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Articles

ELDRED V. ASHCROFT AND THE (HYPOTHETICAL) COPYRIGHT TERM EXTENSION ACT OF 2020

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I. Introduction

The Supreme Court's decision in *Eldred v. Ashcroft*¹ establishes, at least for now, Congress's power under the Copyright Clause to extend the copyright term applicable to existing works. In upholding the 20-year extension conferred by the Sonny Bono Copyright Term Extension Act of 1998 (CTEA),² the Eldred decision establishes that there is no categorical constitutional bar to a legislative extension of an existing copyright term. Justice Ginsburg's opinion for the Court in Eldred rejected the petitioners' argument that the CTEA "is an impermissible exercise of Congress' power under the Copyright Clause,"³ and in so doing held that the CTEA ~~*2~~ is reconcilable with both the "limited times" provision and the "progress of science" preamble of the Copyright Clause.⁴

But while the Eldred opinion conclusively upholds the constitutionality of the CTEA, it leaves open some important questions as to the ultimate extent of Congress's power to enact further extensions. The opinion relies on a number of different strands of analysis that may point in opposite directions under any further extensions enacted by Congress, creating an ambiguity as to the ultimate extent of Congress's power under the Copyright Clause.

The ambiguity can be illuminated by hypothesizing the next generation of copyright extensions. The hypothetical that I examine here is what I call the "Marshall Mathers Copyright Term Extension Act of 2020." My hypothetical statute is named for a rapper-cum-Congressman who used to perform under the name of Eminem, but was elected to Congress in 2016 under his given name, Marshall Mathers.⁵ With apologies to the "real Slim Shady,"⁶ my hypothetical involves a thirty-year extension of the copyright term enacted by Congress in 1998 on the eve of the expiration of the copyright on many of the

works that spawned the Sonny Bono CTEA (such as Disney's "Steamboat Willie," Gershwin's "Rhapsody in Blue," and F. Scott Fitzgerald's "The Great Gatsby").⁷

Unlike its predecessor, the Mathers Act breaks new ground in the realm of international copyright law. Changes had been proposed to the copyright term available under the law of the European Union, but in our hypothetical these proposals *3 were all voted down. The legislative history of the Mathers Act includes testimony from a number of experts who suggest that the extension is necessary to ensure that aging, classic works will be adequately preserved and disseminated in an increasingly digital world. The Senate and House Reports on the Mathers Act adopt this testimony as the principal basis for the extension, along with an additional statement that continuing advances in medical science have translated into increased life expectancies and a need for a greater return on copyrighted works in order for authors to be able to provide for their descendants. At the same time, the legislative history also includes a candid statement by the bill's initial sponsor, Congressman Mathers, that "I know we can't admit it, but everyone knows it; each change itself is gradual, but we're getting to perpetual."

Predictably, the Mathers Act is countered by an immediate challenge in the courts, and the case makes its way back to the Supreme Court for a decision on its constitutionality. The likely fate of the hypothetical statute is the topic of this article. The discussion that follows first summarizes the arguments raised by the plaintiffs in Eldred (in Part II), and then examines the Court's treatment of those arguments (in Part III). This background sets the stage for the analysis of the constitutionality of the Mathers Act--a discussion that offers a deeper understanding of the real meaning and eventual impact of the decision in Eldred (in Part IV).

II. The CTEA and the Eldred Challenge

Initially, American copyright terms followed the pattern set by the British Statute of Anne.⁸ The first American Copyright Act of 1790 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.⁹ The first change to this term was implemented in 1831, when Congress increased the term to an initial twenty-eight-year period, renewable for an additional fourteen years.¹⁰ A similar change was made in 1909, when Congress increased the renewal term to twenty-eight years, providing for a total potential term of fifty-six years.¹¹

The 1976 Copyright Act implemented a basic change in the method of computing the copyright term. Under that Act, works created by natural persons were protected until fifty years after the death of the author, while other works were protected for a term of seventy-five years from publication or one hundred years from *4 creation, whichever came first.¹² The 1998 CTEA increased both of these terms by twenty years. It provided a life plus seventy-year term for works by natural persons, and a term for other works of ninety-five years from publication or 120 years from creation, whichever expires first.¹³

Within three months after the enactment of the CTEA, the Eldred suit was filed in the United States District Court for the District of Columbia.¹⁴ The Eldred plaintiffs were individuals and entities who make their living on artistic works that have fallen into the public domain.¹⁵ They challenged the CTEA as unconstitutional to the extent it applied to existing works--that is, to the extent it delayed by an additional twenty years the date on which copyrighted works would enter the public domain. In their view, the CTEA represented a triumph of the commercial interest of the lobby of publishers and motion picture producers who led the charge for the CTEA over the public interest (recognized in the Copyright Clause of the Constitution) in the promotion of "the Progress of Science."¹⁶

Specifically, the Eldred plaintiffs made three principal challenges to the CTEA. First, they argued that any extension of the copyright term for an existing *5 work is a violation of the Copyright Clause's "limited times" requirement.¹⁷ On this point, they conceded that the term of life plus 70 years was "limited" as applied to works yet to be created, but insisted that once a term is set by statute it may not be later extended without running afoul of the "limited times" provision.¹⁸ In other words, the Eldred plaintiffs argued that a copyright term that is subsequently extended by Congress is effectively perpetual (even if formally limited), and that the CTEA must be struck down in order to prevent Congress from establishing "a perpetual term 'on the installment plan'" by enacting successive term extensions "ad infinitum."¹⁹

Second, the Eldred plaintiffs also challenged the CTEA under the Copyright Clause's preamble, which provides that Congress has the power "[t]o promote the Progress of Science" by protecting copyrights.²⁰ Under this argument, 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.”²¹ In other words, the preamble purportedly indicated the *6 constitutional recognition of a quid pro quo inherent in the copyright power—that authors may be granted the limited monopoly of copyright protection only in exchange for the consideration of the creation of a new work of authorship.²² On this logic, the CTEA’s extension of the copyright on existing works was unconstitutional because those works were already in existence and thus could not have been created in consideration of the extension. Or, as they explained in their brief to the Supreme Court, “[r]etroactive extensions cannot ‘promote’ the past.”²³

*7 Finally, the Eldred plaintiffs also leveled a series of more general challenges to the rationality of the CTEA’s regime. They argued (with reference to the Fourteenth Amendment standard applied in *City of Boerne v. Flores*²⁴) that Congress’s retrospective extension of existing copyright terms should be struck down as not “congruent and proportional” to the ends recognized under the Copyright Clause.²⁵ In their view, the CTEA failed under this standard because at most the statute could be said to encourage the preservation of old films, and its blanket extension of the copyright on all works could not be said to be “congruent and proportional” to that end.²⁶

III. The CTEA and the Eldred Opinion

Although the Court’s decision to hear the Eldred case was widely perceived to portend the CTEA’s doom,²⁷ the statute ultimately was upheld on a 7-2 vote.²⁸ Justice Ginsburg, author of the majority opinion, rejected each of the challenges *8 raised by the plaintiffs but left a crack in the door for future challenges. Justice Stevens and Justice Breyer each filed separate dissents.

Justice Ginsburg’s opinion for the Court first rejected the notion that an extended copyright term is not a “limited” time. The Court explained that “[a]t the time of the Framing, [the word ‘limited’] meant what it means today: ‘confined within certain bounds,’ ‘restrained,’ or ‘circumscribed.’”²⁹ The CTEA’s term of life plus seventy years was limited in this sense, and the Court held that the term did not become unlimited simply by being applied to existing copyrights.³⁰

The Court also identified extensive historical support for its interpretation of the “limited Times” provision. Quoting Holmes’ famous aphorism that “a page of history is worth a volume of logic,”³¹ the Court cited a record of “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.”³² In particular, the Court noted that this historical record traces back to the First Congress, which “accorded the protections of the Nation’s first federal copyright statute to existing and future works alike.”³³ Here and elsewhere in the opinion, the Court gave substantial—“almost conclusive”—weight to historical practice.³⁴

At the same time, the Court seemed to leave room for the possibility that a term defined by a set number of years might at some point run afoul of the “limited Times” provision. It did so first by considering whether the CTEA was an attempt to “evade the ‘limited Times’ constraint by creating effectively perpetual copyrights through repeated extensions.”³⁵ In rejecting this argument, the Court acknowledged *9 Justice Breyer’s dissenting assertion that Congress “sought to test the Constitution’s limits” as evidenced by the fact that “the statute was named after a Member of Congress, who, the legislative history records, ‘wanted the term of copyright protection to last forever.’”³⁶ Despite this and other statements in the legislative history of some of the bill’s proponents’ interest in a perpetual term, the Court indicated that this testimony was of little significance. The Court instead turned to the statutory text and the House and Senate Reports accompanying the CTEA in search of a “purpose to make copyright a forever thing.”³⁷ Finding nothing to that effect in either of these “authoritative source[s],”³⁸ the Eldred majority held that there was no indication that the CTEA was an “attempt to evade or override the ‘limited Times’ constraint,” and no reason to believe that “the CTEA crosses a constitutionally significant threshold with respect to ‘limited Times’ that the 1831, 1909, and 1976 Acts did not.”³⁹

In the course of this analysis, the Court also addressed Justice Breyer’s assertion in dissent “that the ‘economic effect’ of the CTEA is to make the copyright term ‘virtually perpetual.’”⁴⁰ On this point, the Court acknowledged Breyer’s assertion that the economic value of the CTEA’s term is 99.8% of a perpetual copyright.⁴¹ But the Court also noted that “on that analysis even the ‘limited’ character of the 1909 and 1976 Acts might be suspect,” since the value of the terms conferred in those statutes was 97.7% and 94.1% of the value of a perpetual term, respectively.⁴² And in any event, the majority expressed its doubt that the “architects of our Nation, in framing the ‘limited Times’ prescription, thought in terms of the calculator rather than the calendar.”⁴³

In upholding the CTEA's term as "limited," the Court also responded to Justice Breyer's argument that the term "extends beyond that typically permitted by the traditional rule against perpetuities" and "other long-accepted durational practices" *10 in the law, such as 99-year leases of real property.²⁴⁴ Here, the Court asserted that Justice Breyer's analysis was in error, as "the period before a bequest vests could easily equal or exceed the anticipated average copyright term under the CTEA," as where "the vesting period on a deed [is] defined with reference to the life of an infant."²⁴⁵ At the same time, however, the Court again left the door open a little for a future challenge--in reserving as "not before us today" the question whether the "long accepted durational practices" identified above might "mark the outer boundary of 'limited Times.'²⁴⁶

The Court also rejected the argument that the copyright term extension was inconsistent with the Copyright Clause's preambular goal of promoting the "Progress of Science." Addressing this point, the Court began by establishing a deferential standard of review, holding that "Congress, not the courts" should "decide how best to pursue the Copyright Clause's objectives," including the "Progress of Science."²⁴⁷ It then turned again to the historical record, concluding that "Congress' unbroken practice since the founding generation . . . overwhelms petitioners' argument that the CTEA's extension of existing copyrights fails per se to 'promote the Progress of Science.'²⁴⁸

Moreover, the Court found that Congress could reasonably conclude that copyright extensions are reconcilable with the quid pro quo principle identified by the Eldred plaintiffs. Specifically, the Court explained that "the author of a work created in the last 170 years would reasonably comprehend, as the 'this' offered her, a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time."²⁴⁹ In the Court's view, Congress may "rationally seek to 'promote . . . Progress'" by adopting a policy that assures "that authors would receive the benefit of any . . . legislative extension of the copyright term."²⁵⁰

*11 Finally, the Court refused to evaluate the CTEA under the "congruence and proportionality" standard proposed by the Eldred plaintiffs, holding instead that the proper standard of review asks "whether it is a rational exercise of the legislative authority conferred by the Copyright Clause."²⁵¹ Under this standard, the Court emphasized that the judiciary must "defer substantially to Congress," and held that the "CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain."²⁵² In so doing, the Court identified a number of rational bases that supported the copyright extension conferred by the CTEA.

First, the Court held that Congress rationally found that "a key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years."²⁵³ Because this directive, consistent with the terms of the Berne Convention,²⁵⁴ instructed EU "members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term,"²⁵⁵ the Court held that Congress rationally concluded that an extension was necessary "to ensure that American authors would receive the same copyright protection in Europe as their European counterparts."²⁵⁶

Second, the Court acknowledged that the CTEA was passed "in light of demographic, economic, and technological changes" and that Congress "rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works."²⁵⁷ On this point, the Court *12 noted that Members of Congress had expressed the concern that the pre-CTEA term was inadequate to "secure 'the right to profit from licensing one's work during one's lifetime and to take pride and comfort in knowing that one's children - and perhaps their children - might also benefit from one's posthumous popularity.'"²⁵⁸ And in response to Justice Breyer's dissenting position that "the economic incentives accompanying copyright term extension are too insignificant to 'move' any author with a 'rational economic perspective,'" the Court asserted that "[c]alibrating rational economic incentives . . . is a task primarily for Congress, not the courts."²⁵⁹

IV. Marshall Mathers and the Eldred Opinion

Although the Eldred decision unambiguously upholds Congress's power to enact the copyright extension conferred by the CTEA, it is not so clear what it portends for any future extensions like the one hypothesized in the Marshall Mathers Act. Justice Ginsburg's opinion for the Court includes several different strands of analysis, and some of them may point in conflicting directions the next time around.

All indications are that there will be a "next time."²⁶⁰ The lobby that advanced the cause of the CTEA was extraordinarily well-funded and equally relentless.²⁶¹ Disney, the Motion Picture Association of America (MPAA), and the heirs of prominent artists like George Gershwin and Dr. Seuss all faced the prospect that their artistic works would fall into the public domain,

thereby losing the millions of dollars in royalties that had previously flowed from the copyrights they held.⁶² Those royalty streams have been preserved for now (as has creative control), but the same pressures that brought us the 1998 CTEA undoubtedly will be brought to bear again toward the close of the twenty-year period that was added to the copyright *13 term for the works in question.⁶³ At that point, members of Congress (and eventually, I imagine, the courts) will again be presented with the question of the extent of Congress's power under the Copyright Clause--and, in that process, with the task of divining the impact of Eldred on the issue.

I turn now to my answer to that question, in the context of a constitutional analysis of the Mathers Act. I find much to support the Mathers Act in Eldred, and also some possible grounds for striking it down. Ultimately, I conclude that the Mathers Act (or its equivalent) is likely to be upheld unless the extension to the term is substantially greater than the twenty-year extension conferred by the 1998 CTEA, or unless the Congress that enacts it is careless enough to ground the extension on a desire to establish a term that is effectively perpetual.⁶⁴

A. Eldred and the Case for Constitutionality of the Mathers Act

There is ample support for the Mathers Act in Justice Ginsburg's opinion for the Court in Eldred. To the extent Eldred turns on a textual and originalist construction of the Copyright Clause, the Mathers Act stands on equal footing with the CTEA and is equally worthy of deference by the courts.

First, the Eldred Court's textual analysis of the "limited Times" provision is an equally effective rebuttal to any challenge to the Mathers Act. If a life plus seventy years term is limited in the sense that it is "'confined within certain bounds,' 'restrained,' or 'circumscribed,'"⁶⁵ the same can be said of the lifeplusone hundred years conferred under the Mathers Act. And under the Court's textual construction of the Constitution, the term of life plus one hundred years is no less "limited" when applied to existing works, since "a time span appropriately 'limited' as applied to future copyrights does not automatically cease to be 'limited' when applied to existing copyrights."⁶⁶

*14 Moreover, the "page of history" that Justice Ginsburg turns to in Eldred⁶⁷ seems just as supportive of the Mathers Act as it is of the CTEA. The "unbroken congressional practice of granting to authors of works with existing copyrights the benefit of [any new] term extensions"⁶⁸ suggests that there is no constitutional bar to the CTEA's extension-- particularly where this pattern traces back to the First Congress.⁶⁹ The historical analysis would also lend support to the Mathers Act on the rationale that it, like the CTEA, is essentially indistinguishable from the "historical practice" followed by Congress.⁷⁰ If the First Congress's "contemporaneous legislative exposition of the Constitution . . . acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions,"⁷¹ then that fixed construction applies equally to the Mathers Act.

Eldred's reliance on history would also weaken any attempt to challenge the Mathers Act as establishing an effectively perpetual term that circumvents the constitutional requirement of a limited term. The Congress that enacted the CTEA indicated "no purpose to make copyright a forever thing," and in fact went out of its way to "disclaim any intent to contravene" the constitutional prohibition of a perpetual term.⁷² The same can be said of the Congress that enacted the Mathers Act. It is true that Mathers himself expressed his candid assessment that "everyone knows" that Congress is inching toward a "perpetual term." But even if a member of the Congress that enacts the next generation of copyright extensions is as candid (or careless) as our hypothetical Mr. Mathers, the record is unlikely to establish a persuasive ground for attributing such an intent to Congress itself. If the "authoritative source for finding the Legislature's intent lies in the Committee Reports" themselves,⁷³ it seems unlikely that an intent to evade is ever likely to make its way into such a report. And in any event, Mathers' hypothetical assertion is not much different from the sentiment attributed to Mr. Bono, who himself had openly longed for a perpetual copyright.⁷⁴ In both instances, it arguably could be said that the statutes' challengers "fail to show how [the statutes] cross a constitutionally significant *15 threshold with respect to 'limited Times' that the 1831, 1909, and 1976 Acts did not."⁷⁵

The Mathers Act's challengers undoubtedly could muster persuasive economic evidence indicating that the present value of a term of life plus one hundred years approaches quite closely the value of a perpetual term. If (as Justice Breyer asserted and the majority appeared to acknowledge) a term of life plus seventy years is worth 99.8% of the value of a perpetual copyright,⁷⁶ a term of life plus one hundred years may be worth 99.9% of that value, and the Mathers Act plaintiffs could contend (as the Eldred plaintiffs did) that a decision to uphold the term of life plus seventy years would allow Congress "to evade the 'limited Times' constraint by creating effectively perpetual copyrights."⁷⁷

But the Eldred opinion also seems to foreclose this argument. The Court's response to Justice Breyer's economic argument again relied on history, noting that the terms conferred by the 1831 and 1909 Acts were worth 94.1% and 97.7% of the value of a perpetual copyright, and expressing "[doubt] . . . that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar."⁷⁸ Again, the Eldred Court's focus was on form, not economic effect, and the term conferred by the Mathers Act would seem to be equally sustainable as a term limited by the calendar even if its economic effect is even closer to that of a verboten perpetual term.

Second, the Court's construction of the Copyright Clause's preamble would also seem to foreclose any reliance on that provision in the Mathers Act case. Eldred establishes that "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives,"⁷⁹ and that Congress can "rationally seek to 'promote . . . Progress'" by continuing the "unbroken practice" of placing "existing copyright holder in parity with future holders" whenever the copyright term is extended.⁸⁰ And if the quid pro quo or "bargain" envisioned by the preamble is satisfied by an author's understanding that "the 'this' offered" in exchange for the artistic work is "a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time,"⁸¹ then *16 neither the preamble nor the quid pro quo argument is a viable basis for challenging the Mathers Act.

Third, Eldred identifies some rational bases that could be offered in support of the Mathers Act. To the extent the CTEA was sustained "in light of demographic, economic, and technological changes," and on the basis of "projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works,"⁸² those same considerations undoubtedly could be offered in support of the Mathers Act. Medical science inevitably will continue in the direction of increased life expectancy, and as it does so, Congress rationally could determine (as it did with the CTEA) that extensions are necessary to assure that an author can "take pride and comfort in knowing that one's children--and perhaps their children-- might . . . benefit from one's posthumous popularity."⁸³ Technological advances are equally predictable, and they too may provide a basis for an extension in the hope of encouraging investment in restoration and distribution.

B. Eldred and the Case for Unconstitutionality of the Mathers Act

Although Eldred provides substantial ammunition for the defenders of the Mathers Act's constitutionality, it does not leave the plaintiffs in our hypothetical case completely unarmed. After all, the Eldred opinion turns not only on the Court's textual and originalist construction of the Copyright Clause, but also on its conclusion that the CTEA was not an attempt to "evade the 'limited Times' constraint by creating effectively perpetual copyrights through repeated extensions."⁸⁴ The case against the next generation of copyright extensions will turn largely on the credibility of the characterization of any new copyright term as an "effectively perpetual" term aimed at "evad[ing] the 'limited Times' constraint"⁸⁵--and on the strength of the related challenge to the rational basis for the extension.

The case for evasion is not an easy one. Eldred sets the bar pretty high in its reliance on Congress's history of copyright extensions⁸⁶ and in its examination of the statutory text and legislative history in search of a statement of intent to "install *17 a perpetual copyright."⁸⁷ At the same time, however, Eldred appears to go out of its way to leave the door open to a future attack on a statute like the Mathers Act. Justice Ginsburg's opinion for the Court expressly flags as "not before [the Court] today" the question whether a term (like CTEA's) that "resembles some other long-accepted durational practices in the law, such as 99-year leases of real property and bequests within the rule against perpetuities" may "mark the outer boundary of 'limited Times'."⁸⁸ The negative implication is that there is an "outer boundary" under the Copyright Clause, and that the Court may be willing to entertain a future argument for evasion by an effectively perpetual copyright.

The Mathers Act plaintiffs would argue that this statute crosses that "outer boundary." First, they would assert that the term of life plus one hundred years would exceed the "long-accepted durational practices in the law" alluded to in Eldred, in that it obviously would extend beyond the ninety-nine-year ground leases noted in the Court's opinion and typically would exceed the term applicable under the rule against perpetuities. As noted above, the Eldred opinion notes that under the rule of "lives in being plus 21 years," "the sum of the measuring life plus 21 years could commonly add up to 95 years," particularly where "the vesting period on a deed [is] defined with reference to the life of an infant."⁸⁹ Once thirty more years is added by the Mathers Act, however, the rule against perpetuities benchmark is no longer satisfied. It could not be said that "the measuring life plus 21 years could commonly add up to 125 years."⁹⁰ Thus the Mathers Act plaintiffs *18 would argue that the new term has finally exceeded the "outer boundary of 'limited Times'."

Second, the evasion point is further strengthened by the timing of the Mathers Act. My hypothetical assumes that Disney, the

MPAA and others will come back to the congressional well as the copyrights they fought to protect in the mid-1990s are again on the brink of slipping into the public domain. If that in fact is the timing of the next generation of copyright extensions, it would bolster the argument that Congress's true motive is to line the pockets of the well-funded lobby of copyright holders that drove the statutory extension. It would also tend to diminish the credibility of Congress's purported reliance on the need for incentives for the preservation and dissemination of existing works. After all, if Congress were truly concerned about preservation and dissemination, it need not have waited until "Steamboat Willie" and other historical works were on the brink of passing into the public domain.

In short, the timing of the Mathers Act seems hardly coincidental, and to support the idea that Congress was really attempting to provide an effectively perpetual copyright term. The argument gathers more momentum when one views the 2020 statute in the context of the pattern of extensions conferred by the 1976, 1998, and now 2020 acts. These statutes all extended the copyright term by two or three decades,⁹¹ and they are spaced about two decades apart. In light of this pattern, Congress could certainly be accused of attempting to evade the "limited Times" provision by periodic extensions of the copyright term that are timed to continue to withhold the same works from the public domain. In this sense, the Mathers Act may lend itself to the epithet that did not quite stick to the CTEA--that Congress is attempting to create "a perpetual term 'on the installment plan'" by enacting successive ***19** term extensions "ad infinitum."⁹² Once a third "installment" is added to the list of extensions, this characterization of Congress's intent may gain credibility.

Third, Congress's true motive in enacting the next generation of copyright extensions may be more transparent if there is no emerging international standard to lean on, as there was under the CTEA.⁹³ Here, the Eldred Court's discussion of Congress's "rational basis" for enacting a copyright extension merges into the question whether Congress really meant to establish a perpetual term and to evade the "limited Times" restriction in the Constitution. To the extent the bases that supported the CTEA are not available to sustain the next generation of copyright extensions, the Court may be more willing to see through a term that is facially "limited" and strike it down as "effectively perpetual."

For all of these reasons, the Mathers Act plaintiffs would argue that this next generation of copyright extensions does "cross[] a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, . . . 1976 [and 1998] Acts did not."⁹⁴ Eldred suggests that there is an "outer boundary of 'limited Times,'" and the Mathers Act may arguably fall beyond that boundary. Ultimately, the Mathers Act's challengers would say that the former rapper had it exactly right--that "everyone knows" that "each change itself is gradual, but we're getting to perpetual."

V. Conclusion

The Supreme Court's opinion in Eldred gives at least one conclusive answer to the question of the extent of Congress's power under the Copyright Clause. It holds that there is no categorical bar to the application of a copyright extension to existing works of authorship created under a different copyright regime. Neither the "limited Times" provision nor the "progress of science" preamble imposes an absolute prohibition on such retrospective extensions, as the Eldred plaintiffs had argued.

***20** Beyond, that, however, Eldred provides only subjective clues-- not objective answers--as to the extent of Congress's power to enact the next generation of copyright extensions. In some ways, I have hypothesized the strongest conceivable case that may arise in the next round of constitutional challenges. By imagining a statute timed to save "Steamboat Willie" and his comrades just in the nick of time and by assuming away an emerging international standard, I have set the stage for a relatively strong hypothetical claim that the new term is formally "limited" but is nevertheless an unconstitutional attempt to evade the Copyright Clause by establishing a term that is effectively perpetual.

If the actual timing of the next generation of copyright extensions is such that "Steamboat Willie" and the others that led the charge for the CTEA are allowed to slip into the public domain, and if the new American standard follows another new EU term, then the case becomes substantially weaker. Under those circumstances, the "pattern" argument articulated above disappears, and it becomes much more unlikely that the Court would second-guess the motive that inevitably will be articulated by Congress--that the extension is aimed at encouraging dissemination and preservation, and is a reaction to demographic and technological changes. By the same token, if Congress is able to seek the cover of an emerging international standard, then it may offer the justification of harmonization in support of the change in the American copyright term, and further deflect the criticism that its real goal is to create an effectively perpetual term for well-heeled works of authorship.

Even under the circumstances of my hypothetical, however, the constitutional case against the Mathers Act is a difficult one. Although the Eldred Court did leave some room for the argument that a future copyright extension would be an attempt to evade the limited times provision by establishing a term that is effectively perpetual, it also tempered its opinion with a heavy dose of deference to the legislative process. Ultimately, the challenge to the Mathers Act set forth above boils down to the proposition that the new term is meaningfully different from those established in prior statutes (culminating in the CTEA)--so much so that the term set by the 2020 statute is effectively “perpetual” while all of those that preceded it were “limited.” It seems difficult to draw the line at life plus one hundred years once life plus seventy years is deemed permissible, just as it was difficult to draw the line at life plus seventy years once life plus fifty years was assumed to be constitutional.

Indeed, it was this very line-drawing problem that seemed to push the Eldred Court to its expressions of deference to Congress on these matters. If the Framers “thought in terms of the . . . calendar,” and not the “calculator,” then it simply will not do to assert that a term of life plus one hundred years is more like a perpetual term than is a term of life plus seventy years. Both are terms set by the calendar, and both should probably suffer the same fate. And even if one were to shift the focus to the calculator, life plus one hundred years would be a strange place to draw the constitutional line. The CTEA’s term of life plus seventy years was already worth 99.8% of the value of a perpetual copyright, and the additional thirty years ^{*21} added by the Mathers Act adds value at a level that is mathematically insignificant. In other words, if a copyright term worth 99.8% of the value of a perpetual copyright is not effectively perpetual, it is hard to see why a term worth 99.9% should be past the breaking point.⁹⁵

Again, the Eldred Court made several attempts to cast any such close calculations into the legislative domain. It opined variously that the factors relevant to the length of a copyright term go to “judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain,”⁹⁶ that “[c]alibrating rational economic incentives . . . is a task primarily for Congress,”⁹⁷ and ultimately “that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”⁹⁸ If these dicta are taken at face value, they support the constitutionality of the Mathers Act because the 2020 Congress still had plausible, rational bases for the thirty-year extension it enacted-- bases rooted in the purpose of the Copyright Clause that belie a purpose to evade the “limited Times” provision.

Such bases include the goals of encouraging the “restoration and public distribution”⁹⁹ of existing works and of providing a greater assurance (necessary in light of increased life-expectancies) that an author will be able “to take pride and comfort in knowing that one’s children--and perhaps their children--might also benefit from one’s posthumous popularity.”¹⁰⁰ Plaintiffs in the Mathers Act case might question the wisdom of the thirty-year extension--the necessity of an extra thirty years in order to adequately encourage restoration and distribution, or to sufficiently provide for an author’s progeny--but the close calibrations as to where exactly to draw the line are within the legislative domain under Eldred. And such a holding would find further support, of course, in the plain language and originalist strands of the Eldred opinion. The Mathers Act’s term is no less “limited” than the CTEA’s (or that of the 1976 Act or other statutory predecessors) and it seems to me that the case for overturning the next generation of copyright extensions faces a difficult challenge in attempting to distinguish itself from its predecessors.

^{*22} That is not to say that the permissible length of any future copyright extension is effectively a political question, such that any extension would be upheld so long as it is not facially perpetual. Eldred, taken at face value, indicates that there is an “outer boundary of ‘limited Times.’”¹⁰¹ Unfortunately, that boundary is a little fuzzy and will ultimately be delineated by the Court’s subjective determination of the true motive of Congress. My own admittedly subjective view is that the Court is likely to continue to defer to Congress’s extensions of the copyright term so long as the magnitude of the extensions is roughly in line with those sustained in Eldred.

Thus, I believe that the Court would uphold a thirty-year extension like the one I have imagined in the Mathers Act, but that it would strike down an extension amounting to multiples of that magnitude--in the range of a one-hundred-year extension or more. At that point, it would be much easier to conclude that the extension is distinguishable from prior extensions, and that Congress is really attempting to arrive at an effectively perpetual term. I would also say, however, that at some point soon even a twenty or thirty-year extension would be viewed not in isolation but as part of a larger pattern of increases, which together do start to resemble a term that is not limited but effectively perpetual. And I would concede that the Mathers Act hypothetical comes close to the “outer boundary”; that is the whole point of the hypothetical--to identify the difficult case that may lie ahead in an attempt to identify the fuzzy contours of the constitutional line.

My best guess is that the Mathers Act would survive, but my conclusion admittedly is affected by my own views as to the

primacy of text and history as methods of interpretation, and the Supreme Court of 2020 certainly could conclude otherwise. And in my view the likelihood of such a ruling will depend not only on the 2020 Court's views on the role of textualism and originalism as interpretive methodologies, but on the various factors identified above, including the timing of the extension in relation to the expiration of the copyright on the prominent works that were saved from the public domain by the CTEA, and any change in the international copyright standards.

Footnotes

^{a1} Professor of Law, Brigham Young University, J. Reuben Clark Law School, and counsel to amicus curiae Senator Orrin G. Hatch in *Eldred v. Ashcroft*. Thanks to the Intellectual Property Section of the American Bar Association, which gave me an opportunity to present some of the ideas developed in this article at its 2003 annual meeting in San Diego. Thanks also to Larry Solum and Jeff Lamken (my co-panelists at the ABA meeting) for their comments on earlier drafts, and to Steven Haskins for his helpful research assistance.

¹ 537 U.S. 186, 65 U.S.P.Q.2d (BNA) 1225 (2003).

² Sonny Bono Copyright Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301-304).

³ *Eldred*, 537 U.S. at 208, 65 U.S.P.Q.2d at 1236.

⁴ The Copyright Clause provides in relevant part that “Congress shall have Power ... to promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings.” U.S. Const. art. I, § 8, cl. 8. The *Eldred* petitioners offered two main textual objections to the CTEA: (1) that a legislative extension of the copyright term for an existing work is not “for limited Times”; see *Brief for Petitioners* at 11-17, *Eldred v. Ashcroft*, 537 U.S. 186, 65 U.S.P.Q.2d 1225 (No. 01-618) (2003) [hereinafter Petitioners’ Brief]; and (2) that an extension of the copyright term for works already in existence cannot “promote the Progress of Science” “because the incentive is being given for work that has already been produced,” and “[r]etroactive extensions cannot ‘promote’ the past.” *Id.* at 22.

⁵ Eminem is admittedly a bit of a fantastical choice as a hypothetical name-bearer for the 2020 CTEA, but in the case of the last CTEA, truth was almost as strange as fiction, as the 1998 statute was named for pop-star Sonny Bono, who was elected to the House of Representatives and found his name attached to the 1998 CTEA after his death in a skiing accident. See 105 Cong. Rec. H1483 (daily ed. Mar. 25, 1998) (statement of Rep. Coble).

⁶ Marshall Mathers is the given name of the rapper who performs under the name Eminem; he also refers to himself in the title of one of his albums as “Slim Shady.” *Eminem, The Slim Shady LP* (Interscope Records 1999).

⁷ See Charles Lane, *Justices Hear Challenge to Copyright Law; Extensions Stifle Access, Opponents Say; Government Claims Congressional Prerogative*, Wash. Post, Oct. 10, 2002, at E1; Charles Lane, *Court Upholds Copyright Extension; Justices Back Congress in Win for Artists, Entertainment Firms*, Wash. Post, Jan. 16, 2003, at A1 [hereinafter Court Upholds Copyright]; Paul March, *Mickey’s Not For Taking: Without Fanfare, a Ruling Has Extended Protection for Many of the 20th Century’s Artistic Landmarks*, *The Guardian* (London), Jan. 27, 2003, at 10.

⁸ See Statute of Anne, 8 Ann., c. 19, §§ 1 & 11 (1710) (Eng.).

⁹ Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124.

¹⁰ Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439.

¹¹ Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-1081.

¹² Pub. L. 94-553, § 302(a), (c), 90 Stat. 2541, 2572 (1976).

¹³ 17 U.S.C. § 302(a), (c) (1998).

¹⁴ Eldred v. Reno, 74 F. Supp. 2d 1, 53 U.S.P.Q.2d (BNA) 1217 (D.D.C. 1999), aff'd, 239 F.3d 372, 57 U.S.P.Q.2d 1842 (D.C. Cir. 2001), aff'd sub nom. Eldred v. Ashcroft, 537 U.S. 186, 65 U.S.P.Q.2d 1225 (2003).

¹⁵ See Damien Cave, Mickey Mouse v. The People, at http://archive.salon.com/tech/feature/2002/02/21/web_copyright (last visited Sept. 29, 2003). In addition, the plaintiffs' websites can be found at <http://www.eldritchpress.org> and <http://www.higginsonbooks.com>.

¹⁶ This perception of the CTEA was widely reported and generally accepted. See, e.g., Chris Springman, The Mouse That Ate the Public Domain: Disney, The Copyright Term Extension Act, and Eldred v. Ashcroft (Mar. 5, 2002), at http://writ.news.findlaw.com/commentary/20020305_springman.html (last visited Sept. 29, 2003); David Streitfield, The Cultural Anarchist v. The Hollywood Police State: A Stanford Professor is One Supreme Court Decision Away From Ending Copyrights on Thousands of Movies, Books and Songs. If He Wins, the Entertainment Industry Will Have to Find Other Ways to Make Money, L.A.Times, Sep. 22, 2002, at I10 (Magazine); Free Mickey Mouse: Lawrence Lessig Wants Less Copyright Protection, The Economist, Oct. 12, 2002; Michael H. Davis, Extending Copyright and the Constitution: "Have I Stayed Too Long?", 52 Fla. L. Rev. 989, 1005 (2000) (asserting that the CTEA provided "not an incentive, but a gift or windfall"); William Patry, The Failure of the American Copyright System: Protecting the Idle Rich, 72 Notre Dame L. Rev. 907, 932 (1997) (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"); Richard A. Epstein, The Dubious Constitutionality of the Copyright Term Extension Act, 36 Loy. L.A. L. Rev. 123, 128 (2002) (asserting that the CTEA "pads the wealth of the widows and children of the original copyright holders" and represents a "massive giveaway of public domain resources"); Dennis S. Karjala, Judicial Review of Copyright Term Extension Legislation, 36 Loy. L.A. L. Rev. 199, 232-36 (2002) (putting the point in public choice theory terms, and explaining that the benefits of the CTEA were conferred on a small, cohesive group while the costs were widely diffused among the public).

¹⁷ See Petitioners' Brief, *supra* note 4, at 15-18.

¹⁸ *Id.* at 14 ("Whether 50 years is enough, or 70 years too much, is not a judgment meant for this Court. But whether extensions for works already created prevent copyrights from being for 'limited Times,' and exceeds a power to 'promote the Progress of Science,' is a judgment that this Court can appropriately make.").

¹⁹ Petitioners' Brief, *supra* note 4, at 15-18 ("[T]he sole issue is whether Congress may achieve indirectly what it cannot achieve directly--a perpetual term on the installment plan."); see Lawrence B. Solum, Congress's Power to Promote the Progress of Science: Eldred v. Ashcroft, 36 Loy. L.A. L. Rev. 1, 9 (2002) (asserting that "[t]here is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection").

²⁰ U.S. Const. art. I, § 8, cl. 8. See Solum, *supra* note 19, at 21 (arguing that "the Intellectual Property Clause grants the power to pursue a goal and then qualifies that power by specifying the permissible means" of exercising it); Edward C. Walterschied, To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power, 43 Idea 1 (2002) ("There has been a steady and ever increasing tendency of both Congress and the judiciary to erode through legal fiction and evermore expansive interpretation those limitations on the copyright power found in the Clause."). As Professor Solum has indicated, the term "preamble" may not be the most accurate way to refer to the "progress" provision of the Copyright Clause because preambles usually are not "legally operative language," but merely "operate[] as a preface stating the goal to be served by the language that follows," whereas the "progress" provision is "actually the legally operative grant of power." Solum, *supra* note 19, at 22-23. But "preamble" is the label that has often been used in this context, and ultimately it makes little difference "whether we call the first phrase in the Intellectual Property Clause a 'preamble' or a 'power grant.'" *Id.* at 23.

²¹ Petitioners' Brief, *supra* note 4, at 22. Variations on this argument had been echoing in the academic literature. See 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, 1162-63, 1169 (2000) (concluding that the purpose provision of the Copyright Clause imposes a quid pro quo requirement under which "author ... creates, then author ... gets reward," and asserting that "[i]t is difficult to imagine a more overt violation of the Quid Pro Quo Principle than CTEA"); L. Ray Patterson, *Eldred v. Reno, An Example of the Law of Unintended Consequences*, 8 J. Intell. Prop. L. 223, 234 (2001) (arguing that "the creation of a new work is the unalterable condition for copyright," and that that condition is violated by an extension of an existing copyright term); Davis, *supra* note 16, at 1004 (contending that the CTEA is unconstitutional because "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"); Patry, *supra* note 16, at 915 (asserting that "it is unclear" how a retroactive copyright extension "can withstand constitutional scrutiny" since "obviously no further works can be induced"). At least two other scholars purported not to challenge the CTEA's constitutionality, but nevertheless agreed with the conclusion that retrospective extension is at least "suspect ... because it certainly did not provide an incentive for the creation of that work." Jane Ginsburg, Wendy J. Gordon, Arthur Miller & William F. Patry, *The Constitutionality of Copyright Term Extension: How Long is Too Long?*, 18 Cardozo Arts & Ent. L.J. 651, 702 (2000) (Jane Ginsburg); see also *id.* at 677 (Wendy Gordon) (questioning whether the "slugabed author" is "likely to stir any earlier at the thought of increasing the wealth of his grandchildren's grandchildren").

²² Petitioners' Brief, *supra* note 4, at 23. See also Dan T. Coenen and Paul J. Heald, *Means/Ends Analysis in Copyright Law: Eldred v. Ashcroft in One Act*, 36 Loy. L.A. L. Rev. 99, 108-110 (2002) (defending the application of the "quid pro quo" test to copyright term extensions).

²³ *Id.* at 20-22. In his interviews with the press, plaintiffs' counsel (and Stanford Law Professor) Larry Lessig was fond of making the point by reference to now-deceased authors, noting, for example, that "[n]o matter how much we promise Gershwin, he will not produce anything more." Brooks Boliek, *Copyright Law Goes to High Court: Justices to Mull Bono Act, Which Increased Term by 20 Years*, Hollywood Rep., Oct. 8, 2002, at 3. Although most of the academic literature readily agreed with the Eldred plaintiffs, see Epstein, *supra* note 16, at 128 (asserting that there was a "widespread academic consensus" as to the CTEA's inadvisability), a few academics argued in favor of the CTEA's constitutionality. One argument that was made in support of the CTEA was the assertion that the founding-era notion of "progress" included distribution or dissemination, and that an extended copyright term might well be expected to increase incentives for that sort of "progress," even if it could not encourage the creation of new works. See Orrin G. Hatch & Thomas R. Lee, "To Promote the Progress of Science": The Copyright Clause and Congress's Power to Extend Copyrights, 16 Harv. J.L. & Tech. 1, 21 (2002) (identifying historical evidence for the proposition that "progress" means dissemination, and discussing evidence in the legislative history to show that Congress intended to encourage that sort of progress by enacting the extension in the CTEA). Compare Molla Pollack, *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, 778 (2002) (offering evidence of founding-era usage of the term "progress" in periodicals, and suggesting that such usage implies a meaning of progress as "spread," but concluding for other reasons that the CTEA is constitutional) with Patterson, *supra* note 21, at 234-35 (asserting 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," since "[t]he condition for copyright is the creation of a new work, not the recycling of old works"). Other defenses of the CTEA in the academic literature similarly asserted that copyright extension would "incentivize the dissemination industries, the preservation industries, and the derivative work industries," see Ginsburg et al., *supra* note 21, at 693 (Arthur Miller), but they stopped short of connecting these points to the language of the Copyright Clause--or, in other words, they did not explain "how dissemination and preservation are consistent with the goal of promoting the progress of science." Hatch & Lee, *supra* at 6 n.24. Other defenders of the CTEA focused on considerations outside of the preamble, such as the notion that copyright extension would "harmonize[] our law with that of other copyright-protecting nations," Ginsburg et al., *supra* note 22, at 690 (Arthur Miller); that it would "provide tremendous benefits to the American economy," Arthur R. Miller, *Copyright Term Extension: Boon for the American Creators and the American Economy*, 45 J. Copyright Soc'y 319, 320 (1998); or that it would ensure "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," Orrin G. Hatch, *Toward A Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 733 (1998).

²⁴ 521 U.S. 507 (1997).

²⁵ Petitioners' Brief, *supra* note 4, at 31-32.

²⁶ *Id.* Eldred also offered two additional arguments that are not treated in detail here: (1) that extending the copyright term of an already existing work ran afoul of the requirement that copyrighted material be original, on the theory that "once published, a work

is no longer original.” Eldred, 537 U.S. at 211, 65 U.S.P.Q.2d at 1237 (citing *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991) (“Originality is … the sine qua non of copyright.”)); and (2) that copyright extension abrogated his First Amendment rights, because the CTEA further “prevented willing speakers who would adapt or distribute copyrighted works from reaching willing audiences,” without otherwise advancing an “important governmental interest,” Petitioners’ Brief, *supra* note 4, at 35-39. These arguments were rejected by the Court in Eldred. Eldred, 537 U.S. at 211, 65 U.S.P.Q.2d at 1237 (distinguishing *Feist* from Eldred in that “the originality requirement has no bearing” on the “limited Times” rule); *id.* at 219 (noting that “copyright’s purpose is to promote the creation and publication of free expression”). While the Court’s holding on the First Amendment question was not surprising, several authors have called for the Court to take a more active role in applying the First Amendment to police Congress’s copyright power. See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 1 (2001) (criticizing “[t]he notion that copyright’s internal free speech safety valves substitute for First Amendment scrutiny”); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 Yale L.J. 1, 3 (2002) (calling copyright law a “giant First Amendment duty-free zone,” which “flouts basic free speech obligations” and “produces results that, outside copyright’s domain, would be viewed as gross First Amendment violations”).

²⁷ See, e.g., Springman, *supra* note 16; Drew Clark, *A Mickey Mouse Copyright Law*, The National Journal, Oct. 12, 2002.

²⁸ Lane, *Court Upholds Copyright*, *supra* note 7, at A1.

²⁹ Eldred, 537 U.S. at 199, 65 U.S.P.Q.2d at 1232. As I have noted elsewhere, the “limited Times” argument in Eldred also ignored the historical development of this provision, which was adopted only after the Framers considered “more definite and restrictive language (both ‘a limited time’ and ‘a certain time’ were considered.” Hatch & Lee, *supra* note 23, at 2 n.4 (citing 3 Documentary History of the Constitution of the United States 556 (Dep’t of State 1900) (Convention, Aug. 18, 1787); George Ramsey, *The Historical Background of Patents*, 18 J. Pat. Off. Soc’y 6, 14 (1936)). The conclusion that a term of life plus 70 years is “limited”—even when it represents a 20-year extension of the term that applied previously—finds further support in this historical evidence, since the Framers undoubtedly could have required a “certain time” or even the singular “limited time” if they meant to foreclose the possibility of extensions of the copyright term.

³⁰ Eldred, 537 U.S. at 199, 65 U.S.P.Q.2d at 1232.

³¹ *Id.* (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)) at 200, 65 U.S.P.Q.2d at 1232.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 213, 65 U.S.P.Q.2d at 1238 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884)).

³⁵ *Id.* at 208, 65 U.S.P.Q.2d at 1236.

³⁶ Eldred, 537 U.S. at 209 n.16, 65 U.S.P.Q.2d at 1236 n.16. See *id.* at 256, 65 U.S.P.Q.2d at 1256 (Breyer, J., dissenting) (quoting 144 Cong. Rec. H9952) (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono)).

³⁷ *Id.* at 209 n.16, 65 U.S.P.Q.2d at 1236 n.16.

³⁸ *Id.*

³⁹ *Id.* at 209-10, 65 U.S.P.Q.2d at 1236-37.

⁴⁰ Id. at 209 n.16, 65 U.S.P.Q.2d at 1236 n.16. See *id.* at 243, 65 U.S.P.Q.2d at 1251 (Breyer, J., dissenting).

⁴¹ Id. at 267, 65 U.S.P.Q.2d at 1261 (Breyer, J., dissenting) (Appendix to Opinion of Breyer, J.). See also Amicus Curiae Brief of George A. Akerlof et al. at 6-7, *Eldred v. Ashcroft*, 537 U.S. 186, 65 U.S.P.Q.2d 1225 (2003) (No. 01-618).

⁴² *Eldred*, 537 U.S. at 209 n.16, 65 U.S.P.Q.2d at 1236 n.16.

⁴³ *Id.*

⁴⁴ *Id.* at 210 n.17, 65 U.S.P.Q.2d at 1207 n.17 (quoting Brief for Respondent at 27 n.18).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Eldred*, 537 U.S. at 212, 65 U.S.P.Q.2d at 1237-38.

⁴⁸ *Id.* at 213-14, 65 U.S.P.Q.2d at 1237-38.

⁴⁹ *Id.* at 215, 65 U.S.P.Q.2d at 1239.

⁵⁰ *Id.* Prior to the Court’s decision, this sort of incentive was minimized in the academic literature. See *Davis*, *supra* note 16, at 1031 (dismissing as a “bizarrely rarified long shot” the “incentive provided [by a copyright extension]” in the form of “a ‘bet’ the author makes that Congress will enact another retrospective extension”); *Stewart E. Sterk, Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197, 1223 (1996) (noting that the sort of incentive identified here presupposes an author that has “extreme confidence in his own success”). But see *Hatch & Lee*, *supra* note 23, at 21 (acknowledging that “[t]he effects of a potential future extension on any individual author’s creativity are somewhat speculative,” but asserting that “one of the fatal weaknesses of 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”).

⁵¹ *Id.* at 204, 65 U.S.P.Q.2d at 1234; see also *id.* at 217-18, 65 U.S.P.Q.2d at 1240 (expressly rejecting “the ‘congruence and proportionality’ standard described in cases evaluating exercises of Congress’ power under § 5 of the Fourteenth Amendment”). In some ways, the Court’s choice of a deferential standard of review was pivotal in this decision, as a more searching standard would have substantially enhanced the odds of a future challenge to further copyright term extensions. See *Epstein*, *supra* note 16, at 128 (predicting that although such a result “is not entirely to [the author’s] liking … the government is likely to win” in *Eldred*, and asserting that “the culprit lies in the standard for judicial review”); *id.* at 133 (asserting that “[t]he level of scrutiny thus tells the tale” as to whether the CTEA survives constitutional review).

⁵² *Eldred*, 537 U.S. at 205, 65 U.S.P.Q.2d at 1235.

⁵³ *Id.* (citing Council Directive 93/98/EEC, arts. 1(1), 2(2), 1993 O.J. (L290) 9; 144 Cong. Rec. S12,377-78 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch)).

⁵⁴ See Berne Convention for the Protection of Literary and Artistic Works, Sept. 6, 1886, art. 6(1), 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971).

⁵⁵ Eldred, 537 U.S. at 205, 65 U.S.P.Q.2d at 1235.

⁵⁶ Id. at 205-06, 65 U.S.P.Q.2d at 1235

⁵⁷ Id. at 207, 65 U.S.P.Q.2d at 1235 (citing H.R. Rep. No. 105-452, at 4 (1998) (testimony indicating that term extension “provides copyright owners generally with the incentive to restore older works and further disseminate them to the public”); see also Hatch & Lee, *supra* note 23, at 22-23 (identifying evidence in the legislative history to show that Congress intended to encourage dissemination and preservation in enacting the extension in the CTEA).

⁵⁸ Eldred, 537 U.S. at 207 n.14, 65 U.S.P.Q.2d at 1235 n.14 (citing 141 Cong. Rec. S3393 (1995) (statement of Sen. Feinstein)).

⁵⁹ Id. at 207 n.15, 65 U.S.P.Q.2d at 1235 n.15.

⁶⁰ See Epstein, *supra* note 16, at 123 (characterizing the CTEA as “the most recent, but not necessarily the last, step in a constant expansion of copyright protection”).

⁶¹ Ariana Eunjung Cha, Determining the Life of Corporate Copyrights; Supreme Court to Hear Case on Extensions, Wash. Post, July 4, 2002, at E06 (identifying Walt Disney Co. as the “most visible” lobbyist in favor of copyright extension); Disney Lobbying for Copyright Extension No Mickey Mouse Effort; Congress OKs Bill Granting Creators 20 More Years, Chi. Trib., Oct. 17, 1998, at 22 [hereinafter Disney Lobbying].

⁶² See Disney Lobbying, *supra* note 61; David G. Savage, Justices OK Copyright Extension; High Court Gives Movie Studios a Hollywood Ending, L.A. Times, Jan. 16, 2003, at A1 (“[The Film Industry] could have lost an estimated \$400 million in revenue”).

⁶³ See Lane, Court Upholds Copyright, *supra* note 7, at A1 (quoting President of the MPAA Jack Valenti’s assertion that the MPAA has “always maintained and the law has long recognized that copyright, whose aim it is to provide incentive for the creation and preservation of creative works, is in the public interest.”).

⁶⁴ It is always possible, of course, that the Supreme Court of 2020 will resolve the constitutionality of the next generation of copyright extensions by reversing course altogether, overruling Eldred and adopting a standard more like that proposed by Justice Stevens or Justice Breyer in dissent. Aside from mentioning that possibility here, however, I do not entertain it any further, but proceed on the assumption that Eldred will be given *stare decisis* effect and will be taken at face value.

⁶⁵ Eldred, 537 U.S. at 199, 65 U.S.P.Q.2d at 1232 (quoting S. Johnson, *A Dictionary of the English Language* (7th ed. 1785)).

⁶⁶ Id.

⁶⁷ Id. at 200, 65 U.S.P.Q.2d at 1232 (citing *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.) (“[A] page of history is worth a volume of logic.”)).

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id. at 204, 65 U.S.P.Q.2d at 1234.

⁷¹ Eldred, 537 U.S. at 213, 65 U.S.P.Q.2d at 1238 (quoting *Meyers v. U.S.*, 272 U.S. 52 (1926)).

⁷² Id. at 209 n.16, 65 U.S.P.Q.2d at 1236 n.16.

⁷³ Id.

⁷⁴ 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono).

⁷⁵ Eldred, 537 U.S. at 209-10, 65 U.S.P.Q.2d at 1236-37.

⁷⁶ Id. at 209 n.16, 65 U.S.P.Q.2d at 1236 n.16.

⁷⁷ Id. at 208, 65 U.S.P.Q.2d at 1236.

⁷⁸ Id. at 209 n.16, 65 U.S.P.Q.2d at 1236 n.16.

⁷⁹ Id. at 212, 65 U.S.P.Q.2d at 1238.

⁸⁰ Id. at 214-25, 65 U.S.P.Q.2d at 1239.

⁸¹ Eldred, 537 U.S. at 215, 65 U.S.P.Q.2d at 1239.

⁸² Id. at 207, 65 U.S.P.Q.2d at 1235.

⁸³ Id. at 207 n.14, 65 U.S.P.Q.2d at 1235 n.14 (quoting 141 Cong. Rec. S3393 (1995) (statement of Sen. Feinstein)).

⁸⁴ Id. at 208, 65 U.S.P.Q.2d at 1236.

⁸⁵ Id.

⁸⁶ Id. at 209-210, 65 U.S.P.Q.2d at 1236. Ultimately, the Mathers Act's constitutionality may turn on whether it can be shown to "cross a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, ... 1976 [and 1998] Acts did not." Id. That issue is taken up in the conclusion.

⁸⁷ Eldred, 537 U.S. at 209 n.16, 65 U.S.P.Q.2d at 1236 n.16.

⁸⁸ Id. at 210 n.17, 65 U.S.P.Q.2d at 1237 n.17 (quoting Brief for Respondent at 27 n.18, *Eldred v. Ashcroft*, 537 U.S. 186, 65 U.S.P.Q.2d 1225 (2003) (No. 01-618)).

89 Id.

90 This conclusion finds some support in the analysis that has been offered in favor of the Uniform Statutory Rule Against Perpetuities (USRAP). The USRAP would abandon the common-law rule in favor of a 90-year statutory vesting period, on the rationale that that is the period “that would, on average be produced by identifying and tracing an actual set of measuring lives and then tacking on a 21-year period following the death of the survivor.” Unif. Statutory Rule Against Perpetuities Prefatory Note (amended 1990), 8B U.L.A. 230 (2001). The statistical basis for this assertion has been the subject of some debate in the academic literature. Compare William B. Stoebuck & Dale A. Whitman, *The Law of Property* 137 (3d ed. 2000) (citing *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 U. Miami Inst. on Est. Plan. Ch. 7 (1986)) (asserting that the youngest measuring life is six years old on average and that the average life expectancy of a six-year old in 1986 was 69.6 years, and explaining that the 90-year proposal represents the average expected remaining lifespan of a measuring life plus the 21-year term of the common law rule); Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. Rev. 1023, 1033 (1987) (criticizing the “inherently implausible assumption” that forms the basis of the USRAP’s 90-year term and asserting that “not a single bit of empirical information” was used in calculating the averages noted above). But even the USRAP’s critics have suggested that “statistics are not really necessary to support the idea that 90 years is about equal to the longest time a lawyer can tie up property through a saving clause.” Dukeminier, *supra*, at 1034; see also Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 Cornell L. Rev. 157, 167-68 (1998) (“[a]lthough this method [referred to in the Prefatory Note] may not be scientifically accurate to the nth degree, the Drafting Committee considered it reliable enough to support a waiting period of 90 years, given the margin-of-safety function that it performs.”). If a 90-year period approximates the outer limits of the rule against perpetuities, the Mathers Act plaintiffs may be able to argue that a term of life plus 100 years is well beyond the “outer boundary of limited Times.” See also Solum, *supra* note 19, at 30-31 (asserting that the term “limited” “must be measured against the facts of human life in general and authorship in particular,” and that in that context a limited time “only very, very rarely would exceed seventy years”).

91 As explained above, the 1976 Act changed the methodology of calculating the copyright term from a fixed term with rights of renewal to a term tied to the life of the author. See text accompanying *supra* notes 12-13. In extending the term from a total of 56 years under the 1909 Act (28 years, renewable for an additional 28 years) to a term of life plus 50 years, the 1976 Act may have been roughly comparable to the 1998 CTEA in adding a couple of decades to the applicable term--assuming that an average author may have twenty-some years of life remaining at the time of publication. See, e.g., S. Rep. No. 104-315, at 10 (1996) (finding that “among the justifications the Committee cited for adopting the life-plus-50 term in 1976 was the insufficiency of the 56-year fixed term to ensure fair economic returns for American creators and their dependents”).

92 Petitioners’ Brief, *supra* note 4, at 14. See also Solum, *supra* note 19, at 35 (asserting that at the time of the CTEA one could argue that the notion of a perpetual term on the installment plan was “only a theoretical possibility,” and that one response would be to say “that the Court could strike down such extensions if they occurred on a repeated basis”).

93 There was some question as to whether the CTEA itself created uniformity in American-European copyright law. Indeed, Justice Breyer took this argument up in his dissent, arguing that the CTEA did not bring American copyright law into conformity with the EU’s law, and therefore could not establish a rational basis for the proposed extension. *Eldred*, 537 U.S. at 257-58, 65 U.S.P.Q.2d at 1257. (“Despite appearances, the statute does not create a uniform American-European term with respect to the lion’s share of the economically significant works that it affects”). My hypothetical, of course, eliminates any appearance of uniformity.

94 *Id.* at 210, 65 U.S.P.Q.2d at 1236-37. See Ginsburg et al., *supra* note 21, at 704 (challenging “the Eldred proponents either to explain why [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”).

95 If the constitutional line were to be drawn on the basis of the economic value of a given copyright term relative to value of a perpetual term, presumably the line would be drawn not at the Mathers Act, but at a much earlier stage in the history of Congress’s copyright extensions. See Epstein, *supra* note 16, at 127 (asserting that “the economic difference between a 100-year copyright ... and a perpetual copyright ... is trivial compared to the differences between a fourteen-year and a 100-year copyright period, both of which are unquestionably legal”).

96 *Eldred*, 537 U.S. at 205, 65 U.S.P.Q.2d at 1235.

⁹⁷ Id. at 207 n.15, 65 U.S.P.Q.2d at 1235 n.15.

⁹⁸ Id. at 212, 65 U.S.P.Q.2d at 1238.

⁹⁹ Id. at 207, 65 U.S.P.Q.2d at 1235.

¹⁰⁰ Id. at 207 n.14, 65 U.S.P.Q.2d at 1235 n.14.

¹⁰¹ See *id.* at 210 n.17. The outer boundary, if it exists, cannot possibly be at “perpetuity less one day,” as suggested by Jack Valenti of the MPAA. See Ginsburg et al., *supra* note 21, at 652. As a practical matter, the “limited Times” provision would be robbed of any practical significance if it left Congress free to enact a term on the order of 1,000 years or more. See Epstein, *supra* note 16, at 127 (“Any fixed period counts as a limited time. Presumably, a billion- year term would run afoul of the Clause. So why not a million or a thousand years?”); Solum, *supra* note 19, at 29 (noting that “Congress might specify terms measured in centuries or millennia without approaching infinity,” and thus concluding that “the phrase limited times must mean something other than a finite term”). At the same time, however, it is difficult to predict where exactly the outer boundary would be located by the Court. I have taken a stab at that in the paragraphs of this article.