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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech

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

The Constitution gives Congress 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." Congress has periodically adjusted the terms of federal copyright law. The first federal copyright law adopted in 1790 set a term of 14 years for copyrights. A 1976 statute altered the formula, extending copyrights 50 years after the death of the author. In 1998, Congress adopted the Copyright Term Extension Act (CTEA), which was sponsored by the California representative and former singer Sonny Bono (who mused in hearings that it might be preferable if copyrights never had an expiration date). The CTEA extended copyrights to 70 years after the death of the author. Anonymous works or works made for hire were granted copyright for 95 years from publication or 120 years from creation, whichever is shorter. The copyright extension applied to both new and existing copyrights (though copyrights granted before 1978 were simply extended to 95 years from the date of publication). The CTEA brought American copyright law into alignment with European standards and was the product of heavy lobbying by corporate interests. (Some derided the CTEA as the "Mickey Mouse Protection Act" since a particular concern was the possibility of the Mickey Mouse character, which was created in 1928, passing into the public domain.)

Eric Eldred, an activist for public domain work, filed suit in federal district court seeking a declaration that the CTEA was unconstitutional. Eldred and his supporters argued that the dramatic extension of copyrights exceeded Congress's constitutional power to grant copyrights for a "limited time" and violated the First Amendment by restricting the ability of artists and publishers to make use of works that would otherwise be in the public domain. The trial court and an appellate court upheld the act, and Eldred appealed to the U.S. Supreme Court. In a 7–2 decision, the Court likewise upheld the statute.

JUSTICE GINSBURG delivered the opinion of the Court.

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The CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a "limited Time" as applied to future copyrights. . . . Petitioners' argument essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever "fixed" or "inalterable." The word "limited," however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: "confined within certain bounds," "restrained," or "circumscribed." Thus understood, a time span appropriately "limited" as applied to future copyrights does not automatically cease to be "limited" when applied to existing copyrights. . . .

To comprehend the scope of Congress' power under the Copyright Clause, "a page of history is worth a volume of logic." History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime. . . .

Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry. We count it significant that early Congresses extended the duration of numerous individual patents as well as copyrights. The courts saw no "limited Times" impediment to such extensions; renewed or extended terms were upheld in the early days, for example, by Chief Justice Marshall and Justice Story sitting as circuit justices. *Evans v. Jordan* (CC Va. 1813). . . .

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Congress' consistent historical practice of applying newly enacted copyright terms to future and existing copyrights reflects a judgment stated concisely by Representative Huntington at the time of the 1831 Act: "Justice, policy, and equity alike forbid" that an "author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act." . . .

Satisfied that the CTEA complies with the "limited Times" prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress.

The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain. . . . By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts. The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States. . . .

In addition to international concerns, Congress passed the CTEA in light of demographic, economic, and technological changes and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.

In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA—which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes—is an impermissible exercise of Congress' power under the Copyright Clause.

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More forcibly, petitioners contend that the CTEA's extension of existing copyrights does not "promote the Progress of Science" as contemplated by the preambular language of the Copyright Clause. . . .

[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives. . . .

On the issue of copyright duration, Congress, from the start, has routinely applied new definitions or adjustments of the copyright term to both future works and existing works not yet in the public domain. Such consistent congressional practice is entitled to "very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centuries, it is almost conclusive." Indeed, "this Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions." *Myers v. United States* (1926). . . .

. . . Congress could rationally seek to "promote . . . Progress" by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term. Nothing in the Copyright Clause bars Congress from creating the same incentive by adopting the same position as a matter of unbroken practice.

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[I]n the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to promote the creation and publication of free expression. As *Harper & Row v. Nation Enterprises* (1985) observed: "The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."

In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. Specifically, [federal law] provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." As we said in *Harper & Row*, this "idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.

Second, the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. . . . The fair use defense affords considerable "latitude for scholarship and comment," and even for parody.

The CTEA itself supplements these traditional First Amendment safeguards. First, it allows libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright . . . for purposes of preservation, scholarship, or research" if the work is not already being exploited commercially and further copies are unavailable at a reasonable price. . . .

If petitioners' vision of the Copyright Clause held sway, it would do more than render the CTEA's duration extensions unconstitutional as to existing works. Indeed, petitioners' assertion that the provisions of the CTEA are not severable would make the CTEA's enlarged terms invalid even as to tomorrow's work. The 1976 Act's time extensions, which set the pattern that the CTEA followed, would be vulnerable as well.

. . . Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second guess. . . .

Affirmed.

JUSTICE STEVENS, dissenting.

Writing for a unanimous Court in 1964, Justice Black stated that it is obvious that a State could not "extend the life of a patent beyond its expiration date," *Sears, Roebuck & Co. v. Stiffel Co.* (1964). . . . [T]he reasons why a State may not extend the life of a patent apply to Congress as well. If Congress may not expand the scope of a patent monopoly, it also may not extend the life of a copyright beyond its expiration date. . . .

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It is well settled that the Clause is "both a grant of power and a limitation" and that Congress "may not overreach the restraints imposed by the stated constitutional purpose." . . .

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The issuance of a patent is appropriately regarded as a quid pro quo—the grant of a limited right for the inventor's disclosure and subsequent contribution to the public domain. It would be manifestly unfair if, after issuing a patent, the Government as a representative of the public sought to modify the bargain by shortening the term of the patent in order to accelerate public access to the invention. The fairness considerations that underlie the constitutional protections against ex post facto laws and laws

impairing the obligation of contracts would presumably disable Congress from making such a retroactive change in the public's bargain with an inventor without providing compensation for the taking. Those same considerations should protect members of the public who make plans to exploit an invention as soon as it enters the public domain from a retroactive modification of the bargain that extends the term of the patent monopoly. . . .

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We have recognized that these twin purposes of encouraging new works and adding to the public domain apply to copyrights as well as patents. Thus, with regard to copyrights on motion pictures, we have clearly identified the overriding interest in the "release to the public of the products of [the author's] creative genius." . . .

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. . . Respondent argues that that historical practice effectively establishes the constitutionality of retroactive extensions of unexpired copyrights. Of course, the practice buttresses the presumption of validity that attaches to every Act of Congress. . . . [T]he fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify our duty to invalidate an unconstitutional practice when it is finally challenged in an appropriate case. . . . Regardless of the effect of unconstitutional enactments of Congress, the scope of "'the constitutional power of Congress . . . is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" . . .

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The general presumption that historic practice illuminates the constitutionality of congressional action is not controlling in this case. That presumption is strongest when the earliest acts of Congress are considered, for the overlap of identity between those who created the Constitution and those who first constituted Congress provides "contemporaneous and weighty evidence" of the Constitution's "true meaning." But that strong presumption does not attach to congressional action in 1831, because no member of the 1831 Congress had been a delegate to the framing convention 44 years earlier.

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One must indulge in two untenable assumptions to find support in the equitable argument offered by respondent—that the public interest in free access to copyrighted works is entirely worthless and that authors, as a class, should receive a windfall solely based on completed creative activity. Indeed, Congress has apparently indulged in those assumptions for under the series of extensions to copyrights, only one year's worth of creative work—that copyrighted in 1923—has fallen into the public domain during the last 80 years. But as our cases repeatedly and consistently emphasize, ultimate public access is the overriding purpose of the constitutional provision. Ex post facto extensions of existing copyrights, unsupported by any consideration of the public interest, frustrate the central purpose of the Clause.

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By failing to protect the public interest in free access to the products of inventive and artistic genius—indeed, by virtually ignoring the central purpose of the Copyright/Patent Clause—the Court has quitclaimed to Congress its principal responsibility in this area of the law. Fairly read, the Court has stated that Congress' actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure. It is not hyperbole to recall the trenchant words of Chief Justice John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is." . . .

JUSTICE BREYER, dissenting.

. . . The economic effect of this 20-year extension—the longest blanket extension since the Nation's founding—is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And

most importantly, its practical effect is not to promote, but to inhibit, the progress of "Science"—by which word the Framers meant learning or knowledge.

The majority believes these conclusions rest upon practical judgments that at most suggest the statute is unwise, not that it is unconstitutional. Legal distinctions, however, are often matters of degree. And in this case the failings of degree are so serious that they amount to failings of constitutional kind. Although the Copyright Clause grants broad legislative power to Congress, that grant has limits. And in my view this statute falls outside them.

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. . . [I]t is necessary only to recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture. In this sense only, and where line-drawing among constitutional interests is at issue, I would look harder than does the majority at the statute's rationality—though less hard than precedent might justify.

Thus, I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective. Where, after examination of the statute, it becomes difficult, if not impossible, even to dispute these characterizations, Congress' "choice is clearly wrong."

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A . . . cause for concern arises out of the fact that copyright extension imposes a "permissions" requirement—not only upon potential users of "classic" works that still retain commercial value, but also upon potential users of any other work still in copyright. Again using CRS estimates, one can estimate that, by 2018, the number of such works 75 years of age or older will be about 350,000. Because the Copyright Act of 1976 abolished the requirement that an owner must renew a copyright, such still-in-copyright works (of little or no commercial value) will eventually number in the millions.

The potential users of such works include not only movie buffs and aging jazz fans, but also historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds—those who want to make the past accessible for their own use or for that of others. The permissions requirement can inhibit their ability to accomplish that task. Indeed, in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope.

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What copyright-related benefits might justify the statute's extension of copyright protection? First, no one could reasonably conclude that copyright's traditional economic rationale applies here. The extension will not act as an economic spur encouraging authors to create new works. . . .

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[T]he statute's legislative history suggests another possible justification. That history refers frequently to the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports. . . . I can find nothing in the Copyright Clause that would authorize Congress to enhance the copyright grant's monopoly power, likely leading to higher prices both at home and abroad, solely in order to produce higher foreign earnings. That objective is not a copyright objective. Nor, standing alone, is it related to any other objective more closely tied to the Clause itself. Neither can higher corporate profits alone justify the grant's enhancement. The Clause seeks public, not private, benefits.

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Neither do I share the Court's aversion to line-drawing in this case. Even if it is difficult to draw a single clear bright line, the Court could easily decide (as I would decide) that this particular statute

simply goes too far. And such examples—of what goes too far—sometimes offer better constitutional guidance than more absolute-sounding rules. In any event, "this Court sits" in part to decide when a statute exceeds a constitutional boundary. . . .

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This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.

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