, footnote 28, at 5–6; and *Sears, Roebuck*, *supra*, footnote 65, at 230–31.

⁷⁰ *Eldred*, *supra*, footnote 1, at 223 (Stevens, J., dissenting).

⁷¹ *Ibid.*, at 226–227.

protection to existing but unexpired copyrights. In Justice Stevens's view, however, these Congressional actions were all unconstitutional under the modern understanding of the Patent and Copyright Clause, embodied, according to Justice Stevens, in the 1966 Supreme Court decision in *Graham v. John Deere Co. of Kansas City*, which stated that:

“Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.”⁷²

In Justice Stevens's view, the unconstitutionality under *Graham* of these early Congressional actions substantially reduced their significance in evaluating Congress's copyright power.⁷³

Justice Stevens concluded that the majority's deference to Congress in determining the scope of the copyright power went far beyond what was appropriate, effectively abdicating any role for the Court:

“Fairly read, the Court has stated that Congress' actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable.”⁷⁴

III. THE CTEA AS A RATIONAL EXERCISE OF CONGRESS'S COPYRIGHT POWER

A. THE MAJORITY OPINION

Having decided that in general Congress has the constitutional power to extend the unexpired copyright term of previously created works, the Court majority next considered whether the CTEA in particular was a rational exercise by Congress of its copyright power. Rationality review is the most deferential standard of review for constitutionality, and the Court rejected the challengers' suggestion that it should subject copyright enactments to any of the stricter standards the Court applies to congressional laws in certain other circumstances. In particular, the Court declined to review copyright legislation under the “congruence and proportionality” standard used in the Section 5 cases noted above. Section 5, the Court said, involved Congress's power to enforce the Fourteenth Amendment. But the Copyright Clause gives Congress the power to define the scope of substantive copyright rights, and therefore

⁷² *Supra*, footnote 28, at 5–6. Justice Stevens also drew on statements in *Sears, Roebuck, supra*, footnote 65, at 230: “When the patent expires ... the right to make the article ... passes to the public.”; and *Bonito Boats, supra*, footnote 65, at 146: “[N]or may [Congress] ‘authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.’” (quoting *Graham*).

⁷³ *Eldred, supra*, footnote 1, at 234, 237–238, (Stevens, J., dissenting). Justice Stevens also pointed out that with respect to copyright, the first revision of the federal copyright law that extended the term of protection occurred in 1831, and that “no member of the 1831 Congress had been a delegate to the [Constitution's] framing convention 44 years earlier”, thus weakening the presumptive force of historic Congressional practice as evidence of Constitutional meaning, since that presumption is based in large part on “the overlap of identity between those who created the Constitution and those who first constituted Congress.”: *ibid.*, at 237. As to the early circuit court decisions, pointed to by the majority, that upheld Congressional extensions of the term of particular patents, Justice Stevens viewed those cases as implicitly overruled by the Court's much more recent decision in *Graham*: *ibid.*, at 237–238.

⁷⁴ *Ibid.*, at 242.

requires judicial deference to the scope of rights that Congress defines. Thus, the Court reviewed the CTEA using rational-basis review and emphasized that it would “defer substantially to Congress.”⁷⁵

In keeping with the deferential nature of its rationality review, the Court only briefly identified several rational policy justifications for the term extension. First, the Court noted that the CTEA would allow U.S. authors to receive the same protection as European authors in EU nations under the 1993 Directive, and also suggested that the extension might provide authors greater incentive to create and disseminate their works in the United States.⁷⁶ Next, the Court said that the CTEA responded to “demographic, economic, and technological changes”. Increases in longevity and child-bearing age, Congress feared, would keep authors from being able “to take pride and comfort in knowing that [the authors’] children—and perhaps their children—might also benefit from [the authors’] posthumous popularity.”⁷⁷ And Congress may have believed that the term extension responded to “the substantially increased commercial life of copyrighted works resulting from the rapid growth in communications media.”⁷⁸ Finally, the Court observed that Congress “rationally credited” projections that the extended term would give copyright owners incentives to invest in restoration and dissemination of their works. Having identified these justifications as rational, the Court upheld the CTEA against the challenge on Copyright Clause grounds.⁷⁹ The Court did sound a note of scepticism about the desirability, rather than the constitutionality, of the CTEA, noting that the law’s justifications might be “debatable or arguably unwise” but that the Court could not second-guess Congress’s wisdom.⁸⁰

The Court paid little attention to the relationship, if any, between the justifications it identified for the CTEA and that statute’s extension of the copyright term for works already created, particularly with respect to the justification of parity with European authors. Indeed, the CTEA creates a very mixed picture with respect to such parity. For works whose term in the United States is measured by the life of the author plus 70 years, the CTEA creates uniformity between U.S. and EU copyright terms. The CTEA does not, however, uniformly ensure such Euro–American parity. Take two works, each written and published in 1975 by an author who was born in 1955 and who will die in 2040. One work is written and published in the United States by a U.S. author, while the other is written and published in an EU nation by a European author. The European work will be protected in the EU for the life of the author plus 70 years, or until 2110. Under the 1976 Act, the U.S. copyright in both works would have expired in 2050,

⁷⁵ *Eldred*, *supra*, footnote 1, at 204 (majority opinion).

⁷⁶ *Ibid.*, at 205–206. The opinion did not explain how the extension would provide such additional incentives for creation and dissemination.

⁷⁷ *Ibid.*, at 207 n. 14 (quoting Sen. Dianne Feinstein).

⁷⁸ *Id.* (quoting Sen. Orrin Hatch).

⁷⁹ Interestingly, though the Court several times mentioned the need for parity between holders of new and existing copyrights (see *supra*, footnote 21) it did not expressly offer a Congressional desire for parity as a justification for the extension of existing copyrights.

⁸⁰ *Eldred*, *supra*, footnote 1, at 208, 222.

75 years after the copyright was secured. Under the CTEA, both U.S. copyrights will expire in 2070, 95 years after publication. Even after passage of the CTEA, the American author's copyright in Europe will expire in 2070, because although the American author would ordinarily be entitled to protection until 70 years after her death (i.e. until 2110), she is not entitled to that full term if the work's copyright in its country of origin expires sooner. While her copyright will now expire 20 years later in Europe than it would have without the CTEA, she will still receive 40 fewer years of protection in Europe than will her European counterpart. As a result, the CTEA's grant of 20 additional years of protection will not, in such a case, ensure that the American author will receive the same copyright protection in Europe as her European counterpart, as the Court suggested.

This lack of uniformity is not merely a transitional problem that will end when the last work copyrighted before the 1976 Act finally expires at the end of 2072 (barring further extensions). Instead, significant disuniformity exists between the terms provided in the EC Directive and the CTEA for many new works. For example, sound recordings in the United States are protected for the life of the author plus 70 years or, if the recording is a work made for hire, for 95 years from publication. The EC Directive requires protection only for 50 years after publication. Most motion pictures in the United States are works made for hire, protected for 95 years from publication, but the EC Directive requires Member States to protect a motion picture until 70 years after the death of the last survivor among a film's director, screenwriter and composer. For certain other works that are protected in the United States for 95 years from publication, the EU requires only 70 years of protection.⁸¹

Thus, while uniform copyright terms might be a rational goal for a copyright extension law, the CTEA leaves significant disuniformity in American and European copyright terms.⁸² In upholding the CTEA as rational for uniformity reasons, the Court must have reasoned that adding 20 years of protection for some copyrighted works (both in existence when the CTEA was passed and created afterwards), is rationally justified by uniformity considerations. The addition of 20 years of protection to all other copyrighted works is apparently rationally justified by a desire for relative uniformity in the U.S. copyright terms for all works, in order to provide even-handed treatment to copyright owners within the United States, and perhaps for administrative convenience.

B. JUSTICE BREYER'S DISSENT

Justice Breyer's dissent focused on whether the CTEA was a legitimate exercise of Congressional power. While Justice Stevens concluded that retroactive extensions of copyrights are entirely outside Congress's power, Justice Breyer's dissent concentrated on

⁸¹ EC Directive, *supra*, footnote 8, Article 1(3) and (4): applying publication-plus-70 term to anonymous and pseudonymous works and to works where a legal, rather than a natural, person is designated as a rightholder.

⁸² In addition, while the CTEA creates some harmony with European copyright terms, it created disuniformity with those countries that only provide protection for a life-plus-50 term as required by the Berne Convention and the WTO TRIPS Agreement.

the CTEA's rationality. He argued that the rationality of copyright statutes must be subjected to a somewhat more searching scrutiny than the majority had used because the copyright power involves expression and the Constitution's First Amendment protection for freedom of speech similarly involves expression. Generally, Justice Breyer said, copyright and the First Amendment will operate together to achieve the same goal: the creation and dissemination of information. But in any particular case, he suggested, a copyright law might operate at cross-purposes to the First Amendment, depriving the public of speech-related benefits promised by the Constitution. As a result, Justice Breyer argued that the Court should review "plausible claims that a copyright statute seriously, and unjustifiably, restricts the dissemination of speech somewhat more carefully than" ordinary rational-basis review would suggest.⁸³ Justice Breyer said that such more careful scrutiny would merely recognize that copyright regulates expression and:

"... what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture."⁸⁴

Therefore, Justice Breyer concluded that a copyright law is not a rational exercise of Congress's power:

- "(1) if the significant benefits that it bestows are private, not public;
- (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and
- (3) if it cannot find justification in any significant Clause-related objective."⁸⁵

Justice Breyer read the Copyright Clause to mandate that a copyright law "must serve public, not private, ends."⁸⁶ The power granted to Congress is:

"... to stimulate artistic creativity for the general public good ... by motivating the creative activity of authors through the provision of a special reward."⁸⁷

As a result, copyright laws must seek to promote progress:

"... both by creating incentives for authors ... and by removing the ... restrictions on dissemination after expiration of a copyright's 'limited Time'."⁸⁸

Measured against these purposes, Justice Breyer wrote, the CTEA was not a rational exercise of the copyright power.

Justice Breyer argued (at 248) that the CTEA "primarily benefits the holders of existing copyrights ... on works already created", rather than the public, and that those benefits would come at the expense of the public. He advanced a "conservative estimate" that the additional 20 years of copyright protection for existing works "will mean the transfer of several billion extra royalty dollars to holders of existing

⁸³ *Eldred*, *supra*, footnote 1, at 244 (Breyer, J., dissenting).

⁸⁴ *Id.*

⁸⁵ *Ibid.*, at 245.

⁸⁶ *Ibid.*, at 247.

⁸⁷ *Ibid.*, at 245, quotation marks, citations, and emendations omitted.

⁸⁸ *Ibid.*, at 247–248.

copyrights”, in addition to the “many billions of dollars” that those holders had previously earned. The money would “ultimately come from those who wish to read or see or hear those classic books or films or recordings that have survived” to be commercially valuable in the last 20 years of the extended term.⁸⁹ This primary benefit is presumably private and not public because the public benefit—initial creation of the works—has already been realized without the addition of 20 years of protection.

The harm to the public, and presumably the threat to the expressive values embodied in the Copyright Clause, extended much further than the direct financial cost, Justice Breyer noted, because the term extension imposes an additional 20-year “permissions requirement” on potential users of any copyrighted work, whether or not the work retains commercial value. The number of works enjoying the extra 20 years of protection would eventually grow into the millions, and Justice Breyer observed that potential users included “historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds.”⁹⁰ But many uses of such material may not occur because the expense and difficulty of tracking down the copyright holder of material published over 75 years earlier can be prohibitive.⁹¹ Acknowledging that any copyright law imposed this obstacle on potential users, Justice Breyer nonetheless argued that extending the term of works published 75 years earlier:

“... will dramatically increase the size of the costs just as—perversely—the likely benefits from protection diminish ... The older the work, the less likely it retains commercial value, and the harder it will likely prove to find the current copyright holder. The older the work, the more likely it will prove useful to the historian, artist, or teacher [and] the more likely it is that the copyright holder making the decision [whether to allow use of the work] is not the work’s creator but, say, a corporation or a great-grandchild whom the work’s creator never knew.”⁹²

In addition, Justice Breyer suggested that increased costs of permissions due to term extension could be particularly problematic for the promise of increased access to copyrighted works by means of new digital technologies.⁹³ Indeed, one might expect that in the era of digital networks many more people will bear the burden of obtaining permission, since it is generally easier and more affordable to disseminate works electronically than in hard-copy format.

Having considered the harms to expressive values imposed by the CTEA, Judge Breyer then turned to the final aspect of his standard of review: whether the law could be justified by any copyright-related benefits it provided. He considered several possibilities, beginning with the economic incentive to create that copyright provides. Justice Breyer rejected copyright’s “traditional economic rationale” of providing incentives for the creation of works of authorship as a justification for the term

⁸⁹ *Ibid.*, at 249.

⁹⁰ *Ibid.*, at 250.

⁹¹ For instance, Justice Breyer (*ibid.*, at 250) wrote that “the American Association of Law Libraries points out that the clearance process associated with creating an electronic archive ... ‘consumed approximately a dozen man-hours’ *per work*.” (emphasis in original).

⁹² *Ibid.*, at 251.

⁹³ *Ibid.*, at 250.

extension.⁹⁴ He concluded that the *ex ante* probability of any work surviving to be commercially valuable 75 years after its publication was extremely small, as was the present value of the money that those few works would earn 75 to 95 years in the future. Indeed, he suggested that US\$ 100 of annual royalties for the entire 20 years of extended copyright would be worth less than 7 cents at the time the work is created. “What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum?” Justice Breyer asked. “What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account?”⁹⁵ In sum, Justice Breyer concluded, “the incentive-related numbers are far too small for Congress to have concluded rationally, even with respect to new works, that the extension’s economic-incentive effect could justify the serious expression-related harms” he had earlier identified.⁹⁶

Justice Breyer also concluded that the CTEA could not be justified by the need for international uniformity of copyright terms. First, he pointed out that the statute:

“... does *not* create a uniform American-European term with respect to the lion’s share [i.e. the vast majority] of the economically significant works that it affects—all works made ‘for hire’ and *all* existing works created prior to 1978.” (emphasis in original).⁹⁷

Even regarding works for which the CTEA does result in a uniform term of protection in the United States and Europe, Justice Breyer argued that because the uniformity affects the copyright only 50 years after the author has died, that uniformity “will neither encourage creation nor benefit the long-dead author in any other important way.”⁹⁸ In sum, Justice Breyer concluded that the CTEA only provided

⁹⁴ *Ibid.*, at 254.

⁹⁵ *Ibid.*, at 255. Justice Breyer noted (*ibid.*, at 255–256) that the incentive effect of receiving 20 additional years of copyright protection after already receiving 75 years (or lifetime protection plus 50 years) was so small as to be economically indistinguishable from the incentive effect of copyright protection that would last for 200 years, 500 years, 1,000 years, or “‘til the End of Time.” He asserted that the copyright term granted under the CTEA already allowed a copyright owner to receive over 99.8 percent of the value of a perpetual copyright term. This, he wrote, “makes this latest extension difficult to square with the Constitution’s insistence on ‘limited Times’.”: *ibid.*, at 256.

The majority suggested that this view might require holding the 1976 Act’s life-plus-50 term unconstitutional, since on the same assumptions, that term secured to the copyright owner 99.4 percent of the value of a perpetual term: *Eldred*, *supra*, footnote 1, at 209 n. 16. Indeed, the Court pointed out that the 56-year maximum term under the 1909 Act and the 42-year maximum term under the 1831 Act gave the copyright owner 97.7 percent and 94.1 percent of the value of a perpetual copyright, respectively, thus making those terms constitutionally suspect. Justice Breyer rejoined that with respect to the earlier Acts, “the balance of copyright-related harms and benefits ... is far less one-sided.”: *ibid.*, at 264–265 (Breyer, J., dissenting). In the case of the 1976 Act, he pointed out that the adoption of the life-plus-50 term was a necessary pre-condition to the benefits available from joining the Berne Convention.

⁹⁶ *Ibid.*, at 257 (Breyer, J., dissenting).

⁹⁷ *Ibid.*, at 257–258. See *supra*, text accompanying footnote 81.

⁹⁸ *Ibid.*, at 258. Justice Breyer rejected the argument that a potential author might decide to publish a work initially in Europe rather than in the United States in an attempt to obtain the longer European copyright term. He noted that no one had explained who would be hurt, and how, if a work was published first in Europe and only later in the United States. In any case, however, he suggested that few if any authors would choose where to publish based on the possibility of 20 additional years of copyright protection far in the future, given that the present value of the additional term “amounts at most to comparative pennies.”: *ibid.*, at 259. Again, Justice Breyer concluded, as he had with the suggestion that the CTEA’s additional 20 years of protection would give authors additional encouragement to create, that a “rational legislature could not give major weight to an invisible, likely non-existent incentive-related effect” on the choice of where to publish: *id.*

“partial, future uniformity” with European copyright terms. That uniformity could not, in his view, justify the extension for works created after the CTEA’s enactment, let alone for existing works where the CTEA did not create uniformity.⁹⁹ Justice Breyer, however, did not reject outright the possibility that international uniformity could produce benefits that would justify a copyright enactment as a rational exercise of Congressional power. He pointed out that the changes in copyright term made by the 1976 Copyright Act were needed “to conform to an important international treaty” (the Berne Convention),¹⁰⁰ suggesting that the benefits of joining such a fundamental international copyright regime could serve as justification for a U.S. copyright law. But Justice Breyer asserted that the longer European copyright term adopted in 1993 arose only from “special European institutional considerations” involved in the EU, and he noted that “European and American copyright law have long coexisted despite important differences.”¹⁰¹

Justice Breyer also rejected another justification advanced by CTEA supporters, that the extension provided incentives to publishers to disseminate old works still protected by copyright. As Justice Breyer put it, the argument is:

“... that extension, rather than limitation, of the [copyright] grant will, by rewarding publishers with a form of monopoly, promote, rather than retard, the dissemination of works already in existence.”¹⁰²

Justice Breyer acknowledged that the extended copyright term in fact might, in some cases, provide a publisher with incentive to resurrect an older work. However, he rejected such an incentive as a rational basis for the constitutionality of term extension because he found that justification flatly inconsistent with the Copyright Clause. The Clause, he said, mandates a copyright system that provides an author’s work with a temporary period of copyright protection followed by the removal of protection for that work. The suggestion that extending the copyright term would provide a continuing incentive to disseminate a work raises the question of whether a work will be more widely accessible if its copyright continues or if it enters the public domain. But in Justice Breyer’s view, the Copyright Clause itself embodies the Constitution’s answer to that question, “that it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance, promote the dissemination of works already in existence.” (emphasis in original).¹⁰³ Thus, even if in some cases a continued copyright would better promote the dissemination of a work, Justice Breyer’s reading of the Copyright Clause would “deny Congress the ... power to base its actions primarily upon that empirical possibility.”¹⁰⁴

⁹⁹ *Ibid.*, at 260.

¹⁰⁰ *Ibid.*, at 259.

¹⁰¹ *Ibid.*, at 260.

¹⁰² *Ibid.*, at 262.

¹⁰³ *Ibid.*, at 260.

¹⁰⁴ *Id.* Justice Breyer found support for this reading of the Copyright Clause in the history of copyright’s origins and the views of the Framers, in Supreme Court opinions, in the clause’s restrictions of Congress’s power to grants of rights for “limited” times and to “Authors”, in empirical data on access to public domain works, and in the lack of any logical endpoint for copyright protection under the contrary view: *ibid.*, at 260–262.

He concluded that the argument that extended copyright would promote dissemination of existing works “seems constitutionally perverse—unable, constitutionally speaking, to justify the blanket extension” granted by the CTEA.¹⁰⁵ The alleged dissemination-incentive rationale for the Act was simply too inconsistent with the nature of Congress’s power under the Copyright Clause.

As to the need for parity between new and existing copyrights, Justice Breyer accepted, for argument’s sake, the majority view that Congress has the power to extend existing copyrights when it extends the copyright term for future works, in order to treat works in the two categories relatively equally. But he concluded that the CTEA’s extension of existing copyrights could not be justified on this ground:

“A desire for ‘parity’ between *A* (old copyrights) and *B* (new copyrights) cannot justify extending *A* when there is no rational justification for extending *B* ... Where the case for extending new copyrights is itself so weak, what ‘justice,’ what ‘policy,’ what ‘equity’ can warrant the tolls and barriers that extension of existing copyrights imposes?”¹⁰⁶

Justice Breyer also rejected as rational justifications for the CTEA its export promotion effects, as well as technological, demographic and economic changes since the last term extension. Seeing no permissible copyright-related justification for the CTEA as a benefit to the public, but serious expression-related harm from term extension, he would have held the statute not to be a legitimate exercise of Congress’s power under the Copyright Clause and therefore unconstitutional.

IV. FIRST AMENDMENT REVIEW OF THE CTEA

In addition to arguing that the CTEA was beyond the scope of Congress’s power under the Copyright Clause, the *Eldred* plaintiffs argued that the Act violated the Constitution’s First Amendment, which guarantees freedom of speech.¹⁰⁷ Under the Supreme Court’s First Amendment cases, laws that restrict or regulate speech are generally subject to heightened judicial scrutiny. The plaintiffs argued that such scrutiny was appropriate in reviewing the CTEA and should result in the statute being held an unconstitutional restriction on speech.

Commentators and courts have long recognized a tension between copyright law and the First Amendment. Copyright law penalizes those who write or speak the copyrighted words of another person. This may cause particular concern in the case of derivative works in which an author borrows from another’s copyrighted work but substantially transforms the borrowed material and supplements it with additional original expression of her own. One prominent recent example of such a situation involved Alice Randall’s *The Wind Done Gone*, which retells the story of Margaret Mitchell’s classic

¹⁰⁵ *Ibid.*, at 262.

¹⁰⁶ *Ibid.*, at 266.

¹⁰⁷ The First Amendment, adopted in 1791, provides *inter alia* that “Congress shall make no law ... abridging the freedom of speech, or of the press ...”: U.S. Constitution, Amdt. 1.

Civil War novel *Gone With The Wind* but from the point of view of a slave rather than of a slave owner.¹⁰⁸ But even when an accused infringer does more than simply copy verbatim another's copyrighted expression, courts have generally declined to review copyright law under ordinary First Amendment principles as a speech restriction, though relatively few cases address the issue.

The *Eldred* majority followed this traditional reluctance to apply First Amendment law directly to copyright, and chose not to scrutinize the CTEA under any of its heightened First Amendment standards, essentially because the Court concluded that copyright law itself "incorporates its own speech-protective purposes and safeguards" adequate to address any First Amendment concerns raised by copyright law.¹⁰⁹ Considering the historical origins of the Copyright Clause and the First Amendment, the Court noted that they were drafted only two years apart, indicating to the Court that "in the Framers' view, copyright's limited monopolies are compatible with free speech principles."¹¹⁰

In essence, in dismissing the First Amendment claim, the Court reiterated the two points it made in the 1985 case of *Harper & Row Publishers v. Nation Enterprises*, its first detailed consideration of the interaction of copyright and the First Amendment: copyright promotes the speech that the First Amendment seeks to protect from government control, and doctrines within copyright law provide adequate "safety valves" for free-speech concerns, making formal First Amendment review of copyright law unnecessary. First, with respect to copyright's speech-promoting purpose, the Court repeated its statement from *Harper & Row* that copyright is "the engine of free expression" because it "supplies the economic incentive to create and disseminate ideas."¹¹¹ And second, as it had done in 1985, the Court identified two copyright doctrines that, in its view, adequately accommodated copyright law to First Amendment principles: the idea/expression dichotomy, which allows others to use "ideas" from an author's work,¹¹² and the fair-use doctrine, which allows some unconsented use by others even of an author's expression.¹¹³ The latitude that these copyright doctrines allow for someone other than the author to use a copyrighted work provide, in the

¹⁰⁸ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d. 1257 (11th Cir. 2001).

¹⁰⁹ *Eldred*, *supra*, footnote 1, at 219.

¹¹⁰ *Id.*

¹¹¹ 471 U.S. 539, 558 (1985).

¹¹² This fundamental principle of U.S. copyright law is embodied in 17 U.S.C. § 102(b): "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, illustrated, or embodied in such work."

¹¹³ The judicially created fair-use doctrine is currently codified in 17 U.S.C. § 107, which provides that: "Notwithstanding the [exclusive rights of the copyright owner], the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringement of copyright." The statute includes a non-exhaustive list of factors for a court to consider in determining whether any particular use qualifies as a fair use.

Court's view, sufficient safeguards for free speech.¹¹⁴ Therefore the Court declined to subject the CTEA to typical First Amendment review.

In the past five years, numerous academic commentators have revisited the tension between copyright and First Amendment law, and have raised questions about the approach to that tension reaffirmed in *Eldred*.¹¹⁵ Professor Neil Netanel has recently traced the origins of that approach to a 1970 law review article by copyright and First Amendment scholar Melville Nimmer.¹¹⁶ That 1970 article concluded that copyright law, in almost all instances, did not run afoul of First Amendment interests because copyright provided the incentive for the expression protected by the Amendment and because the idea/expression, fair-use, and limited-term doctrines in copyright law protected speech interests. Professor Netanel shows how courts, including the Supreme Court in *Harper & Row*, adopted Nimmer's approach, and how subsequent developments call the continued vitality of that approach into question.¹¹⁷ Netanel details how the scope and term of copyright have substantially expanded since 1970, how the fair-use doctrine has been constricted, and how protection for derivative works has eroded the public's freedom to use ideas from copyrighted works.¹¹⁸ He also points out that First Amendment law has developed substantially since 1970 in ways that challenge the view of an easy coexistence with copyright law. Thus, while the Court's approach to the intersection of copyright and freedom of speech might have been justified when it was first articulated by Nimmer in 1970, Professor Netanel argues that it is much less justifiable today. Nonetheless, the *Eldred* Court, without much discussion, squarely reaffirmed its commitment to that approach.

The Court's rejection of First Amendment analysis of copyright law was, however, less complete than it might have been. The Court of Appeals in *Eldred* had held that copyright law is "categorically immune from challenges under the First

¹¹⁴ The Court noted two additional safeguards in the CTEA itself. First, during the final 20 years of copyright, libraries may use a copyrighted work if "the work is not already being exploited commercially and further copies are unavailable at a reasonable price.": *Eldred*, *supra*, footnote 1, at 220, citing 17 U.S.C. § 108(h). Second, the Court pointed out that the Fairness in Music Licensing Act, 17 U.S.C. § 110(5)(B), was enacted as part of the CTEA. That provision allows many businesses, restaurants and bars to publicly perform copyrighted musical works by radio and TV reception without paying the copyright owner. The Court did not mention that the WTO has ruled that Section 110(5)(B) violates U.S. obligations under the TRIPS Agreement: see *United States—Section 110(5) of the U.S. Copyright Act*, WTO, WT/DS160/R (2000).

¹¹⁵ See, Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. Rev. 1057 (2001); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833 (2000); Mark Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).

¹¹⁶ Netanel, *ibid.*, 7–10. The Nimmer article is at 17 UCLA L. Rev. 1180, 1186–1204 (1970). Together with Paul Goldstein's *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970), the Nimmer article was one of the first to consider the intersection of copyright and First Amendment law.

¹¹⁷ Netanel, *ibid.*, at 10–24. While Nimmer included copyright's limited term (a maximum 56 years at the time) as a free-speech safeguard, courts have tended not to look to copyright term as a safety valve for First Amendment interests. Had they done so, the extension at issue in *Eldred* might have required closer scrutiny as potentially clogging that safety valve.

¹¹⁸ *Ibid.*, at 12–24.

Amendment.”¹¹⁹ The Court declared the lower court’s pronouncement too broad. Instead, the Court said that “when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”¹²⁰ This at least suggests that the Court might subject a law significantly changing the idea/expression or fair-use doctrines to First Amendment scrutiny. This suggestion may be relevant in connection with recently enacted anti-circumvention provisions in U.S. copyright law. In 1998, responding to obligations under the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty, Congress outlawed devices that circumvent technological protection measures, such as encryption, used by copyright owners to control access to, or use of, their works.¹²¹ Several courts have interpreted the ban to apply even to devices that can be used, and may be necessary, to engage in fair use of the protected work, and have held that this obstacle to fair use did not run afoul of the First Amendment.¹²² To the extent that the anti-circumvention provisions do not allow the public to engage in fair use, it is possible that the *Eldred* opinion might require explicit scrutiny of those provisions to determine whether they violate the First Amendment, since they do not include the internal speech safeguards that the Court held shield copyright law from First Amendment review.

V. CONCLUSION

The *Eldred* decision is not a particularly helpful contribution to the debate over the substantive copyright question at issue in the case—the appropriate length of the copyright term. The decision offers little support for the view that the law should protect an author’s works until 70 years after her death. The majority discusses the merits of that term only briefly, and adopts such a deferential standard of review that it merely concludes that Congress could have been acting with minimal rationality in choosing the life-plus-70 term. That is hardly a ringing endorsement of the extended term, particularly when combined with the majority’s express acknowledgement that the CTEA might well be “unwise” or a “very bad policy”.¹²³ The most detailed discussion of the merits of the life-plus-70 term comes in Justice Breyer’s dissent, which primarily argues that such a long copyright term is, indeed, a bad idea. While the decision upholds the life-plus-70 term as a rational choice by Congress, it does not vindicate it as a good choice.

The importance of the *Eldred* decision lies not in its position on substantive copyright law but rather in its view of the process of copyright law-making. The Supreme Court’s approach in *Eldred* to interpreting the Copyright Clause largely

¹¹⁹ 239 F. 3d, *supra*, footnote 13, at 375.

¹²⁰ *Eldred*, *supra*, footnote 1, at 221.

¹²¹ See 17 U.S.C. §§ 1201–1205.

¹²² See, for example, *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002); *Universal City Studios, Inc. v. Corley*, 273 F. 3d 429 (2d Cir. 2001); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

¹²³ *Eldred*, *supra*, footnote 1, at 208, 222.

continues a 150-year tradition of reading the Constitution to grant Congress very broad power in the field of copyright.¹²⁴ While recent Court decisions have somewhat curtailed Congress's power to regulate commerce and enforce guarantees of individual liberty against the states, the *Eldred* Court showed no interest in limiting Congress's copyright power, perhaps viewing that power as inherently more circumscribed and less threatening to the balances of power between Congress and other branches and levels of government. As a result, Congress seems likely, for now, to have a fairly free hand in writing copyright laws, though the Court's 1991 *Feist* decision signals a willingness to impose some constitutional boundaries on Congress's power at the margins.

Eldred also signals, in two ways, the increased relevance of international copyright relations for domestic copyright law-making. First, both the majority and Justice Breyer made it clear that Congressional concerns about the protection available to U.S. authors in other countries, and U.S. involvement in the international copyright system, could be part of the rational justification for a domestic copyright enactment. Second, and more importantly, because *Eldred* reads the Constitution as imposing only very modest limits on the kind of copyright law Congress can enact, international law will likely grow to constrain Congress's copyright choices more vigorously than the Constitution does. International agreements such as the Berne Convention and the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) impose significant obligations on the United States with respect to substantive copyright law. If Congress decided to abandon the CTEA's life-plus-70 copyright term in favour of a life-plus-30 term, *Eldred's* view of the copyright power would clearly allow it to do so,¹²⁵ but the same decision would violate U.S. obligations under Berne and TRIPS.¹²⁶ A U.S. life-plus-30 term could certainly be challenged in the WTO, and while the WTO could not directly strike down the life-plus-30 term, it could authorize U.S. trading partners to impose economic sanctions until Congress amended the law and brought the United States into compliance with its obligation to provide a life-plus-50 term of protection. Indeed, the WTO has already ruled that one provision of U.S. copyright law, passed by Congress together with the CTEA, violates U.S. obligations under the TRIPS Agreement and has authorized sanctions against the United States.¹²⁷

¹²⁴ Similarly, the *Eldred* majority's handling of the interaction of copyright and free-speech law continues the Court's recent trend of treating copyright's internal limits as accommodating speech interests sufficiently to make formal First Amendment review unnecessary.

¹²⁵ Adopting a life-plus-30 term would likely raise no problems as applied to works created after the law were changed. Applying the shortened term retrospectively might run afoul of constitutional provisions other than the Copyright Clause.

¹²⁶ Berne Convention, Article 7; TRIPS, Article 9. These international Agreements are generally not directly enforceable in U.S. courts, so the Supreme Court might well uphold a life-plus-30 term against legal challenge based on the treaties. See Paul Goldstein, *International Copyright: Principles, Law, and Practice* 15, Oxford University Press, New York, 2001: noting the general, though not universal view, that Berne Convention is not self-executing in the United States.

¹²⁷ See *United States—Section 110(5)*, *supra*, footnote 114.

The shift from constitutional to international limits on Congressional copyright power will change the type of constraint Congress faces in drafting copyright laws. The Copyright Clause tells Congress that it can establish copyright laws, though Congress could choose not to do so. The international treaties, in contrast, tell the United States that it must establish copyright laws. The Constitution, as read by *Eldred*, contains few, and very minimal, restrictions that largely prevent Congress from enacting too much copyright protection—Congress cannot protect works that are not the writings of authors, and cannot protect such writings for more than limited times. The international treaties, on the other hand, contain many, and relatively detailed, restrictions that prevent the United States from enacting too little copyright protection—for example, the copyright term for most works must be at least the life of the author plus 50 years. Thus, as international law constraints gain in importance relative to constitutional limits, copyright laws may more likely be successfully challenged for not being protective enough, rather than for being too protective—as the *Eldred* challengers asserted was the case with the CTEA.

Congress might, at some point, find itself chafing under restrictions that prevent it from providing less copyright protection. Should that happen, it could, of course, seek to amend the international treaties or simply withdraw from them.¹²⁸ As a practical matter, however, reaching consensus among the treaty signatories for amendment will likely be extremely difficult, and withdrawing from the WTO would have such dramatic repercussions in so many areas that it is hard to imagine that issues of copyright law would provoke such a step.¹²⁹

Instead, sufficient dissatisfaction with restrictive treaty obligations might push Congress toward a two-tier system of copyright law. TRIPS and the Berne Convention generally require the United States to provide specified levels of protection to nationals of other treaty parties, but leave it free to provide U.S. nationals with copyright protection that does not meet those minimum standards. In at least two instances, Congress has taken this path and treated U.S. and foreign works differently. Most significantly, in 1994, Congress restored copyright protection to works that had fallen into the public domain because of a failure to comply with the formalities imposed by U.S. law prior to 1989 to obtain and maintain copyright,¹³⁰ but that restoration applies

¹²⁸ Similarly, if the Supreme Court were to read the Copyright Clause more restrictively, Congress could seek to amend the Constitution to increase its authority to legislate in the copyright field.

¹²⁹ Of course, when the WTO rules that U.S. copyright law violates TRIPS, Congress can simply choose not to change the law to bring it into compliance, but doing so would subject the United States to economic penalties that it may not be willing to pay.

¹³⁰ These formalities primarily included the requirements (a) that a copyright notice appear on every published copy of a work and (b) that an application for renewal be made at the end of the initial copyright term. For a detailed discussion of the evolution and eventual abandonment of these and other formality requirements under U.S. law, see Goldstein, *supra*, footnote 40, at §§ 3.1 to 3.15, 4.9.

only to works of foreign origin, not of U.S. origin.¹³¹ A second difference is that before suing for infringement in a U.S. court, the copyright owner of a U.S. work must seek to register her claim of copyright in the work, while the owner of a foreign work need not do so.¹³²

One currently pending legislative proposal, responding in part to the *Eldred* decision, would take a similar two-tier approach in the area of copyright term. It would require a copyright owner to pay periodic maintenance fees, starting 50 years after a work is published, in order to keep the work from falling into the public domain—but the fee would apply only to U.S. works, not foreign ones.¹³³ While that particular bill may not be headed toward passage in the very near future, it indicates a Congressional willingness to at least consider treating U.S. and foreign copyright owners differently in order to avoid, in part, the substantive limits that international copyright law places on Congress's constitutionally very broad power to enact copyright legislation.

¹³¹ 17 U.S.C. § 104A. For details of the complex provisions on restoration of copyright, including provisions designed to protect those who had relied on the prior public-domain status of restored works, see Goldstein, *ibid.*, at § 2.5.4.3.

This example suggests the possibility of a conflict between the international constraints that require the United States not to provide *too little* copyright protection and the Constitutional constraints that prevent Congress from providing *too much* copyright protection. For example, an international agreement might require the United States to restore copyright to foreign-origin works that had previously fallen into the public domain. It is possible, however, that granting copyright protection to a work that has entered the public domain might exceed Congress's power under the Copyright Clause. See, for example, *Graham, supra*, footnote 28, at 5–6: “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” Indeed, a suit challenging the constitutionality of Section 104A's restoration of copyright is currently pending, *Golan v. Ashcroft*, Civ. 01-B-1854 (D. Colo.), see: http://cyberlaw.stanford.edu/about/cases/golan_v_ashcroft.shtml. In such a situation, Congress might lack the authority under the Copyright Clause to enact copyright protection required of the United States by international law.

¹³² 17 U.S.C. § 411(a).

¹³³ H.R. 2601, 108th Cong., 1st Sess. (2003).