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JUDICIAL REVIEW OF COPYRIGHT TERM EXTENSION LEGISLATION

*Dennis S. Karjala**

I. INTRODUCTION

In adopting the Sonny Bono Copyright Term Extension Act (CTEA),¹ Congress acceded to the demands of noncreative heirs and assignees of old but unexpired copyrights for extension of the period of copyright protection by twenty years. This legislation thus allows these copyright owners twenty more years to collect royalties and control performance and dissemination of the covered works. At the same time, Congress extended the term prospectively for works created in the future. Both prospective and retroactive term extensions, but particularly the latter, raise the question of the scope of congressional power under Article I, Section 1, Clause 8 of the Constitution (the "Intellectual Property Clause").² Specifically, does such legislation conflict with the congressional power "to promote the Progress of Science" and does it ignore the constitutional restriction on that power mandating that exclusive rights granted under the Clause endure only for "limited Times"?

Lurking beneath these substantive issues of constitutional law, however, is the question of who decides them. Congress, evidently, has made the decision that the CTEA comports with its powers under

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1. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998).

2. U.S. CONST. art. I, § 8, cl. 8 (Congress has the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

the Intellectual Property Clause. A fundamental issue in *Eldred v. Ashcroft*,³ therefore, is the scope of judicial review of copyright term extension legislation: Do the courts have the power, and if so should they exercise it, to second-guess congressional legislation that directly raises questions concerning the meaning of substantive constitutional language? Resolution of this fundamental issue involves two basic subissues. The first is the degree, if any, to which the Court should independently review the factual record and conclusions drawn by Congress therefrom. The second is the standard of review the Court applies to the facts that it chooses to consider.

Everyone is familiar with the many legitimate arguments that the legislature is better equipped to make policy judgments, balance policy tensions, and collect the factual information necessary to making those determinations. In the case of the CTEA, Congress heard testimony concerning increased incentives for the creation of new works—arguments saying, essentially, “[t]erm extension makes copyright protection stronger, and stronger protection means a higher incentive to create.”⁴ CTEA proponents also claimed other advantages for term extension, such as a costless flow of additional royalty income from Europe to the United States (“U.S.”).⁵ On the other hand, Congress received testimony from opponents of term extension, arguing that the statute would not encourage creativity and that the other supposed goals were neither achieved by the proposed statute nor would benefit the public in the constitutionally required way of “promot[ing] the Progress of Science.”⁶

If *Eldred* were a Commerce Clause⁷ case (at least prior to *Lopez*⁸ and *Morrison*⁹), a routine application of the rational basis test¹⁰ would lead to upholding the CTEA’s constitutionality, on the ground that Congress heard various and opposing viewpoints and decided among them. However, the challenge to the CTEA is an Intellectual

3. *Eldred v. Ashcroft*, No. 01-618 (U.S. oral argument Oct. 9, 2002).

4. *See infra* notes 35, 64 and accompanying text.

5. *See infra* notes 45, 50 and accompanying text.

6. *See infra* notes 69, 77-79 and accompanying text.

7. U.S. CONST. art. I, § 8, cl. 3 (Congress has the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

8. *Unites States v. Lopez*, 514 U.S. 549 (1995).

9. *United States v. Morrison*, 529 U.S. 598 (2000).

10. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

Property Clause¹¹ case. That Clause is textually, historically, and legally distinguishable from the Commerce Clause. It does not raise the difficult interpretation issues that the Commerce Clause has engendered.

The legislative process of copyright term extension further distinguishes this case from the Commerce Clause cases. While the Court has split deeply over whether the political process is sufficient to protect constitutional values of federalism under the commerce power, any realistic view of how the CTEA was adopted reveals that the constitutional issues arising out of the Intellectual Property Clause were not balanced in the legislative process. A review of the record shows that Congress listened to a relatively small number of owners of old copyrights and chose to bestow upon those owners a windfall at an incalculable but heavy cost to the diffuse public. These costs come in the form of royalty transfer payments during the extended period and in the form of a reduced number of new creative works by current authors because of the diminished public domain and the transaction costs of licensing many old works. Analysis of the realities of the legislative process thus leaves no doubt that Congress did not seek to fulfill the constitutionally mandated purpose “to promote the Progress of Science” in enacting the CTEA. It also confirms that to leave Congress as the sole interpreter of critical limitations on congressional power, like the “limited Times” provision, is equivalent to eradicating those limitations from the Constitution. The Court should therefore be willing to form an independent judgment concerning the real reasons for the congressional action, as opposed to the reasons formally offered.

The second question, which arises regardless of whether the Court takes at face value the record before Congress, is the standard of review that should be applied. The CTEA, at least insofar as it applies retroactively to works already in existence, cannot survive any test for review that is stronger than a rubber-stamp version of “rational basis” (if, indeed, it can survive rational basis analysis).¹²

11. U.S. CONST. art. I, § 8, cl. 8.

12. Retroactive extension (term extension for works already in existence) appears to conflict on its face with specific constitutional language (that the copyright term be for a “limited Time[]” and that copyright law “promote the Progress of Science”). *Id.* Upholding the statute would render nugatory both of these specific constitutional limitations on congressional power to grant ex-

Rational basis was adopted as a test in Commerce Clause cases because of the difficulties in interpreting the scope of the term “commerce” and the apparent practical need to allow Congress to regulate an increasingly national economy. In recent years the Court has split over the issue of whether there is a way to place some real limits on that scope, in the interest of preserving the basic federal structure of the U.S.¹³ Both the majority and the dissenters in these cases agree, however, that the Supreme Court is the final arbiter of the meaning of the term “commerce.”¹⁴ The disagreement is primarily over whether, as a practical matter, an interpretation of the scope of the term “commerce” is possible that preserves federalism while leaving some realms of regulatory activity solely to the states without raising the problems that led to the pre-1930s restrictive view of the federal commerce power.¹⁵

The limitations contained in the Intellectual Property Clause, on the other hand, are not aimed at preserving federalism.¹⁶ The limitations on congressional power in the Intellectual Property Clause were intended to ensure that Congress itself does not fall prey to the temptation to grant exclusive rights in writings or inventions where the grant is not for a “limited Time” or does not “promote the Progress of Science [or] useful Arts.” They are express substantive limitations on federal power. If the Supreme Court does not ensure that congressional action purportedly taken under this power complies

clusive intellectual property rights. The Supreme Court is the ultimate arbiter of the meaning of constitutional language. Even if we could assume that the political process was balanced, no rational justification for extending the terms of existing copyrights was presented to Congress that comports with the requirements of the Intellectual Property Clause.

13. See *Morrison*, 529 U.S. at 627; *Lopez*, 514 U.S. at 567.

14. Compare *Morrison*, 529 U.S. at 614 (quoting earlier cases to the effect that whether particular operations affect interstate commerce sufficiently to come within congressional power under the commerce clause is ultimately a judicial question), with *id.* at 651 n.19 (Souter, J., dissenting) (agreeing “that politics is the arbiter of state interests only within the realm of legitimate congressional action under the commerce power.”).

15. See *id.* at 660 (Breyer, J., dissenting) (“This consideration [that virtually all local activity could be regulated under the ‘substantial effects’ test], however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality.”).

16. Indeed, in the copyright arena, Congress has preempted all state protection that gives equivalent rights to works constituting copyright subject matter. See 17 U.S.C. § 301(a) (2001).

with these limitations, our system of checks and balances is thrown aside and Congress alone determines the meaning of constitutional language limiting its enumerated power.

This does not mean that the Court should second-guess the myriad policy balances that Congress has drawn in writing the Copyright Act. Most of the statute deals with the types of exclusive rights that Congress has chosen to recognize, limitations on those rights, and means for their enforcement. These provisions do not trench upon the "limited Times" restriction nor can any serious challenge be mounted, at least in general, that they fail to "promote the Progress of Science."¹⁷ It does mean, however, that the Court should independently review the bases on which Congress acts to ensure that there is good reason to believe that Congress acted with the constitutionally mandated goals in mind and that Congress had a reasonable basis to believe that its action would further those goals through constitutionally permitted means. There is nothing in the record to show that Congress had a reasonable basis for believing that retroactive extension would promote the progress of science. Nor is there anything in the record to show that Congress tried to find any meaning for the phrase "limited Times" other than the abstract dictionary definition "mathematically finite,"¹⁸ unrelated to the context of the Clause as a whole or the Framers' intended purpose of the "limited Times" restriction.¹⁹ Nor did Congress pay anything more than lip service to the question of whether prospective extension would increase creation incentives or otherwise meet the constitutionally mandated goal of "promot[ing] the progress of science."

Congress did hear from copyright owners holding rights to a relatively small number of old but still valuable works who were seeking desperately to keep their royalty streams flowing. If there was a constitutionally valid reason for retroactive extension, we can be sure that these representatives would have thought of and presented them. Consequently, the Court in *Eldred* can and should find,

17. See *infra* note 170.

18. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 854, 1393 (1961).

19. See *infra* notes 160-65 and accompanying text. Not even the Government's Response Brief in the Supreme Court offers a standard for determining what copyright terms would extend beyond a "limited Time." See Brief for the Respondent, *Eldred v. Ashcroft*, No. 01-618 [hereinafter Brief for Respondent].

without remand, that retroactive extension under the CTEA was unconstitutional (without necessarily determining the validity of any prior retroactive extensions).²⁰ Prospective extension is also difficult to uphold on the present record. Congress heard no testimony that prospective extension would constitute a creation incentive other than bald statements to that conclusory effect. Nobody came before Congress seeking prospective extension alone, and Congress thought so little of prospective term extension by itself that it did not even bother to insert a severability clause in an attempt to disconnect it from the more problematic retroactive term extension. The entire term extension bill was also intimately tied together with the Fairness in Music Licensing Act, which could not have been adopted as a free-standing measure and has now been determined to place the U.S. in violation of its international trade obligations.²¹ Thus, the

20. Whether prior retroactive extensions were constitutional is not an issue presented by *Eldred*. The nineteen-year extension effected by the 1976 Copyright Act would surely be called into question if the CTEA is held unconstitutional. There can be little doubt that the same, rent-seeking forces were at work in support of the 1976 Act extension, and the various shorter extensions that preceded it, which should make it constitutionally suspect. The reasoning presented herein, however, would require separate consideration of what information was before Congress at the time of the adoption of the 1976 Act. Not only was that a comprehensive revision of the entire statute, but it was also adopted with a view to eventual entry into the Berne Convention by the U.S..

21. For reasons strictly related to the U.S. legislative process, copyright term extension and the so-called "Fairness in Music Licensing Act" (FMLA) were adopted as titles I and II, respectively, of the same bill. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tits. I & II, 112 Stat. 2827 (1998). The FMLA amended section 110(5) of the Copyright Act to provide a greater exemption to perform music publicly in restaurants, bars, and retail establishments. Early on in the legislative process, Representative Sensenbrenner of the House Subcommittee stated that he would not look favorably on term extension without action on the theoretically unrelated issue of music licensing. *See 1995 House Hearings, infra* note 25, at 156. Although Senator Hatch, Chair of the Senate Judiciary Committee, opposed expanding the exemption for the public performance of music, Mr. Sensenbrenner was quoted as saying, "If they want to separate the two issues, it won't happen." Alan K. Ota, *Disney in Washington: The Mouse That Roars*, CQ WEEKLY, Aug. 8, 1998, at 2167. Eventually, the House passed the CTEA with the FMLA added as a floor amendment, and a conference committee left it in the final product.

That is not the end of the story, however. The European Union complained that the amendment to section 110(5) effected by the FMLA violated the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs). A WTO panel decided against the U.S. in June 2000. *See World Trade Organization, Report of the Panel,*

Court should overturn the CTEA in its prospective aspect as well, giving Congress another try at adopting prospective extension if Congress concludes that it is in the public interest and can find constitutionally valid bases for acting.²² By “remanding” to the legislature, the Court would recognize the basic policymaking role of Congress in our democratic society while maintaining its own special role in interpreting the meaning of the Constitution.

Part II of this Article attempts to summarize the evidence before Congress on the basis of which the CTEA was adopted. Part III argues that any independent review of that evidence must conclude that none of the justifications of the CTEA offered by Congress can be the real reason for the congressional action. Part IV concludes that the only viable inference from an independent reading of the evidence before Congress was that Congress gave in to the demands of the heirs and assignees of old copyrights that still had economic

United States—Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000). The Panel Report was adopted by the Dispute Settlement Body. World Trade Organization, *Action by the Dispute Settlement Body*, WT/DS160/8, IP/D/16/Add.1 (July 31, 2000). As of this writing, sanctions are being arbitrated. World Trade Organization, *Recourse by the European Communities and its Member States to Article 22.6 of the DSU*, WT/DS160/21 (Feb. 19, 2002). Because the FMLA had no majority support from either the House Subcommittee or the Senate Judiciary Committee, it is a bill that could never have been adopted on its own. It was passed only because Representative Sensenbrenner was successful in getting it tied to copyright term extension, apparently on the theory that if Congress gives something to one set of special copyright interests, it may take away something from another set (music authors) for the benefit of yet a third lobbying group (restaurant and bar owners). While the country benefited from Representative Sensenbrenner’s tactics, which delayed the CTEA for two or perhaps three years and thereby allowed works from 1920-22 to enter the public domain, and while there may be some merit to an expanded exemption for the public performance of music, the FMLA has put the U.S. in violation of its international trade agreements. The *Eldred* case is a good opportunity for the Court to clear the decks and allow Congress to act on the essentially unrelated issues of prospective term extension and music licensing (in the light of developments at the WTO) on their individual merits.

22. This “structural” approach to judicial review of term extension legislation, which overturns enacted legislation but leaves Congress free to try again in the light of constitutional demands articulated by the judicial branch, is not new to the Court. Professor Coenen has shown that structural review in this sense pervades constitutional law. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1834, 1869-70 (2001).

value but were about to enter the public domain. Part V amplifies the claims made above,²³ that the powers granted to Congress by the Intellectual Property Clause require an approach to judicial review different from that used in Commerce Clause cases. In particular, the express limitations on federal power contained in the Intellectual Property Clause can only have their intended constitutional force and meaning if legislation adopted under the Clause is independently scrutinized by the judiciary and determined not to violate those limitations.

II. WHAT CONGRESS HEARD AND CONCLUDED CONCERNING TERM EXTENSION

Hearings were held in 1995 on proposed copyright term extension legislation by the Senate Judiciary Committee²⁴ and the House Judiciary Committee's Subcommittee on Courts and Intellectual Property.²⁵ The House Subcommittee held additional hearings in 1997.²⁶ The Senate Judiciary Committee issued a Report in 1996,²⁷ and the House Subcommittee issued a Report in 1998.²⁸ Both reports recommended adoption of what eventually became the CTEA. The 1998 House Subcommittee Report offers only brief conclusions as its reasons for supporting term extension,²⁹ so the emphasis here will be

23. *Supra* notes 7-16 and accompanying text.

24. *Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *1995 Senate Hearing*].

25. *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 104th Cong (1995) [hereinafter *1995 House Hearings*].

26. *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; And Copyright Paper Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter *1997 House Hearing*].

27. S. REP. NO. 104-315 (1996) [hereinafter *1996 Senate Report*], available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/legmats/s483rep104-315.html> (last visited August 23, 2002).

28. H.R. REP. NO. 105-452 (1998) [hereinafter *1998 House Report*].

29. After referring to the action of the EU and its mandatory rule of the shorter term, the Report states that extension: "[W]ill ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States." *Id.* at 4. It goes on to say, "Extending copyright protection

on the 1996 Senate Report and the evidence (before both bodies) supporting its conclusions. The reasons offered in the Senate Report were the ineffectiveness of current terms to afford adequate or fair protection to creators and their heirs,³⁰ the extension in Europe³¹ and the asserted need for international harmonization,³² the benefits to international trade,³³ the substantially increased commercial lives of works due to growth in communications technologies³⁴ and a supposed concomitant increased incentive for the creation of new works³⁵ and incentives to preserve and digitize existing works.³⁶ As

will be an incentive for U.S. authors to continue using their creativity to produce works, and provide copyright owners generally with the incentive to restore older works and further disseminate them to the public. Authors will be able to pass along to their children and grandchildren the financial benefits of their works." *Id.*

30. *1996 Senate Report, supra* note 27, at 6, 10-11.

31. *Id.* at 6-7. The Report lists the EU extension as "[p]erhaps most important[.]" noting that "[f]ailure on the part of the United States to provide equal protection for works in the United States will result in a loss for American creators and the economy of the benefits of twenty years of international copyright protection that they might otherwise have." *Id.* The Report uses Germany as an example of how the "rule of the shorter term" would limit protection of U.S. works made for hire in that country to the seventy-five year U.S. term instead of the life-plus-70-year German term. *Id.* at 15-16. This example is particularly inapt, because the EU Directive makes an exception from the mandatory rule of the shorter term for EU members who are bound by preexisting treaty obligations recognizing a longer term. Council Directive 93/98/EEC of 29 October 1993, art. 7(3). Therefore, U.S. works are protected in Germany for the full life-plus-70-year term regardless of the U.S. term. *Copyright Agreement with Germany*, 27 Stat. 1021, Jan. 15, 1892, art. 1 (providing for unrestricted national treatment), reproduced verbatim in Presidential Proclamation No. 24, 27 Stat. 1021, April 15, 1892 (declaring subjects of Germany to be eligible for the benefits of U.S. copyright); see also Wilhelm Nordemann, *The Term of Protection for Works by U.S.-American Authors in Germany*, 44 J. COPR. SOC'Y, 1 (Fall 1996). Similarly, the U.K. term for pre-1996 U.S. works is a minimum of life-plus-50 years. See Dennis S. Karjala, *Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S.505, Submitted to the Committees on the Judiciary, United States Senate, United States House of Representatives*, January 28, 1998, at 17-18 [hereinafter *Opposition Statement*], available at [http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/legmats/1998Statement.html#Economic costs](http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/legmats/1998Statement.html#Economic%20costs) (last visited August 23, 2002).

32. *1996 Senate Report, supra* note 27, at 7-9.

33. *Id.* at 7-10, 16-17.

34. *Id.* at 6, 12.

35. *Id.* at 11-13. The Report asserts an incentive to create "new and derivative works" by explicitly denying a reduced incentive from income to be

is discussed below, only the latter two reasons are potentially relevant to the constitutional goal of “promot[ing] the Progress of Science.” Yet, only conclusory testimony of interested parties argued that term extension would lead to new creativity, without meeting any of the economic arguments demonstrating that prospective extension could not increase incentives. Nor did any CTEA proponent attempt to show how extension for existing works would have a positive effect on preservation or digitization of existing works that the copyright owner had not bothered to preserve or digitize before the copyright expired.

A. Adequate or Fair Protection for Authors and their Heirs

The Senate Report is laced with the notion of supplying a “fair economic return” for authors and their dependents or heirs.³⁷ The Report, however, does not offer a standard of “fairness” at all, let alone seek to determine a standard of fairness from the constitutional power to “promote the Progress of Science.”³⁸ The Report cites uniformity of copyright laws as helping “to ensure the greatest possible exploitation of the commercial value of these works in world markets

received “many years down the road.” *Id.* at 12. It also asserts that authors who license their works can receive the full present value of the projected income stream. *Id.* This is, of course, true (except for the Report’s failure to observe that no purchaser of a license will bargain for more than 35 years, because of inalienable termination rights). The problem is that the “full present value” is not increased by an extension that kicks in so “many years down the road.” See *infra* note 69 and accompanying text. The Report thus flunks Economics 101. For existing works, the added incentive is supposed to be “income with which to subsidize the creation of new works.” *Id.* It mentions no mechanism for insuring that the extra income will indeed be used for this purpose. See *infra* note 113 and accompanying text.

36. 1996 Senate Report, *supra* note 27, at 13.

37. *Id.* at 3, 4, 6, 9.

38. U.S. CONST. art. I, § 8, cl. 8. Again, the contrast with the Commerce Clause is crucial. In general economic regulation, Congress implicitly determines “fairness” by including some things and excluding others from a statute’s coverage. This does not render the legislation vulnerable to constitutional attack. The Intellectual Property Clause, however, contains express limitations on congressional power and defines the power itself as one “to promote the Progress of Science.” Legislation adopted under the Clause must be justified in terms of the express power and the express limitations on that power contained in the Clause. If “fairness” to authors or inventors is to be a legitimate goal of the Clause, it must therefore be derived from the express power “to promote the Progress of Science.” *Id.*

for the benefit of U.S. copyright owners and their dependents.”³⁹ It thus seems to be treating benefit to copyright owners and their dependents as a primary goal of the extension. Many witnesses testified before Congress that copyright law was designed to protect the copyright owners for a period covering the lives of two generations of descendants of the creative author and that increased life expectancies had rendered the current term insufficient to achieve this goal.⁴⁰ Others testified more generally that the current terms did not protect copyright owners for an adequate or reasonable time.⁴¹ No statistical evidence was offered, however, to show that the increased life expectancy was not already reflected in the prospective life-plus-50-year term because of the increased longevity of authors themselves, or to show that on average creative authors were having children later in life (let alone twenty years later). While Irving Berlin was offered as an example of a creative author who saw copyrights on some of his works expire in his own lifetime,⁴² no evidence was presented to show that Irving Berlin’s children or grandchildren did not benefit from the wealth amassed by their creative forebear from exploitation of his works.

More importantly, no one offered any basis in law for the “life plus two generations” argument or tried to relate it to the constitutional mandate to “promote the Progress of Science.” Nobody attempted to relate the “life plus two generations” argument to the demand for an increase in the term for works made for hire, in which the author is generally a corporation that has no descendants.⁴³ It is

39. 1996 Senate Report, *supra* note 27, at 8.

40. 1995 Senate Hearing, *supra* note 24, at 44 (presentation of Alan Menken); *id.* at 55 (statement of Bob Dylan); *id.* at 59 (statement of Ellen Donaldson); *id.* at 140 (resolution of ABA Section of Intellectual Property Law); *id.* at 143-44 (letter from Alison Fine); *see also* 1995 House Hearings, *supra* note 25, at 272 (statement of Mary Ellin Barrett); *id.* at 628 (joint statement of the Coalition of Creators and Copyright Owners); *see also* 1997 House Hearing, *supra* note 26, at 36 (testimony of George David Weiss).

41. 1995 Senate Hearing, *supra* note 24, at 57-58 (statement of Carlos Santana); *id.* at 57 (letter from Stephen Sondheim); *see also* 1997 House Hearing, *supra* note 26, at 133 (statement of Hoagy Bix Carmichael).

42. *See* 1996 Senate Report, *supra* note 27, at 10.

43. The Senate Report shifts gears in the case of works made for hire, defending term extension for them based on the benefits to international trade and the increased commercial lives of works. *See id.* at 16-17.

thus one of those catchy phrases that sounds appealing but reveals itself upon analysis to be without foundation in U.S. jurisprudence.⁴⁴

B. *International Harmonization*

The Senate Report cites the “international movement” towards a term of life-plus-70 years and the loss to American creators and to the economy of the benefits they would otherwise have as perhaps the most important reason for term extension in the U.S.⁴⁵ The Register of Copyrights is quoted, as saying that harmonization of national copyright laws is “crucial” and predicting that a life-plus-70-year term will be the world standard “at some point in the future.”⁴⁶ The Report states that the copyright industries account for 5.7 percent of the total gross domestic product and are creating jobs at twice the rate of other industries.⁴⁷ It sees the U.S. as losing a significant trade advantage if it fails to keep pace with the emerging international standards.⁴⁸ It asserts that Europe’s adoption of the rule of the shorter term will cause American works to fall into the public domain twenty years before those of our trading partners unless the

44. One strongly pro-CTEA witness, Commissioner of Patents and Trademarks Bruce A. Lehman, indirectly revealed how little concern he had for even the first generation of an author’s heirs. Senator Brown sent some post-hearing questions to some of the witnesses. Question 1 had to do with whether the bill should be altered “to pass along the benefit of a term extension to the creators of works, rather than the consumers of their labors.” In stating the Administration’s opposition to an amendment designed to effect this, Mr. Lehman responded, “For virtually all pre-1978 works and all post-1978 works (other than works made for hire) the creators of works will have long been dead when the additional twenty-year copyright period begins. Thus, the actual beneficiaries of the twenty-year extension would not be the author, but rather the author’s heirs.” *1995 Senate Hearing, supra* note 24, at 117. Mr. Lehman’s opposition thus implicitly discards even a “one generation” argument, favoring current copyright owners over the original author’s heirs.

Professor Sterk has written more generally on how the rhetoric about “authors” and their supposed just desserts has influenced and supported the great expansions of copyright protection we have seen, especially with and since the adoption of the 1976 Copyright Act. See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996).

45. *1996 Senate Report, supra* note 27, at 6-7.

46. *1995 Senate Hearing, supra* note 24, at 8, 20 (prepared statement of Marybeth Peters), quoted in *1996 Senate Report* at 8.

47. *1996 Senate Report, supra* note 27, at 9.

48. *Id.*

U.S. also extends its term.⁴⁹ A long parade of witnesses and statements to Congress made assertions in support of these conclusions.⁵⁰

None of the pro-CTEA witnesses arguing that harmonization called for term increases in the U.S. attempted to show how harmonization of term would benefit anyone in the U.S. other than owners of old but still valuable copyrights. Indeed, "harmonization" cannot be considered a serious motivating factor, in view of the demonstrable fact that the only important class of works to which the CTEA achieved harmonization of term consists of those created after 1977 by individual authors, who have a life-plus-70-year term in both the European Union ("EU") and the U.S.⁵¹ The earliest any

49. *Id.*

50. On the importance of international harmonization, see *1995 Senate Hearing, supra* note 24, at 4-5 (statement of Senator Feinstein that international harmonization is the "most compelling" reason for the legislation); *id.* at 23 (testimony of Bruce A. Lehman that international harmonization is the "primary reason" for the bill); *id.* at 59-60 (statement of Ellen Donaldson); *id.* at 132-34 (joint prepared statement of the Coalition of Creators and Copyright Owners); *id.* at 143-44 (letter from Alison Fine); *id.* at 147 (letter from Jonathan Tasini); see also *1995 House Hearings, supra* note 25, at 75 (testimony of Edward P. Murphy).

On the importance to U.S. trade interests, see *1995 Senate Hearing, supra* note 24, at 25 (testimony of Bruce A. Lehman); *id.* at 42 (testimony of Jack Valenti); *id.* at 46 (statement of Mary Rodgers); *id.* at 59 (statement of Ellen Donaldson); *id.* at 64 (statement of Shana Alexander); *id.* at 138 (statement of the American Society of Composers, Authors and Publishers); *id.* at 162 (statement of Edward P. Murphy); *1995 House Hearings, supra* note 25, at 57 (testimony of Marilyn Bergman); *id.* at 205 (testimony of Charlene Barshefsky); *id.* at 594 (memorandum dated July 10, 1995 from Shira Perlmutter to Jack Valenti); *id.* at 616 (joint statement of the Coalition of Creators and Copyright Owners); *1997 House Hearing, supra* note 26, at 134 (statement of Hoagy Bix Carmichael).

On the supposed deleterious effect of Europe's adoption of the rule of the shorter term, see *1995 Senate Hearing, supra* note 24, at 6 (testimony of Marybeth Peters); *id.* at 56 (statement of Bob Dylan); *id.* at 56 (letter of Don Henley); *id.* at 59 (statement of Ellen Donaldson); *id.* at 142 (statement of George David Weiss); *id.* at 143-44 (letter from Alison Fine); *1995 House Hearings, supra* note 25, at 109 (testimony of Martha Coolidge); *id.* at 234 (testimony of Quincy Jones); *id.* at 243 (statement of Alan Menken); *id.* at 273 (statement of Mary Ellin Barrett); *id.* at 511-12 (resolution of ABA Section of Intellectual Property in support of H.R. 989); *id.* at 639 (letter dated June 2, 1995, from Michael K. Kirk); *1997 House Hearing, supra* note 26, at 46 (testimony of Fritz Attaway); *id.* at 133 (statement of Hoagy Bix Carmichael).

51. See Dennis S. Karjala, *Chart Showing Changes Made and the Degree of Harmonization Achieved and Disharmonization Exacerbated by the Sonny*

disharmony of terms can exist for these post-1977 works is 2028.⁵² That the U.S. terms might be longer under the CTEA does not eliminate any of the disharmony that results when the U.S. term expires at a different time from that of some other country. Because the U.S. term for works made for hire is *in any event* a fixed number of years, it can *never* be harmonized with the term in any country that follows a life-plus system for determining the term. Similarly, the U.S. term for pre-1978 works even by individuals is a fixed number of years both before and after the CTEA (seventy-five and ninety-five respectively). Consequently, the harmonization argument is of no current importance for post-1977 works and is only intelligible for pre-1978 works as a plea for more money to the owners of copyrights in those works.⁵³ No CTEA proponent attempted to deal with these irreparable flaws in the “harmonization” argument.

Moreover, even treating “harmonization” as a code word for more money to U.S. copyright owners, no one presenting evidence to Congress on the supposed advantages in international trade made the crucial distinction between trade in *old* works and trade in current works, such as blockbuster new movies, to which term extension has no effect on the trade balance because the works are protected in any

Bono Copyright Term Extension Act (CTEA), at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/legmats/HarmonizationChartDSK.html> (last visited July 15, 2002). Even the pro-CTEA Register of Copyrights conceded that the bill did not completely harmonize on term. *1995 Senate Hearing, supra* note 24, at 20 (testimony of Marybeth Peters).

52. Copyright in a work created in 1978 by an author who died in that year would expire at the end of 2028 under the pre-CTEA life-plus-50-year term. It will continue until 2048 under the CTEA’s life-plus-70-year term.

53. Some of the testimony was quite explicit to this effect. In addition to those claiming an entitlement to protection for life of the author plus two generations, *supra* note 40, or that the current return to copyright owners was not fair or reasonable, *supra* note 41, *see 1995 Senate Hearing, supra* note 24, at 47-52 (statement of Mary Rodgers—listing songs and musicals from 1920 whose loss to the public domain would be “devastating” to their owners); *id.* at 59 (statement of Ellen Donaldson—referring to her father’s works as “our livelihoods”); *id.* at 63 (statement of Marsha Durham—relies on income as paralegal and royalties from her father’s works to support her family); *id.* at 64 (statement of Shana Alexander—income on her own works is far less than that from her father’s); *id.* at 65 (statement of E. Randol Schoenberg—asserting “a great loss” to composer’s grandchildren if his works were to enter the public domain); *id.* at 272 (statement of Mary Ellin Barrett—families will suffer if works fall into the public domain while still commercially viable).

event. The closest anyone came to this issue was Bruce A. Lehman, Commissioner of Patents and Trademarks, who observed that the works from 1920 to 1940 were about to enter the public domain and that this is the time period in which American copyright-based industries came into worldwide preeminence.⁵⁴ Mr. Lehman did not supply any factual support for his implication that this meant a favorable trade balance in old works “saved” from the public domain by the CTEA. Nor did Congress make a study of the relative contribution of old works and current works to the trade balance in copyright-protected works, notwithstanding being urged to do so.⁵⁵

C. *Increased Commercial Life of Works*

The Senate Report mentions in several places a substantially increased commercial life of creative works as a result of the growth in communications media.⁵⁶ At one point, the Report seems to be accepting as a goal of U.S. copyright that the value of any such extended commercial life properly belongs to copyright owners and their dependents.⁵⁷ However, the main thrust is that “afford[ing] ample opportunity to exploit their works throughout the course of the works’ marketable lives” will increase the return on investment and

54. *1995 Senate Hearings*, *supra* note 24, at 24; *1995 House Hearings*, *supra* note 25, at 212.

55. *1995 Senate Hearings*, *supra* note 24, at 88 (statement of Dennis S. Karjala on behalf of some forty-five copyright and intellectual property law professors); *1995 House Hearings*, *supra* note 25, at 417 (testimony of Dennis S. Karjala). Charlene Barshefsky, Principal Deputy, U.S. Trade Representative, presented an estimate from the Motion Picture Association of America that term extension would result in \$1 million revenue increase from international sources for 2000, a \$3 million increase for 2010 and a \$160-200 million increase for 2020. *Id.* at 211 (statement of Charlene Barshefsky). She supplied no factual foundation, however, and the conclusion can only be regarded with extreme skepticism: It would mean that films from 1925 to 1945 would be generating *from international sources* \$160-200 million in the year 2020. Such an outlandish claim requires more than citation to an estimate by a highly interested party. Even this estimate shows, moreover, that there was no need to rush into term extension now if improved trade balances were the goal. It predicts (in 1995) only a \$3 million increase for the year 2010, a full fifteen years later.

56. *1996 Senate Report*, *supra* note 27, at 6, 8, 12.

57. *Id.* at 8 (uniformity of copyright laws helps “to ensure the greatest possible exploitation of the commercial value of these works in world markets for the benefit of U.S. copyright owners and their dependents.”).

thus strengthen incentives to creativity.⁵⁸ Some of the testimony and submitted statements before Congress also assumed a longer commercial life for works in general⁵⁹ and would give the benefit of that increase to the copyright owner on the ground of fairness⁶⁰ or, in one case, on the ground that it might increase incentives by subsidizing the creation of new works.⁶¹ In fact, there was no evidence at all to show that works in general have a longer commercial life than works from the past. Shakespeare, Rembrandt, and Bach are the authors of works that are used commercially today and would surely have commercial value as works if they were protected by copyright. But perhaps we may assume, along with Congress, that the new avenues of exploitation through digital technology that make all works more accessible will also allow them to live longer. The question is whether the commercial benefits of any such assumed longer commercial life should, under our copyright jurisprudence and the Constitution, go to the original copyright owner or be shared among the public.

D. Incentives for the Creation of New Works

The Senate Report, noting the extended commercial lives of works, would give "American authors" the benefit of the new opportunities for exploitation of their works because "the promise of additional income will increase existing incentives to create new and derivative works."⁶² The Report argues that the extended term is valuable even to current authors because they wish to leave a legacy to their children and grandchildren. If they transfer the copyright, they will receive the present value of the projected income stream for

58. *Id.* at 12.

59. 1995 Senate Hearing, *supra* note 24, at 5 (statement of Senator Feinstein); *id.* at 135 (joint prepared statement of the Coalition of Creators and Copyright Owners); *id.* at 143 (statement of George David Weiss); 1995 House Hearings, *supra* note 25, at 630 (joint statement of the Coalition of Creators and Copyright Owners).

60. 1995 Senate Hearing, *supra* note 24, at 18 (testimony of Marybeth Peters); *id.* at 44 (testimony of Alan Menken stating that many works fall into the public domain while still commercially successful); *id.* at 59 (statement of Ellen Donaldson complaining of the loss "of our works (our livelihoods) to public domain, while they still have a viable commercial life").

61. 1995 Senate Hearing, *supra* note 24, at 18 (testimony of Marybeth Peters stating that the increased income may subsidize new works).

62. 1996 Senate Report, *supra* note 27, at 12.

the longer term. According to the Report, extending the term will also provide income that creative authors can use to subsidize the creation of new works.⁶³ Much of the testimony and many statements before Congress made general assertions to the effect that the longer term would increase incentives to create new works.⁶⁴ In addition, there was testimony that maintaining control over the work for a longer period operated as an incentive.⁶⁵ (There was also testimony, even from proponents of the CTEA, that increasing the term from life-plus-50 years to life-plus-70 years would not increase incentives.)⁶⁶ Some said that the extra money from the extended term could be used to finance the creation of new works,⁶⁷ although the one time any witnesses were pressed on this issue, CTEA proponents expressed an unwillingness to condition term extension on a showing of new creativity.⁶⁸

63. *Id.*

64. *1995 Senate Hearing, supra* note 24, at 57-58 (letter from Stephen Sondheim); *id.* at 58 (statement of Mike Stoller); *id.* at 70, 95, 123 (testimony and letter of Patrick Alger); *id.* at 57 (testimony of Marilyn Bergman); *id.* at 66 (statement of E. Randol Schoenberg); *id.* at 135 (joint statement of the Coalition of Creators and Copyright Owners); *id.* at 141 (resolution and report of the ABA Section of Intellectual Property Law); *1995 House Hearings, supra* note 25, at 57 (testimony of Marilyn Bergman); *id.* at 590-93 (memorandum from Shira Perlmutter to Jack Valenti); *id.* at 638 (letter from Michael K. Kirk); *1997 House Hearing, supra* note 26, at 32 (testimony of Frances Preston); *id.* at 48 (testimony of Fritz Attaway); *id.* at 517 (statement of Judith M. Saffer).

65. *1995 Senate Hearing, supra* note 24, at 56-57 (statement of Don Henley); *id.* at 99 (testimony of Alan Menken); *1995 House Hearings, supra* note 25, at 271 (statement of Betty Kern Miller).

66. *1995 Senate Hearing, supra* note 24, at 62 (testimony of Marybeth Peters); *id.* at 32 (oral statement of Sen. Grassley); *1995 House Hearings, supra* note 25, at 420 (oral statement of Rep. Hoke). Bruce A. Lehman, Commissioner of Patents and Trademarks, testified that the greater financial rewards offered by extension might serve as an incentive to create more new works, even if no particular author would create a work under a life-plus-70-year regime that he would not have created under a life-plus-50-year regime. *Id.* at 26. This remark seems to be simply a slightly more sophisticated, or more garbled, version of the "stronger copyright means more incentives" assertions.

67. *1995 Senate Hearing, supra* note 24, at 5 (testimony of Marybeth Peters); *id.* at 90 (testimony of Jack Valenti); *1995 House Hearings, supra* note 25, at 583 (letter from Paul Goldstein to Jack Valenti); *id.* at 668-69 (article of Lisa M. Brownlee).

68. At the Senate Hearing, Senator Leahy asked how Congress could insure that term extension profits would be invested in additional creativity. *See 1995 Senate Hearing, supra* note 24, at 92. Alan Menken simply responded that authors should receive the income from their works. *Id.* Patrick Alger said that

None of the general statements to the effect that “stronger copyright increases incentives” attempted to deal with the explicitly presented analysis showing that, for current works, the additional twenty years would add only a minuscule amount to the present value of the copyright, and that when risk was factored in, the additional amount was nil.⁶⁹ Indeed, there was not even any testimony that focused solely on prospective extension. None of the testimony asserting that the extra money rolling in from retroactive term extension could be used to finance the creation of new works gave any plausible theory of just how that would work, such as showing that the extra money would, in fact, be used to subsidize new creative projects that would not have been undertaken were the investment required to come from some other source. Nor did any of the CTEA supporters suggest that

we must rely on authors’ integrity to donate money, or the right to use works, voluntarily. *Id.* Jack Valenti said that the movie industry creates jobs and the greater their revenues, the more solid would be their fiscal foundation. *Id.* at 92-93.

69. 1995 House Hearings, *supra* note 25, at 300 (statement of Dennis S. Karjala). Even some proponents of the CTEA agreed that the extended term did not increase creation incentives. *See supra* note 66 and accompanying text. Professor Paul Goldstein, in a letter to Jack Valenti that was inserted into the House record, agreed that the discount of the benefits to present value was proper but that social costs should also be similarly discounted and were minimal. *Id.* at 582. This seems to assume, however, that minimal social cost justifies giving exclusive copyright rights, even if they do not promote the progress of science. It would mean, for example, that Congress could grant to the descendants of Mark Twain alive in, say, year 2200, a copyright in *Huckleberry Finn*, on the ground that it does not cost us much today. That turns the constitutional regime upside down. Even more importantly, however, Professor Goldstein does not consider the social costs of the extension for existing works. Those costs to the public domain—to the public in works not created and in additional royalties paid—are paid today, and there is therefore no discount to present value. Shira Perlmutter, in a memorandum to Jack Valenti that was also made a part of the House record, simply stated that the extra twenty years can make a real difference in total return. *Id.* at 591. The reason offered in support of this statement is that many copyright owners have rights to multiple works, so the cumulative total may be significant. *Id.* Works are created one at a time, however. For each work, the question is whether the additional twenty years adds anything to the expected return on investment. The present value analysis shows that it does not. Creating twenty works or even 200 at, say, Disney or other large corporate author does not change this. Each work requires an investment of time, money, and creativity, and in each case the corporate author has no reason to think that anything having present value will be added to whatever return was expected in the absence of term extension.

Congress condition the availability of the extra twenty years on investing the proceeds in additional creativity.⁷⁰ Needless to say, the only testimony suggesting that extension for existing works would increase incentives for the creation of new works was only implicit in the general statements that “stronger copyright increases incentives.” Nobody offering testimony of this type attempted to weigh the costs to the public in royalty transfer payments or a diminished public domain against this purported increased incentive.

A few witnesses suggested that an author has a greater incentive to produce derivative works or exploit works more generally if the underlying works are protected.⁷¹ The argument is that exclusive rights are necessary for a remake of a classic work, such as a film, in order to justify the huge production and marketing expenses.⁷²

70. When Senator Leahy raised this question at the 1995 Senate Hearing, the responses from CTEA supporters were that authors deserved the money and that we would have to rely on their integrity for new works. *See supra* note 68 and accompanying text. Senator Dodd, who was not a member of the Judiciary Committee, submitted a prepared statement indicating an interest in looking at recapturing the benefits of extended copyright terms for the purpose of funding the National Endowments for the Arts and the Humanities. *1995 Senate Hearings, supra* note 24, at 94 (statement of Senator Dodd). The Congressional Research Service actually issued a report on proposals to charge copyright owners a fee to obtain term extension, with the proceeds devoted to promoting the arts. EDWARD RAPPAPORT, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES, No. 98-144E, (1998) *available at* <http://www.senate.gov/~dpc/crs/reports/ascii/98-144> (last visited Aug. 23, 2002).

71. *See 1995 Senate Hearing, supra* note 24, at 34 (testimony of Bruce A. Lehman suggesting that property rights are necessary as an incentive to take already existing works and reuse them in new formats); *1995 House Hearings, supra* note 25, at 669 (article of Lisa M. Brownlee). Shira Perlmutter asserted that CTEA opponents—in arguing that current derivative work authors would have fewer building blocks available to them under the extended term—failed to consider that these derivative work authors themselves would get the benefit of the extended term for their original derivative works. *See id.* at 600 (memorandum from Shira Perlmutter to Jack Valenti). However, *she* fails to notice that the negligible effect on incentives to current authorship produced by extending the term applies equally to all current authors, whether they are creating wholly original works or derivative works.

72. *See 1995 House Hearings, supra* note 25, at 669 (article of Lisa M. Brownlee).

Otherwise, competitive remakes would get a free ride on the renewal of interest in the work generated by the first remake.⁷³

E. Incentives to Preserve, Digitize, or Distribute Existing Works

The Senate Report asserts that extending existing terms (retroactive extension) would strengthen incentives to preserve existing works.⁷⁴ The argument is that because of the cost of restoring and digitizing existing works, no one will have an incentive to make the investment without an extended copyright term during which one's investment can be returned.⁷⁵ A number of witnesses testified that extension would supply an incentive to restore, digitize, or distribute works that were about to fall into the public domain.⁷⁶ Others testified that, in the case of films, copyright owners had historically failed to preserve or restore works.⁷⁷ Witnesses further testified that many films of cultural and social value, but with little economic value, were "orphan works" for which copyright ownership could not be determined.⁷⁸ In these cases term extension would inhibit, rather than promote, film restoration by archivists and others who do it more as a labor of love than for economic benefits.⁷⁹

F. Value of the Public Domain

While the 1996 Senate Report does not expressly rely on their testimony, many witnesses disparaged the value of the public domain

73. See *id.* These arguments cannot withstand analysis. See *infra* notes 114-26 and accompanying text.

74. See 1996 Senate Report, *supra* note 27, at 3.

75. See *id.* at 13.

76. See 1995 Senate Hearing, *supra* note 24, at 26, 34 (statement and testimony of Bruce A. Lehman); *id.* at 41-42 (testimony and statement of Jack Valenti); *id.* at 45 (testimony of Alan Menken); *id.* at 143 (statement of George David Weiss); 1995 House Hearings, *supra* note 25, at 593 (memorandum from Shira Perlmutter to Jack Valenti); *id.* at 633 (joint statement of the Coalition of Creators and Copyright Owners); 1997 House Hearing, *supra* note 26, at 48 (testimony of Fritz Attaway).

77. See 1995 Senate Hearing, *supra* note 24, at 160 (letter from John Belton, Society for Cinema Studies); 1995 House Hearings, *supra* note 25, at 283 (testimony of John Belton).

78. See 1995 Senate Hearing, *supra* note 24, at 154 (letter from Larry Urbanski, American Film Heritage Association estimating that seventy-five percent of the films from the 1920s are orphan works).

79. See 1995 Senate Hearing, *supra* note 24, at 160 (letter from John Belton, Society for Cinema Studies).

with assertions that entry into the public domain did not benefit consumers by reducing prices.⁸⁰ Or, if prices did decrease, quality generally decreased as well. The most colorful statements of this type came from Jack Valenti,⁸¹ but there were many others.⁸² Some witnesses went so far as to compare, wholly inaptly, a public domain classic to a popular current work in an effort to demonstrate the point.⁸³ A few pro-CTEA witnesses acknowledged a potential or

80. Senator Brown's dissenting report contested the claims of CTEA proponents that term extension would not harm anyone. *See 1996 Senate Report, supra* note 27, at 34.

81. *E.g., 1995 Senate Hearing, supra* note 24, at 42 (statement of Jack Valenti):

Whatever work is not owned is a work that no one protects and preserve [*sic*]. The quality of the print is soon degraded. There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale. A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues.).

82. *1995 Senate Hearing, supra* note 24, at 25 (testimony of Bruce A. Lehman); *id.* at 143 (statement of George David Weiss); *1995 House Hearings, supra* note 25, at 86 (testimony of Marilyn Bergman); *id.* at 141 (testimony of Judith M. Saffer); *id.* at 213 (testimony of Bruce A. Lehman); *id.* at 272 (statement of Mary Ellin Barrett); *id.* at 584 (letter from Paul Goldstein to Jack Valenti); *id.* at 598 (memorandum from Shira Perlmutter to Jack Valenti); *id.* at 602 (article of Arthur R. Miller); *id.* at 633-34 (joint statement of the Coalition of Creators and Copyright Owners); *1997 House Hearing, supra* note 26, at 134 (statement of Hoagy Bix Carmichael).

83. *1995 House Hearings, supra* note 25, at 235 (testimony of Quincy Jones, comparing a John Grisham novel to a Tolstoy novel and a Pearl Jam CD to a Beethoven CD); *1995 Senate Hearing, supra* note 24, at 45 (testimony of Alan Menken, comparing a John Grisham novel to *Moby Dick* and a Garth Brooks CD to a recording of Mozart's *Requiem in D Minor*). On the inaptness of these comparisons, *see infra* notes 102-08 and accompanying text. One witness argued that movie theaters charge as much for movies based on public domain works as for those based on copyrighted works. *See 1995 Senate Hearing, supra* note 24, at 135 (joint prepared statement of the Coalition of Creators and Copyright Owners). This comparison is even more inapt, because a film based on a public domain work is itself copyright protected as a derivative work. It might also have been noted that theaters charge as much for a film that costs \$1 million to make as one that costs \$50 million. Given such economics in the film industry, any cost savings to the producer cannot be expected to be reflected in box office prices. At the margin, however, such costs are likely to be reflected in the total number and types of films that are available. Many small film makers might well go ahead with a project if the

theoretical loss in the creation of new works but primarily for the purpose of denying⁸⁴ or minimizing⁸⁵ this possibility. Others implied that the opponents of term extension had the burden of proving that such losses would occur.⁸⁶

G. Summary

Based on the evidence presented at the various hearings on copyright term extension, Congress could have rationally concluded that many owners of existing copyrights felt that the current terms were unfair, unreasonable, or inadequate, either to supply financial support to heirs through at least two generations or to permit those heirs to control derivative works and performances based on popular works. Congress had no evidence that the CTEA as proposed and subsequently enacted would harmonize copyright terms for works published prior to 1978 or for the important class of works made for hire published after 1977. While the CTEA harmonized the post-1977 term for works authored by individuals, not a single witness or written statement argued in favor of a purely prospective extension (or even an extension that would take effect for works created in 1978 or later). Congress had clear evidence that trade in intellectual property is important to our international balance of payments. Nevertheless, it heard no more than general conclusions or suppositions concerning trade in those works most affected by the CTEA, namely, works from the 1920s and 1930s. Congress heard much general testimony that works now have extended commercial lives due to advances in communications technologies, but no studies were cited to support this claim. Assuming that today works do generally have

underlying work were in the public domain but do something else when they see the high transaction costs of copyright clearances.

84. *Id.* at 136 (joint prepared statement of the Coalition of Creators and Copyright Owners asserting that there is no evidence that public domain status leads to significant exploitation by way of derivative works).

85. *Id.* at 16 (statement of Marybeth Peters asserting that costs to the public would be minimal so we should favor authors); *1995 House Hearings, supra* note 25, at 586 (letter from Paul Goldstein to Jack Valenti arguing that owners have economic incentives to keep their works accessible for exploitation); *but see id.* at 159 (testimony of Marybeth Peters that twenty-year freeze on works entering the public domain would be a negative impact of the CTEA).

86. *1995 Senate Hearing, supra* note 24, at 16 (statement of Marybeth Peters asserting the Copyright Office belief that no case has been made that extension would diminish the supply of new works).

longer commercial lives, a number of witnesses testified that an extended exclusive copyright was important in ensuring wide dissemination of these works in a form that is most desirable to the public. There was also evidence to the contrary, namely, that works in the public domain are more likely to be exploited in a publicly desirable form, because they are available to all, including those whose passion may lead them to restore and preserve works without the prospect of exclusive rights in the end product.⁸⁷

A number of witnesses before Congress stated, in essence, that an extended term meant stronger copyright protection and that stronger protection would operate as an incentive to the creation of new works. No witnesses attempted to rebut the argument that the present value of the extended term to a current author is nil. No one testified that any particular author had decided against undertaking the creation of a new work that he would have undertaken had the prospective term been life plus seventy years instead of the pre-CTEA life-plus-50-year term. Obviously, Congress heard no evidence indicating that retroactive extension would have any incentive effect on the creation of those existing works. There was testimony that the extra money that copyright owners would receive during the extended twenty year term could be used to finance the creation of new works.⁸⁸ Yet, no one offered a plausible economic theory to indicate any likelihood that the extra money would flow in the direction of new authorial creativity. Additionally, no CTEA supporters suggested that Congress should condition the extended term on proof that the extra money would be used to support new works.

Many witnesses testified in general terms that property rights were necessary as an incentive to preserve, digitize, restore, or distribute existing works.⁸⁹ However, testimony concerning restoration was almost exclusively related to films.⁹⁰ Except for digitization of existing works, none of this testimony indicated why the pre-CTEA seventy-five year period was insufficient in providing the necessary incentive but a ninety-five year period would be sufficient. Even as to digitization, no pro-CTEA witness sought to condition the

87. *1996 Senate Report*, *supra* note 27, at 29, 34.

88. *E.g.*, *1995 Senate Hearing*, *supra* note 24, at 6 (testimony of Marybeth Peters).

89. *See supra* notes 74-76 and accompanying text.

90. *See 1995 Senate Hearing*, *supra* note 24, at 90-123.

extended copyright on the production of an actual and accessible digital version of the work in question.

III. EVALUATION OF THE EVIDENCE FAVORING THE CTEA IN TERMS OF THE INTELLECTUAL PROPERTY CLAUSE

A. *Fairness to Authors*

If Congress can constitutionally extend copyright terms for the purpose of giving adequate, fair, or reasonable financial returns to the owners of existing copyrights, sufficient evidence was presented to Congress on which it could have reasonably decided that the existing terms were not long enough. "Fairness" in this sense is a basic policy question that Congress is better equipped to deal with than the courts. While we should be suspicious that Congress might hear the louder voices of rent seekers who benefit from term extension, this is a problem with any welfare or wealth transfer measure. However, Congress is not empowered under the Intellectual Property Clause simply to enrich copyright owners. Such a goal, in itself, does not "promote the Progress of Science" and, particularly for retroactive extension, violates the constitutional mandate that the exclusive rights of copyright be made for a "limited Time[]." ⁹¹

B. *Maintenance of Authorial Control*

Another goal of some CTEA proponents was to maintain control over the use of their works. ⁹² One can understand how an author may find some uses of his or her creation improper or offensive, and copyright (during its proper term) allows the copyright owner to enjoin any unlicensed production or performance. While there is some merit to the argument that authorial control "promote[s] the Progress of Science," on the theory that the author knows best what the work "means" and therefore how it is best used and presented, the argument loses much of its force as that control passes to heirs and

91. See Brief for Petitioners at 17-23, *Eldred v. Ashcroft*, No. 01-618 [hereinafter *Petitioners Brief*]; Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners at 8-14, *Eldred v. Ashcroft*, No. 01-618 [hereinafter *Intellectual Property Professors Brief*].

92. See *1995 Senate Hearing*, *supra* note 24, at 142 (testimony of George David Weiss).

assignees.⁹³ No evidence was presented to Congress to show, for example, that George Gershwin's nephews, who control the trust that owns the Gershwin copyrights, have any more competence to understand and convey the real "meaning" of his works than anyone else who has listened to and studied Gershwin's works.⁹⁴ Certainly the distant descendants of Victor Hugo should not be able to prevent Disney from polishing up the Hunchback's image.⁹⁵ Nor is there any reason to believe that the great-great-grandnephews of Jane Austen are better qualified to determine current uses of her works than the makers of the movie "Sense and Sensibility" or the television mini-series "Pride and Prejudice."⁹⁶

93. Music critic Gerald Nachman gave a number of examples of the use of copyright to prevent "misuse" of a particular piece, such as the refusal of Lorenz Hart's estate to use any of Hart's lyrics in a biography that mentioned Hart's homosexuality, the refusal of the Ira Gershwin estate to license an album by Gershwin devotee Michael Feinstein, and the Leonard Bernstein estate's refusal to allow a production of "On the Town" because it objected to a dance number. See Gerald Nachman, Letter, *Let's Say Enough to Copyright Welfare*, N.Y. TIMES, Feb. 25, 1995, available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/Nachman.html>.

94. Reports in the media indicate that the Gershwin Family Trust will not license "Porgy and Bess" for performance by a white cast. See Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES, Mar. 28, 1998, at A13, available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/smith.html> (discussing reluctance of Gershwin family license "Porgy and Bess" to white casts); see also Gail Russell Chaddock, *When Is Art Free?*, CHRISTIAN SCI. MONITOR, June 11, 1998 at B1, available at <http://www.csmonitor.com/durable/1998/06/11/p51s1-csm.htm>; Steve Zeitlin, *Strangling Culture with a Copyright Law*, N.Y. TIMES, Apr. 25, 1998, available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/zeitlin.html> (discussing Gershwin Family Trust and other copyright holders' control over copyrighted materials).

95. *Clan of Victor Hugo Denounce Disney Film*, CHI. TRIB., Mar. 11, 1997, at 2, available at <http://p8asb.p8archner.com/chicagotribune/index.html> (Reporting that the descendants of Victor Hugo in France were "profoundly shocked" at Disney's treatment of The Hunchback of Notre Dame and had denounced the film as "commercial pillage of heritage." Related items in which Disney has a proprietary interest, like toys and comic books, were labeled by the Hugo heirs as "scandalous and obscene.").

96. Amy Stevens, *Poor Jane Austen Didn't Live to See "Sense and Sensibility"*, WALL ST. J., Mar. 25, 1996, at A1. A summary of the article and some commentary are available at <http://www.law.asu.edu/HomePages/Karjala/>

Moreover, using copyright as a tool of censorship would explicitly raise the many First Amendment issues created by term extension and force Congress to tailor its legislation to meet some legitimate governmental objective while not burdening more speech than necessary to achieve that objective.⁹⁷ Here Congress has not offered censorship as an objective, let alone defended censorship as a legitimate objective under the Intellectual Property Clause. Furthermore, the CTEA has not been tailored to insure that only those works in danger of “misuse” are covered. On the contrary, the CTEA extends the term for *all* works of *all* types, regardless of whether the works have economic value and regardless of whether the copyright owner is known or can be found.⁹⁸ Consequently, while Congress saw evidence of a desire for copyright-owner control over the use and presentation of works, Congress did not indicate that this was a basis for the CTEA; moreover, the desire for control would not be a sufficient constitutional basis.

C. *Longer Commercial Lives of Works*

One consistently offered reason that the current terms were insufficient, and one emphasized in the 1996 Senate Report, was that modern communications technologies generally extended the commercial lives of works.⁹⁹ For this reason the copyright is now expiring for many works that are still being performed and are still generating royalties.¹⁰⁰ No witness offered a basis for distinguishing a twenty-year extension, as proposed by the CTEA, and a perpetual copyright for works that retain commercial value. No witness explained how maintaining copyright in existing works for more of their now-longer commercial lives comported with the constitutional mandate to “promote the Progress of Science.” Nor did anyone attempt to explain how a term based on an assumed longer commercial life comports with the constitutional mandate that copyright terms be

OpposingCopyrightExtension/commentary/austen-wsj.html (summarizing and commenting on Stevens’ article).

97. See *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

98. See *e.g.*, 17 U.S.C. § 304(a), (b) (applying the ninety-five-year term to “any copyright”).

99. *1996 Senate Report*, *supra* note 27, at 12.

100. See *id.* at 12-14.

for "limited Times." The epic poetry of Homer, the Bible, and the works of Shakespeare would all qualify for copyright under this rationale.

D. Value of the Public Domain

Although the 1996 Senate Report did not make the assertion, many pro-CTEA witnesses testified that term extension would be essentially costless to the American public.¹⁰¹ By means of anecdotal example, they argued that works in the public domain sold for prices that were equal to or even greater than the prices for works still under copyright. These claims were rarely challenged at the hearings.¹⁰² Nevertheless, one would have to reject basic microeconomic theory to conclude that, in a competitive economy, reducing the cost of one input to a product while keeping everything else constant would not cause prices to fall. Prices in a competitive economy should fall to marginal cost.¹⁰³ The absence of copyright eliminates monopoly pricing,¹⁰⁴ and marginal cost decreases when a royalty no

101. *Id.* at 25, 27.

102. *But see 1995 House Hearings, supra* note 25, at 417 (testimony of Dennis S. Karjala, stating that he did not accept claims that the costs were de minimis and asking for a study); *Opposition Statement, supra* note 31, at 3, 7 (arguing that longer terms are economically inefficient and that public costs outweigh public benefits).

103. *See* Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 10-12, *Eldred v. Ashcroft*, No. 01-618 [hereinafter *Economists Brief*].

104. This is an element that has received insufficient consideration in the literature concerning term extension. In the nineteenth century, before the U.S. recognized copyrights on works from other countries, competition among publishers of works by famous foreign authors, especially those from Britain, reduced prices far below those for protected works by U.S. authors. This was a primary reason U.S. authors got on the "international copyright" bandwagon. *See SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS* 50-62 (2001). For example, books by an emerging U.S. author would cost at least \$0.50 per copy, while unprotected versions of Sir Walter Scott's *Ivanhoe* were available for \$0.10-0.15. *See id.* at 59. This difference by a factor of three may be explained partially by differences in production quality, but it cannot be explained by a royalty requirement alone. And, if low production quality is the explanation for the price differential, it means that the purchasing public preferred that tradeoff between price and quality. Otherwise, some publishers would have responded with higher-production-quality versions. In fact, competition resulted in giving American readers "their choice of dozens of editions of their favorite British authors in a wide variety of prices and quality." *Id.* at 53.

longer has to be paid.¹⁰⁵ The fundamental premise of copyright as an incentive is that it allows the extraction of monopoly profits during its term. Indeed, the pro-CTEA witnesses were often desperate to keep their royalty streams flowing.¹⁰⁶ *Somebody* is obviously paying these royalties, and because American citizens and companies are the major users of U.S. works,¹⁰⁷ it is clear that Americans are paying them.¹⁰⁸ Moreover, the most important cost to the public results

The copyright allows pricing above marginal cost. To be sure, while books are not entirely fungible, at some price many people will simply buy a different book, or no book at all, and this limits the degree to which prices can rise above marginal cost. There is little reason, however, to think that the entire increase is due to a royalty payment to the author. Most important, the figures from the nineteenth century clearly show that the absence of copyright *did* very definitely result in a wide variety of works available to the American public at lower prices. *See id.* Thus, the claim that public domain status does not benefit the consumer is utterly without merit.

105. Pro-CTEA witnesses used the technique of holding up one public domain and one protected book or CD, of unstated production quality or length, to show that public-domain status did not reduce prices for consumers. *See supra* note 83. In contrast, Tim Phillips has conducted a much more careful survey of public domain songbooks, in which he attempts to control at least for quantity. Tim Phillips, *Survey on the Relative Costs of Copyright-Protected and Public Domain Songs*, available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/publicdomain/PhillipsSongSurvey.html>. He found that the average cost per song was from 20-33% lower for public domain songs than for protected songs. *See id.*; *see also* Letter from Randolph P. Luck, President of Luck's Music Library, to Senator Spencer Abraham (June 28, 1996) available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/letters/Luck'sMusic01.html> (showing a dramatic drop in the cost of classical sheet music when works enter the public domain). To compare a recent John Grisham novel, which may sell millions of copies, to a Tolstoy work in the public domain, which may sell copies measured in the thousands, is to compare apples and oranges. Where the market is thin, higher prices may be necessary just to cover production costs, so prices are higher notwithstanding competition and the absence of royalties. *See 1995 Senate Hearing, supra* note 24, at 82 (statement of Dennis S. Karjala); *Opposition Statement, supra* note 31, at 11.

106. *See supra* note 53 (discussing the claimed losses of copyright revenues to heirs of copyright-protected materials).

107. Even the pro-CTEA Register of Copyrights testified that the U.S. was the biggest market for U.S. works, making the CTEA difficult to justify on economic grounds. *See 1995 Senate Hearing, supra* note 24, at 22 (testimony of Marybeth Peters).

108. Businesses are every bit as much "consumers" as individuals and are equally entitled to the benefits that flow from the free availability of works that

from new derivative works that are *not* created and performances that do not take place because the new author or performer cannot obtain permission from whoever owns the copyright fifty years after the original author's death. The claims that the public domain does not benefit the public are therefore not merely implausible; they are simply false. Surely this is the main reason the 1996 Senate Report does not expressly rely on them. Yet, it is difficult to escape the conclusion that Congress was enticed by the notion that it could supply a benefit to major campaign contributors purportedly without cost to the public.

E. Harmonization with the European Union and the Balance of Trade

Congress heard conclusory evidence that international "harmonization" of copyright law was important to maintaining and developing U.S. preeminence in copyright-protected works.¹⁰⁹ No one testified how harmonization of copyright terms (as opposed to simply lengthening them as the CTEA did) would provide these claimed trade advantages. Nor did anyone testify how the CTEA achieved harmonization of copyright terms for works (except for post-1977 works by individuals) or seek to extend only the post-1977 or the post-CTEA terms. The testimony, including statements from some pro-CTEA witnesses, demonstrated that the CTEA did not, in fact, achieve harmonization.¹¹⁰ Even if harmonization is a permissible goal of copyright legislation where it promotes the progress of science, Congress had no credible evidence before it to show (1) that the CTEA as proposed would achieve harmonization for anything but individually authored post-1977 works or (2) that the harmonization achieved would in fact promote the progress of science. Congress received much evidence to the contrary. Therefore, any test

enter the public domain. To the extent the royalties are paid by a commercial enterprise (whether a formal "business" or an individual performer), the ultimate consumer pays indirectly through higher prices necessarily charged by the direct user due to its higher costs. Of course, U.S. consumers will also have to keep paying for whatever uses they make of foreign works that remain protected during the extended period.

109. *See supra* notes 50-52 and accompanying text.

110. *See supra* notes 45-55 and accompanying text.

beyond rubber stamp rational basis must lead to overturning the statute to the extent its adoption rests on this ground.

The other aspect of the “harmonization” argument is that the extended term, while failing to harmonize with the EU (let alone most of the rest of the world), would improve our international trade balance by sending money from Europe to U.S. copyright owners who would otherwise lose European royalties after expiration of the U.S. seventy-five year term because of the EU’s mandated “rule of the shorter term.”¹¹¹ No one offered evidence of any careful study to show how much old works contribute to the balance of trade or whether that contribution was negative or positive.¹¹² Nor did any witness supply any meaningful argument showing how improvements in international trade, even if achieved by the CTEA, would “promote the Progress of Science” within the meaning of the Intellectual Property Clause.

F. Incentives for New Creativity or Increased Public Access

The foregoing shows that neither fairness to authors, maintenance of authorial control, longer commercial lives of works, an asserted lack of value of the public domain, nor harmonization justifies the congressional action in adopting the CTEA. There remains the question of incentives. We must consider two types: incentives to create new works and incentives to preserve, restore, distribute, or further exploit existing works.

111. See *supra* notes 49-50 and accompanying text.

112. One CTEA proponent suggested that the 1920s and 1930s marked the beginning of U.S. preeminence in the copyright industries, but he offered no data to prove the implication that trade from that era was either positive or significant in comparison to trade in current works, like movie blockbusters and Microsoft’s computer software. See *supra* notes 54-55 and accompanying text. Only the copyright industries themselves have the data necessary to answer questions like how much old works contribute to the balance of trade. Had the numbers been convincing at any level, we can be sure that testimony would have been forthcoming. Cf. Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 95-96 (1999) (showing how the database industries blurred the distinction between “exports” and “foreign sales” in hearings concerning database protection and concluding that information in their control concerning prices to U.S. consumers and relative growth of jobs inside and outside the U.S. was likely not favorable to them.)

No one testified in favor of prospective copyright term extension (or even post-1977 extension) alone. No one argued that term extension for existing works would provide any incentive for the creation of new works except in the general sense that “stronger copyright means a greater incentive.” There was testimony that the extra income from extension for existing works could be used to subsidize the creation of new works, but no pro-CTEA witness suggested that extension for existing works be tied to or conditioned upon using the money to finance new creativity. Not only would the subsidization argument justify reviving copyrights in popular works, it would justify giving those extended or revived copyrights to just about anyone who plausibly might use the exploitation proceeds to finance new works, regardless of whether they are “authors.” Further, no one presented evidence that the heirs and assignees of the many valuable old copyrights whose terms were extended by the CTEA were especially creative or especially in need of funding. Jack Valenti did not testify to a dearth of capital in the movie industry, nor did he attempt to show how much Hollywood income from the nineteen-year extension effected by the 1976 Act was devoted to new projects that would not otherwise have been financed. Indeed, to believe that Hollywood would devote the extension proceeds to projects that were otherwise economically unviable flies in the face of ordinary microeconomic principles.¹¹³

Given the huge preponderance of pro-CTEA witnesses asked to testify, we may safely assume that Congress heard all of the constitutionally relevant arguments for retroactive extension. Any independent review of this record must conclude that Congress could not have believed that extending the term for existing works would lead to the creation of new works in anything but a haphazard, and to the public very costly, way. It is thoroughly implausible that Congress expected to promote new creativity by protecting the income stream of a single copyright owner who might or might not invest it in developing new works. The whole purpose of expiration after a “limited Time[]” is to harness the creativity of many potential creators who will take the work farther or promote it in new and different ways. Nor could such an independent review find that the 105th Congress

113. See *Opposition Statement*, *supra* note 31, at 23-24; see also *Petitioners Brief*, *supra* note 91, at 42 (arguing that without a quid pro quo, there is no change in the incentives to produce).

had any basis for concluding that prospective term extension would promote the progress of science. Although one can imagine the theoretical possibility that a record carefully measuring the costs and benefits would support prospective extension, no one supporting the CTEA sought prospective extension alone.

Finally, then, we are down to the question of whether copyright term extension for existing works encourages preservation, digitization, distribution, or other exploitation of existing works.¹¹⁴ Testimony suggested that digitizing existing films in the interest of preserving them and making them more accessible involved significant investment.¹¹⁵ On the other hand, testimony also asserted that copyright owners would have an incentive to restore and digitize only those relatively few works retaining economic value, while the CTEA would subject all restoration and preservation projects to the transaction costs of copyright, such as locating the owners of orphan works.¹¹⁶

Moreover, the testimony that a subsisting underlying copyright is an important incentive for the creation of derivative works makes little sense, applies equally to all term extensions of whatever length, and flies in the face of experience. For example, no one explained why, if creators of derivative works value subsistence of an underlying copyright, creation of derivative work is not undertaken at least within a few years of the expiration of the existing term, while rights remain exclusive. In addition, no one indicated why copyright owners would be moved to create derivative works in the period from seventy-five to ninety-five years after first publication where they had not done so in the first seventy-five years. The argument thus applies to *any* term increase at any time. Its implausibility is further suggested by the recent spate of high-production quality films and other works based on the public domain works of Shakespeare,

114. See Brief of Hal Roach Studios & Michael Agee as Amici Curiae Supporting Petitioners at 6-23, *Eldred v. Ashcroft*, No. 01-618 [hereinafter Hal Roach Brief] (demonstrating how the film preservation rationale is logically and legally unsound and that the CTEA hurts film preservation, restoration, and digitization).

115. *E.g.*, 1995 House Hearing at 50 (statement of Jack Valenti). That film restoration is expensive is not in dispute. See Hal Roach Brief at 12.

116. See Hal Roach Brief, *supra* note 114, at 13-14.

Hardy, Austen, Hugo, and many others.¹¹⁷ Perhaps the best example is that of Disney itself. Disney was one of the strongest lobbyists for the CTEA.¹¹⁸ Yet many of Disney's films have been based on public domain works.¹¹⁹

Whether the goal is to encourage digitization, preservation, or new exploitation, Congress could have believed that—in the case of some old films—an extended term might lead to the desired goal. Even this was strongly contested, however, and no pro-CTEA witness offered any plausible argument, let alone any factual support, that term extension would supply an incentive for the preservation or digitization of other types of works. Nor did any such witness explain how term extension would encourage the preservation of works that lack economic value but have immense historic, research, or scholarly value. In fact, there was affirmative evidence that adoption of the CTEA would harm such projects.

Therefore, the evidence presented to Congress provided no basis for extending the copyright term for all works just because old films are deteriorating and are expensive to restore. Nor was there any evidentiary basis for believing that a work that was not fully exploited by its copyright owner in the first seventy-five years of copyright protection would be newly exploited during an additional

117. See Mary B.W. Tabor, *Vanishing rights mean open book season on jazz-age classics*, THE EDMONTON JOURNAL, June 9, 1995, reprinted in THE VANCOUVER SUN, Aug. 23, 1995 under the title *Publishers' loss is readers' gain as classics go public*. Ms. Tabor states that publishing companies were "scrambling to publish . . . newly available titles" such as WOMEN IN LOVE by D.H. Lawrence, THIS SIDE OF PARADISE by F. Scott Fitzgerald, and THE AGE OF INNOCENCE by Edith Wharton, as such classic works entered the public domain. *Id.* The entrance into the public domain of Frances Hodgson Burnett's THE SECRET GARDEN has also spawned a huge outpouring of new and creative derivative works. See *Derivative Works Based on Frances Hodgson Burnett's Classic The Secret Garden* (1911), at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/publicdomain/SecretGardenDWs.html> (last visited Aug. 11, 2002) (providing a short list).

118. See *infra* note 121.

119. E.g., MULAN (1998); THE HUNCHBACK OF NOTRE DAME (1996); POCAHONTAS (1995); BEAUTY AND THE BEAST (1991); THE LITTLE MERMAID (1989); THE JUNGLE BOOK (1967); KIDNAPPED (1960); SLEEPING BEAUTY (1959); THE LEGEND OF SLEEPY HOLLOW (1958); PAUL BUNYON (1958); JOHNNY APPLESEED (1955); 20,000 LEAGUES UNDER THE SEA (1954); ALICE IN WONDERLAND (1951); CINDERELLA (1950); PINOCCHIO (1940); SNOW WHITE AND THE SEVEN DWARFS (1937).

twenty-year period. (Moreover, this argument works for any extension at any time.)¹²⁰ An independent review of the evidence should leave one skeptical that preservation goals motivated Congress to enact the CTEA. To the contrary, Congress steadfastly refused to consider proposals that were more carefully tailored to serve these goals without inflicting nearly as much damage on the public domain.

IV. CONGRESS'S REAL MOTIVES

In addition to the formal evidence Congress received during the various hearings on copyright term extension, the popular press supplied a number of anecdotal reports on lobbying by major beneficiaries of the CTEA. In particular, the press reported campaign contributions from CTEA beneficiaries to members of the Senate Judiciary Committee and House Judiciary Subcommittee on Courts and Intellectual Property.¹²¹ Of course, there is nothing inherently wrong in

120. It is also an argument for giving the extended rights to persons in the best position to restore or exploit the work rather than to the constitutionally mandated authors or inventors. There is little reason to think that the heirs or assignees of original creators are particularly qualified to fulfill the goals of restoration or digitalization of old works.

121. See, e.g., Alan K. Ota, *Disney in Washington: The Mouse That Roars*, 56 CQ WEEKLY 2167 (1998) (discussing the visit of Disney's Michael Eisner to Senate Majority Leader Trent Lott urging passage of the CTEA, Disney's lobbying expenditures of \$1.5 million in the past year, Disney's hosting of Newt Gingrich, then House Majority Leader, at its "educational" institute, and its \$800,000 of campaign contributions in 1997-98, including key members of the Judiciary Committees), available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/constitutionality/CQW-DisneyLobbying8-8-98.html>; Daren Fonda, *Copyright's Crusader*, BOSTON GLOBE MAG., Aug. 29, 1999 (reporting political contributions from media companies, especially Disney, to congressional leaders and members of the Judiciary Committees, such as Howard Coble, Patrick Leahy, Orrin Hatch, and Trent Lott), available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/Fonda8-29-99.html>; Brigid McMenamin, *Mickey's Mine!*, FORBES MAG., Aug. 23, 1999, at 43 ("No wonder Walt Disney, whose most valuable characters were set to lapse into the public domain, devoted millions to lobbying and campaign contributions as Congress weighed the idea [of the CTEA]. So did Time Warner."), available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/Mcmenamin8-23-99.html>; John Solomon, *Rhapsody in Green*, BOSTON GLOBE, Jan. 3, 1999, at E02 (reporting on Disney's contribution to Trent Lott and to the National Republican Senatorial Committee after Michael Eisner's lobbying in favor of the

contributing to political candidates or in trying to convince our representatives in Washington that a particular law would be good policy. No evidence of which I am aware indicates that CTEA beneficiaries made campaign contributions on a quid pro quo basis or that contributions were accepted in any way other than as support from people or groups who agreed with the legislator's politics. Contributors do, however, often get the ears of busy members of Congress. When Congress passes legislation that directly benefits influential lobbyists and campaign contributors, without discussion of its costs to the general public, we must be suspicious that Congress simply has not heard the public's side of the story.

It is easy to see why this happened in the case of the CTEA. The benefits of this legislation are concentrated on a relatively small number of individuals and companies who can afford to set aside a percentage of their potential benefit for lobbying. The costs of copyright term extension, on the other hand, are diffuse. These costs are paid, in small amounts, by just about every American, and they are paid in such a way that the extra cost to Americans is not directly identified with the legislation that creates the cost. Some of the heaviest costs of term extension—the loss of works *not* created or *not* performed because of the transaction costs of copyright licensing—may not be felt by individual members of the public. Few consumers can know what works have not been created or performed due to copyright licensing difficulties.¹²²

CTEA), available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/Solomon1-3-99.html>; Associated Press, *Disney Lobbying for Copyright Extension No Mickey Mouse Effort*, CHI. TRIB., Oct. 17, 1998 (reporting on Disney's lobbying and contributions, particularly to CTEA sponsors), available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/ChiTrib10-17-98.html>; Bill McAllister, *Mouse Droppings*, WASH. POST, Oct. 15, 1998, at A21 (reporting on Disney lobbying efforts and Eisner's meeting with Trent Lott).

122. Brief of Jack M. Balkin et al. as Amici Curiae in Support of the Petitioners at 20, *Eldred v. Ashcroft*, No. 01-618 [hereinafter *Constitutional Law Professors Brief*] (“Although the benefits of copyright extensions to discrete industries are palpable and concrete, the costs of such extensions to future users are diffuse and intangible”).

This problem is not new to the law. Commentators have written generally on public choice theory and legislative capture.¹²³ Whether the problem should be addressed through the political process or whether the courts should intervene is a question quite separate from recognizing that it *is* a problem. Once we establish that we have a problem with the political process, the discussion can focus on the role, if any, courts should play in resolving the problem.

No independent review of the record can leave any doubt as to why the CTEA was adopted. The CTEA does not harmonize U.S. terms with those of the EU, whose copyright term extension was said to necessitate our own. There was no evidence how harmonization of copyright terms would contribute favorably to our international trade balance. Congress did not determine how much of the cost of term extension would be borne by U.S. citizens and how much would be borne by Europeans. Congress did not even inquire whether the net effect of copyright term extension would be positive for the U.S., or what difference it would make in our overall trade in copyright-protected works (the vast bulk of which consists of current works, not the old works that are the beneficiaries of retroactive term extension). Needless to say, Congress made no effort to determine the costs to the U.S. public, in either royalties paid during the extension period or in works not created, performed, or restored due to transaction costs, to ascertain whether those costs did not exceed the purported benefits of "harmonization."

While some theoretical basis exists for finding that prospective term extension might "promote the Progress of Science," the failure of any CTEA proponent or any member of the Judiciary Committees to recommend limiting the CTEA to works created after its adoption shows that prospective extension was only a smokescreen. Congress may have had a traditional rational basis for concluding that copyright term extension might encourage the restoration of some old movies (notwithstanding the more substantial conflicting evidence that more films were likely to be preserved if they were allowed to

123. *E.g.*, Sterk, *supra* note 44, at 1244-46; MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 125-28 (1971) (large-group organization is ineffective where the benefits are collective because of free riding). *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (analyzing interest groups and the political process in the context of public choice theory).

enter the public domain). Nevertheless, film restoration cannot be accepted as the basis for extending the copyright terms on hundreds of thousands of works for which there is no pressing need for restoration or works that would not in any event be restored by economically motivated actors because the works lack economic value. If Congress were interested in encouraging the restoration and preservation of our film heritage, Congress had many narrower possibilities from which it could have chosen.

Thus, the only conclusion possible from the record before Congress is that Congress gave in to the demands of the heirs and assignees of old copyrights that still had economic value but were about to enter the public domain. The vast bulk of the pro-CTEA testimony asserted that the current terms did not supply “fair” or “adequate” protection for authors and their heirs (their corporate assignees were much less often mentioned), because commercial lives of works have grown longer and because extension would not cost the public anything anyway.¹²⁴ That extension would not cost the public anything is demonstrably false. Whether commercial lives of works today are generally longer than they were in the past is debatable. The only part of the assertion that is unassailable is that owners of old copyrights desperately wanted copyright term extension to extend their royalty streams—calling the term unfairly or inadequately short at a mere seventy-five years and multimillions of dollars in total royalties.

Affirming that there *is* a problem leads to two questions: first, does Congress have the constitutional power under the Intellectual Property Clause to extend existing copyright terms for the purpose of effecting a wealth transfer from the general public to the owners of copyrights in old works that they did not create? Second, if this action is not authorized by the Intellectual Property Clause, should the courts intervene to determine whether this action was indeed aimed at an impermissible wealth transfer and by what standard should the courts determine whether Congress acted impermissibly?

124. See *supra* notes 80-86 and accompanying text.

V. JUDICIAL REVIEW OF THE CTEA

A. *What Does the Intellectual Property Clause Empower?*

The petitioners and numerous amici in *Eldred* have argued that the Intellectual Property Clause does not authorize Congress to extend the terms for existing works for any of the reasons advanced by the proponents of the CTEA.¹²⁵ The argument is that a wealth transfer from the public to owners of old copyrights does not “promote the Progress of Science.”¹²⁶ Moreover, because Congress could (and has) continued to extend the term *seriatim*, any such extension cannot be considered to be for a “limited Time[.]”¹²⁷ “Harmonization” with Europe’s natural-rights-based copyright systems does not “promote the Progress of Science,”¹²⁸ and maintenance of the U.S. economic position in the international marketplace for information works is not the kind of “progress” envisioned by the constitutional purpose.¹²⁹ The Clause requires incentives for new creativity, and the CTEA fails to supply such incentives.¹³⁰ Moreover, Congress may not rely on the Commerce Clause to make an end-run around an explicit limitation in a separate express power.¹³¹ These arguments, in my opinion, are valid and compelling. I do not repeat them here in order to focus on the question of the scope of judicial review.

125. See Petitioners Brief, *supra* note 91, at 11-33; Intellectual Property Professors Brief, *supra* note 91, at 15-21; Brief of Amici Curiae National Writers Union et al. in Support of Petitioners at 15-29, *Eldred v. Ashcroft*, No. 01-618 [hereinafter National Writers Brief].

126. See Intellectual Property Professors Brief, *supra* note 91, at 21; National Writers Brief, *supra* note 125, at 20-21.

127. See Petitioners Brief, *supra* note 91, at 17-19.

128. Moreover, this rationale is illusory. See Brief Amici Curiae of The American Association of Law Libraries et al. in Support of Petitioners at 28-29, *Eldred v. Ashcroft*, No. 01-618 [hereinafter Libraries Brief].

129. See National Writers Brief, *supra* note 125, at 18-19.

130. See Petitioners Brief, *supra* note 91, at 15-16, 19-23; Intellectual Property Professors Brief, *supra* note 91, at 15-16; National Writers Brief, *supra* note 125, at 22-29.

131. See *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-71 (1982) (holding that Congress does not have power to enact nonuniform bankruptcy laws under the Commerce Clause, because that would eradicate from the Constitution the uniformity limitation contained in the Bankruptcy Clause). Similarly, Congress does not have power under the Commerce Clause to afford exclusive rights to authors or inventors for more than “limited Times” or where such rights do not “promote the Progress of Science.” *Id.*

Before turning to that, however, I would make one additional argument against congressional power to enact retroactive term extension that has not yet been made by petitioners or amici. The Supreme Court has unequivocally stated that Congress does not have the power to remove works from the public domain, because to do so would not “promote the Progress of Science and useful Arts.”¹³² We may leave to the side the question of whether the Court intended this to apply absolutely or whether there might be some specific removals from the public domain that Congress could properly find would promote the progress of science.¹³³ If the Constitution does not prohibit reviving expired copyrights generally, the constitutional requirement that exclusive intellectual property rights be granted only for “limited Times” becomes a meaningless formality.¹³⁴ Moreover, it would mean that copyrights could be given to people other than the

132. *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) (“Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.”).

133. That issue is raised in *Golan v. Ashcroft*, Civ. Act. No. 01-B-1854 (D. Colo. filed Sept. 19, 2001) available at <http://www.law.stanford.edu/library/special/ashcroft-01-B-1854.pdf>. *Golan* challenges the revival of copyrights in works whose country of origin is other than the U.S., where those works entered the public domain due to failure to follow a formal requirement of prior U.S. copyright law, such as publishing with notice or filing for renewal in the twenty-eighth year of the initial term. This revival was effected in the Uruguay Round Agreements Act, purportedly to bring the U.S. into compliance with international treaty obligations. Whether such treaty obligations, if they exist, are sufficient to authorize recognizing a new copyright in a public domain work is well beyond the scope of the retroactive extension issue in *Eldred*. Arguably, compliance with the treaties brings advantages to copyright owners that increase authorial incentives to create works, so revivals permitting our continued participation in the treaties conceivably will “promote the Progress of Science.” Under the theory of judicial review presented in this Article, courts should scrutinize such action carefully to be convinced that Congress did have plausible grounds for believing that its action would promote the progress of science and is not a smokescreen for evading the “limited Times” requirement. No such treaty obligations are involved in *Eldred*. The government has recommended a stay in *Golan* pending the Supreme Court’s decision in *Eldred*. Defendant’s Notice of Grant of Certiorari in *Eldred v. Ashcroft, Golan*, No. 01-B-1854 available at <http://www.law.stanford.edu/library/special/Eldred.cert.notice.pdf>.

134. The D.C. Circuit in *Eldred* recognized that *John Deere* “would indeed preclude Congress from authorizing . . . a copyright to a work already in the public domain.” *Eldred v. Reno*, 239 F.3d 372, 377 (D.C. Cir. 2001).

“Authors” who are specified in the Constitution, because in most cases the original author will be long dead by the time a copyright is considered for revival.¹³⁵

On what basis, if any, does the constitutional power distinguish between works already in the public domain and works that are still protected but near the end of their original term? Specifically, the CTEA extended the term of protection for 1923 works by twenty years, from the end of 1998 to the end of 2018. Yet works from 1922, which were already in the public domain in 1998, remained there. Nothing, besides the difference of one year in initial publication date, distinguishes these two types of works. Many U.S. works from 1922 would be protected by Europe’s life-plus-70-year system, so the “harmonization” argument applies to 1922 works as well as it does to 1923 works. No one attempted to show that 1923 works contribute substantially more to our balance of trade than 1922 works would were they still protected.¹³⁶ No one can say that the heirs of 1922 authors are less needy or less likely to exploit, restore, or preserve works from that year than heirs of 1923 authors. If the descendants of 1923 authors have not received a “fair” or “adequate” return from exploitation of their works, the same must be said for the descendants of 1922 authors.

Of course, it is true that we are dealing with a continuum and that a line must be drawn if copyright terms are not to be perpetual. That says nothing, however, about where the line should be drawn. Without guidance from the Constitution, drawing that line is arbitrary. With the CTEA, Congress chose to draw the line at 1922, which had the effect of continuing as-yet-unexpired copyrights but not of reviving expired copyrights. But what is it in the Constitution that compelled Congress to draw that line?

I believe the answer is “nothing.” That is, nothing in constitutional power distinguishes between the years 1922 and 1923 on the

135. This is necessarily the case for any “life plus” term. It is not necessarily the case for the seventy-five-year term established for 1909 Act works whose copyrights were timely renewed. Copyrights on some of Irving Berlin’s early songs expired while the composer was still alive. *See 1995 House Hearings, supra* note 25, at 272 (statement of Mary Ellin Barrett).

136. The closest anyone came to this was Commissioner of Patents and Trademarks Bruce A. Lehman, who noted generally that the era of the 1920s and 1930s marked the beginning of U.S. preeminence in copyright. *See supra* notes 54-55 and accompanying text.

question of copyright term. The CTEA gave the benefit of an extended term to whoever owned a 1923 copyright at the time of the Act.¹³⁷ Congress could have drafted legislation that granted copyrights in 1922 works to whoever owned them on December 31, 1997. In either case, the beneficiaries would rarely have been the authors. Therefore, if 1923 copyrights pass muster under the “promote the Progress of Science” and “limited Times” requirements of the Intellectual Property Clause, that must equally be true for 1922 copyrights. The Constitution simply does not distinguish between these two years.

Yet, to say that Congress has power to revive expired copyrights without requiring a convincing case that revival would “promote the Progress of Science” would effectively eradicate that basic purpose of the congressional power from the Constitution. It would also emasculate the “limited Times” restriction on congressional power as well as the requirement that the exclusive rights of copyright be secured to “Authors.” We may therefore conclude that the Constitution prohibits extending 1923 copyrights to the same extent it prohibits reviving 1922 copyrights. If revival of copyrights after their term has expired is unconstitutional as violative of the “limited Times” restriction, so too is retroactive term extension. If revived copyrights may only be secured in “authors,” so too must retroactive extensions of existing copyrights. If revival of expired copyrights is permissible only upon a showing that to do so would promote the progress of science, retroactive term extension must be subject to the same strict scrutiny.

B. The Standard of Judicial Review

Congress, we must assume, has determined that the CTEA was enacted within its constitutional powers. The question is how much deference, if any, the Court should pay to this congressional determination. Petitioners and amici have cited extensive

137. There is one minor exception: any prior transfer or license already beyond its first termination period and as to which no termination right had been exercised is subject to termination by the statutory heirs of the original author with respect to the twenty years added to the term by the CTEA. See 17 U.S.C. § 304(d).

authority,¹³⁸ beginning with *Marbury v. Madison*,¹³⁹ that the Supreme Court is the ultimate arbiter of the meaning of the Constitution.¹⁴⁰ Even though the Court was deeply split in *Lopez*¹⁴¹ and *Morrison*,¹⁴² its two recent Commerce Clause cases, both the majority and the dissenters agreed that congressional power under that clause is limited by the Court's interpretation of the term "commerce."¹⁴³ Instead, the division involved whether the Court could meaningfully set "judicially enforceable outer limits"¹⁴⁴ or whether, as a practical matter, judicial establishment of categorical limits was simply no longer possible,¹⁴⁵ especially after sixty years of allowing Congress to legislate in any area where it saw a substantial effect on interstate commerce.¹⁴⁶ Consequently, under either view, the Court is constitutionally authorized, and indeed compelled, to determine the meaning of "limited Times" and "promote the Progress of Science" in the Intellectual Property Clause.

The Commerce Clause has caused problems for the Court because the only substantive limitation it contains is the phrase "Commerce . . . among the several States."¹⁴⁷ The opinions on both sides in *Lopez* and *Morrison* detail the many difficulties the Court has faced in interpreting this phrase as the country underwent "two centuries of scientific, technological, commercial, and environmental

138. Petitioners Brief, *supra* note 91, at 11-14; Brief of Malla Pollack, Amicus Curiae, Supporting Petitioners at 8-13, *Eldred v. Ashcroft*, No. 01-618 [hereinafter Pollack Brief].

139. 5 U.S. (1 Cranch) 137 (1803).

140. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (affirming "judicial authority to determine constitutionality of laws"); *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 467-69 (1982) (determining that congressional action purportedly under the Commerce Clause was in fact an exercise of power under the Bankruptcy Clause and further determining the nature of the uniformity required by the Bankruptcy Clause).

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

142. *United States v. Morrison*, 529 U.S. 598 (2000).

143. *See supra* note 14 and accompanying text.

144. *Morrison*, 529 U.S. at 610.

145. *See id.* at 660 (Breyer, J., dissenting).

146. *See id.* at 646-47 n.14 (Souter, J., dissenting) ("[T]o suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by the substantial effects test is to deny our constitutional history.").

147. U.S. CONST. art. I, § 8, cl. 3.

change.”¹⁴⁸ Part of the difficulty was jurisprudential. For over 100 years the Court created categories of things that either were or were not “commerce.”¹⁴⁹ That was followed by approximately sixty years in which the Court defined “commerce” broadly as essentially any activity that substantially affected commerce. Recently, a majority of the Court is again going in the direction of categorical restrictions in the service of “judicially enforceable outer limits.”¹⁵⁰ In other words, the dissenters in these Commerce Clause cases had some sixty years of recent precedent saying essentially that “politics, not judicial review, should mediate between state and national interests”¹⁵¹ as the need grew for a larger federal role in the increasingly national economy. The dissenters did not deny that the Court is the ultimate interpreter of the meaning of “commerce” in the Commerce Clause.¹⁵² Rather the dissenters argued that adhering to the sixty years of pre-*Lopez* precedent, which allowed Congress nearly free reign in regulating the economy through “rational basis” review of statutes enacted under the commerce power, was the only approach that made practical sense.¹⁵³ Perhaps most important, the dissenters in these Commerce Clause cases could forcefully argue that the interests of the states were fully and adequately represented in the national legislative process.¹⁵⁴

148. *Morrison*, 529 U.S. at 660 (Breyer, J., dissenting).

149. *See Lopez*, 514 U.S. at 549.

150. *Id.* at 566.

151. *Morrison*, 529 U.S. at 647 (Souter, J., dissenting).

152. *See id.* at 651 n.19 (Souter, J., dissenting).

153. *See supra* note 15 and accompanying text.

154. *See Morrison*, 529 U.S. at 598, 660-61 (Breyer, J., dissenting) (arguing that Congress is institutionally motivated to strike an appropriate federal/state balance because its members represent state and local district interests). Both Justice Breyer and Justice Souter, dissenting in *Morrison*, relied heavily on *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-52 (1985) (arguing that the constitutional Framers relied on the structure of the federal government itself to protect the interests of the states). The reasoning of *Garcia* is fully applicable to term extension legislation, once one adjusts for the crucial distinctions between the Commerce Clause and the Intellectual Property Clause.

The fundamental constitutional value in Commerce Clause cases is federalism. The *Lopez* and *Morrison* majorities would protect federalism values by a nonstructural approach categorically excluding certain “noncommercial” activities from federal regulation. The same approach to the Intellectual Property Clause leads to the heightened review argued for herein. The majority in *Garcia* and the dissenters in *Lopez* and *Morrison* would intervene in federal

The Intellectual Property Clause is different in nearly all of these respects from the Commerce Clause.¹⁵⁵ First, it has more express limitations, and the limitations are more concrete. Congress may afford to “Authors” exclusive rights to their “Writings” but only for “limited Times” and only to “promote the Progress of Science.” Second, and even more important, these limitations on the power to grant copyrights are *not* something the drafters of the Constitution intended to leave to politics. This Clause does not raise federalism questions.¹⁵⁶ The limitations on federal power were included in the Intellectual Property Clause to ensure that exclusive intellectual property rights were recognized only in return for original creative works and that rent-seeking activity by special interests would not result in monopolies impeding advances in and dissemination of knowledge rather than “promot[ing] the Progress of Science.”¹⁵⁷

Commerce Clause regulation only “to compensate for possible failings in the national political process.” *Id.* at 554. In each of these cases there was a strong argument that the political process was working successfully and that judicial deference was therefore appropriate. In contrast, the goals of the Intellectual Property Clause are to limit the monopolies afforded to the creators of original and socially desirable intellectual works to those that “promote the Progress of Science” and to prevent economically wasteful rent-seeking activity by those persons owning the monopoly privileges. *See infra* note 157 and accompanying text. The argument that the political process was working successfully is not only unavailable with respect to the CTEA; the political process was actually distorted precisely in the manner against which the limitations of the Intellectual Property Clause were designed to protect. Compensation for this failing in the political process through judicial intervention is thus imperative (and all the more so because of the First Amendment interests involved). This is an example of a “representation-reinforcing” structural approach to judicial review, which has been recognized by the Court in other contexts as well. *See Coenen, supra* note 22, at 1689-98.

155. The Supreme Court has not yet formulated a standard of judicial review for the Intellectual Property Clause. *See Pollack Brief, supra* note 138 at 2. Professor Pollack also distinguishes the largely unconstrained commerce power with the tightly worded purpose, time, and means constraints of the Intellectual Property Clause. *See id.* at 7-8; *see also* 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, 369-70 (2002) [hereinafter Pollack, *Dealing with Old Father William*].

156. Congress has preempted state authority to afford copyright-equivalent rights in works constituting copyright subject matter. *See* 17 U.S.C. § 301(a).

157. Petitioners Brief, *supra* note 91, at 23-28 (pointing out that if “limited Times” is not interpreted to prevent extension of existing copyright terms, copyright owners have a perpetual incentive to lobby for ever longer

Moreover, recognizing the dangers inherent in any monopoly right, the constitutional drafters sought to insure that even a justifiable monopoly in intellectual creations would be for a “limited Time[]” so that such creations would become part of the common pool for later creative authors to use as building blocks.¹⁵⁸

The general problems resulting from government-supported monopolies and the inefficiency of rewarding rent-seeking activity were thus well known to the Framers’ of the Constitution. The specific

copyrights, which is both economically unproductive activity that results in no new creativity—indeed, it inhibits new creativity—and an illegitimate wealth transfer); Brief Amici Curiae of Tyler T. Ochoa et al. at 17, *Eldred v. Ashcroft*, No. 01-618 [hereinafter *Historians Brief*] (“The stipulation that patent and copyright protection be granted only for ‘limited Times,’ only to ‘authors’ and ‘inventors,’ and only ‘To promote the Progress of Science and useful Arts,’ appears to have been aimed at preventing the kinds of abuses that had prompted the Statute of Monopolies 150 years earlier.”); Pollack Brief, *supra* note 138, at 22 (clause drafted to curtail hidden subsidies used as a government pay-off tool). Professor Pollack characterizes indirect payments to special interests in exchange for their support as a “free lunch” that disturbs markets and results in failures of public oversight of government expenditures. She traces the practice back to Norman England and the Tudor practice of “purveyance.” See Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of Government*, 30 SW. U. L. REV. 1, 20-39 (2000). Even in the Commerce Clause context, the Court has distinguished between constitutionally valid direct local subsidies and constitutionally invalid taxes that discriminate in favor of local industry. See Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 972-78 (1998). Among other reasons, subsidies involve characteristics of visibility, intelligibility, self-limitation, and impermanence, thus posing less of a threat to dormant Commerce Clause values than do discriminatory tax breaks. See *id.* at 1002; see also 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, 1162-63 (Constitution requires that a suspect grant [exclusive right] take the form of a quid pro quo: “Congress cannot imitate Queen Elizabeth by granting a monopoly in the making of ale, simply by prefacing the legislation with a statement that it hopes the monopoly will result in the production of more varieties of and better ale.”); Constitutional Law Professors Brief, *supra* note 122, at 19 (“The CTEA is a quintessential example of the kind of rent-seeking statute one would expect to result from this structural distortion [where benefits go to well defined groups today but burdens are borne in the future by the diffuse public].”).

158. *Historians Brief*, *supra* note 157 at 20-21 (Intellectual Property Clause designed to limit the duration and purposes for which exclusive rights could be granted); *Economist Brief*, *supra* note 103, at 14 (pointing out the transaction costs the CTEA places on new creators).

limits on congressional power placed in the Intellectual Property Clause reflect the Framers' attempt to resolve, or at least ameliorate, these problems. The danger that Congress would fall prey to special-interest lobbying was precisely the problem these limits were designed to prevent. To make Congress the sole arbiter of constitutional limits would be a classic case of allowing the fox to guard the chickens.¹⁵⁹ The term "limited Times" was not inserted into the Clause just so later generations could play word games concerning whether "forever minus one day" was mathematically finite,¹⁶⁰ or even whether a term of one thousand years would qualify as "limited."¹⁶¹ It was inserted to insure that the exclusive rights created by Congress pursuant to this power would afford a monopoly that was only temporary—one that was justified by the benefit to the community from the revelation by authors and inventors of the fruits of their creative endeavors.¹⁶² The original term of copyright, which was a maximum of twenty-eight years, provides a good idea of what

159. See Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 FLA. L. REV. 989, 993 (2000) (citing JOHN ELY, *DEMOCRACY AND DISTRUST* (1980) (stating that judicial review is particularly important in situations where the very process of legislating has been impaired)); see also *supra* note 157.

160. Representative Mary Bono, who replaced the CTEA's namesake in Congress, stated on the record, "Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for a term to last forever less one day. Perhaps the Committee may look at that next Congress." 144 CONG. REC. H9946, 9952 (Oct. 7, 1998).

161. Even the government, in its brief to the D.C. Circuit, conceded that some fixed-term extensions might violate the "limited Times" requirement. See Brief for Respondent, *supra* note 19, at 42 ("It may well be that some term extensions are so long or so lacking in rational basis that a court could conclude that the Congress has in effect created an unlimited term.").

162. See *Historians Brief*, *supra* note 157, at 20. This brief quotes a manuscript by Madison noting that the Constitution permitted granting monopolies only to authors and inventors:

"as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use. There can be no just objection to a temporary monopoly in these cases; but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given."

Id. (citing JAMES MADISON, *WRITINGS* 756 (Jack N. Rakove ed. 1999)).

“temporary” meant.¹⁶³ If the courts do not enforce this fundamental underlying vision of the Intellectual Property Clause, the term “limited Times” becomes constitutional surplusage, excisable at the will of Congress. This is a dangerous approach to constitutional interpretation even where there is little suspicion that rent-seeking activity underlies the congressional motivation. When rent seekers have been successful, such a “hands off” approach abandons the Court’s constitutional duty.

Similarly, courts must be vigilant in ensuring that Congress does not afford exclusive rights even for “limited Times” and even to authors or inventors if granting those rights does not “promote the Progress of Science.” The Supreme Court has consistently said that this constitutional purpose may not be ignored¹⁶⁴ and that the public interest in access to creative works is the primary goal, with reward to the author or inventor only secondary or incidental.¹⁶⁵

Congress is better suited than the courts to effect the complex array of policy tradeoffs that best “promotes the progress of science” in modern copyright law. Our system, however, is one of checks and balances. Especially where special interests have managed to convince Congress to pass legislation that is directly contrary to the

163. See Act of May 31, 1790, ch. 15, sec. 1, 1 Stat. 124 (repealed 1802) (An Act for the encouragement of learning).

164. See *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) (“Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must ‘promote the Progress of . . . useful Arts.’ This is the *standard* expressed in the Constitution and it may not be ignored.”); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 145-46 (1989) (“The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts’”); cf. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”).

165. *E.g.*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994); *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts’”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

express constitutional purpose, some independent review of the basis for the legislation is imperative.¹⁶⁶ Whether the heightened scrutiny applied by the courts is borrowed from the First Amendment cases, the “congruence and proportionality” approach of *City of Boerne*,¹⁶⁷ or a *sui generis* Intellectual Property Clause requirement of tight fit with a plausible supporting record,¹⁶⁸ the approach hardly matters for the CTEA. Retroactive term extension cannot survive even a rational basis analysis unless that term is interpreted to mean “no analysis at all.”¹⁶⁹ Nothing in the record before Congress, the reasons given by Congress for enacting the CTEA, or common sense provides any basis for believing that Congress acted other than to afford the owners of old copyrights an indirect subsidy at public expense. Congress’s references to film restoration, international trade, harmonization with Europe, and incentives for the creation of new works were simply a smokescreen, as demonstrated by Congress’s failure to inquire honestly and carefully about which of these goals, if any, were consistent with the constitutional mandate “to promote the Progress of Science”; Congress’s consistent rejection of proposals more carefully tailored to achieve the arguably legitimate among these stated goals (such as prospective extension or conditioning an extended term on restoration or new creativity); and Congress’s

166. See Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 659 (1996) (“Although the Court is appropriately loathe to substitute its policy judgments for those of Congress, it has an obligation to effect the means by which the Constitution divides power within the government and, under the Copyright Clause, within the society.”); see also *infra* note 170.

167. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (construing “appropriate legislation” clause of the Fourteenth Amendment to require “congruence and proportionality” between injury and statutory remedy); see Petitioners Brief, *supra* note 91, at 31-32.

168. See Pollack, *Dealing with Old Father William*, *supra* note 157.

169. Even *Carolene Products*, which established the rational-basis test for Commerce Clause cases, left room for a narrower scope of its presumption of constitutionality where a “specific prohibition” of the Constitution was concerned. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The limitations of the Intellectual Property Clause are “specific prohibitions” on the scope of the congressional power, in that they expressly exclude the power to recognize exclusive intellectual property rights that go beyond “limited Times” or do not “promote the Progress or Science” (or go to people other than “Authors” or “Inventors” or in respect of something other than their “Writings” or “Discoveries”).

steadfast refusal to undertake any study of the costs of copyright term extension to the public and to the public domain.

The Court must make an independent assessment of Congress's reasons for acting to extend the copyright terms and the plausibility of the evidence supporting those reasons. That does not mean that the Court can or should rewrite the Copyright Act in accordance with its own vision of the constitutional mandate. Congress should determine which exclusive rights go into the copyright bundle (such as display rights) as well as the specific limitations on those rights, with minimal scope for judicial review.¹⁷⁰ Where specific limitations on Congress's constitutional power are at issue, however, the Court must be convinced that Congress has seriously considered those constitutional limitations. The narrow question of retroactive term extension raises such issues in stark relief. The Court should inquire whether Congress could have honestly believed that extending the

170. The Constitution does not *require* Congress to adopt any copyright statute, let alone one giving any particular bundle of rights. It only limits whatever exclusive copyright rights Congress does choose to recognize to those going to "Authors" for their "Writings" and only to the extent that the rights are for "limited Times" and that they "promote the Progress of Science." Judicial review is crucial to the success of our constitutional scheme where Congress presses against the limitations expressly set forth. Judicial review has almost no role to play, however, in balancing the other interests and social policies reflected in the Copyright Act. Register of Copyrights Marybeth Peters was therefore incorrect when she stated recently that reversal in *Eldred* could call into question rights like display rights, which were added to the Copyright Act in the 1976 legislation and apply to then-existing works as well as works to be created in the future. Marybeth Peters, Keynote speech at the Spring Meeting, American Intellectual Property Law Association (Apr. 18-20, 2002), in 63 PAT., TRADEMARK & COPYRIGHT J. (BNA) 551, 552 (Apr. 26, 2002). To extend the term of an existing work directly raises the question of whether the bundle of exclusive rights is for a "limited Time[]." Adding a display right to the bundle, or subtracting from the bundle by expanding exemptions, and applying them prospectively to existing works, does not impinge on any of the express limitations of the Intellectual Property Clause (unless they can be shown not to "promote the Progress of Science"). In particular, the bundle of exclusive rights, although changed from what it was, still lasts for the same "limited Time[]" that it had before. Respect for the basic constitutional limitations on congressional power does not require judicial fine-tuning of each of the complex tradeoffs necessarily made in any copyright statute, and especially when there is a general overhaul of the type effected by the 1976 Copyright Act. Of course, even such a complex overhaul should be subject to judicial scrutiny insofar as it also effected a term increase in addition to the establishment of things like display rights. See *supra* note 133.

terms of existing copyrights would “promote the Progress of Science,” as the Court has defined that phrase, and whether any basis was in place to prevent perpetual duration by a series of finite-term extensions. The Court should ask whether the evils against which the constitutional limitations were devised were part of the impetus for the congressional action.

On the present record, the answers to these questions are clear, especially as far as retroactive term extension is concerned. Rent-seeking, the very evil that led the drafters to the specific limitations on congressional power in the Intellectual Property Clause, was the overwhelmingly dominant motivation of the pro-CTEA supporters.¹⁷¹ By treating the “limited Times” restriction as simply a word game to determine what is “mathematically finite,” Congress isolated this substantive limitation on congressional power both from the stated purpose of the Clause to “promote the Progress of Science” and from the goals of the constitutional drafters who very much worried about government-granted, long-term monopolies. Retroactive term extension, by definition, cannot serve as a means to “promote the Progress of Science” as the Court has defined it, that is, as an incentive to create the underlying works whose copyrights were extended. Even expanding the interpretation of “promote the Progress of Science” to include incentives to restore, digitize, or further exploit existing works must consider whether the extended exclusive rights are going to authors for their original writings,¹⁷² and nothing in the record shows that Congress considered these issues. Moreover, the CTEA is much broader than necessary to achieve any such ends. There was no evidence that “harmonization” of terms for existing works would “promote the Progress of Science” by encouraging new creativity.¹⁷³ Moreover, Congress could not have believed,

171. See *supra* Part IV; *supra* note 157 and accompanying text.

172. See *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); Petitioners Brief, *supra* note 91, at 32-33.

173. Professor Pollack has argued that “progress” in the Intellectual Property Clause originally meant “spread,” so that the constitutional mandate is more to encourage the dissemination of knowledge than the creation of new knowledge. Malla Pollack, *What Is Congress Supposed to Promote? Defining “Progress” in Article I, Section 8, Clause 8 of the U.S. Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. (forthcoming 2002). The Register of Copyrights, Marybeth Peters, stated the belief of the Copyright Office that “harmonization of the world’s copyright laws is imperative if there is to be

because it is demonstrably false, that retroactive term extension harmonized U.S. terms with those of the EU.

In addition, "harmonization" cannot in any event justify overriding the other limits on congressional power under the Intellectual Property Clause, such as affording the exclusive rights of copyright only for "limited Times." While improving the United States's position in international trade is clearly within the congressional commerce power, to treat it as a permissible Intellectual Property Clause goal would be to eradicate the limitations of that Clause. If Congress may not legislate directly under the Commerce Clause to circumvent express limitations in other powers, as the Court has held,¹⁷⁴ neither may it substitute the phrase "promote commerce" for "promote the Progress of Science" in the intellectual property power. Retroactive term extension, therefore, cannot stand under any standard of judicial review beyond rubber-stamp rational basis. Prospective term extension, too, cannot stand on this record under such a standard of review, because Congress simply did not consider prospective term extension alone, although it was urged to do so.¹⁷⁵ There is nothing in

an orderly exploitation of copyrighted works." *1995 Senate Hearing, supra* note 24, at 20. She reasons, however, that in the past copyright owners have refrained from entering markets where their works were not protected, without explaining how copyright owners could legally prevent uses in such markets. She gives no indication how harmonization of terms, especially in the direction of longer terms, could promote the dissemination of works, "orderly" or otherwise. She even goes on to concede that the CTEA did not harmonize the U.S. terms with those of the EU. *See id.* Others testified that extension would supply an incentive to preserve, restore, distribute, or further exploit works that were about to enter the public domain. *See supra* note 76 and accompanying text. Independent analysis of these claims, however, shows that Congress did not act with this purpose in mind, because it refused to consider narrower and more effective means for achieving this result. *See supra* notes 114-20 and accompanying text. Nor does the CTEA supply any defense to those who wish to disseminate "orphan works" for which the copyright holders cannot be found. Consequently, if Professor Pollack's interpretation of the meaning of "progress" in the Intellectual Property Clause is correct, there remains little in the legislative record to support an inference that Congress acted with the goal of promoting the dissemination of works, as opposed to lining the pockets of the owners of old copyrights.

174. *See Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, at 468-71.

175. *See, e.g., supra* note 69 and accompanying text; Opposition Statement, *supra* note 31, at 21 ("term extension at most must be given only prospective application"), available at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/legmats/1998statement.html#Incentives>.

the record before Congress to indicate that Congress would, indeed, adopt purely prospective term extension. There was no lobby for it prior to enactment of the CTEA, and in view of the total absence of present value to current authors that such copyright term extension affords, it is unlikely that any substantial lobby will develop for it in the future. To sever prospective copyright term extension from the CTEA as enacted and leave it in force would create the anomaly that the U.S. public is stuck with a statute that literally *no one* sought.¹⁷⁶

VI. CONCLUSION

In *Eldred v. Ashcroft*, the Supreme Court has both an opportunity and a responsibility to reaffirm our basic constitutional system of checks and balances by making an independent review of whether the Copyright Term Extension Act was validly enacted pursuant to congressional power under the Intellectual Property Clause. The Intellectual Property Clause was drafted with important substantive limitations on federal power to grant exclusive rights of patent and copyright, designed to insure that Congress did not succumb to the temptation to effect indirect wealth transfers to rent-seeking special interests. To uphold the CTEA would permanently remove these explicit textual limitations on congressional power from the Constitution because concentrated special interests will always have greater lobbying resources than self-appointed and uncompensated representatives of the public interest.

On the other hand, to overturn the CTEA would not take away from Congress the basic power to resolve the complex policy tensions that will be present in any modern copyright statute. It would simply remind Congress that, in our system of checks and balances, Congress's action in the area of intellectual property will be subject to independent judicial review. This is especially true when Congress's enactment falls under specific provisions incorporated into

176. Moreover, overturning the statute in its entirety enables the Court to assist Congress and the Executive branch in the problem we now face with the Fairness in Music Licensing Act, which has been found to place the U.S. in violation of its obligations under the WTO. *See supra* note 21. On the inseparability of prospective and retroactive extension, *see* Petitioners Brief, *supra* note 91, at 48-50; Brief Amici Curiae of the Progressive Intellectual Property Law Association and Union for the Public Domain at 13-14, *Eldred v. Ashcroft*, No. 01-618.

the Constitution to limit congressional power. This Court can uphold a subsequently adopted prospective term extension if Congress articulates reasons, and supplies a plausible basis for believing them, that prospective term extension encourages new artistic creativity and thereby “promote[s] the Progress of Science.” There may even be some cases, less than the across-the-board extensions of existing copyrights effected by the CTEA, in which Congress can make the case that retroactive term extension falls within the spirit and letter of the intellectual property power. However, the broad and indiscriminate CTEA should be ruled unconstitutional in its entirety.

