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Cover Page Footnote

Many thanks to the organizers and participants of the 10th annual Supreme Court IP Review at Chicago-Kent College of Law and to the student editors of the Chicago-Kent Journal of Intellectual Property

AGAINST PROGRESS: INTERVENTIONS ABOUT EQUALITY IN SUPREME COURT CASES ABOUT COPYRIGHT LAW

JESSICA SILBEY*

This essay is adapted from a book I am writing called *Against Progress: Intellectual Property and Fundamental Values in the Internet Age*.¹ The book's primary argument is that, with the rise of digital technology and the ubiquity of the internet, intellectual property law is becoming a mainstream part of law and culture. Also, IP's mainstreaming in the late-20th century exposes on-going debates about "progress of science and the useful arts," which is the constitutional purpose of intellectual property rights.²

Today, it is unexceptional to read about intellectual property law on the front page of mainstream newspapers or for intellectual property to be the subject of popular television shows.³ Intellectual property law is now a central part of legal education, with law schools building intellectual property and technology law research and advocacy centers to highlight the importance of the field in contemporary legal practice.⁴ Moreover, since the mid-1990s, the United States Supreme Court has granted certiorari on intellectual property cases at a rate that is more

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1. JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (forthcoming 2021).

2. U.S. CONST. art. I, § 8, cl. 8.

3. See *Silicon Valley: Seasons 1-6* (HBO television broadcast 2013-2019).

4. See Steven Brachmann, *The State of IP Education Worldwide: Seven Leading Nations*, prepared for The Center for IP Understanding (2018), pp. 1, 3, available at <https://www.understandingip.org/wp-content/uploads/2019/11/CIPU-State-of-IP-Education-Worldwide-SB-BB.pdf>.

than double previous decades.⁵ Intellectual property's "domestication" into everyday legal and popular culture signals its probable reshaping and repurposing of the "progress" towards which intellectual property aims in ways that may be far afield from original foundations.

In brief, *Against Progress* describes how in the 20th century intellectual property legal doctrine and scholarship focused on economic models of progress, which were framed in terms of wealth accumulation and market theories facilitating economic growth.⁶ The rise of digital technology that facilitates all sorts of copying at the turn of the century puts pressure on the anti-copying regulations defining intellectual property. Combine this technological development with the focus on economic rationales and incentive-based reasons for exclusive rights, and federal intellectual property rights expand and broaden to regulate more of the behavior that technology enables. The result was an increase in the amount of intellectual property itself: more copyrighted works, more patents and more trademarks.⁷

Despite expanding scope and the rise of "more" intellectual property, *Against Progress* demonstrates that turn-of-the century intellectual property practice challenges the "progress as more" paradigm. Through various methodological interventions – close reading of cases, doctrinal analysis, and various qualitative empirical methods – *Against Progress* demonstrates how contemporary accounts of intellectual property are not primarily anchored by claims of "more" or in economic growth terms. Instead, creative and innovative practices

5. See Mark P. McKenna, *The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property*, 21 Wash. U. J.L. & Pol'y 11, 14-15 (2006) (counting cases from 1972 to 2006). From 2006 to 2019, the Supreme Court's IP case load has continued apace, with 26 patent cases, 12 copyright cases, and 10 trademark cases.

6. For canonical writing on the economic roots of intellectual property, see generally WILLIAM LANDES AND RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

7. For scholarship on problems of increasing scope in IP, see Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123, 123-24 (2018); Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2202 (2016); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 587 (2008). I understand that trademarks are authorized not by the "progress" clause of the Constitution but by its Commerce Clause. But insofar as progress is measured by "more" in the twentieth century, more distinctiveness and more competition—trademark law's hallmarks—are considered good things too. Trade secret and right of publicity are also relevant intellectual property doctrines that have expanded in scope over the past several decades. See generally JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018) (tracing evolution of right of publicity as an expanded right of privacy through the twentieth century); Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493, 493-96 (2010) (discussing evolution of trade secret law from common law to enactment of Uniform Trade Secret Act). Due to scope and time restraints, I have limited my analysis in the book largely to copyright, patent, and trademark.

(and disputes concerning them) revolve around adjacent values and principles central to our constitutional system such as equality, privacy, and community or general welfare.

The founders of the United States and its Constitution understood intellectual property to achieve “progress of science and the useful arts” by granting authors and inventors durationally limited property-like rights in their writings and inventions.⁸ But contemporary conversations about creative and innovative practices reveal that exclusivity and property-like rights may degrade not develop community sustainability.⁹ In other words, property rights and the economic models that have sustained them are under critical scrutiny in the new century by everyday creators and innovators in light of our new digitally-enabled landscapes. Supplanting economic rights are other fundamental rights deeply rooted in our constitutional democracy but which, like economic models of sustainable markets, are also subject to reconfiguration in our digital age. *Against Progress* argues that twenty-first century creativity and innovation and the intellectual property law that structures it are developing from the new human and digital networks of the 21st century, which are reinvigorating and reconfiguring twentieth-century social and political values for our internet age. These values, such as equality, privacy, and distributive justice, are central to human dignity and flourishing but have been largely absent from intellectual property policy. The book describes these debates about intellectual property over these values as a bellwether of changing social justice needs in the internet age.

In this short essay, I provide only two examples of the shifting narratives at play in intellectual property disputes that are refocusing concerns from economic resource allocation to fundamental values that ground the rule of law in the United States. These examples are drawn from the chapter on equality, which traces themes of equal treatment and substantive equality doctrine through intellectual property cases at the United States Supreme Court. The below discussion concerns two controversial copyright cases, but the chapter discusses cases about patent, trademark, and copyright law.

8. U.S. CONST. art. I, § 3, cl. 8.

9. For an early and by now canonical example of a critique of intellectual property rights and “Progress of Science and useful Arts,” see generally Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 Sci. 698 (1998).

I. SUPREME COURT AND EQUALITY DOCTRINE

When the Supreme Court started taking more intellectual property cases in the 1990s, their decisions were largely unanimous. Although some milestone decisions were contested and split (for example the case deciding the legality of the home video recorder was decided 5-4¹⁰), most cases then and now were much less contentious than, for example, cases about criminal law, affirmative action, or federalism. These other constitutional questions exhibit deep ideological division on the Court about, e.g., the role of government in ameliorating social inequality based on race, sex, or sexual orientation. To be sure, the Supreme Court is more often unanimous than divided on most issues it decides in the dwindling set of cases on which it grants certiorari.¹¹ But with the contentious cases concerning the lawfulness of same-sex marriage, anti-discrimination laws and their potential conflict with religious exercise, as examples,¹² the relative unanimity of the justices concerning intellectual property regulation and its relation to the constitutional prerogative of “progress of science and the useful arts” is notable.

As the Supreme Court’s intellectual property caseload grows, however, so does the level of disagreement among the justices. The disagreements resonate (on the surface at least) with utilitarian and economic explanations of IP law and policy. Is the IP law at issue rationally related to achieving its goal of promoting fair competition (trademark law) and “progress of science and the useful arts” (copyright and patent law)? Only upon closer look and comparison between cases, as one might compare texts by the same author tracing phrases, structure, and influences, does the ascendant priority and significance emerge of new values other than commercial policy and welfare as a measure of progress and a fair marketplace. These other values reflect debates concerning the nature and purpose of equality.

10. *Sony Corp v. Universal Studios*, 465 U.S. 1112 (1984).

11. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 *Wm. & Mary L. Rev.* 1219 (2012); Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 *Cornell L. Rev.* 769 (2015).

12. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (deciding 5-4 that the Fourteenth Amendment requires both marriage licensing and recognition for same-sex couples); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding 5-4 that the Religious Freedom Restoration Act allows for-profit companies to deny contraception coverage to employees based on a religious objection); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding 5-4 that Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body).

When dissents or concurrences arise, at first disagreements appear to revolve around customary IP-specific concerns such as balancing exclusive rights with meaningful access to promote a notion of “progress” defined by more inventions and creativity. But dig further and this canon of IP-specific Supreme Court case law also debates the appropriate beneficiaries for legal entitlements, fair opportunities to those benefits, and the effect of access to and constraints on those benefits for community wellbeing. In other words, as with all statutes and constitutional interpretation, the Court fills the semantic gaps and ambiguities with its perspective on the history and policy of the subject as related to deeper contemporary socio-cultural themes and preoccupations. We learn by studying the gap-filling that various dimensions of equality central to U.S. law and culture influence the Court’s intellectual property decisions and structure the Court’s growing disagreements in the intellectual property field.

It is curious that equality concepts frame these decisions when equality’s rival, *liberty*, is more fundamentally related to intellectual property given its power to exclude and restrict. Freedom to do something, rather than equal treatment with regard to some activity, is often considered the crux of the intellectual property issue. Equality presupposes fair distribution or access that frustrates freedom – think of anti-discrimination laws that mandate access at the expense of the freedom of the person or entity seeking to discriminate. This kind of equality would significantly reduce the dominion an IP owner has over their work. Indeed, until recent Supreme Court decisions from the first decade of the 21st century changed IP remedy rules,¹³ the dominant remedy for IP infringement was an injunction (prohibiting doing something). This reflects IP’s home in the field of property law, where remedies reflect and rely upon control and dominance over the more typical property asset – a car, a home, a bank account. By contrast, legal claims that result in money damages (often described as the “liability”), and not an injunction or specific performance to do something, are often associated with contracts (broken promises) and torts (accidents and injuries).¹⁴ Of course, remedial schemes may be mixed in law. For example, civil rights disputes include both injunctions and money

13. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (holding by unanimous court that permanent injunctions should not always be issued when a patent has been violated and instead that traditional four-part test for injunctive relief applies in patent law).

14. See generally Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Louis Kaplow and Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996).

damages: a prohibition on the unlawful activity going forward and compensation for the civil rights injury of the past. In civil rights cases, we may understandably reject thinking of liberty and equality as forming a zero-sum relationship: is the right to be free from racial segregation a wrongful lack of freedom for the segregationist or a rightful benefit for the equality of those previously segregated? But in some contemporary cases concerning the “right to discriminate” in public accommodations – for example refusing to bake a gay couple’s wedding cake – the liberty-equality trade-off has returned.¹⁵

And this is true with the Supreme Court cases about intellectual property. Once considered mere economic rights like property, the debate about how to allocate IP resources was as uncontentious as whether Congress can regulate the interstate dairy industry with its plenary power to regulate interstate commerce.¹⁶ Now, however, to read and understand Supreme Court cases about IP as debating something other than property, something instead akin to civil rights of equal dignity, we recognize in them deeply rooted and still contentious debates over segregation, discrimination, and freedom from the arbitrary and unaccountable will of others as a path towards egalitarianism.

When these equality debates concern access for women to an all-male school, for example, lawyers understand immediately the implication of the equal protection clause of the 14th amendment. The implication of the equal protection clause in these situations triggers recognizable and long-standing doctrinal analyses.

When the law at issue is not drawn along so-called “suspect” or “quasi-suspect” lines, however, e.g., regarding categorizations of race, religion, or gender, the acceptable doctrinal analysis under the equal protection clause is deferential judicial review. The court’s job is to ask only if the distinction in the law is rationally related to some legitimate purpose showing deference to the legislative line-drawing and the democratic processes that gave rise to the legislation in the first instance. What this means is that “equal protection of the laws” does not require that all people or entities be treated the same, only that likes be treated alike or that when they are not, a rational basis exist for

15. See *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (holding 7-2 that the Colorado Civil Rights Commission’s conduct in evaluating a cake shop owner’s reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause but refraining from deciding whether Colorado’s public accommodation law requires the baker to treat the same-sex the same as an opposite-sex couple).

16. See *US v. Carolene Products*, 304 U.S. 144 (1939).

differential treatment.¹⁷ This is the rule against arbitrariness. When differential treatment is justified, the differences are just that; they do not impose status hierarchies or perpetuate abuses of power but instead are distinctions rationally relied upon to promote orderly economic relations.

So, for example, when opticians are treated differently than ophthalmologists for the purposes of state licensing requirements, or when a federal law blesses “pure” dairy products but bans “impure” dairy products, we ask whether this differential treatment violates the presumptive rule of formal equality (all eye doctors or dairy products should be treated the same).¹⁸ We ask whether differential treatment is justified by some rational basis. Intellectual property regulations are considered to embody economic rights and policy and thus would fall under rational basis scrutiny. As such, the Court largely defers to the lines drawn by Congress promoting or limiting intellectual property as long as a hypothetical rational basis exists for the categories and the differential treatment at issue.

Deference to the democratic legislative rational disappears when the law distinguishes on the basis of “suspect” or “quasi-suspect” categories, e.g., on the basis of race, ethnicity, religious affiliation, or gender. In these circumstances, equality law developed to more strictly scrutinize democratic decision-making out of concern that democratic rule has failed a historically disadvantaged group for arbitrary reasons or is otherwise perpetuating long-standing and irrational prejudice that degrades people on the basis of class membership or identity. This “strict scrutiny” requires a court’s searching review of the legislative rationales to root out invidious discrimination,¹⁹ such as White Supremacy and misogyny, both which structure political, social, and economic institutions to keep people of color and women on the margins of power and opportunity. In these cases, courts demand from lawmakers a higher justification for the law and the lines it draws. In doing so, courts look for the perpetuation of status hierarchies for their own sake in which differences are stigmatized as markers of

17. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-75 (1980).

18. See *Williamson v. Lee Optical Inc.*, 348 U.S. 483 (1955) (holding differential treatment of opticians from ophthalmologists is ordinary economic legislation and does not violate equal protection clause); cf. *Carolene Products*, 304 U.S. at 154 (holding that federal law banning impure dairy products from interstate commerce does not violate due process or equal protection).

19. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-11 (1976).

inferiority.²⁰ The rightful disdain of caste systems in which hierarchies perpetuate humiliation and shame for those with relatively little power or status motivates this equal protection analysis.

This equality reasoning originates with the dissent from the grotesque error in *Plessy v. Ferguson*, which upheld legally mandated racial segregation as a reflection of consensual custom instead of a humiliating and oppressive practice that implied the social inferiority of Black people.²¹ *Plessy* was later reversed and corrected in *Brown v. Board of Education*, which defines equality as freedom from legally sanctioned hierarchy and subordination that create “unacceptable degrees of control over the lives of others.”²² This reasoning, conjoining freedom and equality, also celebrates choice and consent of free and equal people as a measure of a just society. Ideally, just legal regimes facilitate free choice and mutual consent between otherwise independent actors, developing self-determination and equal dignity while avoiding unjust subordination.

Two controversial copyright cases decided a decade apart exhibit these doctrinal strands of equal protection law. These cases are controversial because both extended and strengthened copyright protection against a backdrop of an expanding digital age in which the swelling scope of copyright threatens speech and behavior on the internet. They are also controversial because as opportunities for speech and creativity grow in the digital age, copyright law’s incentive rationale (that exclusivity is necessary to promote expression and its dissemination) is less persuasive when applied to the expanding breadth of works to which copyright law now pertains. Finally, the cases are controversial because of weak reasoning and fractured opinions that speak past each other.²³ As I explain below, a better way to understand these cases is not as debating the scope of copyright law as

20. “The evil involved in such arrangements is a comparative one: what is objectionable is being marked as inferior to others in a demeaning way. . . . [I]t is not the tasks themselves that members of lower castes are assigned to perform that are demeaning – they may be necessary tasks that someone has to perform in any society. The problem is that they are seen as beneath those in higher castes. The remedy in such cases is to abolish the social system that defines and upholds such distinctions between superior and inferior.” T.H. Scanlon, *When Does Equality Matter?*, 8 (2004).

21. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding Louisiana Law segregating train travel by race as consistent with the equal protection clause because it treats both black and white passengers the same).

22. Scanlon, *supra* note 20, at 9.

23. For critique of *Eldred*, see Pamela Samuelson, *The Constitutional Law of Intellectual Property after Eldred v. Ashcroft*, 50 J. COPYRIGHT SOC’Y U.S.A. 547, 547-550, n. 7) (2003) (citing others). For critique of *Golan*, see Howard B. Abrams, *Eldred, Golan and Their Aftermath*, 60 J. COPYRIGHT SOC’Y U.S.A. 491 (2013).

a matter of ordinary economic policy, but instead about the role of equality between people regarding copyright's burdens and beneficiaries, an increasingly relevant concern in the digital age when copying fuels the internet and copyright can restrict access.

II. FORMAL EQUALITY AND LIKES TREATED ALIKE: *ELDRED V. ASHCROFT*

Eldred v. Ashcroft concerns the rationality of congressional legislation called the Copyright Term Extension Act of 1998 (the CTEA), passed at the end of the decade that witnessed the birth of the internet and the world wide web.²⁴ The CTEA extended the copyright term twenty years, from life of the author plus fifty years (as enacted in 1976), to life of the author plus seventy years.²⁵ A central question in the case was whether Congress had a rational basis for adding the twenty years and, relatedly, whether the enlarged term could permissibly apply to existing and future copyrights alike.²⁶ Justice Ginsburg, writing for seven members of the Court, held that Congress did have a rational basis for the twenty-year extension and for its equal application to both existing and future copyrights and copyright holders.²⁷

The controversy around *Eldred* centers largely on the fact that few people believe that twenty extra years of copyright protection adds any incentive to authors or owners to create or disseminate creative works, the primary reasons for which copyrights are granted.²⁸ Those disbelieving the Court's reasoning would be forgiven for their skepticism given that Disney Corporation led the lobbying push for this legislation in order to protect Mickey Mouse (in his earliest incarnation as Steamboat Willie) from falling into the public domain in 1998. Also, the legislation was sponsored by representative Sonny Bono, a man who became wealthy from the sales of his music. But rather than dig into the legislative history to discern whether the evidence and factual record supported a finding of sufficient incentives for more than the Disney

24. *Eldred v. Ashcroft*, 537 U.S. 186, 193-94 (2003) (upholding the Copyright Term Extension Act (CTEA) of 1998, which amended the durational provisions of the Copyright Act at 17 U.S.C. §§ 302, 304 (1998)).

25. *Id.*

26. *Id.* at 204, 231.

27. *Id.* at 194.

28. *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (stating that "the primary objective of copyright" is "[t]o promote the Progress of Science and useful Arts.") (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the [Copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .").

Corporation and musical celebrities, the Court traveled its usual and customary path when considering the rationality of ordinary economic legislation. It deferred to Congress, the relevant democratic body, saying “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives” of promoting progress of science and the useful arts.²⁹

This is a correct statement of law and legal history. And, there was some evidence before Congress—albeit self-serving and exaggerated evidence—suggesting that the extension of copyright by twenty years would benefit authors and publishers and encourage both to invest in more creative work.³⁰ Musicians such as Bob Dylan and Carlos Santana gave testimony before Congress that said an extra twenty years would “assur[e] . . . fair compensation for themselves and their heirs [and thus] was an incentive to create.”³¹ The Motion Picture Association of American, of which Disney is a member, said that copyright term extension would “provide copyright owners [by which the MPAA means their studio members] generally with the incentive to restore older works and further disseminate them to the public.”³² And Senator Orrin Hatch argued that given “increasing longevity and the trend toward rearing children later in life, [copyright term extension will] provide adequate protection for American creators and their heirs” otherwise the “U. S. copyright term [will fail] to keep pace with the substantially increased commercial life of copyrighted works resulting from the rapid growth in communications media.”³³ Even without such evidence, however, the Court properly exercises deferential judicial review of ordinary economic legislation when it *presumes* the existence of such facts and when there is no evidence of legislative irrationality (such as prejudice), the targeting a suspect class (race or gender), or the burdening of a fundamental right. In these exceptional cases, the Court would abandon deference and engage in strict scrutiny of the legislative purpose and effect.³⁴

29. *Eldred*, 537 U.S. at 212.

30. *Id.* at 255-257 (Breyer, J., dissenting).

31. *Id.* at 207 n.15.

32. *Id.* at 207 (quoting H.R. Rep. No. 105-452, at 4 (1998))

33. *Id.* at 207 n.14. See also Brief for Motion Picture Association of America as Amici Curiae Supporting Respondents at 14-20, *Eldred v. Ashcroft*, 537 U.S. 186 (2002) (arguing that films are fragile and restoration is expensive such that longer terms will incentivize more restoration by facilitating recuperation of investment in that restoration process).

34. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980). Notably, Justice Breyer suggests the level of scrutiny should be more than rational basis because the copyright extension intrudes on speech and raises First Amendment concerns. *Id.* at 244. Were this position to have prevailed, the lack of

There was another complaint about *Eldred* aside from the absence of sufficient or rational basis for the twenty-year extension. The Court's reasoning exposed the possibility of perpetual copyright protection which would violate the Constitution's "limited times" provision in the IP clause: Congress has the power "to promote the progress of science and useful arts, by securing for *limited times to authors* and inventors the exclusive right to their respective writings and discoveries."³⁵ If Congress could extend by twenty years both existing and future copyrights on the self-serving statement of certain wealthy copyright owners who had a seat at Congress's table, what prevents Congress from extending copyright indefinitely through a series of incremental extensions over time (which is precisely what has happened to copyright beginning with the first 1790 statute, which granted a mere fourteen year term).³⁶ To this, the Court majority had little to say except that what it (and Congress) were aiming for in its application to future and present copyright authors alike was "parity" and "evenhanded[ness]."³⁷ This is where the equality rationale resurfaces in a surprising new formulation for intellectual property law.

The majority held that "[i]n that 1998 legislation, as in all previous copyright term extensions, Congress placed existing and future copyrights in parity. In prescribing that alignment, we hold, Congress acted within its authority and did not transgress constitutional limitations."³⁸ Doing so, the Court sidestepped the perpetual copyright problem altogether, except to say that 70 years is not perpetual and perpetual copyright would violate the "limited times" provision. And it justified its retroactive application of the longer copyright term with the moral force of the value of "equal treatment." As long as Congress acts to promote equality in the copyright field among existing and future copyright holders the same – or "alike," "evenhandedly," or "in parity" (however the Court describes the similar treatment) – the Court says it trusts congressional decision-making. Notably, Justice Breyer in his dissent accepts for the purposes of argument that "it is not 'categorically

evidentiary support that both existing and future copyright holders are incentivized by the twenty-year extension might have doomed the Act.

35. *Eldred*, 537 U.S. at 198-99 (quoting CONST. art. 1, § 8, cl. 8).

36. See STAFF OF THE S. COMM. ON THE JUDICIARY, 86th CONG., STUD. ON DURATION OF COPYRIGHT (Comm. Print 1957) (detailing extension of copyright term from 14 years for the first Copyright Act in 1790 to 56 years as of 1957 (28 years plus a renewal term of 28 years)), <https://www.copyright.gov/history/studies/study30.pdf>. The 1976 Act changed copyright term to life of the author plus fifty years. The CTEA extended it to life of the author plus seventy years.

37. *Eldred*, 537 U.S. at 200, 208.

38. *Id.* at 194.

beyond Congress' authority' to 'exten[d] the duration of existing copyrights' to achieve such parity."³⁹

One could understand Justice Ginsburg's majority decision in *Eldred* as about recognizing and protecting the class of copyright holders that deserve equal treatment to avoid a violation of bedrock formal equality law demanding that similarly situated people (and things) be treated the same. Indeed, long-standing copyright law from 1903 prohibits discrimination among copyright holders, holding that "high" and "low" art are similarly situated with regard to the exclusive rights copyright law provides.⁴⁰ *Eldred* may therefore be simply an extension of this century-old anti-discrimination principle. Simply counting the number of times the *Eldred* opinion uses words synonymous with "equality" reveals the Court's focus on similar treatment. The first paragraph ends with the sentence, "Congress provided for application of the enlarged terms to existing and future copyrights *alike*."⁴¹ The third paragraph states again that "Congress placed existing and future copyrights *in parity*."⁴² It then concluded by saying "[i]n prescribing that *alignment*, we hold, Congress acted within its authority."⁴³ The opinion repeats the words "alike," "parity," and "alignment" or "aligned" nearly a dozen times. If we add references to "matches," "equity," "harmony," "evenhandedly," and "same[ness]," which also pepper the decision, the prominence of equal protection thinking in this copyright opinion emerges clearly.

Other than linguistic choices, Ginsburg focused on the individual authors themselves and their expectations for equal legal treatment. She insisted throughout the opinion that current copyright holders are reasonable to expect they will be treated like future copyright holders should new legal benefits arise, because that is what has always happened.⁴⁴ She also explained that Congress' extension of copyright terms ensures the equal treatment of American authors to foreign authors under the Berne Convention.⁴⁵ Personalizing the equal

39. *Id.* at 266 (Breyer, J., dissenting).

40. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

41. *Eldred*, 537 U.S. at 193 (emphasis added).

42. *Id.* at 194 (emphasis added).

43. *Id.* (emphasis added).

44. *Id.* at 200.

45. *Id.* at 205-206 ("Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.").

treatment—its present expectation and its future effect globally—paints this case not about monetary incentives to create or disseminate creative work but about the dignity of equal treatment as a social value absent a good reason to deviate. In other words, although the decision reads as the classic deference to congressional decision-making under Congress' plenary powers concerning ordinary economic legislation, Ginsburg's opinion evoked her continuing mission of equal treatment for persons under the law. Writing for the majority, she could see no plausible reason to treat some copyright holders differently from others, be it current versus future copyright owners or American versus foreign copyright authors. This was in part because of the strength of similar treatment, or formal equality, as a constitutional value.

But reliance on formal equality to govern the outcome of this case disregards the history of copyright legislation, its captured process subject to special interest lobbying, and the democratic principles of fair process and open institutions on which procedural fairness is based. The tortured history of special interest copyright legislation is well-documented.⁴⁶ Jessica Litman's book *Digital Copyright* explains how U.S. copyright legislative reform has been led largely by the strong-copyright advocates: the big six movie studios (the MPAA), the music recording industry (the RIAA), and the text publishing industry (the Author's Guild).⁴⁷ Litman argues that captured legislative process concerning copyright helps an elite group of copyright holders and harms the everyday audience of copyright users and creators. (In today's parlance we might call the beneficiaries of these legislative reforms "the one percent.") This is a far cry from equal treatment, and it is camouflaged by democratic flag waiving.

Litman warned that if the past legislative process is predictive of the future, copyright spoils will be only for the wealthy and powerful, and its predominant form of digital copyright (the majority of expression today) will suffocate the constitutional mandate for "progress of science and the useful arts" that requires wide distribution of and access to creative expression. Justice Breyer's *Eldred* dissent does not mention this critical legislative history but does say that "congressional action under the Copyright/Patent Clause demonstrates

46. JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001) (providing history of the 1998 copyright legislation); BILL HERMAN, *THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY* (2014) (providing a history of the DMCA, the CTEA and SOPA/PIPA in particular).

47. Litman, *supra* note 46. See also ARAM SINNREICH, *THE PIRACY CRUSADE: HOW THE MUSIC INDUSTRY'S WAR ON SHARING DESTROYS MARKETS AND ERODES CIVIL LIBERTIES* (2013).

that history . . . does not provide the ‘volume of logic,’ necessary to sustain the . . . [Act’s] constitutionality.”⁴⁸ Indeed, as both dissents explain, the formal equality logic of equal treatment appears to be a ruse benefitting only 2% of copyright holders. Those beneficiaries’ estates may profit 50 years after the author’s death from the extended copyright term, but it is manifestly unlikely the extra years of copyright did or will incentivize the production or further dissemination of the creative work produced.⁴⁹

In this light, the equal treatment justification for the Sonny Bono Copyright Term Extension Act melts away. As it turns out, very few *people* actually supported the CTEA. It was a compromise struck by digital platform intermediaries, building their commercial presence on the internet, and content companies, such as the MPAA and the RIAA, whose copyright assets traveled farthest and fastest on those digital networks. In exchange for agreeing to the twenty year copyright term extension, the digital intermediaries received immunity for certain kinds of unauthorized uses on-line pursuant to a law passed later the same year called the Digital Millennium Copyright Act (the DMCA).

The motivation for record companies and music publishers was clear enough; the former wanted to reduce the number of illicit digital copies competing with their official recordings, and the latter wanted another source of licensing revenues. Technology companies supported the bill – not on principle, but because they wanted to design and sell their products without being sued.⁵⁰

The result of a captured legislative process is copyright law that entrenches moneyed interests.⁵¹ Far from treating people the same, the CTEA (and its sibling the DMCA) was a backroom deal later justified by the Court as democratic and reflecting equal treatment.

Justice Stevens’ dissent is most vocal on this score, and Justice Breyer adopts the reasoning in full. Justice Stevens’ critique of the parity argument shifts focus of equal treatment from the class of “authors” seeking to protect their copyright (content owners, such as the MPAA) to the public that the Copyright Act was intended to ultimately benefit. “*Ex post facto* extensions of copyrights result in a gratuitous transfer of wealth from the public to authors, publishers and their successors in interest. Such retroactive extensions do not even arguably serve either the purposes of the Copyright/Patent Clause,” which he explained is “to

48. *Eldred*, 537 U.S. at 233.

49. *Id.* at 248.

50. Herman, *supra* note 46, at 35.

51. *Id.* at 48-52.

allow the public access to products of [author's creative activity] after the limited period of exclusive control has expired."⁵² And later Justice Stevens says:

the reason for increasing the inducement to create something new simply does not apply to an already-created work. To the contrary, the equity argument actually provides strong support for petitioners. Members of the public were entitled to rely on a promised access to copyrighted or patented works at the expiration of the terms specified when the exclusive privileges were granted. On the other hand, authors will receive the full benefit of the exclusive terms that were promised as an inducement to their creativity, and have no equitable claim to increased compensation for doing nothing more.⁵³

Stevens unravels the majority's parity argument with an expanded focus on *all* the beneficiaries of the Copyright Act, demonstrating how formal equality logic of equal treatment can be easily manipulated by narrowing the relevant class. Treating "likes alike" – "all" "authors" the same, in Ginsburg's argument – ignores all those other people for whom copyright also exists as well as the flaws in democratic process that established the benefit. The equal treatment argument thereby perpetuates the exclusion of a vast public who should be included within the Act's application of parity, or, as Breyer names them: "movie buffs and aging jazz fans, . . . historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds . . . who want to make the past accessible for their own use or for that of others."⁵⁴ The dissents' identification of flaws in the underlying justification for the majority's equality rationale articulates additional interests for IP's constitutional implementation: a public and the public domain. The dissents do not reject equality as critical to copyright law's structure, but instead redraws the lines of class membership and asks explicitly: who else counts when considering equal treatment?

As the dissents explain, the category of "authors" varies to whom the twenty-year extension applies. Most authors – 98% of them according to the dissent's calculation based on briefs filed in the case – would not materially benefit from the legislation. And future or aspiring authors who rely on previous work on which to create new works will

52. *Eldred*, 537 U.S. at 227.

53. *Id.* at 244 (Stevens, J., dissenting). Breyer reiterates this point: "Copyright statutes must serve public, not private, ends; . . . they must seek 'to promote the Progress' of knowledge and learning; and . . . they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration . . ." *Id.* at 247-48 (Breyer, J., dissenting).

54. *Id.* at 250, (Breyer, J., dissenting).

be hindered by the extended monopoly. The dissents presage in 2003 how today, decades later, the category of authors to whom the equality principle should apply continues to expand and be even more relevant to human relations and productivity in the digital era.⁵⁵ For example, in 2011, when the Stop On-Line Piracy Act (SOPA) was being debated, which law had it passed would have strengthened law enforcement tools to combat online copyright infringement including blocking user internet access, a successful grassroots movement of everyday internet users, authors, creators, and innovators, shut down the internet for a day in protest demonstrating their criticality and their power.⁵⁶ Movements like this emphasize that authors are not only those who succeed at earning royalties in exchange for licensed use by established intermediaries (a very small class of lucky authors). In the internet age especially, authors are everyday creators and users – or “prosumers” to borrow Alvin Toffler’s coinage – who depend on access to the vast trove of expressive works newly accessible from our digital networks in order to produce and participate in our dynamic and industrious culture.⁵⁷ As the *Eldred* dissents explain, the majority failed to consider these other copyright stakeholders despite basing its decision on the value of inclusivity.

As civil rights advocates understand, there is much to criticize about equality jurisprudence that mechanically recites the benefit of “equal treatment” without investigating more deeply the relevant categories of people or things being compared.⁵⁸ The just application of formal equality often depends on carefully defining the category of membership and identifying a starting line to which everyone has the same access in order to evaluate relevant progress. Justice Ginsburg is no stranger to this critique given her role in gender and racial equality

55. See Amy Goodman, *The SOPA Blackout Protest Makes History*, THE GUARDIAN (Jan. 18, 2012), <https://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history> (“An unprecedented wave of online opposition to the SOPA and PIPA bills before Congress shows the power of a free internet.”).

56. BILL HERMAN, *THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY* 194 (2013).

57. ALVIN TOFFLER, *THE THIRD WAVE* 27 (1980). See also DON TAPSCOTT, *THE DIGITAL ECONOMY* 62 (1995); George Ritzer & Nathan Jurgenson, *Production, Consumption, Prosumption: The Nature of Capitalism in the Age of the Digital ‘Prosumer’*, 10 J. CONSUMER CULTURE 13, 17 (2010).

58. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 219 (1989) (describing how law and society subordinate women to men by defining women as different and thus justifying their unequal treatment, or by measuring women by male standards and thus justifying women’s subordination when they don’t match up) [hereinafter MacKinnon, *Toward a Feminist Theory*]. See also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 123 (1987) [hereinafter MacKinnon, *Feminism Unmodified*].

cases concerning accommodation and affirmative action that interrogate inequality as a function of disparate origins and inattention to their relevant differences. But she fails to see its purchase here. Nonetheless, the debate between the majority and dissents in *Eldred* concerning equal treatment illuminates new stakes on which the argument about IP's structure and purpose proceeds in the digital age.

III. ANTI-HIERARCHY, ANTI-CASTE: *GOLAN V. HOLDER*.

This section discusses the Supreme Court case *Golan v. Holder* as an example of equality law grounded not in the equal treatment principle but in the anti-subordination principle. Formal equality or "equal treatment" is only one aspect of equality analysis. Critical to equality law is the consideration of social circumstances, opportunities, or freedoms that are thwarted because not all are treated or created the same, which may justify disparate treatment. Cases like *Golan* demonstrate this layered equality jurisprudence by moving from an equal treatment analysis to concern over status hierarchies and denigrating castes in the context of intellectual property disputes that justify special accommodation or affirmative action. *Golan v. Holder* rejects a formal equality analysis ("all authors") and looks instead to promoting equality by treating some authors differently ("foreign authors" alone) to undo the injustice of prior differential treatment or subordination.

Despite attention to unjust subordination, the effect of the Court's analysis is to reinstate property relations or a social system that oppresses people not present to protect their stake in the IP dispute. I argue that this demonstrates the court's inadequate attention to the internet's complex integration of social relations and economic opportunities, a feature of our networked age that magnifies both opportunities and deprivations. Cases like *Golan* debating the benefits of IP law show how the interconnectedness of economic and social policy in the digital age complicates and requires clarification of the responsibilities we have to each other in terms of "the social conditions of freedoms . . . need[ed] to function as equal citizens."⁵⁹ And yet the Court's unrequited paean to anti-subordination equality moved the debate from market economics to deeply held values of equal dignity and reflects the centrality of current cultural debates about persistent inequality and solutions to it in the new era of the internet. When, as the *Golan* court explains, past IP rights or limitations are stigmatic markers

59. Elizabeth S. Anderson, *What is the Point of Equality*, 109 ETHICS, 287, 320 (1999).

of inferiority, or when they perpetuated caste-like conditions (the way race was understood in *Brown v. Board of Education*), the Court reorients its analysis from IP being about ordinary economic legislation to one about identity, personhood, and belonging in a complex ecosystem aiming to promote creative expression and sustaining collaborations.

The 2012 decision of *Golan v. Holder* upholds as constitutional section 104A of the U.S. Copyright Act, added in 1994 as part of the U.S. joining the international Berne treaty (the Berne Convention for the Protection of Literary and Artistic Works). Section 104A grants copyright protection to certain preexisting works of Berne member countries previously in the public domain in the U.S. These foreign works lacked U.S. copyright protection and were in the U.S. public domain because either the U.S. did not protect works from that country at the time of their publication or because authors of those works failed to comply with U.S. statutory requirements. Section 104A's effect was to withdraw hundreds of thousands of works from the U.S. public domain—canonical works such as Prokofiev's "Peter and the Wolf" and Edward Munch's painting "The Scream"—and bring them under U.S. copyright protection for the remaining portion of their exclusive term.

Many advocates considered section 104A's shrinking of the public domain—on which innumerable people rely for education, entertainment, and commerce—a First Amendment violation and beyond Congress' power under the intellectual property clause. The petitioners in *Golan* argued that "[r]emoving works from the public domain . . . violates the 'limited [t]imes' restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires."⁶⁰ This shrinking of the public domain presented new challenges to freedom of speech. Those opposed to section 104A drew on the Supreme Court's statement a decade earlier in *Eldred*, that altering the "traditional contours of copyright protection" warrants heightened scrutiny under the First Amendment.⁶¹ Heightened scrutiny, sometimes in the form of strict scrutiny, means a court demands more than a rational justification for the law. Democratic deference and mere rationality no longer apply when a fundamental right is at stake. In other words, the *Golan* petitioners learned their lesson from the *Eldred* court's submissiveness to congressional line-

60. *Golan v. Holder*, 565 U.S. 203, 318-19 (internal quotation marks omitted).

61. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

drawing for ordinary economic policy issues. If the Court defers only to Congress's *ordinary* copyright legislation based in economic policy, Petitioners must show how 104A is *extraordinary* legislation because it interferes with the fundamental right of free speech. As such, Congress would have to justify 104A's copyright extension with a more rigorous record of its purported benefits to creative production and dissemination, a challenge the petitioners thought Congress could not meet.

But Petitioners focused on the wrong fundamental right. In *Golan*, as in *Eldred*, the Court is not worried about free speech but about equality. Instead of analyzing the law's balance of producing more creative work despite substantially shrinking the public domain, the Court considers the new equality as justification. The decision begins with familiar language about formal equality – “sameness” and “reciprocity” – stating that Section 104A gave to foreign works “the same full term of protection available to U.S. works” because “[m]embers of the Berne Union agree to treat authors from other member countries as well as they treat their own.”⁶² Justice Ginsburg, for the majority, understands the United States' acquiescence to Berne as a “reciproc[at]ion with respect to . . . authors' works.”⁶³ The Court considers the laudable effect of section 104A, despite its diminution of the public domain, as a “restoration plac[ing] foreign works on an equal footing with their U.S. counterparts.”⁶⁴

But the *Golan* decision goes beyond formal equality of treating likes alike and reasons to its result by relying on an anti-subordination principle. The anti-subordination principle is sometimes understood as competing with anti-classification (or formal) equality.⁶⁵ Commitment to anti-subordination reflects a belief that certain distinctions reproduce or enforce inferior social status, especially of historically oppressed people. As Reva Siegel and Jack Balkin write, “[a]ntisubordination theori[es] contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically

62. *Golan*, 565 U.S. at 308.

63. *Id.* at 312.

64. *Id.* at 315.

65. Reva Siegel, *Equality Talk: Anti-subordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004).

oppressed groups.”⁶⁶ The anti-subordination rationale, in contrast to the anti-classification or formal equality principle, allows—and even encourages—the government to prefer or benefit some groups over others to remedy past conditions of subordination or deprivation. Rather than rely on concepts of “sameness” and “difference” for which relevant differences justify different treatment, an anti-subordination rationale excoriates the existence and perpetuation of hierarchy that reinforce both privilege and stigma and justifies treating people differently to undo such injustices. The Supreme Court’s equality jurisprudence embraces both anti-subordination equality (affirmative action) as well as anti-discrimination equality (equal treatment). These doctrines co-originated after the Civil War when the Freedman’s bureau provided benefits only to newly freed slaves at the same time as the new Fourteenth Amendment insisted on a new norm of “equal protection of the laws.” Constitutional approval of affirmative action has extended into the 20th century with programs in education and employment that aim to remediate systemic discrimination and disadvantage by selecting for and protecting only certain statuses and physical traits historically targeted, such as race, sex, pregnancy and able-bodiedness.

Consider the case of gender inequality. Under the formal equality model, women and men are both persons and thus equal, e.g., “the same” and should be judged by the same criteria, for example when applying for jobs.⁶⁷ Conversely, they may also be “different” in some capacity and thus need not be treated the same, for example when assessing leave after a child is born.⁶⁸ Neither approach considers how gender as a social category constrains or provides opportunities for and access to social, political and economic benefits on the basis of sex.⁶⁹ Job criteria may be the same, but fewer women may be hired because they experience less access to opportunities that prepare them for the job market because of gender stereotyping and differential social roles (of child care or career expectations). Similarly, providing more leave for women after child birth may make sense because their physical experience of child birth may require more recovery time, but granting more time to women than to men may encourage more mothers to stay home with newborns than

66. Siegel & Jack Balkin, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2004).

67. MacKinnon, *Feminism Unmodified*, *supra* note 58, at 33; *see also* MacKinnon, *Toward a Feminist Theory*, *supra* note 58, at 219.

68. MacKinnon, *Feminism Unmodified*, *supra* note 58, at 33; *see also* MacKinnon, *Toward a Feminist Theory*, *supra* note 58, at 219.

69. MacKinnon, *Feminism Unmodified*, *supra* note 58, at 34-39.

fathers and discourage equal parenting and equal opportunity to return to and advance at work. “Same” or “different” treatment without regard to existing gendered social stratification and the reasons for it reproduces inequality through powerful male-dominated institutions (the paid workforce) at the expense of women. By contrast, an anti-subordination approach to gender inequality identifies the power instantiated in the labels “male” and “female,” and asks whether the maintenance of the labels “participates in the systemic social deprivation of one sex because of sex.”⁷⁰ As Catherine MacKinnon has written regarding this form of equality theory:

The only question [for equality] . . . is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status The social problem addressed is not the failure to ignore woman’s essential sameness with man, but the recognition of womanhood to women’s comparative disadvantage.⁷¹

What does this have to do with the *Golan* decision and copyright law? As literary historians and copyright scholars recount, the U.S. copyright system was rigged against foreign authors from its earliest days on behalf of the American publishing industry.⁷² Foreign authors were disadvantaged as compared to domestic authors regarding copyright. U.S. copyright was riddled with technical traps unfamiliar to foreign authors. U.S. copyright law in large part failed to protect foreign authors (who first published overseas) who sought to publish and sell their works in the United States. This led to profound imbalances in the U.S. of the relative cost of works by foreign and domestic authors; foreign works were cheap to publish because copyright licenses were not required. These purposeful market asymmetries skewed the perceived value of, and access to, foreign and domestic works. Foreign authors were the “women” in this social hierarchy of access to economic independence and career opportunities. Section 104A was enacted by Congress to remedy those imbalances – only for foreign authors. It was enacted, according to Ginsburg’s majority opinion, as affirmative action

70. CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 102, 117-118 (1979).

71. *Id.* at 117.

72. ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING AND THE PUBLIC DOMAIN* 2, 70 (2013); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 17 (1993).

to undo or reverse the harm caused by decades of copyright deprivation for foreign authors and overseas copyright holders.⁷³

According to the *Golan* majority, fixing the anti-foreign bias in the U.S. copyright system by reserving benefits only for formerly deprived foreign authors is justified for two reasons: international harmonization assures better treatment to U.S. authors abroad and it is a targeted remedy for the purposeful deprivation of foreign authors' copyright by restoring their exclusive rights in the United States. Section 104A did in fact harmonize the U.S. copyright regime by placing foreign works in the position they would have occupied if the current non-discriminatory U.S. regime had been in effect when those works were created and first published. As the Court states, "[a]uthors once deprived of protection are spared the continuing effects of that initial deprivation; [section 104A] gives them nothing more than the benefit of their labors during whatever time remains before the normal copyright term expires."⁷⁴ Restoring works to the "position they would have occupied" and "spar[ing]" authors any further "deprivation" unmistakably resonates with the language of affirmative action and remedying past unjust discrimination.⁷⁵ Indeed, in a footnote, Justice Ginsburg's opinion accuses the unreformed copyright law (and Justice Breyer's dissent) of American exceptionalism and isolationism, a critique resonating with concerns of cultural dominance (status and stigma) that animate anti-subordination equality theory.⁷⁶

The *Golan* majority further argues that restoration of copyright and a focused shrinking of the public domain is a modest reform. Far from making foreign authors whole (it does not add all the years they lost), it raises those "deprived" foreign authors to the current status of the U.S. authors.⁷⁷ Like the affirmative action doctrine in the gender or race context, the bestowed "benefit" on the select class—here, copyright of foreign works whose protection was unavailable under the older regime—is something that should have previously been conferred, but

73. Supreme Court affirmative action jurisprudence in the context of race began in 1976 (with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)) and with gender arguably not until 1996 (with the decision of *U.S. v. Virginia*, 518 U.S. 515 (1996)). There has never been a Supreme Court decision evaluating a gender-based affirmative action plan. *U.S. v. Virginia* concerned the level of judicial scrutiny for equality violations on the basis of gender (VMI did not allow women to enroll), which would also apply to programs that afforded affirmative action to women. See *Virginia*, 518 U.S. at 530-31.

74. *Golan v. Holder*, 565 U.S. 302, 334 (2012).

75. *Id.*

76. *Id.* at 327 n.28.

77. *Id.* at 333.

was otherwise unlawfully or wrongfully withheld. The wrong was the denial of copyright to foreign authors not because they failed standards of merit or creativity but to benefit U.S. authors by providing them with market leverage. Foreign authors were unrepresented in the U.S. legislative process and thus their denial of copyright that enriched the purse of U.S. authors without any obvious connection to copyright law's goals of promoting the creation and dissemination of creative work smacks of abuse of power.

Of course, there were benefits to the deluge of uncopyrighted works by foreign authors into the U.S. public domain. Those works could be disseminated without license, making them cheaper and more available to readers (albeit without remuneration to the original authors). Some say this fact alone explains the prevalence of the modernist authors from Europe in the U.S. public school curricula for much of the 20th century.⁷⁸ Would we have read James Joyce in the volume we did had the books not been so inexpensive to reproduce and disseminate? Breyer's dissent in *Golan* develops this theme, focusing on the public domain's indispensability to education and national culture.⁷⁹ He also critiques as unfounded and irrational the majority's argument that the remediation of the lost copyright and harmonization of both foreign and domestic rights "promotes the diffusion of knowledge" (a copyright goal) by incentivizing the republication and restoration of those works "lost" to the public domain.⁸⁰ The dissent argues that revived copyright for these foreign authors will not promote more of them or their wider distribution. Indeed, there is recent empirical evidence that supports this assertion.⁸¹ Copyright might disappear all but the best sellers, leaving the majority of books invisible to the public until they become public domain material.⁸² This is an argument that

78. Spoo, *supra* note 72, at 158-159. Spoo writes about how obscenity law at this time severely hampered the publishing industry especially when the modernists were writing novels and poems and short stories with "dirty" words and erotic content. *See id.* at 182-183. Some obscenity laws were enforced through the postal service - declaring manuscripts "nonmailable." *Id.* Spoo suggests the "absence of copyright registration records for issues of *The Little Review* [which contained many of the early works of Joyce] may be the direct result of the post office's obscenity suppressions. Nonmailable issues could not readily have been deposited in the Copyright Office. Once the magazine had acquired the stigma of obscenity, moreover, the register of copyrights has a plausible ground for effusing to register claims of copyright in the issues . . ." *Id.*

79. *Golan*, 565 U.S. at 354.

80. *Id.* at 345.

81. Imke Reimers, *Copyright and Generic Entry in Book Publishing*, 11 AM. ECON. J.: MICROECONOMICS 1, 2 (2019) (showing that copyright expiration promoted the works availability); Paul Heald, *How Copyright Keeps Works Disappeared*, 11 J. OF EMPIRICAL LEGAL STUD. 829, 830 (2014).

82. Heald, *supra* note 81, at 830.

104A's restoration or affirmative action does more harm than good from a copyright perspective and that attention should be paid when protecting status and erasing stigma anchor IP policy, which is typically geared to progressing economic and cultural production.

The *Golan* majority decisively rejects the public domain benefits of the U.S. copyright regime that left so many foreign works unprotected because, the Court argued, equality is worth the costs to users. In making this argument, the majority analogizes to a well-understood equality harm of pay discrimination:

The question here . . . is whether would-be users must pay for their desired use of the author's expression, or else limit their exploitation to "fair use" of that work. Prokofiev's *Peter and the Wolf* could once be performed free of charge; after §514 [Section 104A] the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev's U.S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers.⁸³

This analogy resonates with the rhetoric of "equal pay for equal work," the slogan used for the Equal Pay Act of 1963 that continues to be marshaled in support of the Paycheck Fairness Act, first introduced in 1997 and re-introduced every two years since but never passed. On the surface, Justice Ginsburg's reasoning for the *Golan* majority makes sense: why value Copland's work higher than Prokofiev's? If there is no difference between the works by copyright standards, why must one be paid for while the other is free? Absence of a rational basis leaves open the possibility of irrational or invidious purposes. And indeed, Justice Ginsburg critiques the unreformed U.S. copyright law as xenophobic and U.S.-centric that purposely devalues and excludes foreign works in order enrich national authors. To her, there is no good justification for the stigmatic and material harm arising from this scheme.

But contrary to equal pay laws, which have no losers except the employers for whom antidiscrimination policies may be expensive, the dissent in *Golan* argues that section 104A causes real harm to a diffuse and vulnerable public. Those who rely on the stability and existence of public domain material, such as educators, researchers, fledgling artists and authors, are now forced to pay where they had not previously. The *Golan* majority and dissent dispute the relevance and importance of the

83. *Golan*, 565 U.S. at 333; *but see* Spoo, *supra* note 72, at 143, 303 n.148 (questioning whether American authors were held back by European competition).

public domain to cultural production, expressive freedoms and community development, that is, to “progress” writ large. The dissent claims the public domain is a resource relied upon as of right with constitutional importance. As previously mentioned, some literary and legal scholars have argued that the U.S. publishing industry’s “piracy” of European works shaped the American and European literary culture. Without the “burden” of copyright protection, foreign authors such as James Joyce, Ezra Pound, Djuna Barnes and even Gilbert and Sullivan evaded U.S. government censors and enriched their celebrity through lower prices and saturated U.S. markets, which led the global market for these works.⁸⁴ Because many of these works were intellectually challenging or even obtuse to American readership, their prevalence in the U.S. marketplace given their affordability and lack of regulation very likely facilitated widespread acceptance and celebration. Whether this justifies the “subordination” of foreign authors to U.S. authors is an important question the decision does not address. This is because the majority describes the U.S. public domain as “unowned” and thus less protected or important than personal property such as copyright and thereby easily elevates equality and anti-subordination as the predominate concerns.⁸⁵ When there is no public good at stake other than that produced by copyright ownership per the majority opinion, equality concerns with regard to that ownership can take priority.

The majority’s equal pay argument is laudable in the context of pay discrimination cases in which similarly situated workers are paid less because of irrelevant differences (such as gender or race). But in the copyright context this argument speaks past the dissent’s concern that the public domain be constant or growing and that shrinking the public domain thwarts copyright’s goals of “progress” measured by access to expressive works and opportunities for creative production. The majority’s argument assumes a financial benefit exists for authors whose copyright revives under 104A, which may encourage further publication and dissemination of those works. To the dissent and many commentators, this position is laughable. For the most part, works not under copyright disseminate freely and are accessible.⁸⁶ By contrast, works once in the public domain and now under copyright due to *Golan* may be stalled from dissemination and republication precisely because permission is now required and may be expensive. The majority and

84. Robert Spoo, *Ezra Pound’s Copyright Statute*, 56 UCLA L. REV. 1775, 1817 (2009).

85. See *Golan*, 565 U.S. at 325 n.26, 331.

86. Heald, *supra* note 81, at 855.

dissent are debating what “progress” means in this case: equal status under copyright law (but without a guarantee of remuneration) or a stable and nurtured public domain, even if that comes at a loss of control to copyright owners.

Golan majority’s unconvincing reliance on copyright’s financial benefit to justify foreign copyright restoration belies its true focus, which is the dignity deprived European authors by being excluded from the legal regime of authorial control.⁸⁷ Foreign authors who lacked U.S. copyright and sought to be published in the U.S. with some hope of copyright-like revenue had to devise creative business solutions. Some issued alternative versions of their work so “first publication” of this “new” work would in fact be in the U.S.⁸⁸ Others struck precarious publishing deals on a handshake without the enforceability of law. These additional hurdles required for foreign authors simply to participate in the same market as U.S. authors was insulting and degrading. Working twice as hard for less control or pay is a professional affront in other contexts (such as gender or race discrimination situations). Indeed, authors such as James Joyce, Ezra Pound, and T.S. Eliot were vocal and organized around the unfairness of U.S. copyright law to non-U.S. authors and fought the system to control the form and manner in which their work was published and disseminated in the U.S.⁸⁹ These and other authors signed Joyce’s “protest” accusing certain American publishers of being “get-rich-quick promoter[s]” by benefitting from “the innocent connivance of American law.”⁹⁰ The *Golan* majority echoes these sentiments without dwelling on the literary characters or history and draws on the general characterization of dignity harms foreign authors experience from the earlier U.S. copyright regime.

In other contexts, the harm of anti-subordination is obvious. Women who cook do so as wives and mothers without pay, men who cook do so as chefs to fame and fortune. Men are doctors and women are nurses, where the former is high paying and provides more autonomy and prestige.⁹¹ There is nothing inherently “beneath” a person to do

87. Wendy J. Gordon, *Dissemination Must Serve Authors: How the U.S. Supreme Court Erred*, 10 REV. OF ECON. RES. COPYRIGHT ISSUES 1, 4 (2013).

88. Spoo, *supra* note 78, at 74, 280 n.10.

89. *Id.* at 116-153 (detailing Ezra Pound’s legal battles against US copyright law).

90. *Id.* at 168, 186.

91. Where the opposite is true and doctors are predominantly women, as in Russia, being a physician is not as prestigious or well-paying a job. *See, e.g.*, Aditi Ramakrishnan et al., *Women’s Participation in the Medical Profession: Insights from Experiences in Japan, Scandinavia, Russia and*

laundry and change bed linen – it is likely the vast majority of us do it – but over centuries those who have done so for others are perceived to be part of an underclass as maids, servants, or even as enslaved persons.

The evil involved in such arrangements is a comparative one: what is objectionable is being marked as inferior to others in a demeaning way. . . . [I]t is not the tasks themselves that members of lower casts are assigned to perform that are demeaning – they may be necessary tasks that someone has to perform in any society. The problem is that they are seen as beneath those in higher castes. The remedy in such cases is to abolish the social system that defines and upholds such distinctions between superior and inferior.⁹²

The identity and status of “author” is subject to the same structural analysis: when are authors valued as “authors” under copyright and when are they excluded despite doing the same work as legal authors? The *Golan* majority and other Supreme Court opinions from the recent past appear to draw on this equality critique, identifying unjust hierarchies in the distribution of IP benefits and burdens anchored in status and subordination. Their underlying effect is to elevate the status of authorship in the digital age worthy of this values-based critique. But doing so without concern for critical function of the public domain for all people, especially subsequent and developing authors who rely on the public domain, may miss an opportunity for larger structural reform.

When amplifying anti-subordination causes, it is often too easy to reinstate property relations that oppress those not present to protect their equity stakes and social status. This was the case in *Golan* regarding all who routinely rely on the public domain. This is especially problematic given the internet’s integration of social relations and economic opportunities; failing to account for absent and diffuse stakeholders who rely on access to the public domain that is vastly improved by the digital era doubly oppresses them in today’s networked society. The majority’s copyright bean-counting solution – simply give more copyright to more people to undo the subordination – triggers the dissent’s response that the public domain has value too. Fair enough, but that imagines the copyright pie as a zero-sum resource, balancing allocations like a finite amount on a scale. But that is not how copyright works. It is not how anti-subordination equality works either.

Eastern Europe, 23 J. Women’s Health 927, 930 (2014) (describing how women are a majority of physicians in the former USSR, and the prestige of the profession declined and was one of the poorest-paid professional occupations. “Simultaneously, women were encouraged to work as physicians in this new landscape, resulting in the feminization of the profession.”).

⁹². Scanlon, *supra* note 20, at 8.

Describing copyright exclusivity and the public domain as opposites of the IP coin leaves the public domain as copyright's negative as opposed to a fundamental baseline of all intellectual property regimes.⁹³ A different solution to those injured by the unreformed copyright law would have been reparations to the injured class paid for by those who became rich from the free works and also a declaration requiring fair treatment going forward. Shrinking the public domain and hurting all who rely on it to pay for past injuries to authors aggrieved by the public domain's fecundity is affirmative action that perpetuates the injury of exclusivity and hierarchy under the guise of inclusivity and equality.

The risk that affirmative action aiming to undue past unjust discrimination may paradoxically perpetuate inequality of status and opportunity is the reason the Supreme Court strictly reviews such plans when they are based on race and gender. When they are based on copyright, however, as the legislation in *Golan* was, the Court is not doctrinally required and thus misses the chance to ask the hard questions of legislative rationales. Despite importing commendable equality jurisprudence into copyright law, which is typically an ordinary economic policy matter for Congress, the Court does not go far enough with its anti-subordination logic. Doing so would have exposed and thus more ably considered copyright law not only as market regulation producing economic chits and fungible assets but as social and civil rights legislation generating and sustaining a public resource and fundamental rights. There is a reason equality law, be it based on anti-discrimination or anti-subordination, is complex and contentious especially at the Supreme Court. It is rooted in deeply-felt convictions based on centuries of historical experience about what equal treatment and equal dignity means and what is required from individuals and government to promote both. As the Supreme Court begins to adopt more of this equality reasoning and history in its IP decisions, we may therefore see more contentious disputes reconceiving copyright, for example, as a feature of the new century that plays a central role progressing human welfare through fundamental human rights. As the Supreme Court has traditionally been the protector of those rights against the tyranny of the majority and legislative overreach, it may begin a closer investigation of the Constitution's "progress" mandate in

93. Abraham Drassinower, *Copyright is Not About Copying*, 125 HARV. L. REV. 108, 1120, 118-19 (2012) (describing how copyright has a bilateral structure mirroring the correlativity of a private law action refuting the possibility that copyright's public domain isn't essential to its internal structure).

terms of the affordances of shared, networked connectivity in our irrevocable and bittersweet digital age.

CONCLUSION

The resurgence of equality concerns in Supreme Court cases about IP is not only because equality concerns are in the air with new civil rights movements driven by digital communication and activism gaining traction – think only of #MeToo, BlackLivesMatter, and the LGBTQ civil rights movement. The rise of equality logic in Supreme Court cases about IP is also because IP is fundamental to and deeply influencing everyday life in ways unforeseen in decades past. With copying and sharing technology at the fingertips of anyone with a cell phone, the digital age has changed how IP regulation works or doesn't work. Control over IP may be more difficult, its economic significance arguably higher or more apparent, and the restrictions IP regulation affects more severe in terms of costs to consumer and access to cultural works and useful inventions (such as books and medicine). The digital age has, in fact, changed so many of our baseline expectations regarding resource access and allocation, community formation, membership and influence as well as the transparency, truthfulness and accessibility of information. Why should it be surprising, then, that the Supreme Court's resolution of issues concerning IP not only describe economic efficiency and wealth accumulation as one of IP's goals, but also the promotion of fairness, anti-subordination, and pluralism in a deeper analysis over the purpose and proper application of IP laws.⁹⁴

But the Court's constrained economic analysis based on property ownership anchored in pre-digital era categories underappreciates the changes the digital age has wrought to authorship, creativity, and human flourishing that are in need of renewed legal attention. The Court's narrow view of IP's stakeholders also constrains opportunities to meaningfully participate in politics and society through digital networks and markets that might generate the democratic ideal on which the Court bases its reasoning. But as *Plessy* came sixty years

94. It is not enough to say utilitarian analysis will maximize whatever good is chosen, e.g. efficiency is a form of justice. "A fair price in law is not necessarily the same as an efficient or wealth maximizing price in economics. . . justice, fairness, equity, reasonableness, and equality are not the subject of mathematical calculus: they are values formed from the human experience of living in community with others. If such concepts . . . are simply translated into economic equivalent of efficiency and wealth maximization, they lose much of their social and cultural meaning." Robin Paul Malloy, *An Interpretive Critique of an Economic Analysis of Law* 3-5 (unpublished paper) (Mar. 2, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572497.

before *Brown*, and with *Brown* came a new opportunity to pursue racial justice for the twentieth century, maybe at the beginning of the twenty-first century, we are living through an IP civil rights era. Perhaps the transformative IP decisions are yet to come. In any case, the equality interests the Supreme Court debates in these IP cases highlight renewed and urgent concerns regarding social progress and the public good now that the internet age is out of its infancy.