
AUTHORING THE LAW

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Copyright law denies protection to legal texts through a rule known as the “government edicts doctrine.” Entirely a creation of nineteenth century courts, the government edicts doctrine treats expression produced by lawmakers in the exercise of their lawmaking function as altogether uncopyrightable. Despite having been in existence for over a century, the doctrine remains shrouded in significant mystery and complexity. Lacking statutory recognition, the doctrine has come to be seen as driven by open-ended considerations of “public policy” that draw on the overarching importance of public access to laws. In its decision in Georgia v. Public.Resource.Org., Inc., the Supreme Court reaffirmed the continuing significance of the doctrine but refused to endorse the public policy justification commonly offered for its existence, preferring instead to root it in copyright’s principle of authorship. In so doing however, the Court refrained from explicating the connection between authorship and the government edicts doctrine, contributing to the doctrine’s mystery. This Article develops a theory of the government edicts doctrine that anchors it firmly to the principle of authorship. The authorship rationale for the government edicts doctrine is rooted in a “personalization mismatch”: whereas authorship in copyright law is predicated on the need to personalize a work by identifying the human actor that created it, a commitment to the rule of law necessitates that lawmaking and legal directives be impersonal and derive their authority not from an identified individual. It is this basic mismatch which explains the government edicts doctrine and its principled roots in copyright law rather than broader considerations of public policy. The Article traces the competing (and confusing) normative ideas that have influenced the evolution of the doctrine, develops the analytical basis of its connection to authorship, and shows how this connection enables the doctrine to be extended and applied to new forms and modes of law and lawmaking.

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INTRODUCTION

Should a government be allowed to claim copyright in the laws that it creates and promulgates, especially if the production of those laws involves a significant amount of effort and resources? Does the nature and authoritativeness of the particular law at issue have any bearing on the answer? Should it be any different if the government does not itself produce the law, but merely adopts something as law by incorporation?

Each of these questions is supposedly answered by a little-known nineteenth century copyright rule, known as the “edicts of government” doctrine or the “government edicts” doctrine,¹ which formed the basis of the Supreme Court’s recent decision in *Georgia v. Public.Resource.Org., Inc.*² Entirely a creation of courts, the government edicts doctrine denies all copyright protection to an “edict” of government, a term that encompasses any official text produced by a government-body (or agency) in the

¹ See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.12[A] (2018); Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43, 77 (2007). For the earliest — and to date, only systematic — scholarly analysis of the doctrine, see L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989).

² 140 S. Ct. 1498 (2020).

exercise of its lawmaking function.³ Edicts thus cover “legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials.”⁴ While the doctrine originated in nineteenth century decisions denying copyright protection to judicial opinions and official reports,⁵ it soon expanded to cover statutes and constitutions,⁶ and in recent times has been extended by some courts to encompass government-adopted standards and codes.⁷ In short, the fundamental idea behind the doctrine is that expression purporting to have the authority of law should remain outside the domain of copyright protection and ownership. The letter of the law, in other words, ought to remain unowned.

While the proposition that “no one can own the law⁸” may seem facially self-evident as a justification for the government edicts doctrine, in reality the doctrine is layered with mystery and complexity. Not only is the doctrine entirely a creation of courts, but it also finds no mention in the copyright statute or its accompanying legislative history. As a result, courts invoking and extending the doctrine offer different justifications for its existence. Such explanations range from simplistic invocations of “public policy⁹” and “due process¹⁰” to the more abstract ideas of “popular sovereignty¹¹” and “citizen authorship.”¹²

An undeniable reality of these justifications is that they each locate the rationale for the government edicts doctrine in normative ideas that are external to copyright. And in so doing, they inevitably set up the doc-

³ *Id.* at 1504-05.

⁴ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.6(C)(2) (3d ed. 2017) [hereinafter COMPENDIUM].

⁵ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834); *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888); *Callaghan v. Myers*, 128 U.S. 617, 648-50 (1888).

⁶ *Davidson v. Wheelock*, 27 F. 61 (C.C.D. Minn. 1866); *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898); *Georgia v. Harrison Co.*, 548 F. Supp. 110 (N.D. Ga. 1982).

⁷ *Bldg. Offs. & Code Adm. v. Code Tech., Inc.*, 628 F. 2d 730 (1st Cir. 1980); *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791 (5th Cir. 2002).

⁸ *Georgia v. Pub. Res. Org.*, 40 S. Ct. 1498, 1507 (2020).

⁹ *Banks*, 128 U.S. at 253 (“The question is one of public policy.”).

¹⁰ *PRO*, 140 S. Ct. at 1516 (Thomas, J. dissenting) (“[C]oncerns of fair notice, often recognized by this Court’s precedents as an important component of due process, also may have animated the reasoning of these nineteenth-century cases.”).

¹¹ *Code Revision Comm’n v. Pub. Res. Org., Inc.*, 906 F.3d 1229, 1247 (11th Cir. 2018) (“[T]he rule in *Banks* derives more directly from the concept of popular sovereignty.”)

¹² *Bldg. Offs. & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) (“The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.”).

trine — and its justification — as being in opposition to copyright, rather than as emanating from its own underlying principles. In other words, the government edicts doctrine is treated as an exception to copyright protection, requiring copyright's set of normative goals to be balanced against those informing the doctrine. Once so framed as an external policy-based limitation on copyright, the legal origins and basis of the doctrine start becoming suspect, thereby undermining the continuing the legitimacy of the doctrine altogether.

Further compounding the problems with this framing is the reality that ever since the origins of the doctrine in the nineteenth century, conceptions of law, law-making, and the government's role therein have evolved dramatically and thereby called into question the very idea of a "government edict." The doctrine emerged during an era where judge-made law was the principal source of law.¹³

In the many decades since, statutes and regulations have proliferated, as have the myriad institutional sources and processes through which they are developed. Unsurprisingly, this has in turn necessitated a re-examination of the justification for the doctrine and its fundamental connection to the nature of law and legal authority.

The Supreme Court had occasion to revisit the government edicts doctrine after a period of 130 years in *Georgia v. Public.Resource.Org.*¹⁴ The case involved the copyrightability of the annotations contained in the Official Code of Georgia Annotated (OCGA), the only official compendium of state statutes published by the State of Georgia.¹⁵ While the annotations are prepared by a private entity, their creation is overseen and supervised by an arm of the state legislature (the Code Revision Commission), which then submits it to the legislature for a formal vote to merge them with the rest of the code.¹⁶ Despite this merger, the annotations themselves are denied the authority of law, but serve an interpretive function.¹⁷ When the defendant organization sought to make the entire OCGA publicly available for free, Georgia commenced an action for copyright infringement, claiming copyright in the annotations.¹⁸

In a splintered 5-4 decision, the Court found the annotations to be uncopyrightable under the government edicts doctrine.¹⁹ In his opinion for the majority, Chief Justice Roberts saw the doctrine as relatively

¹³ Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 384 (1908) (describing this position and critiquing it).

¹⁴ 140 S. Ct. 1498 (2020).

¹⁵ *Id.* at 1504.

¹⁶ *Id.* at 1504-05.

¹⁷ GA. CODE ANN. § 1-1-7 (West).

¹⁸ 140 S. Ct. at 1505.

¹⁹ *Id.* at 1506.

“straightforward.”²⁰ Rather than locating the rationale for the doctrine in considerations external to copyright law, his opinion instead situated it within copyright’s emphasis on the “author” as the subject of protection,²¹ an idea that had been alluded to in some of the early cases applying the doctrine. The work of lawmakers was incapable of qualifying as authorship.

While the majority opinion identified the rationale for the doctrine within copyright law, it did little more. Despite locating the rationale for the doctrine in the concept authorship, Chief Justice Roberts failed to specify the Court’s logic any further. What is it about lawmaking that renders it ineligible for classification as authorship in copyright law? Answering this question is obviously essential, as the nature and forms of lawmaking continue to expand; and yet the Court chose to limit itself to the narrow circumstances of the case before it, a reality that one of the two dissenting opinions readily pointed out.²² Indeed, in failing to explicate how authorship and lawmaking fail to coalesce, the Court effectively shrouded the government edicts doctrine in further mystery, thereby opening the doctrine up to the criticism that it represents little more than a smoke screen for non-copyright (i.e., external) considerations.

This Article fills the missing gap in the Court’s reasoning by explicating the mismatch between authorship and lawmaking. As I argue herein, Chief Justice Roberts was correct to locate the justification for the doctrine within the idea of authorship, a concept of unappreciated significance in the working of copyright law.²³ Copyright has long embodied a fairly distinctive conception of authorship, one that seeks to identify the source of a work and its creative elements as a precondition to protection.²⁴ The identification of an individual as an author of a work speaks to copyright’s effort to personalize expression that it sees as worthy of protection, an

²⁰ *Id.*

²¹ *Id.* (“A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author.”).

²² *Id.* at 1519-20 (Thomas, J. dissenting).

²³ Prior scholarship that has discussed the doctrine has uniformly refused to recognize the centrality of the authorship rationale for the doctrine and preferred to focus on the policy rationales offered by courts for the doctrine. See Patterson & Joyce, *supra* note 1, at 781; Shubha Ghosh, *Legal Code and the Need for a Broader Functionality Doctrine in Copyright*, 50 J. COPYRIGHT SOC’Y 71, 87-91 (2005) (criticizing some courts’ “erroneous focus on authorship” as the basis of the doctrine and suggesting that the basis “rests on a policy goal of copyright law”).

²⁴ The literature on authorship in copyright law continues to grow. For a recent sample, see Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1 (2017); Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455.

effort that is buttressed by its other protectability doctrines most notably originality and fixation.²⁵ Personalization — through identification — is therefore central to copyright and showcases its emphasis on the normative ideal of autonomy, often ignored in utilitarian accounts of copyright that dominate the landscape. Perhaps most importantly though, authorship remains copyright's principal mechanism to that end.

An undeniable feature of American law in the modern context has been the conscious impersonalization of the process through which it is produced. In other words, the formal validity of a directive as a proposition of law is independent of the personal identity (or identities) of the individuals producing it. Judicial opinions speak in the voice of the court and derive their status as law from there;²⁶ and legislation speaks in the voice of the legislature regardless of the precise composition of the body. This is not to say that we do not care about the identity and composition of the lawmaker, just that it is irrelevant to the status of their directives as law. We certainly care whether an opinion was written by Justice Holmes as opposed to a Justice Unknown, but that does not determine whether the one and not the other is more legitimately law. That question is instead entirely dependent on whether either judge was duly appointed and speaking for the majority of the court, i.e., the process through which it is produced. Law is thus characteristically produced *ex officio* in a democratic setting, and derives its force from the impersonalized process of production. Most importantly, such impersonalization is hardly an unintended consequence of the lawmaking process. It is instead a defining hallmark of the rule of law in a democracy.²⁷

Whereas authorship emphasizes personalization, law and lawmaking recoil at it and embrace impersonalization. And it is from this fundamental opposition that the mismatch between authorship and lawmaking emerges, which explains the origins and persistence of the government edicts doctrine. Indeed, it is this very distinction that is captured in the difference between the ideas of “publication” and “promulgation.”²⁸ Laws are promulgated; works are published. Both are public acts; yet the difference is that the former is an official act while the latter is private.

²⁵ Authorship, originality and fixation are all mentioned in a single provision of the Copyright Act of 1976. 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.”)

²⁶ Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 2-3 (2010).

²⁷ See generally Kenneth Hensley, *The Impersonal Rule of Law*, 5 CAN. J.L. & JURIS. 299 (1992).

²⁸ For a comprehensive overview of promulgation and its role in law and legal theory, see Gilbert Bailey, *The Promulgation of Law*, 35 AM. POL. SCI. REV. 1059 (1941).

And accordingly, they each produce different consequences. Therein lies the key to understanding the government edicts doctrine.

Appreciating the role of this mismatch — best described as the “personalization mismatch” — also helps explain the continuing significance and potential expansion of the government edicts doctrine beyond the narrow domain identified for it by the Court. While the Court in *PRO* rightly refused to limit the idea of an edict to rules that are formally binding,²⁹ it failed to specify when and how the doctrine might apply to additional directives that are produced through different processes and consultative methods. One such question that has confounded lower courts involves situations where privately produced industry codes come to be adopted by local governments, or government agencies into their law.³⁰ Focusing on the personalization mismatch has courts pay additional attention to the manner and assumptions under which such codes are produced to assess their copyrightability under the doctrine.

The government edicts doctrine is therefore fundamentally about the authorship of law. While it no doubt serves important non-copyright ideals, it does not do so at the cost of copyright’s own commitments and principles. Instead, it represents a domain where copyright principles align well with the overarching external goals that the doctrine has come to be associated with. It thus presents a rare instance where the doctrine’s internal and external justifications coincide.³¹

The argument of this Article is developed in three parts. Part I sets out the government edicts doctrine by tracing its origins in nineteenth century copyright decisions and examining its evolution over time. This account reveals how the concern with authorship came to be eclipsed by various public-regarding external justifications for the doctrine, effectively

²⁹ *Georgia v. Pub. Res. Org., Inc.*, 140 S. Ct. 1498, 1504 (2020).

³⁰ See, e.g., *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002); *Am. Soc’y for Testing & Materials v. Pub. Res. Org., Inc.*, 896 F.3d 437 (D.C. Cir. 2018).

³¹ This framing partially adopts the internal/external distinction in legal theory that has often been cast in methodological terms. “Internal” arguments are seen as doctrinally driven and motivated by the analytics of the legal area at issue whereas “external” arguments take consequentialist outcomes to be their starting points and begin the analysis from there. To some extent — though not completely — the non-copyright framing of the issues involved in the government edicts doctrine embody an external perspective in this framing. All the same, they are not completely devoid of legal grounding, which the Article turns to in Part II. For more on the internal/external distinction, see Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015); Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a “Practice” in Legal Theory and Sociolegal Studies*, 30 LAW & SOC’Y REV. 163, 163 (1996); Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 90 U. CHI. L. REV. 1743, 1745 (2013).

converting it into an exception to copyright protection that lacked a clear normative justification. Part II develops a rationale for the doctrine that is rooted in the idea of authorship and the mismatch between the personalization demanded by copyright's commitment to authorship and the law's emphasis on the impersonalization (and officialization) of its directives. Part III then applies the personalization mismatch account of the government edicts doctrine to the context of privatized lawmaking, an area where the doctrine has been frequently invoked in recent times to show how it can operate coherently and with clear outer boundaries once understood through the lens of authorship.

I. THE EVOLUTION OF THE GOVERNMENT EDICTS DOCTRINE

The rule denying copyright protection to edicts of government (the "government edicts doctrine") can be traced back to nineteenth century judicial opinions. In the years since, it has continued to remain a common law doctrine, operating without direct recognition in the text of the copyright statute. This purely common law existence has had a few noteworthy consequences for the evolution and status of the doctrine over the century and a half of its existence.

First, as with most common law doctrines its growth has been largely organic and incremental. The doctrine originated in one narrow area (judicial opinions) and eventually expanded and migrated to other allied domains, all on the assumption that its core principle was capable of such extension. This occurred gradually, and over the course of about a century.

Second, that core principle — or indeed the normative bases of the doctrine — was rarely ever announced with any degree of coherence by the early courts developing the doctrine. Instead, in keeping with the famous observation that "the common law . . . decides the case first and determines the principle afterwards,"³² courts treated the rationale for the doctrine as self-evident. When later courts sought to make sense of the doctrine in order to consider its potential application to new circumstances, this prior omission forced them to in effect discover its basis de novo.

Third, in seeking to discover the normative basis of the doctrine, later courts attempted to root the doctrine in collectivist, public-regarding ideals. This was in keeping with the overall influence of public law thinking on copyright that has dominated the U.S. legal landscape for the last sev-

³² Oliver Wendell Holmes, *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

eral decades.³³ All the same, it had the unintended effect of situating the doctrine outside of copyright law, or rather as an *exception* to copyright law rather than as one that originates from its central precepts. What it ignored altogether was the reality that the doctrine embodied an account of *authorship* applicable to *law*.

A. *Origins: Judicial Opinions and Embellishments*

While statutes are today thought of as paradigmatic of edicts, the government edicts doctrine first took shape in relation to the copyrightability of judge-made law, i.e., judicial decisions. Given the primacy of the common law as a source of law in the nineteenth century this was perhaps inevitable.³⁴ All the same, the confusion that is today seen in the working of the government edicts doctrine is directly traceable back to its origins in the cases involving copyright protection for judicial opinions. On this topic, we observe a surprisingly consistent level of equivocation and ambiguity in the jurisprudence and its underlying rationales, both of the Supreme Court and of the lower courts.

I. *Supreme Court Brevity*

The kernel of a statement that would eventually grow into the government edicts doctrine emerged in the U.S. Supreme Court's first ever copyright case, decided in 1834: *Wheaton v. Peters*.³⁵ *Wheaton* is an important opinion in the overall landscape of federal copyright law wherein the Court concluded that the sole basis of copyright law for published works in the U.S. was statutory.³⁶ Common law copyright, the Court categorically noted, could not subsist in parallel for such works. Thereafter, in treating the formalities prescribed by the copyright statute as a necessary pre-requisite for protection, the Court proceeded to examine their applicability to the work at issue, a collection of law reports.³⁷ And in so doing, it summarily announced the rule 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."³⁸ The Court then applied the proposition to the facts at hand, with no further explication of the rule,

³³ For a comprehensive overview of the factors that contributed to this move, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973) (attributing this to the rise of pragmatism and scientific naturalism in American thinking).

³⁴ See, e.g., ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 98-100 (1921); Pound, *supra* note 13.

³⁵ *Wheaton v. Peters*, 33 U.S. 591 (1834).

³⁶ *Id.* at 666-68.

³⁷ *Id.* at 668.

³⁸ *Id.* /

and ordered the case to be remanded back to the lower court for further determination.³⁹

Despite its own expository brevity on the question, the reality of the Court's remand in *Wheaton* invited the interpretation that despite being a collection of court reports, the plaintiff's work did contain expression that was plausibly copyrightable.⁴⁰ In the absence of such expression, the remand would have made little sense. Consequently, the *Wheaton* opinion came to be understood by later courts and scholars as standing for two connected propositions: first, that judicially-authored court opinions were not eligible for copyright, and second, that a court reporter's own contributions to such reports were eligible for such protection when prepared by that reporter.⁴¹

Half a century after *Wheaton* — in 1888 — the Court had occasion to revisit the proposition directly in *Banks v. Manchester*.⁴² The facts of the case involved an Ohio statute that authorized the state supreme court to appoint a reporter whose primary purpose was the preparation, printing and publishing of the court's decisions as a volume.⁴³ The statute further specifically mandated that the reporter was to secure a copyright in each of the volumes so printed and published, for which it also prescribed a specific consideration.⁴⁴ Another section also provided for the method through which the state was to identify and select a publisher for the reports, and in who it could confer a "sole and exclusive right to publish" the reports.⁴⁵ The plaintiff in the case was the assignee of a company that had entered into a contract with the state of Ohio under the statute, and under which it had been conferred the exclusive right to publish the decisions of the state supreme court. The defendant, in turn, was a competing publisher who had chosen to publish a few cases that had been the subject of the plaintiff's volume.⁴⁶

Relevant for our discussion is the Court's preliminary dissection of the work at issue, i.e., the case reports that the plaintiff was asserting a copyright in. Each of the cases copied was seen to consist of "the head

³⁹ *Id.* ("[I]f the said requisites have not been complied with in regard to all the said volumes, then the jury [is] to find in particular in regard to what volumes they or either of them have been so complied with.")

⁴⁰ *Gray v. Russell*, 10 F. Cas. 1035, 1039 (C.C.D. Mass. 1839) (No. 5,728) (Story, J.).

⁴¹ See EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 159 (Boston, Little, Brown & Co. 1879); *Callaghan v. Myers*, 128 U.S. 617, 649-50 (1888); *Russell*, 10 F. Cas. at 1039.

⁴² 128 U.S. 244 (1888).

⁴³ *Id.* at 245-46.

⁴⁴ *Id.* at 245.

⁴⁵ *Id.* at 246.

⁴⁶ *Id.* at 249-50.

note or syllabus, the statement of the case, the names of the counsel for the respective parties and the decision or opinion of the court.”⁴⁷ From this dissection, and even prior to its exegesis of the law, the Court then categorically concluded that “[i]t is, therefore, clear, that, in respect of the publication complained of, the reporter was not the author of any part of the matter for which he undertook to take a copyright, for the State of Ohio.”⁴⁸ This conclusion appears to be directly tied to the defendant’s claim, which the plaintiff did not dispute, that in Ohio court reports it was the judge — and not the reporter — who prepared the statement of the case and the case syllabus in addition to the opinion itself. The Court’s conclusion that the *reporter* could not be the author of these components was therefore a factual observation rather than a legal conclusion.

Jumping then into its analysis of the copyrightability of the case reports, the Court in *Banks* then examined the relevant provisions of the federal copyright statute and moved directly to the proposition that *judges* were incapable of obtaining copyright in their works:

In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note, be regarded as their author or their proprietor, in the sense of [the copyright statute], so as to be able to confer any title by assignment on the State, sufficient to authorize it to take a copyright for such matter, under that section, as the assignee of the author or proprietor.⁴⁹

It is crucial to appreciate that in this observation, the Court’s emphasis appears to lie in the conceptual disconnect between judicial opinion-writing and copyright’s notion of *authorship*. Yet the Court does not tell us more, or indeed what the “proper sense” at issue entails. Instead, in the very next paragraph it attempts to provide additional reasons for its conclusion. Here it equivocates and oscillates somewhat clumsily between grounds of policy and copyright principles.

Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and head notes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial *consensus*, from the time of the decision in the case of *Wheaton v. Peters*. . . 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,

⁴⁷ *Id.* at 251.

⁴⁸ *Id.*

⁴⁹ *Id.* at 253.

binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute. . . . What a court, or a judge thereof, cannot confer on a reporter as the basis of a copyright in him, they cannot confer on any other person or on the State.⁵⁰

Embedded in this paragraph are a few inter-related “public policy” rationales that have since assumed significance in discussions of the case and its holding. It is crucial to note that these policy-based reasons for the rule are drawn from considerations external to copyright law, a point that the opinion’s use of them does not make clear.

The first is the idea that since judges are already compensated by the treasury, they do not need the pecuniary benefits that might accrue from a grant of copyright. This argument has since come to be known as the “double subsidy” principle and become the basis of the rule denying copyright protection to works created by agents or employees of the U.S. government in the course of their employment.⁵¹ The public is seen to be subsidizing the government through the power of taxation; and consequently, an additional market-based right becomes superfluous as a second subsidy. Logical as the argument may be, it has no special connection to judges — as opposed to all government employees — nor to the duties and functions of the judge. The logic of double subsidy applies with equal force to a memorandum penned by an official court clerk as it does to an opinion written by a judge.

The second rationale, seen in the later part of the paragraph, has to do with the idea that an official exposition of law, in so far as it was binding on citizens, needed to be “free for publication to all.”⁵² Since the law grants rights and imposes obligations on citizens, it is but appropriate that citizens have access to such law so as to be able to live their lives in a law-abiding manner. We might call this the “access to law” rationale. It is perhaps crucial to note here that despite the Court’s use of the term “binding” to describe the law and its effects on citizens, it in no way considered that to be a limiting element of rule in the formal sense of the term, i.e., as things having the formal force of law. The Court’s own formulation of its decision rule extended to parts of the court report (the statement of the case, syllabus, and headnote) which carried no authoritative effect as such but were produced “for the convenience of the profession in the examination of the reports.”⁵³ The idea of binding was thus the Court’s general allusion to the obligatory nature of legal directives, which justified adequate notice of them.

⁵⁰ *Id.* at 253-54.

⁵¹ H.R. REP. NO. 94-1476, at 59 (1976).

⁵² *Banks*, 128 U.S. at 253.

⁵³ *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

As authority for this idea, *Banks* cites to the Massachusetts case of *Nash v. Lathrop*.⁵⁴ The facts and circumstances that gave rise to the opinion in *Nash* were fundamentally different from those in *Banks* and *Callaghan*, as was the court's reasoning. Under the terms of a state statute at issue in *Nash*, the court reporter was required to allow an officially designated publisher to publish the reports, and the publisher was entitled to the "copyright of the volumes" so published.⁵⁵ The petitioner in the case was a legal newspaper, which sought access to unpublished court opinions, reports of which had been prepared by the court reporter and were pending publication by the official publisher.⁵⁶

Very importantly, the court in *Nash* expressly chose to avoid the deciding the case on the basis of copyright law, preferring instead to address the much "narrower question" of whether the state's grant to a designated publisher of the exclusive right of first publication of judicial opinions enabled that publisher to assert that "the opinions shall not be made public until they are published" by them.⁵⁷ This was an obviously different question from the assertion of copyright in that it involved the state's contract with the publisher, which the court in turn treated as having legal significance (akin to legislation) beyond the parties themselves, and thus needing interpretation. And in answering this question, the court observed:

The decisions and opinions of the justices are the authorized expositions and interpretations of the laws which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices.⁵⁸

Directly at issue in *Nash* was therefore the issue of the public's access to the laws, since the plaintiff had sought to censor the defendant's pre-publication release of them. The court in *Nash* treated the question as one of intent, both legislative and contractual, and asked if the contractual language of exclusivity should be interpreted in a manner that allowed restraining alternative publication of opinions. Here it concluded that "it was not the intention of the Legislature . . . to limit the previously existing right of the citizen to have free access to the opinions, or to confer upon [the publisher] the right to restrain any persons from procuring copies of

⁵⁴ 6 N.E. 559 (Mass. 1886).

⁵⁵ *Id.* at 562.

⁵⁶ *Id.* at 559.

⁵⁷ *Id.* at 560.

⁵⁸ *Id.*

them.”⁵⁹ At the same time, the court readily acknowledged that the legislature was at liberty to “limit” that right when needed, and in furtherance of other ideals.⁶⁰ In short, *Nash* treated the public policy underlying the free access to opinions as a contextual and interpretive idea rather than as a freestanding and absolute proposition (or indeed as one connected to copyright) in the manner that the Court uses it in *Banks*.

Neither “policy” rationale put forth in the *Banks* opinion generated the rule that it formulates. Indeed, both rationales appear to be little more than offered to support a more primary, copyright-based one rooted in the concept of authorship. All the same, the court’s perfunctory treatment of authorship shed little additional light on the connection between authorship and the rule denying copyright protection to official judicial opinions.

We glean some additional insight into the rule from a sister opinion of the Court handed down less than a month after *Banks*: *Callaghan v. Myers*.⁶¹ What makes the opinion in *Callaghan* a fruitful interpretive tool is the all-important fact that it was authored by the same justice who penned *Banks*: Justice Samuel Blatchford. An expert on admiralty and patent law, while in private practice Justice Blatchford had also served as a formal “reporter of decisions” for the federal circuit court in New York for many years even after being elevated to the bench.⁶² He was therefore very familiar with the process of preparing court decisions, the subject of both the *Banks* and *Callaghan* opinions.

The facts at issue in *Callaghan* were slightly different from those of *Banks*. The case involved an Illinois statute that called for the appointment of a court reporter for official decisions.⁶³ But unlike the Ohio statute, the reporter was not mandated to obtain copyright in the reports so produced, and the statute made no reference to the assignment and ownership of the copyright. Additionally, and of great significance, in Illinois it was the reporter — rather than the judges — who prepared all the embellishments to the opinion, including the statement of the case and its syllabus.⁶⁴ As the Court put it, everything but the opinion itself was the product of the reporter’s “intellectual labor.”⁶⁵ This appears to have made a great difference to the Court.

⁵⁹ *Id.* at 561.

⁶⁰ *Id.* at 560.

⁶¹ 128 U.S. 617 (1888).

⁶² See A. Oakey Hall, *Justice Samuel Blatchford*, 5 GREEN BAG 489, 490 (1893); *Blatchford, Samuel M.*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/blatchford-samuel-m> (last visited Jan. 7, 2022).

⁶³ 128 U.S. at 645-47.

⁶⁴ *Id.* at 620.

⁶⁵ *Id.* at 645.

Distinguishing its holding from that in *Banks*, the Court in *Callaghan* allowed the plaintiff's copyright claim, noting:

But, although there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges, *Banks v. Manchester* . . . yet there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume, which will cover the matter which is the result of his intellectual labor.⁶⁶

The Court's rationale for allowing the claim is rooted quite simply in the intellectual labor involved in preparing the report. Further, the double subsidy argument was no impediment as such. On this point, the Court was categorical in observing that "[e]ven though a reporter may be a sworn public officer, appointed by the authority of the government which creates the court of which he is made the reporter, and even though he may be paid a fixed salary for his labors, yet, in the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government as the assignee of his work, he is not deprived of the privilege of taking out a copyright, which would otherwise exist."⁶⁷ Beyond the absence of a prohibition in the statute, the Court thus offered no additional reason for its dismissal of the double subsidy idea, which had formed part of its policy rationale for the rule in *Banks*.

The double subsidy (policy) rationale was thus no constraint for the Court in *Callaghan*. Nor was the access to law concern, which *Banks* had elaborated on using flowery language, even considered by the opinion. The Court instead summarily concluded that there was "no ground of public policy" that would restrict a reporter from obtaining copyright in the parts of the report that he prepared.⁶⁸

Facially, *Callaghan* and *Banks* may appear to have produced contradictory rules in so far as they related to nearly identical types of works. While both denied copyright protection to judicial opinions, *Callaghan* permitted the embellishments to the opinion contained in the case report to be copyrighted while *Banks* denied the very availability of such protection. Yet the two opinions are capable of reconciliation, when one considers the source of the embellishments. Central to both opinions was therefore the authorial source of the subject-matter at issue — both opinion and embellishment. When produced by a judge, *anything* contained in the reporter was to be treated as presumptively uncopyrightable, but when

⁶⁶ *Id.* at 647.

⁶⁷ *Id.*

⁶⁸ *Id.*

produced by a reporter they become eligible for protection, regardless of the official status or otherwise of the reporter.

But what was it about a *judge's* actions as law-maker and law-interpreter that rendered the work uncopyrightable, even when it did not carry the force of law as such (e.g., syllabi and head notes)? Neither opinion addressed this question directly, even though *Banks* hinted at a disconnect between the law-making function and authorship in the “proper sense.” It is indeed this principled disconnect that drives the government edicts doctrine, which courts and scholars have failed to fully explicate in the many decades since. The notion of *authoring the law* sits uncomfortably with several of copyright's core assumptions, which quite rightly motivated the unease seen in Justice Blatchford's twin opinions.

Banks and *Callaghan* are therefore clear in enunciating what is today described as the government edicts doctrine. Yet neither case offers a coherent normative rationale for the doctrine. To the contrary, it was in the policy-based normative rationales proffered by Justice Blatchford in the two cases that weaknesses and inconsistencies arise. Despite appearing to base his decision on copyright's notion of authorship, Justice Blatchford felt compelled to offer a non-copyright, policy-based rationale for his holding in *Banks*. While his reasons for doing so do not appear in the opinion, one suspects that they may have their roots in the manner in which lower courts had approached the question prior to *Banks* and *Callaghan*. Indeed, Justice Blatchford was well acquainted with this early — albeit confused — jurisprudence, having served as court reporter for at least one prominent decision that dealt with the issue.

2. *Pre-Banks* Lower Court Confusion

The interregnum between *Wheaton* and *Banks*, i.e., between 1834 and 1888, saw courts around the country grappling with the question of copyright protection for judicial opinions and reports. While most of them accepted the premise of *Wheaton* that the official opinions prepared by judges were uncopyrightable, they also saw that rule as having an important limit, namely, in relation to parts of court reports that were unofficial, i.e., not prepared by the judges but instead by court reporters. And it is in relation to these unofficial parts that significant nationwide confusion arose.

One of the earliest cases to consider the question was the 1851 case of *Little v. Gould*, a decision of the circuit court of New York.⁶⁹ The facts were similar to the cases previously described, but with a few crucial state law wrinkles. A New York state statute allowed for the appointment of a state reporter to prepare and oversee the publication of decisions deliv-

⁶⁹ 15 F. Cas. 604 (C.C.N.D.N.Y. 1851) (No. 8,394).

ered by the state's court of appeals. That statute expressly forbade the reporter or anyone else from asserting copyright in the reports of the judicial decisions of the court of appeals, with the declaration that they "may be published by any person."⁷⁰ At the same time, it further provided that the copyright in any "notes and references" made by the court reporter in the reports was to be automatically vested in the secretary of state rather than the reporter.⁷¹ The defendants in the case had reproduced case reports published under the direction of the state reporter, who commenced an action for copyright infringement against them.⁷²

Much of the debate revolved around the court's attempt to understand the meaning of the phrase "notes and references," the only components of the case reports in which copyright was permitted but vested in the state.⁷³ Recognizing the strictness of the prohibition, the court interpreted the phrase to cover only those parts of the case reporter that were obligatory, i.e., which the reporter was "bound to supply."⁷⁴ It thus excluded gratuitously produced content. Included in the former were the summary of the case, footnotes, and the summaries of parties' arguments, while the latter covered things like the abstracts of the pleadings and the statement of facts.⁷⁵

All the same, what is especially relevant for our purposes relates to a broader constitutional question that the court addresses at the outset. A rather unique provision of the New York State constitution directed the legislature to ensure the speedy publication of all laws and judicial decisions and further directed that "all laws and judicial decisions shall be free for publication by any person."⁷⁶ Relying on this provision, the defendant argued that statute's (limited) allowance for copyright in the notes and references contained in the reports was itself unconstitutional.⁷⁷ As should be apparent, this was but a variant of the "access to law" rationale against copyrightability, referenced in the *Banks* opinion, except that its source was the state constitution. Unsurprisingly, the court rejected it, interpreting the provision as instead obligating the legislature to remove any legislative impediments to the private publication of the case reports.⁷⁸ These legislative impediments were distinct from claims of authorial copyright, since the latter were beyond the purview of the enacting body at the

⁷⁰ *Id.* at 608.

⁷¹ *Id.* at 608-09.

⁷² *Id.* at 606.

⁷³ *Id.* at 609.

⁷⁴ *Id.*

⁷⁵ *Id.* at 609-10.

⁷⁶ *Id.* at 606.

⁷⁷ *Id.*

⁷⁸ *Id.* at 607.

time (perhaps owing to their federal nature). Consequently, the free access rationale embodied in the state constitution was to the court perfectly compatible with the limited copyrightability of judicial opinions.

Little is important to our understanding of *Banks* and *Callaghan* for one reason above all others: the court reporter for the case was none other than Samuel Blatchford, then in private practice.⁷⁹ While the case was about an issue of state (rather than federal) law, the general principles motivating the analysis were of wider applicability and undoubtedly played some (even if only minor) role in Justice Blatchford's own opinions. Consider, for instance, the multiple references in *Callaghan* to the "absence of a prohibitory statute."⁸⁰ Neither statute at issue in the twin cases (of Illinois and Ohio) contained any such prohibition, which instead was the hallmark of the New York statute seen in *Little*. *Little*, unlike many other cases, extols the efforts of the court reporter in preparing the syllabus, statement of the case, and the arguments of the counsel, which one sees rather distinct traces of in *Callaghan* in its reference to the reporter's "intellectual labor" in preparing the non-official parts of the judicial opinion.⁸¹

Closer in time to *Banks* and *Callaghan* was an 1886 decision of a federal court in Minnesota on a similar question.⁸² A state law directed the clerk of the state supreme court to record all judicial opinions, ensure their publication by a reporter, and vested copyright in their publication with the state.⁸³ The statute required that reporter was to prepare additional embellishments to the opinions in the publication: syllabi, abstracts, tables of contents and cases, and indices.⁸⁴ Recognizing that under English law the Crown held copyright in the laws enacted by the legislature and in opinions produced by judges, the court nevertheless expressed serious doubts about the applicability of that rule under American common law.⁸⁵ Quoting and endorsing the logic of the lower court in *Banks*, the Minnesota district court accepted the idea that any assertion of copyright was limited to the "work of the reporter" and that the "work of the judges" even if it extended beyond the opinion itself could be "published freely by any one who may choose to publish them", effectively foreshadowing the rule laid down by the Supreme Court.⁸⁶ Unsurprisingly, the court offered

⁷⁹ See *id.* at 604 n.1 ("Reported by Samuel Blatchford, Esq., and here reprinted by permission.). The alternative citation is: 2 Blatchf. 165 (C.C.D.N.Y. 1851).

⁸⁰ *Callaghan v. Myers*, 128 U.S. 617, 647 (1888).

⁸¹ *Little*, 15 F. Cas. at 607; *Callaghan*, 128 U.S. at 647.

⁸² *Banks & Bros. v. West Publ'g Co.*, 27 F. 50 (C.C.D. Minn. 1886).

⁸³ *Id.* at 51.

⁸⁴ *Id.* at 60.

⁸⁵ *Id.* at 57-59 ("[I] may be that due regard for settled law forbids a decision in accord with the views I have expressed.").

⁸⁶ *Id.* at 60.

little guidance on the basis for this distinction, invoking “sound public policy” that it saw as deriving from the idea that all persons are “presumed” to know the law, an obvious allusion to the access to law rationale.⁸⁷ While the access to law rationale explains the court’s final conclusion that the court opinions were themselves free for publication by anyone, its endorsement of the idea that the non-opinion (i.e., non-binding) parts of the reports merit similar treatment when prepared by judges, misses an intermediate explanatory step.

A particularly confused opinion on the same issue around the same time is seen in the case of *Gould v. Banks*, decided by a state court in Connecticut.⁸⁸ In a short opinion that is utterly devoid of reasoning (and citation to precedent), the judge attempted to split hairs in order to reconcile apparently inconsistent ideas. The opinion begins with the observation that the “judges and the reporter are paid by the state; and the product of their mental labor is the property of the state, and the state, as it might lawfully do, has taken to itself the copyright.”⁸⁹ Recognizing then that the access to law principle could run afoul of the state’s assertion copyright, the opinion nevertheless concludes that the state’s copyright “in no sense offends” it.⁹⁰ Why? Because there was a difference, in the court’s view, between the “reason[ing]” in an opinion and a “judgment” in the dispute, and it was only the latter that was subject to the rationale that judicial proceedings needed to be public, open, and accessible to all.⁹¹ The judgment/determination was to be “accessible to all who desire to use them in the enforcement of their rights” and copyright was no impediment to this proposition.⁹² This attempted differentiation makes little sense, and above all else reveals a fundamental misunderstanding of the common law. It is also in stark contrast to what the court in Minnesota had said about the importance of a court’s reasoning in common law opinions, noting that “mere judgment for or against the plaintiff of course decides the case; but that often furnishes little insight into the questions considered and determined.”⁹³

It took less than three years for the decision in *Gould* to be discredited, albeit diplomatically. In *Connecticut v. Gould* (hereinafter “*Connecticut*”), a decision of the federal circuit court in New York on a similar question involving Connecticut law, the court distanced itself from the state court’s position in *Gould*, characterizing its conclusions there as mere

⁸⁷ *Id.*

⁸⁸ 2 A. 886 (Conn. 1885).

⁸⁹ *Id.* at 896.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Banks & Bros. v. West Publ’g Co.*, 27 F. 50, 57 (C.C.D. Minn.).

dicta.⁹⁴ Departing from *Gould*, the court called into question the idea that a state could — even if as trustee — claim copyright in the laws and judicial opinions in its jurisdiction.⁹⁵ But in keeping with what would be seen in *Banks*, the court’s only rationale was the nebulous idea of “public policy”:

The opinion has been expressed in several adjudications by judges whose opinions are entitled to the highest respect, that the judicial decisions of the courts are not the subject of copyright, but should be regarded as public property to be freely published by any one who may choose to publish them. This view has been taken upon considerations of public policy which, it is said, demand, in a country where every person is presumed and required to know the law, that the fullest and earliest opportunity of access to the expositions of the judicial tribunals should be afforded to all. No statute should be interpreted, unless the language used admits of no other interpretation, to press beyond the certain confines of legislative power . . . and in obedience to this rule the courts have almost uniformly interpreted statutes closely resembling the present so as to restrict the copyright to the completed volume.⁹⁶

The pre-*Banks* lower court opinions therefore conformed to a common pattern. Their logic was built around the posture of contractual and statutory interpretation rather than the first principles of copyright law. Indeed, none of them so much as once alluded to copyright doctrine or principles, preferring to focus instead on “public policy.” This posture in turn enabled them to “interpret” the plaintiffs’ claims as legitimate/illegitimate based on the statute or contract, without having to grapple with the nature, form, and function of copyright.

The Supreme Court in *Banks* all but followed this approach, with the sole exception of its cryptic reference to the “proper sense” of authorship, a reference that has found very little discussion in the years since. The lack of a clear rationale for the rule remained relatively unproblematic when it was applied to the simple question of copyright protection for judicial opinions as such. As the doctrine came to be extended to newer legal sources, it began to generate problems. These problems arose for two interrelated reasons. First, the open-ended idea of public policy did little to delineate any workable limits on the doctrine; and second, newer legal sources demanded an updating of how law came to be used and presented.

⁹⁴ *Connecticut v. Gould*, 34 F. 319, 320 (C.C.N.D.N.Y. 1888) (“The observations upon this point, however, were unnecessary to the decision of the case before the court.”).

⁹⁵ *Id.* at 320.

⁹⁶ *Id.* at 319.

B. *Extension: Statutes*

During the early evolution of the doctrine, the common law was the principal source of law. It is no coincidence that this emerged during the era of classical legal thinking, i.e., formalism, during which time legislation was treated as a decidedly inferior source of authority in comparison to judge-made law.⁹⁷ Consequently, when the government edicts doctrine first crystallized — in *Wheaton*, *Banks* and *Callaghan* — we see echoes of this hierarchy, with statutes entering the fray of legal relevance principally through the idea of judicial “interpretation.”

The earliest reported decision to have considered the copyrightability of statutes was the 1866 case of *Davidson v. Wheelock*.⁹⁸ The case involved a Minnesota statute that awarded the lowest bidder an exclusive contract to print and publish the “General Statutes” enacted by the state legislature.⁹⁹ Very importantly, the Minnesota statute expressly provided that the copyright in the “General Statutes” was to be awarded to that publisher.¹⁰⁰ The complainant in the case had obtained this exclusive contract and published the state’s statutes under it. The defendant in turn produced its own publication containing the statutes, without copying the marginal notes and references that the complainant had appended to the statutes in its books.¹⁰¹ Despite the express wording of the statute and the explicit grant of copyright in the statutes to the plaintiff, the court disallowed the assertion of copyright in the statutes, noting:

They obtained no exclusive right to print and publish and sell the laws of the state of Minnesota, or any number of legislative acts. The materials for such publication are open to the world. They are public records, subject to inspection by every one, under such rules and regulations as will secure their preservation. They may be digested or compiled by any one, and it is true such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis; but such compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him.¹⁰²

⁹⁷ Christopher Columbus Langdell, *Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of It, During That Period*, 19 HARV. L. REV. 151, 151 (1906) (adopting the view that legislation is not law).

⁹⁸ *Banks*, 27 F. at 61.

⁹⁹ *Id.* at 61-62.

¹⁰⁰ *Id.* at 62.

¹⁰¹ *Id.* (“An examination of the book and pamphlet published by the defendants shows that they neither contain, nor purport to, any of the marginal notes or references contemplated by the acts of the legislature . . . with the exception of the laws of the state.”).

¹⁰² *Id.*

On this basis, the court found for the defendant. What is most interesting about the court's opinion is that it treated the proposition that statutes are uncopyrightable, as seemingly transcendental and capable of overriding the unambiguously express intent (and action) of the legislature. And yet, it offered no support for the controlling proposition except that as laws they remained a matter of "public record."¹⁰³ All the same, the court's certitude — despite clear authority — is intriguing.

What is additionally noteworthy is the fact that despite treating the statutes of the state as uncopyrightable content because of their stature and significance for the public, the court nevertheless accorded the individual statute at issue in the case an inferior status. The court treated that individual statute's directive awarding copyright in the "General Statutes" to the publisher of the volume as unambiguously overridden (or at least modified) by the principle denying copyrightability to statutes. It was therefore hardly the mere superiority of statutory law that drove the court's conclusion.

Another early case that discussed the copyrightability of statutes was also a case in which Justice Blatchford served as official court reporter. This was the case of *Banks v. McDivitt*, decided in 1875.¹⁰⁴ The plaintiff in the case had published two books containing the rules of practice adopted by the judges of the state of New York, together with "notes appended to each rule."¹⁰⁵ The notes summarized every decision of courts that referenced the rules, along with citations to the reports of each such decision and the related statute (if any) that was relied on. The defendants published their own competing books, but in the notes accompanying the rules therein, copied and arranged the citations contained in the plaintiff's books, and supplemented those citations with their own.¹⁰⁶ Echoing the logic of *Wheelock*, albeit without citation, the court regarded the plaintiff's work as a compilation that was protectable under copyright, even though the rules themselves were conceded to be outside the domain of copyright as "common property."¹⁰⁷ And on this basis, it found that the defendant's actions amounted to free-riding on the effort of the plaintiff, which amounted to infringement.

Unlike *Wheelock*, *McDivitt* did not discuss the copyrightability of statutes directly and its holding is of questionable applicability after the Su-

¹⁰³ *Id.* By which the court appears to have meant the fact that they were "subject to inspection by every one." *Id.*

¹⁰⁴ 2 F. Cas. 759 (C.C.S.D.N.Y. 1875) (No. 961). The report acknowledges Blatchford's role: "Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission." *Id.* at 759 n.1.

¹⁰⁵ *Id.* at 760.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

preme Court's decision in *Feist*, which categorically rejected the "sweat of the brow" standard for originality in compilations,¹⁰⁸ a standard that the *McDivitt* court appears to have relied on extensively in its recognition that the defendant had copied the plaintiff's selection and arrangement.¹⁰⁹ All the same, what is interesting is the court's ready acceptance of the proposition that the rules at issue — as statutes — were beyond the reach of copyright.

The leading copyright treatise of the period, *Drone on Copyright*, adopted a curiously contrarian view on the issue.¹¹⁰ Relying on what appears to be the English law of crown copyright, Drone took the position that statutes "are the property of the government, which employs and pays those who make them."¹¹¹ And from this, it followed to Drone that "[t]he government, if it chooses, may have them copyrighted; and only the government, or some person deriving title from it has this right."¹¹² This position is obviously hard to reconcile with the position taken in *Wheelock* and *McDivitt*. The proposition that statutes could not be the subject-matter of copyright law, was to Drone, not an issue of copyrightability but instead a question of formalities. He thus concluded:

Statutes . . . are usually published by the government without being copyrighted. Hence they become common property; and as far as copyright is concerned, may be reprinted by any person.¹¹³

Governments therefore *could* but in reality *chose not to* assert copyright in their statutes, a conscious omission that to Drone was verifiable by a government's failure to comply with the formalities that were considered essential to copyrighting works at the time. Drone's idiosyncratic view however bears no connection to the actual facts of the precedents (none of which he cites for his views) and appears to represent his normative position on the issue rather than an accurate description of the existing state of the law. Not surprisingly, it received little attention from courts.

The most systematic treatment of the question was to be seen in *Howell v. Miller*,¹¹⁴ a case decided by the Sixth Circuit in the 1898, a decade after *Banks* and *Callaghan*. The plaintiff in the case had produced a compilation of Michigan's statutes, which he annotated and embellished with marginal references, notes, memoranda, and digests of relevant judi-

¹⁰⁸ *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 353-61 (1990).

¹⁰⁹ *McDivitt*, 2 F. Cas. at 761 (applying the principle that the defendant was prohibited from taking "for the purpose of saving himself labor").

¹¹⁰ DRONE, *supra* note 41, at 164.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 91 F. 129 (6th Cir. 1898).

cial decisions.¹¹⁵ When the defendant produced his own compilation a few years later, he relied on the plaintiff's work — including the annotations therein — and made relatively minor modifications to it.¹¹⁶ Addressing the question of copyrightability, the court likened the question to *Callaghan*, where the Supreme Court had recognized the viability of copyright protection for contributions made by a court reporter.¹¹⁷ It thus noted that:

Upon like grounds we are of opinion that Howell was entitled to have copyrighted his volumes of Annotated Statutes, and that such copyright covers all in his books that may fairly be deemed the result of his labors. Speaking generally, this would include marginal references, notes, memoranda, table of contents, indexes, and digests of judicial decisions prepared by him from original sources of information; also such headnotes as are clearly the result of his labors. We do not perceive any difficulty in holding that his copyright would embrace all such matters, for they constitute no part of that which is public property, and are plainly produced by the compiler.¹¹⁸

Despite concluding that the plaintiff's contributions were copyrightable on their own, i.e., even without the text of the statute itself, the court eventually found for the defendant.¹¹⁹ This is an aspect of the decision that is often ignored and its worth explicating. In comparing the defendant's compilation to the plaintiff's annotated statutes, the court was struck by the nature of the similarity, and observed:

But it is to be observed that those notes [allegedly copied] relate principally or often to previous statutes and judicial decisions which would be referred to by annotators in substantially the same way, even if they resorted exclusively to the original common sources of information, and did not have before them at the time the books of others who had been engaged in the same kind of work. There are some instances specified in the original brief for the appellant which seem to justify the charge that Miller did appropriate the labors of Howell. In respect of some of those instances, it may be said that the plaintiff claims as his work references to statutes and decisions which are almost identical with references to be found in former compilations.¹²⁰

The court's observation herein implicates both independent creation and originality, bedrock principles of copyright law. In the first part of the above-quoted paragraph, the court adopted the position that despite the similarity between the two works that could produce an inference of copying, such similarity an inevitable consequence of both works drawing on a

¹¹⁵ *Id.* at 130.

¹¹⁶ *Id.* at 130-31.

¹¹⁷ *Id.* at 138.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 142.

¹²⁰ *Id.* at 141-42.

common set of sources. The copying, if any, was either immaterial or unproven. In the second part, the court concluded that the plaintiff's work itself was less original than claimed in as much as its annotations encompassed material already found in previous work. Here, if the plaintiff copied (from a prior compilation), it could assert no claim; and even if independently created, evidenced insufficient variation so to be original. In essence then, despite nominally allowing the plaintiff's work to claim copyright, the court stripped such copyright of any real teeth by finding most of the (copied) portions of the work to be unoriginal and/or identical to a prior common source.

What is perhaps most intriguing in the court's reasoning is that in its reliance on and extension of, the rule developed in *Banks* and *Callaghan* to statutes, it spent no time at all on the rationale for that rule, instead taking its basis to be self-evident. Just as judicial opinions were ineligible for copyright, so too were statutes. Annotations, when private prepared were exempt from this limit. Nowhere in the court's reasoning does it examine the critical respects in which judge-made law and statutory law resemble each other, as it relates to their copyrightability. Statutes were deemed "public property", but for little reason other than that they represented the *law*.

The extension of the government edicts doctrine to statutes did little to clarify the normative basis of the doctrine. To most courts the extension was self-evident, which had the unwelcome consequence of further clouding the reasons for the existence of the doctrine.

C. *Expansion: Private Codes and Standards*

The government edicts doctrine lay dormant through most of the twentieth century. The Copyright Act of 1909 made no mention of the doctrine, despite including a provision rendering "any publication of the United States Government" ineligible for protection.¹²¹ Not much by way of jurisprudence appears to have transpired on the question under the 1909 Act either. As the elaborate reform process for what would become the Copyright Act of 1976 began, the continuing validity of the doctrine came to be expressly noted by the Copyright Office in its Revision Studies.¹²² Nevertheless, the text of the 1976 Act and its accompanying legislative history were both silent on the doctrine, and merely continued the prohibition on copyright in U.S. Government works, regardless of whether

¹²¹ Copyright Act of 1909, Pub. L. 60-349, § 7.

¹²² See Caruthers Berger, Study No. 33: Copyright in Government Publications (27 Oct. 1959).

such works could qualify as edicts.¹²³ This silence came to be understood as tacit approval of the doctrine and its common law existence.

The Supreme Court's 1990 decision in *Feist* also played an important, albeit indirect, role in reducing litigation around the government edicts doctrine. As is well-known, the Court in *Feist* significantly limited copyright protection for compilations by insisting that such works meet the originality standard by showing a "modicum of creativity" in their "selection, coordination or arrangement."¹²⁴ In so far as prior decisions had applied the government edicts doctrine, they had limited the doctrine to the text of the edicts (i.e., decisions and statutes) themselves, but allowed private compilations (with minor embellishments) of such edicts to obtain copyright in the non-edictal components of the work. *Feist's* new originality standard put pressure on the viability of that distinction. After *Feist*, courts therefore began denying protection to compilations of case reports which sought to rely on their arrangement, pagination, and revisions for their originality.¹²⁵ What is especially noteworthy for our purposes is that during such denials, courts took it for granted that the underlying edict itself was ineligible for copyright, and that such denial was a self-evident proposition that required no further elaboration.¹²⁶

All the same, what did change rather dramatically in the first three quarters of the twentieth century were the forms of law and law-making. The first half of the century saw the proliferation of specialized administrative agencies, with the power to issue regulations and adjudicatory opinions that for all intents and purposes replicated the working of traditional edicts.¹²⁷ And as lawmaking became more specialized, lawmakers — at different levels — began relying on private actors for the actual content of rules. This reliance took varying forms.

At one end of the spectrum were instances where a law (or decision) standardized a practice in a relevant domain by requiring participants to conform to a privately created set of rules.¹²⁸ A court's insistence that

¹²³ 17 U.S.C. § 105.

¹²⁴ *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 357, 362 (1990).

¹²⁵ See, e.g., *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 699 (2d Cir. 1998); *id.* at 681. But see *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986) (pre-*Feist*); *Oasis Publ'g Co. v. West Publ'g Co.*, 924 F. Supp. 918, 923 (D. Minn. 1996) (finding the *Feist* standard of originality to have been met).

¹²⁶ Most courts relied on the fact that the plaintiff's reports emphasized federal — rather than state — judicial opinions, which were covered by § 105, and therefore ineligible for copyright as works of the U.S. government.

¹²⁷ See, e.g., Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 299-305 (1983).

¹²⁸ Lawrence Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291 (2005) (offering examples of this phenomenon in relation to accounting standards).

citations in filed briefs comply with *The Bluebook* typifies this category; the court does not specify the rules (of citation) themselves, it just standardizes them by reference to an external source that contains the rules. At the other end of the spectrum were situations where a state legislature or other local body delegated the task of creating new rules to a private (usually industry-based) organization and then, when presented with the rules, formally enacted it into law. Here, the expressive content of the rules themselves — despite their private origins — become the word of the law. In between the two were situations where the privately produced rules were made the formal law of a jurisdiction, but their actual content was not spelled out in the law itself but instead merely referenced. This is sometimes today called an “incorporation by reference,¹²⁹” and is for the most part a time- and space-saving technique in legislative drafting and rule-making. In due course, litigants tested the applicability of the government edicts doctrine to such private involvement in the lawmaking process. And unlike with other sources of law, the extension (or non-extension) of the doctrine to this category was hardly self-evident, necessitating courts’ direct engagement with the underlying justification for the doctrine. Rather peculiarly, we see an altogether new set of “policy” based considerations being offered here.

An early case of the First Circuit from 1980 involved a building code that had been produced by an organization consisting of building officials and code administrators.¹³⁰ The organization had asserted a copyright in its code and developed a licensing mechanism under which it encouraged and allowed governments to adopt its code into law by reference, through the licensing program.¹³¹ The state of Massachusetts adopted the code into its law and promulgated an official version of the code which contained much of the privately produced code with some minor modifications.¹³² When a defendant made copies of the state code for sale, the organization sued for copyright infringement. After undertaking a detailed analysis of the caselaw developing the government edicts doctrine, the court denied the plaintiff-organization’s claim for an injunction against the defendant, concluding that the doctrine may “apply equally to regulations of this nature.”¹³³

In advancing the possibility of the doctrine’s expansion to such codes however, the court offered various arguments for its existence. Rejecting

¹²⁹ See Emily S. Bremer, *Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference*, 71 ADMIN. L. REV. 315, 316 (2019); 5 U.S.C. § 552(a).

¹³⁰ *Bldg. Offs. & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 732 (1st Cir. 1980).

¹³¹ *Id.* at 732.

¹³² *Id.*

¹³³ *Id.* at 735.

the double subsidy argument as the only possible justification, the court grounded its validation of the doctrine in the idea that “citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, express through the democratic process.”¹³⁴ It further identified access to the laws and notice of them as a “due process” driven rationale for the doctrine, closely allied with “citizen authorship” justification, which it identified as a “policy” based rationale.¹³⁵ Missing altogether now was any reference or allusion to authorship as a principle-based internal constraint of copyright that informed the doctrine.

A few later cases remained noticeably reluctant to apply the doctrine to situations where a law or regulation merely referenced a standard or text produced privately, without actually promulgating the entirety of that standard/text as part of the law. The Second Circuit in *CCC Information Services v. Maclean Hunter Market Reports, Inc.* thus rejected an argument that the plaintiff’s *Red Book* — a book contained the valuation of used cars based on make, model and year of manufacture, and specific geographic market — was ineligible for protection since it had been referenced by the insurance statutes and regulations of some states as an “alternative standard.”¹³⁶ Judge Leval dismissed the argument, concerned that it would raise problems under the Takings Clause of the Constitution, while nevertheless acknowledging that it was driven by “policy considerations.”¹³⁷ Similarly, the Ninth Circuit in *Practice Management Information Corp. v. AMA*,¹³⁸ considered an incorporation by reference of a coding system produced and maintained by the American Medical Association. The incorporation was done by a federal agency, the Health Care Financing Administration (“HFCA”), which contracted with the AMA.¹³⁹ In refusing to extend the government edicts doctrine to the incorporation, the court considered two potential rationales for the doctrine, neither of which it found applicable to incorporations. The first was the double subsidy argument, which it saw as being of no applicability to privately produced rules; and the second was the access to law/due process, which it found to be insufficient to justify “termination of the AMA’s copyright” altogether.¹⁴⁰

¹³⁴ *Id.* at 734.

¹³⁵ *Id.*

¹³⁶ *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc.*, 44 F.3d 61, 73 (2d Cir. 1994).

¹³⁷ *Id.* at 74.

¹³⁸ 121 F.3d 516 (9th Cir. 1997).

¹³⁹ *Id.* at 517.

¹⁴⁰ *Id.* at 519.

An identical result was reached by the Second Circuit a few years later, in relation to tax maps produced by a local county.¹⁴¹ These maps were mandated by a local law, and obviously involved the expenditure of significant time and resources to ensure their accuracy. A local law further mandated public access to the maps at all times.¹⁴² In finding the government edicts doctrine inapplicable to the maps, the court identified two considerations motivating the doctrine: the incentive to create, and notice. As to the former, the court (somewhat oddly) thought it to be a factual question whether the local county needed a market incentive to produce the map at issue, something that it concluded it did not have evidence on for summary judgment.¹⁴³ On the latter, it concluded that there was no indication that the assertion of copyright had interfered with notice and access to the maps. It therefore found the government edicts doctrine inapplicable.¹⁴⁴

All of these cases followed a common trend. The government edicts doctrine was seen as a stringent — and extreme — limit on the copyrightability of expressive works, a limit that was motivated entirely by considerations external to copyright law. And in this framing, each of the courts set itself up as choosing between clear doctrine on the one hand, as enumerated in the statute, and amorphous and factually questionable policy bases on the other. The framing thus indelibly dictated the outcome, since it effectively forced the court to choose between legal (i.e., copyright) and non-legal (policy) considerations. Indeed, not only did the framing predetermine the outcome, but it also caricatured the government edicts doctrine as premised on an outmoded concern with the legal process that was mismatched to the modern world of complex and technical lawmaking.

Interestingly, these cases also added an altogether new dimension to the government edicts doctrine, influenced by the incentives theory of copyright law that had come to dominate copyright thinking by the early 1990s.¹⁴⁵ While acknowledging (even if only in passing) that the government edicts doctrine had some connection to authorship, some of these cases saw that connection as deriving from the doctrine's recognition that creators of edicts, i.e., government entities, do not need a market incentive for their creativity. In other words, the doctrine was implicitly justified as a mechanism for giving recognition to the idea of copyright as an incentive

¹⁴¹ *Cnty. of Suffolk, New York v. First Am. Real Estate Sols.*, 261 F.3d 179 (2d Cir. 2001).

¹⁴² *Id.* at 184.

¹⁴³ *Id.* at 194-95.

¹⁴⁴ *Id.* at 195.

¹⁴⁵ See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009); Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007).

for creativity. Since judges and legislators need no such incentive, the doctrine was seen to deny them copyright. On the other hand, private actors were presumed to need such incentives, which rendered the doctrine inapplicable to them.

By far the most systematic treatment of private codes under the government edicts doctrine was to be seen in the Fifth Circuit's en banc decision in *Veeck v. Southern Building Code Congress International*, from 2002.¹⁴⁶ The case involved a model building code produced by a private non-profit organization, which two small towns in Texas had adopted as their codes and enacted into law by reference.¹⁴⁷ The defendant attempted to publish the codes of the two towns online, for which he relied on the model code produced by the plaintiff non-profit. When sued for copyright infringement, the defendant argued that once enacted into law the model codes lost all copyright protection under the government edicts doctrine.¹⁴⁸

Sitting en banc, the Fifth Circuit sided with the defendant. In an elaborate opinion, the majority based its conclusion principally on the government edicts doctrine.¹⁴⁹ The plaintiff had attempted to rationalize the government edicts doctrine by limiting it using the utilitarian theory of incentives, arguing that since the creator of the model code was a private entity (rather than a government agency), it should not be denied a market incentive for such creation.¹⁵⁰ The court found this logic lacking, and refused to tie the passing reference to "authorship" in *Banks* to the idea of creator incentives. Instead, it rooted the doctrine back in the metaphorical concept of citizen authorship, which the First Circuit had first enunciated:

Lawmaking bodies in this country enact rules and regulations only with the consent of the governed. The very process of lawmaking demands and incorporates contributions by "the people," in an infinite variety of individual and organizational capacities. Even when a governmental body consciously decides to enact proposed model building codes, it does so based on various legislative considerations, the sum of which produce its version of "the law." In performing their function, the lawmakers represent the public will, and the public are the final "authors" of the law.¹⁵¹

¹⁴⁶ 293 F.3d 791 (5th Cir. 2002).

¹⁴⁷ *Id.* at 793-94.

¹⁴⁸ *Id.* at 794.

¹⁴⁹ *Id.* at 795-800. It is important to note that the court also considered doctrinal reasons for its holding, including the merger doctrine, and independent policy considerations. *Id.* at 800, 805-06.

¹⁵⁰ *Id.* at 796.

¹⁵¹ *Id.* at 799.

Also crucial to the court's logic was the ideal of access to the law, which it treated as a conceptual — rather than factual question.¹⁵²

The most intriguing part of the *Veck* opinion was not its conclusion that model codes are covered by the government edicts rule but rather that they obtain protection at creation but lose such protection *upon* their adoption by a government.¹⁵³ The court's reason for its conclusion was the reality that the plaintiff organization actively “urged” authorities to adopt its codes, which implied a motivation to have the code become law, rendering the loss of protection voluntary.¹⁵⁴

Veck did little to clarify the rationale for the government edicts doctrine. Indeed, its extension to private codes from the moment of their adoption, but based on their being marketed to legislators, introduced an element of subjectivity into the analysis. Additionally, its attempt to ground its reasoning on ideas beyond the government edicts doctrine has caused scholars to find alternate ways to justify it.¹⁵⁵ All the same, its abject rejection of the incentives logic for the doctrine proved to be impactful and was seen as largely convincing.

In the years since, the only other court to consider a similar question was the D.C. Circuit in *ASTM v. Public.Resource.Org., Inc.*, a 2018 case that involved technical standards incorporated by reference into federal regulations.¹⁵⁶ Despite being pushed by the defendant to examine the applicability of the government edicts doctrine to the case, the court declined for fear that it would implicate unnecessary constitutional issues.¹⁵⁷ Consequently, it focused on the narrow question of fair use and found for the defendant.¹⁵⁸

The D.C. Circuit's “avoid[ance]” of the government edicts doctrine is rather telling, for our purposes.¹⁵⁹ It highlights the mystery and complexity that invocations of the doctrine entail: mysteries that relate to the reasons for the denial of protection to expressions of law, and complexities pertaining to the definition of law and lawmakers. Nevertheless, in avoiding the doctrine and suggesting its rooting in the Constitution, the court

¹⁵² *Id.* at 797.

¹⁵³ *Id.* at 803 (“This is not, however, a “takings” case, not least because SBCCI urged localities to adopt its model codes.”).

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., Shubha Ghosh, *Copyright as Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653 (2003); Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193 (2007).

¹⁵⁶ 896 F.3d 437 (D.C. Cir. 2018).

¹⁵⁷ *Id.* at 447 (“[W]e think it best at this juncture to address only the statutory fair use issue. . . and leave for another day the question of whether the Constitution permits copyright to persist in works incorporated by reference into law.”).

¹⁵⁸ *Id.* at 448-54.

¹⁵⁹ *Id.* at 447.

was directly endorsing its public law framing, which treats it as deriving from considerations of due process and free speech.

* * *

Despite having been in existence for over a century, the government edicts doctrine has remained unmoored from any identifiable normative logic. Courts invoking it to deny a work copyright treat its basis as self-evident, while those rejecting its application point to the absence of a clear normative basis as proof of its incoherence and antiquity.

When initially formulated in 1888, the Supreme Court in *Banks* unequivocally anchored the doctrine in considerations of authorship, which it identified as having a “proper sense” that had obtained recognition in the statute. This framing was therefore not some abstract theory about democracy or the rule of law, as later courts have understood it in their theories of citizen authorship, but instead a principled formulation internal to the functioning of copyright. In supplementing the logic of authorship with considerations of “public policy” and access to law, the *Banks* opinion effectively ensured that the logic of authorship would recede into the backdrop and be overtaken by other — seemingly more important — external considerations.

As legal thinking in the U.S. became more collectivist and public-oriented, the government edicts doctrine began to take color from these myriad external policy-based considerations. In the process, the logic of authorship underlying the doctrine was all but lost. Its partial (or nominal) revival would come from the Supreme Court a whole 186 years after its original decision in *Wheaton*.

II. AUTHORSHIP AND PERSONALIZATION

Despite having been alluded to by Justice Blatchford as the basis for the government edicts doctrine in *Banks*, the authorship rationale for the doctrine lay dormant for over a century. Indeed, as we saw in Part I, the mysteriousness of the authorship rationale prompted other courts to either morph it into alternate justifications or instead replace it with external-facing public policy explanations for the persistence of the doctrine.¹⁶⁰ It was not until its 2020 decision in *PRO* that the Court resurrected authorship as the basis for the doctrine. Yet, in so doing it added little meaningful content to the idea, setting up the possibility that lower courts will continue to side-step it in their further development of the doctrine.

This Part examines the Court’s cryptic foray into authorship as the basis for the government edicts doctrine. It begins by examining what the Court did — and did not — say about the rationale (II.A), and then proceeds to develop a theory that shows how the authorship rationale is in-

¹⁶⁰ See *supra* Part I.

deed a principled basis for the doctrine, one that derives from longstanding ideas and concepts that are internal to the very nature of copyright (II.B). Finally, it shows how the authorship rationale is significantly superior to broader public policy concerns for institutional and legitimacy reasons, even though the latter remain more popular (II.C).

A. *Georgia v. Public.Resource.Org. and the Authorship Rationale*

As noted previously, in *PRO* the Supreme Court was presented with the question of whether annotations to a state statute that were produced under the guidance of the state legislature merged into a combined official document with the text of the statute, and nevertheless denied binding status as law were subject to the government edicts doctrine and therefore ineligible for copyright protection.¹⁶¹ In reiterating the continued viability of the doctrine and finding it applicable to all expressive content produced by lawmakers in the exercise of their lawmaking authority including annotations, the Court had occasion to examine the underlying justification and rationale for the doctrine.¹⁶²

At the very outset, the Court noted that the doctrine was “rooted in the Copyright Act’s ‘authorship’ requirement” and that “[a] careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author.”¹⁶³ After setting out the facts of the case and describing the prior holdings in *Wheaton*, *Banks*, and *Callaghan*,¹⁶⁴ Chief Justice Roberts synthesized them together:

These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the “author” of the works they prepare “in the discharge of their judicial duties.” . . . This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi). . . . It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters. . . .

The animating principle behind this rule is that no one can own the law. . . . Our cases give effect to that principle in the copyright context through construction of the statutory term “author.”¹⁶⁵

A few important things emerge from these observations, beyond the origins of the doctrine in copyright’s concept of authorship. To begin with, the reason why judges (and lawmakers) cannot be authors is because they “make and interpret the law.”¹⁶⁶ Indeed to the majority, this alone fully

¹⁶¹ *Georgia v. Pub. Res. Org.* 140 S. Ct. 1498, 1504 (2020).

¹⁶² *Id.* at 1506-08.

¹⁶³ *Id.* at 1506.

¹⁶⁴ *Id.* at 1506-08.

¹⁶⁵ *Id.* at 1507.

¹⁶⁶ *Id.*

explained the difference between *Banks* and *Callaghan*, since in the latter case the court reporter had no such authority. Lawmaking authority and copyright authorship were at odds with each other. To Chief Justice Roberts, this was “straightforward”¹⁶⁷ so as to require no further elaboration. But what is it about lawmaking authority that renders it incompatible with authorship in copyright law?

Instead of answering this question the majority opinion instead jumped a step and launched into the “animating principle” that law was incapable of ownership.¹⁶⁸ Yet, the insusceptibility of law to ownership is not the same thing as the incompatibility of lawmaking authority with authorship. The former may derive from considerations external to authorship and indeed all of copyright law, whereas the latter derives from some perceived mismatch between authorship and the type of authority at issue. And as is well known, authorship and ownership do not always go hand in hand even though the former ordinarily triggers the latter.¹⁶⁹ Additionally, by moving from authorship to ownership, the opinion also opened the door to various public policy considerations (such as those relating to access and control¹⁷⁰), which more credibly attach to ownership.

The authorship rationale was no mere passing reference to the majority. Instead, as Chief Justice Roberts observed, the doctrine was rooted “in the word ‘author’” by “[a] century of cases”, buttressed by the fact that “Congress has repeatedly reused the term without abrogating the doctrine.”¹⁷¹ It therefore had a “settled meaning” through such Congressional acquiescence.¹⁷² Not only was authorship the basis of the doctrine, but both authorship and its relationship to the government edicts doctrine were traceable to the copyright statute. While it is of course true that the statute uses the term “works of authorship” to describe protectible expression, the legislative history accompanying the statute suggests that Con-

¹⁶⁷ *Id.* In his dissent, Justice Thomas found the characterization of “straightforward” to be anything but, noting how even the lower courts in the case had deviated from it. *Id.* at 1519 (Thomas, J. dissenting).

¹⁶⁸ *Id.* at 1507.

¹⁶⁹ Copyright law treats the author of a work (or if a joint work, the coauthors) as the first owner of the work. 17 U.S.C. § 201(a). An owner of copyright may therefore come to acquire the work through a transfer from the author, in which case authorship and ownership reside in different individuals. *Id.* § 201(d). The difference is particularly salient in relation to U.S. government works, which are works prepared by U.S. government employees in the scope of their employment. While the statute denies such works authorship, it nevertheless permits the U.S. government to own works that are transferred to it. *Id.* § 105(a). Indeed, the difference between authorship and ownership lay at the root of copyright’s very origins. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993).

¹⁷⁰ PRO 140 S. Ct. at 1507 (2020).

¹⁷¹ *Id.* at 1510.

¹⁷² *Id.*

gress accorded the term “author” no special meaning beyond what already existed in the jurisprudence at the time.¹⁷³ In effect then, Chief Justice Roberts was affirming the non-statutory (i.e., common law) conception of authorship that courts had developed around the language of the statute. Yet, the opinion was silent about all of this, taking it as self-evident.

In his dissenting opinion, Justice Thomas called the majority out for being “content to accept [the government edicts] precedents reflexively” without a full exploration of the doctrine’s rationale.¹⁷⁴ Countenancing the possibility that the term “author” may have meant something narrower in copyright law than in ordinary speech, he raised the possibility that this difference in meaning may have influenced the Court’s authorship rationale in *Banks*.¹⁷⁵ In his view, these differences included the binding nature of legal expression, the fact that laws are produced at public expense, and the reality that authors in copyright (rather than lawmakers) were capable of being encouraged by copyright’s grant of exclusivity.¹⁷⁶ Additionally relevant to Justice Thomas — flowing from the abstruseness of the authorship rationale — was the possibility that other policy considerations were responsible for the doctrine, which the Court was not institutionally competent to adjudicate on, given the statutory nature of copyright law.¹⁷⁷

In steadfastly committing to the authorship rationale, even in the face of trenchant criticism from the dissent, Chief Justice Roberts’ opinion for the majority was treading a fine line. On the one hand, he was rejecting the primacy of the myriad public policy goals that had been used to justify and expand the doctrine, and instead rooting it a “principle” internal to copyright and expressly mentioned in the copyright statute. Yet on the other he was endorsing the centrality of the judicial role in constructing, maintaining, and expanding that principle, along the lines that federal courts have been doing in relation to the concept for the last century.¹⁷⁸ Despite all of this, the opinion does not go nearly far enough in developing

¹⁷³ Authorship finds mention in § 102(a) of the statute, which accords protection to “original works of authorship fixed in a tangible medium.” Yet, the legislative history that describes the provision merely notes that originality and fixation are “[t]he two fundamental criteria of copyright protection.” H.R. REP. NO. 94-1476, at 51 (1976). The history is fairly clear that Congress intended to leave the matter to judicial development.

¹⁷⁴ *PRO*, 140 S. Ct. at 1515 (Thomas, J. dissenting).

¹⁷⁵ *Id.* at 1516.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1522.

¹⁷⁸ For a general discussion of the majority’s vision of the judicial role, see Shyamkrishna Balganesh, *Long Live the Common Law of Copyright! Georgia v. Pub. Res. Org., Inc. and Debate over Judicial Role in Copyright*, 121 COLUM. L. REV. F. 1 (2021).

a workable rationale for the disconnect between authorship and lawmaking authority, an omission that only risks more lower court confusion on the applicability of the doctrine to situations distinct from the one that was before the Court in *PRO*.

Regardless of whether this omission was strategic or otherwise motivated by some oversight, it is hardly fatal to the centrality of the authorship rationale to the government edicts doctrine. As the next Section reveals, Chief Justice Roberts had it absolutely right in locating the logic for the doctrine within authorship. Understanding the contours of this logic requires taking a closer look at copyright's assumptions behind the idea of authorship, as well as certain key analytical features of lawmaking that are usually taken for granted.

B. The Personalization Mismatch

Chief Justice Roberts was correct: copyright authorship is incompatible with lawmaking authority. This incompatibility is neither strategic nor a product of public policy, but instead a direct consequence of the reality that both authorship and democratic lawmaking embody essential characteristics that renders them fundamentally mismatched to each other. While authorship is a concept that has remained undefined in copyright legislation, its meaning has nevertheless been developed for over a century by courts. This development points to one feature of the idea above all others: the identification of a legal person as the party responsible for the production of the work. Concurrently, lawmaking in a democratic polity committed to the rule of law requires that the validity of directives emanating from a legitimate lawmaking process be de-linked from the identity of the persons generating them. It is the disjoint between these core assumptions underlying the two ideas that generates the need for the government edicts doctrine.

1. Authorship as Personalization

While authorship finds no definition in the copyright statute, it nevertheless exerts an outsized influence on the working of copyright law.¹⁷⁹

¹⁷⁹ For scholarly accounts of authorship in copyright law, see LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007); Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016); Shyamkrishna Balganesh, *The Folklore and Symbolism of Authorship in American Copyright Law*, 54 HOUS. L. REV. 43 (2016); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455; Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2002); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008); Tim Wu, *On Copyright's Authorship Policy*, 2008 U. CHI. LEGAL F. 335 (2008).

The “author” remains the beneficiary and target of the system identified expressly in the Constitution,¹⁸⁰ whose behavior copyright seeks to influence and whose actions the public is assumed to benefit from. To qualify for protection, expression needs to be original and fixed but additionally also qualify as a “work of authorship.”¹⁸¹ Given the relative neglect of attempts to define the term, one could be forgiven for thinking that it is little more than a part of the copyright vocabulary that does no more than serve a structural purpose denoting the subject of protection, much like the terms plaintiff and defendant do in ordinary adjudicative contexts. In reality however, authorship means something specific within copyright law. And while it has often been understood and elaborated on by courts when determining when certain actions or forms of expression fail to qualify for protection, there nevertheless is a fairly-sizable body of jurisprudence of this nature that allows for a reconstruction of what it affirmatively means.¹⁸²

Over a century ago (and coincidentally a few years before *Banks* and *Callaghan*) the Supreme Court delivered a unanimous opinion on the copyrightability of photographs under U.S. law, wherein it set forth the parameters of copyrightable authorship.¹⁸³ Notably, Justice Blatchford was already a member of the Court by this time, even though he did not author the opinion.¹⁸⁴ In concluding that photographs qualified as writings for copyright law, the Court went on to observe:¹⁸⁵

An author . . . is “*he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.*” . . .

. . .

Brett, M.R., said, in regard to who was the author: “The nearest I can come to, is that it is the person who effectively is as near as he can be, *the cause* of the picture which is produced, that is, *the person* who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be — the man who is the *effective cause* of that.”

¹⁸⁰ U.S. CONST., ART I, § 8, cl. 8. (“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.”) (emphasis added).

¹⁸¹ 17 U.S.C. § 102(a) (2020).

¹⁸² See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347, 111 S. Ct. 1282, 1288, 113 L. Ed. 2d 358 (1991); *Nottage v. Jackson*, 11 Q. B. Div. 627 (Eng. 1883); *Cummins v. Bond*, [1927] 1 Ch. 167 (Eng.); *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

¹⁸³ *Burrow-Giles*, 111 U.S. 53.

¹⁸⁴ Justice Blatchford served on the Court from April 3, 1882, to July 7, 1893, and *Burrow-Giles* was decided on March 17, 1884. See *Justices 1789 to Present*, U.S. SUPREME COURT, https://www.supremecourt.gov/about/members_text.aspx (Feb. 16, 2021).

¹⁸⁵ *Burrow-Giles*, 111 U.S. at 58-61 (emphasis added).

Lord Justice Cotton said: “In my opinion, ‘author’ involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph;” and Lord Justice Bowen says that photography is to be treated for the purposes of the act as an art, and *the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.*

These observations contain a clearly discernible theory of authorship, one that later courts have built on and embellished further.¹⁸⁶ Central to authorship in this understanding is the idea of causal attribution — or, the law’s need to identify the person who is the “effective cause” for the expression constitutive of the work.¹⁸⁷ To the Court in *Burrow-Giles*, it was the principal photographer, who had arranged the subject matter and orchestrated the photo shoot, in contrast to others who were also on the scene.¹⁸⁸ Causal attribution entails identification of a relevant person, who copyright law treats as the author of the work.¹⁸⁹ In this crucial sense, authorship is therefore about the personalization of the work; personalization through causal attribution to an identified person.

Subsequent courts have added more complexity and nuance to the idea of personalization in the years since. One such nuance of importance is the requirement that the person identified as the work’s author be human.¹⁹⁰ Self-evident as it may seem, it presented peculiar puzzles in cases involving religious texts transcribed by individuals claiming to be acting under the influence of supernatural forces.¹⁹¹ Courts limited themselves to the human agent involved, who they treated as the identifiable creator of the work, i.e., as its author. The issue has resurfaced more recently, in debates surrounding the protectability of works produced by animals,¹⁹² by natural forces,¹⁹³ and artificial intelligence.¹⁹⁴ In each of these situations, copyright law insists on identifying a human personality that is

¹⁸⁶ See, e.g., *Feist Publ’n’s*, 499 U.S. at 346; *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989); *Goldstein v. California*, 412 U.S. 546, 561 (1973); *Aalmuhammed*, 202 F.3d at 1233; *Medforms, Inc. v. Healthcare Mgmt. Sols., Inc.*, 290 F.3d 98, 107 (2d Cir. 2002); *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 753 F.2d 1565, 1568 (11th Cir. 1985); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 897 (5th Cir. 1972).

¹⁸⁷ *Burrow-Giles*, 111 U.S. at 61. For a fuller elaboration of this causal account of authorship, see Shyamkrishna Balganes, *Causing Copyright*, 117 COLUM. L. REV. 1 (2017).

¹⁸⁸ *Burrow-Giles*, 111 U.S. at 60.

¹⁸⁹ Balganes, *Causing Copyright*, *supra* note 187, at 11-34.

¹⁹⁰ COMPENDIUM, *supra* note 4, § 313.2 (“To qualify as a work of ‘authorship’ a work must be created by a human being.”).

¹⁹¹ *Cummins v. Bond*, (1927) 1 Ch. 167 (Eng.). See also Blewett Lee, *Copyright of Automatic Writing*, 13 VA. L. REV. 22 (1926); Balganes, *Causing Copyright*, *supra* note 187, at 23-27.

¹⁹² *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (dealing with the copyrightability of a photograph taken by a monkey).

sufficiently connected to the work; and when it is unable to either identify such human agency or deems its connection to the work insufficient, it is willing to treat the work as altogether unprotected.¹⁹⁵ This reality reveals the importance of authorship and personalization to expression that might otherwise seem perfectly capable of obtaining copyright protection.

The only exception that current law allows to the human personalization that authorship entails relates to the work made for hire doctrine.¹⁹⁶ Based on a statutory presumption introduced into the 1976 Act, where a work is produced within the scope of an employment relationship or commissioned by one party from another under specified circumstances, the employer or the commissioning party is treated as the author of the work, to the exclusion of the party actually producing it.¹⁹⁷ The employer or commissioning party might well be a corporation, which produces the possibility of a non-human author for works made for hire. With this exception however, the law insists that authorship be human.¹⁹⁸ The personalization must therefore relate to an identifiable human.

Contrary to common belief, the category of “anonymous works[s]” which copyright law recognizes does not eliminate the need for personalization through identification either.¹⁹⁹ An anonymous work is simply a work “on . . . which no natural person is identified as author.”²⁰⁰ The category therefore speaks to the identification of the author — by name — *on the work*, and the absence of such identification. It is therefore not the same as an unauthored work, in that the anonymity is not because the law presumes the lack of an author, but instead because the law allows the author to keep their identity secret. Anonymous works are indeed works of authorship,²⁰¹ and copyright law continues to insist on personalizing them through an identifiable person even if such identification is not manifest on the face of the work. Anonymity has no bearing on personalization.

¹⁹³ *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (7th Cir. 2011) (dealing with the copyrightability of a form of “living art” comprising an artistic arrangement of living flowers and plants).

¹⁹⁴ See Jane C. Ginsburg & Luke Ali Budiardjo, *Authors and Machines*, 34 *BERKELEY TECH. L.J.* 343 (2019).

¹⁹⁵ Balganes, *Causing Copyright*, *supra* note 187, at 11-34.

¹⁹⁶ 17 U.S.C. § 101 (definition of a work made for hire).

¹⁹⁷ *Id.* § 201(b) (treating the employer or commissioning party as the author for the purposes of copyright law).

¹⁹⁸ *COMPENDIUM*, *supra* note 4, § 405.

¹⁹⁹ 17 U.S.C. § 101 (definition of “anonymous work”).

²⁰⁰ *Id.*

²⁰¹ *COMPENDIUM*, *supra* note 4, at § 615.1(A) (“The statute implied that anonymous works are limited to works created by natural persons.”).

As has just been noted, the law's rigidity on authorship being about personalization to a human agent produces situations where expressive contributions that are creative become ineligible for protection. Such unauthored expression is denied protection altogether. Instead of seeing this as inherently problematic or anomalous, copyright law treats it as a natural limit on the very idea of copyrightable expression. In other words, just as an idea — however original and creative it may be — is denied protection by virtue of falling outside copyright's domain, so too unauthored expression — even when highly creative — finds itself on the outsides of copyright.²⁰² Authorship is therefore as much of a limit on copyright as any of its other core doctrines, even though it is rarely acknowledged to be so.

The personalization that lies at the core of authorship in copyright also derives significant support from the two doctrinal eligibility requirements that are immediately adjacent to authorship, and which are therefore influenced by its core meaning: originality and fixation.²⁰³ Copyright's requirement of originality mandates that the expression at issue be "independently created by the author" in addition to possessing a modicum of creativity.²⁰⁴ Indeed, the Court in *Feist* developed this requirement drawing on the conception of authorship set out in *Burrow-Giles*.²⁰⁵ Originality was tied to the "originator" of the expression, its author.²⁰⁶ Identifying the source of the work — its author — is therefore implicit within the very concept of originality.

So it is with the requirement of fixation too. To become eligible for statutory protection, a work of original expression needs to be "fixed in any tangible medium of expression."²⁰⁷ It is considered "fixed" when rendered sufficiently permanent or stable "by or under the authority of the author."²⁰⁸ The fixation requirement therefore stresses not just that the work be fixed, but that it be fixed *by* (or under the authority of) the person responsible for its origins, i.e., the author. When fixed by someone without any authorization from the author, the work is denied protection regardless of its originality and other substantive virtues.

Authorship is therefore principally about personalizing a work through identification. To describe someone as the author of a work (for

²⁰² The rejection of ideas and functional content from copyright protection is accepted to be an intrinsic component of what copyright is. See 17 U.S.C. § 102(b).

²⁰³ *Id.* § 102(a).

²⁰⁴ *Feist*, 499 U.S. at 345.

²⁰⁵ *Id.* at 346-7 (developing the meaning of originality the Court's understanding of "authors" in *Burrow-Giles*).

²⁰⁶ *Id.* at 346 ("The Court defined 'author,' in a constitutional sense, to mean 'he to whom anything owes its origin; originator; maker.'").

²⁰⁷ 17 U.S.C. § 102(a).

²⁰⁸ *Id.* § 101 (definition of "fixed").

copyright law) is to assign legal responsibility for that work to the person so identified. Personalization is therefore the key to authorship in copyright law. Since authorship is the effective *sine qua non* of copyright protection, the very availability of copyright for an expressive work hinges on such personalization.

2. *The Impersonality of Lawmaking*

Central to liberal democratic governance is its commitment to the rule of law. An ideal of political morality, the rule of law connotes a sacrosanct commitment to principles of a “formal and procedural character” that undergird the authority and legitimacy of the governance mechanism.²⁰⁹ Common to the myriad lists of formal requirements that have been identified for the rule of law over the years is the ideal of “generality.”²¹⁰ Generality is taken to mean that laws need to be general in character rather than aimed at particular individuals.²¹¹ As commonly understood and defined, generality focuses on the target of the laws being made rather than on its makers, and in this conception emphasizes the imperative of formal equality in the content and application of legal directives.²¹² Submerged within the idea of generality is another idea, one that rarely finds explication as a separate requirement of the rule of law: *impersonality*.²¹³

While traces of the idea are to be found in Plato and Aristotle, its first formal affirmation was seen in Roman law.²¹⁴ Lawmaking in the Roman law tradition rooted authority in an official act of appointment, such that “an impersonality cloaked the application of Roman laws” enabling its application to “culturally and linguistically diverse peoples.”²¹⁵ In so doing, it “assured a rule of laws, rather than of men,”²¹⁶ *non sub homine sed sub lege*. The German thinkers Max Weber and Hans Kelsen both made impersonality a core component of their theories of law and the state. To

²⁰⁹ Jeremy Waldron, *The Rule of Law*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2020), <https://plato.stanford.edu/archives/sum2020/entries/rule-of-law>.

²¹⁰ *Id.*; JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270-71 (1980); JOSEPH RAZ, *THE AUTHORITY OF LAW* 214-18 (1979); JOHN RAWLS, *A THEORY OF JUSTICE* 208-10 (1999); LON L. FULLER, *THE MORALITY OF LAW* 46 (1969).

²¹¹ See FULLER, *supra* note 210, at 46-49.

²¹² *Id.*

²¹³ For a discussion of the connection between generality and impersonality as features of the rule of law, see Kenneth Winston, *The Internal Morality of Chinese Legalism*, 2005 *SING. J. LEG. STUD.* 325-26.

²¹⁴ See WILLIAM E. CONKLIN, *THE INVISIBLE ORIGINS OF LEGAL POSITIVISM* 56-60 (2001).

²¹⁵ *Id.* at 59.

²¹⁶ *Id.*

Kelsen, it was a central part of the very idea of democratic laws.²¹⁷ What made law binding to him, was not the identity of the “commanding human being” but the “impersonal anonymous command.”²¹⁸ That impersonal command was instead rooted in a system of norms that culminated with the basic norm, i.e., the *grundnorm*. Weber in turn conceptualized the state and its political rule in impersonal terms. To him, commands became binding entirely on the basis of “a normatively defined set of impersonal ‘competencies.’”²¹⁹ As one author described Weber’s theory of the state: “[a]s a state, political power is depersonalized and rule bound.”²²⁰ This was hardly an advantageous thing in Weber’s overall theory; yet it undergirded his entire conception of the state. As such then, impersonality has long been seen as a core idea of the rule of the law in a democratic set up, where authority and governance are consciously detached from the personalities and identities of rulers and located instead in a set of norms and processes that have been consented to by the governed.

While impersonality originated as a theoretical proposition to justify the democratic authority of the state, it soon came to be translated into a functional precept in the common law. The principal domain where this occurred was in the common law’s adoption of the declaratory theory of law, made famous by Sir William Blackstone.²²¹ In the declaratory theory, judges were seen as never making the law themselves, despite developing the law incrementally through their decisions. Instead, judicial decisions were fictionalized as merely finding and declaring pre-existing law, which was instead treated as omnipresent.²²² Yet for the declaratory theory of the common law to work, it required the judge to be “invisible and impersonal” when rendering the decision, so as to buttress the putative omnipresence of the law and its detachment from the individual decision and/or decision-maker.²²³

Thus, when a common law judge expanded or narrowed a proposition emanating from a prior case on a principled basis, the declaratory theory treated the judicial exposition of the law — i.e., the expansion or narrowing — as a mere declaration of the true law that pre-existed the immedi-

²¹⁷ See Bruno Celano, *Kelsen’s Concept of the Authority of Law*, 19 *LAW & PHIL.* 173 (2000). For a general discussion, see CONKLIN, *supra* note 214, at 41-44.

²¹⁸ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 36 (1945).

²¹⁹ Karl Dusza, *Max Weber’s Conception of the State*, 3 *see.* 71, 76 (1989).

²²⁰ *Id.*

²²¹ See William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone’s Declaratory Theory*, 22 *J.L. & RELIGION* 255 (2006).

²²² For accounts of the theory, see Allan Beever, *The Declaratory Theory of Law*, 33 *OXFORD J. LEGAL STUD.* 421 (2013); Brian Zamulinski, *Rehabilitating the Declaratory Theory of the Common Law*, 2 *J.L. & COURTS* 171 (2014); Liron Shmilovits, *The Declaratory Fiction*, 31 *KING’S L.J.* 59 (2020).

²²³ Brewbaker III, *supra* note 271, at 285.

ately previous formulation. For this fiction to have any chance of succeeding, the law needed to be seen as entirely disconnected from the circumstances and identity of the decision-maker and instead having an existence of its own that could be seen as originating in the authority of reason and custom.²²⁴

In due course, the common law abandoned its commitment to the declaratory theory and began acknowledging the reality of judicial law-making. All the same, its coherence (as a body of law, rather than scattered individual decisions) demanded a level of continuity that treated individual opinions delivered by disparate judges and courts as representing a harmonious body of law. This it found in the rule of precedent, *stare decisis* which committed judges to underplaying their modifications of prior rules and precedents. *Stare decisis* demanded that judges treat prior holdings as authoritative by default even when they disagreed with them.²²⁵ And for this to work, it became crucial for such holdings to be seen as binding and authoritative *despite* their origins. In other words, they needed to be impersonalized.

The impersonality of the law thus emerged not just as an incidental by-product of the manner in which the common law evolved. It was instead an attribute that was quite consciously cultivated and nurtured, since it was seen as crucial to the continuing legitimacy of legal authority in the common law. As the common law gave way and came to be interspersed with legislation, the impersonality of the law remained a constant feature of the legal landscape, signaling the continuity of the legal system despite variations in the identity and composition of the lawmaking institution.²²⁶

Impersonality thus understood is today a hallmark of democratic law-making institutions. The authority of the law produced by any such institution is made to depend exclusively on its formal adherence to a set of procedures, a dependence that necessitates underplaying the identity of any human author of such. Such masking does not of course erase the

²²⁴ See 1 WILLIAM BLACKSTONE, COMMENTARIES, *69 (London, Clarendon Press 1765) (insisting that a judge decide a case “not according to his own private judgment”).

²²⁵ Indeed, some scholars of precedent have argued that the principal justification for the norm of *stare decisis* derives from its impersonalization of judicial authority. Randy Kozel thus notes that “[b]y deferring to precedent, a justice highlights her membership in a larger institution that predates her and will continue long after she is gone.” RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 41-42 (217). See also Allison Orr Larsen, *Supreme Court Norms of Impersonality*, 33 CONST. COMMENTS. 373 (2018).

²²⁶ For a general account of the role of impersonality in institutional settings, including lawmaking institutions, see John Joseph Wallis, *Institutions, Organizations, Impersonality, and Interests: The Dynamics of Institutions*, 79 J. ECON. BEHAV. & ORG. 48 (2011).

identity of the lawmaker as an epistemic matter. The law does not seek to hide the identity of the judge who writes the opinion, or of the legislators who vote on a particular bill. Instead, the law treats such identity as presumptively irrelevant to its authority.

In this sense, impersonality is much more than just a passive attribute of the lawmaking process. It is instead a feature that is actively advanced in lawmaking through norms and rules that emphasize the detachment of the law from its human author. *Stare decisis* continues to remain one such norm to this day, obligating judges to adhere to prior holdings regardless of the identity of the judge or panel that generated the prior holding and their possible disagreement with those judges.²²⁷ Another less frequently invoked procedure is the “per curiam decision”, where a court chooses to mask the identity of the judges rendering the decision, preferring to deliver its decision in the name of the court instead.²²⁸ And more commonly (and obviously), the validity of a law enacted by the legislature and signed into law by the head of the executive routinely outlasts the compositional duration of that legislature and the identity of the leader of the executive. Thus a law passed by the 114th U.S. Congress and signed into effect by the forty-fifth President remains valid and applicable regardless of changes to either or both the composition of Congress and the identity of the President.

Democratic lawmaking therefore resists personalization and does everything possible to impersonalize not just the final result, i.e., the law, but also the very process of lawmaking itself. As we shall see, it is this resistance that clashes with copyright’s foundational impulse to personalize the work by identifying an author with it.

3. *A Conflict in Principle*

The mismatch between authorship and lawmaking authority should now be obvious. The legal construction of authorship — in copyright — requires the personalization of a protected work by reference to an identifiable individual. Lawmaking authority on the other hand is underwritten by its impersonality, which resists formally associating the exercise of such

²²⁷ See Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1187 (2015) (noting how *stare decisis* promotes the “spirit of continuity, common ground, and compromise”).

²²⁸ BLACK’S LAW DICTIONARY 1201 (9th ed. 2009) (defining a per curiam opinion as “[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion”); see also Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29 (1992); Laura Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court’s Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000); Laura Krugman Ray, *The History of the Per Curiam Opinion: Consensus and Individual Expression on the Supreme Court*, 27 J. SUP. CT. HIST. 176 (2002).

authority — i.e., the production of the law — with an identifiable person. The mismatch is thus aptly described as the “personalization mismatch” since it emanates from conflicting views about the personalization and identification of expression with the human agent producing it.

It is worth emphasizing that the personalization mismatch is conceptual and not epistemic. In other words, it is not that the human responsible for writing a law or judicial opinion cannot be identified as a factual matter. To the contrary, it is fairly easy for this to be done. Similarly, it is not the case that original expression that is fixed changes into something else when its creator cannot be identified. As noted previously, in a vast majority of such works (e.g., the monkey selfie²²⁹), the expression itself would reveal no difference. Instead, on both sides the mismatch arises from the law’s own internal adherence to principles fundamental to its conceptual structure.

If the personalization mismatch is entirely conceptual, it might well be wondered whether its roots are artificial. In this sense, both authorship in copyright and impersonality in lawmaking might be seen to represent elements of formal logic within the law that serve no real purpose as such.²³⁰ Copyright without an identifiable author would be functionally no different from the current system; nor would the rule of law even when committed to the personal identification of the rule-maker for the law’s authority. In short, by locating the rationale for the government edicts doctrine in the authorship rationale which is in turn driven by principles *internal* to law — rather than consequences — the authorship rationale might be seen as little more than a formalistic insistence on adherence to features of the law for its own sake.²³¹

Even assuming for a moment that the authorship rationale serves no external purpose (which it certainly does), as a principle-based rationale internal to copyright law, it reveals how the government edicts doctrine is an inherent part of the very structure of U.S. copyright law rather than an exception to it. Indeed, one might go so far as to argue that it originates in the very idea of what copyright is and means. Consider in this vein a principle such as the idea-expression dichotomy is seen as an integral part of

²²⁹ Balganesch, *Causing Copyright*, *supra* note 1, at 1-3. Indeed, an assessment of the photograph with no additional insight into the manner in which it was produced would yield the conclusion that it was minimally (if not significantly) creative and sufficiently fixed in a tangible medium of expression.

²³⁰ See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 810, 824 (1935) (describing how “conceptual acrobatics” are meaningless exercises in legal theory).

²³¹ *But see* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (arguing that such formalism has the virtue of coherence which is underappreciated in legal theory).

copyright's basic framework even when it serves other external goals.²³² As a principle internal to copyright, the idea-expression dichotomy is seen as constitutive of the very idea of copyright – such that if it were modified or abrogated, one might legitimately ask whether what remains is indeed copyright after all. Far from being a purely theoretical debate, this question would in turn have far-reaching constitutional implications in so far as it alters what the Supreme Court has termed the “traditional contours” of copyright that are constitutionally prescribed, and therefore beyond the pale of amendment by Congress.²³³ Rooting the logic for the government edicts doctrine in the principle of authorship would allow the rule to be seen as a part of copyright's constitutive framework, and as originating in a concept that is central to copyright rather than as being an exception to it.

A secondary, and perhaps equally important, consequence of rooting the government edicts doctrine in the principle of authorship pertains to the locus of institutional authority for its further development and modification.²³⁴ Given its extra-statutory origins in the common law coupled with Congress' abject failure to recognize it in the text of the statute, some have questioned the continuing validity of the doctrine and its ability to override other statutory directives. Situating the doctrine within the concept of authorship and the personalization mismatch provides courts with a principled basis on which to continue their incremental development and adaptation of the doctrine, as they have done for over a century. In contrast to policy-based arguments that have long been seen as the prerogative of Congress — rather than courts — to develop, arguments deriving from principles internal to a domain of law are seen as the primary domain of courts.²³⁵ The authorship rationale therefore anchors the doctrine not just to a principle internal to copyright, but also to courts as the legitimate arbiters of the scope and legitimacy of the doctrine.

²³² See, e.g., Pamela Samuelson, *Why Copyright Excludes Systems and Processes from the Scope of its Protection*, 85 TEX. L. REV. 1921 (2007); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989).

²³³ The phrase originated in the Court's opinion in *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”). The Court later reiterated that the idea/expression dichotomy is a critical component of these traditional contours. See *Golan v. Holder*, 565 U.S. 302, 328 (2012) (“We then described the ‘traditional contours’ of copyright protection, *i.e.*, the ‘idea/expression dichotomy’ and the ‘fair use’ defense.”).

²³⁴ See Balganesch, *Long Live the Common Law of Copyright*, *supra* note 178.

²³⁵ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82-84 (1977) (developing the difference between principle and policy and locating it within an institutional context).

Perhaps most importantly though, rooting the government edicts doctrine in the personalization mismatch need not come at the cost of other non-copyright policy considerations that the doctrine buttresses and furthers. And here, as we shall see, the doctrine represents an example of a rule that has *both* internal and external justifications. While the latter have (until recently) overshadowed the former owing to their trans-substantive nature and wider appeal, the two ought to nevertheless be seen as complementing each other in important ways.

C. *The False Allure of Public Policy*

A crucial hallmark of the authorship rationale for the government edicts doctrine as described herein remains its origins *within* copyright. The personalization mismatch that underlies the rationale derives from considerations intrinsic to copyright's conception of authorship. Putting to one side the rhetorical and methodological significance of the distinction between internal and external perspectives,²³⁶ a large part of the reason why the authorship rationale for the government edicts doctrine has received surprisingly little attention from courts (and scholars) is simply because it does not — on its own terms — implicate broader questions of a collectivist or public-oriented nature.²³⁷ On the other hand, buttressing its logic with goals and purposes that derive from the overall legal order speaks to concerns that transcend the technocratic logic of copyright and thereby imbue the doctrine with broader significance.

Each of the “public policy” justifications offered for the doctrine performs this role and situates its logic external to copyright. As previously noted, the two most commonly ones within this category are the *double subsidy* and *access to law* justifications. According to the double subsidy argument, it is wasteful and inefficient to subsidize governments officials through market exclusivity for their creative expression, when the public is already subsidizing them by paying their salaries.²³⁸ It is thus unquestion-

²³⁶ For an excellent account of the methodological significance, see Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1204 (2015).

²³⁷ Indeed, this is in keeping with the general trend in U.S. legal thinking over the course of the last century to move in the direction of collectivist thinking, spurred by Legal Realism. For general accounts, see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). Indeed, as one scholar notes, in the U.S. legal academy, the dominant view today is that “all law is public law.” George P. Fletcher, *Remembering Gary – and Tort Theory*, 50 UCLA L. REV. 279, 289 (2002).

²³⁸ The clearest articulation of this argument is to be found in the legislative history accompanying § 105 of the 1976 Copyright Act, which denies protection to works of the U.S. government. See H.R. REP. NO. 94-1476, at 59 (1976).

ably rooted in utilitarian cost-saving logic. The access to law justification, by contrast, argues that the rule of law (and/or the constitutional requirement of due process) demand that laws generally applicable to the public be made publicly available, and since copyright protection would — in principle — allow copyright-owners to control access the laws that they create, such protection should be denied.²³⁹ Here, the logic is again collectivist and tied to the notice function of law. A common feature of both arguments is that they derive from collectivist goals and ideas, which they use to *directly* limit the functioning of copyright. It is the *direct* limiting feature of such public policy justifications that merits additional scrutiny.

When thus employed as a direct limit on copyright doctrine, there remains no separation between law and public policy. In other words, the government edicts doctrine becomes a *doctrine* in name only, and instead itself a public policy limit on copyright authorship and ownership. Yet what this runs up against to produce an even greater degree of complexity, is the reality that copyright's own doctrines (of authorship and ownership) are themselves driven by public policy considerations. Indeed, some of the most well-known arguments for copyright protection today stem from the goal of incentivizing creativity that would “promote the progress” through the mechanism of the market.²⁴⁰ Consequently, the validity and basis of the government edicts doctrine then boils down to balancing competing visions and considerations of public policy: market incentives for creativity and access/subsidy considerations.

Even on its own terms, such free-standing balancing of competing policy considerations is no easy feat. When undertaken by a legislature, it is usually an empirically-informed exercise. All the same, it represents a form of reasoning that courts are inherently reluctant to engage in, preferring instead to limit themselves to reasoning through doctrine and principles. If thus understood to be a pure policy-driven limit on copyright, the government edicts doctrine will remain a rule of questionable substantive and institutional legitimacy. Substantively questionable because of the inherent ambiguity inherent in any balancing exercise; and institutionally suspect given its judge-made origins. Indeed in *PRO*, Georgia made pre-

²³⁹ See generally Yaniv Roznai & Nadiv Mordechay, *Access to Justice 2.0: Access to Legislation and Beyond*, 3 THE THEORY & PRACTICE OF LEGIS. 333 (2016).

²⁴⁰ *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights 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 in ‘Science and useful Arts.’”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

cisely such an argument to question the continuing validity of the doctrine, which the Court deflected.²⁴¹

Rooting the government edicts doctrine entirely and directly in considerations of public policy may therefore appear rhetorically alluring, yet it comes with its own set of perils. And this is where the complementarity between the principles-based authorship rationale and public policy is worth emphasizing. The personalization mismatch translates considerations external to copyright — e.g., the rule of law and its commitment to the impersonality of lawmaking — into a principled directive for copyright thinking: the lack of authorship for a work. In a crucial sense then, the authorship rationale is not entirely internal to copyright but instead takes color and content from external rule of law considerations. And in so doing, it overcomes the potential legitimacy and institutional concerns that accompany arguments of public policy. Indeed, it is for these very concerns that one common law decision famously remarked that public policy “is a very unruly horse . . . once you get astride it you never know where it will carry you.”²⁴²

III. THE PUZZLE OF PRIVATIZATION

Despite the Supreme Court’s validation of the government edicts doctrine in *PRO* and its resurrection of the authorship rationale as the principled justification for its existence, the Court’s own decision shied away from some of the most pressing debates surrounding the doctrine. While much of this was unquestionably because of the peculiar factual scenario in the case itself, it also was driven by the Court’s reluctance to fully explicate the authorship rationale, which might have required it to explore the applicability of the doctrine to additional forms of lawmaking.²⁴³ The principal domain that the Court’s analysis avoided altogether was the role and significance of *private parties* in the lawmaking process, or the *privatization* of some/all of the lawmaking process and its effect on the copyrightability of the edict emanating from the process.

²⁴¹ *Georgia v. Pub. Res. Org. (PRO)*, 140 S. Ct. 1498, 1510 (2020) (noting that “Georgia suggests that we should resist applying our government edicts precedents to the OCGA annotations because our nineteenth-century forebears interpreted the statutory term author by reference to ‘public policy’ — an approach that Georgia believes is incongruous with the “modern era” of statutory interpretation” and rejecting it).

²⁴² *Richardson v. Mellish*, 2 Bing. 229, 252 (C.P. 1824) (Eng.); see also Percy H. Winfield, *Public Policy in English Common Law*, 42 HARV. L. REV. 76 (1928).

²⁴³ For criticism of the majority opinion’s failure to address this question, arguing that the silence raised the possibility of all private contractors being treated as “adjunct to the legislature” and therefore devoid of authorship, see *PRO*, 140 S. Ct. at 1521-22 (Thomas, J. dissenting).

This Part argues that here too, the authorship rationale for the government edicts doctrine suggests coherent answers. The involvement of private parties in the lawmaking process can come in different forms — depending on the nature of the relationship between the private and government entities as well as the process through which the privately produced work-product becomes law.²⁴⁴ This Part examines three such forms using the authorship rationale for the government edicts doctrine.

A. *Private Delegation and Enactment*

PRO involved one form of private involvement in the lawmaking process. Recall that in the case, the legislative agency — the Code Revision Commission — had outsourced the actual production of the individual annotations to a private company (Matthew Bender & Co.) under a work made for hire agreement.²⁴⁵ The Court even conceded that the private company performed the “lion’s share of the work” involved in producing the annotations.²⁴⁶ All the same, the commission closely supervised the work and specified in great detail what the annotations needed to contain, which rendered them the result of the commission’s exercise of its lawmaking authority.²⁴⁷

Owing to the work made for hire arrangement, the commission and not the private company claimed authorship (and ownership) and as a result the case did not have to confront an assertion of copyright by the private entity actually producing the expression.²⁴⁸ If no such agreement had accompanied the commission’s delegation to the private entity, the issue would have been different. One could thus imagine a situation where a government body/agency actively delegates the production of the text of the edict to a private entity (individual or organization) and then enacts the text into law. We might call this form of private involvement — the “delegation and enactment” model of private lawmaking.

The form and extent of delegation is of course likely to vary from one context to another. At one end of the spectrum are situations where the

²⁴⁴ For a prior attempt at generating a taxonomy of private participation in lawmaking, see Cunningham, *supra* note 128, at 297-300 (developing a three-fold classification of such involvement into “strong form”, “weak form” and “semi-strong form”). Cunningham’s categories however focus entirely on considerations relevant to “public policy balancing inquiries”, including arguments purporting to balance considerations underlying the government edicts doctrine with copyright’s incentives rationale. *Id.* at 298. As such, it altogether ignores the authorship rationale in favor of an overt public policy analysis.

²⁴⁵ *PRO*, 140 S. Ct. at 1505.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1508-09.

²⁴⁸ 17 U.S.C. § 201(b) (treating the employer or commissioning party as author and owner of a work made for hire).

government tasks a private agency to produce the text but then remains closely involved in supervising the production of the text, through an iterative and collaborative process. At the other is the situation where the private entity is tasked with the textual production, which the government then mechanically enacts into law eventually. Regardless of the precise nature of delegation, the key in such situations is that the private entity is performing a task that is ordinarily vested in the government, but under the authorization of that government.

Within the category of a delegation should be included situations of *ex post* delegation, or ratification. These are situations where the request for delegation begins with the delegate, i.e., the private entity, that seeks to have its textual work product enacted into law. Even though the process therefore technically begins with the private entity, once adopted and enacted into law the ratification is functionally no different from an *ex ante* delegation in that the private entity's motivation for producing the text is no different. Included in this category would therefore be model codes produced by the Uniform Law Commission, a private entity, which originates projects as model laws with the specific goal of their enactment by state legislatures.²⁴⁹ While on rare occasion, the Commission is approached by states with a mandate to produce a model law in a particular field, it initiates the vast majority of its projects with the goal of adoption.²⁵⁰

Situations of such private delegation and enactment implicate the government edicts doctrine in a rather straightforward manner. The relationship between the government entity and the private actor that motivates the production of the edict imparts it with the impersonality inflecting edicts directly generated by a government actor. There is little difference between a government agency delegating a task to another subordinate government actor and its doing so to a private actor. In both situations, the agent derives its authority for the task entirely from the delegation. Consequently, the personalization mismatch that attaches to the government actor seamlessly flows to the agent.

Another way of thinking about this arrangement analytically is to conceptualize the relationship between the government agency and the private entity as largely identical to the relationship surrounding a commissioned work, ordinarily subject to a work made for hire arrangement.²⁵¹ Leaving aside the formalities that the law demands for the

²⁴⁹ See UNIFORM LAW COMM'N, OBSERVERS' MANUAL 1-3 (2020).

²⁵⁰ See *id.* at 1; see also Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 602 (1995).

²⁵¹ 17 U.S.C. § 101 (definition of a work made for hire).

validity of such a “commission”,²⁵² a work made for hire operates as a form of vicarious authorship, in so far as it relocates not just ownership but also authorship from the actual creator to the commissioning party.²⁵³ When a work is capable of personalization, the relocation is thus of authorship. But when the work is incapable of it — i.e., owing to the personalization mismatch — what results is a form of vicarious impersonalization that attaches to the product. And since the product of the arrangement was created from its very inception under the demand of impersonality, no authorship ever attaches to it. The cloak of impersonality thus inflects the expression from its very inception.

This might at first seem to be at odds with situations of *ex post* delegations, or ratifications. Yet, this is where a scrutiny of the objective behind the creation of the private expression becomes crucial. In situations where the private expression is created with the sole purpose and reasonable expectation of its enactment by a government entity, the cloud of impersonality affects the production of the code/expression by the private in near identical manner as it does with an *ex ante* delegation. In other words, even in such *ex post* delegations, the private actor is attempting to speak in the impersonalized voice of the government actor, even if it did not have prior authorization to do so.

Of course, the moment we move from an *ex ante* delegation to an *ex post* one, much of the emphasis will need to be placed on the precise intentions and motivations of the private party creating the code. In so far as it reveals significant ambivalence in purpose and is thus equivocal about its singular commitment to enactment when being produced, the cloak of impersonality ought to be seen as absent, with the code no longer qualifying as a government edict and becoming eligible for copyright. Put another way, such equivocation goes to the question of whether the creation occurred under a delegation at all, and if answered in the negative, ought to ensure the inapplicability of the government edicts doctrine. The copyrightability of such *un*-delegated productions of text that makes its way into the law is addressed in a later section.²⁵⁴

²⁵² *Id.* (requiring the formalities of specific subject matter, a written and signed agreement between parties, and the identification of the work as a work made for hire).

²⁵³ *Id.* § 201(b). It is worth noting that it is precisely this logic that Congress employed in § 105 to deny copyright protection to U.S. government works, which it understood as works created by an employee or officer of the U.S. government “as part of that person’s official duties.” *Id.* § 101 (definition of “work of the United States Government”). The legislative history accompanying § 105 makes clear that Congress intended the provision to be “construed in the same way” as the work made for hire doctrine. H.R. REP. NO. 94-1476, at 58 (1976).

²⁵⁴ See *infra* Section III.C.

Herein lies the principal error seen in the Fifth Circuit's en banc decision in *Veeck*, discussed previously.²⁵⁵ Despite concluding that the privately-produced code at issue was created with the objective of adoption by local municipalities, the court nevertheless saw the government edicts doctrine as attaching to the work only upon adoption/enactment and not before.²⁵⁶ This post-creation operation of the doctrine is fundamentally at odds with the authorship logic and rationale, since authorship — or its absence — attaches to the work at the time of its creation, and not after. While the court's logic may have been justifiable on alternate grounds,²⁵⁷ it certainly detracts from the authorship-driven logic of the government edicts doctrine.

Much of the work product of several well-known private lawmaking institutions in the U.S. operates under this delegation and enactment model.²⁵⁸ The Uniform Law Commission discussed earlier, otherwise known as the NCCUSL ("National Conference of Commissioners of Uniform State Laws") is a good example here. Established in 1892, it is comprised of commissioners appointed for three-year terms by the governors of individual states. The organization produces model codes and uniform codes, which it proposes to state legislatures for adoption.²⁵⁹ Given the composition of the organization, the process through which the commissioners are appointed, and the manner in which the work product is advertised to states — there remains little doubt that each code (model or uniform) is produced with the clear and sole objective of enactment by individual states. It would thus qualify as an *ex post* delegation.

The same holds true for model codes produced by the American Law Institute (ALI) another private lawmaking entity, which notes that its "[m]odel or uniform codes or statutes and other statutory proposals are addressed mainly to legislatures, with a view toward legislative enactment."²⁶⁰ Codes thus produced by both the NCCUSL and the ALI operate under the cloak of impersonality, which their impacts their principal audience (the legislature) and thus colors the very nature of their work

²⁵⁵ *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791 (5th Cir. 2002). Additionally problematic is the court's description of the adoption as involving the code being "enacted into law" when later noting that it was incorporated into law "by reference." Compare *id.* at 808 with *id.* at 802.

²⁵⁶ *Id.* at 793-94, 802.

²⁵⁷ Such as the merger doctrine. See *id.* at 800-03.

²⁵⁸ For a general overview of private lawmaking in the U.S., and its efficiency as a lawmaking mechanism, see Schwartz & Scott, *supra* note 250.

²⁵⁹ UNIFORM LAW COMM'N, *supra* note 249, at 1.

²⁶⁰ AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2d ed. 2015).

product as far as the government edicts doctrine and the question of copyrightability go.

Situations of delegation and enactment therefore involve private actors purporting to speak in the voice of the government when they produce the text that eventually becomes the edict. They do so either with the authority of the government, or in anticipation/expectation of such authority. This *voice* is more than just a formal attribute of the process or the content; it instead imbues the text with the impersonality demanded by the law from outset, and thus falls squarely within the working of the government edicts doctrine.

B. Standardization by Reference

Delegation and enactment into law represents a somewhat extreme form of private involvement in lawmaking. A more common, yet analytically distinct, category presents some similarities to delegation and enactment but ought to be treated very differently. These are situations where a government lawmaker decides to standardize an area that a law relates to by incorporating that standard into the text of the law through a reference. The standard is usually too complicated to be spelt out in full detail in the law and is therefore incorporated through the more efficient process of a simple short-form reference.

Paradigmatic of such standardization by reference are situations where the law deals with technical or professional standards that involve the expertise of a non-governmental body.²⁶¹ Peter Strauss describes such standards as follows:

Throughout the world, manufacturing and markets are greatly aided, and consumers offered protection, by the application of uniform industrial standards created independent of law, as means of assuring quality, compatibility, and other highly desired market characteristics. They define what is meant by U.S. Hard Red Spring wheat, reflect railroads' agreement on track widths permitting interchangeability, establish threading conventions for nuts and bolts, or fix the characteristics of the fittings that attach fire hoses to hydrants.²⁶²

In an effort to be efficient, the law itself does not enact these standards into the letter of the formal law. Instead, it merely references the source from which they are to be derived. Nevertheless, the reference effectively converts the standard into a legal obligation despite its private origin.²⁶³

²⁶¹ See OFF. OF THE FED. REGISTER, IBR HANDBOOK 1 (2018) (noting how the process enables “agencies to draw on the expertise and resources of private sector standard developers to serve the public interest.”) (quoting a recommendation of the Administrative Conference of the U.S.).

²⁶² Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL OF RTS. J. 497, 499 (2013).

²⁶³ *Id.* at 502.

The question that thus emerges is whether the private entity creating the standard should be denied the ability to claim copyright in it, by virtue of the government edicts doctrine.

Before answering the question directly, it must be noted that standardization by reference can itself occur in different ways. One form is commonly seen in administrative regulations and is referred to as “incorporation by reference.”²⁶⁴ Understood as the “practice of codifying material published elsewhere by simply referring to it in the text of a regulation”, incorporation by reference is today a standard practice in federal regulations and subject to a set of rules and requirements.²⁶⁵ Most standards incorporated by reference are technical standards developed by private organizations through an open and transparent process. A good recent example of such incorporation by reference is a federal regulation published by the Consumer Product Safety Commission (“CPSC”) for four-wheeled all-terrain vehicles (ATVs).²⁶⁶ The relevant portion of the regulation provides that “[e]ach ATV shall comply with all applicable provisions of the American National Standard for Four-Wheel All-Terrain Vehicles (“ANSI/SVIA 1-2017”), ANSI-approved on June 8, 2017.”²⁶⁷ It thus incorporates by reference into the law the standard for such vehicles developed by the Specialty Vehicle Institute of America (“SVIA”) and approved by the American National Standards Institute (“ANSI”), both private organizations.²⁶⁸

While incorporation by reference is today a fairly streamlined process in administrative law, standardization by reference can also occur through other less organized routes. A lawmaker’s attempt to standardize aspects of its process or rules by relying on standards set by another publication or body that it deems appropriate achieves the same result. Thus, for instance, a court’s requirement that briefs and motions filed before it need to comply with a standard form of citation such as *The Bluebook*²⁶⁹ or the *ALWD Guide to Legal Citation*²⁷⁰ operates in near identical manner as an incorporation by reference, except that it goes through less public scrutiny upfront.

²⁶⁴ OFF. OF THE FED. REGISTER, *supra* note 261, at 1.

²⁶⁵ Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 133 (2013).

²⁶⁶ Consumer Prod. Safety Comm’n, All-Terrain Vehicles: Final Rule, 83 Fed. Reg. 8336 (2018).

²⁶⁷ 16 C.F.R. § 1420.3 (2018).

²⁶⁸ See SVIA, *About ATV Safety*, <https://svia.org/about-us/> (Feb. 28, 2021) (describing the private non-profit status of SVIA); ANSI, *About ANSI*, <https://www.ansi.org/about/introduction> (Feb. 27, 2021) (noting how ANSI is a private non-profit organization).

²⁶⁹ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (2021).

²⁷⁰ ALWD, GUIDE TO LEGAL CITATION (2020).

Two characteristics thus differentiate the standardization and reference approach from the delegation and enactment approach to private lawmaking. First, their content almost always relates to specialized non-legal material rather than just the text of the legal directive, which is the basis for the involvement of a specialized non-law private entity. The SVIA, ANSI or ALWD are seen as entities with special expertise in their domains that the lawmaker chooses to rely on rather than override. This makes the relationship between the government entity and the private organization very different from the kind of implicit/express supervisory relationship seen in a delegation. Second, the text of the standard is not enacted into law as such. Instead, it is simply referenced in short form and with no discernible alteration. While seen as a time- and cost-saving mechanism, this also has significant implications for the government edicts doctrine and the authorship rationale.

As previously noted, most courts to have considered the copyright status of such standards incorporated by mere reference have exhibited a marked reluctance to extend the government edicts doctrine to them.²⁷¹ Yet, they have offered a confusing array of reasons for this reticence. The discomfort is plainly understandable given the content of such standards and the manner in which they interact with the formal law, both of which are very different from the traditional domain of the government edict. And here again, the authorship rationale — emanating from the personalization mismatch — for the government edicts doctrine justifies and explains the impulse.

Situations of standardization by reference encounter no personalization mismatch, the principle that lies at the heart of the government edicts doctrine. Whereas the exercise of legal authority is seen as demanding a commitment to impersonality in the identity of its creator, standards incorporated into the law purport to do just the opposite. In other words, since they involve subject matter that entails professional expertise of a non-legal nature, the justification for their being given an exalted/obligatory status through the law derives entirely from the identity (and thus, qualification) of their creators. The very credibility (and legitimacy) of these standards as nationwide obligations is therefore heavily tied to their private source, in turn a question of identity. Now, regardless of whether such identity is on its own sufficient to generate a claim of authorship for copyright law, it is nevertheless the case that the need for such identity *denies* the possibility of a categorical personalization mismatch, which undergirds the government edicts doctrine.

To see the need for identification and personalization underlying such standards, consider the example of the federal regulation quoted previ-

²⁷¹ See *supra* Section I.C.

ously.²⁷² The regulation mentions not such the standard, but in so doing readily identifies the source of the standard (ANSI/SVIA) and alludes to the process through which it was brought into existence (i.e., ANSI approval). If the regulation were to merely note a/the standard for four-wheeled all-terrain vehicles without any further information as to its content or source, it would defeat the very objective of such a standard, which is to provide a uniform benchmark for the manufacture of the vehicles at issue. In other words, an identified benchmark can operate as a standard only when it is identified with a particular source seen as qualified to produce it, which in turn gives it the desired credibility for obligatory status.

The same is equally true of less formal modes of standardization by reference. Consider in this vein, a rule set out by the Supreme Court of California in the exercise of its administrative powers over the California judiciary.²⁷³ Rule 1.200 of the California Rules of Court provides that “[c]itations to case and other authorities in all documents filed in the courts must be in the style established by either the *California Style Manual* or *The Bluebook: A Uniform Style of Citation*.”²⁷⁴ The rule thus incorporates the citation standards set out in both manuals by express reference and raises them to obligatory status. Most relevantly, the rule does not simply say “any uniform style of citation”; instead, it specifies a particular benchmark, a specification that is intricately tied to the identity of its creator. As a particular style manual, *The Bluebook* has an identified author and that identity is critical for the obligatory content of the rule to operate as such.²⁷⁵ In short, specification and thus personalization of the standard are not just side-effects of standardization by reference, but represent the specific pathway through which the very process operates.

Standardization by reference may appear functionally similar to situations of delegation and enactment — yet, they remain very distinct when considered through the lens of the government edicts doctrine as a manifestation of the personalization mismatch. This functional similarity generates the same set of public policy concerns about notice, access to law, and due process that courts (and scholars) have come to raise in relation to the government edicts doctrine. That, however, does not render the government edicts doctrine the appropriate vehicle through which to ventilate and give credence to these concerns. To the contrary, extending the government edicts doctrine to situations of standardization as a policy

²⁷² 16 C.F.R. § 1420.3 (2018).

²⁷³ CAL. CT. R. 1 *et seq.* (2021).

²⁷⁴ *Id.* § 1.200

²⁷⁵ *The Bluebook* lists the editors of various law reviews as its “compilers”, and notes that it is published and distributed by the Harvard Law Review Association. See *The Bluebook: Acknowledgements*, THE BLUEBOOK (Feb. 28, 2021), <https://www.legalbluebook.com/acknowledgements>.

matter dilutes its principled rationale, risking its complete elimination by courts averse to adjudicating policy questions.

This is not to say that the concerns surrounding the incorporation of standards into law by mere reference are not serious or legitimate. To the contrary, they are likely both. Nevertheless, these concerns are specifically addressed by various other copyright doctrines under which such standards — whether enacted into law or not — are likely to be rendered unprotectable. These include: (i) copyright’s well-known (and now codified) discomfort with functional expression such as systems, methods of operation, and procedures,²⁷⁶ (ii) the merger doctrine, which renders expression uncopyrightable when it embodies an idea that is capable of being expressed in a minimal number of ways,²⁷⁷ and (iii) the scenes-a-faire doctrine, which excludes from the gamut of protection content that is stock or common place within the genre.²⁷⁸ Each of these doctrinal vehicles is well-equipped to give effect to the myriad public policy concerns surrounding the need to keep incorporated standards in the public domain and accessible to all. Yet they have nothing to do with the government edicts doctrine, even if they may appear to further the same set of public policy concerns commonly voiced by courts for the government edicts doctrine.

Rooting the rationale for the government edicts doctrine in the principle of authorship thus operates to draw some bright lines around the doctrine, ensuring that it does not collapse into being a mere conclusion for a set of homologous policy concerns relating to free and open access to government information. The government edicts doctrine may well complement other doctrines and point in the same policy direction on occasion, but it does not — when understood through the authorship rationale — operate as a blunt instrument to deny copyright protection to any expression that the government renders obligatory.

²⁷⁶ See Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C.L. REV. 193, 196 (2007) (noting how some technical standards are rendered ineligible for copyright under § 102(b) of the statute). For the most part, courts have however refused to apply § 102(b) consistently on this question. See *supra* Section I.C.

²⁷⁷ See Shubha Ghosh, *Legal Code and the Need for a Broader Functionality Doctrine in Copyright*, 50 J. COPYRIGHT SOC’Y. 71 (2002). Ghosh argues that the focus on authorship in government edicts cases is “erroneous,” *id.* at 87, and that a better approach would entail the application of the merger doctrine to deny protection to content that forecloses particular uses and effects of expression. *Id.* at 104. For a fuller treatment of the merger doctrine in copyright law more generally, see Pamela Samuelson, *Reconceptualizing Copyright’s Merger Doctrine*, 63 J. COP. SOC’Y U.S.A. 417 (2016). Indeed, it is worth noting that in the *Veeck* case, the Fifth Circuit offered the merger doctrine as an independent basis for its holding. *Veeck v. S. Bldg. Code Cong. Int’l*, 293 F.3d 79.

²⁷⁸ See generally Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79 (1989); Samuelson, *Questioning Copyrights*, *supra* note 276, at 215-18.

C. Authorized and Unauthorized Adoption

The last scenario remaining for consideration involves situations where a government entity incorporates/enacts into law the text of something produced by a private entity and does so without any form of (ex ante or ex post) relationship with the private entity. Such situations present three interrelated copyright questions. First, whether either/both the privately produced text or the law embodying it are eligible for copyright under the government edicts doctrine;²⁷⁹ second, whether an authorized adoption and enactment of the private text by the government in its law alters the issue of copyrightability; and third, whether an unauthorized adoption and enactment by the government actor are at all actionable if the private entity is able to assert copyright in it.

What obviously sets these situations apart from a delegation and enactment is that there exists no *a priori* relationship between the private entity producing the text and the lawmaker. Nor is the private text produced in anticipation of enactment/incorporation; it is produced as a purely private act. In no sense therefore is there a delegation. Additionally, unlike in situations of standardization by reference where the privately produced text is merely referenced rather than adopted/enacted verbatim, these situations typically involve the wholesale, i.e., verbatim, enactment of the private text into law. Their hallmark is therefore an incorporation/enactment into law without any relationship to the producer.

Having been generated with no authorization from a government entity nor in expectation of being enacted into law, the privately produced text is not covered by the government edicts doctrine. The text encounters no personalization mismatch, in that it is produced by a private entity with no commitment or anticipation of acceptance into law. It thus has an identifiable author, and such identification is altogether unproblematic. Assuming the text meets copyright's other protectability criteria,²⁸⁰ the expression becomes eligible for copyright.

Conversely, when put into formal law (usually by enactment), the edict of law — containing text that is subject to copyright — encounters the government edicts doctrine directly. Being an edict of a government lawmaker, the commitment to impersonality that lawmaking entails runs counter to any notion of authorship, resulting in the enacted text becoming ineligible for copyright as a work of the government. All the same, it is crucial to note that the two texts — the privately produced text and the enacted law — remain distinct for copyright purposes, even though the

²⁷⁹ Assuming of course that the expression meets copyright's other eligibility requirements and does not fail owing to any of copyright's exclusionary categories. See 17 U.S.C. § 102.

²⁸⁰ Most notably "originality" and "fixation." *Id.* § 102(a).

latter copies the former. In purely formal terms, the privately produced text constitutes the original work and the version enacted into law a derivative.²⁸¹ The eligibility or ineligibility of one for copyright does not necessarily impact that question for other. Nor does the edict's incorporation of expression that is eligible for copyright protection alter the copyrightability of that underlying expression outside of the edict.

An example from an actual case illustrates the point. In the celebrated Supreme Court case of *Campbell v. Acuff-Rose Music, Inc.*,²⁸² the Court considered the applicability of the fair use doctrine to a parody of the plaintiff's song made by the defendants. In order to illustrate the similarities and differences between the lyrics of the two songs, the majority opinion created two appendices to its opinion, wherein it reproduced the lyrics of both pieces of music.²⁸³ It was undisputed (indeed, validated by the Court) that the plaintiff held a valid copyright in its work. All the same, the Court's incorporation of the lyrics into its opinion effectively put it into a government edict, i.e., the judicial opinion. And as we have seen, judicial opinions are rendered uncopyrightable under the government edicts doctrine, owing to the personalization mismatch.²⁸⁴ Yet, the mere fact that the Court (or Justice Souter, who wrote the majority opinion) would be unable to obtain a copyright in its creation does nothing to the independent copyrightability of the plaintiff's lyrics even when incorporated into the edict.

The variation in copyright eligibility of the private text and the enacted version is therefore entirely a product of the authorship rationale. The adoption and enactment of the text by the government entity may in turn be either voluntary (authorized) or involuntary (unauthorized). In the former, we might imagine a scenario where the author of the text assigns/licenses the content to the lawmaker for the purpose of enactment into law.²⁸⁵ Again, the mere content-based connection between the two

²⁸¹ Indeed, the edict would on its face appear to qualify as a derivative work under the statute, which is defined as "a work based upon one or more preexisting works. . . in which a work may be recast, transformed, or adapted." *Id.* § 101 (definition of a "derivative work"). A broader question, the answer to which would depend on the nature of the incorporation into the law, is whether the edict meets the originally standard seemingly demanded by the definition of a derivative work.

²⁸² 510 U.S. 569 (1994).

²⁸³ *Id.* at 594-96.

²⁸⁴ See *supra* Part I. Though in this case, the opinion might have also been denied copyright protection as a work of the U.S. government, since federal judges are employees of the federal government.

²⁸⁵ As was the case in the *BOCA* case, decided by the First Circuit in 1980. *Bldg. Offs. & Code Adm. v. Code Tech., Inc.*, 628 F. 2d 730, 732 (1st Cir. 1980) ("Pursuant to a license granted by BOCA, the Commonwealth of Massachusetts has adopted and distributed a building code based in substantial part on the BOCA CODE.").

should have no bearing on the copyrightability of the private text *qua* text. The enacted version however is rendered uncopyrightable under the authorship rationale.

Most importantly, it is not the mere acquisition/assignment of the copyright by the government that produces this outcome. To the contrary, the government entity (including the U.S. government²⁸⁶) is free to acquire and own copyright in works authored by others. An enacted version is instead rendered uncopyrightable when converted into an edict of law by enactment/promulgation, which is the only governmental act that implicates the authorship rationale. A government agency may therefore acquire the copyright in a privately produced text intending to convert it into a portion of the relevant law and do so only decades after the acquisition. When acquired, and for the several decades when the agency does nothing with the text, it remains fully under copyright (to the same extent that it was before, when under private ownership).

It is however crucial to understand what happens when the text is enacted into law. Formally enacting/incorporating the private text into law produces two related but functionally separate versions: (i) the original version that is privately produced, and (ii) the derivative version that is embellished by enactment and incorporation into the broader corpus of law. The enactment of the private text into law to produce a derivative denied copyright under the government edicts doctrine, does not affect the copyrightability or ownership of the underlying original private-text version. This is almost axiomatic, and flows directly from the text of the statute, which mandates that “copyright in [a derivative] work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”²⁸⁷ Consequently, even if the government entity acquires (through an assignment for its private creator) the copyright in the original version and does not obtain copyright in the enacted version owing to the government edicts doctrine, it still retains the *ownership* of copyright in the original version. And if the private creator retains copyright in the original version, the incorporation/enactment into law (i.e., the derivative version) has no effect on such ownership either. The *edictification*, so to speak, of privately produced text thus has no legal consequence on the copyright in the original privately created text.

Much of the logic described above holds true even when the government entity adopts the private text into the law involuntarily, i.e., without the private creator’s authorization. While the government entity remains

²⁸⁶ 17 U.S.C. § 105(a) (noting that “the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise”).

²⁸⁷ *Id.* at § 103(b).

unable to claim copyright in the law owing to the government edicts doctrine, the private text itself continues to be eligible for copyright. Thus, contrary to what some opinions have claimed, the unauthorized adoption/enactment by a government entity does not implicate the Takings Clause since such enactment does not on its own annul or affect the copyright in the underlying private text.²⁸⁸ Indeed, often forgotten in discussions of expropriation and the Takings Clause surrounding copyright is the existence a specific provision in the copyright statute that disallows a government actor from involuntarily seizing or expropriating the copyright in a work from its author.²⁸⁹

Nevertheless, the altogether unresolved issue that situations of unauthorized enactment/incorporation by a government entity raises relates to infringement: whether the private creator whose protected text is involuntarily adopted into the letter of the government edict has a cause of action for infringement against the state actor. The principal impediment here has little to do with authorship or the government edicts doctrine, but instead derives from the doctrine of sovereign immunity.²⁹⁰ In so far as the doctrine limits the ability of a private actor to initiate a private action against the government actor, any claim of copyright infringement will necessarily fail.²⁹¹ On the other hand, should sovereign immunity not be a bar, then the unauthorized enactment/incorporation would raise a very plausible case of copyright infringement.

CONCLUSION

The aphorism that “no one can own the law” is both straightforward and uncontroversial on its face. Yet, as an explanation for the government edicts doctrine, it falls short. It wrongly implies that concerns with ownership, control, and access to the law lie at the heart of the doctrine, allowing

²⁸⁸ See, e.g., *Veeck v. S. Bldg. Code Cong. Int'l.*, 293 F.3d 791, 803 (8th Cir. 2002); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Repts., Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) (“For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.”).

²⁸⁹ 17 U.S.C. § 201(e) (“When an individual author’s ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.”)

²⁹⁰ The doctrine formed the basis of a recent Supreme Court case that examined whether it had been waived by Congress for copyright infringement actions, through legislation. See *Allen v. Cooper*, 140 S. Ct. 994 (2020) (finding the legislation enacted by Congress to be unconstitutional and in violation of the Eleventh Amendment).

²⁹¹ *Id.*

it to function as a limitation on copyright that takes color and content from the importance of law to the public. And for more than a century, U.S. courts have incoherently alluded to versions of these concerns as the motivating rationale for the government edicts doctrine. In the process, courts and scholars have altogether ignored and underplayed the key to understanding the doctrine and its rationale: *authorship*.

While the Supreme Court in *Banks* observed that the idea of authorship was the basis of the doctrine, its reasoning provided little insight into what that observation really meant. With little to go on, later courts altogether ignored that observation in their expansion of the doctrine. More than a century later, the Court in *PRO* resurrected authorship as the guiding principle behind the doctrine. Yet, *PRO* too failed to shed sufficient light on the nature of the connection between authorship and the government edicts doctrine, beyond disconnecting it from freestanding “public policy” considerations. By leaving this connection altogether unspecified yet again, the Court’s opinion once again fueled the analytical and normative mystery surrounding the doctrine and its applicability.

The Court was correct to root the government edicts doctrine in the principle of authorship. Contrary to common perception, this authorship rationale is neither a smokescreen nor a vacuous idea. It instead originates in the mismatch between copyright’s demand that a work of authorship be personalized by identifying the human agent responsible for its creation, and the ideal of impersonalized lawmaking that undergirds the rule of law in a democratic state. This “personalization mismatch” explains how the government edict doctrine originates in copyright’s very foundational structure and is thus as much a part of copyright as are any of its other limiting doctrines.

Understanding the government edicts doctrine through the authorship rationale sheds important light not just on the motivations for the doctrine but also on its true scope and applicability, questions that the Court altogether sidestepped in *PRO*. Viewing the working of the doctrine through the authorship rationale and the personalization mismatch underlying it reveals how courts might be able to make sense of the copyrightability issues surrounding privately produced expression that becomes (or becomes part of) a legal edict. Rather than forcing courts to sift through, and balance complicated and competing policy considerations either overtly or in the guise of legal doctrine, the authorship rationale anchors the doctrine in principles underlying the copyright system, most of which have been the creation of courts themselves. It thus indirectly facilitates the continued legitimacy not just of the government edicts doctrine but also of the institutional role of courts in developing it.

Authorship and ownership often go hand in hand in copyright law, yet they are each driven by divergent considerations. While copyright oper-

ates as a regime of ownership that functions through exclusive rights, its focus is at all times on authorship and its consequences. Authorship thus remains an underappreciated requirement of copyrightability; one that surfaces most commonly when it is found to be absent. All the same, when authorship surfaces as a principle in copyright, it is deeply consequential. The government edicts doctrine is one such area where the principle of authorship operates to shed important light on an area that has been shrouded in mysterious theories of “public policy” for over a century.