

## THROUGH THE YEARS: THE SUPREME COURT AND THE COPYRIGHT CLAUSE

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The Supreme Court's role in developing copyright law recently has assumed a significance traditionally reserved for issues of "high" constitutional import. The extension of copyright-type protection to new technologies and new information products,<sup>1</sup> the increasing criminalization of copyright violations,<sup>2</sup> and the implications of copyright term extension for the First Amendment<sup>3</sup>

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1. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.) [hereinafter DMCA]; Database and Collections of Information Misappropriations Act, H.R. 3261, 108th Cong. (2003), *available at* <http://thomas.loc.gov> (last visited July 20, 2004).

2. *See, e.g.*, No Electronic Theft Act, 17 U.S.C. § 506(a) (2) (2000) (imposing criminal liability on individual infringers without regard to profit motives); DMCA, 17 U.S.C. § 1204 (2003) (imposing criminal liability for violation of the anti-trafficking provision of the anti-circumvention prohibition); Lydia Loren, *Digitalization, Commodification, and Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 840 (1999).

3. Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); *see also* Eldred v. Ashcroft, 537 U.S. 186 (2003)

and the public domain expose a complex and enduring mêlée over the function of copyright in the digital age and a corresponding concern about the scope of Congress's power pursuant to the Copyright Clause.<sup>4</sup> With little historical documentation on the Clause, but growing scholarly interest,<sup>5</sup> Congress's power over intellectual property policy has not been subject to the level of judicial or academic scrutiny usually attendant to matters of constitutional application. In recent years, however, the legislative expansion of copyright and the ubiquitousness of copyrighted works, both to a large degree occasioned by digital networks, have intensified the relationship between copyright and the First Amendment while highlighting the less-explored relationships between copyright and the Commerce Clause, the Treaty Power, and other subjects of constitutional significance. The explicit application of constitutional law analysis to copyright policy has taken place almost exclusively within the context of First Amendment considerations in efforts to determine limits on copyright and, by extension, limits on Congress's power to expand copyright protection.<sup>6</sup> The relationship of copyright to social and economic welfare—matters that resonate less powerfully in wealthy economies, but that appeal strongly to salient moments in the chronicles of United States constitutional jurisprudence<sup>7</sup>—has

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(rejecting a First Amendment challenge to the Copyright Term Extension Act); David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281 (2004) (rejecting the proposition that the First Amendment provides any rational basis for limiting copyright).

4. U.S. CONST. art. I, § 8, cl. 8. Commentators use different names for this constitutional provision, such as the Intellectual Property Clause, the Patent and Copyright Clause, the Patent Clause, and the Copyright Clause. I will use the title "Copyright Clause" throughout this article.

5. See, e.g., Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45 (2000); L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y 365 (2000); Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001).

6. Again, the bulk of this work has focused on the relationship between copyright and the First Amendment. See C. Edwin Baker, Essay, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Jed Rubinfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

7. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *United States v. Carolene Prods.*, 304 U.S. 144 (1938); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (identifying education as "perhaps the most important function" of state and local governments). Historically, the role of copyright in promoting education has been a weighty aspect of the public welfare element of copyright regulation. Starting from the first copyright statute, the Statute of Anne, copyright

largely been reserved to scholars dealing with the effect of strong proprietary regimes on economic development in the developing world. The current environment in the United States has provided a valuable opportunity to consider how copyright policy affects matters of broad socio-economic and political concern in developed countries as well.

The three cases of the new millennium deal with different aspects of copyright regulation—indeed, one only indirectly with copyright at all.<sup>8</sup> In *New York Times Co. v. Tasini*,<sup>9</sup> the Court considered the copyright interests of freelance authors whose articles had been published without their authorization in an electronic database by the *New York Times*. Section 201(c) of the Copyright Act grants the owner of copyright in a collective work the privilege only of “reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.”<sup>10</sup> The question before the Court was whether the electronic publication of a periodical in a database that offered users individual articles isolated from the periodical as a whole was a proper exercise of the § 201(c) publisher’s privilege. The Court, in a 7-2 decision, opined that the transfer of articles to a database was not similar to the conversion from newsprint to microfiche, and held that databases that store and retrieve articles separately “effectively override[] the Author’s exclusive right to control the individual reproduction and distribution of each Article . . . .”<sup>11</sup> The majority held fast to a literal reading of the statutory text and disagreed with the dissenting Justices that “revision” in the context of digital media should mean something different than in print media.

In *Eldred v. Ashcroft*,<sup>12</sup> the Court addressed a challenge to the constitutionality of the Sony Bono Copyright Term Extension Act

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has been an engine to encourage “learning.” See Statute of Anne, 1710, 8 Anne, ch. 19 (“An act for the encouragement of learning”). This focus was reflected in various state copyright statutes. See, e.g., Rhode Island 1783 Copyright Act (citing as one purpose “the improvement of knowledge”); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 186 (1968) (stating that the preambles to early state copyright statutes provided that “the reason for [copyright] was to encourage authors to produce and thus to improve learning”).

8. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

9. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

10. 17 U.S.C. § 201 (c) (2000).

11. *Tasini*, 533 U.S. at 503-04 (2001).

12. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

(CTEA),<sup>13</sup> which extended copyright protection for existing and future works by twenty years. The petitioner argued principally that the CTEA fails to satisfy the constitutional mandate to promote the progress of science and the useful arts, and violates the “limited times” provision of the Copyright Clause, as well as the First Amendment. *Eldred* thus presented the Court with a direct opportunity to determine the constraints imposed by the Clause on Congress’s power to regulate copyright.

Finally, in *Dastar v. Twentieth Century Fox*,<sup>14</sup> the petitioner released a video set it called “World War II Campaigns in Europe” made from tapes of an original television series first produced by Fox, but that were in the public domain. Dastar edited the series and marketed the video sets as its own product. Fox and its licensees brought an action under § 43(a) of the Lanham Act, which proscribes false designations of origin, false or misleading description of fact, or false or misleading representation of fact likely to cause confusion as to the origin of the goods.<sup>15</sup> The Court held that § 43(a) does not provide a cause of action against a person who uses a public domain work without attribution to the author. The decision affirmed a vision of the public domain as a resource for completely unconditional access to, and use of, expired copyrighted works.<sup>16</sup>

These three cases of the new millennium provide an opportunity to consider copyright law in a broader constitutional context, and to examine the role of the Supreme Court in the development of copyright policy in a global digital environment. Focusing principally on the *Eldred* case, I discuss why the Court (and the judiciary in general), whose vigilance in the nineteenth century gave us the legacy of the public domain, would now seemingly retreat from active oversight of legislation that, in the view of many,<sup>17</sup> redefines the copyright bargain between authors

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13. Pub. L. No. 105-298, § 102 (b), (d), 112 Stat. 2827, 2827-28 (1998).

14. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

15. 15 U.S.C. § 1125(a)(1) (2000).

16. *Dastar*, 539 U.S. at 34 (acknowledging the “public’s right” to copy and use works in which copyright has expired).

17. See, e.g., Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 54 (1994) (criticizing balance of rights between copyright owners and public); Ted Bunker, *Copyright Idea Emerges*, BOSTON GLOBE, Jan. 20, 2003, at 23 (“If Congress isn’t entirely in the grip of Hollywood and the big media interests served by the 1998 extension, it’s tough to see the evidence”); Adam Cohen, Book Review, *The Intellectual Imperialists*, N.Y. TIMES, Apr. 4, 2004, at 12 (criticizing power of copyright holders to restrict public use of various works); Robert S. Boynton,

and the public to the detriment of the latter. I conclude that the Supreme Court has ostensibly remained stable in its treatment of the Copyright Clause. The Court's adherence to a strict textualist approach to statutes enacted pursuant to the Copyright Clause is reconcilable with the literalism that dominated nineteenth century copyright cases. Such textualism, and the deference to Congress that it begets, is also fairly consistent with the Court's jurisprudence in matters of economic regulation. However, the nineteenth century cases reflected concerns about the nature of copyright that are no longer salient today. Thus, I argue that the Court's modern textualism actually serves to undercut the significant normative principles that counseled literalism as the most faithful means for achieving the welfare goals of the Copyright Clause in the previous millennium.

#### I. COMPETENCY AND ORIGINALISM

The cautious conservatism of the Court in *Eldred*, *Dastar*, and *Tasini* is noteworthy, in my view, primarily for the tension between the Court's insistence on literalism in its interpretation of the copyright statute, and its abandonment of any inquiry into the original intent behind the Copyright Clause. From a historical perspective, originalism and textualism must be balanced if the Court is to consider seriously the meaning and purpose of the Copyright Clause.<sup>18</sup> By eliding substantive analysis of the social welfare effects of copyright and, instead, deferring to the institutional competency of Congress, the Court failed to engage in its most formidable and necessary task, namely, determining the appropriate scope of congressional powers consistent with the basic premise of the Copyright Clause.<sup>19</sup> As one nineteenth century judge expressed it, "[u]ndoubtedly a large discretion is lodged in the Congress with respect to the subjects which could properly be included within the constitutional provision; but that discretion is not unlimited. It is bounded and circumscribed by the lines of the

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*The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, at 40 (criticizing recent copyright laws as giving too much power to copyright holders).

18. *But see Eldred*, 537 U.S. at 260-61.

19. As Chief Justice Rehnquist stated recently, "[n]o doubt the political branches have a role in interpreting and applying the Constitution, but . . . this Court has remained the ultimate expositor of the constitutional text." *United States v. Morrison*, 529 U.S. 598, 616 (2000).

general object sought to be accomplished.”<sup>20</sup> The new jurisprudence of deference in copyright matters, “constrained by the language of statutes and the intent of Congress,”<sup>21</sup> dispenses with the fundamental challenge of delineating institutional roles by treating as one and the same the constitutional objective and the means by which Congress chooses to exercise its authority.<sup>22</sup>

As I will elaborate later, this is a notable difference between the nineteenth century cases and the modern cases leading up to *Eldred*. The early courts took seriously the objectives of the Copyright Clause, often invoking those objectives as the premise for analysis of the legitimacy of the statute at issue.<sup>23</sup> Professor Leaffer prefers a “pragmatic, instrumentalist”<sup>24</sup> approach to constitutional interpretation as the best means of promoting social welfare, broadly defined in copyright parlance in terms of the balance between the interests of owners and users.<sup>25</sup> In my view, constitutional jurisprudence “constrained by the language of statutes and intent of Congress”<sup>26</sup> yields a circularity that obfuscates the central question whether a particular statute is a proper exercise of a constitutional power. A statute should be evaluated in light of the scope of the underlying constitutional grant—a scope determined by a specific interpretive approach that is itself informed by how the Court views its role in that particular subject area. It seems clear that the current Court views copyright first and foremost as a piece of economic regulation, with built-in mechanisms to redress First Amendment concerns.<sup>27</sup> But the Copyright Clause may also involve matters with less-explored constitutional implications, which only a constitutional vision of copyright can help elucidate. For example, is it constitutional to grant stronger copyright protection to foreign copyright owners?<sup>28</sup>

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20. *J.L. Mott Iron Works v. Clow et al.*, 82 F. 316, 319 (7th Cir. 1897).

21. Marshall Leaffer, *Life after Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597 (2004).

22. At heart, this is an issue that dates back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and more generally, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

23. *See infra* pp. 1647-49.

24. Leaffer, *supra* note 21, at 1598.

25. *Id.*

26. *Id.*

27. *Eldred v. Ashcroft*, 537 U.S. 186, 218-19 (2003).

28. This is arguably what Congress did when it restored the works of foreign copyright owners pursuant to the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828

In what way does such restoration promote “progress” in the United States? Would a statute that extends copyright protection to oral literature or folklore in the United States violate the Copyright Clause? The fixation requirement of copyright law<sup>29</sup> is generally regarded as consistent with the constitutional term “writings” in the Copyright Clause. However, no international treaty requires fixation for obtaining copyright protection.<sup>30</sup> If Congress decided to eliminate fixation to recognize the bounty of creative expression existing or generated by minority groups in the United States, whose cultural traditions are rooted in community identity and shared traditions passed down orally through generations, would such a statute be constitutional? Would it pass constitutional muster if Congress passed the statute pursuant to an international agreement?

Failure to provide a grand constitutional vision of the Copyright Clause ignores the fact that copyright law, like other economic regulation, may operate in ways that privilege certain values, cultures, heritages, and types of expression over others, and that it does so in a way that undermines other constitutional ideals found in the Equal Protection or Due Process Clauses. Viewed strictly as a form of economic regulation, constitutional analysis of copyright legislation falls significantly short of addressing the deep cultural, political, social, and economic importance of copyright to this and succeeding generations. This myopic vision of copyright also ignores the growing use of the Foreign Affairs Power to accomplish change in domestic copyright policy.<sup>31</sup> Further, it leaves us with no meaningful criteria to evaluate whether a particular legislative outcome is properly informed by or infused

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U.N.T.S. 221 (Berne Convention), and failed to extend the same privilege to United States works.

29. 17 U.S.C. § 102(a) (2000).

30. Berne Convention, *supra* note 28, art. 2 (2) (leaving a fixation requirement to the discretion of member countries). Neither the WIPO Copyright Treaty nor the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) addresses fixation.

31. A recent opinion from the District of Columbia avoided the intersection between the Treaty Power and the Copyright Clause, and evaluated the constitutionality of the Uruguay Round implementing legislation under the latter. *See Luck’s Music Library Inc. v. Ashcroft*, Civ. Action No. 01-2220, 2004 WL 1278070 (D.D.C. June 10, 2004), at 1, 8-9. The court, applying *Eldred*, concluded that restoration of copyright in foreign works pursuant to Section 514 of the Uruguay Round Agreements Act “did not overstep Congress’ power under the [Copyright Clause].” *Id.* at 1.

with an identifiable constitutional value. Finally, it diminishes the significance of the Court's role in the development of modern copyright law and, specifically, the public domain.

As epitomized by *Eldred*, there are no precise measurements for the ideal of "progress" that is the objective of intellectual property protection in the United States. And certainly, in related issues involving property and liberty,<sup>32</sup> or federalism, the Court's deference to the institutional competency of Congress has not precluded an examination of the exercise of such competency under the constitutional provision at issue.<sup>33</sup> The Court's failure to address the meaning of the Clause purposively, or to determine why rational basis deference was the appropriate standard of review, raises directly the famous "footnote four" problem in *United States v. Carolene Products*.<sup>34</sup> Does the enormous influence of special interest groups on copyright legislation and the diffuse nature of "the public" together add up to something akin to "legislation which restricts . . . political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . ."?<sup>35</sup> This is a difficult question, because copyright law historically has been the product of negotiation and compromise between special

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32. Of course, this is part of the fundamental problem: Is copyright more about personal rights and less about commerce or vice versa? This is one of the classic dilemmas of intellectual property rights—not quite property but more than trade regulation. The Slaughter-House Cases convey an early reflection of the intractable relationship between property, liberty, and exclusive privileges. "But we think it may be safely affirmed, that the parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way." See 83 U.S. (16 Wall.) 36 (1872). See generally LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) (examining copyright as a form of trade regulation).

33. *United States v. Morrison*, 529 U.S. 598 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995). One could argue, of course, that second-guessing Congress in matters of private property rights is an entirely different matter than doing so in matters of states' rights and the Court has a stronger history of engaging in the latter.

34. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

35. *Id.*

interest groups, dominated, of course, by the interests of copyright owners.<sup>36</sup> However, representatives of the “public interest,”<sup>37</sup> such as librarians, educators, and scientific organizations, have recently played important roles in opposing the expansionist demands of the content industry, both domestically and internationally.<sup>38</sup> While the playing field is by no means even, the point is that the *opportunity* for participation in the legislative process and the measure of success flowing from such participation<sup>39</sup> weaken arguments that copyright legislation is subject only to protectionist interest group influence. Further, in light of previous term extensions by Congress, the CTEA does not, on its face, fall within a “specific prohibition of the Constitution.”<sup>40</sup> But even if it did, it is unlikely that granting term extension to *all* authors of existing and future copyrights would “call for a . . . more searching judicial inquiry”<sup>41</sup> as may be directed to legislation that targets specific

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36. JESSICA LITMAN, DIGITAL COPYRIGHT 23, 135-63 (2001).

37. I am fully aware that this characterization is problematic. After all, the grant of rights to authors is an inextricable aspect of the public interest. In this context, I am simply referring to the efforts to preserve a balanced system between owners and users of protected works.

38. J.H. Reichman & Paul F. Uhler, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L. J. 793, 824-26 (1999) (discussing the “unusual” direct participation of United States scientific organizations in negotiations over the proposed database bill). See also Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 374 nn. 32, 33 (1997) (noting how those who had opposed the Clinton Administration digital agenda before Congress turned their efforts to WIPO and helped to influence the negotiations toward a more balanced treaty). “They not only successfully lobbied the Clinton administration, persuading it to moderate or abandon parts of its digital agenda at WIPO, they also attended WIPO-sponsored regional meetings to acquaint other states with their concerns about the draft treaties, and went to Geneva in large numbers to participate informally in the diplomatic conference as observers and lobbyists. These expressions of concern found a receptive audience among many national delegations to the diplomatic conference. In the end, none of the original U.S.-sponsored digital agenda proposals emerged unscathed from the negotiation process, and at least one—the proposed database treaty—did not emerge at all. Insofar as the copyright treaty emanating from the diplomatic conference contains provisions addressing digital agenda issues, these provisions reflect an approach that strongly resembles the balancing-of-interests approach that has been traditional in U.S. copyright law. The WIPO Copyright Treaty even affirms ‘the need to maintain a balance between the interests of authors and the larger public interest, particularly education, research and access to information.’” *Id.* at 374-75.

39. *Id.*

40. *Carolene Prods.*, 304 U.S. at 152 n.4. See *Eldred v. Ashcroft*, 537 U.S. 186, 210 (2003).

41. *Carolene Prods.*, 304 U.S. at 152 n.4.

groups of people. This conclusion is strengthened by the fact that it is the very operation of the political process that produced the CTEA,<sup>42</sup> and some commentators have suggested that the outworking of this process is a reason important enough to justify the Court's deference to Congress.<sup>43</sup>

But I suspect that it was the very intractability of determining "welfare" and "progress" that compelled the Court to treat *Eldred* not as a case about the Copyright Clause per se,<sup>44</sup> but merely as a reflection of congressional judgment that adding another layer of protection to an established copyright system<sup>45</sup> was consistent with the public good. Once the Court acknowledged the constitutionality of term extension,<sup>46</sup> the effect of such extension on the copyright balance easily became a matter of judgment about where the appropriate lines should be drawn between owners and the public. The majority did not view it as the Court's role to engage in such line-drawing or to second-guess Congress's competency to do so.<sup>47</sup> This is not unique to copyright. For example, difficulty in defining the "public use" requirement of the Fifth Amendment has led the Court to defer almost entirely to Congress on this aspect of takings law.<sup>48</sup> Even in areas where the Court has actively developed a body of constitutional interpretation, such as "due process" or "equal protection," deference to Congress is more likely as the claims at issue fall further away from the core issues of procedure or discrimination that are the nuclei of these two areas of constitutional

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42. Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003).

43. *Id.* at 2402.

44. The petitioners in *Eldred* did not argue that term extension itself was unconstitutional, but rather that serial term extension was a violation of the requirement that protection should exist for "limited times."

45. *See Eldred*, 537 U.S. at 210 (noting the various times Congress had extended the copyright term).

46. The Court elided the interpretation of the Clause and focused instead on the constitutionality of term extension per se, concluding that the CTEA was not a violation of the Copyright Clause. *See Eldred*, 537 U.S. at 209 (noting that "a regime of perpetual copyrights 'clearly is not the situation before us.'")

47. *See also* United States v. Carolene Prods., 304 U.S. 144, 147 (1938). The Court noted that where the values of a particular legislation are debatable, the decision belongs to Congress alone and "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it." *Id.* at 154.

48. *See* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).

jurisprudence.<sup>49</sup>

*Eldred* was not as surprising or outrageous as it was disappointing. Many may have underestimated the path-dependency created by previous term extensions,<sup>50</sup> and by the increased internationalization of copyright relations, which inexorably raises standards of protection worldwide. These two factors in themselves exert significant force in two areas of constitutional jurisprudence where the Court is also fairly deferential; namely, Congress's authority pursuant to the Commerce Clause and the Executive's exercise of the Foreign Affairs Power.<sup>51</sup> This said, however, it should be noted that there are zones of constitutional sensitivity even in these traditional areas of deference. For example, judicial sensitivity to the Copyright Clause is likely to be heightened significantly in instances where legislation implementing treaty obligations introduces new rights unfamiliar to, or in tension with, domestic copyright law.<sup>52</sup> In my view, such cases offer a stronger basis for assessing the boundaries of congressional power under the Copyright Clause.<sup>53</sup> An important case to watch in this regard is *Golan v. Ashcroft*.<sup>54</sup>

In *Golan*, the plaintiffs challenged the constitutionality of the

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49. I am grateful to Jim Chen for pointing this out.

50. *Eldred*, 537 U.S. at 210 (noting that previous term extensions did not create perpetual copyrights). See also *Luck's Music Library Inc. v. Ashcroft*, Civ. Action No. 01-2220, 2004 WL 1278070 (D.D.C. June 10, 2004) (affirming the constitutionality of copyright restoration based on previous restorations by Congress).

51. With respect to the Treaty Power, the Supreme Court held in *Geoffrey v. Riggs*: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government . . . and those arising from the nature of the government itself and the States. It would not be contended that it extends so far as to authorize what the Constitution forbids . . ." 133 U.S. 258, 267 (1890). Modern Supreme Court jurisprudence recognizes constitutional limitations to the Treaty Power that apply to all exercises of federal power, but remains very broad. See, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 185 (1996).

52. At the very least, legislation that destabilizes the traditional scheme of the copyright system is likely to give rise to a heightened standard of judicial review. See *Eldred*, 537 U.S. 186; see also *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999). But see *Luck's Music Library* at 9-13 (noting that Congress has historically exercised its powers to restore copyright).

53. The district court opinion in *Eldred* states as much and was not disturbed by the Supreme Court. If anything, the *Dastar* opinion in my view affirms this point. See *infra* at 1650-52 (discussing *Dastar*).

54. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D.Colo. 2004).

CTEA and the Uruguay Round Agreements Act (URAA).<sup>55</sup> Section 514 of the URAA<sup>56</sup> amended the Copyright Act by restoring copyright protection to qualifying works of foreign origin whose authors lost their United States copyrights for failure to comply with then-existing copyright formalities.<sup>57</sup> Pursuant to the URAA, the Copyright Act was amended<sup>58</sup> to allow restoration of copyright for the length of time the work would have been protected had it not lost its copyright status.<sup>59</sup> The plaintiffs in *Golan* argued that copyright restoration restricts their right to free speech because they could no longer publish works in which copyright had been restored, and violates their Due Process rights under the Fifth Amendment by unfairly trammeling on their expectations to be able freely to use works already in the public domain.<sup>60</sup> The district court allowed all but the term extension claim to withstand the government's motion to dismiss.<sup>61</sup> Importantly, the court held that the plaintiffs' First Amendment argument was adequately distinguished from the one made in *Eldred*, thus suggesting that the *Golan* court may apply a higher standard of scrutiny to assess the constitutionality of § 104A of the Copyright Act.<sup>62</sup> Although the court expressed some skepticism about the plaintiffs' Due Process argument, it considered seriously the claim that copyright restoration is a violation of the Copyright Clause. Citing the district court opinion in *Eldred*, the court noted that the Supreme Court's precedent in *Graham v. John Deere Co.*<sup>63</sup> would preclude Congress from extending copyright to a work in the public domain.<sup>64</sup> Interestingly, the plaintiffs in *Golan* employed a similar strategy

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55. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C. (2000)).

56. 17 U.S.C. § 104A (2000).

57. See 17 U.S.C. § 104A (h)(6)(C)(I) (2000).

58. Uruguay Round Agreements Act, § 514, 108 Stat. 4809, 4976, codified at 17 U.S.C. § 104A (2000).

59. See 17 U.S.C. § 104A (a)(1)(B) (2000).

60. *Golan*, 310 F. Supp. 2d at 1220.

61. *Id.* at 1221.

62. *Id.* at 1220.

63. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (holding that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available").

64. *Eldred v. Ashcroft*, 239 F.3d at 377 (2002) (observing that *Graham* "would indeed preclude Congress from authorizing under [the Patent and Copyright] Clause a copyright to a work already in the public domain").

used by the government in *Eldred* by pointing out previous legislative acts, which specifically precluded the extension of copyright to works in the public domain.<sup>65</sup> Coupled with the explicit acknowledgment in *Dastar* of a “federal right to copy and to use expired copyrights,”<sup>66</sup> other dicta noting the “carefully crafted bargain” between authors and the public,<sup>67</sup> and statements averring to the limits of authorial/inventor prerogatives, I believe *Golan* offers an opportunity to contest the precedential weight of copyright expansionism with the strong legacy of preserving a robust public domain.

An additional factor to consider is a little-acknowledged footnote in the first international agreement negotiated by the United States allowing restoration of foreign works in the public domain. Under the North American Free Trade Agreement (NAFTA),<sup>68</sup> qualifying motion pictures of Mexican and Canadian authors can be restored.<sup>69</sup> However, the treaty also notes that such restoration would only proceed if it was not deemed to be unconstitutional.<sup>70</sup> It would appear, then, that the government itself was initially uncertain as to the constitutionality of copyright restoration. When restoration was not challenged under NAFTA, Congress dipped the proverbial “entire legislative foot” by expanding restoration to all copyrightable works of eligible foreign authors.<sup>71</sup> Given this background of the modern copyright restoration impetus, I am far from confident that the fairly limited history of copyright restoration to *domestic* authors presumptively confers a constitutional legitimacy on copyright restoration to foreign authors. The fact that such discriminatory restoration is based on an exercise of the Treaty Power makes the restoration regime more—not less—constitutionally suspect, and certainly calls for a higher level of judicial scrutiny.<sup>72</sup>

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65. *Golan*, 310 F. Supp. 2d at 1219.

66. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003).

67. *Dastar*, 539 U.S. at 33-34.

68. North American Free Trade Agreement, Dec. 17, 1992, Annex 1705.7, 32 I.L.M. 289, 605 (1993) available at [http://www.nafta-sec-alena.org/DefaultSite/legal/index\\_e.aspx?articleid=170#An1705.7](http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=170#An1705.7) (last visited July 20, 2004).

69. *Id.*

70. *Id.* (stating “This obligation shall apply to the extent that it is consistent with the Constitution of the United States . . .”).

71. Uruguay Round Agreements Act, Pub. L. No. 103-465, tit. 5, § 514, 108 Stat. 4809 (1994).

72. *Cf. Luck’s Music Library Inc. v. Ashcroft*, Civ. Action No. 01-2220, 2004

At least one district court has confronted, without answering, the question of whether the United States can constitutionally obligate itself to a treaty that requires enforcement of a copyright that falls short of the requirements for copyrightability established by the Copyright Clause.<sup>73</sup> This question, along with another equally difficult issue—whether Congress can accomplish under the Commerce Clause what is forbidden by the Copyright Clause—has not been directly addressed by the Supreme Court.<sup>74</sup> The weight of the Court's acknowledgment of the public domain in *Dastar*, the importance of historical practice emphasized in *Eldred*, and the culture of strict interpretation that is evident in *Tasini* all suggest that the constitutional challenge in *Golan* is more likely to meaningfully address the constitutional questions that many hoped *Eldred* would answer.

The Supreme Court's deference is a striking feature of this new millennium. It was, after all, the Court that almost single-handedly created the doctrinal underlay of the "public domain." The most salient tributaries to the public domain are the result of the Court's active policing of congressional power, and its careful interpretation of the Copyright Act in light of the constitutional mandate of the Copyright Clause. In the landmark decision of *Baker v. Selden*,<sup>75</sup> the Supreme Court drew the distinction between copyrightable expression and uncopyrightable ideas. The idea/expression dichotomy today is one of the key doctrines contributing to the public domain,<sup>76</sup> and is codified in § 102(b) of

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WL 1278070 (D.D.C. June 10, 2004).

73. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 193 (S.D.N.Y. 1999).

74. The weight of scholarly opinion is that the Copyright Clause imposes limits on the exercise of congressional authority pursuant to the Commerce Clause. See, e.g., Yochai Benkler, *Constitutional Bounds of Database Protection Legislation: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 539-52 (2000); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause As an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119 (2000); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359 (1999). In *United States v. Moghadam*, the court held that protecting unfixated performances pursuant to the Commerce Clause is not "fundamentally inconsistent" with the fixation requirement in the Copyright Clause, but might violate the "limited times" provision. 175 F. 3d 1269 (11th Cir. 1999). The court ultimately did not consider this issue because it had not been raised by the plaintiff during the district court proceedings.

75. *Baker v. Selden*, 101 U.S. 99 (1879).

76. Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79, 83-84 (1989) (explaining importance of idea/expression dichotomy in keeping a

the Copyright Act. Pursuant to the TRIPS Agreement,<sup>77</sup> the idea/expression dichotomy is now also a principle of international copyright law.<sup>78</sup> Other limitations on the rights of owners, such as the first sale doctrine, have antecedents in some of the earliest decisions of the Court.<sup>79</sup> Like the idea/expression dichotomy, the first sale doctrine has also been codified in the Copyright Act.<sup>80</sup>

The lower courts in the nineteenth century also played a significant role in guarding the boundaries of the Copyright Clause.<sup>81</sup> For example, in *Clayton v. Stone & Hall*,<sup>82</sup> the court denied the copyrightability of a daily publication of current market prices.<sup>83</sup> The court looked first at the Copyright Clause to determine what was protectable and held that, since the statute in question was passed pursuant to this constitutional imperative, copyright protection had to be consistent with the promotion of science and the useful arts.<sup>84</sup> Similarly, the District Court in *Burrow-Giles Lithographic Co. v. Sarony*<sup>85</sup> took very seriously the limitations imposed by the Constitution to hold that Congress did not have the constitutional right to protect photographs by copyright.<sup>86</sup> Although this rigid interpretation might be an example of the inflexibility that Professor Leaffer eschews,<sup>87</sup> the Supreme Court's decision in the case was nevertheless soundly literalist in its interpretation of the constitutional clause.<sup>88</sup> This same literalism is

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store of "raw materials" in public domain).

77. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

78. See TRIPS Agreement, art. 9 (2), *supra* note 77.

79. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908) ("Recent cases in this Court have affirmed the proposition that copyright protection under the Federal law . . . depends upon the right created under the acts of Congress passed in *pursuance of the authority* conferred under . . . the Federal Constitution . . .") (emphasis added).

80. See 17 U.S.C. § 109 (2000).

81. See, e.g., *Clayton v. Stone*, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2872).

82. *Clayton*, 5 F. Cas. 999.

83. *Id.* at 1003.

84. According to the court, "it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them . . . . The act of Congress is 'for the encouragement of learning,' and was not intended for the encouragement of mere industry, unconnected with learning and the sciences . . ." *Id.*

85. *Sarony v. Burrow-Giles Lithographic Co.*, 17 F. 591 (C.C.S.D.N.Y. 1883).

86. *Id.* at 592.

87. Leaffer, *supra* note 21, at 1598.

88. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884).

evident in the Court's resoluteness about digital technology in *Tasini*. Indeed, the Court's literalism in *Tasini* is remarkably consistent with the Court's treatment of new technology in *White-Smith Publishing Co. v. Apollo Co.*<sup>89</sup> There, the Court held that a player piano roll was not a "copy" of the musical composition it represented. Congress responded to this decision by legislative change in the 1909 Copyright Act.<sup>90</sup>

Outside of the technology context, nineteenth and early twentieth century judicial interpretations were quite literal, often drawing on historicism to constrain the operation of the Copyright Act, particularly with respect to the basic right to copy.<sup>91</sup> In *Ricordi and Co. v. Mason*,<sup>92</sup> the court construed § 1 of the 1909 Copyright Act and held that a booklet that described various opera scenes was not an infringement of copyrights in the underlying librettos. According to the court, stories of the defendant were neither abridgements nor infringements on plaintiff's copyright because they did not interfere with the right to "publish, reproduce or sell the operas." The alleged infringing stories, according to the court, gave "just enough information to put the reader upon inquiry, precisely as the syllabus of a law report, the review of a book, or the description of a painting induces the reader to examine further."<sup>93</sup> The defendant was simply making use of the copyrighted material; copyright protection, the court held, does not extend so far as to prevent this use.<sup>94</sup> Similarly, the mechanical reproduction of sounds of a performance of copyrighted music was not considered an infringement of the copyright in the composition.<sup>95</sup> On the other hand, lithographic reproductions of copyrighted works were held to constitute infringements of the underlying works.<sup>96</sup> Between

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89. *White-Smith Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

90. Subjecting mechanical reproductions of musical works to a compulsory licensing system. *See* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

91. *See, e.g., Stern v. Rosey*, 17 App. D.C. 562 (C.A. D.C. 1901) (holding that mechanical reproductions of sounds of a performance of copyrighted music were not an infringement of the copyright in the composition); *Ricordi & Co. v. Mason*, 201 Fed. 182 (S.D.N.Y. 1911) (construing § 1 of the 1909 Copyright Act to allow descriptions of various opera scenes of the plaintiff's works because the descriptions were not abridgements, and did not interfere with the exclusive right to publish, reproduce, or sell the operas).

92. *Ricordi*, 201 F. 182.

93. *Id.* at 183.

94. *Id.* at 185.

95. *Stern*, 17 App. D.C. 562.

96. *Schumacher v. Schwencke*, 25 F. 466 (S.D.N.Y. 1885).

1856 and 1870, new laws granted performance rights to musical and dramatic works;<sup>97</sup> and protected photographs or negatives,<sup>98</sup> dramatic compositions, painting, drawing, chromo, statue, statuary, and models or designs intended to be perfected as works of fine art.<sup>99</sup> Translation rights and the right to dramatize novels were also included in the corpus of copyright protection.<sup>100</sup> At one time or another, all of these activities had previously been determined by a court to be noninfringing activity, most usually because the works did not infringe a specific right.

The literalism that characterized the nineteenth century copyright cases evidenced vigilant attempts to reinforce the statutory roots of the new copyright, all while ensuring that Congress's exercise of power was consistent with the Copyright Clause. The scope of congressional power and the means of exercising that power were distinct in the eyes of the judiciary, and deference to the means chosen by Congress was the result of satisfaction with the constitutionality of the legislation. In this sense, *Eldred* was inconsistent with the Court's historical approach to the Copyright Clause.<sup>101</sup> The nineteenth century courts were literal *precisely* so they could affirm that copyright protection was a product solely of statutes, and had no claim outside of the welfare-enhancing objectives established by the Constitution and implemented by Congress. The modern literalism goes in the opposite direction, affirming Congress's power no matter how or if remotely related to the objectives and ideals of the Clause's purpose.

## II. SHIFTING BOUNDARIES: CONGRESSIONAL POWER UNDER THE COPYRIGHT CLAUSE AND THE TREATY POWER

Scholars and commentators have criticized the *Dastar* opinion for undermining an already weak compliance scheme for the

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97. The Copyright Revision Act of 1831, ch. 16, 4 Stat. 436 (1831) (music); Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856) (drama).

98. Act of March 3, 1865, § 1, 13 Stat. 540 (1865).

99. Act of July 8, 1870, c. 230, § 86, 16 Stat. 212 (1870).

100. Act of July 8, 1870, c. 230, § 86, 16 Stat. 198, 212 (1870).

101. *See, e.g.*, *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903); *Higgins v. Keuffel*, 140 U.S. 428, 430-31, 433 (1891); *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889); *Banks v. Manchester*, 128 U.S. 244 (1888); *Wheaton v. Peters*, 33 U.S. 591, 642 (1834).

protection of moral rights under the Berne Convention.<sup>102</sup> At the time of Berne accession, the Berne Convention Implementation Act (BCIA) stated that existing United States law, such as “various provisions of the Copyright Act and the Lanham Act, various state statutes, and common law principles[,]”<sup>103</sup> was sufficient to protect moral rights. The Court in *Dastar* declined to find a right of attribution under § 43(a) of the Lanham Act for works in the public domain reproduced by others. Writing for a unanimous Court, Justice Scalia stated that to find such a right of attribution would create a series of “mutant copyright laws” that would trammel on the “federal right to copy and use expired copyrights.”<sup>104</sup> This explicit reference to a positive right to freely access and use public domain works is an important acknowledgment by the Court of the centrality of the public domain to the copyright system. Ironically, the Court further noted that extending § 43(a) to works in the public domain renders limitations on copyright (in visual and other kinds of works) superfluous.<sup>105</sup> Although Congress enacted a very limited version of moral rights protection after ratification of the Berne Convention,<sup>106</sup> the Court deferred to Congress’s ambivalence to moral rights by observing that “[w]hen Congress has wished to create such an addition to the law of copyright, it has done so with much more specificity than the Lanham Act’s ambiguous use of ‘origin.’”<sup>107</sup> In reviewing the right of attribution granted under the

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102. Tyler T. Ochoa, Amicus Brief, *Introduction: Rights of Attribution, Section 43(A) of the Lanham Act, and the Copyright Public Domain*, 24 WHITTIER L. REV. 911 (2003) (questioning how *Dastar* can be reconciled with moral rights under the Berne Convention); Janet Fries & Michael J. Remington, *Beware of Mutant Copyright: Justice Scalia Issues a Warning in the Dastar Decision*, IP LAW & BUSINESS, Sept. 2003, at 70 (questioning whether *Dastar* leaves United States law in compliance with the Berne Convention); Leaffer, *supra* note 21, at 1615 (asserting that “*Dastar* goes far in undermining whatever illusion is left of the minimalist” position on moral rights in the United States).

103. See Berne Convention Implementation Act, Pub. L. No. 100-568, § 2(3), 102 Stat. 2853 (1988), codified in scattered sections of 17 U.S.C. (2000).

104. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (citing *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141 (1989)).

105. *Id.* at 35.

106. See Visual Artists Rights Act, Pub. L. No. 101-650, tit. VI, 104 Stat. 5089, 5128-33 (1990) (hereinafter VARA) (granting the author of a work of visual art the right of attribution; the right to prevent any intentional distortion, mutilation or other modification of the work prejudicial to the author’s reputation; and the right to prevent destruction of works of art of a recognized stature), codified in 17 U.S.C. § 106A (2000).

107. *Dastar*, 539 U.S. at 34-35.

Visual Artists Rights Act (VARA),<sup>108</sup> the Court was very clearly aware of the obligations under the Berne Convention.<sup>109</sup> In ignoring those obligations, the Court reinforced Congress's attitude by narrowly interpreting the word "origin."

The fairly loud scholarly "buzz" about the implications of *Dastar* for United States compliance with the Berne Convention ignores the important fact that the TRIPS Agreement specifically excludes any obligation to protect moral rights.<sup>110</sup> The United States insisted on this exclusion during the Uruguay Round negotiations because it remained unwilling to commit to a strong regime for the protection of moral rights.<sup>111</sup> Thus, the *Dastar* decision, as much as it compromises the protection of moral rights in the United States, is not subject to the World Trade Organization (WTO) dispute-settlement process.<sup>112</sup> Further, under principles of international law, the TRIPS Agreement supersedes the Berne Convention.<sup>113</sup> At best, it is an open question whether, as

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108. VARA, *supra* note 106.

109. VARA was enacted pursuant to United States accession to the Berne Convention. VARA provides limited moral rights protection for works of visual arts. See 17 U.S.C. § 106A (2000).

110. TRIPS Agreement, art. 9, *supra* note 77.

111. Laurence R. Helfer, *Adjudicating Copyright Claims under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 379 n.92 (1998).

112. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

113. The more specific agreement prevails in interpretive conflicts between two treaties. See Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAW 619, 644 (1998). For some support for the proposition that TRIPS supersedes Berne to some extent, see Sam Ricketson, *Copyright and Related Rights in the TRIPS Agreement*, available at <http://www.kipo.go.kr/ehtml/eAnnSemi05.html> (last visited July 20, 2004); Susan M. Deas, *Jazzing Up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law*, 20 HASTINGS COMM & ENT L.J. 567 (1998) ("Although TRIPS member nations are required to comply with the Berne Convention requirements, this requirement is subject to TRIPS' 'signal exception,' which explicitly states that Berne Article 6*bis* moral rights or obligations are excluded from TRIPS' mandatory incorporation of Berne Convention provisions." [citing NIMMER ON COPYRIGHT]); *contra*, Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 768 (2001) ("In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention . . . . [I]t is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is

between two WTO member states, the United States has an obligation to protect moral rights. However, as between a WTO member and a non-WTO member who have both ratified the Berne Convention, the Article 6*bis* obligation still applies with full force.

An important limit to this argument is that Article 2(2) of the TRIPS Agreement preserves the obligations members have to each other under existing intellectual property agreements, including the Berne Convention. From an international law perspective, the picture that emerges is as follows: countries that never joined the Berne Convention have no obligation to protect moral rights under the TRIPS Agreement, and countries that are members of the WTO and the Berne Convention cannot employ the compliance mechanism of the WTO to enforce a member's obligation to protect moral rights under the Berne Convention. Finally, since the domestic application of an international treaty is governed solely by the provisions of the implementing legislation, protection of moral rights in the United States is available only to the extent that Congress has enacted legislation for such protection.<sup>114</sup> The Court in *Dastar* clearly was aware of the passage of VARA as Congress's effort to provide a limited form of moral rights protection. This suggests that the Court (rightly) was unwilling to treat the Lanham Act and the Copyright Act as coterminous, nor

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explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body in a number of cases."); Martin D.H. Woodward, Comment, *TRIPS and NAFTA's Chapter 17: How Will Trade-Related Multilateral Agreements Affect International Copyright?*, 31 TEX. INT'L L.J. 269, 275 (1996) ("The Berne Convention, then, continues to be of great significance in both TRIPS and NAFTA; while both agreements exhibit some degree of independence from the Berne Convention, the paradigms of international copyright protection established by the Convention remain influential.") In several significant respects, the TRIPS Agreement now outflanks and supersedes the provisions of the Berne Convention. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 59, 1155 U.N.T.S. 331, 345-46, 8 I.L.M. 679, 700-01 (specifying circumstances under which newer treaty supersedes older treaty on same subject matter).

114. See § 3(a) of the BCIA: "The Berne Convention (1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law and, (2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself." Section 4(c) goes on to provide in part that "no right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention or the adherence of the United States thereto." Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

(wrongly) to explicitly consider the exercise of the Treaty Power as an additional basis to engage in judicial oversight of Congress's competency.<sup>115</sup>

### III. MORE THAN A JURISPRUDENCE OF DEFERENCE?

The Court's deference at this particular historical moment is troublesome from another perspective. Copyright legislation is well known to be a product of interest-group bargaining that invariably diminishes the voice of a diffuse and loosely organized public. This public choice problem is being addressed in a variety of ways,<sup>116</sup> particularly through the activities of public interest groups who seek to counterbalance the influence of the entertainment industry. Notwithstanding, the legislative process remains quite vulnerable to pervasive, persistent and economically powerful organized industries that generally represent copyright owners' interests. As other commentators have observed, the Court's deference ultimately leads to acquiescence to the extension of the underlying economic philosophy of the Industrial Age to the Information Age, namely that strong property interests are an indispensable feature of a "rapidly changing civilization."<sup>117</sup> This suggests not pragmatic instrumentalism, but the Court's own acceptance of a core normative vision of copyright law. It is a vision more about what exclusive proprietary rights mean to the national economy than what they mean to authors or the public. That vision must be carefully considered in the combined light of the Copyright Clause, the Commerce Clause, and the Treaty Power.

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115. The Court's rigid adherence in *Dastar* to the boundaries between copyright, patent, and trademark is also consistent with the weight of precedent going back to the nineteenth century. See, e.g., *Higgins v. Keuffel*, 140 U.S. 428 (1891); *Baker v. Selden*, 101 U.S. 99 (1879); *Wheaton v. Peters*, 33 U.S. 591, 642 (1834).

116. Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 245-46 (2002) ("Especially where special interests have managed to convince Congress to pass legislation that is directly contrary to the express constitutional purpose, some independent review of the basis for the legislation is imperative."); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 659 (1996) ("The marketing and concomitant lobbying power of the copyright industries, and their repeated victories at the expense of individual authors (most particularly in the work-made-for-hire context) is a clarion call to the Court to read the Copyright Clause with fresh attention and historical understanding.")

117. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 263 (1918); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462 (1988); see also Schwartz & Treanor, *supra* note 42.

Within the context of the latter, this vision informs global trade relations and exacerbates the pressure on the domestic legislative process. For this reason, I have suggested elsewhere that mandatory adjudication panels under the auspices of the World Trade Organization (WTO) must take seriously the balance between owners and users of public goods.<sup>118</sup> Specifically, these panels must develop a jurisprudence of public welfare that will affirm the importance of the public interest in reasonable access to protected works, and that can influence domestic policies in favor of a balanced approach to copyright.<sup>119</sup> At the very least, the WTO dispute settlement mechanism should *not* contribute to domestic welfare-distorting applications of the TRIPS Agreement, and should account for correction of domestic government failure.<sup>120</sup> This outcome is compelled, at least in part, by modern trends in international law and is facilitative of the welfare goals of international economic policy.<sup>121</sup> It is also consistent with the internal constraints of constitutional democracy on the international legal process, and might help to constrain the global influence that promotes a one-sided version of “progress” and the “public good.”

It is not just the public interest that is at stake given the Supreme Court’s repose in the copyright arena. Rather, the Court’s role in copyright cases also speaks to the balance between Congress’s authority over domestic copyright matters, and the Executive’s exercise of the Treaty Power to negotiate bilateral and multilateral copyright agreements that may coexist uneasily with established copyright doctrines.<sup>122</sup> Given the global pressures that influence domestic copyright legislation,<sup>123</sup> pressures that the Court

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118. See Ruth L. Okediji, *Public Welfare and the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT’L L. REV. 819 (2003).

119. *Id.* at 824.

120. *Id.* at 838, 913-17.

121. Expressing those goals, the IMF Articles of Agreement’s Article 1, Purpose, includes “(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.” IMF Articles of Agreement, art. 1, *available at* <http://www.imf.org/external/pubs/ft/aa/aa01.htm> (last visited July 20, 2004).

122. See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75 (2000) (arguing that the fair use doctrine is in tension with the Berne three-step test and advocating for an explicit fair use principle in international copyright law).

123. See, e.g., Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts*

alluded to in both *Eldred and Dastar*, I do not agree that the search for permanent principles of constitutional probity will lead inexorably to inflexible or unworkable outcomes for copyright law.<sup>124</sup> Indeed, I suggest that if the Constitution admits sweeping congressional powers over copyright with minimal constraints, the exercise of the Treaty Power in the area of copyright and patent law is of significant concern. In *Reid v. Covert*,<sup>125</sup> a plurality of the Court held that the Treaty Power cannot be used to avoid the Constitution's affirmative limitation on congressional power—in that case, the Bill of Rights.<sup>126</sup> Thus, the Treaty Power could not be used to deprive a U.S. citizen of the right to a court trial. However, in the related case of *Missouri v. Holland*,<sup>127</sup> the Court adverted that the Treaty Power may be used to accomplish things that are not otherwise within the power of Congress. If the promotion of progress and the useful arts is not a limit on Congress's power, then *Holland* would govern and international agreements become a more powerful agency of legislative change in the domestic arena. Of course, Congress could, as it often does, limit the reach of an agreement through the use of implementing legislation, which then constitutes the only source of the treaty's domestic application.<sup>128</sup> Where, however, the root issue is Congress's capture

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*Should Create Global Norms*, 149 U. PA. L. REV. 469, 477 (2000) (“[a]lmost every significant reform of U.S. copyright law over the last twelve years, since the United States belatedly joined the Berne Convention in 1988, has reflected international influences”); Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 39 (2002) (noting that “significant aspects of U.S. copyright law are influenced by international concerns, and important parts are dictated by a growing body of public international law obligations”).

124. Leaffer, *supra* note 21, at 1598.

125. *Reid v. Covert*, 354 U.S. 1 (1957).

126. U.S. CONST. amends. I-X.

127. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

128. See, e.g., *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999) (stating that the scope of United States protection under the Berne Convention is defined by United States legislation: “Thus, while the Copyright Act, as amended by the BCIA, extends certain protection to the holders of copyright in Berne Convention works as there defined, the Copyright Act is the exclusive source of that protection.” The Berne Convention Implementation Act states that:

[T]he provisions of the Berne Convention—

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law, and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

Pub. L. 100-568, § 3, 102 Stat. 2853, 2853 (1988).

by special-interest groups, whose influence has proven just as powerful in the international arena,<sup>129</sup> implementing legislation in fact becomes another opportunity to secure or expand the gains made internationally, or to weaken or eliminate any public-interest limitations admitted by the treaty.<sup>130</sup> This was clearly the case with respect to the World Intellectual Property Organization's Copyright Treaty,<sup>131</sup> which was implemented very narrowly through the Digital Millennium Copyright Act.<sup>132</sup> The question of how the Treaty Power may expand indirectly the Copyright Power is squarely at issue in *Golan*. If the Court determines that the object of the Copyright Clause is a limitation on Congress's power, then under the rule in *Reid*, the scope of congressional power will yet again be addressed by a lower court.

#### IV. CONCLUSION

Copyright law recently has taken a place alongside the First Amendment and Due Process as an area of significant constitutional importance. Of course, copyright touches both of these areas and more. The ubiquitousness of copyright in modern American culture has occasioned an unprecedented economic influence exerted by the entertainment industry over the legislative branch, creating a movement of global proportion to limit the expansion of copyright. In the United States, the explicit constitutionalization of intellectual property matters has focused primarily on the nexus between copyright and the First

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Similarly, the Uruguay Round Agreements Act specifies that U.S. law shall prevail in the event of any conflict with the Uruguay Round Agreements. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102, 108 Stat. 4809, 4815 (1994).

129. Okediji, *supra* note 118 (analyzing the TRIPS Agreement negotiations using game theory, and arguing that the WTO dispute-settlement process should defer to a country's calculus of public welfare except in cases where the international forum is used as an excuse to avoid consideration of the public interest at the domestic level).

130. See Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L. & COMP. L. 315, 374-75 (2003/2004) (suggesting that developing countries adopt a practice of implementing legislation to strengthen the prospects that development concerns will be considered in deciding how the treaty will be incorporated in domestic law).

131. WIPO Copyright Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997).

132. For analysis of the WIPO negotiations and the success of the coalition of public interest groups and developing countries that opposed the expansionist digital agenda, see Samuelson, *supra* note 38.

Amendment.<sup>133</sup> However, the recent emphasis on constitutional concerns has been a central part of efforts to insulate traditional copyright rights (and for that matter intellectual property generally) from the rapid encroachment of greater propertization. This movement has not always been accompanied by careful examination of the ways in which the appeal to constitutional jurisprudence in any number of areas might actually affect or influence the Court's examination of intellectual property policy, nor of how they should. With the explicit politicization of copyright policy through interest-group activity, the role of the Supreme Court is now a significant aspect of the public choice problem facing advocates of the public domain. But it is also a cry for the Court to once again assume a dynamic deference, reminiscent of its brief period in the nineteenth century, which is faithful to congressional intent without abandoning constitutional interpretation. In the words of Justice Holmes, "[a] Constitution . . . is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."<sup>134</sup>

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133. See, e.g., Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1011-15, 1017-22 (1970); Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

134. *Lochner v. New York*, 198 U.S. 45, 75-76 (1905).