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**ORIGINAL INTENT AND THE COPYRIGHT CLAUSE:
ELDRED v. ASHCROFT GETS IT RIGHT**

CRAIG W. DALLON*

In *Eldred v. Ashcroft*¹ the Supreme Court considered the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998 (the “CTEA”)² and was called upon to construe the scope of power granted to Congress by Article I, section 8, clause 8 of the Constitution (the “Copyright Clause”).³ Many scholars were surprised that the Court had granted certiorari in the case.⁴ The case generated no fewer than thirty-four amicus curiae briefs from interest groups and individuals on both sides of the case,⁵ and spawned numerous law review articles while it was pending.⁶

Many scholars and advocates for the public domain hoped that the Supreme Court in *Eldred* would find in the Copyright Clause meaningful limitations on the power of Congress to confer financial benefits on copyright

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1. 537 U.S. 186 (2003). The case was argued on October 9, 2002, and decided January 15, 2003. *Id.*

2. Pub. L. No. 105-298, 112 Stat. 2827.

3. U.S. CONST. art. 1, § 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”).

4. This may be putting it mildly. Professor Hugh C. Hansen stated: “I do not know anyone on either side of the debate who thought that certiorari would be granted. When the Court granted certiorari, people were dumbstruck.” Symposium: Panel II, *Mickey Mice? Potential Ramifications of Eldred v. Ashcroft*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 771, 776–77 (2003).

5. See U.S. Supreme Court docket No. 01-618, <http://www.supremecourtus.gov/docket/01-618.htm> (listing briefs). This number does not include the amicus briefs filed in connection with the petition for certiorari. See *id.*

6. See, e.g., Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123 (2002); Orrin G. Hatch & Thomas R. Lee, “To Promote the Progress of Science”: *The Copyright Clause and Congress’s Power to Extend Copyrights*, 16 HARV. J.L. & TECH. 1 (2002); Tyler T. Ochoa & Mark Rose, *The Anti-monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC’Y U.S.A. 675 (2002); Symposium: Panel II, *supra* note 4.

holders without providing any corresponding benefit to the public.⁷ The petitioners and others hoped for a bold, landscape-altering decision. They did not get it. Instead, the Court afforded Congress substantial discretion in adopting copyright legislation and refused to find significant limits in the “To promote the Progress of Science” or “for limited Times” language of the clause.

Since *Eldred*, some scholars have decried what they perceive as the Court’s abrogation of its constitutional role to give meaning to the Copyright Clause and operate as an effective check on the legislative branch.⁸ Others believe that the Court’s holding was correct.⁹ This Article takes the position that, regardless of the merits of the CTEA itself,¹⁰ the Court correctly determined that Congress had the power to enact the CTEA, including the retroactive extension of the term for existing copyrights. The Framers and ratifiers of the Constitution likely did not intend for the Copyright Clause to be construed to impose the limits urged by opponents of the CTEA, nor would they have viewed the Copyright Clause as a vehicle for the courts to strike down copyright legislation retroactively extending copyright terms. This Article will evaluate *Eldred* using originalist and textualist approaches to constitutional interpretation.¹¹

Part I of this Article will discuss the rationale and holding of *Eldred*. Part II will consider the meaning of the text of the Copyright Clause and suggest that the clause is first and foremost a grant of power to establish an effective copyright system with only modest limits on the exercise of congressional

7. See Pamela Samuelson, *The Constitutional Law of Intellectual Property After Eldred v. Ashcroft*, 50 J. COPYRIGHT SOC’Y 547, 548 (2003) (noting “substantial consensus” among intellectual property scholars that CTEA is unconstitutional).

8. See, e.g., Edward C. Walterscheid, *Musings on the Copyright Power: A Critique of Eldred v. Ashcroft*, 14 ALB. L.J. SCI. & TECH. 309 (2004); William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 HOUS. L. REV. 749, 755–58 (2003); L. Ray Patterson, *What’s Wrong with Eldred? An Essay on Copyright Jurisprudence*, 10 J. INTELL. PROP. L. 345, 349 (2003).

9. See, e.g., Paul M. Schwartz & William Michael Treanor, *Essay, Eldred and Lochner: Copyright Term Extension and Intellectual Property As Constitutional Property*, 112 YALE L.J. 2331 (2003).

10. On balance, the CTEA was bad policy; it served the private interests of a few copyright holders to the detriment of the public. See Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365 (2004) (arguing that the CTEA is inconsistent with the historical purposes of copyright protection and elevated the interest of a few copyright holders above the public interest).

11. The *Eldred* petitioners and the Court both used these modes of interpretation. See *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (relying upon “[t]ext, history, and precedent” in its analysis); Brief for Petitioners at 14, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (stating that argument was based on the “text, structure and original meaning of the Copyright Clause”). For a discussion of the modalities of interpretation, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 9–38 (1982).

power. Part III will suggest that limited judicial review for constitutionality of copyright enactments is consistent with Supreme Court precedent and the intention of the Framers. Part IV will identify problems with the *Eldred* decision and suggest that the Court unnecessarily placed greater emphasis on private interests of copyright holders at the expense of the public interest. It will also disagree with the Court's analysis of the "quid pro quo" argument and will question the Court's historical rationale. Part V will conclude that the Supreme Court appropriately affirmed Congress's power to enact the CTEA.

I. THE HOLDING AND RATIONALE OF *ELDRED V. ASHCROFT*

Eldred v. Ashcroft,¹² for the first time before the Supreme Court, squarely presented an issue concerning the constitutionality of copyright terms. In earlier decisions the Supreme Court had considered whether works qualified for copyright protection¹³ and whether works had passed into the public domain,¹⁴ but *Eldred* was the first case to question the authority of Congress to extend copyright terms.

In *Eldred*, the petitioners argued that the CTEA, enacted in 1998, was unconstitutional. The CTEA extended the terms of existing and future copyrights by twenty years. Prior to the CTEA, under the Copyright Act of 1976 (the "1976 Act"), generally the term for copyrights was the life of the author plus fifty years.¹⁵ For works made for hire, anonymous works, and pseudonymous works, the term was the earlier of seventy-five years from the year of its first publication or one hundred years from its creation. The CTEA extended those copyright terms by twenty years to the life of the author plus seventy years, or for works made for hire, anonymous works, and pseudonymous works, the earlier of ninety-five years from publication or one hundred twenty years from creation.¹⁶

12. 537 U.S. 186 (2003).

13. *E.g.*, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (holding circus advertisements subject to copyright protection); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (holding photograph qualified for copyright protection); *Wheaton v. Peters*, 33 U.S. 591 (1834) (holding strict conformance with statute required for copyright protection).

14. *See Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907) (holding public display of painting at exhibit did not constitute general publication placing work beyond reach of copyright protection); *Mifflin v. Dutton*, 190 U.S. 265 (1903) (holding Harriet Beecher Stowe's work, the "Minister's Wooing," had passed into the public domain for failure to satisfy the notice requirement). For leading circuit court decisions, see, e.g., *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999) (deciding whether Dr. Martin Luther King, Jr.'s "I Have a Dream" speech passed into the public domain); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189 (2d Cir. 1985) (deciding whether failure to place required copyright notice on toys could be cured to afford copyright protection).

15. *Eldred*, 537 U.S. at 193 (citing Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541).

16. *Id.*

The petitioners in the lower courts argued that the CTEA was unconstitutional as it concerned term extensions for both existing and future copyrights.¹⁷ Before the Supreme Court, the petitioners limited their argument to the constitutionality of the extension of existing copyrights (*retroactive* term extensions); they did not challenge the constitutionality of copyright term extension for future works (*prospective* term extensions).¹⁸ The petitioners argued that under an intermediate scrutiny analysis, copyright extension violated the First Amendment.¹⁹ The petitioners' other arguments spoke directly to the text and meaning of the Copyright Clause itself; they claimed that the CTEA violated the "limited Times" requirement because retroactive extension was not "limited," did not "promote the Progress of Science," and violated an implied quid pro quo requirement.²⁰ This Article will focus on the Copyright Clause issues and will only briefly summarize the First Amendment argument.

The First Amendment argument did not get much traction at any level of the litigation.²¹ The district court spent barely three sentences rejecting the argument, relying upon District of Columbia Circuit precedent holding that "there are no First Amendment rights to use the copyrighted works of others."²² The argument received greater attention in the circuit court decision, but an equally strong rebuke. The Court of Appeals for the District of Columbia Circuit held that prior precedents stood "as insuperable bars" to plaintiffs' argument, and reaffirmed its holding that "copyrights are categorically immune from challenges under the First Amendment."²³ The Court of Appeals emphasized that the copyright doctrines of the idea/expression dichotomy and fair use already afford adequate protection for free speech.²⁴

17. See *Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001), *aff'd sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

18. See *Eldred*, 537 U.S. at 218 n.23 (2003). "Petitioners originally framed [the First Amendment] argument as implicating the CTEA's extension of both existing and future copyrights," but narrowed the argument on appeal to the Supreme Court. *Id.*; see also *id.* at 198 (stating questions for which certiorari was granted).

19. Brief for Petitioners, *supra* note 11, at 11.

20. *Id.* at 10.

21. William Patry is of the view that "[i]n truth, there never was a claimed First Amendment violation," but rather an effort to get the Court to apply First Amendment strict scrutiny to an alleged Copyright Clause violation. Patry, *supra* note 8, at 758.

22. *Eldred v. Reno*, 74 F. Supp. 2d 1, 3 (D.D.C. 1999), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

23. *Eldred*, 239 F.3d at 375.

24. *Id.* at 376.

Like the lower courts, the Supreme Court did not dwell long on the First Amendment argument.²⁵ The Supreme Court agreed with the Court of Appeals' view that copyright law's "built-in First Amendment accommodations," namely the idea/expression dichotomy and fair use, already afford adequate protection for First Amendment considerations²⁶ and refused to impose heightened scrutiny on the CTEA.²⁷ The Supreme Court found significant that the Copyright Clause and the First Amendment were both adopted close in time, indicating that the Framers saw these two constitutional provisions as compatible.²⁸ The Court held that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches."²⁹ The Court, however, did disavow the circuit court's overly broad statement that copyrights were "categorically immune from challenges under the First Amendment."³⁰

The Court also rejected the petitioners' Copyright Clause claims. These claims focused on the "limited Times" language and the "To promote the Progress of Science" language.³¹ The heart of the petitioners' argument was that Congress exceeded its constitutionally granted authority under the Copyright Clause when it enacted retroactive copyright term extensions.

The petitioners argued that the CTEA retroactive extension of the term of existing copyrights violated the constitutional requirement that copyrights be granted for limited times.³² Petitioners argued that the CTEA retroactive extension was, in essence, a step toward perpetual copyright.³³ The Court responded that a copyright term for the life of the author plus seventy years is a copyright for a limited time (petitioners essentially conceded as much).³⁴ The Court looked to Constitution-era dictionary definitions of the word "limited"

25. The Court handled the analysis of the First Amendment argument in six paragraphs covering about three pages. See *Eldred*, 537 U.S. at 218–21. By contrast, the Copyright Clause analysis covered about nineteen pages. See *id.* at 199–218.

26. *Id.* at 219.

27. *Id.* at 218–19.

28. *Id.* at 219; cf. 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 379, 386 (John P. Kaminski et al. eds., 1986) [hereinafter 16 DOCUMENTARY HISTORY OF RATIFICATION] (Norfolk & Portsmouth J., by "Marcus" (James Iredell), dated Mar. 12, 1788). James Iredell, later Justice of the Supreme Court, arguing for ratification of the Constitution, wrote that the Copyright Clause did not impede liberty of the press; "surely such an encouragement to genius is no restraint on the liberty of the press." *Id.*

29. *Eldred*, 537 U.S. at 221.

30. *Id.*

31. *Id.* at 197.

32. *Id.* at 208.

33. *Id.*; Brief for Petitioners, *supra* note 11, at 18–19.

34. *Eldred*, 537 U.S. at 199; see also Brief for Petitioners, *supra* note 11, at 14 (arguing that "[w]hether 50 years is enough, or 70 years too much, is not a judgment meet for this Court"); *id.* (stating that "[t]he line between *prospective* and *retrospective* extensions is a clear one") (emphases added).

and easily found that the extended term continued to be limited—“‘confine[d] within certain bounds,’ ‘restrain[ed],’ or ‘circumscribe[d].’”³⁵ Nothing in the text of the CTEA creates a perpetual copyright.³⁶ Moreover, the Court found no intention by Congress to create perpetual copyrights.³⁷ Given that a copyright in a future work lasting for the life of the author plus seventy years is for a limited time, it is a small step—if a step at all—to find that extending the term of an existing copyright resulting in the same term is a term for a limited time.

As confirmation of no violation of the limited times requirement, the Court relied heavily upon the historical practice of various congresses in granting retroactive copyright extensions. “History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.”³⁸ The Court also pointed to a history of retroactive patent extensions and decisions approving such extensions as evidence that the Copyright Clause in no way forecloses retroactive extensions.³⁹ Article I, section 8, clause 8, referred to here as the Copyright Clause, is also sometimes referred to as the Intellectual Property Clause or the Patent Clause⁴⁰ because this same clause also authorizes Congress to extend patent protection.⁴¹

The Court also rejected the petitioners’ claim that the extension failed to promote the progress of science. The Court emphasized that Congress enjoys broad discretion in determining how best to promote the progress of science by affording copyright protection.⁴² The Court found that the CTEA promoted the progress of science and satisfied the rational basis test by harmonizing United States copyright law with European Union (EU) copyright law and providing greater incentives for creation and dissemination of works in the United States.⁴³ The Court rejected the argument that the retroactive extension failed to satisfy a perceived constitutionally mandated *quid pro quo*

35. *Eldred*, 537 U.S. at 199 (alterations in original) (quoting S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785)).

36. *Id.* at 209 n.16. “[Justice Breyer] does not identify any statement in the statutory text that installs a perpetual copyright for there is none.” *Id.*

37. *Id.* at 199–200, 209.

38. *Id.* at 200.

39. *Id.* at 201–04.

40. *See, e.g.*, *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 35 (2001) (not reaching the “Patent Clause” issue); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 635–37, 636 n.4 (1999) (discussing and quoting the “Patent Clause”); *United States v. Elcom Ltd.*, 203 F. Supp.2d 1111, 1137 (N.D. Cal. 2002) (referring to the “Intellectual Property Clause”).

41. *Eldred*, 537 U.S. at 201.

42. *Id.* at 212–13.

43. *Id.* at 205–07.

exchange—a copyright in exchange for creation of a work.⁴⁴ The Court accepted, for argument’s sake, the contention that a quid pro quo requirement existed, but found that authors created their works in exchange for copyright protection with an expectation that they would also be entitled to future copyright extensions.⁴⁵

II. THE MEANING OF THE COPYRIGHT CLAUSE: FOREMOST, A GRANT OF AUTHORITY

A. *Empowering Congress*

In *Eldred*, the Court allowed Congress substantial deference to define the contours of copyright protection. “As we read the Framers’ instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.”⁴⁶ The Court, recognizing its role, refused to “second-guess” Congress.⁴⁷ The Court’s deference and the outcome in *Eldred* comport with the language and intent of the Copyright Clause; the Clause, above all, was intended to grant Congress authority to create a copyright scheme and not to impose limits upon copyright interests.

Any constitutional analysis must begin with the language of the Constitution itself. The Copyright Clause states that Congress has the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”⁴⁸ Little is known about the drafting of the precise language of the Copyright Clause. In the Constitutional Convention there was no recorded discussion of the meaning of the clause; it was adopted unanimously and without controversy.⁴⁹ Proposed language for the clause was introduced at the Constitutional Convention by both James Madison and Charles Pinckney.⁵⁰ Copyright, however, was already a familiar concept to the Framers. The famous English copyright statute, the Statute of Anne of 1710,⁵¹ was well known to the Framers.⁵² Moreover, the Continental Congress in 1783

44. *Id.* at 214–15.

45. *Id.*

46. *Eldred*, 537 U.S. at 222.

47. *Id.*

48. U.S. CONST. art. I, § 8, cl. 8.

49. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 505–15 (Max Farrand ed., rev. ed in four vols., 1966) [hereinafter 2 CONVENTION RECORDS].

50. *Id.* at 324–25.

51. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

52. The preamble to the Copyright Act of 1790 clearly drew upon the language of the preamble of the Statute of Anne of 1710. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 307 (1st ed. 1826) (noting that the Copyright Act of 1790 was taken generally from the

passed a resolution encouraging the states to adopt copyright laws.⁵³ James Madison was one of the three members of the committee in the Continental Congress who reported on the copyright resolution as it was adopted.⁵⁴ Between 1783 and 1786, all the states except Delaware passed their own respective copyright laws.⁵⁵

The Copyright Clause is unambiguously a grant of power. The text of the clause communicates the Framers' intent to give Congress the power to provide protection to authors for their writings (and inventors for their discoveries). This understanding of the clause is confirmed by contemporaneous events and statements. Just prior to the Constitutional Convention, Madison complained that one of the problems with the government under the Articles of Confederation was the "want of uniformity in the laws concerning naturalization & literary property."⁵⁶ In May 1783, when Congress passed its resolution on copyright protection, it did not have the power to impose a national copyright law, but instead was reduced to "recommend[] to the several states, to secure to the authors or publishers of any new books not hitherto printed . . . the copy right of such books."⁵⁷

During the debates for ratification of the Constitution, the Framers and ratifiers echoed the same theme—that the individual states were incapable of effectively protecting literary property. Madison, in *The Federalist No. 43*, justified granting the power to protect authors and inventors under the Copyright and Patent Clause by observing that "[t]he states cannot separately make effectual provision for either of the cases."⁵⁸ Prominent founder Thomas McKean,⁵⁹ in debates over ratification before the Pennsylvania Convention, argued the same point: "[T]he power of securing to authors and inventors the

Statute of Anne); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (noting that the Framers understood the nature of copyright and surely were aware of the then-recent controversy in England concerning the Statute of Anne and common law copyrights).

53. 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 326–27 (Gaillard Hunt ed., 1922) (reporting text of resolution) [hereinafter 24 JOURNALS].

54. *Id.* at 326.

55. See COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 21 (Copyright Office ed., Bulletin No. 3, rev. 1963) [hereinafter COPYRIGHT ENACTMENTS].

56. *Observations by J.M.*, II MADISON PAPERS 109, vol. XII, 53 (1787), reprinted in 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786–1870, at 126, 128 (1905).

57. 24 JOURNALS, *supra* note 53, at 326–27.

58. THE FEDERALIST NO. 43, at 222 (James Madison) (George W. Carey & James McClellan eds., Gideon ed. 2001).

59. Thomas McKean (also seen as M'Kean) was a signor of the Declaration of Independence, President of the Continental Congress, Chief Justice of the Pennsylvania Supreme Court, and Governor of Pennsylvania. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–1996, 1490–91 (Joel D. Treese ed., 1997).

exclusive right to their writings and discoveries could only with effect be exercised by the Congress.”⁶⁰ Roger Sherman, himself an important member of the Constitutional Convention and an active participant in the ratification debates in Connecticut, wrote in the *Connecticut Courant* that the new power vested in the United States “for promoting the progress of science,” among other powers, “appear[ed] to be necessary for the common benefit of the states and could not be effectually provided for by the particular states.”⁶¹

The clause was not a reaction to existing monopolies,⁶² nor was it an effort to restrict or limit existing copyrights. Instead, the clause was to make clear that the national government had the power to enact copyright (and patent) laws. This purpose can be contrasted with the purpose behind the Statute of Anne, which was drafted with the dual purposes of allowing copyright protection but also limiting the Stationers’ book monopoly.⁶³ Admittedly, the grant of authority does carry with it some implicit limitations on congressional power, but these limitations on their face and by design are modest as will appear below.⁶⁴

B. “To promote the Progress of Science”

1. Phrase As Part of the Substantive Grant of Power

Some commentators, in an effort to breathe life into what sometimes has been characterized as the “preambular” language of the Copyright Clause, have maintained that the language “To promote the Progress of Science and useful Arts” is part of the power-granting language.⁶⁵ Judge Sentelle took this position in his dissent in the Court of Appeals decision in *Eldred*.⁶⁶ Taking the argument a step further, this granting language imposes corresponding

60. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (Merrill Jensen ed., 1976) [hereinafter 2 DOCUMENTARY HISTORY OF RATIFICATION].

61. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 525 (Merrill Jensen ed., 1978) [hereinafter 3 DOCUMENTARY HISTORY OF RATIFICATION].

62. See Thomas B. Nachbar, *Constructing Copyright’s Mythology*, 6 GREEN BAG 2d 37, 43–44 (2002).

63. See Dallon, *supra* note 10, at 403–09 (discussing purposes of the Statute of Anne and efforts to limit Stationers’ monopoly).

64. See *infra* notes 215–65 and accompanying text.

65. Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft*, 44 IDEA: THE J. OF LAW & TECH. 331, 332–34 (2004) (arguing that the “To promote the Progress of Science and useful Arts” language is a grant of power, not merely a preamble); Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 22 (2002) (arguing that the “to promote” language is a grant of power and finding the argument that the clause consists of a preamble followed by a power grant “unsustainable”).

66. *Eldred v. Reno*, 239 F.3d 372, 381 (D.C. Cir. 2001) (arguing that the Clause “is a grant of a power to promote progress”), *aff’d sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

limitations on congressional power.⁶⁷ Under this view, Congress is empowered to legislate in the areas of copyrights and patents only if the particular legislation in some way promotes the progress of science or the useful arts.

The “preamble” argument embraced by the court of appeals in *Eldred* was that the language “To promote the Progress of Science” was merely a statement of purpose and itself placed no substantive limit on Congress’s legislative power.⁶⁸ The court of appeals claimed that the preambular language was not part of the substantive grant of power.⁶⁹ The precedent the court of appeals relied upon, however, did not go so far. In *Schnapper v. Foley*,⁷⁰ relied upon by the court, the Court of Appeals for the District of Columbia held that the “purposive” or “introductory phrase” of the Copyright Clause did not constitute a substantive limit on Congress’s legislative power.⁷¹ It did not hold that the language was not part of the grant of power. In fact, the *Schnapper* court cited *Nimmer on Copyright* for the proposition that the introductory phrase, rather than limiting Congress’s authority, “has for the most part tended to expand such authority.”⁷²

The Supreme Court, without expressly embracing or disavowing the preamble argument, acknowledged the circuit court’s position⁷³ and the petitioners’ concession⁷⁴ that the preamble was not a substantive limit on Congress’s power. Instead of expressly rejecting the preamble argument, the Court found that the CTEA arguably did “promote[] the Progress of Science”⁷⁵ by harmonizing American copyright law with EU law and encouraging investment in restoration and public distribution of works.⁷⁶

The phrase “To promote the Progress of Science and useful Arts” should be considered part of the granting language of the clause, but should neither be viewed as a general grant of authority to promote the progress of science by

67. See Walterscheid, *supra* note 65, at 359–60 (finding “the ‘to promote’ language of the Clause is more than merely a statement of purpose; it is both a general grant of power and a constitutional limitation on the authority granted to Congress with respect to patents and copyrights”).

68. See *Eldred*, 239 F.3d at 378.

69. *Id.* (stating that “the Court in *Feist [Publications, Inc. v. Rural Telephone Service Co.]*, 499 U.S. 340 (1991)] never suggests that the preamble informs its interpretation of the substantive grant of power to the Congress”).

70. 667 F.2d 102 (D.C. Cir. 1981).

71. *Id.* at 111–12.

72. *Id.* at 111 (citing 1 NIMMER ON COPYRIGHT § 1.03(B)). The latest edition of *Nimmer on Copyright* continues to hold to that view. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[B] (2005).

73. *Eldred v. Ashcroft*, 537 U.S. 186, 197 (2003).

74. *Id.* at 211.

75. *Id.* at 213.

76. *Id.* at 205–07.

any means nor as a limitation on Congress's copyright power. The phrase could be considered "introductory" only in the sense that it is the opening or beginning phrase of the clause.⁷⁷ That label in no way detracts from the legal significance of the phrase. Whether the phrase is fairly characterized as "preambular" is a closer call. A preamble is defined as:

1: an introductory part (as to a book, document): introduction, preface; *specif*: the introductory part of a statute . . . that states the reasons and intent of the law . . . or is used for other explanatory purposes (as to recite facts knowledge of which is necessary to an understanding of the law or to define or limit the meanings of words used in the law) . . .⁷⁸

The phrase does communicate the reasons and intent of the law, but it is not limited to an introductory or explanatory role. The phrase on its face is an adjective phrase directly describing the power granted. The phrase beginning "by securing," in turn, modifies "to promote." The "to promote" phrase is language of the grant and not merely a preamble.⁷⁹

2. Power Limited to Creation of Copyright and Patent Schemes

Finding that the "to promote . . ." phrase is not merely preambular does not suggest that the power granted by the clause extends beyond legislating in the areas of copyright and patent. The clause, read in its entirety, identifies the means by which Congress may achieve its goals. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . ."⁸⁰ The "by securing" phrase is specific and can only be read as limiting the "to promote" phrase. Hence, the phrase authorizes Congress to promote the progress of science and useful arts pursuant to this clause only in the ways identified in the "by securing" phrase—by affording copyright and patent protection.⁸¹

77. See WEBSTER'S II: NEW COLLEGE DICTIONARY 582 (1995) (listing one definition of "introduce" as: "[t]o open or begin: PREFACE" and one definition of "introductory" as: "[s]erving to introduce").

78. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE: UNABRIDGED 1783 (Philip Babcock Gove ed., 1993) (1961).

79. See Solum, *supra* note 65, at 21–25 (making strong case that the phrase is part of the grant); Walterscheid, *supra* note 65, at 358–78 (rejecting characterization of the phrase as merely meaningless preamble).

80. U.S. CONST. art. I, § 8, cl. 8.

81. This Article does not suggest that by limiting the "To promote the Progress of Science" phrase the Copyright Clause negates Congress's power to promote the progress of science in other ways pursuant to other powers granted by the Constitution such as the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, or the General Welfare Clause, U.S. CONST. art. I, § 8, cl. 1. Compare Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004) (arguing that the Intellectual Property Clause does not act as a limitation on

Edward Walterscheid, who has done excellent work in the area of the history of the Copyright Clause, disagrees. He reads the “by securing” phrase “as an explanation of, rather than a limitation on, the ‘to promote’ language.”⁸² He suggests that the clause authorizes Congress to promote the progress of science and useful arts in ways other than through copyright and patent protection.⁸³ If this view is correct, then the *Eldred* petitioners were right—any legislation in the area of copyright must first and foremost promote the progress of science. This interpretation of the Copyright Clause, however, is contrary to the plain meaning of the text of the clause.⁸⁴ A deviation from the constitutional text arguably might be forgiven if compelling evidence indicated that the Framers in fact intended something other than what they said (and the ratifiers understood that meaning), but the historical record is devoid of such evidence.

Walterscheid claims support in original intent of the clause and makes three points.⁸⁵ First, there is little evidence in the contemporaneous record to support the plain meaning interpretation of the clause.⁸⁶ Second, other means for promoting the progress of science and useful arts were known at the time of the Federal Constitutional Convention.⁸⁷ Third, “indirect evidence” suggests that Washington and Hamilton interpreted the Copyright Clause to grant more than the power to protect copyrights and patents.⁸⁸

Given that there is scarce evidence expressing *any* contemporaneous views of the Framers of the Copyright Clause, it comes as no surprise that there is little evidence for any particular view. What evidence there is, however, strongly suggests that, concerning the clause, the Framers and ratifiers were focused exclusively on the copyright and patent powers. *The Federalist’s* comments on the Copyright Clause, brief though they may have been, indicate that the Framers understood that the purpose of the clause was to empower Congress to create a national copyright system and a national patent system. Madison wrote:

other Article I powers), *with* Walterscheid, *supra* note 65, at 352–54 (discussing the view that the Copyright Clause limits other Article I powers).

82. Walterscheid, *supra* note 65, at 356.

83. *Id.* at 347–48 (noting that if the “by securing” phrase is viewed as explanation, then the clause empowers Congress to promote the progress of science and useful arts by a wide variety of means, not merely by copyrights and patents); *see also id.* at 351–52, 357 (arguing for broad interpretation); Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J.L. & TECH. 87, 94–97 (1999) (arguing for broad interpretation).

84. Walterscheid faults the drafting of the clause—“the Framers unartfully phrased it.” Walterscheid, *supra* note 65, at 357.

85. *Id.* at 351–52.

86. *Id.* at 351.

87. *Id.* at 351 n.106.

88. *Id.* at 351–52.

The utility of this power will scarcely be questioned. The copy-right of authors has been solemnly adjudged in Great Britain, to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.⁸⁹

There is no word or hint of a broader power to promote the progress of science or useful arts in ways other than through copyrights or patents. If the clause were intended to have such a broad sweep, one would have expected discussion or explanation supporting a broad meaning.

Even if the language of the Copyright Clause was “unartfully” drafted,⁹⁰ it likely was understood and ratified as written.⁹¹ There are few recorded references to the Copyright Clause during the ratification debates, but what references there are support a narrow view of the clause limited to copyright and patent legislation. During the ratification debates in Connecticut in 1788, Roger Sherman, himself an important Framer of the Constitution,⁹² publicly wrote that one of the new powers vested in the United States was “for promoting the progress of science *in the mode therein pointed out*.”⁹³ In the ratification debates before the Pennsylvania convention, Thomas McKean’s only reference to the Copyright Clause focused on “the power of securing to authors and inventors the exclusive right to their writings and discoveries” with no reference to a broader power.⁹⁴

At the Constitutional Convention, Madison initially proposed the powers “To secure to literary authors their copyrights for a limited time,” “To establish an University,” and “To encourage by premiums & provisions, the

89. THE FEDERALIST NO. 43, *supra* note 58, at 222 (James Madison).

90. *See supra* note 84.

91. Justice Story aptly put it:

Nothing but the text itself was adopted by the people. And it would certainly be a most extravagant doctrine to give to any commentary then made, and, *a fortiori*, to any commentary since made under a very different posture of feeling and opinion, an authority, which should operate an absolute limit upon the text, or should supersede its natural and just interpretation.

1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 406 (1833).

92. Sherman actively participated in the debates at the Constitutional Convention and was a member, along with Madison, of the Committee of Eleven, which worked on the language of the Copyright Clause and reported it to the Convention for approval. *See* 2 CONVENTION RECORDS, *supra* note 49, at 473, 481, 505, 508–09.

93. 3 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 61, at 525 (emphasis added). This view appears to be consistent with Sherman’s views in 1789 when, as a member of Congress, he opposed funding a scientific voyage suggesting that protection for petitioner’s discovery or invention was as far as Congress should go—“as far as warranted by the Constitution.” 10 DEBATES IN THE HOUSE OF REPRESENTATIVES 213 (Charlene Bangs Bickford et al. eds., 1992).

94. 2 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 60, at 415.

advancement of useful knowledge and discoveries.”⁹⁵ That same day, Pinckney proposed the powers “To establish seminaries for the promotion of literature and the arts & sciences,” “To grant patents for useful inventions,” and “To secure to Authors exclusive rights for a certain time.”⁹⁶ These proposals were submitted initially to the Committee of Detail but later fell to the Committee of Eleven whose members included both Madison and Sherman.⁹⁷ Walterscheid suggests that the intellectual property clause combined the copyright, patent, and “advancement of useful knowledge” provisions into one and concludes that incorporation of language close to the “advancement of useful knowledge” provision “suggests that the Framers viewed the intellectual property clause expansively.”⁹⁸

Significantly, however, the more expansive language authorizing grants of premiums and provisions for the advancement of useful knowledge and discoveries proposed by Madison did not survive the committee and never became part of the Constitution, nor is there any hint in the Copyright Clause that it was intended to operate in such a way. Walterscheid concedes that both Madison and Sherman took a limited view of the Intellectual Property Clause.⁹⁹

The views of Madison should be accorded particularly great weight in determining what the Framers intended as it concerns the Copyright Clause. Madison, after all, proposed the copyright power and the “advancement of useful knowledge” powers, and he served on the Committee of Eleven that came up with the final language of the Copyright Clause.¹⁰⁰ Sherman, too, was

95. 2 CONVENTION RECORDS, *supra* note 49, at 325.

96. *Id.*

97. *Id.* at 321–22, 324 (submitted to Committee of Detail); *id.* at 473, 481 (appointing Committee of Eleven to consider unfinished business; listing committee members).

98. Walterscheid, *supra* note 83, at 94; *accord* Walterscheid, *supra* note 65, at 343.

99. *See* Walterscheid, *supra* note 83, at 103 (recognizing that Madison and Sherman “narrowly construed the clause”). Walterscheid concludes that

Madison narrowly construed the intellectual property clause as authorizing *only* the issuance of patents of invention and precluding any other means of promoting the progress of useful arts. Although he was silent as to the issue of promoting the progress of science, i.e., learning and knowledge as encompassed within the broad compass of education, it is apparent that his argument necessarily applied to federal funding of education as well.

Id. at 105. Walterscheid’s view that Madison narrowly construed the clause appears correct. This Article takes no position on the issue of whether Madison viewed the clause as a general bar to any efforts under other constitutional provisions that had the effect of promoting the progress of science in other ways.

100. 2 CONVENTION RECORDS, *supra* note 49, at 473, 481, 505, 508–09. Madison likely played the most important role of any Framer in the inclusion of the Copyright Clause in the Constitution. *See* Dallan, *supra* note 10, at 421–23 (noting Madison’s involvement in copyright legislation beginning in the Continental Congress in 1783, the Virginia legislature in 1785, and the Constitutional Convention).

a member of the Committee of Eleven. Significantly, Madison and Sherman, the only members of the Committee of Eleven with known views about the Copyright Clause, appear to have viewed the clause as limited to copyright and patent legislation. Even Alexander Hamilton, one of the most radical, pro-central government members of the Constitutional Convention,¹⁰¹ in some respects either agreed with or acknowledged Madison's limited view of the Intellectual Property Clause.¹⁰²

The Framers' debate concerning the proposal to include the power for Congress to establish a national university also supports the view that the Framers did not intend the "to promote" phrase to extend beyond copyrights and patents. Madison and Pinckney initially proposed the power to establish a university, in Madison's words,¹⁰³ or a seminary, in Pinckney's words,¹⁰⁴ and Pinckney added: "for the promotion of literature and the arts & sciences."¹⁰⁵ The Committee of Eleven deleted this power from its report, and Madison and Pinckney jointly moved to reinsert the power to establish a university in the list of congressional powers.¹⁰⁶ The Convention rejected the proposal.¹⁰⁷

Madison and Pinckney's joint motion to insert the power was proposed, debated, and rejected after the Convention had already agreed to the Copyright Clause.¹⁰⁸ Gouverneur Morris argued that it was not necessary because it would already be achieved by the "exclusive power at the Seat of

101. Hamilton's views were radical in their strong support for a powerful central government. See JOHN C. MILLER, *ALEXANDER HAMILTON: PORTRAIT IN PARADOX* 161–62 (1959) (noting Hamilton's support of a strong central government and stating "[h]ad Hamilton seen his way clear, he no doubt would have recommended the abolition of the states"). His views on the meaning of the Copyright Clause, while of interest, are less convincing than those of Madison and Sherman, in part because he was absent from the convention when the clause was proposed, drafted, and approved. See 1 BROADUS MITCHELL, *ALEXANDER HAMILTON: YOUTH TO MATURITY 1755–1788*, at 407 (1957) (noting Hamilton's absence from the Convention for most of August and noting that "[t]he next mention of Hamilton in the convention proceedings is on September 6, which is probably as early as he attended"); 2 CONVENTION RECORDS, *supra* note 49, at 321–22 (noting proposal of copyright and patent powers on Aug. 18, 1787); *id.* at 505, 509 (noting approval of Copyright Clause on Sept. 5, 1787).

102. See Walterscheid, *supra* note 83, at 109 (stating that Hamilton conceded that there was a question about the authority of Congress under the Constitution to grant patents of importation). Hamilton did advocate for broad congressional power to promote the progress of science under the general welfare clause and implicitly did not view the Copyright Clause as a bar to achieving those goals. *Id.* at 111. Significantly, he relied upon other congressional powers and not the Copyright Clause for the authority. *Id.*

103. 2 CONVENTION RECORDS, *supra* note 49, at 325.

104. *Id.*

105. *Id.*

106. *Id.* at 616.

107. *Id.*

108. The Copyright Clause was approved on Sept. 5, 1787, 2 CONVENTION RECORDS, *supra* note 49, at 509; the university proposal was rejected on September 14, 1787, *id.* at 616.

Government.”¹⁰⁹ If the “to promote” phrase was intended to convey a broad power beyond copyrights and patents, Article I, section 8, clause 8 would have been primary authority supporting creation of a university. Neither Madison nor Pinckney would have needed to advocate for insertion of the power “to establish an University,”¹¹⁰ and Morris could have easily pointed to the power “to promote the Progress of Science and useful Arts” as negating a need for the separate power to establish a university. These Framers understood that the Copyright Clause did not reach so far.

The First Congress doubted that the Copyright Clause extended beyond the grant of copyrights and patents. As early as 1789, in response to a request by John Churchman to fund a scientific voyage, members of Congress questioned whether any provision of the Constitution authorized that expenditure. Representative Tucker,¹¹¹ one of the three-member committee appointed to report on the petition, “[e]xpressed a doubt whether the Legislature has power, by the Constitution, to go further in rewarding the inventors of useful machines, or discoveries in sciences, than merely to secure to them for a time the right of making, publishing and vending them.”¹¹² Sherman,¹¹³ then a member of the House of Representatives, also opposed the funding. He believed that the committee report, which encouraged protection for Churchman’s map, globe, and tables, went far enough.¹¹⁴ “It appears gone as far as proper to go at this time, as far as warranted by the Constitution.”¹¹⁵

109. *Id.*; see also U.S. CONST. art. I, § 8, cl. 17 (giving power to legislate over the seat of the United States government).

110. 2 CONVENTION RECORDS, *supra* note 49, at 616.

111. Thomas Tudor Tucker was a representative from South Carolina in the First and Second Congresses, and he was the United States treasurer from 1801–1828. 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 858, 862 (William C. DiGiacomantonio et al. eds., 1995) [hereinafter 14 DOCUMENTARY HISTORY OF FIRST CONGRESS].

112. 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 220 (Charles Bangs Bickford et al. eds., 1992) [hereinafter 10 DOCUMENTARY HISTORY OF FIRST CONGRESS].

113. Roger Sherman was a representative from Connecticut in the First Congress and was then appointed to the Senate. 14 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 111, at 512.

114. See 10 DOCUMENTARY HISTORY OF FIRST CONGRESS *supra* note 112, at 213; 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 510 (Charles Bangs Bickford, et. al. eds., 1986) (providing text of Apr. 20, 1789 committee report) [hereinafter 4 DOCUMENTARY HISTORY OF FIRST CONGRESS].

115. 10 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 112, at 213. Lloyd’s sometimes cryptic notes of Sherman’s speech continue:

This report of committee will show that they supposed his discovery worthy attention and giving the exclusive right to benefit by the discovery. If have a right to go further and lay out money it must be upon—Gentleman has fruitful invention. . . . The committee thought

When the same funding proposal was made again in 1790, a committee of three, which included Madison, stated that the proposal “involves an enquiry into the Constitutional powers of Congress, as well as the expediency of furnishing the aid requested”¹¹⁶ The proposal was rejected by the House.¹¹⁷

This understanding of the Copyright Clause is confirmed by other early authorities. Law professor and judge St. George Tucker¹¹⁸ in 1803 wrote that

the constitution not only declares the object, but points out the express *mode* of giving the encouragement Nothing could be more superfluous, or incompatible, with the object contended for, than these words, if it was, indeed, the intention of the constitution to authorize congress, to adopt any other mode which they might think proper.¹¹⁹

United States Attorney General William Wirt, arguing *Gibbons v. Ogden*,¹²⁰ stated the view that “Congress has the power to promote the progress of science and the useful arts; but only in one mode, viz. by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries.”¹²¹ Justice Joseph Story, in 1833, wrote of the clause that “[t]he power, in its terms, is confined to authors and inventors.”¹²²

President Washington believed that the Constitution, at least somewhere, allowed promotion of science and knowledge by means other than copyrights

fit to go as far as this to promote the progress; they did not think proper to give any further power to encourage this useful discovery.

Id. Rep. Seney of Maryland, 14 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 111, at 589, likewise doubted that the Copyright Clause authorized Congress to fund the expedition. Lloyd’s cryptic notes summarize Seney’s comments: “Doubt if—No doubt of adopting the report to secure—I have doubts whether in power or not to give money. I much doubt if encouragement—any other mode than that mentioned, other than securing.” 10 DOCUMENTARY HISTORY, *supra* note 112, at 214.

116. 4 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 114, at 531.

117. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 689 (Linda G. De Pauw, et. al. eds., 1977) (“It passed in the negative.”) [hereinafter 3 DOCUMENTARY HISTORY OF FIRST CONGRESS]; 4 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 114, at 529–30 (motion “disagreed to”).

118. St. George Tucker was also the brother of U.S. Rep. Thomas Tucker. 14 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 111, at 858–59.

119. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 266–67 (1803).

120. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

121. *Id.* at 165–66; *see also id.* at 166 (stating that the clause is the grant “of one mode of promoting the progress of science and the useful arts,” recognizing that other modes existed and could clearly be exercised by the states).

122. 3 STORY, *supra* note 91, § 1148. *But see* 2 *id.* § 968 (suggesting that a tax on foreigners or foreign inventions might be appropriate construing the power to tax and the power to promote the progress of science and useful arts).

and patents, and he encouraged Congress to establish and fund a national university.¹²³ Washington did not point to the constitutional provision that would authorize establishment of a national university, and members of Congress were quick to question the constitutionality of such action.¹²⁴ No action was taken on Washington's proposal.¹²⁵

In short, on the admittedly thin record available, it appears that the Framers and ratifiers of the Copyright Clause first and foremost intended to grant Congress the power to enact copyright laws and patent laws. This grant of power would necessarily further the objective of promoting the progress of science and useful arts. The Framers did not intend to grant, at least by means of the Copyright Clause, a broad power to take any action to promote the progress of science.

3. Taking the Broad View of Promoting the Progress of Science

The petitioners in *Eldred* made the argument that the retroactive extension of existing copyrights failed to promote the progress of science because the extension failed to stimulate creation of new works.¹²⁶ The petitioners, in substance, restated this same argument a second time when they argued that the clause requires a "quid pro quo"; the author gives the work in exchange for the rights afforded by copyright protection.¹²⁷ This view is born of a narrow reading of the "to promote" phrase, not supported by the language or history of the clause.

"To promote the Progress of Science" means to encourage the advancement of knowledge. In the language of the late eighteenth century,

123. See 3 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 117, at 253–54 (text of Washington's speech to both houses of Congress, dated Jan. 8, 1790).

124. 13 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1221 (Helen Veit et al. eds., 1994) [hereinafter 13 DOCUMENTARY HISTORY OF FIRST CONGRESS]. Rep. Stone, of Maryland, see 14 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 111, at 598,

enquired what part of the Constitution authorised Congress to take any steps in a business of this kind—for his part he knew of none. We have already done as much as we can with propriety—We have encouraged learning, by giving to authors an exclusive privilege of vending their works—this is going as far as we have power to, by the Constitution.

13 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra*, at 1221. *But cf. id.* (stating Rep. Page thought that Congress did have the power but suggested the matter be investigated).

125. The proposal was made in 1790 and again in 1796. See 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENT 1790–1966, at 3, 35 (Fred L. Israel ed., 1966).

126. *Eldred v. Ashcroft*, 537 U.S. 186, 211–12 (2003); see also Brief for Petitioners, *supra* note 11, at 15–16, 22 (making the argument that enactments must stimulate creation of works).

127. See *Eldred*, 537 U.S. at 214; Brief for Petitioners, *supra* note 11, at 23 ("Congress may make a trade—it may grant an 'exclusive Right' for a 'limited Time[]' in exchange for a 'Writing' by an 'Author.'"). Under this theory, the CTEA violates the requirement by awarding a windfall—additional copyright protection in exchange for nothing. See *id.*

“science” had the broad meaning of knowledge.¹²⁸ “Promote” meant to advance, to forward, or to contribute to the growth of something.¹²⁹ “Promote” also meant “encourage.”¹³⁰ “Progress” meant an “advance in knowledge; intellectual or moral improvement; proficiency.”¹³¹ Thus, the clause intended to forward or encourage the advancement of knowledge.¹³² This interpretation is in harmony with the copyright objectives stated by Congress immediately following ratification of the Constitution in the Copyright Act of 1790. In genuinely preambular language, Congress stated the purpose of the law: “An Act for the encouragement of learning, by securing the copies . . . to the authors and proprietors of such copies, during the times therein mentioned.”¹³³

128. The early American authority Noah Webster defined “science”: “1. In a *general sense*, knowledge, or certain knowledge . . . 4. Any art or species of knowledge. . . 5. One of the seven liberal branches of knowledge, viz. grammar, logic, rhetoric, arithmetic, geometry, astronomy and music.” 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Johnson Reprint Corporation 1970) (1828) (unpaginated); accord 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (unpaginated; giving essentially identical definition of “science” as Webster).

129. 2 WEBSTER, *supra* note 128 (definition of “promote”: “To forward; to advance; to contribute to the growth, enlargement or excellence of any thing valuable . . .”); 2 JOHNSON, *supra* note 128 (defining “promote” as “To forward; to advance”).

130. See 2 WEBSTER, *supra* note 128 (definition of “promotion”: “The act of promoting; advancement; encouragement . . .”); 2 JOHNSON, *supra* note 128 (defining “promotion” as “Advancement; encouragement”); see also Goldstein v. California, 412 U.S. 546, 555 (1973) (finding “to promote” synonymous with “to stimulate,” “to encourage,” or “to induce”). Both the Pennsylvania and New York copyright acts used the word “promote” or “promotion” seemingly synonymously with encourage or encouragement. See COPYRIGHT ENACTMENTS, *supra* note 55, at 10 (Pennsylvania act, “for the encouragement and promotion of learning”); *id.* at 19 (New York act, “AN ACT to promote literature”).

131. 2 WEBSTER, *supra* note 128 (definition of “progress”); accord 2 JOHNSON, *supra* note 128 (defining “progress” as “Intellectual improvement; advancement in knowledge; proficience”); cf. Orrin G. Hatch & Thomas R. Lee, “To Promote the Progress of Science”: The Copyright Clause and Congress’s Power to Extend Copyrights, 16 HARV. J.L. & TECH. 1, 12 (2002) (arguing that to “promote the progress of science” meant to promote distribution or dissemination of works); Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 803, 809 (2001) (arguing that “progress” in the Copyright Clause means physical “spread”). The Massachusetts, New Hampshire, and Rhode Island copyright acts made reference to the need to encourage “the progress of civilization.” COPYRIGHT ENACTMENTS, *supra* note 55, at 4, 8–9.

132. James Iredell (later Justice Iredell), in urging ratification of the Constitution, appeared to equate the language with “encouragement to genius.” 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 28, at 386 (Norfolk & Portsmouth J., by “Marcus IV” (James Iredell), dated Mar. 12, 1788).

133. Copyright Act of 1790, ch. 15, 1 Stat. 124. This language closely parallels the language of the first English copyright statute, the Statute of Anne in 1710. 8 Ann., c. 19 (1710) (Eng.) (“An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”).

Representative Stone's statement in May 1790 also appeared to equate promoting the progress of science with encouraging learning.¹³⁴ The encouragement of learning theme had also been expressed in the state copyright acts, just prior to the Constitution.¹³⁵

The "to promote" phrase on its face is broad. The Framers intended for Congress to have the power to legislate in the area of copyrights. They further communicated their belief and desire that copyright protection would have the effect of promoting the progress of science but likely they did not intend judicial scrutiny of each amendment to a copyright act to determine whether the enactment standing alone promoted the progress of science. This may have been the Supreme Court's point when it held that "the Copyright Clause empowers Congress to determine the intellectual property regimes that, *overall*, in that body's judgment, will serve the ends of the Clause."¹³⁶ So long as the resulting copyright act promotes the progress of science, then a particular germane amendment need not be measured against the "to promote" phrase.

Taking the petitioners' view of the "to promote" clause would call into question other amendments of the Copyright Act of 1976 (the "1976 Act"). In 1990, Congress enacted the Visual Artists Rights Act (VARA), and added section 106A to the 1976 Act.¹³⁷ VARA allows an author of a work of visual art to claim authorship of the work, to prevent use of the author's name in some cases, and to prevent distortion, mutilation, or destruction of the work, regardless of whether or not the author is the copyright owner.¹³⁸ The Act applied retroactively to already-created works still owned¹³⁹ by the authors, as

134. 13 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 124, at 1221 (quoting *Gazette of the United States*, 5 May 1790) ("We have encouraged learning, by giving to authors an exclusive privilege of vending their works—this is going as far as we have power to, by the Constitution."); *cf.* 10 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 112, at 213 (statement of Rep. Sherman, Apr. 20, 1789, referring to Churchman's request to fund his scientific voyage; noting that beyond copyright and patent protections, "[t]he committee thought fit to go as far as this to promote the progress; they did not think proper to give any further power to encourage this useful discovery").

135. *See, e.g.*, COPYRIGHT ENACTMENTS, *supra* note 55, at 1–2 (Connecticut act, "for the encouragement of literature and genius," "for the encouragement of learning"); *id.* at 6 (New Jersey act, "for the promotion and encouragement of literature"); *id.* at 10 (Pennsylvania act, "for the encouragement and promotion of learning"); *id.* at 17 (Georgia act, "encourage men of learning and genius").

136. *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (emphasis added).

137. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §603, 104 Stat. 5089, 5128–33 (1990) (codified at 17 U.S.C. § 106A (2000)).

138. 17 U.S.C. § 106A(a).

139. In this sense, "owned" has reference to the tangible medium in which the work is fixed rather than the copyright. *See id.* § 106A(d)(2) (referencing works "title to which has not . . . been transferred from the author").

well as to future works.¹⁴⁰ The new benefits conferred upon authors of this class of existing works did not create an incentive for creation of those works. With VARA, borrowing the terminology of the *Eldred* petitioners, there was no “quid pro quo,” but rather “a windfall” to authors of those particular existing works; authors did not give a work to the public in exchange for these added protections.

The broad view of the “to promote” phrase does not require such an analysis. Instead, this view would inquire whether the 1976 Act, as amended by VARA, continued to secure to authors for limited times rights to their works which would have the effect of promoting knowledge. Alternatively, a more limited but still broad view would inquire whether VARA itself secured to authors for limited times rights to their works that would have the effect of promoting knowledge. VARA would pass either of these tests. First, the basic copyright scheme remained intact, and authors received new rights to their works. Second, these new rights allowed authors to preserve works and truthfully inform the public concerning the origin and nature of those works.

In 1994, Congress enacted the Uruguay Round Agreements Act (URAA)¹⁴¹ adding section 104A to the 1976 Act.¹⁴² The amendment restored copyright in certain existing foreign works that had passed into the public domain.¹⁴³ The authors of works whose copyrights were restored did not give anything to the public in exchange for the new copyright protection. The broad view of the “to promote” phrase does not require such an exchange.¹⁴⁴ The basic copyright scheme remained intact, and arguably the restored copyright owners might be encouraged to create new works by perceived strong commitment to copyright protection demonstrated by the Act.

Many provisions of the 1976 Act taken in isolation, had they been offered as amendments to the Act, would not have provided incentive for creation of new works. For example, section 108,¹⁴⁵ permitting certain copying of works

140. *Id.* In fact, the Act provides a longer duration of protection for the category of works created before the effective date of the Act but whose title remained in the author, than for those works created after the effective date of the Act. *See id.* § 106A(d)(1) (stating that rights in post-effective date works last only for life of the author); *id.* § 106A(d)(2) (qualifying pre-effective date works receive protection for the same term as rights conveyed under § 106 (now life of the author plus seventy years)).

141. Pub. L. No. 103-465, § 514, 108 Stat. 4976 (1994).

142. 17 U.S.C. § 104A.

143. *Id.* § 104A(a), (h)(6).

144. Two courts recently rejected attacks on the constitutionality of the URAA. *See Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005) (holding restoration of copyrights under URAA constitutional); *Golan v. Gonzales*, No. Civ. 01-B-1854 (BNB), 2005 WL 914754, at *2 (D. Colo. Apr. 20, 2005) (same).

145. 17 U.S.C. § 108. Section 108 was part of the original 1976 Act, although it has been amended.

by libraries and archives, and section 110,¹⁴⁶ announcing exceptions to the performance and display rights, primarily limit authors' exclusive rights. Permitting copying, performance, or display of protected works without authorization of the copyright holder, while perfectly sensible and beneficial to the public, does not create incentives for authors of the original works to create new works—if anything, it reduces the incentives otherwise afforded by the exclusive rights. Nevertheless, these provisions, as part of a larger copyright act, support a scheme of incentives for authors. Moreover, individually each promotes the progress of science by providing the public reasonable access and opportunity to use protected works. These provisions, had they come as later amendments to the Copyright Act, could have been viewed as “windfalls”—this time not for copyright holders, but for the public.

The point is this: adopting the *Eldred* petitioners' reading of the Copyright Clause would have invited untold mischief by imposing close scrutiny of each amendment of the Copyright Act to determine whether the amendment on its own merits promoted the progress of science by encouraging creation of new works or publication of works. This limited approach would call into question many prior or future amendments, which might strengthen or improve the overall copyright scheme, but which, standing alone, do not encourage creation or publication of works. The petitioners tried to avoid this problem by limiting their test only to amendments extending the duration of copyrights and thus implicating the “limited Times” requirement.¹⁴⁷ Nevertheless, it is difficult to justify selective application of the phrase to only copyright terms and not other aspects of copyright law.

To the extent that the “to promote” phrase is viewed as a limitation on the power of Congress when legislating in the area of copyrights, the phrase establishes, at most, only a low threshold. Although the entire clause does identify the means for achieving the promotion of the progress of science (by securing to authors exclusive rights to their writings), neither the “to promote” phrase nor the broader Copyright Clause specifies *how* copyright law must promote the progress of science. The Copyright Clause does not specifically require creation of new works, distribution or publication of unpublished works, or any other particular knowledge-promoting end.

This broad interpretation of the Copyright Clause is consistent with the early history of copyrights both in Europe and the United States. The earliest copyrights in fifteenth century Europe were not strictly reserved for protection of newly authored works. In some cases these early privileges protected works

146. *Id.* § 110. Section 110 was also part of the original 1976 Act, although it has been amended.

147. *See Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003) (stating petitioners' argument that preamble language was not independently enforceable limit on Congress's power, but informed meaning of “limited Times” requirement).

hundreds of years old and were a means of encouraging publication of existing works.¹⁴⁸ Similarly, in the United States, a major impetus for copyright protection was Noah Webster's desire for protection of his nearly completed, or, as was the case in some states, both completed and published spelling and grammar book (the "blue-backed speller").¹⁴⁹

The Copyright Act of 1790 (the "1790 Act") protected works created after its enactment, but it also protected existing works created before the Act, including already-published works.¹⁵⁰ The 1790 Act was prompted by several private petitions to Congress for copyright protection for existing works. The first petition seeking copyright protection was from David Ramsay, who in April 1789 applied to Congress for copyright protection for two works he had written.¹⁵¹ The first work already was written and published; the second was to be published shortly.¹⁵² His petition asked for protection of both works "as a compensation for his labour and expence and finding the same principle expressly recognized in the new Constitution . . ."¹⁵³ The House Committee report recommended protection for both works without suggesting any constitutional doubt.¹⁵⁴ Rather than moving forward with the petition as an individual request, however, Congress referred it, and a similar petition from John Churchman, to a committee for preparation of general copyright legislation.¹⁵⁵

148. See HORATIO F. BROWN, *THE VENETIAN PRINTING PRESS* 54 (1891) (noting early practice of granting copyrights to publishers for works authored by others). For example, a copyright for the Letters of St. Catherine of Siena was granted in 1494–1495. *Id.* at 58–59. The letters were originally written from about 1370 to 1380. 1 *THE LETTERS OF ST. CATHERINE OF SIENA* 3 (Suzanne Noffke trans., 1988).

149. See Nachbar, *supra* note 62, at 43–44 (rebutting quid pro quo requirement and noting state copyright protection for Webster's work). Webster's book was finished by the summer of 1783 and published on October 7, 1783. RICHARD M. ROLLINS, *THE LONG JOURNEY OF NOAH WEBSTER* 34 (1980). Congress passed its resolution encouraging states to enact copyright laws in May 1783, and the various states passed their copyright laws during the period of early 1783 to 1786. See *COPYRIGHT ENACTMENTS*, *supra* note 55, at 1–21; see also, e.g., Letter from Noah Webster to the New York State Legislature (Jan. 18, 1783), in *LETTERS OF NOAH WEBSTER* 5, 5 (Harry R. Warfel ed., 1953) (letter asking state to grant copyright protection to Webster's book); Letter from Noah Webster to James Madison (July 5, 1784), in *LETTERS OF NOAH WEBSTER supra*, at 8, 9 (letter asking Madison to encourage Virginia legislature to grant copyright protection to Webster's book).

150. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1790).

151. 8 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA* 34–35 (Kenneth R. Bowling et al. eds., 1998) [hereinafter 8 *DOCUMENTARY HISTORY OF FIRST CONGRESS*] (Petition of David Ramsay, Charleston, S.C., dated Apr. 4, 1789).

152. *Id.*

153. *Id.*

154. 3 *DOCUMENTARY HISTORY OF FIRST CONGRESS*, *supra* note 61, at 29 (House Journal entry for Apr. 20, 1789).

155. *Id.*

Shortly after the Ramsay and Churchman petitions, Jedidiah Morse applied to Congress for copyright protection for his already-written and published work, again noting Congress's power under the Constitution.¹⁵⁶ Morse complained that his work was already being copied without his consent.¹⁵⁷ The House, again without any suggestion of a constitutional problem, referred his petition to the committee tasked to prepare general copyright legislation.¹⁵⁸ Ultimately, in 1790, Congress enacted the first United States copyright act, and soon after the Act was passed both Churchman and Morse registered the copyrights for their already existing and published works.¹⁵⁹ (It is not known whether Ramsay ever registered the copyrights in the works referred to in his petition because the records of the courthouse where he would have registered them no longer exist.)¹⁶⁰ The important point is that early authors and the First Congress, which included many Framers, in 1790 understood the Copyright Clause in the only recently ratified Constitution to empower Congress to grant copyright protection to existing, published works. Possibly, by rewarding authors of existing works Congress believed it promoted the progress of science by providing remuneration¹⁶¹ for their past efforts, hence encouraging those same authors to continue their creative efforts in the future.¹⁶² In any event, the approach of the First Congress is consistent with a broad understanding of the "to promote" phrase and discredits the *Eldred* petitioners'

156. 8 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 151, at 36 (Petition of Jedidiah Morse, Charlestown, Mass., dated Apr. 15, 1789 and May 12, 1789). Others also petitioned Congress for copyright protection for their existing works. *See, e.g., id.* at 36–37 (Nicholas Pike to Benjamin Goodhue, May 23, 1789) (seeking protection for his published work); 3 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 117, at 118 (House Journal entry for July 22, 1789) (referring to petition by Hannah Adams seeking "an exclusive privilege" for "a limited time" to publish her work on religious sects); *id.* at 424 (House Journal entry for May 26, 1790) (referencing petition of Enos Hitchcock seeking copyright protection for his published book).

157. 8 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 151, at 36.

158. 3 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 117, at 56–57, 60 (House Journal entries for May 12 & 14, 1789).

159. 8 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 151, at 29–30. Churchman's works were registered on June 17, 1790; Morse's works were registered on July 10, 1790. *Id.* Others who had sought copyright protection also registered their works. Adams registered the second edition of her work on July 6, 1791. *Id.* at 31. Hitchcock registered his work on Aug. 9, 1790. *Id.* at 32.

160. *Id.* at 29. Two of Ramsay's other works, both "orations," were registered for copyright protection in 1794 and 1800. FEDERAL COPYRIGHT RECORDS 1790–1800, at 130–31 (James Gilreath ed., 1987) (reproducing South Carolina district court copyright records for 1794–1800).

161. Or, in the words of the times, "pecuniary emolument." 8 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 151, at 35 (House Committee Report on Ramsay and Churchman Petitions, Apr. 20, 1789).

162. In the case of Churchman, in particular, the House committee considering his petition viewed the award of copyright as encouragement of his continuing research efforts in the area of navigation based on magnetic points. *Id.*

argument that any congressional copyright enactment must stimulate creation of new works that must be offered up by the author in exchange for the copyright protection.¹⁶³

The *Eldred* petitioners argued that the 1790 Act, by extending copyright protection to existing works, involved the necessary exchange of the authors' state-granted or common law copyrights for federal copyright protection.¹⁶⁴ This argument has as its necessary premises first, that the authors of existing works already held legally protected rights, and second, that the new federal copyright protection preempted or superseded those existing rights. The first premise is necessary or otherwise the authors would have had nothing of value to surrender in exchange for federal protection. Some of those seeking protection for their already-written works did have state copyright registrations,¹⁶⁵ but others likely did not.¹⁶⁶ The 1790 Act was completely indifferent to the existence of prior copyright protection and offered protection for published works regardless of their state copyright status.¹⁶⁷

Concerning common law copyright, although there may have been some theoretical question about the existence of common law copyright, it was clear that, to the extent the right existed at all,¹⁶⁸ it did not afford any practical legal protection. The forces seeking copyright protection in the states prior to the Constitution and on the federal level thereafter were not seeking an improved mechanism to enforce existing, recognized legal rights. These authors had no legal protection for their copyright interests, and they understood keenly the need for statutory copyright protection. In advocating for state copyright laws, Noah Webster did not argue that existing protections were ineffective, rather, he complained that his book and efforts were "not protected by the laws that protect every other species of property."¹⁶⁹ Jedidiah Morse, in the spring of 1789, petitioned Congress for copyright protection, noting "as the work is already published and as your Petitioner has no Security against its

163. See *supra* notes 126–36 and accompanying text.

164. Brief for Petitioners, *supra* note 11, at 28–29.

165. See, e.g., 8 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 151, at 30–31. Nicholas Pike had copyrights in four states before petitioning Congress for protection. *Id.* at 31. Hannah Adams had a copyright under Massachusetts law before petitioning Congress for protection. *Id.*

166. Delaware did not have state copyright protection, and some state copyright laws may never have become operative. See COPYRIGHT ENACTMENTS, *supra* note 55, at 21. Delaware had no act. *Id.* Maryland's act was to become effective only after all states had passed similar acts. *Id.* at 6. Pennsylvania's act also was to become effective only after all states had passed similar acts. *Id.* at 11.

167. See Copyright Act of 1790, ch. 1, §1, 1 Stat. 124 (1790).

168. The Supreme Court in 1834 held that there was no common law copyright for published works in America. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834).

169. Letter from Noah Webster to the New York State Legislature (Jan. 1783), in LETTERS OF NOAH WEBSTER, *supra* note 149, at 5, 7.

Republication by any other person.”¹⁷⁰ Authors of existing works did not give up any meaningful common law copyrights in exchange for the new federal copyright protection afforded by the 1790 Act.

The second premise, that the new federal copyright statute preempted or superseded existing rights, is at best uncertain and likely incorrect. It is doubtful whether the Copyright Clause or the 1790 Act preempted state copyright protections,¹⁷¹ and in modern times the Supreme Court has

170. 8 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 151, at 36.

171. Edward Walterscheid takes the view that the First Congress likely believed that the Intellectual Property Clause did preempt state patent and copyright laws, and appears to agree that this is the better view. EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 436, 468–69 (2002). There is historical support for this view. Nicholas Pike, who petitioned Congress in 1789 for copyright protection, apparently believed that his state copyrights were invalid, possibly due to the adoption of the Constitution. He stated:

As I find that one & another are petitioning Congress respecting the Copy-rights of their Works; I beg leave to request the favor of your Attention in my behalf.

I have already been at great trouble & some Cost in sending through the United States for the purpose of securing mine; which is now of no Validity.

8 DOCUMENTARY HISTORY OF FIRST CONGRESS, *supra* note 151, at 36; *see also* WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 102 (1825) (stating, specifically in reference to state patent laws, that “there can be no doubt that, as soon as congress legislated on the subject . . . all the state provisions ceased”).

There is, however, evidence suggesting that the clause did not preempt state copyright protection. The Patent Act of 1793, also authorized by Article I, section 8, clause 8, required an applicant for federal patent to relinquish any rights obtained under prior state laws. “That where any state, before its adoption of the present form of government, shall have granted an exclusive right to any invention, the party, claiming that right, shall not be capable of obtaining an exclusive right under this act, but on relinquishing his right under such particular state . . .” Patent Act of 1793, ch. 11, § 7, 1 Stat. 318, 322 (1793) (prior to revisions in Patent Act of 1836). If the Intellectual Property Clause preempted prior state law protections, the provision of the 1793 Patent Act would have been completely unnecessary. Rawle believed that the provision was included as an act of caution, *see* RAWLE, *supra*, at 102, but at a minimum the provision demonstrates doubt whether the clause preempted state law protections and may indicate that in fact it did not. Also, on its face the Act permitted a holder of a state right to retain the state protection and decline federal protection.

Other evidence also suggests that the Copyright Clause did not limit or preempt state copyright protections. *See also* BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 124 (1967) (noting that state copyright systems “passed out of use” but were “not rendered illegal by the Federal legislation and did not die immediately” as demonstrated by issuance of a copyright under South Carolina law in 1792 after enactment of the first federal copyright act); *Livingston v. Van Ingen*, 9 Johns. 507, 581 (N.Y. Sup. Ct. 1812) (Kent, C.J., separate opinion) (“That power only secures, for a limited time, to authors and inventors the exclusive privilege to their writings and discoveries; and as it is not granted, by exclusive words, to the *United States*, nor prohibited to the individual states, it is a concurrent power which may be exercised by the states . . .”). Many of the state copyright acts were not repealed until many years after the Constitution and the 1790 Act. *See, e.g.*, COPYRIGHT ENACTMENTS, *supra* note

concluded that as a matter of constitutional law the states have concurrent power to grant copyright protection.¹⁷² In *Goldstein v. California*, the Court held that the Copyright Clause “does not provide that such power shall vest exclusively in the Federal Government. Nor does the Constitution expressly provide that such power shall not be exercised by the States.”¹⁷³ Nothing in the 1790 Act expressly negated state-granted copyright protection.¹⁷⁴ Federal copyright protection likely did not formally replace or void any existing state copyright grants, although as a practical matter it may have made state copyright grants obsolete because of the advantages of federal protection.

As it concerned common law copyright protection, in *Wheaton v. Peters*,¹⁷⁵ the Supreme Court found that no common law copyright existed in the United States.¹⁷⁶ Therefore, the Court had no reason to reach the question of whether either the Constitution or the copyright act of the time preempted an existing common law right.

Later, the Copyright Act of 1909 (the “1909 Act”) afforded statutory copyright protection only to *published* works,¹⁷⁷ thus creating a direct incentive for publication of works—not merely the creation of new works. In contrast, the Copyright Act of 1976 (the “1976 Act”) affords copyright protection upon fixation in a tangible medium, instead of publication.¹⁷⁸ Each of these schemes (the 1790 Act, the 1909 Act, and the 1976 Act) promoted learning or knowledge, although they differed in substance and detail.

The Framers may have believed that copyright protection primarily would advance knowledge by encouraging creation of new works or publication of previously unpublished works, but the language of the Constitution is not limited to those ends. The Framers did not tie down future generations to any particular view of the progress of science. Justice Story, in *Martin v. Hunter’s Lessee*,¹⁷⁹ recognized that

[t]he constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those

55, at 3 (Connecticut act repealed in 1812); *id.* at 7 (New Jersey act repealed in 1799); *id.* at 8 (New Hampshire act repealed in 1842).

172. See *Goldstein v. California*, 412 U.S. 546, 560 (1973) (“[T]he language of the Constitution neither explicitly precludes the States from granting copyrights nor grants such authority exclusively to the Federal Government.”).

173. *Id.* at 553.

174. In contrast, the Copyright Act of 1976, by statute, does preempt most state copyright protection. See 17 U.S.C. § 301 (2000).

175. 33 U.S. 591 (8 Pet.) (1834).

176. *Id.* at 661, 663.

177. Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1075, 1077 (protection required publication with notice).

178. 17 U.S.C. § 102(a).

179. 14 U.S. (1 Wheat.) 304 (1816).

powers should be carried into execution. . . . The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages¹⁸⁰

The Pennsylvania Constitution, a close contemporary of the United States Constitution,¹⁸¹ contained the provision: “The arts and sciences shall be promoted in one or more seminaries of learning.”¹⁸² Pinckney proposed similar language for the United States Constitution at the same time he proposed the patent and copyright powers.¹⁸³ Like the Copyright Clause, the Pennsylvania provision identified the objective—“the arts and sciences shall be promoted”—and the means to achieve that objective (implying establishment of “one or more seminaries of learning”).¹⁸⁴ The provision did not direct *how* universities must promote the arts and sciences, nor would one expect a constitutional provision to be so limiting. This phrase in the Pennsylvania Constitution, notwithstanding its similarity to the “to promote the progress of science” phrase, could not reasonably refer exclusively to creation of new works or inventions of new discoveries. Other state constitutions of the time also contained language encouraging “arts and sciences” and promotion of arts and sciences by supporting universities and public schools.¹⁸⁵ These

180. *Id.* at 326. He continued: “Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.” *Id.* at 326–27.

181. The Pennsylvania Constitution of 1790 was adopted September 2, 1790. 5 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3092 n.a (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

182. PA. CONST. of 1790 art. VII, § 2, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 181, at 3092, 3099.

183. *See* 2 CONVENTION RECORDS, *supra* note 49, at 324–25 (noting Pinckney’s proposal empowering Congress “[t]o establish seminaries for the promotion of literature and the arts & sciences”).

184. PA. CONST. of 1790 art. VII, § 2, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, note 181, at 3092, 3099.

185. The Massachusetts Constitution of March 2, 1780, recognized the value of the “encouragement of arts and sciences” in granted authority to the president and fellows of Harvard College. MASS. CONST. of 1780 ch. V, § 1, art. 1, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 181, at 1906. The same constitution directed the “legislatures and magistrates . . . to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences.” *Id.* ch. V, § 2, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 181, at 1907; *accord* N.H. CONST. of 1784 pt. 2, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 181, at 2467 (“[I]t shall be the duty of the legislators and magistrates . . . to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences”); *see also* GA. CONST. of 1798 art. IV, § 13, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR

constitutional provisions recognized broad objectives and did not prescribe how these institutions of learning should encourage or promote the arts and sciences. The Copyright Clause should enjoy this same breadth.

4. “The Progress of Science” and Early Supreme Court Cases

The Supreme Court at one time flirted with the idea that the term “science” in the Copyright Clause had some significant limiting force. In dicta in the well-known case of *Baker v. Selden*,¹⁸⁶ the Court quoted and cited with approval language from *Clayton v. Stone & Hall*,¹⁸⁷ a circuit court decision, suggesting that there could be no copyright protection for a newspaper reporting “the state of the market.”¹⁸⁸ The language of *Clayton* cited the Copyright Clause and noted that the purpose of the copyright act was the promotion of science.¹⁸⁹ Moreover,

it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of of them. . . . The term “science” cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere temporary use.¹⁹⁰

Based in part upon this interpretation of the Copyright Clause, the court in *Clayton* concluded that the “price-current” or newspaper at issue could not be considered a “book” within the meaning of the Copyright Act of 1790.¹⁹¹ Another theme in *Clayton* was that the price-current was an item of utility and the result of the plaintiffs’ industry, but not a work of science, nor connected with learning.¹⁹²

Twelve years after *Baker*, in 1891, the Supreme Court in *Higgins v. Keuffel*¹⁹³ picked up on a similar theme when it held that mere product labels could not qualify for copyright protection. Such labels, it reasoned, had no value separate from the articles upon which they were attached, “and no possible influence upon science or the useful arts.”¹⁹⁴ The Court held that in

HERETOFORE FORMING THE UNITED STATES OF AMERICA 801 (Francis Newton Thorpe ed., William S. Hein & Co. 1993) (1906) (“The arts and sciences shall be promoted, in one or more seminaries of learning . . .”).

186. 101 U.S. 99 (1879).

187. 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872).

188. *Baker*, 101 U.S. at 105–06.

189. *Id.* at 105 (quoting *Clayton*, 5 F. Cas. at 1003).

190. *Id.*

191. *Clayton*, 5 F. Cas. at 1003; accord *Baker*, 101 U.S. at 105–06 (quoting *Clayton*, 5 F. Cas. at 1003).

192. *Clayton*, 5 F. Cas. at 1003.

193. 140 U.S. 428 (1891).

194. *Id.* at 431.

order to qualify for copyright protection, an “article” had to serve “some purpose other than as a mere advertisement.”¹⁹⁵ Although *Higgins* can be justified on the ground that the label lacked originality or contained unprotectable ideas, the language of the opinion was not so limited. *Higgins* suggested that copyrightability was dependent upon whether a particular work seeking protection actually promoted the progress of science in some identifiable manner.

The Seventh Circuit Court of Appeals in *J.L. Mott Iron Works v. Clow*,¹⁹⁶ followed *Baker* and *Higgins* in holding that a price catalogue with illustrations, dimensions, and price listings did not qualify for copyright protection because it was a mere advertisement and, as such, failed to advance literature, science, or art.¹⁹⁷ The court noted that under the Constitution, Congress’s power was “restricted to the promotion of the progress of science and useful arts.”¹⁹⁸

The Sixth Circuit Court of Appeals in *Courier Lithographing Co. v. Donaldson Lithographing Co.*,¹⁹⁹ attempted to follow *Higgins* when it held that chromolithographic prints created as advertising posters for a circus did not qualify for copyright protection.²⁰⁰ The court held that with “no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision.”²⁰¹ On appeal to the Supreme Court, Justice Holmes, in *Bleistein v. Donaldson Lithographing Co.*,²⁰² reversed and put to rest the idea that pictures used exclusively for advertisements were ineligible for copyright protection.²⁰³ Justice Holmes, while never mentioning *Higgins*, balked at the suggestion that courts should or could do a qualitative analysis of the aesthetic or educational value of works.²⁰⁴ Since *Bleistein*, the courts have not looked back.²⁰⁵

195. *Id.*

196. 82 F. 316 (7th Cir. 1897).

197. *Id.* at 321.

198. *Id.* at 320.

199. 104 F. 993 (6th Cir. 1900), *rev’d sub nom.* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

200. *Courier Lithographing*, 104 F. at 995–97.

201. *Id.* at 996; *see also id.* (“[H]aving no intrinsic value other than its function as an advertisement, [it] must be equally without the obvious meaning of the constitution.”).

202. 188 U.S. 239 (1903).

203. *Id.* at 251–52.

204. *Id.*; *see also* *Griesedieck W. Brewery Co. v. Peoples Brewing Co.*, 56 F. Supp. 600, 606 (D. Minn. 1944) (contrasting *Higgins* with *Bleistein* and following *Bleistein*’s “more liberal rule”).

205. *See, e.g.*, *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 348 (1991) (not necessarily construing the “to promote” phrase, but holding that the Constitution requires only a very low level of creativity to qualify for copyright protection).

5. CTEA: Promoting the Progress of Science

Under this broad view of the “to promote” phrase, the CTEA satisfies the constitutional requirement. First, the CTEA directly relates to copyright protection,²⁰⁶ and it leaves intact the basic protections and requirements of copyright law. The 1976 Act, as amended by the CTEA, continues to provide a system of incentives for the creation of works for limited times and permits, within limits, public use of and access to those works.

Applying a more restrictive approach, which would require that the CTEA itself promote the progress of science, the CTEA still survives scrutiny. It harmonized United States copyright law with European Union law by synchronizing the terms of many American and European copyrights. Under an EU Council directive, member states were required to establish a copyright term “for the life of the author and for 70 years after his death.”²⁰⁷ By extending the term of American copyrights from the life of the author plus fifty years to the life of the author plus seventy years,²⁰⁸ Congress believed it was maintaining the United States as a leader in intellectual property protection and consequently in creation of works.²⁰⁹ The statements made by members of Congress and others emphasized this justification.²¹⁰ The Register of Copyrights, Marybeth Peters, in testimony before Congress strongly supported passage of the CTEA²¹¹ and stated emphatically: “The Copyright Office believes harmonization of the world’s copyright laws is imperative if there is

206. If a non-germane amendment, addressing an issue unrelated to copyright—say providing crop subsidies—were attached to the Copyright Act, Congress would need to have authority for that provision from some constitutional provision other than the Copyright Clause.

207. Council Directive 93/98/EEC, art. 1, 1993 O.J. (L 290) 9 (EC).

208. See 17 U.S.C. § 302(a) (2000).

209. This was not the first time Congress had relied upon this rationale for adopting copyright legislation. In 1830, the House Report in support of the 1831 Act spoke of the need for the United States to be “foremost among nations in encouraging science and literature” but lamented that based on the term of copyright protection afforded in the United States, it was “very far behind them all.” H.R. REP. NO. 3, at 1 (1830), reprinted in U.S. Cong. Serial Set 210 (1830). The report recommended passage of the bill extending the original term of copyright from fourteen to twenty-eight years. *Id.* at 2.

210. See, e.g., *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 4 (1995) [hereinafter *S. Hearings*] (statement of Sen. Feinstein citing harmonization as “[p]erhaps the most compelling reason” for the CTEA); *id.* at 7, 20, 22 (statement of Register of Copyrights, Marybeth Peters, pointing to need to harmonize copyright terms and need for United States to be a leader in copyright protection); S. REP. NO. 104-315, at 3 (1996) (Senate report stating reasons for the CTEA).

211. *S. Hearings*, *supra* note 210, at 22 (revealing that the Copyright Office “strongly support[ed]” enactment of the CTEA). Perhaps Ms. Peters is having second thoughts. She recently acknowledged that “the merits [of the CTEA] in terms of copyright principles were slim.” Marybeth Peters, *Copyright Enters the Public Domain: The 33rd Donald C. Brace Memorial Lecture Delivered at New York University School of Law on Apr. 29, 2004*, 51 J. COPYRIGHT SOC’Y USA 701, 710 (2004).

to be an orderly exploitation of copyrighted works.”²¹² In the face of such testimony it is difficult to find that Congress did not act reasonably to promote the progress of science by enacting the CTEA.

The more relevant question is not whether implementing longer terms for copyrights increased harmony with European law, but whether increasing terms for existing copyrights either increased harmony with European law or otherwise promoted the progress of science. The CTEA’s retroactive extension of copyright terms is consistent with the European approach, which also required retroactive extension of copyright terms.²¹³ If harmonizing United States copyright law with European law is a valid justification for the CTEA, then it is a small step to find that harmonizing United States copyright law with itself by synchronizing existing copyright terms with future copyright terms is also valid justification. Testimony before Congress also supported a finding that extension of existing copyrights would encourage investment in restoration and public distribution of existing works with aged copyrights.²¹⁴

C. *Limits of the Copyright Clause*

1. Originality requirement

Article I, section 8, clause 8 empowers Congress to provide copyright and patent protections, but it does impose some limits on Congress’s power to legislate in the copyright area. Perhaps foremost is the requirement of originality. Although originality is not expressly identified in the Copyright Clause, courts have found the requirement implicit in the terms “authors” and “writings.”²¹⁵ In 1879, the “authors” and “writings” limitations were controlling in *The Trade-Mark Cases*,²¹⁶ where the Supreme Court held that the Copyright Clause could not support trademark legislation because trademarks were neither writings of authors nor discoveries of inventors.²¹⁷

212. *S. Hearings*, *supra* note 210, at 20.

213. The EU directive required that the new copyright term applied to “all works” protected in any Member State on July 1, 1995. Council Directive 93/98/EEC, arts. 10(2), 13, 1993 O.J. (L 290) 9 (EC); *see also* Written Question No. 841/98, 1998 O.J. (C 323) 82 (stating that art. 10(2) requirement “has led to a resurrection of rights in some Member States”).

214. *See* Hatch & Lee, *supra* note 6, at 16–20 (discussing congressional testimony and this justification).

215. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346–47 (1991); *see also* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (defining author as “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature” and holding that the Constitution is broad enough to cover photographs “so far as they are representatives of original intellectual conceptions of the author”). The *Eldred* petitioners argued that the originality requirement relates to the “promote the Progress of Science” requirement. *See* Brief for Petitioners, *supra* note 11, at 20–21.

216. 100 U.S. 82 (1879).

217. *Id.* at 93–94.

During the same term, *Baker v. Selden*²¹⁸ recognized that copyright fundamentally did not extend to ideas or useful knowledge contained in protected works.²¹⁹ Shortly thereafter, in 1884, in *Burrow-Giles Lithographics Co. v. Sarony*,²²⁰ the Supreme Court considered a constitutional question which was “not free from difficulty”—whether photographs were writings of authors within the meaning of the Copyright Clause.²²¹ The Court concluded that photographs could qualify “so far as they are representatives of original intellectual conceptions of the author.”²²² In 1891, in *Higgins v. Keuffel*,²²³ the Court on constitutional grounds refused copyright protection for merely descriptive ink bottle labels. The Court found that the labels lacked any value as compositions and communicated nothing more than the contents of the bottles.²²⁴ The holding in *Higgins* could be understood to mean that the labels were not protectable because they lacked original expression.

More recently, in 1991, the Court in *Feist Publications v. Rural Telephone Service Co.*²²⁵ enforced the originality requirement to hold that typical telephone book white pages were not subject to copyright protection.²²⁶ Although the 1976 Act codifies the originality requirement,²²⁷ the courts recognize that originality is a constitutional requirement.²²⁸

The *Eldred* petitioners, citing *Feist*, argued that extension of existing copyrights violated the originality requirement.²²⁹ They argued that “whenever congress extends to an ‘Author’ an ‘exclusive Right,’ that grant too must be tested for originality.”²³⁰ Under this view, an existing work, already protected by statutory copyright, could no longer be original for any subsequent

218. 101 U.S. 99 (1879).

219. *Baker* does not clearly state that its holding was driven by the Copyright Clause. *Baker*, however, quoted with approval language from *Clayton v. Stone & Hall*, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829), which explicitly relied upon the Copyright Clause. 101 U.S. at 105.

220. 111 U.S. 53 (1884).

221. *Id.* at 56.

222. *Id.* at 58. Other cases have discussed the originality requirement. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249–50 (1903) (discussing originality requirement); *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 101–03 (2d Cir. 1951) (discussing originality requirement).

223. 140 U.S. 428 (1891).

224. *Id.* at 433.

225. 499 U.S. 340 (1991).

226. *Id.* at 363–64.

227. 17 U.S.C. § 102(a) (2000) (“Copyright protection subsists . . . in original works of authorship”).

228. *E.g.*, *Feist Publ’ns*, 499 U.S. at 346–47; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58, 61 (1884); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 100–01 (2d Cir. 1951).

229. See *Eldred v. Ashcroft*, 537 U.S. 186, 210 (2003); Brief for Petitioners, *supra* note 11, at 32–33.

230. Brief for Petitioners, *supra* note 11, at 33.

copyright extension or grant. The theory appears to suggest that once a work receives statutory copyright protection by virtue of being an original work, or the work passes into the public domain for any reason, it has exhausted its originality. This argument is inconsistent with the practice of the First Congress when, under the authority of the Copyright Clause, it enacted the 1790 Act. The 1790 Act granted copyright protection to existing and even published works.²³¹ Neither Congress nor the Framers recognized a constitutional problem by granting copyright protection to existing works or works already protected by state copyrights.

The originality requirement is derivative of the “authors” and “writings” requirements²³² and should not be divorced from them or be permitted to expand broadly, untethered from the text of the Copyright Clause. An individual is genuinely an author when he or she includes an original contribution (“creative spark”)²³³ as part of the work. That individual is no less an author of the work with the passage of time, publication, or upon procurement of statutory copyright protection; a work continues to be original in the sense required by *Feist*. More fundamentally, changes to the scope or term of existing copyrights should not require consideration of the originality requirement. Any other rule would place copyright in a straitjacket, incapable of any alteration after the interest first arose, and could lead to the specter of multiple copyrights governed by different standards depending upon when a copyright interest first arose. The Copyright Clause does not and should not impose such a requirement.

2. Limited Times Requirement

a. Limited Times Copyrights in America: A Conscious Decision

Another limitation in the Copyright Clause, and of particular relevance to *Eldred v. Ashcroft*, is the limited times restriction.²³⁴ At the time of the framing of the Constitution, the idea of limited term copyrights had strong

231. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1790); *see also supra* notes 150–63 and accompanying text.

232. The *Eldred* petitioners argued that the originality requirement is based not only on “authors” and “writings,” but also on the “promote the Progress of Science” requirement. Brief for Petitioners, *supra* note 11, at 20–21; *accord* WALTERSCHEID, *supra* note 171, at 396–97 (originality standard of *Feist* incorporates creativity standard derived from the “to promote the Progress of Science” clause).

233. *See Eldred*, 537 U.S. at 211.

234. The Supreme Court has never invoked this limitation, but it has recognized it. *See* *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (acknowledging “limited copyright duration required by the Constitution”); *see also* *Pennock v. Dialogue*, 27 U.S. (1 Pet.) 1, 16–17 (1829) (patent case noting that the clause contemplates exclusive rights for a limited period determined by Congress).

historical precedent and support. Under the English copyright act, the Statute of Anne of 1710, copyrights lasted for fourteen years from publication “and no longer,”²³⁵ with the potential for an additional fourteen year renewal term if the author was then living.²³⁶ When the Continental Congress called for state copyright laws in 1783, it called for copyright protection “for a certain time.”²³⁷ All the early state copyright laws were for limited terms.²³⁸

The fact that American statutory copyrights were for limited terms was not by happenstance. The genesis of limited term copyrights likely was rooted in a desire to avoid unnecessary monopolies in printing.²³⁹ Prior to the Statute of Anne of 1710 in England, the Stationers’ Company, a powerful trade group sanctioned by royal charter and legislation,²⁴⁰ created a system of private perpetual copyrights.²⁴¹ By this system of copyrights, the Stationers enjoyed a powerful monopoly in the book trade. As part of the debate in the late seventeenth century, John Locke complained about the impact of the Stationers’ monopoly and advocated for, at most, limited term copyrights.

That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning; and for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of

235. Statute of Anne, 8 Ann., c.19, § I (1710) (Eng.).

236. *Id.* § XI.

237. 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 326–27 (Gaillard Hunt ed., Government Printing Office 1922) (reporting text of resolution).

238. The terms varied. Most, like the Statute of Anne, provided for an original term of fourteen years followed by a renewal term of fourteen years. *See* COPYRIGHT ENACTMENTS, *supra* note 55, at 1–21 (acts of Connecticut, Georgia, Maryland, New Jersey, New York, Pennsylvania, and South Carolina). Others varied from as short as fourteen years, *id.* at 15 (North Carolina), to as long as twenty-one years, *id.* at 9, 14 (Rhode Island, Virginia).

239. Professor Thomas B. Nachbar rejects the position that the Copyright Clause reflected the Framers’ alleged abhorrence of monopolies. *See* Nachbar, *supra* note 62, at 329–49. Professor Nachbar’s thesis, however, focuses on the broader point that the Constitution does not evince a generally applicable norm against grants of monopolies or exclusive rights. *See id.* The thesis here is that the history of statutory copyright, dating back to the Statute of Anne, had antimonopoly origins, and those origins carried through as a basis for copyright theory in America. English statutory copyright law, spawned by the bad experience with the Stationers’ Company’s printing monopoly, coupled with Madison’s own undeniable distaste for monopolies, likely were behind the “limited Times” phrase of the Copyright Clause.

240. *See* Licensing Act, 14 Car. 2, c. 33 (1662) (Eng.); 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON; 1554–1640 A.D., at xxviii–xxxii (Edward Arber ed., Peter Smith 1950) (1875) [hereinafter TRANSCRIPT OF STATIONERS] (reproducing the text and translation of the 1557 charter).

241. *See generally* Dallan, *supra* note 10, at 391–402 (discussing history of Stationers’ Company and its system of private copyright); 1 & 2 TRANSCRIPT OF STATIONERS, *supra* note 240 (providing history and records of the Stationers’ Company).

the author, or the first printing of the book, as, suppose, fifty or seventy years.²⁴²

Eventually, in 1694, Parliament refused to renew the Licensing Act, which had allowed the Stationers to monopolize the book trade. The House of Commons objected to renewal of the Licensing Act, because under the Act “said Company are impowered to hinder the printing all innocent and useful Books,” and printing of “the Classick Authors,” and “a great Number of the best Books” had been “monopolized by the Company of Stationers.”²⁴³

Later, in 1710, Parliament enacted the Statute of Anne and terminated perpetual copyrights for published works by imposing limited terms upon both the existing private copyrights and future copyrights under the statute.²⁴⁴ The Stationers continued to press their case for perpetual copyrights in the courts until finally in 1774, the House of Lords rejected post-Statute of Anne perpetual common law copyrights in *Donaldson v. Beckett*.²⁴⁵

Madison and Jefferson were opponents of monopolies, but Madison, for his part, was willing to accept copyrights and patents as limited monopolies necessary to encourage literary works and discoveries.²⁴⁶ Madison in his correspondence with Jefferson in 1788 agreed that monopolies were “among the greatest nuisances [sic] in Government.”²⁴⁷ On a later occasion Madison wrote that monopolies should only be “granted with caution, and guarded with strictness against abuse.”²⁴⁸ Concerning copyrights and patents, however, “[t]here can be no just objection to a temporary monopoly in these cases; but it ought to be temporary because under that limitation a sufficient recompence [sic] and encouragement may be given.”²⁴⁹ Supreme Court Justice and legal scholar Joseph Story in 1833 explained that the public benefits from limited

242. LORD KING, *THE LIFE AND LETTERS OF JOHN LOCKE* 208 (Burt Franklin ed., Garland Pubs. 1972) (1884).

243. 11 H.C. JOUR. 306 (1695).

244. Statute of Anne, 8 Ann., c.19, § I (1710) (Eng.) (providing a term of twenty-one years for existing copyrights and two fourteen-year terms for future copyrights).

245. 1 Eng. Rep. 837 (H.L. 1774). *Donaldson* held that even if a perpetual common law copyright had existed, it was preempted by the Statute of Anne. *Id.* at 844–47.

246. See Letter from Madison to Jefferson (Oct. 17, 1788), in 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826*, at 562, 566 (James Morton Smith ed., W.W. Norton & Co. 1995) (“With regard to Monopolies they are justly classed among the greatest nuisances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?”).

247. *Id.*

248. James Madison, *Aspects of Monopoly One Hundred Years Ago*, 128 *HARPER’S MAGAZINE*, March 1914, at 489, 490 (publishing Madison’s previously unpublished essay).

249. *Id.*

term copyrights because “after a short interval,” the people have “full possession and enjoyment” of the writings “without restraint.”²⁵⁰

Prior to the Constitution, the concept of perpetual copyright had been advocated for in England. As late as 1774, in *Donaldson v. Beckett*,²⁵¹ proponents of perpetual copyright were pressing their case. Noah Webster, one of the early American advocates for copyright protection,²⁵² preferred perpetual copyrights. Several years after ratification of the Constitution, Webster opined that he did “not see the reason why an interest in original literary composition should stand on different ground from all other personal property,” and he puzzled over why “[m]en are strangely influenced by habits” into believing that property in literary compositions “should be held only for a limited time, while a horse or an acre of land . . . is a permanent inheritable estate.”²⁵³

The Framers, by including the “limited Times” phrase in the Copyright Clause, unambiguously rejected the idea of perpetual statutory copyrights. In the historical context where perpetual copyright was a familiar but rejected concept, it was no surprise that the Framers accepted the prevailing view of the time and opted for limited duration copyrights.

b. Perpetual Copyright on “The Installment Plan”?

The petitioners in *Eldred* argued that the “blanket” term extension in the CTEA for existing copyrights violated the limited times requirement.²⁵⁴ However, petitioners did not claim that the CTEA’s lengthened copyright terms for works created in the future violated the limited times requirement.²⁵⁵ Rather, under petitioners’ view, only retroactive copyright term extensions were suspect. The Court rejected the petitioners’ argument by resorting to the dictionary definition of “limited” and Congress’s historical practice of retroactive extensions.²⁵⁶

250. 3 STORY, *supra* note 91, § 1147.

251. 1 Eng. Rep. 847 (H.L. 1774).

252. Noah Webster was one of the first advocates for copyright protection in America. Before the time of the Constitution he lobbied the individual states for copyright laws. See HARRY R. WARFEL, NOAH WEBSTER: SCHOOLMASTER TO AMERICA 58 (1936) (“Webster unquestionably is the father of copyright legislation in America.”).

253. Letter from Webster to Simeon Baldwin (Dec. 1803), in LETTERS OF NOAH WEBSTER, *supra* note 149, at 253, 254; see also Letter from Webster to John Pickering (Dec. 1816), in LETTERS OF NOAH WEBSTER, *supra* note 149, at 341, 383–86 (arguing that copyright is not a monopoly, but property which should be for permanent enjoyment of author’s heirs).

254. Brief for Petitioners, *supra* note 11, at 18.

255. See *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (“petitioners concede” that life plus 70 years for future copyrights qualifies as limited time); Brief for Petitioners, *supra* note 11, at 14 (“Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court.”).

256. *Eldred*, 537 U.S. at 199–204.

Opponents of the CTEA and the *Eldred* petitioners both recognized the danger with retroactive term extensions—perpetual copyrights on the installment plan.²⁵⁷ Under the Court’s approach, a twenty-year extension of an existing limited term is still “confine[d] within certain bounds.”²⁵⁸ The problem is that under this view, any copyright term extension for a set number of years would satisfy this requirement, and each time copyrights were about to expire, Congress could tack on another extension with no clear end in sight.²⁵⁹ The Court acknowledged this risk, but noted that the CTEA did not present the situation of a string of lengthy extensions attempting to avoid the limited times requirement.²⁶⁰

The Court also found a lack of evidence that Congress intended the CTEA as a step toward perpetual copyright.²⁶¹ The challenge with this approach is that it encourages unspoken motives; careful witnesses and legislators need only pay lip service to the limited times requirement to avoid a constitutional conflict. Members and witnesses may even speak supportively of perpetual copyrights without causing a problem. The Court rejected Justice Breyer’s dissenting citation to members of Congress who viewed the CTEA as a step in the right direction toward perpetual copyright.²⁶² In the Court’s view, these “scattered statements” cited by Justice Breyer were not the sort of legislative history “accord[ed] high value.”²⁶³

The EU Council directive requiring European Union member states to adopt copyright terms for life of the author plus seventy years²⁶⁴ was a major motivation—and for many the single most important motivation—for congressional support of the CTEA.²⁶⁵ The EU directive lends strong support

257. In testimony before Congress, Professor Peter Jaszi warned that some might believe that the CTEA “represents a downpayment on perpetual copyright on the installment plan.” *S. Hearing, supra* note 210, at 72 (statement of Peter A. Jaszi).

258. *Eldred*, 537 U.S. at 199 (alteration in original) (quoting S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785)).

259. Professor Thomas Lee has picked up on this theme and analyzed his own hypothetical “Marshall Mathers Copyright Term Extension Act of 2020,” which he forecasts undoubtedly will be proposed in some form in the future. Thomas R. Lee, *Eldred v. Ashcroft and the (Hypothetical) Copyright Term Extension Act of 2020*, 12 TEX. INTELL. PROP. L.J. 1, 12 (2003). He concludes that “[a]ll indications are that there will be a ‘next time,’” noting the powerful lobbying interests behind the 1998 CTEA. *Id.* Professor Lee concludes that his best guess is that such an extension of 30 years would likely survive a constitutional challenge under *Eldred*. *Id.* at 22.

260. *Eldred*, 537 U.S. at 208–09.

261. *Id.*

262. *Id.* at 209 n.16; *see also id.* at 256 (Breyer, J., dissenting) (citing members of Congress).

263. *Id.* at 209 n.16 (majority opinion).

264. Council Directive 93/98/EEC, art. 1, 1993 O.J. (L 290) 9 (EC).

265. *See, e.g., S. Hearings, supra* note 210, at 4 (statement of Sen. Dianne Feinstein, a cosponsor of the CTEA, that harmonization with European law was “[p]erhaps the most compelling reason” for the CTEA); *id.* at 1–2 (statement of Sen. Orrin G. Hatch, citing economic

for the view that most members of Congress were not attempting to institute perpetual copyright protection; instead, they were motivated by competitive and economic concerns. Copyright terms for the life of the author plus seventy years, and in the case of works made for hire for ninety-five or one hundred and twenty years, are literally for limited times.

III. LIMITED JUDICIAL REVIEW FOR THE COPYRIGHT CLAUSE

Applying an originalist approach, a court should consider both the Framers' intent concerning the Copyright Clause itself and their intent regarding judicial review of congressional acts. To be true to the Framers' intentions, there are two pertinent questions. First, would the Framers have viewed the CTEA as consistent with the power granted by the Copyright Clause? Second, assuming the CTEA is inconsistent with the grant in the Copyright Clause, would the Framers have intended that a court strike down the CTEA?

A. *Courts Read the Grant of Authority Under the Copyright Clause Broadly*

In construing the Copyright Clause, the Supreme Court has read the clause liberally,²⁶⁶ and *Eldred* is a continuation of the Court's earlier precedents. In *Burrow-Giles Lithographic Co. v. Sarony*, the Court read the clause broadly to hold that photographs were "writings" of "authors" within the constitutional meaning of the clause.²⁶⁷ In *Bleistein v. Donaldson Lithographing Co.*,²⁶⁸ the Court held that "a mere advertisement"²⁶⁹ was subject to protection under the Constitution and the prevailing copyright act.²⁷⁰ In *Kalem Co. v. Harper Brothers*, the Court held that a movie dramatization of scenes depicted in the novel *Ben Hur* infringed the plaintiff's copyright and did not violate the Copyright Clause by extending protection to ideas.²⁷¹ In *Mazer v. Stein*, the

and trade disadvantages with Europe without the CTEA); ORRIN G. HATCH, COPYRIGHT TERM EXTENSION ACT OF 1996, S. REP. NO. 104-315, at 3 (1996) (stating purpose of CTEA was "to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works" and citing "significant trade benefits" through harmonizing U.S. copyright law with European law).

266. *Goldstein v. California*, 412 U.S. 560, 561 (1973) (noting that terms "writings" and "authors" "have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles"); *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823, 826 (8th Cir. 1924) (noting courts' liberal construction of Copyright Clause).

267. 111 U.S. 53, 58 (1884).

268. 188 U.S. 239 (1903).

269. *Id.* at 252 (Harlan, J., dissenting).

270. *Id.* (majority opinion).

271. 222 U.S. 55, 63 (1911).

Supreme Court assumed, as did the parties, that the creator of a picture or a statue was an “author” within the meaning of the Copyright Clause.²⁷²

These cases broadly construing the Copyright Clause are weighed against the holdings enforcing limitations of the clause beginning with the *Trade-Mark Cases*,²⁷³ *Baker v. Selden*,²⁷⁴ *Higgins v. Keuffel*,²⁷⁵ and more recently in *Feist Publications, Inc. v. Rural Telephone Service Co.*²⁷⁶ These cases are rooted in the principle that copyright protection does not extend to ideas, facts, or other works lacking originality. Yet, even these opinions in some measure signaled a broad interpretation of the Copyright Clause. The *Trade-Mark Cases* acknowledged that the word “writings” in the clause is “liberally construed.”²⁷⁷ *Baker*, although holding ideas beyond the reach of copyright protection, recognized the basic doctrine that the copyright in a book is valid “without regard to the novelty, or want of novelty, of its subject-matter.”²⁷⁸ In *Feist*, the Court held that the constitutional requirement of originality is satisfied by only an “extremely low” level of creativity, and emphasized that copyright protection may exist for compilations of facts.²⁷⁹ These cases demonstrate that the Court has construed the Copyright Clause liberally and implicitly afforded broad discretion to Congress to legislate in the area of copyrights. Other courts have followed the Supreme Court’s lead and have construed the language of the Copyright Clause liberally. For example, courts have assumed, seemingly without hesitation, that various works including computer programs, fabric designs, belt buckles, and architectural structures are “writings” in the constitutional sense.²⁸⁰

272. 347 U.S. 201, 208 (1954). *But see id.* at 219–21 (Douglas, J., concurring) (questioning whether sculptor is an “author” or a statue a “writing,” and urging reargument to consider the “important constitutional question”).

273. 100 U.S. 82 (1879).

274. 101 U.S. 99 (1879).

275. 140 U.S. 428 (1891).

276. 499 U.S. 340 (1991).

277. 100 U.S. at 94; *accord Higgins*, 140 U.S. at 431 (quoting *Trade-Mark Cases*, 100 U.S. at 94).

278. 101 U.S. at 102.

279. 499 U.S. at 345.

280. *See, e.g.*, *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 762–63 (2d Cir. 1991) (recognizing and discussing copyright protection for fabric designs); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1248 (3d Cir. 1983) (recognizing that computer programs are afforded copyright protection as literary works); *Kieselstein-Cord v. Accessories By Pearl, Inc.*, 632 F.2d 989, 994 (2d Cir. 1980) (upholding copyright protection for ornamental belt buckles); *Yankee Candle Co. v. New England Candle Co.*, 14 F. Supp. 2d 154, 158 (D. Mass. 1998) (recognizing copyright protection in architectural structures); *see also United States v. Moghadam*, 175 F.3d 1269, 1274 (11th Cir. 1999) (noting “the term ‘Writings’ has been interpreted so broadly as to include much more than writings in the literal sense, or the lay definition of the word”).

In *Sony Corporation of America v. Universal City Studios, Inc.*,²⁸¹ a case cited by the Court in *Eldred*,²⁸² the Court explained its position: “As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.”²⁸³ The Court has been willing to read the clause broadly and to otherwise afford Congress flexibility when legislating in the area of copyrights. The Court’s decision in *Eldred* is consistent with the Court’s historically deferential approach to congressional copyright enactments; a stricter reading of the Copyright Clause would have been a departure from the Court’s prior cases.

B. The Framers Intended Limited Judicial Review

There has been extensive debate over the scope, and early on even the validity, of judicial review of congressional enactments. Although individual Framers had many different views, it appears that the prevailing view among the leading Framers was that the Constitution supported at least some level of judicial review of congressional acts.²⁸⁴ Nevertheless, the early evidence supports a practice of only limited, deferential judicial review of congressional enactments. Professors Paul M. Schwartz and William Michael Treanor make the case that under the Constitution generally, and the Copyright Clause in particular, “the original understanding would be that the standard of judicial review is a very deferential one,”²⁸⁵ and note that “the scholarly orthodoxy is

281. 464 U.S. 417 (1984).

282. *Eldred v. Ashcroft*, 537 U.S. 186, 204–05 (2003).

283. 464 U.S. at 429; *see also* *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (“[I]t is not our role to alter the delicate balance Congress has labored to achieve.”); *Goldstein v. California*, 412 U.S. 546, 562 (1973) (noting that under the Copyright Clause “the area in which Congress *may* act is broad”); *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972) (patent case; “The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress.”).

284. EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS* 10–11 (reprint 1963) (1914) (identifying specific leading Framers who understood the Constitution to provide for judicial review of congressional acts); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 70 (1985) (noting that, at the Convention, members “recognized that the courts would review the validity of congressional legislation”); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 38–39 (1990) (noting limited discussion of judicial review in the Constitutional Convention and concluding that of those who spoke about it, more supported it than denied it).

285. Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 *YALE L.J.* 2331, 2374 (2003).

that the original understanding was that courts deferred to Congress and legislatures unless a statute's unconstitutionality was clear."²⁸⁶

If what the Framers intended by the Copyright Clause is to be controlling of its construction today, that intent must be taken in the broader context of their views of judicial review. Understanding that the Framers intended only very limited review over the constitutionality of congressional enactments, the Supreme Court was correct in upholding the CTEA, which at a minimum does not clearly violate the Copyright Clause.

IV. PROBLEMS WITH THE *ELDRED* RATIONALE

This Article takes the position that the outcome in *Eldred* likely did comport with the original intentions of the Framers; the Framers intended that Congress have broad discretion in enacting copyright laws and likely would have approved even retroactive extension of copyrights to improve the international competitive and economic position of the United States and its copyright owners. The *Eldred* opinion also recognized the Court's limited constitutional role in review of copyright laws. That role permits the people's elected representatives to make policy decisions and pass laws with intrusion only when absolutely necessary to enforce the people's expressed will in the Constitution.

The *Eldred* opinion, however, did open itself to some criticism. First, the Court unnecessarily elevated the private interest rationale of copyright to a status equal with the public interest rationale of copyright. Second, the Court failed to reject outright the "quid pro quo" requirement suggested by the petitioners. Third, the Court's reliance on Congress's history of copyright extensions is problematic.

A. *The Public Interest Rationale for Copyright Protection*

From the earliest history of copyright protection there have been two competing rationales for copyright protection—a public interest rationale and a private interest rationale.²⁸⁷ The public interest rationale focuses on benefits to the public by encouraging availability of works to the public. The private interest rationale focuses on benefits to individual authors or copyright holders. In decisions prior to *Eldred*, the Court consistently reaffirmed the preeminence

286. *Id.* at 2371; *see also* *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.) ("[I]f the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case.*"); SNOWISS, *supra* note 284, at 36, 60 (noting that during the period prior to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), judicial review was "reserved for the concededly unconstitutional act").

287. *See generally* Dallon, *supra* note 10 (discussing public interest and private interest rationales).

of the public interest rationale for copyrights.²⁸⁸ In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court stated that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”²⁸⁹ In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court stated: “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”²⁹⁰ In *United States v. Paramount Pictures, Inc.*, the Court recognized that “copyright law . . . makes reward to the owner a secondary consideration.”²⁹¹ These pronouncements are consistent with the language of the Copyright Clause itself, which explicitly focuses on the public benefits of copyright protection in its “To promote the Progress of Science” language.²⁹² The 1790 Act also focused on the public interest rationale.²⁹³

Adoption of the public interest rationale by the Framers and the First Congress likely was a calculated decision. The state copyright acts adopted from 1783 to 1786 had a strong flavor of the private interest rationale,²⁹⁴ but the Framers chose not to include any reference to the private interest rationale in the Constitution. The 1790 Act is likewise devoid of reference to the private interest rationale.

Eldred in lengthy footnote 18 is critical of the dissenters’ reliance upon the public interest rationale.²⁹⁵ The opinion claims that Justice Stevens “understates” the relationship between reward to authors and the progress of science, and Justice Breyer “misses the mark” when he asserts that “copyright

288. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 519–20 (2001) (Stevens, J., dissenting) (primary purpose is not to reward authors; private motivation must promote public availability of works); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524–26 (1994) (copyright must ultimately serve public good); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (reward to copyright owners is secondary); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The 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.”).

289. 499 U.S. 340, 349 (1991).

290. 464 U.S. 417, 429 (1984).

291. 334 U.S. 131, 158 (1948).

292. U.S. CONST. art. I, § 8, cl. 8.

293. The Act was entitled “An Act for the encouragement of learning . . .” Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790).

294. For example, the Connecticut copyright statute stated: “[I]t is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works . . .” COPYRIGHT ENACTMENTS, *supra* note 55, at 1. The North Carolina copyright statute began: “Whereas nothing is more strictly a man’s own than the fruit of his study . . .” *Id.* at 15.

295. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

statutes must serve public, not private, ends.”²⁹⁶ According to the Court, “copyright law celebrates the profit motive,”²⁹⁷ and “[r]ewarding authors” and promoting progress are “complementary.”²⁹⁸ Finally, the Court concluded, the public end and the private end “are not mutually exclusive.”²⁹⁹

The Court also found that the CTEA enjoyed a rational basis and promoted the progress of science in part because of demographic, economic, and technological changes, and because “longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.”³⁰⁰ The demographic, economic, and technological changes argument at heart is only a private interest justification. The argument was that in view of increased human longevity and the pattern of starting families later in life, the term life plus fifty years did not adequately provide for an author’s descendants.³⁰¹ This argument, although framed in terms of increased incentives for authors to create works, had little to do with incentives³⁰² and much to do with the private interests of maintaining revenue streams to non-author copyright successors.³⁰³ One is hard pressed to claim that by retroactively lengthening the term of an existing copyright, there is an increased incentive to the author of the existing work (who may or may not continue to be the copyright holder).

Encouraging restoration and public distribution of existing works, on the other hand, would serve the public interest rationale. The difficulty is that the forces behind the CTEA had in mind *preventing* restoration and public distribution of copyrighted works by petitioners and others. Also, this argument would support perpetual copyright; a copyright holder will always have greater incentive to invest in a work so long as the copyright monopoly continues. Of course lengthening copyright terms does not necessarily encourage public distribution of works. In some situations it could encourage a copyright holder to sit on a work and wait, knowing that the renewed copyright protection will prevent others from exploiting the work first.

296. *Id.*

297. *Id.* (emphasis omitted) (quoting *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994)).

298. *Id.*

299. *Id.*

300. *Eldred*, 537 U.S. at 206–07; *see also id.* at 213 (identifying justifications for concluding that CTEA promoted the progress of science).

301. *Id.* at 207 n.14.

302. *See Dallan*, *supra* note 10, at 447–53 (arguing that CTEA has no significant impact on incentives to create works).

303. *See id.* at 442–44 (citing testimony before Congress seeking income for authors’ descendants); *id.* at 443–46 (arguing that increased life expectancy and providing for three generations are not valid justification for copyright term extension).

The Court further diminished the distinction between the public interest and the private interest in another troublesome footnote when it cited testimony of the Register of Copyrights.³⁰⁴ The Court stated:

According to the Register, extending the copyright for existing works “could . . . provide additional income that would finance the production and publication of new works.” “Authors would not be able to continue to create,” the Register explained, “unless they earned income on their finished works. The public benefits not only from an author’s original work but also from his or her further creations.”³⁰⁵

Under this view, anything that puts money in the pockets of copyright holders promotes the progress of science.³⁰⁶ This is not accurate. For many extended copyrights, the authors are dead and will not be creating any new works regardless of continued revenue to their estates or copyright successors; assuring continued payments to George Gershwin’s grandchildren does not promote the public interest. Moreover, for those living authors who continue to hold their copyrights, the additional financial value of twenty years tacked onto an already lengthy copyright period is likely next to nothing.³⁰⁷ The large majority of works do not retain significant economic value for more than fifty years from the death of the author, and adding twenty years to the term changes nothing for those works.³⁰⁸

The Court’s private interest-oriented arguments were unnecessary and risk eroding the public interest rationale of copyright. The Court could have avoided this problem by adopting the view urged above—that the Copyright Clause does not require judicial scrutiny of each copyright amendment for compliance with the “to promote” phase so long as the overall copyright scheme complies with the requirement.³⁰⁹ Alternatively, the Court should have

304. *Eldred*, 537 U.S. at 207–08 n.15.

305. *Id.* at 208 n.15 (citations omitted).

306. For example, tax cuts or grants to entertainment companies would “promote the Progress of Science.”

307. Professor John Belton testified before Congress that corporations making movies and television programs “operate on a short-term financial basis” and need to make their money on a work within two to five years from release. *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 286 (1995) (statement of John Belton, Professor, Rutgers University, on behalf of the Society for Cinema Studies). “Any profit that it generates after its initial play-off is pure gravy and has little or no relation to the initial incentives which led to its production.” *Id.*; see also *S. Hearings*, *supra* note 210, at 72 (Professor Peter A. Jaszi stated: “No rational business makes economic decisions about present investment based on the mere possibility of income 75 or 100 years in the future.”).

308. See *Eldred*, 537 U.S. at 248 (Breyer, J., dissenting) (quoting Congressional Research Service study finding that only 2% of copyrights between 55 and 75 years old retain commercial value).

309. See *supra* note 136 and accompanying text.

maintained that the CTEA itself does promote the progress of science. Under the Copyright Clause and our legal tradition, the public interest and private interest are not co-equal interests and never have been. The private interest is only relevant to the extent that it furthers the public interest. To the extent that the CTEA was intended to provide for the grandchildren of now-dead authors, a private interest is served, but not a public interest. However, in the case of the CTEA, the Act served both private and public interests. By harmonizing United States copyright law with European Union copyright law, the CTEA serves the public interest required by the Copyright Clause; it promotes the progress of science by encouraging efficiencies and maintaining the United States as a leader in copyright protection.³¹⁰ This in turn encourages American authors to create works in the United States and seek American copyright protection. Retroactive extension of copyrights less clearly promotes the progress of science, but seems to be a reasonable adjustment to copyright law, internally harmonizing United States copyright terms. Also, even retroactive extensions may serve to encourage authors of future works who sense that American copyright law is favorable to authors. This prevents potential authors from shifting their creative efforts to other countries, which might be perceived as offering more favorable copyright protections.

B. Quid Pro Quo: Really?

The *Eldred* opinion should not have assumed, for purposes of the opinion, the petitioners' argument that the Copyright Clause "imbeds a quid pro quo" applicable to the CTEA.³¹¹ The quid pro quo argument was that Congress can only grant copyright protection in exchange for a writing by an author.³¹² By assuming the correctness of the proposition, the Court had to stretch to find that in fact copyright holders did give something in exchange for retroactive term extension. The Court concluded that when authors of existing works created their works, they did so in exchange for both the then-existing copyright protection and any future extensions.³¹³ Part of that original bargain was a legitimate expectation that the authors—or more aptly their successors—would be entitled to any future extensions.³¹⁴ This expectation became part of the incentive to authors by virtue of Congress's "unbroken practice."³¹⁵ The

310. The fact that the CTEA improves the United States' international trading position also serves a public interest, albeit not the public interest envisioned by the Copyright Clause. The public interest purpose of the Copyright Clause requires that copyright law "promote the Progress of Science." This purpose has nothing to do with the balance of trade between nations, but has to do with the advancement of knowledge or the spread of learning.

311. Brief for Petitioners, *supra* note 11, at 23.

312. *Id.*

313. *Eldred*, 537 U.S. at 214–15.

314. *Id.*

315. *Id.* at 215.

Court also noted that standard copyright assignment agreements envision such possible extensions.³¹⁶

The Court's analysis on this point is not persuasive. There is nothing remotely approaching consideration³¹⁷ for the retroactive extension. When an author receives copyright protection there is no commitment or expectation of any copyright extension.³¹⁸ Would an author who created a work in 1978 have had an expectation that the term of his or her copyright would be extended? Does an author who creates a work today have a reasonable expectation that his or her copyright term will be extended in the future? If so, then there would be a serious "limited Times" issue with the CTEA and a genuine risk of perpetual copyright "on the installment plan."

Not only are future extensions generally speculative, but there is no requirement or moral imperative that any future term extensions be made retroactive. Whether an extension is retroactive is completely at the discretion of Congress. The Court unwisely suggested that Congress "as a matter of unbroken practice" has given authors the equivalent of "an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term."³¹⁹ Prior legislative practices are not binding on future congresses³²⁰ and no reasonable author could expect otherwise. When an author creates (or "gives") his or her work, any exchange is for the rights afforded under then-existing copyright law. Whatever additional rights Congress thereafter chooses to afford the copyright holder are bonuses and separate from the inducement. The fact that standard copyright assignment agreements routinely acknowledge the fortuity of a retroactive legislative extension³²¹ indicates only good lawyering in providing broadly for possible future events.

The hope of retroactive term extensions, completely optional at the will of Congress, as part of the original inducement for authors is analogous to the contract law classic illusory promise. In contract law, a promise of performance may be consideration for a return performance, but a purported promise that is optional with the promisor is no promise at all and does not

316. *Id.* at 215 n.21.

317. The Court uses the word "consideration" in its discussion. *Id.* at 214. The petitioners consistently made reference to a required "exchange." See Brief for Petitioners, *supra* note 11, at 16 n.5, 23.

318. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.").

319. *Eldred*, 537 U.S. at 215.

320. See *United States v. Windstar*, 518 U.S. 839, 871–73 (1996) (discussing and accepting entrenchment doctrine); Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. B. FOUND. RES. J. 379 (1987) (recognizing and discussing rationale for entrenchment doctrine).

321. *Eldred*, 537 U.S. at 215 n.21.

constitute consideration.³²² The optional retroactive extension is not consideration for the work and the work cannot be consideration for a future optional extension.

Instead of reaching to find an exchange, the Court should have held that the Copyright Clause does not impose a quid pro quo requirement. As authority for this requirement, the petitioners cited two patent cases: *Pennock v. Dialogue* and *Brenner v. Manson*.³²³ *Pennock* only invoked the “quid pro quo” argument in determining the probable intent of Congress under the patent act, without reference to construction of the Intellectual Property Clause.³²⁴ *Brenner* stated that the “quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility.”³²⁵ But *Brenner* involved interpretation and application language of the patent act, not the limits of Congress’s constitutional powers.³²⁶ There is no reason to believe that the Framers, by the Copyright Clause, intended a quid pro quo analysis for each amendment of copyright law.

C. History of Copyright Extensions

The *Eldred* opinion relied heavily upon the “unbroken congressional practice” of extending terms of existing copyrights when prospective copyright terms are extended.³²⁷ Although historical practice is significant, the Court may have overstated the argument.

The historical rationale is twofold. First, conduct of the earliest congresses speaks directly to the meaning of the Constitution. Second, longstanding accepted practices otherwise are entitled to some deference. The Court followed its long line of cases holding that actions of the early congresses speak to the meaning of the Constitution and to the intent of the Framers.³²⁸

322. RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981) (stating that “[w]ords of promise which by their terms make performance entirely optional with the ‘promisor’ . . . do not constitute a promise”); *id.* at § 77 (discussing illusory promises).

323. Brief for the Petitioners, *supra* note 11, at 8 (citing *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1 (1829), and *Brenner v. Manson*, 383 U.S. 519 (1966)).

324. See *Pennock*, 27 U.S. at 22–23.

325. *Brenner*, 383 U.S. at 534.

326. *Id.*; see also *McClurg v. Kinsland*, 42 U.S. (1 How.) 202, 206 (1843) (stating that retroactive changes to the patent law were valid, noting “the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution . . . there can be no limitation of their right to modify them at their pleasure”).

327. *Eldred v. Ashcroft*, 537 U.S. 186, 200–04 (2003).

328. *Lynch v. Donnelly*, 465 U.S. 668, 673–74 (1984) (looking to the conduct of the First Congress as evidence of the meaning of Establishment Clause and noting that seventeen draftsmen of the Constitution were members of the First Congress); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (holding that “historical evidence sheds light not only on what the draftsmen intended . . . but also on how they thought that Clause applied to the practice authorized by the

Of particular significance is *Burrow-Giles Lithographic Co. v. Sarony*,³²⁹ which construed the meaning of “writings” and “authors” of the Copyright Clause to include photographs. The Court interpreted the words of the clause in light of the 1790 Act and 1802 amendments to the Act, noting the early congresses’ broad view of writings to include maps, charts, etchings, engravings, and prints supported a broad interpretation of the Copyright Clause.³³⁰ The Court repeated the now familiar principle:

The construction placed upon the Constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.³³¹

This principle applies to the First Congress and to other early congresses that included members of the founding generation, but cannot claim the same force as it concerns later, if now distant, congresses whose members were not involved with the framing or ratification of the Constitution.³³²

The 1790 Act did not retroactively extend existing copyrights; it created for the first time federal copyrights. Although the 1790 Act does not directly

First Congress—their actions reveal their intent”); *Hampton v. United States*, 276 U.S. 394, 353 (1928) (explaining that “a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions”); *Myers v. United States*, 272 U.S. 52, 175 (1926) (affirming practice of affording “greatest weight” to constitutional interpretation of First Congress); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (holding enactment of First Congress “is contemporaneous and weighty evidence of [the Constitution’s] true meaning”); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (holding that practice and acquiescence from organization of judiciary fixed the construction of constitutional provision); see also *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring) (stating that “[t]he existence from the beginning of the Nation’s life of a practice . . . is not conclusive of its constitutionality[, b]ut such practice is a fact of considerable import in the interpretation of abstract constitutional language”); *United States v. Woodley*, 751 F.2d 1008, 1011–12 (9th Cir. 1985) (en banc) (relying heavily upon practices acquiesced in by the Framers in interpreting scope of recess appointment power under the Constitution); *James v. Watt*, 716 F.2d 71, 76–77 (1st Cir. 1983) (stating that “[t]he views and actions of the first Congress . . . are entitled to considerable weight in cases like this of constitutional interpretation”). But see *Walz*, 397 U.S. at 678 (majority opinion) (explaining that “no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it”).

329. 111 U.S. 53 (1884).

330. *Id.* at 57–58.

331. *Id.* at 57.

332. See Walterscheid, *supra* note 8, at 339 (arguing that actions of Congress in 1831 do not qualify for the great weight afforded to earlier congresses that included members of the founding generation). But see *infra* notes 341–45 and accompanying text.

speak to retroactive copyright extension, it does establish that the First Congress did not understand the Constitution to prohibit affording copyright protection to existing, published works.³³³ The 1790 Act undermines the *Eldred* petitioners' arguments that retroactive term extensions do not promote the progress of science and violate a perceived *quid pro quo*.³³⁴

The first copyright term extension of general application³³⁵ occurred in the Act of February 3, 1831 (the "1831 Act").³³⁶ The 1831 Act extended the terms of existing copyrights to bring them in harmony with the new, longer copyright term afforded to new works under the Act.³³⁷ Both the 1909 Act³³⁸ and the 1976 Act³³⁹ likewise extended the terms of existing copyrights. The later two of these three extensions, however, were not enacted by congresses containing Framers, and their constitutional interpretations do not necessarily reflect on the Framers' intent.³⁴⁰

The Twenty-first Congress, which enacted the 1831 Act, may accurately claim familiarity with the Framers' and Ratifiers' intentions because it contained several members of that generation. This Congress had twenty-five members who were born in 1770 or earlier and would have been sixteen or older when the Constitution was written in 1787.³⁴¹ One of its members, Senator Samuel Smith from Maryland, was born in 1752, fought in the Revolutionary War, and was thirty-five when the Constitution was written.³⁴² Congressman John Roane from Virginia, born in 1766, was himself a delegate to Virginia's constitutional convention in 1788.³⁴³ Senator James Iredell, Jr.,

333. See *Eldred v. Ashcroft*, 537 U.S. 186, 213 n.19 (2003).

334. See Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124; 8 DOCUMENTARY HISTORY OF THE FIRST CONGRESS, *supra* note 151, at 30, 34–36 (explaining that the early authors and the First Congress understood the Copyright Clause to grant copyright protection to existing, published works).

335. Congress did pass two acts continuing the copyright of John Rowlett in a work. See Act of May 24, 1828, ch. 145, 6 Stat. 389; Act of Feb. 11, 1830, ch. 13, 6 Stat. 403.

336. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

337. See *id.* at ch. 16, § 16.

338. Act of Mar. 4, 1909, ch. 320, §§ 23, 24, 35 Stat. 1075, 1080–81.

339. Act of Oct. 19, 1976, Pub. L. No. 94-553, § 304, 90 Stat. 2573, 2573–74.

340. This history of retroactive extensions may speak to the policies of settled expectations and stability.

341. See Biographical Directory of the United States Congress 1774–Present, <http://bioguide.congress.gov/biosearch/biosearch1.asp> (last visited Oct. 30, 2005); see also BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–1989, at 108–10 (Bicentennial ed., 1989) (listing members of the 21st Congress and publishing their biographies).

342. A BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–1989, *supra* note 341, at 1837. Senator Asher Robbins from Rhode Island who was born in 1757 and graduated from Yale in 1782 would have been almost thirty when the Constitution was written. *Id.* at 1723.

343. *Id.* at 1723.

from North Carolina, was the son of Justice James Iredell³⁴⁴ who, in addition to being an original member of the Supreme Court, was a leading Federalist in North Carolina and instrumental in achieving ratification of the Constitution in North Carolina.³⁴⁵

The extensions afforded by these three acts also might be distinguishable from the CTEA because each of them involved the repeal of predecessor copyright acts and were general copyright law revisions. They were not primarily copyright term extensions. Each act, as a whole, could be viewed as promoting the progress of science and serving the public interest. The CTEA was different; it was not a comprehensive copyright law revision. Its primary purpose was to extend the term of copyrights.

The view that longstanding practices otherwise should be entitled to deference is not persuasive. Longevity of a practice alone, particularly where a constitutional challenge had never before been considered, should not define the reach of the Constitution.³⁴⁶ Interpreting the meaning of the Constitution based on the conduct of Congress undermines judicial review and diminishes the force of the Constitution.

V. CONCLUSION

Eldred v. Ashcroft presented a limited question: whether Congress had exceeded its constitutional powers by extending the terms of existing copyrights. The case was not about whether a term of the life of an author plus seventy years violated the limited times requirement, nor was it about whether copyright term extension was prudent. The Court correctly held that Congress did not exceed its constitutional powers. Applying an originalist or historical approach to constitutional interpretation, the Copyright Clause is first and foremost a grant of power. The clause permits Congress, at its discretion, to enact laws to create and protect copyright interests and imposes only modest limitations on Congress. These limitations include the originality and limited times requirements.

The phrase “To promote the Progress of Science” should be understood broadly to empower Congress to make changes to copyright law that Congress rationally believes improve the overall copyright scheme. The phrase should not be understood to impose a test for each germane amendment to copyright law. To the extent that the phrase is viewed as a test for each copyright

344. WILLIS P. WHICHARD, JUSTICE JAMES IREDELL, at xiv (2000) (noting that James Jr. was born in 1788).

345. *See id.* at 45–52 (discussing Iredell’s influence with North Carolina’s delegates to the Constitutional Convention and efforts to secure ratification in North Carolina).

346. *See* L. Ray Patterson, *What’s Wrong with Eldred? An Essay on Copyright Jurisprudence*, 10 J. INTELL. PROP. L. 345, 349 (2003) (criticizing Court’s tactic of using practice of Congress to define Constitution rather than measuring practice of Congress against language of Constitution).

amendment, it should not impose a limited understanding requiring creation or publication of new works.

The *Eldred* decision, not surprisingly, read the grant of authority under the Copyright Clause broadly and afforded Congress great deference to legislate in the area of copyrights. The decision is consistent with the Court's prior copyright cases that indulged in liberal construction of the Copyright Clause and allowed Congress substantial latitude to establish copyright policy. The approach also is consistent with the Framers' view of the appropriate role of the courts in reviewing congressional enactments.

Unfortunately, the decision may be understood by some as demoting the public interest rationale for copyrights in favor of a private interest rationale. The Court need not have backed away from the public interest rationale, but instead should have emphasized how even retroactive extensions would serve the public interest.

The seeming irony of the CTEA's retroactive copyright term extension is that rather than increasing public access to works by encouraging creation or publication, instead, the CTEA discouraged publication and dissemination of existing, protected works by individuals and entities like the *Eldred* petitioners. Copyright should "increase and not . . . impede the harvest of knowledge,"³⁴⁷ but Congress reasonably may have believed that retroactive extension created an incentive for copyright holders to exploit and publish their works in new media and to preserve their works for future exploitation. Congress also may have believed that by maintaining the United States as an international leader of copyright protection, creators of future works would be encouraged to create works governed by American copyright law rather than opting to create works abroad.

The Court in *Eldred* should have rejected the position that the Copyright Clause requires a "quid pro quo" rather than stretch to find "an exchange"³⁴⁸ between authors of previously copyrighted works and the United States. The hope of being the beneficiary of possible future copyright extensions is so tenuous that it cannot be considered the basis for any exchange. Nothing in the language or history of the Copyright Clause imposes a quid pro quo requirement for amendments to copyright law.

Finally, the Court's reliance on the "unbroken congressional practice" of Congress, while appropriate to a point, is not as compelling as it might first appear. The 1790 Act did not retroactively extend existing copyrights. The other extensions cited by the Court occurred several decades or more after ratification of the Constitution. Particularly, the unchallenged extensions in the 1909 and 1976 Acts do not speak to the intentions of the Framers. The 1831 Act may have more interpretive significance, but it too was more than

347. *Harper & Row, Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

348. *See Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003).

four decades removed from the framing and ratification of the Constitution. The three major retroactive extensions were temporally separated by many decades; they were not frequently recurring events. Moreover, the CTEA could be distinguished from those prior extensions. It stands alone as an amendment to an existing copyright act rather than an extension which was part of a comprehensive revision of copyright law.

The Framers and ratifiers of the Constitution wanted to clarify that Congress had the power to grant copyrights, which they believed would be good for the United States society and economy. Had they been faced with the opportunity to maximize profits of American copyright holders, improve the United States balance of trade, and place the United States on par with European copyright protections, there can be little doubt what they would have done, even understanding their desire for limited term copyrights. Any other outcome in *Eldred* would have been contrary to the Copyright Clause as defined by the intentions of those who wrote and ratified it and would have imposed a policy decision not supported by elected representatives or required by the Constitution.

