

ACQUIESCENCE, BAD TIMING, AND THE ROLE OF CONGRESSIONAL PRACTICE IN CONSTITUTIONAL INTERPRETATION

In 1998, Congress extended the rights of owners of existing copyrights for twenty extra years. It required nothing of the recipients of this gift. The two most interesting discussions in *Eldred v. Ashcroft* explain why the Constitution allows Congress to make a gift of exclusive rights with no strings attached. First, the Court severed the copyright clause from the patent clause in Article I, section 8, holding that previous discussions of a constitutional quid pro quo requirement did not apply to Congress's copyright power. Instead, it invoked equitable principles tied to authorship to justify retroactive term extension. This shift from a familiar economic model to an equitable one may have ramifications for future disputes involving database protection, preemption, and moral rights. Second, the Court relied heavily on relatively recent Congressional practice as its primary tool for constitutional interpretation. This non-originalist approach to "constitutional incrementalism," is strikingly described in Peter Spiro's seminal "Treaties, Executive Agreements, and Constitutional" and should prove to be of tremendous interest to advocates seeking to interpret the Constitution based on practice rather than historical understanding.