Eldred v. Ashcroft: A Critical Analysis of the Supreme Court Decision

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ELDRED V. ASHCROFT: A CRITICAL ANALYSIS OF THE SUPREME COURT DECISION

“A page of history is worth a volume of logic.”¹

I. INTRODUCTION

On October 9, 2002, Brewster Kahle parked his green Ford Aerostar outside the United States Supreme Court building. Washington D.C. was one of many places where Kahle - armed with a satellite dish, a laptop, high-speed printer, book cutter and bookbinder - printed public domain books for free from his Bookmobile. On his cross-country journey he stopped at public schools, libraries, universities, mobile home parks, and retirement homes connecting users to an online library, consisting solely of public domain works, where they can choose, download and print a book.

Inside the courthouse, the case of Eldred v. Ashcroft had convened and oral arguments were underway. The case would decide how many books would be a part of the Bookmobile’s digital library. At issue in the case, was the Sonny Bono Copyright Term Extension Act² ("CTEA") which extended copyright terms an additional twenty years. If the act was upheld, the Bookmobile would not have one new book for twenty years.

The CTEA is comprised of four basic provisions that set forth copyright term extensions, alter transfer rights, create a new

² After Sonny Bono’s (Songwriter/Congressman) fatal ski accident his lawmaker colleagues named the bill in his honor. Sonny Bono’s widow completed his term. About the CTEA, she commented, “Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti’s proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.” 3 MELVILLE NIMMER, NIMMER ON COPYRIGHT §9.01, at 9-4 n.2 (1963) (quoting 144 Cong Rec. H9951 (daily ed. Oct 7, 1998) (remarks of Rep. Bono)).
infringement exception and address division of fees.\textsuperscript{3} In this regard, it makes the following amendments to the current Copyright Act of 1976: (1) a work created in 1978 or later is granted protection for the life of the author plus seventy years; (2) a work created in 1978 or later that is anonymous, or pseudonymous, or is made for hire is protected for ninety five years from publication or one hundred and twenty years from creation, whichever occurs first; (3) a work created before 1978 receives an extended renewal term of sixty seven years creating a total of ninety five years of protection.\textsuperscript{4} The CTEA does not affect any works that have already fallen into the public domain. Accordingly, all works in the public domain at the end of 1997 will remain there.\textsuperscript{5} However, works whose copyrights were set to expire between January 1\textsuperscript{st} and October 27\textsuperscript{th} of 1998 receive the twenty-year extension.\textsuperscript{6} Thus, works authored from 1923 on, which would initially have begun to fall into the public domain in 1998, will be protected at least until the end of 2018, unless the copyright is extended again.\textsuperscript{7}

In the era of information, the benefits of an expansive public domain are easily recognized. The Internet allows users to view public domain works for free. In fact, corporations are establishing digital libraries and archives with the intent of preserving old classics and making them available to those otherwise without access to such works. Specifically, these

\textsuperscript{3} Christina N. Gifford, Note, \textit{The Sonny Bono Copyright Extension Act}, 30 U. MEM. L. REV. 363, 378 (2000). Only the provision granting a copyright term extension is addressed in this article.

\textsuperscript{4} Eldred v. Reno, 239 F.3d 372, 90 (D.C. Cir. 2000). According to Congressional reports, the purposes of the CTEA are to harmonize U.S. copyright standards with those set forth by the European Union and to increase the amount of works in the public domain by providing incentives to create new works and monetary incentives to preserve existing works. Camila Alarcon, Legal Update, \textit{Eldred v. Ashcroft Challenges the Copyright Term Extension Act}, 8 B.U. J. SCI. & TECH. L. 713, 714 (2002).

\textsuperscript{5} Gifford, \textit{supra} note 3 at 379.

\textsuperscript{6} \textit{Id.}

\textsuperscript{7} Brief for Petitioners at 2, Eldred v. Ashcroft, 123 S. Ct. 769 (2003) (No. 01-618).
archives provide access to material that libraries generally have a
difficult time finding, acquiring and storing. The archives flourish
with the help of efficient technology and operate solely within the
public domain.

However, on January 15, 2003 the Court found in favor of the
copyright extension under the CTEA, thereby frustrating the goals
of the Bookmobile and other users of public domain works. This
article examines the Supreme Court’s decision to uphold the
CTEA in Eldred v. Ashcroft. Part II provides an introduction to
the history of copyright extensions and introduces the process of
judicial review of congressional legislation. Part III explains the
Court’s analysis in Eldred v. Ashcroft. Part IV argues that the
majority’s opinion was based on flawed reasoning. In particular,
the Court failed to address the critical issues such as defining the
“limited Times” provision of the Copyright Clause and outlining
the scope of Congress’s legislative authority with regards to
copyright. Further, the Court misstates its role by asserting its
inability to second-guess Congress’ legislative judgment. Part V
suggests that the resulting ambiguity will negatively impact
copyright holders, even the proponents of the CTEA such as
Disney, and offers a compromise solution.

II. BACKGROUND

Article 1, Section 8, Clause 8 of the United States Constitution
empowers Congress “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.”8 Since the constitution was ratified, the language of
this clause has remained ambiguous and the enumerated powers of
Congress have remained unclear. However, lawmakers have
agreed upon the general underlying principles of copyright
protection. The Framer’s believed that protecting one’s creative
work would give the author economic incentive to create

8. U.S. CONST. art. 1, § 8, cl. 8. At the time of the framing, “science” meant
knowledge or learning. Brief for Petitioners at 16 n. 4, Eldred (No. 01-618).
additional works.\textsuperscript{9} By encouraging the author’s economic interests, the public would benefit from wider dissemination of artistic and literary works.\textsuperscript{10} “Thus, the underlying philosophy of copyright requires a balancing of two competing interests—the protection granted to authors must be broad enough to provide economic incentive, but limited enough to ultimately serve the public’s interest in the widespread dissemination of creative works.”\textsuperscript{11} In other words, authors’ works should receive copyright protection, but only for a specified period of time, so that these works eventually become free for public use. In maintaining this balance, Congress has extended the copyright term eleven times in forty years.\textsuperscript{12}

\textit{A. A History of Extensions}

The first Copyright Act was established in 1790.\textsuperscript{13} It provided

\begin{itemize}
\item[9.] Gifford, \textit{supra} note 3 at 373.
\item[10.] \textit{Id}.
\item[11.] \textit{Id}.
\item[12.] In 1828, Congress, by private act, extended the copyright in a book of tables compiled by John Rowlett. Rowlett sought an extension as a means of recovery for lost money on his first edition because he invested time and money ensuring the accuracy of the tables. At the time, devoting substantial time and money to a work was grounds for copyright protection. This doctrine has since been rejected by the Supreme Court as inconsistent with the Patent and Copyright Clause and the basis of Rowlett’s claim is no longer valid. Congress has since extended a copyright by private act one other time and the extension was held invalid. Tyler T. Ochoa, \textit{The Anti-Monopoly Origins of the Patent and Copyright Clause}, 84 J. PAT. \& TRADEMARK OFF. SOC’Y 909, 930 (2002).
\item[13.] The Copyright Act of 1790 was entitled “An Act for the Encouragement of Learning.” President George Washington urged Congress in his January 1790 address that legislation promoting science and literature by encouraging creativity and publishing was their top priority. Congress responded with an address to the President, “We concur with you in the sentiment that...the promotion of science and literature will contribute to the security of a free Government; in the progress of our deliberations we shall not lose sight of objects so worthy of our regard.” The Copyright Act of 1790 was signed into law that same year. Edward Samuels, \textit{The Public Domain Revisited}, 36 LOY. L.A. L. REV. 389, 410 (2002).
\end{itemize}
for an initial copyright term of fourteen years from the time of recording\textsuperscript{14} with the option of a fourteen-year renewal if the author survived to the end of the first term.\textsuperscript{15} During the initial fourteen-years, the author could assign away his rights for the renewal period.\textsuperscript{16} The Act maintained a balance between exclusive rights for an author for a specified amount of time and viable avenues to the public domain. For instance, if the author died during the initial copyright term, the work fell into the public domain at the end of the fourteen-year period.\textsuperscript{17} Additionally, if the author survived the first term but failed to renew, the work fell into the public domain.\textsuperscript{18} This two-tiered system created the likelihood that authors would not renew their copyrights if their works were not commercially viable and instead would replenish the public domain.

In 1831, the initial copyright term was extended to twenty-eight years from the date of publication with a renewal period of fourteen years.\textsuperscript{19} The purpose of this extension was to "...enlarge the period for the enjoyment of copyright, and thereby to place authors in this country more nearly upon an equality with authors in other countries."\textsuperscript{20} The legislative history reveals that the 1831 extension was also the result of an erroneous belief that copyright

\begin{itemize}
\item \textsuperscript{14} In order to trigger copyright protection an author had to first complete certain recording formalities such as registration, deposit and notice. These formalities were abandoned in the Copyright Act of 1976 which attaches copyright protection at the time of creation. This change grants automatic copyright protection, regardless of the author's intent that the work be protected or free to the public. See Marci Hamilton, Should U.S. Intellectual Property Rights Change to Fit World Norms?, at http://writ.corporate.findlaw.com/hamilton/20010524.html. (May 24, 2001).
\item \textsuperscript{15} Jerome N. Epping, Jr., Comment, Harmonizing the United States and European Community Copyright Terms: Needed Adjustment or Money for Nothing?, 70 U. Cin L. Rev. 651, 655 (1996).
\item \textsuperscript{16} Gifford, supra note 3 at 367.
\item \textsuperscript{17} Epping, supra note 15 at 655.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Epping, supra note 15 at 656. The terms applied to existing works as well by repealing the Copyright Act of 1790 and applying the terms of the new Act to existing works. Samuels, supra note 13 at 411.
\item \textsuperscript{20} 7 Cong. Deb. App. CXIX (1830) (statement of Rep. William Ellsworth).
\end{itemize}
was a natural right of the author.\textsuperscript{21} Despite pressure to establish a perpetual right, Congress granted only a fourteen-year extension period.

Similar to the Act of 1790, the renewal period served the valid purpose of allowing works that were no longer profitable to fall into the public domain after twenty eight years, assuming that the author would not pay to renew his rights in an unprofitable work.\textsuperscript{22} "The structure also gave authors a 'second bite at the apple' if their works achieved popularity during the first term by allowing them to renew the copyright on commercially viable works and to renegotiate licensing terms and conditions of sale."\textsuperscript{23} However, if the author did not go through the formalities of renewal the work fell into the public domain.

Congress again amended copyright duration in 1909 after insistence by authors that they were outliving their copyrights and thus receiving insufficient monetary gain for their efforts.\textsuperscript{24} Many authors lobbied for a term of life plus fifty years identical to that of

\begin{enumerate}
\item Ochoa, \textit{supra} note 12 at 932. In a report to the Judiciary Committee, Congressman William W. Ellsworth wrote, "[u]pon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor." \textit{Id.} at 931 (quoting \textit{7 GALES \& SETON'S REGISTER OF DEBATES IN CONGRESS} CXX (Dec. 17, 1830); "When the Bill was debated in Congress, Rep. Michael Hoffman of New York complained that it would 'establish a monopoly of which authors alone would reap the advantage, to the public detriment.' He noted that patents were limited in duration to 14 years, and argued: 'So it should be...with the author or publisher. There was an implied contract between them and the public. They, in virtue of their copyright, sold their books to the latter at an exorbitant rate; and the latter, therefore, had the right to avail themselves of the work, when the copyright expired.' Ellsworth replied, arguing that the bill would 'enhance the literary character of the country, by holding forth to men of learning and genius additional inducements to devote their time and talents to literature and the fine arts.' Ellsworth did not explain how this justified the retroactive extension..."\textit{Id.} at 932 (quoting \textit{7 GALES \& SETON'S REGISTER OF DEBATES} at 423 (Jan. 6, 1831)."
\item Gifford, \textit{supra} note 3 at 368.
\item \textit{Id.;} The Act granted the renewal rights to a surviving spouse or child if the author died during the initial term. Epping, \textit{supra} note 15 at 656.
\item Epping, \textit{supra} note 15 at 656.
\end{enumerate}
their European counterparts. However, Congress refused the authors’ efforts, fearing that works with little commercial value would no longer pass into the public domain. Instead, they extended the renewal period to twenty-eight years thereby granting a total of fifty-six years of protection.

By the 1970’s, technological advances, not contemplated by drafters of the original copyright acts, obviated the need for revision of the current copyright law. In fear of acting too quickly, Congress examined alternative provisions to the 1909 Act accounting for the invention of photocopiers, computers and videocassette recorders and conducted studies of their potential impact over a twenty-year period.

Congressional consideration culminated into the 1976 Copyright Act, which changed the structure of copyright law. Congress abandoned the two-tier structure and instead created one fixed term beginning upon a work’s creation. For all works created after January 1, 1978, the term was set at the life of the author plus fifty years. Works published before 1978 were given a forty-seven year renewal term, in effect granting protection for a maximum of seventy-five years after publication, or one hundred years from the date of creation, whichever occurred first. For works made for

25. Gifford, supra note 3 at 368.
26. Epping, supra note 15 at 656. This extension applied to existing works whose copyright had not yet expired under the Copyright Act of 1831, but did not apply to works already in the public domain. Samuels, supra note 13 at 412. A work under the Copyright Act of 1831 only received copyright protection if the author deposited a copy of the work with the federal government and paid a fee. Under the 1909 Act an author was eligible for the extended renewal term if they properly filed an application for renewal with the copyright office. The CTEA has no such formal requirements of copyright eligibility. Brief for Petitioners at 31 n. 13, Eldred (No. 01-618).
27. Gifford, supra note 3 at 369.
28. Epping, supra note 15 at 657. Congress concluded that, on average, life plus fifty years would be equivalent to seventy-five years from publication. For works produced toward the end of the author’s life, protection would last a little over fifty years, less than the fifty-six year term under the Copyright Act of 1909. Samuels, note 13 at 413.
hire, anonymous or pseudonymous works the term was seventy-five years.  

Interestingly, while the 1976 Act extended the term of protection for all works, at the same time it decreased the term of protection for works created but not yet published. Until 1976, copyright was governed at both the federal and state level. Before a work was published, state common law granted an author an exclusive right to publish his work. This common law copyright in unpublished works extended in perpetuity until the work was published. The new Act preempted state common law copyright in all unpublished works, subjecting them to the federal provisions, which began from the date of fixation in a tangible medium of expression, rather than from publication. Older works, which were unpublished, were automatically restricted from entering the public domain before December 31, 2002. To encourage publication of these works, Congress provided that if such works were published by 2002, they would be granted additional protection until 2027.

Creation and publication of new works and expansion of the public domain are two policies that run throughout the legislative history of the copyright acts. However, the importance of the public domain seemed to decrease with the enactment of the 1976 Act and continued with to decline with the CTEA which affords authors longer terms of protection and fewer opportunities for works to enter the public domain. Consider the impact of these cumulative extensions by following the copyright activity of a work published in 1940. After publication, it was granted an

30. Brief for Petitioners at 2, Eldred (No. 01-618).
32. Id.
33. Samuels, supra note 13 at 413.
34. Id. It should be noted that state common law protections still apply to some types of works. ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, INTELLECTUAL PROPERTY: CASES AND MATERIALS ON TRADEMARK, COPYRIGHT AND PATENT LAW 233 (Robert C. Clark et al. eds., 1996).
35. Samuels, supra note 13 at 414.
36. Id.
original term of twenty-eight years from 1940 – 1968 under the 1909 Act provisions. In 1968, its copyright was renewed for another twenty-eight years which would have expired in 1996. However, the 1976 revisions added an additional nineteen years, thereby extending its protection until 2015. Yet again, the CTEA brought another extension granting this work protection until 2035.\(^\text{37}\) It is argued that in effect, these subsequent extensions create a perpetual copyright.

**B. Judicial Review of the CTEA**

With the enactment of each of the above mentioned extensions, Congress never placed a timeframe on the constitutional restriction of “limited Times” in the Copyright Clause. Accordingly, repeated extensions to term duration have been passed and no limits have been placed on Congress’ authority with respect to extending terms in the future. As a result, petitioners in *Eldred* asked the Court to qualify the Copyright Clause.

The Court has the special role of interpreting the meaning of the constitution. It has emphasized that they, not Congress, have the power and the duty to define constitutional words and phrases.\(^\text{38}\) Generally, constitutional review of a statute requires the Court to complete three steps – defining terms, identifying the statute’s measures and goals, and comparing what Congress has done with what Congress has been empowered to do by the constitution.\(^\text{39}\)

First, the Court defines terms in the constitutional clause. For example, the Trademark cases in 1879 produced a definitional analysis of portions of the copyright clause. “Writings” was declared to include original works “founded in the creative powers of the mind.”\(^\text{40}\) In 1884, the Court defined an “author” as “he whom anything owes its origin; originator; maker; one who

\(^{37}\) Nimmer *supra* note 2, § 9.11(B), at 9-153.


\(^{39}\) Id.

\(^{40}\) Id. at 364-365.
completes a work of science or literature."\textsuperscript{41}

Second, the Court will assess whether the goal of the legislation is legitimate, substantial, or compelling.\textsuperscript{42} The question with regard to the Copyright Clause is whether Congress used the proper means (term extension) to achieve a legitimate end (promoting progress of the Science and the Arts).\textsuperscript{43}

Third, the Court determines whether Congress has acted within the scope of its constitutional authority in enacting legislation.\textsuperscript{44} Here, the key is the level of deference the Court gives to Congress. The level of deference determines the level of review the court applies to legislation. The level of review applied determines the relationship between what Congress has done and what they are authorized to do.\textsuperscript{45}

The Court in the \textit{Eldred v. Ashcroft}, had an opportunity and a responsibility to independently review whether the CTEA was enacted pursuant to Congress' authority under the Copyright Clause, thereby affirming our constitutional system of checks and balances.\textsuperscript{46} The Copyright Clause was drafted with substantial limitations on congressional power. It is the role of the court to check Congress' exercise of its copyright power and maintain the spirit of the clause.

\section*{III. Explanation: Eldred v. Ashcroft\textsuperscript{47}}

The Court granted certiorari to hear arguments challenging the constitutionality of the CTEA. Petitioners, corporations and individuals who used works in the public domain, brought suit

\begin{itemize}
\item 41. \textit{Id.} at 365.
\item 42. \textit{Id.} at 366.
\item 43. \textit{Id.} at 367-368.

\item 44. \textit{Pollack, supra} note 38 at 369.

\item 45. \textit{Id.} Basic levels of review include: rational basis review, intermediate scrutiny, and strict scrutiny. The Supreme Court has never discussed which standard of review should be applied to the Copyright Clause. Further discussion of these constitutional principles is outside the scope of this article.

\item 46. The Court has never held a copyright or patent statute unconstitutional for violation of the Copyright Clause. \textit{Id.} at 365.

\end{itemize}
against the attorney general, limiting their challenge to the CTEA’s copyright extension for published works with existing copyrights. Petitioners decline to challenge CTEA’s life plus seventy years provision for newly created works. Rather, petitioners maintain the act’s unconstitutionality with respect to enlarging the term of protection for published works with existing copyrights. Additionally, petitioners contended that the CTEA is a content neutral regulation that fails heightened scrutiny. The Court rejected this argument holding that: (1) the CTEA did not violate the “limited Times” requirement in the Copyright Clause and (2) the CTEA did not violate petitioners’ First Amendment right of free speech.

In so holding, the Court merely affirmed the lower courts’ rulings. The United States District Court for the District of Columbia held that the CTEA is not unconstitutional because the new terms are still limited, not perpetual, and subject to Congress’s discretion. Additionally, the district court held that the First Amendment does not grant individuals the right to use others’ copyrighted works. The Court of Appeals of the District of Columbia affirmed, finding Congress’ use of legislative authority proper. The appellate court found nothing in the constitutional text or its history to suggest that, “a term of years for a copyright is not a limited time if it may later be extended for another limited time.” It was also swayed by the policy benefits of harmonizing United States copyright law with that of the European Union (EU). The appellate court, “in an era of

48. Petitioners are individuals and businesses that rely on the public domain for their creative work and livelihood. Lead petitioner, Eric Eldred, is a noncommercial publisher of existing works and a creator of new derivative ones. He founded Eldritch Press, an Internet based press that creates and stores copies of public domain works for the World Wide Web. With new technology students and scholars are able to search the texts in ways that are not possible in the printed version. Brief for Petitioners at 5, Eldred (No. 01-618).

49. Eldred, 123 S. Ct. at 775.

50. Id. at 776.

51. Id. at 777.

52. Id.

53. Id.
multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits and is a necessary and proper measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual.”

A. Opinion of the Supreme Court

The court evaluated arguments in light of prior copyright legislation. For example, the Court noted that Congress has consistently applied term extensions equally to existing and future copyrights. The CTEA merely follows the tradition of retroactive extensions and therefore, the Court concluded, the CTEA’s enactment does not exceed Congress’ legislative authority.

1. Retroactive Extensions

The Court interpreted the Copyright Clause as giving authority to Congress to prescribe copyright protection for “limited Times” to all copyright holders, present and future. Petitioners argued that the term extension qualifies as a “limited Tim[e]” for future copyrights but not for existing ones. The Court contended that petitioners’ argument “reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever ‘fixed’ or ‘inalterable.’” The Court disagreed, defining “limited” as “confined within certain bounds.” Thus, the court held, the “limited Times” clause does not preclude Congress from extending a copyright term; even for a work that has already enjoyed the benefits of a prior copyright extension.

Additionally, legislative history has proven that Congress has applied copyright extensions retroactively in prior copyright acts. Since 1790, Congress’s position has remained that authors who created or published before the new statute was enacted should not

54. Id.
55. Eldred, 123 S.Ct. at 778.
56. Id.
57. Id.
be any worse off than authors who created or published after the statute’s enactment.  

The Court also found patent law significant to this inquiry because the patent power is derived from the same constitutional provision as copyright. Precedent revealed that the Court has not encountered a "limited Times" barrier to extending patent protection. Specifically, in McClurg v. Kingsland, the court upheld the application of expanded patent protection to an existing patent. Therefore, the Court rejected petitioner’s argument that extending the duration of existing copyrights is beyond Congress’s authority.

2. Rational Exercise of Legislative Authority

Content that the CTEA did not violate the "limited Times" clause, the Court considered whether the act constituted a rational exercise of legislative authority. The Court responded by deferring to Congress’ legislative judgment in enacting the CTEA. First, the extension’s purpose was to ensure that American authors would receive the same copyright protection European authors enjoyed in Europe and to provide incentives for foreigners to create in the United States. The European Union passed a directive that established a life plus seventy years copyright term for EU members. Additionally, the directive instructed members to deny the extended term to works of any non-EU country whose laws set forth a different term.

In addition to international concerns, longer terms would give incentive to authors to restore their existing works for public distribution. Congress "...expressed the view that as a result of increases in human longevity and in parent’s average age when their children are born, the pre-CTEA term did not adequately
secure 'the right to profit from licensing one’s work during one’s lifetime and to take pride and comfort in knowing that one’s children – and perhaps their children - might also benefit from one’s posthumous popularity.'\(^{63}\) Longer terms equal larger profits from royalties for the copyright holder. For the above policy reasons, the Court should not have held that the CTEA is an impermissible exercise of Congress’s power.

3. Interpreting the “limited Times” Clause

The Court also rejected petitioner’s argument that even if life plus seventy years is a “limited Time,” the cumulative effect of continuous extensions creates a perpetual copyright thereby violating the “limited Times” provision.\(^{64}\) The Court emphasized that petitioners failed to adequately distinguish between the unconstitutionality of the CTEA and the constitutionality of the extensions under the 1831, 1909, and 1976 Copyright Acts. Justice Ginsburg concluded, “[t]hose earlier acts did not create perpetual copyrights, and neither does the CTEA.”

4. Consideration for Existing Copyrights

Petitioners argued that the extension is inapplicable to existing works because the author gives no new consideration in exchange for increased protection.\(^{65}\) In particular the CTEA (1) overlooks the originality requirement; (2) fails to further Science and the Arts; and (3) ignores copyright’s quid pro quo.\(^{66}\)

i. The Originality Requirement

Petitioners argued that copyright protection is only granted to

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63. Id. at 782 n. 14 (citing 141 CONG. REC. 6553 (1995) (statement of Sen. Feinstein)).
64. Id. at 783.
65. Id.
66. Id at 784.
works with sufficient originality.67 “Relying on Feist, petitioners urged that even if a work is sufficiently ‘original’ to qualify for copyright protection in the first instance, any extension of the copyright’s duration is impermissible because, once published, a work is no longer original.”68 However, the majority rejected this argument because Feist addressed a work’s eligibility for copyright protection; not the duration for which an original work may be protected. Therefore, new consideration is not a necessary requirement in order to receive extended protection.

ii. Fails to Further Science and the Arts

Petitioners contended that “limited Times” must be determined in light of copyright’s policy to “promote the Progress of Science and the useful Arts.” They argued that the extension fails to promote copyright policy because the CTEA does not encourage the creation of new works “but merely adds value to works already created.”69 The Court agreed that promoting the progress of science and the arts is the Copyright Clause’s objective; however, the Court concluded that it is the role of Congress, not the Court, to determine how best to pursue constitutional objectives.70

iii. Quid Pro Quo

Petitioners argued that granting copyright protection is contingent upon the exchange of a writing.71 They maintained that extending an existing copyright without demanding additional consideration unjustly enriches copyright holders and their heirs,
violating the quid pro quo requirement. The Court acknowledged that the quid pro quo standard is significant in patent law. However, the Court concluded, the differences between patent and copyright make such a requirement inapplicable in the copyright context. For example, the fact that disclosure is exacted from the patentee whereas disclosure is the desired objective of the copyright holder explains patent law’s quid pro quo requirement. A further distinction is that copyright does not give the holder a monopoly on knowledge; rather, a reader may use any fact or idea within a writing. By contrast, patents prevent the use of the inventor’s knowledge. As a result, the Court counseled that one could not take language from one of the Court’s patent decisions and use it to support petitioners’ view. Consequently, the quid pro quo requirement does not bar Congress from extending evenhandedly existing and future copyrights.

5. Freedom of Speech

Alternatively, petitioners argued that the CTEA is a content neutral regulation of speech that fails strict scrutiny review under the First Amendment because the CTEA substantially burdens speech without advancing any important governmental interest. However, the Court observed that the First Amendment and the Copyright Clause were adopted “close in time,” therefore the Court concluded that the Framers understood copyright’s limited monopolies as consistent with free speech. The Court noted that

72. Id.
73. Id. at 787. The Court provided the following examples: Brenner v. Manson, 383 US 519, 534 (1996) (“The basic quid pro quo . . . for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility.”); J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc. 534 US 124, 142 (2001) (“The disclosure required by the Patent Act is the quid pro quo of the right to exclude.”).
74. Eldred, 123 S. Ct. at 787.
75. Id.
76. Id.
77. Id. at 788.
copyright law accommodates First Amendment principles in several ways. First, copyright only protects expression and not ideas, thereby allowing free transfer of ideas while protecting the author’s expression. Second, the fair use defense allows a reader to use both ideas and expression in certain circumstances. In turn, the CTEA serves as a supplement to these First Amendment safeguards. “First, it allows libraries, archives, and similar institutions to ‘reproduce’ and ‘distribute, display, or perform in facsimile or digital form’ copies of certain published works ‘during the last 20 years of any term of copyright . . . and for purposes of preservation, scholarship, or research’ if the work is not already being exploited commercially and further copies are unavailable at a reasonable price.” Second, Title II of the CTEA exempts small businesses and restaurants from having to pay performance royalties on music from the radio and television.

Finally, the First Amendment protects one’s own speech; the First Amendment is implicated to a lesser degree when speakers assert the right to make use of other’s speech. The CTEA protects authors’ free expression from exploitation. “Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular

intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”

79. Id.
80. Eldred, 123 S. Ct. at 789. “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 USC §102(b) (1976).
81. Eldred, 123 S. Ct. at 789. “[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.” 17 USC §107 (1976).
82. Eldred, 123 S. Ct. at 789. (quoting 17 U.S.C. § 108(h) (1976)).
83. Id. (quoting 17 U.S.C. § 110(5)(B) (1976)).
facts or ideas." When free speech concerns are raised, copyright’s free speech safeguards are adequate to address them. The Court concluded that the CTEA’s protection of unrestricted exploitation of works does not raise free speech concerns. Justice Ginsburg wrote, “[t]he First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.” In the event that the CTEA does raise a First Amendment issue, the copyright clause’s built in safeguards, discussed above, are adequate to address them.

In conclusion, the Court believed that should it find for petitioners, than not only would the CTEA be held unconstitutional but the legislation the Act is based upon, the Copyright Act of 1976, would be vulnerable to attack as well. Unwilling to give such a broad sweeping holding, the Court gave great deference to Congress’s decision to enact the CTEA.

IV. Analysis

In the United States, where intellectual property policy emphasizes the importance of the public domain, the policy implications of the Eldred decision are far reaching. Yet, a close reading of the court’s analysis proves that policy is not the only reason the decision is erroneous. The opinion itself provides no guidance on the issue of interpreting the “limited Times” provision of the Copyright Clause or defining the scope of Congress’s legislative power. Eldred was a landmark case that could have made huge advancements in copyright law. Instead, the decision left us all in the year 1976.

The following discussion scrutinizes the Eldred Court’s opinion. Most importantly, as mentioned below, the Court purposefully avoided making definitive findings on important issues thereby

84. Id.
85. Id.
86. Id.
87. Id. at 790.
88. Policy implications exceed the scope of this article.
providing little guidance to the intellectual property community in the future.

A. The "limited Times" Clause

The threshold issue is whether Congress has the authority to extend copyright terms in light of the "limited Times" restriction written into the Copyright Clause.\(^8^9\) However, the Court failed to address this question directly. Instead, Justice Ginsburg reframed and narrowed the issue to ask whether placing existing and future copyrights in parity was within Congress's authority.\(^9^0\) She wrote, "In prescribing that alignment, we hold, Congress acted within its authority and did not transgress constitutional limitations."\(^9^1\)

Nonetheless, the application of the CTEA to both future and existing copyrights is a separate issue (although one also raised by petitioners). However, the court cannot reach this narrower question until it answers the threshold issue of whether the CTEA's term extension, as applied to any copyright, fell outside the bounds of Congress' authority. The opinion continued to cite prior copyright acts' provisions and how they applied to both future and existing works equally. But the Court never addressed the scope of Congress' power to extend copyright protection as a whole or place any restrictions on it.

Article 1 section 8 clause 8 of the United States Constitution grants Congress the power "[T]o 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."\(^9^2\) Unequivocally, Congress has been assigned the task of defining the scope of the limited copyright protection. The Court interpreted Congress' characterization in the form of a definitional theme rather than attributing a time frame to the "limited Times" clause. The Court contended that the purpose of limiting the copyright holder's monopoly is to promote the

\(^8^9\) Eldred, 123 S. Ct. at 774-75.
\(^9^0\) Id.
\(^9^1\) Id. at 775.
\(^9^2\) U.S. CONST., art. I, § 8, cl. 8.
“Progress of Science and useful Arts” by guaranteeing that those works will enter the public domain after the copyright grant has expired.\textsuperscript{93} This involves a balance between the exploitation of works by authors and the interest of society in the free flow of information.\textsuperscript{94} Thus, “the Court should [have] independently review[ed] the bases on which Congress acts to ensure that there is a good reason to believe that its action would further those goals through constitutionally permitted means.”\textsuperscript{95} Congress is best suited to determine what length of time would promote the progress of science and the arts. However, our system is one of checks and balances in which the Court can place restriction where needed when Congress has failed to establish these restrictions.\textsuperscript{96} The problem now is that there is nothing stopping Congress from extending copyright protection to life plus ninety years or life plus one hundred and ten years.\textsuperscript{97}

\textsuperscript{93} Epping, supra note 15 at 664.; See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("...the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); Mazer v. Stein, 347 U.S. 201, 219 (1954) ([C]opyright law... makes reward to the owner a secondary consideration.”); See also Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994); Lee v. Runge, 404 U.S. 887, 888-89 (1971).

\textsuperscript{94} Sony, 464 U.S. at 429.

\textsuperscript{95} Dennis J. Karjala, Judicial Review of Copyright Term Extension Legislation, 36 LOY. L.A. REV. 199, 203 (2002). “There is nothing in the record to show that Congress had a reasonable basis for believing that retroactive extension would promote the progress of science. Nor is there anything in the record to show that Congress tried to find any meaning for the phrase ‘limited Times’ other than the abstract dictionary definition ‘mathematically finite,’ unrelated to the context of the Clause as a whole or the Framers’ intended purpose for the ‘limited Times’ restriction. Nor did Congress pay anything more than lip service to the question of whether prospective extension would increase creation incentives or otherwise meet the constitutionally mandated goal of ‘promoting the progress of science.’” Id.

\textsuperscript{96} See discussion infra Part IV(E).

\textsuperscript{97} Eldred could have been decided narrowly, based solely on the Court’s definition of “limited Times.” Even if the Supreme Court chose to stick to their definitional theme (as noted above), the Court still should have found in the
**B. Perpetual Monopoly**

The cumulative effect of such continuous extensions essentially gives an author a perpetual monopoly over her work. The Court failed to address whether the CTEA’s term extension created a perpetual monopoly that violated the “limed Times” clause. This inquiry is especially important for works that have already enjoyed the extensive term extension under the Copyright act of 1976. Justice Ginsburg should have tried to fit the CTEA’s retroactive extensions into the definitional framework of “limited Times.”

Instead the Court set forth a conclusory response. “As the Court of Appeals observed, a regime of perpetual copyrights ‘clearly is not the situation before us.’ Nothing before this Court warrants construction of the CTEA’s 20-year term extension as a congressional attempt to override the ‘limited Times’ restraint.”

Justice Ginsburg then makes a logical leap arguing that petitioners do not adequately explain why they contend that the CTEA is unconstitutional and yet did not argue the unconstitutionality of previous extensions in the 1831, 1909, and 1976 Acts. However, the issue in this case was not previous term extensions or how the CTEA is inferior or different from prior acts. Petitioners specifically argued that the CTEA’s retroactive extension is unconstitutional. Petitioners did not attempt to reform U.S. copyright law as we know it. They sought to change one piece of legislation in the intellectual property arena. It is unfair of Ginsburg to put on petitioners’ shoulders the burden of proving either all copyright extension legislation are unconstitutional or failing to establish any copyright are unconstitutional.

petitioners favor because there is very little evidence that retroactive extensions promote the progress of science and the arts, as the Court has defined it as an incentive to create works. Further analysis of the terms of the Copyright Clause is outside the scope of this article. For a detailed discussion see Karjala, supra note 95 at 248.

98. See discussion supra Part IV(A) for definitional analysis of “limited Times.”

99. *Eldred*, 123 S. Ct. at 783. This quote in itself is baseless. Petitioners did not question Congress’s intent but rather the effect of their actions.
Had Ginsburg appropriately addressed petitioners’ perpetual monopoly argument she would have found that perpetual copyrights are created through repeated extensions. Consider the novel *The Sun Also Rises* by Ernest Hemingway published in 1926. Protected by the Copyright Act of 1909, its copyright endured for twenty-eight years until 1954 whereupon Hemingway renewed his copyright for another twenty-eight years acquiring protection until 1982. However, in 1976 Congress extended the term for unexpired works to a maximum of seventy-five years effectively protecting the novel until 2001. Yet, the enactment of the CTEA again delayed this novel from entering the public domain until 2021.100 And because this Court also failed to place a time limit on a copyright term there is no restriction on that same work receiving another extension. In effect, the novel could remain under Hemingway’s heirs control in perpetuity.

C. Retroactive Extensions

Another problem with the *Eldred* opinion is that the Court consistently looked at the policies supporting previous copyright legislation as justification for the CTEA. While this is a valid form of judicial review, it takes the place of an independent analysis of the term extension’s application specific to the CTEA. The Court argued that history and precedent show that Congress’s policy has been that “...the author’s of yesterday’s work should not get a lesser reward than the author of tomorrow’s work because Congress passed a statute lengthening the term today.”101 As a result, the Court argued, the CTEA should apply equally to existing and future copyrights.

However, policy rationale for previous legislation is not always applicable to present circumstances. Nowhere in copyright history has an author received a windfall like that which they receive under the CTEA. The new extension cannot be looked at as

100. See discussion supra Part I.
merely increasing the 1976 copyright terms by 20 years. Rather, the extension must be viewed as adding to the 1909 Act as well. Many works currently serving time under the 1976 Act were originally granted copyright under the 1909 Act. Such works’ copyrights have already been extended under the 1976 Act, it will again receive an extension under the CTEA. Previously, amendments to copyright acts did not impose as great a length of protection. Therefore, relying on history and precedent for retroactive extensions under the CTEA is improper.\(^{102}\)

Even to the extent that the Court made the argument that today’s works should be treated the same as yesterday’s works, the Court is wrong. Such a line drawing exercise is unavoidable and therefore should at least be drawn with constitutional principles in mind. For instance, the 1976 Act extended the term to life plus fifty years to all works published after January 1, 1978 while works published before the date were given an extension of 19 years for a total of 75 years. Thus, according to the court’s analysis, works published December 31, 1977 are put in a potentially worse position than those published by January 1, 1978.\(^{103}\) Even though the extension applied to both future and existing works, it applied differently to each. Similarly, even the CTEA draws a line between 1922 copyrights and 1923 copyrights. Specifically, the CTEA extends the term of protection for all works created in 1923, however, works created in 1922 do not receive the same benefit because they are already in the public domain. Instead, the distinction should have been made between existing and future works. In this regard, the constitutional grant of federal power to grant copyright protection for a “limited Time” is followed.

\(^{102}\) Additionally, this line of analysis still fails to address the real issue of whether extending the duration of existing copyrights is categorically beyond Congress’ authority under the Copyright Clause.

\(^{103}\) Clearly, 75 years may be a longer copyright term than that granted in the 1976 Act depending upon the length of the author’s life. Nevertheless, Congress did draw a line between the works and treated them differently.
D. Patent Law

The Court used patent law to justify the changes it wished to make in copyright law while denying petitioners the same opportunity of argument. Justice Ginsburg stated, “[b]ecause the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry.” The opinion continued to cite case law where the courts have upheld patent extensions. However, the policies underlying the two intellectual property rights are remarkably different. Thus, amendments to different laws demand different justifications. The Court even admitted to this when assessing petitioner’s reliance on Sears, Roebuck & Co. v. Stiffel Co. to show that intellectual property rights give incentive to creators. The Court distinguished Sears, Roebuck & Co. from the case at bar on several grounds including, that patents and copyrights “do not entail the same exchange,” despite the fact that Justice Ginsburg cited patent law to justify the extension applying to both future and existing works. Further, in a footnote Justice Ginsburg stated, “the fact that patent and copyright involve different exchanges does not, of course, mean that we may not be guided in our “limited Times” analysis by Congress’ repeated extensions of existing patents.” The Court cannot preclude petitioners from using this legal basis while reserving the right for themselves. If the Court finds patent law so different, then why don’t these differences matter with regards to their “limited Times” argument?

In addition to the Court’s inconsistency, rejecting the petitioner’s use of patent law was error. The authority to issue copyrights stems from the same Clause in the Constitution that grants the patent power. Further, policy implications that have

104. Eldred, 123 S. Ct. at 779.
105. See Id.
106. 376 U.S. 225 (1964) (stating “patents are not given as favors. . .but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use if his invention.) Id. at 229.
107. Eldred, 123 S. Ct. at 787 n. 22.
been discussed with regards to copyright are similar to the policies of patent. For instance, in *Graham v. John Deere* the Court stated:

> At the outset it must be remembered that the federal patent power stems from a specific constitutional provision.... The clause is both a grant of power and a limitation. This qualified authority....is limited to the promotion of advances..... The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must `promote the Progress of *** useful Arts.'

Accordingly, precedent and policy of patents can be relied on in evaluating arguments regarding copyright law.

**E. Judicial Review**

Ultimately, the Court abdicated its duty of judicial review of the CTEA. Throughout its opinion, the majority contended that Congress has the authority to select the means of pursuing constitutional objectives and the court cannot “second guess” Congress’s wisdom. Here, the majority misstated the Court’s

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109. *Eldred*, 123 S. Ct. at 790. In response to the Supreme Court’s position one commentator writes: "It doesn’t take a cynic to realize that the Court has allowed the fox to guard the henhouse: Congress will always be lobbied by, and
role.\textsuperscript{110} The Court’s purpose is to keep a check on Congress’s legislative activities.\textsuperscript{111} In doing so, the court needs to analyze the purpose behind such laws and whether Congress abused its legislative power in passing them.

\textit{Marbury v. Madison} set forth this notion by holding that the Court is the ultimate judge of constitutional meaning.\textsuperscript{112} In United States v. Butler, Justice Roberts wrote: “[W]hen an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty—to lay the article of the constitution which is invoked beside the statute which is challenged and to decided whether the latter squares with the former.”\textsuperscript{113} Despite Justice Ginsburg’s articulation of the Court’s current role, the Rehnquist Court found that Congress has exceeded its legislative authority in five instances during the 2000-2001 term, on four occasions during the 1999-2000 term and in a total of twenty-nine cases since the 1994-1995 term.\textsuperscript{114}

have incentives to listen to, wealthy copyright industries seeking extensions. The forces lobbying in favor of works moving into the public domain are far less powerful.” Chris Sprigman, \textit{The Supreme Court’s Copyright Extension Decision: A Mickey Mouse Ruling}, at http://writ.corporate.findlaw.com/commentary/20030120_sprigman.html (Jan. 20, 2003).

\textsuperscript{110} The majority stated “...we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. \textit{Eldred}, 123 S. Ct. at 782-83.

\textsuperscript{111} Justice Stevens dissents because the majority relies “on the mistaken premise that this Court has virtually no role in reviewing congressional grants of monopoly privileges to authors, inventors and their successors....” \textit{Id.} at 790 (Stevens, J., dissenting).

\textsuperscript{112} Karjala, \textit{supra} note 95 at 240; \textit{See also} U.S. v. Lopez, 514 U.S. 549 (1995) and U.S. v. Morrison, 529 U.S. 598 (2000) (both majority and dissenters agreed that congressional power under the commerce clause was limited by the Court’s interpretation of the word “commerce”).


The limitations on congressional power written into the Intellectual Property Clause ensure that Congress does not grant exclusive rights in writings or inventions. "If the Court does not ensure that congressional action purportedly taken under this power complies with these limitations, our system of checks and balances is thrown aside and Congress alone determines the meaning of constitutional language limiting its enumerated power." If the Court recognized its power of review, the Court would have approached the issue differently. The Court would have accepted the task of defining the "limited Times" clause and outlining the scope of Congress's authority within the Copyright Clause. In doing so, the Court would have found that the CTEA was unconstitutional.

V. IMPACT OF THE DECISION.

For proponents of the CTEA, the Eldred decision was a huge victory. Under the upheld CTEA, copyright holders receive longer copyright terms leading to increased monetary gains from their exploited works.

Specifically, the Walt Disney Company ("Disney") traveled to Washington to lobby Congress for a longer copyright term. Disney was upset because its copyright in Mickey Mouse and his first cartoon Steamboat Willie were set to expire in 2003. Disney's copyrights in Pluto, Goofy, and Donald Duck were set to expire a few years later. Congress responded to Disney's generous

115. Karjala, supra note 95 at 202-203.
116. See discussion supra Part IV(A)
117. Chris Sprigman, The Mouse that Ate the Public Domain: Disney, The Copyright Term Extension Act, and Eldred v. Ashcroft, http://writ.corporate.findlaw.com/commentary/20020305_sprigman.html. (Mar. 5, 2002); Compare Scott M. Martin, The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection, 36 Loy. L.A. L. Rev. 253, 318 (2002). (Only the early cartoons featuring the original Mickey Mouse, who looked significantly different from today's version, would have fallen in the public domain. The modern Mickey Mouse is a trademarked character who would have still enjoyed copyright protection for many years and has trademark rights in perpetuity.)
campaign donation of more than $6.3 million dollars by prolonging the life of existing copyrights for another 20 years. With the passage of the CTEA, Mickey Mouse is now safely with Disney until 2023.

However, in actuality *Eldred* was a narrow victory for Disney and other supporters of the CTEA. Many of Disney’s films are based on older works in the public domain such as Snow White and the Seven Dwarfs, Cinderella, Pinocchio, The Hunchback of Notre Dame, Alice in Wonderland and the Jungle Book, which was released one year after its author’s copyright expired. Isn’t it ironic that the Disney classics were created from public domain works and yet Disney has lobbied to keep works out of the public domain? Indeed, while Disney will profit in the short term, the future holds diminished returns on its copyrights.

The *Eldred* Court failed to establish guidelines for future courts to follow. The Court neglected to qualify ambiguities written into the Copyright Clause and skirted the issue of defining the scope of the legislative power granted to Congress. Accordingly, there is no curb on Congress’ ability to extend copyright terms again and no limit to the length of such extension. As a result, fewer works will enter the public domain and, in turn, fewer fairytales will be available for Disney to base its next movie on (without paying an exorbitant amount of money to the copyright holder). In other words, creativity will be stifled with fewer ideas in the public domain to build upon.

Lawrence Lessig’s alternative to the CTEA’s term extension neatly embraces the positions of both proponents and opponents to the Act. He advocates moving works that are not commercially viable into the public domain by excising a tax fifty years after a work is published. The works of authors who fail to pay this tax

119. Lawrence Lessig is a professor at Stanford Law School and served as counsel for petitioners in *Eldred v. Ashcroft*.
120. Lawrence Lessig, *Protecting Mickey Mouse at Art’s Expense*, NEW
for three consecutive years will enter the public domain. The idea is that the tax will not be worth its cost to authors whose works are not financially viable. Proponents of the CTEA claim that a longer term is necessary in order to continue to get revenue for their works. However, if a work is not earning any money, then an extension is not necessary.

Maintaining a balance between monetary compensation to authors and free access to information for the public is the key policy objective of copyright law. In doing so, it is important to create opportunities for works to fall into the public domain. By prolonging works from entering the public domain for an additional twenty years, the CTEA has the opposite effect. The Court failed to seize the opportunity not only to review the impact the CTEA's term extension will have on the free flow of information but also the Act's adherence to constitutional objectives.

VI. CONCLUSION

Internet archives and online corporations utilize the public domain to preserve and restore older works and provide greater public access to creative works. When copyright legislation makes it more difficult for works to enter the public domain, the Court must review the law governing copyright.

Eldred v. Ashcroft provided the opportunity for the Supreme Court to review the term extension under the newly enacted CTEA. However, in doing so they failed to address important issues, thereby providing an insufficient response to petitioners' challenges. As a result, the intellectual property community is left

121. Id.
122. This is similar to the public policy behind the earlier Copyright Acts. Using a two-tier system, authors had to renew their copyrights after a set number of years. Legislators believed that authors whose works were not commercially viable would not go through the trouble of renewing and therefore their work would fall into the public domain. See discussion supra Part II (A).
with little guidance from the Court on important copyright issues. Ambiguous words and phrases within the Copyright Clause are not any clearer and the Court’s decision gives Congress broad discretion to pursue copyright’s constitutional objectives through legislation in the future.

Jaime Davids