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PROMOTING PROGRESS THROUGH PERPETUAL PROTECTION: THE STRUGGLE TO PLACE LIMITS ON CONGRESS' COPYRIGHT POWER

Todd John Canni*

Why do we, the people, grant authors and inventors a limited period of protection for their creations? Why do employers dangle large bonuses in front of their employees? Primarily because if the employee succeeds, so does the employer. The Framers similarly hoped that by offering creative minds a reward for their labor, more artistic and literary expression would occur, thereby enriching the public domain and eventually encouraging more intellectual development and ingenuity through the derivative use of original works. It is the same principle that underlies the bonus structure in employee-employer relationships. Society benefits from the creativity or success of authors and inventors just as employers benefit from the productivity of employees. The underlying concept is that each party benefits from the other party’s contribution, and the result is a bargained-for exchange. The primary

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1. THE FEDERALIST No. 43, at 239-40 (James Madison) (Jacob E. Cooke ed., 1961). The text of the Copyright Clause explicitly states, “To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Although the Framers may have had goals in mind for their young country aside from intellectual development, this is the only stated purpose in the text of the Copyright Clause. Id. Based on this fact, inferentially, the Copyright Clause should not only be used to further that goal, it should be used as an all-purpose power.

2. See Brief for Petitioner at 23, Eldred v. Ashcroft, 534 U.S. 1126 (2002) (No. 01-618) (“Congress may make a trade—it may grant an ‘exclusive Right’ for a ‘limited Time[,]’ in exchange for a ‘Writing’ by an ‘Author.’ It may not handout a monopoly over speech in exchange for nothing—quid pro nihilo.”). The Framers understood it this way, which is why extensions are not even a consideration, either in the text of the clause or in practicality. A retrospective extension gives an author or inventor something for nothing. The Constitution only permits Congress to grant protection for creation, not protection for nothing. See U.S. CONST. art. I, § 8, cl. 8. Employers offer incentives for their employees to produce more than the expected. When the employee does so, he or she will receive a one-time bonus. The following year, the employer will not give the employee a bonus unless he or she produced more than expected. This sounds like common sense, but Congress does not see it this way. Congress consistently has provided additional retrospectice bonuses to authors and inventors despite the fact that they previously were rewarded for their efforts. See Eldred v. Reno, 74 F. Supp. 2d 1, 2 (D.D.C. 1999), aff’d 239 F.3d 372, and aff’d sub nom. Eldred v. Ashcroft, 537 U.S. 186 (2003) (listing every copyright extension since the federal government’s first recognition of copyrights in 1790). This clearly is in contrast with today’s norms, where nothing is given for free. Based on
objective is that intellectual and artistic masterpieces will forever increase in the public domain.\(^3\)

Unfortunately, this goal has become almost impossible to achieve.\(^4\) Decades of copyright extensions have shifted the focus of the copyright power from promoting the creation of new works to protecting pre-existing works.\(^5\) Most recently, Congress, in its pursuit to harmonize United States law with European law, extended copyright protection both prospectively and retrospectively.\(^6\) This essentially quashed any hope of seeing many great works of literature enter the public domain for at least another twenty years.\(^7\) Eric Eldred, an individual who planned to make many of these literary masterpieces available on his website for others to freely use, challenged the constitutionality of the

the text of the Copyright Clause, the current practice is in discord with the Framers’ intentions. See U.S. CONST. art. I, § 8, cl. 8.

3. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)). Chief Judge Hughes acknowledged the copyright monopoly granted by Congress noting, “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.” (emphasis added). This is the only logical assumption. There could be no other reason for creating the Copyright Clause than to encourage authors and inventors to create. See U.S. CONST. art. I, § 8, cl. 8. The protection given merely was a means to an end, the end being artistic creation. See Petitioner’s Brief at 24, Eldred (No. 01-618) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 557, at 402-03 (reprinted with introduction by R. Rotunda & J. Nowak eds., 1987)).


5. See Eldred, 239 F.3d at 374 (listing all the copyright extensions). Increasing the length of copyright protection has been a consistent effort over the last century. However, the extension enacted by the 94th Congress, which ultimately expanded protection past the life of the author, is the main reason that copyright protection has become widely accepted. In order to make intellectual development the focus behind the copyright power once again, there must be a revolutionary change in the term of protection granted to authors and inventors. See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 250 (2001). Until radical changes are made, copyright protection will extend at the expense of the public.


7. Id.
Copyright Term Extension Act of 1998 (CTEA). Eldred argued that the CTEA violated the "limited Times" provision of the Copyright Clause. After the district court and the court of appeals denied relief, the Supreme Court granted certiorari to consider the issues. After hearing the parties' arguments, the Supreme Court ruled in favor of the CTEA and against the public domain.

In delivering its opinion in favor of the CTEA, the Supreme Court majority contributed little to resolve the controversy, and left many questions unanswered. The majority stated, "it is not our role to alter the delicate balance Congress has labored to achieve." Furthermore, "we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be." Prior to the Court's ruling, the focus of this controversy was the constitutional limits on Congress' exercise of its copyright power. Specifically, the issues to be determined were whether retrospective extensions really "promote the [p]rogress of [s]cience and useful [a]rts;" whether Congress could perpetually extend copyright

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8. Petitioner's Brief at 5, Eldred (No. 01-618). Eldred was one of the petitioners in this case. The petitioners represent organizations and sole individuals who planned on using many works that were due to enter the public domain before the CTEA was enacted. Id. at 4-5. Eldred's website allows students and scholars to study literary works in ways never imagined. Id. at 5. Users of his website are able to click on links which will take them to other sites on the World Wide Web which discuss their area of interest in more depth. Id. Essentially, Eldred is slowly constructing a library of public domain works that would someday exceed the technological capacity of a traditional library. Id. However, the CTEA changed his plans.

9. Id. at 11; see also U.S. CONST. art. I, § 8, cl. 8.


11. Eldred v. Ashcroft, 537 U.S. 186 (2003). The petitioners challenged the constitutionality of the CTEA arguing that it violated the "limited Times" provision of the Copyright Clause. Id. at 775. Specifically, the Supreme Court was left to determine two issues: first, whether the D.C. Circuit erred in holding that Congress has the power under the Copyright Clause to enact retrospective extensions; and second, whether the CTEA which extends copyrights prospectively and retrospectively is "categorically immune from challenge[] under the First Amendment." See Petitioner's Brief at 1, Eldred (No. 01-618).


13. Id. at 205 n.12 (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990)).

14. Id. at 208.

15. Petitioner's Brief at 1, Eldred (No. 01-618).

protection through a string of incremental extensions;\textsuperscript{17} and whether any limits existed in Congress’ authority under the Copyright Clause.\textsuperscript{18}

Before the Supreme Court released its opinion, it was unclear whether the Court would resolve these issues.\textsuperscript{19} Without reading the majority’s

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\textit{Trademark Dilution Act, 2 VAND. J. ENT. L. & PRAC. 13, 21-22 (2000). See also Petitioner’s Brief at 22, Eldred (No. 01-618) (“Whatever else a monopoly protection under [the Copyright Clause] may do, it must promote ‘creative activity’ to satisfy the limits of the Constitution.”) (quoting Sony Corp. of Am., 464 U.S. at 429)). See S. Rep. No. 104-315, at 30-32 (1996) (documenting Senator Hank Brown’s statement that the Copyright Clause should not be used to harmonize U.S. laws with those abroad). By examining the text of the Copyright Clause, one can infer that harmonization should be more of the byproduct of a copyright law intended to promote progress. See H.R. Rep. No. 105-452, at 4 (1998). In addition to the harmonization rationale, several other secondary effects were mentioned: providing additional incentives for authors to create new works; providing an incentive to restore old works that have already received protection; and enabling authors and inventors to pass on their financial earnings to their ancestors. Id. However, the secondary goals stated are not likely to be widely accomplished through retrospective extensions. The Copyright Clause was created for one purpose: “[t]o Promote the Progress of Science and useful Arts.” U.S. CONST. art. I, § 8, cl. 8. The clause does not mention harmonization or that it may also serve as an all-mighty power. See id. This is just another Congressional attempt to expand the scope of a limited power well beyond its intended purpose. See United States v. Lopez, 514 U.S. 549 (1995); see also United States v. Morrison, 529 U.S. 598 (2000). Why doesn’t Congress try to harmonize U.S. law with the Constitution before it worries about harmonizing it with other countries? See S. Rep. No. 104-315, at 31-32 (1996). Senator Hank Brown stated that the CTEA does not harmonize U.S. copyright law with that of other countries. Id. In addition, he argued that the U.S. should not be concerned with the harmonization of U.S. law to that of the European Union. Id. See also Petitioner’s Brief at 43, Eldred (No. 01-618) (Marybeth Peters, the Register of Copyrights, testifying before Congress, stated that the CTEA “does not completely harmonize our law with the [EU directive]. In some cases, the U.S. term would be longer; in others the EU terms would be.”). Research has apparently revealed that a majority of copyright terms have not been harmonized. See Id. (citing Dennis Karjala, Harmonization Chart, http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/legmats/HarmonizationChartDSK.html (last visited July 27, 2003)).

17. See Eldred, 74 F. Supp. 2d at 3. The court seems to think that Congress can perpetually extend copyright protection through the facade of many limited extensions. Id. The Supreme Court’s failure to reject this conclusion on its face means that Congress will have a blank check to extend protection infinitely, as long as the grant of infinity is done in small increments. Id.

18. U.S. CONST. art. I, § 8, cl. 8. It should be clear that the Copyright Clause imposes limits on Congress. See id. However, the lower court in Eldred found that “[t]he introductory language of the copyright clause does not limit [Congress’] power.” Eldred v. Reno, 74 F. Supp. 2d 1, 3 n.6 (D.D.C. 1999) (citing Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981)). The court also stated that “[w]ithin the discretion of Congress, any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time.” Id. at 3 n.7. So, although express limitations exist in the Copyright Clause, whether Congress needs to respect them remains unclear. Id.

19. See Petitioner’s Brief at 4, Eldred (No. 01-618). Without answers, the controversy surrounding copyright extensions, especially retrospective extensions, will continue,
opinion, presumably a pro-CTEA decision meant that retrospective extensions do promote progress; that Congress can perpetually extend protection through a string of incremental extensions; and that Congress has unlimited power in its use of the Copyright Clause. However, these presumptions would be incorrect. Essentially, the only issue the Supreme Court clarified was that Congress has unchecked authority in the use of its copyright power. The majority’s opinion does not offer any guidance to Congress nor does it place any limitations on the use of Congress’ copyright power. For these reasons, the implications of this decision are severe, and consequently may result in the transformation of the copyright power into an all purpose power.

This Comment will first examine the historical events leading to the enactment of the Copyright Clause. It will then identify the Framers’ purpose in creating the clause, namely, the promotion of the progress of science and the useful arts. Next, this Comment will examine the string of copyright extensions over the last 213 years, beginning with the federal government’s first recognition of copyright protection in 1790 and concluding with the most recent extension in 1998. This Comment will then follow *Eldred v. Ashcroft* on its journey to the High Court, beginning with an analysis of the decision by the U.S. District Court for the District of Columbia in 1999, its affirmation by the U.S. Court of Appeals for the District of Columbia Circuit in 2001, and ultimately its arrival at the steps of the Supreme Court in 2003. This Comment will argue that the Supreme Court erred in upholding the lower courts’ decisions and failed to provide guidance to Congress in the use of its copyright power. An analysis of the separate dissenting opinions by Justice Stevens and Justice Breyer will demonstrate the flawed reasoning of the majority. Finally, this Comment will project the implications of the Supreme Court’s decision.

I. THE EVOLVING COPYRIGHT POWER AND CONGRESS’ PURSUIT OF UNLIMITED PROTECTION

A. The Roots of Copyright Law

The Framers understood the importance of developing and maintaining an arsenal of artistic creation to further stimulate the intellectual growth of their young country. The Framers carefully

causing much uncertainty for those hoping to use works scheduled to enter the public domain.


considered the best means by which to "[p]romote the [p]rogress of [s]cience and the useful [a]rts." They knew that proper encouragement would motivate authors and inventors to create and innovate, thereby enriching the public’s access to intellectual creations.

CONTINENTAL CONGRESS 180 (1783)). It is important to recognize the deliberation that went into the creation of the Copyright Clause in order to determine the meaning behind the “limited Times” provision. See U.S. CONST. art. I, § 8, cl. 8. The most accurate way to determine the appropriate length of protection to afford creators is to examine the first copyright act of Congress in 1790. This act granted authors a maximum of twenty-eight years of protection, but the renewal was only available to living authors. Act of May 31, 1790, ch. 15, 1 Stat. 124. This fact counters the contemporary argument that because people live longer today, more protection should be granted. Although the Framers might concede that longer terms of protection should accompany longer life expectancies, the Framers would not concede to any protection lasting longer than the author’s life. This trend to extend protection, once the author is deceased, is more a gift to corporate owners, than to authors’ estates. See Disney Buys the Rights to Winnie the Pooh, N.Y. TIMES, March 5, 2001, at C12 (stating that the Disney corporation benefits tremendously from this extension). Statistics show that most of the copyrighted works ready to enter the public domain are no longer earning royalties. See Petitioner’s Brief at 7, Eldred (No. 01-618). Only a small percentage of copyright holders actually benefit from copyright extensions. Id. Congressional Research Service conducted a report that revealed that in order to give 50,000 copyrights additional protection, the CTEA blocked the public’s access to 375,000 other works for at least twenty years. Id. This effect demonstrates that copyright extensions are not beneficial for the public at large.

22. See Petitioner’s Brief at 23-24, Eldred (No. 01-618). See also Patry, supra note 21, at 911 (commenting on the Continental Congress’ approach to enacting copyright protections to foster creativity among artists) (quoting 24 JOURNALS OF THE CONTINENTAL CONGRESS 180 (1783)). The Framers carefully crafted the Copyright Clause, hoping to prevent its exploitation. See Petitioner’s Brief at 23-24, Eldred (No. 01-618). In creating the Copyright Clause, they spent much time examining the problems faced in England. Id. See also ROBERT BLOOM & MARK BRODIN, CRIMINAL PROCEDURE, EXAMPLES AND EXPLANATIONS 13-14 (3rd ed. (2000)). The purpose behind the adoption of the Fourth Amendment was to avoid the abuses of state supported open-ended searches that occurred in England. Id. The provision requiring probable cause before a warrant is issued evidences this concept. Id. The provision also limits the scope of the search. Id. The Fourth Amendment also prohibits “unreasonable searches and seizures.” Id. Like with the interpretation of the “limited Times” provision of the Copyright Clause, there has been much deliberation over the relationship between the two separate clauses separated by the conjunction “and.” See U.S. CONST. art. I, § 8, cl. 8. The similarity between the creation of these two clauses of the Constitution demonstrates that each and every word was carefully chosen and meant to be followed. The term “limited” in the Copyright Clause is not open for broad interpretation. See id. It is evident that no clear numerical limit can easily be determined, but the term granted was intended to be only enough to encourage ingenuity. See id. Although in general the term “limited” may mean 200 years, when placed in the context of the Copyright Clause, it should be clear that the protection granted is merely a pretext to promoting progress. See id. The primary goal of the Copyright Clause was for the public to benefit from the created works, after they received a limited term of protection. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984). (“The sole interest of the United States and the primary object in conferring the monopoly, this Court has said, lie in the general benefits derived by the public from the labors of authors.”).
The Framers drafted the Copyright Clause mindful of the problems created in England by attempts to monopolize and successful monopolization. With history in mind, the Framers "were not about to give the Congress any general . . . nor any specific power to grant monopolies" unless limitations were in place. The Framers anticipated that businesses would, "in the spirit of monopoly," seek exclusive privileges over existing inventions in order to maintain monopolies, rather than invest time and capital into innovation. For this reason, unlike England's Statute of Anne, the Copyright Clause gives Congress the power to vest protection in authors, not publishers or "booksellers."

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23. See Petitioner's Brief at 23-24, Eldred (No. 01-618). See also Edward C. Waltersheid, Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause, 7 J. INTELL. PROP. L. 315, 334 (2000). The House of Commons, like the Framers, debated extensively over the specific term limits to be granted. Id. The pinnacle of concern in granting protection, was to make sure the system implemented would encourage creation while at the same time it could prevent unrestricted monopolies and restraints on trade. Id.

24. Petitioner's Brief at 24, Eldred (No. 01-618). See Waltersheid, supra note 23, at 340 (commenting on Donaldson v. Becket, 4 Burr. 2408 (1774)). In Donaldson, the House of Lords overturned an earlier interpretation of the Statute of Anne that ignored the statutory limitations finding that copyrights should remain in the hands of the creators. The House of Lords held that "the Statute of Anne effectively limited the term for which copyright could be enforced at common law to a maximum of twenty-eight years." Id.

25. Petitioner's Brief at 25, Eldred (No. 01-618) (citing Hall & Sellers, PA. GAZETTE, Feb. 16, 1785, Item. No. 71221). (defining the "spirit of monopoly" as the tendency to seek favors and economic protection in industry from the government instead of competing through innovation and creativity). The brief states, "[t]he practice of granting monopolies to industries already in existence had an obvious, and deleterious effect not only on consumer welfare, but on incentives to innovate. The very possibility of securing exclusive privileges was an invitation to those at court to join in the race for favors." Id. at 24 (citing WILLIAM HYDE PRICE, THE ENGLISH PATENTS OF MONOPOLY 16 (1906)). The powerful businesses in existence did not compete for new inventions, but merely for "monopolies in old industries." Id. The poor were left to innovate, while the rich got richer. Id.

26. Petitioner's Brief at 26, Eldred (No. 01-618) (citing 8 Anne, ch 19, § 1 (1710). Many years after the enactment of the Statute of Anne, England was finally able to restrict the excessive abuses of the Crown's monopolistic practices and lessen the publishers' stronghold on intellectual property. See Petitioner's Brief at 24 (citing EDWARD C. WALTERSHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 95 (2002); see also Waltersheid, supra note 23, at 340. The Framers drafted the Copyright Clause with the main goal of preventing monopolies from corrupting the system as they did in England. See Petitioner's Brief at 23-24, Eldred (No. 01-618) (citing CHRISTINE MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800, 16 (1988)). The brief states that the Framers used the pitfalls discovered through England's experience with copyright protection as a sword in drafting the Copyright Clause. Id.
B. The Framers Enact the Copyright Clause

In 1783, after encouragement from the Continental Congress, twelve of the thirteen states enacted legislation promoting the creation of science and arts. The Framers suggested that the states grant creators fourteen years of protection, with an additional fourteen-year renewable term if the author was still living. This system was not effective because one state's law had no bearing on another state. The Framers soon realized that federal recognition of copyright was needed to adequately protect the interests of all the states' citizens. The Framers unanimously approved the Copyright Clause at the Constitutional Convention on September 5, 1787.

C. The "[L]imited Times" Provision of the Copyright Clause

The Framers painstakingly deliberated over the language of the Copyright Clause. Before its official creation, several drafts were submitted, each with variations on the period of protection granted. In addition, the Copyright Clause became the only power in Article I of the

27. Waltersheid, supra note 23, at 347-49 (quoting 24 JOURNALS OF THE CONTINENTAL CONGRESS 326-27 (1928)).
28. See id. at 349 (citing 24 JOURNALS OF THE CONTINENTAL CONGRESS 326 (1928)). By 1786, twelve states had enacted general copyright statutes. Id. The copyright term granted to authors and inventors was either twenty or twenty-one years, or the term provided in the Statute of Anne. Id.
30. Id. at 362.
31. Id. at 361. The text of the Copyright Clause demonstrates the importance of limitations on congressional power. See U.S. CONST. art. I, § 8, cl. 8. "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." Id. However, because there is no record of any debate, its ambiguity, and the Framer's intent, will likely never truly be known. See Donner, supra note 29 at 361.
33. Karl Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 GEO. L.J. 109, 113-14 (1929). In examining the numerous amount of copyright extensions since the enactment of the Copyright Clause, it seems that Congress believes that the "limited Times" provision was placed in the Copyright Clause without any consideration. This is not the case. See Petitioner's Brief at 17, Eldred (No. 01-618) (citing III DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 556 (Dep't of State 1900) (Convention, Aug. 18, 1877)).
34. Fenning, supra note 33, at 113 (comparing Madison's draft of the Copyright Clause: "to secure to literary authors their copyrights for a limited time," with Charles Pinckney: "to secure to authors exclusive rights for certain time."). See also Petitioner's Brief at 17, Eldred (No. 01-618) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 557, at 402 (reprinted with introduction by R. Rotunda & Nowak eds., 1987) ("'Certain' suggests a fixed, knowable period; 'limited' suggests not just that the period be fixed, but that it also be short in duration.").
Constitution that explicitly stated both its objectives, promoting the progress of the arts and sciences, and the means to accomplish those objectives, giving limited protection. This precision and consideration demonstrates the importance of a fixed limit of protection to the Framers.

After the Framers approved the Copyright Clause in 1787, the First Congress passed the Copyright Act of 1790. This Act granted authors the exclusive right to their respective writings for a limited term of fourteen years, with a renewal option if the author was still living at the end of the first term. The first Congress only intended for authors and inventors to receive a maximum of twenty-eight years of protection.

D. Copyright Extensions: 1831 to 1998

In 1831, Congress extended protection under the original Copyright Act by fourteen years, bringing the total to twenty-eight years of protection, renewable for fourteen years if the author was still living.

35. Petitioner's Brief at 15, Eldred (No. 01-618).
38. Id.
39. Id. If Congress wanted individuals to receive more than twenty-eight years of protection, then the Act of 1790 would have provided a longer term of protection rather than limiting protection to a total of twenty-eight years.
40. Act of Feb. 3, 1831, ch.16, §§ 1-2, 4 Stat. 436. The 1831 Congress granted this extension although neither the text of the Copyright Clause nor the Copyright Act of 1790 explicitly provided the authority to retrospectively extend copyright protection. See U.S. CONST. art. I, § 8, cl. 8; see also Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. Congress has explicit restraints on its power through the Copyright Clause. However, because Congress implemented this extension in 1831, later congressional acts have been deemed constitutional. See Eldred v. Reno, 239 F.3d 372, 374 (D.C. Cir. 2001). ("The CTEA is but the latest in a series of congressional extensions of the copyright term, each of which has been made applicable both prospectively and retrospectively."). The majority appears to rely on the fact that since these past acts have not been challenged, they must be constitutional, not exactly the sort of fact-finding the plaintiffs had in mind. Had the first extension received objection, it is possible that no further extensions would have taken place, and the Copyright Term Extension Act would not exist today. The court of appeals in Eldred considered the Act of 1790 a copyright extension, even though federal recognition of copyrights required the creation of a law. Id. at 384 (Sentelle, J., dissenting). The majority realized the ambiguity surrounding the Copyright Clause and embraced the lack of clarity to its advantage. Id. The majority tried to foster enough one-line quotes from cases over the last one-hundred and fifty years to make its case in favor of retrospective extensions. Id. Without the existence of the extensions of 1831 and on, the Eldred court would have had no other choice than to find the CTEA invalid. The Supreme Court, however, affirmed, piling on another extension. See Eldred v. Ashcroft, 537 U.S. 186, 222 (2003).
The extension provided American authors and inventors with equivalent protection afforded to those in foreign countries. 41 In 1909, Congress extended copyright protection a second time, lengthening the renewal term to twenty-eight years, thereby granting living authors a total of fifty-six years of protection. 42 The 1909 Congress ensured that, as intended by the Framers, the protection granted existed only for the life of the author. 43 The next major copyright extension came in 1976, when Congress extended copyright protection to the life of the author plus an additional fifty years, thereby redefining the term "limited Times." 44 The 1976 Act replaced the previous copyright system with a formula that calculated dual terms of protection. 45 Under the new system, Congress extended protection to the life of the creator plus fifty years for known authors and inventors, and seventy-five years for anonymous works or works created for hire. 46 The 1976 Act paved the way for the CTEA of 1998. 47

In 1998, Congress passed the most recent copyright extension. The CTEA extended the term of protection by an additional twenty years for both existing and future copyrights. 48 For any work published before

41. See Patry, supra note 21 at 917 (citing 7 Cong. Deb. App. CXIX-CXX (1830)) (remarks of Representative Ellsworth)). It is important to note that the argument made by Congress for enacting the CTEA, the harmonization of European and U.S. law, is the same argument used by the 1976 Congress. See Robert A. Kreiss, Accessibility and Commercialization in Copyright Theory, 43 UCLA L. REV. 1, 9-10 (1995). See also H.R. Rep. No. 105-452, at 4 (1998); Eldred, 239 F.3d at 384. As the dissent noted in Eldred, "Neither the European Union nor its constituent nation states are bound by the Constitution of the United States. That Union may have all sorts of laws about copyrights or any other subject which are beyond the power of our constitutionally defined central government." Id. The harmonization of copyright law among countries does not promote the progress of arts and sciences. Id.


43. Id. See Act of May 31, 1790, ch. 15, 1 Stat. 124. Congress specifically made the protection contingent on the author still being alive. Id. This demonstrates that the Act of 1976, which extended protection past the author's death, was not in accord with the intent of the first Congress. Over the course of sixty-seven years, Congress continually increased the protection afforded to works already created with nine separate small extensions from 1910-1975. See Eldred, 74 F. Supp. 2d at 2.


45. Id.

46. Id. §§ 302, 304 (1976).


January 1, 1978, and still under copyright on October 27, 1998, the CTEA extends the term of protection to ninety-five years. For works published after 1978, the CTEA extends the term of protection for the life of the author plus seventy years. For anonymous or corporate authors, the term is the shorter of ninety-five years from the year of first publication, or one-hundred and twenty years from creation. In comparing the Act of 1790 with the CTEA, the protection granted has jumped from 14 years to the life of the author plus seventy years. With this consistent stream of extensions, one would think that this practice is constitutionally permissible.

E. The Supreme Court has Recognized that Congress’ Copyright Power is Limited and that Boundaries are Needed

Despite the number of copyright extensions, the Supreme Court recognized in several copyright and patent infringement cases that the “limited [t]imes” provision of the Copyright Clause is a restraint on congressional power. In Graham v. John Deere Co., the Supreme Court examined judicial precedent dating back to 1851, in the context of a patent infringement action. More importantly, the Court addressed the scope of congressional power, explaining that Congress’ power under the Copyright Clause was “limited to the promotion of advances in the useful arts.” The Supreme Court in Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991).

49. Id. at § 102(b)(3)(A), 112 Stat. 2827.
50. Id. § 102(a)(1).
51. Sonny Bono Copyright Term Extension Act, Title I.
52. Compare Act of May 31, 1790, ch. 15, 1 Stat. 124, with Sonny Bono Copyright Term Extension Act, Title I.
55. Graham, 383 U.S. at 4. The Court noted, “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.” Id. at 6. Although this case concerned patent infringement, the Court engaged in the type of analysis that it should have used in Eldred. The Court used the text of the Copyright Clause in trying to determine the Framers intent: “Congress . . . may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby.” Id. at 5-6. This demonstrates that in using the Copyright Clause, Congress must adhere to its strict textual parameters. For the current Congress this would mean not granting protection unless something is received in exchange. This analysis would exclude retrospective extensions from consideration because protection is granted to authors, but the authors do not give anything to the public in exchange.
56. Id. at 5.
Inc., held that a state statute was preempted by the Supremacy Clause, as it protected creations lacking federal patent protection. In so finding, the Court stated that the Copyright Clause "contains both a grant of power and certain limitations upon the exercise of that power.

The Supreme Court also recognized that the limited protection given to creators is secondary to the main goal of serving the public good. In Twentieth Century Music Corp. v. Aiken, the Supreme Court noted that the limited scope of the monopoly given to creators, like the limited copyright protection mandated by the Constitution, demonstrated a balance of opposing claims upon public welfare. The Court stated that the perfect balance would achieve the necessary motivation to encourage creation, while serving the stated public cause of wide public accessibility to music, literature, and the useful arts. In addition, in Feist Publications, Inc. v. Rural Telephone Service Co., the Court found that the "primary objective of copyright is not to reward the labor of authors, but "[t]o promote the [p]rogress of [s]cience and useful [a]rts."

Furthermore, in Fogerty v. Fantasy, Inc., the Supreme Court expressed the importance of having defined boundaries. Supreme Court precedent demonstrates that necessary limits restrain Congress' copyright power.

57. Bonito Boats, Inc., 489 U.S. at 143-44. This case resembled a patent infringement case, but the main difference was that no official patent was at issue. Id. at 144. Florida had a statute prohibiting the use of the "direct molding process" to duplicate unpatented boat hulls and the knowing sale of duplicated hulls. Id. at 145. The Supreme Court ruled in favor of defendants and held that the Florida statute conflicted with federal policy favoring the free competition in ideas not meriting patent protection. Id. at 166-67.

58. Id. at 146 (emphasis added).


60. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). This case involved a copyright infringement action against the owner and operator of a restaurant. Id. at 152. In ruling in favor of the restaurant owner, the Court held that the radio reception of broadcasted copyrighted musical compositions did not constitute a "performance" of the songs. Id. at 162. The Court further held that the restaurant owner who played the songs over the speakers in his restaurant did not infringe on the copyright holders' exclusive right under the Copyright Act. Id. at 159, 162-63.

61. Id. at 156.

62. Twentieth Century Music Corp., 422 U.S. at 156; see also Fogerty, 510 U.S. at 526.

63. Feist, 499 U.S. at 349-50 (emphasis added).

64. 510 U.S. 517 (1994). In Fogerty the holder of a copyrighted song brought an infringement action against the original musician who composed the song. Id. at 519-20.

65. Id. at 527 ("Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.").

66. See supra notes 53-65; see also infra note 68. This history contrasts with what the lower courts and the Supreme Court found in Eldred. Inconsistencies will continue until actual numerical limits are put into effect giving Congress some guidance.
F. Eldred v. Reno: Summary of the Controversy

The petitioners in Eldred asserted that limits previously recognized by the Supreme Court prove that the CTEA is unconstitutional. Petitioners challenged the constitutionality of the CTEA because works published in or after 1923, that would have entered the public domain in 1998, would remain in the possession of the current copyright holders for an additional twenty years under the Act. This is dramatically different from the initial copyright term of fourteen years, renewable only once by living authors.

Petitioners challenged the constitutionality of the CTEA on three grounds: (1) CTEA's violation of the First Amendment of the Constitution; (2) violation of the Copyright Clause of the Constitution by retroactive extensions; and (3) violation of the public trust doctrine. The district court summarily dismissed petitioners' arguments. This Comment will focus solely on petitioners' retrospective extension argument; specifically, the claim that the CTEA violates the "limited Times" provision of the Copyright Clause. In dismissing petitioners' retrospective extensions argument, the Court relied heavily on Congress' unchallenged, consistent practice of extending copyright protection.

67. Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999). Petitioners in Eldred were several individuals and corporations who "use, copy, reprint, perform, enhance, restore or sell works of art, film, or literature in the public domain." Id. at 2. To encourage the free use of literature, Eric Eldred had planned to post on his website many works due to come off protection in the next few years. See Brief for Petitioner at 5, Eldred v. Ashcroft, 534 U.S. 1126 (2002) (No. 01-618).

68. Petitioner's Brief at 12, Eldred (No. 01-618) (arguing that the lower courts' failure to apply the limits of the Copyright Clause was in error given the Supreme Court's long historical recognition of limitations in the Copyright Clause). See generally Wheaton v. Peters, 33 U.S. 591 (1834); Trade-Mark Cases, 100 U.S. 82 (1879); Graham v. John Deere Co., 383 U.S. 1 (1966); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989); Feist Publ'ns v. Rural Tel. Ser. Co., 499 U.S. 340 (1991).

69. See generally Petitioner's Brief at 3, Eldred (No. 01-618).

70. See Act of May 31, 1790, ch. 15, 1 Stat. 124. See also Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998). CTEA extends protection for an additional twenty years, preventing plaintiffs from using many works. Id.


72. Id. at 3-4. The court noted that there are no First Amendment rights to use the copyrighted works of others. Id. at 3 (citing United Video v. F.C.C., 890 F.2d 1173, 1191 (D.C. Cir. 1989); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985)). In dismissing the plaintiffs' public trust doctrine argument, the court explained that the doctrine was not applicable to copyrights, and thus the CTEA did not violate the doctrine. Id. at 3-4.

73. Id. at 3. U.S. CONST. art. I, § 8, cl. 8. A discussion of the First Amendment and public trust doctrine arguments are omitted because this Comment is primarily concerned with the Copyright Clause and the CTEA's retrospective application.

74. Eldred, 74 F.Supp. 2d at 2-3. Plaintiffs, in their retrospective extension argument, claimed that the CETA violated the "to [a]uthors" term of the Copyright Clause. Id. at 3.
The court fostered the principle that an unsupported foundation will eventually, through many unsupported acts, become strong and well-supported because no one will ever challenge or check its construction.  

I. The District Court Relied on Four Cases in Finding the CTEA Constitutional

In response to petitioners’ argument that the CTEA’s retrospective extension exceeded Congress’ Copyright Clause authority, the district court relied on four cases in finding the CTEA constitutional. The district court, in relying on only these cases, overlooked Supreme Court precedent that recognized limitations on the use of the copyright power. First, the district court cited *Sony Corp. of America v. Universal City Studios, Inc.* to support its finding that “Congress defines the scope of the grant of copyrights to authors or to inventors under its Copyright Clause power.” Second, the district court cited *Pennock & Sellers v. Dialogue*, in which the Supreme Court noted “that this exclusive right shall exist but for a limited period, and that period shall be subject to the discretion of Congress.” Third, the Court relied on *McClurg v.*

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See U.S. CONST. art. I., § 8. cl. 8. In dismissing the argument, the court reasoned that the CTEA merely gives effect to agreements that were already in existence and therefore, a retrospective extension does not violate this provision. *Id.*


76. *Id.* It may seem as though this Comment is simplifying the district court’s ruling, but it is not. The district court’s opinion was little more than three pages. *Id.* at 1-4. In addition, the ruling on the plaintiffs’ “limited Times” argument consisted of one paragraph citing to four cases. *Id.*

77. See *Wheaton v. Peters*, 33 U.S. 591 (1834) (rejecting common law copyright); *Trade-Mark Cases*, 100 U.S. 82 (1879) (holding trademark law unsupported by Copyright Clause power); *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (stating that the Copyright Clause is “both a grant of power and a limitation”); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (rejecting state law which added patent type protection); *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (finding “originality” to be a constitutional requirement). See *Eldred v. Reno*, 239 F.3d 372, 373 (D.C. Cir. 2001). The lower courts failed to recognize that the challenge to the CTEA was one of first impression. *Id.* Rather than devise their own conclusion as to why the CTEA is constitutional, the lower courts sought support in unrelated infringement cases. *Eldred*, 74 F.Supp. 2d at 3. By extracting one sentence from each of the four cases, the lower courts demonstrated that it is possible to find support for any argument in any case mentioning the same topic, even though the case may apply in an unrelated context.


79. *Eldred*, 74 F.Supp. 2d at 3 (citing *Sony*, 464 U.S. at 429).


81. *Id.* at 16-17. However, the district court shortened the language used by the court to: “limited Times provision is subject to the discretion of Congress.” See *Eldred*, 74 F. Supp.2d at 3.
Kingsland to find that "Congress has authority to enact retrospective laws under the Copyright Clause." Finally, in sounding the death knell, the district court examined Schnapper v. Foley and found that "the introductory language of the Copyright Clause does not limit this power."

In Sony Corp. of America v. Universal City Studios, Inc., copyright owners of television programs brought a copyright infringement action against Sony, a manufacturer and seller of home videotape recorders (VTR). The copyright owners alleged that users of Sony's VTR were infringing on their copyrights by recording their works displayed on television, and that Sony was liable for such infringement because it marketed the VTRs. In holding that videotape recording was capable of non-infringing use, the Supreme Court found that Sony adequately demonstrated that a substantial number of copyright holders were unlikely to object to having their broadcasts recorded by private viewers. More importantly, the Court acknowledged that the Constitution assigned to Congress "the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in

82. McClurg v. Kingsland, 42 U.S. (1 How.) 202 (1843). Although the Eldred Court interpreted McClurg as giving Congress unlimited power under the Copyright Clause to enact retrospective extensions, that is not explicitly what the Court held. Id. at 206. In McClurg, a case regarding patent infringement, the Court ruled that Congress can enact laws that are retrospective in their operation; but the Court never mentioned the Copyright Clause or extensions, and therefore, it should be interpreted narrowly and should only apply in the narrow context of patent infringement. Id.

83. Eldred, 74 F.Supp. 2d at 3 (citing McClurg, 42 U.S. at 206).
85. Eldred, 74 F.Supp. 2d at 3 n.6 (citing Schnapper, 667 F.2d at 112).
87. Id. at 419-20. Sony had nothing to do with challenges to Congress' authority. Id. at 420. In addition, Sony had no relation to retrospective challenges. Id. Sony was a simple copyright infringement case, thus having no real connection to the present controversy. The Eldred district court, in searching for support, merely extracted one sentence from the Sony opinion and deemed Congress' otherwise unscrupulous act, constitutional. See Eldred, 74 F.Supp. 2d at 3. When the Supreme Court heard the Eldred case, Supreme Court Justice Sandra Day O'Connor questioned the CTEA's legitimacy. See Gina Holland, High Court Debates Copyright Extension, (Oct. 10, 2002) available at http://www.s-t.com/daily/10-02/10-10-02/a16bu065.htm. ("I can find a lot of fault with what Congress did. This flies directly in the face of what the framers of the Constitution had in mind, but is it unconstitutional?"). Justice O'Connors' skepticism says it all, yet nothing was done to limit Congress' power. Id.

88. Sony, 464 U.S. at 420.
89. Id. at 456 (finding that videotape recording was capable of non-infringing uses, manufacturers' sale of equipment did not constitute contributory infringement of copyright holders' rights, and that copyright owners failed to show how the recordings would cause anything more than minimal harm to the potential market for, or the value of, their copyrighted works).
order to give the public appropriate access to their work product."

This acknowledgement affirms the fact that the Copyright Clause appears in Article One and is a power vested in Congress, rather than in the executive or judicial branches.

In *Pennock & Sellers v. Dialogue*, a patent infringement suit, the plaintiffs claimed that the defendants infringed on their patent, which improved the process of creating tubes or hoses for conveying air, water, and other liquid matters. The Supreme Court held that if an inventor makes his discovery public, as the plaintiff did, and allows others to use it without objection, and before applying for a patent, he abandons the privilege to claim the exclusive right that a patent would have entitled him. The Supreme Court acknowledged that the copyright power is explicitly granted to Congress in the Copyright Clause and therefore is subject to Congress’ discretion within the defined limits.

The *Eldred* Court relied on this statement as additional support for its finding.

In *McClurg v. Kingsland*, patent owners brought an infringement action against defendant. The Supreme Court, relying partly on *Pennock*, ruled in favor of the defendants because they had an existing

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90. Id. at 429.

91. See U.S. CONST. art. I, § 8, cl. 8. See also *Eldred*, 74 F. Supp. 2d at 3. The district court relied on this statement as evidence that Congress possessed near unbounded authority in its use of the Copyright Clause.


93. Id.

94. Id. at 23-24. Specifically, plaintiff failed to comply with the Patent Act. See id. at 13. Plaintiff's patent did not bar defendant from freely using it because plaintiff permitted defendant to utilize the invention before obtaining the patent. Id. at 23-24.

95. Id. at 16-17.

96. *Eldred*, 74 F. Supp. 2d at 3. See *Pennock*, 27 U.S. (2 Pet.) at 19 (noting that if a patent holder were permitted to allow the public to use his work for some time, but then at some point, was able to arbitrarily exclude the public from its use, “it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries”). See also Brief for Petitioner at 16, *Eldred v. Ashcroft*, 534 U.S. 1126 (2002) (No. 01-618) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932)). The language of exchange used by the Supreme Court demonstrates that a monopoly granted through limited protection is “the equivalent given by the public for benefits bestowed.” Id. at 16 n.5. It is a means of paying the author for what would not have otherwise been created. Id. This demonstrates that protection is not something that is intended to be granted for free. Id. Protection was merely to be granted if something was produced. Id. A retrospective extension does not comply with the exchange requirements of the Copyright Clause. Id. Congress may assume that any exchange will suffice, however, the exchange contemplated by the first Congress was protection for creation, not protection for political contributions. Id. See also *Act of May 31, 1790, ch. 15, 1 Stat. 124*. As such, the Court indicated the need for society to limit the term of protection granted to authors and inventors. See *Pennock*, 27 U.S. at 19.


98. Id. at 204.
use of the patent before it was assigned to the patent owners. The Supreme Court stated that in the realm of patents, retrospective laws are permitted. The *Eldred* Court interpreted this statement as authorizing Congress to enact retrospective extensions under the Copyright Clause.

In *Schnapper v. Foley*, appellants challenged the arrangements between government agencies and public broadcasters for the filming and dissemination of a television show. The appellants argued that an individual or organization commissioned by the government to create a literary or artistic work could not obtain a copyright in that creation. In granting respondents' motion to dismiss, the D.C. Circuit found that copyright laws permitted the registration of works commissioned by the government and the subsequent assignment of copyrights to the government. Applying the rule from *Mitchell Brothers Film Group v. Cinema Adult Theatre*, the court noted that "Congress need not require that each copyrighted work be shown to promote the useful arts." The *Schnapper* court then expanded the *Mitchell* rule to find that the introductory language of the Copyright Clause does not constitute a limit on congressional power. Rather than interpret *Schnapper* narrowly to apply solely to government sponsored

99. *Id.* at 210.
100. *Id.* at 206.
103. *Id.* at 105. The television show at issue was "Equal Justice Under Law." *Id.*
104. *Id.*
105. *Id.* at 105, 108-09.
106. *Mitchell Bros. Film Group v. Cinema Adult Theatre*, 604 F.2d 852 (5th Cir. 1979). *Mitchell* arguably does not relate to the case at issue as it did not involve a challenge to the constitutionality of a congressional act, but rather was a suit between private parties. *Id.* at 854. Owners of a registered copyrighted movie brought an infringement suit against two theatres and several individuals, claiming copyright infringement as a result of the copyrighted movie being shown at the theatres. *Id.* The alleged infringers' asserted an affirmative defense that because the movie was obscene, the owners of the copyright were barred from relief under the equitable notion of "unclean hands." *Id.* at 854. The Court, without reaching the decision of whether the film was obscene, held that: (1) the copyright statute contained no explicit or implicit bar to copyrighting obscene materials and provided for a copyright of all creative pieces, regardless of obscenity, that would otherwise meet the requirements of the Copyright Act of 1909; (2) protection of any and all creation regardless of content was constitutionally permissible means of promoting science and the useful arts under Congress' copyright power; (3) obscenity was not an appropriate defense in an infringement action. *Id.* at 854-55, 863.
108. *Id.* If the Schnapper court intended for this rule to apply outside the narrow area of government commissioned works, then it would clearly be in violation of the Copyright Clause, which explicitly limits congressional power. *See* U.S. CONST. art. I, § 8, cl. 8.
copyrights, the Eldred Court applied Schnapper, along with Sony, Pennock, and McClurg, to find CTEA's retrospective extension within Congress' discretion.

2. The Court of Appeals Affirmed the District Court's Ruling

On appeal, the Court of Appeals for the District of Columbia affirmed the lower court's ruling in Eldred v. Reno. The majority premised its holding on the theory that the first Copyright Act of 1790 was in fact an extension of existing state copyright law. In addition, the court noted that the 1998 extension was only the most recent of many congressional extensions of the copyright term. The majority acknowledged that "[i]f the Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause.

The majority stated that the court was subject to the rule of avoidance and therefore could not consider the argument raised solely by the amicus—that the CTEA violates the preamble to the Copyright Clause. In dicta, the court added that it would find the CTEA "necessary and proper" because the Act provides for United States copyrights to have the same terms of protection as European Union copyrights. The court concluded by acknowledging that Congress has difficult decisions to make in interpreting the Copyright Clause, and the court extends beyond its proper role if it alters the "delicate" balance Congress has sought to achieve.


110. Eldred v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999), aff'd 239 F.3d 372 (D.C. Cir. 2001), and aff'd sub nom. Eldred v. Ashcroft, 537 U.S. 186 (2003). It is important to note that the district court's discussion of these cases is contained entirely within one paragraph. Id. Each case was cited for one specific sentence, and no further mention was made to any of the four cases, or to the context within which the specific statements were made. See id.

111. Eldred, 239 F.3d at 380. In affirming the lower court's holding, the court of appeals thus supported its reliance on Sony, Pennock, McClurg, and Schnapper to find in favor of the government. Id.

112. Id. at 374.

113. Id.

114. Id. at 377.

115. Id. at 377-78. See Eldred v. Ashcroft, 255 F.3d 849, 850-51 (D.C. Cir. 2001) (finding it "particularly inappropriate to reach the merits of the amicus's position" because the plaintiffs only claimed that the Copyright Clause as a whole constitutes a substantive limit on Congress' power, and the court must avoid constitutional questions not at issue).

116. Eldred, 239 F.3d at 379.

117. Id. at 380.
3. Judge Sentelle’s Dissenting Opinion

In his dissent, Judge Sentelle disputed the majority’s arguments using substantive case precedent.\textsuperscript{118} Sentelle began his analysis with \textit{United States v. Lopez},\textsuperscript{119} in which the Supreme Court invalidated the Gun-Free School Zones Act.\textsuperscript{120} In \textit{Lopez}, the Supreme Court held that the Act exceeded the “outer limits” of congressional power under the Commerce Clause.\textsuperscript{121} Sentelle argued that this “outer limits” theory applies to the Copyright Clause in addition to all the other enumerated powers.\textsuperscript{122} Judge Sentelle noted that there are limits to congressional power inherent in the Copyright Clause.\textsuperscript{123} Sentelle stated, “[t]his clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress.”\textsuperscript{124} The Supreme Court noted in \textit{Lopez}, and again in \textit{United States v. Morrison}, that simply because Congress concluded a given piece of legislation serves a constitutional purpose “does not necessarily make it so.”\textsuperscript{125}

The dissent next examined the majority’s reliance on \textit{Schnapper v. Foley} as a bar to finding the CTEA unconstitutional.\textsuperscript{126} Judge Sentelle acknowledged that \textit{Schnapper} found that each grant of copyright protection need not promote the useful arts.\textsuperscript{127} However, Sentelle argued that \textit{Schnapper} should be read narrowly to apply only to commissioned copyrights by the United States government.\textsuperscript{128} Outside that context, \textit{Schnapper} does not trump the Copyright Clause of the Constitution,

\begin{itemize}
\item \textsuperscript{118} Id. at 380-84 (Sentelle, J., dissenting).
\item \textsuperscript{119} United States v. Lopez, 514 U.S. 549 (1995).
\item \textsuperscript{120} Lopez, 514 U.S. at 556-57.
\item \textsuperscript{121} See id. at 551, 556-57.
\item \textsuperscript{122} Eldred, 239 F.3d at 381 (Sentelle, J., dissenting) (“[i]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” (citing Lopez, 514 U.S. at 564)).
\item \textsuperscript{123} Id. at 381-82 (Sentelle, J., dissenting).
\item \textsuperscript{124} Id. (Sentelle, J., dissenting) (expounding on this argument, Sentelle stated that the Copyright Clause “empowers the Congress to do one thing, and one thing only. ‘That one thing is ‘to promote the progress of science and useful arts.’ How may Congress do that? ‘By securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.’”)
\item \textsuperscript{125} Id. at 382 (Sentelle, J., dissenting) (citing Lopez, 514 U.S. at 557 n.2; United States v. Morrison, 529 U.S. 598, 610 (2000)).
\item \textsuperscript{126} Eldred, 239 F.3d at 382-83 (Sentelle, J., dissenting) (citing Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981)).
\item \textsuperscript{127} Id. (Sentelle, J., dissenting).
\item \textsuperscript{128} Id. This is simply another example of the lower courts reaching for support. See Eldred v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999). If \textit{Schnapper} is to have any bearing at all, it should only be in the narrow context of government-sponsored copyrights. See Eldred, 239 F.3d. at 382-83 (Sentelle, J., dissenting). Outside that area, especially in the \textit{Eldred} case, one involving a significant constitutional challenge, the \textit{Schnapper} case should not apply. Id.
\end{itemize}
which places a limit on congressional authority. Sentelle pointed out that the court should require that the use of the copyright power at least harmonize with the language of the clause granting Congress the power to enact the statute in the first place, which the CTEA did not.

The dissent disputed the majority’s finding that the first Copyright Act of 1790 was a retrospective extension. Sentelle stated, “[n]ecessarily, something had to be done to begin the operation of federal law under the new federal Constitution. [The Copyright Act of 1790] created the first . . . federal copyright protection; it did not extend subsisting federal copyrights enacted pursuant to the Constitution.”

Finally, the dissent criticized the majority’s claim that the court was barred from considering whether the CTEA violated the preamble to the Copyright Clause because appellants did not raise the issue. Sentelle argued that the appellants had raised the issue and, as required, the amicus merely elaborated on it as desired and expected. Furthermore, Sentelle argued that the court was not limited to the parties’ particular legal theories, and therefore had the power to exercise independent judgment.

4. Petitioners’ Brief Correctly Asserted that the CTEA Exceeds Congress’ Power

Despite the Supreme Court’s ruling, the petitioners in *Eldred* correctly asserted that the CTEA’s retrospective extension exceeded Congress’ power pursuant to the Copyright Clause because it violated the “limited

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129. *Eldred*, 239 F.3d at 382-83 (Sentelle, J., dissenting). The presence of the “limited Times” provision supports this statement. See U.S. CONST. art. I, § 8, cl. 8.
130. *Eldred*, 239 F.3d at 383 (Sentelle, J., dissenting) (commenting on the CTEA, Judge Sentelle stated, “This the extension does not do. It is not within the enumerated power.”). *Id.*
131. *Id.* at 384 (Sentelle, J., dissenting).
132. *Id.* (Sentelle, J., dissenting).
133. *Id.* (Sentelle, J., dissenting). See also Petitioner’s Brief at 28, *Eldred* v. Ashcroft, 534 U.S. 1126 (2002) (No. 01-618). The Supreme Court has recognized that the Act of 1790 created a new right, therefore it did not give effect to an existing copyright, as the majority in *Eldred* claimed. *Id.* (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Mazer v. Stein, 347 U.S. 201, 214-15 (1954); Wheaton v. Peters, 33 U.S. 591, 661 (1834)).
134. *Eldred*, 239 F.3d at 383-84 (Sentelle, J., dissenting).
135. *Id.* (Sentelle, J., dissenting).
136. *Id.* at 384 (Sentelle, J., dissenting). Specifically, Sentelle noted “‘[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.’” *Id.* (citing United States Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) (quoting Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991)).
Promoting Progress Through Perpetual Protection

In making this argument, petitioners’ relied on three primary deficiencies of the CTEA. First, terms that can be continually lengthened through an infinite number of extensions are not limited in duration. If a literary masterpiece never enters the public domain, either because it was granted permanent protection or through an infinite number of limited extensions, the fact still remains that the main goal of the Copyright Clause is thwarted; the public cannot freely use the work. Regardless of how one interprets “limited Times,” the protection serves merely as a means to this end.

Second, extending the protection of existing works does not, as the Framers contemplated, “promote the progress of science and useful arts.” Overall, creations that had previously received protection cannot further promote progress by receiving more protection because nothing new is being produced. Instead, retrospective extensions retard progress because they deprive the public of the derivative use of existing works.

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138. Id.
139. Id. In the artificial sense, as adopted by the majority in Eldred, arguably each extension is limited, because it did not involve a grant of permanent protection. Eldred, 239 F.3d at 377-78. However, it is unlikely that the Framers would see any value in this type of artificial distinction. Finding loopholes is not the task of Congress or the courts.
140. See Feist Publ’ns, Inc. v. Rural Tele. Serv. Co., 499 U.S. 340, 349-50 (1991); see Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994). The Supreme Court has propounded, in varying language, the main purpose of the Copyright Clause in several cases: “serving,” “enriching” and “encouraging” are all key terms used in the Supreme Court’s overall definition “to serve the public cause by promoting wide public accessibility to music, literature and the useful arts.” Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
141. See Eldred, 239 F.3d at 382 (Sentelle, J., dissenting). If the Framers intended progress to be the main goal, why would they seek permanent protection accomplished in any guise? Logic dictates that limited times means a fixed and unchangeable period of time.
142. U.S. CONST. art. I, § 8, cl. 8. See Petitioner’s Brief at 7, Eldred (No. 01-618) (citing Edward Rappaport, Copyright Term Extension: Estimating the Economic Values, Congressional Research Service Report for Congress 8, 12, 15, 16 (May 11, 1998)). Some copyright holders may be encouraged to refurbish an old movie, but this is likely only a small minority compared to the number of works that would be created if all the works scheduled to be released entered the public domain.
143. See Petitioner’s Brief at 22, Eldred (No. 01-618). (“Retroactive extensions cannot ‘promote’ the past. No matter what we offer Hawthorne or Hemingway or Gershwin, they will not produce anything more.”). Illustrative of this problem are the many other authors waiting for these protected works to enter the public domain so they can use them. See id. at 3-4.
works. The purpose behind the Copyright Clause—the promotion of progress—is simply not accomplished through the use of these extensions. The Walt Disney Company exemplified this problem when it decided that purchasing the copyright of an existing successful character was a wiser financial investment than devoting time and energy toward creating a new character.

Finally, retrospective extensions violate the quid pro quo requirement of the Copyright Clause because protection is granted, but nothing is received in exchange. This scenario results in a unilateral exchange, with the copyright holders being the sole beneficiaries. This violates the Supreme Court's understanding of the Copyright Clause as a vehicle used to "promote the progress of science and useful arts."

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144. See id. at 3 (demonstrating how the petitioners in the case planned on using many of the works that were due to enter the public domain, however, because of the CTEA, they were prohibited).

145. Id. at 2. Dover, a plaintiff to this case, planned on republishing several works once they entered the public domain. Id. at 3. In addition, many other organizations had already prepared to use these works, but now, because of the CTEA, their labor will be of no use for at least another twenty years. Id. at 3-5. Consequently, these individuals will be deterred from using prospective public domain works in the future because of the uncertainty that the work will ever fall into the public domain. Id. at 6-7.

146. See Knudsen, supra note 16, at 22 (noting that Disney's purchase of the Winnie the Pooh copyright was contingent upon Congress passing the CTEA). See also Disney Buys the Rights to Winnie the Pooh, N.Y. TIMES, Mar. 5, 2001, at C12; Petitioner's Brief at 7, Eldred (No. 01-618) (arguing that the few copyright holders that benefit from the CTEA will earn billions of dollars from its retrospective protection). Had characters like Winnie the Pooh entered the public domain, it is likely that many different derivative uses of these characters would have occurred, but because of the CTEA, these new uses will be delayed. In addition, it is likely that when a corporation purchases an existing copyrighted character, it does so instead of investing resources into creating a new character. The public, however, would be better off had the corporation created a new character because then two characters would have been developed rather than just one. As can be gleaned from this example, overall, retrospective extensions do very little, but discourage creativity, and further prevent works from entering the public domain. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998) (extending protection of pre-existing copyrights, thereby delaying their availability to the public).


148. The CTEA materially retards the progress of science and useful arts by ignoring the bargained-for exchange implicit within the Copyright Clause. See Pennock, 27 U.S. at 19, 23.

5. The Supreme Court Affirmed the Lower Courts

A Supreme Court majority, in a seven-two decision, affirmed the lower courts and thus conclusively dismissed Eldred's claims. The majority began its analysis of the petitioners' claims "against the backdrop of Congress' previous exercises of its authority under the Copyright Clause." In agreeing with the lower courts, the majority premised that because the first federal Copyright Act in 1790 extended protection to existing state granted copyrights, then retrospective extensions were a constitutional practice. The majority further posited that the CTEA was in accord with the "unbroken congressional practice" of granting existing works protection. In reliance on this argument, the majority cited a law review article which stated, "the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today."

After concluding that the CTEA complied with the "limited Times" provision, the majority then determined that the Act was a rational exercise of Congress' authority. The majority put forth three reasons for this determination. First, by extending protection an additional twenty years, "Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts." Second, "the CTEA may also provide greater incentive for American and other authors to create and disseminate their work in

151. Id. at 194.
152. See id. The majority acknowledged the parties' dispute over whether the Act of 1790 was in fact a retrospective extension, or whether it was the only way for the Framers to acknowledge state backed copyrights while at the same time creating a controlling federal scheme. Id. at 194 n.3. History demonstrates that the state copyright systems were having trouble, so the Framers created a system that would provide uniformity throughout the states, and thus had to extend the protection to works existing works in order for the system to immediately replace state laws. See Donner supra note 29. Nevertheless, the majority concluded that the Framer's act demonstrates that retrospective extensions were permissible. Id. at 194.
153. Id. at 200.
154. Id. at 204 (quoting Symposium, The Constitutionality of Copyright Term Extension, 18 CARDOZO ARTS & ENT. L.J. 651, 694 (2000) (Prof. Miller)).
155. Id. at 204-205. See also U.S. CONST. art. I, § 8, cl. 8.
156. Eldred, 537 U.S. at 205-07.
157. Id. at 205-06. See H.R. Rep. No. 105-452, at 4 (1998). See also Eldred, 239 F.3d at 373-74. Other rationales for extending protection put forth were: providing an incentive for holders of existing copyrights to restore older works and pass them to the public; giving authors additional compensation so they can pass it on to their ancestors; and providing an additional incentive for authors to create new works. See S. Rep. No. 104-315, at 3 (1998). See also H.R. Rep. No. 105-452, at 4 (1998). Congress clearly believes that as long as the CTEA has some effect it is in accord with the Framer's intent. See S. Rep. No. 104-315, at 3 (1998).
the United States.'"\textsuperscript{158} Third, "longer terms would encourage copyright
holders to invest in the restoration and public distribution of their
works."\textsuperscript{159}

The Court then disposed of petitioners' claims that the CTEA fails to
 promote progress as imagined by the Framers, and that it ignores the
 implicit quid pro quo of the Copyright Clause. The majority
acknowledged Supreme Court precedent that labeled the Copyright
Clause as "'both a grant of power and a limitation,'" and acknowledged
that "'the primary objective of copyright' is to 'promote the progress of
science.'"\textsuperscript{160} However, the majority, like the lower courts, fell back on the
concept that "'[i]t is not our role to alter the delicate balance Congress
has labored to achieve.'"\textsuperscript{161} The majority then dismissed petitioners'
bargained-for exchange argument on the grounds that when an author or
inventor copyrights his work, he contemplates that the copyright offered
him, "a copyright not only for the time in place when protection is
gained, but also for any renewal or extension legislated during that
time.'"\textsuperscript{162} In conclusion, the majority asserted, "we are not at liberty to
second-guess congressional determinations and policy judgments of this
order, however debatable or arguably unwise they may be.'"\textsuperscript{163}

6. Justice Stevens' Dissent

In his dissent, Justice Stevens, expressed his thoughts on the Copyright
Clause:

Neither the purpose of encouraging new inventions nor the
overriding interest in advancing progress by adding knowledge
to the public domain is served by retrospectively increasing the
inventor's compensation for a completed invention and
frustrating the legitimate expectations of members of the public
who want to make use of it in a free market. Because those
twin purposes provide the only avenue for congressional action
under the Copyright/Patent Clause of the Constitution, any
other action is manifestly unconstitutional.'\textsuperscript{164}

\textsuperscript{158} Eldred, 537 U.S. at 206 (emphasis added).
\textsuperscript{159} Id. at 207.
\textsuperscript{160} Id. at 212 (quoting Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 5
\textsuperscript{161} Id. at 784-85 (quoting also Sony Corp. of Am. v. Universal City Studios, Inc., 464
U.S. 417, 429 (1984)).
\textsuperscript{162} Id. at 215.
\textsuperscript{163} Id. at 208 (emphasis added).
\textsuperscript{164} Id. at 226-27 (Stevens, J., dissenting).
In assuming a contractarian approach, Stevens stated that “[i]t would be manifestly unfair if, after issuing a patent, the Government as a representative of the public sought to modify the bargain by shortening the term of the patent in order to accelerate public access to the invention.” Stevens further asserted that considerations of fairness implicit within constitutional protections prohibiting ex post facto laws and laws impairing obligations of contracts bar Congress from interfering with a bargained-for exchange without providing compensation for the taking. Justice Stevens relied strongly on Sears, Roebuck & Co. v. Stiffel Co. for the premise that a state cannot “extend the life of a patent beyond its expiration date,” and thus neither can Congress.

Justice Stevens found none of the government’s arguments persuasive. First, he rejected the government’s argument that the first Copyright Act of 1790 was a retrospective extension. Justice Stevens stated that the first Copyright Act did not extend pre-existing copyrights, but created a new federal right that supplanted the diverse and inconsistent state rights that previously existed. Justice Stevens then

165. Id. at 226 (Stevens, J., dissenting).

166. Id. (Stevens, J., dissenting) (arguing that these fundamental considerations should protect members of the public who have anticipated receiving these creations to build upon as they see fit, but will not be able to because of the “retroactive modification of the bargain that extends the term of the patent monopoly”).

167. Id. at 222 (Stevens, J., dissenting) (quoting Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 (1964)). Stevens countered the majority’s contention that the Sears case applied primarily to the preemptive effect of congressional statutes. Id. at 226 n.3. He argued that Sears, along with Graham v. John Deere Co. of Kansas City, 383 U.S. 1 (1966), and Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989), “also relied on the pre-emptive effect of the constitutional provision.” Id. Stevens concluded by pointing out that the Framers recognized that the Constitution itself imposed a limit on Congress’ use of the Copyright Clause. See id. at 230 n.6 (discussing 13 PAPERS OF JAMES MADISON 128 (C. Hobson & R. Rutland, eds., 1981) (reprinting letter to Tench Coxe (Mar. 28, 1790) (“Congress seems to be tied down to the single mode of encouraging inventions by granting the exclusive benefit of them for a limited time, and therefore to have no more power to give a further encouragement out of a fund of land than a fund of money. This fetter on the National Legislature tho’ an unfortunate one, was a deliberate one.”)). This statement by Madison clearly acknowledges dual limitations in Congress’ use of the copyright power: Congress is limited in the length of protection it may grant, and is also limited to granting protection for the sole purpose of encouraging invention. See Eldred, 537 U.S. at 229-30 (Stevens, J., dissenting).

168. Eldred, 537 U.S. at 228 (Stevens, J., dissenting).

169. Id. at 231-32 (Stevens, J., dissenting).

170. Id. (Stevens, J., dissenting) (stating “[t]hat Congress exercised its unquestionable constitutional authority to create a new federal system securing rights for authors and inventors in 1790 does not provide support for the proposition that Congress can extend pre-existing federal protections retroactively”). In addition, Stevens points out that “even this first act required a quid pro quo in order to receive federal copyright protection.” Id. at 231 n.7. The author was first required to register the work in a federal district court, which would act to place the design of the invention on record, so that once the limited
addressed the government's reliance on previous extensions.171 Emphatically, Stevens stated that Congress' use of retroactive extensions does not result in the constitutionality of the CTEA.172 Justice Stevens argued that the Supreme Court's decision in INS v. Chadha demonstrates that simply because "Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify [the Court's duty] to invalidate an unconstitutional practice when it is finally challenged in an appropriate case."173 Stevens stated that "[r]egardless of the effect of unconstitutional enactments of Congress, the scope of the constitutional power of Congress . . . is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."174 Stevens propounded his argument by adding, "no one acquires a vested or protected right in violation of the Constitution by long use, even when the span of time covers our entire national existence."175

In response to the Government's third argument, that the CTEA provides incentives to restore old movies, Justice Stevens highlighted three reasons why the interest in preserving perishable copies of ancient copyrighted works did not justify a blanket extension of existing copyrights.176 First, the restoration or preservation of old works does not promote any new works, and any original expression occurring in the restoration process would receive new copyright protection.177 Second, the justification for restoring these works applies equally to works that have already entered the public domain, and "no one seriously contends that the Copyright/Patent Clause would authorize the grant of monopoly privileges for works already in the public domain solely to encourage their restoration."178 Finally, Justice Stevens contended that even if concern for aging movies allowed congressional protection, "the remedy term expired the public would be able to exploit the creation. See id. "This registration requirement in federal district court—a requirement obviously not required under the various state laws protecting written works" evidences that the government received something for the protection granted, unlike under the CTEA. See id.

171. Id. at 233-34 (Stevens, J., dissenting). The government claimed to find support in later congressional extensions. Id.

172. Id. at 239 (Stevens, J., dissenting).

173. Id. at 235 (Stevens, J., dissenting). In INS v. Chadha, the Supreme Court invalidated legislation despite Justice White's strong dissent whereby he claimed that the majority's decision "sounded the 'death knell for nearly 200 other statutory provisions.'" Id. (quoting INS v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting).


175. Id. at 236 (Stevens, J., dissenting) (quoting Waltz v. Tax Comm'n of City of New York, 397 U.S. 664, 678 (1970)).

176. Id. at 239 (Stevens, J., dissenting).

177. Id. (Stevens, J., dissenting).

178. Id. at 239-40 (Stevens, J., dissenting).
offered—a blanket extension of all copyrights—simply bears no relationship to the alleged harm.”

As its final argument, the government posited that when Congress provides a longer term to encourage new authors to create, as a matter of equity, it should also provide the same reward to all owners of unexpired copyrights. In response, Justice Stevens stated that “ex post facto extensions of existing copyrights, unsupported by any consideration of the public interest, frustrate the central purpose of the [Copyright] Clause.” Justice Stevens concluded his dissent by attacking the majority’s claim that actions under the Copyright/Patent Clause are judicially unreviewable by quoting Chief Justice John Marshall: “[I]t is emphatically the province and duty of the judicial department to say what the law is.”

7. Justice Breyer’s Dissent

Agreeing with Justice Stevens, Justice Breyer noted serious defects in the CTEA. As the longest blanket extension for copyrights in the history of the nation, Breyer argued that the economic effect of the CTEA is to make the copyright term “virtually perpetual.” Its practical effect “is not to promote, but to inhibit, the progress of [s]cience.”

Whereas Justice Stevens’ dissent focused more on congressional authority to extend the duration of existing copyrights, Breyer asserted that the CTEA failed rational basis scrutiny because the CTEA involves regulation of expression rather than economic regulation. Breyer asserted that the statute lacks rational support because: “(1) . . . the significant benefits that [the CTEA] bestows are private, not public; (2) . . . [the CTEA] threatens seriously to undermine the expressive values

179. Id. at 240 (Stevens, J., dissenting).
180. Id. (Stevens, J., dissenting).
181. Id. at 241 (Stevens, J., dissenting). Justice Stevens, armed with the bargained-for exchange concept, contended that to support the government’s argument would require indulging “two untenable assumptions.” Id. First, “that the public interest in free access to copyrighted works is entirely worthless,” and second, that as a class, authors and inventors should receive a windfall based solely on a completed activity. Id.
182. Id. at 242 (Stevens, J., dissenting) (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)).
183. Id. at 242-43 (Breyer, J., dissenting).
184. Id. at 243 (Breyer, J., dissenting).
185. Id. (Breyer, J., dissenting) (stating that the Framers’ use of the word “Science” equally meant “learning or knowledge”). Id.
186. Id. at 244. (Breyer, J., dissenting). Breyer stated that although leniency is extended to economic regulation, this regulation restricts expression, and the United States is a nation “constitutionally dedicated to the free dissemination of speech, information, learning, and culture.” Id.
that the Copyright Clause embodies; and (3) . . . it cannot find
justification in any significant Copyright Clause related objective." 187
Therefore, Breyer stated that "Congress' [sic] 'choice is clearly
wrong.'" 188

In Breyer's first argument, he demonstrated that the CTEA will
effectively affect the public by preventing it from using many works, and
by causing it to pay several billion dollars in extra royalties to copyright
holders. 189 Breyer argued that the CTEA was not benefiting the public as
required, but simply acting to "impede the harvest of knowledge." 190

In Breyer's second argument he asserted that the justifications for the
CTEA were not in accord with the text of the Copyright Clause. 191 First,
the traditional economic rationale for copyright protection did not apply
to the CTEA because "[t]he extension will not act as an economic spur
by encouraging authors to create new works." 192 Second, Breyer
criticized the majority's reliance on the harmonization rationale put
forth by Congress, asserting that the CTEA did not create a uniform
American-European term in two out of three regards. 193 Third, Breyer
disputed the claim that the CTEA provided incentives to publishers and
filmmakers to republish and redistribute older copyrighted works. 194
Justice Breyer noted the inconsistency of this rationale with the
Copyright Clause because the Clause assumed an initial grant of
monopoly, designed to motivate authors to create, followed by the
termination of that monopoly in order to promote the dissemination of

187. Id. at 245 (Breyer, J., dissenting).
188. Id. (Breyer, J., dissenting) (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)).
189. Id. at 248-49 (Breyer, J., dissenting).
190. Id. at 246 (Breyer, J., dissenting) (quoting Harper & Row, Publ's, Inc. v. Nation
Enter., 471 U.S. 539, 545 (1985)). Increasing the term of copyright protection does not
benefit the majority of the public as evidenced by United Airlines charging its customers
higher airfares as a result of the payments it must pay to play George Gershwin's 1924
classic Rhapsody in Blue on its flights. Id. at 248. Had this song entered the public
domain, airfare on United Airlines would be lower. See id.
191. Id. at 254 (Breyer, J., dissenting).
192. Id. (Breyer, J., dissenting). Breyer stated, "No potential author can reasonably
believe that he has more than a tiny chance of writing a classic that will survive
commercially long enough for the copyright extension to matter." Id. Justice Breyer
furthered his argument by illustrating the fact that "after 55 to 75 years, only 0.2% of all
copyrights retain commercial value," so the percentage after seventy-five years must be
even smaller. Id. From a rational economic perspective, the "present extension will
produce a copyright period of protection that, even under conservative assumptions, is
worth more than 99.8% of protection in perpetuity." Id. at 55-56. Breyer contended that
this result is in conflict with the Constitution's requirement of "limited" protection. Id. at
236.
193. Id. at 257 (Breyer, J., dissenting).
194. Id. at 260 (Breyer, J., dissenting).
the previously created works. The Copyright Clause assumes that "it is the disappearance of the monopoly grant, not its perpetuation, that will, on balance, promote the dissemination of works already in existence." Furthermore, Justice Breyer asserted that the problem with Congress' view, as demonstrated above, was that there would never be a stopping point.

Justice Breyer dismissed Congress' rationale that the CTEA "ensure[s] adequate copyright protection for American works in foreign nations" and has "economic benefits of a healthy surplus balance of trade." Breyer acknowledged that Congress had enacted legislation to suppress competition abroad, however, he asserted that such legislation was enacted pursuant to the Commerce Clause.

Finally, Justice Breyer condemned the majority's reliance on possible demographic, technological and economic changes which would justify the CTEA. Breyer stated that demographic changes seemed to argue against the CTEA. Furthermore, economic changes were remedied by the 1976 Copyright Act, which extended copyright terms beyond the life of the author, thus guaranteeing that longer life spans were accounted for in copyright grants. Finally, in response to the majority's argument that adults are having children later in life based on technological changes as a justification for the CTEA, Breyer asserted that that fact did not justify providing protection seventy years past the author's death. Breyer stated that "[t]here is no legitimate, serious copyright-related justification for this statute."

195. Id. (Breyer, J., dissenting).
196. Id. (Breyer, J., dissenting) (emphasis in original)
197. See id. at 261 (Breyer, J., dissenting). "The copyright term is limited to avoid 'permanently depriv[ing] the public of 'the fruits of an artist's labors,'" which the CTEA does not ensure. Id. (Breyer, J., dissenting) (quoting Stewart v. Abend, 495 U.S. 207, 228 (1990)).
198. Id. at 262 (Breyer, J., dissenting).
199. Id. at 262-63 (Breyer, J., dissenting) ("I can find nothing in the Copyright Clause that would authorize Congress to enhance the copyright grant's monopoly power, likely leading to higher prices both at home and abroad, solely in order to produce higher foreign earnings. That objective is not a copyright objective.").
200. Id. at 263 (Breyer, J., dissenting) (interpreting the majority's demographic, economic and technological concerns as meaning that because "today people communicate with the help of modern technology, live longer, and have children at a later age," copyright protection should be lengthened).
201. Id. at 263 (Breyer, J., dissenting).
202. Id. (Breyer, J., dissenting). In addition, the CTEA extends protection by twenty years even though the Department of Health and Human Services reported a four-year increase in expected lifespans between 1976 and 1998. Id.
203. Id. (Breyer, J., dissenting).
204. Id. (Breyer, J., dissenting).
After dispensing with each of the majority's arguments, Justice Breyer addressed the majority's concern that Congress should possess broad discretion in exercising its Copyright power. Although sharing the majority's concern, Breyer stated that finding the CTEA unconstitutional would not intrude upon congressional authority because: (1) the CTEA was not in accord with Copyright Clause objectives; (2) the justifications were totally implausible; (3) and the CTEA failed to provide the international uniformity it espoused. Breyer acknowledged the difficulty in drawing bright lines but explained that the majority could easily decide "that this particular statute simply goes too far."

II. CONGRESS COPYRIGHT POWER IS LIMITED

"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the [C]onstitution is written."
A. The Lower Courts Erred by Relying Upon Unrelated Cases

In finding the CTEA constitutional, the lower courts erred in relying upon several cases that had little similarity to the present controversy. The cases the lower courts cited did not involve a party challenging Congress' authority under the Copyright Clause as in *Eldred*. *Sony* involved copyright infringement, *Pennock* and *McClurg* involved patent infringement, and *Schnapper* dealt with government sponsored copyrights. In addition, the cases the lower courts relied on were taken out of context and applied to a different type of case—one of first impression. Random sentences were extracted from these cases in support of the proposition that Congress can act without restraint in exercising its copyright power, as long as it does not permanently extend copyright protection. After reading these cases, it becomes evident that the lower courts erred in their interpretations of the law.


The district court in *Eldred* relied upon the Supreme Court's statement in *Sony* explaining that "Congress defines the scope of the grant of copyrights," as giving Congress unlimited authority with respect to

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211. See Petitioner's Brief at 11, *Eldred* (No. 01-618). "This Court has never been called upon to interpret the meaning of “limited Times.”* Id.

212. *Eldred*, 74 F. Supp. 2d at 3 n.7. ("Within the discretion of Congress, any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time.").

213. See Petitioner's Brief at 12, *Eldred* (No. 01-618) (citing a string of Supreme Court cases that recognized explicit limits in the use of the copyright power). No other clause in Article I, § 8 has such a long history of the Supreme Court acknowledging substantive restraints on Congress' use of this power. *Id.* (citing *Wheaton v. Peters*, 33 U.S. 591 (1834) (rejecting common law copyright); *Trade-Mark Cases*, 100 U.S. 82 (1879) (holding trademark law unsupported by Copyright Clause power); *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (describing the Copyright Clause as "both a grant of power and a limitation"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (rejecting state law which added patent-type protection); *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (holding "originality" is a constitutional requirement).

214. *Eldred v. Reno*, 74 F. Supp. 2d 1, 3 (D.D.C. 1999). This quote comes directly from the *Eldred* court's text. *Id.* The court extracted one statement from each of the four cases cited to reach its determination. *Id.* Each heading in this section is one of the sentences relied on by the *Eldred* court.
copyright protection.\textsuperscript{215} In that case, however, the Supreme Court simply articulated that Congress has some flexibility in promoting the progress of science and the arts.\textsuperscript{216} The case did not hold, as the \textit{Eldred} court implied, that Congress has unlimited authority to do as it perceives necessary.\textsuperscript{217} Only within defined limits may Congress grant copyright protection.\textsuperscript{218}

The district court omitted a limitation on copyright protection acknowledged by the Court in \textit{Sony}.\textsuperscript{219} The \textit{Sony} Court stated that the copyright power is not unlimited and that the purpose of offering a limited grant is to motivate authors and inventors by providing a special reward.\textsuperscript{213} In addition, the Court noted that the protection afforded is second to the ultimate goal of public access to the works.\textsuperscript{221} The district court erroneously interpreted \textit{Sony}. A proper reading of \textit{Sony} acknowledges that the sole concern was for the public to receive the works.\textsuperscript{222} Retrospective extensions do not achieve this goal; therefore, neither does the CTEA.\textsuperscript{223}


The district court's second flaw was its misinterpretation of \textit{Pennock \& Sellers v. Dialogue}\textsuperscript{225}—a patent infringement case involving private

\textsuperscript{215} \textit{Eldred}, 74 F. Supp. 2d at 3. See \textit{Sony}, 464 U.S. at 429 (stating that "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product").

\textsuperscript{216} \textit{Sony}, 464 U.S. at 429.

\textsuperscript{217} \textit{Id}.

\textsuperscript{218} See \textit{U.S. CONST.} art. I, § 8, cl. 8. The Copyright Clause is not a far-reaching power. It can be used to "promote the [p]rogress of [s]cience and useful [a]rts," nothing less, nothing more. \textit{Id}.

\textsuperscript{219} See \textit{Sony}, 464 U.S. at 429.

\textsuperscript{220} \textit{Id}.

\textsuperscript{221} \textit{Id}. (emphasis added) (quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948)). The Court stated, "'[t]he sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie[s] in the general benefits derived by the public from the labors of authors.'" \textit{Sony}, 464 U.S. at 432 (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (noting that the immediate effect of copyright law is to secure a fair return for the artists' work, but the ultimate aim is to stimulate creativity for the greater public good).

\textsuperscript{222} \textit{Sony}, 464 U.S. at 432.

\textsuperscript{223} See \textit{Eldred v. Reno}, 239 F.3d 372, 381 (D.C. Cir. 2001) (Sentelle, J., dissenting) (stating that the CTEA does not comply with the Copyright Clause).


parties—as giving Congress unlimited discretion in its use of the copyright power. However, the Pennock Court, in upholding the first Patent Act of Congress, merely stated that the limited term granted to inventors was subject to the discretion of Congress. Pennock has no bearing on cases involving copyright extensions or claims of congressional abuse of power as in Eldred. Furthermore, the length of protection afforded at that time was "for a term not exceeding fourteen years." Interpreted in this light, Pennock says that Congress has some discretion within the narrow framework of abandoned or dedicated patents with a fixed term not to exceed fourteen years; thus, the findings of Pennock have no direct application to this copyright case, where a constitutional challenge is at issue.

In fact, the Supreme Court denounced the effects of retrospective extensions in Pennock. The Court noted an implicit bargained-for exchange within the Copyright Clause; if an inventor receives protection for something already in public use, that grant is not an exchange, but merely a gift. From the Supreme Court's indication in Pennock, presumably the High Court would not expand its ruling to laws that far exceed the original grant of protection of fourteen years, nor to a law that, by delaying the arrival of new works, essentially acts to remove works from the public's hands.

226. Eldred, 74 F. Supp. 2d at 3; Pennock, 27 U.S. at 1.
227. Pennock, 27 U.S. at 16-17. The Supreme Court upheld the first Patent Act of Congress of 1793, which stated that Congress established the procedure for obtaining a patent, and provided that those decisions were entirely within Congress' discretion. Id. at 17. The Court held that failure to comply with the enunciated procedures bars a claim of patent infringement. Id. Specifically, plaintiff failed to comply with the Patent Act.
228. See Eldred, 74 F. Supp. 2d 1; Pennock 27, U.S. at 1.
229. Pennock, 27 U.S. at 17.
230. See id. at 1. Pennock should not have been applied to constitutional challenges of copyright extensions. In addition, Pennock should serve as support for plaintiff's claim that Congress' copyright power is limited to promoting the progress of science and the useful arts. See U.S. CONST. art. I, § 8, cl. 8.
231. Pennock, 27 U.S. at 23.
232. Id. This type of gift giving is not authorized under the Copyright Clause and violates the premise of an exchange. See id. "There would be no quid pro quo—no price for the exclusive right or monopoly conferred upon the inventor for fourteen years." Id. Although the CTEA does not give protection to works already in public use, the concept remains relevant. By preventing the public from receiving a work due to revert to the public domain within a short amount of time, the CTEA essentially takes relied-upon works out of public use. Despite the district court's determination, Pennock should serve as support for the plaintiff's argument because the Court clearly recognized a bargained-for exchange implicit within the Copyright Clause, and the CTEA does not support that rationale. Id. The Pennock Court stated that "[i]f the public were already in possession and common use of an invention fairly and without fraud, there might be sound reason for presuming, that the legislature did not intend to grant an exclusive right to any one to monopolize that which was already common." Id.

In McClurg v. Kingsland,233 the Supreme Court noted that in the confined area of patent infringement, retrospective laws are permitted.234 However, the Eldred Court interpreted this to mean that Congress has the power to enact retrospective extensions under the Copyright Clause regardless of the purpose of the law or its effect.235 The McClurg Court also stated that objections to retrospective laws cannot be based solely on their retrospective operation, unless in application they act to take property rights away from those who own or expect to be able to use them.236 The CTEA does just that. Its sole effect removes literary expression from the public domain by delaying its arrival for at least twenty years; thus, the CTEA’s retrospective application is invalid even under McClurg.237 This serves as another example of how the lower courts have dissected cases for support, but have taken the holdings out of context.238


The lower courts, relying on Schnapper v. Foley,240 found that “[t]he introductory language of the copyright clause does not limit this

234. Id. at 206. Although retrospective laws were mentioned in McClurg, the Court never stated that Congress has the power to enact retrospective copyright extensions. Id.
235. Eldred v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999), aff’d 239 F.3d (D.C. Cir. 2001), aff’d sub nom. Eldred v. Ashcroft, 537 U.S. 186 (2003) (“Congress has authority to enact retrospective laws under the copyright clause.”). The district court cited to McClurg in making this statement, however, McClurg did not make that assertion. McClurg, 42 U.S. (1 How) at 206. McClurg stated that Congress has the power to enact retrospective patent laws. Id. The Copyright Clause was never mentioned nor was any reference made to copyright extensions. Id. The Supreme Court’s assertion in McClurg was made in a dissimilar context from Eldred, but the district court nonetheless relied on it. Eldred, 74 F. Supp. 2d at 3.
236. McClurg, 42 U.S. (1 How.) at 206. In this case, the Supreme Court referred to Congress’ ability to authorize the issuance of a new patent if the first one was “invalid by accident, inadvertence, or mistake, and without any fraudulent intent.” Id. at 207.
237. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998). Ultimately, there is no concrete difference between preventing the public from receiving something to which it is entitled, or taking something away from the public after it has received it.
238. See Eldred, 74 F. Supp. 2d at 3; see also Eldred v. Reno, 239 F.3d 372, 380 (D.C. Cir. 2001).
239. Eldred, 74 F. Supp. 2d at 3 n.6 (quoting Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981)). The district court extracted this sentence from Schnapper, finding the CTEA constitutional. Id.
[copyright] power." In *Schnapper*, the court addressed how copyright law applies to government-created works. As argued by Judge Sentelle, *Schnapper* only applies to works commissioned by the U.S. Government, if at all. Under this interpretation, *Schnapper* does not apply in the instant matter.

**B. Judge Sentelle's Dissent Correctly Asserted That an Unconstitutional Law in Disguise Is Still Unconstitutional**

In his dissent, Judge Sentelle disputed the majority's statement that "if Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause." He argued that allowing Congress an unlimited ability to extend limited protection produced the same result as giving Congress the authority to bestow permanent protection. Sentelle, commenting on the majority's conception of the "limited Times" provision, stated "[t]his, in my view, exceeds the proper understanding of enumerated powers reflected in the *Lopez* principle of requiring some definable stopping point." Permanent extension accomplished in any manner is unconstitutional because it defies and exceeds the understanding of the "limited Times" provision. The Supreme Court recognized this principle in *Sony*;

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241. *Eldred*, 74 F.Supp. 2d at 3 n.6 (citing *Schnapper* v. *Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981); see also *Eldred* v. *Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001). If there are no limits to Congress' power, then why is the "limited Times" provision present in the Copyright Clause? *U.S. CONST.* art. I, § 8, cl. 8. It would have been much simpler for the Framers to state that Congress has broad authority to encourage literary and scientific expression, but that is not what the Framers did. After much deliberation, Congress skillfully placed limitations on the use of the copyright power. See *Fenning*, *supra* note 33, at 112-13 (explaining the historical rationale for Congress' self-imposed limitations on the copyright power). The Framers limited the scope of the copyright power by: setting a specific length of time it may grant exclusive rights to authors and inventors, and requiring the work to seek protection, and to promote the progress of the sciences and arts. Brief for Petitioner at 15-17, *Eldred* v. *Ashcroft*, 534 U.S. 1126 (2002) (No. 01-618). These stringent limitations prevent Congress from granting state-backed monopolies or from using the copyright power as a broad, far-reaching power. *Id.*


243. *Id.*

244. *Id.* at 383.

245. *Id.* at 377.

246. *Id.* at 382 (Sentelle, J., dissenting) (stating that if Congress "can extend the protection of an existing work from 100 years to 120 years, [it] can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300; and in effect can accomplish precisely what the majority admits it cannot do directly").

247. See *U.S. CONST.* art. I, § 8, cl. 8.

248. *Eldred*, 239 F.3d at 377. The majority acknowledges that permanent protection is unconstitutional. *Id.* It makes no legal difference whether an author receives protection forever through a string of acts or through one act. See *id.* at 382.
"Copyright protection is not perpetual, the number of works in the public domain necessarily increases each year."²⁴⁹ However, works will not, and cannot, increase in the public domain through the use of retrospective extensions.²⁵⁰

The majority in Eldred accepted that the Constitution limits congressional copyright power.²⁵¹ Thus, an act of Congress granting a permanent term of copyright protection would presumably be held unconstitutional.²⁵² Clearly, Congress knows that the term "limited" is ambiguous in nature, and thus susceptible to exploitation.²⁵³ However, prior to its decision in Eldred, the Supreme Court had a long history of digging below the surface of statutory language and discovering the ultimate purpose behind a piece of legislation.²⁵⁴ In U.S. v. Lopez,²⁵⁵ the


²⁵⁰. The Framers hoped that Congress would adopt a rational measure of protection that would sufficiently encourage creativity and innovation. See Fenning, supra note 33, at 113. After much deliberation, the "limited Times" provision was included. Id. In 1790, the first Congress limited copyright protection to fourteen years, once renewable. Act of May 31, 1790, ch. 15, 1 Stat. 124. This first act of Congress should be viewed as the end-all term for copyright protection because had the Framers wanted terms to be longer, the First Congress would have done so. It is difficult to imagine that the Framers ever intended for copyright protection to be extended beyond the initial term. Extensions are not mentioned in the Copyright Clause. See U.S. CONST. art. I, § 8, cl. 8. See also Eldred, 239 F.3d at 382 (Sentelle, J., dissenting) (asserting that the Framers never imagined permanent protection, either through one stroke of the pen or through unlimited incremental extensions). Sentelle further stated that Congress was merely given the power to promote the arts, and their authority to give protection is only a pretext for the accomplishment of that power. Id. Why would the Framers spend so much time deliberating over the length of time to be granted if that time could be doubled, tripled or permanently extended over a series of extensions?

²⁵¹. Eldred, 239 F.3d at 377.

²⁵². See id. Congress is limited to promoting the progress of the sciences and useful arts, and because of the "limited Times" provision, Congress cannot grant permanent protection. See U.S. CONST. art. I, § 8, cl. 8. It is unlikely that any act of Congress would overtly ignore express limitations. For that reason, it is crucial that the courts take more than a quick look and find the true intent and effects of a law.

²⁵³. This is primarily the reason why the CTEA has not been deemed unconstitutional. However, this may soon change.

²⁵⁴. See United States v. Lopez, 514 U.S. 549 (1995); see U.S. v. Morrison, 529 U.S. 598 (2000) (holding that Congress does not have the power to regulate gender-motivated violence under the Commerce Clause); Printz v. U.S., 521 U.S. 898 (1997) (holding that Congress' Commerce Power does not provide the authority to compel the states to enact a federal regulatory program, and Congress cannot circumvent that restriction by ordering the State's officers directly); New York v. U.S., 505 U.S. 144 (1992) (holding that Congress may not, pursuant to its Commerce Power, commandeer state governments by requiring them to regulate according to federal guidelines). These prior cases exemplify the limitations of Congress' power as established by the Supreme Court. The lower courts in Eldred could just as easily have relied on these Commerce Clause cases in finding for the plaintiffs, but instead chose to find for the government. See Eldred v. Reno, 74 F. Supp.
Supreme Court recognized limits on Congress' use of the Commerce Clause. Once the Supreme Court established a limit on Congress' Commerce Clause power, Congress and the lower courts knew the constitutional scope of Commerce Clause legislation. Both Congress and the courts need this type of guidance when evaluating Copyright Clause legislation.

C. The Supreme Court's Decision in Eldred: Justice Stevens' Dissent Recognized that the Majority Missed its Chance to Set Limits

The majority of the Supreme Court missed its opportunity to define "limited Times," and thus draw a bright line to prevent this issue from resurfacing in another twenty years. Instead, the Court opted to use their rubber stamp, to permit Congress to interpret Article I, section 8, clause 8 of the Constitution as Congress sees fit. The majority's decision appears short-sighted because it presents an opportunity for Congress to repeatedly grant extensions to a point that will destroy creativity. With an ambiguous definition of "limited Times," the scope of copyright law will haunt future generations. As petitioners conceded, there was never a question of whether this practice existed; the relevant question was whether the Supreme Court would resolve it, or at least define a stopping point.

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255. 514 U.S. 549 (1995). The Supreme Court invalidated the Gun Free School Zones Act of 1990, which made carrying a gun in a school zone a federal offense. Id. at 551
256. Id. at 558-59. The court determined that Congress' power is limited to activities that implicate: (1) channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities having a substantial relationship to interstate commerce. Id.
257. See U.S. CONST. art. I, § 8, cl. 8; see also Eldred v. Ashcroft, 123 S.Ct. 769 (2003).
258. See Eldred v. Ashcroft, 537 U.S. 186, 241-42 (2003) (Stevens, J., dissenting) (recognizing the need for a "categorical rule" prohibiting retrospective extensions). Stevens stated, "unless the [Copyright] Clause is construed to embody such a categorical rule, Congress may extend existing monopoly privileges ad infinitum under the majority's analysis." Id. at 242. From Stevens' statements, it is evident that without a defined limit or stopping point, Congress has no explicit limit on its ability to extend protection until informed otherwise. See id.
260. See Brief for Petitioners at 9, Eldred v. Ashcroft, 534 U.S. 1126 (2002) (No. 01-618) (stating that this case is about "one important limit on the legislature's power that Congress has clearly 'forgotten' "). The Petitioners further stated, "Congress has now found a way to evade this constitutional restraint. Rather than granting authors a fixed . . . term of copyright, Congress has repeatedly extended the terms of existing copyrights—eleven times in the past forty years." Id. at 10.
The majority of the Supreme Court opted against a careful analysis of the Copyright Clause, as urged by petitioners.\footnote{261} The majority took the road traveled by the lower courts, rather than create its own path with which they could guide Congress.\footnote{262} In supporting the lower courts' findings, the majority also determined that the first Copyright Act of 1790 was a retrospective extension.\footnote{263} However, as Judge Sentelle and Justice Stevens stated in their respective dissents, the first Copyright Act of 1790 created a new federal copyright that replaced existing state copyrights; it did not extend existing copyrights, as claimed by the majority.\footnote{264} In propelling this myth, the majority failed to offer any rationale of how the Framers could have established federal recognition of copyrights without supplanting the existing state copyrights.\footnote{265} As support for its conclusion, the majority added that Congress has historically enacted retroactive copyright legislation.\footnote{266} However, the fact that Congress has consistently violated the Constitution does not mean it may continue to do so.\footnote{267} As the court of last resort, the Supreme Court has a duty to strike down legislation that is unconstitutional.\footnote{268}

\footnote{261. See Eldred v. Ashcroft, 537 U.S. 186, 207-08 (2003). The majority declined to scrutinize the CTEA, stating, "we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be." Id. at 208.}

\footnote{262. Id. at 212-13. The majority of the Supreme Court mirrored the majority of the court of appeals, stating that it is not the Court's role to decide Congress' role under the Copyright Clause. See id.; see also Eldred v. Reno, 239 F.3d 372, 380 (D.C. Cir. 2001).

\footnote{263. See Eldred, 537 U.S. at 196; see also Eldred, 239 F.3d at 374.}

\footnote{264. See Eldred, 239 F.3d at 384 (Sentelle, J., dissenting); see also Eldred, 537 U.S. at 231 (Stevens, J., dissenting).

\footnote{265. See Eldred, 537 U.S. 1126 n.3 (acknowledging the dispute over whether the Act of 1790 should be distinguished from later acts, but stating that "[w]ithout resolving that dispute, we underscore that the First Congress clearly did confer copyright protection on works that had already been created.").}

\footnote{266. See id. at 200-01.

\footnote{267. Id. at 235 (Stevens, J., dissenting) (stating that notwithstanding the fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution, the Court's duty to invalidate a unconstitutional practice remains).

\footnote{268. See Brief for Petitioner at 18-19, Eldred v. Ashcroft, 534 U.S. 1126 (2002) (No. 01-618) (stating that the Supreme Court should find the CTEA unconstitutional as it did with Commerce Clause legislation in Lopez and Morrison); see also United States v. Lopez, 514 U.S. 549, 556-57 (1995); United States v. Morrison, 529 U.S. 598, 610 (2000). The Supreme Court could have drafted a non-retroactive ruling, thereby pacifying concerns that previous congressional extensions were unconstitutional. Justice Breyer expressed his concern that a ruling against the CTEA could affect previous copyright extensions. Eldred, 534 U.S. at 265. "The chaos that would ensue would be horrendous." See also Andy Sullivan, Mickey Mouse Copyright Case Hits U.S. Supreme Court, http://mail.gnu.org/archive/html/dmca-activists/2002-10/msg00016.html, (Oct. 9, 2002). O'Connor stated, "I can find a lot of fault with what Congress did here, because it takes a lot of things out of the public domain. 'It's longer than one would think desirable, but is it..."}
High Court avoids taking a stand, as it did here, Congress wins at the expense of the public.

After laying such an unsupported foundation, the majority stated that regardless of any constitutional limits, fairness and equity must dictate the result.\textsuperscript{269} Therefore, the majority premised, yesterday's author should not receive less protection than tomorrow's author, simply because Congress decided to lengthen protection today.\textsuperscript{270} However, there are problems associated with retroactively extending the length of protection previously granted to authors.\textsuperscript{271} One problem arises because an author entered into a contractual agreement with the public whereby he was granted a limited period of protection, and in exchange, the public received a future interest in his creation.\textsuperscript{272} By extending his protection,
Congress has authorized the author to breach that contract with the public. Justice Stevens argued that it is "manifestly unfair" for Congress to alter an agreement in favor of one party after the other party has relied upon it to their detriment. The Supreme Court should have limited Congress' ability to alter the terms of its contract.

An additional problem with the majority's finding is that it violates the quid pro quo inherent in the Copyright Clause. It gives the author additional protection, but the public receives nothing in exchange. By the majority's reasoning, the public may be disadvantaged as long as the author receives the prevailing term of protection. Justice Stevens stated that in order for the majority's theory to be accepted, two untenable assumptions must be made. First, "that the public interest in free access to copyrighted works is entirely worthless," and second, as a class, authors and inventors "should receive a windfall solely based on completed creative activity." Despite the majority's willingness to make these assumptions, the public, as a party to this contract, is not.

In finding that the CTEA is rationally related to the purpose of the Copyright Clause, the majority acknowledged that the primary purpose of the CTEA is "to ensure that American authors would receive the same copyright protection in Europe as their European counterparts." As a secondary consideration, the majority noted that the CTEA "may also provide greater incentive for American and other authors to create"

273. See id. at 225 (stating that the obligation of contracts should prevent Congress, or anyone, from altering an agreement without providing compensation for the taking).

274. Id.

275. See Andy Sullivan, Mickey Mouse Copyright Case Hits U.S. Supreme Court, http://mail.gnu.org/archive/html/dmca-activists/2002-10/msg00016.html (Oct. 9, 2002). During the Supreme Court arguments for this case, Justice Scalia, a member of the majority, seemed to have trouble stomaching retrospective extensions. Id. "Justice Antonin Scalia questioned why Congress needed to include existing works when it decided to [extend] copyright laws." Id. Scalia asked how granting an additional twenty years of protection to works already created encouraged artists to produce new work. Id. Scalia further asked, "Why is it inequitable if they get what they're entitled to at the time they make the work?". This demonstrates that members of the Supreme Court agreed that retrospective extensions are not in accord with the Copyright Clause.

276. See U.S. Const. art. I, § 8, cl. 8. See also Eldred, 537 U.S. at 231 n.7 (Stevens, J., dissenting) (acknowledging the existence of a quid pro quo in the Copyright Clause).


278. See Eldred, 537 U.S. at 204. The obvious problem with this is that the public receives nothing in exchange for the gift given to the author or copyright holder.

279. See id. at 241 (Stevens, J., dissenting).

280. Id.

281. Id. at 205-06 ("The CTEA reflects judgments of a kind Congress typically makes, judgments [the Supreme Court] cannot dismiss as outside the Legislature's domain.").
and restore older works. Although harmonizing protection afforded to authors may seem like a worthy cause under the Necessary and Proper Clause, any act of Congress pursuant to the Copyright Clause must aim to "promote the Progress of Science and useful Arts." Evidently this is not the primary consideration of the CTEA, and it is unlikely that granting authors an additional twenty years of protection will provide any additional incentive, the Act should have been found "manifestly unconstitutional."

Furthermore, the majority supported Congress' finding that the CTEA "[will] encourage copyright holders to invest in the restoration and . . . distribution of [older] works." However, the restoration of an existing work does not promote any new creation or intellectual progress, and any original creation occurring in the restoration process would receive new copyright protection without the CTEA. This further demonstrates the weakness in the majority's justification for the CTEA. For these reasons, the CTEA is not in accord with the Copyright Clause; thus, it is unconstitutional.

The majority conceded that the CTEA may not be wise public policy. Nevertheless, the majority upheld the lower courts' decisions, finding that it is not the role of the Supreme Court to "alter the delicate balance Congress has labored to achieve." Such a holding seems contrary to Chief Justice Marshall's statement in *Marbury v. Madison,* that "[i]t is emphatically the province and duty of the judicial department to say

282. Id. at 206.

283. See U.S. CONST. art. I, § 8, cl. 8; See Eldred, 537 U.S. at 224-25 (Stevens, J., dissenting) (quoting Pennock v. Dialogue, 2 (Pet) 1 (1829)).

284. See Eldred, 537 U.S. at 226-27 (Stevens, J., dissenting). Justice Stevens articulated the basic tenets of the Copyright Clause, stating that any act of Congress pursuant to the Copyright Clause must encourage new inventions by granting limited protection, and as an overriding interest, the act must advance progress by ensuring that these protected works will within a limited time fall into the public domain. Id. at 227. Stevens concluded his argument by stating that neither of these goals are accomplished by retrospectively increasing an inventor's compensation for a completed invention. Id. at 226. If anything, retrospective extensions hamper intellectual progress and creativity because the legitimate expectations of members of the public who want to make use of works scheduled to enter the public domain are frustrated when the works remain protected. Id. at 226-27.

285. Id. at 207.

286. Id. at 239.

287. Id. at 208-14 (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990)).
what the law is.\textsuperscript{288} In deciding to do nothing, the majority allowed Congress to take what it did not possess at the public’s expense.\textsuperscript{289}

\textbf{D. Justice Breyer’s Dissent: A Different Approach}

Justice Breyer correctly stated that the CTEA is not rationally related to a legitimate Copyright Clause interest.\textsuperscript{290} Breyer’s argument is comprised of essentially three findings: (1) the benefits bestowed by the CTEA are private rather than public, contrary to the Framers’ intent; (2) the CTEA “threatens seriously to undermine the expressive values that the Copyright Clause embodies”; and (3) the CTEA does not have any justification in a Copyright Clause-related objective.\textsuperscript{291}

Justice Breyer correctly asserted that the CTEA does little for the public as a whole.\textsuperscript{292} The CTEA blocks the public’s ability to use these copyrighted works and costs the public billions of dollars in royalties.\textsuperscript{293} Breyer then demonstrated that the CTEA is not in accord with the Copyright Clause’s mandated requirement of limited protection.\textsuperscript{294} The effect of the CTEA in \textit{economic terms} thereby grants authors 99.8% of protection in perpetuity—in violation of the Constitution—because less
than 0.2% of copyrighted works retain their commercial value after seventy-five years.

Justice Breyer then countered all the majority’s claims supporting Congress. First, he asserted that the harmonization rationale was a mere fallacy. The CTEA does not harmonize U.S. copyright protection with European protection on two out of three fronts, and even if it did, international harmonization is not a stated goal or consideration of the Copyright Clause. Secondly, in response to Congress’ claims that the CTEA ensures equal protection for American authors in Europe, and has positive balance of trade affects, Breyer asserted that these were not valid reasons for justifying an act of Congress under the Copyright Clause. The problems associated with permitting the use of the Copyright Clause or any power of Congress for unintended purposes is obvious. If permitted, there will never be a definable stopping point, thus the measurable effects will be that the copyright power will transform into an all-purpose power, in conflict with the Constitution. If it is so obvious that “there is no legitimate, serious copyright-related justification for this statute,” as stated by Justice Breyer, then why did the majority uphold the CTEA? The Court’s holding indicated a position not to vere from traditional precedent; and in doing so, it strayed from constitutional principles.

III. IMPLICATIONS: THE SUPREME COURT’S RULING ELIMINATED THE LIMITATIONS PRESENT IN THE COPYRIGHT CLAUSE (PROTECTION GRANTED MUST PROMOTE PROGRESS AND BE LIMITED IN DURATION)

A. The Supreme Court Breached Its Duty

The Copyright Clause is one of few clauses of the Constitution with expressed structural limitations, which are explicit in the “limited Times”

295. See id. at 254-56.
296. Id. at 254-63.
297. Id. at 257-58.
298. Id. First, the CTEA provides ninety-five years of protection for works made “for hire” and all existing works created prior to 1978, whereas European copyrights provide between fifty to seventy years of protection for “for hire” works. Id. Second, the CTEA and European law conflict in terms of the rights extended to anonymous and pseudonymous works. Id. Third, the CTEA does provide uniformity with respect to works created post 1977 by natural persons. Id. Breyer contended that “[a] rational legislature could not give major weight to an invisible, likely non existent incentive-related effect.” Id. at 259. Alternatively, Breyer asserted that even if the CTEA harmonized U.S copyright law with that of the European Union, it does not help to justify the statute pursuant to the Copyright Clause, which only considers the promotion of creation. Id. at 260.
299. Id. at 262-63.
300. Id. at 263.
provision, and implicit through the limited purpose of promoting progress.\textsuperscript{301} Implicit limitations have been found in the Commerce Clause despite the lack of explicit limitations.\textsuperscript{302} This demonstrates that when Congress overtly abuses its authority, the Supreme Court has a duty to intervene and declare the act unconstitutional.\textsuperscript{303} Although the Supreme Court chose to do nothing, it had an obligation to stop Congress from overextending its use of the Copyright Clause, as it did regarding the Commerce Clause in \textit{Lopez} and \textit{Morrison}.\textsuperscript{304}

\textbf{B. Implications: Taking the "limited" out of "limited Times"}

Many prominent judges, scholars and intellectuals have noted that defined boundaries are crucial to the longevity of a fruitful public domain.\textsuperscript{305} Otherwise, Congress has unlimited power.\textsuperscript{306} The implications

\begin{quote}

302. United States v. Lopez, 514 U.S. 549, 556-57 (1995) (“[C]ongressional power under the Commerce Clause . . . is subject to outer limits.”). These “outer limits” were found despite any express limitation on Congress’ power, unlike those found in the Copyright Clause. See Eldred, 239 F.3d at 381 (Sentelle, J., dissenting) (stating that this “outer limits” theory applies to the Copyright Clause as well as every other power).

303. In the case of the Copyright Clause, the need for judicial action is even greater because Congress is ignoring explicit limitations on its power. See U.S. CONST. art. I, § 8, cl. 8. The Commerce Clause does not impose express limitations on Congress’ use. The limitations found were implicit. See U.S. CONST. art. I, § 8, cl. 3. “To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” From the text of the Commerce Clause, the Supreme Court determined that Congress’ power is limited to activities that implicate (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities having a substantial relationship to interstate commerce. See Lopez, 514 U.S. at 558-59.


305. See Eldred, 239 F.3d at 381 (Sentelle, J., dissenting) (expressing the need for “outer limits” to be applied to the Copyright Clause). See Eldred v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999), aff’d 239 F.3d 372 (D.C. Cir. 2001), sub nom. Eldred v. Ashcroft, 537 U.S. 186 (2003). Without clear boundaries, Congress’ power is unlimited, according to the district court. See id. Because of the lack of demarcated boundaries, Congress has been given the freedom to extend protection whenever it wants as long as some purpose is given. See id. See also Lessig, supra note 5, at 203. “An expansion of copyright protection,” . . . might . . . reduce the output of literature . . . by increasing the royalty expense of writers.” Id. (quoting Judge Richard Posner). Lessig further states that reaching the right balance between protecting and encouraging creation cannot be found by expanding the ability of copyright holders to control output. Id. Judge Alex Kozinski of the Ninth Circuit Court of Appeals dissented from the majority’s holding in \textit{Vanna White v. Samsung Elecs. Am., Inc.}, 989 F.2d 1512, 1513 (1993). Id. Judge Kozinski stated, “Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of
of the Supreme Court’s ruling are obvious.\textsuperscript{307} First, Congress remains unchecked in the use of its copyright power and can continue to lengthen the term of protection extended because, as the majority of the high Court stated, “it is not [the Court’s] role to alter the delicate balance Congress has labored to achieve.”\textsuperscript{308} Secondly, because of the ambiguity over the length of “limited Times,” Congress has no guidance in determining a stopping point.\textsuperscript{309} Third, because of intense lobbying efforts, works with commercial value will seldom enter the public domain, and as a result, the public domain will become stagnant and inevitably useless.\textsuperscript{310} Fourth, and most critical, the progression of

\[\text{our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine.}^{\text{Id.}}\]

\[\text{306.} \text{ See Eldred, 74 F. Supp. 2d at 3. Because the Supreme Court failed to define Congress’ “outer limits,” the public domain will become even more depleted and retrospective extensions could become even more frequent. See United States v. Lopez, 514 U.S. 549, 556-57 (1995). See also Eldred, 74 F. Supp. 2d at 3 n.7 (stating that as long as Congress did not permanently extend protection, any number of incremental extensions would be a constitutionally permissible “limited Time”).}\]

\[\text{307.} \text{ Eldred, 239 F.3d at 382 (Sentelle, J., dissenting). The court quoted Lopez, 514 U.S. at 564, commenting on the broad implications that the CTEA would have: “Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.’ I fear that the rationale offered by the government for the copyright extension, as accepted by the district court and the majority, leads to such an unlimited view of the copyright power as the Supreme Court rejected with reference to the Commerce Clause in Lopez.”}\]

\[\text{308.} \text{ See Eldred, 537 U.S. at 212-13 (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990)).}\]

\[\text{309.} \text{ See U.S. CONST. art. I, § 8, cl. 3.}\]

\[\text{310.} \text{ The harmonization rationale is merely a front for the primary goal of raising campaign funds. See Knudsen, supra note 16, at 21-22. (asserting that Disney’s copyrights were a major, though unstated concern of Congress in enacting the CTEA because of political donations made by the company). See James Surowiecki, Righting Copywrongs, at http://www.newyorker.com/printable/talk/020121ta_talk_surowiecki, (Jan. 14, 2002) (“Walt Disney Company pulled off a nifty legal heist.”). Nearly every time a Disney character is close to entering the public domain, copyright terms are extended. Id. A few years ago, the copyrights to Pluto, Goofy and Donald Duck were near expiration, so Disney started an aggressive lobbying scheme. Id. After spending $342,000 in campaign}\]


intellectual advancement and creativity may decline. By the time an invention is given to the public for free use, it will have lost most, if not all, commercial value and will be deemed irrelevant.\textsuperscript{311}

In addition to these logical implications, there may be some unforeseen problems that arise. The Supreme Court stated that the CTEA may encourage creativity, but its primary purpose is to harmonize U.S. copyright laws with those laws in Europe.\textsuperscript{312} Thus, Congress may use Eldred as precedent for its unbridled use of the copyright power, transforming it into an all-purpose power. Although one would hope that the Supreme Court would overturn any unconstitutional use of the Copyright Clause, this is no longer clear. Because the Supreme Court provided no guidance to Congress in its use of the Copyright Clause, and it is unlikely that Congress will independently re-draft copyright legislation,\textsuperscript{313} this dilemma will inevitably arise again, and haunt generations to come.\textsuperscript{314}

contributions, Disney was able to divert the loss for another twenty years. See Knudsen, supra. The sooner the Supreme Court labels a spade a spade, the closer the public will be to receiving their bargained-for exchange. See Eldred, 239 F.3d at 382 (Sentelle, J., dissenting) (stating that Congress was merely given the power to promote the arts, and their authority to give protection is only a pretext for the accomplishment of that power). Congress is limited in the use of its copyright power. See id. Any use must conform to the stated objective. See id. Sentelle concluded his argument by propounding the fact that the government has never offered any legitimate theory on how retrospective extensions are promoting the useful arts. Id.

311. See supra note 293 and accompanying text.

312. Eldred v. Ashcroft, 537 U.S. 186, 205-06 (2003). See Patrick Haggerty, The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998, 70 U. Cin. L. Rev. 651, 660 (2002)(noting that Congress passed the CTEA primarily because it believed that U.S. copyright law should be the same as in Europe, which is life plus seventy years). From a constitutional viewpoint, there is no real downfall to offering U.S. authors twenty years less protection then offered in Europe. See id. at 660. In Europe, specifically under the “rule of the shorter term” provision, “member states [would] recognize copyrights in foreign works for only as long as the work would be protected in its own country, or the European Community term, whichever is shorter.” Id. Proponents of the CTEA argued that authors would lose revenue if not given the same protection afforded to European authors. Id. However, proponents failed to realize, and Congress failed to inform them, that the Copyright Clause is not concerned with the distribution of profits to authors and inventors. See U.S. Const. art. I, § 8, cl. 8. The sole purpose of the Copyright Clause is to promote scientific and intellectual progress, a goal that is not being achieved under the European Directive or the CTEA. See id.

313. The uncertainty surrounding congressional copyright authority provides a compelling reason for Congress to draft new legislation that is reflective of the limitations of the Copyright Clause. Although this is unlikely to occur in the near future, some proposals have been suggested. The copyright legislation should apply only to new works thereby redefining the length of protection once and for all. The ultimate goal of this copyright legislation must be to encourage production while simultaneously enriching the public domain. This “delicate balance” can easily be achieved by offering creators a reasonable payoff for their labor, so that they will be compensated, while also ensuring the
IV. CONCLUSION

The petitioners in *Eldred* lost the battle and as a result, Congress remains undefeated in its journey to perpetually extend copyright protection. Until Congress' next attempt to extend copyright protection, works' timely arrival into the public domain. *Eldred v. Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001).

Lawrence Lessig, a "freedom fighter" for the information age, suggests a radical approach to copyright law. *Fischer*, *supra* note 268, at 251. Lessig's proposal, as he acknowledges, is "neither complete nor certain." *Id.* at 261 (citing LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 240 (2001)). Lessig's proposal is revolutionary in application, but because of its proposed drastic changes is unlikely to be implemented. *See Fischer supra* note 268, at 250-52. Interestingly, his proposal comes much closer to the first Act of 1790 in duration, and for that reason, a more favorable system of protection than the CTEA. *See id.* Lessig refers to current copyright law as a "black hole" because protection extends well over a century regardless of whether the protection still benefits the author. *Id.* at 251. His solution to this "black hole" is to essentially force those who reap the benefits of copyright protection to actively maintain their protection. *Id.* at 251-52. Under Lessig's proposal, the protection initially granted to authors and inventors would be for a five-year term, with the option of renewal fifteen times. *Id.* If the author does not renew the work, then it falls into the public domain. *Id.* The major problems with Lessig's proposal are: (1) it offers extremely short terms; (2) it encourages inefficiency with frequent renewal requirements; (3) courts will be inundated with non-compliance issues; and (4) it does not ensure that the author will receive protection for his life, as ensured under the 1976 Act.

Congress should enact copyright legislation that initially grants authors and inventors a fourteen-year term that automatically renews at the end of the term for the life of the author or inventor. This proposal aligns with the first Congress, but also takes into account that individuals live longer today than in 1790. It also escapes the pitfalls of Lessig's proposal because the creator essentially receives a life estate in his or her creation, which shall be no less than fourteen years, as under the Act of 1790. The intent of the Copyright Clause is upheld because of the term's basic limitation to a life estate, but the author is guaranteed fourteen years if he dies before the first term's expiration. In order to promote efficiency, no renewal requirements apply. Ultimately, this proposal is not trying to balance the interests of today's protection-driven Congress. This proposal is concerned with three things: (1) upholding the text of the Constitution; (2) remaining consistent with the first Act of Congress; and (3) understanding that individuals have longer life spans.

In order to encourage authors, inventors, and other copyright holders to donate their works to the public domain for others to expand upon, incentives must exist. Currently, the Internal Revenue Service allows individuals to take tax deductions for donations made to charitable institutions. Similar deductions should be offered to copyright holders, so the public domain will grow more rapidly.

314. *See* Br. of Amici Curiae Progressive Intellectual Property Law Ass'n, at 9-10, *Eldred v. Ashcroft*, 534 U.S. 1126 (2002) (No.01-618) (2002). The potential problems were evidenced by statements made by Sonny Bono's widow, while she was serving the remainder of his term, upon the presentation of the CTEA: "Actually, Sonny wanted copyright to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all ways available to us. As you know, there is also Jack Valenti's proposal to last forever less one day. Perhaps the committee may look at that next Congress." *Id.*
the true effects of the Supreme Court’s decision remain unknown. Hopefully, at that time, the Supreme Court will be composed of Justices committed to checking Congress’ copyright authority, rather than those who defer so readily to Congress in copyright law expansion. Until that day comes, the public domain will remain stagnant and unable to nurture the creativity of those waiting to derivatively use the works of others.