

ELDRED ET AL. v. ASHCROFT, ATTORNEY GENERAL

537 U.S. 186

Supreme Court of United States.

Argued October 9, 2002.

Decided January 15, 2003.

- 14 GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., *post*, p. 222, and BREYER, J., *post*, p. 242, filed dissenting opinions.
- 16 *Lawrence Lessig* argued the cause for petitioners. With him on the briefs were *Kathleen M. Sullivan, Alan B. Morrison, Edward Lee, Charles Fried, Geoffrey S. Stewart, Donald B. Ayer, Robert P. Ducatman, Daniel H. Bromberg, Charles R. Nesson, and Jonathan L. Zittrain*.
- 17 *Solicitor General Olson* argued the cause for respondent. With him on the brief were *Assistant Attorney General McCallum, Deputy Solicitor General Wallace, Jeffrey A. Lamken, William Kanter, and John S. Koppel*.
- 18 JUSTICE GINSBURG delivered the opinion of the Court.
- 19 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.
- 20 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. [...] Under the CTEA, most copyrights now run from creation until 70 years after the author's death. [...] 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." [...] [1] 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.
- 21 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

- 24 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. [...] 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. [...] 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). [...] Both times, Congress applied the new copyright term to existing and future works[...]; to qualify for the 1831 extension, an existing work had to be in its initial copyright term at the time the Act became effective[...].
- 25 In 1976, Congress altered the method for computing federal copyright terms. [...] 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. [...] 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).
- 26 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.
- 27 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. [...] 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).

28 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

30 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). [...]

31 The Court of Appeals for the District of Columbia Circuit affirmed. [...]

36 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. 534 U.S. 1126 and 1160 (2002). We now answer those two questions in the negative and affirm.

II

A

39 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.

40 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.

41 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, [...]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. [...]

- 42 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. [...] 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. [...]
- 43 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.[...] *McClurg v. 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.[...] 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.
- 44 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." [...] 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.
- 45 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]

- 46 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. [...] 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. [...] 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.[...] The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States. [...]
- 47 In addition to international concerns,[...] Congress passed the CTEA in light of demographic, economic, and technological [537 U.S. 207] changes, [...] [14] and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works[...]. [15]
- 48 [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

- 50 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

- 52 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.
- 53 [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.[...] 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. [...] Those earlier Acts did not create perpetual copyrights, and neither does the CTEA.[...]

2

- 55 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*.

- 56 [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.
- 57 *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.
- 58 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. [...] 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.
- 59 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]
- 60 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. [...] 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."
- 61 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.[...] 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." [...]

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." [...] 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." [...]

- 62 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.
- 63 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.[...] 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. [...]
- 64 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.

- 65 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. [...] 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. [...] For the author seeking copyright protection, in contrast, disclosure is the desired objective, not something exacted from the author in exchange for the copyright. [...]
- 67 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. [...] 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.[...]

3

- 69 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. [...] 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.
- 70 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. [...] Judicial deference to such congressional definition is "but a corollary to the grant to Congress of any Article I power." [...] 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*.
- 71 For the several reasons stated, we find no Copyright Clause impediment to the CTEA's extension of existing copyrights.

III

- 73 Petitioners separately argue that the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment.[...] 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. [...]

- 74 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." [...] Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication. [...]
- 75 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).
- 76 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)[...].
- 77 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." [...]

78 [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. [...]

IV

80 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.

81 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. [...] 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.

82 *It is so ordered.*

[The dissenting opinion of JUSTICE STEVENS is omitted.]

130 JUSTICE BREYER, dissenting.

131 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[...].

132 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

134 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.

135 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.

136 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). [...] 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[...].

137 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

140 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." [...] Why? What constitutional purposes does the "bounty" serve?

141 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 "motivat[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).

142 That is how the Court previously has described the Clause's objectives. [...] And, in doing so, the Court simply has reiterated the views of the Founders.

143 Madison, like Jefferson and others in the founding generation, warned against the dangers of 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." [...]

146 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 "restrai[n]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

148 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.

149 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. [...] 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." [...]

150 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. [...] 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. [...]

151 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. [...]

152 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.

153 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." [...] And *amici*, along with petitioners, provide examples of the kinds of significant harm at issue. [...]

155 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. [...] 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.

156 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?

157 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[...].

C

- 161 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. [...] 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. [...]
- 162 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 *fills* would have written more books had Dumas *père's* Three Musketeers earned more royalties?
- 163 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." [...]

164 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). [...]

165 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. [...]

166 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, [...] 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?

167 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. [...] Neither does the statute create uniformity with respect to anonymous or pseudonymous works. [...]

168 The statute does produce uniformity with respect to copyrights in new, post-1977 works attributed to natural persons. [...] 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.

169 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.

170 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.

171 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. [...] 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. [...] 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." [...]

172 [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.

173 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.

174 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. [...]

176 This view also finds textual support in the Copyright Clause's word "limited." [...] 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. [...]

177 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")[...] 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. [...]

178 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. [...]

179 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. [...] 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. [...] 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. The Clause seeks public, not private, benefits.

180 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. [...] The second fact seems already corrected for by the 1976 Act's life-plus-50 term, which automatically grows with lifespans. [...] 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

184 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. [...] 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.[...]

IV

188 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.

189 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.

190 I respectfully dissent.

Notes to the Majority Opinion:

- 203 [1] JUSTICE BREYER's dissent is not similarly restrained. He makes no effort meaningfully to distinguish existing copyrights from future grants. [...]Under his reasoning, the CTEA's 20-year extension is globally unconstitutional.
- 204 [2] Asserting that the last several decades have seen a proliferation of copyright legislation in departure from Congress' traditional pace of legislative amendment in this area, petitioners cite nine statutes passed between 1962 and 1974, each of which incrementally extended existing copyrights for brief periods. See Pub. L. 87-668, 76 Stat. 555; Pub. L. 89-142, 79 Stat. 581; Pub. L. 90-141, 81 Stat. 464; Pub. L. 90-416, 82 Stat. 397; Pub. L. 91-147, 83 Stat. 360; Pub. L. 91-555, 84 Stat. 1441; Pub. L. 92-170, 85 Stat. 490; Pub. L. 92-566, 86 Stat. 1181; Pub. L. 93-573, Title I, 88 Stat. 1873. As respondent (Attorney General Ashcroft) points out, however, these statutes were all temporary placeholders subsumed into the systemic changes effected by the 1976 Act. [...]
- 205 [3] Petitioners argue that the 1790 Act must be distinguished from the later Acts on the ground that it covered existing *works* but did not extend existing *copyrights*. [...] The parties disagree on the question whether the 1790 Act's copyright term should be regarded in part as compensation for the loss of any then existing state- or common-law copyright protections. [...]Without resolving that dispute, we underscore that the First Congress clearly did confer copyright protection on works that had already been created.
- 206 [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.
- 207 [5] This approach comported with English practice at the time. The Statute of Anne, 1710, 8 Ann. c. 19, provided copyright protection to books not yet composed or published, books already composed but not yet published, and books already composed and published. [...]
- 214 [10] JUSTICE BREYER would adopt a heightened, three-part test for the constitutionality of copyright enactments. *Post*, at 245. 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. [...] 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.[...]
- 218 [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." [...] 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." [...]

219 [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. [...] 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." [...]

220 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.

224 [18] JUSTICE STEVENS' characterization of reward to the author as "a secondary consideration" of copyright law, *post*, at 227, n. 4 (internal quotation marks omitted), understates the relationship between such rewards and the "Progress of Science." As we have explained, "[t]he economic philosophy behind the [Copyright] [C]lause ... 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." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Accordingly, "copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.... The profit motive is the engine that ensures the progress of science." *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), *aff'd*, 60 F.3d 913 (CA2 1994). Rewarding authors for their creative labor and "promot[ing] ... Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides . . . with the claims of individuals." *The Federalist* No. 43, p. 272 (C. Rossiter ed. 1961). JUSTICE BREYER's assertion that "copyright statutes must serve public, not private, ends," *post*, at 247, similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.[...]