BACK TO BASICS: THE UTILITY OF COPYRIGHT

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ABSTRACT

The Intellectual Property Clause of the Constitution vests Congress with the power to develop a national copyright system that serves a utilitarian function: providing limited monopolies to authors in order to ultimately promote the progress of learning and knowledge for the benefit of our society. This Note examines the expansive use by Congress of its vested powers under this Clause and, correspondingly, the limited policing by the courts of Congress's exercise of this power. Motivated by international pressures, such as the Berne Convention, Congress has continued to feed the profit motive of the copyright system without due regard for the adverse effects of this action on the public. Furthermore, Congress's overreaching under the Intellectual Property Clause has created a conflict with First Amendment safeguards.

This Note calls for a return to copyright's utilitarian foundation by providing new guidelines for Supreme Court review of congressional action in this area. Firstly, the Court should require that any incentives for private parties be justified by an overriding effort to further the public interest. The Court can achieve this goal by looking to the operation and effect of each statute and ensuring that it truly incentivizes new creations and provides for a robust public domain. Following this thread, if the legislation fails to further the public interest while continuing to extend monopoly privileges, it should be scrutinized as a content-neutral restriction on the freedom of expression. This proposed standard of review will provide the Court with an effective framework to enforce the constitutional charge of encouraging the progress of learning and knowledge in our society. It will also keep Congress's exercise of its Intellectual Property Clause authority within First Amendment bounds.

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INTRODUCTION

The Supreme Court has professed the utilitarian function of the American copyright regime quite clearly: "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[1] On the contrary, modern copyright law in the United States is straying from this public-serving foundation. Congress is not incentivizing new creations and is hindering public access to information, directly contradicting the purpose of the Intellectual Property Clause (the Clause). Currently controlling legislation such as the Copyright Term Extension Act of 1998 (the CTEA) and § 514 of the Uruguay Rounds Agreement Act (the URAA) are causing these harms. To make matters worse, contemporary judicial review of this legislation is not adequately safeguarding the public benefit side of the Clause's *quid pro quo* utilitarian function.

A look into the drafting of the Clause shows that the Framers were focused on providing limited patent and copyright monopolies as a means to primarily benefit society. In effect, "[t]he benefit of the copyright clause belongs ultimately to the public; the author's gain is almost incidental—a carrot on a stick."[2] This understanding should guide the Supreme Court's (the Court) interpretation of the leading language of the Clause: "promote the

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1.Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

2. Deborah Hartnett, *A New Era for Copyright Law: Reconstituting the Fair Use Doctrine*, 34 N.Y. L. SCH. L. REV. 267, 272–73 (1989) (footnote omitted).

[p]rogress" and "for limited [t]imes."[3] As it stands today, the Court is not willing to intercede even when the private benefits derived from new copyright legislation are negligible and the public suffers a serious detriment.

The Court's unfettered deference to Congress in the area of copyright also warrants a discussion of the First Amendment implications of copyright laws that misinterpret the *quid pro quo* and exceed the grant of limited monopolies. The Clause and the First Amendment work together to provide the foundation for an ideal that our culture holds, and has always held, paramount: freedom of expression. While the Court has been willing to state that copyright legislation is not categorically immune to First Amendment scrutiny, the Court has not yet explored what happens when Congress exceeds "the traditional contours" of the copyright grant: the idea/expression dichotomy and the fair use doctrine.

Part I provides an overview of the foundation of copyright law in the United States, beginning with the thought process behind the drafting of the Clause. This section touches upon the addition of the First Amendment to the Constitution and its relationship to the Clause. Next, this section details the current state of modern copyright legislation stemming from the Copyright Act of 1976 and concludes with a discussion of the Court's latest two decisions examining the scope of the Clause's power and its relationship to the First Amendment: *Eldred v. Ashcroft*[4] and *Golan v. Holder*.[5]

Part II of this Note analyzes the fundamental problems with the current state of judicial review of copyright legislation. Through the lens of the Framers' original intent, this Note argues that the Court has been misinterpreting the text and function of the Clause in contradiction of its utilitarian design. Great judicial deference to Congress in this area has come at the expense of the public benefit promised with each grant of copyright. Because the Court has allowed, and likely will continue to allow, Congress to push the boundaries of its authority in this area, this section will also look at copyright's relationship to freedom of expression and the First Amendment implications of Congress overstepping its power under the Clause.

Part III of this Note proposes a solution to the current state of affairs. By providing the Court with a new framework for judicial review of copyright legislation that is more consistent with the intent behind the Clause and takes into account the freedom of expression implications, this proposed solution

3. U.S. CONST. art. I, § 8, cl. 8.
4. Eldred v. Ashcroft, 537 U.S. 186 (2003).
5. Golan v. Holder, 565 U.S. 302 (2012).

will ensure that future legislation will only be upheld if it is wholly consistent with the Clause and its given place in the Constitution.

I. BACKGROUND

A. The Foundation of Copyright Law: The Intellectual Property Clause

Copyright protection for creative works in the United States finds its roots in England's Statute of Anne, enacted in 1710.[6] The Parliament of Great Britain adopted the Statute of Anne "for the encouragement of learning" and provided authors exclusive rights in their works for limited periods of time.[7] By 1786 in the New World, many of the colonies had followed suit enacting similar copyright legislation.[8] Following the 1787 Constitutional Convention, the Founding Fathers of the United States published the first batch of the Federalist Papers, which contained the following notes by James Madison (penned under the name Publius), proposing a national copyright and patent regime:

> A power 'to promote the progress of science and useful arts, by securing for a limited time, to authors and inventors, the exclusive right, to their respective writings and discoveries.' The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals.[9]

Framing this power as a utilitarian construct, Madison spoke of progress, learning, and other aspects of what he believed were important to a republican society.[10] To further understand Madison's intentions in composing this passage, it is important to look at the discussions of the Framers surrounding this publication. What one finds is a consensus of a need for balance. In a July 1788 letter to James Madison, Thomas Jefferson

6. Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 629 (2006).

7. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19 (1710).

8. *See* COPYRIGHT OFF., LIBR. OF CONG., BULL. NO. 3 (REVISED), COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT (1973), at 1–21 (detailing colonial copyright laws in Connecticut, Massachusetts, Maryland, New Jersey, New Hampshire, Rhode Island, Pennsylvania, South Carolina, Virginia, North Carolina, Georgia, and New York enacted between 1783 and 1786).

9. THE FEDERALIST NO. 43, at 288, 298 (James Madison) (Jacob E. Cooke ed., 1961).

10. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 22 (2003).

conceded that "saying there shall be no monopolies lessens the incitements to ingenuity" but ultimately came to the conclusion that "the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."[11] Madison agreed with Jefferson, stating that "[m]onopolies . . . are justly classed among the greatest nusances [sic] in Government" but argued in support of copyright protections because in America, the power is ultimately held by the people, providing a safeguard against the "partialities and corruptions" of the few.[12]

This "power to the people" mentality was a product of the Enlightenment, also evidenced by Jefferson's inclusion of the "pursuit of happiness" as an inalienable right in the Declaration of Independence.[13] Enlightenment thinkers viewed this desired end as a pursuit of *societal* happiness, training their focus on the utility of contributions to society, rather than the so-called "natural rights" of individuals.[14] In light of this, property rights in individual works of authorship were only to be granted "as an encouragement to men to pursue ideas which may produce utility."[15] And it is with this foundation that Jefferson and Madison ultimately condoned the sanction of monopolies because they agreed that grants of limited exclusivity would yield great social benefits in the long run.

What emerged in late 1787 was the following language comprising Article I § 8 Clause 8 of the proposed Constitution of the United States: "The Congress shall have 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 . . . ."[16] With this text, the Framers directed Congress to achieve the ends of promoting the progress of science and useful arts. The Framers also provided the express means to achieve those ends: securing for a limited time the exclusive right to the creative works of authors and inventors. The ordering of these phrases

11. Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* THE PAPERS OF THOMAS JEFFERSON, VOL. 13, MARCH TO 7 OCTOBER 1788, 443 (Julian P. Boyd ed., 1956).

12. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* THE PAPERS OF THOMAS JEFFERSON, VOL. 14, 8 OCTOBER 1788 TO 26 MARCH 1789, 21 (Julian P. Boyd ed., 1958).

13. *See* Stadler, *supra* note 6, at 625–26.

14. *Id.* at 626, 630. Contrary to some scholars' contention that the Framers focused on celebrating the inherent rights of individuals, it was not until a century after the founding that the "natural right" philosophy garnered strong political support. *Id.* at 624. *See* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 168–70 (1978). *But see* Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's* Inventing America: Jefferson's Declaration of Independence, 36 WM. & MARY Q. 503, 503 (1979) (asserting that Garry Wills mischaracterizes Jefferson's reliance on the Scottish Enlightenment in detailing Jefferson's political philosophy).

15. *See* Stadler, *supra* note 6, at 628–29 (internal quotation marks omitted).

16. U.S. CONST. art. I, § 8, cl. 8.

provides insight into the policy goals intended by the Framers.[17] What comes first is the goal of incentivizing creation for the benefit of the progress of society, and what comes second is a caveat: a limited grant of monopoly rights, which ultimately provides for the existence of a public domain once the period of protection has ended.[18]

George Washington would later submit his support for the utility of copyright upon the passing of the Copyright Act of 1790.[19] Uninhibited public access to information and a well-educated public were key elements in the new country's independence and self-sustainability.[20] Following this, in 1791, the States ratified the Bill of Rights, adding, among other cornerstone provisions, the First Amendment to the U.S. Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[21] At first glance, the First Amendment and the Clause work at cross purposes: the former safeguarding freedom of expression and the latter acting as a mechanism for governmental restriction of free expression.[22]

However, as the late Justice Ruth Bader Ginsburg observed, the First Amendment and the Clause were composed and ratified in close proximity to each other, supporting the conclusion that the Framers viewed them as existing in harmony, rather than sitting as contradictions.[23] At base, these provisions are both working to balance public and private rights.[24] To facilitate their coexistence, the courts have since built two First Amendment safeguards into copyright law: the idea/expression dichotomy and the fair use doctrine.[25] These safeguards serve as recognition of the constitutional goal to protect free speech rights by ensuring that the Clause not be used to censor expression or prohibit the dissemination of ideas and the encouragement of learning.[26] Copyright law would later develop into a regime that the Framers would likely no longer recognize.

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17. *See* TyAnna K. Herrington, *The Interdependency of Fair Use and the First Amendment*, KAIROS (1998), http://kairos.technorhetoric.net/3.1/coverweb/ty/ff.html.

18. *Id.*

19. *See* VAIDHYANATHAN, *supra* note 10, at 22.

20. *Id.*

21. U.S. CONST. amend. I.

22. *See* Herrington, *supra* note 17.

23. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

24. *See* Herrington, *supra* note 17.

25. *Id.*

26. *Id.*

B. The Current State of United States Copyright Law: The Copyright Act of 1976

The Copyright Act of 1976 (the 1976 Act) has become the statutory foundation of modern copyright legislation in the United States.[27] The 1976 Act marked the third extension of copyright terms since the first copyright legislation enacted in 1790.[28] In the Copyright Act of 1790, creators were afforded 14 years of copyright protection beginning on the date of publication with an optional 14-year renewal period if the author was still alive and later republished his or her work.[29]

The first major durational extension came with the Copyright Act of 1831, which expanded the original term to 28 years with an optional 14-year renewal.[30] This Act also disposed of the requirement that the author needed to be alive to renew the copyright term.[31] Congress granted the extension not only to authors of future works but also to authors with works currently under copyright protection.[32] In 1909, Congress once again extended the duration of copyright protection by lengthening the renewal term to 28 years (for a total of 56 years of available protection).[33] A House Report from this year shows Congress's recognition of the utilitarian function of the Clause:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.[34]

The next major durational change in copyright law came with the passing of the 1976 Act.[35] After nearly two decades of drafting and debates, Congress implemented the longest term to date and extended copyright protections for works created after the 1976 Act's effective date to a term of

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27. *See* William H. Manz, *Copyright Law*, *in* SPECIALIZED LEGAL RESEARCH 1, 16–17, (Penny A. Hazelton ed., 2018).

28. *See Eldred*, 537 U.S. at 194–95.

29. *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (amended 1831).

30. *See* Act of Feb. 3, 1831, ch. 16, §§ 1–2, 4 Stat. 436 (amended 1909).

31. *Id.* § 2.

32. *Id.* § 16.

33. *See* Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1080–81 (amended 1976).

34. H.R. REP. NO. 60-2222, at 7 (1909).

35. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2572 (codified as amended at 17 U.S.C. § 302(a)).

the author's life plus 50 years.[36] This term, unlike all previous copyright grants, ran from the work's creation date, rather than the publication date.[37] For works that already enjoyed copyright protection at this time, Congress awarded 75 years of protection from the publication date (an increase of 19 years from the previous grant).[38] Anonymous works, pseudonymous works, and works made for hire enjoyed a protection of 100 years from creation or 75 years from publication, whichever expired first.[39] A 1961 Report from the Register of Copyrights, which helped to inspire the 1976 Act, illustrates Congress's continued awareness of the public objectives of the Clause: "As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end."[40]

C. Eldred v. Ashcroft (2003)

Twenty-two years later, Congress would once again extend the duration of protection with the CTEA, also known as the Sonny Bono Copyright Act.[41] This fourth and most recent extension of copyright terms would invite challenges that forced the Court to weigh in on the scope of Congress's power under the Clause.

1. The Majority

In 2003, the Supreme Court reviewed a challenge to the constitutionality of the CTEA.[42] The petitioners in this action—corporations and individuals who relied on the use of works that had entered the public domain—argued that the CTEA was an unconstitutional exercise of Congress's vested powers under both the Clause and the First Amendment.[43] Justice Ruth Bader Ginsburg, writing for the majority, ultimately held that the CTEA did not exceed Congress's power under the "limited [t]imes"

36. *See* Manz, *supra* note 27, § 4.3.4 (noting that the 1976 Act became effective on January 1, 1978).

37. 17 U.S.C. § 302(a).

38. *Id.* § 304(a)–(b).

39. *Id.* § 302(c).

40. REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION: REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (Comm. Print 1961).

41. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 302).

42. *See* Eldred v. Ashcroft, 537 U.S. 186, 194 (2003).

43. *Id.* at 193.

language of the Clause and further that the CTEA did not infringe upon the petitioners' First Amendment rights.[44]

The petitioners, in their first challenge, did not take issue with the length of the terms granted to future works, but rather argued that Congress's grant of extended protection to works already enjoying copyright protection was in violation of the limited times language of the Clause.[45] More specifically, the petitioners asserted that "[t]he line between *prospective* and *retroactive* extensions is a clear one. If 'limited Times' is to have any meaningful content, it is a line this Court must draw."[46] In response, the Court declined to read the word "limited" as absolutely restrictive and noted that the term has meant, and still means, "confine[d] within certain bounds."[47]

The Court further supported its position on this issue with legislative history and case precedent, stating that "[h]istory reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime."[48] The Court also noted multiple past term extensions to both copyright and patent grants.[49] Since these two intellectual property protections are housed in the same clause, it makes sense to read them in congruence.[50] Following this thread, the Court stated that it "has found no constitutional barrier to the legislative expansion of existing patents."[51]

Having found Congress's grant of extended copyright protections to existing works to be within the limited times language of the Constitution, the Court then analyzed whether the CTEA was a rational exercise of Congress's authority in this area.[52] The Court ultimately answered in the affirmative, stating 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."[53] In coming to this conclusion, the Court

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44. *Id.* at 194.

45. *Id.* at 193.

46. Brief for Petitioners at 14, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) [hereinafter Eldred Brief].

47. *Eldred*, 537 U.S. at 199 (citing S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785); *see* T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796) ("confine[d] within certain bounds"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1312 (1976) ("confined within limits"; "restricted in extent, number, or duration")).

48. *Id.* at 200–02 (citing 1790 Act § 1; 1831 Act §§ 1, 16; 1909 Act §§ 23–24; 1976 Act §§ 302–03; 17 U.S.C. §§ 302–04).

49. *Id.* at 200–01.

50. *Id.* at 201.

51. *Id.* at 202.

52. *Id.* at 204.

53. *Id.* at 208.

validated the goal of Congress to conform United States copyright terms to those outlined by the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and implemented in Europe by a 1993 European Union directive.[54] By conforming to the Berne Convention's baselines, Congress hoped that American authors would be more likely to receive reciprocal coverage for their works abroad.[55] Other rational bases for Congress's term extensions included greater incentives for creation and dissemination of local works in the United States, as well as "demographic, economic, and technological" developments.[56]

When the petitioners asserted that allowing Congress to create term extensions would effectively permit grants of perpetual copyright, the Court was unpersuaded and stated that the issue of a perpetual copyright is a discussion for another case and another day.[57] The petitioners were ultimately unable to make an effective showing that the 20-year extension constituted a violation of the limited times language.[58]

The petitioners next challenged that the CTEA fails to achieve the sole objective expressed by the Clause: promote the progress of science.[59] With its feet firmly planted in judicial restraint, the Court reiterated the fact that Congress had a rational basis for enacting the legislation and added that copyright as a "system" must achieve this goal.[60] It is not necessary that each discrete law individually achieve this end.

The petitioners' final argument was that the term extensions violated the Clause by disrupting copyright's underlying *quid pro quo*.[61] In their view, "[e]xtending an existing copyright without demanding additional consideration . . . bestows an unpaid-for benefit on copyright holders and their heirs . . . ."[62] The Court first referenced the "this" side of the equation: the monopoly.[63] In the majority's view, a grant of copyright includes any extensions provided for by Congress during that term of protection.[64] The

54. *Id.* at 205–06. This particular provision of the Berne Convention instituted a term of protection for the author's life plus seventy years. The Court noted that "[c]onsistent with the Berne Convention, the EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term." *Id.* at 205.

55. *Id.* at 205–06.

56. *Id.* at 206–07.

57. *Id.* at 208–09 ("As the Court of Appeals observed, a regime of perpetual copyrights 'clearly is not the situation before us.'") (citation omitted).

58. *Id.*

59. *Id.* at 210.

60. *Id.* at 212 (citing Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966)).

61. *Id.* at 214.

62. *Id.*

63. *Id.* at 214–15.

64. *Id.*

"[p]rogress of [s]cience" is thus rationally promoted by the addition of these provisions that put current authors in parity with future authors.[65]

The Court also distinguished the *quid pro quo* analysis as typically reserved for patent discussions.[66] In essence, patentees agree to the disclosure of their inventions in order to receive protection, whereas disclosure is the ultimate goal of the author filing for copyright, not something exchanged for protection.[67] Furthermore, a patentee has complete control over the knowledge that he or she has protected, whereas a copyright holder's knowledge is not shielded from use by the public.[68]

The petitioners argued separately for heightened judicial review under the First Amendment.[69] In their eyes, copyright law acts as a content-neutral regulation on speech to be analyzed under the *Turner Broadcasting System, Inc. v. F.C.C.* test.[70] The Court proceeded with a structural analysis to dismiss this argument. The fact that the Clause and the First Amendment were adopted close in time supports the position that they operate in harmony with one another.[71] In the Court's view, the Clause works *with* the First Amendment by promoting the economic viability of free expression.[72]

Furthermore, the Clause has sufficient built-in First Amendment safeguards that negate the need for further scrutiny: the idea/expression dichotomy and the fair use doctrine.[73] On top of this, the CTEA provides for additional fair use safeguards for the reproduction, distribution, and display of certain published works and exempts certain small businesses from having to pay performance royalties for particular works.[74] In conclusion, the Court

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65. *Id.* at 215.

66. *Id.* at 216.

67. *Id.* at 216–17.

68. *Id.* at 217.

69. *Id.* at 218.

70. Eldred Brief, *supra* note 46, at 37, 39–40.

> These changes are not necessarily improper. But they must be tested against unchanging principles—that speech regulations go no further than is necessary to achieve important governmental interests. Accordingly, like any other form of content-neutral regulation that tries to balance free speech interests . . . [the] CTEA should be subject to intermediate scrutiny under the First Amendment.

Id. at 39.

71. *See Eldred*, 537 U.S. at 219.

72. *Id.* ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.") (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).

73. *Id.* at 219–20. These two "safeguards" will be explored in more detail. *See* discussion *infra* Part II.E.

74. *Id.* at 220.

returned to its principal basis for upholding the CTEA: "The wisdom of Congress' action . . . is not within our province to second guess."[75]

2. The Dissents

In his dissent, Justice John Paul Stevens primarily took issue with the Court's greatly deferential approach to reviewing the extension of grants of copyrights.[76] Justice Stevens trained his focus on the fact that copyright legislation has its roots in the same constitutional provision as patent law and cited numerous patent cases outlining the restrictions inherent in the limited times language of the Clause.[77] *Ex post facto* grants of copyright, Justice Stevens argued, fail to advance both the public and the private interests of the copyright *quid pro quo*.[78] These subsequent extensions "result in a gratuitous transfer of wealth from the public to authors, publishers, and their successors in interest" while simultaneously failing to effectively serve the public ends of the Clause.[79]

In tying together the history of patent and copyright legislation in this country, Justice Stevens pointed out that the prior congressional activity in these areas, when looked at in its entirety, seriously erodes the majority's reliance on legislative history.[80] Unpleased with the hands-off approach the majority had taken, Justice Stevens contended that it is the responsibility of the Court to determine the scope of constitutional powers, and there exists no vested right in a consistent violation of the Constitution, no matter how long that practice has endured.[81]

Justice Steven Breyer took a different approach in his dissenting opinion. Economically, Justice Breyer argued, the extension provision in the CTEA is functionally a perpetual copyright.[82] The value of an extended copyright term of the author's life plus seventy years "is worth more than

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75. *Id.* at 222.
76. *Id.* at 223 (Stevens, J., dissenting).
77. *Id.* at 223–24.

> Once the patent issues, it is strictly construed, it cannot be used to secure any monopoly beyond that contained in the patent . . . and especially relevant here, when the patent expires the monopoly created by it expires, too, and the right to make the article—including the right to make it in precisely the shape it carried when patented—passes to the public.

Id. (internal citations omitted) (quoting Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230 (1964)).
78. *Id.* at 227.
79. *Id.*
80. *Id.* at 233.
81. *Id.* at 235–36 (citing Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)).
82. *Id.* at 243 (Breyer, J., dissenting).

99.8% of protection *in perpetuity*."[83] However, Justice Breyer also recognized that copyright legislation functions as a regulation on the expression of ideas.[84] And thus, "what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression."[85] Under this rationale, Justice Breyer would say:

> [T]he statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective.[86]

After noting public benefit as the core objective of the Clause,[87] Justice Breyer examined the CTEA's costs to the public. These costs take the form of extra royalty payments and permissions requirements. Justice Breyer provided an inexhaustive list of individuals who will experience difficulties in using these copyrighted works.[88] Efforts to locate the copyright holder of a work will often prove to be time-consuming and expensive, if not discouraging all together.[89] In scrutinizing the other side of the equation, Justice Breyer asserted that the negligible monetary incentives provided to creators through the CTEA do not begin to justify the public expense.[90] "What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum?"[91]

Looking next to the Court's justification that the CTEA brings the United States closer to international uniformity in this area, Justice Breyer stated that there are fundamental differences underlying European and American copyright law.[92] European copyright legislation is rooted in the "moral rights" of the author and does not have a limited times constitutional tether.[93] At best, the CTEA would provide for partial, future uniformity,

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83. *Id.* at 255–56.
84. *Id.* at 244.
85. *Id.*
86. *Id.* at 245.
87. *Id.* at 247.
88. *Id.* at 250.
89. *Id.* ("[T]he permissions requirement can inhibit or prevent the use of old works . . . (1) because it may prove expensive to track down or to contract with the copyright holder, (2) because the holder may prove impossible to find, or (3) because the holder when found may deny permission either outright or through misinformed efforts to bargain.").
90. *Id.* at 254.
91. *Id.* at 255.
92. *Id.* at 259.
93. *Id.*

which is insufficient to justify the public disadvantages created by the CTEA.[94] In conclusion, Justice Breyer read the CTEA as seriously lacking in any public benefit and thus failing to serve the Clause's given purpose.[95]

D. Golan v. Holder (2012)

The Berne Convention, originally made effective in 1887, has become the governing document for a functional international copyright regime.[96] It would take over 100 years for the United States to become a party to this agreement,[97] recognizing the Berne Convention "as the best available mechanism for protecting United States copyrights abroad."[98] After acceding, the United States did not immediately conform to the Berne Convention's requirement that it protect foreign works currently in the United States public domain.[99] However, when the United States joined the World Trade Organization in 1994, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) forced its hand.[100] The United States responded with § 514 of the URAA, providing copyright protection for these foreign works. This legislative action sparked the next high court dispute over Congress's authority under the Clause.

1. The Majority

In 2012, orchestra conductor Lawrence Golan, along with other conductors, musicians, and publishers brought an action contesting § 514 of the URAA and the restoration of public domain works into copyright protection in line with the Berne Convention.[101] The petitioners had previously made use of these publicly-accessible works throughout their careers and believed that once a work enters the public domain, it must remain there.[102] The petitioners ultimately argued on two fronts: Congress's

94. *Id.* at 260.

95. *Id.* at 266–67.

96. Berne Convention for the Protection of Literary and Artistic Works art. 1, adopted Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986), 1161 U.N.T.S. 3 (amended Sept. 28, 1979); *see also* Howard B. Abrams, Eldred*,* Golan*, and Their Aftermath*, 60 J. COPYRIGHT SOC'Y U.S.A. 491, 508 (2013).

97. *See* Hannah Dubina, *Decomposing the Precarious Future of American Orchestras in the Face of* Golan v. Holder, 60 UCLA L. REV. 950, 978 (2013).

98. Abrams, *supra* note 96, at 508.

99. *See* Dubina, *supra* note 97, at 978–79.

100. *Id.* at 979–80. The TRIPS Agreement incorporated the Berne Convention by reference and subjected disputes to enforcement proceedings conducted by the World Trade Organization. *Id.* at 980.

101. *See* Golan v. Holder, 565 U.S. 302, 307–08 (2012).

102. *Id.* at 308.

enactment of § 514 of the URAA is beyond the powers outlined in the Clause, and this statute also violates the First Amendment.[103]

The petitioners' first argument rested on the assertion that a grant of copyright to a work that had previously lived in the public domain violates the limited times language of the Clause.[104] They asserted that by granting this additional protection, there is effectively no limit to the monopolies afforded to creative works.[105] Justice Ginsburg, once again writing for the majority, used the Court's previous decision in *Eldred* to dismiss this argument.[106] This case, just like *Eldred*, simply did not involve an issue of a perpetual grant of copyright.[107] In support of its position, the majority referred to various instances of historical congressional practice, including the original Copyright Act of 1790's grant of protection to works already within the public domain.[108]

The majority framed their decision on the assertion that it is not the Court's place to legislate on behalf of Congress or to intercede when Congress had a rational basis for enacting § 514.[109] Congress's adherence to the Berne Convention effectively promotes the progress of science and learning because "[a] well-functioning international copyright system would likely encourage the dissemination of existing and future works."[110] While the petitioners argued that § 514 still failed to encourage the creation of new works, as mandated by the Clause, the Court held that incentivizing the creation of new works is not the sole means at Congress's disposal.[111] In sum, the Clause does not prevent copyright protection of works already in the public domain.[112]

The petitioners focused their First Amendment argument on § 514's limitation on their previously unencumbered access to these works in which they, as the public, now had vested interests.[113] The Court, once again, reiterated the First Amendment safeguards inherent in the Clause—the idea/expression dichotomy and the fair use doctrine.[114] More importantly, the

103. *Id.*
104. *Id.* at 318.
105. *Id.* at 318–19.
106. *Id.* at 319.
107. *Id.*
108. *Id.* at 320–22 (citing the Copyright Act of 1790 and several private bills, including the Corson Act, the Helmuth Act, and the Jones Act).
109. *Id.* at 324.
110. *Id.* at 326–27.
111. *Id.* at 327.
112. *Id.* at 318.
113. *Id.* at 330.
114. *Id.* at 328–29.

Court dismissed the contention that once a work enters the public domain it somehow vests the public with ownership rights.[115] On the contrary, the end of a copyright term signals the end of any and all protected rights to that work.[116] Ultimately, Congress had a legitimate objective in aligning American interests with "the dominant system of international copyright protection" by putting local and foreign works on the same playing field.[117]

2. Justice Breyer's Dissent

Justice Breyer authored a dissent arguing that § 514 plainly violates the utilitarian premise of the Clause by not incentivizing the creation of any new works and, in fact, inhibiting the dissemination of millions of works previously within the public domain.[118] In line with his opinion in *Eldred*, Justice Breyer asserted that "[t]he possibility of eliciting new production is, and always has been, an essential precondition for American copyright protection."[119] The Framers, after much contention, agreed that grants of limited monopolies over creative works were necessary for the public welfare.[120]

Likewise, Congress, in its legislation that followed, recognized the need for balance between the encouragement of new works and the detriment of private monopolies on the public interest.[121] Section 514 fails to fall within the powers of the Clause because it ultimately restricts the dissemination of creative works in scholarly, educational, and public settings, curtailing the public interest without incentivizing the creation of new works.[122]

This public interest, Justice Breyer stated, is that of "an orchestra that once could perform 'Peter and the Wolf . . . free of charge' . . . [or] a school orchestra or other nonprofit organization [that] cannot afford the new charges . . . ."[123] Likewise, the added administrative costs of orphan works will either discourage people from accessing or making use of these works and may even incentivize piracy.[124] Unlike ordinary copyright protection, pulling creations out of the public domain in this way "work[s] special harm"

115. *Id.* at 331–32.
116. *Id.*
117. *Id.* at 335.
118. *Id.* at 345 (Breyer, J., dissenting).
119. *Id.*
120. *Id.* at 346.
121. *Id.* at 350–51.
122. *Id.* at 351.
123. *Id.* at 354.
124. *Id.* at 354–55.

by reversing the payment and expression expectations of the public.[125] As such, Congress is harming the public without providing a countervailing benefit, and thus Justice Breyer believes that the Court must intervene.[126]

These limits placed on expression are speech-related harms that implicate the First Amendment to some degree, and Justice Breyer argued that this is another reason why the Court must review this legislation with more scrutiny.[127] Justice Breyer did not see how Congress's efforts to align the United States with the language of the Berne Convention could justify § 514's effects.[128] In light of the First Amendment, Congress should have sought out alternative, less-restrictive methods to comply with the Berne Convention.[129] Considering the fact that Congress did not do so, the justification of international uniformity is ultimately insufficient to save the statute.[130]

II. UNFETTERED DEFERENCE

For well over a century, Congress has been pushing the boundaries of its Clause power, and through a reliance on rational basis review, the Court has become far too deferential, resulting in an inadequate protection of the foundational public interest goals of the copyright *quid pro quo*. Using *Eldred* and *Golan* as case studies, this section will challenge the Court's review of modern copyright legislation and show how this review is misaligned with the Clause's original utilitarian premise. The responses to challenges to the term extensions granted in the CTEA and the pulling of works out of the public domain through § 514 of the URAA show that the Court will not take issue with copyright legislation that marginally incentivizes creation while having a greatly disparate impact on the public interest.

This section will first explore the original utilitarian foundation of the Clause. Next, this section will critique the Court's interpretation of the text and purpose of the Clause, including its effects on patent law, arguing that the Court's understanding has resulted in allowing Congress to evade the Clause's express constitutional mandate. Finally, with the argument that Congress has exceeded its authority, it is essential to look at the First Amendment implications of legislation that arguably reaches beyond what

125. *Id.* at 357.
126. *Id.* at 357–58.
127. *Id.* at 358.
128. *Id.* at 365–66.
129. *Id.* at 367.
130. *Id.*

the Court has termed the "traditional contours" of the copyright grant. Scrutiny of the issues underlying the Court's jurisprudence in this area will allow for a future interpretation of the Clause that is more in line with its text, structure, and purpose.

A. Framers' Original Intent

The two phrases that guide our interpretation of the purpose and scope of the Clause are *promote the progress* and *limited times*. With the construction of these phrases, the Framers provided Congress with the ends to be achieved by the Clause (the former) and the means to achieve those ends (the latter).[131] What results is a cultural *quid pro quo*: the "this" being the private benefit of a limited monopoly, and the "that" being the progress of learning and knowledge.[132] When legislating under the Clause,

> Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, *under the proper terms and conditions*, confers a benefit upon the public that outweighs the evils of the temporary monopoly.[133]

The Framers were focused on promoting the progress of knowledge and learning, which required the consistent creation of new works.[134] Copyright in creative works was a necessary means to encourage progress in creative fields; it was to be limited to a time just long enough to provide an incentive to produce new works.[135] By stating in The Federalist that "[t]he public good fully coincides . . . with the claims of individuals,"[136] Madison did not envision the profit motive as an equal goal to be balanced against public benefit. Instead, "copyright was a Madisonian compromise, a necessary evil, a limited, artificial monopoly, not to be granted or expanded lightly."[137]

Jefferson's position on monopolies further supports this interpretation. He stood starkly against the sanction of these exclusive rights, and at the very

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131. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

132. *See* Eldred v. Ashcroft, 537 U.S. 186, 214 (2003) ("We can demur to petitioners' description of the Copyright Clause as a grant of legislative authority empowering Congress 'to secure a bargain—this for that.'" (quoting Eldred Brief, *supra* note 46, at 16).

133. H.R. REP. NO. 60-2222, at 7 (1909) (emphasis added).

134. *See* VAIDHYANATHAN, *supra* note 10, at 21.

135. *Id.*

136. THE FEDERALIST NO. 43, *supra* note 9, at 288.

137. VAIDHYANATHAN, *supra* note 10, at 24.

least he lobbied for explicit restrictions on monopolies, having not yet seen, in effect, private monopolies encouraging creativity.[138] The interpretation that limited monopoly privileges serve only as a means to promote the progress of learning and knowledge through public access has been supported further by the Court time and time again.[139]

The public benefits achieved by the Clause are twofold: (1) the limited grant of monopoly rights in creative endeavors ultimately inspires the constant flow of new creations, and in turn, the progress of those individual fields, and the advancement of society;[140] and (2) after the limited time, those works fall into the public domain for unrestricted access in the educational, creative, and cultural spheres.[141] As illustrated by a review of the opinions in *Eldred* and *Golan*, the Court has allowed Congress's consistently privately-motivated legislation to pass without proper scrutiny, and this has, in turn, damaged both ends of the public interest and eroded the textual mandate, rendering the preamble of the Clause essentially inconsequential.

B. "[P]romote the Progress"

The prefatory wording of the Clause is perhaps the most important language in United States copyright law, setting the minimal standards for Congress's actions under this grant of authority.[142] With this phrase—promote the progress—the Framers provided the Clause with its purpose and scope.[143] The Court has stated that the immediate purpose to be achieved by the Clause is "to motivate the creative activity of authors and inventors."[144] By incentivizing creation, these new additions to science [145] are ultimately enjoyed by the public for learning, archiving, performing, and crucially,

138. *Id.* at 23.

139. *See* Abrams, *supra* note 96, at 525 ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.") (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)); *Id.* ("The copyright law . . . makes reward to the owner a secondary consideration.") (quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948)).

140. *See* Hartnett, *supra* note 2, at 272; *see also* Eldred v. Ashcroft, 537 U.S. 186, 247 (2003) (Breyer, J., dissenting).

141. *See Eldred*, 537 U.S. at 247–48 (Breyer, J., dissenting).

142. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (Matthew Bender ed. 2023).

143. *Id.* § 1.03[A][1].

144. *Id.* (footnotes omitted) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).

145. *Id.* § 1.03[A][2] (explaining that use of the word "science" at the time referred to general knowledge or learning).

creating additional new works.[146] However, an analysis of recent judicial review of congressional actions, as exhibited in *Eldred* and *Golan*, shows that the Court gives little weight to this governing language, and, as a result, the public is not receiving the benefits from the copyright regime intended by the Framers.

On a micro level, neither of these laws actively incentivize the creation of new works. The CTEA extends the majority of copyright protections for a period of twenty more years than the previous grant.[147] However, one would be hard-pressed to find an author or publisher who would create or disseminate works simply based on the fact that they now have twenty more years of protection long after they will have passed away.[148] Even more problematic is § 514 of the URAA, which pulls works out of the public domain, providing monetary rewards to authors of non-novel works without requiring the creation of new works in return.[149]

In response to recent arguments along these lines, the Court has stated that copyright legislation functions as a system, rather than as a series of individual laws.[150] From this perspective, it is not necessary that each individual provision of copyright legislation, on its own, promote the creation of new works.[151] In fact, the Court has indicated that the ends to be achieved extend beyond incentivizing creation and can include other goals that are rationally concluded by Congress to promote the progress of learning and knowledge.[152] As a result, the Court is treating "the Clause as if it were some

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146. *Id.* § 1.03[A][1] (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

147. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105298, tit. I, 112 Stat. 2827 (1998).

148. *See* Abrams, *supra* note 96, at 522.

149. *See* Brief for Petitioners at 24, Golan v. Holder, 565 U.S. 302 (2012) (No. 10-545) [hereinafter Golan Brief] (internal citation omitted). The Petitioners argued the main issue with the URAA:

> A statute that does no more than grant protection for works that were long part of the public domain cannot 'promote the [p]rogress of [s]cience.' It does not spur the creation of any new works. Instead, it inhibits the spread of existing works, reduces the universe of material available to the public for further creation, and threatens to destroy the incentive to use even those works that remain unprotected. It impedes both the creation of knowledge and its spread.

Id.; *see also Golan*, 565 U.S. at 345–46 (Breyer, J., dissenting).

150. *See* Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) ("The 'constitutional command,' we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.'" (quoting Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966))).

151. *Id.* (noting that the Constitution empowers Congress to create a copyright *system* to promote the progress of science).

152. *See Golan*, 565 U.S. at 325 (quoting Eldred v. Ashcroft, 537 U.S. 186, 211–12 (2003)) (The "Clause does not demand that each copyright provision, examined discretely, operate to induce new works . . . those permissible ends, we held, extended beyond the creation of new works.").

kind of dry administrative scheme, and not an engine for creativity and the progress and enlightenment that creativity brings."[153]

For example, the Court deferred substantially to congressional judgment in *Eldred*, citing observance of a 1993 European Union Directive as a rational justification for the CTEA.[154] Congress might well have believed that conformance with the international scheme would both garner United States copyright holders reciprocal protection abroad, as well as encourage the creation and dissemination of creative works in America.[155] The Court also cited "demographic, economic, and technological changes" as rational bases for Congress's action.[156] In *Golan*, the Court once again supported Congress's position because compliance with the Berne Convention, leading to a "well-functioning international copyright system," arguably stimulated the dissemination of creative works both locally and abroad, while also ensuring more protection for American works in foreign jurisdictions.[157]

However, the majority has lost sight of the underlying directive of the Clause. Incentivizing the creation of new works is not one of many requisite goals to be achieved with copyright legislation, it is the *principal* goal.[158] In allowing the creation of new works to become a broad, generalized objective under the Clause, the Court has dispensed with the preamble as virtually meaningless.[159]

Justice Breyer, in his *Eldred* dissent, looked deeper into the majority's justification of conformity with the international system of copyright.[160] Not only did the CTEA not result in uniform international term limits, it is unlikely that reciprocation of the European term actually inspired more creation and publishing locally.[161] Similarly, Justice Breyer noted that § 514 of the URAA failed to provide any incentive for the creation of new works while simultaneously diminishing the public domain, inhibiting

153. Julie Hilden, *The Supreme Court's Decision in* Golan v. Holder*: Can the U.S. Government Constitutionally Pull Works Out of the Public Domain?*, VERDICT (Jan. 23, 2012), https://verdict.justia.com/2012/01/23/the-supreme-courts-decision-in-golan-v-holder.

154. *See Eldred*, 537 U.S. at 205.

155. *Id.* at 205–06.

156. *Id.* at 206–07.

157. *See Golan*, 565 U.S. at 326–27.

158. *See Eldred*, 537 U.S. at 260 (Breyer, J., dissenting); *see also* Eldred Brief, *supra* note 46, at 15–16.

159. *See* Abrams, *supra* note 96, at 526; *see also* Hilden, *supra* note 153.

160. *See Eldred*, 537 U.S. at 257 (Breyer, J., dissenting).

161. *Id.* at 259 (In response to the majority's and the respondents' assertions that disuniformity would encourage American authors to publish first in Europe, Justice Breyer asserted that "few, if any, potential authors would turn a 'where to publish' decision upon this particular difference in the length of the copyright term.").

dissemination of creative works, and raising costs of obtaining copyrighted works for educational and cultural institutions.[162]

Congress further relied on its Treaty Power in enacting § 514 of the URAA to justify skirting the confines of the Clause by citing an attempt to comply with the Berne Convention.[163] While the Court has not directly addressed the issue of whether Congress can use its Treaty Power to legislate in contravention of a Clause constraint, it is highly likely that this is an overstep of congressional power.[164] Notably, the Berne Convention did not impose an obligation on the government to enact the URAA, painting a clearer picture of this congressional action as unjustified overreaching.[165]

While favorable foreign relations are a staple of our government, they do not justify Congress's overstepping its constitutional mandates. The Framers vested Congress with the power to promulgate copyright legislation that would incentivize creation and exploration,[166] and Congress is no longer adhering to that charge. In sum, not only do neither of these statutes individually incentivize the creation of new works in the United States, but their broad application chips away at the copyright system's ability to achieve that same goal. Yet the Court has been willing to look past this deficiency to any number of potential congressional justifications. As a result, international uniformity and private benefits have taken priority over the progress of learning and knowledge.

C. Relationship to Patent Law

Alongside their argument for the proper interpretation of promote the progress, the petitioners in *Eldred* asserted that the extension of copyright protections without the requirement of new creations was a violation of the *quid pro quo* underlying the Clause.[167] The Court, in response, stated that the extension of copyright terms does not require any additional creation on behalf of the authors. The "this" conferred to authors can reasonably be expected by those authors to include any extensions that have accumulated

162. *See Golan*, 565 U.S. at 351 (Breyer, J., dissenting).

163. *See* NIMMER & NIMMER, *supra* note 142, § 1.05[B][2].

164. *See* David L. Lange et al., Golan v. Holder*: Copyright in the Image of the First Amendment*, 11 J. MARSHALL REV. INTELL. PROP. L. 83, 115 (2011) ("[C]an Congress rely on its Treaty Power to act against an affirmative constraint implicit in the Copyright Clause? To this . . . inquiry we think the answer must be, decisively, No.").

165. *Id.* at 116.

166. *See* VAIDHYANATHAN, *supra* note 10, at 21.

167. *See* Eldred v. Ashcroft, 537 U.S. 186, 214 (2003) ("Extending an existing copyright without demanding additional consideration . . . bestows an unpaid-for benefit on copyright holders and their heirs . . . .").

throughout their period of original protection.[168] The Court distinguished patent jurisprudence, noting that the concept of a *quid pro quo* is more properly applied only in the patent context.[169] However, careful scrutiny of the relationship between these two streams of intellectual property highlights significant issues with the Court's position.

Justice Stevens, in his *Eldred* dissent, lobbied against the notion that patent jurisprudence has no bearing on interpretation of copyright law. After all, these grants of power stem from the same Clause.[170] It is counterintuitive that the "this" afforded to copyright holders should include any extensions enacted during their period of protection.[171] Term extensions are used as a way to, in theory, incentivize creation. However, this attempt to inspire creativity does not apply to works that have already been created.[172] Retroactive extensions, in practice, result in the public's detrimental reliance on the expectation of access to creative works once their term is up, while simultaneously giving authors an added benefit for which they have not reciprocated.[173]

If one is to take into account patent law jurisprudence, there is a compelling argument that the congressional actions at issue in this paper exceed Congress's power under the Clause and even raise First Amendment concerns.[174] In fact, the Court has explicitly invalidated this action in the patent context, stating in *Graham v. John Deere Co. of Kansas City* 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."[175]

The Court has distinguished the *quid pro quo* function as being primarily a staple of patent law discussions.[176] The argument is that patentees agree to the disclosure of their inventions in order to receive protection, whereas disclosure is the ultimate goal of the author filing for copyright, not something exchanged for protection.[177] However, no matter the nuances of the function of each branch of intellectual property, both copyrights and patents operate as a *quid pro quo*. The Clause gives Congress the power to encourage inventions and creations "by securing for limited [t]imes to

168. *Id.* at 214–15.
169. *Id.* at 216.
170. *Id.* at 223 (Stevens, J., dissenting).
171. *Id.* at 240–41.
172. *Id.* at 240.
173. *Id.*
174. *See* NIMMER & NIMMER, *supra* note 142, § 1.05[A].
175. Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966).
176. *See Eldred*, 537 U.S. at 216.
177. *Id.* at 216–17.

Authors and Inventors the exclusive [r]ight to their respective Writings and Discoveries."[178] Whether the objective is incentivizing creation or disclosure, the mechanism is the same.

The Court also stated that the patentee has complete control over the knowledge that he or she has protected, whereas a copyright holder's knowledge is not protected from use by the public.[179] However, as this Note will later discuss, the public's access to this knowledge without access to its form of expression provides cold comfort to authors of new works who wish to build off of previous creations. Many times, the idea and expression are indistinguishable, effectively blurring the lines of what is useable and what is not.[180] The fact remains that much of the value of copyrighted creations comes from that specific expression of the idea. The Framers understood that "creativity depends on the use, criticism, supplementation, and consideration of previous works."[181] Copyrights limit the ability of authors to make use of that expression to create new works, thereby limiting a crucial feature of the creative process.[182] The *quid pro quo* function forms the foundation for both patent and copyright law. As such, it is a very real and very essential guideline which the Court has chosen not to enforce.

D. "[L]imited Times"

Looking to the second defining phrase of the Clause, the reward of copyright for a limited time serves both as a limitation on and the means to this grant of power.[183] The Framers understood that encouraging a constant flow of creativity required Congress to provide authors with a legal guarantee—a property right in their work.[184] This way, authors could profit from their contributions without worrying about misappropriation from publishers and competitors.[185] However, the Framers also understood that creative works can only reach their full value if they are accessible to the public.[186] Thus, these property rights were limited to a period of time just

178. U.S. CONST. art. I, § 8, cl. 8.

179. *See Eldred*, 537 U.S. at 217.

180. *See* Hartnett, *supra* note 2, at 271.

181. VAIDHYANATHAN, *supra* note 10, at 21.

182. Neil Weinstock Netanel, *First Amendment Constraints on Copyright After* Golan v. Holder, 60 UCLA L. REV. 1082, 1099 (2013).

183. *See Eldred*, 537 U.S. at 245–46 (Breyer, J., dissenting) ("The 'reward' is a means, not an end. And that is why the copyright term is limited."); *see also* NIMMER & NIMMER, *supra* note 142, § 1.05[A] (stating the limited-times provision "creates a limitation on congressional power").

184. *See* VAIDHYANATHAN, *supra* note 10, at 21.

185. *Id.*

186. *Id.*

long enough to incentivize creation, and thereafter, the public received "access to the materials essential to the development of society."[187]

Justice Ginsburg, in her interpretation of the preambular language of the Clause, opposed the idea of the reward to authors as a "secondary consideration" incidental to the societal goals of a copyright regime, arguing that this is an understatement of the value of the profit motive.[188] Quoting *American Geophysical Union v. Texaco Inc.*, she maintained that "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science."[189] Through this lens, providing authors with an incentive to create is not a collateral, unavoidable measure required to ensure a public benefit. Instead, the public benefit is achieved by deliberately furthering the profit motive of private individuals.

A closer analysis of the majority's interpretation shows that prioritizing the profit motive does not, in practice, serve the public ends as the Court would have us think. The result of the CTEA's focus on the reward to authors is that it further delays the public's expectation interest while simultaneously failing to incentivize the creation and dissemination of new works.[190] It is hard to imagine the societal benefit of works that are constantly afforded more protection to the point where they may never reach the public at all.[191] At the extreme, the monopoly privileges over these works have the potential to endure for well over a century after the author has passed away.[192]

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187. *See* NIMMER & NIMMER, *supra* note 142, § 1.05[D][2] (footnote omitted).

188. *See Eldred*, 537 U.S. at 212 n.18 (internal quotation marks omitted) (responding to Justice Stevens' dissenting opinion).

189. *Id*. (quoting Am. Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994)) (internal quotation marks omitted).

190. *Id.* at 266 (Breyer, J., dissenting).

191. *See* Abrams, *supra* note 96, at 522. *See also Eldred*, 537 U.S. at 251 (Breyer, J., dissenting):

> The older the work, the less likely it retains commercial value, and the harder it will likely prove to find the current copyright holder. The older the work, the more likely it will prove useful to the historian, artist, or teacher. The older the work, the less likely it is that a sense of authors' rights can justify a copyright holder's decision not to permit reproduction, for the more likely it is that the copyright holder making the decision is not the work's creator, but, say, a corporation or a great-grandchild whom the work's creator never knew.

192. *See* NIMMER & NIMMER, *supra* note 142, § 9.11[B][2]. Nimmer presented an example of such a monopoly:

> Let us imagine that an opera diva wrote her memoirs (including how she taught Enrico Caruso to 'stop screeching and start singing') before meeting an untimely end in 1897. Her previously private journal, if published before the end of 2002, likewise enjoys U.S. copyright protection through the end of 2047.

Id.

Section 514 of the URAA's novel effect on the limited times language, by removing works from the public domain, and in part reviving copyright protection for works whose coverage had since lapsed, also illustrates the issue with celebrating the profit motive. This protracted private benefit does not "redound to the public benefit by resulting in the proliferation of knowledge."[193] One area where this is abundantly clear is the orchestral setting for which Lawrence Golan and Richard Kapp were fierce advocates.[194] As Hannah Dubina illustrates in her article "Decomposing the Precarious Future of American Orchestras in the Face of *Golan v. Holder*," the diminution of the public domain results in higher performance and sheet music costs for orchestras—costs which "can be prohibitive for smaller professional, college, community, and youth orchestras."[195]

This, in turn, disrupts the entire orchestral "ecosystem" because it is these types of ensembles that feed the name-brand orchestras.[196] Additionally, the more difficult it is to obtain the rights to perform these copyrighted pieces, the less likely it is that they will be programmed, resulting in them falling out of the repertoire altogether—a significant cultural injury.[197] Justice Breyer elaborated on this point, citing similar injuries to universities, film collectors, database compilers, museums, and public libraries, among others.[198] An emphasis on the profit motive serves only to injure the public interest and undermine the utility of the Clause.

Along with serving as a means to the end of promoting the progress by ultimately giving the work to the public, the limited times language also serves as a constraint on Congress's authority in this area. In both Supreme Court cases, the petitioners raised the issue of compounding term extensions resulting in an effectively perpetual copyright.[199] The CTEA extended

193. Referring to the majority's quoting of Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994).

194. *See* Golan Brief, *supra* note 149, at 10–11.

195. Dubina, *supra* note 97, at 963.

196. *Id.* at 998 (citing Mark MacNamara, *Balancing Rights: The Future of Copyright in the U.S.*, S.F. CLASSICAL VOICE (Sept. 17, 2011), http://www.sfcv.org/article/balancing-rights-the-future-of-copyright-in-the-us).

197. *Id.*

198. *See* Golan v. Holder, 565 U.S. 302, 35556 (2012) (Breyer, J., dissenting).

199. *See* Eldred Brief, *supra* note 46, at 18.

> [T]he Constitution requires that the duration of a copyright term be 'limited.' Under the recent practice of Congress—extending the terms of existing copyrights eleven times in the past forty years—copyright terms are no longer 'limited.' This practice shows that, rather than fixed, or certain, or 'limited,' terms are perpetually changeable and expandable.

Id.; *see also* Golan Brief, *supra* note 149, at 22–23.

> Removing works from the public domain violates the 'limited [t]imes' restriction by turning a fixed and predictable period into one that can be reset or resurrected

copyright protection for creative works for the fourth time in U.S. history, affording authors the longest grant of protection to date. Section 514 of the URAA was similarly groundbreaking, pulling works out of the public domain and affording further protection to works that had either never had protection or whose protection had since lapsed. Both of these provisions show Congress effectively testing the boundaries of the limited-times constraint of the Clause to see just how uncompromising of a barrier the Court is willing to enforce. In both cases, the majority declined to address the issue of where the line sits and when a term is effectively "perpetual," dismissing the issue as beyond the scope of the current disputes.[200]

The problem with the Court's reluctance to look at the big picture here is that, from the majority's position, any finite period of time, however long, is considered to be consistent with the language of the Clause.[201] In the words of the late Professor Howard Abrams: "How much is too much?"[202] Reading the majority opinions at face value, only an expressly perpetual term would trigger a reaction from the Court.[203] Likewise, the Court has not provided any workable insight concerning the extent to which Congress can remove works from the public domain.[204] The fact of the matter is that at some point, the terms afforded by these consecutive extensions and resurrections must eventually reach the point of "becoming *de facto* perpetual in violation of the constitutional command."[205]

By focusing on the actual and conceivable congressional intent, the Court is missing the point. In both cases, the Court asserted that there is no evidence of a congressional intention to circumvent the limited-times restriction of the Clause.[206] Regardless of congressional intent, it is important to look at the actual effects of this legislation.[207] Whether or not Congress

> at anytime, even after it expires. . . . If Congress may, as it did here, place works into the public domain only to reclaim them decades later, the limit placed on a copyright term at any given moment is meaningless.

Id.

200. *See* Eldred v. Ashcroft, 537 U.S. 186, 209 (2003) ("Nothing before this Court warrants construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint."); *see also Golan*, 565 U.S. at 319–20 ("As in *Eldred*, the hypothetical legislative misbehavior petitioners posit is far afield from the case before us.").

201. *See* Abrams, *supra* note 96, at 522.

202. *Id.*

203. *Id.*

204. *Id.* at 523.

205. *See* NIMMER & NIMMER, *supra* note 142, § 1.05[A] (footnote omitted).

206. *See* Eldred v. Ashcroft, 537 U.S. 186, 209 (2003); *see also* Golan v. Holder, 565 U.S. 302, 319–20 (2012).

207. *See Eldred*, 537 U.S. at 256 (Breyer, J., dissenting) ("Of course Congress did not intend to act unconstitutionally. But it may have sought to test the Constitution's limits.").

was motivated by the potential of a perpetual regime, that is where we are headed.[208] If the Court takes this same approach to reviewing all future term extensions and reinstatements of expired copyrights, the limited-times language might as well be stricken from the title page of the Constitution. The consequences are not that difficult to discern. Justice Breyer has stated that this diminution of the public domain has already resulted and will continue to result in "a kind of intellectual purgatory from which [these works] will not easily emerge."[209] Furthermore, the threat of perpetual copyright protections implicates First Amendment concerns as the expression of ideas becomes further monopolized.[210]

The bedrock of the Court's argument in both cases has been that "petitioners fail to show how the CTEA [and later, § 514 of the URAA] crosses a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, and 1976 Acts did not."[211] The majority contends that the granting of term extensions to existing works is an "unbroken congressional practice," starting with the first copyright act in 1790.[212] Citing further to congressional discussion at the time of the Copyright Act of 1831, the Court noted that it would be unfair to refuse to bestow the longer period of protection on an author who had published[213] just before the Act went into effect.[214] However, a closer look at past congressional practice greatly undermines the strength of these justifications.

The most persuasive history is the Copyright Act of 1790 because the actions of a Congress close in time with the framing finds support in the Framers' original intent.[215] At this time, Congress did not *extend* existing copyrights, instead, Congress *created* a federal copyright regime.[216] Not only is this conclusion supported in our jurisprudence,[217] it is evidenced by the

208. *See* Abrams, *supra* note 96, at 522.

209. *Eldred*, 537 U.S. at 252 (Breyer, J., dissenting).

210. *See* NIMMER & NIMMER, *supra* note 142, § 1.05[D][1].

211. *Eldred*, 537 U.S. at 209–10; *see also Golan*, 565 U.S. at 327, 329.

212. *Eldred*, 537 U.S. at 200.

213. With the implementation of the 1976 Act, protection now begins at creation, but the majority's argument still remains relevant. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 302(a), 90 Stat. 2541, 2572 (codified as amended at 17 U.S.C. §§ 101–810 (1976)).

214. *Eldred*, 537 U.S. at 204.

215. *Eldred*, 537 U.S. at 237 (Stevens, J., dissenting) ("That presumption is strongest when the earliest acts of Congress are considered, for the overlap of identity between those who created the Constitution and those who first constituted Congress provides 'contemporaneous and weighty evidence' of the Constitution's 'true meaning.'" (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888))).

216. *Id.* at 231 ("That congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear." (quoting Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834))).

217. *Id.*; *see also* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (explaining Congress created copyright using its constitutional power to promote the arts and sciences).

novel registration requirement that accompanied these early protections.[218] Another distinction put forth by Circuit Judge David Sentelle in his dissenting opinion in *Eldred v. Reno* (the prelude to *Eldred v. Ashcroft*) is that the parameters of the Copyright Act of 1790 were *sui generis*—they were necessary simply in order to catalyze the operation of federal law under the new U.S. Constitution.[219]

While it is true that, thereafter, Congress at times would continue to tack on term extensions, that does not make an argument for the constitutionality of these statutes inviolate. As Professor David Nimmer has posited: "If an unchallenged course of conduct over decades can establish the constitutionality of a practice, then these enactments testify in favor of the practice's legitimacy."[220] The we-have-always-done-it-this-way mentality is an insufficient justification for allowing Congress to continue to legislate in a manner that arguably exceeds the boundaries of the Clause's power.[221]

E. Copyright and the First Amendment

The structural and functional relationship underlying the Clause and the First Amendment invites an analysis of the free-speech implications of Congress's most recent actions under the Clause. Despite their face value—the First Amendment safeguarding freedom of expression and the Clause allowing for limited monopolies over expression—these provisions work together to achieve the same goal.[222] While the First Amendment protects the freedom of expression, the Clause imposes a narrow limitation which, when all is said and done, actually serves that same purpose.[223]

The Clause and the First Amendment mutually reinforce each other, but a statute that exceeds the Clause's boundaries may set these two provisions at cross-purposes, "depriving the public of the speech-related benefits that the Founders, through both [provisions], have promised."[224] While the Court has recognized that challenges brought under the Clause are not exempt from

218. *Eldred*, 537 U.S. at 231 n.7 (Stevens, J., dissenting).

219. *See* NIMMER & NIMMER, *supra* note 142, § 1.05[A] (referring to Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001)).

220. *Id.*

221. *See* INS v. Chadha, 462 U.S. 919, 944–45 (1983) (explaining that just because "a given law or procedure is efficient, convenient, and useful in facilitating functions of government, [that fact] standing alone, will not save it if it is contrary to the Constitution").

222. *See Eldred*, 537 U.S. at 219.

223. *Id.*

224. *Id.* at 244 (Breyer, J., dissenting).

First Amendment scrutiny,[225] the Court has declined to address the First Amendment concerns of copyright legislation that, in its mind, do not exceed the "traditional contours" of the copyright grant.[226]

The Court has defined the "traditional contours" of copyright protection to be coterminous with the Clause's built-in free-speech safeguards: the idea/expression dichotomy and the fair use doctrine.[227] The function of the idea/expression dichotomy is that it only allows the expression of the idea to be copyrighted, rather than the idea itself.[228] In theory, the author's creative interest is protected, while the public is still free to access and make use of the underlying idea.[229] The fair use doctrine acts as a second line of defense, balancing the author's creative interest against the public's use of the work "for purposes such as criticism, comment, news reporting, teaching[,] . . . scholarship, or research . . . ."[230] However, a reliance on the belief that these safeguards provide for adequate First Amendment protections against copyright monopolies has not proven effective.[231]

The idea/expression distinction is not infallible, as many times the idea and the expression are so intertwined that to copyright the expression would be to copyright the entire idea.[232] Even when the two may be separated and the idea is free for public use, authors are still prohibited in any attempt to use existing expression to create new works.[233] Furthermore, there is no judicial or legislative decree defining the distinction between idea and expression.[234] The fair use doctrine also does not provide sufficient protection, as it has been undervalued and is often narrowly construed by the Court, resulting in a deprivation of the free-speech interests that sit at the core

225. *See* Netanel, *supra* note 182, at 1097–98 (In fact, "the First Amendment has been held repeatedly to override legislation enacted by Congress pursuant to other enumerated congressional powers in the Constitution, all of which were adopted with the very same temporal proximity to the First Amendment as the Copyright Clause.").

226. *Eldred*, 537 U.S. at 221.

227. *See* Golan v. Holder, 565 U.S. 302, 328 (2012) (first quoting *Eldred*, 537 U.S. at 219; and then citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (footnote omitted)).

228. *See* Hartnett, *supra* note 2, at 271.

229. *Id.*

230. *Id.* at 271–72; *see also* 17 U.S.C. § 107.

231. *See* Hartnett, *supra* note 2, at 272; *see also* Netanel, *supra* note 182, at 1106 ("[C]ourts have been inconsistent, at best, in interpreting and applying the idea/expression dichotomy and fair use defense in a manner that truly safeguards First Amendment rights.").

232. *See* Hartnett, *supra* note 2, at 271. To attempt to remedy this, many courts have implemented the "merger doctrine" where certain expression cannot be copyrighted, because to do so would confer a monopoly over the idea and violate foundational-copyright principles. *See* Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204, 208 (9th Cir. 1988) (stating the Ninth Circuit's version of the "merger doctrine" rule).

233. *See* Netanel, *supra* note 182, at 1099.

234. *Id.* at 1106.

of both the Clause and the First Amendment.[235] Even the Court's more expansive "transformative use" approach to fair use, which controls today, still needs to be revisited in order to sufficiently safeguard First Amendment rights.[236]

The issues with these safeguards are present in both *Eldred* and *Golan*. The petitioners in *Eldred* understood that "[t]he constitutional interest in the public domain is an interest in guaranteeing access not just to the author's ideas but also his expression."[237] By extending the limited monopoly, Congress is keeping works from the public domain and restricting that access to the expression—something that the idea/expression dichotomy cannot remedy.[238] Furthermore, under the effects of the CTEA, what good is a fair use defense to those using online catalogues to access creative works that are not there?[239] The petitioners in *Golan* made compelling arguments as well, asserting that the idea/expression dichotomy does not make up for the damage done by § 514 of the URAA and the prior unrestricted right to the use of the expression as well as the idea.[240] The limited access afforded by the fair use doctrine, they contended, is similarly insufficient to make up for the unfettered access upon which these conductors, musicians, and publishers had previously relied.[241] "Playing a few bars of a Shostakovich symphony is no substitute for performing the entire work."[242]

Notably, the Court has never found a law to exceed the "traditional contours" of the copyright grant and was unwilling to use *Eldred* and *Golan* to explore the boundaries of the Clause. In enacting the CTEA, Congress took yet another step in the direction of pushing boundaries of the limited-times constraint of the Clause. The value of the economic incentive for authors to create reached over 99.8% of the value of perpetual protection.[243] One is invited to wonder whether the Court will invalidate a law with a set time limit

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235. *See* Hartnett, *supra* note 2, at 301; *see also* Herrington, *supra* note 17 (noting that the fair use doctrine has also been negatively impacted by the Legislature).

236. *See* Netanel, *supra* note 182, at 1111–12.

> [A] use is transformative if the defendant uses the plaintiff's work for a new expressive purpose that conveys a different message from that for which the original was created . . . [i]f the use is transformative, the copyright holder may not prevent the use by proactively licensing such transformative uses and then claiming that the defendant is harming copyright holder's potential market.

Id. (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)).

237. Eldred Brief, *supra* note 46, at 36.

238. *Id.*

239. *See* Eldred v. Ashcroft, 537 U.S. 186, 253 (2003) (Breyer, J., dissenting).

240. *See* Golan Brief, *supra* note 149, at 46.

241. *Id.* at 46–47.

242. *Id.* at 47.

243. *See Eldred*, 537 U.S. at 255–56 (Breyer, J., dissenting).

that measures equally with a grant of copyright in perpetuity. Looking also to § 514 of the URAA, Congress used its Clause power to remove works from the public domain, and "[w]hile it is extremely doubtful the majority would accept wholesale or unprincipled removal of works from the public domain, the language of *Golan* seems to invite it."[244] Meanwhile, this type of action in the patent context has been strictly prohibited.[245]

The insight provided by the petitioners in these cases, and by Justice Breyer in his dissenting opinions, recognizes that copyright legislation is not simply economic regulation; it also regulates the free expression of ideas, inviting a stricter review.[246] The Court must give some attention to this issue to determine whether the speech-related harms caused by these laws can be justified by the copyright power.[247] By not using these cases to test the sufficiency of the "traditional contours" of the First Amendment protections embedded in the copyright power, the Court has allowed Congress to push the envelope and has opened the door for free-speech violations.

III. A PROPOSED SOLUTION

As illustrated in Part II, it has become apparent that the Court's great deference to Congress in this area of the law has invited coercion of the utilitarian function of the copyright grant and has sparked the concern that Congress may soon contravene the First Amendment. While the Court relies on legislative history to support its deference to congressional judgment, "the fact that Congress has repeatedly acted on a mistaken interpretation of the Constitution does not qualify [the Court's] duty to invalidate an unconstitutional practice when it is finally challenged in an appropriate case."[248] Moving forward, the Court needs to be willing to enforce the boundaries of the Clause and preserve its utilitarian foundation.

Step one is to ensure that any congressional enactments in this area, *in effect*, use private incentives as a means for a primarily public benefit. This can be achieved by a focus on the requirement that grants of copyright inspire the creation of new works on the front end, and ultimately live in the public

244. Abrams, *supra* note 96, at 523.

245. *See* Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 6 (1966).

246. *See Eldred*, 537 U.S. at 244 (Breyer, J., dissenting).

247. *See* Golan v. Holder, 565 U.S. 302, 359–60 (2012) (Breyer, J., dissenting); *see also* Netanel, *supra* note 182, at 1105 ("If the idea/expression dichotomy and fair use defense are the built-in First Amendment accommodations that are required for copyright law to pass First Amendment muster, they must protect First Amendment rights in substance, not just in name.").

248. *Eldred*, 537 U.S. at 235 (Stevens, J., dissenting) (referring to INS v. Chadha, 462 U.S. 919 (1983)).

domain after a period just long enough to incentivize the initial creation on the back end. Rather than celebrating the profit motive, the Court should celebrate the unfettered access to knowledge and learning that the Framers so adamantly protected. The Court can accomplish this goal by looking to the actual, real-world effects of congressional action and assessing its utilitarian merits.

Step two is if the legislation fails to provide a primarily public benefit while continuing to further monopoly privileges, then it should be scrutinized as a content-neutral restriction on the freedom of expression. As noted by the petitioners in *Eldred*, speech that exceeds these bounds must be analyzed under the intermediate scrutiny of the *Turner Broadcasting System, Inc. v. F.C.C.* test.[249] This requires the Court to determine whether Congress could have achieved its goals through less restrictive alternatives.[250] While the Court has intimated that the built-in First Amendment safeguards are sufficient to prevent further inquiry into copyright law's repercussions on freedom of expression, the Court has too much faith in the effectiveness of the fair use doctrine and the idea/expression dichotomy. If those safeguards are to be the irrefutable response to all First Amendment inquiries into new copyright laws, they should be reevaluated and strengthened as necessary to protect the freedom of expression in the face of expanding monopolies.

There will, of course, be new concerns raised with this proposed approach. For one, the Court would be going against years of jurisprudence and legislative history in this area. In her majority opinions, Justice Ginsburg cited the absence of past challenges to term extensions and renewed protection of works in the public domain.[251] However, while a discussion of history and precedent are important in this area, they are certainly not determinative. As Justice Oliver Wendell Holmes once declared: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[252]

Another concern that may become apparent with a return to the utilitarian approach to United States copyright legislation is that it will be difficult to respond to international copyright pressures, such as the Berne Convention, which require cooperation with more privately motivated provisions. However, let us not forget that "European and American copyright law have long coexisted despite important differences . . . ."[253] European regimes rely on a "natural rights" approach to copyright,

249. *See* Netanel, *supra* note 182, at 1096.
250. *See Golan*, 565 U.S. at 367 (Breyer, J., dissenting).
251. *See* Abrams, *supra* note 96, at 516.
252. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
253. Eldred v. Ashcroft, 537 U.S. 186, 259 (2003) (Breyer, J., dissenting).

prioritizing the rights of authors, as exhibited by the lack of constitutional limited-times language.[254] This is not to say that American and European copyright regimes can never work in parity. However, the partial uniformity that our current regimes promise is far from a sufficient justification for Congress's contravention of foundational American copyright principles.[255]

CONCLUSION

An examination of the effects of these two statutes, in light of the Framers' original intent, illustrates how detrimental and counterproductive the Court's interpretation of the Clause has been. Under the CTEA, the furtherance of monopoly privileges imposes significant costs on the public and a term extension facilitating private gain, while simultaneously inhibiting the public's access to creative materials.[256] Section 514 of the URAA similarly undermines the goals of the Clause by essentially turning the public domain into an "intermission" period of public access.[257] The Court's response to challenges to these statutes does not show a proper balancing of private benefits against public costs.[258] As a result, copyright holders are the ones who receive the overwhelming benefit from the copyright system.[259] This is by no means a sustainable approach.

A review of the text and purpose of the Clause shows that the progress of learning and knowledge in society is to be the primary goal of all legislation that stems from the Clause. This is further supported by the Court's protection of the *quid pro quo* foundation of patent legislation. Privately motivated laws that marginally benefit monopoly interests while not incentivizing the creation of new works and prolonging the public's limited access to these works arguably infringe upon the fundamental right to freedom of expression. Thus, a First Amendment analysis of copyright legislation is not unnecessary as the Court might suggest. A recognition of the copyright scheme as first and foremost a public service will allow the

254. *Id.*

255. *Id.* at 260.

256. *See* Abrams, *supra* note 96, at 524 ("The public will pay higher prices for access to the copyrighted works and subsequent creators will be unable to build on copyrighted works without permission until the copyright expires.").

257. *See* Golan Brief, *supra* note 149, at 23.

258. *See* Abrams, *supra* note 96, at 526.

259. *Id.* at 527. This injury is cyclical because the creation of new works is highly dependent on access to and exploration of preexisting works. *See* VAIDHYANATHAN *supra* note 10, at 21. Limited public access results in limited private creation, effectively throwing a wrench in the entire function of the copyright system. *Id.*

Clause to serve as an instrument of the accessibility of knowledge, an engine for freedom of expression, and a catalyst for societal progress.