Givings and the Next Copyright Deferment

Lindsay Warren Bowen, Jr.
NOTES

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In 1998, Congress granted a twenty-year deferment to expiring copyrights with the Copyright Term Extension Act (CTEA). Ten years later, debate over the Act's wisdom continues unabated. Major camps in the debate view the CTEA variously as a constitutional prerogative, an economic imperative, and a war on cultural freedom. This Note sidesteps this underlying debate, and, borrowing the property law concept of "givings," examines the result of charging for future copyright deferments. Under this analysis, a givings-based solution would force unproductive copyrights into the public domain faster and more effectively than current approaches, while protecting the most important assets of rights-holding companies likely to influence future legislation.

INTRODUCTION

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA), increasing the period of protection for copyrighted works by twenty years. In the decade since that enactment, a no-holds-barred debate has raged in the courts, academia, and the media over the propriety and the legality of the Act. Naked hostility and bad blood continue to divide the CTEA's supporters and opponents. Instead of looking backwards at the CTEA, however, interested parties should mark this halfway point by looking to the end of the twenty-year protection period and the inevitable copyright extension debate to come. This Note weighs the feasibility of

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applying the relatively new real property doctrine of "givings" to the next copyright extension controversy and proposes a givings solution to balance economic interests of past creators and owners against the interests of future creators and the public.

The central question in the copyright battle asks how to achieve the dual purposes of copyright enshrined in the U.S. Constitution: (1) spurring the creation of new works while (2) ensuring the optimal use of those works once they have been created. In 2003, the petitioners in *Eldred v. Ashcroft* unsuccessfully argued that the provision of the CTEA that applied retroactively to creators of preexisting works did not advance either of the constitutional goals of copyright and therefore was unconstitutional. The U.S. Supreme Court, in *Eldred*, withheld comment on how well the CTEA served copyright policy, but held that Congress did not act in excess of its constitutional powers in enacting it. In doing so, the Court rejected the petitioners' argument that the Copyright Clause of the Constitution should be read as a grant to Congress of a narrow and limited power to define copyrights. The Court also rejected the argument that First Amendment implications trigger heightened judicial scrutiny of copyright legislation.

The arguments of the petitioners and amici curiae in *Eldred* expressed some of the warnings of many academics, technologists, and, to a lesser extent, writers and artists. These warnings go beyond the narrow question of retroactive extension and describe the impending "enclosure" of the public domain by overlong copyright terms and other developments of U.S. copyright law. This enclosure, they say, is the inevitable result of repeated copyright term extensions that defer the date on which works enter the public domain. According to the warnings, these successive deferrals could

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6. *Id.*
7. *Id.* at 220–22.
have the effect of siphoning the fuel from the "engine of free expression" and could have a disastrous effect on our cultural life. Such admonitions have found an avid audience among activists, technologists, and a large segment of Internet culture, who have formed an extensive anticopyright movement.

As a counter to the movement's enthusiasm, the majority of the Court and some constitutional scholars have sought to prevent other constitutional concepts from being implicated in the copyright debate. Scholars in this camp have echoed the Eldred Court, arguing that a proper understanding of the separation of powers and the original intent of the Framers permits no more than deferential judicial scrutiny of any statute. This scrutiny goes no further than ensuring that the statute in question has a rational relationship to promoting the creation of new works. In other words, Congress has the power to enact even imperfect (or downright bad) copyright laws, and to rule otherwise would be a violation of the principle of separation of powers, implicating areas of policy far beyond copyright.

Both sides in the legal debate can point to compelling interpretations of the text and structure of the Constitution that support their arguments. However, only one side has the power "to say what the law is" and that side is not likely to revisit so recent a precedent.

The Court's decision, however, has done little to cool the heated rhetoric on both sides environment of the copyright term extension (or expiration deferment) debate in the media and scholarly press. Court challenges

10. Benkler, supra note 8, at 359 ("A world dominated by Disney, News Corp., and Time Warner appears to be the expected and rational response to excessive enclosure of the public domain.").
16. This Note uses the term "deferment" because, as in loan deferment or draft deferment, it connotes a delay in performance of a duty, rather than a reprieve from a
have continued post-\textit{Eldred} as well, notably in \textit{Golan v. Gonzales}, which challenged the removal of certain foreign works from the public domain.\footnote{18} Likewise, the anticopyright movement has yet to have much effect on lawmakers. In July 2008, the European Union proposed a forty-five-year extension to the length of copyright for sound recording performers.\footnote{19} Clearly, the settling of the constitutional power issues raised in \textit{Eldred} has not settled the policy question of how the copyright term length should be calibrated to achieve constitutional copyright goals.

The appellants and amici in \textit{Eldred} were concerned with protecting the public domain against what they considered to be Congress's unbalanced approach to determining the length of copyright.\footnote{20} As an alternative to finding this protection through congressional action or through judicial restriction of Congress, perhaps the market is a better place to look for a solution. Market forces may seem a counterintuitive place to look for balance between private interests and the public good, but the Constitution provides for just such a mechanism in both the Copyright Clause itself and in the Takings Clause of the Fifth Amendment.\footnote{21} This Note builds on the work of Abraham Bell and Gideon Parchomovsky\footnote{22} in exploring the looming deadline. Other commonly used terms have been cited as containing value judgments about the provenance of creativity and the desirability of the public domain. The most commonly used phrasing of an “extension” that prevents works from “falling into the public domain” is loaded in the direction of the moral rights of copyright holders. Such an understanding misses the perspective of the public, which is denied a benefit when the public domain date is deferred. See \textit{Tyler T. Ochoa, Origins and Meanings of the Public Domain, 28 U. DAYTON L. REV. 215, 256 (2002)} (decrying “the commonly used phrase ‘fallen into the public domain’ [because] [i]t sounds as if the work has fallen into a black hole, never to be heard from again”); \textit{Chris Sprigman, The Mouse that Ate the Public Domain: \textit{Disney, the Copyright Term Extension Act,} and \textit{Eldred v. Ashcroft, FINDLAW'S WRIT, Mar. 5, 2002, http://writ.news.findlaw.com/commentary/20020305_sprigman.html} (“The linguistic convention by which works ‘fall’ when they enter the public domain is revealing: immanent in the phrase is the notion that a work is debased when no longer copyrighted. Perhaps it is this view that allows statutes that shrink the public domain to gain widespread support.”). On the other hand, activists who prefer to speak of “freeing” works from copyright also are loading their language. See \textit{Mark Helprin, Op-Ed, A Great Idea Lives Forever. \textit{Shouldn't Its Copyright?, N.Y. TIMES, May 20, 2007, at A12} (“‘Freeing’ a literary work into the public domain is less a public benefit than a transfer of wealth from the families of American writers to the executives and stockholders of various businesses ...”).


18. \textit{Golan v. Gonzales, 501 F.3d 1179 (10th Cir. 2007); see also Kahle v. Gonzales, 474 F.3d 665, 667 (9th Cir. 2007).}


20. \textit{See, e.g., LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 228 (2004).}

21. \textit{U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).}

possibility that the doctrine of givings, a derivative of Fifth Amendment takings doctrine, is the most useful and evenhanded approach to the issue of balancing Congress’s power to extend the term of copyrights against the public’s interest in the intellectual property “commons.”

Part I of this Note examines the history of copyright deferments from pre-Revolutionary English law through the debate in the aftermath of *Eldred* and *Golan*. This part also introduces the basics of the theory of givings in constitutional property jurisprudence, as outlined by Bell and Parchomovsky. Part II focuses on competing positions regarding future copyright deferments held by former *Eldred* and *Golan* litigants and various commentators. Part III recommends a givings-based approach to determining the proper length of protection the next time copyright expiration is deferred. This part explores how a givings regime in copyright could address many of the arguments and avoid others in the current copyright debate. This rough sketch of a givings solution reveals benefits to both users and owners of copyright. It includes market-imposed limitations on what material is withheld from the public domain and for how long it is withheld. This part also addresses possible arguments against a givings model of copyright expiration deferment.

I. DEFERRING ENTRY OF CREATIVE WORKS INTO THE PUBLIC DOMAIN

This part outlines the goals and history of copyright in the Anglo-American tradition. It then focuses on the CTEA, *Eldred*, and the subsequent debate. Lastly, it introduces the basic concepts of givings.

A. The Balancing Act of Copyright

Justice Ruth Bader Ginsburg, writing for the majority in *Eldred*, noted that the Copyright Clause is a paradox: in order to provide the wider public with the benefits of an author’s work, it forbids anyone but the author from copying her work. The Court characterized this scheme as an early example of economic incentives to encourage socially desirable behavior.\(^2\)\(^3\) By protecting the works for “limited Times,”\(^2\)\(^4\) the Framers ensured that authors could make money through sales (or assignment of rights) during that set period, and that they would therefore have an economic incentive to write rather than pursue what would otherwise be more lucrative occupations. After that set period, the exclusive rights would expire. The right to copy and make use of the work would then be generally available,


\(^{24}\) U.S. CONST. art. I, § 8, cl. 8.
giving a level of access to the public that would be impossible through the efforts of even the most diligent bookseller.\textsuperscript{25} The American copyright system thereby harnesses market forces (namely the self-interest of the author and author's assignees) to promote the public good through private creation, market dissemination, and finally, public "nationalization" of creative works.

The difficulty of keeping up with the shifting balance between market incentives and public access has been the prime mover behind many revisions of the law since the first Copyright Act of 1790.\textsuperscript{26} Many of those successive statutes deferred the expiration of copyright while broadening its scope.

\section*{B. Copyright's History}

This section traces domestic and international copyright laws and treaties from the founding era through the nineteenth century to the CTEA. This history sheds lights on arguments in favor of and against copyright deferment.

\subsection*{1. The Constitutional Copyright and Its Forebears}

The Constitution creates Congress's power to establish copyright and patent protection using singular language. Senator Patrick Leahy, speaking on the Senate floor in 1998, noted, "In the body of the Constitution as originally ratified, the word 'right' appears only once and that is with regard to the protection of intellectual property."\textsuperscript{27} Specifically, the Copyright Clause reads, "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."\textsuperscript{28}

James Madison, writing as Publius in the Federalist Papers, asserted the provision's roots in both English and state law. He predicted that it would be generally accepted with little controversy, which implied that the new republic was already part of a copyright tradition.\textsuperscript{29} In order to see how the Framers intended to follow that tradition and how they intended to break

\begin{itemize}
\item \textsuperscript{25} See LESSIG, supra note 20, at 24–25.
\item \textsuperscript{28} Id. (quoting U.S. CONST. art I, § 8, cl. 8.)
\item \textsuperscript{29} "The utility of this power will scarcely be questioned. The copy-right of authors [is], in Great Britain... a right at common law.... The public good fully coincides in both cases with the claims of individuals. The states cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of congress." \textsc{The Federalist No. 43} (James Madison); see also William M. Landes & Richard A. Posner, \textit{Infinitely Renewable Copyright}, 70 U. CHI. L. REV. 471, 472–73 (2003) (agreeing that "it was English practice that provided the model and inspiration for the Copyright Clause of the Constitution and for the early federal copyright statutes").
\end{itemize}
from it, it is useful to compare English laws before the Revolution with American laws just after the framing. Madison apparently was referring to the 1710 English law, the Statute of Anne. That statute gave authors the right to copy published works, rather than reinstating the unpopular 150-year-old monopoly of the royally licensed printers, the Stationers' Company. The statute fixed a term of fourteen years, which was renewable for another fourteen years by a living author. It included registration requirements and protected some rights of foreign authors.

The first Copyright Act in 1790 used the same term length as the Statute of Anne and added protection for maps and charts, applying the protections retroactively to works that had already been created. It did not, however, protect foreign works, which were all in the public domain as far as federal law was concerned. Madison is on the record in the debates over this bill as only finding it necessary to give U.S. citizens "encouragement" to create.

2. Nineteenth Century Copyright

In the nineteenth century, mainly through case law and the Copyright Act of 1874, copyright slowly was expanded. This expansion was a response to the invention of new creative media, mass production, and the democratization of culture—all of which broadened the audience and markets for creativity. Simultaneously, case law protected the public

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31. See Eldred, 537 U.S. at 260 (Breyer, J., dissenting).
32. See Marc H. Greenberg, Reason or Madness: A Defense of Copyright's Growing Pains, 7 J. MARSHALL REV. INTELL. PROP. L. 1, 11 (2007) (calling the Statute of Anne one of "the first copyright laws in the European tradition," the "principal concern [of which] was the economic well-being of book publishers"). But see 2 William Blackstone, Commentaries *406–07 (describing a Roman civil law protecting copyright by securing rights of artists but not of scribes).
33. The most recent incarnation of the censorship law that reserved exclusive rights to publish in the Stationer's Company had expired fifteen years before. Paula Baron, The Moebuis Strip: Private Rights and Public Use in Copyright Law, 70 ALB. L. REV. 1227, 1237–38 (2007). The statute, in part, admonished that "[p]rinters, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing... books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families." Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).
34. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). Several states also had common law copyright, which remain in place for unfixed works only. See, e.g., CAL. CIV. CODE §§ 980–982 (West 2008).
35. See Schwartz & Treanor, supra note 12, at 2387–88. It is worth noting that James Madison was involved in the debates over the Act and appeared to support its basic aim of expanding copyright beyond the narrowest of enumerated powers. Id. at 2388.
36. Id.
37. See, e.g., White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 8–9 (1908); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59–60 (1884). These cases were precursors to modern cases like Lotus Development Corp. v. Borland International, Inc., 516 U.S. 233
domain by creating and maintaining important curbs on what could be copyrighted. Chief among these curbs were the idea/expression dichotomy, which said that only expression and not the ideas behind expression can be copyrighted, and the fair use doctrine, which protected criticism, parody, and other transformative, noncompeting uses of protected works. Industry practices also developed to protect libraries, curators, archivists, and educators.

3. The Berne Convention

Partially due to the leadership of Victor Hugo and the efforts of Charles Dickens, the Berne Convention—the first international copyright agreement—was signed in 1886. Notably, it provided for registration-free copyright that would be respected in all signatory countries. Works were protected from the moment they were created and fixed in a tangible medium of expression. This concept came from the French concept of droit d'auteur, not English copyright law. The Convention, at least in later iterations, was also retroactive on works that had been in the public domain in the nonprotecting countries. The United States did not join Berne for over 100 years. But the International Copyright Act of 1891 expanded U.S. protection to foreign works for the first time, recognizing the same copyright protections that a work would have had in its country of origin. Even after the United States joined the Berne Convention in 1989,
differences remained between the United States and Europe regarding the length of terms of the copyrights granted.47

More significant differences, however, underlie U.S. and European copyright law. The U.S. goal of spurring creative output in order to benefit the public at large is unknown in European law, which, respecting the droit d’auteur concept, has the protection of the interests of the creators as its only direct goal.48

4. The 1909 Copyright Act

The 1909 Copyright Act extended the copyright term to twenty-eight years from publication or registration. This term could be renewed for an additional twenty-eight-year term, upon application to the U.S. Copyright Office.49 Therefore, works created in 1881 that would have entered the public domain in 1909 would have had this expiration deferred until 1937. The Act did away with the requirement that a work be registered with the Copyright Office before being protected for the first twenty-eight-year period.50

Early in the period under the 1909 Act, in 1928, a short cartoon called Steamboat Willie was released.51 Ironically, the film itself was a parody52


48. Compare Mazer v. Stein, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that [it] is the best way to advance public welfare through the talents of authors . . . .”), with Netanel, supra note 44, at 14 (“[European jurists] have devoted substantial effort and imagination in the attempt to assimilate copyright within, or at least place it in relation to, the classical Roman law subdivision of rights: personality rights . . . . real rights . . . . and personal rights . . . .”). But see Greenberg, supra note 32, at 11 (“[Copyright] now also serves, in the United States, as the creative persons’ equivalent of droit morale.”).


50. Protection was secured instead by publication with a copyright notice, such as the now-familiar “©” symbol. Id. at 1077–79.


that would have fallen under the evolving fair use doctrine, and it starred a
character that was a derivative of "Oswald the Rabbit," for which the
cartoonists did not have the rights.53 The protagonist of this film by Ub
Iwerks and his partner would later become, among other things, a
controversial symbol of the struggles over constitutional interpretation of
the Copyright Clause, congressional power, judicial review, and the
definition of culture in the United States.54 At the moment, however, it was
just another creative work. Success would transform it into something else
over the next eighty years.

5. The 1976 Copyright Act

The next major revision of the copyright laws extended the copyright
term from a combined fifty-six years to a period equaling the life of the
author plus fifty years, which was the international norm.55 Corporate
owners of works for hire and anonymous works were given a flat seventy-
five-year term.56 The Act was a reaction to new technologies that impacted
copyrightable audiovisual work and was intended to increase the length of
time exclusive rights in such work could be profitable.57 Steamboat Willie,
a work for hire, turned forty-eight that year and thus missed passing into the
public domain by eight years. Steamboat Willie's date with the public
domain was deferred until 2003.

The 1976 Act also saw the statutory codification of the fair use doctrine58
and its four-factor test that determines which noncommercial, educational,
critical, and parody uses of works could be made without prior permission
from a rightsholder.59

54. See Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757–58 (9th Cir. 1978) (finding
no fair use in underground comics depicting Mickey and his friends in sexual and drug-
related activity); Lawrence Lessig, Protecting Mickey Mouse at Art's Expense, N.Y. TIMES,
Jan. 18, 2003, at A17; Andrew O’Hehir, Mickey Mouse Is the Devil, SALON.COM, Apr. 16,
crusade of anti-Disney activist and performance artist Bill "Reverend Billy" Talen).
56. This work for hire provision is now an essential component of the motion picture
and other right-holding industries. However, it seems, at first glance, to be directly contrary
to the text of the Copyright Clause's protection for "Authors." U.S. CONST. art. I § 8.
("Since [the 1909 Copyright Act] significant changes in technology have affected the
operation of the copyright law."). In 1992, the Copyright Renewal Act removed the
requirement of formally applying for the extension, making renewal automatic for current
304(a)).
59. Campbell, 510 U.S. at 576–77. Notably, one of the four factors in determining fair
use is the existence of harm to any potential market a copyrighted work might have.
Parchomovsky & Goldman, supra note 2, at 1495.
6. The URAA and CTEA

The Uruguay Round Agreement Act of 1994 (URAA) was the enabling legislation that codified into law the "Uruguay Round," the portion of the multilateral General Agreement on Tariffs and Trade that dealt with intellectual property. In addition to codifying new, tougher penalties for bootlegging video and audio recordings, the URAA accepted the retroactivity requirements of the Berne Convention, which it had repudiated even after signing the Convention.

In 1998, in time for Steamboat Willie's seventieth birthday and five years before the cartoon's copyright was to expire, Congress passed the controversial CTEA. The Act deferred the date that Steamboat Willie and many other iconic works of the early twentieth century were to enter the public domain by adding twenty years to the 1976 Act's term for natural authors, for a total of "author's life plus 70 years." Protection of works for hire was increased to the greater of 120 years after the date of creation or ninety-five years after first publication.

Many commentators in the media and academia argued that big entertainment firms had co-opted the legislature in engineering the deferment of public domain status for their most valuable works. Less-cynical observers pointed out that the terms of the CTEA brought U.S. law in line with international norms. Other observers countered, however,

60. 17 U.S.C. § 104A.
61. See id. § 1101; see also Adam Regoli, The Next (and Last?) Constitutional Copyright Case, 6 VA. SPORTS & ENT. L.J. 243, 247 (2007) ("The importance of [Trade-Related Aspects of Intellectual Property Rights (TRIPs)] to the United States cannot be overstated. As the largest producer of intellectual property in the world by far, the United States has a significant stake in attempting to assure that intellectual property receives protection around the world.” (footnote omitted)).
62. See, e.g., John Kay, Comment: Musicians’ Demands for Copyright Extension Are Off Key, FIN. TIMES, Dec. 12, 2006, at 15 (“In 1998, the Disney Corporation persuaded US Congress to extend the company’s exclusive rights to Mickey Mouse and its stable of cartoon characters.”).
that the CTEA actually increased United States-European Union copyright disharmony. Unlike the international copyright standards, the CTEA would have to pass a constitutional challenge.

C. Eldred v. Ashcroft

Eldred v. Reno, which reached the Supreme Court as Eldred v. Ashcroft, was the major constitutional challenge to the CTEA. The petitioners’ basic argument was that the statute violated the text of the Copyright Clause (specifically the preamble and the Limited Times Clause) with its retroactive application to existing works. The petitioners put great weight on their interpretations of the Founders’ original intent as to the limitations of congressional power in its brief. Secondary arguments involved the First Amendment and public trust doctrine.

Then-Judge Ginsburg, writing for the U.S. Court of Appeals for the District of Columbia Circuit in Eldred v. Reno, already had found for the government and upheld the CTEA. Eric Eldred appealed and the Supreme Court granted certiorari. Because the Court had decided eight years before, in United States v. Lopez, that Congress’s powers under the Commerce Clause could be limited by the Court, the petitioners felt confident that their constitutional argument would carry the day. On appeal, however, Justice Ginsburg, writing for the Court, upheld her own D.C. Circuit opinion, over dissents by Justices Stephen Breyer and John Paul Stevens.

Stanford Law School professor Lawrence Lessig, representing the petitioner, Eldred, argued that the CTEA needed to be scrutinized with a higher standard than rational basis review, and that retroactive deferments were not sufficiently related to the goals in the preamble to the Copyright Clause. According to Professor Lessig’s formulation, the grant of power in the Copyright Clause is narrow and carefully enumerated. That grant is narrowed again by the preamble, whose strong implication is that the enumerated power may only be used to pass copyright laws that directly “promote the progress of Science and useful Arts.” According to Lessig,
since the works in question were already created, protecting them was not promoting the creation of new works.\(^7\)

Additionally, Eldred argued, in allowing a private removal of works that would otherwise have inevitably fallen into the public domain, Congress had limited his ability to make speech containing those works. Even though a copyright suit was between private parties and not a direct restriction from Congress, he would have been able to make such speeches without interference or permission if the CTEA had not been passed.\(^8\)

An amicus curiae brief filed in support of Eldred by several economists and legal scholars of “public choice theory”\(^8\) made a policy argument based on an economic analysis. This analysis contended that a longer term of copyright provided a small incentive for creative output that was outweighed by the social costs of a longer copyright monopoly.\(^8\) According to Lessig\(^8\) the economists concluded that in passing the CTEA, Congress responded to the “rent-seeking”\(^8\) desires of a small, politically powerful group of copyright holders and enacted legislation that provides less of an incentive to the creation of new works than it harms society by allowing copyright holders to charge artificially high prices and by restraining the creation of new works based on copyrighted material.\(^8\)

The majority opinion, written by Justice Ginsburg, held that the clause’s preamble was not meant to be a set of guidelines with which the Court could bind Congress. The Court further held that retroactive deferment of existing copyrights had been part of every American copyright act.\(^8\) The opinion did not directly address the First Amendment implications of the

\(^7\) See Schwartz & Treanor, supra note 12, at 2345–46 (summarizing Eldred’s argument that “for all retroactive extensions, it makes no economic sense to create an incentive for work that has already been produced” (internal quotation marks omitted)).

\(^8\) See id. at 2333 n.11, 2348.

\(^8\) Such scholars included George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, and Milton Friedman. See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 1A, Eldred, 537 U.S. 186 (No. 01-618); LESSIG, supra note 20, at 232.

\(^8\) See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, supra note 81, at 1–3.

\(^8\) LESSIG, supra note 20, at 232; see also Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, supra note 81, at 11–12.

\(^8\) According to Robert Cooter, “‘rent’ refers to profits from passive ownership, as opposed to profits from productive activity.” ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 116 (1999), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1039&context=robert_cooter. “Rent-seeking,” in public choice theory, exists when an interested minority out-organizes more diffuse groups in order to influence legislation that benefits them. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE, A CRITICAL INTRODUCTION 15 n.10 (1991). This behavior is often termed rent-seeking when the harm to society at large is greater than the benefits bestowed on the interested minority. Id. at 34. The means by which influence is brought to bear is generally political lobbying and electoral support for individual politicians whose self-interest in being re-elected makes them unreliable stewards of the public good. Id. at 20, 22 & n.45.

\(^8\) See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, supra note 81, at 5–8, 10–11, 14–15; see also Schwartz & Treanor, supra note 12, at 2348.

\(^8\) Eldred, 537 U.S. at 204, 212–13.
CTEA, because the law had not changed "the traditional contours of copyright" protection. The dissent adopted, to varying extents, the arguments of Eldred and the amici curiae.

The majority held that when Congress sets any fixed term, it abides by the plain language of the "limited Times" prohibition of the Copyright Clause. The preamble is not, according to the Court, a limitation on the power of Congress to set the term however it believes will best reach the Constitution's goals. The Court said that "[n]othing before [it] warrant[ed] construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint."

Rather than finding a self-limiting constitutional grant of power to Congress, the majority found that copyright legislation need only meet rational basis review. As precedent, the Court held that the first Copyright Act of 1790 also applied copyright to preexisting and future works. The majority also cited prior Copyright Acts from 1831 through 1976, holding that they extended the copyright term for both future and existing works as a matter of fair and equitable treatment of different creators. The Court held that Eldred had failed to show why the term extensions in CTEA, and not in earlier acts, violated the Constitution.

As described above, the Eldred Court did not find that the CTEA, in deferring the entry of certain extant copyrighted works into the public domain, changed the "traditional contours of copyright protection," and so therefore the First Amendment was not implicated.

Justice Breyer, writing in dissent, focused on the fact that most works of fiction fail to become classics or reap rewards more than fifty years after the author's death. According to Breyer, this shows that monetary reward is not what motivates artists. Breyer cast doubt on the possibility that the present value of the copyright extension will have much impact on a living

87. Id. at 221, 264.
88. See Schwartz & Treanor, supra note 12, at 2350; see, e.g., Eldred, 537 U.S. 249-52, 255 (Breyer, J., dissenting).
89. Eldred, 537 U.S. at 199.
90. Id. at 209.
91. Id. at 204.
92. Id. at 200.
93. The Court went on to say, 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: "[I]n justice, policy, and equity alike forb[ids]" 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." The CTEA follows this historical practice by keeping the duration provisions of the 1976 Act largely in place and simply adding 20 years to each of them.
94. Id. at 204 (alterations in original) (citations omitted).
95. Id. at 199.
96. Id. at 254-55 (Breyer, J., dissenting).
97. Id.
author or that "somehow, somewhere, some potential author might be
moved by the thought of great-grandchildren receiving copyright royalties a
century hence." 98

Justice Stevens analogized to terms of protection in patent law in his
dissent. He argued that not only would it be unfair to shorten the term of
patents, but also that Congress did not have the ability to do so. 99
Therefore, under the quid pro quo theory that the grant of copyright as a
contract whose consideration is the public domain rights after a set term of
years, it would be just as unfair for the public to have its contractual rights
as "owners" of the public domain violated by the CTEA. 100

After the loss in Eldred, Lessig mounted a similar attack on another
copyright statute. In Kahle v. Gonzales, Lessig argued that the changes in
the 1992 Copyright Renewal Act had First Amendment implications
because the changes limited people from using works whose copyright had
not properly been renewed according to the laws in force at the time. 101
The petitioners argued that the change from the opt-in system of registration
to the opt-out system of registrationless copyright was a change in the
"traditional contours of copyright" and should have been subject to First
Amendment strict scrutiny. 102 Writing for the majority, Judge Joseph
Jerome Farris characterized this as "essentially the same argument, in
different form, that the Supreme Court rejected in Eldred. It fails here as
well." 103

Golan, however, fared better in the U.S. Court of Appeals for the Tenth
Circuit with similar claims about the URAA's retroactivity and removal of
works from the public domain altering the traditional contours of free
speech and implicating the First Amendment. 104 The gist of the argument
was that copyright, in protecting works that had already entered into the
public domain (as in the case of the URAA), implicates First Amendment
speech rights and triggers strict judicial scrutiny. 105 The U.S. District Court

98. Id. at 255.
99. Id. at 226 (Stevens, J., dissenting) ("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."). But see Symposium, Panel II: Mickey Mice? Potential
Ramifications of Eldred v. Ashcroft, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 771, 784
(2003) [hereinafter Symposium, Mickey Mice?] (statement of Eben Moglen, Professor,
Columbia University Law School, assuming that Congress could have chosen to shorten the
length of copyright).
100. Eldred, 537 U.S. at 226 (Stevens, J., dissenting).
101. Kahle v. Gonzales, 474 F.3d 665, 666 (9th Cir. 2007).
102. Id.
103. Id. at 668.
105. Id. at 1183–84.
for the District of Colorado had dismissed Golan’s claims that the URAA violated the First Amendment by restricting speech.106 The district court’s opinion stated that the fact that the petitioner was constrained to contract for rights to copyrighted works did not affect First Amendment rights.107 The Tenth Circuit, however, remanded the First Amendment questions, holding that by removing works from the public domain (which the CTEA had not done), the URAA changed the “traditional copyright contours” mentioned in Eldred.108 The court reasoned that copyrighting a work that already had become part of the public domain was a significant alteration to the normally one-way passage into the public domain and therefore changed the contours of the system.109 The court instructed the district court to apply strict scrutiny to the First Amendment concerns on remand.110 Factoring into the court’s analysis was the fact that the petitioners included small nonprofit symphonies and music librarians.111

D. Eldred’s Aftermath

This section summarizes various responses to the Eldred decision, including responses from opponents of the CTEA, professors concerned with the constitutional separation of powers doctrine, and the entertainment industry. This section also sketches a brief outline of law and economics scholarship regarding copyright extension.

1. The IP Restrictors / Free Culture Movement

Professor Paul M. Schwartz and Dean William Michael Treanor refer to critics of copyright extension as “IP Restrictors,”112 while Professor Lessig prefers to frame the debate as implicating a right similar to free speech that he calls “free culture.”113 However, Schwartz and Treanor’s term has merit, as the movement’s view, with a few exceptions,114 is that copyright is a necessary evil (at best) and as such should be carefully limited.115

106. Id. at 1182–83.
109. Id. at 1189.
110. Id. at 1196.
111. See id. at 1193. The dissent in Eldred made it clear that the free speech rights that the Court considered and denied in Eldred included “music fees that may prevent youth or community orchestras, or church choirs, from performing early 20th-century music.” Eldred, 537 U.S. at 251 (Breyer, J., dissenting).
112. Schwartz & Treanor, supra note 12, at 2332; see also Greenberg, supra, note 32, at 4 (characterizing the term as “probably accurate” but “a bit incendiary”).
113. See generally Lessig, supra note 20. As Professor Lessig writes, he uses “free culture” in the sense of “free speech” and “free market” rather than “free beer” (as irresistible as the latter connotation may be). Id. at xiv.
114. See supra Part II.A.
Furthermore, they read the Constitution, even post-\textit{Eldred}, as restricting the powers of Congress to pass laws that defer copyright expiration.\textsuperscript{116} Based on that reading, they argue that courts should strike down laws like the CTEA, both as a policy matter and as a violation of the Constitution's restrictions on Congress.

"Free culture" is predicated on the idea that, in order to engage in the exchange of ideas that free speech allows, people must be able to share those ideas without first asking permission to communicate them even if the vessel for those ideas happens to be in someone else's words.\textsuperscript{117} In a world, Professor Lessig argues, of possibly infinite deferments of copyright expiration and a stagnant public domain, more and more of our cultural landscape is owned by corporations.\textsuperscript{118} Thus, there is less room for free transmission of ideas through shared culture, apart from the commodified pabulum of corporate entertainment and media.\textsuperscript{119}

The public domain, "owned" in common by all citizens and held in trust by the government, is essential to this idea of free culture.\textsuperscript{120} Many judges and scholars agree that all writers and artists build on the works of others to some extent, and that this is a permissible appropriation of ideas and expressions from the public domain.\textsuperscript{121} Even some scholarly advocates of strong intellectual property rights think of the public domain as the default state of all ideas and expressions of those ideas.\textsuperscript{122} As a reward for their labors, creators are permitted to have the exclusive right to disseminate and license the use of their expression of public domain ideas for a limited time, after which the expressions return to the public ownership.\textsuperscript{123}

The IP Restrictors argue that when too many iterations of ideas are fenced off for long periods, or perhaps for good, there will be less raw material for later artists to use.\textsuperscript{124} The less raw material that exists in the
public domain, the fewer new works can be created from it.¹²⁵ Thus, the enclosure of the public's former marketplace of ideas results in an intellectual starving of the community.¹²⁶

Like most observers of American copyright law, the IP Restrictors characterize the purpose of copyright laws as utilitarian in nature: the property rights or privileges in copyright are meant to enrich the public and expose them to new knowledge, not to protect the natural rights of creators.¹²⁷ Eldred invoked those aims in his argument before the D.C. Circuit and Supreme Court that protection for existing works could not, ex post, add new knowledge to society.¹²⁸

Lessig argued that the CTEA acts inefficiently to harm potential users without benefiting many rightsholders because "it grants copyright protection regardless of the copyright holder's preferences."¹²⁹ Some of these works, called "orphaned works," have no traceable rightsholders at all. Orphaned works are still under copyright, but are out of print or similarly unexploited. The creator may be dead, and his or her heirs may have no idea that they own the rights.¹³⁰ The dilemma of orphaned works was one of the main issues of Kahle¹³¹ and has also been an important component to the arguments in the lawsuits and scholarly debates involving Google Book Search.¹³²

Professor Reza Dibadj argues that too much copyright protection creates an anticommons. In this anticommons, orphaned works-type underuse is encouraged, since many rightsholders have the ability to exclude everyone without the incentive to develop property interests in the work.¹³³

Public choice theory, which examines the role of the legislature's self-interest in the lawmaking process,¹³⁴ has also played a role in the criticism

¹²⁵ This idea is not unique to the Free Culture movement. See generally Landes & Posner, supra note 23.
¹²⁶ See generally Boyle, supra note 8.
¹²⁹ Matthew Dean Stratton, Note, Will Lessig Succeed in Challenging the CTEA, Post-Eldred?, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 893, 916 (2005). As a partial solution to the problem of rightsholders not being able to easily voluntarily disclaim copyright protections when they are unwanted, Electronic Frontier Foundation and Professor Lessig's Creative Commons organization have provided creators with more convenient licenses to allow public domain-like use of otherwise protected works. See generally Creative Commons, About, http://creativecommons.org/about/ (last visited Oct. 17, 2008).
¹³¹ Kahle v. Gonzales, 474 F.3d 665, 666–67 (9th Cir. 2007).
of the Court's decision to uphold the CTEA. Critics claim that Congress has been captured by the extensive political donations from wealthy rights-holding industries, especially Disney, the corporate owner of *Steamboat Willie* and the character it spawned, Mickey Mouse.\(^\text{135}\) Professor Lessig characterizes the rights-holding industry's influence as "corruption":\(^\text{136}\)

Ten of the thirteen original sponsors of the Act in the House received the maximum contribution from Disney's political action committee; in the Senate, eight of the twelve sponsors received contributions. The [Recording Industry Association of America (RIAA)] and the [Motion Picture Association of America (MPAA)] . . . paid out more than $200,000 in campaign contributions. Disney is estimated to have contributed more than $800,000 to reelection campaigns in the 1998 cycle.\(^\text{137}\)

Other commentators have been more blunt, characterizing the pro-CTEA parties as "a purchased Congress [with] a piece of corrupt hireling legislation, a bought bar, and a co-opted academic circle of commentators."\(^\text{138}\) So seriously does Lessig take this issue, that in July of 2007, he announced that he was stepping down from the copyright debate, per se, in order to concentrate on the problem of lobbyists' undue influence over legislation.\(^\text{139}\)

2. Originalist *Eldred* Commentary

Professor Schwartz and Dean Treanor, in their article defending the result in *Eldred* on constitutional separation of powers issues, worried that the jurisprudential underpinnings of the *Eldred* opinion might not hold up to repeated assault, because the opinion did not address Eldred's originalist claims as thoroughly as it could have done.\(^\text{140}\) They added that each Copyright Act, starting with that of 1789, enlarged the scope of what could be protected to include such items as maps and visual arts.\(^\text{141}\) According to Schwartz and Treanor, this shows that a narrow reading of an enumerated

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\(^{135}\) See generally Green, supra note 53.

\(^{136}\) See LESSIG, supra note 20, at 216 ("[T]he practice [of extending copyright protection] had become . . . lucrative for Congress. Congress knows that copyright owners will be willing to pay a great deal of money to see their copyright terms extended. And so Congress is quite happy to keep this gravy train going. [This is] 'corruption' not in the sense that representatives are bribed. Rather, 'corruption' in the sense that the system induces the beneficiaries of Congress's acts to raise and give money to Congress to induce it to act. There's only so much time; there's only so much Congress can do. Why not limit its actions to those things it must do—and those things that pay? Extending copyright terms pays.").

\(^{137}\) Id. at 218 (citations omitted).

\(^{138}\) Symposium, Mickey Mice?, supra note 99, at 784 (Professor Moglen, commenting).

\(^{139}\) Noam Cohen, Taking the Copyright Fight Into a New Arena, N.Y. TIMES, July 2, 2007, at C3.

\(^{140}\) Schwartz & Treanor, supra note 12, at 2350–53, 2369.

\(^{141}\) See id. at 2387.
right to protect "writings" and "inventions" was not what the Founders had in mind. 142

Central to the reading of the constitutional text in Eldred's appeal was the idea that the Founders were hostile to all forms of monopoly interest, which they considered copyright to be. 143 Justice Breyer, in dissent, also implied that the Founders only allowed for copyright grudgingly and with a very narrow scope. 144 Therefore, when in doubt, original understanding should be read in favor of strong limits on Congress's power to grant copyrights. Schwartz and Treanor pointed out, however, that the Founder's attitudes toward monopolies were anything but monolithic. 145 The Federalists in particular were in favor of creating monopolies for banking, infrastructure projects, and transportation. 146 Republican Madison, who was suspicious of monopolies, also wrote of the utility of harnessing the economic incentive of monopoly to encourage creators. 147

Schwartz and Treanor's main objection to Lessig's arguments in Eldred is that the judicial restraint on what is basically an economic decision smacks of the activist court days of Lochner v. New York. 148 Because much of the jurisprudence of the last century has been based on a repudiation of Lochner and the attempts of the Court of that era to interfere with congressional economic legislation, constitutional scholars and the Court are not likely to favor an encroachment in this area. 149 Furthermore, the jurisprudence that ended the era of Lochner was firmly rooted in the Founders' conception of judicial deference to Congress in economic matters. 150

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142. Id.
143. See Brief for Petitioners at 23–25, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-168); Schwartz & Treanor, supra note 12, at 2383.
144. See Eldred, 537 U.S. at 246–47 (Breyer, J., dissenting).
145. Schwartz & Treanor, supra note 12, at 2383–84.
146. Id.
147. Id. at 2384 (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in I THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1790, at 562, 566 (James Morton Smith ed., 1995)).
148. Id. at 2334 (referring to Lochner v. New York, 198 U.S. 45 (1905)).
149. See Schwartz & Treanor, supra note 12, at 2359–61, 2400, 2411 (describing the jurisprudential aftermath of Lochner and positing that a decision for Eldred might not endure). It is also worth noting that the Court's decision in United States v. Lopez, 514 U.S. 549 (1995), a precedent that Professor Lessig thought would be determinative in Eldred, involved a federalism argument that was not implicated in Eldred. Rather than asserting the inability of Congress to pass a certain kind of law, Lopez stood for the proposition that the individual states, and not the federal government, properly held that power. See James E. Fleming, The New Constitutional Order and the Heartening of Conservative Constitutional Aspirations, 75 FORDHAM L. REV. 537, 537 (2006) (arguing that Lopez "really just sent a message to Congress that there is no general federal police power" rather than signaled a revolution in the Court's jurisprudence); Symposium, Panel III: United States v. Martignon—Case in Controversy, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1223, 1270 (2006) (statement by Hugh Hanson, Professor of Law, Fordham University School of Law, pointing out that "[t]he real issue has been the respective legislative roles of Congress and the states," and that federalism concerns are inapposite to intellectual property legislation).
150. Schwartz & Treanor, supra note 12, at 2367–68.
3. Copyright Warriors—Industry Responses

The most economically powerful rights-holding industries, known to
Professor Lessig as "Copyright Warriors" and to themselves as defenders of
"creative property," were understandably supportive of the decision in
_Eldred_.\footnote{\textsuperscript{151}} Cary Sherman, copyright attorney and president of the RIAA,
approvingly noted that the "Court has affirmed . . . the authority of
Congress to adapt [the copyright system] in response to evolving markets
and international developments. The Court also recognized, once again,
that copyright and the First Amendment are completely
compatible."\footnote{\textsuperscript{152}} Jack Valenti, president of the MPAA, characterized _Eldred_ as a "victory not
solely for rights holders but also for consumers everywhere."\footnote{\textsuperscript{153}}
House Judiciary Committee chairman F. James Sensenbrenner said, in support of
the decision,

The United States produces more intellectual property than any other
country in the world. The copyright and related industries employ
millions of American workers, and its vitality is critical to our national
economy. The Court's decision will ensure that American copyright
holders will generate additional revenues from domestic and foreign sales
of their copyrighted works.\footnote{\textsuperscript{154}}

Such statements are representative of a focus on economic activity as an
end, rather than a means, of copyright.

According to the Copyright Warriors, the current copyright system may
be as inefficiently underprotective of some rights as well as creating
wasteful industry practices. Certainly the pre-1989 practice of European
publishers requiring American editions of books to be released
simultaneously with Canadian editions in order to take advantage of more
protective U.K. copyright laws was a wasteful method that ensured that the
URAA copyright terms would effectively apply no matter what the state of
U.S. law was at the time.

Dissemination of some works may also be better served by a single entity
stewarding the process than by widely available, perhaps poor quality,
copies flooding the market in a short period of time:

There is no one who will invest the funds for enhancement because
there is no longer an incentive to rehabilitate and preserve something that
anyone can offer for sale. A public domain work is an orphan. No one is
responsible for its life. But everyone exploits its use, until that time
certain when it becomes soiled and haggard, barren of its previous
virtues.\footnote{\textsuperscript{155}}

\textsuperscript{151} LESSIG, supra note 20, at 18, 79.
\textsuperscript{152} Richard Koman, Eldred Opinion Met with Anger, Determination, O'REILLY POLICY
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} See The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S.
Comm. on the Judiciary, 104th Cong. 42 (1997) (statement of Jack Valenti, President,
If this claim, made by Valenti in 1995, is true, there is little reason why it would not apply seventy years after the death of the creator just as much as at any other time.\textsuperscript{156}

Another concern of rightsholders in the digital age is the opposite of the threat from poor quality copies: the ease with which perfect digital copies can be made and disseminated. With so much more illegal infringement reducing the incentives for creators, investors, and developers of creative works, the industry argues, those incentives should be enhanced by greater protection against competition from commercial public domain users.

4. Positioning Deferments Within the Overall Economic Scheme of Copyright

Copyright can be examined from a purely economic standpoint, as much of the scholarly literature on copyright shows. Law and economics scholars characterize the creative works market as necessarily imperfect.\textsuperscript{157} In an efficient market, the market "clears" when supply and demand meet perfectly,\textsuperscript{158} however the creative works market will never clear on its own, because creative works are a "public good."\textsuperscript{159} A public good is expensive to create initially, yet very cheap to reproduce.\textsuperscript{160} Thus, if there were no laws that protected copyright, there would be no market at all, since there would be no incentive to spend money and time creating works that other people could exactly reproduce and sell very cheaply.\textsuperscript{161} Copyright, therefore, in creating limited monopolies, is intended to do what the market alone is unable to do: strengthen the position of creators enough by giving them the ability to set prices on the market, rather than letting copying and distribution costs set prices.

Copyright expiration deferments are also capable of market evaluation. Notwithstanding the constitutional arguments of their lawyers and the cultural concerns of other IP Restrictors, the real goals of the parties at bar

\textsuperscript{156} Philip Glass and several classical composers took a similarly long view in an amicus brief in \textit{Eldred}. They argued that, in their genre, sixty years to reach public acceptance is not such an unusual wait. Brief of Symphonic and Concert Composers Jack Beeson et al. as Amici Curiae Supporting Respondent at 10–12, \textit{Eldred V. Ashcroft}, 537 U.S. 186 (2003) (No. 01-618). Echoing testimony given to Congress during hearings on the CTEA, the composers added that after a long and productive career, they should be able to provide for their children and grandchildren in the same manner as successful people in other areas. \textit{Id.} at 15–16; \textit{see also Eldred}, 537 U.S. at 207–08 n.15 (recounting congressional testimony of Bob Dylan and Quincy Jones).


\textsuperscript{159} See Landes & Posner, \textit{supra} note 23, at 326.

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} See \textit{id.} at 328.
in Eldred and Golan were economic. The website operators, DVD packagers, and music librarians in those cases had standing because the laws affected their livelihoods, not their sense of how judicial review should operate. Seen through this economic prism, the petitioners were concerned with copyright as a method of delineating property and allocating resources. Their business plans to use their expected legal privileges in public domain works were scuttled when those privileges never came into being when copyright owners’ rights to keep them from using the works in question were extended.163

Professor Henry Smith, borrowing a concept from property law, applies the ancient property law doctrine of accession to explain copyright. Accession governs when the good faith (but mistaken) expropriation of another’s property leads to improvements that cannot be separated from the original item. In such cases, the improver owes a payment to compensate for the original trespass, but has a right to keep the improved item. Professor Smith’s accession theory of copyright contends that the accession model reimburses writers as the improvers of public domain ideas (owned by the public) for their inputs into the work while “paying” the ideas’ original owners, the public, for works taken from the public domain. This payment is the return of the right to copy and use to the public domain after a term of years. Under this conception, every time that reversion is deferred, the value of the “payment” to the public decreases. To borrow the terms used in the Eldred briefs, the “quid pro quo” under which rightsholders were granted copyrights was not honored. The petitioners, therefore, as members of the public, lost the bargained-for exchange outlined in both the Constitution and prior copyright laws.

Whether the major rights-holding industries or Congress intend to create a perpetual property right in copyright or not, there is nothing in the Eldred opinion, as Lessig points out, stopping a de facto perpetual copyright from being created, by “moving the goalposts” every time valuable copyrights are in danger of entering the public domain. While several arguments,

162. For an illustration of this concept of the purpose of copyright, see Smith, supra note 122, at 1745–48.
163. The classic explanation of the terms “rights” and “privileges” can be found in Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710 (1917).
164. Smith, supra note 122, at 1766, 1772–73.
165. See BLACK’S LAW DICTIONARY 4 (8th ed. 2004); Smith, supra note 122, at 1772–73.
166. See BLACK’S LAW DICTIONARY 4 (8th ed. 2004); Smith, supra note 122, at 1766, 1772–73.
167. Smith, supra note 122, at 1766, 1772–73.
168. Id.
169. Id.
170. See Schwartz & Treanor, supra note 12, at 2343. This argument did not convince the Court, which saw any deferment granted as part of the copyright holders’ bargained-for exchange, see Eldred v. Ashcroft, 537 U.S. 186, 189 (2003), but it nonetheless illustrates petitioner’s economic point.
171. LESSIG, supra note 20, at 215–16.
including the need for international harmonization, were persuasive in *Eldred*, none of them were essential to its decision, which required only that Congress have a rational basis for the deferments.\footnote{172 Eldred, 537 U.S. at 189.} Therefore, the public domain is left open for future enclosure, even if predictions about the effects of the CTEA itself do not come to fruition.

The potential effect of perpetual deferment on public access to works is obvious: intellectual property owners would be strongly favored over the general public, who would have to pay to use the kind of material that had once been free. Subtler, perhaps, is the potential negative effect on the creation of new works. As Judge Richard A. Posner and Professor William M. Landes point out, this overprotection of copyright would paradoxically lead to the underproduction of new creative works that typically build upon older works.\footnote{173 Landes & Posner, supra note 23, at 332.}

This underproduction would be exacerbated by the fact that, as enduring works age, their value both to the public and to future creators increases tremendously.\footnote{174 See Eldred, 537 U.S. at 251 (Breyer, J., dissenting) ("The older the work, the more likely it will prove useful to the historian, artist, or teacher."). Professor Joseph Liu makes a similar point in the fair use context, saying that "fair use should be greater for Mickey Mouse than for Harry Potter." Joseph P. Liu, Copyright and Time: A Proposal, 101 MICH. L. REV. 409, 410 (2002) (citations omitted).} Mickey Mouse and Scarlet O'Hara have more power as symbols than Pixar's *Wall-E*\footnote{175 WALL-E (Pixar Animation Studios 2008).} or Elle Woods from *Legally Blonde*.\footnote{176 LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001).} Therefore, keeping these works out of the public domain has a more pronounced effect than the denial of economic advantages to potential commercial users of the public domain.

The modern problem of orphaned works has been much discussed as a market failure. In 2006, the Copyright Office released a compendium of over 850 written comments on its "Report on Orphan Works," an outpouring of public response it termed "extraordinary."\footnote{177 Letter from Marybeth Peters, Register of Copyrights, to Sen. Orrin G. Hatch & Sen. Patrick Leahy (Jan. 23, 2006), in PETERS, supra note 130.} Jason Schultz compiled research on behalf of the *Eldred* legal team showing the percentage of works that were orphaned.\footnote{178 Jason Schultz, The Myth of the 1976 Copyright "Chaos" Theory, available at http://www.lessig.org/blog/archives/jasonfinal.pdf.} He found that "of the 187,280 books published in the U.S. from 1927-1946, only [2.3%, or] 4,267 [were] available in 2002 from publishers at any price." Only 9.2% of films were available.\footnote{179 Id. at 2.}

Several fairly recent copyright developments have coincided to compound the orphaned works problem. The removal of any registration requirement, automatic extension, and terms that outlast a typical single lifespan are chief among them.\footnote{180 PETERS, supra note 130, at 3.} Also, the addition of statutory damages...
that can hold an infringer responsible for sums greatly outweighing the market value of their use of the copyrighted work create some incentive for heirs to maintain an interest in even relatively valueless copyrights.\textsuperscript{181} It is easy to see that the potential of continued deferral of public domain status can have a chilling effect on industries or future creators by creating considerable uncertainty as to whether certain classes of works will become part of the public domain in time to be utilized by any one user.\textsuperscript{182} This leads to underinvestment in otherwise promising areas of commerce and creative realms that seek to utilize the public domain in exactly the way that scholars, Congress, and the Courts agree it is meant to be used.

There are options for potential rights users to legally use copyrighted works, but these options are quite limited, and have been curtailed further by recent copyright statutes. First, users of copyrighted works can license the works. Supposing that the rightsholders can be reached, the cost of licensing, controlled by contract law, can be "prohibitive."\textsuperscript{183} In an undistorted market, a high cost is no sin at all, but the current system encourages holdouts, strategic bargaining for less valuable properties, and overzealous litigation for more valuable ones. A socially wasteful example of the holdout problem is the well-known civil rights era documentary, "Eyes on the Prize," which currently cannot be shown legally.\textsuperscript{184} The licenses for some film clips that originally were properly obtained for use in the film have expired, and the fee for extended licenses demanded by a minority of rightsholders are so high as to make the enterprise unprofitable.\textsuperscript{185}

The second option is to wait to be sued for infringement and roll the dice on fair use. The most prominent recent example of this is the Google Book Search controversy. As legal and business commentators have pointed out, Google is taking a serious risk with this strategy.\textsuperscript{186} The fair use exception, as an ex ante doctrine, is subject to the same uncertainties as the potential deferments mentioned above, which serve to chill legitimate attempts to make use of copyright in even legally noninfringing ways.\textsuperscript{187} Trials can be prohibitively expensive even when the defendant has a strong fair use claim. This is especially relevant to First Amendment concerns, since parody or otherwise robust "free speech" or artistic fair uses are more likely to be patrolled against and challenged by holders of this class of copyright as threatening a lucrative brand or franchise.

\textsuperscript{181} See Lessig, supra note 20, at 51; Parchomovsky & Goldman, supra note 2, at 1498.
\textsuperscript{182} Lessig, supra note 20, at 185–86.
\textsuperscript{183} Golan v. Gonzales, 501 F.3d 1179, 1182 (10th Cir. 2007).
\textsuperscript{184} See Parchomovsky & Goldman, supra note 2, at 1487.
\textsuperscript{185} See id. at 1487–88.
\textsuperscript{186} See, e.g., Mark A. Lemley, Should a Licensing Market Require Licensing?, LAW & CONTEMPO. PROBS., Spring 2007, at 185, 198 (noting that Google could "potentially be liable for a minimum of $1.5 billion in statutory damages and a maximum of $300 billion" (footnote omitted)).
\textsuperscript{187} For a more complete discussion, see Parchomovsky & Goldman, supra note 2.
The competing arguments over length of protection reach the core economic questions of copyright: How do we use copyright to achieve the optimal level of use of creative works in society? Are economic incentives to disseminate copyrighted works more important than the benefits of gratis public access in spurring the creation of the "correct" number of new and widely available works? At what point do making those economic benefits greater serve to starve the public domain and rob new creators of the raw materials they need?

The Copyright Clause was drafted at a time when there was copyright protection, where the public domain was all encompassing, and where economic incentives to create and disseminate works were minimal. At what point does the modern landscape, where the tables are turned, begin to discourage creation? Who is best equipped to determine where that point lies, and how can they prevent overprotection? Scholars and lawmakers have been unable to fashion answers that satisfy both Copyright Warriors and IP Restrictors. Perhaps better solutions can be found in answers that scholars in other fields have given to similar questions.

E. Givings: A View of the Cathedral for Which You’ll Have to Pay a Small Charge

The Eldred debate over government-granted copyright deferments can be characterized as a debate over the proper balance between public and private interests. This debate has not been analyzed using the doctrine of givings, which is a method to balance competing public and private interests in property law. The Takings Clause, from which the doctrine of givings is derived, has been providing a market-based guide for determining the optimal balance between protection of property interests and efficient governmental use of land since the framing. However, only recently have a larger number of scholars understood givings to be a necessary component of that balance.

First outlined by Henry George in 1879 and discussed by Donald Hagman and Dea Misczynski in 1978, the idea of givings, unlike its constitutionally mandated sibling, was largely ignored until Abraham Bell and Gideon Parchomovsky’s article, Givings. The latter article outlined

188. In 1998, Professor Richard A. Epstein discussed the constitutionality of the CTEA in a givings framework. See Richard A. Epstein, Rule of Law: Congress's Copyright Giveaway, WALL ST. J., Dec. 21, 1998, at A19. The scope of this Note, however, does not include any possible constitutional mandate for givings; it focuses on the Eldred debate in the givings context. As to this approach, the relevant literature only contains one short mention by Professor John F. Duffy, who said that the idea "seems commendable whether the giving is in physical property or not." John F. Duffy, Intellectual Property Isolationism and the Average Cost Thesis, 83 TEX. L. REV. 1077, 1094 (2005).


190. Bell & Parchomovsky, supra note 22, at 563.

191. Id. at 549 n.3.
the need for a givings doctrine, provided a taxonomy of givings, and sketched out a plan for implementing a givings methodology for government-granted benefits.\textsuperscript{192}

Bell and Parchomovsky's basic concept is that, just as the government must pay a landowner for any taking of private property for public uses, the government must charge a landowner who has been given public property for her private uses.\textsuperscript{193} Although there is no textualist reading of the Constitution that requires this government action, givings, according to Bell and Parchomovsky, is a necessary concomitant of takings.\textsuperscript{194}

The Takings Clause of the Fifth Amendment\textsuperscript{195} is designed to ensure that the government does not deprive citizens of wealth through its power of eminent domain, and does not exercise its power without taking the costs to the individual into account.\textsuperscript{196} But, measured as relative wealth, that is exactly what happens to Competitor A when the government gives a benefit to Competitor B that is denied to A.\textsuperscript{197} In order to balance the relative harm done to A, B must pay for the benefit.

Likewise, just as takings is a curb on the political abuse of eminent domain, ensuring that the government does not single out critics, a givings charge would discourage the government from dealing in patronage and favoritism.\textsuperscript{198} Finally, the guiding purposes of the Takings Clause, fairness and efficiency, dictate that government should not force one owner to shoulder a burden that should be borne by a larger group.\textsuperscript{199} That principle leads to the conclusion that the government should not force a larger group to pay for a benefit given to one owner either.\textsuperscript{200}

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\textsuperscript{192} Id.
\textsuperscript{193} See id. at 554.
\textsuperscript{194} Although Abraham Bell and Gideon Parchomovsky do not address the topic, the Supreme Court has long upheld the power of local and state governments to charge special assessments to landowners who benefit from improvements, see Londoner v. Denver, 210 U.S. 373, 385–86 (1908), as well as for the federal government to charge user fees. Massachusetts v. United States, 435 U.S. 444, 463 n.19 (1978) ("A user-fee rationale may be invoked whenever the United States is recovering a fair approximation of the cost of benefits supplied.").
\textsuperscript{195} 

[N]or shall private property be taken for public use, without just compensation.
U.S. CONST. amend. V.
\textsuperscript{196} See Bell & Parchomovsky, \textit{supra} note 22, at 552–53 (explaining how diminutions in wealth trigger takings compensation and the efficiency rationale for the Takings Clause is to curb the eminent domain power).
\textsuperscript{197} Id. at 552.
\textsuperscript{198} Id. at 553, 578.
\textsuperscript{199} For a discussion of takings jurisprudence regarding trade secret data (which is a form of intellectual property), see Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004–05 (1984). The Court looked at the assignability of the data, ability of the data to serve as the res for a court proceeding, and "reasonable investment-backed expectations." Id. at 1005.
\textsuperscript{200} Bell & Parchomovsky, \textit{supra} note 22, at 554.
1. Three Types of Givings (and Takings)

As sketched above, Bell and Parchomovsky tie the doctrine of givings tightly to that of takings.201 Where much of the literature and modern case law describes two kinds of takings, however, Bell and Parchomovsky posit three.202 The conceptual closeness begins with three types of givings analogous to these three types of taking.203 Physical takings are the familiar eminent domain powers of taking real property. Regulatory takings, as in Lucas v. South Carolina Coastal Council, involve regulation that “goes too far” in diminishing value or ownership privileges.204 The third type of taking they outline is the “derivative taking,” where one of the first two types of takings has an indirect affect on nearby landowners (often the “not in my backyard” rationale of declining property values).205 Givings follow the same three models.

As an example, imagine that Dagobah Township decides to drain a swamp on the edge of a productive farm, at great public expense. The farmer would be the owner of extra arable acreage, a physical giving. Because the fragile ecosystem has been removed, he and the owners of contiguous property no longer have to comply with development restrictions for areas near wetlands. This would constitute a regulatory giving equal to the subsequently increased value of the farms or lots. Furthermore, the residential areas surrounding the farm and its immediate neighbors no longer have to suffer the odors or mosquitoes associated with the swamp area. That would be a derivative giving, even in the absence of a physical transfer of property or a lifting of regulations.206

These three types of actions, if they were takings, would trigger a fair market reimbursement from the government. According to Bell and Parchomovsky, the matching types of givings likewise should trigger charges for government largess bestowed upon landowners.

2. When the Doctrine Applies

Just as governmental takings (like taxes) do not always trigger a reimbursement,207 not every giving (such as a National Science Foundation Award or unemployment benefits) rises to the level where a charge is required.208 Often the bestowing of a free benefit is precisely the point of the government’s action and a charge would render it meaningless. Beyond those situations, four indicators help show whether a charge is likely to be

201. Id. at 563.
202. Id. at 558–59.
203. Id. at 558.
205. Bell & Parchomovsky, supra note 22, at 559.
206. For an extended example of how zoning rights affect the city of Bespin, see id. at 559. This Note in no way advocates the draining of wetlands.
207. Id. at 590; see also Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978).
208. See Bell & Parchomovsky, supra note 22, at 554.
practicable: the reversibility of the governmental action, the number of recipients of the benefit, the relationship of the giving to a taking, and the voluntariness of the benefit.\textsuperscript{209}

Reversibility means that when a giving, if it were inverted, would be a compensable taking, that giving is properly chargeable.\textsuperscript{210} If the farmer from the example above had dry, productive land that the government flooded to build a community reservoir, this physical taking would require payment. If Mr. Lucas, a neighbor of our Dagobah Lake who had full development rights on his property, was prevented from building by new environmental restrictions enacted to protect the reservoir, he would be subject to a government payment for a regulatory taking. However, the more distant neighbors, who might be impacted by a return of the mosquitoes, would not have suffered a compensable giving.

The number of recipients must be manageable and clearly delineated. Distant neighbors of the drained swamp in the example above would be less likely than the farmer and the immediate neighbors to be awarded a givings charge based on the diffuse nature of the benefit.\textsuperscript{211} Just as a taking from a large demographic does not typically require recompense,\textsuperscript{212} a giving to a large segment of society need not be charged to the members of that segment.

Another key element in Bell and Parchomovsky's conception of givings charges is that chargeable givings are very likely to accompany takings from (usually) another private citizen. The most egregious types of givings usually are associated with a taking from other private individuals as part of the same series of transactions. In these situations, the givings charge can be paid directly from the beneficiary to the victim of the government action, with little governmental action, except for oversight and enforcement.\textsuperscript{213}

Lastly, in order to be a chargeable giving, the benefit must be refusable if a landowner doesn’t want the benefit or can’t afford the charge. This limits the potential for abuse and the temptation to use the power as a redistributive mechanism, rather than a leveling regime.\textsuperscript{214}

These signals for when a giving is chargeable are also limitations on the overuse of givings charges. They help not only to draw a line beyond which a givings charge would be absurd or unnecessary, but also show how the government already takes similar situations along a spectrum of governmental impact into account in takings jurisprudence.\textsuperscript{215}

\begin{itemize}
  \item \textsuperscript{209} Id. at 590–91. Like takings, there can be no bright-line rule for when a giving has taken place and when it has not. Id. at 560, 562.
  \item \textsuperscript{210} Id. at 591.
  \item \textsuperscript{211} Id. at 593.
  \item \textsuperscript{212} Id. at 555.
  \item \textsuperscript{213} Id. at 568 (describing Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)).
  \item \textsuperscript{214} Bell & Parchomovosky, supra note 22, at 556.
  \item \textsuperscript{215} See id. at 595–96 (explaining that givings to large groups are not likely to be the result of special interest politics); see also id. at 551–52 n.16 (explaining that the limitations on takings can be seen as an implicit limitation on givings).
\end{itemize}
3. Givings and Takings as Optimizing Tools

In all three types of givings, as in takings, the requirement that the beneficiary pay for the benefit stops too much value from changing hands.\(^\text{216}\) In takings, cases like *Lucas* emphasize the function of curbing governmental abuses of regulatory power by forcing the government entities involved to internalize the cost of depriving property owners of the right to use their property.\(^\text{217}\) Likewise, givings forces the potential beneficiaries of public largess to internalize a cost equivalent to the value of the benefit.

Therefore, in at least some cases like *Poletown Neighborhood Council v. City of Detroit*\(^\text{218}\) and *Kelo v. City of New London*,\(^\text{219}\) factory owners or developers who would otherwise benefit from the below-market or free acquisition of publicly controlled property would tend to seek the benefit less often if it were no longer free or severely undervalued. This would curb abuses cataloged by public choice scholars, perhaps in a more significant way than takings alone can do.\(^\text{220}\)

By using the market valuation of what the property in question is worth and the private actors' own valuation of what it is worth to them, givings and takings allow for government redistribution of property when it is most efficient to do so. Properly reimbursed takings meet the textual requirements of the Just Compensation Clause. Any proposed givings regime would not have such a high bar to reach as mandated by the text of the Constitution. But, the fact that it could meet such a bar is both elegantly symmetrical and comforting as a constitutionally derived curb against wasteful promotion of special interests.

II. WARRIORS, RESTRICTORS, AND REBALANCING ACTS: COMPETING APPROACHES FOR THE “NEXT” COPYRIGHT DEFERMENT

The Supreme Court’s ruling in *Eldred* did little to quiet the controversy surrounding the CTEA. In addition to Professor Lessig’s subsequent lawsuits,\(^\text{221}\) vigorous advocacy in the press, academia, and the blogosphere continued unabated after *Eldred*.\(^\text{222}\)

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\(^{216}\) Id. at 595–96.
\(^{217}\) Id. at 573, 580.
\(^{218}\) 304 N.W.2d 455.
\(^{219}\) 545 U.S. 469 (2005).
\(^{221}\) Golan v. Gonzales, 501 F.3d 1179, 1181 (10th Cir. 2007); Kahle v. Gonzales, 474 F.3d 665, 666 (9th Cir. 2007).
\(^{222}\) *See*, e.g., Symposium, *Mickey Mice?*, *supra* note 99, at 780, 784 (statements of Professor Moglen, calling Sonny Bono a “moron [who] skied into a tree,” marking *Steamboat Willie* as “the moment at which the thugs take over culture in the United States,” and referring to copyright lawyers as “hirelings of the thugs in Hollywood”). The symposium was held after the oral arguments, but before the ruling in *Eldred*. It nonetheless provides a snapshot of arguments for and against the CTEA that continued long afterwards. *See also* Manes, *supra* note 52 (calling Professor Lessig “an intellectual bully” with “radically silly ideas”); The Secret Diary of Steve Jobs,
Possible revisions or challenges to the CTEA as it now exists are not part of the scope of this Note, which does not purport to solve the disagreement over existing copyright laws. A givings solution is more useful as a normative method to determine what an optimal term for future deferments should be, not as a critical reexamination of the existing law. Accordingly, this Note addresses a theoretical future deferment of copyright expiration.

Inasmuch as the various sides in this debate are speaking the same language at all, this part considers how they would answer two questions: (1) What is the best way to determine the proper length of any future public domain deferrals? (2) Who is best situated to apply that measure? The final part of this Note then looks at how a possible givings solution answers those same questions and addresses the mutual concerns raised by the competing approaches.

There is disagreement about whether further statutory deferments of copyright expiration are likely to pass Congress. David O. Carson, General Counsel of the U.S. Copyright Office, asserted that he “would be shocked if Congress in our lifetimes ever extended copyright term again, and [sees] no evidence for anyone to believe that that is on anyone's agenda.”

However, Professor Eben Moglen, founder of the Software Freedom Law Center argues,

> [O]f course they will be back. They have no more intention of giving away Mickey Mouse or Donald Duck or any of the rest of the franchise in 2024 than they had of giving it away in 2004... They will be back in twenty years to buy more legislation, if we allow bought legislation in the United States in twenty years and if they exist.

Assuming the inevitability of a future debate on the subject when the CTEA expires, this Note examines what positions the debaters are likely to take, in order to explore how a givings-based solution would satisfy concerns on all sides. Part II.A considers the likely position of the IP Restrictor/Free Culture movement; Part II.B considers the likely position of the Eldred majority, originalist constitutional scholars, and Congress; and Part II.C presents several recent ideas that embrace limited market solutions to questions posed above.
A. Draw the Line

The IP Restrictor/Free Culture movement answers the first question of how to determine the optimal amount of public domain deferment in one of two ways. The first answer is some version of "It's predetermined—none at all." Lessig and others have often repeated the mantra that the CTEA was "perpetual copyright on the installment plan." Professor Lessig's post-Eldred proposal, in the "Eric Eldred Act," was to reduce (not extend) the term of copyright to a flat seventy years, with re-registration requirements every five years. However, the answer that the Eldred legal team gave during the trial and appeals is more nuanced: they stipulated that the deferral in the CTEA was appropriate for future works, but it was subject to constitutional outer limits and the Founders' suspicion of copyright in general. Thus, this alternate answer to the question is a strict version of, "The term should be as long as necessary to give incentives to create, but no longer." The movement's answer to the second question of who should apply the properly measured deferment (or advancement) is that Congress should have the power to legislate in this field, but it should be subject to close oversight by the Court, which must apply a narrow interpretation of the "limited Times" and "promote the Progress of Science and useful Arts" provisions of the Copyright Clause. However, it is fair to say that the adage of "strict in theory, fatal in fact" is a good description of the kind of oversight the IP Restrictors wish to see. These ideas are in keeping with the movement's goal of preserving as large of a public domain as possible by blocking further deferments for aging twentieth-century works.

B. Move the Chains

According to the Eldred majority, and the originalist constitutional scholars cited in this Note, and according to Congress (unsurprisingly), the.

225. See, e.g., Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. Rev. 1057, 1071 (2001) (quoting Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary, 104th Cong. (1995) (statement of Professor Peter Jaszi). It is worth noting that such plans have been advanced by individual congresspersons, industry, and creators. See, e.g., 144 CONG REC. H9952 (Oct. 7, 1998) (statement of Rep. Mary Bono) ("Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution."); id. (referencing "Jack Valenti's proposal for [a copyright] term to last forever less 1 day"); Helpem, supra note 16 ("The genius of the framers in making this provision is that it allows for infinite adjustment. Congress is free to extend at will the term of copyright. It last did so in 1998, and should do so again, as far as it can throw.").

226. LESSIG, supra note 20, at 292. Other movement scholars, notably, Professor Moglen, have stated that all copyright should be abolished. Symposium, Mickey Mice?, supra note 99, at 824.

227. These limitations did not allow the deferment for existing works. See supra Part I.C.

228. LESSIG, supra note 20, at 292.


231. See supra Part I.D.1.
answer to the question of how to determine the optimal amount of public domain deferment is “By leaving the decision up to the branch of government most prepared to react to societal changes as envisioned in the Constitution.”

The answer to the second question is, of course, implicit in the first: Congress may legislate freely, subject to the same level of Supreme Court oversight as other areas of economic policy. The IP Restrictors refer to the copyright extensions that have been the result of this system as “perpetual copyright on the installment plan,” otherwise known as “moving the goalposts.” However, rather than moving the goalposts, or changing the rules of the game when one’s favored team is in danger of losing, proponents of these answers might prefer to use another football metaphor and liken this to “moving the chains.”

The proponents of Congress’s power stress the ability of each Congress to periodically measure how the copyright laws are affecting the country, and to decide whether it is appropriate to leave copyrights in the hands of the rightsholders.

The Court used the textualist version of “limited Times” to assert that any deferment period with an end date was a limited time in accordance with the Constitution. Extending this conception of the Copyright Clause, Professor Schwartz and Dean Treanor argue that, as long as any particular Congress makes the decision to defer copyright expiration, the Copyright Clause is satisfied. It is only when a present Congress binds a future Congress to unlimited terms that the “limited Times” language is truly violated. The requirement for each Congress to enact the law separately, then, is enough of a limit on excesses that might, if unchecked, hamper the creation and optimal use of works.

Professor Landes and Judge Posner take this reading of “limited Times” a step further with their proposal for “infinitely renewable copyright.” They argue that the “limited Times” requirement could be circumvented by allowing repeated extensions of the copyright term. While this proposal looks the most like “perpetual copyright on the installment plan,” Landes
and Posner argue that allowing for short deferment periods, subject to a fee, "may enable society to have its cake and eat it too" by enlarging the public domain while protecting valuable copyrights.242

C. Rebalancing Acts

There have been several recent ideas that use limited market approaches to answer both questions posed above. How do you determine how much deferment is optimal? According to proponents of these methods, we should let controlled market forces come to bear. Who has the power to make the determination? In these indirect plans—registration fees, usage taxes, and fair use harbors—Congress would establish statutory mechanisms that would present users or rightsholders with a monetary choice.

1. Registration Fees and Hurdles

The orphaned works problem, according to Lessig, is made worse by the lack of formal renewal requirements. Writing in the New York Times, Professor Lessig has called for essentially a reimplemention of the renewal requirement, in the form of a flat renewal fee of fifty dollars.243 While this is not a complete solution, Lessig argues that some of the worst examples of needlessly keeping works from the public domain will be lessened. Copyright Office General Council David O. Carson admitted, "[p]ersonally—and I hasten to add that this isn't the Copyright Office's view—I look back wistfully at the terms of the 1909 Act in a number of respects, including . . . some of the formalities."244 Notably, the European Union's proposed 2008 copyright deferment directive contains a provision extending copyright only to works made available to the public within one year of the term extension.245 While not a cash fee, this "use it or lose it" clause is intended to ameliorate the orphaned works problem.246

However, these types of proposals have been criticized as unworkable, since Berne prevents a country from imposing any registration requirements on citizens of other member countries.247

242. Id. at 518.
243. Lessig, supra note 54; see also Pamela Samuelson, Preliminary Thoughts on Copyright Reform Project, 2007 UTAH L. REV. 551, 566 (supporting "periodic renewals of copyright claims for a small registration fee").
244. Symposium, Mickey Mice?, supra note 99, at 827.
246. Id.
2. Use Tax/Bundled Licenses

Professor William Fisher has proposed that copyright be replaced by a general tax paired with "digital watermarks" on all media capable of digital use, that is distributed to creators and rightsholders based on downloads.248 According to Professor Lessig, "Fisher would balk at the idea of allowing the system to lapse."249 While Fisher sees this as a replacement for copyright, Lessig reconceptualizes the idea as a temporary complement to his proposals about shorter terms and registration requirements.250 A similar idea, the "Comes With Music" plan, from mobile phone maker Nokia and Universal Music, would add a surcharge to the price of a music download-enabled phone, which would purchase an unlimited download license for one year. The license could be purchased separately after one year.251

3. Fair Use Harbors

Professor Parchomovsky has proposed a series of bright-line rules for fair use in order to reduce the uncertainty associated with waiting to be sued for infringement and invoking a fair use defense.252 These rules include ten seconds of musical works, thirty frames of film, 300 words of text, etc. A more robust, or at least, more certain fair use doctrine would optimize the use of copyrightable works by removing the risk from what are currently legal, but underutilized methods of noninfringing use. While not impacting public domain deferment directly, it can provide a bulwark against too much copyright protection from Congress by using statutory means to enable market users to reduce uncertainty when making fair use of copyrighted works.253 A related proposal has been made by Professor Pamela Samuelson, who advocates substantially expanding the concept of fair use into "clusters" including free speech promotion, authorship promotion, market failure correction, and personal uses.254

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249. LESSIG, supra note 22, at 301.
250. Id. at 301–02; see also supra Parts II.A, II.C.1.
252. See Parchomovsky & Goldman, supra note 2, at 1488–89.
III. GIVINGS

This part recommends moving a step beyond the limited market adjustments of the indirect proposals outlined in Part II.C in favor of a more robust market solution. The givings model would use financial pressures on copyright holders to ensure that future deferments balance the goals of protecting creativity and promoting optimal use of creative works. The givings model has the advantage of fairness and utility, elimination of orphaned works and public choice problems. While this Note does not attempt to place givings within originalist or textualist readings of the Constitution as positive law, the normative solution of givings is compatible with constitutional aims. Finally, the scrutiny given by each copyright holder, who decides whether to pay a givings charge for a deferment, can serve as a proxy for the heightened scrutiny sought by invocation of the First Amendment or the preamble of the Copyright Clause.

A. Answering the Questions: The Complementary Market Underpinnings of Givings and Copyright

A givings solution answers the questions raised in Part II by allowing a robust market mechanism to set the optimal amount of copyright expiration deferments on a case-by-case basis. Congress would draw the exact outlines of the system in setting up the market. Individual determinations about the length of copyright would instead be made by individual decisions of each rightsholder, informed by (and perhaps pressured by) market forces.

The doctrine of givings, applied to copyright expiration deferments, introduces market forces more directly into an area that has always been indirectly influenced by economic forces. As mentioned above, Justices Ginsburg and O’Connor, and Professor Landes and Judge Posner have characterized copyright doctrine as applied law and economics.255 Throughout the nineteenth and twentieth centuries, copyright law has responded to new technologies in order to spur creative innovation in copyrightable works and in the technology used to manufacture and copy the works.256 This economic understanding of the balance sought by the Copyright Clause can be more fully realized by a givings regime.

In order to spur creative output to benefit the public, copyright creates a profit incentive for “authors” by granting them exclusive rights.257 But, when those rights become too great, even though the incentive is more powerful, the actual aims of the incentive, the dissemination of the works to the public, becomes lessened at a rate greater than the creation thus spurred.258

255. See supra notes 23, 127 and accompanying text.
256. See, e.g., supra notes 37–38.
257. See supra note 23 and accompanying text.
258. See supra notes 121–26.
Currently, there is no economic incentive to let works enter the public domain, because retaining copyright is costless while potential rewards from licensing or statutory damages can be high. A givings charge strikes a balance between too much and too little incentive by forcing the rightsholder to decide whether the copyright is still productive enough for a market-rate monetary investment. By assigning a cost for deferment, more works will enter the public domain, both for the use of the public and future creators.

According to Professor Landes and Judge Posner, copyright creates an artificial market to value creative works that would otherwise be undervalued so much as to prevent their creation. Givings uses that same artificial market to approximate the value that an individual work would have as part of the public domain, and therefore to put a price on deferments from the public domain on a case-by-case basis.

Since the value of an individual work to the public domain (and the value of the public domain to the public) is difficult, if not impossible, to ascertain, givings uses the market value that the potential public domain deferments would have in the rightsholder's hands as a proxy. A rightsholder's decision of whether to pay that price takes the place of society's balancing public domain value against the value of the economic incentive to the rightsholders. This replacement of a rightsholder's financial decision, informed and affected by the market value of the work, is a sort of strict market scrutiny that will have the effect of limiting deferments without implicating the Constitution.

Works like Steamboat Willie and Mickey Mouse likely would be deferred from the public domain yet again, as they would have some value to their copyright holders beyond their raw market valuation. Realistically, however, those high-value works inevitably will be deferred under almost any post-Eldred scenario. However, they will not drag the rest of the creative realm away from the public domain in a givings regime. These copyrights currently distort the legislative playing field, but under givings, the revenues they generate can help fund the entire system.

B. Testing Copyright Deferments as Givings

In order to analyze whether a givings regime would prove useful in copyright term balancing, the threshold question is the same for any givings analysis: Is the deferment of copyright expiration a chargeable giving? The same four factors for givings analysis in a property law context provide the answer to that question.

260. Licensing is only one possible way of valuation of copyright. The actual methods used to determine market rate for givings charges is beyond the scope of this Note.
261. Disney made $4.5 billion in retail revenue from Mickey Mouse in 2003. Green, supra note 53. This is a powerful incentive for Disney to continue to push legislation to preserve it's copyright. However, no other character comes close to this sort of revenue. Id.
First, if the act were reversed, would there be a taking? If we can imagine, like the proponents of the Eldred Act or Professor Moglen (but unlike Justice Stevens) a congressional act that shortens the term of copyright protection, the answer is yes. Rights-holding industries would almost certainly view any curtailing of the copyright term as a regulatory taking, and demand Fifth Amendment just compensation.

Second, are the beneficiaries of the supposed giving identifiable? In this case, as Landes and Posner point out, the longer the term of copyright, the harder it is to trace heirs and assignees. This is the cause of the orphaned works problem. However, a return of a registration system is a necessary component of a givings model, and it addresses this hurdle.

Third, can the giving of a copyright deferment be clearly associated with a taking? Yes, according to Professor Lessig and Henry Smith, copyright is a taking from the public domain.

Fourth, is the benefit refusable? Under the CTEA and 1976 Acts, deferments are automatic, but it is possible to refuse the deferment—though this was rarely done. A registration system, if re-established, would make this an opt-in, rather than an opt-out, regime and refusals would be more common. Because the answers to each of these questions is yes, either as copyright doctrine currently stands, or given certain governmental structures that would be necessary for a givings system to work (like a registration system), following the Bell and Parchomovsky model, copyright expiration deferment would qualify as a giving.

C. Creating a Working Givings Framework for Expiration Deferments

The basic, givings-based solution would be easiest to apply to some future CTEA or URAA rather than to existing law. This future deferment would be paired with the introduction of a market-rate givings charge. Whatever “limited Time[]” that Congress chose to offer to rightsholders would come with a charge designed to recapture the total value of the benefit to the company during that time frame.

Following Bell and Parchomovsky’s givings methodology, the givings charge could either go directly to the owners affected by the related taking, or to the government. In the case of copyright expiration deferments, keeping information out of that common ownership of the public domain is a taking from the people; the property right is held in public trust by the

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262. See supra note 99.
263. See supra Part I.D.3.
265. Involuntary or unknown copyrights will be swept away with the enactment of a minimum givings charge system. Deferments will only be granted when the charge is paid and records of this payment must necessarily be kept by the government. Works whose copyright has outlived economic usefulness will likely be given up to the public domain.
266. LESSIG, supra note 20, at 25; Smith, supra note 122, at 1766–69.
267. See supra note 129.
268. See generally Kahle v. Gonzales, 474 F.3d 665 (9th Cir. 2007).
Rather than facilitate a monetary transfer to the public, the givings doctrine would work best by charging the rightsholders a fee, which would go to the government.\footnote{See supra note 120 and accompanying text.}

Therefore, the money that entered the public fisc could be used to administer the valuation of copyright givings charges and the payment records that would serve as registration with the excess paid into a fund to promote, preserve, and protect the public domain. Thus, the money would serve the same interests of the public that are affected by the givings to private rightsholders.

Assessments in the case of deferrals would be calculated in much the same way that property assessments are carried out now. Assessors, who could become part of the Copyright Office, could look to comparable intellectual property rights, expected revenue streams, past performance, or potential alternative uses to come up with the market valuation. While, in a perfect theoretical version of the methodology, the goal would be a total benefits recapture, the actual charge in relation to the assessed value would be an administrative decision of the assessment office. Individual charges doubtlessly would often be contested ex post, but an appeals process similar to the U.S. Patent and Trademark Office and U.S. Court of Appeals for the Federal Circuit’s jurisdiction would be appropriate and sustainable considering the high value of additional copyright deferments, with a supplementary register of copyright protecting the works until a final determination could be reached and charges paid.

This system, like any market-based solution, could lead to imperfect markets replacing the arbitrary statutory rules; however, many problems could be anticipated and avoided. The problem of rightsholders who make bad projections and overpay for deferments that they cannot properly exploit could become a problem analogous to the heirs of creators who currently have incentives not to release relatively valueless works to the public domain, but to wait for a windfall in the form of statutory damages from potential infringers, or to hope for renewed interest in the work. In order to avoid this situation, a partial refund for waiver of rights could be instituted for rightsholders to cash out of the system if they make the wrong “bets.” This refund option would have to be a small enough percentage of the original cost not to function as de facto “bad decision insurance” and therefore encourage overdeferral, but large enough to encourage unproductive works to be returned to the public domain.

### D. Shortcomings of Alternative Proposals

The proposals discussed in Part II provide unacceptable or incomplete alternatives to the givings-based solution. The visions offered by the IP Restrictors and Copyright Warriors invite us to revisit the quandary of

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\footnote{269. See supra note 120 and accompanying text.} \footnote{270. See supra note 218 and accompanying text (discussing a taking of privately owned property in Poletown).}
Shakespeare's clown in *Merchant of Venice*. Both sides counsel well and are mutually exclusive. The IP Restrictors' vision, as Schwartz and Treanor point out, places the Court as arbiter over the details of congressional economic legislation in a way reminiscent of *Lochner*.

However, the "move the chains" scenario preferred by the Copyright Warriors, if repeated by future copyright deferments, will necessarily result in the foretold impoverishment of the public domain.

The infinitely renewable copyright proposed by Landes and Posner fits the description of what the *Eldred* Court called "effectively perpetual copyrights" created to "evade the 'limited Times' constraint." As such, it is not likely to pass constitutional muster. A less extreme version of this plan where renewals are limited, mentioned in passing by Landes and Posner, comes closer to the benefits of givings, although the article does not mention market pricing as a limit on copyright terms.

Lastly, the hybrid market-based approaches outlined in Part II.C, although they address the worst of the current orphaned works and fair use problems, are not as comprehensive as a givings-based framework, and may present problems with treaty commitments. The use tax, proposed by Professor Fisher, even assuming that its technical viability and privacy implications are not concerns, effectively uses the marketplace to allocate per-use compensation to rightsholders and ignores the market in assessing charges, penalizing all taxpayers equally.

E. Addressing Potential Objections to Givings

Although current rightsholders may argue that total benefits capture removes profit incentives to opt into the system, this is a question of where one draws the line. It is also important to remember that these deferments would come only in a context of expiring copyrights. The alternative to opting in would be losing all exclusive rights, so any money they can make from a deferral of the public domain transfer is an unearned gift. The expectation inherent in the charge system is that unless the rightsholder has a new method of exploiting the work that cannot be accounted for in a backwards-looking market valuation, there is no governmental interest in

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272. *See supra* note 148 and accompanying text.
273. *See supra* Part II.B.
277. Rightsholders who would argue that, instead of being an unearned gift, copyright deferment is a right and a givings charge is instead a tax or a taking, are begging the question of perpetual copyright and proving the need for givings charges to ameliorate the tension between rational basis review and the "limited Times" phrasing of the Constitution.
deferring the expiration. This fits with constitutional goal of encouraging innovation, rather than protecting the natural rights of creators. Furthermore, because public value tends to go up over time, simply allowing status quo exclusive uses to continue doesn’t keep pace with the added value to the public.

Another potential objection is that many holders of valuable copyrights might not be able or willing to pay a charge before being allowed to resume economically exploiting the work. To ameliorate that problem, Bell and Parchomovsky have proposed an option to delay the collection of charges in some cases until the new benefit has been exploited. Within the copyright context, this would take the form of an amortized charge over the term of the extension.

Originalists are not likely to find a givings discussion in the ratification debates or in the words of Publius. To a very large extent, the disagreements between the historical interpretation of Breyer and that of Treanor are irrelevant to this discussion because the doctrine of givings is not described in the Constitution, nor does it claim to be so. Instead, the givings proposal is a normative one—to show what the law should be, not what it already is. However, givings, if not a true part of original understanding, is at least compatible with it.

The public choice objections offered by Lessig, the Eldred amici, and other scholars are addressed by a givings solution as well. Charging for any copyright deferment will lessen the preference problem of legislators who would rather preserve their own terms in office by pleasing large potential donors. To be sure, there will be disputes over the size of the charge and valuation of the benefit, much like in takings jurisprudence. These, however, can be centered in administrative and court systems and insulated from the political process, much like trademark appeals today.

A givings charge allows a rightsholder to extend the time during which third parties may not use the work as free expression without privately contracting for it. While this might seem to run counter to the aims of the CTEA opponents, it does, however, satisfy what may be the basic goal of the movement’s First Amendment argument. By invoking the First Amendment, the proponents of such a measure want to invoke a higher level of scrutiny as to the wisdom of withholding copyrighted materials from the public domain. A givings regime provides that higher level of scrutiny, albeit from the combination of market valuations and the individual decisions of rightsholders as rational actors, instead of judges.

278. Commentators within Disney and the licensing industry, for example, thought that the Mickey Mouse character potentially could earn from $1 billion to $1.8 billion more per year as of 2004. Green, supra note 53.
279. See supra note 44.
280. See Bell & Parchomovsky, supra note 22, at 566–67.
281. See supra Part I.E.3 (describing the connections between givings and Takings Clause jurisprudence).
Nonetheless, a givings regime encourages much more public domain work, while holding back only those works where effective channels of distribution and ready markets indicate that they may be best disseminated to the public by a rightsholder.

Finally, the givings methodology is a market system to determine the optimal level of copyright protection versus public domain access for each individual deferment. It cannot provide the larger philosophical background answers as to what the optimal levels of protection and free dissemination are, nor does it purport to. Whatever political and legal decisions are made by Congress and the courts, the givings charge and assessment system can be adjusted to match whatever the optimal level is.

CONCLUSION

A givings solution, applied to copyright expiration deferment, would be likely to displease many on both sides of the debate: businesses that would see a givings charge as a tax on continued use of a current asset, and anticopyright activists who would see a method for large corporations to simply buy their way out of the public domain. But, the givings doctrine can also provide a wide middle ground from which many concerns of both groups can be met. A givings regime could use market forces to promote the constitutional goals of production of new creativity and the widest availability of creative works, while simultaneously strengthening both the public domain and industry. It can provide a restraint on the tendency of Congress to please donors by repeatedly widening the scope and lengthening the term of copyright while also conforming to the modern conception of the Court's limited role in overseeing economic legislation. Finally, as a market-based solution, it takes economic realities into account while promoting efficient use of intellectual property.