

No. 01-618

IN THE
Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioner,

v.

JOHN D. ASHCROFT, In his official capacity
as Attorney General,

Respondent.

**On a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit**

PETITION FOR REHEARING

LAWRENCE LESSIG
(Counsel of Record)
STANFORD LAW SCHOOL
CENTER FOR INTERNET
& SOCIETY
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-0999

Counsel for Petitioners

STATEMENT PURSUANT TO RULE 29.6

See Brief for Petitioners at p. ii.

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PETITION FOR REHEARING

Pursuant to Rule 44.1, petitioners respectfully petition this Court for rehearing.

I.

The currency of this Court is principle. While it is plainly appropriate for individual justices to differ on matters of principle, the credibility of the institution depends upon the consistent articulation of majority principles across cases. If the rule of law is a law of rules, then those rules constrain this Court as they do every other branch of government.

Five justices of this Court have articulated a principle about the limits on Congress's enumerated powers. That principle follows from an increasingly well-formed originalist practice interpreting text, structure and history as a method for determining the Constitution's meaning and limits. As described by Judge Sentelle below, under that principle, an interpretation of an enumerated power that has no "stopping point" is improper. Pet. App. 17a. So understood, the power perpetually to extend the term of subsisting copyrights cannot be a proper interpretation of "limited times."

It was upon the basis of this principle that petitioners brought their challenge to the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301-304) ("CTEA") in this Court. For although no clause in Article I, section 8 has had a longer history of judicially enforced limits on Congress's power, *see, e.g., Trade-Mark Cases*, 100 U.S. 82 (1879) (first case to strike a law as exceeding a specific Article I, sec. 8 grant of power), it was only after *United States v. Lopez*, 514 U.S. 549 (1995), that a particular method for determining enumerated limits was set by a majority of this Court. Only then did it become possible, on the basis of that

method, to frame a challenge to Congress’s increasingly regular practice of extending subsisting terms.

Yet despite this framing and the opinion of Judge Sentelle below, the opinion of this Court does not address the enumeration principle. It does not even cite *Lopez* or *United States v. Morrison*, 529 U.S. 598 (2000). Instead, as the petition for rehearing granted in *Reid v. Covert* observed, the opinion casts “Hamlet without the Prince.” Petition for Rehearing, *Reid v. Covert*, No. 55-701 (U.S. 1956), reprinted in Frederick B. Wiener, *Briefing and Arguing Federal Appeals* 433 (1967). The Court has decided this case based upon an approach that while perfectly consistent with the longstanding view of the author of the Court’s opinion—that this Court has no role checking the reach of enumerated powers—is in fundamental conflict with the principle outlined in *Lopez* and reaffirmed in *Morrison*.

This unaddressed conflict should not stand. If the principle of enumeration that Judge Sentelle believed governs this case does not, then this Court should explain why. If there is a reason why this Court’s review is appropriate to support the Framers’ views protecting States, then this Court should at least explain why it would be inappropriate to support the Framers’ views about the public domain. There is no meaningful difference in principle between the limits. Indeed, any difference between them would support stronger judicial review of the Copyright and Patent Clause, as the longstanding history of this Court confirms, but as the opinion in this case ignores.¹ As a consequence, despite the

¹ Nor can the reasoning adopted in this case be limited in good faith to the question of terms. As petitioners argued, there is no way to defend the implied constitutional limit of “originality” if the test for the express limit of “limited times” is mere rational basis. Early Congresses enacted laws granting copyrights to works that are not “original” under the rea-

injunction in *Morrison* that “[t]he powers of the legislature are defined and limited,” and that these limits are “not solely a matter of legislative grace,” *Morrison*, 529 U.S. at 616 (quoting *Marbury v. Madison*, 1 Cranch 137, 176 (1803)), the limit of “limited times” is now “solely a matter of legislative grace.”² Such a reading, while consistent with a familiar, if dated, view about the Court’s role in reviewing congressional action, is not the principle that a majority of this Court has consistently, if recently, articulated.

soning of *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). Resp. Br. 14 n.6. If those early, unreviewed laws determine the Constitution’s meaning, then *Feist* is wrong.

² The single originalist ground upon which the decision of this Court might stand is the claim that history has effected a “gloss” on the Constitution’s plain meaning. But no opinion of this Court has ever relied upon unreviewed congressional practice as a reason to refuse to interpret the plain text of the Constitution. Compare Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-88 (1985) (describing race-conscious affirmative action programs of the Reconstruction era, and concluding “history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups”) with *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (restricting scope of “affirmative action” despite unreviewed congressional practice at the framing of the 14th Amendment granting benefits on the basis of race). Nor does the history of the 1790 Act validate CTEA. Neither the government nor the Court has cited a single historian to support its view that the 1790 Act would have been perceived as continuous with CTEA. Every historian who has addressed this question concludes that this transitional statute is no more than that. A single cite of the *Green Bag*, slip op. at 10 n.5, cannot overcome this contrary authority—at least for justices for whom an accurate view of history determines the meaning of the Constitution’s text.

II.

The reason for this conflict in principle is not apparent from the opinion. Petitioners believe the cause is their own failure to make plain the profound harm to vital speech interests that this continued tolling of the public domain will effect. That failure allowed the Court to believe that the only real consequence from term extension is higher costs for commercially available works.

This is a mistake. The harm from extensions is not just that prices are higher. The real harm is the removal of a vast amount of our recent past from a domain where it might be usefully or easily cultivated. Because of this extension, for example, a museum cannot freely post an exhibit about the New Deal until 2030—not because the costs of a license are too great, but because it would be impossible to trace the rights necessary to avoid potential liability. Nor can publishers freely reprint now out-of-print books until at least a century after their initial release—again, long after any reasonable effort to locate a copyright owner could be undertaken. These extensions will therefore not simply mean that work that would be “free” will now have to be sold. They will mean instead that much of the culture from the early part of the 20th century will be lost long before the copyrights expire. *See* Brief of *Amici* Hal Roach Studios & Michael Agee at 11-12 (describing decay of nitrate-based film). As estimates published after argument demonstrate, the “commercial” copyright market gives consumers commercial access to just 2.3% of the books and 6.8% of the film work created during 1923-1946 period. Jason Schultz, *The Myth of the 1976 Act “Chaos” Theory*,

<http://eldred.cc/js>. The balance of much this work is effectively unavailable.³

The Internet provides an extraordinary opportunity to spread and advance knowledge by making content that is not now commercially available more easily available. There is no doubt that CTEA fundamentally burdens this opportunity. Nor is there any doubt that the Framers intended to avoid just such a burden. The only question is whether Founding values will continue to constrain current Congresses. This Court has used the enumeration principle to protect Founding values about federalism. The Court should grant this petition to address squarely the question whether this same principle—defining perhaps the most significant aspect of the Rehnquist Court’s jurisprudence—will apply consistently to the powers granted Congress, regardless of continued popularity of the values that may underlie the Framers’ choices.

³ In its apparent weighing of First Amendment interests, the Court points to Section 108(h) of the Copyright Act as mitigating this burden. Slip op. at 30. But because an archivist is given safe harbor under Section 108(h) only so long as specified conditions obtain, Section 108(h) gives no prospective security against liability. If in reliance upon the conditions set in Section 108(h) an archive makes material available, it must constantly monitor those conditions and then remove that material if any of the conditions specified in Section 108(h) change. This does nothing to reduce the burden or uncertainty surrounding works in their last 20 years of copyright.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted, the opinion of January 15, 2003 vacated, and the case scheduled for reargument.

Respectfully submitted,

LAWRENCE LESSIG
Counsel of Record
STANFORD LAW SCHOOL
CENTER FOR INTERNET
& SOCIETY
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-0999
Counsel for Petitioners

February 10, 2003

CERTIFICATE OF COUNSEL

As counsel for petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.

/s/ Lawrence Lessig
Counsel for Petitioners