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**Forever on the Installment Plan? An Examination of the Constitutional History of the Copyright Clause and Whether the Copyright Term Extension Act of 1998 Squares with the Founders' Intent**

**Cover Page Footnote**

William Treanor; Martin Flaherty; Elise Clark; wife & family

## NOTES

# Forever on the Installment Plan? An Examination of the Constitutional History of the Copyright Clause and Whether the Copyright Term Extension Act of 1998 Squares with the Founders' Intent

**Kevin D. Galbraith\***

### INTRODUCTION

According to the terms of our Constitution, "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."<sup>1</sup> That the founders chose to insert this clause at all seems remarkable, given the broad strokes with which they drafted the Constitution.<sup>2</sup> Why would

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8. This is referred to alternately as the Copyright Clause or the Intellectual Property Clause. As this Note looks at copyright specifically rather than intellectual property as a whole, which would include at least patents, and in some circles trade secrets and trademarks as well, I will use the former.

<sup>2</sup> For example, courts and citizens have puzzled for over two hundred years over the meaning of expansive terms such as "due process" and "cruel and unusual punishment." See U.S. CONST. amends. V, VIII, and XIV; *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (holding that the right to physician-assisted suicide was not a fundamental right protected by due process); *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (holding that a death-row inmate had waived his claim that execution by lethal gas violated his Eighth

they take the time to confer a monopoly right in a text seeking to guide a newly free nation? Monopolies, even limited ones, were anathema to late-eighteenth-century political sensibilities,<sup>3</sup> and it is worth asking what tipped the scales in their favor when the founders attempted to balance cultural progress and the monopoly-like property rights granted by copyright.

Contemporaneous accounts reveal that the Copyright Clause gained passage with neither debate nor dissent at the Federal Convention in Philadelphia.<sup>4</sup> As a result, modern observers attempting to discern the original meaning of the Copyright Clause must look at other records. These records include copyright statutes passed by various states at the urging of the Continental Congress, each characterized by the desire to promote cultural progress through securing literary rights to authors;<sup>5</sup> the writings of Thomas Jefferson raised serious objections rooted in his strong distaste for monopolies—a distaste with a long colonial pedigree—in multiple letters to James Madison;<sup>6</sup> the writings of Madison, his Federalist advocacy for consolidated power here embodied in his strong support for national copyright protection—this support is registered in his primary reference to the clause, contained in Federalist 43;<sup>7</sup> and the text of the Copyright Act of 1790<sup>8</sup> passed by the First Congress. It is only upon a careful examination of these and other

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Amendment right to be free from cruel and unusual punishment).

<sup>3</sup> See Timothy R. Phillips, *The Unconstitutionality of the Copyright Term Extension Act of 1998*, *Opposing Copyright Extension* 2-6, 22-23 n.3 (detailing the various contexts in which the founders expressed their distaste for monopolies, including the fact that the trade-restrictive Navigation Acts were among the grounds cited for declaring independence from England), at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/constitutionality/phillips02.html> (last visited Feb. 22, 2002); see also FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 17-18 (1985) (describing colonists' arguably overblown fear of monopoly).

<sup>4</sup> Irah Donner, *The Copyright Clause of the U.S. Constitution: Why did the Framers Include It with Unanimous Approval?*, 36 *AM. J. LEGAL HIST.* 361 (1992); see also Edward Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 *J. INTELL. PROP. L.* 1, 26-27 (1994).

<sup>5</sup> See *infra* note 91 and accompanying text.

<sup>6</sup> See *infra* notes 113-16 and accompanying text.

<sup>7</sup> THE FEDERALIST NO. 43, at 239-40 (James Madison) (Clinton Rossiter ed., 1961).

<sup>8</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124.

records that we can determine the value of history in assessing the constitutionality of the modern copyright regime.

Since the ratification of the Constitution in 1789, Congress and our courts have granted steadily increasing protection to copyright holders. This paper will discuss the following question: Do the protections granted under modern copyright law exceed the founders' intent, or more specifically, does the Copyright Term Extension Act of 1998<sup>9</sup> (hereinafter "CTEA") exceed the powers granted to Congress by the Copyright Clause? Balancing the dual policies of encouraging creativity and protecting public access, this Note will explore whether the current state of copyright law is weighted too heavily in favor of copyright protection, defeating the founders' intent by listing dangerously toward true monopoly, as many commentators have argued,<sup>10</sup> and whether the history of the Copyright Clause provides enough evidence for modern observers to reach a well supported conclusion.<sup>11</sup>

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<sup>9</sup> Pub. L. No. 105-298, 112 Stat. 2827 (1998).

<sup>10</sup> Perhaps the most comprehensive and helpful conceptual framework for analyzing the constitutionality of copyright provisions has been developed by Paul J. Heald and Suzanna Sherry in their article, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1167 (2000). They posit several principles that the Supreme Court must weigh if it is to remain true to the founders' intent:

When the Court addresses the constitutionality of statutes that might possibly run afoul of the Intellectual Property Clause, it is likely to allow Congress significant flexibility but only within the constraints of four principles of constitutional weight: 1. The Suspect Grant Principle: Scrutiny under the Intellectual Property Clause is only triggered when Congress effects a grant of exclusive rights that imposes monopoly-like costs on the public; 2. The Quid Pro Quo Principle: A suspect grant may only be made as part of a bargained-for exchange with potential authors or inventors; 3. The Authorship Principle: A suspect grant must initially be made to either the true author of a writing or to the party responsible for a new advance in the useful arts; 4. The Public Domain Principle: A suspect grant may not significantly diminish access to the public domain.

Heald and Sherry conclude that the CTEA, both in its prospective and retroactive applications, does not pass constitutional muster. *Id.* at 1168-76. Regardless of how one comes out in the application of these core principles, the framework remains valuable.

<sup>11</sup> Regarding the uses and abuses of history at the hands of legal scholars, lawyers, and courts, see generally Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (persuasively arguing that "constitutional discourse is replete with historical assertions that are at best deeply problematic and at

Part One begins in the present, focusing on the CTEA, including its policy rationales, its text, and *Eldred v. Reno* (hereinafter “*Eldred*”),<sup>12</sup> the constitutional challenge to the CTEA that is now before the Supreme Court.<sup>13</sup> While this suit was brought on both First Amendment and Copyright Clause grounds, this Note will focus on the latter, in which plaintiffs argue that the monopoly-like property rights represented by copyright have been unduly extended with no appreciable promotion of progress. With the current case law on the table, Part Two steps back to place the Copyright Clause in historical context, looking at its predecessor in England, the Statute of Anne.<sup>14</sup> This Part will also examine the contemporaneous late-eighteenth-century approaches to copyright protection, specifically the state copyright statutes adopted in the period between the Declaration of Independence and the Federal Convention, and the effectiveness—or lack thereof—of those statutes.<sup>15</sup> After looking at the copyright protections granted in the time leading up to the Federal Convention, this Part will trace the Copyright Clause from introduction and adoption by the Federal Convention through ratification by the state ratifying conventions, including support rooted in the desires to grant increasing power to the national government and to promote cultural progress expressed by Madison,

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worst, howlers”). *Id.* at 525; EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* (2000) (providing a useful overview of copyright law through the ages).

<sup>12</sup> 74 F. Supp. 2d 1 (D.D.C. 1999), *aff’d*, 239 F.3d 372 (D.C. Cir. 2001), *rehearing en banc denied*, *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001), *cert. granted*, *Eldred v. Ashcroft*, 70 U.S.L.W. 3292 (U.S. Feb. 19, 2002) (No. 01-618).

<sup>13</sup> *See Supreme Court to Intervene in Copyright Case*, ASSOCIATED PRESS, Feb. 19, 2002, *available at* 2002 WL 13778135; *see also* Openlaw: *Eldred v. Ashcroft* (a comprehensive website addressing the factual and legal developments of this case, maintained by the Berkman Center for Internet & Society at Harvard Law School), *at* <http://eon.law.harvard.edu/openlaw/eldredvashcroft> (last visited Apr. 15, 2002); James Surowiecki, *Righting Copywrongs*, *THE NEW YORKER*, Jan. 21, 2002 (describing the factual background to *Eldred* and spelling out some of Professor Lawrence Lessig’s criticisms of the growing trend toward “property-rights fundamentalism” in the realm of intellectual property), *available at* [http://www.newyorker.com/printable/?talk/020121ta\\_talk\\_surowiecki](http://www.newyorker.com/printable/?talk/020121ta_talk_surowiecki) (last visited Apr. 15, 2002); *see generally* *Opposing Copyright Extension* (maintained by Professor Dennis S. Karjala of Arizona State University, this website contains well chosen links and documents central to the case), *at* <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/default.htm> (last visited Apr. 12, 2002).

<sup>14</sup> 8 Anne, ch. 19 (1710) (Eng.).

and strong objections grounded in the fear of monopolies lodged by Jefferson.

Part Three will explore the terms of the Copyright Act of 1790,<sup>16</sup> passed by the First Congress. The First Congress comprised many founders whose understanding of the power granted (to authors via the Congress) by the Copyright Clause may be helpful as modern observers attempt to discern the constitutional validity of expanding copyright protection.<sup>17</sup> In addition, this Part will briefly review the ever-expanding terms of copyright protection contained in the Copyright Acts of 1831,<sup>18</sup> 1909,<sup>19</sup> and 1976.<sup>20</sup>

Both sides in *Eldred* have advanced historical arguments regarding the extent of Congress's power, the appropriate level of judicial deference to that power, and the promotion of progress that is expected to underlie any statutory copyright protection. With the historical context provided by Parts Two and Three in mind, Part Four will evaluate these arguments in light of the evidence available. This Part will discuss both the arguments' disposition by the Court of Appeals for the District of Columbia, and the versions of those arguments now before the Supreme Court, as expressed in the briefs seeking and opposing a writ of certiorari, and in the amicus briefs filed to date. This Note will conclude by assessing the usefulness of history in determining the constitutional validity of the CTEA, finding that while the CTEA is assailable on multiple appealing policy grounds, it is likely to survive any history-based constitutional scrutiny.

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<sup>15</sup> See *infra* note 91 and accompanying text.

<sup>16</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124.

<sup>17</sup> See *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 57 (positing that the construction of the Constitution by those "contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight"). This language is axiomatic, and both plaintiffs and defendants in *Eldred* point to it, albeit to advance very different arguments. 74 F. Supp. 2d 1 (D.D.C. 1999), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001), *rehearing en banc denied*, *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001), *cert. granted*, *Eldred v. Ashcroft*, 70 U.S.L.W. 3292 (U.S. Feb. 19, 2002) (No. 01-618).

<sup>18</sup> Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436.

<sup>19</sup> 17 U.S.C. § 12 (1909) (repealed 1978).

<sup>20</sup> 17 U.S.C. § 101 *et seq.*, 90 Stat. 2541 (2001).

## I. THE COPYRIGHT TERM EXTENSION ACT OF 1998 AND THE CHALLENGE TO ITS CONSTITUTIONALITY

The First Congress, which included many founders, interpreting the Copyright Clause in the Copyright Act of 1790,<sup>21</sup> chose a protection term of fourteen years, followed by an equal renewal term, resulting in a maximum duration of twenty-eight years. By 1978, when the Copyright Act of 1976<sup>22</sup> went into effect, the term of copyright had been radically expanded to life plus fifty years, so that if an author wrote a book at age thirty, and lived until she was seventy, the term of protection would be ninety years. As if that was not difficult enough to square with the founders' intent when they wrote "for limited times," next came the CTEA,<sup>23</sup> extending the copyright term to life plus seventy years, bringing the total length of exclusive rights in the above example to 110 years, eighty-two years longer than the term the First Congress thought was required to "promote progress."<sup>24</sup>

The primary rationale given for this latest extension was harmonizing U.S. law with that of the European Union,<sup>25</sup> which, in

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<sup>21</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124.

<sup>22</sup> 17 U.S.C. § 101 *et seq.*, 90 Stat. 2541 (2001).

<sup>23</sup> Pub. L. No. 105-298, 112 Stat. 2827 (1998).

<sup>24</sup> Despite the striking disparity between the fourteen-year term contained in the 1790 Act and the life-plus-seventy-years term in the CTEA, proponents nevertheless advanced a demographic argument in justifying the extension, writing that it "merely modifies the length of protection in nominal terms to reflect the scientific and demographic changes that have rendered the life-plus-[fifty] term insufficient to meet [the aim of protecting the author and at least one generation of heirs]." S. REP. NO. 104-315, at 11 (1998).

<sup>25</sup> See H.R. REP. NO. 105-452 (1998); *see also* S. REP. NO. 104-315, at 3 (1998) (stating that the twenty-year extension will "provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union"). This rationale has been widely criticized by commentators arguing that 1) the CTEA does not achieve harmonization with European Union law, and 2) even if it had, such a goal does not change the fact that it is unconstitutional. *See, e.g.*, J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625, 639 (1996) (pointing out that "uniformity with respect to the term of copyright protection remains an unrealistic goal even as between the United States and the European Union, which otherwise share a common concern for high levels of protection for cultural goods. When the rest of the world is factored into the calculus, the goals of greater uniformity and harmonization than that which occurred under the TRIPS Agreement become chimerical, indeed."); S. REP. NO. 104-315, at 31-32 (1998) (containing the remarks of Senator Hank Brown (R-CO), in which



1995, extended the copyright term of its member states to life plus seventy years.<sup>26</sup> Other rationales cited were: providing additional incentive for authors to create new works; providing additional incentive for holders of existing copyrights to restore older works and further disseminate them to the public;<sup>27</sup> and allowing authors to pass the financial benefits of their creativity on to their children and grandchildren.<sup>28</sup> The extension of the term, its application to existing copyrights, and the rationales given by Congress, are analyzed both below and in Part Four.

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he states, “We are not a member of the European Union. The European Union does not determine our treaty obligations.” Senator Brown goes on to point out that “this bill does not harmonize the American concept of copyrights with that of European countries,” and “if we passed this bill, we would be further distancing our laws from EU laws, not harmonizing them.”); Heald & Sherry, *supra* note 10, at 1171 (arguing that “[t]he desire to cooperate with the international community may be a worthy goal, but it is not a blanket justification for passing otherwise unconstitutional legislation,” and drawing the comic analogy that “granting Heineken the exclusive right to brew beer in the United States might help our relations with Holland, but Congress could not make such a grant.”); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 *CARDOZO ARTS & ENT. L.J.* 655, 660 (1996) (taking a somewhat more hard-line position that “the seemingly amoral goal of international standardization is in fact a shield behind which less public-spirited interests may seek their own ends.”).

<sup>26</sup> Council Directive 93/98, 1993 O.J. (L 290/9) (cited in S. REP. NO. 104-315, at 10 (1998)).

<sup>27</sup> See S. REP. NO. 104-315, at 3 (1998) (stating that “by stimulating the creation of new works and providing enhanced economic incentives to preserve existing works,” the twenty-year extension “will enhance the long-term volume, vitality, and accessibility of the public domain.”). These arguments, particularly regarding the extension’s effect on the public domain, have been hotly contested. See Brief of Amici Curiae American Association of Law Libraries et al., *Eldred v. Ashcroft* (2001) (No. 01-618) (containing a chart representing Professor Peter Jaszi’s understanding of the deleterious effects of repeated copyright term extensions on the growth rate of the public domain).

<sup>28</sup> H.R. REP. NO. 105-452, at 4 (1998) (listing among the purposes of the term extension the fact that “[a]uthors will be able to pass along to their children and grandchildren the financial benefits of their works”). This justification also came under fire from Senate Judiciary Committee member Senator Herb Kohl (D-WI). See S. REP. NO. 104-315, at 38 (1998) (advancing his argument in terms more charitable than those used by more vitriolic critics: “Congress has recognized the legitimate need and desire of an artist to leave a legacy to his heirs. However, it is not and cannot be a first order justification” for the twenty-year extension. “Of course, some of the people who would benefit from this measure—like the heirs of the American composers whose copyrights are about to expire—are decent and hardworking. But just because they are decent people does not mean that they should continue to receive royalties for an extra [twenty] years for work they did not create and at the expense of the American consumer.”).

*A. Eldred v. Reno*

To date, opponents of the CTEA have mounted one serious challenge to its constitutionality. In *Eldred*,<sup>29</sup> multiple plaintiffs argued on several grounds that the CTEA violated the Constitution. For purposes of this Note, I will focus on their claims that the statute violated the “for limited times” portion of the Copyright Clause, leaving aside the First Amendment and public trust doctrine arguments.

Plaintiffs were several individuals and corporations, each of which “use, copy, reprint, perform, enhance, restore or sell works of art, film, or literature in the public domain.”<sup>30</sup> They had prepared to use works created before 1923, relying on the fact that they would have entered the public domain had it not been for the CTEA, which prevented them from legally copying, distributing, or performing these works by virtue of its retroactive term extension.<sup>31</sup>

*1. The District Court*

The district court begins with the text of the Copyright Clause, then briefly details the rights and terms provided by the Copyright Act of 1790, noting that Congress has since repeatedly “revised and extended these exclusive rights for limited times.”<sup>32</sup> After spelling out the plaintiffs’ objections, the court summarily dismisses them, citing authorities for what it holds to be three dispositive propositions: 1) “Congress defines the scope of the grants of copyrights to authors . . . under its copyright clause power;”<sup>33</sup>

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<sup>29</sup> 74 F. Supp. 2d 1 (D.D.C. 1999) [hereinafter *Eldred I*].

<sup>30</sup> *Id.* at 2; see generally Daren Fonda, *Copyright Crusader*, THE BOSTON GLOBE MAGAZINE, Aug. 29, 1999 (containing helpful background information on Eric Eldred’s web-based electronic library comprised largely of public domain works, and on the genesis of this lawsuit), available at <http://www.boston.com/globe/magazine/8-29/featurestory1.shtml> (last visited Apr. 15, 2002); see also Eldritch Press, at <http://www.eldritchpress.org> (last visited Apr. 15, 2002).

<sup>31</sup> *Eldred I*, 74 F. Supp. 2d at 2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 3 (citing *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984)). Here, the Court asserts in a footnote that the “introductory language of the copyright clause

2) “The ‘limited times’ period is “subject to the discretion of Congress;”<sup>34</sup> and 3) “Congress has authority to enact retrospective laws under the copyright clause.”<sup>35</sup> With these three precedents to gird its ruling, the court “concludes that the CTEA’s extension of limited times is within the discretion of Congress”<sup>36</sup> and grants summary judgment in favor of the defendant.

## 2. *The Court of Appeals for the District of Columbia*

Plaintiffs appealed to the Court of Appeals for the District of Columbia,<sup>37</sup> advancing the same arguments with the same result.<sup>38</sup> At the appellate level, however, both the majority and the dissent make extensive historical arguments in reaching their respective conclusions.

Early in the opinion, Judge Ginsburg, writing for the majority, acknowledges that the CTEA “applies retrospectively in the sense that it extends the terms of subsisting copyrights.”<sup>39</sup> The court notes that this is not unusual in the U.S. copyright regime, however, and traces the history of U.S. copyright law from the Copyright Act of 1790<sup>40</sup> through the Copyright Act of 1976<sup>41</sup> to underscore its point

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does not limit” Congress’s power in this realm, citing *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981). *Id.* at n.6. With this conclusion, the court takes the step required to decide this case in defendant’s favor without inquiring as to whether Congress has adequately emphasized the promotion of science and useful arts when enacting the CTEA.

<sup>34</sup> *Id.* (citing *Pennock & Sellers v. Dialogue*, 27 U.S. (2 Pet.) 1, 16-17 (1829)).

<sup>35</sup> *Id.* (citing *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843)). Here, the court drops a footnote stating, “[w]ithin the discretion of Congress, any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time.” *Id.* at n.7. With this statement the court appears to insulate any future statutory extension of the copyright term from constitutional challenge, provided it does not grant an infinite term.

<sup>36</sup> *Id.*

<sup>37</sup> *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) [hereinafter *Eldred II*].

<sup>38</sup> *Id.* at 373.

<sup>39</sup> *Id.*

<sup>40</sup> Act of May 31, 1790, § 1, 1 Stat. 124.

<sup>41</sup> Pub. L. No. 94-553, §§ 302-05, 90 Stat. 2541, 2572-76 (1976) (codified as amended at 17 U.S.C. § 101 *et seq.*).

that retroactivity of term extension has not been seen as objectionable since the earliest days of copyright protection.<sup>42</sup>

The court then explains that the plaintiffs challenge the constitutionality of the CTEA because, “in extending the term of subsisting copyrights, the CTEA violates the ‘limited times’ requirement of the Copyright Clause—a requirement that they say is informed by the goal of ‘promot[ing] the Progress of Science and useful Arts.’”<sup>43</sup> After providing this background, the court states what must be the starting point for any discussion of the “limited times” provision of the Copyright Clause: “If the Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause.”<sup>44</sup>

The court describes the plaintiffs’ position as follows: “The present plaintiffs want a limit well short of the rule against perpetuities, of course. And they claim to have found it—or at least a bar to extending the life of a subsisting copyright—in the preamble of the Copyright Clause: ‘The Congress shall have power . . . To promote the Progress of Science and useful Arts.’”<sup>45</sup> The court further explains the plaintiffs’ argument: “Their idea is that the phrase ‘limited Times’ should be interpreted not literally but as reaching only as far as is justified by the preambular statement of purpose: If 50 years are enough to ‘promote . . . Progress,’ then a grant of 70 years is unconstitutional.”<sup>46</sup> The court quickly dismisses this argument, pointing to its precedent in *Schnapper v. Foley*<sup>47</sup> where it “rejected the argument ‘that the introductory language of the Copyright Clause constitutes a limit on congressional power.’”<sup>48</sup>

As the bulk of the majority opinion directly confronts arguments advanced by the dissent, I will go through those arguments before turning to the majority’s counterarguments. Judge Sentelle,

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<sup>42</sup> *Eldred II*, 239 F.3d at 374.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 377.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 377-78.

<sup>47</sup> 667 F.2d 102 (D.C. Cir. 1981).

<sup>48</sup> *Eldred II*, 239 F.3d at 378 (citing *Schnapper v. Foley*, 667 F.2d 102, 112 (1981)).

dissenting in part, writes that the CTEA's twenty-year extension of copyright terms for existing works violates the Constitution.

Judge Sentelle begins by analogizing the case before the Court to *United States v. Lopez*,<sup>49</sup> where the Supreme Court invalidated the Gun-Free School Zones Act,<sup>50</sup> holding that the Act exceeded the "outer limits" of Congressional power under the Commerce Clause. Judge Sentelle reasons that it is "apparent that this concept of 'outer limits' to enumerated powers applies not only to the Commerce Clause but to *all* the enumerated powers, including the Copyright Clause."<sup>51</sup> The dissent looks at the Copyright Clause as a whole: "The clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress."<sup>52</sup>

Building upon that view, the dissent points out that while "the majority acknowledges that '[i]f the Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause,'"<sup>53</sup> it argues that "there is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection."<sup>54</sup> Fleshing out this thought, the dissent extrapolates from the majority's holding: "The Congress that can extend the protection of an existing work from 100 years to 120 years, can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300; and in effect can accomplish

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<sup>49</sup> 514 U.S. 549 (1995).

<sup>50</sup> 18 U.S.C. § 922(q)(1)(A) (1990) (forbidding "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone").

<sup>51</sup> *Eldred II*, 239 F.3d at 381 (emphasis in original). Plaintiffs have seized on Judge Sentelle's invocation of *Lopez*, one of the originalists' most powerful invocations of history used to strike down legislation as beyond the Constitution's grant of power, illustrating that conservatives do not have a monopoly on originalism. See Petition for a Writ of Certiorari at 5, 7, *Eldred v. Ashcroft* (2001) (No. 01-618); see also Horowitz, *Is Congress Mickey Mouse-ing with Copyrights?*, LEGAL TIMES, Feb. 11, 2002 (quoting lead counsel and Stanford Law Professor Lawrence Lessig: "This is truly one of those unique cases where the issues are not political. This is about interpreting the original intent of the Constitution."), available at <http://www.law.com> (last visited Mar. 6, 2002).

<sup>52</sup> *Eldred II*, 239 F.3d at 381.

<sup>53</sup> *Id.* at 381-82.

<sup>54</sup> *Id.* at 382.

precisely what the majority admits it cannot do directly.”<sup>55</sup> Returning to its *Lopez* analogy, the dissent contends that this type of unrestrained exercise of Congressional power “exceeds the proper understanding of enumerated powers reflected in the *Lopez* principle of requiring some definable stopping point.”<sup>56</sup>

Combining textual and historical rhetoric, the dissent carries the point further: “Returning to the language of the clause itself, it is impossible that the [f]ramers of the Constitution contemplated permanent protection, either directly obtained or attained through the guise of progressive extension of existing copyrights,”<sup>57</sup> for the simple reason that “[e]xtending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.”<sup>58</sup>

Next the dissent turns to the majority’s reliance on *Schnapper*, arguing that case should be read narrowly: “Though, under *Schnapper*, we may not require that each use of a copyright protection promote science and the arts, we can require that the exercise of power under which those applications occur meet the language of the clause which grants the Congress the power to enact the statute in the first place. This the [CTEA] does not do.”<sup>59</sup> Following this reasoning, the dissent concludes that it “is not within the enumerated power.”<sup>60</sup>

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<sup>55</sup> *Id.* Seeking support for their arguments that the CTEA was originally intended to extend the copyright protection term beyond constitutional limits, commentators have (somewhat gleefully) pointed to the remarks of Representative Mary Bono (R-CA): “Actually, [the late] Sonny [Bono] wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti’s proposal for the term to last forever less one day. Perhaps the Committee may look at that next Congress.” 144 CONG. REC. H9946, 9952 (daily ed. Oct. 7, 1998) (statement of Rep. Bono). See, e.g., Jane C. Ginsberg, Wendy J. Gordon, Arthur R. Miller & William F. Patry, Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 652 (then-Professor Patry referring to the above statement).

<sup>56</sup> *Eldred II*, 239 F.3d at 382.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 383.

<sup>60</sup> *Id.*

Finally, the dissent critiques the majority's historical claims regarding the Copyright Act of 1790: "The enactment by the [F]irst Congress in 1790 regularizing the state of copyright law with respect to works protected by state acts preexisting the Constitution appears . . . to be *sui generis*."<sup>61</sup> Here, Judge Sentelle points out what he sees as the logical flaw in the majority's reliance on the initial federal copyright statute: "Necessarily, something had to be done to begin the operation of federal law under the new federal Constitution. [The Copyright Act of 1790] created the first . . . federal copyright protection; it did not *extend* subsisting *federal* copyrights enacted pursuant to the Constitution."<sup>62</sup>

In its opinion, the court addresses the dissent's criticisms squarely. While maintaining that Congress's power to grant copyright protection is not encumbered by the "promot[ing] progress" language, the majority argues that even if it were, the CTEA would satisfy that requirement. For support, the court points to Congress's finding that "extending the duration of copyrights on existing works would . . . give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration."<sup>63</sup>

Next, the court mounts a textual and historical attack on the dissent's objection to this extension of copyright term protection: "The dissent identifies nothing in text or in history that suggests that a term of years for a copyright is not a 'limited [t]ime' if it may later be extended for another 'limited [t]ime.'"<sup>64</sup> Having found the dissent lacking either textual or historical support, the court continues, "Instead, the dissent suggests that the Congress—or rather, many successive Congresses—might in effect confer a perpetual copyright by stringing together an unlimited number of 'limited [t]imes,' although that clearly is not the situation before us."<sup>65</sup>

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<sup>61</sup> *Eldred II*, 239 F.3d at 384.

<sup>62</sup> *Id.* (emphasis in original, citations omitted). The dissent, however, ignores the fact that later term extensions were written to apply to existing copyrights as well.

<sup>63</sup> *Id.* at 379 (citing S. REP. NO. 104-315, at 12 (1996)).

<sup>64</sup> *Eldred II*, 239 F.3d at 379.

<sup>65</sup> *Id.* (pointing to the claim that the CTEA matches U.S. copyrights to the terms of copyrights found in the European Union, a motivation the dissent finds irrelevant, as members of the European Union are not bound in their intellectual property laws by the U.S.

The court goes on to take a somewhat expansive view of “promot[ing] progress” as directed by the preambular language of the Copyright Clause: “As for the dissent’s objection that extending a subsisting copyright does nothing to ‘promote [p]rogress,’ we think that implies a rather crabbed view of progress: Preserving access to works that would otherwise disappear—not enter the public domain but disappear—‘promotes [p]rogress’ as surely as does stimulating the creation of new works.”<sup>66</sup>

Pointing out what it sees as another vulnerability in the dissent’s historical position, the court argues that “[t]he position of our dissenting colleague is made all the more difficult because the First Congress made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states.”<sup>67</sup> Here, the court fails to respond to the dissent’s critique of its logic, where the dissent writes that the fact that the Copyright Act of 1790 extended subsisting copyrights will not support an historical argument because it was the first federal copyright legislation, and as such, contained *sui generis* protection for those works previously covered only by state laws.<sup>68</sup>

Nevertheless, the majority bolsters its historical position by citing authority for the proposition that the work of the First Congress should be carefully considered when deciding constitutional questions: “The construction of the Constitution ‘by [those]

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Constitution). *Id.* at 384.

<sup>66</sup> *Eldred II*, 239 F.3d at 379 (advancing the argument that without extended copyright protection, those who currently control the rights to these works would have no financial incentive to make them available, and that therefore the works would languish and be lost to the public).

<sup>67</sup> *Id.* (citing Act of May 31, 1790, §§ 1, 3, 1 Stat. 124-25, and further pointing to the fact that later Congresses—in 1831, 1909, 1976, and 2000—extending the copyright term did so for both subsisting and prospective copyrights). The inference drawn by the majority has been disputed by commentators. See, e.g., Heald & Sherry, *supra* note 10, at 1151-52 (pointing to multiple reasons for retroactive copyright protection present in 1790, namely confusion over common-law copyright, lack of uniformity among the states under the Articles of Confederation, and arguing that the retrospective term extension of 1831 should be seen as an “isolated incident, coming more than forty years after the first copyright act and not repeated for another seventy-seven years,” and “is more indicative of congressional reticence than of congressional assertion of authority.”) (citations omitted).

<sup>68</sup> *Eldred II*, 239 F.3d at 384.



contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed [for this long], it is almost conclusive.”<sup>69</sup> In dismissing plaintiffs’ attempts to avoid this conclusion by arguing that the extension of subsisting state copyrights under the 1790 act was simply a routine application of the Supremacy Clause, the court reminds plaintiffs that “[a] federal law is not valid, let alone supreme, if it is not first an exercise of an enumerated power.”<sup>70</sup> Having prevented the plaintiffs from distinguishing a long line of cases giving great weight to the work of the First Congress, the court finds that just as “the First Congress was clearly secure in its power under the Copyright Clause to extend the terms of subsisting copyrights beyond those granted by the states,” so too was the Congress when it enacted the CTEA.

Finally, the court follows a different course than that suggested by the dissent when it looks to *United States v. Lopez*,<sup>71</sup> instead pointing to cases where the Supreme court defers to Congress: “Within the realm of copyright, the Court . . . has been . . . deferential to the judgment of the Congress. ‘As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the appropriate public access to their work product.’”<sup>72</sup> The court concludes by applying a rational relationship test (sometimes known as a rational basis test) and affirming the district court’s ruling upholding validity of the CTEA, asserting that “[t]h[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces [in exercising its copyright power]. . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve.”<sup>73</sup>

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<sup>69</sup> *Id.* at 379 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884)).

<sup>70</sup> *Eldred II*, 239 F.3d at 379.

<sup>71</sup> 514 U.S. 549 (1995) (exerting aggressive judicial review where Congress pushed, and in the Court’s opinion exceeded, the outer limits of the Commerce Clause).

<sup>72</sup> *Eldred II*, 239 F.3d at 380 (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), one of the seminal modern copyright cases).

<sup>73</sup> *Eldred II*, 239 F.3d at 380 (quoting *Stewart v. Abend*, 495 U.S. 207, 230 (1990)).

Following the ruling of the court of appeals, plaintiffs petitioned for rehearing and filed a suggestion for rehearing en banc. On a 7-2 vote, the court denied the petition,<sup>74</sup> with both the majority and the dissent advancing the same arguments, in abbreviated form, as they had earlier.

## II. HISTORICAL CONTEXT

### A. *The English Predecessor to U.S. Copyright Law*

In order to more thoughtfully analyze the constitutional validity of the CTEA, it is necessary to place copyright in historical context. When the founders assembled and considered including copyright protection as a part of the new federal Constitution, they were primarily influenced by copyright practice in England.<sup>75</sup> While copyright custom and practice in England dated back to as early as 1518, following the introduction of printing in 1476, not until 1710 was it codified.<sup>76</sup> That was the year that the bill that became the Statute of Anne<sup>77</sup> was introduced. The original bill was entitled “A Bill for the Encouragement of Learning and for securing the property of Copies of Books to the rightful Owners thereof.”<sup>78</sup> The language of the bill created significant controversy for two reasons: first, that it implied with the word “securing” that a property right preexisted, and second, that it contained no term limitation.<sup>79</sup>

After vigorous debate, the name of the bill was changed to “A Bill for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors, or Purchasers, of such Copies, during the Times therein Mentioned,” and contained protection terms of fourteen years for new books, twenty-one years for existing books,

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<sup>74</sup> Eldred v. Ashcroft, 255 F.3d 849 (D.C. Cir. 2001).

<sup>75</sup> Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 320 (2000).

<sup>76</sup> *Id.* at 331-34.

<sup>77</sup> 8 Anne, ch. 19 (1710) (Eng.).

<sup>78</sup> Walterscheid, *supra* note 75, at 334.

<sup>79</sup> *Id.*

and provided for a renewal period of fourteen years if the author was still living at the expiration of the initial term.<sup>80</sup> These term limits were the result of considerable concern expressed during debate in the House of Commons, where critics objected that a perpetual copyright would result in a the type of unrestricted monopoly and restraint of trade that was to be avoided at all costs.<sup>81</sup> These objections would be echoed later in the writings of Jefferson and others, and in the plaintiffs' arguments in *Eldred*. Nonetheless, with minor grammatical changes, this bill was adopted and codified as the Statute of Anne.

The Statute of Anne remained uninterpreted by the courts until 1769, when *Millar v. Taylor* concluded, largely on natural rights and labor theory grounds, that copyright rested with authors as a matter of common law, irrespective of the Statute of Anne's term limitation provisions.<sup>82</sup> Just five years later, however, in *Donaldson v. Becket*, the House of Lords "decided that whatever may have been the case originally at common law, the Statute of Anne effectively limited the term for which copyright could be enforced at common law to a maximum of twenty-eight years."<sup>83</sup> While commentators have questioned the grounds on which *Donaldson v. Becket* was decided,<sup>84</sup> it remained good law during the period when copyright protection was first being discussed in the newly formed United States, and was the backdrop against which the merits, purposes, and potential pitfalls of copyright were analyzed.

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<sup>80</sup> *Id.* at 334-35. A mystery remains as to the origins of the stated purpose of the bill, the encouragement of learning. Legal historians disagree, but what is clear is that this purpose was soon embraced by Parliament and later by the framers of our Constitution. *Id.* at 335-36.

<sup>81</sup> *Id.* at 334. As will be discussed later, this discomfort with open-ended monopolies has surfaced every time copyright terms—or in the case of Thomas Jefferson, the inclusion of a Copyright Clause at all—are debated.

<sup>82</sup> *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769).

<sup>83</sup> Walterscheid, *supra* note 75, at 340 (discussing *Donaldson v. Becket*, 4 Burr. 2408 (1774)).

<sup>84</sup> Walterscheid, *supra* note 75, at 340-41 (describing the theoretical questions raised by scholars both at the time of the decision and since).

*B. Pre-Constitutional U.S. Predecessors to the Copyright Clause*

In the period between the Declaration of Independence and the Federal Convention, while the political theories that would later be memorialized in the Constitution were evolving, copyright protection was a creature of the states. This lack of a national copyright regime was the result of the fact that the Continental Congress had very little centralized power, with the bulk of authority being reserved to its constituent states.<sup>85</sup>

In March of 1783, the Continental Congress formed a committee to “consider the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works.”<sup>86</sup> In May of the same year, the committee issued its report, concluding “nothing is more properly a man’s own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius.”<sup>87</sup> At the committee’s recommendation, the Continental Congress passed an act to encourage all the states (because it could not bind them) to pass copyright legislation protecting the rights of authors, and eleven of the thirteen states did so, with only Delaware declining.<sup>88</sup> The Continental Congress

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<sup>85</sup> *Id.* at 347; see also William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 911 (1997) (discussing the Continental Congress’s approach to encouraging the states to enact copyright protections).

<sup>86</sup> 24 JOURNALS OF THE CONTINENTAL CONGRESS 180 (1783), quoted in Patry, *supra* note 85, at 911. This committee included James Madison, whose writings on the merits of copyright protection in Federalist 43 will be discussed later.

<sup>87</sup> 24 JOURNALS OF THE CONTINENTAL CONGRESS 326 (1783), quoted in Patry, *supra* note 85, at 911.

<sup>88</sup> Patry, *supra* note 85, at 911-12. At the time of this Resolution, Connecticut had already passed state copyright legislation. An interesting sidelight to the development of state copyright laws is the active role played by Noah Webster in securing support of many influential framers. Seeking state copyright protection for his new school textbook on the English language, Webster became what we would today call a lobbyist, traveling from Pennsylvania to New Jersey, on to Connecticut and New York, and finally to Virginia, Maryland, and Delaware, converting to his cause, among others, James Madison and George Washington. See Donner, *supra* note 4, at 370-71.

suggested that an appropriate term would be at least fourteen years, with an additional renewal term of at least fourteen years if the author survived the initial term.<sup>89</sup>

As the purposes of copyright protection are critical to the later discussion of the validity of the CTEA under the Copyright Clause, it is instructive to look at the stated purposes of these state copyright statutes. The New Hampshire preamble is representative:

As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind. Therefore, to encourage the publication of literary productions, honorary and beneficial to the public.<sup>90</sup>

Between 1783 and 1787, the shortcomings of the copyright laws adopted by the states at the urging of the Continental Congress became apparent. The primary weakness of the regime was the simple fact that one state's laws had no effect in another state, so authors wishing to protect their rights on a national basis were forced to expend a great deal of time and energy traveling to the several states to procure protection in each one.<sup>91</sup> This objection was best stated by James Madison, who wrote in April 1787 that the states were "want of concert in matters where common interest requires it,"

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<sup>89</sup> 24 JOURNALS OF THE CONTINENTAL CONGRESS 326-27 (1783), quoted in Walterscheid, *supra* note 75, at 347-48.

<sup>90</sup> Act of Nov. 7, 1783, ch. 1, 1783, 4th Sess., N.H. Laws (Vol. 4, at 521), quoted in Patry, *supra* note 85, at 912. This preamble is virtually identical to those of the Massachusetts and Rhode Island statutes. See Walterscheid, *supra* note 75, at 350. This public benefit rationale lends support to the arguments of those who have challenged copyright term extensions, though defenders of the extensions have also argued that the extensions serve the public good as well, illustrating the malleability of policy declarations.

<sup>91</sup> Donner, *supra* note 4, at 374.

a critique made in reference to a number of matters, including the “laws concerning . . . literary property.”<sup>92</sup> This problem was typical of the time under the Continental Congress, as various states with disparate interests struggled to protect those interests with little regard for the benefits of the nation as a whole, and with little ability to promote any common interests even if they had so desired. As the Federal Convention approached, the states favored copyright protection for authors. Widespread dissatisfaction with the disjointed system in place under the Articles of Confederation made clear the need for a national law.<sup>93</sup> The time was ripe for the inclusion of the Copyright Clause.

### *C. The Copyright Clause from Introduction to Ratification*

Underlying the question of whether to provide for copyright protection in the Constitution was the more fundamental debate over how much power it was safe to grant to the central government, and which branch could be trusted with that power. The Federalists, leery of the growing injustices perpetrated by state legislatures in the name of the people,<sup>94</sup> argued vehemently that if the people’s rights were to truly be safeguarded, it would be through a carefully crafted national government consisting of three equal branches. They had watched in horror as a majoritarian tyranny evolved, something previously thought impossible. These Federalists, many authors among them, were eager to establish the new nation as a cultural

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<sup>92</sup> Department of State, Bureau of Rolls and Library, IV DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870 (1894-1905) 128, quoted in Donner, *supra* note 4, at 374.

<sup>93</sup> See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 192 (1968); see also Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 112-13 (1929) (discussing Madison’s statement and his general sensitivity to the need for federal copyright protection).

<sup>94</sup> See McDONALD, *supra* note 3, at 155-57 (discussing the rampant abuses visited on loyalists by state government in the post-Revolutionary period); see also Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727 (1996) (pointing to James Madison’s recounting of Americans’ experiences under the remote, grasping English Parliament and under the Articles of Confederation: “The legislative department,” he wrote, “is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”) (quoting THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961)).

force in the international arena.<sup>95</sup> The Anti-Federalists, on the other hand, argued vainly for robust states' rights and a relatively weak central government, vested with only enough power to provide the services for which it was uniquely equipped, e.g., the common defense. While they, too, saw the importance of literature and learning in the life of a nation, their means of achieving such policy goals was to reserve power to the states,<sup>96</sup> ever fearful of power concentrated in the hands of a distant few as they thought back to the abusive and overreaching English Parliament whose grasping ways precipitated the Declaration of Independence.

At the time of the Convention, while there was grumbling about a voracious central government swallowing power, more prevalent was the feeling that without a national government adequately empowered, the new nation would be in real trouble, just a decade after its birth. However, among those who supported an increasingly centralized government, namely Federalist leaders and influential citizens, there was great distrust of the legislative branch—seen as “the most dangerous branch.”<sup>97</sup> As a result, if the new Constitution did not contain an explicit grant of Congressional power to promote progress by securing copyright protection, Congress would not be authorized to pass any laws in the area of literary property.<sup>98</sup>

When the Copyright Clause was presented to the Constitutional Convention on September 5, 1787, there was no recorded debate, and the Clause was unanimously approved.<sup>99</sup> This clear need for Congressional authorization, coupled with the relative scarcity of typical sources of divining the founders' intent in adopting a

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<sup>95</sup> Donner, *supra* note 4, at 362.

<sup>96</sup> See McDONALD, *supra* note 3, at 269-70 (discussing the controversies that arose when express limitations on state powers were suggested in the context of militias).

<sup>97</sup> See Flaherty, *supra* note 94 (discussing this perception).

<sup>98</sup> See Donner, *supra* note 4, at 364-65.

<sup>99</sup> *Id.* at 361; see also Edward C. Walterscheid, *To Promote the Progress of the Useful Arts: The Background and origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTEL. PROP. L. 1, 26-27 (1994) (taking issue with the conventional wisdom that unanimous approval without debate indicates universal approbation, instead suggesting that those circumstances might simply indicate that the delegates were “tired, wanted to go home, and simply did not perceive this particular grant of power to the Congress to warrant any further debate, regardless of whether they considered it to have any particular significance.”).

provision unanimously, leads observers to examine alternate sources that might shed light on the meaning of the Copyright Clause, and the context of its adoption.

James Madison of the Virginia delegation kept the most detailed notes recording the proceedings of the Convention, and from those records it appears that the first proposals for a Copyright Clause were presented on August 18, 1787.<sup>100</sup> There is some question as to who deserves credit for originating the Clause, as both Madison and Charles C. Pinckney of South Carolina submitted for consideration by the Committee of Detail provisions for copyright protection.<sup>101</sup> Madison's proposed Congressional powers included the power "to secure to literary authors their copy rights for a limited time."<sup>102</sup> Pinckney proposed the power "to secure to authors exclusive rights for a certain time."<sup>103</sup>

On September 5, 1787, after consideration of the suggested provisions, the Committee of Eleven reported back with the following language: "To promote the progress of Science and useful arts by securing for limited times to authors & inventors the exclusive right to their respective writings and discoveries."<sup>104</sup> On September 12, the Committee of Style and Arrangement reported to the full Convention the entire Constitution, which contained the Copyright Clause with the language unchanged from the September 5 version.<sup>105</sup> On September 17, the Constitution was adopted and

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<sup>100</sup> Fenning, *supra* note 93, at 112-13.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 112 (citing DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION (House Document No. 398, 1927), at 563 *et seq.*).

<sup>103</sup> *Id.* (citing DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION (House Document No. 398, 1927), at 563 *et seq.*). Clearly these proposals were nearly identical in both purpose and phrasing, so with the possible exception of Madison's and Pinckney's descendants, the unresolved question of who should be given more credit merits little interest. As Fenning writes, "It seems impossible to fix definitely on whose brow the laurel wreath should be placed . . . [b]ut there will probably be no great injustice in giving glory to both Pinckney and Madison." *Id.* at 117.

<sup>104</sup> *Id.* at 113 (citing DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION (House Document No. 398, 1927), at 666).

<sup>105</sup> *Id.* at 114, (citing DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION (House Document No. 398, 1927), at 706, 745.).



signed by the delegates, and there was no recorded debate of the Copyright Clause.<sup>106</sup>

There was some discussion regarding the Copyright Clause during the state ratifying conventions, most notably in Pennsylvania and North Carolina, where strong statements of support were made, pointing to its virtues in preventing piracy of literary works and defending it from George Mason's attacks on the Constitution for lacking protection of the values that would later be embodied in the First Amendment.<sup>107</sup> Beyond the words of these Federalist boosters, however, the most significant piece of evidence regarding the intent of the founders comes from Madison, who wrote:

A power 'to promote the progress of science and useful arts by securing, for a limited time, to authors and inventors the exclusive right to their respective writings and discoveries.' The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. . . . The public good fully coincides . . . with the claims of individuals. The States cannot

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<sup>106</sup> Donner, *supra* note 4, at 361.

<sup>107</sup> *Id.* at 376-77. At the Pennsylvania ratification convention, Thomas McKean, Chief Justice of the Pennsylvania Supreme Court, drafter of the Articles of Confederation, and former President of the Continental Congress, phrased his support this way:

[T]he power of securing to authors . . . the exclusive right to their writings . . . could only with effect be exercised by the Congress. For, sir, the laws of the respective states could only operate within their respective boundaries, and therefore, a work which has cost the author his whole life to complete, when published in one state, however it might be secured, could easily be carried into another state in which a republication would be accompanied with neither penalty nor punishment—a circumstance manifestly injurious to the author in particular.

*Id.* (quoting II THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (J. Kaminski & G. Saladino ed., 1984)). In North Carolina, James Iredell, an enthusiastic supporter of the Constitution, responded to George Mason's well publicized objections in part by declaring that "the future Congress will have . . . authority . . . to secure to authors for a limited time the exclusive privilege of publishing their works. This authority has long been exercised in England, . . . and . . . such encouragement may give birth to many excellent writings which would otherwise have never appeared." *Id.* (quoting Marcus IV, Norfolk and Portsmouth Journal, XVI THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 382 (J. Kaminski & G. Saladino ed., 1984)).

separately make effectual provision for either [copyrights or patents], and most of them have anticipated the decision of this point by laws passed at the instance of Congress.<sup>108</sup>

While Madison appears to ignore the House of Lords holding in *Donaldson v. Becket* that copyright was a matter governed by statute rather than common law,<sup>109</sup> the positive, somewhat conclusory language of his statement both encapsulates the accepted need for federal copyright protection and illustrates the relative lack of controversy surrounding this provision.

The idea of promoting progress and vaulting the United States into a place of honor on the world stage was appealing to a new and ambitious nation, and was embraced by Federalists trying to make their case for a strong national government. While the goal's sentiment was admired almost universally, the means of its implementation was not without dispute. Some objections to the Constitution generally, and to the Copyright Clause implicitly, were grounded on the fear of monopolies, especially government-sanctioned monopolies. Such fears traced their roots back to, among others, the printing monopolies granted by the crown in England.<sup>110</sup> George Mason in Virginia, along with the members of ratifying conventions in New York, Massachusetts, New Hampshire, and North Carolina, all expressed reservations. With some variation in phrasing, they all conditioned their approval on the addition of explicit restrictions on Congress's power to grant monopolies.<sup>111</sup> These reservations point up the sensitivity felt by the founders, and

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<sup>108</sup> THE FEDERALIST NO. 43, at 239-40 (James Madison) (Clinton Rossiter ed., 1961).

<sup>109</sup> 1 Eng. Rep. 837 (H.L. 1774).

<sup>110</sup> See McDONALD, *supra* note 3, at 17-18 (arguing that Americans' fear of monopolies was based largely upon prejudice, lacking an understanding of how limited monopolies helped certain industries get off the ground in England); *id.* at 77 (describing monopolies as among what republican ideologues thought of as indicators of corruption and decay; others included "standing armies, priests, bishops, aristocrats, luxury, excises, speculators, jobbers, paper shufflers . . . bloodsuckers, and monocrats").

<sup>111</sup> Walterscheid, *supra* note 99, at 55-56 (citing Objections of the Hon. George Mason, 2 AMERICAN MUSEUM OR REPOSITORY OF ANCIENT AND MODERN FUGITIVE PIECES, ETC. 536 (1965); Ratification of the New Constitution, 4 AMERICAN MUSEUM 156; Remarks on the Amendments to the Federal Constitution, 6 AMERICAN MUSEUM 303).

go a long way toward explaining why the Copyright Clause includes the “limited times” language.<sup>112</sup>

Thomas Jefferson, while not a member of the Federal Convention, was indisputably a force to be reckoned with when it came to theories and practicalities of governance. He harbored a deep mistrust of monopolies, a mistrust shared by many, and strenuously articulated his opposition to them, specifically to those he saw being embraced in the Copyright Clause. In December 1787, upon receiving a draft of the Constitution, Jefferson wrote to Madison expressing his general approval, but lodging his objection that it did not contain a bill of rights.<sup>113</sup> The bill of rights advocated by Jefferson should provide “clearly and without the aid of sophism . . . for the restriction against monopolies.”<sup>114</sup> Amplifying his belief, Jefferson later wrote, “[I]t is better . . . to abolish . . . Monopolies, in all cases, than not to do it in any. . . . The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.”<sup>115</sup> The most concrete recommendation Jefferson made in his correspondence with Madison contained the following suggested alteration to the Constitution’s language: “Monopolies may be allowed to persons for their own productions in literature . . . for a term not exceeding—years, but for no longer term and for no longer purpose.”<sup>116</sup> Here we find the most direct contemporary call for a specific term limitation of copyright protection, and supporters of later term extensions might point to this

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<sup>112</sup> *Id.* at 56.

<sup>113</sup> *Id.* at 55 (citing Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), as quoted in P.J. Federico, *Operation of the Patent Act of 1790*, 18 PAT. OFF. SOC’Y 237, 240 (1936)).

<sup>114</sup> *Id.* (citing Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), as quoted in P.J. Federico, *Operation of the Patent Act of 1790*, 18 PAT. OFF. SOC’Y 237, 240 (1936)).

<sup>115</sup> *Id.* at 55 (citing Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 1788, 440, 442-43 (Julian P. Boyd ed., 1956)).

<sup>116</sup> Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81, n.53 (1995) (citing Letter from Thomas Jefferson to James Madison (Aug. 1789) in 5 THE WORKS OF THOMAS JEFFERSON 113 (P.L. Ford ed., 1895)).

as a clear indication that this view was rejected implicitly when the Constitution, and later the Bill of Rights, were ratified with no such provision.

Responding to Jefferson's forceful objections, Madison did not take issue with Jefferson's characterization of monopolies as an evil to be avoided.<sup>117</sup> To have done so would have been to swim against the forceful tide of political and economic opinion. Rather, he made the case that an exception should be made in the case of what we now know as intellectual property: "With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works . . . they are not too valuable to be wholly renounced?"<sup>118</sup> Here, Madison tries to defuse the power of Jefferson's objections by falling back on the "promot[ing] progress" rationale embraced since the Statute of Anne,<sup>119</sup> and foreshadows the debate that has dogged copyright term extensions up until today—does granting additional protection somehow benefit the public by creating incentives for genius?

### III. THE COPYRIGHT ACTS OF 1790, 1831, 1909, AND 1976

Empowered by the newly ratified Constitution, the First Congress quickly passed the Copyright Act of 1790, which adhered closely to its model, England's Statute of Anne, in both form and substance.<sup>120</sup>

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<sup>117</sup> Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 57 (2000) (citing Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON, 1788-1789, at 17 (Julian P. Boyd ed., 1956)).

<sup>118</sup> *Id.*

<sup>119</sup> 8 Anne, ch. 19 (1710) (Eng.).

<sup>120</sup> *Id.* Commentators have argued that the CTEA invites increased judicial scrutiny and demands close examination in an historical light because not only does it not comport with the Copyright Clause, but also because it is inconsistent with its model, the Statute of Anne. See, e.g., Hamilton, *supra* note 25, at 659:

The British Statute of Anne, the precursor to the American Copyright Clause, was adopted for the purpose of reducing the monopoly power of the publishing industry and decentralizing that power by placing it in the hands of individual authors. The marketing and concomitant lobbying power of the copyright industries, and their repeated victories at the expense of individual authors (most particularly in the work-made-for-hire context) is a clarion call

It granted an initial copyright protection term of fourteen years, and provided for a renewal term of fourteen years if the author was still living at the expiration of the initial term.<sup>121</sup> Concerned by the greater protection received by foreign authors than by Americans,<sup>122</sup> Congress in 1831 lengthened the initial term to twenty-eight years, keeping the renewal term at fourteen years.<sup>123</sup> In 1909, Congress rejected suggestions that it adopt a copyright term based on the life of the author, and instead expanded the renewal term to twenty-eight years, resulting in a total term of fifty-six years, provided the author survived the initial term and complied with filing formalities.<sup>124</sup> In 1976, Congress undertook the first major revision of the copyright regime in over sixty years, and after intense, decades-long lobbying, decided finally to base the protection term on the life of the author, settling on the term of life plus fifty years.<sup>125</sup>

The rationales provided for the extensions of the copyright term between 1790 and 1976 have varied, but with the exception of the 1831 extension, each has at least paid lip service to the constitutional purpose of “promot[ing] progress.” As a result, whatever one thought of the merits of the ever-increasing terms of copyright protection, they were effectively protected from constitutional attack in this arena where Congress was explicitly acting within its enumerated powers.

#### IV. HISTORICAL ARGUMENTS IN *ELDRED*

With the historical context provided by Parts Two and Three in

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to the Court to read the Copyright Clause with fresh attention and historical understanding.

<sup>121</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124.

<sup>122</sup> 7 Cong. Deb. App. CXIX-CXX (1830) (remarks of Representative Ellsworth), cited in Patry, *supra* note 85, at 917. Of course, this argument is echoed in the legislative history of the CTEA. See S. REP. NO. 104-315, at 3 (1998) (stating that the CTEA will “provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union”).

<sup>123</sup> Act of Feb. 3, 1831, ch. 16 §§ 1-2, 4 Stat. 436.

<sup>124</sup> 17 U.S.C. § 12 (1909) (repealed 1978).

<sup>125</sup> Pub. L. No. 94-553 §§ 302-305, 90 Stat. 2541, 2572-76 (1976) (codified as amended at 17 U.S.C. § 101 *et seq.*).

mind, this Part evaluates the historical claims made in *Eldred* in light of the evidence available, discussing the arguments' disposition by the Court of Appeals for the District of Columbia.

The majority appears to be on firmer historical ground than the dissent. The majority, in affirming the constitutionality of the CTEA, has a strong textual argument that the phrase "for limited times," without more, does not tie the hands of Congress if it determines that the existing term of copyright protection is not adequate to "promote progress." It reasons in a straightforward manner that simply adding one "limited time" to an existing "limited time" does not somehow make the resulting term something other than a "limited time."<sup>126</sup> The deferential tack taken by the majority signals an embrace of consolidated federal power, specifically that vested in the Congress—a move that would make Federalists smile and Anti-Federalists cringe were they alive today.<sup>127</sup>

Further, the majority has over 200 years of precedent on its side, significantly starting with the Copyright Act of 1790, which granted copyright protection to existing works.<sup>128</sup> Several extensions of the copyright term that followed, from the 1831 Act and the 1909 Act

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<sup>126</sup> See *Eldred II*, 239 F.3d 372, 379 (D.C. Cir. 2001). Opponents of the CTEA decry what they see as Congress's attempt to circumvent the Copyright Clause's "limited times" restriction. See Petition for a Writ of Certiorari at 8-9, *Eldred v. Ashcroft*, (2001) (No. 01-618) ("Under the authority of this case, Congress can now continue the practice of extending the term of subsisting copyrights without limit. It can thus achieve a perpetual copyright term 'on the installment plan.'") (quoting Statement of Professor Peter Jaszi, *The Copyright Term Extension Act of 1995, Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong. (1995), available at 1995 WL 10524355, at \*6).

<sup>127</sup> Plaintiffs, of course, advocate a more active role for judicial review in the arena of copyright. See Brief of Amici Curiae of Copyright Law Professors in Support of the Petition at 4, *Eldred v. Ashcroft* (2001) (No. 01-618) ("It is well-settled that the [c]onstitutional language conferring a power on Congress constrains the scope of that power."). The brief invokes no less an authority for this proposition than Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803): "The 'powers of the legislature are defined and limited; and . . . those limits may not be mistaken, or forgotten, the [C]onstitution is written.'" *Id.* These arguments are bolstered by an appeal to the Court to halt the copyright regime's slide down the slippery slope characterized by eleven term extensions in the past forty years, and capped by the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2863 (1998), (codified as amended at 17 U.S.C. § 1201) (prohibiting circumvention of technological protections of works without carving out a fair use privilege). See *supra* Brief of Amici Curiae, at 7-8.

<sup>128</sup> See *Eldred II*, 239 F.3d at 374.

through the 1976 Act, made their extensions effective retrospectively.<sup>129</sup> Any argument to the contrary that is purportedly based on history and custom, therefore, faces an uphill battle.<sup>130</sup>

The majority rests its construction of the Copyright Clause on *Schnapper*, which appears to be wrongly decided in that it advances a tortured reading of the text, holding that “the introductory language of the Copyright Clause [does not] constitute a limit on congressional power.”<sup>131</sup> This reading is difficult to support in that it seems to labor to construe individually parts of a sentence that should be read as a whole. Nevertheless, even putting aside its reliance on *Schnapper*, the majority is on solid footing when it decides that the CTEA does not exceed the limits placed on Congressional power by the preambular language of the Copyright Clause, since it is Congress, not the judiciary, that is left to determine the appropriate term required to “promote progress.” If it decides that the historical fear of monopolies and monopoly-like rights is overblown and should be put aside in favor of expanding copyright protection, that decision appears largely insulated from scrutiny.

The dissent presents an appealing policy-based criticism of the CTEA, one that resonates at a core level with those who, like Jefferson, have an elemental abhorrence of government-sanctioned monopolies.<sup>132</sup> However, when we look at the rejection of Jefferson’s plea that the Constitution contain a specific term limit on copyright protection,<sup>133</sup> it becomes clear that the founders chose another course, one that allowed monopolies in the realm of copyright because they—and subsequent Congresses—thought the public benefits would outweigh the costs. Whether that has played out or not is a question better handled by scholars and

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<sup>129</sup> See Brief for the Respondent in Opposition at 14-15, *Eldred v. Ashcroft* (2001) (No. 01-618) (emphasizing historical practice to refute the supposition that granting term extensions to existing copyrights is a per se violation of the Copyright Clause).

<sup>130</sup> However, see Heald & Sherry, *supra* note 10, at 1151-52 (advancing the argument that these retrospective extensions were so few and far between prior to the twentieth century that in terms of historical practice, they should be seen as the exceptions rather than the rule).

<sup>131</sup> *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981).

<sup>132</sup> See *supra* notes 113-16 and accompanying text.

<sup>133</sup> See *supra* note 116 and accompanying text.

commentators<sup>134</sup> than by courts. And more important for this discussion, the policy determination of the proper term of protection is a matter better settled by Congress than by the judiciary.

#### CONCLUSION: THE USEFULNESS OF HISTORY

History is quite a helpful guide in determining whether the CTEA is consistent with the Copyright Clause. Despite the lack of debate at the Federal Convention over its contents, we have a substantial body of evidence on which to draw when seeking to shed light on the founders' intent. This evidence includes English precedent, primarily the Statue of Anne,<sup>135</sup> which was hugely influential on the policies, on the text, and even on the specific term of copyright protection—fourteen years—contained in the Copyright Act of 1790.<sup>136</sup> Beyond that, we have the writings of participants in the Pennsylvania and North Carolina ratifying conventions, registering their strong support for the ideas that federal copyright law was desirable and that it needed to be authorized by the Constitution, implicitly shunting aside the dual fears of monopoly and grasping national power.<sup>137</sup>

Next we have Madison's Federalist 43 in which he asserts the unquestioned benefits of copyright protection that would be manifested in cultural progress.<sup>138</sup> We know, in fact, that these benefits were far from unquestioned, however, by looking at the exchanges between Jefferson and Madison on the subject of monopolies in general and in the realm of copyright specifically.<sup>139</sup>

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<sup>134</sup> See generally SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001) (arguing that the entire modern copyright regime's bent toward property-rights fundamentalism is inconsistent with the founders' intent); see also LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) (warning that the richness and variety of publicly accessible creative materials is shrinking, perhaps irretrievably, as a result of current conceptions of intellectual property).

<sup>135</sup> 8 Anne, ch. 19 (1710) (Eng.).

<sup>136</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124

<sup>137</sup> See *supra* note 107 and accompanying text.

<sup>138</sup> THE FEDERALIST NO. 43, at 239-40 (James Madison) (Clinton Rossiter ed., 1961).

<sup>139</sup> See *supra* notes 113-18 and accompanying text.



Nonetheless, the founders felt that the cultural benefits derived from securing exclusive rights to authors more than counterbalanced the temporary costs to the public posed by the monopoly.

It is with this historical record that the Supreme Court is left to determine the constitutionality of the CTEA,<sup>140</sup> and while a more robust historical record would be welcome, it is of course not forthcoming. What we have is enough, in my opinion, to say with some degree of confidence that the CTEA, despite valid and appealing policy objections, passes constitutional muster under the Copyright Clause.

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<sup>140</sup> As is common with pending cases, observers will be tempted to guess at the Justices' likely positions. For example, many will point to then-Professor Stephen Breyer's article, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970), in which he argues that the copyright regime may be overprotective, frustrating the founders' attempts to balance public access and the reward to creators. However, extrapolating from writings produced in a different context, and in this case more than thirty years ago, is always a dicey business. Here, it is made even more risky given the complex factual background and multiple constitutional considerations at play.