

Big Questions

Keep these three questions in mind as we move through the course:

1) *Why have a constitution in the first place?*

- a) Or, to be more precise, why adopt a *written* constitution? (Courts in the United Kingdom and Israel sometimes talk about a national “constitution,” but there is no single written document meeting that description.)
- b) And even assuming there is a written constitution, why not adopt one in the form of an ordinary Act of Congress? (Note that until recently an ordinary Act of the British Parliament constituted what was in effect the Constitution of Canada. Similarly, Congress has adopted Organic Acts for some of the American territories.) In other words, why make the thing so darn hard to amend?
- c) Why on earth did I ask you to read the excerpt from the *Odyssey* reproduced at page 5 of this Handout? (I mean, law professors are supposed to be weird, but that’s *really* weird, isn’t it? Or is it?)

2) *By what rules or methods should the Constitution be interpreted?*

- a) Should a constitutional provision written in 1787 be understood as it would have been understood in 1787? If so: as it would have been understood *by whom*? Can we recapture this sort of “original understanding”? How? At what level of specificity?
- b) What role, if any, should subsequent historical experience, current political realities, or changing social values play in interpreting the Constitution?
- c) Which of the following considerations are most important in interpreting the Constitution: i) the document’s text; ii) its overall purposes; iii) tradition; iv) precedent; v) morality; vi) justice; vii) consequences; viii) current public consensus? Is any of these considerations *inappropriate*?
- d) If the Constitution turns out to contain some stupid provisions, should those provisions nonetheless be enforced, or should they be ignored in the interest of making the Constitution “the best it can be”?

3) *Who is authorized to do the interpreting?*

- a) Okay, that’s an easy one: the Supreme Court. But is it really so easy? Where *in the Constitution* does it say that the Supreme Court is authorized to interpret the Constitution?
- b) Are members of Congress authorized to interpret the Constitution? Are they obliged to do so? How about the President and her Cabinet? The governor of Illinois? Police officers on the beat? Practicing lawyers? Ordinary citizens?
- c) If the branches of government differ in their constitutional interpretations, who wins?

Group Assignment

Before we turn to the materials in the casebook and consider what various people—primarily justices of the Supreme Court—have said about the Constitution, let's begin with the document itself. Carefully read the Constitution, including its amendments (pages xliii-lix of your casebook) and answer the following questions.

There is no need to write lengthy answers; most questions can be answered with nothing more than a few words. Some questions are more open-ended and require a bit of thought in addition to careful reading. Please cite to the relevant provision(s) of the Constitution where appropriate.

You may work in groups of up to four students. Each group must hand in its set of written answers to me by Friday, September 7.

General questions

1. Let's start with an easy one: How many times is the word *democracy* mentioned in the Constitution? How about *democratic*? *Republican*? *Party* (as in political party)?
2. How many times does the original Constitution of 1787 (which ends at page li of your casebook) mention the word *slave(ry)*? *Right(s)*? *Equal(ity)*?
3. How is the Constitution amended? Are there any provisions of the Constitution that cannot be amended in this way? Which one(s)?
4. One provision of the Constitution defines a criminal offense and establishes the evidentiary standard for proving that offense. What is it?
5. Most of the Constitution's provisions tell us what *public officials* can and can't do. One currently operative provision, however, prohibits *private conduct*. What is it?

Congress

6. Which provision of the Constitution, if any, permits Congress* to establish an Air Force?
7. A member of the House of Representatives cannot be sued for libel for falsely calling her opponent in the upcoming election a "depraved child molester" during a speech on the House floor. Why not?

* With the help of the President's signature, of course. Phrases like "enacted by Congress" are a slightly inaccurate but commonly used shorthand. When you see such phrases, please assume (absent contrary indication) that they mean "adopted by both houses of Congress and the President in accordance with Article I, section 7 of the Constitution."

8. Can Congress nullify a state law if most of its members think the state law is unconstitutional? How? What if most members of Congress think the state law is just dumb? Can they still nullify it? How?
9. Congress, tired of wrangling over military spending and hoping to facilitate long-range planning by the Department of Defense, enacts a law that appropriates money for the military over the next five years. Constitutional?
10. May the United States Congress pass a law mandating a particular grading curve at the DePaul University College of Law? If not, why not?

The President

11. It's 2008, an election year. George W. Bush has had a happy and successful seven-plus years in office. Can he run again? Can he run for Vice President?
12. Can Congress vote the President a bonus if they feel the President is doing a particularly good job? Can the legislature of the state of Hawai'i do so?
13. Can Congress pass a law stating that, in the case of the death of both the President and the Vice President, the Secretary of Homeland Security shall become President? How about a law stating that the Speaker of the House shall become President?

The Supreme Court and Judicial Review

14. Which provision of the Constitution, if any, authorizes the Supreme Court to strike down a state law as unconstitutional?
15. Could Congress pass a law increasing the number of Supreme Court justices from nine to twelve? Could Congress reduce the number of justices from nine to five? To one?
16. Could Congress pass a law eliminating all federal district and circuit courts?
17. Imagine that Senator Orrin Hatch introduces a bill to tax the income of all federal employees, including judges, an extra 5%. The bill passes the Senate and the House, and is signed into law by the President. Constitutional?

The Lawmaking Process

18. Both houses of Congress pass a bill dealing with the "taxation of boats," but, because of a typographical error en route to the White House, the bill signed by the President deals with the "taxation of goats"? Is there a law? What does it say?
19. Imagine that the President goes on vacation beginning August 30th. Congress unanimously passes and sends to the White House a bill on September 1st and goes out of session on September 2nd. The President returns from vacation on September 12th and vetoes the bill. Is it law? What if Congress had remained in

session the whole time?

The States

20. Can Oklahoma place tariffs on imports from Texas?
21. Can Mississippi declare that only people with Mississippi driver's licenses may drive on its roads?
22. Can North Dakota and South Dakota enter into a treaty concerning preservation of wildlife in the northern Great Plains? Can North Dakota enter into a similar treaty with Canada?
23. Could Governor Blagojevich dub me "Duke of Illinois"?
24. Could the legislature of Illinois unilaterally create the "State of Chicago"?

Elections

25. Is there anything in the federal Constitution that would prohibit the state of Illinois from choosing the members of its state legislature in Springfield by a lottery among all candidates, culminating in a random drawing on television involving numbered ping-pong balls?
26. Article I, § 2, cl. 3, says that congressional representatives shall be apportioned according to a numerical formula which includes the phrase "three fifths of all other Persons." Who were these "other Persons"? Is this provision still in effect?

Officers of the United States

27. Can a person simultaneously be a member of the House of Representatives and Postmaster General?
28. In what ways can the Secretary of Health and Human Services be removed from office (during her lifetime and during the tenure of the President who appointed her)?
29. Can army generals be impeached?
30. Could Congress validly give the Chief Justice the power to appoint the Attorney General?

From The Odyssey, by Homer

(translated by Richmond Lattimore)

Book 12, lines 36-54

Then the queenly Circe spoke in words and addressed me:
"So all that has been duly done. Listen now, I will tell you
all, but the very god himself will make you remember.
You will come first of all to the Sirens, who are enchanters
of all mankind and whoever comes their way; and that man
who unsuspecting approaches them, and listens to the Sirens
singing, has no prospect of coming home and delighting
his wife and little children as they stand about him in greeting,
but the Sirens by the melody of their singing enchant him.
They sit in their meadow, but the beach before it is piled with boneheaps
of men now rotted away, and the skins shrivel upon them.
You must drive straight on past, but melt down sweet wax of honey
and with it stop your companions' ears, so none can listen;
the rest, that is, but if you yourself are wanting to hear them,
then have them tie you hand and foot on the fast ship, standing
upright against the mast with the ropes' ends lashed around it
so that you can have joy in hearing the song of the Sirens;
but if you supplicate your men and implore them to set you
free, they must tie you fast with even more lashings."

Lines 177-200

One after another, I stopped the ears of all my companions,
and they bound me hand and foot in the fast ship, standing
upright against the mast with the ropes' ends lashed around it,
and sitting then to row they dashed their oars in the gray sea.
But when we were as far from the land as a voice shouting
carries, lightly plying, the swift ship as it drew nearer
was seen by the Sirens, and they directed their sweet song toward us:
"Come this way, honored Odysseus, great glory of the Achaians,
and stay your ship, so that you can listen here to our singing;
for no one else has ever sailed past this place in his black ship
until he has listened to the honey-sweet voice that issues
from our lips; then goes on, well pleased, knowing more than ever
he did; for we know everything that the Argives and the Trojans
did and suffered in wide Troy through the gods' despite.
Over all the generous earth we know everything that happens."
So they sang, in generous utterance, and the heart within me
desired to listen, and I signaled my companions to set me
free, nodding with my brows, but they leaned on and rowed hard,
and Perimedes and Eurylochos, rising up, straightaway
fastened me with even more lashings and squeezed me tighter.
But when they had rowed on past the Sirens, and we could no longer
hear their voices and lost the sound of their singing, presently
my eager companions took away from their ears the beeswax
with which I had stopped them. Then they set me free from my lashings.

Seven Questions About *Marbury v. Madison*

- 1) Should the Court have addressed the question of whether Marbury had a right to his commission?**

- 2) Did Marbury have a right to his commission?**

- 3) When can a federal court review executive actions?**

- 4) Should the Court have addressed the question of whether section 13 of the Judiciary Act of 1789 was constitutional?**

- 5) Was section 13 of the Judiciary Act of 1789 unconstitutional?**

- 6) Does the Supreme Court have the power to declare federal statutes unconstitutional?**

- 7) Who won the case?**

Learned Hand, THE BILL OF RIGHTS 73-74 (1958)

Each one of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies. No one can fail to recognize the perils to which the last forty years have exposed such governments. We are not indeed forced to choose between absolutism and the kind of democracy that so often prevailed in Greek cities in the sixth to fourth centuries before our era. The Founding Fathers were acutely, perhaps overacutely, aware of the dangers that had followed that sort of rule, though, as you all know, they differed widely as to what curbs to impose. For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.

President Andrew Jackson
Veto Message Regarding the Bank of the United States
July 10, 1832

The bill “to modify and continue” the act entitled “An act to incorporate the subscribers to the Bank of the United States” was presented to me on the 4th July instant. Having considered it with that solemn regard to the principles of the Constitution which the day was calculated to inspire, and come to the conclusion that it ought not to become a law, I herewith return it to the Senate, in which it originated, with my objections.

A bank of the United States is in many respects convenient for the Government and useful to the people. Entertaining this opinion, and deeply impressed with the belief that some of the powers and privileges possessed by the existing bank are unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people, I felt it my duty at an early period of my Administration to call the attention of Congress to the practicability of organizing an institution combining all its advantages and obviating these objections. I sincerely regret that in the act before me I can perceive none of those modifications of the bank charter which are necessary, in my opinion, to make it compatible with justice, with sound policy, or with the Constitution of our country. ...

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the

Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

But in the case relied upon the Supreme Court have not decided that all the features of this corporation are compatible with the Constitution. It is true that the court have said that the law incorporating the bank is a constitutional exercise of power by Congress; but taking into view the whole opinion of the court and the reasoning by which they have come to that conclusion, I understand them to have decided that inasmuch as a bank is an appropriate means for carrying into effect the enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the Constitution which declares that Congress shall have power “to make all laws which shall be necessary and proper for carrying those powers into execution. “ Having satisfied themselves that the word “*necessary*” in the Constitution means “*needful,*” “*requisite,*” “*essential,*” “*conducive to,*” and that “a bank” is a convenient, a useful, and essential instrument in the prosecution of the Government’s “fiscal operations,” they conclude that to “use one must be within the discretion of Congress “ and that “ the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution;” “but, “ say they, “*where the law is not prohibited and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground.*”

The principle here affirmed is that the “degree of its necessity,” involving all the details of a banking institution, is a question exclusively for legislative consideration. A bank is constitutional, but it is the province of the Legislature to determine whether this or that particular power, privilege, or exemption is “necessary and proper” to enable the bank to discharge its duties to the Government, and from their decision there is no appeal to the courts of justice. Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper*, and therefore unconstitutional.

Without commenting on the general principle affirmed by the Supreme Court, let us examine the details of this act in accordance with the rule of legislative action which they have laid down. It will be found that many of the powers and privileges conferred on it can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution. ...

This act authorizes and encourages transfers of its stock to foreigners and grants them an exemption from all State and national taxation. So far from being “*necessary and proper*” that the bank should possess this power to make it a safe and efficient agent of the Government in its fiscal operations, it is calculated to convert the Bank of the United States into a foreign bank, to impoverish our people in time of peace, to disseminate a foreign influence through every section of the Republic, and in war to endanger our independence.

The several States reserved the power at the formation of the Constitution to regulate and control titles and transfers of real property, and most, if not all, of them have laws disqualifying aliens from acquiring or holding lands within their limits. But this act, in disregard of the undoubted right of the States to prescribe such disqualifications, gives to aliens stockholders in this bank an interest and title, as members of the corporation, to all the real property it may acquire within any of the States of this Union. This privilege granted to aliens is not "*necessary*" to enable the bank to perform its public duties, nor in any sense "*proper*," because it is vitally subversive of the rights of the States. ...

It is maintained by some that the bank is a means of executing the constitutional power "to coin money and regulate the value thereof." Congress have established a mint to coin money and passed laws to regulate the value thereof. The money so coined, with its value so regulated, and such foreign coins as Congress may adopt are the only currency known to the Constitution. But if they have other power to regulate the currency, it was conferred to be exercised by themselves, and not to be transferred to a corporation. If the bank be established for that purpose, with a charter unalterable without its consent, Congress have parted with their power for a term of years, during which the Constitution is a dead letter. It is neither necessary nor proper to transfer its legislative power to such a bank, and therefore unconstitutional.

By its silence, considered in connection with the decision of the Supreme Court in the case of *McCulloch* against the State of Maryland, this act takes from the States the power to tax a portion of the banking business carried on within their limits, in subversion of one of the strongest barriers which secured them against Federal encroachments. Banking, like farming, manufacturing, or any other occupation or profession, is a *business* ...

Upon the formation of the Constitution the States guarded their taxing power with peculiar jealousy. They surrendered it only as it regards imports and exports. In relation to every other object within their jurisdiction, whether persons, property, business, or professions, it was secured in as ample a manner as it was before possessed. ...

There is no more appropriate subject of taxation than banks, banking, and bank stocks, and none to which the States ought more pertinaciously to cling.

It can not be *necessary* to the character of the bank as a fiscal agent of the Government that its private business should be exempted from that taxation to which all the State banks are liable, nor can I conceive it "*proper*" that the substantive and most essential powers reserved by the States shall be thus attacked and annihilated as a means of executing the powers delegated to the General Government. ...

If our power over means is so absolute that the Supreme Court will not call in question the constitutionality of an act of Congress the subject of which "is not prohibited, and is really calculated to effect any of the objects intrusted to the Government," although, as in the case before me, it takes away powers expressly granted to Congress and rights scrupulously reserved to the States, it becomes us to proceed in our legislation with the utmost caution. Though not directly, our own powers and the rights of the States may be indirectly legislated away in the use of means to execute substantive powers. ... We may

not pass an act prohibiting the States to tax the banking business carried on within their limits, but we may, as a means of executing our powers over other objects, place that business in the hands of our agents and then declare it exempt from State taxation in their hands. Thus may our own powers and the rights of the States, which we can not directly curtail or invade, be frittered away and extinguished in the use of means employed by us to execute other powers. That a bank of the United States, competent to all the duties which may be required by the Government, might be so organized as not to infringe on our own delegated powers or the reserved rights of the States I do not entertain a doubt. Had the Executive been called upon to furnish the project of such an institution, the duty would have been cheerfully performed. In the absence of such a call it was obviously proper that he should confine himself to pointing out those prominent features in the act presented which in his opinion make it incompatible with the Constitution and sound policy. ...

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.

Nor is our Government to be maintained or our Union preserved by invasions of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves—in making itself felt, not in its power, but in its beneficence; not in its control, but in its protection; not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit. ...

[Full text available at <http://www.yale.edu/lawweb/avalon/presiden/veto/ajveto01.htm>]

President Franklin D. Roosevelt
Radio Address on Reorganization of the Judiciary
March 9, 1937

...Tonight, sitting at my desk in the White House, I make my first radio report to the people in my second term of office. I am reminded of that evening in March, four years ago, when I made my first radio report to you. We were then in the midst of the great banking crisis. Soon after, with the authority of the Congress, we asked the Nation to turn over all of its privately held gold, dollar for dollar, to the Government of the United States. Today's recovery proves how right that policy was.

But when, almost two years later, it came before the Supreme Court its constitutionality was upheld only by a five-to-four vote. The change of one vote would have thrown all the affairs of this great Nation back into hopeless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation. ...

If we learned anything from the Depression [it is that] we will not allow ourselves to run around in new circles of futile discussion and debate, always postponing the day of decision. The American people have learned from the Depression. For in the last three national elections an overwhelming majority of them voted a mandate that the Congress and the President begin the task of providing that protection—not after long years of debate, but now. The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. ...

I want to talk with you very simply about the need for present action in this crisis—the need to meet the unanswered challenge of one-third of a Nation ill-nourished, ill-clad, ill-housed.

Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses.

It is the American people themselves who are in the driver's seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to pull in unison with the other two.

I hope that you have re-read the Constitution of the United States in these past few weeks. Like the Bible, it ought to be read again and again. It is an easy document to understand when you remember that it was called into being because the Articles of Confederation under which the original thirteen States tried to operate after the Revolution showed the need of a National Government with power enough to handle national problems. In its Preamble, the Constitution states that it was intended to form a more perfect Union and promote the general welfare; and the powers given to the

Congress to carry out those purposes can be best described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers “to levy taxes ... and provide for the common defense and general welfare of the United States.” That, my friends, is what I honestly believe to have been the clear and underlying purpose of the patriots who wrote a Federal Constitution to create a National Government with national power, intended as they said, “to form a more perfect union ... for ourselves and our posterity.”

For nearly twenty years there was no conflict between the Congress and the Court. Then Congress passed a statute which, in 1803, the Court said violated an express provision of the Constitution. The Court claimed the power to declare it unconstitutional and did so declare it. But a little later the Court itself admitted that it was an extraordinary power to exercise and through Mr. Justice Washington laid down this limitation upon it: “It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt.”

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures in complete disregard of this original limitation. In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body.

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress—and to approve or disapprove the public policy written into these laws.

That is not only my accusation. It is the accusation of most distinguished justices of the present Supreme Court. I have not the time to quote to you all the language used by dissenting justices in many of these cases. But in the case holding the Railroad Retirement Act unconstitutional, for instance, Chief Justice Hughes said in a dissenting opinion that the majority opinion was “a departure from sound principles,” and placed “an unwarranted limitation upon the commerce clause.” And three other justices agreed with him. ...

In the face of such dissenting opinions, it is perfectly clear that, as Chief Justice Hughes has said, “We are under a Constitution, but the Constitution is what the judges say it is.” The Court in addition to the proper use of its judicial functions has improperly set itself up as a third house of the Congress—a super-legislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution and not over it. In our courts we want a government of laws and not of men.

I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written, that will refuse to amend the Constitution by the arbitrary exercise of judicial power—in other words by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts which are universally recognized.

How then could we proceed to perform the mandate given us? It was said in last year's Democratic platform, "If these problems cannot be effectively solved within the Constitution, we shall seek such clarifying amendment as will assure the power to enact those laws, adequately to regulate commerce, protect public health and safety, and safeguard economic security." In other words, we said we would seek an amendment only if every other possible means by legislation were to fail.

When I commenced to review the situation with the problem squarely before me, I came by a process of elimination to the conclusion that, short of amendments, the only method which was clearly constitutional, and would at the same time carry out other much needed reforms, was to infuse new blood into all our Courts. We must have men worthy and equipped to carry out impartial justice. But, at the same time, we must have judges who will bring to the Courts a present-day sense of the Constitution—judges who will retain in the Courts the judicial functions of a court, and reject the legislative powers which the courts have today assumed.

In forty-five out of the forty-eight States of the Union, Judges are chosen not for life but for a period of years. In many States Judges must retire at the age of seventy. Congress has provided financial security by offering life pensions at full pay for Federal Judges on all Courts who are willing to retire at seventy. In the case of Supreme Court Justices, that pension is \$20,000 a year. But all Federal Judges, once appointed, can, if they choose, hold office for life, no matter how old they may get to be.

What is my proposal? It is simply this: whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States.

That plan has two chief purposes. By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice speedier and, therefore, less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries. The number of Judges to be appointed would depend wholly on the decision of present Judges now over seventy, or those who would subsequently reach the age of seventy.

If, for instance, any one of the six Justices of the Supreme Court now over the age of seventy should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than fifteen, there may be only fourteen, or thirteen, or twelve. And there may be only nine.

There is nothing novel or radical about this idea. It seeks to maintain the Federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869.

Why was the age fixed at seventy? Because the laws of many States, the practice of the Civil Service, the regulations of the Army and Navy, and the rules of many of our Universities and of almost every great private business enterprise, commonly fix the retirement age at seventy years or less.

The statute would apply to all the courts in the Federal system. There is general approval so far as the lower Federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. If such a plan is good for the lower courts it certainly ought to be equally good for the highest Court from which there is no appeal.

Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to “pack” the Supreme Court and that a baneful precedent will be established. What do they mean by the words “packing the Court”? Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

If by that phrase “packing the Court” it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions, that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called “packing the Courts,” then I say that I and with me the vast majority of the American people favor doing just that thing—now.

Is it a dangerous precedent for the Congress to change the number of the Justices? The Congress has always had, and will have, that power. The number of justices has been changed several times before, in the Administration of John Adams and Thomas Jefferson—both signers of the Declaration of Independence—Andrew Jackson, Abraham Lincoln and Ulysses S. Grant.

I suggest only the addition of Justices to the bench in accordance with a clearly defined principle relating to a clearly defined age limit. Fundamentally, if in the future, America cannot trust the Congress it elects to refrain from abuse of our Constitutional usages,

democracy will have failed far beyond the importance to it of any king of precedent concerning the Judiciary. We think it so much in the public interest to maintain a vigorous judiciary that we encourage the retirement of elderly Judges by offering them a life pension at full salary. Why then should we leave the fulfillment of this public policy to chance or make independent on upon the desire or prejudice of any individual Justice?

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the Judiciary. Normally every President appoints a large number of District and Circuit Court Judges and a few members of the Supreme Court. Until my first term practically every President of the United States has appointed at least one member of the Supreme Court. President Taft appointed five members and named a Chief Justice; President Wilson, three; President Harding, four, including a Chief Justice; President Coolidge, one; President Hoover, three, including a Chief Justice. Such a succession of appointments should have provided a Court well-balanced as to age. But chance and the disinclination of individuals to leave the Supreme bench have now given us a Court in which five Justices will be over seventy-five years of age before next June and one over seventy. Thus a sound public policy has been defeated.

I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a Judge reaches the age of seventy, a new and younger Judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our Federal Courts, including the highest, to be determined by chance or the personal indecision of individuals.

If such a law as I propose is regarded as establishing a new precedent, is it not a most desirable precedent?

Like all lawyers, like all Americans, I regret the necessity of this controversy. But the welfare of the United States, and indeed of the Constitution itself, is what we all must think about first. Our difficulty with the Court today rises not from the Court as an institution but from human beings within it. But we cannot yield our constitutional destiny to the personal judgement of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present. This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our Constitutional Government and to have it resume its high task of building anew on the Constitution "a system of living law." The Court itself can best undo what the Court has done.

I have thus explained to you the reasons that lie behind our efforts to secure results by legislation within the Constitution. I hope that thereby the difficult process of constitutional amendment may be rendered unnecessary. But let us examine the process.

There are many types of amendment proposed. Each one is radically different from the other. There is no substantial groups within the Congress or outside it who are agreed on any single amendment. It would take months or years to get substantial agreement upon the type and language of the amendment. It would take months and years thereafter to get a two-thirds majority in favor of that amendment in both Houses of the Congress. Then would come the long course of ratification by three-fourths of all the States. No

amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time. And thirteen states which contain only five percent of the voting population can block ratification even though the thirty-five States with ninety-five percent of the population are in favor of it. ...

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court Bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.

This proposal of mine will not infringe in the slightest upon the civil or religious liberties so dear to every American. My record as Governor and President proves my devotion to those liberties. You who know me can have no fear that I would tolerate the destruction by any branch of government of any part of our heritage of freedom. ...

I am in favor of action through legislation. First, because I believe that it can be passed at this session of the Congress. Second, because it will provide a reinvigorated, liberal-minded Judiciary necessary to furnish quicker and cheaper justice from bottom to top. Third, because it will provide a series of Federal Courts willing to enforce the Constitution as written, and unwilling to assert legislative powers by writing into it their own political and economic policies.

During the past half century the balance of power between the three great branches of the Federal Government, has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed. You and I will do our part.

[Full text available at <http://www.mhric.org/fdr/chat9.html>.]

GONZALES

v.

RAICH

545 U.S. 1 (2005)

Justice STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution “[t]o make all Laws which shall be necessary and proper for carrying into Execution” its authority to “regulate Commerce with foreign Nations, and among the several States” includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana, and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996.... The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician....

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act.... Both women have been using marijuana as a medication for several years pursuant to their doctors’ recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich’s physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as “John Does,” to provide her with locally grown marijuana at no charge....

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson’s home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. ...

The case is made difficult by respondents’ strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the

statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals.

...[P]rompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act [of 1970]. Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.²⁰ Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels. To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. ...

Respondents in this case do not dispute that passage of the CSA ... was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause. ...

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as

²⁰ In particular, Congress made the following findings:

"(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

"(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

"(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because-

"(A) after manufacture, many controlled substances are transported in interstate commerce,

"(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

"(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

"(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

"(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

"(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. §§ 801(1)-(6).

commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” We have never required Congress to legislate with scientific exactitude....

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed “to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses...” and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions. ...

Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a “quintessential economic activity”—a commercial farm—whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court’s reasoning.

The fact that [Filburn]’s own impact on the market was “trivial by itself” was not a sufficient reason for removing him from the scope of federal regulation. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court’s analysis. Moreover, even though [Filburn] was indeed a commercial farmer, the activity he was engaged in—the cultivation of wheat for home consumption—was not treated by the Court as part of his commercial farming operation. And while it is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect. ...

In assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a “rational basis” exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to “make all Laws which shall be necessary and proper” to “regulate Commerce ... among the several States.” U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases.... Those two cases, of course, are *Lopez* and *Morrison*. As an initial

matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."

At issue in *Lopez* was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. ...

The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA ... was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." ... Marijuana was listed as the 10th item in the third subcategory. That classification, unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*. Our opinion in *Lopez* casts no doubt on the validity of such a program.

Nor does this Court's holding in *Morrison*. The Violence Against Women Act of 1994 created a federal civil remedy for the victims of gender-motivated crimes of violence. The remedy was enforceable in both state and federal courts, and generally depended on proof of the violation of a state law. Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. ...

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.... Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law."... The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed

individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme. ...

One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity.

[L]imiting the activity to marijuana possession and cultivation “in accordance with state law” cannot serve to place respondents’ activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. ... Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state action cannot circumscribe Congress’ plenary commerce power. ...

Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.

Justice SCALIA, concurring in the judgment.

I agree with the Court’s holding that the Controlled Substances Act (CSA) may validly be applied to respondents’ cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

...[O]ur cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that “substantially affect” interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See *Gibbons v. Ogden*. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, ... Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of “activities that substantially affect interstate commerce” is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. See *NLRB v. Jones & Laughlin Steel Corp.* That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. ...

This principle is not without limitation. In *Lopez* and *Morrison*, the Court—conscious of the potential of the “substantially affects” test to “obliterate the distinction between what is national and what is local,”—rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. Thus, although Congress’s authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to “pile inference upon inference,” in order to establish that noneconomic activity has a substantial effect on interstate commerce.

As we implicitly acknowledged in *Lopez*, however, Congress’s authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” ...

Although this power “to make ... regulation effective” commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself “substantially affect” interstate commerce. Moreover, as ... *Lopez* ... suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power. ...

Lopez and *Morrison* affirm that Congress may not regulate certain “purely local” activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation; *Lopez* expressly disclaimed that it was such a case, and *Morrison* did not even discuss the possibility that it was....

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch v. Maryland*, even when the end is constitutional and legitimate, the means must be “appropriate” and “plainly adapted” to that end. Moreover, they may not be otherwise “prohibited” and must be “consistent with the letter and spirit of the constitution.” ...

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish

“controlled substances manufactured and distributed intrastate” from “controlled substances manufactured and distributed interstate,” but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State....

Justice O’CONNOR, with whom the CHIEF JUSTICE and Justice THOMAS join as to all but Part III, dissenting.

We enforce the “outer limits” of Congress’ Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann* (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California ... has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court ... announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez* and *Morrison*. Accordingly I dissent.

I

Our decision [in *Lopez*] about whether gun possession in school zones substantially affected interstate commerce turned on four considerations. First, we observed that our “substantial effects” cases generally have upheld federal regulation of economic activity that affected interstate commerce, but that § 922(q) was a criminal statute having “nothing to do with ‘commerce’ or any sort of economic enterprise.” In this regard, we also noted that “[s]ection 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated....” Second, we noted that the statute contained no express jurisdictional requirement establishing its connection to interstate commerce. Third, we found telling the absence of legislative findings about the regulated conduct’s impact on interstate commerce. Finally, we rejected as too attenuated the Government’s argument that firearm possession in school zones could result in violent crime which in turn could adversely affect the national economy. Later in *Morrison*, we relied on the same four considerations to hold that § 40302 of the Violence Against Women Act exceeded Congress’ authority under the Commerce Clause.

In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account.

II

What is the relevant conduct subject to Commerce Clause analysis in this case? The Court takes its cues from Congress, applying the above considerations to the activity regulated by the Controlled Substances Act (CSA) in general.... In my view, allowing Congress to set the terms of the constitutional debate in this way, *i.e.*, by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.

The Court's principal means of distinguishing *Lopez* from this case is to observe that the Gun-Free School Zones Act of 1990 was a "brief, single-subject statute," whereas the CSA is "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" Thus, according to the Court, it was possible in *Lopez* to evaluate in isolation the constitutionality of criminalizing local activity (there gun possession in school zones), whereas the local activity that the CSA targets (in this case cultivation and possession of marijuana for personal medicinal use) cannot be separated from the general drug control scheme of which it is a part.

Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme.... If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones....

Lopez and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires, as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.

The hard work for courts, then, is to identify objective markers for confining the analysis in Commerce Clause cases. Here, respondents challenge the constitutionality of the CSA as applied to them and those similarly situated. I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce. See *Wickard*. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis)....

A number of objective markers are available to confine the scope of constitutional review here.... Respondents challenge only the application of the CSA to medicinal use of marijuana. Moreover, ... California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation,

possession, and use of marijuana for medicinal purposes.

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in the aggregate, substantially affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities.... [T]he Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach. ...

It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow—a federal police power. See *Lopez*. ...

The Court suggests that *Wickard*, which we have identified [in *Lopez*] as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” established federal regulatory power over any home consumption of a commodity for which a national market exists. I disagree. *Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production.... In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. ... *Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook's herb garden. ...

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of “substantial effects” at issue (*i.e.*, whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. ... Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. ... In particular, the CSA's introductory declarations are too vague and unspecific to demonstrate that the federal statutory scheme will be undermined if Congress cannot exert power over individuals like

respondents. The declarations are not even specific to marijuana....

III

We would do well to recall how James Madison, the father of the Constitution, described our system of joint sovereignty to the people of New York: “The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” The Federalist No. 45.

Relying on Congress’ abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one’s own home for one’s own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California’s experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

[The dissenting opinion of Justice THOMAS is omitted.]

ELDRED
v.
ASHCROFT

537 U.S. 186 (2003)

Justice GINSBURG delivered the opinion of the Court.

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

Petitioners are individuals and businesses whose products or services build on copyrighted works that have gone into the public domain. They seek a determination that the CTEA fails constitutional review under the Copyright Clause’s “limited Times” prescription [and the First Amendment]. ... Under the 1976 Copyright Act, copyright protection generally lasted from the work’s creation until 50 years after the author’s death. Under the CTEA, most copyrights now run from creation until 70 years after the author’s death. Petitioners do not challenge the “life-plus-70-years” timespan itself. ... Congress went awry, petitioners maintain, not with respect to newly created works, but in enlarging the term for published works with existing copyrights. The “limited Tim[e]” in effect when a copyright is secured, petitioners urge, becomes the constitutional boundary, a clear line beyond the power of Congress to extend. ...

We evaluate petitioners’ challenge to the constitutionality of the CTEA against the backdrop of Congress’ previous exercises of its authority under the Copyright Clause. The Nation’s first copyright statute, enacted in 1790, provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term. The 1790 Act’s renewable 14-year term applied to existing works (*i.e.*, works already published and works created but not yet published) and future works alike. Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for an additional 14 years), and to 56 years in 1909 (28 years from publication, renewable for an additional 28 years). Both times, Congress applied the new copyright term to existing and future works; to qualify for the 1831 extension, an existing work had to be in its initial copyright term at the time the Act became effective.

In 1976, Congress altered the method for computing federal copyright terms. For works created by identified natural persons, the 1976 Act provided that federal copyright protection would run from the work’s creation, not—as in the 1790, 1831, and 1909 Acts—its publication; protection would last until 50 years after the author’s death. In these respects, the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works. For anonymous works, pseudonymous works, and works made for hire, the 1976 Act provided a term of 75 years from publication or 100 years from creation, whichever expired first.

These new copyright terms, the 1976 Act instructed, governed all works not published by its effective date ... regardless of when the works were created. For published works with existing copyrights as of that date, the 1976 Act granted a copyright term of 75 years from the date of publication, a 19-year

increase over the 56-year term applicable under the 1909 Act.

The measure at issue here, the CTEA, installed the fourth major duration extension of federal copyrights. Retaining the general structure of the 1976 Act, the CTEA enlarges the terms of all existing and future copyrights by 20 years. For works created by identified natural persons, the term now lasts from creation until 70 years after the author's death. This standard harmonizes the baseline United States copyright term with the term adopted by the European Union in 1993. For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first.

Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe "limited Times" for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.

The CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a "limited Tim[e]" as applied to future copyrights. Petitioners contend, however, that existing copyrights extended to endure for that same term are not "limited." Petitioners' argument essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever "fixed" or "inalterable." The word "limited," however, does not convey a meaning so constricted. At the time of the Framing, that word meant what it means today: "confine[d] within certain bounds," "restrain[ed]," or "circumscribe[d]." S. Johnson, *A Dictionary of the English Language* (7th ed. 1785). Thus understood, a timespan appropriately "limited" as applied to future copyrights does not automatically cease to be "limited" when applied to existing copyrights.

To comprehend the scope of Congress' power under the Copyright Clause, "a page of history is worth a volume of logic." History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime. As earlier recounted, the First Congress accorded the protections of the Nation's first federal copyright statute to existing and future works alike. Since then, Congress has regularly applied duration extensions to both existing and future copyrights.

Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry. We count it significant that early Congresses extended the duration of numerous individual patents as well as copyrights. ... Further, although prior to the instant case this Court did not have occasion to decide whether extending the duration of existing copyrights complies with the "limited Times" prescription, the Court has found no constitutional barrier to the legislative expansion of existing patents. ...

Congress' consistent historical practice of applying newly enacted copyright terms to future and existing copyrights reflects a judgment stated concisely by Representative Huntington at the time of the 1831 Act: "[J]ustice, policy, and equity alike forb[id]" that an "author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act." ... The CTEA follows this historical practice by keeping the duration provisions of the 1976 Act largely in place and simply adding 20 years to each of them. Guided by text, history, and precedent, we cannot agree with petitioners' submission that extending the duration of existing copyrights is categorically beyond Congress' authority under the Copyright Clause.

Satisfied that the CTEA complies with the "limited Times" prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress. "[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors ... in order to give the public appropriate access to

their work product.”

The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain. [A] key factor in the CTEA’s passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years.... By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts. The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States. ...

In addition to international concerns, Congress passed the CTEA in light of demographic, economic, and technological changes, and rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works. ...

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

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

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

[A] regime of perpetual copyrights clearly is not the situation before us. Nothing before this Court warrants construction of the CTEA’s 20-year term extension as a congressional attempt to evade or override the “limited Times” constraint. Critically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to “limited Times” that the 1831, 1909, and 1976 Acts did not. Those earlier Acts did not create perpetual copyrights, and neither does the CTEA.

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

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

Feist, however, did not touch on the duration of copyright protection. Rather, the decision addressed the core question of copyrightability, *i.e.*, the “creative spark” a work must have to be eligible for copyright protection at all. Explaining the originality requirement, *Feist* trained on the Copyright Clause words “Authors” and “Writings.” The decision did not construe the “limited Times” for which a work may be

protected, and the originality requirement has no bearing on that prescription.

More forcibly, petitioners contend that the CTEA's extension of existing copyrights does not "promote the Progress of Science" as contemplated by the preambular language of the Copyright Clause. To sustain this objection, petitioners do not argue that the Clause's preamble is an independently enforceable limit on Congress' power. Rather, they maintain that the preambular language identifies the sole end to which Congress may legislate; accordingly, they conclude, the meaning of "limited Times" must be "determined in light of that specified end." The CTEA's extension of existing copyrights categorically fails to "promote the Progress of Science," petitioners argue, because it does not stimulate the creation of new works but merely adds value to works already created.

As petitioners point out, we have described the Copyright Clause as "both a grant of power and a limitation," and have said that "[t]he primary objective of copyright" is "[t]o promote the Progress of Science." The "constitutional command," we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a "system" that "promote[s] the Progress of Science."

We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives. The justifications we earlier set out for Congress' enactment of the CTEA, provide a rational basis for the conclusion that the CTEA "promote[s] the Progress of Science."

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

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

We can demur to petitioners' description of the Copyright Clause as a grant of legislative authority empowering Congress "to secure a bargain—this for that." But the legislative evolution earlier recalled demonstrates what the bargain entails. Given the consistent placement of existing copyright holders in parity with future holders, the author of a work created in the last 170 years would reasonably comprehend, as the "this" offered her, a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time. Congress could rationally seek to "promote ... Progress" by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term. Nothing in the Copyright Clause bars Congress from creating the same incentive by adopting the same position as a matter of unbroken practice. ...

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

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

For the several reasons stated, we find no Copyright Clause impediment to the CTEA’s extension of existing copyrights. [The Court went on to uphold the CTEA against First Amendment attack.]

[A dissenting opinion by Justice STEVENS is omitted.]

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.

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

The “monopoly privileges” that the Copyright Clause confers “are neither unlimited nor primarily designed to provide a special private benefit.” This Court has made clear that the Clause’s limitations are judicially enforceable. 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,” the second assuring that government throws up no obstacle to its

dissemination. At the same time, a particular statute that exceeds proper Copyright Clause bounds may set Clause and Amendment at cross-purposes, thereby depriving the public of the speech-related benefits that the Founders, through both, have promised.

Consequently, I would review plausible claims that a copyright statute seriously, and unjustifiably, restricts the dissemination of speech somewhat more carefully than reference to this Court's traditional Copyright Clause jurisprudence might suggest. There is no need in this case to characterize that review as a search for "congruence and proportionality," or as some other variation of what this Court has called "intermediate scrutiny"... 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. ...

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."

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." (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," but "to stimulate artistic creativity for the general public good." It does so by "motivat[ing] the creative activity of authors" through "the provision of a special reward." 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."

That is how the Court previously has described the Clause's objectives. And, in doing so, the Court simply has reiterated the views of the Founders. Madison, like Jefferson and others in the founding generation, warned against the dangers of monopolies. Madison noted that the Constitution had "limited them to two cases, the authors of Books, and of useful inventions." He thought that in those two cases monopoly is justified because it amounts to "compensation for" an actual community "benefit" and because the monopoly is "temporary"—the term originally being 14 years (once renewable). Madison concluded that "under that limitation a sufficient recompence and encouragement may be given." But he warned in general that monopolies must be "guarded with strictness ag[ain]st abuse." ...

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]." ... I would examine the statute's effects in light of these well-established constitutional purposes.

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

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

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

The extra royalty payments will not come from thin air. Rather, they ultimately come from those who wish to read or see or hear those classic books or films or recordings that have survived. Even the \$500,000 that United Airlines has had to pay for the right to play George Gershwin's 1924 classic *Rhapsody in Blue* represents a cost of doing business, potentially reflected in the ticket prices of those who fly.

A second, equally important, cause for concern arises out of the fact that copyright extension imposes a “permissions” requirement—not only upon potential users of “classic” works that still retain commercial value, but also upon potential users of *any other work* still in copyright. Again using CRS estimates, one can estimate that, by 2018, the number of such works 75 years of age or older will be about 350,000. Because the Copyright Act of 1976 abolished the requirement that an owner must renew a copyright, such still-in-copyright works (of little or no commercial value) will eventually number in the millions. ...

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.”

As I have said, to some extent costs of this kind accompany any copyright law, regardless of the length of the copyright term. But to extend that term, preventing works from the 1920's and 1930's from falling into the public domain, will dramatically increase the size of the costs just as—perversely—the likely benefits from protection diminish. The older the work, the less likely it retains commercial value, and the harder it will likely prove to find the current copyright holder. The older the work, the more likely it will prove useful to the historian, artist, or teacher. The older the work, the less likely it is that a sense of authors' rights can justify a copyright holder's decision not to permit reproduction, for the more likely it is that the copyright holder making the decision is not the work's creator, but, say, a corporation or a great-grandchild whom the work's creator never knew.... 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. ...

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. No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter. After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term)—must be far smaller. And any remaining monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them. Using assumptions about the time value of money provided us by a group of economists (including five 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.

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. ...

[Even if] 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*). The lack of a practically meaningful distinction from an author's *ex ante* perspective between (a) the statute's extended terms and (b) an infinite term makes this latest extension difficult to square with the Constitution's insistence on “limited Times.”

I am not certain why the Court considers it relevant in this respect that “[n]othing ... warrants construction of the [1998 Act's] 20-year term extension as a congressional attempt to evade or override the ‘limited Times’ constraint.” Of course Congress did not intend to act unconstitutionally. But it may have sought to test the Constitution's limits. After all, the statute was named after a Member of Congress, who, the legislative history records, “wanted the term of copyright protection to last forever.” 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.

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*. ...

[S]everal 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....

[T]he statute’s legislative history suggests another possible justification. That history refers frequently to the financial assistance the statute will bring the entertainment industry, particularly through the promotion of exports. I recognize that Congress has sometimes found that suppression of competition will help Americans sell abroad—though it has simultaneously taken care to protect American buyers from higher domestic prices. In doing so, however, Congress has exercised its commerce, not its copyright, power. I can find nothing in the Copyright Clause that would authorize Congress to enhance the 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. The first fact seems to argue not for, but instead against, extension. The second fact seems already corrected for by the 1976 Act’s life-plus-50 term, which automatically grows with lifespans. And the third fact—that adults are having children later in life—is a makeweight at best, providing no explanation of why the 1976 Act’s term of 50 years after an author’s death—a longer term than was available to authors themselves for most of our Nation’s history—is an insufficient potential bequest. The weakness of these final rationales simply underscores the conclusion that emerges from consideration of earlier attempts at justification: There is no legitimate, serious copyright-related justification for this statute.

The Court is concerned that our holding in this case not inhibit the broad decisionmaking leeway that the Copyright Clause grants Congress. It is concerned about the implications of today’s decision for the Copyright Act of 1976—an Act that changed copyright’s basic term from 56 years (assuming renewal) to life of the author plus 50 years. It is concerned about having to determine just how many years of copyright is too many—a determination that it fears would require it to find the “right” constitutional number, a task for which the Court is not well suited.

I share the Court’s initial concern, about intrusion upon the decisionmaking authority of Congress. But ... [we] cannot avoid the need to examine the statute carefully by saying that “Congress has not altered the traditional contours of copyright protection,” for the sentence points to the question, rather than the answer. Nor should we avoid that examination here. That degree of judicial vigilance—at the far outer boundaries of the Clause—is warranted if we are to avoid the monopolies and consequent restrictions of expression that the Clause, read consistently with the First Amendment, seeks to preclude. And that vigilance is all the more necessary in a new Century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation’s economy and the lives of its citizens. ...

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. ...

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

I have set forth the analysis upon which I rest these judgments. This analysis leads inexorably to the conclusion that the statute cannot be understood rationally to advance a constitutionally legitimate interest. The statute falls outside 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.

Notes and Questions on *Eldred v. Ashcroft*

1. Under the majority's reading, are there any limitations on Congress's copyright power? Where do those limitations come from?

2. One limitation is suggested by the Supreme Court's decision in *Feist*, which Justice Ginsburg discusses. *Feist* held that the telephone book white pages are not copyrightable. *Feist* turned on the interpretation of the statute, but it was one of those cases in which the statute is read in light of constitutional concerns. The issue in the case was whether telephone white pages are sufficiently "original" to justify copyright protection. The Court stated:

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to 'secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings. . . . For a particular work to be classified under the head of writings of authors, . . . originality is required . . . [and] originality requires independent creation plus a modicum of creativity.

If not original, then the work cannot be said to be the work of an "author"; that term itself requires a "creative component of originality":

To qualify for copyright protection, a work must be original to the author. . . . Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.

Therefore, even though Congress may extend protection to factual compilations,

[t]his protection is subject to an important [constitutional] limitation. The mere fact that a work is copyrighted [under statutory law] does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.

Finally, the Court expressed its holding in constitutional terms: "As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. [The telephone] white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark."

3. As between the majority and the dissent in *Eldred*, who has the better of the argument simply as a matter of text? As a matter of purpose? As a matter of overall policy?

4. The copyright clause is an almost unique constitutional provision in that it includes a statement of purpose. (Not totally unique. Can you find another one?) Should the statement of purpose limit permissible readings of the clause? "Inform" our reading of the clause? Be irrelevant?

5. In general, the courts have rejected efforts to rely on the introductory language of the copyright clause. *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), is a leading example. There the D.C. Circuit ruled that private parties had a valid copyright in a film made for public television using federal funds. One of the arguments against the copyright was that it would be unconstitutional for Congress to create a copyright in works made with federal funds because such a right could not be justified as “necessary” to promote the progress of science and the useful arts. The court refused to adopt such a limitation on Congress, relying on a Fifth Circuit decision:

The appellants’ argument . . . is that the purposive language of the Copyright Clause constitutes a substantive limit on Congress’s legislative power, and that it only refers to the need to provide economic incentives in the form of royalties.

There are a number of problems with appellants’ position less obvious than their failure to cite any relevant authority for either proposition. Professor Nimmer apparently does not agree with the appellants’ interpretation of the introductory phrase as a limitation upon congressional power: “(T)he introductory phrase, rather than constituting a limitation on Congressional authority, has for the most part tended to expand such authority.” 1 Nimmer on Copyright § 1.03(B).

The Fifth Circuit, in holding that a copyright may subsist in a work judged obscene, has, we think, stated the proper scope for judicial review of challenges to congressional power based upon the supposed limits of the Copyright Clause:

Congress has authority to make any law that is “necessary and proper” for the execution of its enumerated Article I powers, ... including its copyright power, and the courts’ role in judging whether Congress has exceeded its Article I powers is limited. The courts will not find that Congress has exceeded its power so long as the means adopted by Congress for achieving a constitutional end are “appropriate” and “plainly adapted” to achieving that end. *McCulloch v. Maryland* It is by the lenient standard of *McCulloch* that we must judge whether Congress has exceeded its constitutional powers in enacting an all-inclusive copyright statute.

Having stated a standard for judicial review that we today endorse, the Fifth Circuit applied that standard to conclude that Congress need not “require that each copyrighted work be shown to promote the useful arts” That being so, we cannot accept appellants’ argument that the introductory language of the Copyright Clause constitutes a limit on congressional power.

6. Suppose the *Eldred* case had come out the other way; that is, the Act exceeded Congress’s power under the Copyright Clause. Could the Act still have been upheld as a valid exercise of the Commerce Power? That question involves two subquestions. First, in the absence of the copyright clause, would the Act be valid given *Lopez* and *Morrison*? (The answer

would seem to be yes, wouldn't it?) Second, does the existence of the Copyright Clause change anything?

7. Arthur Miller (the Civil Procedure professor, not the playwright) has said:

Obviously, what I wrote yesterday was not affected or promoted by a copyright extension enacted today or tomorrow. But two facts should be noted. First, creators of works of expression have longevity. If you provide the proper incentives today, it will not enhance my productivity in the past, but it may promote my productivity in the future. In other words, I may stay and continue to write or do my scholarly thing today because, yesterday, Congress enacted a statute that enhances my reward. Second, since 1790, it has indeed been Congress's policy that the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today. That has always been a rule of equity that Congress has followed since 1790.

Do these considerations render the CTEA constitutional? Are they the same as the justifications offered by the Supreme Court?

8. *Eldred* is unusual in that it is a case about congressional power that is not also about federalism. Does the absence of federalism concerns explain why the Court reads the clause so broadly? Should it?

9. Can the states adopt their own copyright laws, affording more or less protection than the federal statute?

10. Mark Twain on "limited times":

I am aware that copyright must have a limit, because that is required by the Constitution of the United States . . . When I appeared before [a] committee of the House of Lords the chairman asked me what limit I would propose. I said, "Perpetuity."

Samuel Clemens, *Copyright*, in MARK TWAIN'S SPEECHES (1910).

Note on the Tenth Amendment

As you know by now, the first question to ask yourself when you confront the issue of whether the federal government has the power to do a particular thing is “What in the Constitution, if anything, confers that power?” So when you read about the *National League of Cities* case on page 334 of the casebook, make sure ask yourself whether Congress had the power to pass the minimum wage law at issue. (The same law was at issue in the *Garcia* case excerpted at pp. 334-36, so your answer for *National League of Cities* should hold for *Garcia* as well.)

As the casebook tells you, in *National League of Cities* the Court held that Congress had the power to pass a minimum wage law, but that the application of that law to state employees was unconstitutional. Unfortunately, the casebook does not tell you which constitutional provision was the basis for the Court’s decision. So I’m going to tell you. According to Justice Rehnquist’s majority opinion in *National League of Cities*, the relevant constitutional rule is to be found in the Tenth Amendment.

Read the Tenth Amendment (it’s at page liii of the casebook). Does it support the holding in *National League of Cities*? Here’s a quote from Justice Rehnquist’s opinion: “The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” Do you agree?

When you get to the “anticommandeering” cases (*New York v. United States*, p. 337; and *Printz v. United States*, p. 348) ask yourself again whether the Tenth Amendment supports the holding in those cases.