

Notes

Unlimited Congressional Power Under the Copyright Clause in Article I of the Constitution: *Eldred v. Ashcroft*

By SHERRY LYNN MURPHY*

HAVE YOU EVER wondered why restaurants make up ridiculous songs to sing “happy birthday” to customers? No one knows the words or melodies, so no one sings along. Why do restaurants do this, instead of just singing the “Happy Birthday to You” song that everyone knows and loves, the one every kid has sung to him or her at birthday parties? The reason is because it is illegal for restaurants, in fact for anyone, to sing “Happy Birthday to You” unless a royalty fee is paid for permission to use the song.¹ Although the song is an important part of American popular culture, it is also copyrighted, and its owner AOL Time Warner is entitled to a royalty fee whenever it is sung or played.²

When originally published in 1935,³ the song had a copyright term of fifty-six years, and therefore would have been in the public domain after 1991.⁴ However, as copyright law now exists, after the most recent copyright term extension of 1998, the “Happy Birthday to You” song will be protected by copyright until the year 2030.⁵ This

* Class of 2004. Thanks to my husband Andrew for his tireless support and to my editor Javier Lavagnino for always believing in this piece.

1. See Lyle V. Harris, *Singing Different Tune on Birthdays*, DALLAS MORNING NEWS, Feb. 23, 2000, at 2C; see also Jonathan Zittrain, *Calling off the Copyright War in Battle of Property vs. Free Speech, No One Wins*, BOSTON GLOBE, Nov. 24, 2002, at D12 (describing how the owners of this copyright threatened to sue the Girl Scouts for using the “Happy Birthday to You” song at their campfires).

2. See SNOPE.S.COM, HAPPY BIRTHDAY, WE’LL SUE, at <http://www.snopes.com/music/songs/birthday.htm> (last accessed Sept. 28, 2003). The song collects about \$2 million in royalties annually. *Id.*

3. Nancy Watkins, . . . and Many More, CHI. TRIB., June 22, 2003, at C9 (“Happy birthday to you, happy bir—oops, better stop now on advice of our attorneys.”).

4. See SNOPE.S.COM, *supra* note 2.

5. See Watkins, *supra* note 3, at C9.

lengthening of copyright terms for works such as the “Happy Birthday to You” song resulted from the Copyright Term Extension Act of 1998 (“CTEA”), which extended the terms of all copyrights by twenty years.⁶

Exclusive copyright property rights are given by the government to authors and artists to protect their original expressive works for a fixed period of time.⁷ After the expiration of that period of time, the works fall into the public domain for everyone to use.⁸ The extension of copyright terms retroactively is a one-sided modification of the terms of this grant. Accordingly, these retroactive extensions given by the CTEA were challenged as unconstitutional in *Eldred v. Ashcroft*.⁹

This Note will expose and analyze the Supreme Court’s holding in *Eldred*, both in terms of copyright law and in terms of congressional power to enact legislation under Article I of the Constitution.¹⁰ Part I gives the basic background necessary to understand the issues and reasoning in *Eldred*, including an explanation of the enumerated powers of Congress under Article I, a comparison of copyright law to that of other forms of intellectual property, and some history of copyright term extensions. Part II presents the *Eldred* case itself, including the lower court history, the Supreme Court’s majority rationale, and the two dissenting opinions. Part III analyzes the holding of the case, what it means for copyright law, and what it means for Article I jurisprudence.

Part III points out that the holding in *Eldred* gives great deference to Congress to enact retroactive extensions of copyrights. Instead of answering some very tough questions on interpreting the Copyright Clause, the Court majority simply accepted the judgment of Congress. This heavy deference gives Congress unlimited power to enact copyright term extensions, at the peril of the public domain. However, the

6. See Sonny Bono Copyright Term Extension Act §§ 101, 102, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 301–304 (2000)).

7. See 17 U.S.C. §§ 102(a), 106, 302, 304.

8. However, it is possible that works may still be protected by another form of intellectual property, e.g. trademark law. See 15 U.S.C. §§ 1051–1059 (2000).

9. 537 U.S. 186 (2003). For a short, entertaining, and obviously anti-CTEA account of how the CTEA was enacted, see Bill Haltom, *Micky vs. The Ghost of Sonny Bono*, 39 TENN. BAR J. 38 (2003) (“Sonny got the new law enacted, effectively keeping Mickey under the exclusive control of the Walt Disney Company until 2024, enabling Disney CEO Michael Eisner to sing to Mickey, ‘I got you, babel!’ Suffice to say that when it came to Mickey Mouse, Sonny did not feel that Walt Disney should have to Cher and Cher alike.”).

10. *Eldred* also addressed the issue of whether the CTEA violated the First Amendment Freedom of Speech provision. See *infra* note 116. This is a separate issue from the one this Note addresses.

two dissenting opinions are also not persuasive in arguing against the constitutionality of the CTEA because they are not careful to distinguish copyright jurisprudence from that of patents.

Curiously, the majority opinion in *Eldred* is couched not on the Copyright Clause in isolation, but on Article I powers in general, including the Commerce Clause. This seems to be a deliberate use of terms by Justice Ginsburg, the author of the majority opinion, who had dissented recently in both *United States v. Lopez*¹¹ and *United States v. Morrison*,¹² which raised the standard of review of congressional legislation under the Commerce Clause, another congressional Article I power. It is interesting that the Court in *Eldred* declined to follow that trend. Indeed, it seems that the language used in the *Eldred* opinion has brought that trend to an end.

I. Background

A. The Enumerated Powers of Congress Under Article I of the Constitution

The United States federal government has specific enumerated powers, and the legislative branch can pass laws only if specifically authorized by the Constitution.¹³ Furthermore, it is the duty of the judiciary to ensure that Congress legislates within the bounds of its enumerated powers.¹⁴ If a law is unconstitutional, the judiciary must strike it down under the basic understanding that “a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”¹⁵

Section 8 of Article I of the Constitution contains the enumerated powers of Congress to enact legislation.¹⁶ Among those enumerated powers are the Tax Clause,¹⁷ which gives Congress the power to collect taxes, the Commerce Clause,¹⁸ which gives Congress the power to regulate interstate commerce, and the Patent and Copyright

11. 514 U.S. 549 (1995).

12. 529 U.S. 598 (2000).

13. *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

14. *Id.*

15. *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

16. See U.S. CONST. art. I, § 8 (“The Congress shall have Power To”); see also *McCulloch v. Maryland*, 17 U.S. 316, 412 (1819).

17. U.S. CONST. art. I, § 8, cl. 1 (“lay and collect Taxes, Duties, Imposts and Excises”).

18. *Id.* art. I, § 8, cl. 3 (“regulate Commerce . . . among the several States”).

Clause,¹⁹ which gives Congress to power to grant patent and copyright protection.

1. The Recent Heightened Standard of Review of Commerce Clause Legislation Under Article I

A law enacted by Congress can be challenged as beyond Congress's constitutionally enumerated powers. Until recently, the Court's standard of review of laws passed by Congress consisted of determining if the law enacted had any "rational basis" relative to the enumerated power under which it was enacted.²⁰ If so, the law would pass such a constitutional challenge. This was a very deferential standard, and almost all laws passed constitutional scrutiny.

In the past decade the Supreme Court has been limiting congressional powers under the Commerce Clause of Article I of the Constitution, starting with *United States v. Lopez*,²¹ which held the Gun-Free School Zones Act of 1990 unconstitutional.²² The Court announced that, absent a direct regulation of the channels or instrumentalities of interstate commerce, the proper test to determine if Congress is acting pursuant to its power under the Commerce Clause is to determine whether the regulations "substantially affect" interstate commerce.²³

The majority in *Lopez* explained that "limitations on the commerce power are inherent in the very language of the Commerce Clause."²⁴ The power of Congress to legislate under the Commerce Clause is "subject to outer limits," and it is for the Court to enforce those limits.²⁵ The majority in *Lopez* feared that if unchecked, congressional power to legislate under the Commerce Clause could easily escalate to unlimited power, contrary to the framers' intent, because "depending on the level of generality, any activity can be looked upon as commercial."²⁶

The dissent in *Lopez* disagreed sharply with the majority and argued that the standard of review should remain whether Congress had

19. *Id.* art. I, § 8, cl. 8 ("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").

20. *United States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting).

21. 514 U.S. 549.

22. *Id.* at 551.

23. *See id.* at 558-59.

24. *Id.* at 553.

25. *Id.* at 557.

26. *Id.* at 565.

a “rational basis” for enacting the statute in question.²⁷ The dissent predicted that “today’s decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case.”²⁸

However, contrary to the dissent’s prediction in *Lopez*, the Supreme Court in *United States v. Morrison*²⁹ followed the same reasoning when it struck down the Violence Against Women Act of 1994 as beyond Congress’s Commerce Clause power.³⁰ Like the Act in question in *Lopez*, the Court held that the purpose of the Act in *Morrison* was too attenuated from interstate commerce.³¹ The Court recognized that a congressional act is given a “presumption of constitutionality,”³² however, “[u]nder our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace.”³³ This marked an end to the Court’s expansion of congressional deference in the latter half of the twentieth century.³⁴

There were still sharp disagreements among the Justices in *Morrison*, with the same 5-4 rift in the Court that was found in *Lopez*, and with the same Justices on the respective sides of the decisions.³⁵ The majority opinions of both cases, which announced and supported the heightened standard of review, included Chief Justice Rehnquist, writing for the Court, and Justices O’Connor, Scalia, Kennedy, and Thomas. The dissenters, who felt the rational basis standard of review should survive, included Justices Stevens, Souter, Breyer, and Ginsburg.³⁶ Again, the dissent in *Morrison* opined that it “doubt[ed] that the majority’s view will prove to be enduring law.”³⁷

The *Lopez* and *Morrison* cases are known for their promotion of federalism, i.e., the States’ right to self-governance and to be left alone

27. *Id.* at 617 (Breyer, J., dissenting).

28. *Id.* at 614–15 (Souter, J., dissenting).

29. 529 U.S. 598, 627 (2000).

30. *See id.* The Court also held that the Act was beyond Congress’s powers under Section 5 of the Fourteenth Amendment. *Id.*

31. *See id.* at 615.

32. *Id.* at 607.

33. *Id.* at 616. In contrast to the legislation at issue in *Lopez*, here Congress had accumulated a “mountain of data” showing the effect of gender-motivated violence on interstate commerce. *Id.* at 628–29 (Souter, J., dissenting). Nevertheless, that did not prevent the law from being held unconstitutional.

34. *See id.* at 607–08.

35. *See id.*; *United States v. Lopez*, 514 U.S. 549 (1995).

36. *See Morrison*, 529 U.S. at 600; *Lopez*, 514 U.S. at 550.

37. *Morrison*, 529 U.S. at 654 (Souter, J., dissenting).

by the federal government.³⁸ Upon striking down the federal laws at issue, the Court declared a new standard of review: "The Court was deciding whether such a law could be properly enacted by Congress, whatever the Court's (or anyone else's) opinion of the social policy embedded in such a law might be."³⁹ Congress could only regulate "activities that substantially affect interstate commerce,"⁴⁰ and the Court would strike down any legislation that went beyond that enumerated power. This Note's comparison of *Lopez* and *Morrison* with *Eldred* is a comparison of the two standards of review, not of the effect of *Eldred*'s standard of review on federalism.

2. Congress's Enumerated Power in *Eldred v. Ashcroft*: The Copyright Clause

In *Eldred v. Ashcroft*, the Supreme Court was faced with defining the limits of another enumerated power of Congress under Article I of the Constitution, the Copyright Clause. The Clause provides for copyright protection by allowing Congress to grant "Authors" an "exclusive Right" for "limited Times" to their "Writings."⁴¹ The Court in *Eldred* had to determine if retroactive extensions of existing copyrights under the CTEA were within the enumerated power of Congress under the Copyright Clause.

Unlike the Commerce Clause, which has an implicit limitation,⁴² the Copyright Clause has the explicit limitation, "for limited Times," included in the text of the Clause.⁴³ Petitioners in *Eldred* attacked the constitutionality of the retroactive extensions of existing copyrights under the CTEA, which extended all terms of copyrights by twenty years.⁴⁴ This Note examines the scope of the Article I powers granted to Congress under the Copyright Clause in the wake of *Eldred*.

38. See Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 434 (2002) (arguing that liberals should support the growth of states' rights through federalism).

39. *Id.*

40. *Morrison*, 529 U.S. at 609 (quoting *Lopez*, 514 U.S. at 558-59).

41. U.S. CONST. art. I, § 8, cl. 8.

42. See *Lopez*, 514 U.S. at 553.

43. U.S. CONST. art. I, § 8, cl. 8.

44. See Sonny Bono Copyright Term Extension Act §§ 101, 102, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 301-304 (2000)).

B. Copyright Law Compared to Other Intellectual Property Under Article I of the Constitution

In order to understand the differences in the reasoning used by the majority and dissents in *Eldred*, it is necessary to understand the different types of intellectual property. There are three main types of intellectual property rights granted by Congress: copyright, patent, and trademark. All three vary in what they protect, how long the protection lasts, and how they are treated by courts. Patents, copyrights, and trademarks all arise under Article I of the Constitution. Patent and copyright rights are granted under the Copyright Clause (Section 8, Clause 8), and trademark rights are granted through the Commerce Clause (Section 8, Clause 2).⁴⁵

As explained above, copyright protection under the Copyright Clause is given to “Authors” for their “Writings.”⁴⁶ Copyright protection is provided by Congress under Title 17 of the United States Code to “original works of authorship fixed in any tangible medium of expression, now known or later developed.”⁴⁷ This includes literary, musical, choreographic, pictorial, and sculptural works, motion pictures, sound recordings, and architectural works.⁴⁸ Copyright rights do not cover “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”⁴⁹

The other form of intellectual property rights that arises under Article I, Section 8, Clause 8, is patent protection granted to “Inventors” for their “Discoveries.”⁵⁰ Despite their comingling in the text of the Copyright Clause, patents and copyrights have developed into very different forms of intellectual property. The most common form of patents, utility patents,⁵¹ have fixed terms of twenty years from the application filing date.⁵² This is considerably shorter than copyrights, which can easily last for more than a century.⁵³ Also, inventors have to

45. See *supra* Part I.A.

46. See *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

47. 17 U.S.C. § 102(a).

48. See *id.*

49. 17 U.S.C. § 102(b).

50. *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

51. See 1 DONALD S. CHISUM, CHISUM ON PATENTS: A TREATISE ON THE LAW OF PATENTABILITY, VALIDITY AND INFRINGEMENT, glossary G1-23 (2002) (“A utility patent is the normal type of patent issued for a new, useful and nonobvious machine, manufacture, composition of matter, or process.”).

52. 35 U.S.C. § 154 (2000).

53. See 17 U.S.C. §§ 302, 304.

apply to a government agency for patents,⁵⁴ while copyright rights arise automatically when an original work of authorship is created and fixed in some tangible form.⁵⁵

A patent is normally for an invention that solves a particular problem. In fact, one of the requirements to obtain a patent is that the invention must be "useful."⁵⁶ The often-cited Supreme Court case of *Graham v. John Deere Co.*,⁵⁷ for example, involved the invention of a "Clamp for vibrating Shank Plows."⁵⁸ The information detailed in the patent, the way the "Clamp" was created and used, was the intellectual property of the patent holder for the patent term. In theory, if the inventor had not thought of this idea for a better clamp, someone else would have thought of it eventually, if it was truly useful. The quid pro quo in patent law is the information given by the inventor to the public in exchange for the inventor having a temporary monopoly on its use.⁵⁹

In contrast to patents, copyright protection explicitly does not extend to a design that is "useful."⁶⁰ A copyright is granted on an artful expression, such as a novel or a movie.⁶¹ It is the expression, not the informative content, that is copyrighted, and the underlying ideas or facts of the work may be used freely.⁶² For example, when a historian writes a book on the Civil War, his particular way of organizing and presenting the facts of the battles is copyrighted, but not the facts themselves that he uncovers during his research.⁶³ Those facts are freely available for use by other authors in their own style of presentation.⁶⁴

54. The United States Patent and Trademark Office is empowered to grant patents. See 35 U.S.C. § 1.

55. See 17 U.S.C. §§ 101, 102 ("A work is 'fixed' in a tangible medium of expression when . . . sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.").

56. 35 U.S.C. § 101. Other requirements include that the invention be novel, *id.* § 102, nonobvious, *id.* § 103(a), and of a patentable subject matter, *id.* § 101.

57. 383 U.S. 1 (1966).

58. *Id.* at 4. Two other cases were consolidated into the *Graham* case: *Calmar, Inc. v. Cook Chemical Co.*, and *Colgate-Palmolive Co. v. Cook Chemical Co.*, both involving "a finger-operated sprayer with a 'hold-down' cap." See *id.*

59. See *Universal Oil Prods. Co. v. Globe Oil & Ref. Co.*, 322 U.S. 471, 484 (1944).

60. See 17 U.S.C. § 113; *id.* § 101 (defining a "useful article" as one "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information").

61. See *id.* § 102(a).

62. See *id.* § 102(b); *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

63. See *Feist*, 499 U.S. at 350-51.

64. See *id.*

There is another type of intellectual property that arises under the Commerce Clause of the Constitution—trademarks.⁶⁵ Trademarks serve to identify what source a product comes from.⁶⁶ Trademarks are measured by their association with the company they represent, but theoretically the term is limitless.⁶⁷ Because federal trademark law arises under the Commerce Clause, a company can only register a federal trademark if it does business in interstate commerce.⁶⁸

When reading the *Eldred* majority and the two dissenting opinions, it is important to keep in mind that the three main types of intellectual property are very different in character. Accordingly, in all three opinions, the use of patent law precedent, while admittedly somewhat relevant, does not support the Court's reasoning in this case dealing specifically with copyright law. Of course, this may be one of the reasons why the Court's opinion does not refer to the Copyright Clause, but Article I generally.⁶⁹

C. Some History of Copyright Term Extensions

The original copyright statute passed by Congress in 1790 provided a copyright term of fourteen years, plus an additional fourteen years if the author was a living United States citizen, for works "already printed" and "thereafter made and composed."⁷⁰ This statute marked the beginning of federal copyright protection, giving protection to "maps, charts, and books," and extending protection to those works that were already created.⁷¹ However, this protection of works already in existence should not be mistaken as a retroactive extension of copyright protection, for no federal protection existed prior to this statute.

Congress has periodically extended the copyright term, giving longer and longer terms of protection to copyright owners. The Act of 1831 added another fourteen years to the initial term, for a total of forty-two years (twenty-eight years for initial term plus fourteen years renewal term).⁷² The 1831 Act also extended the terms of existing copyrights not yet expired, marking the first time Congress retroac-

65. See 15 U.S.C. §§ 1051–1127 (Lanham Act §§ 1–45) (2000).

66. See *id.* § 1127 (Lanham Act § 45).

67. See *id.* § 1059 (Lanham Act § 9).

68. See Trade-Mark Cases, 100 U.S. 82, 96–97 (1879).

69. See *Eldred v. Ashcroft*, 537 U.S. 186, 216 (2003).

70. See Act of May 31, 1790, §§ 1, 3, 1 Stat. 124–125.

71. See *id.*

72. See Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436.

tively extended existing copyrights.⁷³ Thus, instead of simply naming a new term for future copyrights, existing copyright terms were also extended. This was a one-sided modification of the exchange between the authors and the government. The Act of 1909 added another fourteen years to the renewal term, for a total of fifty-six years (twenty-eight years for initial term plus twenty-eight years renewal term).⁷⁴ Again, this extension had retroactive application to existing works protected by copyright.⁷⁵ The 1909 Act also expanded the types of works protectable under copyright.⁷⁶

Between 1962 and 1974 Congress passed nine more laws that incrementally extended existing copyright terms, all with retroactive effect.⁷⁷ The sole purpose of the first eight of those acts was to retroactively extend the copyright terms of works about to enter the public domain (i.e. no effect on future copyrights); the ninth also included provisions for willful infringement penalties.⁷⁸

The Copyright Act of 1976 altered the way the term of a copyright was computed, setting the term to be the lifetime of the author plus fifty years.⁷⁹ When there is no identifiable author, the term was the earlier of seventy-five years from the year of publication or one hundred years from the year of creation.⁸⁰ Existing copyright terms were

73. See *id.* § 16.

74. See Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

75. See *id.* § 24.

76. See *id.* § 5.

77. See Act of Sept. 19, 1962, Pub. L. No. 87-668, 76 Stat. 555; Act of Aug. 28, 1965, Pub. L. No. 89-142, 79 Stat. 581; Act of Nov. 16, 1967, Pub. L. No. 90-141, 81 Stat. 464; Act of July 23, 1968, Pub. L. No. 90-416, 82 Stat. 397; Act of Dec. 16, 1969, Pub. L. No. 91-147, 83 Stat. 360; Act of Dec. 17, 1970, Pub. L. No. 91-555, 84 Stat. 1441; Act of Nov. 24, 1971, Pub. L. No. 92-170, 85 Stat. 490; Act of Oct. 25, 1972, Pub. L. No. 92-566, 86 Stat. 1181; Act of Dec. 31, 1974, Pub. L. No. 93-573, tit. I, § 104, 88 Stat. 1873.

78. See Act of Sept. 19, 1962, Pub. L. No. 87-668, 76 Stat. 555 (preventing expiration of existing copyrights before December 31, 1965); Act of Aug. 28, 1965, Pub. L. No. 89-142, 79 Stat. 581 (preventing expiration of existing copyrights before December 31, 1967); Act of Nov. 16, 1967, Pub. L. No. 90-141, 81 Stat. 464 (preventing expiration of existing copyrights before December 31, 1968); Act of July 23, 1968, Pub. L. No. 90-416, 82 Stat. 397 (preventing expiration of existing copyrights before December 31, 1969); Act of Dec. 16, 1969, Pub. L. No. 91-147, 83 Stat. 360 (preventing expiration of existing copyrights before December 31, 1970); Act of Dec. 17, 1970, Pub. L. No. 91-555, 84 Stat. 1441 (preventing expiration of existing copyrights before December 31, 1971); Act of Nov. 24, 1971, Pub. L. No. 92-170, 85 Stat. 490 (preventing expiration of existing copyrights before December 31, 1972); Act of Oct. 25, 1972, Pub. L. No. 92-566, 86 Stat. 1181 (preventing expiration of existing copyrights before December 31, 1974); Act of Dec. 31, 1974, Pub. L. No. 93-573, tit. I, §§ 101-104, 88 Stat. 1873 (preventing expiration of existing copyrights before December 31, 1976).

79. See Act of Oct. 19, 1976, Pub. L. No. 94-553, §§ 302, 305, 90 Stat. 2541, 2572-76.

80. See *id.*

also extended to give a total term of seventy-five years from the date when copyright was first secured.⁸¹ In contrast to the new method of computing the terms of future copyrighted works, the terms of existing works did not depend upon the lifetime of the author; the extension was effected by adding forty-seven years to the end of the renewal term.⁸²

Finally, under the CTEA passed in 1998,⁸³ all terms of copyrights were extended by an additional twenty years.⁸⁴ Now terms of works copyrighted after January 1, 1978 (the effective date of the 1976 Act) are computed to be the lifetime of the author plus seventy years, and ninety-five years from publication or one hundred twenty years from creation (whichever is shorter) for unidentified authors or works for hire.⁸⁵ The terms of works copyrighted before January 1, 1978 were extended by changing the renewal term from forty-seven to sixty-seven years.⁸⁶

A large supporter and heavy lobbyist of the extensions was the Walt Disney Corporation; their early clips of Mickey Mouse were due to enter the public domain in 2004.⁸⁷ Ironically, Congressman Sonny Bono did not live to see the bill that bears his name pass in both houses, and President Clinton sign it into law, all in October of 1998.⁸⁸

Though the CTEA applied to both newly-created and existing works,⁸⁹ the copyright term extension debate focuses on the retroac-

81. *See id.* § 304.

82. *See id.*

83. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 301-304 (2000)).

84. *See* 17 U.S.C. § 102.

85. *See id.* §§ 302, 304. "Works for hire" are creations made under, for example, an employment agreement. *See id.* § 101.

86. *See* Sonny Bono Copyright Term Extension Act § 102 (codified as amended at 17 U.S.C. § 304).

87. Amy Harmon, *A Corporate Victory, But One That Raises Public Consciousness*, N.Y. TIMES, Jan. 16, 2003, at A24 ("In 1998, the Sonny Bono Copyright Term Extension Act was passed with hardly any debate after heavy lobbying by the Walt Disney Company, whose early Mickey Mouse movies were about to fall into the public domain."); Sabra Chartrand, *Congress Has Extended Its Protection for Goofy, Gershwin and Some Moguls of the Internet*, N.Y. TIMES, Oct. 19, 1998, at C2 ("Mickey Mouse, first copyrighted in 1928, had been set to pass into the public domain in 2004; Pluto, Goofy and Donald Duck would have followed in 2009.").

88. *See* Bernard Weinraub, *Sonny Bono, 62, Dies in Skiing Accident*, N.Y. TIMES, Jan. 7, 1998, at A16; Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 291-92 (2002).

89. *See* 17 U.S.C. §§ 302-304.

tive extensions.⁹⁰ No one who testified before Congress in support of the CTEA's enactment had argued in support of prospective extensions of copyrights, even though the CTEA's opponents argued against them.⁹¹ Those interested in copyright extensions seemed only to be concerned with extending their existing rights.⁹²

II. The Case: *Eldred v. Ashcroft*

A. The Parties

The petitioners in *Eldred* were Eric Eldred of Eldritch Press and others who use, copy, reprint, perform, enhance, restore and/or sell works of art, film, or literature in the public domain.⁹³ Petitioners had prepared to use works created before 1923 that, but for the CTEA, would have entered the public domain.⁹⁴

Petitioners had the support of such amici groups as The American Association of Law Libraries, Constitutional Law Professors, Copyright Law Professors, Intellectual Property Law Professors, a group of top economists, the National Writers Union, and the Organization of American Historians.⁹⁵ Counsel for petitioners included lead counsel Lawrence Lessig of Stanford and Charles Nesson of Harvard.⁹⁶ However, petitioners also had a number of opponents, including amici American Intellectual Property Law Association, the Songwriters Guild of America, Symphonic and Concert Composers, the Recording Industry Association of America, the Motion Picture Association of America, AOL Time Warner, and Dr. Seuss Enterprises.⁹⁷

The respondent was John D. Ashcroft, in his official capacity as Attorney General of the United States.⁹⁸ Mr. Ashcroft succeeded Janet Reno as the Attorney General listed in the previous titles of the case in the district and appellate courts.⁹⁹ Solicitor General Theodore Olson represented Mr. Ashcroft before the Court.¹⁰⁰

90. See Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 FLA. L. REV. 989, 991 (2000).

91. See *id.* at 996–97.

92. See *id.*

93. See *Eldred v. Reno*, 74 F. Supp. 2d 1, 3 (D.D.C. 1999).

94. See *id.*

95. See OPENLAW, *ELDRED V. ASHCROFT, CERT GRANTED: THE COURT WILL HEAR ELDRED V. ASHCROFT IN ITS FALL TERM*, at <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/legal.html> (last accessed Jan. 28, 2004).

96. See *Eldred*, 537 U.S. at 191.

97. See OPENLAW, *supra* note 95.

98. See *Eldred*, 537 U.S. at 186.

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

100. See *Eldred*, 537 U.S. at 191.

B. Procedural History

1. United States District Court, District of Columbia: *Eldred v. Reno*

In the district court, petitioners sought a declaratory judgment that section 102(d)(1)(B) of the CTEA was unconstitutional.¹⁰¹ The district court granted defendant's motion for judgment on the pleadings,¹⁰² holding that Congress had the power under the Copyright Clause to define "limited Times" and extend copyright terms under the CTEA.¹⁰³ The court concluded that any fixed term is a limited time within the discretion of Congress because it is not perpetual¹⁰⁴ and that Congress has the power to apply retroactive extensions under the Copyright Clause.¹⁰⁵

2. United States Court of Appeals, D.C. Circuit: *Eldred v. Reno*

On appeal, the district court's ruling was affirmed.¹⁰⁶ The appellate court held that Congress did not violate the "limited Times" provision of the Copyright Clause by enacting retroactive extensions in the CTEA.¹⁰⁷ The court also held that the preamble to the Copyright Clause, "To promote the Progress of Science and useful Arts," does not limit congressional power.¹⁰⁸ Even taking the preamble into consideration, the court reasoned that extending copyrights promotes the restoration of old works that would otherwise disappear when surrendered to the public domain, and therefore does promote progress.¹⁰⁹

The dissenting justice on the panel pointed out that congressional powers are subject to outer limits under *Lopez*.¹¹⁰ The dissent argued that Congress only has the power to grant copyrights to promote progress.¹¹¹ Therefore, the extension of rights previously secured are not authorized under the Copyright Clause.¹¹² Congress must promote progress in order to legislate under the Copyright

101. See *Eldred*, 74 F. Supp. 2d at 1.

102. See *id.* at 2.

103. See *id.* at 3.

104. See *id.* at 3 n.7.

105. See *id.* at 3.

106. See *Eldred v. Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001).

107. See *id.*

108. See *id.* at 377-78.

109. See *id.* at 379.

110. See *id.* at 381 (Sentelle, J., dissenting).

111. See *id.* (Sentelle, J., dissenting).

112. See *id.* at 382 (Sentelle, J., dissenting).

Clause, and this retroactive term extension does not.¹¹³ A rehearing and rehearing en banc were denied.¹¹⁴

C. The Case: *Eldred v. Ashcroft*

The Supreme Court granted certiorari to address whether Congress had the authority to grant retroactive extensions of existing copyrights under the Copyright Clause.¹¹⁵ The Court decided that Congress was indeed acting within its constitutional authority.¹¹⁶

1. Petitioners' Contentions

Petitioners argued that the CTEA's blanket retroactive extension of existing copyright terms exceeded Congress's power under the Copyright Clause.¹¹⁷ They claimed that the enumerated powers of Congress are limited, and that those limits are subject to judicial determination.¹¹⁸ In addition, under the "limited Times" provision of the Copyright Clause, there must be some "stopping point" for copyright terms,¹¹⁹ and the Court must draw that line.¹²⁰ Petitioners pointed out that Congress had extended copyright terms eleven times in the past forty years, leading indirectly to a perpetual term under "the installment plan."¹²¹ Thus, petitioners felt the Court should finally stop Congress from continuously extending existing copyright terms and preventing works from entering the public domain.

Furthermore, they argued that retroactive extensions cannot promote progress because they do not require the creation of new works in return.¹²² The Court must give effect to the limitations of the Copyright Clause in order to promote progress, and not allow Congress to

113. See *id.* at 383 (Sentelle, J., dissenting).

114. See *Eldred v. Reno*, 255 F.3d 849, 852 (D.C. Cir. 2001).

115. See *Eldred v. Ashcroft*, 537 U.S. 186, 198 (2003).

116. *Id.* The Court also granted certiorari to answer the question of whether the CTEA, as held by the lower court, was "categorically immune from challenge[] under the First Amendment." See *id.* This Note only addresses the first certified question, whether Congress has the power to retroactively extend copyright terms. The Court held that copyright laws were not categorically immune from First Amendment scrutiny, but existing copyright law provides adequate safeguards so as to not encroach on the First Amendment. See *id.* at 219–20.

117. See Brief for Petitioners at 11, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

118. See *id.* at 12.

119. *Id.* at 13.

120. See *id.* at 14.

121. See *id.* at 18.

122. See *id.* at 10.

freely give copyright extensions with no benefit to the public.¹²³ There is no exchange with retroactive extensions of copyright terms; rather, the government is simply giving a longer monopoly to the copyright owner and depriving the public of that work for a longer period of time.¹²⁴

Finally, petitioners argued that the CTEA should be deemed unconstitutional in its entirety because the CTEA's prospective and retroactive extensions of copyright terms are inseverable.¹²⁵ They are inseverable because CTEA does not discriminate by its terms between copyrights created before and after the law took effect.¹²⁶

2. Respondent's Contentions

The respondent argued that the "limited Times" requirement in the Copyright Clause does not preclude Congress from applying new copyright terms to future and existing copyrights.¹²⁷ In fact, each time Congress had previously extended the copyright term, it had applied the extension to both future and existing copyrights, so that previous authors enjoyed the same protections as future authors.¹²⁸ The Court should give deference to this repeated application by Congress.¹²⁹ In contrast to *Lopez*, federalism and separation of powers issues were not present here, so there should be no heightened standard of review.¹³⁰

The respondent explained that the phrase "limited Times" does not mean a single, inalterable, limited time, and petitioners had conceded this.¹³¹ Petitioners had also admitted that the CTEA term does not violate the "limited Times" provision for future copyrights.¹³² If the CTEA term was "limited" as to future works, it was necessarily "limited" for previous works.¹³³

Respondent felt that petitioners' construction of the "limited Times" provision in light of the preamble of the Copyright Clause,

123. *See id.*

124. *See id.*

125. *See id.* at 47.

126. *See id.* at 48.

127. *See* Brief for Respondent at 8, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

128. *See id.*

129. *See id.* at 6.

130. *See id.* at 27 n.18; *see also* discussion *supra* Part I.A.1.

131. *See* Brief for Respondent at 10, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

132. *See id.* at 9.

133. *See id.*

"To promote the Progress," was ill-founded.¹³⁴ While the preamble of the Copyright Clause explains the overarching purpose of this congressional power, it is not a limitation on its application by Congress.¹³⁵ Moreover, extensions encourage authors of existing works to create more, knowing their creations will be protected for a longer period of time.¹³⁶

According to the respondent, concerns about perpetual protection were unfounded. Congress had only significantly extended the term five times in the past 210 years.¹³⁷ Furthermore, a limited time extended for a limited time remains a limited time.¹³⁸ The respondent explained that the CTEA extended copyright terms in order to better adapt to: 1) the longer commercially viable periods that the works are profitable for their authors, 2) the longer lifetimes of the authors and their immediate heirs, and 3) the increasing amounts of piracy resulting from the advent of new technologies.¹³⁹

3. The Court's Rationale: Congressional Power Under the Copyright Clause Is Given Great Deference

The opinion of the Court was authored by Justice Ginsburg and joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas.¹⁴⁰ The Court held that Congress did act within its authority provided by the Copyright Clause when it applied retroactive extensions to existing copyrights under the CTEA.¹⁴¹ The decision of the appellate court was affirmed, and the case was dismissed.¹⁴²

The Court held that the CTEA did not exceed the bounds of the "limited Times" provision of the Copyright Clause. The Court explained that the term "limited" as used in the Copyright Clause does not "command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'"¹⁴³ Therefore, Congress can change the finite time period set for the duration of copyrights whenever they deem it necessary. As for the petitioners' argument that Congress's habit of

134. *See id.* at 19.

135. *See id.*

136. *See id.* at 31.

137. *See id.* at 7.

138. *See id.*

139. *See id.* at 6-7.

140. *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003).

141. *See id.* at 222.

142. *Id.*

143. *Id.* at 199.

extending existing copyrights will lead to an infinite term of copyright protection, the Court followed the reasoning of the appellate court and stated, “a regime of perpetual copyrights ‘clearly is not the situation before us.’”¹⁴⁴

The Court went further and explained the bounds of the Copyright Clause on congressional legislation: “[W]e have described the Copyright Clause as ‘both a grant of power and a limitation,’ and have said that ‘[t]he primary objective of copyright’ is ‘[t]o promote the Progress of Science.’”¹⁴⁵ “The ‘constitutional command,’ we have recognized, is that Congress, to the extent it enacts copyright laws at all, create[s] a ‘system’ that ‘promote[s] the Progress of Science.’”¹⁴⁶ The Court then “defer[red] substantially to Congress” on whether the CTEA “is a rational exercise of the legislative authority conferred by the Copyright Clause” as part of Congress’s copyright “system.”¹⁴⁷

The Court felt that they were “not at liberty to second-guess congressional determinations and policy judgments of this order, *however debatable or arguably unwise they may be.*”¹⁴⁸ “[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”¹⁴⁹ Giving a surprising amount of deference to Congress, the Court stated that “[t]he wisdom of Congress’[s] action . . . is not within our province to second guess.”¹⁵⁰

The Court used the rational basis standard of review in its analysis. The Court found a “*rational basis* for the conclusion that the CTEA ‘promote[s] the Progress of Science.’”¹⁵¹ Extending their holding to all Article I powers under the Constitution, the Court stated: “Judicial deference to such congressional definition is ‘but a corollary to the grant to Congress of *any Article I power.*’”¹⁵²

Petitioners had argued that retroactive extensions of copyright terms cannot satisfy the quid pro quo requirement of the Copyright Clause previously recognized in the patent context. In response, the Court explained that “patents and copyrights do not entail the same exchange,” and the Court has only applied the existing quid pro quo

144. *Id.* at 209.

145. *Id.* at 212 (citations omitted) (alterations in original).

146. *Id.* (citations omitted).

147. *Id.* at 204–05.

148. *Id.* at 208 (emphasis added).

149. *Id.* at 212.

150. *Id.* at 222.

151. *Id.* at 213 (emphasis added) (alteration in original).

152. *Id.* at 218 (emphasis added) (citation omitted).

requirement to patent jurisprudence.¹⁵³ The *quid pro quo* in copyright law is not as “exacting” as in patent law,¹⁵⁴ and Congress could have rationally included the benefit of future extensions in exchange for the works being given copyright rights in their “system” of copyright protection.¹⁵⁵

The Court pointed to the history of copyright extensions applied retroactively to support the constitutionality of the CTEA: “Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe ‘limited Times’ for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.”¹⁵⁶ The Court expressed a reluctance to invalidate the CTEA because it may have necessarily invalidated the 1976 Act as well, which also provided for retroactive extensions of copyright terms.¹⁵⁷

4. The Dissent of Justice Stevens

Justice Stevens dissented, arguing that “the majority’s [holding] rests on the mistaken premise that this Court has virtually no role in reviewing congressional grants of monopoly privileges to authors, inventors and their successors.”¹⁵⁸ Justice Stevens felt that limiting the copyright term was necessary because “the requirement that those exclusive grants be for ‘limited Times’ serves the ultimate purpose of promoting the ‘Progress of Science and useful Arts’ by guaranteeing that those innovations will enter the public domain as soon as the period of exclusivity expires.”¹⁵⁹ These “twin purposes” of the Copyright Clause—encouraging new works and adding to the public domain—apply to both patents and copyrights, and need to be reflected in congressional legislation.¹⁶⁰ Retroactive extensions of copyright terms serve neither of those purposes because the works are already in existence, and by extending their copyright term they are merely prevented from entering the public domain.¹⁶¹ Justice Stevens argued that the majority opinion gave Congress free reign to legislate away any limit on copyright terms: “[T]he majority’s reading of Article I,

153. *Id.* at 216.

154. *Id.* at 217 n.22.

155. *Id.* at 214–15.

156. *Id.* at 199.

157. *See id.* at 221–22.

158. *Id.* at 223 (Stevens, J., dissenting).

159. *Id.* (Stevens, J., dissenting).

160. *Id.* at 226–27 (Stevens, J., dissenting).

161. *See id.* (Stevens, J., dissenting).

§ 8 . . . [provides] *essentially no limit on congressional action* under the Clause.”¹⁶²

Justice Stevens suggested that, like patent terms, copyright terms are, in essence, contracts between the artists and the government that give exclusivity to the artist for a certain period and surrender the work to the public domain after the term expires.¹⁶³ Extensions of copyright terms are a taking of the remainder interest in the work from the public, who were to acquire the works once the copyright terms had ended.¹⁶⁴ It is unfair to “mak[e] such a retroactive change in the public’s bargain with an inventor without providing compensation for the taking.”¹⁶⁵ In addition to that unfairness, “[m]embers of the public were entitled to rely on a promised access to copyrighted or patented works at the expiration of the terms specified when the exclusive privileges were granted.”¹⁶⁶ Justice Stevens noted the resultant shrinking of the public domain:

[U]nder the series of extensions to copyrights . . . no copyrighted work created in the past 80 years has entered the public domain or will do so until 2019. But as our cases repeatedly and consistently emphasize, ultimate public access is the overriding purpose of the constitutional provision. *Ex post facto* extensions of existing copyrights, unsupported by any consideration of the public interest, frustrate the central purpose of the Clause.¹⁶⁷

According to Justice Stevens, the fact that Congress has in the past applied copyright extensions retroactively does not save the CTEA from constitutional scrutiny. “[A]s our decision in *INS v. Chadha* demonstrates, 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.”¹⁶⁸ The Court has not been afraid in the past to correct a constitutional violation, “even when that span of time covers our entire national existence.”¹⁶⁹ Justice Stevens warned that, “[f]airly read, the Court has stated that Congress’[s] actions under the

162. *Id.* at 230 (Stevens, J., dissenting) (emphasis added).

163. *See id.* at 225–27 (Stevens, J., dissenting).

164. *See id.* (Stevens, J., dissenting).

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

166. *Id.* at 240 (Stevens, J., dissenting).

167. *Id.* at 241 (Stevens, J., dissenting) (citation omitted).

168. *Id.* at 235 (Stevens, J., dissenting) (citation omitted).

169. *Id.* at 236 (Stevens, J., dissenting) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970)).

Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable.”¹⁷⁰

Justice Stevens argued that the question of whether the CTEA violates the “limited Times” provision of the Copyright Clause need not be answered, because the question posed by petitioners was merely whether Congress could extend the copyright terms retroactively.¹⁷¹ Nevertheless, “a categorical rule prohibiting retroactive extensions would effectively preclude perpetual copyrights.”¹⁷²

5. The Dissent of Justice Breyer

In Justice Breyer’s dissenting opinion, the grant of power to Congress under the Copyright Clause is subject to limits, and the CTEA extension “falls outside them.”¹⁷³ Justice Breyer felt that the “[t]here [was] no legitimate, serious copyright-related justification for this statute.”¹⁷⁴

Justice Breyer disagreed with the majority’s holding that the CTEA does not violate the “limited Times” requirement of the Copyright Clause. “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.”¹⁷⁵

Also discussing public policy, Justice Breyer said that the Copyright Clause was meant to “stimulate artistic creativity for the general public good.”¹⁷⁶ The copyright term is limited so that the public will not be permanently deprived of the free use of works of art.¹⁷⁷ The framers of the Constitution were wary of monopolies, and the Constitution was written to allow limited monopolies in only two situations, for patents and copyrights, but these monopolies were purposefully only temporary.¹⁷⁸ James Madison “warned in general that monopolies must be ‘guarded with strictness agst abuse.’”¹⁷⁹ It was also difficult for Justice Breyer to imagine that “somehow, somewhere, some

170. *Id.* at 242 (Stevens, J., dissenting).

171. *See id.* at 241 (Stevens, J., dissenting).

172. *Id.* at 242 (Stevens, J., dissenting).

173. *Id.* at 243 (Breyer, J., dissenting).

174. *Id.* at 263 (Breyer, J., dissenting).

175. *Id.* at 243 (Breyer, J., dissenting).

176. *Id.* at 245 (Breyer, J., dissenting) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

177. *See id.* at 246 (Breyer, J., dissenting).

178. *See id.* (Breyer, J., dissenting).

179. *Id.* at 247 (Breyer, J., dissenting) (quoting James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.*, in *WRITINGS* 756 (J. Rakove ed., 1999)).

potential author might be moved by the thought of great-grandchildren receiving copyright royalties a century hence.”¹⁸⁰

Justice Breyer did not feel the CTEA even passed a rational basis standard: “[T]he incentive-related numbers are far too small for Congress to have concluded rationally, even with respect to new works, that the extension’s economic-incentive effect could justify the serious expression-related harms.”¹⁸¹ In comparing the CTEA’s potential benefit to the public with its benefit to copyright holders, Justice Breyer felt that “the present statute primarily benefits the holders of existing copyrights, *i.e.*, copyrights on works already created.”¹⁸²

III. Analysis

A. Criticism of the Majority’s Holding Giving Excessive Deference to Congress

1. What Is a Limited Time?

The Court in *Eldred* did not elaborate on the meaning of the “limited Times” limitation found in the Copyright Clause. The Copyright Clause and the Commerce Clause are both enumerated powers of Congress under Article I, Section 8. The Supreme Court had held in *Lopez* that the Commerce Clause of the Constitution has an implicit limitation.¹⁸³ By comparison, the text of the Copyright Clause has an explicit limitation—rights are given to authors “for limited Times.”¹⁸⁴ Naturally an explicit limitation should be more apparent and thus stronger than an implicit limitation, yet the Court did not apply the heightened standard of review to this explicit limitation. The Court held in *Eldred* that a limited time does not mean a “fixed” time.¹⁸⁵ As for the CTEA embodying Congress’s attempt to create a perpetual copyright, the Court agreed with the appellate court that “a regime of perpetual copyrights is ‘clearly not the situation before us.’”¹⁸⁶ This begs the question, what would be seen by the Court as exceeding a limited time? The Court’s rationale that a period of time that is of a finite, specified number of years would theoretically apply to a copyright term of one thousand years, or even one million years.¹⁸⁷

180. *Id.* at 255 (Breyer, J., dissenting).

181. *Id.* at 257 (Breyer, J., dissenting).

182. *Id.* at 248 (Breyer, J., dissenting).

183. *See* United States v. Lopez, 514 U.S. 549, 553 (1995).

184. U.S. CONST. art. I, § 8, cl. 8.

185. *Eldred*, 537 U.S. at 199.

186. *Id.* at 209.

187. *See id.* at 199.

Though the CTEA does set a finite duration on copyright terms (at least until the next extension), where would a line be drawn?

In a footnote, the majority of the Court dismissed the calculation made by top economists that the CTEA effectively gives 99.8% of a perpetual copyright term, explaining that the CTEA is no different from previous extensions in that regard.¹⁸⁸ However, even if that were true, just because Congress has previously acted without challenge does not mean they were acting within the bounds of the Constitution. The footnote ended: "It is doubtful . . . that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator instead of the calendar."¹⁸⁹

Why not? It is more difficult to imagine that the framers intended "limited Times" to span into the lifetimes of the author's great-grandchildren. By providing for "limited Times," the framers wanted the works to, after a reasonable period of time, go into the public domain for the benefit of everyone.¹⁹⁰ "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'"¹⁹¹ This cannot be accomplished if works are prevented from entering the public domain by continuous retroactive extensions.

It is understandable that the Court did not want to draw a line in the sand declaring how many years would be too many for a copyright term, since this is the sort of policy judgment that should be a legislative decision. However, by failing to hold retroactive copyright extensions unconstitutional, the Court may be forced to do just that in future cases in order to strike down a law granting five hundred years retroactively to a copyright term as not being a limited time. But based on the precedent set by *Eldred*, the Court will never be able to draw that line. Copyright law is now subject to unlimited congressional power. It is entirely within the province of Congress to define what a limited time is under the Copyright Clause.

2. The Lack of a Rational Basis for Congress Enacting the CTEA

The majority curiously applied the rational basis standard of review, instead of following the trend announced in *Lopez* and *Morrison* of a heightened standard. However, even applying a rational basis standard of review, the CTEA should not have been held constitu-

188. *Id.* at 209 n.16.

189. *Id.*

190. *See id.* at 223-24 (Stevens, J., dissenting).

191. *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991):

tional by the Court. The Court's decision that the CTEA was a rational exercise of congressional power is based upon faulty reasoning.

In passing retroactive copyright extensions, congressional records indicated that Congress wanted an author who sold his work last week to be in no worse position than the author who sells his work next week.¹⁹² The argument that this was a rational basis for retroactive extensions is wholly unconvincing. There is still a disparity among copyright holders. The author whose copyright term expired last week cannot take advantage of the copyright extensions, while the copyright holder whose term expires next week suddenly received an extra twenty years of protection.

The majority claimed that copyright owners have an expectation of future extensions.¹⁹³ This argument is not only unconvincing, it is irrational. The author who sold his work before the CTEA was enacted had the expectation that the copyright term would span his or her lifetime plus fifty years, the law that was in effect when the work was created. He or she most likely did not count on future extensions when bargaining with the buyer, but counted on the current law. This fictional expectation of future copyright term extensions cannot be a "rational basis" for the promotion of progress, because it simply makes no sense.

The Court reflected on the history of Congress's application of copyright extensions to future and existing copyrights.¹⁹⁴ The Court expressly admitted that "prior to the instant case this Court did not have occasion to decide whether extending the duration of existing copyrights complies with the 'limited Times' prescription."¹⁹⁵ However, prior to the end of the twentieth century, the effect of withholding works from the public domain was far less significant. Nowadays, in the age of the internet where works in the public domain can be freely and nearly infinitely disseminated, parties who are deprived of public works suffer a far greater harm.¹⁹⁶ The fact that no one has previously sued on this issue simply cannot prove the validity of the

192. See *Eldred*, 537 U.S. at 200.

193. See *id.* at 215.

194. See *id.* at 200–01.

195. *Id.* at 202. The Court went on and applied patent jurisprudence to copyright law, discussing a prior patent extension. *Id.* at 203. This contradicts the Court's own prescription against the direct comparison of these different types of intellectual property. See *id.* at 216.

196. Cf. Adam P. Segal, Comment, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 99–100 (1996) (commenting on how the power of the internet to allow the free flow of works may challenge the ability of copyright owners of digitized music to protect their rights).

congressional action in the context of today's technological developments.

The majority in *Eldred* relied on "text, history, and precedent."¹⁹⁷ However, the text of the Copyright Clause does not provide for retroactive extensions, the history of retroactive copyright extensions has never been challenged in court, and there is no precedent supporting these extensions, as the Court has admitted.¹⁹⁸ Though the Court in *Eldred* seemed reluctant to jeopardize previous copyright extensions under the 1831, 1909, and 1976 Acts,¹⁹⁹ the Court has not in the past been afraid to overturn numerous enacted laws with one ruling. In a previous far-reaching decision, the Court in effect held hundreds of laws unconstitutional, showing that the Court is not bound to uphold long-standing congressional practice.²⁰⁰ The Court was not bound by history, and was not bound by *stare decisis*, because the issue had never before been presented.²⁰¹ The same should have applied to *Eldred*. As well-stated by Justice Stevens: "Though relevant, the history is not dispositive of the constitutionality of [the CTEA]."²⁰²

The Court majority continuously relied on the fact that the first copyright act passed by Congress in 1790 applied to preexisting works.²⁰³ However, the Court started its opinion by expressly not deciding whether the "1790 Act must be distinguished from the later Acts on the ground that it covered existing *works* but did not extend existing *copyrights*."²⁰⁴ This was echoed in Justice Stevens's dissent: "That [the 1790 Act] applied to works already in existence says nothing about the First Congress' conception of their power to extend this newly created federal right."²⁰⁵ The Court in *Eldred* simply used this historical argument to avoid a more thorough analysis of the Copyright Clause limitations, and instead deferred heavily to the judgment of the current Congress.

At the beginning of the opinion, the Court recognized that Congress had only applied copyright extensions to both future and existing copyrights three times prior to the CTEA: in 1831, 1909, and

197. *Eldred*, 537 U.S. at 199.

198. *Id.* at 202.

199. *Id.* at 209–10.

200. See *Printz v. United States*, 521 U.S. 898, 918 (1997) (discussing the impact of the Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983)).

201. *Eldred*, 537 U.S. at 202.

202. *Id.* at 237 (Stevens, J., dissenting).

203. *Id.* at 197–98, 200–01, 204, 208, 213–15.

204. *Id.* at 196 n.3.

205. *Id.* at 232 (Stevens, J., dissenting).

1976.²⁰⁶ The three occurrences in the past two hundred years are hardly enough to amount to the “unbroken” history the Court heavily relied upon to uphold the constitutionality of the CTEA.²⁰⁷

It is disappointing that *Eldred*, which set a dangerous precedent giving unlimited power to Congress to extend existing copyrights, is based on faulty and wholly unconvincing reasoning. Nonetheless, the existence of the public domain is now entirely within the power and whims of Congress.

B. Criticism of the Dissenting Opinions: The Copyright Clause as Applied to Copyrights, Not Patents

Though perhaps more convincing than the majority’s rationale, the two dissenting opinions in *Eldred* were also based on faulty reasoning. The majority was at least correct in observing that the grant of copyright rights does not require the same quid pro quo as patents.²⁰⁸ The major failing of the dissenting opinions in *Eldred* is that in their rationales they each blend together two very different forms of intellectual property, patents and copyrights, and blindly apply patent jurisprudence to copyrights. By contrast, the majority in *Eldred* at least recognized the differences between patents and copyrights,²⁰⁹ though they also allowed patent jurisprudence to “inform[] [their] inquiry.”²¹⁰ Since the two entail very different property rights in practice, they are entitled to different treatment by the law.

Nevertheless, the dissenting opinions were wise to stress that the purpose of the Copyright Clause, for both patents and copyrights, is to ultimately benefit the public by promoting the creation and disclosure of these works.²¹¹ The majority opinion stopped short of analyzing this point and excessively deferred to Congress.²¹² While the Court should certainly not act as a legislature and decide how to best promote progress, the Court should still have ensured that Congress was acting within its constitutional decree.

In the context of patents, the ownership term is limited to twenty years,²¹³ which at least seems fair in that the public can get access to the intellectual property in a reasonable amount of time after the in-

206. *Id.* at 196.

207. *Id.* at 200.

208. *See id.* 216; *see also* discussion *supra* Part I.B.

209. *See Eldred*, 537 U.S. at 216.

210. *Id.* at 201.

211. *See id.* at 242 (Stevens, J., dissenting); *id.* at 245–46 (Breyer, J., dissenting).

212. *See id.* at 204–05.

213. 35 U.S.C. § 154 (2000).

ventor has the chance to profit from his or her innovation. However, for copyrights, as one commentator has noted, "Congress seems to have tilted the balance against the interests of the public at large in favor of authors."²¹⁴ So it has, and copyright law has evolved, for better or for worse, for the benefit of copyright owners.

C. Limits on Congressional Article I Powers in the Wake of *Eldred*

In addition to not providing a well-reasoned opinion to support the constitutionality of the CTEA, the Court quietly disrupted its recent shift of the standard of review on Article I power.²¹⁵ This was done by the Court applying its holding not to the Copyright Clause in isolation, but to Article I powers in general.

1. The Court's Standard of Review of Article I Powers Reverted Back to a Rational Basis Analysis

The majority opinion in *Eldred* gave an excessive amount of deference to Congress's own interpretation of the Constitution. On whether the CTEA was "a rational exercise of the legislative authority conferred by the Copyright Clause," the Court "defer[red] substantially to Congress."²¹⁶ The Court gave Congress the power "to decide how best to pursue the Copyright Clause's objectives" in order to create a "system" that "promote[s] the progress of Science."²¹⁷

These statements seem to say not just that Congress needs only a rational basis for this type of legislation, but also that the Court will let Congress decide whether in fact the basis was rational. The Court also declared: "[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, *however debatable or arguably unwise they may be*."²¹⁸ This suggests that if the Court did care to decide whether the basis was rational, they may very well have found that it was not. The dissent also recognized this surprising amount of deference, saying the majority "rests on the mistaken premise that this Court has virtually no role in reviewing congressional grants of monopoly privileges to authors, inventors, and their successors."²¹⁹ If the Court is to have any role in interpreting the Constitution, it must de-

214. Sue Ann Mota, *Eldred v. Reno—Is the Copyright Term Extension Act Constitutional?*, 12 ALB. L.J. SCI. & TECH. 167, 175 (2001).

215. See *supra* Part I.A.2.

216. *Eldred*, 537 U.S. at 204.

217. *Id.* at 212 (citations omitted) (alteration in original).

218. *Id.* at 208 (emphasis added).

219. *Id.* at 223 (Stevens, J., dissenting).

cide whether Congress has acted within its constitutionally-mandated boundaries. It cannot simply defer to Congress, or Congress will be able to legislate unchecked, without judicial scrutiny.

Such expansive deference to Congress does not comport with the *Lopez* and *Morrison* opinions. In *Lopez* and *Morrison*, the Court not only made its own determination of whether Congress's legislation was rational, but it also applied a higher standard: whether the legislation "substantially affect[ed]" interstate commerce.²²⁰ For the Copyright Clause, a more parallel standard with which the Court could have reviewed Article I powers would be whether the CTEA substantially promotes progress in science and the arts. Of course, if that were the standard used, retroactive extensions would most certainly not substantially promote progress in science and the arts, because it merely gives a windfall to current copyright owners.

The Court may someday feel the need to resurrect the seemingly-forgotten limitation in the Copyright Clause and hold retroactive extensions of copyrights unconstitutional, perhaps when they do feel that legislation has effectually created a perpetual copyright term. However, to do that the Court will have to get past the precedent now set by *Eldred*. At present, under *Eldred*, Congress has boundless authority to extend existing copyrights, at the peril of the growth of the public domain.

2. Broad Application of the Standard of Review in the Majority Opinion to "Article I Powers"—Death of the Heightened Standard

Writing for the majority of the Court in *Eldred* was Justice Ginsburg, who had joined the dissent in both *Lopez* and *Morrison*. Joining Justice Ginsburg in the majority in *Eldred* was Justice Souter, who had authored the dissenting opinions in *Lopez* and *Morrison*, and who predicted that the Court's departure from the rational basis standard of review would be short-lived. His prediction proved correct. As opposed to the 5-4 splits in *Lopez* and *Morrison*,²²¹ all nine justices in *Eldred* agreed to apply a rational basis standard.²²²

220. See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

221. See *supra* text accompanying notes 34–36.

222. See *Eldred*, 537 U.S. at 204. The dissenting opinion of Justice Stevens did not specifically state his preferred standard of review, but his arguments were consistent with a rational basis standard by effectively stating that the majority went beyond a rational basis standard and adopted a standard of essentially no judicial review. See *id.* at 223 (Stevens, J., dissenting). The dissenting opinion of Justice Breyer did apply a rational basis standard of review and argued the standard was not met. See *id.* at 245, 257 (Breyer, J., dissenting).

Importantly, the majority explained its great deference to Congress, not in terms of the Copyright Clause, but in terms of Article I powers: "Judicial deference to such congressional definition is 'but a corollary to the grant to Congress of any Article I power.'"²²³ Though the Court did not directly address the *Lopez* and *Morrison* precedent, it was argued in the pleadings by the petitioners and respondent and was addressed in the appellate court opinion.²²⁴ At the very least, in applying the rational basis standard to congressional legislation under Article I of the Constitution,²²⁵ *Eldred* has severely weakened the *Lopez* and *Morrison* precedent.

Conclusion

In *Eldred*, the Supreme Court upheld the retroactive extension of copyright terms under the CTEA, finding that they did not violate the "limited Times" provision of the Copyright Clause. However, the Court's reasoning that any retroactive extension that sets a finite period of time is still a limited time sets a dangerous precedent, and leaves Congress free to retroactively extend a term by any length, even if that term is one thousand years. The Court should have taken the opportunity in *Eldred* to reign in Congress's retroactive extensions of copyright terms and hold the CTEA unconstitutional.

The Court did reaffirm that the purpose of granting copyrights is to "promote the Progress of Science," but failed to analyze the CTEA in light of this goal, giving Congress great deference to legislate under the Copyright Clause.²²⁶ This is a sharp turn from the majority opinions in *Lopez* and *Morrison*, where the Court itself decided whether Congress was "substantially" acting within the authority delegated by the Constitution.

Even under a rational basis standard of review, the CTEA should not have been held constitutional. No rational basis was given by the majority of the court to uphold the CTEA's retroactive extensions. Only irrational arguments were given, and the CTEA should have been held unconstitutional as beyond the power of Congress to enact under the Copyright Clause.

223. *Id.* at 218.

224. See Brief for Petitioners at 9, 11-12, 19, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618); Brief for Respondent at 27 n.18, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618); *Eldred v. Reno*, 239 F.3d 372, 381-83 (D.C. Cir. 2001) (Sentelle, J., dissenting).

225. See *Eldred*, 537 U.S. at 204.

226. *Id.* at 212.

By the application of the majority's opinion to Article I powers in general, the strength of the *Lopez* and *Morrison* decisions in reigning in congressional power to legislate under Article I has been severely weakened by *Eldred*, as the Court reverted back to the rational basis standard of review of Congress's power to legislate. The dissents' predictions in *Lopez* and *Morrison* have proven correct: the heightened standard is now lost in history. Furthermore, now Congress has free reign to retroactively extend existing copyrights indefinitely.

