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An Unconventional Approach to Reviewing the Judicially Unreviewable: Applying the Dormant Commerce Clause to Copyright

Donald P. Harris¹

“[B]y virtually ignoring the central purpose of the Copyright/Patent Clause . . . the Court has quitclaimed to Congress its principal responsibility in this area of the law. Fairly read, the Court has stated that Congress' actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable.”²

INTRODUCTION

On July 15, 2014, the House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet, held one of a number of hearings reviewing the Copyright Act.³ This particular hearing focused, among other things, on the copyright term (the length over which copyrights are protected).⁴ While it is not surprising that Congress is again considering the appropriate term for copyrights—Congress has reviewed and increased the copyright term many times since the first Copyright Act of 1791⁵—it is troubling because Congress has unfettered discretion in doing so. To be sure, the Constitution squarely places this responsibility in Congress's hands.⁶ But Congress's renewed consideration of the copyright term should trouble those who believe the copyright term is already excessive and

¹ Professor, Temple University Beasley School of Law. I am grateful for valuable comments on earlier drafts from Craig Green, Gregory Mandel, Mark Rahdert, and Rachel Rebouche, and also for feedback from John Whelan and the participants of the George Washington University Law School Speaker Series (March 12, 2015). I also thank Lauren Green for her outstanding research assistance. All mistakes, of course, are mine.

² *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Stevens, J., dissenting).

³ See *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014).

⁴ *Id.* at 2. The hearing also included discussions about moral rights, termination rights, and resale royalties. *Id.* Witnesses at the hearing included: Rick Carnes, President of the Songwriters Guild of America; Professor Michael W. Carroll, Director of the American University Washington College of Law Program on Information Justice and Intellectual Property; Karyn A. Temple Claggett, Associate Register of Copyrights and Director of Policy and International Affairs for the U.S. Copyright Office; Thomas D. Sydnor II, Visiting Scholar at the Center for Internet, Communications and Technology Policy at the American Enterprise Institute; and Casey Rae, Vice President for Policy and Education at Future of Music Coalition. *Id.* at III.

⁵ See U.S. COPYRIGHT OFFICE, CIRCULAR NO. 1, COPYRIGHT BASICS 6 (May 2012).

⁶ See U.S. CONST. art. I, § 8, cl. 8.

unwarranted. Congress has never reduced the copyright term, and there are scant signs that it is willing to do so now.

The concern is not whether Congress will act. Over the last four decades Congress has aggressively expanded copyright protection and is likely to continue doing so.⁷ The concern is that there is currently no way to predict whether such future congressional action will or will not comply with the Constitution. The problem stems from the murky constitutional law in this area. Congress has almost unfettered discretion to pass copyright legislation, and this discretion is fueled by the astonishing lack of guidance from the Supreme Court.

In recent years, the Supreme Court has twice confronted copyright legislation with opportunities to provide clarity to the constitutionality of congressional action with respect to copyright term extension and expansion.⁸ Despite these occasions to provide such clarity, the Court has failed to do so, abdicating its pivotal role in interpreting the Constitution thereby setting constitutional boundaries for the Constitution's Copyright Clause.

The Copyright Clause has limits. The Clause protects literary and artistic works only for "limited Times" and only to "promote the Progress of Science."⁹ In the Court's two controversial copyright decisions, *Eldred v. Ashcroft*¹⁰ and *Golan v. Holder*,¹¹ the Court had opportunities to shed light on "a virgin area of constitutional theory," that is the scope and reach of Congress's power under the Copyright Clause.¹² The Court has found it exceedingly difficult to do so. Perhaps more disturbingly, the Court's latest decisions in *Eldred* and *Golan* continue to sustain the Court's extreme deference to congressional action and leaves one to question whether the Copyright Clause places any limits on Congress's powers to legislate in this area.

Prior to the acts at issue in *Eldred* and *Golan*, Congress had expanded the reach of the Copyright Clause, steadily increasing copyright protection.¹³ These expansions responded to changes in technology, pressure from interested industry groups, and international concerns.¹⁴ While these forces necessitate a change in the scope of protection, it is not altogether clear that the change in scope inexorably leans in the direction of *expanding* rights. But, even when Congress exceeded what were previously believed to be its limits, Congress had been careful to steer clear of

⁷ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

⁸ See *Golan v. Holder*, 132 S. Ct. 873, 878 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 192 (2003).

⁹ U.S. CONST. art. I, § 8, cl. 8.

¹⁰ *Eldred*, 537 U.S. at 192.

¹¹ *Golan*, 132 S. Ct. at 878.

¹² See Malla Pollack, *Dealing with "Old Father William," or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 337, 341 (2002). In both decisions, in particular, the Court reviewed limits the Constitution prescribes as to term limits. See *Golan*, 132 S. Ct. at 878; *Eldred*, 537 U.S. at 194.

¹³ See *infra* Part I.B.

¹⁴ See *infra* notes 66-68 and accompanying text.

one area when increasing terms—the public domain (the space that expired or unprotected works occupy). Congress had steered clear, that is, until its latest foray into the copyright realm, when yet another perceived limit fell.

Eldred and *Golan* affected the copyright term and the public domain in slightly different ways. Before the legislation at issue in *Eldred*, the copyright term was life of the author plus an additional fifty years.¹⁵ In *Eldred*, the Court reviewed the Copyright Term Extension Act (“CTEA”), which extended protection to *existing* works ready to expire for an additional twenty years,¹⁶ thus preventing works that would have entered the public domain from doing so. In *Golan*, the Court reviewed the Berne Convention Implementation Act, Section 104A of the Copyright Act, which grants foreign copyright owners the right to have certain works “restored,” renewing protection for the works’ remaining life.¹⁷ Section 104A went further than the CTEA because it authorized works that had already fallen into the public domain to be wrenched from the public domain and protected anew.¹⁸

The *Eldred* Court held that Congress did not exceed its constitutional authority in enacting the CTEA.¹⁹ The CTEA did not violate the Copyright Clause’s “limited Times” prescription because the new term of life plus seventy years was limited, i.e., “confined within certain bounds,” “restrained,” or “circumscribed.”²⁰ The CTEA did not run afoul of the “promote Progress” Clause because Congress could rationally believe that protecting American authors abroad and placing existing copyright holders in parity with future copyright holders would “promote the Progress of Science” by providing additional incentives for authors to create.²¹

Along the same lines, the *Golan* Court held that the “limited Times” and “promote Progress” restrictions did not limit Congress’s power to enact copyright laws, even when those laws removed works from the public domain.²² As the term in *Eldred* did not violate the “limited Times” prescription, neither did the term in *Golan*, which, at most, provided for a similar term after the work was restored.²³ And because the Act created incentives to disseminate works, Congress could rationally believe that it would “promote the Progress of Science,” and the Court concluded that “[t]he public domain . . . [is] not a threshold that Congress [is] powerless to traverse.”²⁴

¹⁵ Copyright Act of 1976, Pub. L. No. 94-553, § 302(a), 90 Stat. 2541, 2572 (codified as amended at 17 U.S.C. § 302 (2006)).

¹⁶ *Eldred*, 537 U.S. at 193.

¹⁷ *Golan*, 132 S. Ct. at 877–78.

¹⁸ *Id.* at 878.

¹⁹ *See Eldred*, 537 U.S. at 194.

²⁰ *Id.* at 198–99.

²¹ *See id.* at 206, 213–15.

²² *See Golan*, 132 S. Ct. at 884.

²³ *See id.* at 882.

²⁴ *Id.* at 883, 889 (citing *Golan v. Gonzales*, 502 F.3d 1179, 1187 (10th Cir. 2007)). The Court also discussed the constitutionality of the Restoration Act under First Amendment grounds. *Id.* at 889. While the Act was petitioned as a content-neutral regulation of speech failing to meet strict scrutiny, the Court relied on its rejection of the similar argument made in *Eldred*, claiming the Copyright Term Extension Act of 1998 violated free speech. *See id.*; Petition for Writ of Certiorari at 8, *Golan*, 132 S.

These cases are troubling not because the Acts are necessarily unconstitutional—although there are strong arguments they are—but because the Court failed to articulate any principle that might guide future congressional action in the copyright arena,²⁵ such as those actions Congress is currently contemplating. The Court’s logic shows no signs of indicating a limit as even more aggressive congressional action is upheld, and upheld summarily. In combination, these cases suggest that the Copyright Clause places no meaningful limits on congressional ability to legislate in the copyright field, and that the Court will not second-guess Congress’s actions. In *Eldred*, for example, the Court stated that it would not question Congress’s judgments in the copyright field “however debatable or arguably unwise they may be.”²⁶ In *Golan*, too, the Court remarked that the “judgment [Section 104A] expresses lies well within the ken of the political branches,”²⁷ and “[g]iven the authority we hold Congress has, we will not second-guess the political choice Congress made between leaving the public domain untouched and embracing [the] Berne [Convention] unstintingly.”²⁸ These holdings are remarkable both for the deference the Court afforded Congress (a deference not seen in the Court’s treatment of Congress’s other enumerated Article I powers) and for their potential breadth. While deference in such policy matters is appropriate, such deference cannot “become abdication in matters of law.”²⁹ The Copyright Clause has limits. Moreover, in both decisions, the Court relied on congressional judgments that do not hold up under careful scrutiny.

Aside from concerns over *Eldred* and *Golan* separately, more serious concerns arise when these cases are considered together. The Court insists, as it must, that in fact the Constitution does place limits on congressional action. The constitutional text could not be clearer on this point.³⁰ And the Court promises that there is a limit.³¹ Yet, the Court has given no indication what those limits might be, nor any doctrinal framework that one could someday use to draw a line.³²

Ct. 873 (No. 10-545). In accordance with *Eldred*, the Court rejects the Restoration Act as a free speech transgression and denies heightened scrutiny by reasoning that “some restriction on expression is the inherent and intended effect of every grant of copyright” and that the Restoration Act has not altered the “traditional contours” of copyright protection, which include the built-in First Amendment protections of “idea/expression dichotomy” and “fair use” defense. *Golan*, 132 S. Ct. at 889–91. As this Article is focused on the Copyright Clause, the First Amendment issue is beyond the scope of these additional discussions.

²⁵ The Court’s holding in both *Eldred* and *Golan* that the CTEA and The Berne Retroactivity Act comport with Congress’s legislative objectives and satisfied rather than violated the Constitution’s Copyright Clause can be justified on a number of grounds. But that misses the point. The Court did not support its holding with persuasive evidence and, more importantly, did not provide any guidance for future Courts or Congress.

²⁶ *Eldred*, 537 U.S. at 208.

²⁷ *Golan*, 132 S. Ct. at 894.

²⁸ *Id.* at 887.

²⁹ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

³⁰ See U.S. CONST. art. I, § 8, cl. 8.

³¹ See *Eldred*, 537 U.S. at 199.

³² The combination of *Eldred* and *Golan* leaves perhaps only one remaining limit on congressional authority—the prohibition against perpetual copyright protection. Even here, however, the Court’s

After reviewing both *Eldred* and *Golan*, this Article suggests that the Court has, as Justice Stevens feared, made congressional decisions under the Copyright Clause “judicially unreviewable.”³³ This Article heeds the Court’s (and the Constitution’s) promise that there is, and must be, a limit on congressional power in this field. This Article also takes seriously the Court’s decisions that established doctrines concerning Congress’s Section 5 power (congruence and proportionality) and First Amendment heightened scrutiny analysis must be rejected as acceptable standards. At the same time, this Article questions whether the Court’s adoption of rational basis scrutiny is acceptable, concluding that the Court’s recent decisions have shown that rational basis scrutiny cannot possibly do the job.

As such, this Article offers a different doctrinal framework in which to analyze copyright legislation. The Article suggests the Court look to the dormant Commerce Clause as an analogous analytical framework. Under that framework, the Court would look to see whether the legislation discriminates on its face, which would then require a strict scrutiny test. Strict scrutiny would likely apply to only a very narrow band of congressional action. If the legislation were applied evenhandedly, the Court would engage in a balancing test to determine if the legislation’s benefits to copyright owners outweigh the harms to the public at large. This test would apply to a wider range of congressional action. While the doctrine is intended to prevent state burdens on interstate commerce, the doctrine is appropriate in circumstances where the state legislation discriminates against out-of-state interests who have no political voice in the particular state, and the legislation regulates more than mere economic conduct. These differences appropriately call for a test that receives more than the scant, surface mode of review accorded economic regulation. These differences are also what make the doctrine appropriate for copyright review.

This is more than a call for a different outcome in either or both *Eldred* and *Golan*. Rather, it is a call to delineate more precisely copyright’s reach, and to provide a balancing analysis that is already inherent in copyright but that has been woefully absent from the Court’s recent copyright cases. While this approach may seem novel, or even radical, the predictability of new congressional action, combined with the Court’s current set of doctrinal dead ends, requires something different. The many functional comparisons between copyright and the dormant Commerce Clause doctrines suggest that this framework might be just what the Court, and our society, need most.

This Article proceeds as follows. Part I sets forth foundational principles of copyright law and highlights the limits imposed by the Copyright Clause. Parts II

decisions leave ample room for Congress to, in effect, create the perpetual copyright that stands as the last remaining limit on Congress’s power. A broad reading of *Golan*, for example, suggests that Congress can constitutionally withdraw works from the public domain, regardless of the reason the works fell into the public domain, including that the original copyright term expired. See *Golan*, 132 S. Ct. at 884–86. And Congress may do so only to satisfy “international concerns,” whatever they may be. See *id.* at 894; see also *infra* Part II.

³³ *Eldred*, 537 U.S. at 242 (Stevens, J., dissenting).

and III discuss *Eldred* and *Golan* and demonstrate in detail why neither of these decisions provide a satisfactory framework in which to evaluate congressional action with respect to copyright. Indeed, these Parts explain how the Court inappropriately abdicated its responsibility to place limits on Congress's power under the Copyright Clause. Part IV introduces a new framework to guide future congressional action in the copyright field. That framework relies on the Court's dormant Commerce Clause jurisprudence. The section identifies the parallels between copyright and the dormant Commerce Clause that support use of the dormant Commerce Clause doctrine. Two of the major principles are the doctrine's recognition that more is at issue than mere economic regulation and that the doctrine acts as a response to legislation that effectively bypasses the democratic process. Part IV applies this new framework to the acts at issue in both *Eldred* and *Golan*. The Article then offers responses to possible criticisms, and then concludes.

I. PRINCIPLES OF COPYRIGHT LAW

A. The Copyright Clause and the Utilitarian Theory of Copyright

The United States Constitution grants Congress the power to regulate copyrights and patents through the IP Clause (also referred to as the Copyright and Patent Clause).³⁴ Article I, Section 8, Clause 8 provides that Congress shall have the power “[t]o 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.”³⁵ Embedded in the IP Clause are two grants of power, one to establish patents, and the other to establish copyrights. The copyright grant reads: “Congress shall have the Power . . . [t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”³⁶ This Clause empowers Congress to pass copyright legislation, justified on utilitarian grounds.³⁷ In other words, copyright law has utility by providing

³⁴ U.S. CONST. art. I, § 8, cl. 8. Of Congress's constitutional powers, this Clause is unique in that it alone specifies the means by which Congress can exercise its authority: “[t]o promote the Progress of Science.” *Id.*

³⁵ *Id.*

³⁶ *Id.* The Patent Clause reads: “Congress shall have the power “[t]o promote the Progress of Science . . . by securing for limited Times to . . . Inventors the exclusive Right to their respective. . . Discoveries.” *Id.*

³⁷ See, e.g., Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 453–54 (2013) (discussing the utilitarian approach to intellectual property law). The utilitarian-based theory of copyright stands in contrast to the natural rights theory predominantly advanced in Europe. Under the natural rights theory, a person who creates the original work of expression, by virtue of creating it, merits rights in and to that work. See Russell K. Hasan, *Winning the Copyright War: Copyright's Merger Doctrine and Natural Rights Theory as Solutions to the Problem of Reconciling Copyright and Free Speech*, 14 FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD., Feb. 28, 2013, at 59, 66, <http://www.fed-soc.org/publications/detail/winning-the-copyright-war-copyrights-merger-doctrine-and-natural-rights-theory-as-solutions-to-the-problem-of-reconciling-copyright-and-free-speech>. Any other person must ask the creator's permission to use the work. *Id.* It is

incentives for artists to create, promoting creativity to benefit the public by allowing access to authors' creative contributions.³⁸ Congress does this by, among other things, protecting authors' works but limiting the term of protection for these works. The Clause's primacy purpose, thus, is not to reward the labor of authors or to provide authors "special private benefit,"³⁹ but to ensure the public benefits from a copyright regime that produces a wide variety of creative works for public consumption.⁴⁰

B. The Copyright Clause's Limitations

The Copyright Clause contains a number of limitations on Congress's authority to legislate.⁴¹ These limits help copyright law strike the complex balance between protecting the owner's interests in expression and the public's interest in access to creative works. First, Congress may only grant "Authors" exclusive rights.⁴² Second, Congress may do so only for authors' "Writings," and only for "limited Times."⁴³ Finally, copyright laws must fulfill an express purpose: to "promote the Progress of Science."⁴⁴

While Congress initially applied these limitations narrowly, over the last four decades Congress has expansively applied and significantly expanded each of these limitations.⁴⁵ For example, initial copyright statutes protected maps and books.⁴⁶ Later, protection extended to photographs, musical and dramatic works, motion pictures, sculpture, and architectural works.⁴⁷ Now, copyright protects authors'

the author's labor and effort that gives rise to ownership. *Id.*; see Craig A. Stern & Gregory M. Jones, *The Coherence of Natural Inalienable Rights*, 76 UMKC L. REV. 939, 971–72 (2008).

³⁸ Rosenblatt, *supra* note 37, at 453.

³⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

⁴⁰ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–51 (1991); *Sony Corp. of Am.*, 464 U.S. at 428–33; *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Of course, as the *Eldred* Court correctly points out, "[t]he two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones." *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

⁴¹ See U.S. CONST. art. I, § 8, cl. 8.

⁴² *Id.*

⁴³ *Id.* Moreover, the Supreme Court has held that the terms "authors" and "writings" imply a requirement of originality. *Feist*, 499 U.S. at 351, 355. "The *sine qua non* of copyright is originality." *Id.* at 345. Works cannot gain copyright protection unless they are "original works of authorship." *Id.* at 355. The Court has also held that "fixation" is a requirement, ostensibly flowing from the "writings" limitation. *Id.*

⁴⁴ U.S. CONST. art. I, § 8, cl. 8.

⁴⁵ In turn, statutes protecting the rights of creators were similarly narrowly construed. See, e.g., Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 565–66 (2007) ("Under previous copyright statutes, an author's exclusive rights were, for the most part, narrowly tailored and narrowly construed; moreover, acts that did not fall within the contemplated scope of those exclusive rights were considered to be unregulated and consequently free from copyright constraints.")

⁴⁶ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802, 1819, 1831, 1834).

⁴⁷ *Golan v. Holder*, 132 S. Ct. 873, 892 (2012) (listing when copyright protection was extended to dramatic works (1856), photographs (1865), motion pictures (1912), and architectural works (1990)); Act of February 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (extending copyright protection to musical

“original works of authorship.”⁴⁸ This is relatively uncontroversial as it demonstrates copyright’s ability to adapt to changing times and new technologies.

Congress has similarly expanded who may qualify as an “Author.” While the term might have been construed to be limited to flesh and blood authors and people who actually created the literary or artistic work, “Authors” now clearly not only comprise corporations, but also through the work made for hire doctrine, allows for employers to be “Authors” for the works of their creative employees.⁴⁹

Further complicating matters, Congress has passed copyright legislation under its other constitutional powers, such as the Commerce Clause, circumventing the Copyright Clause’s express limitations.⁵⁰

compositions); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (extending copyright protection to sculptures).

⁴⁸ 17 U.S.C. § 102(a) (2012).

⁴⁹ See 17 U.S.C. § 101 (2012). A work made for hire is a work that is created in the context of employment, in which the employer owns all the rights, not the employee. See *id.* Commissioned works are also works made for hire if the work falls into one of nine categories: “[1] as a contribution to a collective work, [(2)] as a part of a motion picture or other audiovisual work, [(3)] as a translation, [(4)] as a supplementary work, [(5)] as a compilation, [(6)] as an instructional text, [(7)] as a test, [(8)] as answer material for a test, or [(9)] as an atlas.” *Id.*

⁵⁰ In *United States v. Moghadam*, for example, the court held that an anti-bootlegging statute, 18 U.S.C. § 2319A, could be enacted via Commerce Clause powers despite lack of compliance with the Copyright Clause. *United States v. Moghadam*, 175 F.3d 1269, 1271, 1282 (11th Cir. 1999). Section 2319A made it illegal to record and distribute live performances, thus making copyright protection inherent in works that were not “fixed” for the purposes of eligibility under the Copyright Act. See 17 U.S.C. § 102 (2012) (requiring that works be “fixed in any tangible medium of expression” in order to be eligible for inherent copyright protection). While the court did not decide whether § 2319A satisfied the fixation requirements of the Copyright Clause, it found the legislation constitutional as a valid exercise of Congress under the Commerce Clause. *Moghadam*, 175 F.3d at 1274, 1282. Finding that the inherently commercial nature of bootlegging would inevitably affect interstate commerce, the court was able to validate § 2319A via the “substantial effects” test of the post-*Lopez* Commerce Clause jurisprudence.” *Id.* at 1282. The question remained, however: could the court circumvent the Copyright Clause to apply the Commerce Clause? The court addressed this “tension” between competing constitutional provisions, ultimately finding that “in some circumstances,” including this one, “the Commerce Clause indeed may be used to accomplish that which may not have been permissible under the Copyright Clause.” *Id.* at 1280. The court reasoned that because the wording of the Copyright Clause is “stated in positive terms,” and thus does not “imply any negative pregnant” the Framers did not intend for its provisions to prohibit legislation via other constitutional provisions. See *id.*

The *Moghadam* holding was reinforced recently in *United States v. Martignon*, in which § 2319A was again challenged: this time for its lack of compliance with the “limited Times” provision of the Copyright Clause. *United States v. Martignon*, 492 F.3d 140, 141–44 (2d Cir. 2007). Though “limited Times” was mentioned in *Moghadam*, the court did not address it at that time. *Moghadam*, 175 F.3d at 1275 n.9. Again, the *Martignon* court addressed whether Congress could bypass the Copyright Clause via the Commerce Clause. *Martignon*, 492 F.3d at 141. Though the court arrived at the same result as in *Moghadam*, it acknowledged that at least in some instances Congress might not make an end run around the Copyright Clause: “when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause.” See *id.* at 149. The court found that because § 2319A is largely a criminal statute, and thus beyond the scope of the Copyright Clause’s civil judicial power, it did not meet the first requirement of the test and thus Congress could rely on the Commerce Clause. See *id.* at 151–53.

Most relevant here, Congress has expanded the copyright term far beyond its original term. The original copyright term was set at fourteen years.⁵¹ The term has steadily increased from the initial fourteen years, with a possible fourteen year renewal (1790),⁵² to twenty-eight years, with a potential fourteen year renewal (1831),⁵³ to twenty-eight years with a potential twenty-eight year renewal (1909),⁵⁴ to life of the author plus fifty years (1976),⁵⁵ to its current term of life of the author plus an additional seventy years (1998).⁵⁶ This increase in term stands in stark contrast to the patent term, also governed by the IP Clause's "limited Times," which began with a similar fourteen-year term⁵⁷ and has been lengthened to its current twenty-year term.⁵⁸

The concept of "limited Times" is foundational to copyright law because it helps define and protect the public domain. Thus, Congress's expansion of the Copyright Clause's "limited Times" is not without consequences—it concomitantly reduces the public domain.

C. *Whither the Public Domain?*

The public domain is a critical, indispensable feature of the copyright regime. However, there is little consensus on what the public domain entails, and a universally accepted definition has proven elusive. Professor Ochoa contends that there are at least thirteen possible definitions of the public domain.⁵⁹ The most

⁵¹ Act of May 31, 1790, ch. 15, § 1, 1 Stat. at 124.

⁵² *Id.*

⁵³ Act of February 3, 1831, ch. 16, §§ 1–2, 4 Stat. at 436–37.

⁵⁴ Act of Mar. 4, 1909, ch. 320, Pub. L. No. 60-349, § 23, 35 Stat. 1075, 1080.

⁵⁵ Copyright Act of 1976, ch. 3, Pub. L. No. 94-553, § 302, 90 Stat. 2541, 2572 (codified at 17 U.S.C. § 302(a) (2012)).

⁵⁶ 17 U.S.C. § 302.

⁵⁷ Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10.

⁵⁸ 35 U.S.C. § 154 (2012).

⁵⁹ Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 217–21 (2002) [hereinafter Ochoa, *Origins*] (listing the possible definitions as (1) "inventions and works that were formerly subject to patent and copyright protection, but are no longer"; (2) ideas contained in copyrighted materials and artistic works contained in patented material; (3) "statutes [and] judicial opinions"; (4) "basic scientific principles"; (5) "all inventions that are obvious, not novel, or not useful"; (6) "facts"; (7) "clichés, unoriginal material, and indispensable expressions"; (8) "all ideas and works for which the proper [patent or copyright law] formalities are not followed"; (9) "[w]ords, phrases, images, and product designs that are generic or that become generic"; (10) "words, phrases, images, and product designs that are functional (and not otherwise protected by copyright or patent)"; (11) "a [trade]mark which ceases to be used"; (12) trade secrets that become generally known; and (13) "the name or likeness of a person who has been dead for a long time."); see also Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975–977 (1990) (explaining that the public domain is "compris[ed] [of] elements of intellectual property that are ineligible for private ownership" and the public domain "contains works [that are] free from copyright" including "[w]orks created before the enactment of copyright statutes," "works once subject to copyright, but created so long ago that the copyright has since expired," and works that "were ineligible for U.S. copyright or failed to comply with a formal prerequisite for securing it."); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 789–811 (2006) (offering thirteen definitions of public domain including: (1) "information artifacts unencumbered by

widely accepted definition, and the one used throughout this Article, is the one that Ochoa dominantly advances: a “body of literary and artistic works (or other information) that is not subject to any copyright (or other intellectual property right), and which therefore may be freely used by any member of the general public.”⁶⁰ So described, once a work enters the public domain, such as for failure to comply with copyright formalities or expiration of the copyright term, society benefits through free and unrestricted access to the work. The more works that enter the public domain, the more vibrant and diverse it is and in turn, the more the scheme facilitates public use of creative outputs to participate in the process of cultural development. Artistic creation does not occur in a vacuum. Creative activity regularly involves the production of works that depend upon or are derived from previous works; works in the public domain are the lifeblood of further creative material.

Scholars have complained that over the past three decades the public domain has been “under attack.”⁶¹ They bemoan congressional legislation as evincing “a systematic imbalance in favor of the expansion and deepening of exclusive rights to information at the expense of the public domain,” and resulting in a vanishing public domain.⁶² To make the matter more concrete, no copyrighted work that has been created in the past eighty years has entered the public domain.⁶³ Nor will any enter until 2019.⁶⁴ The primary source of this systemic imbalance is legislation increasing the copyright term.⁶⁵

intellectual property rights”; (2) “IP-free information resources”; (3) “the constitutionally protected public domain”; (4) “[p]rivatizable [i]nformation [r]esources”; (5) “[b]roadly [u]sable [i]nformation [r]esources”; (6) “contractually constructed information commons”; (7) “[a] [s]tatus [c]onferring a [p]resumptive [r]ight of [c]reative [a]ppropriation”; (8) a “cultural landscape”; (9) “a communicative sphere”; (10) “publication of . . . governmental information”; (11) “[a] [d]omain of [p]ublicly [a]ccessible [i]nformation”; (12) “[t]he [u]npublished [p]ublic [d]omain”; and (13) the “romantic public domain.”)

⁶⁰ Tyler T. Ochoa, *Is the Copyright Public Domain Irrevocable? An Introduction to Golan v. Holder*, VAND. L. REV. EN BANC 123, 124 (2011); see also Ochoa, *Origins*, *supra* note 59, at 259.

⁶¹ See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 38, 39; see also JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 46 (2008) (ebook); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 173, 196–97; Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1092–93 (1998).

⁶² Benkler, *supra* note 61, at 196. Benkler claims this is so because “the benefits of such rights are clearly seen by, and expressed by, well-defined interest holders that exist at the time the legislation is passed” and “in contrast, most of the social costs—which are economic, social, political, and moral—are diffuse and likely to be experienced in the future by parties not yet aware of the fact that they will be affected by the extension of rights.” *Id.* Benkler is describing the immense lobbying of the content industry, as revealed in scholarship by Jessica Litman. See *id.* at 196–97; e.g., JESSICA D. LITMAN, *DIGITAL COPYRIGHT 202* (2006) (ebook).

⁶³ See *Eldred v. Ashcroft*, 537 U.S. 186, 241 (2003) (Stevens, J., dissenting).

⁶⁴ 17 U.S.C. §§ 302–04 (2012); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, §§ 102–03, 112 Stat. 2827, 2827–28 (1998) (codified as amended in scattered sections of 17 U.S.C.).

⁶⁵ See Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 74 (2002) (“No one can reliably plan to prepare derivative works so long as

Copyright legislation, including an increased copyright term, is a response to three separate pressures: (1) technological innovation;⁶⁶ (2) interest group political pressure;⁶⁷ and (3) international obligations.⁶⁸ Each of these pressures played a role in the Court's decisions in *Eldred* and *Golan*. However, it is this final pressure, international obligations under the Berne Convention for the Protection of Literary and Artistic Works ("Berne" or "Berne Convention") and the Agreement on the Trade Related Aspects of Intellectual Property Rights ("TRIPS"), that Congress most heavily relied upon and the Court most readily accepted in justifying the legislation at issue in both *Eldred* and *Golan*.

II. THE COURT'S MISSED OPPORTUNITIES

A. Eldred v. Ashcroft: The Court's First Failed Effort

In *Eldred*, petitioners were individuals and businesses whose products or services built on copyrighted works that had fallen into the public domain.⁶⁹ They claimed that the Copyright Term Extension Act ("CTEA"), which extended the copyright term by twenty years (increasing the term from life of the author plus fifty years to life of the author plus seventy years), violated the Copyright Clause's "limited Times" and "promote Progress" limitations.⁷⁰

Congress enacted the CTEA in response to the European Union's increase of EU copyright term through the 1993 European Copyright Term Directive; this expanded copyright protection by twenty years for European Union members.⁷¹ The EU Copyright Term Directive provided reciprocal treatment for nationals of those countries that provided extended protection for EU members.⁷² Congress enacted the CTEA to ensure that U.S. authors would benefit from increased copyright protection in the EU.⁷³

In responding to petitioners' arguments, the Court made clear early in the opinion that petitioners had an uphill battle, foreshadowing its holding by noting

Congress might extend the term of copyright. To the extent that the incentive for authors is significant, the disincentive for users of the public domain is also significant.")

⁶⁶ See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.). The Digital Millennium Copyright Act was enacted in part due to technological innovations. See S. REP. 105-190, at 1-2 (1998).

⁶⁷ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.). The Copyright Act of 1976 was enacted in part due to interest group pressure. See, e.g., LITMAN, *supra* note 62, at 36.

⁶⁸ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.). The Sonny Bono Copyright Term Extension Act was enacted in part due to international pressures. See *Eldred v. Ashcroft*, 537 U.S. 186, 205-08 (2003).

⁶⁹ *Id.* at 196.

⁷⁰ *Id.*

⁷¹ See S. REP. NO. 104-315, at 4 (1996).

⁷² See *id.* at 4-5.

⁷³ See *id.* at 3.

that “[t]he CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain.”⁷⁴

1. *The “Limited Times” Analysis*—The *Eldred* petitioners argued that “[t]he ‘limited Time’ in effect when a copyright is secured” (i.e., life plus fifty years) “becomes the constitutional boundary, a clear line beyond the power of Congress to extend.”⁷⁵ “[A] time prescription, once set,” they argued, “becomes forever ‘fixed’ or ‘inalterable.’”⁷⁶ Accordingly, even though Congress might increase the term for *future* works, Congress could not extend *existing* copyrights.⁷⁷ The Court rejected this argument.⁷⁸

Relying on text, history, and precedent, Justice Ginsburg, writing for the majority, held that rather than “inalterable” or “fixed,” the term “limited” means “‘confined within certain bounds,’ ‘restrained,’ or ‘circumscribed.’”⁷⁹ Looking only to the new term—life of the author plus seventy years—the Court held that this term was “limited,” or confined within certain bounds.⁸⁰ The Court also found “an unbroken congressional practice” of granting authors of existing copyrighted works the same benefit of new term extensions, thus allowing all copyright owners to “be governed evenhandedly under the same regime.”⁸¹ Finally, the Court held that in deciding whether the CTEA was a “rational exercise of legislative authority” under the Copyright Clause it would “defer substantially to Congress.”⁸² The “international concerns,” that is, reciprocity under the 1993 European Copyright Term Directive, provided that rationality.⁸³

The *Eldred* petitioners mounted another attack against the “limited Times” prescription by claiming that Congress created perpetual copyrights by continually extending protection to existing works before they expired.⁸⁴ Once again, the Court rejected petitioners’ argument.⁸⁵ The Court remarked that “[n]othing before th[e] Court warrant[ed] construction of the CTEA’s 20-year term extension as a congressional attempt to evade or override the ‘limited Times’ constraint.”⁸⁶

The Court’s decision expressed some concern, however. The Court stated that it was “not at liberty to second-guess congressional determinations and policy judgments of this order, *however debatable or arguably unwise they may be.*”⁸⁷ Yet, as

⁷⁴ See *Eldred*, 537 U.S. at 205.

⁷⁵ *Id.* at 193.

⁷⁶ *Id.* at 199.

⁷⁷ See *id.*

⁷⁸ *Id.* at 199–200.

⁷⁹ *Id.* at 199.

⁸⁰ See *id.* at 199–200.

⁸¹ *Id.* at 200.

⁸² *Id.* at 204.

⁸³ *Id.* at 204–06. The Directive is aimed at European countries as an effort to ensure uniformity throughout Europe. Council Directive 93/98/EEC of Oct. 29, 1993, 1993 O.J. (L 290) 9, 9 (EC).

⁸⁴ *Eldred*, 537 U.S. at 208.

⁸⁵ *Id.*

⁸⁶ *Id.* at 209.

⁸⁷ *Id.* at 208 (emphasis added).

argued below, the Court must still articulate constitutional boundaries of congressional power under the Copyright Clause.

2. *The “Promoting the Progress of Science” Analysis*—As to the Copyright Clause’s “promote Progress” limit, petitioners argued that this “preamble language identifie[d] the sole end to which Congress may legislate,”⁸⁸ and thus all copyright legislation must “promote the Progress of Science.”⁸⁹ This requires that copyright legislation provide incentives for authors to create new works. Because the CTEA failed to stimulate the creation of *any* new works, the CTEA did not—and could not—“promote Progress.”⁹⁰

The Court agreed that the “primary objective of copyright’ system is ‘to promote the Progress of Science’” but pronounced that *individual acts* need not “promote Progress” so long as Congress creates a copyright *system* that does so.⁹¹ The Court stressed “that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives”⁹² and again relying on congressional discretion, international obligations in complying with the EU Copyright Term Directive, “demographic, economic, and technological changes,”⁹³ and Congress’s consistent practice of applying adjustments of the copyright term to both future and existing works, found that such factors “overwhelm[ed]” petitioners’ argument that the CTEA “fail[ed] . . . to ‘promote the Progress of Science.’”⁹⁴

In ruling on both the “limited Times” and “promote Progress” arguments, the Court was careful to steer clear of removing works from the public domain, underscoring that the CTEA did not remove works from the public domain and observing that the important parity achieved involved “future works and existing works *not yet in the public domain*.”⁹⁵ Moreover, though granting exclusive rights to authors may encourage individual creativity, the Court made clear that copyright

⁸⁸ *Id.* at 211.

⁸⁹ *See id.* at 211–12.

⁹⁰ *Id.*

⁹¹ *See id.* at 212.

⁹² *Id.*

⁹³ *Id.* at 205–08. The Court explained that “[m]embers of Congress expressed the view 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.’” *Id.* at 207 n.14.

⁹⁴ *Id.* at 213–14; *see also id.* at 215 (“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.”).

⁹⁵ *See id.* at 213 (emphasis added). The Court also noted that the CTEA allowed ample room for future derivations of ideas or facts and did not allow copyright holders to gain a “monopoly on . . . knowledge.” *See id.* at 217.

has historically been more concerned with ensuring that protected works someday end up in the public domain.⁹⁶

In dissent, Justice Breyer argued that the practical effect of the CTEA's copyright term extension was to create a framework that is "virtually perpetual," unconstitutionally violating the "limited Times" provision.⁹⁷ He also argued that the CTEA inhibited any creative progress by limiting the works that would otherwise be available in the public domain.⁹⁸ And the CTEA did not increase the *author's* private benefit; instead, it would serve to positively impact only the author's *heirs*—going beyond the Copyright Clause's stated intent of "securing for limited Times to *Authors* . . . the exclusive Right to *their* respective Writings."⁹⁹

Breyer also argued that by protecting works that would otherwise be in the public domain, the extended copyright term for *existing* works wholly failed to "promote Progress."¹⁰⁰ Breyer argued authors who wish to create from works already in the public domain need not seek the original author's permission, thus avoiding costs that could potentially inhibit or even prohibit their creative goals.¹⁰¹ By protecting works that would otherwise be publicly accessible, the CTEA would place undue obstacles in the way of potential authors' progress.¹⁰²

To support his argument that the CTEA failed to "promote Progress," Breyer relied on an economic analysis provided by leading economists, including five Nobel Prize winning economists.¹⁰³ These economists concluded that the motivational incentives created by the statute could not justify the extension.¹⁰⁴ Monetary incentives fifty-five or seventy-five years after the author's death tend to diminish, if not disappear completely.¹⁰⁵ Even if, in the rare instance, an author were "moved by the thought of great-grandchildren receiving copyright royalties a century hence,"¹⁰⁶ this scant positive effect would hardly outweigh the harm caused by removing the works from the public domain.¹⁰⁷ In responding to the majority's contention that an additional twenty years could provide incentives, Breyer

⁹⁶ *Id.* at 223 (Stevens, J., dissenting) ("[T]he 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."). The Court also noted that both the First Amendment and fair use doctrine promoted creativity beyond the scope of copyright protection. *See id.* at 219–20 (majority opinion).

⁹⁷ *Id.* at 242–43 (Breyer, J., dissenting).

⁹⁸ *See id.* at 243 ("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.").

⁹⁹ *See id.* at 242–43 (first alteration in original) (emphasis added).

¹⁰⁰ *See id.* at 247, 249–50.

¹⁰¹ *See id.* at 249–50.

¹⁰² *See id.* at 250.

¹⁰³ *Id.* at 254–55.

¹⁰⁴ *Id.* at 254–55, 257; *see also* EDWARD RAPPAPORT, CONG. RESEARCH SERV., 98-144E, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES 4–5 (1998).

¹⁰⁵ *Eldred*, 537 U.S. at 254–55 (Breyer, J., dissenting).

¹⁰⁶ *Id.* at 255.

¹⁰⁷ *Id.* at 257. Breyer also questioned if, as the majority found, an additional 20 years could provide incentives, why not go further and provide protection beyond the author's life plus 70 years, such as for "two centuries, five centuries, [or] 1,000 years." *Id.* at 255.

intimated that a more searching inquiry was needed, observing that if an additional twenty years could provide incentives, why not extend the term for “two centuries, five centuries, [or] 1,000 years.”¹⁰⁸ As Breyer explained, “[F]rom a rational economic perspective the time difference among these periods *makes no real difference*,”¹⁰⁹ suggesting, obviously, that the latter extensions would clearly be unconstitutional and the current one should also meet the same fate.

Justice Stevens also wrote a vigorous dissent. Justice Stevens relied on parallel patent law opinions and perspectives to demonstrate that extending copyright terms would inhibit the promotion of “Progress.”¹¹⁰ In particular, Stevens cited *Pennock v. Dialogue*, an 1829 Supreme Court patent law case that emphasized the importance of public access to inventions as sources for future creativity and progress.¹¹¹ Like increasing an inventor’s compensation for an already completed invention, extending copyright term retroactively would only serve to “frustrat[e] the legitimate expectations of members of the public” who relied on public domain works.¹¹² Justice Stevens’ major complaint, however, appeared to be the majority’s lack of any meaningful inquiry and its overly deferential stance.¹¹³ Here, Justice Stevens lamented that “the majority’s contrary conclusion rest[ed] on the mistaken premise that th[e] Court has virtually no role in reviewing congressional grants of monopoly privileges to authors.”¹¹⁴ The Court’s next venture into copyright legislation, *Golan*, did not inspire confidence that the Court would heed Justice Stevens’s caution of creating “judicially unreviewable” copyright legislation.¹¹⁵ Indeed, Justice Stevens’s concern may ring more loudly in the aftermath of that decision.

B. Golan v. Holder: The Court’s Second Failed Effort

Before discussing *Golan*, it is necessary to discuss the international setting that served as the backdrop to that decision. That begins with the Berne Convention.

1. *The Berne Convention for the Protection of Literary and Artistic Works*—By the late 1880s, individual countries were developing separate national copyright laws.¹¹⁶ Attempts at multilateral agreements, however, were limited, mostly involving bilateral treaties.¹¹⁷ In 1886, in Berne, Switzerland, in a landmark event, ten countries reached the first true multilateral international copyright agreement—the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 222–42 (Stevens, J., dissenting).

¹¹¹ *See id.* at 224–25 (quoting *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 19 (1829)).

¹¹² *See id.* at 226–27.

¹¹³ *See id.* at 223.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 242.

¹¹⁶ *See* Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 10 (1986).

¹¹⁷ *See id.* at 14–15 (explaining that bilateral copyright agreements had become common by the middle of the 1800s).

Berne Convention.¹¹⁸ The Berne Convention “recognized the need for more uniform international protection of authors’ rights, but advocated [a] limited means for achieving this, mainly through the replacement of the numerous existing bilateral agreements with a single multilateral instrument.”¹¹⁹

As evidenced by its initial members (Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Liberia, Switzerland, and Tunisia), the Berne Convention was “Eurocentric,” and Berne’s theoretical groundings reflected the civil law “author’s right” system of copyright.¹²⁰ The author’s right tradition is based on a natural rights theory; that is, authors have a natural, inherent, right in their works and are thus entitled to their creations without positive law providing such rights.¹²¹ Berne’s grounding affects such important issues as the copyright term, the moral rights of authors, and the ownership of copyrighted works.¹²²

One of the standards Berne members must implement is Berne’s Rule of Retroactivity, Article 18(1), which provides: “This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of

¹¹⁸ See *id.* at 9, 29–30. Prior to the Berne Convention, other multilateral copyright agreements were limited to a few countries and were entered into for political reasons. See *id.* at 9. Berne, on the other hand, was open to all states, provided the members complied with the mandatory obligations imposed by Berne. *Id.* Berne was born because of the need to protect against widespread piracy of foreign works, for example, the United States’ piracy of English books, and the Belgian piracy of French books. *Id.* at 12.

¹¹⁹ See GRAEME B. DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 522, 535–36 (2001) (“The original Convention was intended to promote five objectives: (1) the development of copyright laws in favor of authors in all civilized countries; (2) the elimination over time of basing rights upon reciprocity; (3) the end of discrimination in rights between domestic and foreign authors in all countries; (4) the abolition of formalities for the recognition and protection of copyright in foreign works; and, (5) ultimately, the promotion of uniform international legislation for the protection of literary and artistic works.”).

¹²⁰ See *id.* at 513, 525 (describing the author’s right system of copyright as prevalent in Europe and the Berne Convention as “clearly Eurocentric”).

¹²¹ *Id.* at 513. Such rights exist and laws simply accord formal recognition of these rights. *Id.* at 517. The emphasis on the author’s natural rights may stem in part from its origin in France following the French Revolution. *Id.* at 517–18. When France’s ancient regime was abolished by its 1789 Revolution, the rights of man enshrined in the new revolutionary laws included the rights of authors in their works, rooted in natural law. Ricketson, *supra* note 116, at 10. This is not to suggest that utilitarian goals do not also underlie the natural rights tradition, simply that the utilitarian influence was very minor as compared to the robust entitlement theory of natural rights. See DANIEL CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, AND MATERIALS 86 (2d ed. 2012) (“[I]t would be inaccurate to suggest that utilitarian and natural rights theories of copyright law are mutually exclusive, or that the copyright and author’s rights traditions are at odds. Strands of both theories and traditions may well inform the development of copyright laws in the same countries, although with varying degrees of influence. And, regardless . . . , today the international copyright conventions require a certain set of minimum standards that will be common to all countries.”).

¹²² See DINWOODIE ET AL., *supra* note 119, at 513. Such contrasts affect issues such as whether copyright can be owned by non-natural persons and whether employers have automatic control rights over employee-created works, or only a non-exclusive exploitation right. See Paul Edward Geller, *Worldwide “Chain of Title” to Copyright*, in 4 WORLD INTELLECTUAL PROPERTY REPORT 103, 104 (1990).

protection.¹²³ Article 18 thus requires countries to restore protection to works that fell into the protecting country's public domain for reasons other than term expiration.¹²⁴ For example, a national of Denmark can have works that fell into the public domain in the United States for failure to provide copyright notice "restored" to protection in the United States, if the work is still protected in Denmark and was first published not less than thirty days prior to being published in the United States.¹²⁵

The United States long objected to certain of Berne's minimum standards. It thus refused to join the Union.¹²⁶ Moreover, because Berne's underlying theoretical grounding was at odds with the United States' utilitarian approach, the United States resisted Berne accession for over a century.¹²⁷ "[F]aced with a ballooning trade deficit and a need to restore U.S. competitiveness in world markets, . . . the United States grudgingly bec[ame] a member" of Berne in 1989.¹²⁸ This was "part of its larger strategy to use the [GATT] Uruguay Round of multilateral trade negotiations to strengthen international intellectual property protection."¹²⁹ As the

¹²³ Paris Act Relating to the Berne Convention for the Protection of Literary and Artistic Works art. 18(1), July 24, 1971, 1161 U.N.T.S. 3, 41 [hereinafter Berne Convention].

¹²⁴ *See id.*

¹²⁵ *See* Dam Things from Den. v. Russ Berrie & Co., 290 F.3d 548, 556–57 (3d Cir. 2002) (describing requirements for restoring a foreign work's copyright). Berne's Rule of Retroactivity, which is at odds with the general rule that laws apply prospectively, is limited in a couple of important respects. First, with respect to works that fell into the public domain because the works' copyright term had expired, Berne does not require retroactive protection. Berne Convention, *supra* note 123, art. 18(2) ("If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew."). Second, Berne provides countries with discretion in determining how to implement the retroactivity principle embodied in Article 18. *See id.* art. 18(3). Specifically, Berne Article 18(3) provides: "The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, *the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.*" *Id.* (emphasis added). By way of example, under Article 18(3), countries have allowed parties that relied on a work's previous public domain status to continue using such works, albeit by paying adequate compensation to the copyright owner. *See, e.g.*, 17 U.S.C. § 104A (2012). Berne's Rule of Retroactivity can be justified by the limited effect Berne would have had without retroactive application. When first formed, many works meeting Berne requirements were not protected. Unless Berne was applied retroactively, the number of works entitled to Berne protection would have been minimal and Berne would have had limited impact. Prior to the Berne Convention, there were wide discrepancies with respect to formalities. *See* DINWOODIE, ET AL., *supra* note 119, at 518–19. These formalities could include notice and registration, among others. *Id.* at 530. Berne soon made clear that copyright was not to depend on satisfying formalities in countries outside the country of origin. *See id.* at 528. As many works had been denied protection for failure to satisfy formalities, it made sense to restore copyright to those works as well. *See, e.g.*, Golan v. Holder, 132 S. Ct. 873, 879 & n.3 (2012).

¹²⁶ Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, 66 U. CIN. L. REV. 1283, 1287 (1998). However, "[e]ventually, nonadhering countries opted for the more minimal national-treatment obligations contained in the Universal Copyright Convention of 1952," of which the United States became a member. *Id.*

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

world's leader in intellectual property production and export, the United States could no longer justify denying protection to foreign works; more importantly, the United States desired protection for its nationals' works abroad.¹³⁰

In implementing Berne, however, the United States admittedly took a minimalist approach, amending the U.S. Copyright Act only when there was a clear conflict with an express Berne provision.¹³¹ The provision that Congress responded to in enacting the act at issue in *Golan* was Article 18's retroactivity mandate.¹³² This proved troublesome.¹³³ Because of the potential disruptive impact of removing works from the public domain, the United States' initial position was that the United States complied with its Article 18 obligations simply by virtue of protecting future works.¹³⁴ To be generous, this was a questionable position. Perhaps recognizing so, the House Judiciary Committee also "indicated . . . that it had not definitively rejected 'retroactive' protection for preexisting foreign works" but would defer consideration "until 'a more thorough examination of

¹³⁰ See Ricketson, *supra* note 116, at 13 (describing protection for citizens' own works abroad as a turning point in extending domestic protection to authors of foreign works).

¹³¹ See William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373, 393 (1995). The U.S. State Department assembled the Ad Hoc Working Group on U.S. Adherence to the Berne Convention to determine how the United States could comply with Berne. *Id.* at 391.

¹³² *Golan v. Holder*, 132 S. Ct. 873, 881–82 (2012).

¹³³ See *id.* at 878. Two other provisions merit discussion: (1) Article 6 *bis*'s moral rights provision; and (2) Article 5's prohibition against formalities. Berne Convention, *supra* note 123, at 35–36. The United States concluded that no change to the Copyright Act was necessary to comply with the latter two. See H.R. REP. NO. 100-609, at 37–38, 40–41 (1988). Although Congress had traditionally conditioned copyright protection on compliance with formalities (e.g., registration, renewal, and notice), it had gradually eliminated these requirements. See, e.g., Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1415 & n.1 (2013). As for moral rights, these rights protect, among other rights, both the author's reputation and the integrity of their work. See H.R. REP. NO. 100-609, *supra* note 133, at 32–33. The House Committee on the Judiciary, whose report accompanied the Berne Convention Implementation Act of 1988, took the dubious position that existing state and federal laws already afforded authors equivalent protection. See *id.* at 34. Specifically mentioned were: state law rights of publicity and prohibitions against breach of contract, fraud and misrepresentation, unfair competition, and defamation; and federal protections against unfair competition afforded by Section 43(a) of the Lanham Act. *Id.* As such, the Committee found that "current United States law [met] the requirements of Article 6[]*bis*." *Id.* at 38. Despite taking this position, the United States demanded that the major international intellectual property treaty, TRIPS, expressly exclude moral rights from members' commitments. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods art. 9(1), Dec. 15, 1993, 33 I.L.M. 81, 87 [hereinafter TRIPS]; Monica Kilian, *A Hollow Victory for the Common Law? TRIPS and the Moral Rights Exclusion*, 2 J. MARSHALL REV. INTEL. PROP. L. 321, 321–22 (2003). Accordingly, TRIPS Article 9(1) provides that "Members shall not have rights or obligations under this Agreement in respect of the rights conferred under article 6[]*bis* of [Berne]." TRIPS, *supra* note 133, at 87. This effectively shielded Members from the WTO dispute settlement mechanism for failure to provide authors with moral rights.

¹³⁴ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2(3), 102 Stat. 2853, 2853. The BCIA indicated that the protection of future foreign works satisfied Article 18. See *id.* ("The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention . . .").

Constitutional, commercial, and consumer considerations [wa]s possible'.¹³⁵ The Committee recognized that whether, and how, Congress could provide retroactive protection to works already in the public domain was a difficult question, "possibly with constitutional dimensions."¹³⁶ But, ultimately the Committee deemed it unnecessary to address until the question was "presented in the context of specific facts."¹³⁷ In short, Article 18 merited further discussion.

In 1994, to accede to TRIPS, Congress relented and enacted Section 514 of the Uruguay Round Agreements Act,¹³⁸ perfecting U.S. implementation of Berne by finally addressing Article 18's retroactivity obligation. According to Congress, failure to comply at this point threatened to expose the United States to possible trade sanctions, which was a threat not available under Berne.¹³⁹ Section 514, codified at 17 U.S.C. § 104A, grants copyright protection to preexisting works of Berne member countries, protected in their country of origin, that fell into the public domain in the United States for any of three reasons: (1) the United States did not protect works from the country of origin at the time of publication, (2) the United States did not protect sound recordings fixed before 1972, or (3) the author had failed to comply with U.S. statutory formalities.¹⁴⁰ It is this U.S. codification that was the subject of *Golan*, to which we now turn.

While *Eldred* left open whether Congress could remove works from the public domain, the Court squarely confronted that question in *Golan*. In *Golan*, the petitioners were "orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works that [Section 104A] removed from the public domain."¹⁴¹ These parties argued that the Copyright Clause and the First Amendment both mandated that works that entered the public domain forever

¹³⁵ *Golan*, 132 S. Ct. at 879 (quoting H.R. REP. NO. 100-609, at 52).

¹³⁶ H.R. REP. NO. 100-609, at 51.

¹³⁷ *Id.* The House Report of the Judiciary Committee stated "any solution to the question of retroactivity can be addressed after adherence to Berne when a more thorough examination of Constitutional, commercial, and consumer considerations is possible." *Id.* at 52.

¹³⁸ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994) (codified as amended at 17 U.S.C. §§ 104A, 109 (2012)).

¹³⁹ See TRIPS, *supra* note 133, art. 9(1) ("Members shall comply with Articles 1-21 and the Appendix of the Berne Convention. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6[]bis of that Convention or of the rights derived therefrom.") TRIPS provides what many describe as a robust and effective dispute settlement mechanism, with possible trade sanctions for failing to comply with its obligations. See *Golan*, 132 S. Ct. at 880-81. Fearing possible TRIPS-related WTO complaints, Congress passed Section 104A. See *id.* at 881. This did not escape the *Golan* Court's attention: "[t]he landscape changed in 1994" given the "specter of WTO enforcement proceedings [which] bolstered the credibility of [American] trading partners' threats to challenge the United States for inadequate compliance with Article 18." *Id.*

¹⁴⁰ 17 U.S.C. § 104A(h)(6)(C) (2012). As permitted by Berne, Section 104A provided limited protection for reliance parties by allowing parties that reproduced the restored work to continue doing so for a year after the copyright holder provided a notice of intent to restore, and by allowing parties who created derivative works to continue creating and exploiting those works upon adequate compensation to the copyright holder. *Id.* § 104A(d)(2)-(3).

¹⁴¹ See *Golan*, 132 S. Ct. at 875.

remain there.¹⁴² Justice Ginsburg again authored the majority opinion, in which the Court rejected both the Copyright Clause and First Amendment challenges, holding that “[n]either the Copyright and Patent Clause nor the First Amendment . . . makes the public domain, in any and all cases, a territory that works may never exit.”¹⁴³

With respect to the Copyright Clause, the petitioners made two primary arguments. First, by taking works out of the public domain and according them new protection, the Act violated the boundary of “limited Times.”¹⁴⁴ Second, because the Act could not provide incentives for artists to create—as the works were already created—the Act did not “promote the Progress of Science.”¹⁴⁵ In rejecting both of these arguments, the Court once again grounded its decision in the text, history, precedent, and wide discretion granted to Congress.

2. *The “Limited Times” Analysis*—The *Golan* petitioners’ primary line of attack was that removing works from the public domain violated the “limited Times” constraint “by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires.”¹⁴⁶ The petitioners distinguished *Eldred* by noting that in *Eldred*, rather than remove works from the public domain and protect them anew, the CTEA merely extended existing works.¹⁴⁷ The Court nevertheless found *Eldred* “largely dispositive.”¹⁴⁸

The Court found that petitioners’ distinction between *Eldred* and *Golan* was without significance. As the term at issue in *Eldred* was limited, so too, was the term at issue in *Golan*.¹⁴⁹ The Court pointed out that some works protected under Section 104A received less protection than other works.¹⁵⁰ At most, protection for restored works would be for the full term (life of the author plus seventy years), but in the vast majority of cases the term would be less because Section 104A did not account for time lost during the period of no protection.¹⁵¹

The *Golan* petitioners attempted to further distinguish *Eldred* with an unconventional argument. Relying on statements in *Eldred* implying that Congress could not remove *expired* works from the public domain, petitioners argued that Section 104A did precisely that.¹⁵² More specifically, they argued that the initial term of protection for these restored works was “zero,” after which the “expired”

¹⁴² *Id.* at 878. As stated earlier, because this Article is trained on the limits imposed by the Copyright Clause, the First Amendment analysis is not considered here. *See supra* note 24 (analyzing petitioners’ First Amendment argument).

¹⁴³ *Golan*, 132 S. Ct. at 878.

¹⁴⁴ *Id.* at 884.

¹⁴⁵ *Id.* at 888.

¹⁴⁶ *Id.* at 884 (citation omitted).

¹⁴⁷ *See id.* at 884–85.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 878.

¹⁵¹ *Id.*

¹⁵² *See id.* at 884; Brief for Petitioners at 22–23, *Golan*, 132 S. Ct. 873 (No. 10–545).

works fell into the public domain.¹⁵³ The Court summarily dispensed with this argument, criticizing it as making “scant sense.”¹⁵⁴ The Court stated that “a ‘limited time’ of exclusivity must begin before it may end.”¹⁵⁵ The Court, thus, did not rule on whether works that indeed fell into the public domain through expiration of the term could be renewed or restored. This opening may have important implications, as discussed later.

The Court also rejected the second “limited Times” argument the petitioners advanced—a perpetual copyright.¹⁵⁶ Petitioners believed Section 104A presented a more forceful argument of perpetual copyrights than in *Eldred*. Specifically, if works can be removed from the public domain, Congress can institute a second “limited” term after the first expires; it can provide a third “limited” term after that, and so on, thus achieving a perpetual copyright.¹⁵⁷ As in *Eldred*, the Court gave short shrift to this argument.¹⁵⁸ The Court stated that “the hypothetical legislative misbehavior petitioners posit is far afield from the case before us.”¹⁵⁹ By “accord[ing] equitable treatment to . . . disfavored [] authors, Congress can hardly be charged with a design to move stealthily toward a regime of perpetual copyrights.”¹⁶⁰

3. *The “Promoting the Progress of Science” Analysis*—Petitioners’ “promoting the Progress of Science” argument fared little better. This argument rested on the claim that promoting “Progress” required the creation of at least one new work, and any act passed pursuant to the Copyright Clause must spur the creation of new works.¹⁶¹ Because Section 104A provides renewed protection for works *already created*, it could not logically provide any incentive to create even a single new work.¹⁶² Conceding that the “promote Progress” preamble did limit congressional power, the Court nevertheless found that providing incentives to create new works was not the sole means by which Congress could “promote Progress.”¹⁶³ Again relying on *Eldred*, and acknowledging that providing incentives for authors to create new works “is surely an essential means to advance the spread of knowledge and learning,” the Court interpreted “promotes Progress” to also include the *dissemination* of works.¹⁶⁴ Congress could find that “exemplary adherence to Berne”

¹⁵³ *Golan*, 123 S. Ct. at 885. Such a term would also violate international obligations for providing at least the term of life of the author plus fifty years, or the CTEA’s life of the author plus seventy years. See William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 693–94 (1996).

¹⁵⁴ *Golan*, 132 S. Ct. at 885.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 888.

¹⁶² *Id.*

¹⁶³ See *id.*

¹⁶⁴ *Id.* at 888–89.

would lead to the dissemination of works.¹⁶⁵ In so finding, the Court had “no warrant to reject the rational judgment Congress made.”¹⁶⁶

III. THE COPYRIGHT CLAUSE’S DOCTRINAL FRAMEWORK: WHERE FOR ART THOU?

In analyzing *Golan* and *Eldred*, three separate but interrelated threads emerge. First, the Court will be extremely deferential to Congress with respect to copyright legislation. The Court repeatedly pronounced that Congress decides how best to pursue the Copyright Clause’s objectives and the Court would not “second-guess” Congress, however “debatable or arguable” its actions may be.¹⁶⁷ Second, “international concerns,” even those not rising to international treaty obligations, will justify copyright expansion.¹⁶⁸ While resting on international concerns breaks no new ground, the extended reach of this notion is of concern. Finally, in both *Eldred* and *Golan*, the Court took pains to distinguish the CTEA and Section 104A from congressional attempts to evade the perpetual copyright prohibition,¹⁶⁹ suggesting that the Court will strike down legislation that provides for unlimited terms, including unlimited terms disguised as limited terms. The Court failed, however, in either case to describe what such attempts might resemble. Each of these three threads warrants further discussion.

A. Lost in Unfettered Discretion

The Court is unquestionably right to defer to Congress in matters that the Constitution expressly grants Congress the authority to regulate. To do more might require the Court to engage in difficult line drawing, e.g., how long does “limited Times” actually mean? Moreover, balancing interests is a task better left to Congress than the Court. But deference has its limits. Since *Marbury v. Madison*, the Supreme Court’s role has been to interpret the Constitution and inspect congressional power.¹⁷⁰ The doctrine of judicial review,¹⁷¹ although not explicitly

¹⁶⁵ *Id.* at 889.

¹⁶⁶ *Id.* (“A well-functioning international copyright system would likely encourage the dissemination of existing and future works.”). Justice Breyer again dissented, this time joined by Justice Alito. *Id.* at 899 (Breyer, J., dissenting).

¹⁶⁷ See *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003).

¹⁶⁸ See *id.* at 212.

¹⁶⁹ *Golan*, 123 S. Ct. at 885; *Eldred*, 537 U.S. at 196.

¹⁷⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”).

¹⁷¹ See generally Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (discussing the role of judicial review in constitutional interpretation); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003); Theodore W. Ruger, *“A Question Which Convulses a Nation”: The Early Republic’s Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing for a more clear

addressed in the Constitution, was established in *Marbury* as an implied, necessary power of the judicial branch, granted in order to maintain a balanced government and to uphold the “supreme Law of the Land.”¹⁷² As Chief Judge Marshall understood over two centuries ago, to scrutinize an act of Congress as against the Constitution is to perform the very duty imposed upon officers of the judiciary, whose role without such an imposition would be “worse than solemn mockery.”¹⁷³ Two centuries later, Chief Justice Roberts likewise reminds us: “[T]here can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.”¹⁷⁴ Whether it is under a strict scrutiny standard or a more relaxed deferential standard, this is the role of the judiciary and the Court must exercise it. As such, one might legitimately question whether the Court is exercising this role with respect to Congress’s enactment of copyright laws. In over two hundred and twenty years since the Copyright Clause was enacted, the Supreme Court has never found legislation passed pursuant to Congress’s authority unconstitutional.¹⁷⁵ The Court’s extreme

and consistent framework for the Court to conduct judicial review of legislative action); Arthur E. Wilmarth, Jr., *Evasive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 113 (2003) (noting the basic rationale for judicial review, as expressed in *Marbury*).

¹⁷² U.S. CONST., art. VI; see also Prakash & Yoo, *supra* note 171, at 887; James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (stating that a court should only declare an act of the legislature as void when “those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”). For arguments against or for a limited role of judicial review, see, for example, Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287, 292 (2000) (criticizing the Court’s *sua sponte* raising of constitutional issue as “violat[ing] basic principles of separation of powers” and “usurp[ing] the judgment of the executive branch about how to exercise its prosecutorial authority,” thus “exceed[ing] the appropriate judicial role in raising a major constitutional issue not presented by the parties that in no way concerned the jurisdiction of the federal courts to hear the matter.”); Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1556–1557 (1977) (distinguishing between constitutional issues regarding states’ rights versus federal power (federalism) and those related to individual rights (mostly arising out of the Bill of Rights), arguing that the former should not be within the jurisdiction of the courts).

¹⁷³ See *Marbury*, 5 U.S. (1 Cranch) at 180.

¹⁷⁴ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579–80 (2012).

¹⁷⁵ Judicial review is not judicial activism disguised. Judicial activism is a mostly pejorative term implying that the Court imposes its own judgment for that of Congress in striking down law enacted by the legislature. For definitions of judicial activism, see, for example, RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 211 (1985) (defining “judicial activism” as when judges act “contrary to the will of the other branches of the government,” thereby “taking power from the other branches”); Glendon Schubert, *A Functional Interpretation: Judicial Policy Making*, in *THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT* 17 (David F. Forte ed., 1972) (defining judicial activism as “whenever [a court’s] policies are in conflict with those of other major decision-makers”). Some examples of acts that have been described as activist include the Lochner Era pro-business free-market policies, the Warren Court’s expansion of civil rights during the 1960s, and recent court decisions undoing habeas corpus laws. See Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1083, 1094 (2002). Whether judicial activism is “good” or “bad” depends on how one views the court’s function. See Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1082 (1997) (“The extent to which judicial

deference to Congress in this area is troubling. The Court's deference in matters of policy cannot "become abdication in matters of law," nor can the Court's respect for Congress's policy judgments "extend so far as to disavow restraints on federal power that the Constitution carefully constructed."¹⁷⁶ Either Congress has been truly remarkable staying within the boundaries of its constitutional copyright authority—unlike it has been with any other constitutional grant of authority—or the Court has abdicated its duty to scrutinize congressional copyright acts.

As to line drawing, this is always a difficult task. The Constitution is necessarily vague. But the difficulty in drawing lines does not abrogate the Court's responsibility in drawing them in appropriate circumstances. Moreover, the Court need not necessarily draw a line in all cases. For example, the Court in *Eldred* might have reasonably concluded that extending the term an additional twenty years exceeded congressional authority, without stating precisely how long protection should last.¹⁷⁷

B. Lost in Questionable Grounding

In both *Eldred* and *Golan*, Justice Ginsburg relied heavily on Congress's concern about complying with international obligations.¹⁷⁸ In its most simple form, this argument is as follows: if the United States complies with international obligations, it will be better able to protect U.S. authors' rights abroad, and compliance will engender a respect for a strong international intellectual property regime protecting intellectual property rights. In *Eldred*, the international concern was the EU Term Directive.¹⁷⁹ In *Golan*, Congress passed Section 104A to comply with Berne's Retroactivity provision (even if only after, and because, the U.S. acceded to TRIPS).¹⁸⁰ In both of these cases, the Court said that so long as international commitments are present, Congress is justified in enacting copyright legislation.¹⁸¹ As the world leader in intellectual property production and export, the United

lawmaking is improper depends upon one's conception of the appropriate judicial role."). Professors Jeffries and Levinson argue that defining judicial activism is more nuanced and depends upon, among other things, whether the legislation takes away rights rather than extends rights. See John C. Jeffries, Jr., & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1211–1212 (1998).

¹⁷⁶ *Sebelius*, 132 S. Ct. at 2579; see also *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting) ("Although the Copyright Clause grants broad legislative power to Congress, that grant has limits. And in my view this statute falls outside them.").

¹⁷⁷ See, e.g., *Eldred*, 537 U.S. at 265 (Breyer, J., dissenting) ("Neither do I share the Court's aversion to line-drawing in this case. Even if it is difficult to draw a single clear bright line, the Court could easily decide (as I would decide) that this particular statute simply goes too far. And such examples—of what goes too far—sometimes offer better constitutional guidance than more absolute-sounding rules. In any event, 'this Court sits' in part to decide when a statute exceeds a constitutional boundary." (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting))).

¹⁷⁸ See *Eldred*, 537 U.S. at 205; *Golan v. Holder*, 132 S. Ct. 873, 894 (2012).

¹⁷⁹ See *Eldred*, 537 U.S. at 196.

¹⁸⁰ See *Golan*, 132 S. Ct. at 881–82.

¹⁸¹ See *id.* at 894.

States has obvious commitments in seeking strong global protection. But such concerns cannot trump the Constitution. Such international concerns must further the Copyright Clause's objective to "promote the Progress of Science."¹⁸² If Berne, TRIPS, or the European Union Copyright Term Directive require intellectual property protection that go beyond the limits of the Constitution, such laws must fail.

1. *The Relationship between treaties and the Constitution*—Under the Constitution, a treaty, like a federal statute, is part of the "supreme law of the Land."¹⁸³ Self-executing treaties (those that do not require implementing legislation) automatically become effective as domestic law immediately upon entry into force. Berne is not self-executing in the United States,¹⁸⁴ and it does not become effective as domestic law until implementing legislation is enacted, such as Section 104A.¹⁸⁵ While scholars debate the legal relationship between the U.S. Constitution and the treaties to which the United States is a party, "conventional wisdom is that constitutional provisions always trump treaty obligations."¹⁸⁶ Congress is powerless to do under a treaty what is strictly prohibited under the

¹⁸² See U.S. CONST. art. I, § 8, cl. 8.

¹⁸³ *Id.* art. VI, cl. 2.

¹⁸⁴ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 § 4(c), 102 Stat. 2853, 2855 (codified at 17 U.S.C. 104(c) (2014)). Congress made this clear in Section 104(c) of the Copyright Act of 1976, as amended by the BCIA, which provides:

No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

Id.

¹⁸⁵ The Uruguay Round Agreements Act was passed under the so-called fast track procedure. See, e.g., Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 633 (1994). Section 151 of the Trade Act of 1974 set forth specific procedures giving the President the ability to negotiate trade agreements with the understanding that Congress will either pass or reject the agreement without modification within ninety days. Trade Act of 1974, Pub. L. No. 93-618, § 151, 88 Stat. 1978, 2001 (codified at 19 U.S.C. 2211 (2014)). Section 161 of that Act requires the U.S. Trade Representative to keep members of Congress informed on the status of trade agreement negotiations and to consult on a continuing basis with the House Ways and Means Committee and the Senate Finance Committee. *Id.* at § 161, 88 Stat. at 2008 (codified at 19 U.S.C. § 2211 (2014)).

¹⁸⁶ William M. Carter, Jr., *Rethinking the Constitution-Treaty Relationship: A Reply to Remy Z. Levin & Paul Chen*, 10 INT'L J. CONST. L. 261, 261 (2012). Others contend that "characterizing this relationship in absolutist terms is inaccurate and misleading: while the Constitution does sometimes override treaty obligations, international law and domestic constitutional law sometimes interact in a dialogic manner, with treaty obligations and constitutional norms operating to inform or 'adjust' one another." *Id.* (describing the argument of Remy Z. Levin and Paul Chen). "[T]he relationship is a more nuanced process of 'mutual adjustment' between treaties and the Constitution than is commonly understood." *Id.*

Constitution.¹⁸⁷ Accordingly, the Court must (1) ensure that “international concerns” do not trump the Constitution, and only then can they (2) determine whether these international concerns justify the action taken by Congress. The Court paid lip service to the former; it simply avoided inquiry into the latter, relying solely on statements by Congress without examining those statements.

2. *American Exceptionalism Undercuts the Court's Reliance on U.S. Compliance with International Obligations*—The Court's reliance on Congress's international concerns in both *Eldred* and *Golan* seems misdirected. This is not to suggest that international obligations are not relevant or significant. Certainly they are. Technological innovations, the disappearance of national borders, and the need to protect the United States' position as the world's leader in intellectual property make international concerns so. In *Eldred*, however, the international concerns did not rise to the level of an international treaty obligation.¹⁸⁸ Rather, the CTEA was based upon a European Union Directive that increased protection for *EU members*.¹⁸⁹ The U.S. was not *required* to also increase protection (at least not as part of its international obligations).¹⁹⁰ Thus, reliance on this as justification to extend domestic copyright protection seems weak.¹⁹¹

In *Golan*, the Court relied on statements from Congress that the potential of a trading partner bringing a TRIPS-related complaint justified Section 104A.¹⁹² In particular, Justice Ginsburg acknowledged that the difference between 1989, when the United States acceded to Berne with its “minimalist approach,” and 1994, when Congress ultimately passed Section 104A to comply with Berne's Retroactivity provision, was TRIPS' enforcement mechanism.¹⁹³ In other words, Congress passed Section 104A after the U.S. acceded to TRIPS, rather than Berne, because TRIPS had “teeth.” Certainly, the dispute settlement mechanism distinguishes TRIPS from other international intellectual property treaties. By being subject to

¹⁸⁷ See *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (finding that the Treaty Clause does not permit the circumvention of constitutional limits). *But see* *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (finding that the Treaty Clause permits Congress to do what is beyond its enumerated Article I powers); Graeme B. Dinwoodie, *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355, 357–59 (2007) (arguing that it might be appropriate to allow intellectual property law to be made via treaty when it could not be enacted as domestic legislation).

¹⁸⁸ See *supra* Part II.A.

¹⁸⁹ See *supra* Part II.A.

¹⁹⁰ See *supra* Part II.A. The EU did limit increased term protection for non-EU authors to those countries that provided reciprocal treatment. Thus, even though not mandated by international agreement or treaty, as say Berne or TRIPS, a policy argument—as opposed to an international mandate—can justify the CTEA.

¹⁹¹ Of course, even if not required by international treaty, the EU would provide extended protection only to those countries that provided reciprocal treatment. Thus, given the desire to give American authors greater protection abroad, the United States was, in fact, required to provide at least such protection, but only to the European Union. Whether this might have violated TRIPS most-favored nation principle is open to debate.

¹⁹² *Golan v. Holder*, 132 S. Ct. 873, 881–82 (2012).

¹⁹³ *Id.*

an elaborate enforcement framework, hailed as the “crown jewel” of the entire WTO system,¹⁹⁴ TRIPS represented a significant departure from Berne and other multilateral intellectual property agreements. The irony here is that in *Eldred* there was no international obligation and in *Golan*, the U.S. had an obligation under Berne to implement Article 18 but failed to do so for over five years and only implemented it contemplating possible retaliation from member countries filing WTO complaints. Nevertheless, to those untrained in or unfamiliar with international law, grounding discretion on international obligations has force. However, the argument has less force in view of the U.S.’s lack of compliance with its international intellectual property obligations, where the U.S. has been “exceptional,” playing by its own rules.

This American exceptionalism takes on a number of different forms. Harold Koh describes it as “instances when the United States proposes that a different rule should apply to itself and its allies from the one that should apply to the rest of the world.”¹⁹⁵ Examples of this form include the United States’ treatment of the International Criminal Court, the Kyoto Protocol on Climate Change, and the execution of juvenile offenders or persons with mental disabilities.¹⁹⁶

Michael Ignatieff defines American exceptionalism as referring to the

. . . ways in which the United States actually *exempts itself* from certain international law rules and agreements, even ones that it may have played a critical role in framing, through such techniques as noncompliance; nonratification; ratification with reservations, understandings, and declarations;

¹⁹⁴ Sanjeev Davé, *TRIPS: International Trademark Law That Promotes Global Trade*, 12 J. CONTEMP. LEGAL ISSUES 458, at 459 (2001). See, e.g., Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, 30 U. PA. J. INT’L L. 1133, 1134 (2009); Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreements*, 96 AM. J. INT’L L. 561, 583 (2002). Commentators have described the DSU as including

a series of remedial steps for the DSB to take in response to a violation, leading to the ultimate sanction of retaliation by a complainant country against the offending country if it fails to comply. First, the violating country is afforded a “reasonable period of time” to implement the WTO recommendations, which implementation typically consists of the country bringing its law into compliance. As a suggested guideline, the time for implementation should not exceed fifteen months, although “the time may be shorter or longer, depending upon the particular circumstances.”

Edward Lee, *Measuring TRIPS Compliance and Defiance: The WTO Compliance Scorecard*, 18 J. INTELL. PROP. L. 401, 407 (2011) (citations omitted).

¹⁹⁵ Harold Hongju Koh, *America’s Jekyll-and-Hyde Exceptionalism*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 111, 116 (Michael Ignatieff ed., 2005).

¹⁹⁶ *Id.* at 116–17. Professor Koh also mentions additional examples, including “declining to implement orders of the International Court of Justice with regard to the death penalty, or claiming a Second Amendment exclusion from a proposed global ban on the illicit transfer of small arms and light weapons.” *Id.* at 117. He goes on to note that “[i]n the post-9/11 environment, further examples have proliferated: particularly, America’s attitude toward the global justice system, and holding Taliban detainees on Guantanamo without Geneva Convention hearings.” *Id.*

the non-self-executing treating doctrine; or the latest U.S. gambit, unsigning the Rome Statute of the International Criminal Court (ICC).¹⁹⁷

There are at least two other noted forms of American exceptionalism: (1) America's legal self-sufficiency, i.e., the idea that "practices of foreign countries are irrelevant to U.S. constitutional interpretation" and (2) American double standards, "whereby the United States judges itself by different standards from those it uses to judge other states, and judges its friends and its enemies by different standards."¹⁹⁸

As pertinent here, the United States has acted in "exceptional" ways in complying with its international intellectual property obligations. Paradoxically, the United States is simultaneously both a leader and an outlier in promoting and enforcing intellectual property rights. Even though the United States had acceded to Berne, only after remaining outside the then-premier international copyright treaty for over a century, and the United States was the major force behind TRIPS, the Court's praise of "unstinting adherence to" Berne and TRIPS was curious, at best, or ill-informed, at worst. Already noted is the United States' initial refusal to comply with Berne. The record regarding TRIPS is more glaring.

The United States has been a TRIPS member, subject to the treaty's obligations, since its creation in 1994.¹⁹⁹ In the first fifteen years of TRIPS/WTO dispute settlements, there have been twenty-nine TRIPS-related complaints, of which all but eight were resolved without further action.²⁰⁰ Of the eight matters that went to a WTO panel for decision, all but one found at least one TRIPS violation.²⁰¹ Significantly, all of the offending countries *but one* enacted changes to their laws to bring the offending laws into compliance.²⁰² The lone country not to implement WTO panel adverse decisions was the United States—and it has failed to comply twice, the only two times it has been found to violate TRIPS.²⁰³ This

¹⁹⁷ *Id.* at 113 (explaining Michael Ignatieff's definition).

¹⁹⁸ *Id.* at 113. Not all countries have the power to be "exceptional." Professors Goldsmith and Posner argue that countries will (or will not) follow international law according to their own self-interest. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3, 7–10 (2005). Posner and Goldsmith posit that states act rationally. See *id.* Thus, states comply with international obligations and norms to promote their national interests, and under this, stronger states, such as the United States, have more freedom to depart from WTO and international obligations. Their theory raises larger issues, such as whether TRIPS or other international treaties have the force of law, and whether compliance with treaty obligations should be viewed as a formal obligation or simply an opportunity for countries to decide whether compliance with such obligations would further the country's own self-interest. These issues are not within the scope of this article.

¹⁹⁹ *Member Information: United States of America and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26# (last visited Jan. 24, 2016).

²⁰⁰ Lee, *supra* note 194, at 405.

²⁰¹ *Id.*

²⁰² See *id.*

²⁰³ *Id.* "The U.S. has not corrected its violations in the Section 110(5) and the Havana Club Rum disputes. The average time it took the offending countries, other than the U.S., to correct their violations was less than a year (10.4 months)." *Id.* at 411–12. It has been fifteen and fourteen years—and counting—for the United States to comply. *Id.* at 412. See also *Dispute Settlement: Disputes by Agreement*,

Article's contention is not that the United States should have implemented (or should implement) these changes.²⁰⁴ Rather, it is that the United States' claim of unstinting adherence to its international obligations is suspect, and upon closer scrutiny the Court may have found such claims wanting.

3. *The 1790 Act as an Additional Justification?*—To be fair, the Court did not rest solely on Congress's claims of international concerns in finding the CTEA and Section 104A constitutional; the Court also relied on congressional practice and history, including the 1790 Act, subsequent copyright acts, and decisions interpreting patent grants.²⁰⁵ This Article's primary criticism here is that the Court relied on the 1790 Act at all. The 1790 Act was the first federal scheme protecting copyright.²⁰⁶ Prior to the 1790 Act, there existed no express federal recognition of author's rights. Arguably, no public domain existed until a copyright scheme was in place.²⁰⁷ If so, then it is odd to suggest that the first act pulled works out of the public domain.²⁰⁸

As to the Court's reliance on other previous extensions, Justice Stevens observed that repeated, unconstitutional acts by Congress do not obviate the need to challenge the constitutionality of a congressional action in other appropriate cases.²⁰⁹ The Court never had occasion to review those acts. At most, previous extensions support the contention that *those* extensions may have been constitutional; they do not inevitably lead to the conclusion that subsequent extensions are. In addition, as explored further below, even if the earlier acts were

WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26# (last visited Jan. 24, 2016) (listing all of the WTO disputes and describing the outcome of the cases).

²⁰⁴ Indeed, elsewhere I have cautioned against the United States implementing international obligations that are constitutionally suspect or inappropriately limit its discretion in important domestic areas. See Donald P. Harris, *TRIPS' Rebound: An Historical Analysis of How the TRIPS Agreement Can Ricochet Back Against the United States*, 25 NW. J. INT'L L. & BUS. 99, 102 (2004).

²⁰⁵ See *Golan v. Holder*, 132 S. Ct. 873, 884–86 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 200–03 (2003).

²⁰⁶ See Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124.

²⁰⁷ See, e.g., Boyle, *supra* note 61, at 52 (“Like the environment, the public domain must be ‘invented’ before it is saved.”).

²⁰⁸ Additionally, the Court relies on evidence that works were pulled from the public domain via various private bills and court rulings following the 1790 Act. See *Golan*, 132 S. Ct. at 876, 886 (stating that “[h]istorical practice corroborates our reading of the Copyright Clause to permit full U.S. compliance with Berne,” and thus supporting the protection of previously unprotected works”). But only one of these listed instances, *Evans v. Jordan*, explicitly involved restoration of protection after an expired term. See *id.* (citing *Evans v. Jordan*, 13 U.S. (9 Cranch) 199 (1815)). The other instances cited by the Court as involving retroactive protection are distinguishable. In three of the private bills, copyright was restored to works that previously had been in the public domain, but not due to term expiration. See *id.* at 886–87 (citing, among others, *McClurg v. Kingsland*, 42 U.S. 202 (1843); Act of Sept. 25, 1941, ch. 421, 55 Stat. 732 (1941); Act of Mar. 3, 1893, ch. 215, 27 Stat. 743 (1893)). The private bills concerning patents were bills that retroactively protected patents when those patents were invalidated because of an accident, inadvertence or mistake. See *id.* at 887 (citing Act of July 3, 1832, ch. 162, § 3, 4 Stat. 559, 559).

²⁰⁹ See *Eldred*, 537 U.S. at 235 (Stevens, J., dissenting).

constitutional, subsequent acts can fail as, in the aggregate, they, in conjunction with the earlier acts, may result in a perpetual copyright.

C. Lost in a Dubious Promotion of “the Progress of Science”?

The *Golan* Court’s finding that Section 104A “promotes Progress” is even less persuasive. Conceding that increased retroactive protection could not provide incentives to create new works, the Court announced that dissemination of works can also “promote Progress.”²¹⁰ Yet generally, copyright protection results in less dissemination, as increased prices drive down demand.²¹¹ Moreover, the works granted restored protection were in the public domain, free for public access and dissemination. Thus, the Court’s justification for dissemination of existing works leaves much to be desired.

Perhaps Justice Ginsburg’s closest explanation is her statement (relying on copyright industry representatives’ statements) that “full compliance with Berne . . . would expand the foreign markets available to U.S. authors and invigorate protection against piracy of U.S. works abroad . . . , thereby benefitting copyright intensive industries stateside and inducing greater investment in the creative process.”²¹² But even here, the logic is thin. For one, new markets abroad certainly lead to dissemination of works *abroad*. It does nothing for *domestic* dissemination. It is difficult to imagine the Framers of the Constitution drafted the 1790 Copyright Clause with this in mind (particularly as the U.S. failed to protect foreign works until 1891).²¹³

More likely, Justice Ginsburg believed that increased revenue from works disseminated abroad would encourage domestic authors to increase the production of works at home. But this ignores two points. First, increasing production for domestic works relates to creation, not dissemination, and the Court expressly rested its holding on dissemination.²¹⁴ Second, even if furthering dissemination of works, either at home or abroad, the Constitution and “traditional understanding” speak in terms of protecting authors, not the “noncreative disseminators” that Section 104A seeks to protect.²¹⁵ As Professor Gordon observes, it is not that dissemination is unimportant to progress; rather it is important only because it aids

²¹⁰ *Golan*, 132 S. Ct. at 889.

²¹¹ *Id.* at 900 (Breyer, J., dissenting) (citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 68–70, 213–14 (2003)).

²¹² *Id.* at 889.

²¹³ *See, e.g.*, Tyler T. Ochoa, *Protection for Works of Foreign Origin Under the 1909 Copyright Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L. J. 285, at 291 (2010). Section 104A also might result in dissemination of foreign works in the U.S. Here, however, we would have to believe that renewed protection of works increased incentives for foreign authors to disseminate works in the U.S. more than free public domain access would. This is doubtful. Even more, as mentioned above, revenues to foreign authors seems far removed from what the Framers intended under the Copyright Clause.

²¹⁴ *See Golan*, 132 S. Ct. at 888–89.

²¹⁵ Wendy J. Gordon, *Dissemination Must Serve Authors: How the U.S. Supreme Court Erred*, REV. OF ECON. RES. ON COPYRIGHT ISSUES, August 3, 2013, at 1, 4.

in inducing disseminators to pay authors for creations to be disseminated.²¹⁶ In other words, dissemination contributes to authors' incentives; absent this, dissemination for the sole benefit of disseminators is outside the goal of copyright. Section 104A provides incentives for disseminators to distribute the works, and allows them to reap rewards for increased or renewed protection (hence, heavy lobbying by publishers and other noncreative disseminators).²¹⁷ It does not assist in authorial incentives, and it is thus an improper ground upon which to uphold the Act's constitutionality.

D. Lost in an Unlimited "Limited Time": A Perpetual Copyright by Another Name?

The final criticism is trained on the Court's "limited Times" analysis and whether Congress created perpetual copyrights. The Court took pains in both *Eldred* and *Golan* to distinguish those facts from the "hypothetical legislative misbehavior" of a perpetual copyright scheme.²¹⁸ The Court suggested that if the scheme was a perpetual copyright by another name, the scheme would be unconstitutional.²¹⁹ But, according to the Court, neither the *Eldred* nor the *Golan* petitioners could support such a claim.²²⁰

The Court summarily rejected the *Golan* petitioners' argument that works in the public domain had already enjoyed a limited term (of zero), and throughout the opinion remarked that Section 104A did not extend new protection to works that had fallen into the public domain because their term expired.²²¹ The *Golan* Court viewed the public domain as consisting only of works that enjoyed a full and fair term of protection.²²² The Court chided the petitioners for implying that Congress was trying to surreptitiously evade the "limited Times" limitation, stating that there was no congressional "design to move stealthily towards a regime of perpetual copyright."²²³ The Court was correct, of course, in declaring that each act by itself did not evince a regime of perpetual copyright. But this misses the point. The Court failed to appreciate that a perpetual copyright might comprise not only a copyright with an unlimited term, but also a copyright with a finite term perpetually extended. By looking solely to each specific term, the Court looked past this second form of a perpetual copyright.

The Court's statement also raises two questions. First, what does a "congressional design to move stealthily towards a regime of perpetual copyright" look like? Second, is such a regime unconstitutional? Ginsburg's opinions in both

²¹⁶ See *id.* at 5 ("[D]isseminators are honored in copyright only for the purpose of assisting authorial incentives").

²¹⁷ See *id.*

²¹⁸ *Golan*, 132 S. Ct. at 885; *Eldred v. Ashcroft*, 537 U.S. 186, 199–200, 209–10 (2003).

²¹⁹ See *Eldred*, 537 U.S. at 241–42 (Stevens, J., dissenting) (arguing that the decision allowed Congress to extend existing monopoly privileges *ad infinitum*, creating a perpetual copyright).

²²⁰ See *Eldred*, 537 U.S. at 209–10; *Golan*, 132 S. Ct. at 885.

²²¹ See, e.g., *Golan*, 132 S. Ct. at 882.

²²² See *id.* at 885.

²²³ See *id.*

Eldred and *Golan* suggest that the answer to the second question is yes, although the opinions could have been clearer. The answer to the first question is even less clear.

A “congressional design” might begin by gradually but purposefully extending the term of copyright. The history of copyright term extensions is illustrative. As noted earlier, when the Copyright Clause was enacted, the copyright term was fourteen years, with a possible renewal for another fourteen years.²²⁴ Over the course of the next two centuries, the term gradually increased from fourteen years (1790)²²⁵ to twenty-eight years (1831),²²⁶ to fifty-six years (1909),²²⁷ to life of the author plus fifty years (1976),²²⁸ to its current term of life of the author plus seventy years (1998).²²⁹ By itself, this may have little significance. But this expansion stands in stark contrast to the patent term, which is also constrained by the IP Clause’s “limited Times” prescription. The patent term, as did the copyright term, began at fourteen years (1790).²³⁰ Unlike the copyright term’s tremendous increase in the ensuing two centuries, the patent term was extended twice—once in 1861 to seventeen years,²³¹ then in 1994 to its current term of twenty years.²³²

The copyright term’s spectacular expansion might not, standing alone, be indicative of a stealthy design to achieve a perpetual copyright. However, the ability of Congress to extend *existing* copyright terms changes the very nature of copyright term limits. If a term was set to expire, and Congress, for whatever reason, extended the term, it could do so repeatedly and indefinitely. Allowing Congress to

²²⁴ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802).

²²⁵ *Id.*

²²⁶ Act of February 3, 1831, ch. 16, §§ 1–2, 4 Stat. 436–37.

²²⁷ Act of March 4, 1909, ch. 320, Pub. L. No. 60-349, § 23, 35 Stat. 1075, 1080.

²²⁸ Copyright Act of 1976, ch. 3, Pub. L. No. 94-553, § 302, 90 Stat. 2572, 2572 (codified as amended in scattered sections of 17 U.S.C.).

²²⁹ 17 U.S.C. § 302 (2012).

²³⁰ Act of April 10, 1790, ch. 7, § 1, 1 Stat. 109, 109–110.

²³¹ Act of March 2, 1861, ch. 88, § 16, 12 Stat. 246, 249.

²³² 35 U.S.C. § 154(a)(2) (2012). The original term of patents actually provided for a term not to exceed fourteen years. Act of April 10, 1790, ch. 7, § 1, 1 Stat. at 109–10. It is not clear whether patents were actually granted for a term less than fourteen years. As for the change in terms from seventeen years to twenty years, the change may not have amounted to much of a change at all. The seventeen-year grant was measured from the time the patent was issued, while the twenty-year term is measured from the time the patent application is filed. Act of March 2, 1861, ch. 88, § 16, 12 Stat. at 249; 35 U.S.C. § 154(a)(2). Because patent applications take about three years to prosecute, these terms provided for similar protection.

The difference between the patent term and the copyright term might owe itself to the differences in subject matter protected under each. It is plausible that Congress could value inventions as more useful to society and thus believe this intellectual property should fall into the public domain more quickly. It is also true that patent protection is considered significantly stronger than copyright protection, justifying a shorter term. Neither of these explanations, however, explain why the first copyright and patent terms were equal, nor do they adequately justify why the copyright term has grown exponentially longer than the patent term.

extend existing monopoly privileges *ad infinitum* could resemble a perpetual copyright.²³³ This was the petitioner's argument in *Eldred*.²³⁴

The stealthy design might also include the ability to remove works from the public domain, perhaps for a limited number of reasons, such as those found in Section 104A. Rather than just further protecting existing copyrights, giving new terms to public domain works allows for the extension of copyright terms for an unlimited duration. This was the petitioners' argument in *Golan*.²³⁵

The design would be complete, it might be argued, if Congress were permitted to not only remove works from the public domain, but also to provide new terms to public domain works *that have already expired*. Admittedly, *Golan* did not go this far, and one might seek solace by limiting the Court's decisions to its precise facts and to Section 104A's express limitations for restoring works that fell into the public domain for one of three specific reasons—none of which was term expiration.²³⁶ The works restored under Section 104A, as Ginsburg repeatedly made clear, never received *any* (or full) protection.²³⁷ Unfortunately, the Court's broad language leaves open the possibility that Congress can withdraw works from the public domain for any reason, including term expiration. Justice Ginsburg was vague in explaining just how far-reaching Congress's authority under the Copyright Clause is, implying that Congress reserves the right to remove works from the public domain *for any reason*. As mentioned above, in various parts of the opinion, Ginsburg points to the wide latitude Congress is permitted. For example, when

²³³ See *Eldred v. Ashcroft*, 537 U.S. 186, 240–42 (2003) (Stevens, J., dissenting). The Court concluded that Congress had a rational basis for extending existing copyrights—doing so would create incentives for publishing and distributing these works in new forms and through new media. *Id.* at 207 (majority opinion). In view of the digital environment, the Court might be right. A contrary argument is that the Court's stated goal could be accomplished by others who take such works once they enter the public domain, allowing these works to enter digital markets perhaps more easily than by providing increased protection.

²³⁴ See *id.* at 240–42 (Stevens, J., dissenting).

²³⁵ See *id.*

²³⁶ See *Eldred*, 537 U.S. at 209–10. The Act provided for restoration for works that fell into the public domain for (1) failure to comply with U.S. formalities (e.g., notice), (2) lack of federal protection of a particular subject matter, i.e., sound recordings, and (3) lack of copyright relations with the country where the work was first published. 17 U.S.C. § 104A(a)(1)(A), (h)(6)(C)(i)–(iii) (2012).

²³⁷ *Golan*, 132 S. Ct. at 883. These works thus can be distinguished from those works whose terms had expired. Title 17 defines a “restored work” to include “an original work of authorship” that is “not in the public domain in its source country through expiration of [its] term of protection.” 17 U.S.C. § 104A(h)(6)(B). This provision tracks Berne's denial of protection for any work that has “fallen into the public domain in the country of origin through the expiry of the term of protection.” Berne Convention, *supra* note 123, art. 18(1). Neither Berne nor TRIPS require works that have fallen into the public domain after term expiration to be restored. Berne, article 18(2) provides: “If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.” Berne Convention, *supra* note 123, art. 18(2). TRIPS provides: “There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.” TRIPS, *supra* note 133, art. 70(3). Of course, TRIPS also incorporates Berne, so the retroactivity provision for certain works falling into the public domain still applies. TRIPS, *supra* note 133, art. 9(1).

accepting international concerns as a justification for enacting the legislation, Ginsburg remarked that “[g]iven the authority we hold Congress has, we will not second-guess the political choice Congress made.”²³⁸ Later, Ginsburg remarked that “the Clause ‘empowers Congress to determine the intellectual property regimes that . . . will serve the ends of the Clause.’”²³⁹ And, in concluding that the legislation was a rational exercise of congressional authority, Ginsburg again made clear the deference afforded to Congress: “[w]e have no warrant to reject the rational judgment Congress made.”²⁴⁰

The Court’s extreme deference is problematic. In deferring to Congress, the Court failed to fully appreciate that copyright terms that are not expressly infinite can also evade the “limited Times” prescription. More troubling than either the Court’s deference or the Court’s narrow ruling, the Court provides no guideline to evaluate whether future terms are beyond the “limited Times” constraint. Prior to *Eldred*, scholars implored the Court to provide some direction to Congress in delineating the contours of Congress’s copyright powers.²⁴¹ The *Eldred* Court failed to do so. Despite additional prodding, the Court again failed to do so in *Golan*. This has disturbing consequences, because history has demonstrated that Congress has little compunction in not continuing its march toward increased, even perpetual protection.²⁴² Indeed, in view of the Court’s extreme deference, Congress has little reason not to.²⁴³

²³⁸ *Golan*, 132 S. Ct. at 887.

²³⁹ *Id.* at 888 (citing discussion of the Progress Clause found in *Eldred*, 537 U.S. at 186, 222).

²⁴⁰ *Id.* at 889.

²⁴¹ See, e.g., Pollack, *supra* note 12, at 338–39 (optimistically hoping that the Court would use *Eldred* to construe the Progress Clause “because Congress needs assistance with this important area of legislation”); see also Solum, *supra* note 65, at 30–31 (arguing that “limited” cannot be defined unless placed in context). As Professor Solum reasonably argues, that context should be in terms of what the Framers believed, which would be “in the context of the time that individual human beings spend as authors—that is, limited with respect to a period that only very, very rarely would exceed seventy years.” *Id.*

²⁴² As Justice Breyer cautioned, however, Congress might not be the only actor seeking everlasting protection. *Eldred*, 537 U.S. at 256 (Breyer, J., dissenting) (“I am not certain why the Court considers it relevant in this respect that “[n]othing . . . warrants construction of the [1998 Act’s] 20-year term extension as a congressional attempt to evade or override the “limited Times” constraint.” (alterations in original) (citation omitted) (quoting the majority opinion)). Of course Congress did not intend to act unconstitutionally. But it may have sought to test the Constitution’s limits. After all, the statute was named after a Member of Congress who, the legislative history shows, “wanted the term of copyright protection to last forever.” See 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono); see also *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et al. Before the H. Subcomm. on Courts and Intellectual Property of the H. Judiciary Comm.*, 104th Cong. 93–94 (1995) [hereinafter *House Hearings*] (statement of Rep. Sonny Bono) (questioning why copyrights should ever expire); *id.* at 94 (statement of Rep. Howard Berman) (“I guess we could . . . just make a permanent moratorium on the expiration of copyrights.”); *id.* at 230 (statement of Rep. Martin Hoke) (“Why 70 years? Why not forever? Why not 150 years?”); *id.* (statement of the Register of Copyrights Marybeth Peters) (stating that during Copyright Office proceedings, “[t]he Songwriters Guild suggested a perpetual term”); *id.* at 234 (statement of Quincy Jones) (“I’m particularly fascinated with Representative Hoke’s statement. . . . [W]hy not forever?”); *id.* at 277 (statement of Quincy Jones) (“If we can start with 70, add 20, it would be a good start”).

²⁴³ See Pollack, *supra* note 12, at 339 (“Congress has abandoned earlier caution. The first Congress stepped gingerly into this area, but more recent sessions of Congress have enacted drastic changes with relative rapidity and little empirical study.” (citations omitted)).

IV. A NEW APPROACH TO EVALUATE COPYRIGHT LEGISLATION

A. Looking Beyond Rational Basis Review

In this part, I propose a different framework for evaluating future copyright legislation. The real question, of course, is what should be the appropriate amount of judicial deference the Court should afford Congress? By now, the three predominant standards of constitutional judicial review are familiar: strict scrutiny, intermediate scrutiny, and rational basis.²⁴⁴ The least deferential standard, strict scrutiny, requires narrow tailoring to achieve a compelling government purpose.²⁴⁵ The Court applies this standard when reviewing legislation that significantly abridges a fundamental right,²⁴⁶ or that involves a suspect classification such as race, national origin or religion.²⁴⁷

A slightly more deferential standard, intermediate scrutiny requires that Congress demonstrate that the regulation at issue both serves a significant governmental interest and leaves open ample alternative channels for communication of the information.²⁴⁸ This standard might alternatively demand a substantial government interest that is directly advanced by the challenged limitation, and the limitation may not be more extensive than necessary to serve the asserted substantial government interest.²⁴⁹ The Court applies intermediate scrutiny to constitutional challenges of equal protection based on gender and sex

²⁴⁴ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring). Political questions, where “the Court defers entirely to Congress,” might also be considered a standard of judicial review. See *Solum*, *supra* note 65, at 63.

²⁴⁵ Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1781 n.2 (1996); see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 n.10 (1978) (Brennan, J., concurring in part and dissenting in part).

²⁴⁶ The Court has, for example, found that interference with the right to marry and interference with interstate migration require strict scrutiny analysis. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (establishing that the right to marry is fundamental); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (applying strict scrutiny to the abridgement of the fundamental right to marry); *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969) (quoting *United States v. Guest* 383 U.S. 745, 757–58 (1966)) (applying strict scrutiny to legislation interfering with interstate migration); *Shauhin A. Talesh, Welfare Migration to Capture Higher Benefits: Fact or Fiction?*, 32 CONN. L. REV. 675, 676 (2000).

²⁴⁷ See *Bakke*, 438 U.S. at 290–91. A suspect class includes a class that has experienced a history of discrimination, is definable as a group based on obvious, immutable, or distinguishing characteristics, is a minority or politically powerless, and has characteristics that have little relationship to the government’s policy aims or the ability of the group’s members to contribute to society. See *id.* at 361 (majority opinion), 438 (Brennan, J., concurring in part and dissenting in part). Other suspect classes might, according to the Court, include alienage, age, and wealth. See *id.* at 290 (majority opinion).

²⁴⁸ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455–56 (2002) (Souter, J., dissenting) (quoting *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); see also Gregory Russel Mier, Madsen v. Women’s Health Center: *Another Battle in the Endless War Over Abortion*, 40 LOY. L. REV. 979, 992 (1995).

²⁴⁹ See Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 131–35 (2002). Professor Richard Epstein argues that this is the appropriate standard for review, based on the language of the Copyright Clause, which sets forth both the means and the ends of promoting the progress of science. *Id.*

discrimination,²⁵⁰ as well as to First Amendment challenges to content-neutral regulations.²⁵¹ Finally, rational basis is the Court's default level of scrutiny, which applies when neither a suspect class nor a quasi-suspect class is involved, nor a fundamental right implicated.²⁵² Because the Court has done very little to define the scope of Congress's power under the Copyright Clause, we must extrapolate from the Court's thinking in *Eldred* and *Golan* and the Court's thinking about other constitutional powers.

In *Eldred*, the Court intimated the unlikelihood of straying outside Congress's Article I powers to define copyright limitations.²⁵³ The petitioners there offered the "congruence and proportionality" standard found in Congress's Fourteenth Amendment, Section 5 power.²⁵⁴ To withstand constitutional scrutiny under that standard, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."²⁵⁵ As applied to the Copyright Clause, petitioners argued that any term extension must be congruent and proportional to the goal of "promoting the Progress of Science."²⁵⁶ The Court rejected petitioners' effort to import into copyright jurisprudence this congruence and proportionality standard.²⁵⁷ The Court noted that it "[had] never applied that standard outside the § 5 context" and distinguished Section 5 authorization from copyright law authorization arising from Article I on the ground that "Section 5 authorizes Congress to *enforce* commands contained in and incorporated into the Fourteenth Amendment" while the Copyright Clause "empowers Congress to *define* the scope of the substantive right."²⁵⁸ The Court also rejected a heightened First Amendment scrutiny standard, believing that copyright's prohibition on protecting ideas and the fair use defense provided ample room for expressive

²⁵⁰ See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–26 (1982); *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting).

²⁵¹ See, e.g., *Alameda Books, Inc.*, 535 U.S. at 448–49 (majority opinion), 455–56 (Souter, J., dissenting); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997); *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

²⁵² See Sarah Finnane Hanafin, Note, *Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435, 436 n.8 (2011) (describing rational basis as the "default level" of review); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011) ("Historically, rational basis review has operated as a residual category—that is, if a classification does not receive heightened scrutiny, it receives rational basis review.").

²⁵³ See *Eldred v. Ashcroft*, 537 U.S. 186, 217–18 (2003). Thus, Professor Pollack's worthy suggestion to look to those constitutional amendments granting Congress power to enforce the amendments "by all Appropriate Legislation" (i.e., the Thirteenth, Fourteenth, Fifteenth, Eighteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments) would also be unavailing to the Court. See Pollack, *supra* note 12, at 350 & n.55.

²⁵⁴ See *Eldred*, 537 U.S. at 217–18 (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

²⁵⁵ *City of Boerne*, 521 U.S. at 520.

²⁵⁶ *Eldred*, 537 U.S. at 217–18.

²⁵⁷ See *id.* at 218.

²⁵⁸ *Id.*

conduct.²⁵⁹ The Court's rejection of these non-Article I standards counsel confining ourselves to Article I.

Perhaps the most natural Article I analogue is the Commerce Clause. Of Congress's constitutional powers, this Clause has received the most attention and is the most well-defined, albeit over a very long period of vacillating jurisprudence. It is noteworthy that Congress has relied on the Commerce Clause to pass other copyright-like legislation.²⁶⁰ Under the Commerce Clause, Congress has expansive powers and broad authority to regulate activities that affect interstate commerce.²⁶¹ The Court is most deferential when Congress exercises its Commerce Clause power. The leading case on Congress's Commerce Clause powers is *United States v. Lopez*.²⁶² Under *Lopez*, the Court applies a rational basis standard of review. Under this standard, the Court will uphold Congress's exercise of regulatory authority so long as there is a rational basis for believing that the activity has a substantial effect

²⁵⁹ *Id.* at 218–20.

²⁶⁰ See *United States v. Moghadam*, 175 F.3d 1269, 1277–78 (11th Cir. 1999); *United States v. Martignon*, 492 F.3d 140, 152–53 (2d Cir. 2007). Both the *Martignon* and *Moghadam* holdings suggested a dangerous precedent in legislative power: using the Commerce Clause (and other constitutional provisions) to grant copyright-like protection not otherwise allowable under the Copyright Clause. Through “creative citation[s],” namely finding the Copyright Clause to be merely affirmative and not restrictive, the Court opened the proverbial floodgates to copyright protection without bounds. See The Harvard Law Review Association, *Constitutional Law—Copyright Clause—Second Circuit Upholds Perpetual Anti-Bootlegging Protection Against Copyright Clause Challenge—United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007), 121 HARV. L. REV. 1455, 1462 (2008). Especially troubling is the use of the Commerce Clause to circumvent the “limited Times” provision. Using solely a Commerce Clause analysis unlimited by the Copyright Clause, future courts could conceivably extend protection terms indefinitely given that the protected subject matter had a substantial effect on interstate commerce. See *Moghadam*, 175 F.3d at 1275 (describing the current requirements for applicability of the Commerce Clause). In *Martignon*, the Second Circuit held that Congress “exceeds its power under the Commerce Clause by transgressing limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause.” *Martignon*, 492 F.3d at 149. The limiting “test” suggested in *Martignon* does very little to protect against such legislative power, which would “undermine the Constitution's very charge to promote the progress of the useful arts and sciences.” See Yavar Bathaee, Note, *A Constitutional Idea-Expression Doctrine: Qualifying Congress' Commerce Power When Protecting Intellectual Property Rights*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 441, 512 (2008). Under the *Moghadam* proviso that the text of Copyright Clause is not inherently limiting, courts could easily find that legislation fell outside the scope of its powers, thus passing the *Martignon* test and becoming eligible for a Commerce Clause analysis.

²⁶¹ See *United States v. Lopez*, 514 U.S. 549, 552–59 (1995); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573 (2012) (describing Congress's powers under the Commerce Clause as “expansive”). This precedent shows it is well established that Congress has broad authority under the Commerce Clause.

²⁶² See *Lopez*, 514 U.S. at 552–59.

on interstate commerce.²⁶³ Although it is less than clear, in both *Eldred* and *Golan*, the Court appears to rely on this standard.²⁶⁴

The Court's use of rational basis stands on solid ground. Both the Copyright Clause and the Commerce Clause regulate economic activity.²⁶⁵ Moreover, as both are Article I powers,²⁶⁶ Congress should have wide discretion, and the rationality supporting Congress's discretionary acts will be low. Applying a rational basis standard with respect to the CTEA and Section 104A, the Court's deference to Congress's judgment seems appropriate.

While the use of rational basis review is not unfounded, features of the Copyright Clause warrant a different standard.²⁶⁷ As more fully developed below,

²⁶³ See *Sebelius*, 132 S. Ct. at 2616. In *Sebelius*, the Court added gloss to this standard by holding that there must be pre-existing economic activity to which the regulation applies. See *id.* at 2586. Congress cannot order the activity for the purpose of regulating it. See *id.* ("The power to regulate commerce presupposes the existence of commercial activity to be regulated.")

²⁶⁴ See *Golan v. Holder*, 132 S. Ct. 873, 889 (2012) ("Considered against this backdrop, § 514 falls comfortably within Congress's authority under the Copyright Clause. Congress rationally could have concluded that adherence to Berne 'promotes the diffusion of knowledge.'" (citation omitted)); *id.* ("Congress determined that exemplary adherence to Berne would serve the objectives of the Copyright Clause. We have no warrant to reject the rational judgment Congress made."); *Eldred*, 537 U.S. at 213 ("The justifications we earlier set out for Congress' enactment of the CTEA . . . provide a rational basis for the conclusion that the CTEA 'promote[s] the Progress of Science.'"); *id.* at 204 ("Satisfied that the CTEA complies with the 'limited Times' prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress."). The Court's statements concerning Congress's lack of stealthy design is odd, though. The Court intimates that one would have to show purposeful conduct on the part of Congress to evade the limited Times' limitation. See *Golan*, 132 S. Ct. at 885; *Eldred*, 537 U.S. at 209. This, however, looks less like rational review and more like the Equal Protection race discrimination line of cases that started with *Washington v. Davis*, in which the Court held that disproportionate effect alone is not enough to sustain a claim of race discrimination and that proof of purposeful discrimination is the sine qua non of race discrimination under the Constitution. See *Washington v. Davis*, 426 U.S. 229, 241–42 (1976). While the legislative history of the acts at issue in *Eldred* and *Golan* provides some examples of congressional intent by mentioning the interests benefitted from the legislation (Disney and other major publishers and producers of works set to expire) and statements that Congress should look for ways to protect works in perpetuity without saying so (e.g., "forever less a day"), none of the evidence would be the smoking gun sufficient for a finding of purposeful intent to evade the limited Times' limitation. See *supra* Part III.C. Even conceding that the Court applied a rational basis test, one might question whether the approach might more accurately be described as employing a "toothless" rational basis standard, or one that does not look too hard at the statute's rationality. See, e.g., Pollack, *supra* note 12, at 377 (describing the government's rational basis approach as "toothless").

²⁶⁵ Copyright regulates activity related to the creation and dissemination of creative works, which involve the ability of copyright holders to economically exploit their works. See U.S.C. § 102(a) (2012) (listing categories of works subject to copyright protection, including motion pictures and sound recordings). The Commerce Clause, by definition, relates to commercial activity and the power to regulate commerce between states. See *Lopez*, 514 U.S. at 552–53.

²⁶⁶ U.S. CONST., art. I, § 8, cl. 3, 8.

²⁶⁷ This idea is touched on by Justice Breyer in his dissenting opinion, though Justice Breyer did not reject a rational basis review. *Eldred*, 537 U.S. at 244 (Breyer, J., dissenting). Rather, he thought rational basis might differ depending on the circumstances: "what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture." *Id.* Justice Breyer thus proposed a slightly more exacting rational basis test: "I would find that the statute

unlike the Commerce Clause, the Copyright Clause does not relate to purely commercial conduct. Among other things, copyright also regulates expression.²⁶⁸ Legislation regulating more than mere economic activity should be subject to a more exacting inquiry. Also, unlike the Commerce Clause—or any other Article I power—the Copyright Clause is unique as it is the only clause that “describes both the objective which Congress may seek and the means to achieve it.”²⁶⁹ The Clause grants the power to pursue a goal (“promote the Progress of Science . . .”), and limits that power by specifying the precise means to be employed (“by securing for limited Times to Authors . . . exclusive Right[s] . . .”).²⁷⁰ Failing to recognize this uniqueness reads a significant distinction out of the Constitution.²⁷¹

Moreover, in most cases, imprudent congressional action sanctioned by the Court’s rational basis deference can be remedied by the democratic process.²⁷² There should be uneasiness however, when that democratic process has been hijacked through industry capture, as arguably has been done by the copyright industry. For at least these reasons, something more than rational basis review is required.

B. Enter the Dormant Commerce Clause

If not rational basis, then what? An unthought-of but potentially useful alternative is to reason from the Court’s dormant Commerce Clause jurisprudence.²⁷³ The dormant Commerce Clause, which goes as far back as Chief Justice Marshall, is the notion that the Commerce Clause not only grants power to Congress, but also restricts the capacity of states to interfere with or burden

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.” *Id.* at 245.

²⁶⁸ See 17 U.S.C. § 102(a) (2012). Copyright does not protect ideas, but only the expression of ideas. *Id.* § 102(b); see *Baker v. Selden*, 101 U.S. 99, 105–07 (1880).

²⁶⁹ See *Goldstein v. California*, 412 U.S. 546, 555 (1973); Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1062 (2001).

²⁷⁰ U.S. CONST. art. I, § 8, cl. 8.

²⁷¹ See Pollack, *supra* note 12, at 379 (“In short, the choice of this odd textual format signals a much deeper original suspicion of legislative action pursuant to Article I, Section 8, Clause 8, than of legislative action taken under other congressional powers.”).

²⁷² See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”).

²⁷³ As the Court recently explained: “[t]he Commerce Clause provides that ‘Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States.’ U.S. CONST., art. I, § 8, cl. 3. Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citing *In re Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279 (1873); *Cooley v. Bd. of Wardens*, 153 U.S. (12 How.) 299, 318 (1852)).

interstate economic actors.²⁷⁴ Two theoretical justifications support the dormant Commerce Clause. The first is an economic efficiency rationale: the dormant Commerce Clause “ensures free trade among the states and thereby secures the associated economic benefits.”²⁷⁵ A second justification is that it protects out-of-state actors who lack a political voice but are nevertheless burdened by the state's regulation.²⁷⁶

The Court has devised two dormant Commerce Clause tests to ensure that states do not burden interstate commerce. One includes a virtual *per se* prohibition against overt state discrimination against out-of-state economic interests (with a few exceptions).²⁷⁷ “If a state’s law discriminates against out-of-state [persons], [the law] is subject to ‘the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.’”²⁷⁸ This test is rarely satisfied.²⁷⁹ The second test is a balancing test for laws that are formally neutral

²⁷⁴ The “dormant” nature of the Commerce Clause reflects the notion that “the Commerce Clause is always awake, even when Congress is asleep.” MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 92 (2012) (citing BORIS I. BITTKER, *BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE* 6–4 n.5 (1999)).

²⁷⁵ See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *YALE L.J.* 785, 795 (2001). This might also be thought of as preventing state protectionism. As Goldsmith and Sykes note:

Economic theory holds that when a jurisdiction undertakes to insulate its producers from competition through restrictions on the importation of goods and services, overall economic welfare declines as the losses to in-state consumers and out-of-state producers exceed the gains to the protected in-state producers. Protectionist policies nevertheless may be politically attractive in many cases because the beneficiaries are often well-organized groups of in-state firms. As mentioned above, the central purpose of the dormant Commerce Clause is to prevent such protectionism, and the primary judicial tool for effectuating this purpose is a prohibition on state regulations that discriminate against out-of-state actors.

Id. at 797 (citations omitted).

²⁷⁶ See, e.g., *United Haulers Ass’n, Inc.*, 550 U.S. at 361; *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008); *McBurney v. Young*, 133 S. Ct. 1709, 1719–20 (2013); Goldsmith & Sykes, *supra* note 275, at 795. Additionally, as Goldsmith and Sykes note:

A secondary justification for the dormant Commerce Clause is that it protects out-of-state actors who are burdened by a state's regulation but lack a voice in the political process that generates it. The difficulty with the process justification, however, is that it sweeps too broadly. Innumerable state laws affect outsiders, and no one thinks that all (or even most) of these laws violate the dormant Commerce Clause. What is needed is a way to distinguish legitimate from illegitimate out-of-state effects. Our economic perspective does just this by distinguishing between state regulations that enhance overall economic welfare despite their extraterritorial effects and state regulations that lower overall economic welfare. In this manner, we unify the efficiency and process justifications for the dormant Commerce Clause in a way that is consistent with much of the pertinent case law. The economic perspective also allows us to bring some theoretical coherence to the otherwise undertheorized notions of extraterritoriality and inconsistency that play an important role in the Internet cases.

Id. at 795–96 (citations omitted).

²⁷⁷ See *id.* at 788 (citations omitted).

²⁷⁸ *Id.* (citations omitted).

²⁷⁹ *Id.*

with respect to out-of-state actors, but that cast disproportionate burdens on interstate (as opposed to intrastate) commercial activity.²⁸⁰ Stated differently, “[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”²⁸¹ The test is a proportionality or balancing test, which measures the extent of the disproportionate burden on out-of-state actors against the putative benefits to legitimate state governmental interests. This test was first articulated in *Pike v. Bruce Church, Inc.*²⁸²

In *Pike*, the Court ruled that an order prohibiting a cantaloupe grower from transporting uncrated cantaloupes from Arizona to California for packing and processing constituted an unlawful burden upon interstate commerce.²⁸³ The statute at issue, the Arizona Fruit and Vegetable Standardization Act, required all Arizona grown cantaloupes to “be packaged in regular compact arrangement in closed standard containers.”²⁸⁴ Because Bruce Church, which had commercial farming operations in Arizona and California, transported cantaloupes grown in Arizona to California for processing and packaging, the statute required Bruce Church to build packing facilities in Arizona; the facilities would cost approximately \$200,000.²⁸⁵ The state official in charge of enforcing the statute argued that the statute did not impose a burden upon interstate commerce, but rather would merely regulate intrastate packing of goods destined for interstate commerce.²⁸⁶

The Court rejected this reasoning. It held that the statute affected interstate commerce because it required operations previously performed in California to be performed in Arizona.²⁸⁷ And, though the Court found that the statute was evenhanded, the burden imposed on commerce was clearly excessive to any local interest.²⁸⁸ In particular, while the state was pursuing a legitimate interest, i.e., protecting and enhancing the reputation of growers within the state,²⁸⁹ these interests were clearly outweighed by the burden imposed on Bruce Church.²⁹⁰ In addition to the considerable expense of building an Arizona packing plant, the

²⁸⁰ *Id.*

²⁸¹ *Id.* at 788–89 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

²⁸² *See Pike*, 397 U.S. at 142.

²⁸³ *See id.* at 146.

²⁸⁴ *See id.* at 138 (citing ARIZ. REV. STAT. ANN. § 3-503(C) (repealed effective 1994)).

²⁸⁵ *Id.* at 140.

²⁸⁶ *Id.* at 140 (according to *Pike*, “[a]rticles being made ready for interstate movement are not necessarily yet in interstate commerce. . .”).

²⁸⁷ *See id.* at 146.

²⁸⁸ *See id.*

²⁸⁹ *See id.* at 143.

²⁹⁰ *See id.* at 145. After deciding that a legitimate interest was involved, the Court looked to the burden imposed on interstate commerce. *See id.* at 142 (“If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”).

Court viewed the statute with skepticism, as it required Bruce Church to perform its business operations in Arizona when it could have performed its operations more efficiently in California.²⁹¹

The *Pike* test has appeal as a constitutional principle for thinking about the limits on copyright protection.²⁹² Unlike the Commerce Clause power to regulate, which Congress can exercise in any direction (i.e., increase commerce, reduce commerce, eliminate commerce), both the dormant Commerce Clause and the Copyright Clause are unidirectional: Congress can only “promote Progress” under the Copyright Clause, and under the dormant Commerce Clause states can only legislate to encourage interstate commerce, and are forbidden from burdening it.²⁹³ In that sense, copyright is more similar to the dormant Commerce Clause than to the general commerce power of Congress.

The dormant Commerce Clause and copyright legislation also share underlying concerns of interference with the democratic process and uneven participation. Absent the dormant Commerce Clause, states remain free to regulate when Congress has not spoken. This allows for decentralized regulation, which has many benefits.²⁹⁴ Specifically, “lower levels of government are better able to ascertain and implement the best regulatory policy for the local citizenry than the central government.”²⁹⁵ This is understandable. Variations exist with regard to state citizens’ cultural and religious backgrounds, and the costs and benefits of regulation often vary from state to state, justifying state autonomy.²⁹⁶

Decentralized regulation, however, has negative effects. Relevant here is the hijacking of the political process. Goldsmith and Sykes make this point:

[T]he political process in any jurisdiction may fail to pursue policies that are in the best interests of its citizens as a whole. Individuals and other entities with large stakes in a policy outcome will organize to influence it; those with smaller stakes often will not bother. Policies that are on balance undesirable may thus be enacted if the costs are diffused widely enough that resistance is ineffective.²⁹⁷

This, too, describes copyright legislation. Elsewhere, I have recounted the history of recent copyright legislation and how copyright holders and content providers have heavily influenced the political process; indeed, industry capture and public choice theory accounts for the spectacular expansion of copyright law

²⁹¹ *Id.* at 145.

²⁹² Admittedly, much of the Supreme Court’s dormant Commerce Clause cases have involved discriminatory and protectionist state legislation. *See* Goldsmith & Sykes, *supra* note 275, at 797–98.

²⁹³ *See* U.S. CONST. art. I, § 8, cl. 8; GREVE, *supra* note 274, at 93 (“The affirmative commerce power lends itself to a pro- or anticompetitive purposes: Congress may break monopolies or make them, liberate interstate commerce or restrict it, regulate commerce or balkanize it. The judicially enforced dormant Commerce Clause, in contrast, cuts in only one direction; regardless of its precise formulation, it mows down state-imposed obstacles to interstate commerce.”).

²⁹⁴ *See* Goldsmith & Sykes, *supra* note 275, at 796.

²⁹⁵ *Id.*

²⁹⁶ *See id.* at 796–97.

²⁹⁷ *Id.* at 797.

through legislative efforts, including the ever-increasing copyright term.²⁹⁸ The short story is that the Copyright Act was produced under intense lobbying from the copyright and content industry, with the near-complete absence of public interest representation. It is consequently not surprising that this led to a Copyright Act heavily slanted in favor of content providers and copyright owners, resulting in a “maximalist ideology of copyright”²⁹⁹ and a systemic bias against absent interests.³⁰⁰ As the Court polices this conduct with regard to state-to-state discrimination, so too should it do so with regard to copyright legislation.³⁰¹

Beyond the above similarities, both the dormant Commerce Clause and copyright reach more than economic regulation.³⁰² The dormant Commerce Clause, while unmistakably affecting commerce, is at the same time a federalism doctrine,³⁰³ an anti-circumvention rule,³⁰⁴ a state protectionist doctrine,³⁰⁵ and an extraterritoriality principle.³⁰⁶ It also promotes national union, i.e., political and economic integration.³⁰⁷ Copyright’s reach is vast. While principally regarded as

²⁹⁸ See Donald P. Harris, *The New Prohibition: A Look at the Copyright Wars Through the Lens of Alcohol Prohibition*, 80 TENN. L. REV. 101, 102, 131–35 (2012). There, I argue:

The legislative changes to the Copyright Act fit nicely with public choice theory. Public choice is the economic theory of interest group politics. The theory addresses the dynamic tension between ‘rent-seeking’ behavior of interest groups, who lobby government for special moneymaking privileges, and the desires of ordinary voters. The former fund campaigns, while the latter vote in them. To a large degree, politicians are beholden to both, but often must play them off against each other. Lobbyists succeed best when their interests can be protected by laws that might not be beneficial to the public, but are not so directly harmful that they motivate the public to vote against the politicians whose votes for protective legislation the lobbyists secure. As regards the copyright laws, the lobbyists were able to secure the legal protection they desired from the legislatures (in exchange for campaign money) but consumers were unlikely to vote against the legislators on this ground. From the legislator’s selfish short-term perspective, the best of all possible worlds is to have strong theoretical laws on the books, that keep getting stronger (hence drawing continuing interest group support), but to have the enforcement of those laws remain sporadic and isolated, so that consumers/voters do not react against the laws by organizing against them.

Id. at 134 (citations omitted).

²⁹⁹ *Id.* at 102.

³⁰⁰ See *id.* at 131–34.

³⁰¹ See, e.g., *Golan v. Holder*, 132 S. Ct. 873, 907 (2012) (Breyer, J., dissenting) (“[W]hen a copyright law is primarily backward looking the risk is greater that Congress is trying to help known beneficiaries at the expense of badly organized unknown users who find it difficult to argue and present their case to Congress. In *Eldred*, I thought this problem was severe . . . I cannot say that even here the problem, while much diminished, was nonexistent.” (citations omitted)).

³⁰² That is evident from the separate Clause given to patent and copyright protection within Article I, Section 8. See U.S. CONST. art. I, § 8, cl. 8. Had the Framers envisioned author and inventor rights as mere economic rights, they might easily have authorized Congress to pass such laws under their Commerce Clause powers. They did not choose to do so. See *id.*, cl. 3; *id.*, cl. 8.

³⁰³ GREVE, *supra* note 274, at 93.

³⁰⁴ See *id.* at 95.

³⁰⁵ Goldsmith & Sykes, *supra* note 275, at 788.

³⁰⁶ *Id.* at 788–89.

³⁰⁷ GREVE, *supra* note 274, at 111. According to Goldsmith and Sykes, the Court has defined the scope of this extraterritoriality principle as “preclud[ing] the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within

affecting commerce, free speech, and expression,³⁰⁸ it also shapes diffusion of culture, knowledge, and distributive justice,³⁰⁹ to name but a few. The similarities between the purposes and principles underlying the dormant Commerce Clause and copyright legislation, and their similar reach into areas beyond commerce, thus provide an adequate foundation for applying the *Pike* balancing test to copyright legislation, including the CTEA and the Berne Implementation Act.

C. Applying the Pike Balancing Test to Copyright

Under *Pike*, the initial inquiry is whether either the CTEA or the Uruguay Round Agreements Act, Section 104A discriminate on their face. If so, they are “virtually *per se* invalid.”³¹⁰ Neither of the acts do so. Neither act provides for a facially perpetual copyright grant, nor do either unambiguously fail to “promote Progress” or discriminate against the public or users of works.³¹¹ In evaluating this, more is required than that both acts affect the promotion of “Progress.” Both clearly do. Indeed, how they do so is complicated, because the potential for promotion lies on both sides of the balance. Sometimes, securing copyright will “promote Progress”; sometimes, limiting or prohibiting copyright will “promote Progress.” But neither act clearly and unambiguously fails to “promote Progress.”

Moreover, admittedly in the first instance, the line drawing unquestionably belongs to Congress. Here, however, is where the dormant Commerce Clause analysis differs from current analysis. Rather than blindly relying on any proffered rationale Congress provides, under *Pike*, the Court must not only require some plausible explanation as to how a particular extension of copyright ownership will advance rather than retard the “Progress of Science,” but the balancing test requires closer judicial scrutiny of Congress’s proffered rationale.³¹² And, unlike the current test, which requires either a facially perpetual copyright or some explicit evidence of a congressional design to provide a perpetual copyright,³¹³ the *Pike* balancing test can capture a functionally perpetual term. This is where the second prong of the test becomes important.

the State.” Goldsmith & Sykes, *supra* note 275, at 789–90 (emphasis removed) (citing Healy v. Beer Institute, 491 U.S. 324, 336 (1989)).

³⁰⁸ See Eldred v. Ashcroft, 537 U.S. 186, 244 (2003) (Breyer, J., dissenting) (“[W]hat may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture.”).

³⁰⁹ See, e.g., Lea Shaver, *Copyright and Inequality*, 92 WASH. U. L. REV. 117, 121 (2014).

³¹⁰ Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality, 511 U.S. 93, 99 (1994). To be more precise, legislation that facially discriminates is subject to the strictest scrutiny. See *id.* In practice, such legislation rarely, if ever, survives strict scrutiny.

³¹¹ See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514, 108 Stat 4809, 4976–4981 (1994) (codified as amended at 17 U.S.C. § 104A (2012)); see generally Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

³¹² See *supra* Part IV.B.

³¹³ See *supra* Part III.D.

The second prong requires analyzing whether the legislation imposes a disproportionate burden on users that outweighs any benefits to copyright holders.³¹⁴ Copyright has always been seen as a balance of interests, balancing the interests of artists and creators against those of the public's access to a broad and varied array of literature, music, and other creative works of art.³¹⁵ This, then, is a particularly appropriate test that recognizes and incorporates this balance in analyzing congressional copyright action.³¹⁶ A rational basis test fails to accomplish this.³¹⁷ Applying this prong to both the CTEA and the Section 104A produces, perhaps, different outcomes.

The CTEA fails the test, as it benefits private interests without regard to public benefits. The additional twenty year protection—the “longest blanket extension since the Nation’s founding”³¹⁸—might provide some incentive to artists to create, but this incentive is minimal. Not only could artists not be guaranteed any later extension, but the economic value of the additional twenty years becomes relatively insignificant. Citing an amicus brief written by five Nobel prize-winning economists, Justice Breyer’s dissent in *Eldred* explains how the present value of revenue over a hundred years would mean pennies currently.³¹⁹ This analysis generally presumes a constant revenue stream and also accounts for the fact that less than two percent of works enjoy the type of success that enables long-term revenue.³²⁰ These economists also concluded that the protection under the CTEA

³¹⁴ See Goldsmith & Sykes, *supra* note 275, at 802–03. As Goldsmith and Sykes explain:

To recast this point in the language of balancing, we can say that the benefits to the regulating jurisdiction and its citizens exceed the losses to those outside the jurisdiction; that is, the regulatory benefits exceed the burden on commerce. Whenever regulatory policy corrects for external harms in a precisely optimal fashion, economic welfare will rise; the gains to those who benefit then exceed the losses to those who suffer. If all state regulation of external harms embodied the ideal corrective response, therefore, there would be no role for balancing analysis because the outcome of such analysis would always favor the regulation in question. But for various reasons, including limited information and defects in the political process, states may not impose the ideal corrective for external harm.

Id.

³¹⁵ See *Golan v. Holder*, 132 S. Ct. 873, 901–03 (2012) (Breyer, J., dissenting) (discussing the historical consideration in copyright legislation of balancing the interests of the copyright holder and the public).

³¹⁶ See *id.* at 900 (“Consequently, the original British copyright statute, the Constitution’s Framers, and our case law all have recognized copyright’s resulting and necessary call for balance.”).

³¹⁷ Justice Breyer was on the right track, but stopped short. Under a more deferential standard than that proposed here—his modified rational basis standard—he would have found the statute unconstitutional. See *id.* at 900, 907–08, 912. Unlike the majority, Justice Breyer appreciated that copyright is more than economic regulation, as it also affects freedom of expression. See *id.* at 907–08, 912. He would collapse the First Amendment and Copyright Clause analysis and instead apply a heightened rational basis standard. See *id.* at 912.

³¹⁸ See *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting).

³¹⁹ See *id.* at 254–55 (citing Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 5–7, *Eldred*, 537 U.S. 186 (No. 01-618)).

³²⁰ Only two percent of works retain their commercial value beyond 55 years. See *id.* at 248 (based on figures provided in RAPPAPORT, *supra* note 104, at 4–5). Of course, whether the time is “limited”

term was worth more than 99.8% of protection in perpetuity.³²¹ Moreover, the EU Copyright Term Directive does not justify the extension. As shown above, the Directive is not an international obligation, and thus compliance was not required under any treaty or international agreement.³²² On the other hand, the harm to users is significant. The CTEA keeps out of the public domain a significant number of works and keeps the prices for these works artificially high.³²³ This not only restricts distribution of these works, but also inhibits the ability of potential users to either access the works or make them accessible to others.³²⁴ The combined economic impact and the impact on expressive conduct outweighs the singular focus on benefiting copyright owners.

depends upon how one defines that term. "Limited" is relative. The Court has interpreted "limited Times" in reference to a perpetual copyright. With that frame of reference, it is difficult to envision any term other than a perpetual copyright would be found unlimited. See *supra* note 32. The Court had other options. Indeed, a better reference might be that of no protection. The framers enacted copyright legislation in the face of monopolistic abuses in England. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1144–46 (2000); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2363–64 (2003). It is not unreasonable to expect that limited monopolies were tolerated only because they had to be. As Justice Breyer notes in his *Golan* dissent: "Thomas Jefferson, for example, initially expressed great uncertainty as to whether the Constitution should authorize the grant of copyrights and patents at all, writing that 'the benefit even of limited monopolies is too doubtful' to warrant anything other than their 'suppression.'" *Golan*, 132 S. Ct. at 901 (Breyer, J., dissenting) (citing Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 PAPERS OF THOMAS JEFFERSON 440, 443 (J. Boyd ed. 1956)). Another plausible reference is that of the average lifespan of persons in 1790, when Congress enacted the first copyright act. Professor Solum reasons that "limited" must be placed in context, and argues that that context should be in terms of what the Framers believed, which would be "the time that individual human beings spend as authors—that is, limited with respect to a period that only very, very rarely would exceed seventy years." Solum, *supra* note 65, at 30–33. As Professor Solum states,

the "limited Times" in the Clause must be construed as limited in context. In this case, as in so many others, there is no bright line that divides a limited term from one that is not limited. Given the facts of human life and the early historical practice, twenty-eight, forty-two or even fifty-six years can reasonably be viewed as long but limited terms. Given these same facts and clues to original understandings, life plus fifty years or life plus seventy years cannot be viewed as limited. Although no precise line divides that which is constitutionally permissible from that which is forbidden, this should not be viewed as an obstacle to judicial enforcement in cases in which Congress has exceeded its constitutional authority. Rather, terms that are not limited in the context of exclusive rights granted to authors ought to be struck down. In this way, the abstract and acontextual reading of "limited Times" can be avoided, and with it, the consequence that Congress might, consistent with the language of the Clause, confer a practically infinite but abstractly limited copyright term of 500 years or even much longer.

Id. at 33 (citations omitted). Viewed from either of these references, a changing perception emerges with regard to the suitability of copyright term of life plus seventy years. Put more simply, the term looks significantly different from either of these perspectives than it does from that of a perpetual term.

³²¹ *Eldred*, 537 U.S. at 255–56 (Breyer, J., dissenting) (arguing this based on figures provided in RAPPAPORT, *supra* note 104, at 7).

³²² See *supra* Part II.A.

³²³ See *Eldred*, 537 S. Ct. at 248–49.

³²⁴ *Id.*

Section 104A presents a closer question. The interests at stake under Section 104A differ from those of the CTEA. Section 104A's benefit to copyright owners is significant. Rather than having no protection, copyright holders obtained original protection for the remainder of the copyright term.³²⁵ In addition, although the claim of "exemplary adherence to Berne" is generous and dissemination of foreign works abroad likely lies beyond the relevant interests contemplated by the Framers, it is nonetheless true that under either Berne or TRIPS restoration of works falling into the public domain is an international obligation and failure to do so might have threatened the United States' prominent position with respect to international intellectual property.³²⁶ The Act is also less questionable than the CTEA in terms of ulterior motives, as it protects foreign interests as opposed to the domestic interests at stake with respect to the CTEA.³²⁷ The impact on the public is also significant.³²⁸ Unlike in *Eldred*, where the public's interest involved the anticipation of works falling into the public domain,³²⁹ in *Golan* the parties relied on works already in the public domain, and had already begun utilizing the works.³³⁰ Having these parties either stop using the works or requiring them to now pay for such works imposes considerable harm. Section 104A attempts to ameliorate or lessen this harm by allowing "reliance parties" to continue using the work so long as they pay to the copyright holder reasonable remuneration.³³¹ Providing protection to works in the public domain also arguably moves us closer to a perpetual copyright.³³² While this is a close call, the fact that copyright holders were denied protection at all in the first place coupled with the international concerns, plausibly tilts the balance in favor of copyright holders and thus points to the constitutionality of Section 104A.

D. Response to Possible Criticisms

Adopting the dormant Commerce Clause analytical framework has its problems. As a preliminary matter, though, we can put to one side concerns of supplanting the Court's current standard, whatever that may be. The Court's application of a particular standard does not preclude the Court from later applying a different standard it deems more appropriate. The Court's history regarding sex discrimination is instructive on this point. In *Reed v. Reed*, the Court applied rational basis scrutiny to sex discrimination.³³³ Two years later, in *Frontiero v.*

³²⁵ See 17 U.S.C. § 104A (2012).

³²⁶ See *Golan v. Holder*, 132 S. Ct. 873, 878–80 (2012).

³²⁷ See *id.* at 907 (Breyer, J., dissenting) ("[W]hen a copyright law is primarily backward looking the risk is greater that Congress is trying to help known beneficiaries at the expense of badly organized unknown users who find it difficult to argue and present their case to Congress.")

³²⁸ See *id.* at 900.

³²⁹ See *Eldred*, 537 S. Ct. at 195–96.

³³⁰ See *Golan*, 132 S. Ct. at 900 (Breyer, J., dissenting).

³³¹ See *id.* at 883 (majority opinion) (citing 17 U.S.C. § 104A (2012)).

³³² See *supra* Part III.D.

³³³ See *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Richardson, the Court changed course and applied strict scrutiny.³³⁴ Then, three years after that, the Court yet again changed course in *Craig v. Boren* and applied the current intermediate scrutiny standard.³³⁵ There are numerous other examples of such changes.³³⁶

Neither should the fact that the dormant Commerce Clause is to some degree controversial pose a problem. Justice Thomas opposes all dormant Commerce Clause reasoning because he believes the doctrine “has no basis in the Constitution and has proved unworkable in practice.”³³⁷ Justice Thomas fundamentally believes that the Court has no business policing state commercial regulation.³³⁸ Justice Scalia is only slightly less hostile to the dormant Commerce Clause. While he asserts that neither history nor text “provide[] grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce,”³³⁹ he nevertheless enforces the dormant Commerce Clause—on *stare decisis* grounds—in two situations: “(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court.”³⁴⁰ Despite Justices Thomas’s and Scalia’s (and others’) spurn of the dormant Commerce Clause,³⁴¹ the dormant Commerce Clause has an

³³⁴ See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

³³⁵ *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *id.* at 218 (Rehnquist, J., dissenting) (noting that the Court’s opinion in the case elevated the standard of scrutiny under which the statute was analyzed).

³³⁶ In *City of Richmond v. J.A. Croson Co.*, the Court applied strict scrutiny to a state affirmative action measure, which the Court a year later in *Metro Broadcasting Inc. v. FCC* changed to intermediate scrutiny. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 508 (1989); *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 564 (1990). The Court reasoned that the federal government had more flexibility and that considerations of the Fourteenth Amendment and race allow the federal government to be more restrictive than states. See *Metro Broad., Inc.*, 497 U.S. at 605–06 (citing *J. A. Croson Co.*, 488 U.S. at 522). In addition, the Court changed course from the strict scrutiny restrictions on married couples in *Griswold v. Connecticut* to rational basis scrutiny restrictions on contraception for unmarried couples in *Eisenstadt v. Baird*, and then required strict scrutiny analysis in *Carey v. Popul. Servs., Int’l*. See *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685–86 (1977).

³³⁷ See *United Haulers Ass’n. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349 (2007) (Thomas, J., concurring in judgment).

³³⁸ *Id.*

³³⁹ See *id.* at 348 (Scalia, J., concurring in part) (quoting *Tyler Pipe Indus., Inc. v. Wash. St. Dep’t of Revenue*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part)).

³⁴⁰ *Id.* (quoting *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring in judgment)).

³⁴¹ See, e.g., Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1765 (2004) (“Justices Scalia and Thomas stand far taller than other critics of the dormant Commerce Clause. These Justices so despise the dormant Commerce Clause that they no longer call it by its usual name. Instead, because the Clause ‘does not appear in the Constitution,’ Justices Scalia and Thomas call it the ‘negative’ Commerce Clause.” (citing *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (Scalia, J., concurring) and *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609 n.1 (1997) (Thomas, J., dissenting))). The Justices suggest that other constitutional provisions can regulate state-to-state discrimination. Justice Thomas proposes replacing dormant Commerce Clause analysis with an Import-

unquestionably strong historical pedigree, having been part of constitutional jurisprudence for almost a century and a half.³⁴²

Further, both Justices's views rest on the underlying premise that constitutional doctrine must be a clause-bound doctrine; that is, the doctrine must have a foundation in one or more clauses of the Constitution.³⁴³ Because the dormant Commerce Clause neither has such constitutional authority nor derives solely from the Commerce Clause, it is unsound. While this premise dominates constitutional interpretation, it is not alone. Charles Black suggests searching for constitutional doctrine from "the structures and relationships created by the [C]onstitution."³⁴⁴ Absent particular text to point to as authority, the Court can still infer doctrine

Export Clause analysis (Article I, Section 10). *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 610. The Import-Export Clause provides in relevant part: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." U.S. CONST. art. I, § 10, cl. 2. Justice Scalia advocates for an analysis under the Privileges and Immunities Clause, Article IV, Section 2. See *Tyler Pipe Indus., Inc.*, 483 U.S. at 265. The Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

³⁴² See, e.g., *United Haulers Ass'n*, 550 U.S. at 338 ("Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." (citing *In re Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279 (1873)); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 318 (1852))). Greve contends that the first "unambiguous" dormant Commerce Clause case was in 1872, in *In re State Tax on Railway Gross Receipts*. GREVE, *supra* note 274, at 93 & 426 n.3 (citing *In re State Tax on Ry. Gross Receipts*, 82 U.S. (15 Wall.) 284 (1872)). Greve underscores the importance of the doctrine, noting that "[b]y 1932, the dormant Commerce Clause had felled some 180 state laws, and it would retain much of its vitality throughout and after the New Deal." *Id.* (citation omitted). The doctrine continues to have significant influence in American jurisprudence today. See, e.g., *United Hauler's Ass'n*, 550 U.S. at 338.

³⁴³ See *United Haulers Ass'n*, 550 U.S. at 348 (Scalia, J., concurring in part); *id.* at 349 (Thomas, J., concurring in the judgment).

³⁴⁴ See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969). Black argues that this form of constitutional interpretation and legal reasoning is undervalued and underused, but could better explain current doctrine and, moreover, "frees us to talk sense," rather than relying on other means of interpretation to define vague and ambiguous text such as using dictionaries and "scanning utterances, contemporary with the text, of persons who did not really face the questions we are asking." See *id.* at 13, 22-23. Black does not suggest substituting structure and relationship in place of textual interpretation. Rather, he suggests a complementary relationship, with the inferences from structure and relationship "under[ly]ing the textual manipulation" and "invoked to support the interpretation of the cryptic text[.]" See *id.* at 29. Black makes this symbiotic connection clear:

I must timidly correct a doubtless nonexistent impression that what I have suggested is the total abandonment of the method of particular-text interpretation. It is entirely plain, on the contrary, that so long as we continue to look on our Constitution as a part of the law applicable in court, just so long the work of sheer textual interpretation will be a great part—probably the greatest part—of judicial work in constitutional law. There is, moreover, a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and the relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.

Id. at 31. Of course, Black's mode of interpretation requires us to identify those relations and structures that might establish a suitable basis for relying on such interpretation.

from, for example, “the economic structure of nationhood” or the political structure of federalism.³⁴⁵

Still further, the most forceful response to opponents of the dormant Commerce Clause is that one need not endorse the dormant Commerce Clause itself to adopt the Court’s *review standard* as a useful tool in thinking about and analyzing copyright legislation. That standard, undeniably, remains part of constitutional jurisprudence. And it is because the underlying principles that animate the dormant Commerce Clause also undergird policing copyright legislation, the *Pike* test is suitable for evaluating copyright legislation like that at issue in *Eldred* and *Golan*, and other future copyright legislation.

The sharpest criticism of doing so is perhaps that the Supreme Court’s dormant Commerce Clause cases are limited to discriminatory and protectionist *state* legislation—the Court has never applied the test outside of this specific context.³⁴⁶ Fair enough. But while overcoming this argument is a challenge, it is not insurmountable.³⁴⁷ In fact, the same reasons that justify the doctrine in the first place are an adequate response to this criticism. More to the point, that the doctrine has been applied only against states should not prevent us from borrowing from it in circumstances where Congress’s power is similarly limited under the Constitution. The doctrine applies when legislation negatively affects commerce. Copyright legislation can negatively affect commerce. The doctrine applies to neutralize defects in the political process. Copyright law is tainted because of defects in the political process. The doctrine regulates more than economic concerns. Copyright is imbued with much more than mere economic matters, including fundamental rights of expression and speech. The doctrine provides a flexible approach that looks beyond literal or facial discrimination to balance competing interests. Copyright’s foundation is built on balancing competing interests. All of these make the dormant Commerce Clause analysis fitting for considering copyright laws.

CONCLUSION

How long should copyright last? How best can we promote the public interest in assuring access to works? These are hard questions.³⁴⁸ But they must be answered. And the answer cannot be “whatever Congress says.”³⁴⁹

³⁴⁵ See *id.* at 20–21. Black grounds the dormant Commerce Clause on, among others, this economic structure of nationhood (i.e., “we are one people, commercially as otherwise”) rather than on any negative implication of the Commerce Clause. See *id.* at 19–21.

³⁴⁶ See *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 571 (noting that the Commerce Clause is used as a limit on the power of the states).

³⁴⁷ See, e.g., Goldsmith & Sykes, *supra* note 275, at 797–98 (providing an argument for overcoming this limitation of the dormant Commerce Clause in relation to federal internet regulations).

³⁴⁸ See Gordon, *supra* note 215, at 6 (“Much lively debate surrounds the question of what kind of fine-tuning copyright needs in order to ensure that social gains exceeds social loss.”).

There will be future copyright legislation, including cries for increasing the copyright term. While some scholars have called for a reduction in the duration of the copyright term, this seems optimistic, to put it politely.³⁵⁰ Conventional wisdom envisages another increase in the term. Mary Bono, speaking on the floor of the House of Representatives during the hearings on the CTEA, informed the House that her husband, Sonny Bono, after whom the CTEA is named (“The Sonny Bono Copyright Term Extension Act”), wanted copyrights to last forever.³⁵¹ When informed that such a term would be unconstitutional, she pleaded with the House to take up at the next Congress Jack Valenti’s (then President of the Motion Picture Association of America) proposal for a term of “forever less a day”³⁵² It is hard to seriously contend that this is a term our Framers envisioned. Moreover, that such a term is unwise is, hopefully, self-evident.³⁵³

But how will we evaluate it or a similarly lengthy term? Of course not every increase in the term will offend the Constitution or violate the Copyright Clause’s “limited Times” or “promote Progress” limits. Yet a broad *Eldred*-like strict reading of the Copyright Clause’s “limited Times” would defeat the constitutional purpose of promoting “Progress” and might include unfathomable terms. Insofar as the Court’s test limits second-guessing to terms other than those that are “circumscribed,” “restrained,” and “confined within certain bounds,”³⁵⁴ the Court licenses Congress to do indirectly what the Clause forbids them to do directly.³⁵⁵

³⁴⁹ There is much to be said for deference to Congress, particularly in areas where the Constitution by its express terms grants authority to Congress to regulate. But, as expressed throughout this Article, while Congress has a role to play, so too does the Court. See *supra* Part II & Part IV.A.

³⁵⁰ See, e.g., Samuelson, *supra* note 45, at 566–67 (2007) (discussing the author’s lack of optimism and the infeasibility of copyright reform at this time); cf. WILLIAM PATRY, HOW TO FIX COPYRIGHT 201 (2011) (proposing a potential reform); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 292–93 (2004) (discussing ideas for improvement in the area of copyright regulation).

³⁵¹ See 144 CONG. REC. H9951–52 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono).

³⁵² *Id.* at H9952.

³⁵³ See Solum, *supra* note 65, at 29 (“It is clear that a limited time is not an infinite one. If this were the only constraint imposed by this phrase, it would be a trifling constraint indeed. Congress might specify terms measured in centuries or millennia without approaching infinity. Indeed, any period or term at all, even one that would exceed the expected life of the Sun would be limited in this sense. This possibility motivates the search for some other constraint. Because there are finite spans of time that are unlimited for the purposes of humans, the phrase limited times must mean something other than a finite term if we are to attribute to the Framers some purpose in using the word ‘limited.’” (citations omitted)).

³⁵⁴ See *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003).

³⁵⁵ An “originalist” such as Justices Thomas or Scalia might extrapolate the answer from information gleaned from documentary evidence of the founding generation (constitutional debates, writings like the Federalist papers, contemporary law and practice, historical English and common law antecedents, and the like). See Fallon, *supra* note 171, at 1197, 1211. There is scant legislative history regarding the Copyright Clause. See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 999 (1990). A “nonoriginalist” would, in addition to these sources, also consider historical statutory practice since the founding, plus some sort of functionalist reasoning about the relationship between protection and innovation, in light of current and future realities of research, art, and publishing. See Fallon, *supra* note 171, at 1197–98, 1214 & n.120.

To give force and effect to the Copyright Clause's limitations, this Article has suggested a balancing test with more bite than the current approach. The Article has undertaken the challenge to provide future Courts and Congress guidelines and a limiting principle to constrain congressional action. An approach that more straightforwardly and unambiguously balances the interests of creators and the public and requires some real evidence supporting any conclusion is needed. And an approach that allows us to look to the functional effect of copyright legislation rather than to a nondiscriminatory purpose is a modest attempt at providing such a limiting principle. We need one. Thus far, the Court has failed to provide it.