

foreclose JLWOP.<sup>115</sup> On remand, Kuntrell Jackson and Evan Miller would meet this bar easily.

And, because *Miller* presumes that some or all of these mitigating factors affect the vast majority of juveniles, a faithful procedural application could shift the burden to the State to demonstrate that the offender lacks mitigating factors typical among children. With this approach, an offender's age would establish a presumption of diminished culpability and enhanced capacity for change, rebutted only if the State demonstrated the absence of any relevant age-related considerations.<sup>116</sup>

At heart, an implementation of procedural safeguards true to *Miller*'s underlying premises amounts to something close to a de facto substantive holding: children should be sorted from adults and, except when indistinguishable from adults, be spared LWOP. Considering the underlying psychological premise, Justice Kagan's suggestion that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon"<sup>117</sup> sounds less like dicta.

#### F. Copyright Clause

*Restoring Copyright to Public Domain Works.* — The only clause in the body of the Constitution to contain both a prefatory and an operative clause,<sup>1</sup> the uniquely structured Copyright Clause<sup>2</sup> has generated debate about the scope of powers that it confers upon Congress.<sup>3</sup> While most scholars acknowledge that the prefatory clause is

<sup>115</sup> A critic might charge that this burden-of-proof system, which would foreclose JLWOP for any children with age-related reduced culpability or enhanced capacity for change, is not supported by objective indicia of community standards. Cf. *Miller*, 132 S. Ct. at 2490 (Alito, J., dissenting). Under this view, the *Miller* opinion would be trapped, necessarily conflicting either with the logic of *Graham* or with the Eighth Amendment. The critic would be perceptive but mistaken: the same strong arguments made in support of an Eighth Amendment categorical JLWOP ban apply here with even greater force because the burden-of-proof system allows for the rare case when chronological age does not match developmental maturity. See sources cited *supra* note 85.

A critic might also complain that the burden-of-proof system does not allow for the consideration of the severity of an offense. But it does: parole boards can weigh the qualities of crimes. States could also use death penalty-like sentencing — which calls for consideration of offense-related aggravating factors — if final sentencing of juvenile offenders is deferred until after children have time to mature; courts could issue provisional sentences but delay a final JLWOP determination until after an offender's maturation allows experts to assess more accurately her incorrigibility.

<sup>116</sup> Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (detailing burden shifting to a defendant when a plaintiff establishes a prima facie case of discrimination).

<sup>117</sup> *Miller*, 132 S. Ct. at 2469.

<sup>1</sup> See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1774 (2006).

<sup>2</sup> U.S. CONST. art. I, § 8, cl. 8. The Copyright Clause provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

<sup>3</sup> See, e.g., Oliar, *supra* note 1, at 1775–76, 1781–88.

directed to an end (“Progress of Science”) and the operative clause provides the means (“securing for limited Times to Authors . . . the exclusive Right to their . . . Writings”),<sup>4</sup> there is no consensus on what the proper relationship between these clauses should be. Last Term, in *Golan v. Holder*,<sup>5</sup> the Supreme Court upheld section 514 of the Uruguay Round Agreements Act<sup>6</sup> (URAA), which “restored” copyright status to numerous foreign works that were already in the U.S. public domain and which was passed to comply with U.S. obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>7</sup> (TRIPS),<sup>8</sup> against Copyright Clause and First Amendment challenges.<sup>9</sup> The ambiguity over the proper relationship between the prefatory and operative clauses underlies the Justices’ disagreement about the URAA’s constitutionality: The majority’s expansive reading of the operative clause formed the basis for a broad reading of the prefatory clause, leading to the majority’s conclusion that dissemination was a form of progress. The dissent took the opposite view, that the operative clause actually contracted the prefatory language. The dissent’s reading, while aptly focused on the incentive to create, might have insensibly curbed congressional latitude to manage foreign affairs. However, the Court’s interpretive approach, combined with its deference to Congress’s factual findings, effectively gave Congress the reins to define the scope of its copyright power. The result may be public reluctance to invest in creation of new works given uncertainty over the scope of this right.

In 1989, the United States joined the Berne Convention for the Protection of Literary and Artistic Works<sup>10</sup> (Berne), which mandated that member countries accord one another minimum levels of copyright protection and treat other countries’ creators as well as they treat their own.<sup>11</sup> Before 1994, the United States had not fully complied with Berne’s terms in part because Berne lacked a meaningful enforcement mechanism.<sup>12</sup> In 1994, however, the Uruguay Round of multilateral trade negotiations begot the World Trade Organization (WTO) and TRIPS, both of which the United States joined.<sup>13</sup> TRIPS required that member countries fully implement Berne’s terms or else possibly face WTO-enforced consequences, such as cross-sector retalia-

<sup>4</sup> *Id.* at 1774.

<sup>5</sup> 132 S. Ct. 873 (2012).

<sup>6</sup> 17 U.S.C. § 104A (2006).

<sup>7</sup> Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

<sup>8</sup> *Golan*, 132 S. Ct. at 881–82.

<sup>9</sup> *Id.* at 877–78.

<sup>10</sup> Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention]; see *Golan*, 132 S. Ct. at 879.

<sup>11</sup> Berne Convention, *supra* note 10, arts. 5, 7, at 231–33, 235–37.

<sup>12</sup> *Golan*, 132 S. Ct. at 879–81.

<sup>13</sup> *Id.* at 881.

tion and tariffs.<sup>14</sup> In response to this new pressure, Congress augmented its protection of foreign works through passage of the URAA.<sup>15</sup> Specifically, section 514 of the URAA extended copyright to works that garnered protection in their countries of origin but not in the United States,<sup>16</sup> while mitigating its own impact by reducing the liability of parties who had relied on the restored works.<sup>17</sup>

In 2001, orchestra conductors, educators, performers, publishers, film archivists, and motion picture distributors — all of whom had formerly freely accessed works that section 514 removed from the public domain — sued to challenge section 514 on two different constitutional grounds.<sup>18</sup> First, they argued section 514 exceeded Congress's authority under the Copyright Clause because (1) the law's removal of works from the public domain contravened the "limited Times" provision of the clause, and (2) the law failed to serve the clause's aim of "the creation and spread of knowledge and learning" as it does not "spur[] the creation of . . . new works."<sup>19</sup> Second, they argued section 514 violated the First Amendment because the law restricted an individual's freedom to express himself through works that had previously been in the public domain.<sup>20</sup>

The U.S. District Court for the District of Colorado granted the Attorney General's motion for summary judgment,<sup>21</sup> concluding that Congress acted within its Copyright Clause authority<sup>22</sup> and that "private censorship via copyright enforcement [did] not implicate First Amendment concerns."<sup>23</sup>

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 881–82.

<sup>16</sup> *Id.* This extension reached three types of foreign works: (1) works that had never received copyright protection in the United States because the United States did not previously have copyright relations with their country of origin; (2) pre-1972 sound recordings, a subject matter the United States did not previously protect; and (3) works previously refused copyright protection due to their creator's failure to observe U.S. copyright formalities in place at the time. *Id.* at 882. However, section 514 did not protect works that had already fallen into the public domain after the expiration of a full copyright term. *Id.*

<sup>17</sup> See *id.* at 883. Specifically, (1) parties are not liable for usage of foreign works that occurred before their restoration; (2) anyone may copy and use the restored works for one year following section 514's enactment; (3) "reliance parties" — those who had used a foreign work before the URAA's enactment — remain free to exploit the work until the owner of the restored copyright gives notice of intent to enforce; and (4) "anyone who, before the URAA's enactment, created a 'derivative work' based on a restored work may indefinitely exploit the derivation upon payment to the copyright holder of 'reasonable compensation.'" *Id.* (quoting 17 U.S.C. § 104A(d)(3) (2006)).

<sup>18</sup> See *id.* at 878.

<sup>19</sup> *Id.* at 888 (alterations in original) (quoting Brief for the Petitioners at 21, 24, *Golan*, 132 S. Ct. 873 (No. 10-545), 2011 WL 2423674, at \*21, \*24) (internal quotation marks omitted).

<sup>20</sup> *Id.* at 891.

<sup>21</sup> *Golan v. Gonzales*, No. Civ.01-B-1854, 2005 WL 914754, at \*19 (D. Colo. Apr. 20, 2005).

<sup>22</sup> *Id.* at \*14.

<sup>23</sup> *Id.* at \*17.

The Court of Appeals for the Tenth Circuit affirmed in part.<sup>24</sup> Congress's enactment of the URAA, the Tenth Circuit agreed, did not exceed its power under the Copyright Clause because it could regulate the public domain "in both directions."<sup>25</sup> But the Tenth Circuit remanded the First Amendment issues: reading *Eldred v. Ashcroft*<sup>26</sup> to suggest that only congressional acts that "alter[] the traditional contours of copyright protection" are subject to First Amendment scrutiny,<sup>27</sup> the Tenth Circuit directed the district court to reconsider whether the URAA deviated from the "bedrock principle" of copyright law that works that enter the public domain must stay there.<sup>28</sup>

On remand, the district court granted summary judgment to the plaintiffs.<sup>29</sup> Determining that section 514 was a "content-neutral restriction," the court applied "intermediate scrutiny" to evaluate the URAA's constitutionality under the First Amendment.<sup>30</sup> It considered the government's three asserted interests: complying with Berne, obtaining reciprocity for American works abroad, and correcting historical inequities.<sup>31</sup> The court concluded that while complying with Berne was a legitimate interest, section 514 was substantially broader than necessary to achieve it; the court then found that neither of the other two interests were legitimate, nor was section 514 narrowly tailored to meet those interests.<sup>32</sup> Thus, section 514 did not survive First Amendment scrutiny.<sup>33</sup>

The Tenth Circuit reversed.<sup>34</sup> Showing more deference to the government than the district court had, it held that the URAA did survive First Amendment scrutiny because it was narrowly tailored to advance important government interests, in particular protecting U.S. copyright holders' interests abroad.<sup>35</sup>

The Supreme Court affirmed.<sup>36</sup> Writing for the Court, Justice Ginsburg<sup>37</sup> held that section 514 withstood both Copyright Clause and

<sup>24</sup> *Golan v. Gonzales*, 501 F.3d 1179, 1182 (10th Cir. 2007).

<sup>25</sup> *Id.* at 1187 (quoting Appellants' Opening Brief at 50, *Golan*, 501 F.3d 1179 (No. 05-1259), 2005 WL 2673976, at \*50) (internal quotation mark omitted).

<sup>26</sup> 537 U.S. 186 (2003).

<sup>27</sup> *Golan*, 501 F.3d at 1187 (quoting *Eldred*, 537 U.S. at 221) (internal quotation marks omitted).

<sup>28</sup> *Id.*

<sup>29</sup> *Golan v. Holder*, 611 F. Supp. 2d 1165, 1177 (D. Colo. 2009).

<sup>30</sup> *Id.* at 1170–71.

<sup>31</sup> *Id.* at 1172–77.

<sup>32</sup> *Id.*

<sup>33</sup> *See id.*

<sup>34</sup> *Golan v. Holder*, 609 F.3d 1076, 1080 (10th Cir. 2010).

<sup>35</sup> *Id.* at 1095.

<sup>36</sup> *Golan*, 132 S. Ct. at 894.

<sup>37</sup> Justice Ginsburg was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Sotomayor. Justice Kagan recused herself.

First Amendment challenges.<sup>38</sup> First, the text of the Copyright Clause did not exclude application of copyright protection to works in the public domain.<sup>39</sup> The Court dismissed as an irrelevant hypothetical the plaintiffs' argument that the Court risked allowing Congress to institute unlimited installments of "limited" terms.<sup>40</sup> Second, the Court found that historical congressional practices of protecting works once freely available and of restoring patent validity further legitimized the URAA.<sup>41</sup> Third, it assessed the contours of the Copyright Clause's prefatory words, that Congress is empowered to "promote the Progress of Science and useful Arts."<sup>42</sup> Countering plaintiffs' argument that the URAA did not promote the "Progress of Science" because it did not spur the creation of new works, the Court explained that the clause "does not demand that each copyright provision, examined discretely, operate to induce new works. Rather, . . . the Clause 'empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause.'"<sup>43</sup> Those ends, the Court continued, could extend beyond the creation of new works to include adherence to an international copyright system, if Congress rationally concluded that such adherence would "serve the objectives of the Copyright Clause."<sup>44</sup> As such, the Court concluded that it had "no warrant to reject the rational judgment Congress made."<sup>45</sup>

The Court next determined that the URAA did not violate the First Amendment. First, it recognized that "some restriction on expression is the inherent and intended effect of every grant of copyright."<sup>46</sup> But given that the URAA left intact the "traditional contours" of copyright protection — that is, it did not disturb speech-protective safeguards such as the "idea/expression dichotomy"<sup>47</sup> and the fair use defense<sup>48</sup> —

<sup>38</sup> *Golan*, 132 S. Ct. at 878.

<sup>39</sup> *Id.* at 884. The Court declared that *Eldred v. Ashcroft*, 537 U.S. 186 (2003), was largely dispositive of this issue. *Golan*, 132 S. Ct. at 884–85. *Eldred* interpreted "limited Times" to mean not perpetual, thereby upholding the Copyright Term Extension Act (CTEA), which extended existing copyright terms by twenty years to yield a life-plus-seventy-years protected time span for newly authored works. *Eldred*, 537 U.S. at 201–10.

<sup>40</sup> *Golan*, 132 S. Ct. at 884–85.

<sup>41</sup> *Id.* at 885–87.

<sup>42</sup> *Id.* at 887–88 (quoting U.S. CONST. art. I, § 8, cl. 8) (internal quotation marks omitted).

<sup>43</sup> *Id.* at 888 (quoting *Eldred*, 537 U.S. at 222).

<sup>44</sup> *Id.* at 889.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> The "idea/expression dichotomy" is a distinction that "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Id.* at 890 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)) (internal quotation marks omitted).

<sup>48</sup> The fair use defense allows copyrighted works to be reproduced for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. *Id.*

the Court concluded that the URAA withstood First Amendment scrutiny and no heightened review was warranted.<sup>49</sup> Second, the Court rejected plaintiffs' arguments that such built-in safeguards were insufficient to protect their First Amendment rights since the URAA stripped their formerly unrestricted rights to use public domain works.<sup>50</sup> The Court stressed that section 514 "does not impose a blanket prohibition on public access";<sup>51</sup> rather, would-be users of a protected foreign work are free to pay, at market price, for their desired use of the work, just as they would for any protected domestic work.<sup>52</sup> Third, in response to the dissent's argument that potential users of copyrightable materials may incur hardships to locate the owners of "orphan works,"<sup>53</sup> the Court reasoned that this problem was not unique to would-be users of URAA-restored copyrightable materials<sup>54</sup> and the problem was more properly addressed by the legislature.<sup>55</sup>

Justice Breyer dissented.<sup>56</sup> He would have held that the statute exceeded Congress's copyright power.<sup>57</sup> For Justice Breyer, the only legitimate end under the Copyright Clause is eliciting new production.<sup>58</sup> And yet, he observed, section 514 "does not encourage anyone to produce a single new work."<sup>59</sup> Justice Breyer emphasized that "[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."<sup>60</sup> Assuming *arguendo* that dissemination was a permissible objective, Justice Breyer noted that any act that grants copyright is by definition one that inhibits dissemination.<sup>61</sup> The URAA hinders dissemination by allowing copyright holders to charge fees for works that

---

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 891–93.

<sup>51</sup> *Id.* at 892.

<sup>52</sup> *Id.* at 892–93.

<sup>53</sup> *Id.* at 893 (internal quotation marks omitted).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 894.

<sup>56</sup> *Id.* at 899 (Breyer, J., dissenting). Justice Alito joined Justice Breyer's dissent.

<sup>57</sup> *Id.* at 900.

<sup>58</sup> *Id.* In Justice Breyer's view, copyright law should be "utilitarian": monopoly rights should only be conferred "as an encouragement to men to pursue ideas which may produce utility." *Id.* at 901 (emphasis omitted) (quoting Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 PAPERS OF THOMAS JEFFERSON 379, 383 (J. Looney ed., 2009)) (internal quotation marks omitted).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 899 (alterations in original) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003)) (internal quotation marks omitted).

<sup>61</sup> *Id.* at 900.

consumers previously used for free<sup>62</sup> and by levying administrative burdens on those consumers attempting to use the “restored” works.<sup>63</sup>

Next, as for the First Amendment issue, Justice Breyer contended that the URAA’s removal of works from the public domain literally “‘abridges’ a preexisting freedom to speak.”<sup>64</sup> Moreover, it reverses payment expectations and rewards rent-seekers at the public’s expense.<sup>65</sup>

Finally, Justice Breyer remarked that the Court’s argument for expanding “Progress” to include dissemination of existing and future works proved too much, because it would justify restored copyright protections for any written works (such as the King James Bible).<sup>66</sup> Justice Breyer also disputed the soundness of the government’s economic justifications by observing that, while copyright protection may allow music publishers to raise prices and thus garner extra profits, they will not necessarily use the profits toward “the nonrepeatable costs of initial creation,” as opposed to investing in advertising, for example.<sup>67</sup> Justice Breyer concluded that ultimately the majority’s argument turned on a private, rather than public, benefit: how to make more money from sales of existing products, which is not a goal sanctioned by the Copyright Clause.<sup>68</sup>

Driving the disagreement between the majority and the dissent on the URAA’s constitutionality are their different understandings of the proper relationship between the goals contained in the Copyright Clause’s prefatory words, “to promote the Progress of Science,” and the means contained in the operative words, “securing for limited Times.”<sup>69</sup> The Court’s expansive reading of the operative clause paved

---

<sup>62</sup> *Id.* at 904.

<sup>63</sup> *Id.* at 905. These burdens, such as determining whether a work is subject to “restored copyright,” identifying copyright holders, and negotiating prices for usage, are magnified for older, more obscure “orphan works” with no ascertainable owner. *Id.* at 905–06. Such difficulties may even induce piracy. *Id.* at 906.

<sup>64</sup> *Id.* at 907.

<sup>65</sup> *Id.* at 906–07.

<sup>66</sup> *Id.* at 909–10.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* Justice Breyer also noted that the examples the majority drew of historical congressional removal of works from the public domain are not analogous to the URAA because those were private bills enacted during times of national crisis, such as wars, hurricanes, and other disasters. *Id.* at 909.

<sup>69</sup> There is no scholarly consensus on what limits the structure of the Copyright Clause places upon Congress. For example, one copyright treatise states that the prefatory clause is simply a preamble with no limiting effect. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (2012). A second understanding of the clause views the operative clause as a grant of power and the prefatory clause as a limitation on the purposes for which that power is used. See *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966). A third approach reads the prefatory clause as a grant of power and the operative clause as a qualification of that power. See

the way for a similarly expansive reading of the prefatory clause, expanding “Progress” to include dissemination. Casually paraphrasing “by securing for limited Times . . . exclusive right[s]” as “by enacting systems of copyright . . . protection,”<sup>70</sup> the Court broadened the meaning of the operative clause to give Congress wide leeway to create “intellectual property regimes.”<sup>71</sup> Such an expansive definition of congressional means necessarily augments the range of permissible congressional ends — when the context in which to interpret the term is as diffuse as “intellectual property regime,” then “Progress” inevitably takes on a similarly permissive meaning.<sup>72</sup> “Progress” itself is a broad, abstract term whose precise meaning is context dependent.<sup>73</sup> In fact, the Court left the definition of “Progress” nearly open ended, proclaiming that “[t]he creation of at least one new work . . . is not the sole way Congress may promote knowledge and learning,” but it declined to suggest which ends were unacceptable.<sup>74</sup>

In this way, the Court effectively allowed Congress to define “Progress.”<sup>75</sup> Instead of prescribing the bounds of what “Progress” could mean and then looking to see if Congress’s action fell within those bounds, the open-endedness of the definition of “Progress” allowed room for legitimizing the proposed action of Congress, whose goal the Court couched as “dissemination.”<sup>76</sup>

By itself, the Court’s broad reading of “Progress” may not be an eyebrow-raising jurisprudential move.<sup>77</sup> However, the Court historically has been extremely deferential to Congress in its factual determinations of whether the means used actually accomplish the ends as-

---

Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 19–20 (2002).

<sup>70</sup> *Golan*, 132 S. Ct. at 888.

<sup>71</sup> *Id.*

<sup>72</sup> *Cf.* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008) (“Logic demands that there be a link between the stated purpose and the command.”).

<sup>73</sup> Commentators understand “Progress” to refer to a variety of concepts. *See, e.g.*, Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329, 1373 (2012) (observing that “Progress” can mean “advancement,” “improvement in a knowledge base’s quality or quantity,” or “spread, diffusion, or distribution”).

<sup>74</sup> *Golan*, 132 S. Ct. at 888.

<sup>75</sup> *See id.* at 889 (“Congress determined that exemplary adherence to Berne would serve the objectives of the Copyright Clause.”). The Court did not say what those objectives are, suggesting that it was deferring to Congress’s judgment about whether a given piece of legislation serves Congress’s definition of those objectives.

<sup>76</sup> *Id.* at 889; *see id.* at 888–89. The Court ignored the fact that Congress had articulated completely different interests when facing First Amendment scrutiny at the district court, and only one of those asserted interests (obtaining reciprocity for American works abroad) was directly related to copyright. *See Golan v. Holder*, 611 F. Supp. 2d 1165, 1172–77 (D. Colo. 2009).

<sup>77</sup> In fact, the dominant view, propelled by Professor David Nimmer, is that the prefatory clause merely indicates the purpose of Congress’s power and does not act as a limitation on its exercise. *See NIMMER & NIMMER, supra* note 69, § 1.03.



serted.<sup>78</sup> *Golan* is no exception: the Court glossed over the validity of the government's economic justifications, which the dissent found tenuous.<sup>79</sup> Instead, it exhaustively discussed the foreign policy pressures behind the passage of the URAA.<sup>80</sup> Yet the URAA was not upheld on Article II grounds, but rather on an expansive reading of "Progress."<sup>81</sup> Thus, this "double deference" — the loose interpretive approach to understanding the Copyright Clause's mandate combined with a tendency to default to Congress's factual determinations — operated to declaw the Copyright Clause.

The Copyright Clause was once considered a force that could "pull[] Congress back" as the "drive toward international harmonization pushes Congress to enact more expansive copyright protection."<sup>82</sup> But after *Golan*, it is no longer. As the limiting power of the Copyright Clause shrinks, Congress may be constrained in its actions toward copyrighted material only by general limits on its substantive powers, meaning that the substantive scope of copyright may be unpredictably at the mercy of *other* governmental interests. Put differently, while *Golan* is considered a loss for the public domain,<sup>83</sup> copyright holders should not necessarily rejoice. The effect of *Golan* may be that both copyright holders' monopoly rights in their works and the public's interest in preserving the public domain may be superseded or abrogated by the government's other aims, without an explanation of the reason those aims should override the aims of copyright.<sup>84</sup> For example, if

<sup>78</sup> See generally Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y U.S.A. 317 (2000) (documenting the lineage of the Court's copyright cases and noting that its deferential approach might be due to the "paucity of materials from which to draw to interpret the theoretical premises for United States copyright law," *id.* at 320).

<sup>79</sup> See *Golan*, 132 S. Ct. at 889.

<sup>80</sup> See *id.* at 879–83. These foreign policy pressures included the trade and tariff consequences that would result if the United States failed to atone for its historical noncompliance with international copyright agreements. See *id.* at 881.

<sup>81</sup> See *id.* at 889 (highlighting the concern that the United States might "lose all flexibility" if providing incentives to create were the only way to promote the progress of science (quoting Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 332 (2002) (internal quotation marks omitted))).

<sup>82</sup> Caroline T. Nguyen, Note, *Expansive Copyright Protection for All Time? Avoiding Article I Horizontal Limitations Through the Treaty Power*, 106 COLUM. L. REV. 1079, 1081 (2006). In the past, for example, courts have prevented Congress from using its other enumerated powers, such as the Commerce Power, to save antibootlegging provisions that breached the limits of the Copyright Clause. *Id.*

<sup>83</sup> See, e.g., Jeffrey R. Young, *Supreme Court Upholds Law that Pulled Foreign Works Back Under Copyright*, CHRON. HIGHER EDUC., Jan. 27, 2012, at A11.

<sup>84</sup> One potential counterargument is that if one considers intellectual property on par with real property, then the Fifth Amendment would prevent Congress from making noncompensable contractions of intellectual property rights. See Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 514 (2010) ("Within the current legal framework, any action that allows the government to use, or to

Congress could decide that “Progress” encompasses removal of works from the public domain, then Congress could just as easily decide that “Progress” includes the stripping of preexisting copyrights, should that decision be necessary for Congress to achieve some other goal. While the ability to put a price on what was formerly free is worrisome for the *public*, the ability to make free what originally was not is even more disconcerting to the *copyright holder*. The result is unpredictability about the value of our ideas, works, and inventions. This unpredictability can in turn discourage investment in creation by people who do not want to risk uncertain returns.<sup>85</sup> Furthermore, as intellectual property has become a staple of commerce whose consistency of value is relied upon, it may upset the stability of our financial system.<sup>86</sup>

The dissent interpreted the operative clause to contract the range of goals contained in the preface. Justice Breyer focused on the clause’s operative words, “limited Times” and “exclusive Right,” reading into them the economic philosophy of *quid pro quo* that underlies the clause and circumscribes the range of permissible goals.<sup>87</sup> The clause’s conferment of an “exclusive Right” allows copyright holders to charge others for use of the work, and the ability to charge a fee in turn encourages the holder to produce new works.<sup>88</sup> Thus, the only legitimate end — the only definition “Progress” could have — is incentivizing the

---

authorize private persons to use, someone else’s patent or copyright should be subject . . . to the *per se* takings rules.”). The strength of this counterargument, however, depends on how analogous intellectual property is to real property as well as how vigilantly a court will protect property under the Fifth Amendment. Both these premises may be untenable. Treating intellectual property strictly as real property may undermine research and development, *see* Peter S. Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L.J. 1523, 1555 (2011), and the Supreme Court’s protection of property under the Fifth Amendment is known to be loose, *see* Epstein, *supra*, at 462–63.

<sup>85</sup> *See* Raymond T. Nimmer & Patricia A. Krauthaus, *Secured Financing and Information Property Rights*, 2 HIGH TECH. L.J. 195, 195 (1988) (“Commercial . . . activity in technological areas is intense and cannot continue to be burdened by uncoordinated and uncertain law.”).

<sup>86</sup> *Id.* (“[I]nformation, how it is processed and how it is used, has increasing value and influence in our economy. Information is an asset at the forefront of current technological development and commercial investment. It will remain there for the foreseeable future.”). This prediction is proving correct. Take, for example, the emerging trend of financial institutions’ treating intellectual property as a tangible asset that can be used as collateral. *See* Brooke Masters, *Banks Eye Intangible Assets as Collateral*, FIN. TIMES, June 12, 2012, at 21. The worth of these assets — and on a macro level, the stability of financial institutions — would depend on how Congress chooses to define “Progress.”

<sup>87</sup> *See Golan*, 132 S. Ct. at 900–02 (Breyer, J., dissenting) (“The Constitution’s words, ‘exclusive Right,’ ‘limited Times,’ ‘Progress of Science,’ viewed through the lens of history underscore the legal significance of . . . the ‘economic philosophy behind the Copyright Clause.’ That philosophy understands copyright’s grants of limited monopoly privileges to authors as private benefits that are conferred for a public reason — to elicit new creation.” *Id.* at 900 (citation omitted) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003))).

<sup>88</sup> *Id.* at 900. In other words, copyright operates as “a ‘tax on readers for the purpose of giving a bounty to writers’ — a bounty designed to encourage new production.” *Id.* at 899 (quoting T. MACAULAY, *SPEECHES ON COPYRIGHT* 25 (E. Miller ed., 1913)).

creation of new works.<sup>89</sup> But his understanding of the Copyright Clause is as constricted as the majority's is loose. While such a narrow reading focuses on copyright's core competency and makes "public benefit" copyright's maximand, it may be shortsighted. Justice Breyer discounted the weight of the foreign policy concerns behind the URAA.<sup>90</sup> If his opinion had carried the day, it might have severely truncated Congress's latitude to manage America's standing in the world. Before Berne, copyright law was territorial and domestically oriented such that domestic copyright interests superseded international concerns.<sup>91</sup> But now the growing importance of intellectual property as a propeller of global trade<sup>92</sup> means that the United States can no longer afford to be only inwardly focused.

*Golan's* approach of ceding interpretive power to Congress results in a broad grant of power that leaves the public uncertain as to the scope of their copyrights and may ultimately curb creation. With its expansive reading of "Progress," the Court has made the Copyright Clause an enabler of congressional power instead of a limitation.

### G. Constitutional Remedies

*Bivens Actions.* — In 1971's *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>1</sup> the Supreme Court interpreted the Fourth Amendment to imply a cause of action for the Amendment's violation despite the lack of an enabling statute. The Court subsequently implied causes of action for Fifth<sup>2</sup> and Eighth Amendment vi-

<sup>89</sup> *Id.* at 900. Accordingly, Justice Breyer eyed more critically the economic justifications behind the URAA. *See id.* at 909 ("[S]imply making the industry richer does not mean that the industry, when it makes an ordinary *forward-looking* economic calculus, will distribute works not previously distributed.").

<sup>90</sup> Furthermore, while Justice Breyer accurately questioned whether dissemination, as a matter of economics, would lead to creation of new works, he did not address the validity of the contention that obtaining reciprocity for American works abroad may, *in the long term*, promote creation of new works. In other words, there may exist an "internationalized version of the *quid pro quo* rationale." Graeme W. Austin, *International Copyright Law and Domestic Constitutional Doctrines*, 30 COLUM. J.L. & ARTS 337, 342 (2007).

<sup>91</sup> *See* Nicole Maciejunes, *Golan v. Holder: A Step in the International Direction for United States Copyright Law*, 10 J. INT'L BUS. & L. 369, 376 (2011).

<sup>92</sup> Intellectual property rights are necessary to the development of a wealth of fields such as scientific research, creative authorship, and commercial development. Robert J. Gutowski, Comment, *The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47 BUFF. L. REV. 713, 759 (1999). "[N]ow that intangible intellectual creations have become the most valuable source of wealth for twenty-first century economic development, the preservation of comity between nations requires" that nations collaborate by creating neutral rules instead of competing, which would make countries "vulnerable to the countervailing policies of other national systems." J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, 29 INT'L LAW. 345, 381–82 (1995).

<sup>1</sup> 403 U.S. 388 (1971).

<sup>2</sup> *Davis v. Passman*, 442 U.S. 228, 248–49 (1979).