

JUDICIAL OVERSIGHT OF COPYRIGHT LEGISLATION

*Dennis S. Karjala**

ABSTRACT

While many intellectual property scholars were hoping that the Supreme Court would find the Sonny Bono Copyright Term Extension Act (CTEA) unconstitutional in *Eldred v. Ashcroft*, some serious scholarship has appeared on the other side, arguing that a hands-off policy for copyright legislation is precisely the role courts should play. The arguments are general, and generally correct. They deconstruct the *Eldred* plaintiffs' textual claims based on the intellectual property clause, and on a broader level they look to the appropriate role of the courts in our constitutional democracy. In particular, they see the *Eldred* plaintiffs' claims as an attempted retreat to the now discredited *Lochner* era of substantive due process.

This article suggests that these *Eldred* supporters get just about everything right except application of their arguments to the actual issue in *Eldred*, which is the scope of judicial review of copyright term extension legislation – not judicial review of copyright legislation in general. The copyright term is constitutionally mandated to be for a “limited time[.]” The Court need not decide how long a period is “limited” nor even that, as sought by the *Eldred* plaintiffs, a retroactive term extension is never constitutional. It need only apply a mild form of judicial review that requires Congress to present plausible reasons for why a term extension (retrospective or prospective) is both “limited” and “promotes the progress of science.” In some cases, such as the revival of expired copyrights under the Uruguay Round Agreements Act, reasons can probably be proffered that will uphold the legislation against an intellectual-property- clause challenge. In *Eldred*, however, nothing in the record before Congress, the reasons given 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. Fear of *Lochner* – in the sense of judicial arrogation of intellectual property policy under the guise of constitutional mandates – may be appropriate to review of the legislative logrolling that occurs with copyright legislation generally. It is wholly inappropriate to the constitutionally separable issue (because of the “limited times” requirement) of copyright term extension.

This analysis also shows why the *Eldred* plaintiffs' choice to focus solely on the retrospective extension of the term for existing works was a mistake – not because it failed but because the argument required rejecting 200 years of history

* Dennis S. Karjala serves as the Jack E. Brown Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University

in which existing copyrights had always been given the benefit of new term extensions. Attacking the prospective life + 70 term as going beyond a “limited time” because no plausible reason was offered that a prospective extension would benefit society more than its cost – indeed, no one even argued in favor of prospective extension alone – would have been a theoretically sounder approach. It is also the approach that should be taken when the same rent-seeking forces seek to extend the term once again, which may well arise before Justice Roberts leaves the bench (and thus be a matter for “The Roberts Court”).

INTRODUCTION

One problem that the Roberts Court may have to face involves the scope of judicial review of copyright and other intellectual property legislation. For copyright, the constitutional problem results from the tension between two decisions of the Rehnquist Court, namely, *Feist Publications, Inc. v. Rural Telephone Service Co.*¹ and *Eldred v. Ashcroft*.² *Feist* held that telephone book white pages were not protected by copyright and, albeit in dictum, elaborated a complex theoretical interpretation of the Intellectual Property Clause (“IP Clause”)³ to find both “originality” and “creativity” as constitutional requirements for copyright, although neither term – indeed, not even the terms “patent” or “copyright” – appears in the Clause. In *Eldred*, on the other hand, the Court considered the question of whether an extension of the copyright term for existing and still protected works went beyond an express IP Clause limitation on congressional power, namely, that the exclusive rights granted to authors not exceed “limited times.” The Court held that the congressional decision was subject to no more than rational-basis review by the Court and upheld the statute on the ground that Congress might rationally have considered the extended term “limited.” Two important commentaries on *Eldred* have argued that for *Eldred* to have come out the other way would constitute intellectual property Lochnerism by injecting the Court’s personal interpretation of the social value of copyright legislation into the Constitution and that copyright legislation should be afforded as deferential a scope of judicial review as other economic regulations.⁴

This article argues that these *Eldred* supporters get just about everything right except application of their arguments to the actual issue in *Eldred*, which is

1. *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340 (1991).

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

3. U.S. CONST. art. I, § 8, cl. 8: Congress shall have 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.”

4. Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003)[hereinafter Schwartz & Treanor]; Thomas B. Nachbar, *Judicial Review and the Quest to Keep Copyright Pure*, 2 J. TELECOMMUN. & HIGH TECH. L. 33 (2003) [hereinafter Nachbar, *Quest to Keep Copyright Pure*].

the scope of judicial review of copyright term extension legislation – not judicial review of copyright legislation in general. Copyright is and should be considered complex economic legislation that is finely tuned by all the flaws and benefits of legislative logrolling. When interest groups negotiate a given set of statutory tradeoffs, it is generally best that the courts resist the temptation to rewrite the substantive result and restrict themselves to interpreting within the interstices of the statutory language. However, if there was ever any threat of *Lochnerism* in the copyright arena it came from *Feist*, not *Eldred*. The *Feist* dictum basing copyright protection on a finding of authorial “creativity” is founded on a noneconomic view of copyright and forces that view directly into the Constitution. Taken to its limits, the *Feist* dictum would threaten not only modern variations on exclusive rights in information like database protection and trademark dilution; it would also threaten many traditional works of copyright like bare-bones maps and nautical charts that have always been considered copyright subject matter.

The issue in *Eldred*, however, was much narrower. The copyright term is expressly mandated to be for a “limited time[.]” The Court did not have to decide how long a period is “limited” nor even that, as sought by the *Eldred* plaintiffs, a retroactive term extension is never constitutional. It needed only to apply a mild form of judicial review that would require Congress to come up with plausible reasons explaining why a given proposed term extension (retrospective or prospective) is both “limited” and “promotes the progress of science.” In some cases, such as the revival of expired copyrights under the Uruguay Round Agreements Act, reasons can probably be proffered that will uphold the legislation against an IP Clause challenge. In *Eldred*, however, nothing in the record before Congress, the reasons given 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. Fear of *Lochner* – in the sense of judicial arrogation of intellectual property policy under the guise of constitutional mandates – may be appropriate to review of the legislative logrolling that occurs with copyright legislation generally. It is wholly inappropriate to the constitutionally separable issue (because of the “limited times” requirement) of copyright term extension.

Given that we are now already almost halfway through the 20-year extension provided by the Sonny Bono Act, it is unlikely that the Roberts Court will revisit the issue of copyright term extension legislation.⁵ However, the specter of the *Feist* dictum still hangs heavy over proposals for copyright reform and

5. The Supreme Court recently denied certiorari in *Kahle v. Mukasey*, 128 S. Ct. 958, (U.S. Jan. 7, 2008)(No. 07-189), heard in the Ninth Circuit as *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007). *Kahle* upheld the 1992 automatic renewal legislation and followed *Eldred* to conclude that whether the Sonny Bono term extension was for a “limited time” was a matter left to Congress. *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007).

expansion. Although inconsistent with *Eldred*, the *Feist* dictum has not been repudiated by the Court. Moreover, given the one-sided lobbying effort that produced the Sonny Bono Act in 1998, we should not be surprised to see a renewal of those efforts in the coming years. The question of the actual scope of congressional power in the copyright arena therefore remains critically important. It is therefore necessary to discuss why and how judicial review of copyright term extension legislation differs from the review of copyright legislation in general.

FEIST AND ELDRED

Feist dealt with the copyright protectability of ordinary telephone book white pages – a factual compilation. As a copyright matter, the case should have been a routine exercise in statutory interpretation (muddied, perhaps, by the long “sweat of the brow” tradition that *Feist* purported to overrule). The statutory language quite plausibly requires that only creative selecting, coordinating, or arranging of the materials comprising a compilation can result in an original work of authorship.⁶ The Court in *Feist* adopted this line of reasoning in Part II.C. of its opinion,⁷ which would have been sufficient to decide the case without reference to the Constitution, but by this time, the Court had already devoted two subsections of dictum to explaining that “originality” was a general constitutional mandate that includes both the traditional copyright meaning of independent production (not copied from something else) and “a minimal degree of creativity.”⁸

I have long been critical of *Feist* for the roadblocks its dictum purports to place before Congress⁹ and for the contortions it has forced courts worried about market failure to take in finding copyright protection for works that lack the

6. The Copyright Act explicitly provides that copyright subject matter “includes compilations.” 17 U.S.C. § 103(a) (2008). Compilation is defined as works “formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101 (2008).

7. *Feist*, 499 U.S. at 354-61.

8. *Id.* at 348; see Dennis S. Karjala, *Copyright and Creativity* (forthcoming).

9. Dennis S. Karjala, *Copyright in Electronic Maps*, 35 JURIMETRICS J. 395 (1995)[hereinafter Karjala, *Copyright in Electronic Maps*]; Dennis S. Karjala, *Copyright and Misappropriation*, 17 U. DAYTON L. REV. 885 (1992)[hereinafter Karjala, *Copyright and Misappropriation*].

necessary originality or creativity on their face.¹⁰ Taken at face value, the *Feist* dictum would prohibit Congress from affording the incentive of exclusive copyright rights to creators of socially desirable works, such as complete (nonselective) factual databases,¹¹ bare-bones maps showing only boundary lines and the minimal location or ownership information necessary for a particular purpose,¹² and skillfully reproduced copies of old master paintings and sculpture.¹³ Although Professor Nachbar has cogently challenged the argument,¹⁴ some commentators have concluded that the restrictions of the IP Clause, including the *Feist* dictum, restrict the freedom of Congress to legislate even under other Article I powers.¹⁵ For present purposes, it is sufficient to note that the *Feist* dictum interprets the IP Clause in a way that mandates the Court's view of "creativity" in any work to which Congress would afford the exclusive

10. Many courts simply cannot bring themselves to deny copyright protection to things like maps, that have long been considered copyright subject matter. Therefore, they find "creativity" in the process by which the map was made, rather than in the actual result, which is simply a pictorial representation of factual information that lacks creativity on its face in the sense that anyone who drew a map based on similar facts would come up with an identical or highly similar result. *E.g.*, *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992); see Karjala, *Copyright in Electronic Maps*, *supra* note 9, at 400-04. Others find the necessary creativity in the organizational scheme or principle by which the information is arranged, creating tension with section 102(b), which denies copyright protection to "any principle," and trenching into the domain of patent subject matter. *Id.* at 404-06; Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 CONN. L. REV. 439, 482-95 (2003) [hereinafter Karjala, *Distinguishing Patent and Copyright Subject Matter*].

11. Karjala, *Copyright in Electronic Maps*, *supra* note 9, at 398. Even telephone book white pages would be vastly more costly to produce than to copy – the classic conditions for market failure – for anyone but the telephone company that already has the list of its subscribers in its books. *E.g.*, Karjala, *Distinguishing Patent and Copyright Subject Matter*, *supra* note 10 at 489.

12. *E.g.*, *Darden v. Peters*, 488 F.3d 277 (4th Cir. 2007) (discussing that digitally resized public domain maps with smoothed lines and boundaries reshaped and colored to give a three-dimensional effect lacked the creativity necessary for copyright protection); see Karjala, *Copyright in Electronic Maps*, *supra* note 9, at 398-99.

13. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 196-97 (S.D.N.Y. 1999) (skillfully made exact reproductions of public domain art works lacked originality and were therefore without copyright protection). Art reproductions were a problem even before *Feist*, notwithstanding their inclusion in the definition of "pictorial, graphic, and sculptural works" under section 101 of the Copyright Act. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976) (en banc) (newly created plastic version of public domain "Uncle Sam" bank denied copyright protection because the artistic dissimilarities were too minimal); *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987) (meticulously reproduced illustrations of the original public domain version of *The Wizard of Oz* held to lack copyright originality).

14. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 281-98 (2004) [hereinafter Nachbar, *Constitutional Norms*].

15. *E.g.*, William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 371-75 (1999) (arguing that traditional trademark law was likely within the commerce power because the likelihood of confusion requirement distinguishes trademark rights from property rights, but antidilution legislation is more problematic); 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, 1167-68 (arguing that specific limitations on exclusive rights under the IP Clause would have been meaningless if they could be trumped using other powers).

rights of copyright. It might be added that *Feist* did not come up with constitutional status for creativity out of the blue, Lochnerian though it may be. As early as the *Trademark Cases*,¹⁶ the Court stated that copyright requires a foundation in the “creative powers of the mind.”¹⁷ Moreover, dicta in a spate of cases all the way down to *Feist* (and beyond) have emphasized the public benefit objectives of United States copyright policy, as opposed to a natural rights objective aimed at benefiting creative authors and their heirs or assigns.¹⁸ Still, if intellectual property Lochnerism is the problem, *Feist* is much more of a villain than would have been a contrary result in *Eldred*.

Eldred did recognize the constitutional goal of promoting the progress of science for the public benefit, but the majority criticizes Justice Stevens in dissent, for citing the Court’s long chain of prior cases asserting that reward to the author is a secondary consideration of U.S. copyright policy.¹⁹ The *Eldred* majority argues that the Stevens approach understates the relationship between rewards and the progress of science.²⁰ The majority also criticizes Justice Breyer’s assertion in dissent, that copyright must serve public rather than private

16. *In re Trademark Cases*, 100 U.S. 82 (1879).

17. *Id.* at 94; see Diane Leenheer Zimmerman, *It's an Original! (?): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 200 (2005).

18. See *Feist*, 499 U.S. at 349-350 (“The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts’”); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved”); *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.”); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors”); see also *Fogerty v. Fantasy Inc.*, 510 U.S. 517, 524 (1994) (“The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public”). The Court has made similar statements in the patent context. *E.g.*, *Graham v. John Deere Co. of Kansas City*, 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. 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, 146 (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’”). See generally Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 423-36 (2004).

19. *Eldred*, 537 U.S. at 212.

20. *Id.* at 212 n.18.

ends as “miss[ing] the mark” because the two goals are not mutually exclusive.²¹ After rejecting the plaintiffs’ arguments that retroactive term extension violated the IP Clause per se, largely based on the long history of term extensions that included existing works,²² the *Eldred* majority, in a very brief discussion, rejected the demand for heightened judicial review, stating that “The Copyright Clause...empowers Congress to *define* the scope of the substantive right.”²³ Congress thus has the power to give substantive content to the constitutional concept of “promot[ing] the progress of science” and to define what times are “limited” within the meaning of the IP Clause, subject at most to rational basis review by the courts. The *Eldred* majority found that Congress could rationally have decided that the CTEA harmonized U.S. law with that of the European Union, that it could favorably affect the U.S. balance of trade, that it was fair to authors, and that it might stimulate the production of new works and encourage the creation of new derivative works and the preservation of existing works, especially films.²⁴

21. *Id.* See Craig W. Dallan, *supra* note 18, at 431-32. At this point of the opinion, the Court also asserts that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *Eldred*, 537 U.S. at 212, *citing* *Stewart v. Abend*, 495 U.S. 207, 230 (1990). In *Stewart*, however, the Court was wrestling with the problem of the renewal term and how Congress had iterated its way through a variety of approaches. *Stewart*, 495 U.S. at 230. The *Stewart* Court was simply saying that it was not going to revoke the renewal right just because an underlying work had been incorporated into what became a much more popular work, absent explicit instruction from Congress. *Id.* This statement from *Stewart* is pure dictum with respect to the *Eldred* issue of who should interpret the *express* limitations on Congress found in the IP Clause. *Id.* The *Eldred* Court also quotes *Sony*’s statement that “[I]t is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product.” *Eldred*, 537 U.S. at 213, *citing* *Sony Corp. of America*, 464 U.S. at 430. This statement from *Sony*, however, is in the context of balancing the author’s monopoly against the need for appropriate public access and was made without reference to any of the express limitations on congressional power in the IP Clause. *Id.* Finally, the *Eldred* majority also quotes *John Deere*’s assertion that “[w]ithin the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.” *Eldred*, 537 U.S. at 213, *citing* *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966). This statement from *John Deere* on its face has nothing to do with IP Clause limits on congressional power because it says that Congress may operate only *within* those limits. *Id.*

22. *Eldred*, 537 U.S. at 210-17.

23. *Id.* at 218 (emphasis in original). Earlier, the *Eldred* majority quotes *Bonito Boats* for the proposition that “‘It is for Congress to determine if the present system’ effectuates the goals of the Copyright and Patent Clause.” *Id.* at 216, *quoting* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989). In context, the quotation from *Bonito Boats* is wholly inapt. The full statement in *Bonito Boats* reads, “‘It is for Congress to determine if the present system of design and utility patents is ineffectual in promoting the useful arts in the context of industrial design. By offering patent-like protection for ideas deemed unprotected under the present federal scheme, the Florida statute conflicts with the ‘strong federal policy favoring free competition in ideas which do not merit patent protection’.” *Bonito Boats*, 489 U.S. at 168 (citation omitted). Thus, the contrast in *Bonito Boats* was between the power of Congress, on the one hand, and the power of the *states*, on the other, to enact patent legislation. The Court was not making any statement about the power of Congress generally under the IP Clause. *Id.*

24. Craig W. Dallan, *supra* note 18, at 438.

The extreme deference to Congress exhibited by the *Eldred* Court contrasts sharply with the *Feist* dictum and with many prior statements of the Court concerning the scope of congressional power under the IP Clause.²⁵ It also contrasts with common sense, because as I and others have shown,²⁶ none of the reasons given by Congress and accepted by the Court as “rational” can withstand even the mildest scrutiny.²⁷ For pre-1978 works and all works made for hire, for example, the CTEA simply added 20 years to a fixed term of 75 years, while all such works in Europe have a term that is based on a human life + 70 years. No evidence was presented to Congress showing that, even on average, the U.S. term under the CTEA would be closer to the European term than would have been the case under our prior law.²⁸ Similarly, while Congress heard much testimony about the importance to our trade balances of *current* works like films and computer software, no evidence whatsoever was presented to show that the balance of trade in *old* works – the works most directly affected by the retroactive extension – was even favorable to the U.S., let alone in amounts that made up any significant portion of our exports.²⁹ Moreover, Congress paid no attention to the *costs* of achieving whatever trade benefits it thought might arise from the CTEA. Because Americans are the primary users of U.S. works, most of the benefit to U.S. copyright owners will be paid by Americans, not Europeans. Even worse, all people, including new creators, suffer losses in the form of new works *not* created or old works *not* performed because of the transaction costs of copyright licensing. Thus, the CTEA is not just a wealth transfer but an actual net loss to the U.S. public. Because no one can know how

25. See generally, William Patry *supra* note 15; Heald & Sherry, *supra* note 15.

26. Craig W. Dallan, *supra* note 18, at 438-53; Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 222-32 (2002)[hereinafter Karjala, *Judicial Review*]; 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 [hereinafter Karjala, *1998 Statement*], available at <http://homepages.law.asu.edu/~dkarjala/opposingCopyrightExtension/legmats/1998Statement.html>.

27. This is not to say that *Eldred* is inconsistent with the general approach to equal protection that the Court has taken for many years in cases like *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) and *U.S. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980). I regard these as cases in which the Court simply refused to engage in *any* level of meaningful substantive review, which is what it also did in *Eldred*. This general approach does, however, present some tension with recent commerce clause cases. See *infra* note 18.

28. I supplied some examples showing the contrary. Karjala, *1998 Statement*, *supra* note 26, at 16; For example, George Gershwin died in 1937, meaning that all of his works went into the public domain in Europe on January 1, 2008. Under our prior law, Gershwin works published between 1923 and 1937 would have gone into the public domain between 1999 and 2013, which dates nearly equally surround the date in Europe. Under the CTEA, these works go into the public domain in the U.S. between 2019 and 2033, as much as 25 years after everything from Gershwin is in the public domain in Europe.

29. Karjala, *Judicial Review*, *supra* note 26, at 227-28.

much has been lost due to these higher transaction costs, however, it is difficult to rally political opposition to the giveaway.³⁰

The fairness to authors argument was based largely on the European Union's adoption of the so-called "rule of the shorter term" under Berne Convention Article 7.³¹ This meant that U.S. authors would have copyright in Europe only for the shorter U.S. term, not the new and longer European term. The rule of the shorter term is optional under Berne, not mandatory, and it is one of the few exceptions from the general rule of national treatment that Berne makes.³² It is strange that, if our government thought the longer term for Europeans in Europe was unfair to U.S. authors, nobody protested the European Union's mandating the rule of the shorter term for all of its members. But for that conscious and discriminatory choice by the European Union, authors from either region would be treated the same in both.³³

The incentives justification for the CTEA consists of two parts: Incentives to create new works and incentives to preserve, restore, and distribute old works. Incentives to create new works obviously cannot justify extending the term for works already in existence. And no supporter of an extended copyright term argued solely for a prospective extension, that is, a life + 70 year term only for works created after the effective date of the extension. Present value

30. *Id.* at 233.

31. Berne Convention for the Protection of Literary and Artistic Works, Art. 7(8)(Paris Text 1971). Other "fairness" arguments were even wider off the mark. The notion that the copyright term was aimed at providing for authors plus two generations of descendants is almost fatuous. A life + term automatically increases with increased life expectancies; protection for two generations of descendants (author grandchild welfare) has never been recognized as a U.S. copyright goal; a copyright can always be transferred outside the family after termination rights have expired; and for works made for hire – possibly the most important category in economic terms – speaking of successive "generations" makes no sense. See Karjala, *1998 Statement*, *supra* note 26, at 24-26; Craig W. Dallan, *supra* note 18, at 445. The claim that improvements in communications technology and an extended commercial life justify the extended term also fails. Indeed, improved communications technology may allow an author to recover her investment *faster* than before, justifying a shorter term. In any event, if we measured terms by commercial life, Shakespeare, Rembrandt, and Bach would still be under copyright protection. Karjala, *Judicial Review*, *supra* note 26, at 213-14.

32. The U.S. does not and has not adopted the rule of the shorter term.

33. Consider the following example that I gave to Congress in 1998: Suppose Europe decided to guarantee a \$20,000 income to each of its citizens and to everyone else residing within its borders, on condition in the case of foreigners that the foreign country offer similar treatment to Europeans. Would "unfairness" to Americans in Europe be a ground for our adopting a similar measure here? Is it conceivable that any member of Congress would support such a welfare policy in the name of "harmonization" or "fairness"? If there is any "unfairness" here it is the discrimination against noncitizens by Europe. In such cases, our government should perhaps seek to persuade Europe not to act so discriminatorily, but surely we would adopt the welfare measure for ourselves only after carefully considering all the costs and benefits to those in the U.S. who would be footing the bill, not only for the indigent Europeans residing in the U.S. but also for the many U.S. citizens whose incomes would call for support under the new system. Increasing our copyright term in the name of "fairness" just because Europe has adopted a discriminatory rule makes no more sense. Karjala, *1998 Statement*, *supra* note 26, at 20-21.

calculations show that a life + 70 term cannot give any meaningful economic incentive to an author today who is deciding whether or not to embark on the creation of a new work.³⁴ The argument that an extended term would encourage the production of new derivative works applies whenever a term is about to expire, and no one explained why derivative work authors were called to their creativity only at the end of the then-current 75-year term, instead of a few years earlier when exclusive rights were still available.³⁵ An extended term might supply an incentive for the preservation or restoration of old films, but no testimony before Congress suggested how this rationale applied to other types of works. Had Congress been truly concerned about films, it could have narrowly tailored a statute to give exclusive rights to film restorers. The CTEA leaves only the copyright owner as a potential preserver or restorer of old films; it excludes the many film archivists who engage in that activity on a regular basis. If the copyright owners had not preserved their films in the original copyright term, what reason was there to think they would do better with an extra 20 years, especially as to the vast majority of old films that no longer have much commercial value?

The CTEA effected a wealth transfer from the American public generally to a small group of owners of old copyrights that were about to expire, at a cost greater to the American public than the additional royalties the public will pay during the 20-year extension period (because transaction costs reduce the number of new works and performances that are available). Still, this is far from the first time that interest groups have banded together to implement legislation that favors their special interests. The question is whether and to what extent the judicial branch should intervene to overturn or at least second-guess the legislative branch. Two important commentaries have cogently argued that courts should not intervene, either in congressional choices for copyright generally or in congressional decisions extending copyright terms.

AVOIDING COPYRIGHT LOCHNERISM

Professors Paul M. Schwartz and William Michael Treanor have argued that judicial review of intellectual property legislation should be deferential because it is analytically similar to legislation affecting other forms of property.³⁶ In

34. Karjala, *1998 Statement*, *supra* note 26, at 22-23 & n.33 (showing that a *certain* revenue stream for 95 years to an entity author would have a present value less than 0.1% greater than the present value of a 75-year stream at a 10% discount rate and only 1.5% at a 5% discount rate); *see also Eldred*, 537 U.S. at 254-55 (Justice Breyer, dissenting). Of course, whether there will be any revenues *at all* from a work newly created today is highly speculative. The vast majority of works, even those that have a modicum of current popularity, fade away from economic importance in much less than 75 years. This means that the economic value of the extension to a current author is much less than even small amount the present value calculation for a guaranteed income stream shows.

35. Karjala, *Judicial Review*, *supra* note 26, at 230-31.

36. Schwartz & Treanor, *supra* note 4, at 2334.

attacking originalist arguments seeking judicial intervention, they reason that even if the Framers regarded congressional power under the IP Clause to be very limited, they had an even more constrained view of judicial power to determine whether Congress adhered to the boundaries that had been set.³⁷ They criticize the opposition arguments that the IP Clause had a narrow meaning to the Framers, particularly the argument that the Framers were aware of the British experience leading to the Statute of Monopolies³⁸ and sought to insure that interest groups could not garner special favors from Congress. They argue that there is scant evidentiary support showing that the Framers linked the IP Clause to the British experience, that those who expressed fear of monopoly were worried about broad powers under the Necessary and Proper Clause rather than the IP Clause, and that reliance on Jefferson's views was misplaced because Jefferson was not at the Constitutional Convention.³⁹ Professors Schwartz and Treanor go on to argue affirmatively that the Founders, at least in general, were not unalterably opposed to monopolies;⁴⁰ that even if Madison read the IP Clause narrowly, the CTEA would comport with his view because 20 years is a "limited time";⁴¹ and that the 1790 Copyright Act as well as three early private law extensions of patent protection showed the Framers understanding that exclusive intellectual property rights could be extended by Congress.⁴² They conclude by arguing that the jurisprudence under *Lochner* shares a "common attitude" with

37. *Id.* at 2368-75.

38. An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof (Statute of Monopolies), 21 Jam., c. 3 (1624).

39. Schwartz & Treanor, *supra* note 4, at 2378.

40. *Id.* at 2383-84. In a separate work, Professor Nachbar convincingly demonstrates that the British Statute of Monopolies must be viewed in its mercantilist context and that, when understood in context, it provides no support for any particular restriction on modern intellectual property laws. Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313 (2005).

41. Schwartz & Treanor, *supra* note 4, at 2382. Later, Professors Schwartz and Treanor argue that Madison's views of "limited time" were not derived from his anathema to monopoly but rather in insuring that any exclusive rights granted could be revisited by later majorities and ended, perhaps with the payment of compensation. *Id.* at 2386. They conclude that Madison would view the CTEA as constitutional, because a term extension, and even a series of term extensions, would each be for a limited time and could be stopped when a majority decided to do so. *Id.* Professors Schwartz and Treanor quote another passage from Madison that they assert shows that he did not view the purpose of the IP Clause as limited to encouragement of future production:

With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it?

Id. at 2384, quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1790*, at 562, 566 (James Morton Smith ed., 1995). The final sentence, however, also suggests that Madison did think of copyright as a bargain whose terms are set at the time of the grant.

42. *Id.* at 2388-89.

those who view the IP Clause as establishing narrow and judicially enforceable limits on intellectual property legislation,⁴³ in that both reflect the belief “that an active judicial role is necessary to combat rent-seeking in the legislative process.”⁴⁴ Professors Schwartz and Treanor argue that to insert this particular view into the Constitution, when other plausible (if not more likely) readings of the text are possible, would be a mistake, because judges have limited competence to make complex economic decisions,⁴⁵ and judicial decisions are likely to have unintended consequences.⁴⁶ They argue that the lesson of history is that victories for aggressive judicial review will be unstable because they are countermajoritarian.⁴⁷

Professors Schwartz and Treanor conclude by applying this reasoning to the CTEA itself. They argue that the judicial branch is particularly unsuited to determine what constitutes a “limited time” or whether a particular measure “promotes the progress of science.”⁴⁸ They believe that Justice Breyer’s purely rational calculus concerning the economic value of the extended term to a current author might not be the one followed by many authors and that there are other plausible visions even under an economic-utilitarian view.⁴⁹ Moreover, intellectual property issues often pit roughly equally matched actors against one another, and under these circumstances the political process should work well.⁵⁰ If there are process failures, to scrutinize legislation closely on that ground has no obvious limit.⁵¹ Constitutional holism, too, says that, unless there is good reason to treat the IP Clause differently, the norms adopted in similar areas, such as property (where rational basis review is the norm), should govern intellectual property as well.⁵²

In his article *Judicial Review and the Quest to Keep Copyright Pure*,⁵³ Professor Thomas B. Nachbar similarly argues for a highly deferential scope of judicial review of copyright legislation. He contrasts *Feist* and *Eldred*, finding *Feist* to be a sweeping policy decision constitutionalizing the notion of creative

43. *Id.* at 2390.

44. *Id.* at 2392.

45. *Id.* at 2400.

46. *Id.*

47. Schwartz & Treanor, *supra* note 4, at 2402.

48. *Id.* at 2403.

49. *Id.* at 2404-05.

50. *Id.* at 2405. Of course, this was not the situation with the CTEA, where concentrated special interests like Disney and the Gershwin Family Trust were pitted against the diffuse general public. Not even the education or librarian lobbies, which historically have been a kind of proxy for the public interest in copyright as against content owners in the legislative process, took a stand against the CTEA in Congress. The reason was not that they favored the CTEA; rather, the copyright term was already so long that an additional 20 years would have only a small direct effect on their day-to-day activities. As a result, the bill was able to get through Congress largely under the radar.

51. *Id.* at 2406-08.

52. *Id.* at 2410-11.

53. Nachbar, *Quest to Keep Copyright Pure*, *supra* note 4, at 68.

originality as a constraint on Congress⁵⁴ and applauding *Eldred's* refusal to question whether Congress's decision to extend the copyright term in response to international changes and to increase incentives to preserve and distribute older works served progress within the meaning of the IP Clause.⁵⁵ He starts from the general rule that it is for legislatures rather than courts to determine policy.⁵⁶ He then offers four possible justifications for heightened judicial review of a statute and concludes none embrace the review of legislation for compliance with the IP Clause:

I would like to suggest that, collectively, the justifications for heightened judicial review break down into four categories of cases, those involving: 1) fundamental rights and principles, 2) attempts by the government to prevent the electorate from exercising political rights, 3) systematic discrimination (most clearly implicated by discrimination by the majority against the minority), and 4) attempts to alter the boundaries and relative power of the various competitors for governmental power in the constitutional system.⁵⁷

Briefly, Professor Nachbar's argument is that, while the First Amendment may limit what Congress can do in the copyright arena, that is a matter of First Amendment law and gives no support to the claim that the IP Clause independently propounds free speech principles.⁵⁸ Treating points (2) and (3) together, he finds that copyright does not present any special public-choice problem, as interest groups often manage to commandeer representative government to shift wealth from the majority to their members.⁵⁹ Moreover, there is no obvious limit to the rent-seeking argument,⁶⁰ which could be claimed for any exercise of congressional power, so it would take the court even beyond

54. *Id.* at 38.

55. *Id.* at 39.

56. *Id.* at 43-44.

57. *Id.* at 45.

58. *Id.* at 45-51. Professor Ku has argued at length that the First Amendment is a clear textual limit on majoritarian decisionmaking. Raymond Shih Ray Ku, *Copyright Lochnerism*, 33 N. KY. L. REV. 401 (2006). Professor Ku, however, accepts their conclusion that Congress should stay out of decisions on the length of the copyright term. *Id.* at 413 n.115. Cf. James Weinstein, *Database Protection and the First Amendment*, 28 U. DAYTON L. REV. 305, 350 (2002)(concluding that database legislation involves issues of economic justice and not core First Amendment values).

59. Nachbar, *Quest to Keep Copyright Pure*, *supra* note 4, at 51-55.

60. *But see* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692, 1713 (1984) (arguing that government decisions must be based on "something other than a raw exercise of political power" and that "the function of rationality review is to enforce [a] weak version of the prohibition of naked preferences."

Lochner in the breadth of review that would result.⁶¹ Finally, copyright, being exclusively federal, does not trench upon the established boundaries of the institutions of our representative government, particularly the relative powers of the federal government and the states.⁶² He then returns to *Feist* as an example of the dangers that a rigidly constitutionalized view of the meaning of “progress” in the IP Clause has for real progress in knowledge and culture in a modern society.⁶³ He concludes that a highly deferential scope of judicial review of copyright legislation for consistency with the IP Clause is appropriate.⁶⁴

THE SPECIAL CASE OF TERM EXTENSION LEGISLATION

If there is a way to refute the general point made by Professors Schwartz and Treanor and by Professor Nachbar that, in general, copyright legislation should be subject to deferential review by the courts, I do not know what it is. The copyright statute is complex in the extreme and riddled with legislative tradeoffs. And while all of the interested parties cannot be represented at the legislative “bargaining” that occurs when Congress deliberates copyright legislation,⁶⁵ Congress can certainly place more views on the table than a court. Thus, while Congress is required under the IP Clause to pursue copyright legislation that

61. *Id.* at 54. Professor Nachbar concludes by asking, “Other than an awkwardly worded clause in the Constitution to provide a textual hook, what makes copyright so special?” *Id.* Presumably he is referring to the clause requiring copyright legislation to “promote the progress of science,” but, as discussed below, the term “limited times” does and indeed must distinguish *copyright term extension* legislation from the general economic regulation to which he believes copyright *in general* should be compared.

62. *Id.* at 56-61. It is on this ground that Professor Nachbar distinguishes the Court’s more active intervention in recent Commerce Clause cases to overturn federal statutes. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Nachbar, *Quest to Keep Copyright Pure*, *supra* note 4, at 59-61. Professors Schwartz and Treanor acknowledge some tension between the approach to judicial review in *Eldred*, on the one hand, and *Lopez* and *Morrison*, on the other, but they put it to the side to argue that “concern for the original understanding mandates that aggressive judicial review should not be extended to a new area.” Schwartz & Treanor, *supra* note 4, at 2374.

63. Nachbar, *Quest to Keep Copyright Pure*, *supra* note 4 at 62-68. Professor Nachbar cogently points out that intellectual property markets and technology change enormously over time, so that so that even if we could know the exact intent of the Framers in drafting the IP Clause, we might hesitate in relying solely on that intent today. *Id.* at 64-66. The ambiguity and disagreements over the meaning of “progress,” he argues, argue strongly for leaving the definitions to the legislature rather than the courts. *Id.* at 67-68.

64. *Id.* at 68-69.

65. Professor Litman has pointed out that the exploiters of yet-to-be-invented technologies cannot be present at the congressional negotiations, so there is no one to argue that their views are getting too little consideration. Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 883-84 (1987).

promotes the progress of science,⁶⁶ it would be absurd for a court to try to determine whether, for example, a public performance right for sound recordings would “promote the progress of science,” let alone second guess whether Congress’s limited public performance right for digital audio transmissions⁶⁷ optimally achieves that goal under the nearly impenetrable exemption and compulsory licensing scheme set out in section 114.⁶⁸

Term extension legislation, however, involves not just the so-called “preambular” requirement that copyright legislation “promote the progress of science.”⁶⁹ More specifically, term extension legislation also invokes the requirement that the exclusive rights of copyright endure only for “limited times.” Professor Nachbar is surely correct that the progress clause, standing alone, is so vague and potentially broad as to defy specific judicially imposed limits on congressional power with respect to copyright legislation in general.⁷⁰ It can and should, however, play a role in determining the meaning of the term “limited times.” For one thing, this saves the progress clause from the status of wholly surplus language in the Constitution. At the same time, it avoids reading the “limited times” language out of the Constitution as well.

Let us take a simple example: Suppose the European Union had adopted a term of life + 1000 years and Congress followed suit in the name of

66. Professor Nachbar does not disagree:

There can be no general debate over whether the Clause means that any system of exclusive rights established pursuant to the Clause must promote progress; the Clause clearly says that its objective is to promote progress. It hardly takes sophisticated textual analysis to determine that the promotion of progress is part of what the Clause is about.

Rather, the more fundamental ambiguity underlying *Eldred* stems from the constitutional implications of a charge that Congress has failed to abide by the restriction that its grants of exclusive rights promote progress.

Nachbar, *Quest to Keep Copyright Pure*, *supra* note 4, at 42 (footnotes omitted).

67. 17 U.S.C.A. § 106(6).

68. 17 U.S.C.A. § 114(d)-(j).

69. Professor Dotan Oliar has argued, convincingly in my view, that the progress clause and the exclusive rights clause were intended by the Framers to be read together, each defining and limiting the other. Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEORGETOWN L.J. 1771 (2006). Professor Oliar looks at the language of a proposed intellectual property power by both Madison and Pinckney, neither of which contained a “preambular” goal or end and were therefore plenary powers for Congress to create exclusive intellectual property rights. *Id.* at 1789-90, 1811. At the same time, Madison and Pinckney proposed other powers – the establishment of universities or seminaries and the use of premiums – for specific purposes, such as promotion of literature and the arts, promotion of agriculture and commerce, and the advance of useful knowledge and discoveries. These education and encouragement powers proposed by Madison and Pinckney were not adopted, but the purposes contained in them were combined into what became the preamble of the IP Clause. *Id.* at 1805-10. He concludes that the Framers gave Congress the power to promote the progress of science, by means of exclusive intellectual property rights, and intended to prohibit Congress from using other means to exercise this power, namely, by the establishment of universities or the grant of encouragements. *Id.* at 1818.

70. Nachbar, *Quest to Keep Copyright Pure*, *supra* note 4, at 68-69.

“harmonization.” Should there be no non-rubber-stamp judicial review of this decision? In its brief to the D.C. Circuit in *Eldred*, the government conceded that some fixed term extensions might violate the limited times requirement.⁷¹ In this case there would even be a more colorable case for harmonization than there was in the case of the CTEA, at least insofar as the extension was prospective. Under the extremely deferential review advocated by Professors Schwartz and Treanor and by Professor Nachbar, such an extension would presumably be upheld without judicial consideration of the constitutional meaning of “limited times” or whether the extension actually did “promote the progress of science.”

Yet, a term of life + 1000 years is effectively unlimited. Because intellectual property does not physically depreciate and is not consumed by use, such a term as a practical matter would be more nearly perpetual than the so-called “perpetual” term we associate with tangible property outside of land (and in these days of global warming and rising seas, maybe much of the earth’s land will not even last that long). I suggest that it is possible for a court to make a substantive inquiry into the constitutionality of this congressional action without raising the specter of *Lochner* or the other adverse effects that Professors Schwartz, Treanor, and Nachbar raise for the review of copyright legislation generally. The court can look to the *reasons* given by Congress for asserting that the extension is limited and promotes the progress of science, against the background of the *purpose* of the progress and limited-times clauses in the IP Clause.

I agree with Professor Nachbar that the actual purposes and goals of the Framers in inserting these limitations into the IP Clause, even if we could divine them, should not be fully determinative of the meanings we give them today.⁷² Our society today is very different from that of the United States in 1790, in just about every dimension by which one might measure such differences. While I do not advocate reading “white” to mean “black” in the Constitution simply to achieve (legislatively or judicially) a given policy goal, the meanings of many terms in the Constitution have expanded and contracted over time to meet the needs of then-current United States society. Therefore, that “limited times” may well have meant something on the order of 28-42 years to the Framers is not

71. Brief for the Appellee at 42, *Eldred v. Reno*, No. 99-5430 (D.C. Cir. 2000) (“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”), available at <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/constitutionality/GovtAppBrief.pdf>. In its brief to the Supreme Court, the government obliquely said something similar in countering the plaintiffs’ claim that a series of extensions could not be “limited”: “If Congress ever did adopt a term that was too long to be “limited,” such an effort would be unconstitutional whether enacted in one statute or a series, and this Court surely could distinguish that term from the limited time protected under the CTEA.” Brief for the Respondent at 27, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (footnote omitted), available at <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/constitutionality/SupremeCourtBriefs/GovtResponseSCT.pdf>.

72. Nachbar, *Quest to Keep Copyright Pure*, *supra* note 4, at 65-66.

determinative of whether a life + 70 year, or even a life + 1000 year, copyright term is “limited.” Still, since *Marbury v. Madison*,⁷³ it is the institutional duty of the Court to interpret the meanings of terms in the Constitution.⁷⁴ And when a plausible view of the intended meaning of the Framers comports with the policy basis today for limiting the temporal duration of intellectual property rights, it is not unreasonable for the courts to adopt that meaning and, at a minimum, insist that Congress give convincing reasons that its new and longer term is still “limited” in that sense. The Court need not decide what the term should be, either in general or with respect to any given class of works. It can leave that to Congress, sending the issue back if necessary by invalidating a statute establishing a term that, under the circumstances, Congress has not justified with plausible reasons but allowing Congress to try again if it can better convince the Court that the new term is, indeed, “limited.”⁷⁵

A PLAUSIBLE MEANING OF “LIMITED TIMES”

What is a plausible view of the Framers’ intent in inserting the “limited times” requirement into the IP Clause?⁷⁶ This is not the place to rehash the isolated pieces of evidence concerning who thought what or what the group of Framers as a whole was thinking. What we do know is that the term “limited time” (or “certain time”) appeared in the copyright powers proposed by both

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

74. In the recent Commerce Clause cases, both the majority and the dissenters agreed that the Court was the final arbiter of the term “commerce”. See, e.g., *U.S. v. Morrison*, 529 U.S. 598, 614, 651 n.19 (2000).

75. Professor Coenen has shown that this “structural” judicial review, which overturns enacted legislation but allows Congress to try again in the light of constitutional demands, is far from uncommon and in fact 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).

76. Professor Schwartz and Treanor argue extensively that the *Eldred* petitioners’ originalist arguments for restricting congressional power to determine the meaning of “limited times” have thin evidentiary support. Schwartz & Treanor, *supra* note 4, at 2379. However, in giving their own view of how to understand the IP Clause, they concede that Madison’s view may have been very narrow but that there was no reason to attribute to him the type of restrictions on congressional power the *Eldred* petitioners claimed. They then conclude bluntly, “The twenty-year extension is a ‘limited Time[.]’” *Id.* at 2382. They later argue that a plausible interpretation of Madison’s position is that “limited times” was intended to insure that rights could not be established in such a way that they could not be revisited by later majorities. *Id.* at 2386. Thus, an extension for 20 years – a “limited time” – would not be troubling to Madison, because, even if such extensions occurred on a regular basis, the ultimate extension of exclusive rights for such a long period is not made by a single Congress. *Id.* Even accepting all of these arguments, however, the question remains of how long is “limited.” Does it mean “mathematically finite”? Had the extension been to life + 100 years, or life + 200 years, would that still be fine with Madison because Congresses in the year 2098 or 2198 could revisit the issue? Take it up to our hypo of life + 1000 and one necessarily gets a bit queasy attributing such a view to Madison. Either Congress is the sole determinant of the meaning of “limited times,” in which case the phrase is wholly surplus, or the courts must play some role in determining its meaning.

Pinckney and Madison,⁷⁷ and the term “limited times” appears in the final version of the power approved by the Committee of Eleven.⁷⁸ One reason for a limited term for copyright that made sense in 1789 and still makes exactly the same sense today is economic efficiency. Many of the Framers made reference to the exclusive rights of copyright as an incentive to the production of desirable works.⁷⁹ But perpetual exclusive rights had long been recognized for the creators of tangible property as well as for owners of land (and even intangibles like stocks and bonds). Why should information works be protected only for a limited time?

The answer is economic efficiency. Information works are not consumed by use, are nonrival in use,⁸⁰ and are essentially infinitely reproducible at zero or very small cost. For works that have already been created (or would in any event be created even without the incentive of exclusive rights), it is economically inefficient to recognize exclusive rights. Where the marginal cost of reproducing a work is zero or close to zero, the demand for it will be greater and more people will have access to it, thereby more widely disseminating knowledge and culture.⁸¹ Making more works more widely available is also a plausible interpretation of the “promote the progress of science” clause. We reasonably assume, however, that many desirable works will not be created, and if created will not be disseminated except under strict secrecy conditions, if upon a work’s release to the public anyone could make and further distribute copies. Such

77. Dotan Oliar, *supra* note 69, at 1789.

78. *Id.* at 1790.

79. For example, Madison wrote that a monopoly was given 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.” JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed. 1999). The incentive basis for copyright has long permeated Supreme Court discussions of the issue. See *supra* note 18.

80. Professor Nachbar has argued that intellectual works are not special in their nonrival nature. Thomas B. Nachbar, *The Comedy of the Market*, 30 COLUM. J. L. & ARTS 453 (2007). He points out that access to markets is also nonrival and yet such access has long been regulated, often to limit access artificially (and usually to the benefit of the existing players). *Id.* at 458-59. His main point is to show that the nonrival nature of intellectual property does not entitle it to a special place in constitutional law. *Id.* at 465-66. The point here, however, is not to try to understand why the Framers failed to insure freer markets or open up access to other nonrival goods (whatever they may be). Rather, the question for us is to understand why the Framers *did* provide that intellectual property rights should endure for only limited times. The nonrival nature of information works is so obvious that, while they may not have been explicit about their reasons, it insults their intelligence to assume that they did not take that nature into consideration, even if subconsciously.

81. Professor Landes and Judge Posner have argued that “congestion externalities” can result in a loss of value in popular works when they go into the public domain and have proposed a system of infinitely renewable copyright. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003). Their argument, however, is wrong on its economics and implausible for all works of copyright, even if their economics were correct. Dennis S. Karjala, *Congestion Externalities and Extended Copyright Protection*, 94 GEO. L.J. 1065 (2006).

competition with the creator would drive the price down to marginal cost, and the creator would have little chance to recover her investment in time, effort, and other expenses of initial creation that a copier does not have to pay. The exclusive rights of copyright are designed to eliminate this market failure, by providing a limited time in which the author can recoup his investment in creating the work.⁸²

We cannot prove that avoiding market failure without undermining economic efficiency was the goal of the Framers in giving Congress the power to legislate exclusive rights in intellectual property but only for limited times.⁸³ It is, however, a major argument today for limiting the duration of intellectual property rights, and nothing special has happened to the economics of intellectual property that makes today any different on this point from 1789. The one incontestable point is that the Framers did include the phrase “limited times” in the IP Clause, and there almost surely was a reason for their doing so. They wanted to “promote the progress of science,” which would happen most efficiently, if creation incentives could be ignored, with no intellectual property rights. But because we need a creation incentive, we must offer some period of exclusive rights. Until a more plausible reason is suggested, it would not be unreasonable for a court called upon to interpret the meaning of the Constitution in a term extension case to treat “limited times” in the IP Clause as that length of time that is reasonably necessary to encourage the production and public availability of the types of intellectual works desired by society.⁸⁴

SPECIFIC TERM EXTENSION APPLICATIONS

How, then, should a court handle our hypothetical life + 1000 year term when it is challenged as violative of congressional power under the IP Clause? For the time being, let us limit ourselves to *prospective* term extension, that is, a term extension that applies only to works created after the effective date of the

82. This market failure is also both the justification for a copyright in computer programs – functional works that under traditional principles belong under the patent or trade secret regimes – as well as the basis for limiting such protection. *E.g.*, Dennis S. Karjala, *A Coherent Theory for the Copyright Protection of Computer Software and Recent Judicial Interpretations*, 66 U. CIN. L. REV. 53, 69-70 (1997).

83. Professor Frischmann argues against the ongoing “Demsetzian” trend toward stronger property rights under copyright by looking to the “social demand” for access to protected work, which can exceed private demand based on individual willingness to pay and that many uses generate value for third parties. Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON., No. 3, Art. 2 (2007), available at <http://www.bepress.com/rle/vol3/iss3/art2/>.

84. This may be a special case of Professor Gunther’s version of equal protection with “bite.” Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972). Professor Gunther suggests going beyond a “mere rationality” standard and have the Justices focus on the means by which legislation is adopted, judging their reasonableness “on the basis of materials that are offered to the Court” rather than resorting to conjecture. *Id.* at 21.

extension. The Court should look to the reasons given by Congress for the extension and ask whether Congress's conclusion that it promotes the progress of science (for example, by increasing creation incentives or otherwise increasing the supply of desirable works) makes sense. In the hypo, the reason given is harmonization with the European Union. Present value calculations show that, for someone contemplating the creation of a new work today and the unlikelihood that the work will have *any* economic value even 20 years from now, let alone 50 or 70 years after the author's death, there is no economic difference between life + 50 or 70 years and life + 1000 years (or even perpetual duration).⁸⁵ Would harmonization in itself supply more of an incentive? It is difficult to see how. If the term is life + 50 or 70 here but life + 1000 in the E.U. would any U.S. author consider moving to Europe to do her creating in order to get the benefit of the longer European term? Would a U.S. author simply not create a work because of differences between the two regimes, even though those differences would only manifest themselves 50 or 70 years after her death? Anything is *possible*, but when the Constitution is involved we should demand at least a little more: it should be *plausible*, and these supposed incentives are simply not plausible.

The proposed life + 1000 year term extension should therefore be held unconstitutional until Congress comes up with a plausible reason that the extension somehow promotes the progress of science by increasing creation incentives or incentives to restore or distribute works that, for whatever reason, are not as widely available as they would be with exclusive intellectual property rights in someone.⁸⁶ Perhaps Congress will narrow the class of works that benefit from the extended term and the new statute could pass constitutional muster. In the case of the CTEA, for example, Congress might have considered giving an exclusive right to restorers of old films, if film restoration was indeed a concern that Congress had.⁸⁷ It is difficult, however, to imagine any particular class of works for which a 1000-year term supplies any more incentive to do anything than the current (or even a shorter) term would.

This same argument applies almost equally, if not entirely, to the prospective term extension effected by the CTEA, which was not challenged by the *Eldred* petitioners.⁸⁸ As before, the economic incentive argument simply carries no

85. See *supra* note 34 and accompanying text.

86. I put to the side here the problem that the exclusive rights under the IP Clause are supposed to go to authors or inventors. If there is a plausible reason for giving an incentive to restorers, there is probably also a plausible basis for considering them to be "authors."

87. Even if *Feist* remains good constitutional law, there is almost surely a minimal degree of creativity in the process of restoring old films. Cases denying copyright originality in exact copies of public domain art, however, run the other way. E.g., *Bridgeman Art Library, Ltd*, 36 F. Supp. 2d at 196-97; *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987).

88. The petitioners conceded that whether 50 years or 70 years was too long was a judgment for Congress, not the Court. Brief for Petitioners at 14, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618). They did argue, however, that the prospective extension was not severable from the retrospective extension that they were attacking, so that both should fall. *Id.* at 17.

persuasive force. Besides the present-value arguments,⁸⁹ perhaps the strongest evidence is that literally *no one* sought purely prospective extension or even argued that it would be a viable compromise with the CTEA as enacted (including retroactive extension).⁹⁰ Professors Schwartz and Treanor criticize the economic present-value reasoning by saying that judges do not know enough about authorial psychology and that authors may not follow the “the same purely rational calculus as Breyer.”⁹¹ They do not, however, supply an alternative incentive theory of any kind, let alone one that is plausible. The key point here is that the issue cannot be simply, “Is there an increased creation incentive of some sort, however limited?” Our hypothetical life + 1000 term might also increase incentives microscopically over the current term.⁹² The issue is whether the increase from 50 to 70 years is “limited” because the increased incentive plausibly outweighs the cost in economic efficiency of tying up all works for the additional 20 years. Because Congress refused to engage in any such cost/benefit analysis, this alone would have been grounds for the Court to send the issue back.

Harmonization does not work any better as support for a prospective life + 70 term than it does for a life + 1000 term. That a current author might not embark on creative activity in the U.S. because her successors will not get the benefit of the longer European term 50 years after she dies is implausible in the extreme. Anyone making such a claim should support it with some factual foundation and reasonable analysis. Nothing like that was presented to Congress when it enacted the CTEA. There was no evidence that differing terms in the two regions 50 years later would lead to any special difficulties. Indeed, if differing terms caused friction in the international intellectual property markets, Congress might have tried to harmonize the terms for existing works, which were not harmonized at all by the CTEA.⁹³ At a minimum, Congress should have done a study to show whether and how public domain availability of works in one major market but not in another adversely affected creation incentives or the distribution of desirable works. Like incentives, “harmonization” is a plus on only side of the equation; the cost of harmonization must also be taken into account. When it is not, the Court can and should send it back to Congress to do so.

89. See *Eldred*, 537 U.S. at 254-55 (Breyer, J., dissenting).

90. Karjala, *Judicial Review*, *supra* note 26, at 216, 229. This point becomes crucial to analysis of the fairness of the retroactive extension as well. See *infra* notes - and accompanying text.

91. Schwartz & Treanor, *supra* note 4, at 2404.

92. Indeed, as Professor Litman has pointed out, *any* strengthening of rights will arguably lead to an increase in incentives and higher production if we look only to the incentive side of the tradeoff between return to authors and benefit to the public. Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 32-33 (1996).

93. See *supra* note 28 and accompanying text.

The *Eldred* Court concluded that Congress “rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.”⁹⁴ The slightest degree of scrutiny beyond “conceivable basis” reveals the makeweight nature of this argument. If Congress were concerned about restoration of old films, it could have carefully tailored the new rights to benefit those who actually restore old films. The CTEA gives no incentive to restore films already in the public domain, and not even the copyright owner has an incentive to restore an old film that he deems to lack economic value, although many film archivists would be delighted to engage in such restoration.⁹⁵ And if old films are the problem (there was precious little testimony concerning anything else on the restoration issue), there was no need to extend the copyright on *all* works. In other words, even if an extension of 20 years was “limited” with respect to old films, it will not be “limited” with respect to the vast majority of other works for which the economic inefficiency of an extended term has no counterbalancing benefit to the public.

Congress also cited the supposed increased commercial lives of works due to advances in communications technologies in support of the CTEA, and the *Eldred* Court credited this conclusion as a basis for upholding the statute.⁹⁶ There was no evidence that commercial lives of works actually have lengthened substantially, especially since the previous term extension in 1976 (where the same reason was given), but even if we assume such longer lives, what is the basis for perpetuating the economic inefficiency of longer exclusive rights?⁹⁷ This is an argument for perpetual protection for those works that maintain a their commercial lives. It would justify awarding a copyright in the works of Shakespeare (or even Homer or the Bible) to whoever might be the successor to the authors of those works (and possibly even to someone unrelated). Indeed, it would justify reviving copyrights in all works in the public domain that still sell copies. That cannot be the correct interpretation of the “limited times” clause.

94. *Eldred*, 537 U.S. at 207, citing H.R. Rep. No. 105-452, p. 4 (1998) (term extension “provide[s] copyright owners generally with the incentive to restore older works and further disseminate them to the public”); Professors Schwartz and Treanor also find this argument plausible. Schwartz & Treanor, *supra* note 4, at 2382.

95. See Karjala, *Judicial Review*, *supra* note 26, at 230-31.

96. *Eldred*, 537 U.S. at 207 n.14, citing 144 Cong. Rec. S12377 (daily ed. Oct. 12, 1998)(statement of Sen. Hatch); Professors Schwartz and Treanor also find this to be a rational basis for the CTEA and “represents a judgment creators of copyrighted works should ‘receive the benefit of increased marketability of their creations,’” quoting S. Rep. No. 104-315, at 17. Schwartz & Treanor, *supra* note 4, at 2382-83.

97. The *Eldred* majority also seemed to credit the “protection for two generations of descendants” argument. *Eldred*, 537 U.S. at 207 n.14. It is hard to believe that the Court would have relied on this argument if that were all that it had. See Schwartz & Treanor, *supra* note 4. Try applying it to the life + 1000 hypothetical considered earlier. Would a claim that copyright should protect the author plus fifty generations of descendants be plausible? The two generations argument came out of whole cloth and has no intrinsic limits.

A related argument was that the income derived from the increased term could be used to finance the production of new works.⁹⁸ Yet no supporter of the CTEA suggested, or was willing to accept, that the extension be conditioned upon using the profits to subsidize new creativity.⁹⁹ More important, the argument that the increased profits might be used to finance new creativity flies in the face of ordinary free-market economic theory.¹⁰⁰ The availability of risk capital depends on cost/benefit analysis for the project in question, regardless of how much money one has. There was no evidence, and no reason to believe, that Disney would invest in riskier movies because it would continue to earn profits from its control over Mickey Mouse.

TREATING PAST AND PRESENT AUTHORS EQUALLY

Professors Schwartz and Treanor also applaud another version of the fairness argument offered by the *Eldred* majority:

In our view, moreover, the most compelling justification for retrospective extension is an equitable one. The CTEA may simply reflect a dual congressional commitment to promoting both the progress of the arts and the equitable treatment of copyright holders. To promote future creation, Congress decided in enacting the CTEA to increase the incentives for creation by increasing the period of copyright protection prospectively. In this context, retrospective extension of the copyright period reflects equitable concerns: One class of copyright holders (the class of those who create after enactment of the statute) should not be treated better than another class (those who created before enactment of the statute).¹⁰¹

This argument for upholding the CTEA nicely illustrates the differences between simply accepting grammatically phrased reasons given in support of a statute and taking even a modest look at the reality behind its adoption. It starts from a premise that is wholly contrary to fact, namely, that Congress wanted to increase creation incentives and therefore decided to increase the term prospectively by 20 years. Having done so, it seemed only equitable to make the extension retroactive. In fact, however, *nobody* ever sought prospective term extension. *All* of the support for extension came from the owners of old copyrights. It's a cute game: the owners of old copyrights propose a 20-year prospective term

98. *Eldred*, 537 U.S. at 207 n.15; Schwartz & Treanor, *supra* note 4, at 2382.

99. When asked how Congress could be sure that the profits would be used to finance new creativity, the responses were simply that authors should receive the income generated by their works, that we can rely on authors' integrity to donate money or the right to use works voluntarily, and that a more solid financial basis for the movie industry would create more jobs. *Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995), at 92-93; see Karjala, *Judicial Review*, *supra* note 26, at 215 & n.68.

100. Karjala, *1998 Statement*, *supra* note 26, at 10-14.

101. Schwartz & Treanor, *supra* note 4, at 2383, citing *Eldred*, 537 U.S. at 204.

extension and then cry “Unfair!” if they, too, are not included. Again, the mildest degree of review asking whether Congress had plausible reasons for thinking that the 20-year extension, prospectively or retroactively, would supply benefits beyond the increased economic inefficiency resulting from the extended terms would end with sending the statute back to Congress to try again.¹⁰²

It is true that, in the past, Congress has always included existing works (at least those still under copyright) in the benefits of any term extension, and this was a powerful factor in the *Eldred* analysis.¹⁰³ In all of the earlier extensions, however, the validity under the “limited times” restriction was not questioned, and the equitable argument on behalf of existing copyright owners has some force. If the longer term promotes the progress of science, that is, plausibly supplies more social benefits than it costs in economic inefficiency, perhaps some arguments on behalf existing copyright owners can be made. The 19-year extension made by the 1976 Act, for example, was part of a comprehensive revision of the entire statute, and a longer term for existing copyrights might have been one of the legislative tradeoffs. Moreover, the longer term was adopted with a view to eventual United States entry into the Berne Convention, which also might at least plausibly justify the extension for all copyright owners.¹⁰⁴ The inclusion of existing works in the 1790 Act,¹⁰⁵ too, might be justified for similar reasons.

It seems, therefore, that the *Eldred* petitioners made exactly the wrong strategic choice. Instead of conceding the constitutionality of the prospective term extension and arguing against the retroactive aspect of the CTEA, they should have argued directly that the 20-year prospective extension was not justified because no plausible arguments in support of it were presented to show that its benefits would outweigh its costs. If the prospective extension falls, retrospective extension falls with it, because equitable treatment of existing copyright owners, based on our long historical practice, is the *only* conceivable basis for finding a public benefit from across-the-board retrospective extension. If prospective extension does pass constitutional muster, our long tradition of giving existing copyrights the benefit of any extensions that happen while they are still in force, plus the strong (if doctrinally suspect under the cost/benefit

102. Moreover, the inclusion of existing works *still protected by copyright* does not eliminate this so-called fairness problem. It only pushes it back, in this case to 1923, distinguishing between authors who completed works in 1923 or later from those who completed works in 1922 or earlier. See Karjala, *Judicial Review*, *supra* note 26, at 238. To be wholly fair in this sense, the extension should have covered *all* prior works. And, in fact, it is not unfair to hold creators of works under a life + 50 regime to the term promised at the time they created their works. The fairness argument also cuts the other way, because members of the public may have been relying on the entrance into the public domain of works on which they wished to base new creativity. *Eldred*, 537 U.S. at 240 (Stevens, J., dissenting).

103. *Eldred*, 537 U.S. at 200-04; Schwartz & Treanor, *supra* note 4, at 2388-89.

104. See Karjala, *Judicial Review*, *supra* note 26, at 204 n.20.

105. *Eldred*, 537 U.S. at 200.

analysis proffered here) equitable argument that the two classes should be treated equally will almost always carry the day.¹⁰⁶

FURTHER EXAMPLES

Another example of how this limited approach to judicial review of copyright term legislation is supplied by the Uruguay Round Agreements Act, codified as section 104A of the Copyright Act.¹⁰⁷ This congressional action does not merely extend copyright terms; it actually *revives* copyrights that had expired or failed to attach as an initial matter because of noncompliance with the formalities of prior U.S. law, such as publication with notice or renewal after 28 years of copyright protection. The URAA thus takes works out of the U.S. public domain, which the Supreme Court in dictum has said is impermissible.¹⁰⁸ Congress did, however, supply a plausible basis for believing that the statute would promote the progress of science. Most important, revival of foreign copyrights was at least arguably required by our treaty obligations under Article 18 of the Berne Convention,¹⁰⁹ and whether complying with such treaty obligations promotes the progress of science is a classic example of the kind of decision that must be left to Congress.¹¹⁰ The statute also is narrowly tailored to apply solely to foreign works,¹¹¹ which largely if not wholly eliminates the suspicion that the special interest rent seeking so blatantly obvious in the CTEA

106. The goal here is not to assess blame for the approach taken. As a policy matter, the retrospective aspect of the CTEA was clearly the most reprehensible. That rent seeking on behalf of owners of old copyrights rather than incentives for new creations was at the core of the CTEA is blatantly evident from any review of the record before Congress. *See generally* Karjala, *Judicial Review*, *supra* note 26. It was also of most immediate importance, as few works subject to the life + 50 regime (post-1977 creations) were anywhere close to expiration. The works published between 1923 and 1932, however, would be in the public domain *now* but for the retroactive extension. At a gut level, therefore, this is what most CTEA opponents thought people would react to, including judges. Had the Court given even minimal review beyond rational basis it would have thrown out the retrospective portion as unconstitutional. Still, at least in retrospect, insufficient attention was given to the long history of including owners of existing copyrights in the benefits of any term extension.

107. 17 U.S.C.A. § 104A.

108. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 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.”).

109. Berne Convention for the Protection of Literary and Artistic Works (Paris text 1971), Art. 18(1).

110. In some cases there may be reason to suspect that even a treaty may be the result of protectionist forces unable to achieve their goals directly in U.S. national law but able to manipulate the international negotiations in such a way that their domestic goals are reflected in an international treaty. Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369 (1997). They then argue that adoption of their protectionist goals is mandated by our treaty obligations. I leave this case for another day, and more specific facts.

111. Berne does not care whether a member country discriminates against its *own* citizens. It simply requires that countries treat foreigners at least as well as their own citizens (national treatment). Berne Convention for the Protection of Literary and Artistic Works (Paris text 1971), Art 5(1).

underlay the statute. As a statute carefully designed to meet a well defined problem, the URAA should fare much better under the limited approach to judicial review proffered here.

We might even take this a step further and ask whether Congress could take works from the public domain and award exclusive copyright rights in it to someone. For example, what if Congress were to provide that Disney would have exclusive rights for 10 years to Mark Twain's *Huckleberry Finn*. The reason might be that *Huckleberry Finn* is a quintessentially American novel that is not sufficiently well known or appreciated and that a company like Disney could do a better job at promoting the work, which it was likely to do only if it had exclusive rights.¹¹² I am certainly not advocating that Congress do anything of the sort, but if the URAA changes are valid, it would mean that Congress is not flatly prohibited from taking works out of the public domain and placing them back under copyright. Assigning new rights in existing works is not such a great step further. When and if that happens, we need at least modest judicial oversight. Asking whether the reasons on which Congress purports to base its decision make plausible sense is a way to give some degree of oversight without running the risk that the courts will make intellectual property policy entirely on their own. And in doing so the courts should look very carefully at the length of the new copyright's term. It must be convinced, based on plausible reasons supplied by Congress, that 10 years was the minimum term that would reasonably give Disney an opportunity to achieve the public-interest goal desired by Congress. The longer any such revived copyright term is, the more convincing and detailed should be the reasons Congress supplies. It is difficult to imagine, for example, any public-interest goal that Congress might seek to achieve that would require more than a 10-20 year term.

CONCLUSION

Will the Roberts Court, or any subsequent Court, confront this issue anew? It is doubtful that the Court will look at the CTEA again, even if the argument is rephrased to attack it at its truly vulnerable spot, namely, the prospective 20-year extension. First, reliance on the CTEA is even more entrenched now than it was at the time of the *Eldred* decision. Moreover, as between *Feist* and *Eldred*, it is *Feist* that presents the real problem for those worried about free-wheeling

112. There would, of course, be a problem here with whether Disney is an "author" with respect to *Huck Finn*. There are probably ways around this problem. For example, Congress might condition Disney's rights on its making a movie of the book within a certain period of time. That is, if Disney makes the movie, it gets exclusive rights not only in the movie (which it would have, anyway) but also in the whole work. Whether this counts as "authorship" within the IP Clause is itself an interesting question into which I do not propose to delve. It is at least plausibly authorship, and if Congress can come up with sensible reasons that this grant to Disney "promotes the progress of science," and if the Court accepts those reasons, it is likely to go along on the "authorship" issue as well. Moreover, Congress could give the copyright to Mark Twain's estate subject to similar conditions.

judicial oversight of copyright legislation. The *Eldred* majority did not explain its underlying thinking on the crucial question of judicial review,¹¹³ and if it does start thinking seriously about this issue in the future, it is more likely that the *Feist* dictum will fall rather than *Eldred*, both because it is dictum and because the Court will be able to see more clearly how continued enforcement of the *Feist* dictum would impede Congress's ability to legislate in the digital age.

Nonetheless, the argument may become important in the future, when and if Congress attempts yet another term extension. Justice Roberts is young and may well still be Chief Justice when that new case comes before the Court. As was the case with the CTEA, it would obviously be better for term-extension opponents to defeat such a bill in Congress, but if an extension is passed and the issue does come to the Court again, it will behoove the opponents at that time to make the fundamental case that life + whatever (where "whatever" is greater than 70) is unconstitutional unless Congress can supply plausible reasons for concluding that the new and extended term is, indeed, a "limited time," that is, something that cost/benefit analysis plausibly shows to be in the public interest and, therefore, promotes the progress of science.

113. Schwartz & Treanor, *supra* note 4, at 2334.