

A Page of Logic: *Eldred v. Ashcroft* and the Logic of a Written Constitution

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In the much-anticipated case of *Eldred v. Ashcroft*,¹ the Supreme Court upheld the 20-year extension of existing and future copyrights enacted in the Sonny Bono Copyright Term Extension Act of 1998 (CTEA).² The Court rejected constitutional challenges under both the Copyright Clause and the First Amendment. In doing so it placed considerable emphasis on Congress's unscrutinized historical practice of making copyright term extensions applicable to existing copyrights in addition to future copyrights. That heavy historical emphasis contrasted with the Court's light textual analysis of whether a retroactive extension of existing copyright terms could be squared with Congress's limited constitutional power "To promote the Progress of Science," through the narrow means of "securing for limited Times to Authors" the "exclusive Rights to their" writings.³ The Court likewise avoided substantial analysis of the tension between congressional power under the Copyright Clause and the limits on congressional power established in the First Amendment.

Contrary to the Court's assertion that when seeking to "comprehend the scope of Congress's power under the Copyright Clause, 'a page of history is worth a volume of logic,'" ⁴ the *Eldred* opinion would have been better served by a smaller volume of largely irrelevant history and several more pages of logical analysis of the Constitution itself. In particular, a meaningful exposition of the content and limits of the terms of the Copyright Clause, and some articulation of

¹123 S. Ct. 769 (2003).

²Pub. L. No. 105-298, § 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302, 304).

³U.S. CONST. Art. I, § 8, cl. 8.

⁴123 S. Ct. 778 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).

the First Amendment bounds on the copyright power would have been far more compelling and useful than a simple endorsement of historical congressional practice. Although such an approach would not necessarily have changed the outcome of the case, it would have provided a more cogent jurisprudence and valuable guidance for those concerned with both copyright and the First Amendment.

Background

In 1998, Congress extended by 20 years the term for most copyrights, including those already in existence under the prior law, so that they would run until 70 years after the death of the author.⁵ For works published before 1978 and still under copyright, Congress extended the terms of those copyrights from 75 years to 95 years from publication.⁶ Because numerous copyrighted works from the 1920s and beyond were nearing the end of their terms and were about to enter the public domain, the immediate effect of the CTEA was to prevent those works from becoming freely available to the public and to extend the monopoly on those works for another 20 years. Notable examples of works that soon would have entered the public domain, but which now will remain under copyright, include *The Prophet* by Kahlil Gibran, sheet music by Bartok, Ravel, and Strauss, and early poetry by Robert Frost.

The CTEA promptly was challenged by individuals and businesses that make use of public domain materials and that eagerly had been awaiting public access to tremendous volumes of early 20th-century music, literature, and film classics. The challengers sued in the U.S. District Court for the District of Columbia, claiming that the CTEA violated the Copyright Clause of the United States Constitution, which, along with the Patent Clause, reads:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to

⁵17 U.S.C. § 302(a). For works whose statutory “authors” were not identifiable natural persons—that is, works for hire, anonymous works, and pseudonymous works—the CTEA extended the copyright term alternatively from 75 years to 95 years from publication or from 100 years to 120 years from creation, whichever expires first. *Id.* § 302(c). As under the previous law, the new terms apply to all works not published by January 1, 1978. *Id.* §§ 302(a), 303(a).

⁶*Id.* § 304(a) & (b).

Eldred v. Ashcroft *and the Logic of a Written Constitution*

Authors and Inventors the exclusive Right to their respective
Writings and Discoveries . . . ⁷

Extending the previously fixed terms of existing copyrights, they argued, violated the “limited Times” requirement both because such extension could be repeated indefinitely and because, when interpreted in light of the initial language of the Copyright Clause, the extended term was not limited to that necessary to “promote the Progress of Science.” The challengers also argued that the extension of both existing and future copyright terms abridged the freedom of speech of persons who would make use of copyrighted material that would otherwise more quickly enter the public domain. The district court rejected all of the challenges and upheld the CTEA.⁸

On appeal before the U.S. Court of Appeals for the D.C. Circuit, the challengers raised the same arguments and met a similar fate. Regarding the Copyright Clause challenge, a panel of the D.C. Circuit held 2 to 1 that the retroactive extension of existing copyright terms did not violate the Copyright Clause.⁹ Judge Sentelle, dissenting in part, would have held that Congress’s claimed authority to extend existing copyrights lacked any stopping point and neither promoted the progress of science nor secured exclusive rights for a limited time.¹⁰ Regarding the First Amendment challenge, the panel unanimously held that copyrights are “categorically immune from challenges under the First Amendment.”¹¹ The full D.C. Circuit subsequently denied rehearing *en banc* over the dissent of Judge Sentelle, this time joined by Judge Tatel.¹² The original panel majority simultaneously issued a supplemental opinion denying rehearing and rejecting arguments claiming that the retroactive extension of copyright terms failed to promote the progress of science.

The Supreme Court thereafter agreed to hear the case and, despite expressing considerable skepticism during oral argument as to the wisdom of the law, nonetheless reached the same result as the lower

⁷U.S. CONST. Art. I, § 8, cl. 8.

⁸Eldred v. Reno, 74 F. Supp.2d 1 (D.D.C. 1999).

⁹Eldred v. Reno, 239 F.3d 372, 377–80 (D.C. Cir. 2001).

¹⁰*Id.* at 380-84 (Sentelle, J., dissenting in part).

¹¹239 F.3d at 375.

¹²Eldred v. Reno, 255 F.3d 849 (D.C. Cir. 2001).

courts and upheld the CTEA.¹³ The decision was 7 to 2, with Justice Ginsburg writing the majority opinion and Justices Stevens and Breyer each writing individual dissents.

From the outset, the Court adopted a decidedly historical approach to the case, evaluating the constitutional challenges to the CTEA “against the backdrop of Congress’ previous exercises of its authority under the Copyright Clause.”¹⁴ In particular, the Court looked to the nation’s first copyright statute, enacted in 1790, which created the first federal copyrights and applied to future works and to certain existing works already protected by state copyrights.¹⁵ The Court then looked to three subsequent copyright statutes from 1831, 1909, and 1976, each of which extended the terms of existing and future copyrights.¹⁶ The Court also looked to early examples of Congress’s extending various individual patents and copyrights and lower court decisions written by individual circuit justices upholding several patent extensions.¹⁷ And while recognizing that it had not previously had “occasion to decide whether extending the duration of existing copyrights complies with the ‘limited Times’ prescription,” the Court looked to its decision in the patent case of *McClurg v. Kingsland*,¹⁸ which upheld the retroactive application of more lenient requirements for obtaining a patent, thus sustaining a patent that would otherwise have been invalid under the previous statute.¹⁹

Regarding the textual issue of whether retroactive extension of copyright terms violated the “limited Times” constraint in the Copyright Clause, the Court rejected the argument that a copyright term, “once set, becomes forever ‘fixed’ or ‘inalterable,’” and held that

[t]he word “limited,” however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: “confine[d] within certain bounds,”

¹³*Eldred v. Ashcroft*, 123 S. Ct. 769 (2003).

¹⁴*Id.* at 775.

¹⁵*Id.* (citing Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Act)).

¹⁶123 S. Ct. at 775 (citing Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (1831 Act); Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1080–1081 (1909 Act); Pub.L. 94–553, § 302(a), 90 Stat. 2572 (1976 Act)).

¹⁷123 S. Ct. at 779 (citing Acts from 1808, 1809, 1815, 1828, and 1830 and opinions by Chief Justice Marshall and Justice Story sitting as circuit justices).

¹⁸42 U.S. (1 How.) 202 (1843).

¹⁹123 S. Ct. at 779–80.

“restrain[ed],” or “circumscribe[d].” S. Johnson, *A Dictionary of the English Language* (7th ed. 1785); see T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) (“confine[d] within certain bounds”); Webster’s Third New International Dictionary 1312 (1976) (“confined within limits”; “restricted in extent, number, or duration”). Thus understood, a time span appropriately “limited” as applied to future copyrights does not automatically cease to be “limited” when applied to existing copyrights.²⁰

As for the related argument that repeated extensions vitiate the limited times requirement, the Court responded that “a regime of perpetual copyrights ‘clearly is not the situation before us’” and there was no reason to view the CTEA “as a congressional attempt to evade or override the ‘limited Times’ constraint.”²¹ The Court acknowledged the government’s position that the average copyright term under the CTEA “resembles some other long-accepted durational practices in the law, such as 99-year leases of real property and bequests within the rule against perpetuities,” but went no further, stating that “[w]hether such referents mark the outer boundary of ‘limited Times’ is not before us today.”²²

The Court also held that the CTEA was a rational exercise of congressional authority and adequately promoted the progress of science, noting that on such matters it “defer[s] substantially to Congress.”²³ Citing the life-plus-70 years copyright term adopted by the European Union (EU), and the EU’s denial of such an extended term to works from countries without a similar copyright term, the Court credited as rational Congress’s desire “to ensure that American authors would receive the same copyright protection in Europe as their European counterparts,[]” as well as Congress’ potential view that longer terms would provide a greater incentive for creation and dissemination of works in the United States.²⁴ The Court also accepted Congress’s view that extending copyright terms “provide[s] copyright owners generally with the incentive to restore

²⁰*Id.* at 778.

²¹*Id.* at 783 (citation and footnote omitted).

²²*Id.* at 784 n. 17 (citation omitted).

²³*Id.* at 781; *id.* at 785 (“it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives”).

²⁴*Id.* at 781 (footnote omitted).

older works and further disseminate them to the public,' and that "as a result of increases in human longevity and in parents' average age when their children are born, the pre-CTEA term did not adequately secure 'the right to profit from licensing one's work during one's lifetime and to take pride and comfort in knowing that one's children—and perhaps their children—might also benefit from one's posthumous popularity.'"²⁵ Finally, the Court noted testimony from the Register of Copyrights that "extending the copyright for existing works 'could . . . provide additional income that would finance the production and distribution of new works.'"²⁶

The Court rejected the argument that the so-called "preambular language" of the Copyright Clause, empowering Congress to "promote the Progress of Science," is incompatible with retroactive extensions of copyright terms "because it does not stimulate the creation of new works but merely adds value to works already created."²⁷ While acknowledging that the Copyright Clause is "'both a grant of power and a limitation,'" the Court observed that the "'constitutional command,' . . . is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.'"²⁸ As to whether the congressional system promoted the progress of science, the Court again looked to history:

Congress, from the start, has routinely applied new definitions or adjustments of the copyright term to both future works and existing works not yet in the public domain.[] Such consistent congressional practice is entitled to "very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive."²⁹

The Court bolstered its reliance on historical congressional practice with the suggestion that the Framers themselves approved of retroactive copyright term extensions, noting that "'a contemporaneous legislative exposition of the Constitution when the founders of our

²⁵ *Id.* at 782 & n. 14 (citations omitted).

²⁶ *Id.* at 782 n. 15 (citations omitted).

²⁷ *Id.* at 784.

²⁸ *Id.* at 784–85 (quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5, 6 (1966)).

²⁹ 123 S. Ct. at 785 (footnote and citation omitted).

Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions.'³⁰ It concluded that "Congress' unbroken practice since the founding generation thus overwhelms petitioners' argument that the CTEA's extension of existing copyrights fails *per se* to 'promote the Progress of Science.'³¹

After playing its historic-practice trump card, the Court wrapped up by simply assuming, *arguendo*, that the Copyright Clause requires a quid pro quo from an author in exchange for a grant of copyright, "'to secure a bargain—this for that,'"³² and held that "the legislative evolution earlier recalled demonstrates what the bargain entails":

Given the consistent placement of existing copyright holders in parity with future holders, the author of a work created in the last 170 years would reasonably comprehend, as the "this" offered her, a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time.[] Congress could rationally seek to "promote . . . Progress" by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term. Nothing in the Copyright Clause bars Congress from creating the same incentive by adopting the same position as a matter of unbroken practice.³³

The bargain having included an implied promise of future extensions, the CTEA's retroactive elements merely implemented the pre-existing exchange that promoted creation of the earlier works and did not offer something new for nothing.

Thus having disposed of the Copyright Clause challenge, the Court proceeded to address the First Amendment challenge to the CTEA. Although content-neutral regulations of speech are ordinarily subject to heightened—though not strict—judicial scrutiny, the

³⁰*Id.* (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)).

³¹123 S. Ct. at 785–86.

³²*Id.* at 786 (citation omitted).

³³*Id.* (citations and footnote omitted).

Court rejected the suggested “imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards.”³⁴ It began by observing that the “Copyright Clause and First Amendment were adopted close in time” and that such “proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”³⁵ Recalling its opinion in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,³⁶ the Court reiterated that “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”³⁷

The Court then observed that “copyright law contains built-in First Amendment accommodations” such as the idea/expression dichotomy and the fair-use defense.³⁸ The idea/expression dichotomy reserves copyright protection only for expression and not for the ideas contained therein, thus striking “a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”³⁹ The fair use defense “allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.”⁴⁰ And the CTEA slightly expands the scope of fair use “during the last 20 years of any term of copyright . . . for purposes of preservation, scholarship, or research” if the work is not already being exploited commercially and copies are unavailable at a reasonable price.⁴¹

Having recounted the speech-promoting and speech-protecting aspects of copyright law, the Court then distinguished its treatment

³⁴*Id.* at 788.

³⁵*Id.*

³⁶471 U.S. 539, 558 (1985).

³⁷123 S. Ct. at 788.

³⁸*Id.*

³⁹*Id.* at 788–89 (quoting *Harper & Row*, 471 U.S. at 556).

⁴⁰123 S. Ct. at 789; 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work, including such use by reproduction in copies . . ., for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

⁴¹17 U.S.C. § 108(h); see also *id.* § 110(5)(B) (limited exception from performance royalties for music).

of content-neutral cable television regulations at issue in *Turner Broadcasting System, Inc. v. FCC*⁴² by observing that the CTEA “does not oblige anyone to reproduce another’s speech against the carrier’s will,” but instead “protects authors’ original expression from unrestricted exploitation.”⁴³ It noted that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches. To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them.”⁴⁴ While the Court recognized that “the D.C. Circuit spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment[.]’ 239 F.3d, at 375,” it concluded that “when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”⁴⁵

Justice Stevens and Justice Breyer each wrote a dissenting opinion. Justice Stevens argued that just as Congress may not extend the scope of a patent monopoly, it may not extend the duration of a copyright beyond its expiration date.⁴⁶ In his view, the “limited Times” requirement acts as an essential element of the constitutional purpose of promoting the progress of science, and members of the public should have a right to rely on the expiration of copyrights at the time set forth in the grant.

We have recognized that these twin purposes of encouraging new works and adding to the public domain apply to copyrights as well as patents. . . . And, as with patents, we have emphasized that the overriding purpose of providing a reward for authors’ creative activity is to motivate that activity and “to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). *Ex post facto* extensions of copyrights result in a gratuitous transfer of wealth from the public to

⁴²512 U.S. 622 (1994).

⁴³123 S. Ct. at 789.

⁴⁴*Id.*

⁴⁵*Id.* at 789–90 (citing *Harper & Row*, 471 U.S. at 560, and *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987)).

⁴⁶123 S. Ct. at 790 (Stevens, J. dissenting).

authors, publishers, and their successors in interest. Such retroactive extensions do not even arguably serve either of the purposes of the Copyright/Patent Clause.⁴⁷

Responding to the Court's reliance on past congressional practice, Justice Stevens observed that "the fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify our duty to invalidate an unconstitutional practice when it is finally challenged in an appropriate case. . . . Regardless of the effect of unconstitutional enactments of Congress, the scope of "the constitutional power of Congress . . . is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." "⁴⁸ Not even the early legislative efforts of the founding generation could substitute for that essential judicial function, he argued, because "[i]t is obviously correct 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." "⁴⁹

Turning to the merits of the Copyright Clause challenge, Justice Stevens rejected the argument that the retroactive extension of copyright terms provides "incentives to restore old movies," observing first that "such restoration and preservation will not even arguably promote any new works by authors or inventors," second, that such "justification applies equally to works whose copyrights have already expired," and third, that "the remedy offered—a blanket extension of all copyrights—simply bears no relationship to the alleged harm."⁵⁰

He further noted that, regardless of congressional power to prospectively grant lengthy copyright terms, "a categorical rule prohibiting retroactive extensions would effectively preclude perpetual copyrights. . . . [U]nless the Clause is construed to embody such a categorical rule, Congress may extend existing monopoly privileges *ad infinitum* under the majority's analysis."⁵¹

⁴⁷*Id.* at 793.

⁴⁸*Id.* at 797 (quoting *United States v. Morrison*, 529 U.S. 598, 614 (2000) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring))).

⁴⁹123 S. Ct. at 797 (Stevens, J., dissenting) (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970)).

⁵⁰123 S. Ct. at 799–800 (Stevens, J., dissenting).

⁵¹*Id.* at 800–01.

Justice Breyer's dissent went further and took the position that the length of time tacked on to the existing lengthy copyrights added virtually no value and that the "economic effect of this 20-year extension—the longest blanket extension since the Nation's founding—is to make the copyright term not limited, but virtually perpetual. . . . And most importantly, its practical effect is not to promote, but to inhibit, the progress of 'Science'—by which word the Framers meant learning or knowledge."⁵² He would have applied a more searching review of congressional judgments under the Copyright Clause given the countervailing First Amendment interests. Although such review would not rise even to the level of intermediate scrutiny, it would, in his view, be sufficient to invalidate the thin justifications used by Congress to support both the prospective and retrospective extension of copyright terms.

Applying his hybrid form of scrutiny, Justice Breyer would have found that "the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective."⁵³

Central to Justice Breyer's analysis was the requirement that copyright statutes "must seek 'to promote the Progress' of knowledge and learning; and that they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration of a copyright's 'limited Tim[e]'—a time that (like 'a *limited* monarch') is 'restrain[ed]' and 'circumscribe[d],' 'not [left] at large,' 2 S. Johnson, *A Dictionary of the English Language* 1151 (4th rev. ed. 1773)."⁵⁴ Applying that requirement, he concluded that "the partial, future uniformity [with EU copyright terms] that the 1998 Act promises cannot reasonably be said to justify extension of the copyright term for new works. And concerns with uniformity cannot possibly justify the extension of the new term to older works, for the statute there creates no uniformity at all."⁵⁵ Justice Breyer likewise rejected the "conflicting rationale that

⁵²123 S. Ct. at 801 (Breyer, J., dissenting) (citation omitted).

⁵³*Id.* at 802.

⁵⁴*Id.* at 803–04.

⁵⁵*Id.* at 810.

the publishers advance, namely that extension, rather than limitation, of the grant will, by rewarding publishers with a form of monopoly, promote, rather than retard, the dissemination of works already in existence” because the rationale was limitless in its application, because it conflicted with the Copyright Clause’s embedded assumption that eventual entry into the public domain was the best means of promoting widespread distribution and use of works created with the incentive of copyrights, and thus such rationale “seems constitutionally perverse—unable, constitutionally speaking, to justify the blanket extension here at issue.”⁵⁶

Discussion

It is important to note from the outset that the question whether the text of the Copyright Clause or the First Amendment forbids retroactive extensions of existing copyrights is a fairly debatable issue on which reasonable jurists could differ. Although there are better and worse answers to that question—and in my view the Court elected a “worse” answer—the result in *Eldred* was hardly shocking or implausible. If the decision is to be criticized, then, it should not be on its outcome alone, but rather on the means the Court used to reach that outcome. The particular aspect of the opinion that I will focus on is the Court’s reliance on a largely irrelevant and subtly distorted history to support its rather thin textual analysis of the Constitution. The problem is encapsulated in the Court’s reliance on the questionable epigram that “‘a page of history is worth a volume of logic.’”⁵⁷ That approach, in my view, gets it precisely backward and tends to undermine both the value of a written constitution and the role of the Court as the proper authority for interpreting such a constitution.

One of the very purposes of our written Constitution, as opposed to an evolving constitutional tradition, is to provide a definitive exposition of the powers and limits of government, and to stand as a bulwark over time against casual expansions of government power and encroachments on private liberty. Such purposes are thwarted whenever analysis of the terms of the Constitution is made secondary to the inherently biased practices of the government meant to be

⁵⁶*Id.* at 811.

⁵⁷123 S. Ct. 778 (quoting *New York Trust*, 256 U.S. at 349).

restrained by that Constitution. Indeed, precisely because our federal Constitution is one of *enumerated* powers (granting and limiting authority through the same language) and contains still further restraints on the exercise of those powers, deferring to Congress' interpretation of its own powers is akin to putting the fox in charge of the henhouse. Although comity undoubtedly counsels a healthy respect for the constitutional views of a coordinate branch of government, such respect must also be tempered by a proper skepticism of the political branches' inclination and ability to restrain themselves and Congress' seeming tendency to legislate first and ask constitutional questions later, if at all.

The judiciary's role as the last practical line of defense of our written Constitution is no less significant in connection with the Acts of earlier Congresses than it is in connection with more recent Congresses. Although some of the earliest members of Congress may indeed have had a greater familiarity with the then-fledgling Constitution, and may even have participated in its drafting, such backgrounds hardly suggest that, in their subsequent roles as legislators, they were any more willing or able than present-day legislators to interpret or abide by the restraints imposed upon them by the Constitution.

Once it is accepted that constitutional language and logic, and not mere historical practice, should govern constitutional analysis, the best approach is then to "start with first principles."⁵⁸ The first principles most significant to an analysis of the *Eldred* case are straightforward and uncontroversial: Constitutional interpretation begins with the actual language of the Constitution⁵⁹; all such language is presumed to have meaning⁶⁰; and the enumeration of certain powers presupposes powers outside the scope of the enumeration.⁶¹ Those first principles lead to the conclusion that *all* of the language of the Copyright Clause in one way or another limits congressional authority, and that the First Amendment limits the copyright power just as it limits all other Article I powers.

⁵⁸*United States v. Lopez*, 514 U.S. 549, 552 (1995).

⁵⁹*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188–89 (1824).

⁶⁰*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

⁶¹*Gibbons*, 22 U.S. (9 Wheat.) at 194–95.

I. The Copyright Clause

Article I, section 8, clause 8, of the Constitution enumerates Congress' copyright and patent power:

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. . . .

Plainly read, the language of the Copyright Clause defines, and therefore delimits, congressional power as being "To promote the Progress of Science." The structure of the clause defines a power "to do X by means of Y." In the case of the copyright power, "X"—to promote the progress of sciences—not merely "preambular language," as the Court suggests⁶²; it *is* the power granted to Congress. The remainder of the Clause—"by securing for limited Times," etc.—is not an affirmative grant; it is a negative limit on the *means* by which the power "[t]o promote" may be exercised.⁶³

The actual language of the Copyright Clause thus determines the relevant inquiries when evaluating the CTEA: (1) Has Congress, in adopting the CTEA, acted to "promote the Progress of Science?; and (2) Has Congress done so through the prescribed means of securing to authors the exclusive right to their writings "for limited Times"?

A. The Nature of Limited Times

Regarding whether the CTEA's retrospective term extensions conflict with the "limited Times" requirement, the Court offered only a meager few sentences attempting to reconcile the CTEA with the language of the Constitution. Looking to dictionaries from both 1796 and 1976, the Court defined "limited" as "confine[d] within certain bounds," "restrain[ed]," "circumscribe[d]," "confined within limits," "restricted in extent, number, or duration."⁶⁴ Then, in what

⁶²123 S. Ct. at 784.

⁶³See also, e.g., U.S. CONST., Art. II, § 2, cl. 2 ("[The President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties. . . ."); *id.*, Art. IV, § 1 (regarding full faith and credit for state acts, records, and proceedings, "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof"). The "by" language limits the means of exercising a particular authority; it does not imply that the language enumerating the power itself lacks any limiting function.

⁶⁴123 S. Ct. at 778 (citations omitted).

constitutes the entirety of its textual analysis, the Court concluded that if the time span set out in the CTEA is “appropriately ‘limited’ as applied to future copyrights,” then it “does not automatically cease to be ‘limited’ when applied to existing copyrights.”⁶⁵

But the Court’s conclusion does not follow from the definitions it cited, and it certainly does not stand on its own. The problem with the CTEA’s retrospective term extension is that it removed the restraint of existing copyright terms and made once-certain bounds uncertain. Indeed, even as applied to future copyrights, the extended term is certainly not confined within *certain* bounds or restricted in duration; it is subject to still further extension at Congress’ whim, without any rationale as to where the “certain bounds” of copyright duration will lie. Absent such bounds, it cannot satisfy even the Court’s own cited definition of “limited.” The actual limit of a copyright thus remains “[left] at large” so long as the possibility of congressional extension remains.⁶⁶

The notion that the Court was not *yet* confronted with a regime of perpetual copyright, or that Congress did not *intend* to secure such perpetual rights is wholly beside the point. Having offered no test for determining when a copyright becomes “perpetual,” the Court’s implicit definition of “limited” as meaning “not perpetual” simply begs the question. And if “perpetual” means only that a specific copyright term, on its face, literally extends forever, then the phrase “limited Times” in the Copyright Clause has no realistic function. A term of 1000 or 10,000 years is certainly not forever in the literal sense, but just as certainly it is not what the Framers could have meant when they permitted Congress to secure copyrights only for “limited Times.”

Furthermore, when evaluating Congress’ exercise of an enumerated power, the proper analysis is whether the *rationale* used by Congress to justify a statute is unlimited, not whether the exercise of such power in a specific instance is itself unlimited.⁶⁷ When defining a

⁶⁵*Id.*

⁶⁶123 S. Ct. at 804 (Breyer, J., dissenting) (quoting 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1151 (4th rev. ed. 1773)).

⁶⁷See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (Congress may not justify an exercise of its commerce powers on a “rationale[]” that “would . . . authorize a general federal police power”); *id.* at 567 (rejecting “manner” of analyzing exercise of commerce power that “would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”).

limited constitutional power, therefore, the Court looks to the larger *theory* used to justify the particular exercise of the power and asks whether that theory is limited, not whether the specific exercise of power involved the full application of that theory. So too, when evaluating whether copyrights are “limited” in time, the Court should have looked to whether the rationale for the extension had any limits that would prevent perpetual repetition, not whether this isolated extension failed to go all the way to perpetuity in a single step.

The approach taken by the Court regarding the limited times requirement lacked any rationale that would prevent Congress from repeatedly granting term extensions each time the latest extension neared completion. Indeed, the Court’s suggestion—when discussing whether the CTEA promotes the progress of Science⁶⁸—that all copyrights contain the implicit promise of the benefit of any future term extensions confirms that the duration of any copyright term under the Court’s theory is anything but “confined within certain bounds.” The nominal term of years granted by a copyright under the Court’s rationale is not the *limit* of that term. Rather, it is merely the opening bid, subject to expansion (though presumably not contraction) at Congress’ pleasure. The power to extend existing copyright terms, and all future terms subject to such power, renders such terms unlimited in that they are not subject to any “certain” bounds.⁶⁹

As noted earlier, however, the deficiencies of the Court’s reasoning do not necessarily demonstrate that its ultimate result was incorrect. Had the Court articulated a determinable outer limit to copyright terms (for example, that such terms could not exceed the rule against

⁶⁸123 S. Ct. at 786.

⁶⁹The Court’s analysis perhaps can be understood in light of the challengers’ supposed concession that the “CTEA’s baseline term of life plus 70 years . . . qualifies as a ‘limited Tim[e]’ as applied to future copyrights,” thus leading the Court to assert that the same discreet time would likewise be limited even as applied to existing copyrights. 123 S. Ct. at 778. But such reasoning distorts petitioner’s argument that a *fixed* term of life plus 70 years would be limited and evades the point that retroactive application of that new term removes the previous “limit” on existing copyright terms. The issue is not whether the facial amount of the baseline would be “limited” *if adhered to*, but whether the retroactive extension demonstrates that no term is limited if subject to retroactive revision. Thus understood, the CTEA’s application even to future copyrights creates an unlimited term if that term is not certain and remains *subject to* still further extension.

perpetuities as it existed when the Constitution was written) then even retroactive term extensions within that outer limit might still be considered “limited Times” precisely because they could not be repeated indefinitely. Such outer limits would presumably set “certain bounds” for all present and future copyrights notwithstanding that the term of any given copyright might be somewhat of a moving target *within* those bounds. But the Court expressly refused to adopt any such outer boundary, or even to suggest a theory under which such a boundary could be determined in some later case.⁷⁰ Given the Court’s highly deferential treatment of whether Congress had exercised its power rationally and of Congress’s determinations of how best to promote the progress of science, it is far from clear how the Court would propose to draw any line between a limited and an unlimited copyright term. And insofar as the only term constraints the Court suggests are the due process limit that Congress exercise its powers rationally and the promote-progress limit from the remainder of the Copyright Clause, the phrase “limited Times” has no independent force, in violation of a first principle of constitutional construction that all the words have meaning.

In my view, the better construction would recognize that the Copyright Clause’s use of the plural “Times” matches the plural “Writings and Discoveries,” but that its use of the singular “the exclusive Right” suggests only a singular “Time[]” per each writing or discovery. That interpretation requires Congress to select a time and stick to it for copyrights already granted, though it could modify the “Time[]” prospectively as to any future copyright. It also has the benefit of avoiding the seriatim grant of supposedly limited copyright terms that could, as a practical matter, be repeated indefinitely. Absent that or some other theory limiting such repetition, the *Eldred* decision renders the “limited Times” language meaningless.

Without the essential foundation of a logical construction of the language of the Copyright Clause, the Court’s reliance on historic congressional practice cannot support its decision. Furthermore, the Court’s historical discussion is less than compelling even on its own terms. Most notable in that regard is the Court’s attempt to channel the credibility of the Founders by relying on the 1790 Act creating

⁷⁰123 S. Ct. 784 n. 17.

federal copyrights and its application to existing works protected by state or common-law copyrights.

While acknowledging the challengers' argument that "the 1790 Act must be distinguished from the later Acts on the ground that it covered existing *works* but did not extend existing *copyrights*," the Court refused to confront the implications of that argument as it related to understanding the phrase "limited Times" and instead offered the non sequitur that "the First Congress clearly did confer copyright protection on works that had already been created."⁷¹ As Justice Stevens correctly observed, "the question presented by this case does not even implicate the 1790 Act, for that Act created, rather than extended, copyright protection. That this law applied to works already in existence says nothing about the first Congress's conception of their power to extend this newly created federal right."⁷² The 1790 Act did not extend the terms of federal copyrights for the simple reason that no such copyrights even existed before the Act. And, even as to state-granted copyrights, not only did the 1790 Act not extend those copyrights, it instead replaced them with the newly enacted federal copyright that was, in many instances, *shorter* in term than the previously existing state copyrights.⁷³

Absent any implicit support from the founding generation for its construction of the "limited Times" requirement, the Court can take little analytical comfort from the actions of subsequent Congresses in 1831, 1909, and 1976. The unarticulated construction of the Copyright Clause supposedly found in those Congresses' failure to restrain their own exercise of power is not based on any personal familiarity of the congressmen with the drafting of the Constitution or upon any "inside information" on the meaning of "limited Times."⁷⁴ If

⁷¹*Id.* at 776 n. 3.

⁷²123 S. Ct. at 795 (Stevens, J., dissenting); *see also id.* ("That Congress exercised its unquestionable constitutional authority to *create* a new federal system securing rights for authors and inventors in 1790 does not provide support for the proposition that Congress can *extend pre-existing* federal protections retroactively.") (emphasis in original).

⁷³*Id.*

⁷⁴Being slightly closer in time to the drafting of the Copyright Clause may have given earlier members of Congress a certain linguistic advantage based on familiarity with the speech patterns of the time, but, as the Court noted, 123 S. Ct. at 778, the meaning of the word "limited" has not changed, and hence that potential advantage does not bear on the issue in *Eldred*.

anything, those Congresses would be even less knowledgeable regarding the proper construction of the Constitution given the fewer judicial constructions and scholarly resources available to them and given the technological limits on accessing what information did exist at the time. Whatever added weight one might give to the constitutional understandings of the first Congress, such weight does not attach to the implied views of subsequent Congresses.⁷⁵

B. Promoting the Progress of Science

Turning to whether the CTEA's retrospective extension of copyright terms "promote[s] the Progress of Science," the Court's opinion fails to offer any analysis of the meaning and limits of that constitutional language and frequently conflates the effects of the prospective lengthening of copyright terms and the quite different effects of the retrospective extension of existing copyrights. When the language of the Copyright Clause and the retrospective effects of the CTEA are properly analyzed, there is considerable reason to conclude that the retrospective extension of existing copyrights does nothing to induce the creation of new writings and hence does not "promote the Progress of Science."

As a precursor to this discussion, however, it is worth noting that the Court ducked the question of the independent force of the "promote the Progress of Science" language in the Copyright Clause, choosing instead to assume such a requirement and hold that it was met.⁷⁶ Unfortunately, by not confronting the question head on, the Court avoided a closer look at the language of that portion of the Clause, and its subsequent analysis of the merits suffered accordingly. As noted above, however, the initial language of the Copyright Clause is not merely a preamble, it is the very definition of the power granted to Congress, and thus some attention to the meaning of the enumerated terms of that power is warranted.⁷⁷

⁷⁵123 S. Ct. at 798 (Stevens, J., dissenting) (presumption accorded historic practice "does not attach to congressional action in 1831, because no member of the 1831 Congress had been a delegate to the framing convention 44 years earlier").

⁷⁶123 S. Ct. at 784–787.

⁷⁷The Court at least casually seemed to acknowledge the correct structural reading of the Copyright Clause by citing to its decision in the patent case of *Graham v. John Deere Co.*, 383 U.S. 1 (1966). *Eldred*, 123 S. Ct. at 784–85. In *Graham*, the Court stated regarding the patent Clause that the:

clause is both a grant of power and a limitation. This qualified authority . . . is limited to the promotion of advances in the "useful arts." . . . The Congress in the exercise of the patent power may not overreach the restraints imposed

The specific language of Congress's enumerated power is "To promote the Progress of Science." "Promote" means "to help forward," "to encourage."⁷⁸ "Progress" means "forward movement," "improvement, advancement."⁷⁹ Science, as used in the Constitution, was understood to mean all learning and knowledge, not merely the "sciences" as we more narrowly understand them today.⁸⁰ In combination, those definitions suggest that the copyright power must be used to induce new, and not merely to reward or sustain old, learning or knowledge.⁸¹

Many of the Court's arguments as to how the CTEA might encourage the creation of new works apply only to the prospective aspects of the term extensions, and have little or nothing to do with retrospective extensions of existing copyrights. For example, the claimed value of creating harmony with the EU's longer copyright terms is completely irrelevant to the bulk of the existing copyrights affected by the CTEA given that the Act does not even purport to create such uniformity for works published before 1978, for works-for-hire, and for anonymous and pseudonymous works.⁸² And even as to the extension of existing copyright terms for post-1997 works by identified natural persons, there is precious little explanation of how such uniformity has any value for promoting progress beyond that promoted by the prospective creation of uniformity as to future works.

Likewise, the Court's discussion of the need for longer terms based on increased life expectancy, technological changes, and the need

by the stated constitutional purpose. . . . [A patent system] by constitutional command must "promote the Progress of . . . useful Arts." *This is the standard expressed in the Constitution and it may not be ignored.*

383 U.S. at 5–6 (emphasis added). If patent laws "must 'promote the Progress of . . . useful Arts,'" then copyright laws similarly "must" promote "the Progress of Science." The Court failed to take that final step, however, and thus neglected a closer discussion of the relevant language.

⁷⁸NEW LEXICON WEBSTER'S DICTIONARY 800 (1994).

⁷⁹*Id.* at 799.

⁸⁰*Eldred*, 123 S. Ct. at 801 (Breyer, J., dissenting).

⁸¹*Cf. Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1983) ("the limited grant [of monopoly privileges] is . . . intended to motivate the creative activity of authors").

⁸²*Eldred*, 123 S. Ct. at 809 (Breyer, J., dissenting).

of authors to support their future efforts from the continuing proceeds of prior works generally serves as an explanation for longer terms for future copyrights, not retroactive extension of past copyrights. Indeed, the Court's argument regarding continuing creation by authors of earlier works is particularly odd.⁸³ Prior to the CTEA, existing copyrights for identified natural persons already extended well beyond the author's death, and the posthumous addition of 20 years to such copyrights could not possibly revive the creative flow from such authors.

In fairness, however, some of the Court's arguments might indeed apply to retroactive extensions. For example, the support-for-future-works rationale could apply where the author is not a natural person—for example, a corporate “author” of a work for hire—and thus may continue to exist and create further works for hire during the extended term. But the unconditional transfer of wealth to immortal authors represented by retroactive term extensions has only the most speculative connection to any future acts of creativity and thus drains much of the meaning from the word “promote.” As the Supreme Court observed in *United States v. Morrison*, reasoning that follows a “but-for causal chain . . . to every attenuated effect” implicating an enumerated power is “unworkable if we are to maintain the Constitution's enumeration of powers.”⁸⁴ Although it might be different if the retroactive extension were somehow conditioned on further acts of creativity, merely throwing monopoly rights at corporate “authors” in the attenuated *hope* they use the proceeds beneficially only mocks the constitutional enumeration that Congress actively “promote Progress.” If such passive reliance on the positive consequences of corporate charity sufficed to promote science, then the language of the Copyright Clause has little meaning.

The same objection holds true for the Court's acceptance of the claim that retroactive extension encourages the preservation and dissemination of existing works. Because the retroactive extension is not conditioned on any further preservation or dissemination, there is no credible reason to believe that the extension will induce

⁸³123 S. Ct. at 782 n. 15 (“‘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.’”) (citations omitted).

⁸⁴529 U.S. 598, 615 (2000).

owners to preserve any works that they have, by hypothesis, already neglected for years. The CTEA thus does not “promote” progress or anything else because the connection between the additional rights conferred and the supposed benefits is too attenuated and speculative.⁸⁵ The gift of 20 more years of exclusive rights for existing copyrights, without even requiring that the protected works be converted into a format that will be preserved *and available* for public use in the future, is not the promotion of progress, it is simply a transfer of wealth from the public to existing copyright holders. Furthermore, even if retroactive extensions promoted preservation, they do not promote the “Progress” of science. While “progress” involves forward movement, advancement, and creation, preservation involves the very different realm of stasis and avoidance of decay.⁸⁶ Although preservation might eventually *benefit* science or the public generally, authorizing the promotion of mere preservation would effectively nullify the word “Progress” and more broadly empower Congress to promote science *in toto*.

One argument that has a stronger theoretical appeal is the Court’s characterization of the copyright quid pro quo as being understood by authors from the outset to include the retroactive application of any future extensions. If future extensions were understood as part of the original bargain, and hence the original incentive to create copyrightable works, then applying such extensions to existing works is simply the implementation of that bargain and, at a minimum, necessary and proper to the exercise of the copyright power. The trouble with that argument, insofar as the *Eldred* opinion itself is concerned, is that it is woefully underdeveloped and leaves unanswered a number of troubling questions. Thus, although it is true that Congress could have explicitly included in its definition of copyright terms a right to share equally in any future term extensions, it certainly did not do so in any of the copyright statutes it

⁸⁵Also, it is highly doubtful whether Congress could grant a *new* copyright for the mere preservation of an existing work. Such a copyright would appear to violate the requirement of originality and the prohibition against removing works from the public domain. Yet that is precisely the effect of retroactively extending copyrights: Granting more years of exclusive rights in return for the hope of preservation of works that otherwise would enter the public domain in due course.

⁸⁶*Compare* NEW LEXICON WEBSTER’S DICTIONARY 799 (“Progress” means “forward movement,” “improvement, advancement”), *with id.* at 792 (“preserve . . . to keep up, maintain, prevent from ruin or decay”).

has adopted. And implying such a promise into those past statutes is quite a stretch. Such a promise certainly would not be enforceable against the federal government or third parties had Congress elected *not* to extend the terms of existing copyrights, and surely would not constitute a sufficiently reasonable investment-backed expectation to sustain a takings claim for any failure to extend existing terms along with an extension of future terms. Insofar as copyright holders had nothing more than the unenforceable hope that they might be the beneficiaries of future extensions, fulfilling that unilateral hope surely does not qualify as either necessary or proper to fulfill Congress's side of the bargain struck when existing copyrights were initially issued.

Thus, although there are a smattering of arguments that might be stretched to support the Court's conclusion that retroactive term extensions are compatible with the "promote the Progress of Science" language of the Copyright Clause, accepting those arguments does considerable violence to the first principles of constitutional construction. The better interpretation would be to read "promote" as requiring an active incentive, in the form of an express *quid pro quo* for the creation of copyrightable works, and would read "Progress" as requiring the creation of something new in exchange for whatever benefits Congress bestows. Because the retroactive extension of existing copyright terms in the CTEA does not actively encourage the creation of any new works, it should have been held to violate the Copyright Clause.

The difficulties with the Court's analysis of the CTEA and the Copyright Clause once again leaves as the primary bulwark of the opinion the historical claim that Congress has consistently acted to promote the progress of science through the extension of increased benefits for existing works. That argument theoretically applies even to the 1790 Act given that the nonexistence of federal *copyrights* before 1790 is relevant only to the analysis of whether such copyrights are for limited times. In terms of promoting progress, it is the existence of the work itself that seems relevant—because the reward would go to a writing that is not "new"—not the existence of a federal copyright. But again, aside from the questionable abdication of interpretive authority even to the first Congress, the Court's reading of the historical record is a bit off. In claiming that the 1790 Act demonstrates that "the First Congress understood it could 'promote

. . . Progress' by extending copyright protection to existing works,"⁸⁷ the Court neglects to acknowledge that the original federal copyrights replaced and preempted state copyrights that in many instances would have provided *longer* protection.⁸⁸ Rather than extending the duration of author control over existing works, the retroactive application of the 1790 Act often hastened the entry into the public domain of those existing works. Such increased public access indeed would have been understood to promote the progress of science, but offers no support for the CTEA. And even as to existing works that may have received greater protection under the 1790 Act than under prior copyright law, there is no indication that the first Congress gave any consideration to whether such increased protection would promote the progress of science. It is far more likely that Congress, in creating a new federal copyright system, simply overlooked any such start-up problems or considered them *sui generis* rather than expressed an implied view on the matter of constitutional construction going forward.

Overall, therefore, an ambiguous history and the dubious inferences drawn from earlier Congresses' self-serving decisions to exercise power are no substitute for the logical analysis of the terms and implications of a written constitution. Such analysis is the province and duty of the courts, and should not be abdicated in favor of the historical practices of Congress.

II. *The First Amendment*

In addressing the First Amendment challenge to the CTEA, the Court again looked to history and observed that the "Copyright Clause and First Amendment were adopted close in time" thus reasoning that such "proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."⁸⁹ The Court then offered the additional analysis that the speech-promoting incentives of copyright law and the speech-protecting limits on copyright of the idea/expression dichotomy and the fair-use defense served generally to resolve most First Amendment questions in favor of copyright law.⁹⁰ Thereafter, while the Court

⁸⁷123 S. Ct. at 785 n. 19.

⁸⁸123 S. Ct. at 795 (Stevens, J., dissenting).

⁸⁹123 S. Ct. at 788.

⁹⁰*Id.* at 788–89.

offered a welcome rejection of the D.C. Circuit's notion that copyright law was "categorically immune from challenges under the First Amendment[,]" it adopted the less-than-compelling alternative that "when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."⁹¹

In evaluating the Court's First Amendment reasoning, it is well to begin with a fundamental principle that the Court recently reiterated in another context: Article I powers do not supersede restrictions created by Amendments.⁹² Rather, Amendments to the Constitution narrow congressional authority that would otherwise exist under Article I standing alone. The First Amendment question is whether government action is unconstitutional *despite* Congress's enumerated power. The constitutional hierarchy is no different in the case of copyright law. A law within Congress's copyright power may *still* be prohibited by the First Amendment.

That the Copyright Clause and the First Amendment were adopted close in time does nothing to mitigate the precedence of the First Amendment. The same proximity of adoption is equally true for all other Article I powers, yet that hardly raises the inference that all exercises of such powers are "compatible" with the First Amendment. Indeed, that the First Amendment was adopted at all suggests that the Framers understood that various exercises of congressional power could indeed abridge the freedom of speech, and hence that there was a need for still further limits operating *within* the scope of the limited enumerations of congressional power. There is no reason to think that the Copyright Clause involved less of a concern than any of the other Article I powers.

Ultimately, however, the Court in *Eldred* seemed to accept that the First Amendment indeed imposes some restraint on the copyright power. At that point, it was not enough simply to rely upon the idea/expression dichotomy and the fair-use defense, particularly

⁹¹*Id.* at 789–90.

⁹²See, e.g., *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635–36 (1999) (provision that "[a]ny State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court . . . for infringement of a patent" was unconstitutional, in part because "Congress may not abrogate state sovereign immunity pursuant to its Article I powers").

when evaluating a new statutory expansion of copyright's restrictions on speech rather than evaluating an individual copyright alone. The notion that copyright only restricts particular expression, not the underlying ideas, and hence has little impact on First Amendment interests is mistaken. The First Amendment protects not only the conveyance of concepts generally, but the particular *form* of expression as well. Thus, Paul Robert Cohen was constitutionally entitled to display on his jacket a uniquely evocative disparagement of "the Draft," not merely some alternative "expression" of the same basic sentiment.⁹³ Indeed, the Court has recognized that protected expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."⁹⁴ It generally is left to the speaker to decide not merely what to say, but also how to say it, and the First Amendment protects the intangible value associated with a particular "expression" independently from the underlying idea.⁹⁵ Indeed, in the case of music and much poetry and art, there may not be much of an underlying "idea" at all beyond the descriptive beauty conveyed through the particularized "expression." Yet such work is protected by the First Amendment as well as by copyright, and the idea/expression dichotomy is insufficient to accommodate the First Amendment interests at stake.

The fair-use defense likewise may mitigate the First Amendment burden of copyrights generally, but it does not eliminate the substantial remaining burden on uses not subject to the defense. Activities that would infringe authors' copyrights continue to have significant value, as evidenced by the Framers' concern that copyrights remain limited to relatively brief periods and their clear desire to expand the public domain. The Framers understood that copyrights limited access to protected works, and that fully free use of various works would be a driving force for the progress of science. Fair use thus

⁹³See *Cohen v. California*, 403 U.S. 15, 24 (1971) ("the usual rule [is] that governmental bodies may not prescribe the form or content of individual expression").

⁹⁴*Id.* at 26.

⁹⁵The government could not, consistent with the First Amendment, restrict publication of works by Plato or Marx on the theory that the ideas could still be conveyed through other "expression."

helps in the eventual balance, but fully *free* use is the First Amendment optimum, with anything less constituting a restriction on speech that should be analyzed accordingly.

As for the Court's refusal to engage in separate First Amendment balancing of new statutory restrictions added to copyright law that do not alter the "traditional contours of copyright protection,"⁹⁶ Justice Breyer correctly observed that "the sentence points to the question, rather than the answer."⁹⁷ The Court makes no attempt to explain why the term of copyrights is not part of the "traditional contours of copyright protection" or why a retroactive increase in term of 20 years—a substantial percentage of the term for any category of copyrighted works—is not a sufficiently significant alteration. Given the exceedingly trivial and speculative benefits from such retroactive extension and the palpable prolongation of copyright's burdens on fully free speech, surely the First Amendment balance will be different than it is for the prospective copyright protection previously analyzed by the Court.

The gain from such an extension does not involve any realistic *addition* to the incentive for prior authors to create new work, and the speech-promoting qualities of copyright therefore would not play a significant role in the balance. On the other side of the scale, an additional 20 years of retroactive monopoly is a significant burden on both First Amendment and copyright values. The extension will hinder access to numerous works that would soon enter the public domain and that need no additional incentive for preservation. And the CTEA will chill the public use of works having uncertain status or whose authors are not readily located because few persons will risk the criminal penalties for unauthorized use of such works. Categorically rejecting First Amendment balancing for statutory changes based on the conclusory assertion that such changes do not alter the traditional contours of copyright protection does a disservice to the fundamental priority of the First Amendment over Article I powers and avoids the Court's duty to enforce the Constitution when a case calls upon it to do so.

⁹⁶123 S. Ct. at 789–90.

⁹⁷123 S. Ct. at 812 (Breyer, J., dissenting).

Conclusion

The history of unchallenged congressional legislation relied upon by the Court to uphold the CTEA was inadequate for that purpose both in principle and in substance. Any defense of the CTEA should have started and ultimately ended with the words and logic of the Constitution itself. And by that measure, the opinion failed to persuade. Although the language and logic of the Constitution cannot be said to foreclose entirely the outcome reached by the Court, that language and logic certainly undermine many of the reasons given by the Court for its result and leave substantial doubts as to whether the CTEA could survive a logically rigorous examination under the Copyright Clause or the First Amendment. Regardless of the outcome, however, both the *Eldred* opinion and the jurisprudence it will influence would have been better served by an additional page or two of logic and a considerably smaller volume of history.