

JUDICIAL REVIEW AND THE QUEST TO KEEP COPYRIGHT PURE

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American copyright law is under pressure. The history of copyright in the United States is a story of repeated success by copyright owners in obtaining from Congress expansions in both the scope and duration of copyright. For instance, in response to lobbying by copyright owners, Congress has expanded the term of copyright from a maximum of 28 years in 1790 to the life of the author plus seventy years in 1998. In the twenty-two years from 1976 to 1998, Congress lengthened the duration of copyright by twenty years, a pace that, if maintained, will result in nearly perpetual copyrights. But politics and lobbying are not the only ways to bring about changes in copyright law. Recognizing that the political process offers little hope of curtailing the growth of copyright, opponents of copyright's expansion have turned to constitutional litigation in an effort to trump politics as a source of American copyright policy.¹ Their claim is that the copyright policies embodied in the Constitution – and enforced by courts – represent a better vision of copyright law than what is currently being produced by the federal legislative process.

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1. See, e.g., *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003); *Golan v. Ashcroft*, No. 01-CV-1854 (D. Colo. filed Sept. 19, 2001). On the phenomenon of seeking to constitutionalize copyright, see Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 533 (2000) (“If you can persuade a court that what Congress has done is unconstitutional, all the campaign contributions in the world are unlikely to help your opponents.”); Paul M. Schwartz & Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2390 (2003) (characterizing recent constitutional challenges to intellectual property statutes as attempts to “constitutionalize a particular vision of intellectual property”).

These attempts to constitutionalize copyright law are misguided in both form and substance. Attempts to make the judiciary the guardian of copyright policy fail to acknowledge that judicial intervention in the legislative process can be justified only in narrow circumstances and that the making of copyright policy is not one of them. Not only are judges ill suited to making economic and political judgments about copyright, but the only guide they have for making those judgments – the Copyright Clause of the Constitution – has painfully little to say about how to formulate good, modern copyright policy. Although the Court's recent decision in *Eldred v. Ashcroft* is unlikely to be popular among commentators seeking to rein in America's overgrown copyright protections, the case is a cause for celebration, not consternation, that the Court has decided to leave to Congress the task of making American copyright policy.

I proceed by laying out, in section I, the context for the challenge to Congress's copyright power made in *Eldred v. Ashcroft*. Section II begins with a brief description of the different ambiguities presented by challenges based on the language in the Copyright Clause, particularly the portion of the Clause exhorting Congress to "promote . . . Progress" before continuing on to explain what cases making Copyright Clause challenges, such as *Eldred*, are not: Such cases raise none of the concerns that the Court and commentators have recognized as justifying the displacement of representative policymaking by rigorous judicial review.² After establishing the negative in section II, I attempt in section III to explain what is at stake in such cases, and, using the Court's analysis in *Feist Publications, Inc. v. Rural Telephone Service Co.*³ as an example, to demonstrate why the Court should avoid resolving the disputes presented in cases like *Eldred*. Far from requiring aggressive protection against congressional overreaching, copyright laws deserve the most deferential standard of judicial review conceivable, a standard I define and defend in section IV.

I. SOURCES OF AMERICAN COPYRIGHT LAW

Copyright protection has been the subject of legislation in the United States for as long as there has been a United States. Under the Articles of Confederation, all of the States but one enacted general

2. See generally Jane C. Ginsburg, "No Sweat"? Copyright and Other Protection of Works of Information After *Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 375 (1992) (distinguishing between congressional interpretation of portions of the Constitution bearing on separation of powers or individual rights from congressional interpretation of the Copyright Clause).

3. 499 U.S. 340 (1991).

copyright laws.⁴ Copyright was important enough to receive specific attention at the Federal Convention of 1787 in its half of the Patent and Copyright Clause, which enumerated Congress's power to grant authors exclusive rights to their writings,⁵ and Congress enacted the first federal copyright statute during its very first session.⁶ But Congress did not stop there. Congress has, at the behest of copyright owners, repeatedly expanded the reach of copyright law over time.

The justifications offered by those seeking extensions of the copyright term have generally involved the need to provide compensation to authors, frequently with an emphasis on the author's family. Over the last 200 years, Congress has expanded copyright in response to calls from authors seeking to provide for their spouses,⁷ then their children,⁸ and eventually their grandchildren.⁹ But the hearings that eventually led to

4. See THORVALD SOLBERG, *COPYRIGHT ENACTMENTS OF THE UNITED STATES 1793-1906*, at 11-19 (1906).

5. The Patent and Copyright Clause gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

6. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802).

7. In response to the 1831 Copyright Act's extension of the initial term of copyright from 14 to 28 years, Noah Webster wrote: "This law will add much to the value of my property, and I cannot but hope I may now make dispositions of copyright which will make me comfortable during the remainder of my life, and secure to Mrs. Webster, if she should survive me, a decent independence." Letter from Noah Webster to William Chauncey Fowler (Jan. 29, 1831) in *LETTERS OF NOAH WEBSTER* 424 (1953). The 1790 Act had made provision for renewal of the original 14-year term but had vested the renewal right only if the "author or authors, or any of them, be living, and a citizen . . . of these United States, or resident therein" at the expiration of the first term. 1790 Act § 1. Thus, if the author died before renewal, the copyright lapsed. The 1831 Act gave the renewal power not only to the living author, but also to a deceased author's "widow, or child, or children, either or all then living," which may have explained Webster's reference to the benefit of the act to his wife's well-being. See Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436 (repealed 1870).

8. Appearing before Congress to support a life-plus-fifty-year term, Samuel Clemens (aka Mark Twain) testified:

I like the . . . extension, because that benefits my two daughters, who are not as competent to earn a living as I am, because I have carefully raised them as young ladies, who don't know anything and can't do anything. So I hope Congress will extend to them that charity which they have failed to get from me.

Arguments Before the Committees on Patents on S. 6330 and H.R. 19853, 59th Cong. 117 (1906) (statement of Samuel L. Clemens). Congress did extend the duration of copyright, but only to 56 years from the date of publication. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1947).

9. Seeking to extend the duration of copyright by an additional twenty years beyond the 1976 Act's life-plus-fifty year term, Marilyn Bergman testified that the "[e]xtension of copyright term will serve to encourage the tens of thousands of music creators who struggle to earn a living in this highly competitive business, and for whom the prospect of leaving an asset of their own making to their children and grandchildren is a powerful incentive." *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 before the Subcommittee on Courts and Intellectual Property of the House*

the Sonny Bono Copyright Term Extension Act of 1998¹⁰ (CTEA) included a new justification for the expansion of copyright: benefit to the work itself.

A public domain work is an orphan. No question about that. No one is responsible for its future life. But everyone exploits its use until that time certain when it becomes soiled and haggard and barren of all its former virtues. Who then – who then will invest the funds required to renovate it and to nourish its future when nobody owns it?¹¹

Jack Valenti made this argument with respect to older motion pictures. Without the incentive of copyright protection, the theory goes, no one will undertake the expensive task of preserving and distributing celluloid films, resulting in their loss to society. Either Congress bought one of the many policy rationales offered for the CTEA – the legislation was also justified as harmonizing American and international copyright protection and as providing benefits for American copyright owners in connection with use of their works abroad¹² – or the politics favoring passage were just too strong,¹³ because Congress passed the CTEA's twenty-year extension and applied that extension to the previously existing works about which Mr. Valenti had testified, again changing American copyright law.

But not all changes to copyright take place in Congress. Just as lobbyists have gone to Congress seeking to change the reach of copyright protection, litigants have gone to the courts, also hoping to alter the face of American copyright law. One of the most significant judicial changes to copyright happened in 1991, when the Supreme Court decided in *Feist Publications, Inc. v. Rural Telephone Service Co.* that facts are outside the scope of copyright.¹⁴

Comm. on the Judiciary, 104th Cong. 57 (1995) (statement of Marilyn Bergman, President, ASCAP).

10. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in relevant part at 17 U.S.C. §§ 301 to 304).

11. *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 before the Subcommittee on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 52 (1995) (statement of Jack Valenti, President of the Motion Picture Association of America).

12. *Eldred v. Ashcroft*, 123 S. Ct. 769, 781-82 (2003).

13. The CTEA also enlarges the rights of storeowners to play televisions and radios in their establishments, a provision disfavored by the proponents of term extension but accepted as a matter of compromise. See Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 204-05 & n.21 (2002).

14. 499 U.S. 340 (1991).

Feist Publications was an independent publisher of “area-wide” telephone directories, directories covering more than one telephone service area. Rural was a local telephone company that published its own directory for the service area it covered. To publish its directory, Feist copied names, telephone numbers, and some address information out of Rural’s directory. Because Feist admitted to copying the information from Rural’s directory, the only question was whether the subscriber information was copyrightable.¹⁵

Section 102(a) of the Copyright Act limits copyright protection to “original works of authorship,”¹⁶ meaning that the names and telephone numbers in Rural’s directory could not be copyrightable unless they were “original.” In the years leading up to the decision in *Feist*, the circuits had split over whether “originality,” in copyright parlance, permitted protection against the copying of facts based merely on the labor expended by the author in collecting those facts. *Feist* rejected this view, commonly referred to as the “sweat of the brow” doctrine, and instead insisted that originality required not only that the work originate with the author, but also that the work be the product of the author’s creativity. Rural may have *discovered* the facts contained in its directory, but Rural did not *create* them, and they were therefore not copyrightable.¹⁷ After *Feist*, it became clear that the standard for copyrightability was not merely originality, but *creative* originality.

The case could have been an unremarkable resolution of a circuit split but for the Court’s decision to ground its holding not only in the copyright statute, but also in the Constitution. “Originality,” the Court explained, “is a *constitutional* requirement.”¹⁸ Originality is inherent in the Copyright Clause’s use of the term “writings” (a widely accepted rule since the 1879 *Trade-Mark Cases*), and because facts cannot be original (by the analysis above), copyright protection for facts is unconstitutional.¹⁹ It was not enough to say that Congress *did not* extend protection to facts; Congress *could not* extend protection to facts.²⁰

The Court elaborated, explaining how denying protection to facts was also necessary to fulfill the “primary objective” of the Copyright

15. *Id.* at 342-44.

16. 17 U.S.C. § 102(a).

17. *Feist*, 499 U.S. at 347-48.

18. *Id.* at 346 (emphasis added).

19. *Id.*

20. The Court’s zeal is demonstrated by its repetition; in *Feist*, the Court cited the constitutional basis for the originality standard “no fewer than thirteen times.” Paul Goldstein, *Copyright*, 38 J. COPYRIGHT SOC’Y USA 109, 119 (1991). On the Court’s uncharacteristic willingness to reach the constitutional issue, see Ginsburg, *supra* note 2, at 378-79, 382 n.207.

Clause: “[t]o promote the Progress of Science and useful Arts.”²¹ Denying protection to facts leaves them available for future authors to use in creating their own works, which furthers progress. “This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”²²

The Court’s conclusion that promoting progress requires that facts be unprotected by copyright is a sweeping policy statement, one on which many reasonable minds differ.²³ In 1991, the Supreme Court, whether it recognized it or not, made profound copyright policy. They better have gotten it right, because *Feist* is a matter of constitutional law now – a Supreme Court decision that can be undone only by another Supreme Court decision or by constitutional amendment. *Feist*’s requirement of creative originality is a part of American copyright law that Congress cannot change.

Perhaps encouraged by the Supreme Court’s willingness in *Feist* to engage in constitutional policymaking, several plaintiffs, including Eric Eldred, filed suit seeking to strike down the CTEA’s extension of the copyright term for works already in existence, both as an improper exercise of the copyright power and as a violation of the First Amendment.²⁴ The heart of their Copyright Clause challenge was that extensions to subsisting works do not promote progress, a requirement embodied in the Progress Phrase.²⁵

21. *Feist*, 499 U.S. at 349 (quoting U.S. CONST. art. I, § 8, cl. 8). For simplicity, I shall refer to this part of the grant listed in clause 8 of section 8 as the “Progress Phrase.”

There are many opinions among commentators about how to parse the text of the Progress Phrase and whether copyright should promote the progress of “Science,” “Useful Arts,” or both, and even some discussion about what “Science” might mean. *E.g.* Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 44-54 (2002). In any event, it’s clear that at the very minimum that what must be promoted is “progress,” and no further specification seems relevant to understanding the aspiration reflected in the phrase. I shall thus confine my rhetoric to the promotion of progress generally.

22. *Feist*, 499 U.S. at 350.

23. See Victoria Smith Ekstrand, *Drawing Swords After Feist: Efforts to Legislate the Database Pirate*, 7 COMM. L. & POLY 317 (2002) (collecting sources). At the very least, the adoption by the European Union of database protection suggests that there is some social utility in granting such rights. See Directive 96/9/EC of the European Parliament of the Council of 11 March 1996 on the Legal Protection of Databases [1996] O.J. L77 20.

24. *Eldred v. Ashcroft*, 123 S. Ct. 769, 775 (2003).

25. The petitioners in *Eldred* made four copyright-related claims before the Supreme Court, two of which they styled as stemming from the “limited Times” language of the Copyright Clause. The first argument is that a copyright that is extended after it is created is not for a “limited” time. The Court rejected that argument out of hand, refusing to equate a “limited” copyright term as with “fixed” or “inalterable” one. *Eldred*, 123 S. Ct. at 778. The second argument was that the Progress Phrase informs what a “limited” time may be; on this view a grant that does not promote progress fails the test of the limited times language of the Clause. Br. for Pet’rs at 19, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618)

The *Eldred* petitioners disputed the supposed benefits of the CTEA, asserting that the act would not actually harmonize American copyright law with international copyright protection.²⁶ As for Jack Valenti's proffered justification for extending the copyright terms of existing works – the incentive to preserve older works – the *Eldred* petitioners countered that copyright term extension for existing works actually *discourages* preservation efforts:

Much of this film is “orphaned” because current copyright holders cannot be identified, and all of it is now decaying because of the unstable properties of nitrate-based film and even so-called “safety” film. [One of the petitioners] restores these old films when they pass into the public domain, but under the CTEA no films will pass into the public domain for 20 years.²⁷

Similarly, other *Eldred* petitioners have

built an archive of public domain movies which will make film available in a digital form to viewers and filmmakers around the world. The technical capacity of this archive is limited only by the number of machines linked to the network. . . . The copyright

[hereinafter *Eldred Petitioners' Brief*]. Regardless of the textual basis, the heart of this claim is that the CTEA's term extensions for existing works do not promote progress and should therefore be invalidated. The Court took this claim to mean that the CTEA should be struck because it does not promote progress, *Eldred*, 123 S. Ct. at 784, and I will discuss it as such. Their third Copyright Clause claim was that the CTEA, by failing to extract anything in return for its added protection, violates the Copyright Clause's requirement that all grants be in the form of a *quid pro quo*, a claim the Court handled by “demur[ring]” to the petitioners' claim that the Clause might require an exchange, but finding any requirement of an exchange satisfied, *id.* at 786, and distinguishing the Court's stronger exchange-oriented statements in the patent context, *id.* at 786-87. Finally, the petitioners argued that an extension of copyright in an existing work violates the Copyright Clause's requirement of originality as announced in *Feist*. The Court responded without even addressing the logic of the argument, merely pointing out instead that the case the petitioners cited for the originality requirement, *Feist*, had nothing to do with duration. *Id.* at 784. In addition to their enumerated claims, the Court treated the case as addressing whether the CTEA is “a rational exercise of the legislative authority conferred by the Copyright Clause,” which the Court found was satisfied by the same justifications as Progress Phrase challenge: “international concerns” and by responding to changing markets by providing an incentive to restore and release old films. *Id.* at 782, 785. The Progress Phrase claim was the petitioners' strongest, *id.* at 784, and I believe it is this claim that raises the most interesting questions about how the Court should review copyright laws for compliance with the Copyright Clause. While I do not wish to diminish the importance of the petitioners' First Amendment claims, my inquiry is limited to the Copyright Clause.

26. *Eldred Petitioners' Brief*, *supra* note 25, at 43-44.

27. *Id.* at 4 (citations omitted).

owners of many of these films cannot be identified. Their work thus cannot be made available on the Internet.²⁸

When a film becomes an “orphan,” it seems, is a matter of dispute.

The Court rejected the Progress Phrase challenge by holding that, as demonstrated by historical practice, the extension of copyright in an existing work does not run afoul of the Progress Phrase²⁹ and that, given Congress’s stated international and preservation-oriented justifications for the act, there was a “rational basis” for believing that the CTEA promotes progress.³⁰ But the Court consciously refused to question whether extending the term of copyright in order to respond to international increases in copyright terms and to provide an incentive to preserve and distribute older works served “progress” as defined by the Clause.³¹ The Court was willing to engage in rational basis scrutiny to determine whether the means served the stated end, but it would not second-guess Congress’s determination of an appropriate end. The Court found the CTEA to be a rational means of furthering progress but let pass Congress’s chosen definition of “progress” without specifying the level of review it had applied.

The Court’s heavy emphasis in *Eldred* on the historical practice of extending the copyright term for existing works makes the case of uncertain value as a precedent for challenges to more novel forms of regulation, whether promulgated under the Copyright Clause or under other Article I grants of authority.³² I would like to offer a more

28. *Id.* at 6.

29. *Eldred*, 123 S. Ct. at 785-86.

30. *Id.* at 785.

31. The Court came closest to addressing the definition of “progress” in its discussion of the petitioners’ Progress Phrase claim. *See id.* at 785. Although the Court repeatedly referenced congressional prerogative in choosing the means by which to effectuate the “Copyright Clause’s objectives,” the Court assiduously avoided any substantive discussion of what it means to “promote the Progress of Science.” *Id.*

32. The battle for the Copyright Clause is not over. Currently pending in federal court in Denver is a case that will provide a much more difficult challenge to a federal copyright law. *Golan v. Ashcroft*, No. 01-CV-1854 (D. Colo. filed Sept. 19, 2001), challenges both the CTEA (a claim that is likely precluded by the decision in *Eldred*) and the Uruguay Round Agreements Act, § 514, 17 U.S.C. § 104A. Section 104A “restores” copyright to works by foreign authors if the work fell into the public domain in the United States because (i) the author failed to comply with a formality imposed by the Copyright Act, (ii) the work was a sound recording fixed before federal copyright was extended to sound recordings in 1972, or (iii) the author lacked national eligibility. *See* 17 U.S.C. § 104A(a)(1)(A), (h)(6). Such a grant is arguably inconsistent with language in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966), a patent case in which the Supreme Court wrote in dicta that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available,” and there is no similarly pervasive historical practice of granting rights in works that have fallen into public domain. *But see Eldred*, 123 S. Ct. at 787 (some limits relevant to the patent power may not apply with

principled, and generally applicable, analysis of what drove the Court to a display of deference to Congress unseen since *United States v. Lopez*³³ was decided in 1995 and what the case has to say about the role of constitutional judicial review of federal statutes.

Challenges to copyright legislation based on the Progress Phrase are cases about ambiguity – not just ambiguity in the text itself, but ambiguity over what purpose the text serves in the constitutional order. Those arguing for the use of the Progress Phrase to restrict Congress's power can point to a body of case law suggesting that the Court will aggressively review federal laws for compliance with the Constitution's restrictions on congressional authority, but those who have argued for restrictive judicial review of the copyright power have ignored the *basis* for the Supreme Court's restrictive approach to interpreting congressional power. When one considers the rationales behind the various justifications for judicial review – including the Rehnquist Court's rediscovery of constitutional limits on Article I powers – it becomes clear that arguments for reading the Copyright Clause restrictively ignore the foundational premises of constitutional judicial review. Rather, calls for reading the Copyright Clause restrictively are merely attempts to employ the rhetoric of constitutional limitation to engage the Court in making socially optimal copyright policy. That the Court should not do so is plain not only as a matter of republican values, but also as a matter of relative competence to make copyright policy. Far from safeguarding constitutional values, challenges based on the Progress Phrase will place modern copyright law at the mercy of a group ill qualified to make modern copyright policy: the Framers.

II. WHAT COPYRIGHT CLAUSE CHALLENGES ARE NOT

A. *An Aside on Ambiguity*

Recognizing that *Eldred* is a case about constitutional ambiguity is hardly an insight, but it is important to note that the ambiguity at issue in *Eldred* is not primarily a textual one.

equal force to the copyright power); *Evans v. Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813) (No. 4,564) *aff'd* 13 U.S. (9 Cranch) 199 (1815) (upholding a private bill extending the duration of a previously expired patent). Sooner or later, the Court will have to decide whether Congress has a completely free hand when it comes to determining whether a particular copyright-related goal promotes progress.

On the possibility that Congress could turn to another power, see Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. (forthcoming 2004).

33. 514 U.S. 549 (1995).

That is not to say that the Copyright Clause is necessarily clear. For example, the phrase “limited Times” is clear in some ways and ambiguous in others. If one is asking whether copyright grants may be perpetual, “limited Times” is clear – they may not. However, if the question is whether the duration of a copyright can be extended after the grant is made, “limited Times” provides a less certain answer.³⁴

Application of the Progress Phrase almost always raises a nice question of textual ambiguity: What is “progress”? That is a question with as many answers as there are opinions,³⁵ but I do not believe that it is the important ambiguity at issue in cases challenging copyright laws for failure to promote progress. Indeed, my only point about the word “progress” (discussed more fully below) is that its inherent ambiguity cannot possibly be a reason for reading the Copyright Clause restrictively. The one point on which the Copyright Clause seems to be free of ambiguity is the question at the center of the disagreement in *Eldred*. There can be no general debate over whether the Clause means that any system of exclusive rights established pursuant to the Clause must promote progress;³⁶ the Clause clearly says that its objective is to promote progress. It hardly takes sophisticated textual analysis to determine that the promotion of progress is part of what the Clause is about.³⁷

Rather, the more fundamental ambiguity underlying *Eldred* stems from the constitutional implications of a charge that Congress has failed to abide by the restriction that its grants of exclusive rights promote progress.³⁸ In this regard, cases challenging copyright legislation on the basis of non-compliance with the Progress Phrase are very similar to the cases challenging Congress’s power under the Commerce Clause. Those

34. *Eldred*, 123 S. Ct. at 778 (comparing two meanings of limited: fixed and inalterable or restrained and circumscribed).

35. See, e.g., Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, Or Introducing The Progress Clause*, 80 NEB. L. REV. 754, 755, 794-95 (2001) (defining “progress” as used in the Progress Phrase as “spread,’ i.e. diffusion, distribution” in favor of other potential definitions, such as “advancement”).

36. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 859 (5th Cir. 1979) (citing Jeremy Phillips, *Copyright in Obscene Works: Some British and American Problems*, 6 ANGLO-AM. L. REV. 138, 165-66 (1977)).

37. See Solum, *supra* note 21, at 10-20.

38. The D.C. Circuit, for example, decided the Progress Phrase question by applying circuit precedent to the effect that the Progress Phrase provides no enforceable constraint on Congress’s actions. See *Eldred*, 123 S. Ct. at 777. See also Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 57 (2002) (at issue in cases like *Eldred* are questions about “the role of the Court in the development of domestic and international copyright policy”).

cases are less about the meaning of the Commerce Clause's limiting text – that Congress may only regulate “Commerce with foreign Nations, and among the several States, and with the Indian Tribes”³⁹ – than they are about *how* the limitations contained in the Clause will be enforced.⁴⁰ The meaning of the Commerce Clause was not at issue in either of the two most recent Commerce Clause cases; the dispute in both was about how much leeway the Court would give Congress in implementing the Clause's charge to regulate interstate commerce.⁴¹ Challenges based on the Copyright Clause's Progress Phrase raise the same question in a different context: How much leeway should the Court give Congress in implementing the Clause's grant of authority? How actively should the Court review copyright legislation for compliance with the Progress Phrase? It's one thing to say that copyright legislation should promote progress; it's quite another to say that a federal court should review copyright legislation to decide whether it promotes the court's definition of progress and strike legislation that does not.⁴² Defining what role the judiciary should have in policing Congress's exercise of the copyright power requires more than a textual argument about the meaning of the words in the Copyright Clause.⁴³ What is needed is a broader theory that explains when judges adjudicating constitutional cases should negate the results of the legislative process.

B. Justifications for Judicial Review

There are many powerful justifications available to support rigorous judicial review of legislation for consistency with the Constitution. Nevertheless, all theoretical justifications for judicial review begin with a disadvantage: the rather straightforward intuition that in a republic such as the United States it is the role of the legislature, not judges, to make

39. U.S. CONST. art. I, § 8, cl. 3.

40. Compare *United States v. Lopez*, 514 U.S. 549, 559 (1995) (If the statute “is to be sustained, it must be . . . as a regulation of an activity that substantially affects interstate commerce.”), with *id.* at 631 (Breyer, J., dissenting) (“Upholding this legislation would do no more than simply recognize that Congress had a ‘rational basis’ for finding a significant connection between guns in or near schools and . . . the interstate and foreign commerce they threaten.”).

41. See *id.* at 615-19 (Breyer, J., dissenting) (discussing the degree of deference afforded to Congress, but not disputing the majority's definition of commerce); *United States v. Morrison*, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) (arguing that, under the Framers' design, “politics, not judicial review, should mediate between state and national interests”); Karjala, *supra* note 13, at 241.

42. Austin, *supra* note 38, at 44-45 (suggesting that the Progress Phrase provides a reason for congressional action but perhaps not a judicially enforceable constraint on it).

43. See Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 *LOY. L.A. L. REV.* 123, 128-29 (2002).

policy. For unelected judges to discard the product of representative lawmaking and replace it with their own judgment about what the law should be is at least superficially undemocratic. The concern is captured nicely by the label applied to the problem in 1962 by Alexander Bickel: the counter-majoritarian difficulty.⁴⁴

In the face of the counter-majoritarian difficulty, the case for active judicial review has been made most commonly in a few broad (and frequently overlapping) areas. The first three track roughly the three categories described by the Supreme Court in footnote 4 of *United States v. Carolene Products, Inc.*:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see . . . ; on restraints upon the dissemination of information, see . . . ; on interferences with political organizations, see . . . ; as to prohibition of peaceable assembly, see

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities. . . . [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.⁴⁵

44. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (2d ed. 1986). Despite decades of treatments and responses, the counter-majoritarian difficulty's vitality is unquestionable. It presents, arguably, the central question facing every theory of judicial review. See Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. L. REV. 921 (2001) ("[O]ne might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today.").

45. 304 U.S. 144, 152-53 n. 4 (1938) (citations omitted). See also Michael B. Gerdes, Comment, *Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L.J. 1461, 1475 (1992) (suggesting the Court apply a permissive standard of review of the Copyright Clause and citing *Carolene Products*).

The Rehnquist Court's emphasis on maintaining the constitutional balance of power in the American system accounts for a fourth area of heightened judicial scrutiny.⁴⁶

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

One should not take my categories of arguments for judicial review as an attempt to provide a comprehensive taxonomy of theories of judicial review, nor do I mean to endorse the categories I've laid out as equally deserving of rigorous judicial review – my enterprise is descriptive, not normative. Similarly, my list fails to acknowledge theories advocating restrictive approaches to judicial review⁴⁷ and the contributions by commentators to elaborate on these categories (which I will address in modest detail below). Rather, my goal is merely to list the categories of cases that are generally regarded as deserving heightened judicial review. Despite the amount of attention constitutional judicial review has received from courts and commentators over the last several decades, the widely accepted theories supporting expansive judicial review fit roughly within these four categories, albeit with wide variations within them.

And if my groupings are not wholly mistaken, one thing is clear from even cursory consideration: review of legislation for compliance with the Copyright Clause falls within none of them.

C. Copyright and Fundamental Interests

The first category has perhaps received the most attention from commentators inquiring into the proper reach of judicial review. Although Footnote 4 itself refers to “specific prohibition[s] of the Constitution, such as those of the first ten Amendments,” many have

On footnote 4 more generally, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2378 (2002) (discussing the ramifications of footnote 4 and collecting sources thereon).

46. See William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 137-38 (2001); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001) (following the development of the Court's federalism jurisprudence in recent years).

47. E.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

argued that the category is more appropriately viewed as including cases involving basic or fundamental liberties. Alexander Bickel's own response to the counter-majoritarian difficulty, for instance, was not so much to justify judicial review as to limit its reach, in part by limiting its application to matters of principle and defining "principle" narrowly. Judicial review, he wrote,

extends over a broad range of public issues in our system . . . Ranging as widely as it has and as, on the premises I accept, there is no reason it should not, judicial review brings principle to bear on the operations of government. By "principle" is meant general propositions . . . ; organizing ideas of universal validity in the given universe of a culture and a place, ideas that are often grounded in ethical and moral presuppositions.⁴⁸

Others have elaborated on the moral and fundamental basis for intervention in some circumstances. My co-panelist, Christopher Eisgruber argues that the major advantage judges have over the legislature or electorate is their ability to remain *impartial* – the quality of responding to "the interests and opinions of all the people, rather than merely serving the majority or some other faction"⁴⁹ – when considering important matters of morality. According to Professor Eisgruber, matters of constitutional morality are likely to be implicated when the scope of individual civil rights (such as the right to the free exercise of religion or equal protection of the laws)⁵⁰ and fundamental liberties (as embodied in the doctrine of substantive due process) are in question.⁵¹ Bruce Ackerman has also argued for an expansive approach to the first category, contending that judges should apply heightened review in order to protect, as a matter of "higher law," "basic rights" that he claims go beyond those enumerated in the Bill of Rights.⁵²

48. BICKEL, *supra* note 44, at 199. See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959) (arguing that in order to be legitimate, the Court's decisions must be justified by reference to "neutral principles"). Bickel was unsatisfied with Wechsler's "neutral principles": "Which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental . . . to be vindicated by the Court against other values affirmed by legislative acts?" BICKEL, *supra* note 44, at 55. On Bickel's response to Wechsler, see G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 547 (2002).

49. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001). On "impartiality" as he uses it, see *id.* at 19.

50. *Id.* at 52.

51. *Id.* at 157-61.

52. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 743-44 (1985); see also EISGRUBER, *supra* note 49, at 115-20 (on the importance of "Unenumerated Rights"). Ronald Dworkin's "moral reading" of the Constitution implicates similarly fundamental principles, although citation to Dworkin itself demonstrates the overlap of the

But neither a more restrictive approach focusing on enumerated constitutional rights nor a broader view of implied fundamental interests supports application of a heightened standard when reviewing legislation for consistency with the Copyright Clause. Copyright law certainly has the potential to affect interests that might be characterized as fundamental. But that is not to say that the application of anything as grand as fundamental principles can resolve any of the ambiguities present in the Copyright Clause. Nor is consideration of the fundamental interests affected by the Copyright Clause helpful in uncovering its meaning.

Some commentators have argued that a permissive reading of the Copyright Clause is inconsistent with the Framers' general disdain for monopolies.⁵³ Even if that were true, it's hard to place "the right to be free from monopolies" among the kinds of fundamental interests typically protected by courts through a heightened standard of judicial review. The right to be free from monopolies is a right with purely economic consequences, and not since the *Lochner* Era have economic rights *as economic rights* received any heightened form of constitutional judicial protection. While regulation of some activities that are primarily economic – such as commercial speech – is subject to heightened scrutiny, that is so not because of the economic impact of the regulation but rather because of the direct effect of the regulation on some more fundamental interest.⁵⁴ Indeed, the Court made it clear when

categories. See RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1 (1996) (listing as the subjects of his discussion, "abortion, affirmative action, pornography, race, homosexuality, euthanasia, and free speech"), *id.* at 7-12 (describing his theory of moral reading).

53. See, e.g., *Eldred Petitioners' Brief*, *supra* note 25, at 23-27; Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 172-73 (2002); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 659-60 (1996); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1143-46; Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 56-57 (2000); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909 (2002). See also Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1062 (2001) ("The great evil in the Framers' mind, second only to the great evil of centralized, monarchical government, was the evil of state-sanctioned monopoly.")

54. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'") (quoting *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)). Cf. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 474 (1997) (government's use of assessments paid by growers for advertising does not violate the speech rights of the growers paying the assessment).

overturning *Lochner* that the right to engage in any particular economic activity is not so fundamental as to warrant heightened scrutiny.⁵⁵

The most likely candidate for a fundamental interest affected by copyright is the interest in free speech. Although copyright can affect speech interests by increasing the cost of speech – at least speech that would amount to infringement of a copyright⁵⁶ – it is difficult to come up with either a fundamental principle that necessarily determines the point at which the increased cost of speech is intolerable or a fundamental liberty to speak without paying the person whose speech one is copying.⁵⁷ Indeed, the wide acceptance of copyright by the framing generation itself suggests that the two interests are far from inconsistent.⁵⁸

Even if one assumes that the Free Speech Clause of the First Amendment represents a fundamental principle in tension with copyright,⁵⁹ it is hard to glean any sort of specific limit on copyright based on First Amendment protections.⁶⁰ How long a duration, exactly,

55. *United States v. Carolene Prods., Inc.*, 304 U.S. 144, 152 (1938).

56. See Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 553 (2000).

57. Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law*, 2 J. ON TELECOMM. & HIGH TECH. L. 17, 28-29 (2003).

58. *Eldred v. Ashcroft*, 123 S. Ct. 769, 774 (2003).

59. See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (autonomy-enhancing nature of the First Amendment as constraint on the ability to grant property rights in information) [hereinafter, Benkler, *Free as the Air*]; Dan T. Coenen & Paul J. Heald, *Ends/Means Analysis in Copyright Law: Eldred v. Ashcroft in One Act*, 36 LOY. L.A. L. REV. 99, 114 (2002) (Copyright Clause and Free Speech Clause have “shared purposes”); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (describing changes in both copyright doctrine and First Amendment doctrine that bring copyright and the First Amendment more clearly into conflict); Jed Rubenfeld, *The Freedom of Imagination, Copyright’s Constitutionality*, 112 YALE L.J. 1, 4 (2002) (describing a First Amendment “freedom of imagination,” which prohibits restrictions on the ability to imagine or communicate the product of one’s imagination). See generally Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353 (2000) (collecting theories of the First Amendment); Rubenfeld, *supra*, at 30 (discussing “Giant-Sized First Amendment Theories”).

60. See Eisgruber, *supra* note 57, at 29; Marci A. Hamilton, *A Response to Professor Benkler*, 15 BERKELEY TECH. L.J. 605, 610-12 (1999). Cf. Benkler, *supra* note 56, at 555:

The analysis that applies to the Copyright Act is suggestive of the relationship between the First Amendment and the Intellectual Property Clause. The constraints on laws imposed by the Intellectual Property Clause – the originality requirement, the exclusion of materials already in the public domain, and the express time limitation – are inherent constraints on the tension between property rights in information enacted within the confines of that clause, and the values of free speech.” (footnote omitted)

Id.; L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 36 (1987) (describing the “three free speech constraints implicit in copyright – publication, no copyright

is the maximum permissible in order to serve the speech interests represented by the First Amendment? Is the granting of exclusive rights to facts or ideas inconsistent with the First Amendment? If so, how can trade secret law be constitutional?⁶¹

This is not to say that legislation passed pursuant to the Copyright Clause should be immune from First Amendment scrutiny. Rather, my point is that there are no “organizing ideas of universal validity . . . grounded in ethical and moral presuppositions”⁶² underlying *any particular definition* of the copyright power described in the Copyright Clause. A copyright statute may fail First Amendment scrutiny, but that only means that, as a matter of constitutional law, Congress’s copyright power is limited by the First Amendment’s requirement that Congress not overly burden speech. It is another thing to say that the scope of the Copyright Clause itself can only be determined after one considers the relevant fundamental principles embodied in the First Amendment (if any there are).

Why does it matter? After all, a copyright law that violates an enforceable free speech principle will be struck regardless of whether the violation is identified as a violation of the First Amendment or as being beyond the copyright power. But the distinction is critical because, while free speech *principles* might be fundamental, First Amendment *doctrine* has never been absolute.⁶³ As the Court has expanded cognizable free speech interests, it has developed a number of devices to prevent them from overwhelming all others. Thus, in cases involving content-neutral legislation, the Court has adopted a rough balancing test to assure that the government interest being furthered is substantial and that speech rights are not being curtailed more than necessary to further that government interest.⁶⁴

Attempts to limit the Copyright Clause by calling upon the principles contained in the First Amendment are attempts to alter copyright doctrine by applying the First Amendment’s underlying

for ideas or governmental works, and fair use”).

61. Hamilton, *supra* note 60 at 611-15; Rodney Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. L. REV. 1099, 1127 (2002):

If the First Amendment were understood to create a presumptive right to publish anything that might be deemed ‘true,’ legal recourse for a vast array of injuries effectuated through the revelation of truthful material would be eviscerated, from the revelation of trade secrets to disclosure of information that one is contractually bound to keep confidential.

62. BICKEL, *supra* note 44, at 199.

63. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657 (1994) (“[N]ot every interference with speech triggers the same degree of scrutiny under the First Amendment.”).

64. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

principles without its corresponding doctrinal limitations. Does the First Amendment embody principles that are inconsistent with perpetual copyright or the granting of copyright in works that have fallen into the public domain? Maybe. It depends on one's view of the First Amendment. In fact, one's view of the First Amendment may determine whether any particular protection results in a net harm to speech at all, much less the degree of harm that has to be weighed against some non-speech-enhancing benefit.⁶⁵ But even if the First Amendment does contain such principles, that is only the beginning of the analysis as a matter of First Amendment doctrine. Free speech principles often give way when they are outweighed by competing legislative interests, but arguments that the reach of the copyright *power* is limited by principles contained in the First Amendment would prohibit all such regulation, without regard to its net regulatory effect. Thus, proponents of particular views of the First Amendment could obtain through the Copyright Clause that which they could not obtain through the application of the First Amendment itself: an absolute prohibition against copyright laws inconsistent with free speech values.⁶⁶ The availability of such arguments is not hypothetical – arguments supporting the Copyright Clause's denial of protection to facts based on the need to have access to facts for the purposes of debate raise precisely this problem.⁶⁷

Of course, the very availability of First Amendment review of copyright legislation⁶⁸ severely undercuts any call for vigorous judicial review of copyright laws on the basis of speech protections genetic to the Copyright Clause. Even if Congress is given *carte blanche* to exercise its copyright power based on its own interpretation of the Copyright Clause, legislation overly harmful to speech interests will be invalidated by the Court under the First Amendment itself. There simply is nothing

65. See Eisgruber, *supra* note 57, at 30-31.

66. See, e.g., *Eldred Petitioners' Brief*, *supra* note 25, at 13 (arguing for a standard of review for the Copyright Clause more rigorous than that applied to the Commerce Clause because, in part, "copyright values intersect with First Amendment liberties"); Malla Pollack, *Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 337, 383 (2002) (considering the Progress Phrase "a pre-First Amendment First Amendment," which would call for *per se* unconstitutionality of grants that do not serve the dissemination of speech). See also Hamilton, *supra* note 60, at 614-15 (A First Amendment-based theory of information regulation would likely result in "an absolute standard of review that would invalidate any legislation touching on information.").

67. E.g., Benkler, *Free as the Air*, *supra* note 59, at 395-96.

68. *Eldred*, 123 S. Ct. 769, 789-90 (2003) (copyright laws subject to challenge under the First Amendment).

to be gained by reading into the Copyright Clause potentially fundamental principles already protected by the First Amendment.

Although copyright allocates an important social resource, its effects on speech are much less direct than those resulting from many other economic regulations, such as the labeling requirements of the Food and Drug Act or the disclosure requirements of the Securities Act. But, while the disclosure requirements of the Securities Act must pass First Amendment review,⁶⁹ to argue that the First Amendment has anything to say about how one interprets the reach of the Commerce Clause inverts the analysis. The First Amendment can *limit* the commerce (or copyright) power, but that is quite a different argument from suggesting that it supplies *definition* to the text of Article I.

D. Majorities, Minorities, and the Politics of Copyright

The second and third classes of justifications offered for aggressive judicial review – overreaching that prevents the electorate from exercising political rights and systematic discrimination by the majority against the minority – have also received considerable attention from commentators. In his book *Democracy and Distrust*, for instance, John Hart Ely offered a proceduralist theory of judicial review, which he termed “representation reinforcement,” and justified judicial intervention based on the presence of a “malfunction” in representative government.

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.⁷⁰

These two breakdowns in the political system are often closely related; one of the most effective ways in which a majority can insulate its discrimination against the minority is to deny the minority access to the avenues of political change.⁷¹

69. SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 373-74 (D.C. Cir. 1988).

70. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

71. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991).

I will treat these two categories together, both because of their close relationship and because, when the conversation is limited to copyright, talk of systematic discrimination makes very little sense,⁷² or at least does very little to further the argument that the Copyright Clause deserves to be read restrictively.⁷³ Rather, if one were to describe the relevant “majority” and “minority” for copyright, the holders of economically valuable copyrights play the role of the minority at risk of legislative discrimination by those of us who would gain from relaxing copyright protection.

That the very few owners of valuable copyrights are not a helpless minority is explained by public choice theory – a theory about how the majority’s political rights might be nullified, if not suppressed. Public choice theory posits that small groups of individuals who place great value in a set of shared interests (interest groups) will consistently be able to control the legislative agenda in the face of a larger, but diffuse, majority. Such interest groups can effectively commandeer representative government on the relevant issue and through it shift wealth (in the form of legal rights, tax breaks, or whatever) from the majority to their members based not on the merits of such a legislative choice but merely as a result of the group’s coordinated political influence.⁷⁴ This is, in a

72. Typically, the form of discrimination considered worthy of heightened judicial review is discrimination based on some seemingly irrelevant criteria, such as race or sex. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (race); *Craig v. Boren*, 429 U.S. 190 (1976) (sex). However, even a broader view of suspect discrimination, e.g. *Ackerman*, *supra* note 52, at 735 n.40, 745 (discrimination against women, homosexuals, and the poor), fails to provide support for heightened judicial review of legislation for consistency with the Copyright Clause.

73. One pair of commentators have suggested that the intellectual property regulations should receive deferential review because they are closely analogized to federal property rights, and that “with respect to a series of constitutional issues involving property – the Supreme Court currently employs a deferential standard in reviewing legislation.” Schwartz & Treanor, *supra* note 1, at 2402. In such cases it is not the characterization of the measure as a property regulation, but rather the absence of some *other* constitutional interest, that results in lowered scrutiny. See *id.* at 2401 (distinguishing economic legislation generally, and intellectual property regulation specifically, from the types of legislation to which Ely’s process-based justification of heightened judicial scrutiny are more readily applicable); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (arguing that the Takings Clause should trigger heightened scrutiny of regulations whose impact is felt by discrete and insular minorities based on a political-process theory of judicial review). A statute that regulates property rights in a way implicating the *Carolene Products* categories (such as a regulation conferring different property rights to the same class of property based on the race of the owner) will be subjected to the same level of scrutiny as will a similarly flawed law having nothing to do with property (such as a regulation setting different speed limits for the same stretch of road based on the race of the driver).

74. My summary of public choice theory does justice to neither the theory’s subtleties nor its many forms. For a more thorough summary, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* ch. 1 (1991).

slightly more developed form, Madison's concern about the destructive potential of "faction."⁷⁵

Many who have called for active judicial review of Congress's exercise of the copyright power have pointed to the problem of public choice as demonstrating a breakdown in the political process that only the Court can correct. The argument goes something like this: Owners of valuable copyrights compose a powerful interest group, while the public (and future generations), which will bear the cost of enhanced copyright protection, are a diffuse group. The disparity of incentives between these two groups is reflected in their relative ability to influence Congress's copyright legislation, which systematically leads to increases in the scope and duration of copyright. This systematic push toward enlarging copyright is the realization of a public choice problem that demonstrates a breakdown of the political process. Breakdowns of the political process are precisely the kinds of problems for which a proceduralist theory of judicial review (such as Ely's) would justify judicial intervention. Therefore, judges should read the Copyright Clause restrictively in order to correct for the public choice problem inherent in Congress's exercise of the copyright power.⁷⁶

75. See THE FEDERALIST NO. 10 at 78 (James Madison) (Clinton Rossiter, ed. 1961). To Madison, "faction" is "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or interest, adverse to the rights of others citizens, or to the permanent and aggregate interests of the community."

Ironically, Madison himself addressed this question, arguing that the owners of intellectual property rights were more likely to be victims than winners in the political process:

Is there not also infinitely less danger of [the] abuse [of monopolies] in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON 21 (1958).

76. See, e.g., *Eldred Petitioners' Brief* at 27-28; Benkler, *supra* note 56, at 571 ("What is important to understand for contemporary purposes of institutional design is that insofar as the progress of knowledge is concerned, the basic assumption is that the politics of faction will lead to too much recognition of exclusive rights at the expense of the common good."); Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 FLA. L. REV. 989, 993 (2000):

The process, however, seems to have failed with the [CTEA], because massive extensions of future copyrights were enacted – with no real support for such encroachments upon the public domain and the public interest – just to gain retrospective protection of existing copyright terms. John Hart Ely has discussed an analogous problem in the larger area of judicial review generally.

The argument proves too much. Copyright does not present any special form of public choice problem; it is the same public choice problem that exists whenever a well-coordinated minority has much to gain from the enactment of a slight burden on a diffuse majority. If the presence of legislative capture or the existence of rent-seeking were an adequate basis for heightened judicial scrutiny, *every* exercise of congressional power that could favor a well-organized minority over the majority demands vigorous scrutiny.⁷⁷ “The rent-seeking model, if taken seriously, would require much broader judicial review than even the *Lochner* Court ever contemplated.”⁷⁸

Some have argued that copyright presents an unusually severe public choice problem because the burden imposed by copyright expansion is not apparent to average voters; copyright expansion has the effect of a government subsidy, but its implementation is in the form of a hidden tax.⁷⁹ That hardly distinguishes copyright from other opportunities for

Id.; Marci A. Hamilton, *An Evaluation of the Copyright Extension Act of 1995: Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J., 655, 659 (1996) (“The marketing and concomitant lobbying power of the copyright industries, and their repeated victories at the expense of individual authors (most particularly in the work-made-for-hire context) is a clarion call to the Court to read the Copyright Clause with fresh attention and historical understanding.”); Karjala, *supra* note 13, at 245-46 (“Especially where special interests have managed to convince Congress to pass legislation that is directly contrary to the express constitutional purpose, some independent review of the basis for the legislation is imperative.”); Merges & Reynolds, *supra* note 53, at 52-56 (public choice one of three reasons for “Taking the Patent and Copyright Clause Seriously”). See also Brief of Amici Curiae Jack M. Balkin, Yochai Benkler, Burt Neuborne, Robert Post, and Jed Rubenfeld at 19, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (01-618) (“Copyright legislation typically produces . . . systematic structural distortions of the political process [because of the relative strength of the interests of copyright owners and those harmed by greater copyright protection], and these distortions will always skew copyright legislation towards ever-increasing protection, with only occasional exemptions where specific harms are directly borne by cohesive interest groups such as broadcasters, cable operators, or software producers.”) (arguing for heightened judicial review under the First Amendment).

77. FARBER & FRICKEY, *supra* note 74, at 68 (listing “tariffs, defense contracts, public works projects, direct subsidies, government loans, and a host of other activities”). See also Ackerman, *supra* note 52, at 739-40 (When considering whether to apply heightened scrutiny, the ability of the harmed class to represent itself in the political process should be of little import. Rather, what matters is whether there is discrimination against the group in a way inimical to the fundamental values of the Constitution.).

78. FARBER & FRICKEY, *supra* note 74, at 68; Schwartz & Treanor, *supra* note 1, at 2409 (“Logically, applied, the [Eldred petitioners’] position would lead to a deeply counter-majoritarian approach to judicial review [That] approach contains precisely the same flaws that its critics find in *Lochner*.”).

79. See, e.g., Heald & Sherry, *supra* note 53, at 1168-74; Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of the Government*, 30 SW. U. L. REV. 1 (2000).

Although public choice theory is concerned with transparency, that concern is primarily with the transparency of the legislative process, not the transparency of the effects of the legislation, which have little to do with the validity of the reasons for the legislation’s

legislative rent-seeking. The same opacity is present in the case of tariffs, which also serve as subsidies that are paid by consumers in the form of higher prices for (often downstream) goods.⁸⁰ But only the most radical devotee of public choice theory would argue that Congress's exercise of the power to set tariffs, to use Madison's example,⁸¹ should be policed by courts to ensure that Congress has not fallen prey to special interests.⁸²

The Framers were concerned about the possibility of legislative capture by economic interests, to be sure, but their solution was not aggressive judicial review. Instead, the Constitution's solution is to gather a large group of geographically dispersed individuals with divergent interests under a republican government.⁸³ Arguments that we should rely on judicial review as the solution to copyright-owner rent-seeking are arguments that we should respond to a problem with representative government by discarding it; it is a solution to a problem identified by the Framers that ignores the very system they put in place.

Certainly intellectual property regulation presents opportunities for small, well-organized groups to seek and obtain rents from society; such groups have done so consistently. The same can be said of dozens of areas of federal regulation, yet we don't hear calls for *constitutional* limitations on Congress's ability to levy tariffs or provide senior citizens with prescription drug benefits. Other than an awkwardly worded clause in the Constitution to provide a textual hook, what makes copyright so special? More relevantly, how can such widely applicable concerns about the legislative process justify judicial intervention in applying the ambiguous text of the Copyright Clause? The presence of rent-seeking in copyright cannot be enough to warrant denying Congress the power to make copyright policy.

passage. Thus, public choice theory commonly concerns itself with the problem of legislators avoiding responsibility for legislation by delegating policymaking responsibility to others. See FARBER & FRICKEY, *supra* note 74, at 136-39. See also ELY, *supra* note 70, at 131-34 (arguing that judicial review is appropriate to correct for attempts by the legislature to reduce its accountability to the electorate by delegating policymaking authority to administrative agencies). Again, that problem is no more likely to arise in the context of copyright than it is to arise in any other area of economic regulation.

80. See Stephen P. Magee, *Endogenous Protection: The Empirical Evidence*, in PERSPECTIVES ON PUBLIC CHOICE 526, 548 (Dennis C. Mueller ed., 1997).

81. THE FEDERALIST NO. 10, *supra* note 75, at 80.

82. *Cf.* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 412 (1928) ("Whatever we may think of the wisdom of a protection policy [as embodied in an import tariff], we can not hold it unconstitutional.")

83. THE FEDERALIST NO. 10, *supra* note 75, at 83-84. See also *id.* at 78 (rejecting the reduction of liberty as a solution to the problem of faction).

E. Copyright and the Balance of Power

Nor do arguments that the Court take an active role in policing the copyright power fall into the final category of justifications for aggressive judicial review: maintenance of the relative power of the various competitors for power in the constitutional system. The need for judicial review in such cases is obvious: The constitutional scheme relies heavily for its stability on dividing power among various governmental entities, and the entities cannot themselves be trusted to decide the boundaries of their own power.⁸⁴ For every increase in the ability of one to control another, there is a corresponding loss by the one being controlled. The Court, with its limited ability to make or implement policy and its consequently greater degree of impartiality, is the best judge of the proper boundaries between the Constitution's various governmental entities.⁸⁵

That maintaining the balance of power among governmental entities can be a basis for vigilant judicial review will hardly come as news to Court-watchers. Although the Court has consistently enforced the separation of powers among the branches of the federal government,⁸⁶ it has been particularly aggressive of late in its review of laws that potentially alter the relationship between the federal and state governments. Concern over maintaining the federal-state balance of power is perhaps most apparent in the Court's resurgent Tenth and

84. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001) (highlighting the incentives to aggrandize and the lack of any political constraints on Congress's doing so); Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 795-99 (1995) (arguing that not only are individual members of Congress more dependent for reelection on national parties than they are on state interests, but also that they have an interest in increasing federal control in order to increase the size of the "pool of resources or 'pork'" out of which they can distribute political favors to their supporters).

85. EISGRUBER, *supra* note 49, at 201.

Professor Eisgruber would further cabin judicial intervention in matters of institutional balance to those cases particularly served by the Court's increased degree of impartiality, in particular, those cases involving a moral constraint on governmental action. Thus, according to Professor Eisgruber, the Court's intervention in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which involved religious liberty, was justifiable, but its broader intervention under the Commerce Clause is not. EISGRUBER, *supra* note 49, at 201.

86. *See, e.g.*, *Clinton v. New York*, 524 U.S. 417 (1998) (striking the Line Item Veto Act); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that the Comptroller General, who is removable by Congress, may not carry out executive powers); *INS v. Chadha*, 462 U.S. 919 (1983) (striking unicameral legislative review of the Attorney General's immigration decisions); *Buckley v. Valeo*, 424 U.S. 1, 137-43 (1975) (per curiam) (limiting the powers of the Federal Election Commission because its members were not appointed in accordance with the Appointments Clause).

Eleventh Amendment jurisprudence,⁸⁷ but it is also at the root of the Court's Commerce Clause cases.

United States v. Lopez,⁸⁸ the 1995 case that signaled a shift from the post-New Deal Court's attitude of decided deference to Congress's own sense of the scope of the commerce power, reflects the Court's perception of the system of enumerated powers embodied in Article I, Section 8 as designed by the Framers expressly to prevent the federal government from overreaching into the sphere of state control: "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."⁸⁹ Justice Kennedy's *Lopez* concurrence argues that the most important issue in any Commerce Clause case is the adverse effect of federal regulation on state power and that the potential for harm to the balance of power is the very reason why the Court must not defer to Congress in interpreting the reach of the Commerce Clause.⁹⁰ The

87. See *Alden v. Maine*, 527 U.S. 706, 749 (1999) ("A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals."); *Printz v. United States*, 521 U.S. 898, 922 (1997) ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States.").

The Court's lack of deference is equally, and given the similarity of the issues, unsurprisingly present in its refusal to grant Congress much discretion to interpret the scope of its power to enact laws pursuant to Section 5 of the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (Even if the Religious Freedom Restoration Act (which invalidated neutral state laws that "substantially burden" the free exercise of religion) could be interpreted to provide a weak test for state laws, "the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."); *id.* at 536 ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 512 (2000) ("[O]ne might even say that, having worked so hard in *Seminole Tribe* to establish state Eleventh Amendment immunity from suits predicated upon federal commerce power, the Court was not about to cede to Congress free rein to override that immunity under Section 5."). But that is not to say that Section 5 provides Congress no discretion. See *Nev. Dept. of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1983 (2003) (applying the congruence and proportionality test to find the Family Medical Leave Act a valid, prophylactic exercise of its Section 5 power to prevent States from violating the Fourteenth Amendment's prohibition against gender discrimination, even though the FMLA is not limited in its reach to actions that amount to unconstitutional gender discrimination).

88. 514 U.S. 549 (1995).

89. *Id.* at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

90. *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring):

Although it is the obligation of all officers of the Government to respect the

Court built upon the federalist justification for its willingness to intervene in the Commerce Clause context in *United States v. Morrison*, a case holding that Congress exceeded its commerce power in granting a private right of action to redress gender-motivated violence.⁹¹ According to the Court, given the paucity of findings that gender-motivated violence has a substantial effect on interstate commerce, “the concern we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well-founded.”⁹² The Court also emphasized the win-lose nature of Commerce Clause questions as a reason for giving a wide berth to the Clause’s limits in 2001’s *Solid Waste Agency of Cook County v. United States Army Corp of Engineers*.⁹³ “Congress does not casually authorize administrative agencies to interpret a statute to push the limit of the congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”⁹⁴

In an effort to call upon the Court’s attitude of intervention in such cases, many, including the plaintiffs in *Eldred*, have argued that the Court should apply a similar level of review to congressional attempts to broaden copyright power.⁹⁵ Indeed, such an argument was the centerpiece of Judge Sentelle’s *Eldred* dissent in the D.C. Circuit.⁹⁶

constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far. (citations omitted)

Id. See also Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 130 (“*Lopez* limits federal power in the name of state autonomy . . .”).

91. 529 U.S. 598, 601-02 (2000) (describing the Violence Against Women Act, 42 U.S.C. § 13981).

92. *Morrison*, 529 U.S. at 615. See also *id.* at 610-11 (the Commerce Clause’s limitation to economic regulation prevents Congress from exercising police powers, which the Framers reserved to the States); *id.* at 618-19 (Congress may not exercise the general police power, which is reserved to the States); Buzbee & Schapiro, *supra* note 46, at 138.

93. 531 U.S. 159 (2001).

94. *SWANCC*, 531 U.S. at 172-73. The dissent in *SWANCC* also viewed the question in such terms; it just differed on whether the power implicated by the Clean Air Act is a traditional state power. See *id.* at 191 (Stevens, J., dissenting).

95. See, e.g., Coenen & Heald, *supra* note 59, at 110 (arguing that the Court should apply heightened review to the CTEA because of concerns over accountability, as it did in *Lopez*); Epstein, *supra* note 43, at 138-44 (arguing that the Court should apply greater scrutiny to the CTEA than to Commerce Clause cases, which Epstein believes deserve something approaching intermediate scrutiny); Karjala, *supra* note 13, at 239-50 (arguing that the CTEA might pass pre-*Lopez* rational basis scrutiny but that Commerce Clause scrutiny is too lenient for copyright legislation because the Copyright Clause has so many more limitations than the Commerce Clause).

96. Judge Sentelle wrote:

Carrying on Judge Sentelle's sentiment, the *Eldred* petitioners invoked the entirety of the Court's recent federalism jurisprudence in their Supreme Court brief,⁹⁷ and explained "In *Lopez* and *Morrison*, the principle of enumerated powers supported the values of federalism. But there could be no principled reason why federalist limits should be judicially enforced while copyright's limits should not."⁹⁸

I would like to suggest one.

While vigilant judicial review in the federalism context is a response to the possibility that Congress has taken power from the States, thereby altering the balance of power so carefully established by the Constitution, the exercise of the copyright power presents no similarly fundamental danger to the constitutional order because exercise of the copyright power does not in any way impinge on the authority of the States. Of course, exercise of the copyright power *could* impinge on the authority of the States, but only by altering the rights of the States to regulate.⁹⁹ If the Copyright Act presents a problem worthy of judicial review under the federalism cases, it is Section 301 of the Copyright Act, which expressly takes power from the States by preempting state copyright laws.¹⁰⁰ But

It would seem to me apparent that [*Lopez's*] concept of "outer limits" to enumerated powers applies not only to the Commerce Clause but to *all* the enumerated powers, including the Copyright Clause, which we consider today. In determining whether the legislation before it in such cases as *Lopez* exceeded the outer limit of the authority granted under the Commerce Clause, the *Lopez* Court laid out a precise outline concededly not applicable by its terms to the construction of other clauses, but I think most useful in conducting the same sort of examination of the outer limits of any enumerated power.

Eldred v. Reno, 239 F.3d 372, 381 (D.C. Cir. 2001), *rev'd sub nom*, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (Sentelle, J., dissenting).

97. See *Eldred Petitioners' Brief* at 11-12 (citing Judge Sentelle's dissent as well as *Lopez* and *Morrison* (Commerce Clause), *City of Boerne* (Tenth Amendment and Section 5 of the Fourteenth Amendment), and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Eleventh Amendment and Section 5 of the Fourteenth Amendment)).

98. *Eldred Petitioners' Brief* at 13.

99. Or by making the States amenable to suit for copyright infringement. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Eleventh Amendment immunity for States from patent infringement suits); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (same for Lanham Act claims). The Copyright Act explicitly provides for liability on the part of States, Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) (codified at 17 U.S.C. §§ 501(a), 511), a provision widely considered to be unconstitutional. See *Chavez v. Arte Publico Press*, 180 F.3d 674 (5th Cir. 1999); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1332 (2001).

100. See 17 U.S.C. § 301(a):

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by

alterations to the *scope or duration* of copyright do not shift power from some other entity (state or federal) to Congress – they merely alter the legal rights of private parties, which is not the sort of constitutional self-dealing that requires vigilance by the Court under any theory of judicial review concerned with the balance of governmental powers. Instead, copyright legislation presents only the potential for – constitutionally speaking – the milder form of congressional self-dealing described by public choice theory. And, as demonstrated above, the potential for rent-seeking by private special interest groups is far too broad a justification to support heightened judicial review in the copyright context.

Simply put, copyright does not go to the essence of the constitutional framework in the same way that federalism does, and the Court's decision in *Eldred* reflects the distinction. So long as Congress sticks to altering the legal rights of private parties instead of governmental entities, the Court has little interest in second-guessing its decision to do so, and rightly so. The Court struck the Violence Against Women Act not because it altered the legal rights of Christy Brzonkala and Antonio Morrison in an unconstitutional way but rather because it altered the regulatory rights of the federal and state governments in an unconstitutional way.¹⁰¹ No similar alteration of governmental powers is presented by any substantive change to the copyright laws.

Although the Rehnquist Court has been willing to enforce limits on the reach of Congress's Article I powers, the theory underlying that willingness does not extend to review of copyright legislation. Congress's self-interest in altering the federal-state balance of power in its favor, along with the singular importance of maintaining that balance in the larger constitutional scheme, calls for close review of any legislation that expands Congress's regulatory universe. But copyright presents neither the same potential for congressional avarice nor the same degree of harm in the event of congressional overreaching. Assuming that Section 301 is constitutional, there simply is no inter-governmental balance of power to be maintained in matters of copyright. Aggressive judicial review of

this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Of course, §§ 501(a) and 511 similarly implicate problems of federalism. *See supra* note 99.

101. *See Morrison*, 529 U.S. at 627 (“If [Brzonkala’s] allegations [of sexual assault by Morrison] are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.”). *Cf. New York v. United States*, 505 U.S. 144, 166 (1992) (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”).

copyright legislation cannot be justified by reference to the Court's federalism jurisprudence.

F. Copyright and the Policy of Progress

The only constitutional issue raised by the CTEA and most expansions of copyright is quite narrow and specific to the Copyright Clause itself: Is there a need for the Court to review copyright legislation to determine whether it *actually promotes progress*?¹⁰² *Eldred* (at least as limited to the Copyright Clause) did not require resolution according to fundamental interests, the correction of some profound corruption of the democratic process beyond the normal concerns of public choice, or the protection of the Constitution's very existence through preservation of the distinction between the federal and state governments.¹⁰² Stripped of pretense, *Eldred* and cases like it are simply appeals to the Court to intervene by second-guessing Congress's conclusion that a particular piece of copyright legislation promotes progress. In the balance of the paper, I will endeavor to explain why such invitations are properly declined.

III. THE COURT AS COPYRIGHT POLICYMAKER

The starting place for any discussion of whether the Court should intervene in the decisions of Congress must be the premise that the Court should only intervene when there is a clear justification for doing so. That is the premise underlying the counter-majoritarian difficulty; it is a normative preference for democratic self-government and is articulated in the Constitution's conscious choice of the republican form of government. When the Constitution's text is not clear, the Constitution's preference for representative government requires the Court to defer to Congress in the absence of some larger justification for intervention, be it moral or constitutional. The arguments for judicial intervention discussed in the previous section represent such justifications. The question is whether there is an equally powerful justification for an interventionist approach to the Copyright Clause.

Our preference for republican lawmaking may itself be a strong enough argument to rebut assertions that the Court is the right political entity to make copyright policy. But I would like, for the moment, to

102. See Ginsburg, *supra* note 2, at 376 (distinguishing the lack of Supreme Court interest in enforcing "internal" limits on Article I powers from its willingness to review legislation for violations of "external" limits, such as "separation of powers, federalism, and individual rights concerns").

ignore the intrinsic value of democratically made policy and focus simply on the Court's capacity to make good copyright policy with the tools the Constitution has given it. Even if we forget the Constitution's preference for republican government, the Court's institutional weaknesses caution against giving it any meaningful role in regulating copyright – a concern reflected by the many bromides the Court has offered us about its relative ability to make economic policy.¹⁰³ When we remind ourselves of the Court's place in the constitutional framework, the case for aggressive judicial review of the copyright power dissolves completely.

The best way to demonstrate the point is through examination of the Court's most audacious attempt at constitutional copyright policymaking in the last 130 years: *Feist Publications, Inc. v. Rural Telephone Service Co.*

A. *Feist and the Policy of Denying Protection to Facts*

The policy announced by the Progress Phrase is the promotion of progress, but whether a particular protection will actually promote progress is often not only unknown, it's unknowable. A prime example is copyright's awarding of less protection to non-fiction works than to fictional ones. The degree of protection afforded by copyright decreases as the work becomes more factual,¹⁰⁴ to the point that facts are not protected at all, which is the rule of *Feist*. *Feist* maintains that denying protection to facts is not just textually required by the word "writings," it's good copyright policy. Copyright's denial of protection to facts "is the means by which copyright advances the progress of science and art."¹⁰⁵ The theory supporting that policy choice is that the extra incentive gained from providing protection would be outweighed by the lost ability to freely copy the facts, with a net loss to progress.¹⁰⁶ Is that correct? It's impossible to say.

We don't know what would happen if Congress extended copyright protection to facts. Perhaps there would be a flood of inexpensive fact-based works if their creators could easily recapture the cost of creating

103. See, e.g., *General Motors Corp. v. Tracy*, 519 U.S. 278, 308 (1997) (noting that the Court is "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them").

104. *Nash v. CBS, Inc.*, 899 F.2d 1537, 1542-43 (7th Cir. 1990) (Easterbrook, J.).

105. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

106. E.g., William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 365 (1999) ("Only original works promote the progress of science; unoriginal material does not promote the progress of science, and is therefore constitutionally incapable of protection.").

them, with consumers benefiting from that broader availability even if they themselves do not purchase the works (for instance, they could benefit from lower prices because suppliers of goods are able to reduce their costs by buying and using certain fact-based works). New protection might enable new modes of distribution for such works that entail lower transaction costs.¹⁰⁷ Currently, authors of unprotectable fact works can prevent free distribution of their works only through such self-help measures as encryption technology or tightly enforced licensing arrangements, both of which can be unwieldy and expensive. Many have offered theoretical models to support or attack protection of facts,¹⁰⁸ but no one can prove what the net effect to progress would be of granting copyright-like protection to facts.

Indeed, the only thing that is certain is uncertainty; some forms of fact protection would likely promote progress, while others would surely hinder it.¹⁰⁹ Trade secret law, for instance, is an example of a narrow form of protection for facts that many believe encourages innovation.¹¹⁰ One can easily imagine weaker forms of copyright in facts that would have a net positive effect on progress.

But Congress cannot extend any form of copyright protection to facts, nor can the Court allow it to, because of the decision in *Feist*. The durability of constitutional adjudication makes it particularly ill suited to deciding what promotes progress given the rapidly changing economics of intellectual property. Even if *Feist* was correctly decided as a matter of constitutional law, it was breathtakingly short-sighted as a matter of policy. Twelve years ago, our ability to share information was still limited to paper, 1200 baud modems, and floppy disks. Regardless of whether one agrees with extending protection to facts, it is undeniable that no one (and certainly not the Court) understood the economic ramifications of the *Feist* decision in 1991.¹¹¹ We don't understand *Feist's* ramifications in 2003 because we still can't foresee how industry and information technology will evolve. Intellectual property is in a constant struggle to adapt to technological and economic change, which

107. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449-50, 1455 (7th Cir. 1996) (Easterbrook, J.) (describing the efficiencies to be had from allowing authors control over fact works); Ginsburg, *supra* note 2, at 387 (data protection may further free speech interests by encouraging wider dissemination of fact-based works).

108. See Ekstrand, *supra* note 23 (collecting sources).

109. Ginsburg, *supra* note 2, at 378.

110. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474, 493 (1974).

111. Rochelle C. Dreyfuss, *A Wiseguy's Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195, 221-22.

makes it particularly dangerous to etch any particular vision of “progress,” or what it takes to promote it, into constitutional stone.

The longevity of constitutional rules is not the worst problem presented by constitutional judicial review of copyright legislation. Indeed, one could argue that it is no easier to get Congress to change its mind than it is to get the Court to, a problem that’s exacerbated in the case of an established entitlement. It would probably be no harder to get *Feist* reversed than it would be to get Congress to repeal the CTEA.

What makes the Court’s approach in *Feist* so troublesome is that, despite its sweeping policy pronouncement, the Court made no serious inquiry in *Feist* into what “progress” is, much less whether the creative originality requirement *actually promotes* it. There are two reasons why the Court never did that analysis: First, the meaning of the Copyright Clause was not directly at issue in *Feist*. The Court, and both parties, considered the outcome in *Feist* to be dictated by the statute. Although the Court interpreted Section 102 in light of the Constitution, the constitutional text did not control the case’s outcome.¹¹² Second, and more importantly, the Court did not bother to analyze the policy effects of its ruling because it didn’t think it was making a policy decision. The Court considered its statement in *Feist* to be an interpretation of the Constitution and not a decision about which means, as a matter of fact, best promote progress. Interpretation of the Constitution is a matter of text and precedent, not policy and economic outcomes. In *Feist*, the thoughts of Justice Samuel F. Miller, author of the two 19th-century cases on which *Feist* primarily relied,¹¹³ grossly outweighed anything that someone like Jack Valenti or the *Eldred* plaintiffs could have said about whether the Court’s decision to exclude facts from copyright protection would necessarily promote progress.

B. The Framers’ Copyright

Reliance on history as a guide to the appropriate exercise of the copyright power is an uncertain venture given the mixed signals

112. Ginsburg, *supra* note 2, at 378-79; *id.* at 382 & n. 207.

113. Miller authored both *The Trade-Mark Cases*, 100 U.S. 82 (1879), and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). Of course, even if Justice Miller had a perfect vision of copyright, it’s not at all clear that the Court in *Feist* correctly applied his guidance or that the Court had an accurate understanding of history. See Ginsburg, *supra* note 2, at 374-75; Ochoa & Rose, *supra* note 53, at 930 (describing the grant of a private copyright to a book of “tables of discount and interest” in 1828 and pointing out that, “[a]t that time, the investment of time and money [the bases rejected in *Feist*] was at least arguably an acceptable basis for copyright protection . . .”).

contained in what little the Framers did say about copyright.¹¹⁴ Even if we could be confident in the Court's ability to deduce what the Framers thought copyright should be, it's not at all clear that we should want them to. And therein lies a second problem of relative competence – not the relative competence of the Court and Congress but the relative competence of the *Framers* and Congress. Unlike the Framers, Congress evolves as an institution and it continues to accumulate knowledge about markets for intellectual property, both as an abstract matter and because those markets change over time. Newton turned out to have an incomplete understanding of physics; why do we think that Madison had a more complete understanding of intellectual property?

We know almost nothing about the process of authorship or of authors' responsiveness to the incentives offered them by the copyright system; it is virtually certain that the Framers knew even less. It does not appear to have been a topic of much importance to them. The *Records of the Federal Convention* show no debate over the Patent and Copyright Clause, nor does there appear to have been more than the slightest mention of copyright at any of the state ratifying conventions.¹¹⁵ What little discussion there was at the state conventions indicates that the primary import of the Patent and Copyright Clause was not to assure any particular substantive limitation on Congress's ability to grant copyrights but rather to solve the problem of non-uniform state intellectual property laws.¹¹⁶ Similarly, Madison's cursory treatment of the Patent and Copyright Clause in *Federalist No. 43* is hardly evidence that the copyright policy expressed in the Clause – much less the copyright policy expressed by the Clause's limitations, which garnered no mention by Madison at all – was the product of careful consideration.¹¹⁷

It is equally clear that whatever policy insights the Framers had into copyright have been rendered obsolete by changes in the economics of the creation, copying, or use of intellectual property (and likely all

114. Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 2D 37, 44 (2002) (no single understanding of copyright prevalent at the time of the framing).

115. Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 361 (1992) (Federal Convention of 1787); *id.* at 376-77 (state ratifying conventions); Ochoa & Rose, *supra* note 53, at 922-28 (detailing mentions of intellectual property among the Framers, at state ratifying conventions, and by authors during the period of ratification); Schwartz & Treanor, *supra* note 1, at 2376 (same).

116. Donner, *supra* note 115, at 376-77.

117. THE FEDERALIST NO. 43, *supra* note 75, at 271-72 (James Madison) (Clinton Rossiter ed., 1961). See also Howard B. Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 516 n. 38 (*Federalist 43's* cursory mention of intellectual property indicates "that in the public debate over ratification of the proposed constitution, the issue of copyright was comparatively insignificant.").

three).¹¹⁸ At the heart of claims that the CTEA is unconstitutional, for example, is the conviction that Congress should not be allowed to tie us to a 1980s' model of film distribution and preservation because doing so violates an eighteenth-century model of intellectual property. But eighteenth-century copyright policy doesn't necessarily represent fundamentally correct copyright law; it was just the policy deemed most appropriate for the time, as a matter of both economics and political morality.¹¹⁹ Were the Framers so much better at copyright that we should be anxious to restrain our political freedom by looking to them instead of today's Congress to make twenty-first-century copyright policy?¹²⁰ We may not be happy with the CTEA, but the 1790 Act's twenty-eight-year copyright term can hardly reflect better policy for today's intellectual property markets. Is it really time for *Star Wars* to fall into the public domain?

118. Ginsburg, *supra* note 2, at 379-81.

119. Nachbar, *supra* note 114, at 45-46. For instance, the Framers' policy of allowing the widespread piracy of foreign works ignores the modern importance of international copyright protection to American interests. As Graeme Austin explains:

Unless originalist understandings of the scope of copyright law are cognizant of both necessary responses to technological evolution and public international law obligations, much of today's copyright law would be subject to attack on the basis that it departs dramatically from the Framers' conceptions. For the historical claims to work, the United States either needs to return to its pirate ways, or the protection of foreign authors needs to be completely discounted in the analysis. Neither prospect has much appeal.

Austin, *supra* note 38, at 42. *See also* Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 332-33 (2003) (As a matter of realpolitik, maximizing progress requires compromising with other nations on matters of copyright policy, which an inflexible approach toward constitutional copyright would make impossible.).

120. For example, the framing generation passed a law very similar to the one under attack in *Golan v. Ashcroft*, *see discussion supra* note 32, a statute restoring intellectual property rights in a work that had fallen into the public domain. *See* Act of Jan. 21, 1808, ch. 13, 6 Stat. 70 (1808). Worse yet, this private act in favor of Oliver Evans restored his patent rights in an invention whose patent had *expired* four years earlier after running its course, a seemingly even more egregious violation of the "limited Times" requirement. The act was enforced by Justice Marshall riding circuit, and the Supreme Court on appeal, against a defendant who had constructed an embodiment of the invention after the 1804 expiration but before the private bill's passage in 1808. Justice Marshall held, and the Court affirmed, that the defendant's construction of the invention during the period of invalidity did not insulate him from liability after the patent had been renewed. *Evans v. Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813) (No. 4,564), *aff'd*, 13 U.S. (9 Cranch) 199 (1815). On the nineteenth-century practice of granting patent extensions generally, *see* Tyler T. Ochoa, *Patent and Copyright Term Extension and The Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 58-72 (2001)

C. Objectivity and Progress

The problems of judicial intervention are magnified when one considers the value judgment inherent in any interpretation of the Progress Phrase. Application of the Progress Phrase involves a nested imponderable: Not only is the net effect on progress of virtually any change in the copyright law imponderable, but the very nature of progress is itself imponderable. Wouldn't it promote progress to deny copyright protection to pornography on the theory that people are distracted by it and waste time that could otherwise be spent reading technical manuals or great literature? Certainly the copyright clause does not demand such differential treatment,¹²¹ but does it prohibit it?

Viewed this way, the *Eldred* petitioners' argument is not so much that progress is not being served by the CTEA as it is that the right *kind* of progress is not being served. Eric Eldred and company contended that exclusive rights can only be granted as an incentive to create new works. But why is that necessarily the best way to promote progress? Why not confer more rights to encourage distribution of existing works? Even if the CTEA is a windfall to those who happen to own valuable copyrights, isn't it possible to promote progress by providing that windfall? Consider it a subsidy to those who are good at managing copyrighted works, one that allows them to continue in the endeavor. Whether any of these effects of the CTEA promote progress depends on one's definition of "progress," and that definition, I maintain, is completely contingent.

In the absence of a universally held definition of progress, the seemingly irrational but preference-aggregating nature of legislative decisionmaking seems particularly well suited to the making of copyright policy; judicial review (with its emphasis on history, rationality, and ends-means relationships) appears a correspondingly poor choice,¹²² recognition of which was in no small measure behind the Court's decision to turn away from the regime of economic substantive due process that defined the first third of the twentieth century.¹²³ Put another way, belief about what promotes progress is not, in Bickel's

121. See *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 859 (5th Cir. 1979).

122. Other than the obvious public choice problems, which I've already established are no basis for judicial intervention along constitutional lines, copyright is as amenable to (admittedly controversial) pluralistic conceptions of lawmaking, see, e.g., Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983), as any subject can be.

123. Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000).

words, one of “society’s basic principles.”¹²⁴ That reality leaves judges at a decided disadvantage in applying the Progress Phrase. Even if one were indifferent about whether copyright policy be made by the judicial or elected branches of government, demonstrating that judges will make better copyright policy than Congress would be a hard case. But, of course, we do care about whether law is made by judges or legislators; given the political and contingent nature of copyright policy, it is difficult to see how advocates for judicial review of copyright legislation can overcome the counter-majoritarian difficulty’s intuitive preference that policymaking take place in the elected branches of government.

IV. JUDGES, COPYRIGHT, AND THE COPYRIGHT CLAUSE

The question remains: How should the Court review copyright legislation for consistency with the Copyright Clause? My suggestion is decidedly unoriginal – I would suggest a more deferential form of “rational basis” review than the rational basis review we have come to expect in the Commerce Clause context¹²⁵ – a standard of review that some have called “minimal rational basis” or “conceivable basis.”¹²⁶ This is the standard of review the Court generally employs in cases challenging state statutes under the Equal Protection Clause of the Fourteenth Amendment when a “suspect” class is not involved.¹²⁷ It is also the standard of review the Court applies to federal economic regulation challenged under the Fifth Amendment’s Due Process Clause.¹²⁸

Indeed, I am describing the standard of review that the Court eventually applied to the federal statute challenged in *Carolene Products*. Having already dealt with the Commerce Clause challenge, the Court responded to the defendant’s Fifth Amendment rational-basis challenge by explaining that “by their very nature such inquiries, where the

124. BICKEL, *supra* note 44, at 70.

125. *Cf.* Gerdes, *supra* note 45, at 1475 (citing *Carolene Products* and suggesting that the Court apply the rational basis standard of review that it applies in the Commerce Clause and Substantive Due Process contexts). My argument is that the rationale at work in *Carolene Products* suggests a difference between the Commerce Clause and Due Process flavors of “rational basis” review.

126. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* at 1445-46 (2d ed. 1988). Although the Court refers to this standard of review as “rational basis” review, it does differ from the “rational basis” standard used in Commerce Clause cases, so I will use Tribe’s moniker of “conceivable basis” review in order to distinguish the two.

127. *Id.* at 1445 & n.21 (collecting cases). *See also* Schwartz & Treanor, *supra* note 1, at 2412-13 (distinguishing “classic rational basis review – the standard of review that the modern court applies in the economic realm” from a higher standard of scrutiny the Court applies in cases involving “suspect” factors).

128. TRIBE, *supra* note 126, at 1445 (collecting cases).

legislative judgment is drawn into question, must be restricted to the issue of whether any state of facts either known or which could reasonably be assumed affords support for it.”¹²⁹ Just before the famous footnote of exceptions, the Court made the degree of its deference clear:

Even in the absence of [stated legislative findings and legislative reports], the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to *preclude the assumption* that it rests upon some rational basis within the knowledge and experience of the legislators.¹³⁰

Thus, the conceivable basis test relieves the legislature of any duty to consider particular facts or make stated conclusions; the Court will infer a valid purpose if one *could have* existed.¹³¹ As the court explained in *FCC v. Beach Communications, Inc.*, under Fifth Amendment Due Process review, “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”¹³² There is no need for the legislature to have been presented with or considered facts; unsupported “rational speculation” is enough. Contrast this with *Lopez*, in which the Court pointedly highlighted the lack of congressional fact-findings as undercutting the government’s claim that the regulation of guns in schools is the regulation of “[c]ommercer . . . among the several States.”¹³³

My proposal has the support not only of history, but also of general applicability, for it is a standard that applies to all of Congress’s Article I powers so long as one keeps in mind the various justifications for heightened judicial review. All it takes to distinguish between when to apply rational basis review and when to apply conceivable basis review is

129. *United States v. Carolene Products, Inc.*, 304 U.S. 144, 154 (1938).

130. *Id.* at 152 (emphasis added).

131. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“Where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . .”) (internal quotation omitted).

132. 508 U.S. 307, 316 (1993); *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (“The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”) (internal quotation marks and citation omitted). *See also* *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (citing the standard used in *Beach Communications* and *Heller*).

133. *Lopez*, 514 U.S. at 563. *See also* Buzbee & Schapiro, *supra* note 46, at 100 (describing the Court’s approach to the federalism cases as a refusal “to assume the existence of the necessary predicates” and an unwillingness “to defer to the legislative conclusions embodied in or supported by the record”).

to remind ourselves of why higher scrutiny is necessary in the cases in which it is applied: When it is possible that a one member of the federal system is extending its power at the cost of others, higher scrutiny is required as a response to the potential for self-serving behavior, but the Court applies the lower conceivable basis standard when it is satisfied that the sovereign in question does indeed have plenary power in the area being regulated. Thus, once the Court in *Carolene Products* established that the regulation in question was within Congress's plenary interstate commerce power, the Court applied the more deferential Fifth Amendment standard. The same sensitivity to the balance of power applies in the review of state legislation. When a state law is challenged on equal protection grounds (not involving a suspect class), the primacy of the State's police power is not in question, and so the Court applies the more deferential conceivable basis standard. But when a state law has the effect of regulating interstate commerce, an area of *federal* primacy, the Court subjects the law to a much stricter level of review.¹³⁴

134. *Compare* *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959) (state tax with domestic effect will be upheld so long as it is not "palpably arbitrary"), *with* *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (A tax with an effect on interstate commerce will be sustained only if it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.") (internal quotations omitted). *See also* *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985):

Under [dormant] Commerce Clause analysis, the State's interest, if legitimate, is weighed against the burden the state law would impose on interstate commerce. In the equal protection context, however, if a State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.

Id. The difference is that, in the dormant Commerce Clause context, the Court itself weighs the balance of the burdens, whereas in the equal protection context, the Court defers to legislative balancing and looks only for some rational relationship between means and ends. R. Randall Kelso, *Standards of Review under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 230-33 (2002).

The difference in degrees of review described in *Metropolitan Life Insurance* also answers claims by commentators that the means-ends nature of the grant in the Copyright Clause justifies a higher level of review. *See, e.g.*, Coenen & Heald, *supra* note 59, at 103-15; Epstein, *supra* note 43, at 134-35 (intermediate scrutiny); Pollack, *supra* note 66, at 384; Solum, *supra* note 21, at 65-66. The existence of a means-ends relationship between granting exclusive rights and promoting progress may help the Court identify the end the statute should serve, but it does nothing to determine the *level* of review the Court should apply when evaluating whether the means serve the end in question. Thus, the Court might balance the harms and benefits as it does in dormant Commerce Clause cases, or it might merely look for some rational relationship between the means and the end. Of course, the Copyright Clause's limitation of the permissible ends of copyright legislation to promoting progress is not much of a limit given the many potential definitions of "progress." *See supra* text accompanying note 121.

And if Section 301 of the Copyright Act is constitutional, then copyright is one of those areas in which the federal government's power truly is plenary. In the absence of any federalism concerns, there is no reason for the Court to apply standard more restrictive than the conceivable basis test.

In the Progress Phrase context, the test should reflect the dual ambiguity of the phrase itself; the test should be whether a piece of copyright legislation could conceivably further any conceivable definition of "progress."¹³⁵ That is a fairly close approximation of the standard of review the Court applied in *Eldred*. When considering whether the CTEA is "a rational exercise of the legislative authority conferred by the Copyright Clause," the Court deferred to Congress's suppositions about the CTEA's effects, saying simply that "we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."¹³⁶ The tone of complete deference carried over into the Court's examination of Congress's compliance with the Progress Phrase; the Court reiterated that "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."¹³⁷ And, although it did not directly consider Congress's ability to define "progress," the Court made it clear that it would enforce no particular definition of "progress" on Congress.¹³⁸

135. I am not arguing that the Court should apply the political question doctrine to congressional interpretation of the meaning of the Progress Phrase. In the first place, the scope of the doctrine does not seem to reach matters of public lawmaking, and the doctrine's continued vitality is debatable. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (collecting sources). But, more importantly, I do not believe Congress should have *absolute* authority to interpret the Copyright Clause, as would be the case if the political question doctrine applied. There are some cases in which the text is clear, for instance in the case of a facially perpetual grant, and there are circumstances in which Congress could not be promoting *any* vision of progress, such as by making the various exclusive rights inalienable, which would make it impossible to exploit works of authorship.

136. *Eldred v. Ashcroft*, 123 S. Ct. 769, 783 (2003).

137. *Id.* at 785; *id.* at 781 n. 10 (rejecting Justice Breyer's "heightened, three-part test for the constitutionality of copyright enactments" as inconsistent with the Court's literary property jurisprudence). See also Ginsburg, *supra* note 2, at 375 ("Congress should enjoy substantial discretion in implementing its constitutional prerogative to 'promote the Progress of Science.'").

138. *Eldred*, 123 S. Ct. at 781-83 (recognizing that not only creation of works, but also improved international competitiveness and the restoration and increased dissemination of existing works, could further the Copyright Clause's objectives).

V. CONCLUSION

Textualist approaches to the Copyright Clause that attempt to parse the exact meaning of “limited Times” or the Progress Phrase border on the formalistic and ignore both the inherent ambiguity in the Clause’s text and the very real possibility that not all constitutional text calls for the same approach to judicial review. Attempts to provide meaning to the Copyright Clause by importing principles purportedly contained in express constitutional prohibitions (such as the Free Speech Clause of the First Amendment) also distort the analysis by ignoring the limited application of those prohibitions. Instead, what is needed is a theory of judicial review that recognizes both the peripheral nature of the Copyright Clause – as it relates to fundamental interests and constitutional structure – and the political and economic nature of copyright.

The profound insights of the Framers in the field of government – especially as they touch upon unchanging aspects of human nature, such as the power of self-interest and our natural inclination toward expediency – make tinkering with the constitutional order a perilous enterprise. But there is no evidence to suggest that the Framers gave copyright more than a second thought. At the same time, the realities of copyright, unlike the forces that drive our choice of government, change constantly, and the dangers of giving in to expediency are no more acute in copyright than in other legislative contexts. The Framers’ incomplete and disparate understandings of copyright policy neither deserve nor require the same level of judicial scrutiny as is applied to the portions of the Constitution devoted to protecting fundamental interests and maintaining the structural protections put in place to secure those interests. Instead, we should ask ourselves whether Congress, in exercising the copyright power, could conceivably be serving a conceivable definition of “progress.” To ask for more would be to freeze development of the concept of “progress” – an ironic result.

The proper response to the Court’s handling of the Copyright Clause in *Eldred* is a sigh of relief – relief that the Court did not exercise the kind of judicial exuberance that led to the constitutionalization of data protection in *Feist*. All that judges can do by holding Congress to a strict reading of the Copyright Clause is to permanently tie us to a version of copyright that reflects neither the nation’s political will nor the changing realities of intellectual property. Regardless of how one feels about the policies embodied in the CTEA, heightened constitutional review of copyright legislation is a cure far worse than the disease.