

**“TO PROMOTE THE PROGRESS OF SCIENCE”:  
THE COPYRIGHT CLAUSE AND CONGRESS’S POWER  
TO EXTEND COPYRIGHTS**

Senator Orrin G. Hatch & Thomas R. Lee\*

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. PREVAILING WISDOM: THE ACADEMIC LITERATURE AND THE “PROGRESS OF SCIENCE” .....	4
III. TO “PROMOTE THE PROGRESS OF SCIENCE”: THE ORIGINAL UNDERSTANDING OF THE COPYRIGHT CLAUSE .....	7
A. <i>Founding-Era Usage of “Progress”: Physical         Movement or Dissemination</i> .....	8
B. <i>“Progress” in Context: The Structure of the Copyright         Clause</i> .....	11
C. <i>“Progress” in Context: The History of Copyright         Extensions and Renewals</i> .....	12
IV. THE CTEA AS A PROMOTER OF PROGRESS: THE EFFECTS OF EXTENSION ON DISSEMINATION, PRESERVATION, AND CREATION .....	15
A. <i>Extension and the Incentive to Distribute</i> .....	16
B. <i>Distribution in the Digital Age</i> .....	17
C. <i>Extension and the Incentive to Create</i> .....	20
V. CONCLUSION.....	23

I. INTRODUCTION

In *Eldred v. Ashcroft*,<sup>1</sup> the United States Supreme Court will consider the constitutionality of the Sonny Bono Copyright Term Extension Act (“CTEA”).<sup>2</sup> The petitioners in *Eldred* are individuals and entities who make their living on artistic works that have fallen into

---

\* Orrin Hatch is a United States Senator from the State of Utah, the ranking Republican on the Senate Judiciary Committee, and the principal sponsor of the Senate version of the statute that is the subject of this Article. Tom Lee is a Professor of Law, Brigham Young University, J. Reuben Clark Law School, and was counsel to *amicus curiae* Senator Orrin G. Hatch in *Eldred v. Ashcroft*. Our thanks to Makan Delrahim, Shawn Bentley, Michael Lee, and Ryan Nelson for their comments on earlier drafts, and to Andy Nicoll and Jeff Steele for their helpful research assistance.

1. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted sub nom.* *Eldred v. Ashcroft*, 534 U.S. 1126 (2002), and *amended by* 534 U.S. 1160 (2002).

2. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301–304).

the public domain. They challenge the CTEA as unconstitutional to the extent that it delays by an additional twenty years the date on which copyrighted works will enter the public domain.<sup>3</sup>

A principal ground for this challenge is the purpose provision of the Copyright Clause of the Constitution, which states that Congress has the power “[t]o promote the progress of science” by protecting copyrights.<sup>4</sup> According to the *Eldred* petitioners, an extension of the copyright term for works already in existence cannot further the purpose prescribed in the Constitution “because the incentive is being given for work that has already been produced. Retroactive extensions cannot ‘promote’ the past.”<sup>5</sup>

The Court’s decision to hear the *Eldred* case was widely perceived to portend a triumph of the academic understanding of the Copyright Clause over the purely commercial interests of the lobby of publishers and motion picture producers who led the charge for the CTEA.<sup>6</sup> After all, the scholarly literature addressing the constitutionality of copyright extension has been mostly one-sided: it asserts that copyright fulfills its constitutional purpose only if it increases the

---

3. The challenged statute extends the duration of copyright protection granted by the Copyright Act of 1976. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541. Under the 1976 Act, copyright protection on single-author works expired fifty years after the death of the author, while protection on works for hire expired “seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expire[d] first.” *Id.* Under the CTEA, all existing and future copyrights were extended, bringing the duration of single-author works to seventy years after the death of the author and works for hire to ninety-five years. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301–304).

4. U.S. CONST. art. I, § 8, cl. 8. Although this Article focuses exclusively on the “progress” provision of the Copyright Clause, it is worth noting that the petitioners also challenge the CTEA as a violation of the Copyright Clause’s “limited times” requirement. See Brief for Petitioners at 11–17, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618). According to the petitioners, upholding the CTEA would empower Congress to create “a perpetual term ‘on the installment plan’” by enacting successive (but limited) term extensions “ad infinitum.” *Id.* They conclude that for “limited times” to have any meaning, the Court must hold that Congress lacks the power to grant copyright extensions on existing copyrights. *Id.* at 18. In our view, the petitioners reach their conclusion only by ignoring arguments that find support in the language of the Copyright Clause, in the historical context in which that provision came into existence, and in Congress’s longstanding practice of extending subsisting copyrights. The Framers chose “limited times” after considering more definite and restrictive language (both “a limited time” and “a certain time” were considered). See 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 556 (Dep’t of State 1900) (Convention, Aug. 18, 1787); see also George Ramsey, *The Historical Background of Patents*, 18 J. PAT. OFF. SOC’Y 6, 14 (1936). The Copyright Act of 1790, passed by the First Congress, extended existing state copyrights and contained a provision to further extend copyrighted works in the event that the author outlived the initial copyright. Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790). Finally, Congress has repeatedly extended existing copyrights without judicial objection. See, e.g., Pub. L. No. 87-668, 76 Stat. 555 (1962).

5. Brief for Petitioners at 22, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

6. See, e.g., Chris Springman, *The Mouse That Ate the Public Domain: Disney, The Copyright Term Extension Act, and Eldred v. Ashcroft*, FINDLAW (Mar. 5, 2002), at [http://writ.news.findlaw.com/commentary/20020305\\_sprigman.html](http://writ.news.findlaw.com/commentary/20020305_sprigman.html) (last visited Nov. 5, 2002).

quantity or quality of the existing body of artistic works and insists that retrospective extensions like that effected by the CTEA can have no such effect.<sup>7</sup>

To date, there has been precious little rebuttal to this syllogism.<sup>8</sup> Even the D.C. Circuit opinion upholding the CTEA did so without defending its impact on the “progress of science.”<sup>9</sup> Its analysis of this point rested instead on the questionable conclusion “that the introductory language of the Copyright Clause” simply does not constitute “a substantive limit on Congress’ legislative power.”<sup>10</sup>

In this Article, we propose to fill the void in the literature on this issue. Our thesis is that the CTEA can easily be justified as constitutional without ignoring the preambular purpose provision of the Copyright Clause. In the sections below, we identify an understanding of the goal of “promot[ing] the progress of science” that is perfectly consistent with copyright extension. This understanding — which views “progress” as encompassing not only an increase in quantity or quality of works, but also an improvement in the dissemination and preservation of works already in existence — finds support in founding-era usage of the constitutional language, in the structure of the Constitution, and in the historical exercise of the copyright power. Moreover, the evidentiary record leading up to the enactment of the CTEA includes extensive evidence that copyright extension would promote the progress of science by encouraging the distribution and dissemination of copyrighted works.

---

7. See *infra* Part II.

8. Even Edward Walterscheid’s recent comprehensive work on the history of the Intellectual Property Clause omits any substantive treatment of the meaning of the term “progress.” See EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* (2002). Notably, Walterscheid offers in-depth analyses of the terms “science,” “useful arts,” “securing,” “exclusive right,” “limited times,” “inventors and their discoveries,” and “authors and their writings.” *Id.* at 115, n.1 (flagging subsequent chapters devoted to these terms). Yet Walterscheid makes no similar attempt to analyze the term “progress.” The most recent work that does address the meaning of “progress” in detail is Malla Pollack’s article, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution*, 80 NEB. L. REV. 754 (2002). We agree with and expand on some of Pollack’s conclusions but ultimately disagree with her application of those conclusions to the CTEA. See *infra* notes 40–42.

9. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

10. *Id.* at 378 (internal quotations omitted). Elsewhere in the opinion, the D.C. Circuit majority does go out of its way to hypothesize that “[i]f called upon to do so” it “might well hold that the application of the CTEA to subsisting copyrights is ‘plainly adapted’ and ‘appropriate’ to ‘promot[ing] progress.’” *Id.* at 379. This is because extension “give[s] copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration.” *Id.* But the D.C. Circuit apparently saw no need to elaborate on that effect of the CTEA or to explain how it might be consistent with the language of the purpose provision of the Copyright Clause. This Article picks up where the appellate court’s dictum left off.

## II. PREVAILING WISDOM: THE ACADEMIC LITERATURE AND THE “PROGRESS OF SCIENCE”

For the most part, the academic literature that addresses this issue jumps quickly to the *Eldred* petitioners’ conclusion that copyright fulfills its constitutionally prescribed purpose only if it provides incentives for the creation of new works of authorship. Paul Heald and Suzanna Sherry assert that a “retroactive grant of copyright protection cannot ‘promote the Progress of Science’ in the way intended by the framers of the Constitution” because such a grant “cannot possibly provide any incentive for [an author] . . . to create an already existing work.”<sup>11</sup> In other words, as L. Ray Patterson puts it, “the creation of a new work is the unalterable condition for copyright, a condition that the Framers . . . made a part of the Copyright Clause” by authorizing Congress to “promote the progress of science.”<sup>12</sup> Indeed, Patterson even ventures the proposition that there is “no language in the Copyright Clause that empowers Congress to grant a copyright for the preservation [or, presumably, the dissemination] of works,”<sup>13</sup> since “[t]he condition for copyright is the creation of a new work, not the recycling of old works . . . .”<sup>14</sup>

Michael Davis agrees. He states that “[t]here does not seem to be any constitutional power premised . . . on publication, as opposed to creation, of works.”<sup>15</sup> Davis further opines that the Copyright Clause “is about ‘authors,’ and about affording them incentives to produce copyrightable works. It is not about funding authors, or publishers, generally, in the hope or expectation that they might produce something.”<sup>16</sup> Under this approach, Davis asserts that retrospective extension is unconstitutional, since “copyright has already done its job with respect to past works and, by definition, the existing copyright term was sufficient to provide the necessary incentive.”<sup>17</sup>

Other scholars have taken a similar approach. In Jane Ginsburg’s words, the argument for unconstitutionality of the CTEA depends on

11. Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1169 (2000). Heald and Sherry conclude that the purpose provision of the Copyright Clause imposes a *quid pro quo* requirement, under which “author . . . creates, then author . . . gets reward,” *id.* at 1162–63, and assert that “[i]t is difficult to imagine a more overt violation” of the *quid pro quo* principle than the CTEA. *Id.* at 1169.

12. L. Ray Patterson, *Eldred v. Reno, An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 234 (2001).

13. *Id.*

14. *Id.* at 235.

15. Michael H. Davis, *Extending Copyright and the Constitution: “Have I Stayed Too Long?”*, 52 FLA. L. REV. 989, 999–1000 (2000).

16. *Id.* at 1003.

17. *Id.* at 1004; see also Jenny L. Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much?*, 18 HASTINGS COMM. & ENT. L.J. 945, 954 (1996) (“The primary purpose of United States’ copyright law was . . . to stimulate creative production . . .”).

the premise that the public has a “vested interest in a work going into the public domain at the date on which it would have gone into the public domain when the work was originally created.”<sup>18</sup> If the public has such an interest, then an extension of the date on which a work would otherwise have fallen into the public domain is “suspect or illegitimate[] because it certainly did not provide an incentive for the creation of that work.”<sup>19</sup>

Wendy Gordon has made a similar point in comparing an “author’s rights” approach to copyright and an “instrumentalist” approach.<sup>20</sup> Gordon asserts that the Copyright Clause “is instrumentalist in wording” and argues that “an instrumentalist would oppose [copyright] extension” on the ground that “[i]t provides twenty more years of making works expensive and difficult to access, without giving a compensating gain in incentives.”<sup>21</sup> Gordon’s view of the relevant incentives again focuses on the effect on the quantity or quality of the body of existing works:

Under life plus fifty, [an] imaginary New York composer would have had eighty-nine years of copyright in her 1931 composition. Under something like the Bono Act’s life plus seventy, she would have 109 years of copyright in the composition. Perhaps a sleepy author could be dragged to an early worktable by the thought of making his grandchildren better off. But under the law prior to the Bono Act, that generation was already protected. Is the slugabed author likely to stir any earlier at the thought of increasing the wealth of his grandchildren’s grandchildren — or the great-great-grandchildren of the publisher to whom the copyright is assigned?<sup>22</sup>

---

18. Jane C. Ginsburg, Wendy J. Gordon, Arthur R. Miller & William F. Patry, *The Constitutionality of Copyright Term Extension: How Long is Too Long?*, 18 *CARDOZO ARTS & ENT. L.J.* 651, 702 (2000).

19. *Id.* It is worth noting that Ginsburg ultimately rejects this argument, albeit without offering an alternative understanding of the purpose provision of the Copyright Clause. *Id.* at 703–04. Ginsburg’s rejection of the argument is based not on historical usage of the term “progress” but on Congressional practice. *See id.* (noting that Congress has extended the copyright term in the first Copyright Act and repeatedly thereafter, and concluding that there is no “limiting principle” that would uphold early extensions while condemning the CTEA). *See infra* Part III.C for greater development of this point.

20. Ginsburg et. al., *supra* note 18, at 675–77.

21. *Id.* at 677. It should be noted that Gordon purports not to address “the constitutional-ity of the Sonny Bono Copyright Term Extension Act” but only to “look at the statute through the lens of two kinds of policies” (i.e., “authors’ rights” and “instrumentalist” policies). *Id.* at 675. Her assertion that the Copyright Clause is “instrumentalist in wording,” however, suggests that she is at least skeptical of the CTEA’s consistency with the constitutional purpose of copyright. *Id.* at 676.

22. *Id.* at 677 (footnote omitted); *see also* William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 *NOTRE DAME L. REV.* 907, 915 (1997) (as-

This is not to say that the CTEA has not had its defenders in the academic literature. Arthur Miller and others have argued vigorously in favor of the constitutionality of copyright extension.<sup>23</sup> But the statute's defenders have mostly ignored the basic syllogism offered by its critics: that the constitutional exercise of the copyright power must "promote the progress of science," and that retrospective extension of existing copyrights cannot do so because it cannot increase the quantity or quality of works already in existence.<sup>24</sup> Instead, those who argue in support of the CTEA seek mostly to change the subject. They argue, for example, that copyright extension is defensible on the ground that it "harmonized our law with that of other copyright-protecting nations,"<sup>25</sup> that it "will provide tremendous benefits to the American economy,"<sup>26</sup> or that it "ensur[es] that the term of protection afforded to copyrighted works is sufficient to provide a source of revenue for authors and, through them, to their families."<sup>27</sup>

In our view, these defenses of the CTEA are relevant to the policy question of whether copyright extension is a good idea but largely irrelevant to the legal question of its constitutionality. If the statute's critics are correct in their narrow conception of the purpose provision of the Copyright Clause (i.e., if "progress" is promoted only by an increase in the quantity or quality of copyrighted works), then the other salutary effects of copyright extension identified above are simply irrelevant.<sup>28</sup> The CTEA might promote harmonization, benefit the American economy, and enhance the reward given to authors and their families, in other words, but its purported failure to "promote the progress of science" would render it unconstitutional regardless of its

---

serting that "it is unclear" how a retroactive copyright extension "can withstand constitutional scrutiny" since "obviously no further works can be induced").

23. See Ginsburg et. al., *supra* note 18, at 686–95; Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719 (1998); see also Brief of Amicus Curiae Edward Samuels at 6–13, *Eldred v. Ashcroft*, 534 U.S. 1160 (No. 01-618).

24. In his defense of the statute, Miller has gone part way toward the conclusions we offer here: he has asserted that copyright extension will "incentivize the dissemination industries, the preservation industries, and the derivative work industries." Ginsburg et. al., *supra* note 18, at 693. What Miller and others have not done, however, is to connect these points to the language of the Copyright Clause; they have not explained how dissemination and preservation are consistent with the goal of promoting the progress of science. That connection is the unique contribution of this Article.

25. *Id.* at 690; see also Arthur R. Miller, *Copyright Term Extension: Boon for the American Creators and the American Economy*, 45 J. COPYRIGHT SOC'Y 319, 325–26 (1998).

26. Miller, *supra* note 25, at 320; see also *id.* at 326 (asserting that in 1995, "the core copyright industries of the United States realized \$53.25 billion in foreign sales and exports, surpassing every other export sector industry except automotive and agriculture").

27. Hatch, *supra* note 23, at 733.

28. See Davis, *supra* note 15, at 992 (contending that the argument "that any copyright legislation which yields a 'public benefit' is constitutional" is simply "bereft of any identifiable textual basis").

other advantages. At the same time, the statute's critics have also fallen short in their abrupt rejection of the CTEA. They simply assume that the goal of "promot[ing] the progress of science" requires an incentive to create new (or qualitatively better) artistic works, without pausing to analyze the language put in place by the Framers.

### III. TO "PROMOTE THE PROGRESS OF SCIENCE": THE ORIGINAL UNDERSTANDING OF THE COPYRIGHT CLAUSE

Thus, in our view the participants on both sides of the debate have argued around the crucial constitutional question: whether the CTEA can be said to "promote the progress of science" as those words are used in the Copyright Clause.<sup>29</sup> This question cannot be avoided by the D.C. Circuit majority's facile disclaimer that these words are an empty preamble that lacks substantive content.<sup>30</sup> The explicit language of the Constitution cannot lightly be presumed to lack any meaningful content; indeed, since *Marbury v. Madison*, the U.S. Supreme Court has recognized that the very purpose of a written Constitution is to prescribe "limits" on the powers of government, so that "those limits may not be mistaken or forgotten."<sup>31</sup>

An inquiry into the meaning of the language of this preamble is accordingly in order. The key term is "progress." Everyone agrees that the notion of "science" in the founding era referred generally to all forms of knowledge and learning.<sup>32</sup> The term "science," in other words, referred to the subject of copyrightable works, while the paral-

---

29. See Pollack, *supra* note 8, at 767 (asserting that the author "know[s] of no article presenting a detailed explication" of the term "progress" as it is used in the Copyright Clause); Robert P. Merges, *As Many As Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L. J. 577, 587 (1999) (asserting that the Intellectual Property Clause of the Constitution is "rooted in a blind faith in 'progress'").

30. *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001). For criticism of this aspect of the D.C. Circuit's decision, see Patterson, *supra* note 12, at 233 (asserting that "[a] stated goal, of course limits the power to achieve that goal," and that the D.C. Circuit's refusal to accord any significance to the purpose provision is the equivalent of a ruling "that the power the Framers designed to be limited [is] unlimited").

31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); see WALTERSCHEID, *supra* note 8, at 396-97, n.104 (arguing that the requirement of "some minimal degree of creativity" imposed by the Court in *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), can only be explained in light of the "progress of science" provision).

32. See 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed., London, 1789), *microformed on* Early American Imprints 1st Series, Fiche 45588 (Readex Microprint) (defining "science" as "any art or species of knowledge"); JOHN ELLIOTT & SAMUEL JOHNSON, JR., A SELECTED, PRONOUNCING AND ACCENTED DICTIONARY (2nd ed. Hartford, 1800), *microformed on* Early American Imprints 1st Series, Fiche 37356 (Readex Microprint) (defining "science" as "knowledge, skill, art"); see also Brief for Petitioners at 15, n.4, *Eldred v. Ashcroft*, 534 U.S. 1160 (No. 01-618) (acknowledging this meaning of "science" at the time of the framing).

lel phrase “useful arts” referred to the subject of patents.<sup>33</sup> “Promote” is similarly uncontroversial. It meant “to forward” or “to advance.”<sup>34</sup>

The question, then, is whether the term “progress” is confined narrowly to the notion of an increase in number or nature, as the CTEA’s detractors suggest (albeit without any significant analysis of the meaning of that term). We believe that it is not. As explained below, the founding-era understanding of “progress” clearly extends to the dissemination or distribution of existing artistic works and is not limited to an increase in quantity or quality. This is clear from the founding-era usage of “progress,” from the structure of the Copyright Clause, and from the longstanding history of copyright term extensions.

#### A. Founding-Era Usage of “Progress”: Physical Movement or Dissemination

Founding-era dictionary definitions of “progress” focus predominantly on a notion of physical movement or dissemination. Noah Webster’s first American dictionary includes a series of definitions of progress, the first two of which clearly connote “a moving or going forward.”<sup>35</sup> Thomas Sheridan’s 1789 definitions similarly encompass “motion forward” and “a journey of state, a circuit.”<sup>36</sup>

A full-text search for “progress” in the electronic version of *The Federalist* papers reveals twenty-four instances of the word in this important work.<sup>37</sup> The predominant use of the term in *The Federalist*

33. See *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 n.1 (2002).

34. 2 SHERIDAN, *supra* note 32 (defining “promote” as “to forward; to exalt; to prefer”); ELLIOTT & JOHNSON, *supra* note 32 at 114 (defining “promote” as “to forward, advance”). Michael Davis’s analysis of the purpose provision focuses on the term “promote” to the exclusion of the word “progress,” contending that “the terms ‘to promote’ are synonymous with the words ‘to stimulate,’ ‘to encourage,’ or ‘to induce.’” Davis, *supra* note 15, at 1003. We agree with Professor Davis’s analysis as far as it goes; the problem is that it fails to address the *object* of the constitutional goal of promotion (or, to use his synonyms, stimulation or encouragement). In other words, it is true that the Copyright Clause empowers Congress to engage in promotion as Davis defines that term, but the important question is *what* Congress is supposed to stimulate, encourage, or induce.

35. NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (10th ed., New York, 1828).

36. SHERIDAN, *supra* note 32; see also WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 413 (1788), *microformed on* Early American Imprints 1st Series, Fiche 21385 (Readex Microprint) (defining “progress” as “course; advancement; journey”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. London, 1773), *microformed on* The Eighteenth Century, Reel 2045 (Research Publications Microfilm) (defining “progress” as “course; procession; passage” and as “advancement; motion forward”).

37. We executed this search through the electronic version of THE FEDERALIST, available at <http://memory.loc.gov/const/fedquery.html> (last visited Nov. 5, 2002). Our search revealed that the term “progress” appears in THE FEDERALIST Nos. 1, 6, 7, 8, 9, 15, 16, 22, 26, 30, 34, 73, 79, 84, 85 (Alexander Hamilton), Nos. 18, 40, 41, 43, 56, 58, 63 (James Madison), and Nos. 2, 5 (John Jay).



is in reference to an advancement or movement, as in a physical or metaphorical journey. In No. 15, for example, Alexander Hamilton alludes to “the road” over which his readers “have to pass” and “the field through which [they] have to travel,” and indicates his goal “to remove the obstacles from your progress in as compendious a manner as it can be done.” And in No. 73, Hamilton refers to the possibility of the King of England thwarting the “progress to the throne” of a “joint resolution[] of the two houses of Parliament” that he may find “disagreeable to him.”<sup>38</sup>

Most of the other uses of the term in *The Federalist* also connote physical movement or “spread,” often of some mechanism of destruction. In *The Federalist* No. 8, for example, Hamilton speaks of the “rapid desolation which used to mark the progress of war,” and of various “impediments” that could “exhaust the strength and delay the progress of an invader.” Similarly, in No. 2, John Jay writes of “the progress of hostility and desolation,” while Hamilton in No. 34 alludes to a “cloud” that “has been for some time hanging over the European world” and fears “in its progress a part of its fury would . . . be spent upon us.”<sup>39</sup>

The idea of “progress” as physical movement is also carried forward in the usage of the term in founding-era newspapers and other tracts. Malla Pollack reports the results of her “full text search . . . in all existing issues” of the *Pennsylvania Gazette* (“the *New York Times* of the American colonies”) from the founding era.<sup>40</sup> The results of this search are powerful evidence of the common usage of the term “progress” in the Framers’ generation:

By far, the most common use of “progress” was for destructive physical movement. The single most common word in the phrase “the progress of . . .” is “fire.” The *Gazette* speaks of “the progress of a fire” when a modern newspaper would report its “spread.”<sup>41</sup>

---

38. See also THE FEDERALIST No. 5 (John Jay) (discussing the “circumstances which tend to beget and increase power in one part and to impede its progress in another”); THE FEDERALIST No. 79 (Alexander Hamilton) (speaking of the “progress” over time of the “service” of judges, and their need in the course of that progress for an increase in the “stipend” that would have been “very sufficient at their first appointment”); THE FEDERALIST No. 9 (Alexander Hamilton) (noting the “progress towards perfection” in government represented by innovations such as separation of powers and checks and balances); THE FEDERALIST No. 40 (James Madison) (identifying the “origin and progress of the experiment” undertaken by the Framers).

39. See also THE FEDERALIST No. 7 (Alexander Hamilton) (discussing “the progress of the controversy between this State and the district of Vermont”); THE FEDERALIST No. 18 (James Madison) (noting the “progress” of various tyrants in the Greek empire).

40. See Pollack, *supra* note 8, at 798.

41. *Id.* at 799.

Similar uses of the term include the progress of armed troops, illness, insects, bad weather, and hostile ships.<sup>42</sup>

The usage of “progress” as a physical dissemination or spread is also indicated by the context surrounding the term as it appears in several state copyright statutes enacted under the Articles of Confederation. The copyright statutes enacted in Massachusetts, New Hampshire, and Rhode Island all begin with a preamble along the following lines: “Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences . . . .”<sup>43</sup> In context, the term “progress” as used in these statutes again connotes physical dissemination or spreading — as in the goal of seeing civilization spread throughout the new world.

The goal of assuring such “progress” was not an empty aspiration under the state copyright statutes of this era. Under several such statutes, an author’s copyright could be lost if he failed to make sufficient copies of his work available at reasonable prices.<sup>44</sup> Moreover, many

---

42. *Id.* Although we agree with (and build upon) Professor Pollack’s construction of the term “progress,” we ultimately disagree about the CTEA’s constitutionality. Pollack acknowledges that our shared understanding of “progress” “does destroy one argument against the retrospective section of the act — the argument that extending existing copyrights cannot promote progress because this phrase requires each grant to be paid for with a new work.” *Id.* at 762. But she then asserts that the CTEA somehow fails to promote “progress,” since the CTEA only claims “(i) to give copyright holders more of the financial value of works, and (ii) to help the United States’ balance of payments by supporting a strong export industry.” *Id.* at 763. Pollack misunderstands the CTEA’s intended impact on progress: to be sure, it increases the “financial value” of a copyrighted work, but the point is that such an increase provides an incentive for increased dissemination and preservation (i.e., “spread,” to use Pollack’s synonym). *See also* discussion *infra* notes 86–87. It may be, as Pollack subsequently asserts, that the CTEA’s effects on dissemination and preservation cannot be quantified, 80 *Neb. L. Rev.* at 765, but that assertion simply misunderstands the applicable standard of review, which accords deference to Congress and has never been read to require any precise, objective quantification of the effects of copyright protection. *See* discussion *supra* note 8.

43. Acts and Laws of the Commonwealth of Massachusetts 236 (Mar. 17, 1783) (“An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years”), *reprinted in* 8 NIMMER & NIMMER, *supra* note 33, app. 7 § C[2] (1993); *see also* The Perpetual Laws of the State of New-Hampshire, from July, 1776, to the session in December, 1788, continued into 1789, 161–62 (1789) (“An Act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions, for twenty years”), *reprinted in* 8 NIMMER & NIMMER, *supra* note 33, app. 7 § C[5] (identifying the goals of “the improvement of knowledge, the progress of civilization, and the advancement of human happiness”); At the general assembly of the governor and company of the State of Rhode-Island and Providence-Plantations, begun and holden at East-Greenwich on the 4th Monday of December, 1783, 6–7 (1783) (“An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for twenty-one years”), *reprinted in* 8 NIMMER & NIMMER, *supra* note 33, app. 7 § C[6] (articulating the goals of “the improvement of knowledge, the progress of civilization, the public weal of the community”).

44. *E.g.*, 8 NIMMER & NIMMER, *supra* note 33, app. 7-36 § C[11] (Georgia statute of Feb. 3, 1786) (“[W]henever [an] author . . . of such book . . . shall neglect to furnish the public with sufficient editions thereof, or shall sell the same at a price unreasonable [the] court

of the state laws spoke of encouraging the publication of works, not of their creation. Using essentially the same language, the prefaces of the Connecticut, New Hampshire, Georgia, and New York acts state that their purpose is to “encourage men of learning and genius to publish their writings.”<sup>45</sup>

*B. “Progress” in Context: The Structure of the Copyright Clause*

The notion of “progress” as a physical dissemination was the predominant usage of the term in the founding era, but it was not the only one. The above-cited dictionaries focused primarily on the idea of movement or a journey, but several also included the notion of “intellectual improvement.”<sup>46</sup> The same can be said of the usage of the term in the *Pennsylvania Gazette* and *The Federalist* papers: the idea of movement predominated, but “progress” was also used, albeit infrequently, to connote qualitative or quantitative improvement.<sup>47</sup>

This latter connotation, however, does not necessarily undermine the constitutionality of the CTEA. “Intellectual improvement” may be promoted not only by an increase in the number or quality of works, but also by encouraging the broader dissemination of those that already exist.

Moreover, the notion of “progress” as an increase in the quantity or quality of artistic works does not make sense in the context of the Copyright Clause, since it makes its words redundant. After all, “promot[ing] . . . science and the useful arts” is at least as effective a way to express the idea of increasing the number or character of copyrighted works.<sup>48</sup> Thus, if for no other reason, the prevailing conception of “progress” should be rejected on the ground that it fails to give meaning to all of the words of the Copyright Clause.<sup>49</sup>

Moreover, if the Framers had intended to limit Congress to establishing incentives for the creation of artistic works, and to foreclose the goal of promoting their distribution, surely they would not have chosen the broad language of the Copyright Clause. The Framers easily could have followed the language and structure of the British Stat-

---

is . . . authorized and empowered to give to such complainant [filing against the author] a full and ample license to re-print and publish such book, pamphlet, map or chart . . .”).

45. 8 NIMMER & NIMMER, *supra* note 33, app. 7 § C[1], [5], [11], [12].

46. *See* 2 SHERIDAN, *supra* note 32 (“intellectual improvement”); JOHNSON, *supra* note 36 (“intellectual improvement; advancement in knowledge”).

47. *See* Pollack, *supra* note 8, at 790 (noting a minority of uses of the term “progress” to connote “qualitative improvement”); THE FEDERALIST No. 58 (James Madison) (discussing the impact of “the progress of population” on representation in Congress).

48. *See* Pollack, *supra* note 8, at 788 (making the argument that the term “progress” is surplusage under the petitioners’ definition).

49. *See* *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77–78 (1946) (“In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”) (internal quotations omitted).

ute of Anne, which was enacted by Parliament for the express purpose of “the encouragement of learned men to compose and write useful books.”<sup>50</sup> The fact that they chose instead to authorize Congress to “promote the progress of science” suggests that they intended to give broader discretionary authority to take steps aimed at promoting distribution or dissemination, as the predominant usage of the term progress would indicate.

Indeed, at least until 1976, distribution and dissemination (and not creation) were the *exclusive* focus of American copyright law. Until the 1976 Copyright Act, copyright attached not upon creation but only upon publication.<sup>51</sup> For almost two centuries, Congress was focused not on encouraging the initial process of artistic creation, but on providing incentives for publication.<sup>52</sup> Because Congress concluded that the CTEA would advance this same goal, the statute can hardly be invalidated on the ground that it may not affect the initial creative process.

### C. “Progress” in Context: *The History of Copyright Extensions and Renewals*

The prevailing conception of “progress” is also undermined by the long history of copyright extensions and renewals in Britain and America. If copyright protection could not extend beyond the term initially promised to the author, the entire history of copyright would be called into question.

American copyright law was patterned after its British counterpart, which was first codified in the Statute of Anne.<sup>53</sup> The copyright term under the Statute of Anne was for an initial fourteen-year term, renewable for an additional fourteen years if the author was still living.<sup>54</sup> The first American copyright law, the Copyright Act of 1790, followed a similar approach. It conferred an initial term of fourteen years and also provided for a fourteen-year renewal term — if the author survived (or assigned his rights in the renewal term during the initial period) and filed the necessary renewal papers.<sup>55</sup> Thus, under

---

50. 8 Anne c. 19, § 1 (1710) (Eng.).

51. The 1976 Copyright Act expanded statutory protection to works previously protected only by the common law: “Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the terms provided by section 302.” 17 U.S.C. § 303 (1976). Prior to that change, the Act provided that “nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.” Act of Mar. 4, 1909, ch. 320, § 2, 35 Stat. 1075, 1090.

52. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–57 (1991) (outlining the changes made by the 1976 Act).

53. See 8 Anne, c. 19 (1710) (Eng.).

54. *Id.* at §§ 1, 11.

55. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124.

the Statute of Anne and the first Copyright Act, the copyright term would have been fourteen years, or extended to twenty-eight years, depending on the author's longevity and diligence in making an assignment or in filing the renewal papers.

The *Eldred* petitioners' challenge to the CTEA cannot be accepted without calling into question this original approach to copyright protection. Under the petitioners' theory, the author who created an artistic work under the Statute of Anne or the 1790 Act was assured of a copyright term of only fourteen years. By definition, that assurance was a sufficient incentive for the creation of the work in question. Accordingly, any extension for an additional term is an unconstitutional windfall, since the "[r]etroactive extension[]" granted by a renewal application "cannot 'promote' the past" and is "for work that has already been produced."<sup>56</sup>

The extension conferred by the CTEA finds an even closer analogy in another feature of the 1790 Act, which granted the copyright term of fourteen or potentially twenty-eight years to *all* works protected under the copyright laws of the several states. In so doing, the 1790 Act effectively extended the copyright term anticipated by the author at the time his work was created. Because some of the works previously protected under state law would have fallen into the public domain prior to the expiration of the federal term, the 1790 Act had the same effect as the CTEA; it harmonized the copyright term applicable to a broad range of works<sup>57</sup> and thus forestalled the date on which some of those works would have fallen into the public domain.

This effect of the 1790 Act is best seen by a detailed examination of the various state statutes enacted under the Articles of Confederation.<sup>58</sup> Twelve state statutes were enacted in the pre-constitutional period from 1783 to 1786.<sup>59</sup> Seven of those states (Connecticut, Maryland, New Jersey, Pennsylvania, South Carolina, Georgia, and New

---

56. Brief for Petitioners at 22, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618). It should be noted that although the author of a work protected under these statutes was also aware of the possibility of an extension, that fact does not meaningfully distinguish such an author from those under the pre-CTEA Copyright Act. A modern author might also anticipate the possibility of an extension, particularly where (as here) technological and market changes have led other developed nations to extend the copyright term.

57. The petitioners insist that the CTEA did not promote harmonization because "[t]here are 76 countries today with a life plus 50 regime but only 26 with life plus 70." Brief for Petitioners at 44, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618). But this misses the point: the CTEA promotes harmonization of the copyright term among the countries that are America's principal trading partners. See H.R. REP. NO. 105-452, at 4 (1998) ("Extending copyright term to life of the author plus seventy years means that U.S. works will generally be protected for the same amount of time as works created by European Union authors."); S. REP. NO. 104-315, at 6 (1996) (noting "the international movement towards extending copyright protection for an additional 20 years"). The analogy to the 1790 Act again is apt: it harmonized the copyright term among the new states, recognizing that a different term might apply in other countries.

58. ARTICLES OF CONFEDERATION art. II (U.S. 1781).

59. See 8 NIMMER & NIMMER, *supra* note 33, app. 7 § C.

York) adopted the Statute of Anne approach of a fourteen-year term renewable for an additional fourteen years if the author were still living.<sup>60</sup> The remaining five states authorized a single, non-renewable term of fourteen (North Carolina), twenty (New Hampshire), or twenty-one years (Massachusetts, Rhode Island, and Virginia).<sup>61</sup>

The 1790 Act conferred copyright protection on any and all works created under the above regimes, as well as those created without the “carrot” of any copyright protection at all, as in Delaware. It did so by resetting the copyright clock upon the author’s registration of the work with the clerk of a federal district court.<sup>62</sup> Thus, the first Congress crossed the very constitutional line the *Eldred* petitioners claim the CTEA crosses: it granted a retroactive extension for works that had already been produced and therefore cannot be “promoted” by an increase in the copyright term.

The copyrights on Noah Webster’s *American Spelling Book* illustrate this point. The book was initially copyrighted under Connecticut law, but the terms available under the state copyright act were retroactively extended by the 1790 Act. Webster’s copyright under the Connecticut Act would have run for fourteen years from the date of first publication in 1783 and would have expired in 1797.<sup>63</sup> The 1790 Act extended it through 1804 and made it renewable until 1818. The *Eldred* petitioners’ narrow, prevailing understanding of the Copyright Clause would have precluded this approach. Webster’s book was produced under the promise of a term to expire in 1797; the extension granted by the 1790 Act could not “‘promote’ the past,” and thus the Act would fail under the petitioners’ standard.

The significance of the 1790 Act cannot be dismissed by the facile interpretation offered by the D.C. Circuit dissent — that “something had to be done to begin the operation of federal law under the new federal Constitution.”<sup>64</sup> *Something* had to be done, but that *something* did not have to be an extension that applied to writings already in existence. If Congress doubted its power to enact such an extension, surely it could have enacted federal copyright protection for the period of any remaining copyright term applicable under state law. The fact that it instead adopted a uniformly applicable term postponing the date on which some works would otherwise have fallen into

---

60. *See id.* app. 7 § C[1], [3], [4], [7], [8], [11], [12].

61. *See id.* app. 7 § C[2], [5], [6], [9], [10].

62. Copyright Act of 1790, ch. 15, §§ 1, 3, 1 Stat. 124, 124–25.

63. NOAH WEBSTER, A GRAMMATICAL INSTITUTE OF THE ENGLISH LANGUAGE (Hartford, 1783); *see* 8 NIMMER & NIMMER, *supra* note 33, app. 7 § C[1].

64. *Eldred v. Reno*, 239 F.3d 372, 384 (D.C. Cir. 2001) (Sentelle, J., dissenting), *cert. granted sub nom.* *Eldred v. Ashcroft*, 534 U.S. 1126 (2002).

the public domain undermines the petitioners' argument that Congress lacks such power.<sup>65</sup>

Congress made similar extensions to the copyright term in subsequent iterations of the Copyright Act. Thus, the first Congress and its successors concluded that a retroactive extension does promote the progress of science by encouraging the dissemination and preservation of existing works. Unless the Supreme Court is prepared to set aside the entirety of copyright protection throughout United States history, it should uphold the parallel extension granted in the CTEA.<sup>66</sup>

#### IV. THE CTEA AS A PROMOTER OF PROGRESS: THE EFFECTS OF EXTENSION ON DISSEMINATION, PRESERVATION, AND CREATION

Skeptics of the CTEA have painted the statute as a windfall designed by Congress to line the pockets of a well-funded lobby of publishers and motion picture producers, with little or no regard for the constitutional purpose of promoting the progress of science. Professor Patterson is perhaps the most strident proponent of this view.<sup>67</sup> He asserts that “[t]he CTEA . . . is in the tradition of publishers seeking to enhance their monopoly,”<sup>68</sup> and impugns even the D.C. Circuit’s motives in purportedly falling captive to the goal of “protect[ing] the economic interests of American publishers in today’s shrinking world.”<sup>69</sup> Indeed, Patterson goes so far as to compare the CTEA’s proponents to slave owners: “profiteers of the press” would “control[] the people’s right to know, just as slave owners were profiteers in human misery.”<sup>70</sup> Heald and Sherry similarly contend that the “CTEA has precisely the same effects as the Elizabethan grant of a monopoly in ale or printing” in that “[i]t guarantees an income stream to a favor-

---

65. The petitioners’ attempt to dismiss the 1790 extension as a mere “replacement” for state copyrights, Brief for Petitioners at 28, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618), is equally unpersuasive. Whether termed a replacement for existing rights or an extension, the 1790 Act had the same effect as the CTEA: it lengthened the copyright term that otherwise would have applied to subsisting works.

66. See Ginsburg et al., *supra* note 18, at 704 (challenging “the *Eldred* proponents either to explain why this term extension [i.e., the CTEA] is any more unconstitutional than the others, or to concede that all term extensions (and subject matter and scope enlargements) since 1790 have been unconstitutional”).

67. See Patterson, *supra* note 12, at 240–42.

68. *Id.* at 240.

69. *Id.* at 242.

70. *Id.*; see also Davis, *supra* note 15, at 1005 (asserting that the CTEA provided “not an incentive, but a gift or a windfall”); Ginsburg et al., *supra* note 18, at 689 (“So, why did Congress add in the extra twenty years? It is very fashionable to say that the Robber Barons told them to do it.”); Patry, *supra* note 22, at 932 (arguing that “[t]he real impetus for term extension” was to reward “a very small group: children and grandchildren of famous composers whose works are beginning to fall into the public domain, thereby threatening trust funds”).

ite of the legislature, in this case ASCAP, Disney, the Association of American Publishers, the Motion Picture Association of America, and the Music Publishers Association, among others.”<sup>71</sup>

Despite these dismissive assertions, however, the evidentiary record leading up to the enactment of the CTEA includes extensive evidence that copyright extension promotes the progress of science by encouraging the distribution and dissemination of copyrighted works. Moreover, as explained below, Congress also heard evidence that copyright extension would provide incentives for the creation of new works.

#### *A. Extension and the Incentive to Distribute*

In the hearings prior to the enactment of the CTEA, a number of witnesses testified that an extension of the copyright term would enhance the dissemination and distribution of copyrighted works. For example, Marybeth Peters, the Register of Copyrights, testified that “[i]n some cases the lack of copyright protection . . . restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.”<sup>72</sup> In other words, because “the author frequently assigns his right to a publisher, film producer or other disseminator of the work, . . . the copyright in the work represents a protection for the investment that is undertaken in the publication or production of the work.”<sup>73</sup> If the remaining term on the copyright is not “sufficient to allow the investor time not only to recover but also to earn a reasonable return on his investment,” then the work in question will not be published or otherwise disseminated to the consumer.<sup>74</sup> In these circumstances, extension of the copyright term will enhance distribution or dissemination by increasing the return on investment in such activity.<sup>75</sup>

Thus, in enacting the CTEA, Congress reasonably concluded that an extension was necessary to create adequate incentives for investment in dissemination throughout any remaining copyright term. Without an extension, the incentive for publishers and other distributors to invest in dissemination could decline toward the end of the

---

71. Heald & Sherry, *supra* note 11, at 1170.

72. *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intell. Prop. of the Comm. on the Judiciary*, 104th Cong. 171 (1996) (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress).

73. *Id.* at 188.

74. *Id.*

75. *See id.*; *see also id.* at 633–34 (joint statement of the Coalition of Creators and Copyright Owners) (noting that the “costs of quality production, distribution and advertising, and changing technology, all require a major investment to exploit most works,” and that “[f]ew are willing to make such significant expenditures” in the absence of a lengthy copyright term).



copyright term. Accordingly, the CTEA promotes the progress of science by expanding incentives for disseminating protected works at a time when such works might otherwise fall out of circulation.

### *B. Distribution in the Digital Age*

The evidentiary record before Congress also indicates that the need for a term extension of existing works is especially significant during the current period of conversion to digital media. For example, Congress heard testimony that extension of copyright protection will “encourage[] industry to make available to the public in new editions, and much finer editions, works which otherwise would have remained moldering in the library.”<sup>76</sup> “Although existing copyright protection was apparently adequate to encourage the initial creativity necessary for existing works,” Congress perceived a need to extend the terms of “works already in being to encourage investment in those works” to ensure that they would be disseminated in new digital formats.<sup>77</sup> In other words, Congress sought to “encourage not only initial creativity, but investment in new technology to maximize the dissemination of older works.”<sup>78</sup>

Specifically, the record before Congress indicates that certain “works require expensive or labor-intensive maintenance, restoration or distribution” and that “continued copyright protection can induce owners to invest in making the work available to the public in high-quality form.”<sup>79</sup> Because investment in new technology is costly, Congress determined that an extension was an appropriate mechanism for assuring increased dissemination in the digital marketplace.<sup>80</sup>

Technological innovation has also opened up new opportunities for the promotion of the “progress of science” by means of the preservation of existing copyrighted works. Again, the evidentiary record before Congress includes extensive support for the conclusion that copyright extension will increase the incentive for investment in preservation, particularly in new digital formats. As Bruce A. Lehman, then Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, testified, “[g]ranting a twenty-year copyright term extension will encourage copyright owners to restore and digitize

---

76. *Id.* at 212 (statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks).

77. *Id.* at 635 (joint statement of the Coalition of Creators and Copyright Owners).

78. *Id.*

79. *Id.* at 593 (memorandum from Shira Perlmutter to Jack Valenti).

80. *Id.* (explaining that extension will ensure that “copyright owners will have a greater incentive to take whatever steps may be necessary to disseminate their works in high-quality form if they can retain control over reproduction and distribution,” and that the “availability of more works of authorship in superior condition” thus “furthers the progress of science”).

works that are about to fall into the public domain.”<sup>81</sup> “Without a copyright term extension, copyright owners will have little incentive to restore and digitize their works,” and “they might deteriorate over time and our children would be unable to enjoy these works as we have.”<sup>82</sup>

In enacting the CTEA, Congress embraced this and other evidence of the positive effects of copyright extension on dissemination and preservation, including improved incentives to expand works to digital formats:

Many works which are now preserved in perishable media, such as film or analog tape recordings, could be more permanently preserved — and more widely disseminated — in digital formats, using emerging technology. But if we want the substantial investment in digitizing these works to be made, we must choose to either have the taxpayer fund investment in public domain works or to give private parties the incentive to invest by allowing them to recoup their investment. Extending the copyright for an additional two decades can provide this incentive for private funds to be invested in the preservation of artworks important to the American cultural heritage.<sup>83</sup>

The Senate and House Reports confirm that the statute’s enactment rested in part on the observation that “[t]he digital revolution . . . offers exciting possibilities for storage and dissemination of [copyrighted] works,”<sup>84</sup> and on the understanding that the CTEA would create incentives for the use of new technology and thereby promote the dissemination and preservation of copyrighted material.<sup>85</sup>

Congress’s findings cannot be set aside on the ground offered by the CTEA’s detractors — that extensions will postpone the date on

---

81. *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 26, 219 (1997).

82. *Id.*; see also *id.* at 42 (statement of Jack Valenti, President, Motion Picture Association of America) (fearing that “no one . . . will invest the funds for enhancement” without “an incentive to rehabilitate and preserve” certain works); *id.* at 115 (responses to questions from Senator Brown to Marybeth Peters) (explaining that “many works may be more readily available to the public, and in better and more usable condition, when they are still protected by copyright,” and “[c]opyright protection gives publishers and producers an incentive to invest in the expensive and time-consuming activities that may be required to preserve, update and restore older works.”).

83. *Id.* at 3 (opening statement of Senator Hatch).

84. S. REP. NO. 104-315 at 13 (1996).

85. See also H.R. REP. NO. 105-452 at 4 (1998) (noting the CTEA will “provide copyright owners generally with the incentive to restore older works and further disseminate them to the public.”).

which third parties may begin disseminating and preserving works that have fallen into the public domain.<sup>86</sup> Congress found that the CTEA would increase the availability of artistic works by enhancing the incentive for investments in preservation and distribution. Neither the *Eldred* petitioners nor the courts are in any position to insist that this goal would have been better served by erasing those incentives and relying on the public to preserve and distribute.

Thus, Professor Pollack is looking at only one side of the scale when she asserts that under the CTEA “works of various types are being fenced out of competitive circulation for an additional twenty years.”<sup>87</sup> Some works, to be sure, may be “fenced out of competitive circulation” by extension of the copyright term. But it is entirely plausible that there is another set of works that will only receive an investment in publication and circulation if they are protected by copyright. Congress simply thought that the latter consideration was more significant. The courts are in no position to question Congress’s conclusion.<sup>88</sup>

In any event, the *Eldred* petitioners’ assessment of this balance can be accepted without questioning Congress’s decision to extend the copyright term. Even if extensions were thought to dampen dissemination at the time the work was set to fall into the public domain, that possibility would only underscore another tradeoff considered by Congress: extension might increase dissemination during an earlier period leading up to expiration of the term, but might decrease dissemination during a later period after the term otherwise would have expired.<sup>89</sup>

Ultimately, Congress was called upon to strike the difficult balance between these competing considerations. In so doing, it heard evidence that candidly acknowledged that the optimal balance was

---

86. See Hon. Hank Brown & David Miller, *Copyright Term Extension: Sapping American Creativity*, 44 J. COPYRIGHT SOC’Y 94, 95–96 (1996) (asserting that works of authorship are not “freely available” until they enter the public domain); Pollack, *supra* note 8, at 765 (arguing that extension leads to “an additional twenty years” in which the public suffers from “an impressive quantity of lost access”).

87. Pollack, *supra* note 8, at 765.

88. Pollack suggests that this balance should be evaluated by a court on the basis of quantitative evidence — evidence of “how many works” would be disseminated under the two competing regimes (extension or the status quo). *Id.* But such an approach is as unpragmatic as it is unfaithful to the applicable standard of review. See discussion *supra* note 42.

89. Marybeth Peters, Register of Copyrights, summed up the tradeoff in her testimony to Congress:

The ultimate question is not whether the public domain has value, since all works will eventually fall into the public domain. It is instead whether the value to the public of works falling into the public domain 20 years earlier outweighs the value of the incentives provided by an additional 20 years of copyright.

*The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 115 (1997) (responses to questions from Senator Brown to Marybeth Peters).

“very difficult to estimate” and may vary over time for “different types of works and individual works within different genres.”<sup>90</sup> The CTEA’s detractors may not agree with the balance reached by Congress, but that determination is for Congress to make, not for the courts to reassess.

### C. Extension and the Incentive to Create

Although copyright extensions promote the “progress of science” primarily by encouraging the dissemination and preservation of existing works, there is credible evidence that the CTEA also advances the goals identified in the Copyright Clause by enhancing incentives for the creation of copyrighted works in the first instance. It does so by maintaining Congress’s longstanding tradition of periodically revising the copyright term to (1) maintain its consistency with international standards, and (2) ensure that copyright holders are adequately able to capitalize on the fruits of their labors.

As explained in detail above, copyrighted works are created against the backdrop of a longstanding congressional practice of periodically reviewing and revising the copyright term. The first copyright act extended the term of subsisting works already protected under state copyright laws,<sup>91</sup> and subsequent statutes have extended the copyright term for works created under federal law.<sup>92</sup> With each extension, Congress reacted to changes in the market for creative works by making adjustments intended to assure a fair return on the investment made by the author.

The CTEA simply followed this tradition. In extending the copyright term, Congress was merely recognizing that the changing global marketplace merited a somewhat longer period of protection than was warranted in an earlier era.<sup>93</sup>

Contrary to the argument made by the CTEA’s detractors, this extension was not a naked windfall to copyright holders. Rather, it fulfills the justified expectation that Congress will periodically review and revise the copyright term. In so doing, Congress not only con-

---

90. *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intell. Prop. of the Comm. on the Judiciary*, 104th Cong. 188 (1996) (statement of Marybeth Peters).

91. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124.

92. See Act of Feb. 3, 1831, ch. 16, §§ 1–3, 4 Stat. 436, 436–37; Act of Mar. 4, 1909, ch. 320, § 24, 35 Stat. 1075, 1080–81; Act of Oct. 19, 1976, Pub. L. No. 94-553, §§ 302–04, 90 Stat. 2541, 2572–76.

93. See S. REP. NO. 104-315 at 6 (1996) (“In the 20 years since the passage of the 1976 Copyright Act, developments on both the domestic and international fronts have led to further consideration of the sufficiency of the life-plus-50 term.”); 144 CONG. REC. S11672 (daily ed. Oct. 7, 1998) (comments of Sen. Leahy) (“In the global world of the next century, competition in the realm of intellectual property will reach a ferocity even more ruthless than it is today.”).

firmed the expectation of existing copyright holders, it also preserved its ongoing good faith in the eyes of the creators of copyrightable works. Accordingly, such an extension does advance the goal of enhancing the incentive for the creation of new copyrighted works.

At least one of the CTEA's critics has acknowledged that copyright extension might have this effect on creativity.<sup>94</sup> As Professor Davis indicates, "the incentive provided [by extension] is a result of a 'bet' the author makes that Congress will enact another retrospective extension."<sup>95</sup> Davis dismisses the effect of this bet, however, as "a bizarrely rarified long shot" since its present value must be discounted by the unlikelihood of a future extension and by the probability that the work in question may not be one of the rare works that has lasting value many decades beyond the author's death.<sup>96</sup>

In a sense, Professor Davis has a point. The effects of a potential future extension on any individual author's creativity are somewhat speculative. But the speculative nature of those effects need not doom the CTEA's constitutionality. Indeed, one of the fatal weaknesses to the current challenge to the CTEA is its premise that the Supreme Court should undertake an independent examination of the effects of extension and reach its own conclusion as to whether the CTEA adequately promotes the progress of science.<sup>97</sup>

This premise is thoroughly undermined by the case law. As the D.C. Circuit majority recognized, "the text of the Constitution makes plain" that "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the appropriate public access to their work product."<sup>98</sup> Because the Constitution allocates the copyright power to Congress — and in so doing calls on Congress to undertake a "task [that] involves a difficult balance" between competing interests<sup>99</sup> — the Supreme Court has properly accorded a degree of deference to the balance that Congress ultimately strikes. The Court summed up the proper standard in *Stewart v. Abend*:<sup>100</sup> "[The] evolution of the duration of copyright protection tellingly illustrates the

---

94. See Davis, *supra* note 15, at 1031 (noting the "logic" that "the knowledge that retrospective extensions historically occur is an incentive to a potential author considering whether to create a writing").

95. *Id.*

96. *Id.*; see also Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1223 (1996) (noting that such an effect requires an author that has "extreme confidence in his own success").

97. Brief for Petitioners, *Eldred v. Ashcroft*, 534 U.S. 1160 (2002) (No. 01-618).

98. *Eldred v. Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)); see also *Pennock v. Dialogue*, 27 U.S. 1, 16–17 (1829) (stating that the "limited times" provision of the copyright clause "shall be subject to the discretion of Congress").

99. *Eldred v. Reno*, 239 F.3d at 380 (quoting *Sony Corp. of Am.*, 464 U.S. at 429).

100. 495 U.S. 207, 230 (1990).

difficulties Congress faces . . . . It is not our role to alter the delicate balance Congress has labored to achieve.”<sup>101</sup>

Professor Davis’s skepticism of the CTEA’s effects on creativity falls flat under this properly deferential standard. If Congress reasonably believed that the CTEA represented the best “balance” between the competing considerations at stake, it is not for the courts to question that conclusion. In other words, the effect of the copyright term extension on creativity (and on dissemination and preservation) may well be uncertain, but that is precisely why those effects are to be measured by Congress, and not the courts.

In fact, Congress had before it an extensive evidentiary record that supported the conclusion that an extension would improve incentives for creation of copyrighted works. As one witness explained:

Granting a copyright term extension . . . would provide copyright owners with an additional twenty years in which to exploit their works. The additional twenty years will enable copyright owners to increase the exposure of their works. This would result in greater financial rewards for the authors of the works, which will in turn, encourage these authors to create more new works for the public to enjoy.<sup>102</sup>

In other words, as the Register of Copyrights testified:

The public benefits not only from an author’s original work but also from his or her creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster who supported his entire family from earnings on his speller and grammar during the twenty years he took to complete his dictionary.<sup>103</sup>

---

101. *Id.* at 230.

102. *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intell. Prop. of the Comm. on the Judiciary*, 104th Cong. 219 (1996) (statement of Bruce A. Lehman, Commissioner of Patents and Trademarks).

103. *Id.* at 165 (statement of Marybeth Peters); *see also id.* at 109 (statement of Martha Coolidge, Member, Directors Guild of America, Inc.) (“Cycling more money through the system through an extended copyright term will help insure future production.”); *id.* at 583 (letter from Paul Goldstein, Professor Stanford Law School, to Jack J. Valenti, Motion Picture Association of America):

By increasing the value of their libraries overall, term extension can give them revenues to produce new films during the extension period. Further, companies are more likely to invest resources in creating sequels or remakes of existing works if they know that the expiration of the copyright in the original work is more than twenty years in the future. If a work is about to fall into the public domain there is much

Congress clearly intended to advance this objective in enacting the CTEA. The statute's legislative history indicates Congress's view that "a creative work is of legitimate proprietary interest to the families of the authors," and it makes clear that the CTEA was enacted "for the purpose of giving creators an incentive to advance knowledge and culture by allowing them to reap the economic benefit of their creations for 'limited times.'"<sup>104</sup>

In enacting the CTEA, Congress also "sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity."<sup>105</sup> The CTEA embraces Congress's awareness that "[t]echnological developments clearly have extended the commercial life of copyrighted works."<sup>106</sup>

## V. CONCLUSION

At a minimum, Congress acted rationally in accepting the above-cited evidence of the CTEA's positive effects on the "progress of science" when it rejected the contrary position espoused by the *Eldred* petitioners and embraced in the academic literature. The Supreme Court should defer to Congress's balancing of the competing considerations at issue and uphold the constitutionality of the CTEA. Moreover, it may do so without adopting the D.C. Circuit's questionable premise that the Copyright Clause's purpose provision is meaningless surplusage. Although the prevailing wisdom would limit the promotion of the "progress of science" to the establishment of incentives for the creation of new works, the original understanding of the Copyright Clause encompasses the broader notion of encouraging the dissemination and preservation of existing works. Since the CTEA can be understood to advance those objectives (and even to encourage creation of new works), it should be upheld as a constitutional exercise of Congress's copyright power.

---

less incentive to make a derivative work since any rights in underlying works will soon become — in effect — non-exclusive.

*Id.*

104. S. REP. NO. 104-315 at 10 (1996).

105. *Id.* at 12.

106. *Id.* (quoting *Hearings on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 11 (1995) (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress)).