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LONG LIVE THE COMMON LAW OF COPYRIGHT!: *GEORGIA V. PUBLIC.RESOURCE.ORG, INC.* AND THE DEBATE OVER JUDICIAL ROLE IN COPYRIGHT

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In Georgia v. Public.Resource.Org, Inc.*, the Supreme Court resurrected a nineteenth-century copyright doctrine—the government edicts doctrine—and applied it to statutory annotations prepared by a legislative agency. While the substance of the decision has serious implications for due process and the rule of law, the Court's treatment of the doctrine recognized an invigorated role for courts in the development of copyright law through the use of principled reasoning. In expounding the doctrine, the Court announced a vision for the judicial role in copyright adjudication that is at odds with the dominant approach under the Copyright Act of 1976, which sees courts as limited to interpreting and deferring to the text of the statute. This Piece unpacks the longstanding debate about judicial role in copyright that manifested itself rather vividly in the majority and dissenting opinions in the case. In the process, it shows how Chief Justice Roberts's opinion for the Court consciously unraveled a delicate—but undesirable—institutional balance that has come to be accepted within the world of copyright law, and imagines the consequences that it might have for the future of copyright adjudication and lawmaking.*

INTRODUCTION

In its much-anticipated decision in *Georgia v. Public.Resource.Org, Inc. (PRO)*, a 5-4 majority of the Supreme Court reaffirmed the modern significance of copyright's ancient "government edicts" doctrine, which denies copyright protection to official texts created under the authority of law.[1] In identifying the animating principle underlying the doctrine as the

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1. 140 S. Ct. 1498, 1503–04 (2020). Even prior to oral argument, the case received a significant amount of press coverage and publicity, in recognition of the substantive issue at stake. See, e.g., Editorial, The Law©?, N.Y. Times (June 25, 2019), https://www.nytimes.com/2019/06/25/opinion/copyright-law.html (on file with the *Columbia Law Review*); Adina Solomon, Can States Copyright Annotations to Their Own Laws?, U.S. News & World Rep.

idea that "no one can own the law" as its author,[2] the Court proceeded to apply the doctrine to the annotations in the official Code of Georgia on the logic that they were prepared by an agency that was an arm of the legislature and thus executing its legislative duties.[3]

The outcome in the case undoubtedly represents a major victory for advocates of public access to laws, who see in such access a basic commitment to democratic ideals and the rule of law. All the same, the decision is worthy of close attention not just because of its significance for the public availability of laws. As this Piece argues, the Court's decision represents something of a crucial turning point in the complex structure of copyright lawmaking and adjudication.

In holding that the government edicts doctrine fully applied to the annotations involved, the Court validated a rule that had been created, developed, and extended entirely by nineteenth-century courts in parallel with the basic statutory framework of copyright law. The doctrine is thus unequivocally a common law doctrine, in the sense of originating and remaining outside the terms of the statute.[4] Yet unlike other copyright doctrines of common law vintage that the Court has weighed in on,[5] the government edicts doctrine has remained wholly *untouched* by the statute, expressly and implicitly, thereby rendering itself immune to the complexities (and contradictions) of the statute's policy objectives. This has in turn required courts to expound a foundation for the continuing legitimacy of the doctrine rooted entirely in copyright's first principles, without recourse to an actual or imputed legislative intent. And therein lies the central structural contribution of the majority opinion in *PRO*: reaffirming a role for courts in developing copyright rules incrementally, despite the dominance of the statute.

Indeed, it is this attribute of the government edicts doctrine and its evolution that explains the peculiar alliances and divisions that characterized the Court's opinions in the case.[6] Both the majority opinion as well as

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(Aug. 22, 2019), https://www.usnews.com/news/best-states/articles/2019-08-22/can-states-copyright-annotations-to-their-own-laws (on file with the *Columbia Law Review*).

2. *PRO*, 140 S. Ct. at 1507.

3. Id. at 1508–09.

4. The doctrine finds no mention in the text of the current statute, or indeed in the legislative history accompanying the enactment of the 1976 Act. 17 U.S.C. §§ 101–122 (2018); H.R. Rep. No. 94-1476 (1976).

5. Examples of such common law doctrines that find implicit recognition in the statute include the fair use doctrine and indirect infringement. The former is codified in Section 107, and the latter implicitly recognized in Section 106. 17 U.S.C. §§ 106–107.

6. The majority opinion authored by Chief Justice Roberts was joined by Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh, and the principal dissent authored by Justice Thomas was joined by Justices Alito and Breyer. *PRO*, 140 S. Ct. at 1503. Justice Breyer did not sign on to Part II-A of the principal dissent, the portion of the dissent dealing directly with judicial role. Id. at 1513 (Thomas, J., dissenting). Perhaps this might explain why Justice

the principal dissent were each joined by a combination of conservative textualists and liberal purposivists that cut across traditional political lines.[7] Indeed, as has since come to be revealed, one or more Justices switched their votes on the case after the opinions were circulated.[8] Neither political ideology nor interpretive methodology can account for the alliances, which are instead best explained by divergent visions of judge-made law in the copyright system.

To the Justices in the minority (led by Justice Thomas), validating the government edicts doctrine was a dangerous undertaking insofar as it risked undermining the ideal of legislative supremacy in copyright law and thereby recasting the "judicial role."[9] In this view, courts have a purely interpretive role in the copyright system, lest they introduce "noxious weeds" into the statutory scheme by extrapolating from precedent to develop common law rules for copyright.[10] Extreme as it may seem, this view has dominated modern copyright thinking in the United States for some time now.[11] On the other hand, the majority saw its validation of the doctrine as altogether unproblematic, and a mere reaffirmation of what courts—reasoning from precedent—have always done, within copyright and beyond.[12] In this vision, which the majority portrays with some degree of sanguinity as utterly conventional within copyright law, precedent forms a powerful nonstatutory constraint on courts when accompanied by a discernible rationale.[13]

Breyer also signed Justice Ginsburg's substantive dissent. Id. at 1522 (Ginsburg, J., dissenting).

7. The only exception to this is Justice Ginsburg, who chose not to join Justice Thomas's dissent, but instead authored a separate dissent in the case limiting herself to a different interpretation of the government edicts doctrine. Id. at 1522–24. Notably, this dissent was joined by Justice Breyer, who has been on opposite sides from Justice Ginsburg on several significant copyright issues to come before the Court. See, e.g., Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 523–54 (2013) (Breyer, J.); id. at 557–87 (Ginsburg, J., dissenting); Golan v. Holder, 565 U.S. 302, 306–36 (2012) (Ginsburg, J.); id. at 344–67 (Breyer, J., dissenting); Eldred v. Ashcroft, 537 U.S. 186, 192–222 (2003) (Ginsburg, J.); id. at 242–67 (Breyer, J., dissenting).

8. See Joan Biskupic, Behind Closed Doors During One of John Roberts' Most Surprising Years on the Supreme Court, CNN (July 27, 2020), https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html [https://perma.cc/EVV4-CBNU] (describing how Chief Justice Roberts was able to convert his initially dissenting opinion into the majority in the case).

9. *PRO*, 140 S. Ct. at 1515 (Thomas, J., dissenting).

10. Id.

11. See, e.g., Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the text . . . ."). For an overview from a prominent federal judge, lamenting the mistrust of courts that is implicit in the working of the current copyright system, see Pierre N. Leval, An Assembly of Idiots?, 34 Conn. L. Rev. 1049, 1056 (2001).

12. See *PRO*, 140 S. Ct. at 1507–08.

13. Id. at 1510.

Recognizing the legitimacy of an extratextual body of copyright law that is governed by a set of foundational principles has implications that extend well beyond government edicts. It opens up the possibility of greater judicial involvement in crafting the rules of copyright and focuses courts' attention on the identification and elaboration of copyright principles toward this end. The conflict between principle and policy in American copyright thinking has long been a contentious one; it is currently in a state of détente that favors the latter.[14] Chief Justice Roberts's majority opinion in *PRO*—and its direct response to the dissent[15]—seems to portend the possibility of this balance ending and courts doing more than just interpreting the text of the statute. This Piece attempts to unpack and imagine these possibilities.

Part I provides an overview of the substance underlying the majority opinion in *PRO*, describing the doctrinal issues involved. Part II shows how the substantive reasoning of the Court only partially captures the broader issue that the Justices disagreed on, namely, the appropriate judicial role in copyright cases. The government edicts doctrine became a perfect vehicle for this debate, which engaged the balance between legislative policy and principle-based reasoning within the copyright system. Part III then imagines what a new institutional equilibrium—seemingly endorsed by the majority—might look like within copyright thinking.

I. THE OBVIOUS PART OF *PRO*

At issue in *PRO* was the copyrightability of the annotations contained in the Official Code of Georgia Annotated (OCGA). Despite containing annotations, the OCGA is Georgia's official code and produced under the authority of the state.[16] It contains the official text of the Georgia code, which has the force of law, as well as annotations of a nonbinding nature including "summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and a list of related law review articles and similar reference materials."[17]

While these annotations do not carry the force of law on their own, they are produced through a somewhat unique process. The annotations are produced by a branch of the state legislature, designated as the Code

14. See generally Shyamkrishna Balganesh, Copyright as Legal Process: The Transformation of American Copyright Law, 168 U. Pa. L. Rev. 1101 (2020) (tracking the development of U.S. copyright law and arguing that the modern regime is best conceived of as a legal process).

15. See *PRO*, 140 S. Ct. at 1512 n.4 (responding to the dissent's comments on the judicial role).

16. Id. at 1504.

17. Id.

Revision Commission (CRC), and empowered under the state's constitution.[18] The CRC in turn delegates the production of the individual annotations to a private entity—LexisNexis—under a "work made for hire" arrangement, which gives the CRC both authorship and ownership of the annotations.[19] The CRC supervises the specifics of the production of the annotations, which it then approves and presents to the state legislature.[20] Each year, the legislature in turn votes in a legislative session to "merge" the annotations with the actual provisions of the code to produce the OCGA.[21] Perhaps most importantly, the OCGA is the *only* official code of the state—i.e., there is no unannotated official code.[22]

PRO, the defendant in the case, is a nonprofit organization committed to ensuring the public availability of all laws and government materials.[23] In pursuance of its goals, PRO posted a complete version of the OCGA on its website for the public to access and download freely, and it did so without obtaining permission from Georgia.[24] In the first instance, the district court found for the plaintiff, concluding that the OCGA was indeed copyrightable.[25] The Eleventh Circuit Court of Appeals reversed, applying a somewhat convoluted theory of authorship by the people, which it read into the government edicts doctrine.[26] The Court then granted certiorari, which both parties had favored in the interest of greater clarity.[27]

The government edicts doctrine, which was at the heart of the case, is itself a creation of the Court dating back to the late-nineteenth century. In three cases from that period, the Court had framed, developed, and applied the doctrine, without ever visiting or mentioning it again in the 130 years since. In accepting the case, the Court was therefore agreeing to revisit and interpret its own jurisprudence from that era.

The first of these cases was pre–Civil War: *Wheaton v. Peters*.[28] The case is famous among copyright scholars for having concluded that there was no independent common law copyright in the United States for published

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18. Id.; see also Ga. Code Ann. § 28-9-2 (2020) (setting up the CRC and empowering it with distinct functions relating to the production of the OCGA).

19. *PRO*, 140 S. Ct. at 1505; see also 17 U.S.C. § 101 (2018) (definition of a "work made for hire"); id. § 201(b) (determining authorship and ownership of a work made for hire).

20. See Ga. Code Ann. § 28-9-5; *PRO*, 140 S. Ct. at 1505–06.

21. Ga. Code Ann. § 1-1-1.

22. Id.

23. *PRO*, 140 S. Ct. at 1505.

24. Id.

25. See Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350, 1356 (N.D. Ga. 2017).

26. See Code Revision Comm'n ex rel. Gen. Assembly of Ga. v. Public.Resource.Org, Inc., 906 F.3d 1229, 1254–55 (11th Cir. 2018).

27. Georgia v. Public.Resource.Org, Inc., 139 S. Ct. 2746 (2019) (granting certiorari).

28. 33 U.S. (8 Pet.) 591 (1834).

works after the enactment of the 1790 Copyright Act.[29] All the same, since the case involved a dispute between two of the Court's own officially appointed reporters, the opinion concluded with the categorical observation that "no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."[30]

This somewhat cryptic observation in *Wheaton* became the subject of two subsequent Court decisions—both from the year 1888 and authored by the same judge, Justice Samuel Blatchford. A lesser-known Supreme Court Justice from New York, Blatchford had been a prominent private attorney before being elevated to the bench.[31] During that time, however, he also served as the official court reporter for federal courts in New York and up until 1888 maintained and published an independent report of Second Circuit decisions.[32] In this latter capacity, he was therefore intimately familiar with the practices of court reporters, which formed the basis of the two 1888 decisions that he authored.

In *Banks v. Manchester*, the first of these decisions, the Court considered the copyrightability of reports prepared by the court reporter to the Supreme Court of Ohio, who had been appointed under an Ohio statute and mandated to "secure a copyright" in the published reports by the terms of the statute.[33] In holding that no part of the report was copyrightable, the Court relied on *Wheaton* to conclude:

> The question is one of public policy, and there has always been a judicial *consensus* . . . that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen,

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29. See, e.g., Howard B. Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 Wayne L. Rev. 1119, 1178 (1983) ("*Wheaton v. Peters* . . . established that copyright in the United States is strictly a statutory creation, without foundation in common law."); Craig Joyce, A Curious Chapter in the History of Judicature: *Wheaton v. Peters* and the Rest of the Story (of Copyright in the New Republic), 42 Hous. L. Rev. 325, 388 (2005) ("We know from the dissents in *Wheaton* that the question of the existence of copyright in Wheaton's *Reports* was decided negatively by a 4-2 vote.").

30. *Wheaton*, 33 U.S. (8 Pet.) at 668.

31. See A. Oakey Hall, Justice Samuel Blatchford, 5 Green Bag 489, 489 (1893). Blatchford went on to become managing partner of the firm founded by his father—Seward & Blatchford—which would go on to be called Cravath, Swaine & Moore LLP. Id.; Our Story, Cravath, Swaine & Moore, LLP, https://www.cravath.com/our-story/index.html [https://perma.cc/4HMS-MVMY] (last visited Oct. 31, 2020) (referring to the original founders as Blatchford and Seward).

32. Hector T. Fenton, Mr. Justice Blatchford. In Memoriam., 41 Am. L. Reg. 882, 882–83 (1893).

33. 128 U.S. 244, 245–47 (1888).

> is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.[34]

In Ohio at the time, the judge writing the opinion was also responsible for preparing the headnote, syllabus, and statement of the case, all of which were thus regarded as uncopyrightable, being the product of judicial officers discharging their judicial function.[35]

The second of the two decisions, *Callaghan v. Myers*, was handed down by the Court a mere two weeks after *Banks*.[36] While it presented the Court with a similar set of facts as in *Banks*, the state statute at issue was from Illinois.[37] Illinois, unlike Ohio, had the court reporter prepare all parts of the report other than the opinion itself.[38] This made a difference to Justice Blatchford, who seized on the idea of the report being the "intellectual labor" of the reporter—and not the judge—to exempt it from the prohibition formulated in *Wheaton* and *Banks*.[39]

Wheaton, *Banks*, and *Callaghan* were all clear in their formulation of the rule; yet, they all individually and collectively failed to articulate a clear rationale for it. And while lower courts subsequently extended the rule to newer contexts—such as statutes and municipal codes[40]—they struggled to trace the logic of the prohibition back to this trilogy of cases, lacking a basis on which to thread them all together other than an amorphous (and heavily contested) idea of public policy. It thus fell to the Court in *PRO* to rationalize the rule in applying it to the OCGA, which formed the substance of the Court's opinion.

In his opinion for the majority in *PRO*, Chief Justice Roberts found it altogether unproblematic to extend the logic of these cases from judges to legislative bodies "vested with the authority to make law."[41] Much as judges were seen as uncontroversial lawmakers in the nineteenth century's vision of the law, which formed the basis for the trilogy of cases, legislative bodies are today seen as vested with lawmaking authority.[42] Applying the rule developed in those cases—i.e., the government edicts doctrine—to

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34. Id. at 253.

35. Id.

36. 128 U.S. 617 (1888).

37. See id. at 619–20.

38. Id. at 645.

39. See id. at 647.

40. See, e.g., Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 896 F.3d 437, 440–41 (D.C. Cir. 2018) (applying it to local technical standards); Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002) (en banc) (applying it to local municipal codes); Bldg. Offs. & Code Adm'rs v. Code Tech., Inc., 628 F.2d 730, 735 (1st Cir. 1980) (applying it to the local building codes); Howell v. Miller, 91 F. 129, 138 (6th Cir. 1898) (extending it to state statutes).

41. *PRO*, 140 S. Ct. 1498, 1504 (2020).

42. See, e.g., Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 406–07 (1908) (providing an account of this mindset).

the facts at hand then became relatively straightforward: Since the annotations at issue were authored by a body that was an arm of the legislature in the exercise of its legislative functions, they were rendered uncopyrightable under the government edicts doctrine as formulated in the nineteenth-century trilogy of cases.[43]

To arrive at this conclusion, the majority opinion examined the unique structure of the CRC, its sources of funding, its connection to the Georgia legislature, and the nature of its statutory duties—all of which it found to support the holding that it was an "adjunct" to the state legislature.[44] The Court's holding, Chief Justice Roberts argued, would now offer a "clear path forward" for applications of the government edicts doctrine to statutes and statute-like texts created under the authority of the law.[45]

As a substantive matter, the majority opinion certainly resolved any ambiguity about the applicability of the government edicts doctrine, effectively adopting an approach that rendered the doctrine applicable whenever a government agency vested with lawmaking authority exercised its power, regardless of the precise nature of the text that it was producing. For public access advocates, the outcome was a major victory, especially given that Georgia's practice of publishing an official annotated code as the sole official code for the state had been adopted by numerous other states.[46] All the same, the Court's account of how its substantive holding fit within the overall landscape of copyright's institutional framework, and the delicate balances and settlements that have come to be taken for granted therein, was anything but a clear path forward.

II. THE NOT-SO-OBVIOUS DEBATE OVER JUDICIAL ROLE

A. *The Standoff*

Chief Justice Roberts's majority opinion was premised on an extension of the government edicts doctrine as developed in the trio of nineteenth-century cases, in the belief that the "same logic" from those cases carried over to statutory annotations.[47] While it thus relied on a form of analogical reasoning, the precise content of that *logic* was anything but

43. *PRO*, 140 S. Ct. at 1504.

44. Id. at 1508–09.

45. Id. at 1513.

46. Brief of the States of Arkansas, Alabama, Idaho, Kansas, Mississippi, South Carolina, South Dakota & Tennessee as Amici Curiae in Support of Petitioners at 14–15, *PRO*, 140 S. Ct. 1498 (No. 18-1150), 2019 WL 4235530 ("Twenty-three States (including Georgia), two territories, and the District of Columbia copyright the annotations in their official annotated codes . . . . Were those copyrights invalidated, States' cost of making official annotated codes likely would substantially increase. Those codes may even disappear altogether.").

47. *PRO*, 140 S. Ct. at 1504.

self-evident. For a rule to carry over from one domain to another—however closely the two domains appear related—the rationale and basis for the rule requires explication so as to justify the extension (or retrenchment, as the case may be). Perhaps by design or in the pursuit of consensus, the majority opinion fell short on this measure. This prompted a strongly worded dissent from Justice Thomas, who took serious issue with the majority's very approach to the matter.[48] Justice Ginsburg also authored a dissent in the case, interpreting the government edicts doctrine as limited to actions done by the legislature "in a legislative capacity," which in her view did not cover annotations.[49]

To the majority, the primary rationale for the government edicts doctrine was to be found in copyright's commitment to "authorship."[50] Government actors invested with the authority to make law could not be considered to have authored the expression that they produce in such capacity. But what exactly is it that renders the origination of legal texts insufficient to generate a claim of copyrightable authorship? Here, the opinion identified the "animating principle" underlying the doctrine as "no one can own the law."[51] On closer scrutiny, however, that principle embodies a good degree of circularity and remains indeterminate. Since the first owner of a copyright is ordinarily its author, a denial of authorship certainly has the *result* of denying ownership.[52] This is very different from suggesting that such denial of ownership *causes* the law to disallow authorship of the work, which its identification as a "principle" would suggest. In other words, whereas a denial of authorship always results in a denial of ownership, a denial of ownership can arise from reasons other than the absence of authorship. The statute's treatment of U.S. government works illustrates the point.[53] The majority's observations conflate the two.

Instead of explicating the connection between authorship and the government edicts doctrine, Chief Justice Roberts then went one step further later in the opinion and made an additionally powerful suggestion: Congress had acquiesced in the independent validity of the principle he was relying on. He thus noted that "[a] century of cases [has] rooted the government edicts doctrine in the word 'author,' and Congress has

48. Id. at 1513–14 (Thomas, J., dissenting).

49. Id. at 1523 (Ginsburg, J., dissenting).

50. Id. at 1503 (majority opinion).

51. Id. at 1507.

52. 17 U.S.C. § 201(a) (2018).

53. See 17 U.S.C. § 105(a). The statute provides that protection "is not available" for a work of the U.S. government, but that the U.S. government "is not precluded from receiving and holding copyrights transferred to it." The statute further defines a "work of the United States Government" in terms of its authorship. Id. § 101 (defining a work of the U.S. Government based on whether it was "prepared" by a government employee). The U.S. government can therefore never be the *author* of a work (under the "work made for hire" doctrine), even though it can be the *owner* of a work.

repeatedly reused that term without abrogating the doctrine. The term now carries this settled meaning."[54]

Together with its prior invocation of authorship as the guiding principle behind the doctrine, the majority was therefore suggesting three things: that (1) the government edicts doctrine was a natural corollary to copyright's notion of authorship; (2) by using the terms "author" and "authorship" without retrenching the doctrine, Congress was implicitly endorsing its legality and validity as a separate principle; and therefore (3) it was for the Court (or courts) to explicate and police the scope and meaning of these terms—as it (or they) had done in the past. Consequence (3) was implicit in (1) and (2), and perhaps the most functionally significant of the three since it implicated the role of courts in the copyright system.

In his dissent, Justice Thomas (joined by Justices Alito and Breyer) read the majority as doing much more than just applying the doctrine in a straightforward manner, and as instead usurping Congress's role in developing copyright rules. The dissent rightly noted that the trio of nineteenth-century cases did not themselves suggest a rationale for the doctrine, but that the majority had altogether sidestepped the issue instead of attempting to offer such a rationale.[55] To Justice Thomas, this amounted to a "reflexive[]" acceptance of precedent and an "uncritical extrapolation" of the doctrine into a new domain, which was altogether "inconsistent with the judicial role."[56]

At first glance, these observations may appear to be no more than the rhetorical flourishes of a strongly worded dissenting opinion. Yet, within the copyright landscape they represent more—especially the reference to judicial role. In the dissent's view, the problem with the majority's argument was not just that it was relying on the principle of authorship for its reasoning, but that it was doing so to override the statute's express policy rationales (e.g., fair notice, incentives) that can be traced to specific provisions in the text.[57] Without offering a meaning or explication for authorship and presuming that Congress had entirely *delegated* its development to the judiciary, the majority was seen to be opening up an avenue of copyright reasoning that could undermine the primacy of the statute. This risked reallocating institutional power within the copyright landscape, where—according to the dissent—"judges [we]re bound to respect" the choices of legislative bodies, however unfortunate those

54. *PRO*, 140 S. Ct. at 1510.

55. Id. at 1515 (Thomas, J., dissenting) ("The majority is nonetheless content to accept these precedents reflexively, without examining the origin or validity of the rule they announced.").

56. Id.

57. Id. at 1518.

choices may be.[58] The dissent thus ended with the observation that the majority was "stray[ing] from its proper role" of deferring to Congress.[59]

Whether or not the dissent's vision of judicial role in copyright is normatively desirable, its concern that the majority opinion was effecting a change in that role—however subtly—was accurate. To appreciate the nature and significance of that change requires unpacking the delicate balance between different modalities of reasoning and lawmaking that the U.S. copyright system has come to embody over the course of the last half-century.

B. *Unraveling Copyright's Institutional Balance*

1. *Congress over Courts.* — Anglo-American copyright law has always been statutory in origin. Congress enacted the first copyright statute in 1790, in the exercise of its constitutional power to secure to authors such exclusive rights in their writings.[60] Despite originating in a statute, however, U.S. copyright law has never been just a body of textual directives enacted by the legislature. Indeed, for the better part of its existence, U.S. copyright law was principally judge-made.

The Copyright Act of 1790 was a barebones piece of legislation, modelled on the Statute of Anne.[61] While it was periodically updated through the nineteenth century, the statute as such was seen to play something of a secondary role in the system. Courts were instead identified as entrusted with the task not just of interpreting the statute but also of developing the law further through reliance on first principles and deductive logic.[62] This trend continued through most of the nineteenth century, evidenced most poignantly in the pages of the most influential copyright treatise of the era, published in 1879: *Drone on Copyright*.[63] In describing his approach to the subject, the copyright treatise-writer Eaton Drone categorically ridiculed the deficiencies that characterized the copyright statutes, noting how it fell to courts to develop the law using "principles" that were "fundamental and general."[64] Courts were there-

58. Id. at 1522.

59. Id.

60. Copyright Act of 1790, 1 Stat. 124.

61. See Statute of Anne 1710, 8 Ann. c. 19 (Eng.).

62. See, e.g., Joseph P. Liu, Regulatory Copyright, 83 N.C. L. Rev. 87, 94–102 (2004) ("[F]or much of U.S. history, U.S. copyright law has limited itself to defining a relatively simple, industry-neutral property entitlement. The courts subsequently enforced and elaborated upon the entitlement in a common-law-like manner.").

63. Eaton S. Drone, A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States Embracing Copyright in Works of Literature and Art, and Playright in Dramatic and Musical Compositions, at vi–vii (1879) ("[T]he whole body of the law of copyright is more or less affected by [judicial interpretations].").

64. Id. at v, viii.

fore seen not just as interpreters of the statute, or as offering supplementary guidance on the topic, but instead as the regime's effective lawgivers, despite the formal statutory origins of the area.

Congress too—through its statutes—consciously acquiesced in this state of affairs. Each of the copyright statutes that it passed, all the way through 1909, was sparse and open-ended in structure, in the nature of what might be characterized as "common law statutes."[65] Despite the Copyright Act of 1909 being described as a "general revision" of the law,[66] Congress retained this institutional balance in the regime's overall framework. The first half of the twentieth century therefore saw federal courts continuing to develop much of what might be described as the nation's copyright law.

By the 1940s, this model—of sparsely worded copyright statutes and a greater reliance on courts to develop a common law of copyright—came to be criticized.[67] The rapid arrival of new technologies of both copying and dissemination rendered courts' bare reliance on the fundamental principles of the system somewhat incomplete and uncertain to many copyright scholars and lawyers. By the 1950s, a significant movement had begun for a new approach not just to copyright law but to copyright lawmaking.[68]

Thus emerged the Copyright Act of 1976, the present statute in force.[69] The Register of Copyright at the time described the regime that it encapsulated as representing "a shift in direction for the very philosophy" of U.S. copyright law.[70] In a distinctive break with past copyright statutes, the 1976 Act aimed at comprehensiveness in coverage, with most of its provisions representing an elaborate compromise between different copyright industry groups, which Congress—under the guidance of the Copyright Office—enacted into law.[71] Areas of copyright that had previously been created, developed, and synthesized entirely by courts were

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65. William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1052 (1989).

66. Thorvald Solberg, Copyright Law Reform, 35 Yale L.J. 48, 61 (1925).

67. For the best-known criticism, describing the contradictory and confusing case law that emerged under the 1909 Act, see Benjamin Kaplan, An Unhurried View of Copyright 80–85 (1967).

68. See Copyright Off. of the Libr. of Cong., Study No. 1: The History of U.S.A. Copyright Law Revision from 1901 to 1954, at 1–14 (Comm. Print 1955), https://www.copyright.gov/history/studies/study1.pdf [https://perma.cc/G5L7-S52R] (Goldman, Abe A.) (detailing how amendments to and reforms of copyright law in the United States changed over the course of the first half of the twentieth century).

69. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–810 (2018)).

70. Barbara Ringer, First Thoughts on the Copyright Act of 1976, 22 N.Y.L. Sch. L. Rev. 477, 479 (1977).

71. For the leading account of this process, see Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857, 860–79 (1987).

now given a textual significance, all in an effort to establish the institutional primacy of Congress and legislation in the domain of copyright law.

A fully intended consequence of this assertion of legislative supremacy in the area was a trenchant dismantling of the idea that courts were lawmakers. Courts were instead to be seen as mere *interpreters* of the law, except in the few areas where the legislation had actively delegated lawmaking authority to them in recognition of the fact that they had achieved some success in these areas pre-1976.[72] As one prominent federal judge put it, the pervasive sentiment characterizing the new statute was one where "[c]ourts are regarded with suspicion."[73]

The myriad intellectual and sociopolitical influences that generated the new model underlying the 1976 Act need not detain us here. Suffice it to say that the 1976 Act consciously envisioned a reallocation of institutional power within copyright law, one where the old common law style of rule development that had dominated the U.S. copyright landscape between 1790 and 1975 was to be replaced with a statutory model, replete with regulatory thinking and comprehensive textual guidance. With the emergence of textualism as a form of interpretation that is sensitive to the institutional balance of power, the reallocation of lawmaking authority attempted by the 1976 Act has only come to be further entrenched.[74]

Closely aligned with the shift from courts to Congress was another equally important move that has since come to dominate copyright thinking and jurisprudence. And this is the shift in the mode of reasoning employed in copyright thinking; one that is best described as a move from *principle* to *policy*. Over the years, scholars have spent significant time examining the intricacies of the policy/principle divide.[75] Distilled down to its basics, the distinction maps onto the difference between an internal and external focus. An argument based on *policy* looks to the goal or objective that the system is seeking to realize, and attempts to show how

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72. Prominent examples include the fair use doctrine in Section 107, and the requirement of originality, contained in Section 102(a). See H.R. Rep. No. 94-1476, at 51, 65 (1976).

73. Leval, supra note 11, at 1062.

74. An emergence that one prominent textualist describes as "second-generation textualism." John F. Manning, Second-Generation Textualism, 98 Calif. L. Rev. 1287, 1289–90 (2010) (describing how second-generation textualism is sensitive to the compromises involved in lawmaking and respects balances of power).

75. The leading account, which most of this scholarship traces itself back to, is that of Ronald Dworkin. See Ronald Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, 1058–59 (1975) [hereinafter Dworkin, Hard Cases] (distinguishing arguments of policy from arguments of principle by explaining how the former are predicated on the advancement of some collective interest, whereas the latter are concerned with securing some individual or group right). Dworkin's account bears a distinct resemblance to the distinction between policy and principle first made by Henry M. Hart, Jr. and Albert M. Sacks, the founders of the Legal Process school. See Vincent A. Wellman, Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks, 27 Ariz. L. Rev. 413, 419–28 (1987).

something either furthers or impedes that objective.[76] In contrast, an argument based on *principle* does not base itself on an external goal sought to be realized but instead on considerations that are internal to the system, such as morality, justice, fairness, or coherence.[77] Principles are based on reasons and derive their validity therefrom, whereas policy goals realize their legitimacy by virtue of the structural authority of the goal-setter, i.e., by fiat.

As should therefore be obvious from this characterization, arguments and claims based on policy are rooted in the notion of legislative supremacy—i.e., that the legislature has identified a goal for the system or law, and courts should interpret and apply the law in a way that best furthers this goal. The rationality or wisdom of that goal is never called into question, except in relation to the Constitution. Claims of principle, however, derive their force from the persuasiveness with which they are elaborated on by courts. The policy/principle distinction thus adds an important substantive dimension to the institutional question of legislature versus courts.

The Copyright Act of 1976 cemented the idea of copyright as a policy-based regime, one where Congress sought to impose a unifying vision for the area of the law.[78] The vision was hardly unitary—i.e., the Act embodied multiple policies—yet it existed and deserved deference. Courts thus fell into line, seeking to make their jurisprudence further that vision, in stark contrast to what they had been doing previously in their capacity as lawmakers. This preference for policy reached its pinnacle in the Court's own decision in *Eldred v. Ashcroft*, which involved a constitutional challenge to a provision of the copyright statute.[79] In upholding the provision, the Court expressly affirmed the idea that legislative supremacy was the dominant structural ideal behind U.S. copyright law, and that courts were to refrain from second-guessing Congress's wisdom in setting policy goals in the area, even if such wisdom was not readily obvious on its face.[80] Congress over courts, and policy over principle.

2. *Reviving Juricentrism?* — In a subtle but real way, the majority opinion in *PRO* challenges both these accepted dogmas. In its acceptance of the rule constitutive of the government edicts doctrine, the majority places very little reliance on the text of the statute or indeed on the doctrine's compatibility with the text. To the extent that it invokes the

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76. Dworkin, Hard Cases, supra note 75, at 1059.

77. Id.

78. Id. at 1061 ("Policy decisions must therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account.").

79. 537 U.S. 186 (2003).

80. Id. at 222 ("The wisdom of Congress' action, however, is not within our province to second-guess.").

statute, it is in recognition of the fact that the principle of authorship—underlying the government edicts doctrine—has itself been incorporated into the statute. Indeed, it somewhat summarily rejects an argument that in not validating the doctrine—but instead creating a distinct one for U.S. government works—Congress had intended to reject the government edicts doctrine.[81]

The majority's decision to root the government edicts doctrine in the principle of *authorship* is equally consequential in this regard. While Congress may have used the term authorship in the statute, the idea of authorship remains altogether undefined.[82] Over the history of copyright law, authorship has remained a contested area of copyright doctrine and most importantly, one that courts have had to develop on their own with no legislative intervention.[83] While often squeezed between the copyright statute's better-known protectability requirements—originality and fixation[84]—authorship nevertheless rears its head periodically as a principled solution to innumerable copyright dilemmas.[85]

To be sure, Chief Justice Roberts roots the government edicts doctrine in authorship but fails to specify how the two are related. All the same, in so relying on it he was making an unambiguous statement about the institutional legitimacy of the Court to decide the validity and scope of the doctrine. In other words, the very invocation of authorship might be seen as the majority's laying claim to a form of statutory independence for its decision. And in so doing, it subverts the idea of congressional exclusivity in the domain with great subtlety.

The opinion even makes this subversion obvious in its response to Georgia's assertion that the government edicts doctrine being rooted in notions of "public policy" was fundamentally incompatible with the "'modern era' of statutory interpretation."[86] This is a direct allusion to the idea of congressional supremacy and the premise that courts are to interpret—rather than develop—the law. The majority dismisses this by

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81. *PRO*, 140 S. Ct. 1498, 1509–10 (2020).

82. The use of the term is seen in Section 102(a), where protection is afforded to "original works of authorship." 17 U.S.C. § 102(a) (2018).

83. See, e.g., Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60–61 (1884) ("The question here presented [on what constitutes authorship] is one of first impression under our Constitution . . . .").

84. The statute reads in relevant part that "[c]opyright protection subsists, in accordance with this title, in *original* works of *authorship fixed* in any tangible medium of expression." 17 U.S.C. § 102(a) (emphasis added). The legislative history accompanying the provisions notes that originality and fixation are the "two fundamental criteria of copyright protection" but says almost nothing about authorship, despite noting that the phrase is left "undefined." H.R. Rep. No 94-1476, at 51 (1976).

85. For an account of authorship, arguing for a requirement of authorial causation in copyright protection, see generally Shyamkrishna Balganesh, Causing Copyright, 117 Colum. L. Rev. 1 (2017).

86. *PRO*, 140 S. Ct. at 1510.

again rooting the government edicts doctrine in authorship and noting how Congress had used the term without abrogating the doctrine; and then follows up with the observation that it is not altering the fundamental separation of powers insofar as Congress was always at liberty to amend the law to "correct" the Court's mistakes.[87] Unquestionably then, Chief Justice Roberts recognized his opinion to be running up against the accepted idea of what courts were to do in copyright.

Of equal significance in the opinion is Chief Justice Roberts's acceptance of the policy/principle divide and his recognition that the majority's development of the law is heavily rooted in principle. At numerous points in the opinion, Chief Justice Roberts identifies authorship in copyright law as a principled mechanism, embodying its own internal (albeit unannounced) meaning.[88] Perhaps most importantly though, he explicitly treats those principles of authorship as potentially antagonistic to the statute's policy goals. As a last-ditch effort, Georgia argued that the Court's acceptance of the government edicts doctrine was contrary to the copyright statute's avowed policy of incentivizing the production of creative works through the market, a widely accepted goal of the regime that the Court has itself endorsed on multiple occasions.[89] The majority's response to this argument is unequivocal: Take it elsewhere. Or as the opinion puts it: "[The] appeal to copyright policy, however, is addressed to the wrong forum."[90] Policy arguments were for Congress—not courts—to consider; and the Court's decision was to be based on principle rather than policy. In thus setting up the conflict between principle and policy, and endorsing the former at the cost of the latter, the majority opinion could not have been clearer about its deviation from the accepted norms of judicial role in copyright adjudication.

The dissenting opinion's cautionary warnings are therefore no mere hyperbole. Instead, they reflect the reality that the majority opinion—substance aside—is swimming against the tide of extreme judicial deference that has characterized U.S. copyright adjudication for the last half-century. Perhaps equally important, the dissent was responding to the subtlety and sophistication with which Chief Justice Roberts executed the subversion in the majority opinion. The question that then remains is whether this contrarian approach is normatively desirable and, if so, capable of extension into other domains of copyright.

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87. Id.

88. Id. at 1503, 1512.

89. See id. at 1511.

90. Id.

III. THE JUDICIAL ROLE BEYOND GOVERNMENT EDICTS

Modern copyright adjudication should be more than statutory interpretation, and yet it is not. Whether it is wooden textualism or a purposivist reliance on the legislative history of the copyright statute, federal courts—including the Supreme Court—have come to see their role as significantly diminished within the copyright system.[91] While this approach places the separation of powers ideal at the forefront, it also severely constrains the ability of the copyright system to rationalize itself from within—as a body of law with an internal coherence and justification, beyond what the legislature in its political wisdom might have seen for it. Questions that are capable of being answered through logical deduction and analogical reasoning now require the fiction of a hook in the text or legislative history for their answers. Alternatively, such answers are taken to appear magically from the "plain meaning" of the text.[92]

Chief Justice Roberts's majority opinion in *PRO* suggests that this need not be the only way for courts to approach copyright adjudication. Courts deciding copyright cases can—and perhaps should—also place greater emphasis on the value of what the legal philosopher Ronald Dworkin famously called "integrity" in adjudication.[93] According to Dworkin, integrity entails judges deciding cases on the operative assumption that the system of rights and duties at issue is part of a whole "expressing a coherent conception of justice and fairness."[94] As an interpretive exercise involves making the best sense of an existing practice as an expository matter, integrity thus elides the distinction between making and applying the law at the center of debates about judicial role.[95] Rather than being disrespectful of the legislature within a statutory context, a commitment to integrity entails imputing to the legislature the belief (albeit as a fiction) that in drafting the statute the legislature too was driven by a commitment to the regime's systemic coherence, rather than by pure political compromises.[96]

Indeed, the majority opinion in *PRO* articulates precisely such a vision of integrity, insofar as it denies that it is *making* new law and at the same

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91. Compare Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the text."), with Am. Broad. Cos., Inc. v. Aereo, Inc., 573 U.S. 431, 438–39 (2014) ("But when read in light of its purpose, the [Copyright] Act is unmistakable: An entity that engages in activities like Aereo's performs.").

92. *Star Athletica*, 137 S. Ct. at 1010.

93. Ronald Dworkin, Law's Empire 176 (1986).

94. Id. at 225.

95. Id. at 225–26. Interpretivism is a critical feature of Dworkin's theory, which of course informs his account of integrity. It entails constructing a practice or concept in the best light possible for it, in the process eliding the distinctions between a purely objective/neutral description and an openly reconstructionist prescription, otherwise known as the is/ought distinction. Id. at 46–56.

96. Id. at 337–50.

time extols how its reconstruction of the government edicts doctrine coheres with the grand vision underlying the copyright statute.[97] What it thereby affirms is the reality that copyright law is built around a set of functional principles that make copyright law what it is, rather than just a legislative compromise in furtherance of an instrumental goal. And it credits Congress with acquiescing in these principles, even if not affirmatively endorsing them.[98] In other words, this move naturalizes core aspects of copyright law to some extent liberating it from the political machinery.

Recasting the judicial role in copyright as being about integrity therefore injects a rationality and normative coherence into the system, which contribute significantly to its legitimacy. Copyright has long suffered a legitimacy crisis of sorts,[99] wherein the realpolitik surrounding its creation and modifications has inevitably led to a sense of incredulity in its very claim to existence. Writing at the turn of the twentieth century, Mark Twain famously remarked that "[o]nly one thing is impossible for God: to find any sense in any copyright law on the planet."[100] Adjudicative integrity offers a strong antidote to this cynicism.

This, however, brings us to a more pragmatic concern. Even if the vision of judicial role implicit in the majority's opinion in *PRO* is deemed normatively desirable, is it indeed capable of extension to other questions of copyright law or was it unique to the government edicts doctrine and its origins in historic precedent? The answer to this question is more nuanced than a simple yes or no.

To be sure, the circumstances of the *PRO* case and the nature of the precedents at issue therein proved to be the perfect vehicle for an integrity-driven approach to copyright adjudication. All the same, that approach need hardly be limited to questions involving pre-statutory precedents. Given that much of copyright law—even under the Act of 1976—is built on concepts and doctrines that were in vogue long before the comprehensive revision, it is but reasonable to operate on the assumption that many (if not all) of these concepts embody an internal justification that transcends a purely instrumental belief that they were embedded into the copyright system for purely political reasons. Courts committed to

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97. See *PRO*, 140 S. Ct. 1498, 1506–11 (2020).

98. Id. at 1510.

99. It is a crisis in the sense of being seen by the public as lacking a valid reason for its existence, and as being significantly overextended beyond what is needed. See Pamela Samuelson, Is Copyright Reform Possible?, 126 Harv. L. Rev. 740, 740 (2013) (reviewing Jason Mazzone, Copyfraud and Other Abuses of Intellectual Property Law (2011) and William Patry, How to Fix Copyright (2012)) ("Copyright law has taken quite a beating in the legal literature in the past decade or so.").

100. Samuel Langhorne Clemens, Back in America (May 23, 1903), *in* Mark Twain's Notebook 374, 381 (Albert Bigelow Paine ed., 1935).

integrity should strive to reason their way through that internal justification rather than simply assume a superficial "policy" rationale for a rule or concept. A few examples will help illustrate the point.

A. *The Exclusion of Facts*

Consider first the rule excluding facts from copyright protection. The rule itself finds no express mention in the copyright statute but derives from the statute's denial of protection to "discoveries";[101] yet most courts and scholars take it as a fundamental rule of the copyright landscape that is "universally understood."[102] When called upon to determine its scope and applicability to a novel situation, a court might adopt one of two approaches. In the first, it could find the rule to be magically hidden in the language of the statute itself, and thereupon treat the rule as driven entirely by policy considerations that were imposed as a political matter on the law during its framing. Indeed, Judge Frank Easterbrook's 1990 decision in *Nash v. CBS* vividly illustrates this approach, wherein he expressly declared that the rule did "not come straight from first principles" but was instead entirely a congressional prerogative.[103] To the contrary is an alternate approach, the outlines of which appear in the Court's famed decision in *Feist v. Rural Telephone Service Co.*[104]

In this latter approach, the rule is seen as emanating from copyright's requirement of originality, as old as copyright itself.[105] Originality on its own does not say much about the exclusion of facts, which begins to make sense if one understands originality as itself deriving from copyright's commitment to authorship and the ideal that the author is the individual "to whom anything owes its origin."[106] Facts fail the originality requirement because they do not owe their origin to the putative author and instead have an epistemic existence independent of such individual. The exclusion is thus rooted in the principle of authorship, which will now allow a judge to make better sense of its extension and application to novel situations such as "created facts."[107]

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101. See 17 U.S.C. § 102(b) (2018).

102. See, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344 (1991).

103. Nash v. CBS, Inc., 899 F.2d 1537, 1542–43 (7th Cir. 1990).

104. Indeed, one might argue that *Feist* foreshadows something of an integrity-driven approach to copyright adjudication, especially insofar as it based its reasoning on precedents and their underlying principles. The opinion references "principle[s]" on innumerable occasions as well. See *Feist*, 499 U.S. at 347, 350–51, 354.

105. Id. at 345.

106. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

107. See generally Justin Hughes, Created Facts and the Flawed Ontology of Copyright Law, 83 Notre Dame L. Rev. 43 (2007) (describing copyright's treatment of created—i.e., fictional—facts).

B. *Delineating the "Work"*

It should matter little to a court committed to integrity that a concept or idea finds mention in the text of the statute, unless the historical record reveals that Congress chose to alter the principled construction of that concept.[108] Sometimes the legislative history will reveal that Congress chose to retain prior interpretations of a term (e.g., originality), providing courts with a firmer footing on which to embark on a principled understanding.[109] These are the easy cases.

Yet, even when the legislative history is silent on the statute's use of a term, but the term relates to other aspects of the system, integrity demands that courts derive a principled answer to understanding the term rather than superficially deferring to a presumptive or hidden policy concern that limits them to the plain meaning of the text. Paradigmatic of this category is the very idea of a "work," which forms the unit of protection for copyright law and which the statute repeatedly references, but without defining in any way or form.[110]

One approach, an institutionally minded textualist one, would have a court note the absence of any legislative history on the concept and then rely on the plain meaning of the term, which does little more than enable a plaintiff-author to unilaterally determine when to deem expressive content a "work" for the purposes of registration and/or an infringement action.[111] In this approach, the court might simply throw up its hands and defer to the Copyright Office's approach to registering works, in the belief that since it routinely administers the statute's conception of a work, it is best positioned to delineate it.

An alternative integrity-focused one would instead attempt to situate the idea of a work around the system's internal reasons for the term's existence. Since its inception, copyright law has always had a *unit of protection.*[112] That unit of protection was delineated not merely for administrative convenience (i.e., registration) but on the assumption that the law's measure of authorial contribution—origination—was sufficiently robust to

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108. This is often converted into a canon of statutory interpretation known as common law conformity. See Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

109. An obvious example here is the doctrine of originality. See H.R. Rep. No. 94-1476, at 51 (1976) ("[The statute] incorporate[s] without change the standard of originality established by the courts under the present copyright statute.").

110. For an excellent account of this problem, see generally Paul Goldstein, What Is a Copyrighted Work? Why Does It Matter?, 58 UCLA L. Rev. 1175 (2011).

111. Id. at 1176 ("The reflexive answer to the question . . . is that the work is whatever the author says it is.").

112. The Copyright Act of 1790 identified this unit as maps, charts, or books. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124.

extend to the entire unit. In other words, the work was one of the law's indirect mechanisms for determining the existence of authorship and thus took color from it.

Is the chapter of a book the work, or is it instead the book as a whole? In answering this in favor of the latter, copyright law historically reasoned that authorial contribution was to be understood in the aggregate for copyrightability purposes. Indeed, it is this logic that fully explains why in the landmark case of *Baker v. Selden*, the Court found the plaintiff's work to be copyrightable even though it observed that blank forms—which constituted some part of the plaintiff's work—were ineligible for protection on their own.[113] In other words, much like with both government edicts and the exclusion of facts, it is explained by copyright's principle of authorship and the idea that the author's causal contribution to the work defines its boundaries. A court attempting to delineate the work for the purposes of protection should therefore be driven by its relationship to authorship and the idea of authorial contribution that is implicit in the notion of a "work of authorship."[114]

CONCLUSION

The *PRO* decision is undoubtedly important for its substantive holding on the government edicts doctrine and will come to be remembered for bringing the doctrine into the modern era. It will also be remembered for furthering free public access to laws, critical to notions of due process and the rule of law. All the same, lurking underneath the majority's substantive contributions is an equally important structural move, one with potential ramifications that go well beyond the government edicts doctrine.

In reasserting the role of courts as the guardians of reason and principle within the copyright system despite the comprehensiveness and primacy of the statute, Chief Justice Roberts's opinion should be seen as speaking not just for the majority of the Court but for all of the federal judiciary. Adjudicative integrity, which the opinion foreshadows as a virtue in copyright decisionmaking, would go a long way in resurrecting the notion that the copyright system was and is much more than a product of content industry realpolitik and lobbying. The modern approach, which presents courts with a faux choice between extralegal policy considerations and the letter of the law, does little justice to the nuance of the copyright system and its evolution over time. Copyright law embodies a deep internal coherence and rationality that is all too easily forgotten by courts and scholars, given their exclusive emphasis on the text and history

113. 101 U.S. 99, 107 (1879) ("The conclusion . . . is[] that blank account-books are not the subject of copyright; and that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book.").

114. 17 U.S.C. § 102(a) (2018).

of the statute—both of which capture only parts of that edifice. The *PRO* opinion empowers courts to find and illuminate that rationality, a task which should come naturally to them.