

537 U.S. 186

ELDRED ET AL.

v.

ASHCROFT, ATTORNEY GENERAL

No. 01-618.

Supreme Court of United States.

Argued October 9, 2002.

Decided January 15, 2003.

[...]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority the Constitution assigns to Congress to prescribe the duration of copyrights. The Copyright and Patent Clause of the Constitution, Art. I, § 8, cl. 8, provides as to copyrights: "Congress shall have [537 U.S. 193] Power ... [t]o promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their . . . Writings." In 1998, in the measure here under inspection, Congress enlarged the duration of copyrights by 20 years. Copyright Term Extension Act (CTEA), Pub. L. 105-298, §§ 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302, 304). As in the case of prior extensions, principally in 1831, 1909, and 1976, Congress provided for application of the enlarged terms to existing and future copyrights alike.

Petitioners are individuals and businesses whose products or services build on copyrighted works that have gone into the public domain. They seek a determination that the CTEA fails constitutional review under both the Copyright Clause's "limited Times" prescription and the First Amendment's free speech guarantee. Under the 1976 Copyright Act, copyright protection generally lasted from the work's creation until 50 years after the author's death. Pub. L. 94-553, § 302(a), 90 Stat. 2572 (1976 Act). Under the CTEA, most copyrights now run from creation until 70 years after the author's death. 17 U.S.C. § 302(a). Petitioners do not challenge the "life-plus-70-years" timespan itself. "Whether 50 years is enough, or 70 years too much," they acknowledge, "is not a judgment meet for this Court." [...]Congress went awry, petitioners maintain, not with respect to newly created works, but in enlarging the term for published works with existing copyrights. The "limited Tim[e]" in effect when a copyright is secured, petitioners urge, becomes the constitutional boundary, a clear line beyond the power of Congress to extend. [...]As to the First Amendment, petitioners contend that the CTEA is a content-neutral regulation of speech that fails inspection [537 U.S. 194] under the heightened judicial scrutiny appropriate for such regulations.

In accord with the District Court and the Court of Appeals, we reject petitioners' challenges to the CTEA. In that 1998 legislation, as in all previous copyright term extensions, Congress placed existing and future copyrights in parity. In prescribing that alignment, we hold, Congress acted within its authority and did not transgress constitutional limitations.

I A

We evaluate petitioners' challenge to the constitutionality of the CTEA against the backdrop of Congress' previous exercises of its authority under the Copyright Clause. The Nation's first copyright statute, enacted in 1790, provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Act). The 1790 Act's renewable 14-year

term applied to existing works (*i. e.*, works already published and works created but not yet published) and future works alike. *Ibid.* Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for an additional 14 years), and to 56 years in 1909 (28 years from publication, renewable for an additional 28 years). Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (1831 Act); Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-1081 (1909 Act). Both times, Congress applied the new copyright term to existing and future works, 1831 Act §§ 1, 16; 1909 Act §§ 23-24; to qualify for the 1831 extension, an existing work had to be in its initial copyright term at the time the Act became effective, 1831 Act §§ 1, 16.

In 1976, Congress altered the method for computing federal copyright terms. 1976 Act §§ 302-304. For works created [537 U.S. 195] by identified natural persons, the 1976 Act provided that federal copyright protection would run from the work's creation, not—as in the 1790, 1831, and 1909 Acts—its publication; protection would last until 50 years after the author's death. § 302(a). In these respects, the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works. See H. R. Rep. No. 94-1476, p. 135 (1976). For anonymous works, pseudonymous works, and works made for hire, the 1976 Act provided a term of 75 years from publication or 100 years from creation, whichever expired first. § 302(c).

These new copyright terms, the 1976 Act instructed, governed all works not published by its effective date of January 1, 1978, regardless of when the works were created. §§ 302-303. For published works with existing copyrights as of that date, the 1976 Act granted a copyright term of 75 years from the date of publication, §§ 304(a) and (b), a 19-year increase over the 56-year term applicable under the 1909 Act.

The measure at issue here, the CTEA, installed the fourth major duration extension of federal copyrights.[2] Retaining the general structure of the 1976 Act, the CTEA enlarges the terms of all existing and future copyrights by 20 years. For works created by identified natural persons, the term now lasts from creation until 70 years after the author's [537 U.S. 196] death. 17 U.S.C. § 302(a). This standard harmonizes the baseline United States copyright term with the term adopted by the European Union in 1993. See Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 Official J. Eur. Coms. (L 290), p. 9 (EU Council Directive 93/98). For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first. 17 U.S.C. § 302(c).

Paralleling the 1976 Act, the CTEA applies these new terms to all works not published by January 1, 1978. §§ 302(a), 303(a). For works published before 1978 with existing copyrights as of the CTEA's effective date, the CTEA extends the term to 95 years from publication. §§ 304(a) and (b). Thus, in common with the 1831, 1909, and 1976 Acts, the CTEA's new terms apply to both future and existing copyrights.[3]

B

Petitioners' suit challenges the CTEA's constitutionality under both the Copyright Clause and the First Amendment. On cross-motions for judgment on the pleadings, the District Court entered judgment for the Attorney General (respondent here). 74 F. Supp.2d 1 (DC 1999). The court held that the CTEA does not violate the "limited Times" restriction of the Copyright Clause because the CTEA's terms, though [537 U.S. 197] longer than the 1976 Act's terms, are still limited, not perpetual, and therefore fit within Congress' discretion. [...]The court also held that "there are no First Amendment rights to use the copyrighted works of others." [...]

The Court of Appeals for the District of Columbia Circuit affirmed. 239 F.3d 372 (2001). [...]

We granted certiorari to address two questions: whether the CTEA's extension of existing copyrights exceeds Congress' power under the Copyright Clause; and whether the CTEA's extension of existing and future copyrights

violates the First Amendment. [...] We now answer those two questions in the negative and affirm.

[537 U.S. 199] II

A

We address first the determination of the courts below that Congress has authority under the Copyright Clause to extend the terms of existing copyrights. Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe "limited Times" for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.

The CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a "limited Tim[e]" as applied to future copyrights.^[4] Petitioners contend, however, that existing copyrights extended to endure for that same term are not "limited." Petitioners' argument essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever "fixed" or "inalterable." The word "limited," however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: "confine[d] within certain bounds," "restrain[ed]," or "circumscribe[d]." S. Johnson, *A Dictionary of the English Language* (7th ed. 1785); see T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) ("confine[d] within certain bounds"); Webster's Third New International Dictionary 1312 (1976) ("confined within limits"; "restricted in extent, number, or duration"). Thus understood, a timespan appropriately "limited" as applied to future copyrights does not automatically cease to be "limited" when applied to existing copyrights. And as we observe, *infra*, at 209-210, there is no cause to suspect that a [537 U.S. 200] purpose to evade the "limited Times" prescription prompted Congress to adopt the CTEA.

To comprehend the scope of Congress' power under the Copyright Clause, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime. As earlier recounted, see *supra*, at 194, the First Congress accorded the protections of the Nation's first federal copyright statute to existing and future works alike. 1790 Act § 1.^[5] Since then, Congress has regularly applied [537 U.S. 201] duration extensions to both existing and future copyrights. 1831 Act §§ 1, 16; 1909 Act §§ 23-24; 1976 Act §§ 302-303; 17 U.S.C. §§ 302-304.^[6]

Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry. We count it significant that early Congresses extended the duration of numerous individual patents as well as copyrights. See, e. g., Act of Jan. 7, 1808, ch. 6, 6 Stat. 70 (patent); Act of Mar. 3, 1809, ch. 35, 6 Stat. 80 (patent); Act of Feb. 7, 1815, ch. 36, 6 Stat. 147 (patent); Act of May 24, 1828, ch. 145, 6 Stat. 389 (copyright); Act of Feb. 11, 1830, ch. 13, 6 Stat. 403 (copyright); [537 U.S. 202] see generally Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyright Soc. 19 (2001). The courts saw no "limited Times" impediment to such extensions; renewed or extended terms were upheld in the early days, for example, by Chief Justice Marshall and Justice Story sitting as circuit justices. See *Evans v. Jordan*, 8 F. Cas. 872, 874 (No. 4,564) (CC Va. 1813) (Marshall, J.) ("Th[e] construction of the constitution which admits the renewal of a patent, is not controverted. A renewed patent ... confers the same rights, with an original."), *aff'd*, 9 Cranch 199 (1815); *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (No. 1,518) (CC Mass. 1839) (Story, J.) ("I never have entertained any doubt of the constitutional authority of congress" to enact a 14-year patent extension that "operates retrospectively"); see also *Evans v. Robinson*, 8 F. Cas. 886, 888 (No. 4,571) (CC Md. 1813) (Congresses "have the exclusive right ... to limit the times for which a patent right shall be granted, and are not restrained from renewing a patent or prolonging" it).^[7]

Further, although prior to the instant case this Court did not have occasion to decide whether extending the duration of existing copyrights complies with the "limited Times" prescription, the Court has found no constitutional barrier to the legislative expansion of existing patents.^[8] *McClurg v. [537 U.S. 203] Kingsland*, 1 How. 202 (1843), is the pathsetting precedent. The patentee in that case was unprotected under the law in force when the patent issued because he had allowed his employer briefly to practice the invention before he obtained the patent. Only upon enactment, two years later, of an exemption for such allowances did the patent become valid, retroactive to the time it issued. *McClurg* upheld retroactive application of the new law. The Court explained that the legal regime governing a particular patent "depend[s] on the law as it stood at the emanation of the patent, together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity." *Id.*, at 206.^[9] Neither is it a sound [537 U.S. 204] objection to the validity of a copyright term extension, enacted pursuant to the same constitutional grant of authority, that the enlarged term covers existing copyrights.

Congress' consistent historical practice of applying newly enacted copyright terms to future and existing copyrights reflects a judgment stated concisely by Representative Huntington at the time of the 1831 Act: "[J]ustice, policy, and equity alike forb[id]" that an "author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act." 7 Cong. Deb. 424 (1831); accord, Symposium, *The Constitutionality of Copyright Term Extension*, 18 *Cardozo Arts & Ent. L. J.* 651, 694 (2000) (Prof. Miller) ("[S]ince 1790, it has indeed been Congress's policy that the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today."). The CTEA follows this historical practice by keeping the duration provisions of the 1976 Act largely in place and simply adding 20 years to each of them. Guided by text, history, and precedent, we cannot agree with petitioners' submission that extending the duration of existing copyrights is categorically beyond Congress' authority under the Copyright Clause.

Satisfied that the CTEA complies with the "limited Times" prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress. [537 U.S. 205] *Sony*, 464 U.S., at 429 ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors ... in order to give the public appropriate access to their work product.").^[10]

The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain. As respondent describes, [...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. EU Council Directive 93/98, Art. 1(1), p. 11; see 144 Cong. Rec. S12377-S12378 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch). Consistent with the Berne Convention, the EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. See Berne Conv. Art. 7(8); P. Goldstein, *International Copyright* § 5.3, p. 239 (2001). By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive [537 U.S. 206] the same copyright protection in Europe as their European counterparts.^[11] The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States. See Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 *Loyola (LA) L. Rev.* 323, 330 (2002) ("[M]atching th[e] level of [copyright] protection in the United States [to that in the EU] can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages vis-à-vis foreign rightholders."); see also *id.*, at 332 (the United States could not "play a leadership role" in the give-and-take evolution of the international copyright system, indeed it would "lose all flexibility," "if the only way to promote the progress of science were to provide incentives to create new works").^[12]

In addition to international concerns,^[13] Congress passed the CTEA in light of demographic, economic, and technological [537 U.S. 207] changes, [...]and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works, *id.*, at 34-37; see H. R. Rep. No. 105-452, p. 4 (1998) (term extension "provide[s] copyright owners generally with the incentive to restore older works and further disseminate them to the public").^[15]

[537 U.S. 208] In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA — which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes — is an impermissible exercise of Congress' power under the Copyright Clause.

B

Petitioners' Copyright Clause arguments rely on several novel readings of the Clause. We next address these arguments and explain why we find them unpersuasive.

1

Petitioners contend that even if the CTEA's 20-year term extension is literally a "limited Tim[e]," permitting Congress to extend existing copyrights allows it to evade the "limited Times" constraint by creating effectively perpetual copyrights through repeated extensions. We disagree.

[537 U.S. 209] As the Court of Appeals observed, a regime of perpetual copyrights "clearly is not the situation before us." [...]Nothing before this Court warrants construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the "limited Times" constraint.^[16] Critically, we again emphasize, petitioners fail to [537 U.S. 210] show how the CTEA crosses a constitutionally significant threshold with respect to "limited Times" that the 1831, 1909, and 1976 Acts did not. See [...]Austin, *supra* n. 13, at 56 ("If extending copyright protection to works already in existence is constitutionally suspect," so is "extending the protections of U.S. copyright law to works by foreign authors that had already been created and even first published when the federal rights attached."). Those earlier Acts did not create perpetual copyrights, and neither does the CTEA.^[17]

2

Petitioners dominantly advance a series of arguments all premised on the proposition that Congress may not extend an existing copyright absent new consideration from the author. They pursue this main theme under three headings. Petitioners contend that the CTEA's extension of existing copyrights (1) overlooks the requirement of "originality," (2) fails to "promote the Progress of Science," and (3) ignores copyright's *quid pro quo*.

[537 U.S. 211] Petitioners' "originality" argument draws on *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). In *Feist*, we observed that "[t]he *sine qua non* of copyright is originality," [...]and held that copyright protection is unavailable to "a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent," [...]Relying on *Feist*, petitioners urge that even if a work is sufficiently "original" to qualify for copyright protection in the first instance, any extension of the copyright's duration is impermissible because, once published, a work is no longer original.

Feist, however, did not touch on the duration of copyright protection. Rather, the decision addressed the core question of copyrightability, *i. e.*, the "creative spark" a work must have to be eligible for copyright protection at all. Explaining the originality requirement, *Feist* trained on the Copyright Clause words "Authors" and "Writings." [...]The decision did not construe the "limited Times" for which a work may be protected, and the originality requirement has no bearing on

that prescription.

More forcibly, petitioners contend that the CTEA's extension of existing copyrights does not "promote the Progress of Science" as contemplated by the preambular language of the Copyright Clause. Art. I, § 8, cl. 8. To sustain this objection, petitioners do not argue that the Clause's preamble is an independently enforceable limit on Congress' power. See 239 F.3d, at 378 (Petitioners acknowledge that "the preamble of the Copyright Clause is not a substantive limit on Congress' legislative power." (internal quotation marks omitted)). Rather, they maintain that the preambular language identifies the sole end to which Congress may legislate; accordingly, they conclude, the meaning of "limited Times" must be "determined in light of that specified end." [...] The CTEA's extension of existing copyrights categorically fails to "promote the Progress of Science," petitioners argue, because it does not stimulate the [537 U.S. 212] creation of new works but merely adds value to works already created.

As petitioners point out, we have described the Copyright Clause as "both a grant of power and a limitation," *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966), and have said that "[t]he primary objective of copyright" is "[t]o promote the Progress of Science," *Feist*, 499 U.S., at 349. The "constitutional command," we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a "system" that "promote[s] the Progress of Science." *Graham*, 383 U.S., at 6.[18]

We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives. See *Stewart v. Abend*, 495 U.S., at 230 ("Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces. . . . [I]t is not our role to alter the delicate balance [537 U.S. 213] Congress has labored to achieve."); *Sony*, 464 U.S., at 429 ("[I]t is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *Graham*, 383 U.S., at 6 ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim."). The justifications we earlier set out for Congress' enactment of the CTEA, [...] provide a rational basis for the conclusion that the CTEA "promote[s] the Progress of Science."

On the issue of copyright duration, Congress, from the start, has routinely applied new definitions or adjustments of the copyright term to both future works and existing works not yet in the public domain.[19] Such consistent congressional practice is entitled to "very great weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two] centur[ies], it is almost conclusive." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S., at 57. Indeed, "[t]his Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions." *Myers v. United States*, 272 U.S. 52, 175 (1926). Congress' unbroken practice since the founding generation [537 U.S. 214] thus overwhelms petitioners' argument that the CTEA's extension of existing copyrights fails *per se* to "promote the Progress of Science." [20]

Closely related to petitioners' preambular argument, or a variant of it, is their assertion that the Copyright Clause "imbeds a quid pro quo." [...] They contend, in this regard, that Congress [...] may grant to an "Autho[r]" an "exclusive Right" for a "limited Tim[e]," but only in exchange for a "Writin[g]." Congress' power to confer copyright protection, petitioners argue, is thus contingent upon an exchange: The author of an original work receives an "exclusive Right" for a "limited Tim[e]" in exchange for a dedication to the public thereafter. Extending an existing copyright without demanding additional consideration, petitioners maintain, bestows an unpaid-for benefit on copyright holders and their heirs, in violation of the *quid pro quo* requirement.

We can demur to petitioners' description of the Copyright Clause as a grant of legislative authority empowering Congress "to secure a bargain — this for that." [...]see *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"). But the legislative evolution earlier recalled demonstrates what the bargain entails. Given the consistent placement of existing copyright [537 U.S. 215] holders in parity with future holders, 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.^[21] Congress could rationally seek to "promote . . . Progress" by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term. Nothing in the Copyright Clause bars Congress from creating the same incentive by adopting the same position as a matter of unbroken practice. [...]

Neither *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), nor *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), is to the contrary. In both cases, we invalidated the application of certain state laws as inconsistent with the federal patent regime. [...]Describing Congress' constitutional authority to confer patents, *Bonito Boats* noted: "The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'" [...] [537 U.S. 216] *Sears* similarly stated that "[p]atents are not given as favors ... but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention." [...] Neither case concerned the extension of a patent's duration. Nor did either suggest that such an extension might be constitutionally infirm. Rather, *Bonito Boats* reiterated the Court's unclouded understanding: "It is for Congress to determine if the present system" effectuates the goals of the Copyright and Patent Clause. [...] And as we have documented, [...] Congress has many times sought to effectuate those goals by extending existing patents.

We note, furthermore, that patents and copyrights do not entail the same exchange, and that our references to a *quid pro quo* typically appear in the patent context. See, e. g., *J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 142 (2001) ("The disclosure required by the Patent Act is 'the *quid pro quo* of the right to exclude.'" (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974))); *Bonito Boats*, 489 U.S., at 161 ("the *quid pro quo* of substantial creative effort required by the federal [patent] statute"); *Brenner v. Manson*, 383 U.S. 519, 534 (1966) ("The basic *quid pro quo* ... for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility."); *Pennock v. Dialogue*, 2 Pet. 1, 23 (1829) (If an invention is already commonly known and used when the patent is sought, "there might be sound reason for presuming, that the legislature did not intend to grant an exclusive right," given the absence of a "*quid pro quo*."). This is understandable, given that immediate disclosure is not the objective of, but is *exacted from*, the patentee. It is the price paid for the exclusivity secured. See *J. E. M. Ag Supply*, 534 U.S., at 142. For the author seeking copyright protection, in contrast, disclosure is the desired objective, not something exacted from the author in exchange for the copyright.

[537 U.S. 217] Indeed, since the 1976 Act, copyright has run from creation, not publication. See 1976 Act § 302(a); 17 U.S.C. § 302(a).

Further distinguishing the two kinds of intellectual property, copyright gives the holder no monopoly on any knowledge. A reader of an author's writing may make full use of any fact or idea she acquires from her reading. See § 102(b). The grant of a patent, on the other hand, does prevent full use by others of the inventor's knowledge. See Brief for Respondent 22; *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103, n. 16 (CA2 1951) (The monopoly granted by a copyright "is not a monopoly of knowledge. The grant of a patent does prevent full use being made of

knowledge, but the reader of a book is not by the copyright laws prevented from making full use of any information he may acquire from his reading." (quoting W. Copinger, *Law of Copyright* 2 (7th ed. 1936))). In light of these distinctions, one cannot extract from language in our patent decisions — language not trained on a grant's duration — genuine support for petitioners' bold view. Accordingly, we reject the proposition that a *quid pro quo* requirement stops Congress from expanding copyright's term in a manner that puts existing and future copyrights in parity.^[22]

3

As an alternative to their various arguments that extending existing copyrights violates the Copyright Clause *per se*, petitioners urge heightened judicial review of such extensions to ensure that they appropriately pursue the purposes of the Clause. [...] Specifically, [537 U.S. 218] petitioners ask us to apply the "congruence and proportionality" standard described in cases evaluating exercises of Congress' power under § 5 of the Fourteenth Amendment. See, e. g., *City of Boerne v. Flores*, 521 U.S. 507 (1997). But we have never applied that standard outside the § 5 context; it does not hold sway for judicial review of legislation enacted, as copyright laws are, pursuant to Article I authorization.

Section 5 authorizes Congress to *enforce* commands contained in and incorporated into the Fourteenth Amendment. Amdt. 14, § 5 ("The Congress shall have power to *enforce*, by appropriate legislation, the provisions of this article." (emphasis added)). The Copyright Clause, in contrast, empowers Congress to *define* the scope of the substantive right. See *Sony*, 464 U.S., at 429. Judicial deference to such congressional definition is "but a corollary to the grant to Congress of any Article I power." *Graham*, 383 U.S., at 6. It would be no more appropriate for us to subject the CTEA to "congruence and proportionality" review under the Copyright Clause than it would be for us to hold the Act unconstitutional *per se*.

For the several reasons stated, we find no Copyright Clause impediment to the CTEA's extension of existing copyrights.

III

Petitioners separately argue that the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment.^[23] We reject petitioners' [537 U.S. 219] plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression. As *Harper & Row* observed: "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." 471 U.S., at 558.

In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. See *id.*, at 560. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. Specifically, 17 U.S.C. § 102(b) provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." As we said in *Harper & Row*, this "idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." 471 U.S., at 556 (internal quotation marks omitted). Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication. See *Feist*, 499 U.S., at 349-350.

Second, the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. Codified at 17 U.S.C. § 107, the defense provides: "[T]he fair use of a

[537 U.S. 220] copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." The fair use defense affords considerable "latitude for scholarship and comment," *Harper & Row*, 471 U.S., at 560, and even for parody, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (rap group's musical parody of Roy Orbison's "Oh, Pretty Woman" may be fair use).

The CTEA itself supplements these traditional First Amendment safeguards. First, it allows libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright ... for purposes of preservation, scholarship, or research" if the work is not already being exploited commercially and further copies are unavailable at a reasonable price. 17 U.S.C. § 108(h); [...]Second, Title II of the CTEA, known as the Fairness in Music Licensing Act of 1998, exempts small businesses, restaurants, and like entities from having to pay performance royalties on music played from licensed radio, television, and similar facilities. 17 U.S.C. § 110(5)(B); [...]

Finally, the case petitioners principally rely upon for their First Amendment argument, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), bears little on copyright. The statute at issue in *Turner* required cable operators to carry and transmit broadcast stations through their proprietary cable systems. Those "must-carry" provisions, we explained, implicated "the heart of the First Amendment," namely, "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." [...]

[537 U.S. 221] The CTEA, in contrast, does not oblige anyone to reproduce another's speech against the carrier's will. Instead, it protects authors' original expression from unrestricted exploitation. Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas. The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D. C. Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment." [...]But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary. See *Harper & Row*, 471 U. S., at 560; cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U. S. 522 (1987).[24]

IV

If petitioners' vision of the Copyright Clause held sway, it would do more than render the CTEA's duration extensions unconstitutional as to existing works. Indeed, petitioners' assertion that the provisions of the CTEA are not severable would make the CTEA's enlarged terms invalid even as to [537 U.S. 222] tomorrow's work. The 1976 Act's time extensions, which set the pattern that the CTEA followed, would be vulnerable as well.

As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause. See *Graham*, 383 U. S., at 6 (Congress may "implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim." (emphasis added)). Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second-guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.

It is so ordered.

[...]

JUSTICE BREYER, dissenting.

The Constitution's Copyright Clause grants Congress the power to "*promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.*" Art. I, § 8, cl. 8 (emphasis added). The statute before us, the 1998 Sonny Bono Copyright Term Extension Act, extends the term of most existing copyrights [537 U.S. 243] to 95 years and that of many new copyrights to 70 years after the author's death. The economic effect of this 20-year extension—the longest blanket extension since the Nation's founding—is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of "Science" —by which word the Framers meant learning or knowledge, E. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective* 125-126 (2002).

The majority believes these conclusions rest upon practical judgments that at most suggest the statute is unwise, not that it is unconstitutional. Legal distinctions, however, are often matters of degree. [...] And in this case the failings of degree are so serious that they amount to failings of constitutional kind. Although the Copyright Clause grants broad legislative power to Congress, that grant has limits. And in my view this statute falls outside them.

I
The "monopoly privileges" that the Copyright Clause confers "are neither unlimited nor primarily designed to provide a special private benefit." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984); cf. *Graham v. John Deere Co. of Kansas City*, 383 U. S. 1, 5 (1966). This Court has made clear that the Clause's limitations are judicially enforceable. *E. g.*, *Trade-Mark Cases*, 100 U. S. 82, 93-94 (1879). And, in assessing this statute for that purpose, I would take into account the fact that the Constitution is a single document, that it contains both a [537 U.S. 244] Copyright Clause and a First Amendment, and that the two are related.

The Copyright Clause and the First Amendment seek related objectives—the creation and dissemination of information. When working in tandem, these provisions mutually reinforce each other, the first serving as an "engine of free expression," *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U. S. 539, 558 (1985), the second assuring that government throws up no obstacle to its dissemination. At the same time, a particular statute that exceeds proper Copyright Clause bounds may set Clause and Amendment at cross-purposes, thereby depriving the public of the speech-related benefits that the Founders, through both, have promised.

Consequently, I would review plausible claims that a copyright statute seriously, and unjustifiably, restricts the dissemination of speech somewhat more carefully than reference to this Court's traditional Copyright Clause jurisprudence might suggest, [...] There is no need in this case to characterize that review as a search for "congruence and proportionality," [...] or as some other variation of what this Court has called "intermediate scrutiny," *e. g.*, *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U. S. 522, 536-537 (1987) (applying intermediate scrutiny to a variant of normal trademark protection). Cf. *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377, 402-403 (2000) (BREYER, J., concurring) (test of proportionality between burdens and benefits "where a law significantly implicates competing constitutionally protected interests"). Rather, it is necessary only to recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture. In this sense [537 U.S. 245] only, and where line-drawing among constitutional interests is at issue, I would look harder than does the majority at the statute's rationality—though less hard than precedent might justify, see, *e. g.*, *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 446-450 (1985); *Plyler v. Doe*, 457 U. S. 202, 223-224 (1982); *Department of*

Agriculture v. Moreno, 413 U. S. 528, 534-538 (1973).

Thus, I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective. Where, after examination of the statute, it becomes difficult, if not impossible, even to dispute these characterizations, Congress' "choice is clearly wrong." [...]

II

A

Because we must examine the relevant statutory effects in light of the Copyright Clause's own purposes, we should begin by reviewing the basic objectives of that Clause. The Clause authorizes a "tax on readers for the purpose of giving a bounty to writers." 56 Parl. Deb. (3d Ser.) (1841) 341, 350 (Lord Macaulay). Why? What constitutional purposes does the "bounty" serve?

The Constitution itself describes the basic Clause objective as one of "promot[ing] the Progress of Science," *i. e.*, knowledge and learning. The Clause exists not to "provide a special private benefit," *Sony, supra*, at 429, but "to stimulate artistic creativity for the general public good," *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 156 (1975). It does so by "motiv[at]ing the creative activity of authors" through "the provision of a special reward." *Sony, supra*, at 429. The "reward" is a means, not an end. And that is [537 U.S. 246] why the copyright term is limited. It is limited so that its beneficiaries—the public—"will not be permanently deprived of the fruits of an artist's labors." *Stewart v. Abend*, 495 U. S. 207, 228 (1990).

That is how the Court previously has described the Clause's objectives. See also *Mazer v. Stein*, 347 U. S. 201, 219 (1954) ("[C]opyright law . . . makes reward to the owner a secondary consideration" (internal quotation marks omitted)); *Sony*, 464 U. S., at 429 ("[L]imited grant" is "intended . . . to allow the public access to the products of [authors'] genius after the limited period of exclusive control has expired"); *Harper & Row, supra*, at 545 (Copyright is "intended to increase and not to impede the harvest of knowledge"). [...] And, in doing so, the Court simply has reiterated the views of the Founders.

Madison, like Jefferson and others in the founding generation, warned against the dangers of monopolies. See, *e. g.*, Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments. in J. Madison, *Writings* 756 (J. Rakove ed. 1999) (hereinafter *Madison on Monopolies*); [...] Madison noted that the Constitution had "limited them to two cases, the authors of Books, and of useful inventions." [...] He thought that in those two cases monopoly is justified because it amounts to "compensation for" an actual community "benefit" and because the monopoly is "temporary"—the term originally being 14 years (once renewable). [...] Madison concluded that "under that limitation a sufficient recompence and encouragement may be given." [...] But [537 U.S. 247] he warned in general that monopolies must be "guarded with strictness agst abuse." [...]

Many Members of the Legislative Branch have expressed themselves similarly. Those who wrote the House Report on the landmark Copyright Act of 1909, for example, said that copyright was not designed "primarily" to "benefit" the "author" or "any particular class of citizens, however worthy." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 6-7 (1909). Rather, under the Constitution, copyright was designed "primarily for the benefit of the public," for "the benefit of the great body of people, in that it will stimulate writing and invention." [...] And were a copyright statute not "believed, in fact, to accomplish" the basic constitutional objective of advancing learning, that statute "would be beyond the power of Congress" to enact. [...] Similarly, those who wrote the House Report on legislation that implemented the Berne Convention for the Protection of Literary and Artistic Works said that "[t]he constitutional purpose of copyright is to facilitate the flow of ideas in the interest of learning." H. R. Rep. No. 100-609, p. 22 (1988) (internal quotation marks

omitted). They added:

"Under the U. S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and . . . when the limited term . . . expires and the creation is added to the public domain." [...]

For present purposes, then, we should take the following as well established: that copyright statutes must serve public, not private, ends; that they must seek "to promote the Progress" of knowledge and learning; and that they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after [537 U.S. 248] expiration of a copyright's "limited Tim[e]"—a time that (like "a *limited* monarch") is "restrain[ed]" and "circumscribe[d]," "not [left] at large," 2 S. Johnson, *A Dictionary of the English Language* 1151 (4th rev. ed. 1773). I would examine the statute's effects in light of these well-established constitutional purposes.

B

This statute, like virtually every copyright statute, imposes upon the public certain expression-related costs in the form of (1) royalties that may be higher than necessary to evoke creation of the relevant work, and (2) a requirement that one seeking to reproduce a copyrighted work must obtain the copyright holder's permission. The first of these costs translates into higher prices that will potentially restrict a work's dissemination. The second means search costs that themselves may prevent reproduction even where the author has no objection. Although these costs are, in a sense, inevitable concomitants of copyright protection, there are special reasons for thinking them especially serious here.

First, the present statute primarily benefits the holders of existing copyrights, *i. e.*, copyrights on works already created. And a Congressional Research Service (CRS) study prepared for Congress indicates that the added royalty-related sum that the law will transfer to existing copyright holders is large. E. Rappaport, CRS Report for Congress, *Copyright Term Extension: Estimating the Economic Values* (1998) (hereinafter CRS Report). In conjunction with official figures on copyright renewals, the CRS Report indicates that only about 2% of copyrights between 55 and 75 years old retain commercial value—*i. e.*, still generate royalties after that time. [...] But books, songs, and movies of that vintage still earn about \$400 million per year in royalties. CRS Report 8, 12, 15. Hence, (despite declining [537 U.S. 249] consumer interest in any given work over time) one might conservatively estimate that 20 extra years of copyright protection will mean the transfer of several billion extra royalty dollars to holders of existing copyrights—copyrights that, together, already will have earned many billions of dollars in royalty "reward." [...]

The extra royalty payments will not come from thin air. Rather, they ultimately come from those who wish to read or see or hear those classic books or films or recordings that have survived. Even the \$500,000 that United Airlines has had to pay for the right to play George Gershwin's 1924 classic *Rhapsody in Blue* represents a cost of doing business, potentially reflected in the ticket prices of those who fly. See Ganzel, *Copyright or Copywrong?* 39 *Training* 36, 42 (Dec. 2002). Further, the likely amounts of extra royalty payments are large enough to suggest that unnecessarily high prices will unnecessarily restrict distribution of classic works (or lead to disobedience of the law)—not just in theory but in practice. Cf. [...] Brief for College Art Association et al. as *Amici Curiae* 24 (One year after expiration of copyright on Willa Cather's *My Antonia*, seven new editions appeared at prices ranging from \$2 to \$24); Ganzel, *supra*, at 40-41, 44 (describing later abandoned plans to charge individual Girl Scout camps \$257 to \$1,439 annually for a license to sing songs such as *God Bless America* around a campfire).

A second, equally important, cause for concern arises out of the fact that copyright extension imposes a "permissions" requirement—not only upon potential users of "classic" works that still retain commercial value, but also upon potential users of *any other work* still in copyright. Again using CRS estimates, one can estimate that, by 2018, the number of such works 75 years of age or older will be about 350,000. [...] Because the Copyright Act of 1976

abolished the requirement that an owner must renew a [537 U.S. 250] copyright, such still-in-copyright works (of little or no commercial value) will eventually number in the millions. See Pub. L. 94-553, §§ 302-304, 90 Stat. 2572-2576; U. S. Dept. of Commerce, Bureau of Census, *Statistical History of the United States: From Colonial Times to the Present* 956 (1976) (hereinafter *Statistical History*).

The potential users of such works include not only movie buffs and aging jazz fans, but also historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds—those who want to make the past accessible for their own use or for that of others. The permissions requirement can inhibit their ability to accomplish that task. Indeed, in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope.

The reason is that the permissions requirement can inhibit or prevent the use of old works (particularly those without commercial value): (1) because it may prove expensive to track down or to contract with the copyright holder, (2) because the holder may prove impossible to find, or (3) because the holder when found may deny permission either outright or through misinformed efforts to bargain. The CRS, for example, has found that the cost of seeking permission "can be prohibitive." CRS Report 4. And *amici*, along with petitioners, provide examples of the kinds of significant harm at issue.

Thus, the American Association of Law Libraries points out that the clearance process associated with creating an electronic archive, Documenting the American South, "consumed approximately a dozen man-hours" *per work*. [...] The College Art Association says that the costs of obtaining permission for use of single images, short excerpts, and other short works can become prohibitively high; it describes the abandonment of efforts to include, *e. g.*, campaign [537 U.S. 251] songs, film excerpts, and documents exposing "horrors of the chain gang" in historical works or archives; and it points to examples in which copyright holders in effect have used their control of copyright to try to control the content of historical or cultural works. [...] The National Writers Union provides similar examples. [...] Petitioners point to music fees that may prevent youth or community orchestras, or church choirs, from performing early 20th-century music. [...] *Amici* for petitioners describe how electronic databases tend to avoid adding to their collections works whose copyright holders may prove difficult to contact, [...]

As I have said, to some extent costs of this kind accompany any copyright law, regardless of the length of the copyright term. But to extend that term, preventing works from the 1920's and 1930's from falling into the public domain, will dramatically increase the size of the costs just as— perversely—the likely benefits from protection diminish. [...] The older the work, the less likely it retains commercial value, and the harder it will likely prove to find the current copyright holder. The older the work, the more likely it will prove useful to the historian, artist, or teacher. The older the work, the less likely it is that a sense of authors' rights can justify a copyright holder's decision not to permit reproduction, for the more likely it is that the copyright holder making the decision is not the work's creator, but, say, a corporation or a great-grandchild whom the work's creator never knew. Similarly, the costs of obtaining [537 U.S. 252] permission, now perhaps ranging in the millions of dollars, will multiply as the number of holders of affected copyrights increases from several hundred thousand to several million. [...] The costs to the users of nonprofit databases, now numbering in the low millions, will multiply as the use of those computer-assisted databases becomes more prevalent. See, *e. g.*, Brief for Internet Archive et al. as *Amici Curiae* 2, 21, and n. 37 (describing nonprofit Project Gutenberg). And the qualitative costs to education, learning, and research will multiply as our children become ever more dependent for the content of their knowledge upon computer-accessible databases—thereby condemning that which is not so accessible, say, the cultural content of early 20th-century history, to a kind of intellectual purgatory from which it will not easily emerge.

The majority finds my description of these permissions-related harms overstated in light of Congress' inclusion of a statutory exemption, which, during the last 20 years of a copyright term, exempts "facsimile or digital" reproduction by

a "library or archives" "for purposes of preservation, scholarship, or research," 17 U. S. C. § 108(h). [...] This exemption, however, applies only where the copy is made for the special listed purposes; it simply permits a library (not any other subsequent users) to make "a copy" for those purposes; it covers only "published" works not "subject to normal commercial exploitation" and not obtainable, apparently not even as a used copy, at a "reasonable price"; and it insists that the library assure itself through "reasonable investigation" that these conditions have been met. § 108(h). What database proprietor can rely on so limited an exemption—particularly when the phrase "reasonable investigation" is so open-ended and particularly if the database has commercial, as well as noncommercial, aspects?

The majority also invokes the "fair use" exception, and it notes that copyright law itself is restricted to protection of a work's expression, not its substantive content. [...] Neither the exception nor the restriction, however, would necessarily help those who wish to obtain from electronic databases material that is not there—say, teachers wishing their students to see albums of Depression Era photographs, to read the recorded words of those who actually lived under slavery, or to contrast, say, Gary Cooper's heroic portrayal of Sergeant York with filmed reality from the battlefield of Verdun. Such harm, and more, [...] will occur despite the 1998 Act's exemptions and despite the other "First Amendment safeguards" in which the majority places its trust, [...]

I should add that the Motion Picture Association of America also finds my concerns overstated, at least with respect to films, because the extension will sometimes make it profitable to reissue old films, saving them from extinction. Brief for Motion Picture Association of America, Inc., as *Amicus Curiae* 14-24. Other film preservationists note, however, that only a small minority of the many films, particularly silent films, from the 1920's and 1930's have been preserved. 1 Report of the Librarian of Congress, Film Preservation 1993, pp. 3-4 (Half of all pre-1950 feature films and more than 80% of all such pre-1929 films have already been lost); cf. Brief for Hal Roach Studios et al. as *Amici Curiae* 18 (Out of 1,200 Twenties Era silent films still under copyright, 63 are now available on digital video disc). They seek to preserve the remainder. See, e. g., Brief for Internet Archive et al. as *Amici Curiae* 22 (Nonprofit database digitized 1,001 public-domain films, releasing them online without charge); 1 Film Preservation 1993, *supra*, at 23 (reporting well over 200,000 titles held in public archives). And they tell us that copyright extension will impede preservation by forbidding the reproduction of films within their own or within other public collections. Brief for Hal Roach Studios et al. as *Amici Curiae* 10-21; see also Brief for Internet Archive et al. as *Amici Curiae* 16-29; Brief for American Association of Law Libraries et al. as *Amici Curiae* 26-27.

[537 U.S. 254] Because this subsection concerns only costs, not countervailing benefits, I shall simply note here that, with respect to films as with respect to other works, extension does cause substantial harm to efforts to preserve and to disseminate works that were created long ago. And I shall turn to the second half of the equation: Could Congress reasonably have found that the extension's toll-related and permissions-related harms are justified by extension's countervailing preservationist incentives or in other ways?

C

What copyright-related benefits might justify the statute's extension of copyright protection? First, no one could reasonably conclude that copyright's traditional economic rationale applies here. The extension will not act as an economic spur encouraging authors to create new works. See *Mazer*, 347 U. S., at 219 (The "economic philosophy" of the Copyright Clause is to "advance public welfare" by "encourag[ing] individual effort" through "personal gain"); [...] No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter. After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term)—must be far smaller. See [...] CRS Report 7 (estimating that, even after copyright renewal, about 3.8% of copyrighted books go out of print each year). And any remaining monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant

heirs, or shareholders in a successor corporation, will receive them. Using assumptions about the time value of money provided us by a group of economists (including five [537 U.S. 255] Nobel prize winners), Brief for George A. Akerlof et al. as *Amici Curiae* 5-7, it seems fair to say that, for example, a 1% likelihood of earning \$100 annually for 20 years, starting *75 years into the future*, is worth less than seven cents today. See *id.*, App. 3a; see also CRS Report 5. [...]

What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account? The Court itself finds no evidence to the contrary. It refers to testimony before Congress (1) that the copyright system's incentives encourage creation, and (2) (referring to Noah Webster) that income earned from one work can help support an artist who "continue[s] to create." [...] But the first of these amounts to no more than a set of undeniably true propositions about the value of incentives *in general*. And the applicability of the second to *this* Act is mysterious. How will extension help today's Noah Webster create new works 50 years after his death? Or is that hypothetical Webster supposed to support himself with the extension's present discounted value, *i. e.*, a few pennies? Or (to change the metaphor) is the argument that Dumas *fils* would have written more books had Dumas *père's* Three Musketeers earned more royalties?

Regardless, even if this cited testimony were meant more specifically to tell Congress that somehow, somewhere, some potential author might be moved by the thought of great-grandchildren receiving copyright royalties a century hence, so might some potential author also be moved by the thought of royalties being paid for two centuries, five centuries, 1,000 years, "til the End of Time." And from a rational economic perspective the time difference among these periods *makes no real difference*. The present extension will produce a copyright period of protection that, even under conservative [537 U.S. 256] assumptions, is worth more than 99.8% of protection *in perpetuity* (more than 99.99% for a songwriter like Irving Berlin and a song like Alexander's Ragtime Band). [...] The lack of a practically meaningful distinction from an author's *ex ante* perspective between (a) the statute's extended terms and (b) an infinite term makes this latest extension difficult to square with the Constitution's insistence on "limited Times." [...]

I am not certain why the Court considers it relevant in this respect that "[n]othing . . . warrants construction of the [1998 Act's] 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint." [...] Of course Congress did not intend to act unconstitutionally. But it may have sought to test the Constitution's limits. After all, the statute was named after a Member of Congress, who, the legislative history records, "wanted the term of copyright protection to last forever." 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono). See also Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H. R. 989 et al. before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, 104th Cong., 1st Sess., 94 (1995) (hereinafter House Hearings) (statement of Rep. Sonny Bono) (questioning why copyrights should ever expire); *ibid.* (statement of Rep. Berman) ("I guess we could . . . just make a permanent moratorium on the expiration of copyrights"); *id.*, at 230 (statement of Rep. Hoke) ("Why 70 years? Why not forever? Why not 150 years?"); cf. *ibid.* (statement of the Register of Copyrights) (In Copyright Office proceedings, "[t]he Songwriters Guild suggested a perpetual term"); *id.*, at 234 (statement of Quincy Jones) ("I'm particularly fascinated with Representative Hoke's statement. . . . [W]hy not forever?"); *id.*, at 277 (statement of Quincy Jones) ("If we can start with 70, add 20, it would be a good start"). And the statute ended up creating a term so long that (were the vesting [537 U.S. 257] of 19th-century real property at issue) it would typically violate the traditional rule against perpetuities. See 10 R. Powell, Real Property §§ 71.02[2]-[3], p. 71-11 (M. Wolf ed. 2002) (traditional rule that estate must vest, if at all, within lives in being plus 21 years); cf. *id.*, § 71.03, at 71-15 (modern statutory perpetuity term of 90 years, 5 years shorter than 95-year copyright terms).

In any event, the incentive-related numbers are far too small for Congress to have concluded rationally, even with

respect to new works, that the extension's economic-incentive effect could justify the serious expression-related harms earlier described. See Part II-B, *supra*. And, of course, in respect to works already created—the source of many of the harms previously described—the statute creates no economic incentive at all.[...]

Second, the Court relies heavily for justification upon international uniformity of terms. [...]Although it can be helpful to look to international norms and legal experience in understanding American law, cf. *Printz v. United States*, 521 U. S. 898, 977 (1997) (BREYER, J., dissenting), in this case the justification based upon foreign rules is surprisingly weak. Those who claim that significant copyright-related benefits flow from greater international uniformity of terms point to the fact that the nations of the European Union have adopted a system of copyright terms uniform among themselves. And the extension before this Court implements a term of life plus 70 years that appears to conform with the European standard. But how does "uniformity" help to justify this statute?

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—all works made "for hire" and all existing works created prior to 1978. [...]With respect to those works the American statute produces an extended term of 95 years [537 U.S. 258] while comparable European rights in "for hire" works last for periods that vary from 50 years to 70 years to life plus 70 years. Compare 17 U. S. C. §§ 302(c), 304(a)-(b), with Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, Arts. 1-3, 1993 Official J. Eur. Coms. (L 290), pp. 11-12 (hereinafter EU Council Directive 93/98). Neither does the statute create uniformity with respect to anonymous or pseudonymous works. Compare 17 U. S. C. §§ 302(c), 304(a)-(b), with EU Council Directive 93/98, Art. 1, [...]

The statute does produce uniformity with respect to copyrights in new, post-1977 works attributed to natural persons. Compare 17 U. S. C. § 302(a) with EU Council Directive 93/98, Art. 1(1), p. 11. But these works constitute only a subset (likely a minority) of works that retain commercial value after 75 years. [...]And the fact that uniformity comes so late, if at all, means that bringing American law into conformity with this particular aspect of European law will neither encourage creation nor benefit the long-dead author in any other important way.

What benefit, then, might this partial future uniformity achieve? The majority refers to "greater incentive for American and other authors to create and disseminate their work in the United States," and cites a law review article suggesting a need to "avoid competitive disadvantages." [...]The Solicitor General elaborates on this theme, postulating that because uncorrected disuniformity would permit Europe, not the United States, to hold out the prospect of protection lasting for "life plus 70 years" (instead of "life plus 50 years"), a potential author might decide to publish initially in Europe, delaying American publication. [...]And the statute, by creating a uniformly longer term, corrects for the disincentive that this disuniformity might otherwise produce.

That disincentive, however, could not possibly bring about serious harm of the sort that the Court, the Solicitor General, [537 U.S. 259] or the law review author fears. For one thing, it is unclear just who will be hurt and how, should American publication come second—for the Berne Convention still offers full protection as long as a second publication is delayed by 30 days. See Berne Conv. Arts. 3(4), 5(4). For another, few, if any, potential authors would turn a "where to publish" decision upon this particular difference in the length of the copyright term. As we have seen, the present commercial value of any such difference amounts at most to comparative pennies. [...]And a commercial decision that turned upon such a difference would have had to have rested previously upon a knife edge so fine as to be invisible. A rational legislature could not give major weight to an invisible, likely nonexistent incentive-related effect.

But if there is no incentive-related benefit, what is the benefit of the future uniformity that the statute only partially achieves? Unlike the Copyright Act of 1976, this statute does not constitute part of an American effort to conform to an important international treaty like the Berne Convention. See H. R. Rep. No. 94-1476, pp. 135-136 (1976) (The

1976 Act's life-plus-50 term was "required for adherence to the Berne Convention"); S. Rep. No. 94-473, p. 118 (1975) (same). Nor does European acceptance of the longer term seem to reflect more than special European institutional considerations, *i. e.*, the needs of, and the international politics surrounding, the development of the European Union. House Hearings 230 (statement of the Register of Copyrights); *id.*, at 396-398 (statement of J. Reichman). European and American copyright law have long coexisted despite important differences, including Europe's traditional respect for authors' "moral rights" and the absence in Europe of constitutional restraints that restrict copyrights to "limited Times." See, *e. g.*, Kwall, Copyright and the Moral Right: Is an American Marriage Possible? 38 Vand. L. Rev. 1-3 (1985) (moral rights); House Hearings 187 (testimony of the Register of Copyrights) ("limited [T]imes").

[537 U.S. 260] In sum, the partial, future uniformity that the 1998 Act promises cannot reasonably be said to justify extension of the copyright term for new works. And concerns with uniformity cannot possibly justify the extension of the new term to older works, for the statute there creates no uniformity at all.

Third, several publishers and filmmakers argue that the statute provides incentives to *those who act as publishers* to republish and to redistribute older copyrighted works. This claim cannot justify this statute, however, because the rationale is inconsistent with the basic purpose of the Copyright Clause—as understood by the Framers and by this Court. The Clause assumes an initial grant of monopoly, designed primarily to encourage creation, followed by termination of the monopoly grant in order to promote dissemination of already-created works. It assumes that it is the *disappearance* of the monopoly grant, not its *perpetuation*, that will, on balance, promote the dissemination of works already in existence. This view of the Clause does not deny the empirical possibility that grant of a copyright monopoly to the heirs or successors of a long-dead author could *on occasion* help publishers resurrect the work, say, of a long-lost Shakespeare. But it does deny Congress the Copyright Clause power to base its actions primarily upon that empirical possibility—lest copyright grants become perpetual, lest on balance they restrict dissemination, lest too often they seek to bestow benefits that are solely retroactive.

This view of the Clause finds strong support in the writings of Madison, in the antimonopoly environment in which the Framers wrote the Clause, and in the history of the Clause's English antecedent, the Statute of Anne—a statute which sought to break up a publishers' monopoly by offering, as an alternative, an author's monopoly of limited duration. See Patterson, Understanding the Copyright Clause, 47 J. Copyright Soc. 365, 379 (2000) (Statute of Anne); L. Patterson, Copyright in Historical Perspective 144-147 (1968) [537 U.S. 261] (same); Madison on Monopolies 756-757; Papers of Thomas Jefferson 442-443; The Constitutional Convention and the Formation of the Union 334, 338 (W. Solberg 2d ed. 1990); [...]

This view finds virtually conclusive support in the Court's own precedents. See *Sony*, 464 U.S., at 429 (The Copyright Clause is "intended . . . to allow the public access . . . after the limited period of exclusive control"); *Stewart*, 495 U. S., at 228 (The copyright term is limited to avoid "permanently depriv[ing]" the public of "the fruits of an artist's labors"); [...]

This view also finds textual support in the Copyright Clause's word "limited." Cf. J. Story, Commentaries on the Constitution § 558, p. 402 (R. Rotunda & J. Nowak eds. 1987) (The Copyright Clause benefits the public in part because it "admit[s] the people at large, after a *short* interval, to the full possession and enjoyment of all writings . . . without restraint" (emphasis added)). It finds added textual support in the word "Authors," which is difficult to reconcile with a rationale that rests entirely upon incentives given to publishers perhaps long after the death of the work's creator. Cf. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U. S. 340, 346-347 (1991).

It finds empirical support in sources that underscore the wisdom of the Framers' judgment. See CRS Report 3 ("[N]ew, cheaper editions can be expected when works come out of copyright"); see also Part II-B, *supra*. And it draws

logical support from the endlessly self-perpetuating nature of the publishers' claim and the difficulty of finding any kind of logical stopping place were this Court to accept such a uniquely publisher-related rationale. (Would it justify continuing to extend copyrights indefinitely, say, for those granted to F. Scott Fitzgerald or his lesser known contemporaries? Would it not, in principle, justify continued protection of the works of Shakespeare, Melville, Mozart, or perhaps Salieri, Mozart's currently less popular contemporary? [537 U.S. 262] Could it justify yet further extension of the copyright on the song Happy Birthday to You (melody first published in 1893, song copyrighted after litigation in 1935), *still in effect* and currently owned by a subsidiary of AOL Time Warner? See Profitable "Happy Birthday," Times of London, Aug. 5, 2000, p. 6.)

Given this support, it is difficult to accept the conflicting rationale that the publishers advance, namely, that extension, rather than limitation, of the grant will, by rewarding publishers with a form of monopoly, promote, rather than retard, the dissemination of works already in existence. Indeed, given these considerations, this rationale seems constitutionally perverse—unable, constitutionally speaking, to justify the blanket extension here at issue. [...]

Fourth, the statute's legislative history suggests another possible justification. That history refers frequently to the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports. See, e. g., S. Rep. No. 104-315, p. 3 (1996) ("The purpose of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade"); 144 Cong. Rec., at H9951 (statement of Rep. Foley) (noting "the importance of this issue to America's creative community," "[w]hether it is Sony, BMI, Disney," or other companies). I recognize that Congress has sometimes found that suppression of competition will help Americans sell abroad—though it has simultaneously taken care to protect American buyers from higher domestic prices. See, e. g., Webb-Pomerene Act (Export Trade), 40 Stat. 516, as amended, 15 U. S. C. §§61-65; see also IA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 251a, pp. 134-137 (2d ed. 2000) (criticizing export cartels). In doing so, however, Congress has exercised its commerce, not its copyright, power. I can find nothing in the Copyright Clause that would authorize Congress to enhance the [537 U.S. 263] copyright grant's monopoly power, likely leading to higher prices both at home and abroad, *solely* in order to produce higher foreign earnings. That objective is not a *copyright* objective. Nor, standing alone, is it related to any other objective more closely tied to the Clause itself. Neither can higher corporate profits alone justify the grant's enhancement. 1 The Clause seeks public, not private, benefits.

Finally, the Court mentions as possible justifications "demographic, economic, and technological changes"—by which the Court apparently means the facts that today people communicate with the help of modern technology, live longer, and have children at a later age. [...] The first fact seems to argue not for, but instead against, extension. See Part II-B, *supra*. The second fact seems already corrected for by the 1976 Act's life-plus-50 term, which automatically grows with lifespans. Cf. Department of Health and Human Services, Centers for Disease Control and Prevention, *Deaths: Final Data for 2000* (2002) (Table 8) (reporting a 4-year increase in expected lifespan between 1976 and 1998). And the third fact—that adults are having children later in life—is a makeweight at best, providing no explanation of why the 1976 Act's term of 50 years after an author's death—a longer term than was available to authors themselves for most of our Nation's history—is an insufficient potential bequest. The weakness of these final rationales simply underscores the conclusion that emerges from consideration of earlier attempts at justification: There is no legitimate, serious copyright-related justification for this statute.

III

The Court is concerned that our holding in this case not inhibit the broad decisionmaking leeway that the Copyright Clause grants Congress. [...] It is concerned about the implications of today's decision for the Copyright Act of 1976—an Act that changed copyright's basic term from 56 years (assuming renewal) to life of the [537 U.S. 264] author plus 50 years, [...] It is concerned about having to determine just how many years of copyright is too many—a determination

that it fears would require it to find the "right" constitutional number, a task for which the Court is not well suited. [...]

I share the Court's initial concern, about intrusion upon the decisionmaking authority of Congress. [...] But I do not believe it intrudes upon that authority to find the statute unconstitutional on the basis of (1) a legal analysis of the Copyright Clause's objectives, [...] (2) the total implausibility of any incentive effect, [...] and (3) the statute's apparent failure to provide significant international uniformity, [...] Nor does it intrude upon congressional authority to consider rationality in light of the expressive values underlying the Copyright Clause, related as it is to the First Amendment, and given the constitutional importance of correctly drawing the relevant Clause/Amendment boundary. [...] We cannot avoid the need to examine the statute carefully by saying that "Congress has not altered the traditional contours of copyright protection," [...] for the sentence points to the question, rather than the answer. Nor should we avoid that examination here. That degree of judicial vigilance—at the far outer boundaries of the Clause—is warranted if we are to avoid the monopolies and consequent restrictions of expression that the Clause, read consistently with the First Amendment, seeks to preclude. And that vigilance is all the more necessary in a new century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation's economy and the lives of its citizens.

I do not share the Court's concern that my view of the 1998 Act could automatically doom the 1976 Act. Unlike the present statute, the 1976 Act thoroughly revised copyright law and enabled the United States to join the Berne Convention [537 U.S. 265]—an international treaty that requires the 1976 Act's basic life-plus-50 term as a condition for substantive protections from a copyright's very inception, Berne Conv. Art. 7(1). Consequently, the balance of copyright-related harms and benefits there is far less one sided. The same is true of the 1909 and 1831 Acts, which, in any event, provided for maximum terms of 56 years or 42 years while requiring renewal after 28 years, with most copyrighted works falling into the public domain after that 28-year period, well before the putative maximum terms had elapsed. See [...] Statistical History 956-957. Regardless, the law provides means to protect those who have reasonably relied upon prior copyright statutes. See *Heckler v. Mathews*, 465 U. S. 728, 746 (1984). And, in any event, we are not here considering, and we need not consider, the constitutionality of other copyright statutes.

Neither do I share the Court's aversion to line-drawing in this case. Even if it is difficult to draw a single clear bright line, the Court could easily decide (as I would decide) that this particular statute simply goes too far. And such examples—of what goes too far—sometimes offer better constitutional guidance than more absolute-sounding rules. In any event, "this Court sits" in part to decide when a statute exceeds a constitutional boundary. See *Panhandle Oil*, 277 U. S., at 223 (Holmes, J., dissenting). In my view, "[t]ext, history, and precedent," [...] support both the need to draw lines in general and the need to draw the line here short of this statute. [...]

Finally, the Court complains that I have not "restrained" my argument or "train[ed my] fire, as petitioners do, on Congress' choice to place existing and future copyrights in parity." [...] The reason that I have not so limited my argument is my willingness to accept, for purposes of this opinion, the Court's understanding that, for reasons of "[j]ustice, policy, and equity"—as well as established [537 U.S. 266] historical practice—it is not "categorically beyond Congress' authority" to "exten[d] the duration of existing copyrights" to achieve such parity. [...] I have accepted this view, however, only for argument's sake—putting to the side, for the present, JUSTICE STEVENS' persuasive arguments to the contrary, [...] And I make this assumption only to emphasize the lack of rational justification for the present statute. A desire for "parity" between *A* (old copyrights) and *B* (new copyrights) cannot justify extending *A* when there is no rational justification for extending *B*. At the very least (if I put aside my rationality characterization), to ask *B* to support *A* here is like asking Tom Thumb to support Paul Bunyan's ox. Where the case for extending new copyrights is itself so weak, what "justice," what "policy," what "equity" can warrant the tolls and barriers that extension of existing copyrights imposes?

IV

This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.

I have set forth the analysis upon which I rest these judgments. This analysis leads inexorably to the conclusion that the statute cannot be understood rationally to advance a constitutionally legitimate interest. The statute falls outside [537 U.S. 267] the scope of legislative power that the Copyright Clause, read in light of the First Amendment, grants to Congress. I would hold the statute unconstitutional.

I respectfully dissent.

[...]

[1] JUSTICE BREYER's dissent is not similarly restrained. He makes no effort meaningfully to distinguish existing copyrights from future grants. See, *e. g.*, *post*, at 242-243, 254-260, 264-266. Under his reasoning, the CTEA's 20-year extension is globally unconstitutional.

[...]

[4] We note again that JUSTICE BREYER makes no such concession. [...]He does not train his fire, as petitioners do, on Congress' choice to place existing and future copyrights in parity. Moving beyond the bounds of the parties' presentations, and with abundant policy arguments but precious little support from precedent, he would condemn Congress' entire product as irrational.

[...]

[6] Moreover, the precise duration of a federal copyright has never been fixed at the time of the initial grant. The 1790 Act provided a federal copyright term of 14 years from the work's publication, renewable for an additional 14 years *if* the author survived and applied for an additional term. § 1. Congress retained that approach in subsequent statutes. See *Stewart v. Abend*, 495 U.S. 207, 217 (1990) ("Since the earliest copyright statute in this country, the copyright term of ownership has been split between an original term and a renewal term."). Similarly, under the method for measuring copyright terms established by the 1976 Act and retained by the CTEA, the baseline copyright term is measured in part by the life of the author, rendering its duration indeterminate at the time of the grant. See 1976 Act § 302(a); 17 U.S.C. § 302(a).

[...]

[10] JUSTICE BREYER would adopt a heightened, three-part test for the constitutionality of copyright enactments. [...]He would invalidate the CTEA as irrational in part because, in his view, harmonizing the United States and European Union baseline copyright terms "apparent[ly]" fails to achieve "significant" uniformity. [...]The novelty of the "rational basis" approach he presents is plain. Cf. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 383 (2001) (BREYER, J., dissenting) ("Rational-basis review — with its presumptions favoring constitutionality — is 'a paradigm of *judicial* restraint.'" (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993))). Rather than subjecting Congress' legislative choices in the copyright area to heightened judicial scrutiny, we have stressed that "it is not our role to alter the delicate balance Congress has labored to achieve." *Stewart v. Abend*, 495 U.S., at 230; see *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Congress' exercise of its Copyright Clause authority must be rational, but JUSTICE BREYER'S stringent version of rationality is unknown to

our literary property jurisprudence.

[...]

[12] The author of the law review article cited in text, Shira Perlmutter, currently a vice president of AOL Time Warner, was at the time of the CTEA's enactment Associate Register for Policy and International Affairs, United States Copyright Office.

[...]

[14] Members of Congress expressed the view that, as a result of increases in human longevity and in parents' average age when their children are born, the pre-CTEA term did not adequately secure "the right to profit from licensing one's work during one's lifetime and to take pride and comfort in knowing that one's children — and perhaps their children — might also benefit from one's posthumous popularity." 141 Cong. Rec. 6553 (1995) (statement of Sen. Feinstein); see 144 Cong. Rec. S12377 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch) ("Among the main developments [compelling reconsideration of the 1976 Act's term] is the effect of demographic trends, such as increasing longevity and the trend toward rearing children later in life, on the effectiveness of the life-plus-50 term to provide adequate protection for American creators and their heirs."). Also cited was "the failure of the U.S. copyright term to keep pace with the substantially increased commercial life of copyrighted works resulting from the rapid growth in communications media." *Ibid.* (statement of Sen. Hatch); cf. *Sony*, 464 U.S., at 430-431 ("From its beginning, the law of copyright has developed in response to significant changes in technology. . . . [A]s new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.").

[15] JUSTICE BREYER urges that the economic incentives accompanying copyright term extension are too insignificant to "mov[e]" any author with a "rational economic perspective." [...] Calibrating rational economic incentives, however, like "fashion[ing] ... new rules [in light of] new technology," *Sony*, 464 U.S., at 431, is a task primarily for Congress, not the courts. Congress heard testimony from a number of prominent artists; each expressed the belief that the copyright system's assurance of fair compensation for themselves and their heirs was an incentive to create. See, e. g., House Hearings 233-239 (statement of Quincy Jones); Copyright Term Extension Act of 1995: Hearing before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 55-56 (1995) (statement of Bob Dylan); *id.*, at 56-57 (statement of Don Henley); *id.*, at 57 (statement of Carlos Santana). We would not take Congress to task for crediting this evidence which, as JUSTICE BREYER acknowledges, reflects general "propositions about the value of incentives" that are "undeniably true." [...]

Congress also heard testimony from Register of Copyrights Marybeth Peters and others regarding the economic incentives created by the CTEA. According to the Register, extending the copyright for existing works "could ... provide additional income that would finance the production and publication of new works." House Hearings 158. "Authors would not be able to continue to create," the Register explained, "unless they earned income on their finished works. The public benefits not only from an author's original work but also from his or her further creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster[,] who supported his entire family from the earnings on his speller and grammar during the twenty years he took to complete his dictionary." *Id.*, at 165.

[16] JUSTICE BREYER agrees that "Congress did not intend to act unconstitutionally" when it enacted the CTEA, [...] yet in his very next breath, he seems to make just that accusation, [...] What else is one to glean from his selection of scattered statements from individual Members of Congress? He does not identify any statement in the statutory text that installs a perpetual copyright, for there is none. But even if the statutory text were sufficiently ambiguous to warrant recourse to legislative history, JUSTICE BREYER'S selections are not the sort to which this Court accords high value: "In surveying legislative history we have repeatedly stated that the authoritative source for finding the

Legislature's intent lies in the Committee Reports on the bill, which "represent[t] the considered and collective understanding of those [Members of Congress] involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The House and Senate Reports accompanying the CTEA reflect no purpose to make copyright a forever thing. Notably, the Senate Report expressly acknowledged that the Constitution "clearly precludes Congress from granting unlimited protection for copyrighted works," S. Rep. No. 104-315, p. 11 (1996), and disclaimed any intent to contravene that prohibition, *ibid.* Members of Congress instrumental in the CTEA's passage spoke to similar effect. See, e. g., 144 Cong. Rec. H1458 (daily ed. Mar. 25, 1998) (statement of Rep. Coble) (observing that "copyright protection should be for a limited time only" and that "[p]erpetual protection does not benefit society").

JUSTICE BREYER nevertheless insists that the "economic effect" of the CTEA is to make the copyright term "virtually perpetual." [...] Relying on formulas and assumptions provided in an *amicus* brief supporting petitioners, he stresses that the CTEA creates a copyright term worth 99.8% of the value of a perpetual copyright. [...] If JUSTICE BREYER'S calculations were a basis for holding the CTEA unconstitutional, then the 1976 Act would surely fall as well, for — under the same assumptions he indulges — the term set by that Act secures 99.4% of the value of a perpetual term. See Brief for George A. Akerlof et al. as *Amici Curiae* 6, n. 6 (describing the relevant formula). Indeed, on that analysis even the "limited" character of the 1909 (97.7%) and 1831 (94.1%) Acts might be suspect. JUSTICE BREYER several times places the Founding Fathers on his side. [...] It is doubtful, however, that those architects of our Nation, in framing the "limited Times" prescription, thought in terms of the calculator rather than the calendar.

[17] Respondent notes that the CTEA's life-plus-70-years baseline term is expected to produce an average copyright duration of 95 years, and that this term "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." [...] Whether such referents mark the outer boundary of "limited Times" is not before us today. JUSTICE BREYER suggests that the CTEA's baseline term extends beyond that typically permitted by the traditional rule against perpetuities. [...] The traditional common-law rule looks to lives in being plus 21 years. Under that rule, the period before a bequest vests could easily equal or exceed the anticipated average copyright term under the CTEA. If, for example, the vesting period on a deed were defined with reference to the life of an infant, the sum of the measuring life plus 21 years could commonly add up to 95 years.

[...]

[19] As we have noted, see *supra*, at 196, n. 3, petitioners seek to distinguish the 1790 Act from those that followed. They argue that by requiring authors seeking its protection to surrender whatever rights they had under state law, the 1790 Act enhanced uniformity and certainty and thus "promote[d] . . . Progress." See Brief for Petitioners 28-31. This account of the 1790 Act simply confirms, however, that the First Congress understood it could "promote . . . Progress" by extending copyright protection to existing works. Every subsequent adjustment of copyright's duration, including the CTEA, reflects a similar understanding.

[...]

[21] Standard copyright assignment agreements reflect this expectation. See, e. g., A. Kohn & B. Kohn, *Music Licensing* 471 (3d ed. 1992-2002) (short form copyright assignment for musical composition, under which assignor conveys all rights to the work, "including the copyrights and proprietary rights therein and in any and all versions of said musical composition(s), and any renewals and extensions thereof (whether presently available *or subsequently available as a result of intervening legislation*)" (emphasis added)); 5 M. Nimmer & D. Nimmer, *Copyright* § 21.11[B], p. 21-305 (2002) (short form copyright assignment under which assignor conveys all assets relating to the work, "including without limitation, copyrights and renewals and/or extensions thereof"); 6 *id.*, § 30.04[B][1], p. 30-325 (form composer-producer agreement under which composer "assigns to Producer all rights (copyrights, rights

under copyright and otherwise, whether now or hereafter known) and all renewals and extensions (as may now or hereafter exist)").

[22] The fact that patent and copyright involve different exchanges does not, of course, mean that we may not be guided in our "limited Times" analysis by Congress' repeated extensions of existing patents. [...] If patent's *quid pro quo* is more exacting than copyright's, then Congress' repeated extension of existing patents without constitutional objection suggests even more strongly that similar legislation with respect to copyrights is constitutionally permissible.

[23] Petitioners originally framed this argument as implicating the CTEA's extension of both existing and future copyrights. [...] Now, however, they train on the CTEA's extension of existing copyrights and urge against consideration of the CTEA's First Amendment validity as applied to future copyrights. [...] We therefore consider petitioners' argument as so limited. We note, however, that petitioners do not explain how their First Amendment argument is moored to the prospective/retrospective line they urge us to draw, nor do they say whether or how their free speech argument applies to copyright duration but not to other aspects of copyright protection, notably scope.

[24] We are not persuaded by petitioners' attempt to distinguish *Harper & Row* on the ground that it involved an infringement suit rather than a declaratory action of the kind here presented. As respondent observes, the same legal question can arise in either posture. [...] In both postures, it is appropriate to construe copyright's internal safeguards to accommodate First Amendment concerns. Cf. *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 78 (1994) ("It is . . . incumbent upon us to read the statute to eliminate [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.").

[...]