SUPREME COURT OF THE UNITED STATES

No. 01–618

ERIC ELDRED, ET AL., PETITIONERS *v.* JOHN D. ASHCROFT, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 15, 2003]

JUSTICE BREYER, dissenting.

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

The majority believes these conclusions rest upon practical judgments that at most suggest the statute is unwise, not that it is unconstitutional. Legal distinctions, however, are often matters of degree. *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting), overruled in part by *Alabama* v.

King & Boozer, 314 U. S. 1, 8–9 (1941); accord, *Walz* v. *Tax Comm'n of City of New York,* 397 U. S. 664, 678–679 (1970). And in this case the failings of degree are so serious that they amount to failings of constitutional kind. Although the Copyright Clause grants broad legislative power to Congress, that grant has limits. And in my view this statute falls outside them.

I

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

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

Consequently, I would review plausible claims that a copyright statute seriously, and unjustifiably, restricts the dissemination of speech somewhat more carefully than

reference to this Court's traditional Commerce Clause jurisprudence might suggest, cf. *ante*, at 13–14, and n. 10. There is no need in this case to characterize that review as a search for "'congruence and proportionality,'" *ante*, at 27, or as some other variation of what this Court has called "intermediate scrutiny," *e.g.*, *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.,* 483 U. S. 522, 536–537 (1987) (applying intermediate scrutiny to a variant of normal trademark protection). Cf. *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 402–403 (2000) (BREYER, J., concurring) (test of proportionality between burdens and benefits "where a law significantly implicates competing constitutionally protected interests"). Rather, it is necessary only to recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture. In this sense only, and where line-drawing among constitutional interests is at issue, I would look harder than does the majority at the statute's rationality—though less hard than precedent might justify, see, *e.g.*, *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 446–450 (1985); *Plyler* v. *Doe*, 457 U. S. 202, 223–224 (1982); *Department of Agriculture* v. *Moreno,* 413 U. S. 528, 534–538 (1973).

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

Davis, 301 U. S. 619, 640 (1937).

II

A

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

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

That is how the Court previously has described the Clause's objectives. See also *Mazer* v. *Stein,* 347 U. S. 201, 219 (1954) ("[C]opyright law . . . makes reward to the owner a secondary consideration" (internal quotation marks omitted)); *Sony*, *supra*, at 429 ("[L]imited grant" is "intended . . . to allow the public access to the products of [authors'] genius after the limited period of exclusive control has expired"); *Harper & Row*, *supra*, at 545 (Copyright is "intended to increase and not to impede the harvest of knowledge"). But cf. *ante*, at 21–22, n. 18. And, in doing so, the Court simply has reiterated the views of the Founders.

Madison, like Jefferson and others in the founding generation, warned against the dangers of monopolies. See, *e.g.*, Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments. in J. Madison, Writings 756 (J. Rakove ed. 1999) (hereinafter Madison on Monopolies); Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 Papers of Thomas Jefferson 443 (J. Boyd ed. 1956) (hereinafter Papers of Thomas Jefferson) (arguing against even copyright monopolies); 2 Annals of Cong. 1917 (Gales and Seaton eds. 1834) (statement of Rep. Jackson in the First Congress, Feb. 1791) ("What was it drove our forefathers to this country? Was it not the ecclesiastical corporations and perpetual monopolies of England and Scotland?"). Madison noted that the Constitution had "limited them to two cases, the authors of Books, and of useful inventions." Madison on Monopolies 756. 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). *Ibid.* Madison concluded that "under that limitation a sufficient recompence and encouragement may be given." *Ibid.* But he warned in general that monopolies must be "guarded with strictness agst abuse." *Ibid.*

Many Members of the Legislative Branch have expressed themselves similarly. Those who wrote the House Report on the landmark Copyright Act of 1909, for example, said that copyright was not designed "primarily" to "benefit" the "author" or "any particular class of citizens, however worthy." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 6–7 (1909). Rather, under the Constitution, copyright was designed "primarily for the benefit of the public," for "the benefit of the great body of people, in that it will stimulate writing and invention." *Id.*, at 7. And were a copyright statute not "believed, in fact, to accomplish"

the basic constitutional objective of advancing learning, that statute "would be beyond the power of Congress" to enact. *Id.*, at 6–7. Similarly, those who wrote the House Report on legislation that implemented the Berne Convention for the Protection of Literary and Artistic Works said that "[t]he constitutional purpose of copyright is to facilitate the flow of ideas in the interest of learning." H. R. Rep. No. 100–609, p. 22 (1988) (internal quotation marks omitted). They added:

> "Under the U. S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and . . . when the limited term . . . expires and the creation is added to the public domain." *Id.*, at 17.

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 expiration of a copyright's "limited Tim[e]"—a time that (like "a *limited* monarch") is "restrain[ed]" and "circumscribe[d]," "not [left] at large," 2 S. Johnson, A Dictionary of the English Language 1151 (4th rev. ed. 1773). I would examine the statute's effects in light of these well-established constitutional purposes.

B

This statute, like virtually every copyright statute, imposes upon the public certain expression-related costs in the form of (1) royalties that may be higher than necessary to evoke creation of the relevant work, and (2) a require-

ment that one seeking to reproduce a copyrighted work must obtain the copyright holder's permission. The first of these costs translates into higher prices that will potentially restrict a work's dissemination. The second means search costs that themselves may prevent reproduction even where the author has no objection. Although these costs are, in a sense, inevitable concomitants of copyright protection, there are special reasons for thinking them especially serious here.

First, the present statute primarily benefits the holders of existing copyrights, *i.e.*, copyrights on works already created. And a Congressional Research Service (CRS) study prepared for Congress indicates that the added royalty-related sum that the law will transfer to existing copyright holders is large. E. Rappaport, CRS Report for Congress, Copyright Term Extension: Estimating the Economic Values (1998) (hereinafter CRS Report). In conjunction with official figures on copyright renewals, the CRS Report indicates that only about 2% of copyrights between 55 and 75 years old retain commercial value—*i.e.*, still generate royalties after that time. Brief for Petitioners 7 (estimate, uncontested by respondent, based on data from the CRS, Census Bureau, and Library of Congress). But books, songs, and movies of that vintage still earn about $400 million per year in royalties. CRS Report 8, 12, 15. Hence, (despite declining 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." See *id.*, at 16.

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 Air-

lines has had to pay for the right to play George Gershwin's 1924 classic Rhapsody in Blue represents a cost of doing business, potentially reflected in the ticket prices of those who fly. See Ganzel, Copyright or Copywrong? Training 36, 42 (Dec. 2002). Further, the likely amounts of extra royalty payments are large enough to suggest that unnecessarily high prices will unnecessarily restrict distribution of classic works (or lead to disobedience of the law)—not just in theory but in practice. Cf. CRS Report 3 ("[N]ew, cheaper editions can be expected when works come out of copyright"); Brief for College Art Association et al. as *Amici Curiae* 24 (One year after expiration of copyright on Willa Cather's My Antonia, seven new editions appeared at prices ranging from $2 to $24); Ganzel, *supra*, at 40–41, 44 (describing later abandoned plans to charge individual Girl Scout camps $257 to $1,439 annually for a license to sing songs such as God Bless America around a campfire).

A second, equally important, cause for concern arises out of the fact that copyright extension imposes a "permissions" requirement—not only upon potential users of "classic" works that still retain commercial value, but also upon potential users of *any other work* still in copyright. Again using CRS estimates, one can estimate that, by 2018, the number of such works 75 years of age or older will be about 350,000. See Brief for Petitioners 7. Because the Copyright Act of 1976 abolished the requirement that an owner must renew a copyright, such still-in-copyright works (of little or no commercial value) will eventually number in the millions. See Pub. L. 94–553, §§302–304, 90 Stat. 2572–2576; U. S. Dept. of Commerce, Bureau of Census, Statistical History of the United States: From Colonial Times to the Present 956 (1976) (hereinafter Statistical History).

The potential users of such works include not only movie buffs and aging jazz fans, but also historians, scholars,

teachers, writers, artists, database operators, and researchers of all kinds—those who want to make the past accessible for their own use or for that of others. The permissions requirement can inhibit their ability to accomplish that task. Indeed, in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope.

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

Thus, the American Association of Law Libraries points out that the clearance process associated with creating an electronic archive, Documenting the American South, "consumed approximately a dozen man-hours" *per work*. Brief for American Association of Law Libraries et al. as *Amici Curiae* 20. The College Art Association says that the costs of obtaining permission for use of single images, short excerpts, and other short works can become prohibitively high; it describes the abandonment of efforts to include, *e.g.*, campaign songs, film excerpts, and documents exposing "horrors of the chain gang" in historical works or archives; and it points to examples in which copyright holders in effect have used their control of copyright to try to control the content of historical or cultural works. Brief for College Art Association et al. as *Amici Curiae* 7–13. The National Writers Union provides simi-

lar examples. Brief for National Writers Union et al. as *Amici Curiae* 25–27. Petitioners point to music fees that may prevent youth or community orchestras, or church choirs, from performing early 20th-century music. Brief for Petitioners 3–5; see also App. 16–17 (Copyright extension caused abandonment of plans to sell sheet music of Maurice Ravel's Alborada Del Gracioso). *Amici* for petitioners describe how electronic databases tend to avoid adding to their collections works whose copyright holders may prove difficult to contact, see, *e.g.*, Arms, Getting the Picture: Observations from the Library of Congress on Providing Online Access to Pictorial Images, 48 Library Trends 379, 405 (1999) (describing how this tendency applies to the Library of Congress' own digital archives).

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. See *infra*, at 13–15. 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 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. See *supra*, at 8. The costs to the users of nonprofit databases, now numbering in the low millions, will multiply as the

use of those computer-assisted databases becomes more prevalent. See, *e.g.*, Brief for Internet Archive et al. as *Amici Curiae* 2, 21, and n. 37 (describing nonprofit Project Gutenberg). And the qualitative costs to education, learning, and research will multiply as our children become ever more dependent for the content of their knowledge upon computer-accessible databases—thereby condemning that which is not so accessible, say, the cultural content of early 20th-century history, to a kind of intellectual purgatory from which it will not easily emerge.

The majority finds my description of these permissions-related harms overstated in light of Congress' inclusion of a statutory exemption, which, during the last 20 years of a copyright term, exempts "facsimile or digital" reproduction by a "library or archives" "for purposes of preservation, scholarship, or research," 17 U. S. C. §108(h). *Ante*, at 30. 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. 17 U. S. C. §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 non-commercial, aspects?

The majority also invokes the "fair use" exception, and it notes that copyright law itself is restricted to protection of a work's expression, not its substantive content. *Ante*, at 29–30. 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 Depres-

sion 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, see *supra*, at 6–11, will occur despite the 1998 Act's exemptions and despite the other "First Amendment safeguards" in which the majority places its trust, *ante*, at 29–30.

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

Because this subsection concerns only costs, not countervailing benefits, I shall simply note here that, with

respect to films as with respect to other works, extension does cause substantial harm to efforts to preserve and to disseminate works that were created long ago. And I shall turn to the second half of the equation: Could Congress reasonably have found that the extension's toll-related and permissions-related harms are justified by extension's countervailing preservationist incentives or in other ways?

C

What copyright-related benefits might justify the statute's extension of copyright protection? First, no one could reasonably conclude that copyright's traditional economic rationale applies here. The extension will not act as an economic spur encouraging authors to create new works. See *Mazer,* 347 U. S., at 219 (The "economic philosophy" of the Copyright Clause is to "advance public welfare" by "encourag[ing] individual effort" through "personal gain"); see also *ante*, at 21–22, n. 18 ("[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones"). No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter. After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term)—must be far smaller. See s*upra*, at 7; CRS Report 7 (estimating that, even after copyright renewal, about 3.8% of copyrighted books go out of print each year). And any remaining monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them. Using assumptions about the time value of money provided us by a group of economists (including five Nobel prize winners), Brief for George A. Akerlof et al. as *Amici*

Curiae 5–7, it seems fair to say that, for example, a 1% likelihood of earning $100 annually for 20 years, starting *75 years into the future*, is worth less than seven cents today. See *id.*, at 3a; see also CRS Report 5. See generally Appendix, Part A, *infra*.

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.'" *Ante*, at 16–17, n. 15. But the first of these amounts to no more than a set of undeniably true propositions about the value of incentives *in general*. And the applicability of the second to *this* Act is mysterious. How will extension help today's Noah Webster create new works 50 years after his death? Or is that hypothetical Webster supposed to support himself with the extension's present discounted value, *i.e.*, a few pennies? Or (to change the metaphor) is the argument that Dumas *fils* would have written more books had Dumas *père*'s Three Musketeers earned more royalties?

Regardless, even if this cited testimony were meant more specifically to tell Congress that somehow, somewhere, some potential author might be moved by the thought of great-grandchildren receiving copyright royalties a century hence, so might some potential author also be moved by the thought of royalties being paid for two centuries, five centuries, 1,000 years, "'til the End of Time." And from a rational economic perspective the time difference among these periods *makes no real difference*. The present extension will produce a copyright period of protection that, even under conservative 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). See Appendix, Part A, *infra*. 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." Cf. Tr. of Oral Arg. 34 (Solicitor General's related concession).

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." *Ante*, at 18. Of course Congress did not intend to act unconstitutionally. But it may have sought to test the Constitution's limits. After all, the statute was named after a Member of Congress, who, the legislative history records, "wanted the term of copyright protection to last forever." 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono). See also Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H. R. 989 et al. before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, 104th Cong., 1st Sess., 94 (1995) (hereinafter House Hearings) (statement of Rep. Sonny Bono) (questioning why copyrights should ever expire); *ibid.* (statement of Rep. Berman) ("I guess we could . . . just make a permanent moratorium on the expiration of copyrights"); *id.*, at 230 (statement of Rep. Hoke) ("Why 70 years? Why not forever? Why not 150 years?"); cf. *ibid.* (statement of the Register of Copyrights) (In Copyright Office proceedings, "[t]he Songwriters Guild suggested a perpetual term"); *id.*, at 234 (statement of Quincy Jones) ("I'm particularly fascinated with Representative Hoke's statement. . . . [W]hy not forever?"); *id.*, at 277 (statement of Quincy Jones) ("If we can start with 70, add 20, it would be a good

start"). And the statute ended up creating a term so long that (were the vesting of 19th-century real property at issue) it would typically violate the traditional rule against perpetuities. See 10 R. Powell, Real Property §§71.02[2]–[3], p. 71–11 (M. Wolf ed. 2002) (traditional rule that estate must vest, if at all, within lives in being plus 21 years); cf. *id.* §71.03, p. 71–15 (modern statutory perpetuity term of 90 years, 5 years shorter than 95-year copyright terms).

In any event, the incentive-related numbers are far too small for Congress to have concluded rationally, even with respect to new works, that the extension's economic-incentive effect could justify the serious expression-related harms earlier described. See Part II–B, *supra*. And, of course, in respect to works already created—the source of many of the harms previously described—*the statute creates no economic incentive at all*. See *ante*, at 5–6 (STEVENS, J., dissenting).

Second, the Court relies heavily for justification upon international uniformity of terms. *Ante*, at 4, 14–15. Although it can be helpful to look to international norms and legal experience in understanding American law, cf. *Printz* v. *U. S.*, 521 U. S. 898, 977 (1997) (BREYER, J., dissenting), in this case the justification based upon foreign rules is surprisingly weak. Those who claim that significant copyright-related benefits flow from greater international uniformity of terms point to the fact that the nations of the European Union have adopted a system of copyright terms uniform among themselves. And the extension before this Court implements a term of life plus 70 years that appears to conform with the European standard. But how does "uniformity" help to justify this statute?

Despite appearances, the statute does *not* create a uniform American-European term with respect to the lion's share of the economically significant works that it af-

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

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

What benefit, then, might this partial future uniformity achieve? The majority refers to "greater incentive for American and other authors to create and disseminate their work in the United States," and cites a law review article suggesting a need to "'avoid competitive disadvantages.'" *Ante*, at 15. 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. Brief for Respondent 38. And the statute, by creating a uniformly longer term, corrects for the disincentive that this disuniformity might otherwise produce.

That disincentive, however, could not possibly bring about serious harm of the sort that the Court, the Solicitor General, 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. See *supra*, at 13–14. And a commercial decision that turned upon such a difference would have had to have rested previously upon a knife edge so fine as to be invisible. A rational legislature could not give major weight to an invisible, likely nonexistent incentive-related effect.

But if there is no incentive-related benefit, what is the benefit of the future uniformity that the statute only partially achieves? Unlike the Copyright Act of 1976, this statute does not constitute part of an American effort to conform to an important international treaty like the Berne Convention. See H. R. Rep. No. 94–1476, pp. 135–136 (1976) (The 1976 Act's life-plus-50 term was "required for adherence to the Berne Convention"); S. Rep. No. 94–473, p. 118 (1975) (same). Nor does European acceptance of the longer term seem to reflect more than special European institutional considerations, *i.e.*, the needs of, and the international politics surrounding, the development of the European Union. House Hearings 230 (statement of the Register of Copyrights); *id.*, at 396–398 (statement of J. Reichman). European and American copyright law

have long coexisted despite important differences, including Europe's traditional respect for authors' "moral rights" and the absence in Europe of constitutional restraints that restrict copyrights to "limited Times." See, *e.g.*, Kwall, Copyright and the Moral Right: Is an American Marriage Possible? 38 Vand. L. Rev. 1, 1–3 (1985) (moral rights); House Hearings 187 (testimony of the Register of Copyrights) ("limited [T]imes").

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

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

This view of the Clause finds strong support in the writings of Madison, in the antimonopoly environment in which the Framers wrote the Clause, and in the history of the Clause's English antecedent, the Statute of Anne—a statute which sought to break up a publishers' monopoly by offering, as an alternative, an author's monopoly of limited duration. See Patterson, Understanding the Copyright Clause, 47 J. Copyright Society 365, 379 (2000) (Statute of Anne); L. Patterson, Copyright in Historical Perspective 144–147 (1968) (same); Madison on Monopolies 756–757; Papers of Thomas Jefferson 442–443; The Constitutional Convention and the Formation of the Union 334, 338 (W. Solberg 2d ed. 1990); see also *supra*, at 5.

This view finds virtually conclusive support in the Court's own precedents. See *Sony,* 464 U. S., at 429 (The Copyright Clause is "intended . . . to allow the public access . . . after the limited period of exclusive control"); *Stewart,* 495 U. S., at 228 (The copyright term is limited to avoid "permanently depriv[ing]" the public of "the fruits of an artist's labors"); see also *supra*, at 4.

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

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

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

Given this support, it is difficult to accept the conflicting rationale that the publishers advance, namely that extension, rather than limitation, of the grant will, by rewarding publishers with a form of monopoly, promote, rather than retard, the dissemination of works already in existence. Indeed, given these considerations, this rationale seems constitutionally perverse—unable, constitutionally speaking, to justify the blanket extension here at issue. Cf. *ante*, at 20 (STEVENS, J., dissenting).

Fourth, the statute's legislative history suggests another possible justification. That history refers frequently to the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports. See, *e.g.*, S. Rep. No. 104–315, p. 3 (1996) ("The purpose of this bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade"); 144 Cong. Rec., at H9951 (statement of Rep. Foley) (noting "the importance of this issue to America's creative community," "[w]hether it is Sony, BMI, Disney" or other companies). I recognize that Congress has some-

times found that suppression of competition will help Americans sell abroad—though it has simultaneously taken care to protect American buyers from higher domestic prices. See, *e.g.*, Webb-Pomerene Act (Export Trade), 40 Stat. 516, as amended, 15 U. S. C. §§61–65; see also IA P. Areeda & H. Hovenkamp, Antitrust Law ¶251a, pp. 134–137 (2d ed. 2000) (criticizing export cartels). In doing so, however, Congress has exercised its commerce, not its copyright, power. I can find nothing in the Copyright Clause that would authorize Congress to enhance the 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.

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. *Ante*, at 16, and n. 14. The first fact seems to argue not for, but instead against, extension. See Part II–B, *supra*. The second fact seems already corrected for by the 1976 Act's life-plus-50 term, which automatically grows with lifespans. Cf. Department of Health and Human Services, Centers for Disease Control and Prevention, Deaths: Final Data for 2000 (2002) (Table 8) (reporting a 4-year increase in expected lifespan between 1976 and 1998). And the third fact—that adults are having children later in life—is a makeweight at best, providing no explanation of why the 1976 Act's term of 50 years after an author's death—a longer term than was available to authors themselves for most of our Nation's history—is an insufficient potential bequest. The weakness of these final rationales simply

underscores the conclusion that emerges from consideration of earlier attempts at justification: There is no legitimate, serious copyright-related justification for this statute.

III

The Court is concerned that our holding in this case not inhibit the broad decisionmaking leeway that the Copyright Clause grants Congress. *Ante*, at 13–14, 17, 31–32. It is concerned about the implications of today's decision for the Copyright Act of 1976—an Act that changed copyright's basic term from 56 years (assuming renewal) to life of the author plus 50 years, *ante*, at 3. *Ante*, at 31. It is concerned about having to determine just how many years of copyright is too many—a determination that it fears would require it to find the "right" constitutional number, a task for which the Court is not well suited. See *ante*, at 32; but cf. *ante*, at 19, n. 17.

I share the Court's initial concern, about intrusion upon the decisionmaking authority of Congress. See *ante*, at 14, n. 10. But I do not believe it intrudes upon that authority to find the statute unconstitutional on the basis of (1) a legal analysis of the Copyright Clause's objectives, see *supra*, at 4–6, 19–21; (2) the total implausibility of any incentive effect, see *supra*, at 13–16; and (3) the statute's apparent failure to provide significant international uniformity, see *supra*, at 16–19. Nor does it intrude upon congressional authority to consider rationality in light of the expressive values underlying the Copyright Clause, related as it is to the First Amendment, and given the constitutional importance of correctly drawing the relevant Clause/Amendment boundary. *Supra*, at 2–4. We cannot avoid the need to examine the statute carefully by saying that "Congress has not altered the traditional contours of copyright protection," *ante*, at 31, for the sentence points to the question, rather than the answer. Nor

should we avoid that examination here. That degree of judicial vigilance—at the far outer boundaries of the Clause—is warranted if we are to avoid the monopolies and consequent restrictions of expression that the Clause, read consistently with the First Amendment, seeks to preclude. And that vigilance is all the more necessary in a new Century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation's economy and the lives of its citizens.

I do not share the Court's concern that my view of the 1998 Act could automatically doom the 1976 Act. Unlike the present statute, the 1976 Act thoroughly revised copyright law and enabled the United States to join the Berne Convention—an international treaty that requires the 1976 Act's basic life-plus-50 term as a condition for substantive protections from a copyright's very inception, Berne Conv. Art. 7(1). Consequently, the balance of copyright-related harms and benefits there is far less one-sided. The same is true of the 1909 and 1831 Acts, which, in any event, provided for maximum terms of 56 years or 42 years while requiring renewal after 28 years, with most copyrighted works falling into the public domain after that 28-year period, well before the putative maximum terms had elapsed. See *ante*, at 3; Statistical History 956–957. Regardless, the law provides means to protect those who have reasonably relied upon prior copyright statutes. See *Heckler* v. *Mathews,* 465 U. S. 728, 746 (1984). And, in any event, we are not here considering, and we need not consider, the constitutionality of other copyright statutes.

Neither do I share the Court's aversion to line-drawing in this case. Even if it is difficult to draw a single clear bright line, the Court could easily decide (as I would decide) that this particular statute simply goes too far. And such examples—of what goes too far—sometimes offer better constitutional guidance than more absolute-

sounding rules. In any event, "this Court sits" in part to decide when a statute exceeds a constitutional boundary. See *Panhandle Oil,* 277 U. S., at 223 (Holmes, J., dissenting). In my view, "[t]ext, history, and precedent," *ante*, at 7–8, support both the need to draw lines in general and the need to draw the line here short of this statute. See *supra*, at 1–6, 19–21. But see *ante*, at 8, n. 4.

Finally, the Court complains that I have not "restrained" my argument or "train[ed my] fire, as petitioners do, on Congress' choice to place existing and future copyrights in parity." *Ante*, at 2, n. 1, and 8, n. 4. The reason that I have not so limited my argument is my willingness to accept, for purposes of this opinion, the Court's understanding that, for reasons of "[j]ustice, policy, and equity"—as well as established historical practice—it is not "categorically beyond Congress' authority" to "exten[d] the duration of existing copyrights" to achieve such parity. *Ante*, at 13 (internal quotation marks omitted). I have accepted this view, however, only for argument's sake—putting to the side, for the present, JUSTICE STEVENS' persuasive arguments to the contrary, *ante*, at 5–22 (dissenting opinion). And I make this assumption only to emphasize the lack of rational justification for the present statute. A desire for "parity" between *A* (old copyrights) and *B* (new copyrights) cannot justify extending *A* when there is no rational justification for extending *B*. At the very least, (if I put aside my rationality characterization) to ask *B* to support *A* here is like asking Tom Thumb to support Paul Bunyan's ox. Where the case for extending new copyrights is itself so weak, what "justice," what "policy," what "equity" can warrant the tolls and barriers that extension of existing copyrights imposes?

IV

This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copy-

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

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

I respectfully dissent.

APPENDIX TO OPINION OF BREYER, J.

A

The text's estimates of the economic value of 1998 Act copyrights relative to the economic value of a perpetual copyright, s*upra*, at 14–15, as well as the incremental value of a 20-year extension of a 75-year term, *supra*, at 13–14, rest upon the conservative future value and discount rate assumptions set forth in the brief of economist *amici*. Brief for George A. Akerlof et al. as *Amici Curiae* 5–7. Under these assumptions, if an author expects to live 30 years after writing a book, the copyright extension (by increasing the copyright term from "life of the author plus 50 years" to "life of the author plus 70 years") increases the author's expected income from that book—*i.e.*, the economic incentive to write—by no more than about 0.33%. *Id.*, at 6.

The text assumes that the extension creates a term of 95 years (the term corresponding to works made for hire and for all existing pre-1978 copyrights). Under the economists' conservative assumptions, the value of a 95-year copyright is slightly more than 99.8% of the value of a perpetual copyright. See also Tr. of Oral Arg. 50 (Petitioners' statement of the 99.8% figure). If a "life plus 70" term applies, and if an author lives 78 years after creation of a work (as with Irving Berlin and Alexander's Ragtime Band), the same assumptions yield a figure of 99.996%.

The most unrealistically conservative aspect of these assumptions, *i.e.*, the aspect most unrealistically favorable to the majority, is the assumption of a constant future income stream. In fact, as noted in the text, *supra*, at 7, uncontested data indicate that no author could rationally expect that a stream of copyright royalties will be constant forever. Indeed, only about 2% of copyrights can be ex-

pected to retain commercial value at the end of 55 to 75 years. *Ibid.* Thus, in the overwhelming majority of cases, the ultimate value of the extension to copyright holders will be zero, and the economic difference between the extended copyright and a perpetual copyright will be zero.

Nonetheless, there remains a small 2% or so chance that a given work will remain profitable. The CRS Report suggests a way to take account of both that likelihood and the related "decay" in a work's commercial viability: Find the annual decay rate that corresponds to the percentage of works that become commercially unavailable in any given year, and then discount the revenue for each successive year accordingly. See CRS Report 7. Following this approach, if one estimates, conservatively, that a full 2% of all works survives at the end of 75 years, the corresponding annual decay rate is about 5%. I instead (and again conservatively) use the 3.8% decay rate the CRS has applied in the case of books whose copyrights were renewed between 1950 and 1970. *Ibid.* Using this 3.8% decay rate and the economist *amici*'s proposed 7% discount rate, the value of a 95-year copyright is more realistically estimated not as 99.8%, but as 99.996% of the value of a perpetual copyright. The comparable "Irving Berlin" figure is 99.99999%. (With a 5% decay rate, the figures are 99.999% and 99.999998%, respectively.) Even these figures seem likely to be underestimates in the sense that they assume that, if a work is still commercially available, it earns as much as it did in a year shortly after its creation.

B

Conclusions regarding the economic significance of "works made for hire" are judgmental because statistical information about the ratio of "for hire" works to all works is scarce. Cf. *Community for Creative Non-Violence* v. *Reid,* 490 U. S. 730, 737–738, n. 4 (1989). But we know that, as

of 1955, copyrights on "for hire" works accounted for 40% of newly registered copyrights. Varmer, Works Made for Hire and on Commission, Study No. 13, in Copyright Law Revision Studies Nos. 1–19, prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 139, n. 49 (Comm. Print 1960). We also know that copyrights on works typically made for hire—feature-length movies—were renewed, and since the 1930's apparently have remained commercially viable, at a higher than average rate. CRS Report 13–14. Further, we know that "harmonization" looks to benefit United States exports, see, *e.g.*, H. R. Rep. No. 105–452, p. 4 (1998), and that films and sound recordings account for the dominant share of export revenues earned by new copyrighted works of potential lasting commercial value (*i.e.*, works other than computer software), S. Siwek, Copyright Industries in the U. S. Economy: The 2002 Report 17. It also appears generally accepted that, in these categories, "for hire" works predominate. *E.g.*, House Hearings 176 (testimony of the Register of Copyrights) ("[A]udiovisual works are generally works made for hire"). Taken together, these circumstances support the conclusion in the text that the extension fails to create uniformity where it would appear to be most important—pre-1978 copyrighted works nearing the end of their pre-extension terms, and works made for hire.