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Shyamkrishna Balganes

Columbia Law School, sbalganes@law.columbia.edu

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THE INSTITUTIONALIST TURN
IN COPYRIGHT

It was a few minutes after 10 a.m. on October 9, 2002, a brisk Wednesday morning in Washington, D.C. Some of the crowd that had begun lining up outside the Court before daybreak to hear oral argument had successfully obtained seats in the visitor's gallery, where they now waited with great anticipation for the Court to call its first case.¹ In short order, Chief Justice Rehnquist announced that the Court was ready to hear arguments in the case of *Eldred v. Ashcroft*,² and Professor Lawrence Lessig began presenting the case for the petitioner, arguing that the Sonny Bono Copyright Term Extension Act (CTEA) was an unconstitutional exercise of Congress's lawmaking power.³

Shyamkrishna Balganesh is Sol Goldman Professor of Law, Columbia Law School.

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¹ See Linda Greenhouse, *Supreme Court Hears Copyright Challenge*, N.Y. TIMES (Oct. 9, 2002), <https://www.nytimes.com/2002/10/09/business/media/supreme-court-hears-copyright-challenge.html>.

² Transcript of Oral Argument at *4, *Eldred v. Ashcroft*, 537 U.S. 186 (2002) (No. 01-618), 2002 WL 31309203.

³ Opening Brief of Petitioners at 47, *Eldred*, 537 U.S. 186 (No. 01-618).

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Lessig had meticulously prepared for the argument and believed himself to have developed an effective strategy that would appeal to the Court's most conservative Justices, who were generally wary of any attempted Congressional overreach.⁴ Barely a few minutes into the argument, as Lessig was responding to a question from another Justice about the uniqueness of his constitutional challenge to a piece of copyright legislation, Chief Justice Rehnquist interrupted Lessig with a question about the absence of prior constitutional challenges to copyright legislation, which he delivered with his unmistakable tone of skepticism: "Well, doesn't that itself mean something, Mr. Lessig? The fact that they were never challenged, perhaps most people, and perhaps everybody felt there was no basis for challenging them."⁵

Lessig, who had fully anticipated the question, launched into his detailed response, observing how his case was fundamentally different and noting that it was "not the case that the earlier extensions were not questioned on constitutional grounds," but that a prominent copyright scholar (Melville Nimmer) had in fact considered the question and reached a similar conclusion.⁶ Before he could finish, the Chief cut him off derisively, "Well, I'm talking about court challenges, not academic challenges,"⁷ forcing Lessig to concede the novelty of his position: "That's right, there is no [prior] court challenge."⁸ He was asking the Court to circumscribe Congress's legislative authority to enact copyright legislation, and for the first time ever since the enactment of the first federal copyright statute in 1790.⁹

Lessig went on to lose the case, with the Court deciding on a 7-2 vote that the CTEA embodied a rational exercise by Congress of its

⁴ Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFAIRS, Mar.-Apr. 2004, at 57, 58; LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 89 (2008).

⁵ Transcript of Oral Argument, *supra* note 2, at *5.

⁶ *Id.*

⁷ *Id.* at *6.

⁸ *Id.*

⁹ To be sure, as early as 1879 the Supreme Court had held that the Intellectual Property Clause of the Constitution (Art. I, § 8, cl. 8) did not extend to trademark legislation since a trademark was not an invention, discovery, or writing within the meaning of that clause. *Trademark Cases*, 100 U.S. 82 (1879). In so doing, the Court was implicitly placing a limit on what Congress could do under the terms of the Intellectual Property Clause. Yet, its holding was that the legislation at issue was not patent or copyright legislation, while in *Eldred* the argument was that the statute was not constitutionally valid under the substantive limits of the Clause even if a species of copyright legislation. The difference is hardly subtle and should not be overlooked.

legislative powers.¹⁰ *Eldred v. Ashcroft* has since become part of the copyright canon, where it is understood as having broken new ground by concluding that neither the Intellectual Property Clause nor the First Amendment imposed independent limitations on copyright legislation that did not alter the “traditional contours” of copyright.¹¹ Embedded within the logic of Justice Ginsburg’s majority opinion in *Eldred* was, however, an observation that had direct echoes of the early exchange between Lessig and Rehnquist, when she observed that since the CTEA was a “rational enactment” the Court was therefore simply “not at liberty to second-guess congressional determinations and policy judgement[s] of this order, however debatable or arguably unwise they may be.”¹² The Court did not relish an institutional tussle with Congress over copyright policy.

In the years since, *Eldred* has come to be seen by copyright scholars as something of a one-off decision: as a decision that set up a clash between a reading of the Constitution and copyright policy, which the Court refused to recognize and countenance. Yet, in its reasoning—captured vividly by Justice Ginsburg’s quote—the Court foreshadowed an approach to its engagement with copyright law that would become obvious a few years later. Ignored in oversimplified accounts of *Eldred* is the reality that the decision planted the seeds for a general approach to copyright law, which I describe herein as the “institutionalist turn” in the Court’s copyright jurisprudence.

The institutionalist turn refers to the reality that over the last decade and a half, the Court’s copyright jurisprudence has come to focus less and less on directly resolving substantive issues within the landscape of copyright doctrine. It has instead become a principal site of debate and disagreement over issues that have a direct bearing on the role, competence, and legitimacy of the Court within the copyright system. The institutionalist turn does not imply that the Court’s decisions have altogether avoided engaging substantive copyright issues; merely that its engagement of copyright doctrine has come to be intertwined with—and often overshadowed by—strong institutional considerations. These considerations can be seen to cluster around three analytically interrelated themes: (i) the Court’s role as faithful

¹⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 187 (2002).

¹¹ *Id.* at 191.

¹² *Id.* at 208.

agent interpreting Congress's directives as contained in the complex Copyright Act of 1976, (ii) the nature of legislative-judicial interaction and deference in the domain of copyright lawmaking, and (iii) the continuity—or lack thereof—between copyright's adjudicative mechanisms and other legal areas.

U.S. copyright law has always been statutory in origin, with the Constitution expressly investing Congress with the power to make copyright laws.¹³ While the Act of 1976 certainly altered the level of detail and complexity of the statute, interpreting its provisions proved relatively straightforward and uncontroversial in the Court's early jurisprudence under the Act.¹⁴ The legislative origins of copyright presented the Court with no particular concerns in its adjudicatory role. This remained true even in the Rehnquist Court, where copyright opinions did not hesitate to directly engage questions of policy, despite the recognition that Congress remained the primary arbiter of such policy.¹⁵ Not only was the Court comfortable wading into substantive copyright policy, but an overwhelming majority of copyright opinions were also decided unanimously during this period.¹⁶ A few years into the Roberts Court this began to change, despite the text of the statute remaining unaltered. Applying the statute's various substantive provisions began generating serious disagreement among the Justices. While initially entangled with questions of copyright policy,¹⁷ it soon became apparent that the disagreement originated in competing visions of the Court's institutional role within the copyright

¹³ U.S. CONST. art. I, § 8, cl. 8. For the statutory origins of copyright law, see Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124; Joseph Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 88 (2004); Jennifer Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 96 CORNELL L. REV. 463, 475 (2010).

¹⁴ See, e.g., *Community for Creative Non-Violence v. Reid (CCNV)*, 490 U.S. 730 (1989); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 541–42 (1985).

¹⁵ See, e.g., *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (“[T]he policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement.”).

¹⁶ See *CCNV*, 490 U.S. at 732; *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 342 (1991); *Fogerty*, 510 U.S. at 519; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994); *Quality King Distributors Inc. v. L'anza Rsch. Int'l Inc.*, 523 U.S. 135, 138 (1998); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342 (1998); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 918 (2005).

¹⁷ See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng I)*, 568 U.S. 519, 536 (2013) (weighing the policy concerns of granting the “holder of an American copyright . . . permanent control over the American distribution chain . . . in respect to copies printed abroad but not in respect to copies printed in America”).

system, something that had rarely ever been directly addressed during the tenure of Chief Justice Rehnquist, with the exception of *Eldred*.

Much of this disagreement occurred around questions of statutory interpretation, where the issue of whether and how to give effect to Congress's intention on copyright questions soon became the principal frame for most questions of substantive copyright law. Some members of the Court took the position that owing to the comprehensive statutory nature of the field, the interpretive task was to be limited to the plain meaning of the statute, eschewing any direct engagement with considerations of copyright policy out of deference to Congress.¹⁸ Other members disagreed, instead adopting the position that the Court was obligated to interpret the statute by discerning Congress's intention—actual or imputed—from a variety of sources.¹⁹ All the same, the Justices agreed on one core idea: on substantive copyright questions, the answer “depend[ed] solely on statutory interpretation,”²⁰ which emerged as the principal frame for their decisions.

The Court's debates over statutory interpretation in copyright law, however, concealed a more foundational disagreement among the Justices of the Roberts Court. Copyright statutes prior to the Act of 1976 were sparse in detail and thus left it to courts to develop much (if not most) of copyright law incrementally, through the common law's accretive process. The Act of 1976 altered this, and codified (sometimes with alteration) much of the prior judge-made law.²¹ It thus consciously replaced the symbiotic approach to copyright lawmaking with one that emphasized the primacy of the legislature, leaving it to courts to reinvent their place in this changed landscape.²² Despite this change in the statute, neither the Burger nor Rehnquist Courts found it to require any real alteration in their approach to copyright questions. Not so in the Roberts Court, where debates over statutory interpretation were often proxies for disagreements over the appropriate

¹⁸ See *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1006 (2017).

¹⁹ See *Star Athletica*, 137 S. Ct. at 1034–35 (Breyer, J., dissenting); *Kirtsaeng I*, 568 U.S. at 557 (Ginsburg, J., dissenting).

²⁰ *Mazer v. Stein*, 347 U.S. 201, 214 (1954).

²¹ See Peter S. Menell, *The Mixed Heritage of Federal Intellectual Property Law and Ramifications for Statutory Interpretation*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 63, 64 (Shyamkrishna Balganesh ed., 2013); Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1103 (2020); Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y. L. SCH. L. REV. 477, 477 (1977); Zechariah Chafee, Jr. *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 504–509 (1945).

²² Pierre N. Leval, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049 (2001).

role of the Court (and the judiciary more generally) in copyright law. Dissenting opinions (and occasionally concurrences) routinely criticized the Court's opinions as interfering with Congress's prerogative to set federal copyright policy; and the Court's direct engagement with questions of copyright policy soon became taboo. The judicial role thus became a latent—and on occasion, obvious—point of disagreement in copyright opinions on the Roberts Court.

Lastly, the Court's turn toward questions of statutory interpretation and the appropriate judicial role in copyright cases was augmented by its embrace of a form of anti-exceptionalism about copyright's adjudicatory rules. In dealing with the procedural and remedial parts of copyright law—both statutory and non-statutory—the Court came to adopt an altogether different approach from the one seen in its engagement with substantive copyright doctrine.²³ Here, the Court's concern was instead in establishing the seamlessness between copyright adjudication and other forms of federal adjudication. At first blush, this may appear to run contrary to the institutional turn by evincing a degree of judicial immodesty. In reality, however, it served the institutional turn rather perfectly by relegating to the Court a domain of law that it was universally seen as best positioned to administer: the judicial process. Given that the institutionalist turn was at base about the competence and legitimacy of the Court within the copyright system, these exact same concerns were bolstered by the Court's engagement with the procedural and remedial elements of the copyright system since the Court was able to draw parallels and connections between copyright and other forms of federal adjudication.

The institutionalist turn described herein began to take shape toward the end of Chief Justice Rehnquist's time on the Court and fully crystallized several years into Chief Justice Roberts's tenure. While Roberts was formally seated as Chief Justice in 2005, it was not until several years later that the Roberts Court began its foray into copyright jurisprudence, triggering the new institutional dynamic.²⁴ Since that time, roughly a decade ago now, the Court has

²³ See *Reed Elsevier Inc. v. Muchnick*, 559 U.S. 154, 157 (2010); *Petrella v. MGM, Inc.*, 572 U.S. 663, 667 (2014); *Allen v. Cooper*, 140 S. Ct. 994, 996 (2020); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 884 (2019); *Rimini Street Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 874 (2019); *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng II)*, 136 S. Ct. 1979, 1981 (2016).

²⁴ See *Reed Elsevier*, 559 U.S. at 157.

decided twelve copyright cases.²⁵ By contrast, the Rehnquist Court decided a sum total of ten copyright cases in twice that amount of time.²⁶ What is additionally intriguing about the Roberts Court's copyright jurisprudence is its very selection of copyright cases and issues to address. Of the copyright decisions handed down by the Roberts Court half (six out of twelve) have been procedural and remedial,²⁷ i.e., adjectival. In twice as much time, the Rehnquist Court handed down only two such decisions.²⁸

In what follows, I describe the origins and entrenchment of the Court's institutionalist turn in its copyright jurisprudence and show how its copyright decisions reflect a heightened concern with the Court's institutional role and legitimacy. While the turn may have resulted in substantive copyright law doctrine coming to be sidelined in the Court's jurisprudence, it nevertheless entrenched a strong prudentialist impulse in the judicial engagement of the copyright system, one that directs attention away from the polarizing justificatory debates that have long surrounded substantive copyright law—often described as the “copyright wars.”²⁹ Yet in so doing, it also indirectly complicated copyright's own legitimacy crisis by injecting into it a new set of methodological disagreements involving statutory interpretation and the role of the judiciary in the copyright system.

In describing the institutionalist turn in the Court's engagement with copyright law, I am not suggesting that the phenomenon is unique to copyright law, or particularly trenchant therein. Indeed, the elements of the institutionalism seen in copyright are themselves

²⁵ See *id.*; *Golan v. Holder*, 565 U.S. 302 (2012); *Kirtsaeng I*, 568 U.S. 519; *Petrella*, 572 U.S. 663; *Am. Broadcast Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014); *Kirtsaeng II*, 136 S. Ct. 1979; *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017); *Fourth Estate*, 139 S. Ct. 881; *Rimini Street*, 139 S. Ct. 873; *Allen*, 140 S. Ct. 994; *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

²⁶ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Stewart v. Abend*, 495 U.S. 207 (1990); *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340 (1991); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Quality King Distributors Inc., v. L'anza Rsch. Int'l Inc.*, 523 U.S. 135 (1998); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *New York Times Co. v. Tasini*, 533 U.S. 483 (2001); *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

²⁷ See generally *Reed Elsevier*, 559 U.S. 154; *Petrella*, 572 U.S. 663; *Allen*, 140 S. Ct. 994; *Fourth Estate*, 139 S. Ct. 881; *Rimini Street*, 139 S. Ct. 873; *Kirtsaeng II*, 136 S. Ct. 1979.

²⁸ See generally *Fogerty*, 510 U.S. 517; *Feltner*, 523 U.S. 340.

²⁹ PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* (2014); WILLIAM PATRY, *MORAL PANIC AND THE COPYRIGHT WARS* (2009).

drawn from other areas of the Court's jurisprudence. My claim is instead that copyright law has proven to be an unexpectedly ideal vehicle for this shift in orientation, such that the trend is likely to continue into the future, so long as the concerns motivating it remain central to the Court. The noted First Amendment scholar Zechariah Chafee, Jr. once noted that "[c]opyright is the Cinderella of the law,"³⁰ in that its importance and relevance often emerge through happenstance and external factors. While he did not intend it as such, Chafee's metaphor is rather apt as a description of the Court's turn toward institutionalism in its dealings with copyright law.

I. THE STIRRING OF COPYRIGHT INSTITUTIONALISM

To understand the shift in the Court's approach to copyright cases that has come to be seen in its recent decisions, it is essential to note the salient features of its copyright jurisprudence in the immediately preceding era, i.e., during the Rehnquist Court. The Rehnquist Court heard and decided a total of ten copyright cases between 1986 and 2005. While they cumulatively addressed a wide range of substantive copyright issues, two in particular—decided unanimously a couple of years apart—exemplify the Court's pre-institutionalist approach: *Feist Publications v. Rural Telephone Service Co.*³¹ and *Community for Creative Non-Violence v. Reid* ("CCNV").³²

Decided in 1991, *Feist* involved a claim of copyright infringement brought by the producer of a telephone directory against a competitor that had copied the directory in its entirety.³³ In defense of its copying, the competitor argued that the directory did not satisfy the standard of "originality" mandated by the statute for works of authorship to become eligible for copyright. Writing for a unanimous Court, Justice O'Connor found the telephone directory to lack the requisite originality.³⁴ In support of its conclusion, the opinion made three significant (and interdependent) analytical moves.

To arrive at the conclusion that telephone directories were not original, the Court proceeded to reject an approach to originality

³⁰ Chafee, Jr., *supra* note 21.

³¹ 499 U.S. 340 (1991).

³² 490 U.S. 730 (1989).

³³ *Feist*, 499 U.S. at 342–44.

³⁴ *Id.* at 363–64.

that had come to be understood as the “sweat of the brow” doctrine, wherein a creator’s mere expenditure of *some* intellectual labor was viewed as sufficient to meet the originality standard.³⁵ Instead, the Court read into the requirement of originality the need for a “creative component,” an idea that it variously described as the “modicum of creativity” or the “creative spark.”³⁶ In addition to showing that a work therefore originated in its author, the work itself needed to reveal some minimal degree of creativity to qualify as original. In so doing, the Court was actively embracing the common law development of the doctrine, an incremental evolution that had predated the Copyright Act of 1976.³⁷ Indeed, the manner in which the opinion found aspects of the creativity requirement in precedent was vividly reminiscent of common law adjudication, despite the originality requirement having a statutory basis under the 1976 Act.

While not irrelevant, the statutory basis of originality was seen by the Court as exerting surprisingly little constraint on its reasoning. Instead, Justice O’Connor looked to the House and Senate Reports accompanying the 1976 Act to highlight Congress’s desire to preserve the judge-made standard of originality in the statute, which to the Court was an authorization for such judge-made evolution to continue.³⁸ To buttress this conclusion, it dug even further into the legislative history, to cite the views of the Copyright Office during the revision of the statute.³⁹

Justice O’Connor’s opinion for the Court made a further move that has never reappeared in copyright since. In explicating the Court’s standard for originality, the opinion treated its standard as deriving from the Intellectual Property Clause of the U.S. Constitution, specifically the words “writings” and “authors” therein.⁴⁰ In

³⁵ *Id.* at 352–54. For a general overview of the doctrine, see Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992).

³⁶ *Id.* at 346, 359.

³⁷ See generally Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1123–45 (2020) (discussing this evolution); Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 858 (1987) (noting how “courts had embroidered the old statute with a wealth of common law interpretation”).

³⁸ *Feist*, 499 U.S. at 355.

³⁹ *Id.* at 355 (citing to the views of the Register of Copyright during the copyright revision process).

⁴⁰ *Id.* at 346 (“Originality is a constitutional requirement.”).

thus constitutionalizing the originality requirement, the Court was advancing the idea that “[t]he *sine qua non* of copyright is originality.”⁴¹ In other words, even Congress was powerless to amend the copyright statute to eliminate or modify the originality requirement, once so understood to emanate directly from the Constitution. Nothing short of a constitutional amendment (or reinterpretation of the Constitution) would empower Congress to alter copyright’s originality requirement. The Constitution and its principal interpreter, the Court, rather than Congress, had final say over the doctrine.

What is salient in the Court’s reasoning is the matter-of-fact manner in which it strung these three independently significant moves together to build the case for its conclusion. Each of the moves was additionally uncontroversial enough internally on the Court so as to not even fracture its unanimity. *Feist* therefore unproblematically embraced the idea that it was making new law in common law style, developed its legitimacy for such lawmaking from the history and background of the statute rather than from its text alone, and immunized its lawmaking from Congressional scrutiny/override by deriving it directly from the text of the Constitution.

As a decision, *Feist* was hardly an outlier in its manner of dealing with the subject. Just two years prior in 1989, the Court in *Community for Creative Non-Violence (CCNV) v. Reid* had interpreted a particularly controversial part of the 1976 Act—the “work made for hire doctrine”—using a rather unconventional approach.⁴² Copyright’s work made for hire doctrine deals with works that are produced by one individual at the behest of another and treats the latter as both the author and owner of the work.⁴³ It thus deviates from copyright’s traditional presumption that the person actually producing the work is its author.⁴⁴ The statutory definition of a work made for hire identifies two separate circumstances under which a work is to be considered as made for hire, and *CCNV* dealt with one: where “a work is prepared by an employee within the scope of his or her employment.”⁴⁵

CCNV involved a sculpture produced by a sculptor based on an arrangement with the plaintiff non-profit organization. Despite their

⁴¹ *Id.* at 348.

⁴² 490 U.S. 730 (1989).

⁴³ See 17 U.S.C. § 101 (2020) (definition of a “work made for hire”).

⁴⁴ *Id.* § 201(a)-(b).

⁴⁵ *Id.* § 101.

extensive interaction, the parties had failed to formalize their contractual arrangement and when a dispute arose as to the ownership of the sculpture, the question that emerged was whether the sculptor was an employee of the organization, thereby rendering the sculpture a work made for hire.⁴⁶ In another unanimous opinion, this time written by Justice Thurgood Marshall, the Court found the sculptor to be an independent contractor and denied the organization's work made for hire claim.⁴⁷ Yet, the route that it took to arrive at that conclusion was anything but straightforward.

Central to the entire case was the manner in which the Court was to give meaning to the term "employee" that Congress had employed in the definition of work made for hire. Presented with four possible ways in which to understand the term, the Court settled on what it saw as the "common law" meaning of the term, deriving from the judge-made law of agency.⁴⁸ It rejected the alternatives as incompatible with the "language and structure" of the statutory definition, for which it made extensive resort to the Act's legislative history.⁴⁹ Much like it would later do in *Feist*, the Court in *CCNV* set out in great detail the motivation behind the doctrine, as well as the manner in which it was gradually shaped through the legislative process to achieve a "historic compromise."⁵⁰

To support the Court's recourse to the common law, Justice Marshall invoked the canon of common law conformity, noting that when Congress uses terms with a settled common law meaning, a court is obligated to infer a Congressional intent to incorporate that settled meaning into the statute, unless the statute suggests otherwise.⁵¹ The Court saw the statute's use of employment terminology as indicative of just such an intent, and thus concluded "that the term 'employee' should be understood in light of the general common law of agency."⁵² That general common law of agency, it further observed, was embodied in the *Restatement (Second) of Agency*, adopted in 1958.⁵³

⁴⁶ *CCNV*, 490 U.S. at 733–35.

⁴⁷ *Id.* at 737.

⁴⁸ *Id.* at 740.

⁴⁹ *Id.* at 742.

⁵⁰ *Id.* at 746.

⁵¹ *Id.* at 739 (relying on Court precedent for this canon of construction).

⁵² *Id.* at 741.

⁵³ *Id.* at 740.

The Court's principal move in the case was hardly subtle. By invoking the idea of common law conformity as its primary—and sole—interpretive mechanism, *CCNV* had effectively converted a statutory term into a common law one, both in form and in substance. Not only was Congress seen as relying on the settled common law meaning, but it was to be understood as doing so in a dynamic and ongoing process, i.e., by outsourcing the meaning of the term to the state common law of agency, as it would evolve and develop even after the enactment of the statute. In due course, this approach became unworkable owing to its unpredictability. Yet at the time, the decision made a concerted effort to retain judicial control over the employment-prong of the work made for hire doctrine, on the basis of an imputed Congressional intention to this effect. This was unlike in *Feist*, where the legislative history was unequivocal in suggesting that Congress had chosen to incorporate judge-made law (and by implication, further judicial lawmaking) into the statute.⁵⁴

Justice Marshall's opinion for the Court treated each of its inferences, imputations and presumptions as both uncontroversial and unproblematic. The Court's conversion of a statutory term into a common law one, its plunge into the legislative history of the provision and the compromise that it represented, and its decision to look to the *Restatement* as the authoritative embodiment of the common law—were seen as rather straightforward, and unworthy of any independent justification.

Viewed through the lens of the current Court's approach to copyright, both *Feist* and *CCNV* are remarkable decisions. Even while acknowledging the primacy of the statute, neither opinion shied away from engaging in the task of referencing copyright's goals and policies, as embodied in the statute's legislative history and overall constitutional structure. Today, such forays would be derided as tantamount to actual lawmaking. Both decisions instead viewed the statute as affirming (and requiring) the judiciary's involvement in developing copyright doctrine, a task that each opinion further treated as altogether unexceptional. Further, neither opinion saw its approach to statutory interpretation and reliance on specific canons and sources for that task as necessitating additional justification. Indeed, noteworthy

⁵⁴ *Feist*, 499 U.S. at 355 (quoting the House and Senate Reports which noted that the term originality was “purposely left undefined” since it was “intended to incorporate without change the standard of originality established by the courts” under the previous statute).

here is that Justice Scalia—who would go on to play a significant role in advocating a textualist approach to statutory interpretation that abjured recourse to legislative history⁵⁵—was already a member of the Court when both *Feist* and *CCNV* were unanimously decided, and signed on to both opinions’ extensive use of legislative history, engagement with copyright policy, and overt lawmaking.

Under the Rehnquist Court, copyright law was therefore neither a polarizing subject nor the site of deep methodological and institutional disagreement among members of the Court.⁵⁶ This would change over the course of the following decade. Three interrelated factors played a key role in this transformation.

The first was the change in the Court’s composition. Justice Thomas joined the Court a few months after *Feist*, Justice Ginsburg in 1993, and Justice Breyer in 1994. The latter two were particularly important additions for copyright, with direct substantive expertise in the field. Justice Ginsburg had written the majority opinion for the Court of Appeals that the *CCNV* decision endorsed and affirmed,⁵⁷ and Justice Breyer was well-known in the academic world for his early scholarly work adopting a skeptical view of copyright in new technologies.⁵⁸ Their substantive clashes on copyright issues would profoundly shape the Court’s jurisprudence.

The second was the emergence of “textualism” and its emphasis on the text of the statute as a distinctive approach to statutory interpretation,⁵⁹ a development that coincided with the personnel changes on the Court. Textualism’s most overt champion was Justice

⁵⁵ For a general overview of Scalia’s interpretive philosophy, see William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998).

⁵⁶ See generally Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801 (2009) (showing that the Justice’s votes in intellectual property cases are broadly predictable on the basis of ideology, but less so than in some other areas).

⁵⁷ *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988). She also authored a few other significant copyright opinions during her time on the D.C. Circuit. See *Nat’l Cable Television Ass’n v. Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983); *Atari Games Corp. v. Oman*, 888 F. 2d 878 (D.C. Cir. 1989); *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992); *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am, Inc.*, 808 F.2d 133 (D.C. Cir. 1987).

⁵⁸ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

⁵⁹ See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

Scalia, who began advancing the theory in his opinions shortly after his appointment to the Court in 1986. Characteristic of this approach was its connection to constitutional separation of powers, and thus a very particular vision of the judicial role in statutory domains.⁶⁰ Foreshadowing its impact, one prominent scholar of legislation thus predicted that if adopted, textualism would “represent a significant change in the way . . . the Court conceptualizes its role in interpreting statutes” since it represented a “bold rethinking of the Court’s role.”⁶¹

A third factor was specific to the copyright discourse. At the same time that textualism began to divide the Court methodologically and ideologically, substantive thinking about copyright law started becoming increasingly polarized.⁶² Fueled by the emergence of the internet and digital technologies, copyright law began seeing deep divisions around the core substantive issues of scope, coverage, duration, and remedies; a division that came to be described as the “copyright war.”⁶³ By the year 2000, this divisiveness started playing itself out in litigation that often pitted authors and content owners on one side against users, technology companies, and public interest groups on the other.

Then, in 2002 the “copyright war” landed on the front steps of the Supreme Court. While *Eldred v. Ashcroft*⁶⁴ was framed as a constitutional challenge to an amendment to the copyright statute, in reality it was the culmination of a decade-long effort to push back against copyright’s gradual expansion. The petitioners in the case tried convincing the Court that the words “for Limited Times” in the Intellectual Property Clause of the Constitution, and the First Amendment, each independently functioned as limits on Congress’s power to enact copyright legislation, which the statutory amendment transgressed.⁶⁵ In support of their argument, they relied heavily on the Court’s then-recent Commerce Clause jurisprudence, which had

⁶⁰ *Id.* at 673.

⁶¹ *Id.* at 624.

⁶² See PATRY, *supra* note 29, at 1–42 (2009); JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 15 (2011).

⁶³ See PATRY, *supra* note 29; TEHRANIAN, *supra* note 62; LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 16 (2002); Jonathan Zittrain, *How to End the Copyright Wars*, 457 NATURE 264 (2009).

⁶⁴ 537 U.S. 186 (2003).

⁶⁵ *Id.* at 193.

identified Congress's legislative power as having inherent limits embedded within its very grant.⁶⁶ Congress's power to enact copyright law, the petitioners argued, was no different.

In a 7-2 decision, the Court rejected the petitioners' challenge. While the majority considered plausible defenses for the statutory amendment, it ultimately decided the case on institutional grounds. Writing for the Court, Justice Ginsburg concluded that as long as the amendment was a rational exercise of legislative power, it was not the judicial role to examine the wisdom or suitability of that exercise.⁶⁷

As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause. . . . Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second-guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.

Each of the two dissenting opinions—one by Justice Breyer and the other by Justice Stevens—saw the majority's approach as an abdication of its judicial responsibility. Justice Stevens was particularly polemical:⁶⁸

By failing to protect the public interest in free access to the products of inventive and artistic genius—indeed, by virtually ignoring the central purpose of the Copyright/Patent Clause—the Court has quitclaimed to Congress its principal responsibility in this area of the law. Fairly read, the Court has stated that Congress' actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure. It is not hyperbole to recall the trenchant words of Chief Justice John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

In *Eldred*, the majority emphasized a consideration that was altogether new to its copyright jurisprudence: inter-branch coordination or, to use the language of Legal Process theory, "institutional

⁶⁶ Lessig, *supra* note 4, at 60 (discussing petitioner's strategy of relying on *United States v. Lopez*, 514 U.S. 549 (1999), in *Eldred*).

⁶⁷ *Eldred*, 537 U.S. at 222.

⁶⁸ *Id.* at 242 (Stevens, J., dissenting).

settlement.”⁶⁹ According to this principle, lawmaking power is to be allocated to different institutions on the basis of their institutional competence and decisions rendered in the exercise of such power are to be respected by other institutions absent strong countervailing considerations.⁷⁰ While copyright law had long been recognized as statutory in origin, that statutory basis had never—until *Eldred*—been seen as embodying an institutional settlement that needed to be respected and deferred to. As illustrated by both *Feist* and *CCNV*, the Court had been perfectly comfortable in sharing lawmaking responsibility with Congress, especially in areas where Congress had either endorsed such sharing or acquiesced in it.

To be sure, *Eldred* did not transform the Court’s engagement with copyright law overnight. As previously noted, it presented the Court with a unique set of constitutional questions. All the same, the majority’s engagement with Congress’s authority to make copyright law, and its deferential approach to such authority had its roots in a commitment to the ideal of separation of powers. And by making it a distinct part of the calculus, *Eldred* forced the Court to confront its very idea of the judicial role in copyright adjudication.

Federal copyright statutes prior to the Act of 1976 were all characterized by their brevity and use of open-ended language.⁷¹ Courts took this to imply an active role for them in the lawmaking process, through “a constructive, beneficial partnership” as one federal judge observed.⁷² In the years immediately after the passage of the 1976 Act, this mindset did not change. This change was especially true of doctrinal areas that had been previously developed by courts but codified by Congress in the new statute. *Feist* and *CCNV* exemplified the continuation of this mindset while *Eldred* successfully sowed the seeds of change.

Even though *Eldred* was a constitutional challenge to the copyright statute rather than a case about the interpretation of the statute

⁶⁹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (1958) (describing it as “the central idea of law”). See generally William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2045 (1994) (noting the centrality of the idea to Legal Process).

⁷⁰ See Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1143 (2005).

⁷¹ See Liu, *supra* note 13, at 94–101 (describing the nature of these early statutes and their reliance on judge-made law for elaboration and further development).

⁷² Leval, *supra* note 22, at 1062.

as such, the decision's posture toward Congress implicitly rejected the idea of a lawmaking partnership. The Court's belief that it was "not at liberty to second-guess congressional determinations and policy judgements" in the area of copyright "however debatable or arguably unwise they may be" openly endorsed the idea that Congress was the principal lawmaking institution in copyright, which it was bound to respect.⁷³ *Eldred* thus set the stage for the Court's turn toward institutionalist considerations in its copyright jurisprudence.

II. COPYRIGHT'S INSTITUTIONALIST TURN AT THE COURT

While *Eldred* laid the groundwork for the Court's turn toward institutional considerations in its copyright jurisprudence, it also brought to the surface a substantive philosophical difference between the two Justices on the Court most knowledgeable about copyright: Justices Breyer and Ginsburg. Breyer's lengthy dissent in *Eldred* saw the amendment at issue in the case—the CTEA—to be substantively problematic as a matter of copyright policy, since it endorsed a private benefit (to existing authors/owners) at the expense of the public domain.⁷⁴ The logic of deference that informed the majority, was to him, little more than an endorsement of the CTEA itself. His opinion therefore went to considerable length to showcase the problems with the amendment, often well beyond the positions taken by the petitioner. Ginsburg construed this statement as needless advocacy, at one point criticizing Breyer's dissent as not "restrained" but instead "[m]oving beyond the bounds of the parties' presentations, and with abundant policy arguments but precious little support from precedent."⁷⁵

Eldred marked the beginning of an important fracturing in the Court's substantive position on copyright questions. In *Eldred*, Justice Breyer positioned himself rather firmly as a copyright-skeptic who believed that the copyright system was in need of retrenching, having advanced that position in his early academic work.⁷⁶ Justice

⁷³ *Eldred*, 537 U.S. at 208.

⁷⁴ *Eldred*, 537 U.S. at 255–63 (Breyer, J., dissenting).

⁷⁵ *Id.* at 199 n.4.

⁷⁶ Breyer, *supra* note 58, at 281. It is worth noting that this appears to be a departure from Breyer's own engagement with congressional expertise and statutes in other contexts. One study found that in 2005, he was the least "inclin[ed] to strike down Congressional laws," based on his voting patterns. Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES

Ginsburg's position was more neutral. She undoubtedly saw significant virtue in the functioning of the copyright system that Congress had developed and was suspicious of judicial efforts to thwart legislative policy in the domain. The year before *Eldred* was argued, she had penned her first copyright opinion for the Court in *New York Times Co. v. Tasini*, siding with freelance authors against their publishers in an opinion that excavated the history and logic behind a little-known provision of the copyright statute.⁷⁷ Notably, Breyer dissented in the case.⁷⁸ Justice Ginsburg's opinion in *Eldred*, in many ways, represented her overall approach to copyright: a strong presumption of rationality in the system that merited deference.

The Breyer-Ginsburg divide on copyright became undeniable by the end of the Rehnquist Court. In *MGM Studios, Inc. v. Grokster, Ltd.*,⁷⁹ decided a few months before the death of Chief Justice Rehnquist, the Court unanimously decided that a peer-to-peer filesharing service was liable for indirect copyright infringement under a new theory of "inducement" that it developed in the case. Yet, the Court's unanimity was deceptive, evidenced by the two separate concurring opinions—by Breyer and Ginsburg—that vehemently disagreed with *each other* over the scope of the Court's precedent on contributory infringement, an issue that the opinion for the full Court decided to address merely in passing.⁸⁰ During their time together on the Court,

(July 6, 2005), <https://www.nytimes.com/2005/07/06/opinion/so-who-are-the-activists.html>. Indeed, Breyer advanced this idea of deference in his non-judicial writing as well, wherein he described his philosophy as a Justice on the court. See STEPHEN J. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 49 (2006) ("Courts can defer to the legislature's own judgment insofar as that judgment concerns matters (particularly empirical matters) about which the legislature is comparatively expert."). In the same non-judicial writing, he however identified a limit to this deference, noting that "courts should not defer when they evaluate the risk that reform legislation will defeat the participatory self-government objective itself." *Id.* Perhaps the legislation at issue in *Eldred* and much of copyright law since its origin represents such a departure in his thinking. See *Eldred*, 537 U.S. at 265–66 (Breyer, J., dissenting) (noting his concern for deference to Congress, but concluding that the statute was deeply problematic in conferring a private benefit at the expense of the public).

⁷⁷ *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

⁷⁸ *Id.* at 506 (Stevens, J., dissenting). Justice Breyer joined Justice Stevens's dissent.

⁷⁹ 545 U.S. 913 (2005).

⁸⁰ *Id.* at 942 (Ginsburg, J., concurring); *id.* at 949 (Breyer, J., concurring). The disagreement revolved around the interpretation of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). The Court in *Grokster* sidestepped the issue altogether. See *Grokster*, 545 U.S. at 934 ("[We] leave further consideration of the *Sony* rule for a day when that may be required.").

it handed down a total of 15 copyright decisions.⁸¹ In those decisions, Justice Ginsburg wrote an opinion 11 times and Justice Breyer on 9 occasions, indicative of their strong views on the subject. The two Justices wrote opinions specifically disagreeing with each other on 7 of those occasions and voted on opposing sides in 7 of the 15 cases. These numbers capture the extent of their disagreement on copyright matters.

It is of course difficult to know the precise effect of the Breyer-Ginsburg disagreement on the other Justices of the Court. Both Breyer and Ginsburg were reliable progressive votes among the Court's members and routinely voted on the same side on the Court's most politically charged cases.⁸² Indeed, it is because of this overall alignment in views that the extent of their disagreement on copyright matters is little known outside of copyright circles.⁸³ All the same, the overt manifestation of their disagreement toward the end of the Rehnquist Court coincided with an underappreciated, yet readily discernible trend in the Court's approach to copyright cases under Chief Justice Roberts. And this was the Court's overt turn toward institutional considerations in copyright matters.

The Roberts Court's approach to copyright law had a direct connection to broader debates about the Court's institutional legitimacy.

⁸¹ *Quality King Distributors Inc. v. L'anza Rsch. Int'l Inc.*, 523 U.S. 135 (1998); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *Grokster*, 545 U.S. at 913; *Tasini*, 533 U.S. at 483; *Eldred*, 537 U.S. at 186; *Reed Elsevier Inc. v. Muchnick*, 559 U.S. 154 (2010); *Golan v. Holder*, 565 U.S. 302 (2012); *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng I)*, 568 U.S. 519 (2013); *American Broadcast Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014); *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng II)*, 136 S. Ct. 1979 (2016); *Star Athletica LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019); *Rimini Street Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019); *Allen v. Cooper*, 140 S. Ct. 994 (2020); *Georgia v. Public.Resource.Org, Inc. (PRO)*, 140 S. Ct. 1498 (2020). In addition to these, there were two cases where the Court affirmed the lower court's decision because of an equally divided 4-4 court. See *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233 (1995); *Omega SA v. Costco Wholesale Corp.*, 562 U.S. 40 (2010).

⁸² For a fascinating account of why Justices Breyer and Ginsburg might have disagreed within copyright, traced back to their differing approaches to adjudication, see Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1674-75 (2016).

⁸³ See, e.g., Jeremy Bowers, Adam Liptak & Derek Willis, *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES (July 3, 2014), <https://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html> (noting how Justices Ginsburg and Breyer agreed with each other overall 88% during the 2014 Term).

Early into his term, Chief Justice Roberts emphasized that ensuring the legitimacy of the Court as an “impartial institution” would be a principal consideration during his leadership.⁸⁴ As he noted at the time, this was to be realized through fewer separate opinions and greater unanimity in the Court’s decisions.⁸⁵ In reality, this vision never came to be realized, with the Court continuing to offer splintered decisions on a wide range of matters including copyright law.⁸⁶ In the ten copyright cases that the Rehnquist Court decided, seven were unanimous, five of them on substantive copyright doctrine.⁸⁷ Of the twelve decided by the Roberts Court, five were unanimous and they all involved procedural and remedial—as opposed to substantive—questions.⁸⁸

Unanimity was not, however, the only means of furthering the Court’s institutional legitimacy. Equally important to such institutional legitimacy was the Court’s outward commitment to the ideal of separation of powers, which Roberts described as “respecting Congress” and adopting a norm of “deference [to the legislature] in matters of policy.”⁸⁹ This approach to institutional legitimacy was, of course, controversial on its own, as the line between judicial deference (to other branches) and judicial abdication became a point of contention. Whether the other Justices shared his views on this topic or not, the norm of deference and its overt connection to the Court’s institutional role and legitimacy infiltrated their reasoning in copyright matters.

⁸⁴ See Jeffrey Rosen, *Roberts’s Rules*, THE ATLANTIC, Jan.-Feb. 2007, <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

⁸⁵ *Id.* (noting how “he had made it a priority of his first term to promote unanimity and collegiality on the Court”).

⁸⁶ Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 771 (2015) (“Under his leadership ... the patterns that concerned the Chief Justice in 2006 have been maintained.”).

⁸⁷ *Community for Creative Non-Violence v. Reid (CCNV)*, 490 U.S. 730, 732 (1989); *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 342 (1991); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 519 (1994); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994); *Quality King Distributors Inc. v. L’anza Rsch. Int’l Inc.*, 523 U.S. 135, 138 (1998); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342 (1998); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 918 (2005).

⁸⁸ *Reed Elsevier Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (dealing with registration); *Allen v. Cooper*, 140 S. Ct. 994, 996 (2020) (dealing with state sovereign immunity for copyright infringement); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.Com, LLC*, 139 S. Ct. 881, 884 (2019) (dealing with copyright registration); *Rimini Street Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 874 (2019) (dealing with the assessment of costs); *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng II)*, 136 S. Ct. 1979, 1981 (2016) (dealing with attorney’s fees).

⁸⁹ *Nat’l Fed. of Independent Business v. Sebelius*, 567 U.S. 519, 538 (2012).

Much has been written and said about the Court's institutional legitimacy over the last decade.⁹⁰ Debates about the Court's legitimacy have, however, focused principally on the Court's high-profile public law cases, where perceptions of its partisanship and engagement with the other branches of government are most obvious. These same concerns have inflected the Court's copyright jurisprudence in unappreciated ways by intertwining arguments (and disagreements) over institutional legitimacy and separation of powers with questions of copyright doctrine. Institutionalism thus emerged as a common thread in the Court's copyright opinions, and often in subtle ways. As used here, "institutionalism" and "institutional considerations" are descriptors for the idea that the Court's legitimacy and public credibility are important normative considerations that ought to influence its substantive work.

Eldred had already oriented the Court toward institutional considerations in copyright law. The Court's copyright decisions between 2010 (the year that the Roberts Court decided its first copyright case⁹¹) and 2021 further internalized this institutionalism, which manifested itself in the Court's copyright opinions in three interconnected ways. The first manifestation involved its opinions advancing arguments of a *direct institutionalist* nature, wherein members of the Court raised questions and concerns about the appropriate role of the Court (and the judiciary more generally) in copyright matters. While relatively rare, this line of argument has become more common in the Court's most recent copyright disagreements. The second manifestation centered around arguments that were *indirectly institutionalist*. Here, debates surrounding the interpretation of the copyright statute came to be influenced by the nature and degree of deference that needed to be accorded to Congressional intent, either as manifested in the statute or other sources. While the disagreement between the Court's textualist and non-textualist Justices captured some of this indirect institutionalism, it also emerged independent of that debate, and among the next-textualist members of the Court as well.

The third form in which the Court's copyright institutionalism manifested itself was a likely consequence of the Breyer-Ginsburg

⁹⁰ See, e.g., RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018); MICHAEL ZILLS, *THE LIMITS OF LEGITIMACY: DISSIDENT OPINIONS, MEDIA COVERAGE, AND PUBLIC RESPONSES TO SUPREME COURT DECISIONS* (2015); Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing FALLON, *supra*); Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (2012).

⁹¹ *Reed Elsevier*, 559 U.S. 154.

disagreement on the Court over substantive copyright doctrine. At the same time that it became increasingly clear that the Court was likely to splinter on the most pressing substantive copyright questions and thus contribute to concerns about the Court's overall institutional legitimacy, the Justices began coalescing around aspects of the copyright system that (a) did not involve substantive copyright policy where Justices Breyer and Ginsburg each held strong and divergent views, and (b) showed significant continuity with other areas of federal litigation. In short order, the Roberts Court began granting certiorari in cases involving adjectival—i.e., procedural and remedial—aspects of the copyright system. Six of the twelve copyright matters decided by the Roberts Court fell into this category.⁹²

While these grants surprised many in the copyright world given the number of crucial substantive copyright questions that the Court refused to hear, this part of the Court's copyright jurisprudence is best understood as driven by its institutionalism as well. To the extent that these adjectival questions implicated issues that were hardly unique to copyright law and focused on the enforcement and adjudication of copyright claims by reference to principles and doctrines that were somewhat universal, the Court's intervention therein supplemented—rather than detracted from—its overall strategy of legitimacy. Speaking to a jurisdictional or remedial question was something that was unlikely to be viewed as stepping on Congress's policy-making, especially if the Court was willing to speak in one voice. To the contrary, it was more likely to be seen as principally within the Court's domain and competence, as administrator of the federal judicial system. Not surprisingly, *all* of the Roberts Court's unanimous copyright decisions—a total of five—came from this category of copyright cases, which as a whole generated consensus among the Justices in all but one instance. This *adjectivalism* undoubtedly served both of Chief Justice Roberts's legitimacy goals—greater consensus and avoidance of policy—discussed previously.

The discussion that follows unpacks each of the three forms of institutionalism seen in the Roberts Court's copyright jurisprudence. It does so analytically rather than chronologically, to emphasize that the Court's turn to institutionalism in the domain of copyright law is to be understood less as a concerted strategy on the part of its members

⁹² See *Reed Elsevier*, 559 U.S. 154; *Petrella*, 572 U.S. 663; *Kirtsaeng II*, 136 S. Ct. 1979; *Fourth Estate*, 139 S. Ct. 881; *Rimini Street*, 139 S. Ct. 873; *Allen*, 140 S. Ct. 994.

or leadership, but instead as a frame through which to understand the coherence and logic of its copyright jurisprudence.

A. DIRECT INSTITUTIONALISM: APPROPRIATE JUDICIAL ROLE

It is widely recognized that in enacting the Copyright Act of 1976, Congress envisioned a role for federal courts adjudicating copyright disputes that was fundamentally different from what they had been doing under prior statutes.⁹³ Instead of leaving it to courts to extend the statute's abstract principles into new contexts and thus play a co-equal role in the development of copyright law, Congress now envisioned itself as the principal lawmaker in the field. This "shift in direction for the very philosophy" of copyright resulted in the 1976 Act attempting to comprehensively codify much of copyright law, including areas previously developed by courts incrementally.⁹⁴ In its level of detail and coverage, Congress implicitly demanded that its vision of copyright policy obtain a new level of deference from courts. It was not until *Eldred* that the Court overtly acceded to this demand and adopted a vision of the judicial role in copyright matters that showed open deference to Congress's policy choices in the area. To be sure, *Eldred* was a constitutional matter. Yet in the Roberts Court, its logic resonated well beyond.

Nearly a decade after *Eldred*, in what was only the second copyright case decided under Chief Justice Roberts, the Court confronted a nearly identical constitutional challenge to an amendment made by Congress to the copyright statute. In *Golan v. Holder*,⁹⁵ the petitioners argued that an amendment to the copyright statute, the Uruguay Round Agreements Act (URAA) enacted by Congress in order to give effect to international treaty obligations, was a violation of the Intellectual Property Clause and First Amendment.⁹⁶ In an opinion written by Justice Ginsburg, a majority of the Court rejected the challenge on the same grounds that it did in *Eldred*: the Court had "no warrant to reject the rational judgement [of] Congress."⁹⁷

⁹³ See Liu, *supra* note 13, at 102; Litman, *supra* note 37, at 858–59.

⁹⁴ Ringer, *supra* note 21, at 479.

⁹⁵ 566 U.S. 302 (2012).

⁹⁶ *Id.* at 315–18.

⁹⁷ *Id.* at 327.

Yet unlike in *Eldred*, the petitioners in *Golan* presented the Court with a policy rationale that cut against the URAA, deriving from what is known as the “orphan works” problem, involving “older and more obscure works with minimal commercial value that have copyright owners who are difficult or impossible to track down.”⁹⁸ The URAA sought to restore works that had fallen into the public domain back under copyright protection and the petitioners feared that this restoration would impose prohibitive administrative costs on those seeking to use such restored works when they were nevertheless orphaned.⁹⁹ Justice Breyer’s dissenting opinion in *Golan* paid special attention to the orphan works problem, which he saw as undermining the rationality of the URAA. To the majority, this was simply not a judicial prerogative. While acknowledging the gravity of the problem, Justice Ginsburg was clear that the issue was simply not “a matter appropriate for judicial, as opposed to legislative, resolution.”¹⁰⁰ Among her reasons were “the host of policy and logistical questions” underlying the problem and its solution.¹⁰¹ Second-guessing Congress’s policy choices in copyright law—in the name of constitutional scrutiny—was not an appropriate role for the Court.

For the most part, disagreement over institutional considerations in the Court’s copyright jurisprudence presented itself only ever indirectly, i.e., through statutory interpretation. *Golan* raised the issue since it involved a constitutional question where the Court was *asked* to override Congress. While a few opinions alluded to the concern thereafter, debates over institutional considerations remained for the most part submerged under disagreement relating to statutory interpretation, which as we shall see was far more common. All the same, the form of direct institutionalism seen in *Eldred* and *Golan* reached an unexpected crescendo and divided the Court rather sharply in a case from its 2019 Term: *Georgia v. Public.Resource.Org., Inc. (PRO)*.¹⁰²

PRO involved a relatively obscure copyright doctrine known as the government edicts doctrine, which denies copyright protection to texts produced by government bodies and agencies in the exercise

⁹⁸ *Id.* at 355 (Breyer, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 334.

¹⁰¹ *Id.*

¹⁰² 140 S. Ct. 1498 (2020).

of their lawmaking functions.¹⁰³ The principal creation of three nineteenth-century Supreme Court cases,¹⁰⁴ and with no mention in the text of the statute,¹⁰⁵ the doctrine today denies copyright to statutes, judicial opinions, administrative regulations, and a host of other legal texts. At issue in the case was the question whether it applied to annotations accompanying an official state statute, which had received the imprimatur of the state legislature and been merged into a single “official” code.¹⁰⁶ In a splintered 5-4 decision, the Court found the doctrine to apply and denied protection to the state annotations.

The majority opinion in *PRO* was the first—and to date only—copyright opinion written by Chief Justice Roberts. Relying on the Court’s old precedents, which he rooted in the idea of authorship, Roberts developed what he saw as a “straightforward rule” in the case.¹⁰⁷ Since “authorship” found mention in the statute, he treated the precedents as entirely compatible with the statute and found it altogether unproblematic to extend the logic of the doctrine to annotations. His opinion provoked two independent dissents: one by Justice Ginsburg¹⁰⁸ and the other by Justice Thomas.¹⁰⁹ In his dissent, Justice Thomas challenged the majority’s interpretation of the text and common law precedents, and then went one step further arguing that “the majority ha[d] strayed from its proper role” by

¹⁰³ *Id.* at 1504–05.

¹⁰⁴ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

¹⁰⁵ It is of course not unique in this respect. Copyright law embodies other non-statutory doctrines as well, such as substantial similarity and indirect infringement.

¹⁰⁶ *PRO*, 140 S. Ct. at 1504–05.

¹⁰⁷ *Id.* at 1506.

¹⁰⁸ *Id.* at 1522 (Ginsburg, J., dissenting) (joined by Justice Breyer). It remains unclear why Justice Breyer chose to join Justice Ginsburg’s dissenting opinion, in addition to his joining Justice Thomas’s. One plausible explanation has less to do with the actual content of Justice Ginsburg’s dissent, and instead with the strength of his disagreement with the majority in the case.

¹⁰⁹ *Id.* at 1513 (Thomas, J., dissenting) (joined by Justices Alito and Breyer). It is interesting to note that Justice Breyer refrained from joining one part and one footnote in Justice Thomas’s dissent. In that Part, Part II-A, Justice Thomas unpacked the majority’s textualist analysis to argue that its reasoning found little support in the text of the statute, except through the “magic wand of *ipse dixit*.” *Id.* at 1520–21. And that footnote—footnote 6—dealt with Justice Thomas’s views on Supreme Court precedent that had come to be understood differently over time, even when not overruled, and the value of separate opinions in different cases. *Id.* at 1521 n.6. Presumably, Justice Breyer’s disagreement with the implicit political and methodological underpinnings of these views triggered his refusal to join the footnote.

usurping policy decisions that were the exclusive prerogative of Congress to make.¹¹⁰ He put the point even more sharply. Not only did he disagree with the majority's actual conclusion in the case, but he also saw that conclusion as problematic in that it was "the result of [the Court's] meddling" in copyright's legislative scheme, when it was instead "bound to respect" all of "the deliberative legislative choices" made by Congress.¹¹¹ To Justice Thomas, the majority's reasoning—in *both* form and substance—involved an inappropriate exercise of the "judicial role,"¹¹² a point that the Chief Justice's opinion sought to vehemently counter.¹¹³

The institutionalist rhetoric about "judicial role" that divided the Justices in *PRO* was no coincidence. A few months after the Court announced its decision in the case, a news report revealed that the *PRO* case had involved unusually intense internal wrangling among the Justices.¹¹⁴ The report claimed that during private conference following oral argument, Justice Thomas's opinion had garnered enough votes to be the majority opinion, with the Chief Justice's view constituting the minority. Shortly thereafter, Chief Justice Roberts managed to persuade one other Justice over to his side, allowing him to "capture[] the majority" from Justice Thomas.¹¹⁵ While this maneuvering was of course nowhere near as climactic as Chief Justice Roberts's last-minute switch of his vote in *NFIB v. Sibelius* that has since come to be hailed as an overt institutional move,¹¹⁶ it nevertheless suggests that Roberts saw his opinion in *PRO* to be of some institutional significance, despite its arcane subject matter.

A closer look at Chief Justice Roberts's opinion suggests that a good part of that significance may have come from the desire to maintain the Court's nineteenth-century precedents rather than abrogate them on a

¹¹⁰ *Id.* at 1522.

¹¹¹ *Id.*

¹¹² *Id.* at 1515.

¹¹³ *Id.* at 1512 n.4.

¹¹⁴ Joan Biskupic, *Behind Closed Doors During One of John Roberts' Most Surprising Years on the Supreme Court*, CNN (July 27, 2020), <https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html>. For a similar account speculating on why Chief Justice Roberts shifted his position in *NFIB v. Sibelius*, see MARK TUSHNET, *IN THE BALANCE* (2013).

¹¹⁵ *Id.*

¹¹⁶ For a full account, see JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 221 (2019).

theory of desuetude. To treat them as outdated simply because they relied on an outmoded understanding of the “author” and legal publishing, struck him as too conjectural and potentially dangerous. Justice Thomas viewed the Court’s nineteenth-century precedents with suspicion, worrying that they endorsed a view of lawmaking that had since been abandoned.¹¹⁷ To the majority, this was not what the judicial role entailed. It instead mandated that the Court “apply the reasoning and results the Court voted on and committed to writing.”¹¹⁸ To Chief Justice Roberts, therefore, maintaining the integrity of the Court’s own precedents was of institutional significance, a point that his opinion reiterated when directly presented with an argument from the petitioner that the precedents did not represent sound “copyright policy.” Such an “appeal to copyright policy” to overturn precedent, and as an independent basis for the Court’s decision, was to him simply “addressed to the wrong forum.”¹¹⁹

PRO may have therefore been inconsequential as far as its own subject matter went. And yet it fractured the Court around the idea of the “judicial role” in copyright adjudication, an idea that went well beyond the domain of statutory interpretation. In all the back and forth between the opinions, it is easy to overlook the reality that both the majority opinion and Justice Thomas’s dissent agreed on one crucial point: Congress, and “not the court[,],” was to decide how best to pursue copyright policy, a proposition for which they each independently cited the exact same sentence from *Eldred*.¹²⁰ *PRO* thus confirmed that the Court as a whole had arrived at the recognition that the judicial role in copyright cases simply did not extend to its engagement with policy. That was instead the exclusive domain of Congress. What they disagreed on was the secondary question of *how* to give effect to that role. The logic of *Eldred* had successfully percolated deep into the Court’s copyright adjudication.

B. INDIRECT INSTITUTIONALISM: STATUTORY INTERPRETATION

In the Roberts Court, institutional considerations entered copyright jurisprudence most frequently in the name of statutory interpretation.

¹¹⁷ *PRO*, 140 S. Ct. at 1515–17 (Thomas, J., dissenting).

¹¹⁸ *Id.* at 1512 n.4.

¹¹⁹ *Id.* at 1511.

¹²⁰ *Id.* at 1511, 1522.

While the Copyright Act of 1976 was a comprehensive piece of copyright legislation, its component parts embodied rules of varying lineages. In some areas, such as originality and fair use, Congress merely codified pre-existing judge-made law with little to no change.¹²¹ In others, such as collective works, public performance and first sale, it retained the prior doctrine but with significant alteration.¹²² And in yet others, such as preemption and joint works, it constructed rules and doctrines anew.¹²³ Independent of all these categories were additional copyright doctrines such as government edicts and substantial similarity that Congress chose to ignore altogether in its codification, seemingly acquiescing in their continued existence through its silence. In short, the Act of 1976 was a complex statutory enactment and the culmination of over two decades of compromise. Surprisingly little of this complexity produced serious disagreement among the Justices during the Rehnquist Court.

Not so in the copyright jurisprudence of the Roberts Court. *All* of the Roberts Court's decisions that addressed a substantive issue in copyright law generated disagreement among the Justices around the interpretation of the statute. To be sure, some of this was a direct consequence of the rise of textualism on the Court, especially under the stewardship of Justice Scalia (and later Justice Thomas). Yet, textualism is at best a partial explanation. Disagreement on matters of statutory interpretation arose on the Court even among the non-textualist Justices. Indeed, neither Justice Ginsburg or Breyer has ever embraced textualism as their preferred approach to interpreting statutes. A large part of this disagreement arose from competing views of the Court's role in engaging Congress's vision of copyright as reflected in the statute and beyond. All the same, the disagreement masked a unified willingness among members of the Court to refrain from overtly engaging in the development of copyright policy.

*Kirtsaeng v. John Wiley & Sons, Inc.*¹²⁴ was the first substantive copyright matter decided by the Roberts Court. Decided the year after *Golan*, the case involved the first sale doctrine, which exempts the owner of a "lawfully made" copy to sell it without triggering the

¹²¹ See, e.g., 17 U.S.C. §§ 102(a), 107.

¹²² *Id.* §§ 201(c), 106(4), 109(a).

¹²³ *Id.* §§ 301, 101.

¹²⁴ 568 U.S. 519 (2013).

distribution right or its subsidiary, the importation right.¹²⁵ Each of the three elements at issue was codified afresh by Congress in 1976: the first sale doctrine in § 109(a), the distribution right in § 106(3), and the importation right in § 602(a)(1). The controversy that triggered the case involved the interpretation of the phrase “lawfully made” in § 109(a), which one side interpreted as a geographic restriction and the other as a non-geographic one. In an opinion for the majority, Justice Breyer preferred the non-geographic interpretation. Interpreting the phrase using its language, context and “common law history,” the majority concluded that Congress could not have intended a geographic reading of the term since it would have vitiated its own policy goals for copyright.¹²⁶

In a scathing dissent, Justice Ginsburg saw the majority as doing anything but interpreting Congress’s design. Describing the majority’s position instead as a “stunning” and “bold departure from Congress’ design,” she chastised the opinion for substituting its own views on the first sale doctrine for Congress’s in the name of interpretation.¹²⁷ After adopting a textual analysis of the statute, she then proceeded to undertake a detailed scrutiny of the provision’s legislative history and the different treaty obligations that committed the U.S. to a geographic reading of the phrase.¹²⁸ Interestingly enough, Justice Ginsburg’s dissent drew the support of Justices Kennedy and Scalia, with the latter joining the dissent except for its reliance on legislative history.¹²⁹

What is interesting about the Breyer-Ginsburg disagreement in *Kirtsaeng* is less that they disagreed as such on the virtues of their respective substantive positions, with one (Breyer) preferring a narrowing of the copyright owner’s rights and the other (Ginsburg) adopting a more expansive reading of those rights. It is instead that both opinions framed their disagreement as an *interpretive* one and enveloped it in

¹²⁵ 17 U.S.C. § 109(a).

¹²⁶ *Kirtsaeng I*, 568 U.S. at 530.

¹²⁷ *Id.* at 557 (Ginsburg, J., dissenting).

¹²⁸ *Id.* at 561–78.

¹²⁹ Which was in keeping with Justice Scalia’s views on legislative history. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 35 (1997) (taking the position that legislative history is unconstitutional). For a critique, see Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia’s Campaign Against Legislative History*, 105 CORNELL L. REV. 1023 (2020); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849 (2013).

the task of discerning Congress's presumed "intent" on the question. Both opinions therefore steadfastly adopted a "faithful agent" account of the Court's role in cases involving domain, even though their disagreement was substantive.¹³⁰ The very move to statutory interpretation for what was in effect a substantive disagreement over policy—the question of whether to adopt a domestic or international view of exhaustion (i.e., first sale)—highlights the institutionalism that had set in.

A similar interpretive division was to be seen the very next year in *American Broadcasting Cos. v. Aereo, Inc.*¹³¹ The defendant in the case offered its subscribers broadcast television programming over the internet for a monthly fee. Its technology assigned each user an individual (dime-sized) antenna to pick up the appropriate broadcast signal based on the viewer's choice of programming and thereafter made a temporary copy of the content, which it streamed to the viewer. Each of these technological nuances (antenna, temporary copy) was designed to differentiate it from ordinary cable television operators.¹³² Copyright owners whose content was transmitted to viewers through the platform commenced an action for infringement. The dispute centered on whether the defendant had engaged in a "public performance" in violation of the exclusive right to publicly perform the work that the statute grants copyright owners.¹³³

In an opinion for a six-member majority of the Court, Justice Breyer found the defendant to have publicly performed the work. Much—if not all—of the Court's reasoning in interpreting the phrase "public performance" relied on the history behind Congress's inclusion of that

¹³⁰ See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) ("The view that federal courts function as the faithful agents of Congress is a conventional one . . . [and] disputes centered around how best to implement it."); Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1567–68 (2010) (noting the existence of "internal divisions" in this approach but recognizing that both textualists and intentionalists fall within this broad category); Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 Nw. U. L. REV. 269, 296 (2019) (observing how purposivists and intentionalists adhere to this general understanding of faithful agency).

¹³¹ 573 U.S. 431 (2014).

¹³² As the dissenting opinion in the Second Circuit put it, "the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013).

¹³³ *Aereo*, 573 U.S. at 437.

phrase in the statute.¹³⁴ In structuring the public performance right, Congress chose to overturn two pre-1976 decisions of the Court,¹³⁵ which had held that cable television operators did not engage in a public performance when they transmitted over-the-air broadcast content to their subscribers. To Justice Breyer, this history made amply clear that Congress intended to treat cable operators as themselves engaging in a public performance.¹³⁶ Since the defendant's activities were "substantially similar to those of [cable television] companies," the majority saw the public performance right reaching its service.¹³⁷ None of the individual technological differences that the defendant had built into its platform in order to differentiate itself from regular cable television—such as the assignment of an individual (rather than collective) antenna, the transmission of a privately made copy, and the absence of a constant transmission—were seen as material to its liability.

The majority's approach thus placed all of its interpretive emphasis on Congress's desire (as reflected in the legislative history) to treat cable television transmissions as public performances, from which it extrapolated to conclude that the defendant's services would have been within Congress's intention to cover. This approach prompted a dissent from Justice Scalia, which was joined by Justices Thomas and Alito.¹³⁸ As a substantive matter, the dissent contended that the defendant did not perform at all, since it did not satisfy the requirement of "volitional" conduct implicit in a public performance. The majority did not even so much as mention this requirement in its reasoning.

Justice Scalia's biggest problem with the majority's opinion was, however, its failure to offer a workable legal standard, instead using what he described as a "guilt by resemblance" approach to the issue.¹³⁹ That approach was hardly the product of an interpretive method, which he described as embodying "severe shortcomings" and resting

¹³⁴ *Id.* at 441–44.

¹³⁵ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).

¹³⁶ *Aereo*, 573 U.S. at 441 (quoting the relevant legislative history in order to establish this proposition).

¹³⁷ *Id.* at 442.

¹³⁸ *Id.* at 451 (Scalia, J., dissenting).

¹³⁹ *Id.* at 457.

on “the shakiest of foundations.”¹⁴⁰ While acknowledging that the defendant may have exploited loopholes in the statute, the dissent was clear that resemblance-based statutory interpretation was not the right mechanism of closing them, and certainly not one for the Court to adopt:

[W]hat we have before us must be considered a “loophole” in the law. It is not the role of this Court to identify and plug loopholes. It is the role of good lawyers to identify and exploit them, and the role of Congress to eliminate them if it wishes. Congress can do that, I may add, in a much more targeted, better informed, and less disruptive fashion than the crude “looks-like-cable-TV” solution the Court invents today. . . . [T]he proper course is not to bend and twist the Act’s terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade.¹⁴¹

Noticeably absent from Justice Scalia’s dissent was any reference to textualism, except for his observation that the majority’s attempt to interpret the text of the statutory term “public performance” was a façade that falsely gave “the [majority] opinion the ‘feel’ of real textual analysis.”¹⁴² In short, what the dissenting opinion was objecting to was the majority’s effort to create copyright policy (“just outcome”) in the guise of interpreting statutory text.

Putting the dissent’s criticisms to one side, the opinion for the Court is indeed characterized by an extreme intentionalist approach that it adopts to the interpretive question.¹⁴³ While Justice Breyer’s interpretive philosophy had long relied on the use of legislative history to interpret statutes, that reliance has always been accompanied by an identifiable ambiguity in the text of the statute.¹⁴⁴ In his opinion for the Court in *Aereo*, Justice Breyer’s approach was instead to reconstruct Congress’s intention and directly ask if Congress would have wanted (i.e., intended) the defendant’s technology to be

¹⁴⁰ *Id.* at 457–58.

¹⁴¹ *Id.* at 462.

¹⁴² *Id.* at 460.

¹⁴³ See William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–80 (1987) (observing how the “‘intentionalist’ approach asks how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute”).

¹⁴⁴ See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (describing how the use of legislative history assists in the interpretation of unclear statutory language and in the clarification of ambiguity).

treated as a public performance in the same way in which it addressed cable television. Note that this is materially different from asking if Congress's chosen conceptual or textual framework for instantiating its view of a public performance was sufficiently capacious to cover the defendant's operations. The latter would use the legislative history to examine the statute and then arrive at an answer on that basis. The former—as seen in the opinion—merely examined Congress's presumptive coverage of the matter in controversy, independent of the conceptual framework. The difference is thus between asking whether (i) the statutory definition of a public performance could be interpreted as covering internet re-transmissions, and if (ii) Congress would have wanted to cover internet re-transmissions, regardless of what it put into the statute.

The majority's effort to answer the latter accounts for its emphasis on the “similarity” between cable television and the defendant's online streaming. The dissent was perhaps right in observing that the majority opinion could have ended with its observation that “the many similarities between [the defendant] and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that this difference is not critical ... and that [the defendant] ‘perform[s].’”¹⁴⁵ The discussion of the statute could have been mistaken for an afterthought since it was Congress's freestanding objective that formed the opinion's principal focus.

Aereo's overt intentionalism somewhat vividly showcased a further entrenchment of the institutionalist mindset in the Court's copyright jurisprudence. Not only was the Court to refrain from engaging questions of policy in the copyright arena or second-guess Congress's dictates in that domain, its task in adjudicating copyright cases was to search for a fit between the policy/purpose and the controversy at hand. While not altogether irrelevant, the framework of the statute was clearly of secondary importance in this task rather than an embodiment of operative principles. In this sense, the *Aereo* opinion was in reality less about statutory interpretation than it was about the legislature's intent on the question, pure and simple—and fit rather well with the Court's growing emphasis on institutionalism. Again, what should not be missed is the reality that both majority and dissenting opinions agreed that Congressional intent alone—not policy—needed

¹⁴⁵ *Aereo*, 573 U.S. at 444.

to be the basis of the Court's intervention. They simply disagreed on *how* that was to be gleaned. And while the majority left no doubt about its own view of the defendant's behavior, the dissent was equally clear that it shared the majority's position on the matter.¹⁴⁶ Yet to both, statutory interpretation was the only institutionally acceptable vehicle through which that was to be addressed.

Statutory interpretation emerged front and center again—with textualism now occupying the spotlight—in *Star Athletica LLC v. Varsity Brands, Inc.*,¹⁴⁷ a case involving the copyrightability of cheerleader uniform designs. The respondent in the case designed, made, and sold cheerleader uniforms and had obtained over two hundred copyright registrations for its designs, which consisted of combinations and arrangements of different lines, shapes, curves and colors.¹⁴⁸ When the petitioner copied several of these designs on its own uniforms and was sued for copyright infringement, it challenged the copyrightability of the respondent's designs under copyright's "useful article" doctrine. The useful article doctrine, contained in the copyright statute, provides that "the design of a useful article" is eligible for protection as a "pictorial, graphical, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."¹⁴⁹

The above-quoted definition had generated a significant amount of confusion and disagreement among lower courts, with each circuit effectively developing its own test for "separability," as the requirement's core principle came to be called. In its opinion reversing the district court's grant of summary judgment in favor of the petitioner, the Sixth Circuit had highlighted the nine different tests that courts around the country had come to employ in applying the principle.¹⁵⁰ The dissenting opinion ended by noting that "[i]t is apparent that either Congress or the Supreme Court (or both) must clarify copyright

¹⁴⁶ *Id.* at 462 (Scalia, J., dissenting) ("I share the Court's evident feeling that what [the defendant] is doing (or enabling to be done) to the [plaintiffs'] copyrighted programming ought not to be allowed.").

¹⁴⁷ 137 S. Ct. 1002 (2017).

¹⁴⁸ *Id.* at 1007.

¹⁴⁹ 17 U.S.C. § 101 (2020) (definition of a "pictorial, graphic, and sculptural work").

¹⁵⁰ *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 484–85 (6th Cir. 2015).

law with respect to garment design . . . [since t]he law in this area is a mess and it has been for a long time.”¹⁵¹ The Court granted certiorari to review the matter.¹⁵²

In another 6-3 opinion, the Court found for the respondent. The opinion for the majority was authored by Justice Thomas this time. Instead of engaging the myriad tests that had been developed for the principle, the extensive legislative history of the definition, or indeed the Copyright Office’s own guidelines for the registrability of designs of useful articles, Justice Thomas’s opinion presented the solution as a straightforward instance of statutory interpretation that abjured any engagement with copyright policy.¹⁵³ He thus announced at the outset that the opinion was “not a free-ranging search for the best copyright policy, but rather ‘depends solely on statutory interpretation.’”¹⁵⁴ The clear meaning of the text was to dominate this analysis: “[w]e thus begin and end our inquiry with the text.”¹⁵⁵

The irony here is of course that it was that very same “clear meaning” of the text that had produced divergent interpretations among courts. Justice Thomas then proceeded to examine the wording of the statute and develop an overly simplistic two-stage inquiry that began by asking whether the design was capable of separate identification, and then proceeded to examine if it was capable of being “imagined apart from the useful article.”¹⁵⁶ The test was tailor-made for the facts of the case, which allowed the majority to find the cheerleader designs capable of separation from the articles themselves since they could be transposed to a white background.

Justices Ginsburg and Breyer each wrote separate opinions in the case. Ginsburg’s disagreed with the Court’s reasoning, but concurred in its judgment.¹⁵⁷ Breyer’s opinion on the other hand disagreed with the judgment even though it endorsed the Court’s test, and was joined by Justice Kennedy.¹⁵⁸ Somewhat surprisingly though, neither opinion seriously challenged the Court’s observation that the answer

¹⁵¹ *Id.* at 496 (dissenting opinion).

¹⁵² 136 S. Ct. 1823 (2016) (granting certiorari).

¹⁵³ *Star Athletica*, 137 S. Ct. at 1010.

¹⁵⁴ *Id.* (citations omitted).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1010.

¹⁵⁷ *Id.* at 1018 (Ginsburg, J., concurring).

¹⁵⁸ *Id.* at 1030 (Breyer, J., dissenting).

to the problem was to be found in the text of the statute on its own. To be sure, neither separate opinion endorsed textualism either; Justice Breyer openly employed his intentionalist reliance on legislative history and Congressional intent to criticize the Court for failing to appreciate that “[c]ourts must respect [copyright’s statutory] lines and not grant copyright protection where Congress has decided not to do so.”¹⁵⁹

Justice Thomas’s opinion for the Court in *Star Athletica* set up his textualism as an alternative to a policy-based decision. In so doing, the latter was portrayed as an inappropriate exercise of the judicial function, while the former was firmly within it. The connection between textualism as a method of statutory interpretation and the institutional legitimacy of the judiciary is hardly new. One scholar has noted that “formalistic textualism urges the judge to zero in on statutory language, focusing on semantic context and downplaying policy concerns and practical consequences—the very concerns and consequences that tend to be of most interest to external observers.”¹⁶⁰ Textualism was thus a direct mechanism of institutional legitimacy. Characterizing the text as plain and clear allowed the opinion to steer clear of a host of policy considerations that had plagued prior applications of the useful article doctrine, where courts had undoubtedly made new law by integrating such considerations into the framework of the statute. Not only did the Court refrain from engaging in such an exercise, but it also wiped the slate clean of all prior judge-made law in the area; thereby signaling to lower courts that the institutional role of the judiciary was to merely give effect to decisions put into the text of a statute by Congress.

In summary, the most obvious feature of the Roberts Court’s substantive copyright decisions was the lengths to which the Justices’ opinions went to treat their legal reasoning as an exercise in statutory interpretation and no more. Even when the Justices disagreed with each other, they routinely couched their criticism of each other’s opinions as a disagreement about interpretation rather than as a substantive disagreement *tout court*. This in itself highlights the degree to which copyright adjudication had in the Roberts Court become little more than an exercise in statutory interpretation, a reality that is rarely

¹⁵⁹ *Id.* at 1034.

¹⁶⁰ Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 303 (2020).

acknowledged. Congress, and not the Court, made copyright law; the Court was merely interpreting it as a faithful agent of Congress.

What is surprising is certainly not just the Court's near-unanimous retreat to its position as a faithful agent of Congress in the realm of copyright law.¹⁶¹ It is also the stark contrast between this approach and the manner in which substantive copyright decisions were made in the Rehnquist Court, illustrated previously. Nothing about the statute had changed in the interim, and yet in the Roberts Court it produced an emphasis on interpretation and generated serious disagreement among members of the Court around that idea.

C. ADJECTIVALISM: HARMONIZING FEDERAL ADJUDICATION

Adjective law refers to “the remedial agencies and procedure by which rights are maintained, their invasion redressed, and the methods by which such results are accomplished in judicial tribunals.”¹⁶² Substantive law delineates rights and identifies actionable wrongdoing that interferes with those rights; adjective law on the other hand deals with the procedural and remedial rules through which those rights are vindicated and enforced. A hallmark of adjective law, generally speaking, is its trans-substantivity¹⁶³: the rules and principles pertaining to the adjudication and enforcement of rights are rarely ever subject-area specific. This remains true of copyright law, where the general rules and procedures of federal litigation govern the manner in which infringement claims are commenced and adjudicated. Most of the remedies delineated in the copyright statute are themselves drawn from general equitable and common law principles seen in other areas of law.

This trans-substantivity of adjective law formed a key third element of the Roberts Court's institutionalism in its copyright cases. Half of the Roberts Court's copyright decisions focused on procedural and remedial questions in copyright law, which involved the interplay between copyright-specific rules and doctrines on the one hand, and broader principles that are universal to federal adjudication on the

¹⁶¹ See sources cited in note 130.

¹⁶² EDWIN E. BRYANT, *THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE* 1 (2d ed. 1899).

¹⁶³ See David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1190, 1190.

other.¹⁶⁴ And despite routinely involving the interpretation of the statute, an overwhelming majority (five out of six) of these cases were decided unanimously.¹⁶⁵ Their role in the Court's copyright jurisprudence is best viewed through the frame of its institutionalism.

Turning to copyright's adjectival component allowed the Court to avoid much of the substantive disagreement over copyright law and policy that had become obvious in its decisions, captured most vividly in the Breyer-Ginsburg disagreement but extending well beyond. As noted previously, while the substance of these disputes revolved around questions of copyright policy, in rhetoric and form they focused on statutory interpretation. Copyright's adjective law, by contrast, was an area that allowed the Court to develop greater consensus on copyright issues and speak in one voice. And a large part of its ability to do so emerged from the recognition that the issues therein focused less on engaging legislative copyright "policy" where the Court was growing increasingly wary of treading on Congress's domain, and more on the connection between copyright adjudication and other areas of federal litigation. This last feature diminished the significance of substantive copyright expertise (and related disagreement), which likely explains the heightened consensus that it generated among the Justices.

The Roberts Court's first foray into copyright law was an adjectival case pertaining to federal subject matter jurisdiction in copyright cases. In *Reed Elsevier, Inc. v. Muchnick*,¹⁶⁶ the Court examined whether § 411(a) of the copyright statute—which requires that a work be registered with the Copyright Office prior to bringing a claim for infringement¹⁶⁷—was a limitation on courts' subject matter jurisdiction. Writing for a unanimous Court, Justice Thomas answered the question in the negative, drawing a distinction between

¹⁶⁴ *Reed Elsevier Inc. v. Muchnick*, 559 U.S. 154, 157 (2010); *Petrella v. MGM, Inc.*, 572 U.S. 663, 667 (2014); *Allen v. Cooper*, 140 S. Ct. 994, 996 (2020); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 884 (2019); *Rimini Street Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 874 (2019); *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng II)*, 136 S. Ct. 1979, 1981 (2016).

¹⁶⁵ Of the six, the one that was not unanimous was *Petrella*, 572 U.S. at 667.

¹⁶⁶ 559 U.S. 154 (2010).

¹⁶⁷ 17 U.S.C. § 411(a) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.").

jurisdictional conditions and claim-processing rules.¹⁶⁸ For this distinction, he drew on the Court's precedent on jurisdictional limitations, which demanded that the section "clearly state[]" that a limitation is jurisdictional.¹⁶⁹ Applying it to § 411(a), Justice Thomas concluded that that provision was a mere claim-processing rule.

Especially noteworthy in the opinion was its abbreviated engagement with considerations specific to copyright law. Instead, it focused on assessing, extending and reconciling the Court's precedents relating to jurisdictional limits before applying them to copyright.¹⁷⁰ The rejection of copyright exceptionalism was thus an identifiable feature of the Court's opinion, and one that would be seen in many of the Roberts Court's adjectival copyright decisions. Indeed, this rejection allowed the Court to altogether sidestep considerations of "policy," which had been raised as a basis for treating the registration requirement as jurisdictional within copyright. Noting that it had rejected such considerations of policy in its jurisdictional precedents, the Court found the argument altogether unpersuasive.¹⁷¹

The Court adopted a similar approach to adjectival issues in two more recent copyright cases, each also decided unanimously: *Rimini Street, Inc. v. Oracle USA, Inc.*¹⁷² and *Allen v. Cooper*.¹⁷³ *Rimini Street* examined the phrase "full costs" contained in § 505 of the Copyright Act, a provision that gives courts discretion to award a prevailing party litigation costs.¹⁷⁴ *Allen* involved the interaction between copyright and state sovereign immunity. In *Rimini Street*, Justice Kavanaugh openly rejected the idea of copyright exceptionalism in his analysis. His opinion for a unanimous Court instead adopted the position that the copyright statute was to be treated like the "more than 200 subject-specific federal statutes that explicitly authorize the award of costs to prevailing parties" absent a legislative directive to the contrary.¹⁷⁵ For those other statutes, the term "costs" meant the grounds specified in

¹⁶⁸ *Reed*, 559 U.S. at 160.

¹⁶⁹ *Id.* at 163 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006)).

¹⁷⁰ *Id.* at 167–69.

¹⁷¹ *Id.* at 169 n.9.

¹⁷² 139 S. Ct. 873 (2019).

¹⁷³ 140 S. Ct. 996 (2020).

¹⁷⁴ 17 U.S.C. § 505 (2020).

¹⁷⁵ *Rimini Street*, 139 S. Ct. at 877.

the general costs statute, which the Court extended in a straightforward manner to § 505 of the Copyright Act.

Allen on the other hand involved Congress's attempt to abrogate state sovereign immunity for infringement actions brought against states. In 1990 Congress passed the Copyright Remedy Clarification Act (CRCA), which introduced § 511(a) of the statute, specifying that states "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court."¹⁷⁶ In an infringement action brought by a private party against the state of North Carolina, the defendant argued that § 511(a) was unconstitutional under the Court's precedents specifying the conditions under which state sovereign immunity could be abrogated by Congress. The Court agreed. In a unanimous opinion authored by Justice Kagan, the Court found that its precedent controlled. Since Congress had failed to establish in the legislative record that the abrogation was congruent and proportional to the injury being prevented or remedied, the abrogation was found to exceed Congress's power.¹⁷⁷

At first glance, *Allen* may seem hard to reconcile with the Court's opinions in *Eldred* and *Golan*. Whereas the latter two had refused to second-guess Congress, in *Allen* the Court readily declared § 511(a) invalid. Yet *Allen* was qualitatively different and very much in keeping with the Court's institutionalism. Both *Eldred* and *Golan* had involved challenges to *substantive* copyright doctrine, which in turn were seen to embody crucial policy decisions made by Congress on the basis of its effort to balance competing interests. *Allen* on the other hand involved no substantive copyright policy of that kind. Indeed, the Court's precedent on permissible abrogations of state sovereign immunity based on Section 5 of the Fourteenth Amendment required the examination of whether such a policy concern was part of the legislative record that informed Congress's decision.¹⁷⁸ In *Allen* the Court found there to be no such record whatsoever—and thus by implication, no pressing policy concern that had motivated Congress.

¹⁷⁶ 17 U.S.C. § 511(a) (2020).

¹⁷⁷ *Allen*, 140 S. Ct. at 1004.

¹⁷⁸ See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 629 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

Allen therefore involved no second-guessing of Congress's policy wisdom for copyright.¹⁷⁹

Even if there was a discernible policy behind the abrogation of state sovereign immunity in copyright cases, the Court's move to general principles of federal litigation to decide the case was to ensure that its decision would not be seen as second-guessing Congress. It would instead highlight that the Court was constrained by what it had done on the same question elsewhere, since its slate was "anything but clean."¹⁸⁰ Justice Kagan's opinion therefore emphasized the continuity between copyright's attempted abrogation of state sovereign immunity and Congress's successful and unsuccessful efforts to do the same in other areas.¹⁸¹ The rejection of copyright exceptionalism was thus an unmistakable thread through the opinion, borne out of the recognition that state sovereign immunity—much like issues of federal jurisdiction—transcended the specific subject matter at issue, and instead implicated broader considerations involving federalism. It is in this important sense that *Allen* is an adjectival opinion: it involved the Court's consideration of the structure of federal copyright adjudication. And given its role at the apex of the federal judiciary, applying and extending its own rules governing federal adjudication to copyright was seen as presenting no problems as such. Instead, to the extent that the Court would be perceived as the appropriate branch of government to safeguard the boundaries of federal litigation, its decision invalidating § 511(a) would instead be seen as buttressing its core institutional role. In this sense, *Allen*—much like *Rimini Street* and *Reed Elsevier*—represented the affirmative side of the Court's institutionalist approach. Affirmative in the sense of the Court's embrace of its role as gatekeeper of federal adjudication; rather than negative in the sense of its forbearance from addressing issues of substantive policy.

Not all the Roberts Court's adjectival copyright opinions exhibited the same approach. Yet, they strove hard to achieve consensus among the Court's members and routinely side-stepped copyright specific concerns. In *Fourth Estate Public Benefit Corp. v. Wall-Street.com*,¹⁸²

¹⁷⁹ *Allen*, 140 S. Ct. at 1006.

¹⁸⁰ *Id.* at 1002.

¹⁸¹ *Id.* (discussing the dissimilarity between bankruptcy law and intellectual property law for sovereign immunity).

¹⁸² 139 S. Ct. 881 (2019).

Justice Ginsburg's opinion eschewed both pragmatic and policy considerations to instead focus on a textualist reading of the statute that hewed narrowly to its plain meaning. Even while acknowledging the significance of pragmatic considerations that might have urged an alternative interpretation, the opinion made clear that the problem under consideration (i.e., the backlog and consequent delays in the issuance of copyright registrations) was one that "courts cannot cure" by "revis[ing] . . . congressionally composed text."¹⁸³ The opinion was unanimous as a result, generating not even a separate concurrence from another Justice.

Focusing on copyright's adjectival component was of course no guarantee of unanimity, or of Justices Ginsburg and Breyer agreeing. In *Petrella v. MGM, Inc.*¹⁸⁴ the Court examined whether the equitable defense of laches could be invoked by a defendant in response to a claim for copyright infringement that was brought within the statute's period of limitation. Writing for a six-member majority, Justice Ginsburg found that laches could not be used to override the statutory period of limitations, placing reliance on the Court's jurisprudence around equitable remedies and the "province of laches."¹⁸⁵ In a dissenting opinion on behalf of three Justices, Justice Breyer disagreed. In essence, the dissent's objection was that the majority was not rejecting copyright exceptionalism enough, in failing to examine "the rules and practice of modern litigation."¹⁸⁶ His worry was therefore that the rejection of laches would result in inequities between copyright plaintiffs and defendants, and as a result situate copyright defendants differently from their counterparts in other areas.

Quite noticeably, the Breyer-Ginsburg disagreement in *Petrella* was structured around the form and extent of the other's rejection of copyright exceptionalism rather than on an interpretation of the statute as such, a clear departure from the domain of substantive copyright. The majority based its reasoning on the Court's prior jurisprudence relating to the law/equity distinction and the nature of federal litigation, which to the dissent was inadequate.¹⁸⁷ Submerged under the rhetoric about the nature of modern litigation was a straightforward

¹⁸³ *Id.* at 892.

¹⁸⁴ 572 U.S. 663 (2014).

¹⁸⁵ *Id.* at 668.

¹⁸⁶ *Id.* at 699 (Breyer, J., dissenting).

¹⁸⁷ *Id.* at 677–80.

disagreement over policy: the majority position advantaged copyright plaintiffs, i.e., copyright owners, who would now no longer face the risk of having their lawsuit summarily dismissed if they waited for too long but were within the statute of limitations. To Justice Breyer, a self-described copyright skeptic, this was problematic. Yet that disagreement remained buried underneath arguments about copyright's continuity/discontinuity with other areas.

Overwhelmingly, the Roberts Court's copyright adjectivalism has remained an important mechanism for the Court to safeguard and promote its institutional legitimacy in the field. The Court's willingness to actively intervene in this domain and develop a set of rules and principles that are hardly unique to copyright and instead emphasize the continuity between copyright and other areas of law was at once symbolic, cohesive, and outwardly principled. Symbolic in the sense of publicly reaffirming the Court's role as the guardian of the federal litigation process, cohesive since it generated consensus among the Justices about harmonizing copyright litigation with the rest of federal adjudication, and principled in that it was seemingly driven by well-worn ideas and norms that had long informed other areas of litigation or remedies.

* * *

Institutionalism in the Roberts Court's copyright opinions thus had both limiting and enabling elements to it, with the former dominating. The emphasis on appropriate judicial role and the Court's role as faithful agent in interpreting the copyright statute were meant to constrain the Court in its engagement with substantive copyright policy, which came to be seen as the exclusive prerogative of Congress to formulate and develop. At the same time, maintaining the continuity between copyright adjudication and other areas of federal litigation carved out an important domain for the Court to exert its own independent influence over, so as to not be seen as abdicating its role within the copyright system altogether.

The question that deserves asking, however, is whether the Court's turn to institutionalism ought to be understood as little more than a proxy for other deeper and arguably more substantive disagreements among the Justices. Hints of this concern were to be seen in some of the Justices' own criticisms of each other as using interpretation as a mask for a policy preference. Consider in this vein: Justice Ginsburg's observation that the majority in *Kirtsaeng* was departing from the

legislature's design in the name of interpretation in order to adopt an international approach to first sale,¹⁸⁸ or Justice Scalia's assertion that the majority in *Aereo* was "distort[ing] the Copyright Act" in order to remedy the apparent wrongfulness of the defendant's technology.¹⁸⁹ Seen through a traditional Legal Realist lens, these observations suggest that the Justices are on occasion themselves less than convinced that another's reliance on institutional considerations was in reality not in furtherance of a substantive outcome.

A more nuanced way of understanding the concern, however, sees the fault line a little differently. Legal Process thinking—with its commitment to institutional settlement—"absorb[ed] and temper[ed] the insights of Legal Realism,"¹⁹⁰ and in so doing saw courts as the gatekeepers of reason engaged in the "reasoned elaboration" of law.¹⁹¹ Interpretation of the statute was thus in equal measure about recognizing the primacy of congressional policy and channeling it in a principled manner through the use of reason. Viewed through this lens, the disagreements were less about the possibility of motivated reasoning (or "rationalization" as Legal Realists called it¹⁹²) and more about the appropriate balance between policy deference and its reasoned elaboration. In short, they were disagreements about ways in which to give effect to institutionalism, the value of which was taken for granted.

III. INSTITUTIONALISM TRIUMPHANT

The Court's turn toward institutionalism played a decisive role in its most recent copyright decision, characterized by some as "the copyright case of the century"¹⁹³: *Google, LLC v. Oracle, Inc.*¹⁹⁴ A

¹⁸⁸ *Kirtsaeng v. John Wiley & Sons, Inc. (Kirtsaeng I)*, 568 U.S. 519, 556 (2013) (Ginsburg, J., dissenting).

¹⁸⁹ *American Broadcast Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 462 (2014) (Scalia, J., dissenting).

¹⁹⁰ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 254 (1992).

¹⁹¹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 147 (1994).

¹⁹² LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, at 6–7 (1986).

¹⁹³ See Scott Graham, *Supreme Court, Finally, Takes Up 'Google v. Oracle'*, LAW.COM (Nov. 15, 2019), <https://www.law.com/nationallawjournal/2019/11/15/supreme-court-finally-takes-up-google-v-oracle/>; Devin Dwyer, *Google Wins Big in Supreme Court Clash with Oracle*, ABC News (Apr. 5, 2021), <https://abcnews.go.com/Politics/google-wins-big-supreme-court-clash-oracle/story?id=76878814>.

¹⁹⁴ 141 S. Ct. 1183 (2021).

plain reading of that much-anticipated opinion and its reasoning hides the complex institutional motivations that were at play in the decision. Yet when understood contextually and against the backdrop of the doctrinal maneuvering that produced it, *Google* highlights the extent to which the Roberts Court has internalized—and normalized—its institutionalism.

The rather complex facts of the case involved Google's copying of computer code that had been written and organized by Sun (which Oracle acquired) into pre-written packages (called "APIs") contained in its Java library.¹⁹⁵ The copying was however not of the packages in their entirety but instead merely portions of the packages that described their individual functions—known as the "declaring code."¹⁹⁶ When sued for copyright infringement, Google argued that the declaring code was uncopyrightable as a "method of operation," a category that Congress had identified as ineligible for protection in § 102(b) of the statute.¹⁹⁷ Google also argued that its copying constituted a form of fair use since it was copying the code to allow programmers familiar with Java to carry their knowledge-base with them to its new platform. While Google had prevailed at the district court on both arguments (each on a separate occasion), the Federal Circuit had reversed the district court each time.¹⁹⁸ The Court agreed to hear the case, despite the Solicitor General suggesting otherwise.¹⁹⁹

In a 6-2 split, the Court sided with Google. In his opinion for the majority, Justice Breyer sidestepped the issue of copyrightability and concluded that Google's copying amounted to a fair use of the work. In a far-reaching expansion of the fair use doctrine, his opinion concluded that the use was transformative since it was done to ensure that

¹⁹⁵ *Id.* at 1191.

¹⁹⁶ *Id.* at 1192.

¹⁹⁷ 17 U.S.C. § 102(b) (2020) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

¹⁹⁸ *Oracle Am., Inc. v. Google Inc.*, 872 F. Supp. 2d 974 (N.D. Cal. 2012); *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 5393938 (N.D. Cal. Sept. 27, 2016); *Oracle Am., Inc. v. Google LLC*, 750 F.3d 1339 (Fed. Cir. 2014); *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018).

¹⁹⁹ Brief for the United States as Amicus Curiae, *Google LLC v. Oracle Am., Inc.*, No. 18-956, 2019 WL 4750021 (U.S. Sept. 27, 2019); *Google LLC v. Oracle Am., Inc.*, 140 S. Ct. 520 (2019) (mem.) (granting certiorari).

Google's code was interoperable with Oracle's Java platform,²⁰⁰ that the fair use doctrine allowed courts to draw distinctions between different types of computer code,²⁰¹ and further that fair use required courts to examine the potential public benefits of the copying as part of the calculus.²⁰² On its own, the majority opinion broke new ground on fair use and its application to computer software, by effectively incorporating considerations normally associated with copyrightability into the fair use analysis. Yet what is even more far-reaching, even if entirely hidden, was the reason for the majority's reliance on fair use for its result.

At the time of oral argument, the Court was down to eight Justices: Justice Ginsburg had died the month before and her seat remained vacant.²⁰³ During its argument, Google led with the issue of copyrightability and attempted to convince the Court that declaring code was fundamentally different from other types of code so as to render it ineligible for copyright protection under § 102(b).²⁰⁴ This prompted a series of skeptical questions from several members of the Court, all of which focused on the undeniable reality that in expressly allowing for computer code to be protected, Congress had made no distinction between different types of code.²⁰⁵ To recognize such a distinction would put all computer code "at risk of losing protection" under the statute and thus override Congress's "express intent."²⁰⁶ Justice Gorsuch voiced the concern best when he noted his discomfort with overriding Congress's textual directive: "[w]e might not think otherwise that it should be [protected], but there it is."²⁰⁷

²⁰⁰ *Google*, 141 S. Ct. at 1203–04.

²⁰¹ *Id.* at 1201–02.

²⁰² *Id.* at 1206–08.

²⁰³ Transcript of Oral Argument at *3, *Google*, 141 S. Ct. 1183 (No. 18-956), 2020 WL 6203589.

²⁰⁴ *Id.* at *3–5.

²⁰⁵ *Id.* at *10 ("[Y]ou seem to rely quite a bit on Section 102. Why don't we rely on Section 101, which is more specific with respect to computer programs?") (Thomas, J.); *id.* at *17 ("How do you square your position with Congress's express intent to provide protection for computer codes?") (Alito, J.); *id.* at *20 ("I go back to the essence of the question that I think my colleagues are asking, is how do you differentiate between declaring codes and implementing codes?") (Sotomayor, J.); *id.* at *29–30 ("We might not think otherwise that it should be, but there it is. And, normally, . . . the specific instruction there in 101 would govern the more general idea-expression dichotomy in 102.") (Gorsuch, J.).

²⁰⁶ *Id.* at *17.

²⁰⁷ *Id.* at *29.

Playing into the textualist concern with overriding the language of the statute, Google's lawyer continued to describe the copyrightability claim as a "textualist" one.²⁰⁸ The issue of copyrightability—emanating from § 102(b) of the statute—was anything but textual. While the provision identifies "methods of operation" as unprotectable, it says nothing further at all about what such methods are and how courts are meant to identify them. The legislative history accompanying the provision confirms that Congress intended to do no more than "restate" judge-made law on the provision "unchanged."²⁰⁹ Further, Congress saw this as perfectly compatible with the availability of protection for computer software. § 102(b) was instead meant to itself be the vehicle *through which* courts were to sift through the protectable and unprotectable parts of computer code. It put the point unequivocally: "Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes and methods embodied in the program are not within the scope of the copyright law."²¹⁰

Congress therefore fully intended there to be absolutely no textual inconsistency between the denial of protection to certain kinds/components of computer software under § 102(b) and its express recognition that computer software was eligible for protection under the statute. To the contrary, balancing the two was something that it expressly outsourced to courts in almost the exact same manner in which it did with the requirement of originality. But whereas the Court in *Feist* had embraced that outsourcing to expound on the doctrine,²¹¹ the Court in *Google* saw the delegation as controversial since it effectively required reconciling judicial line-drawing under § 102(b) with an express textual directive in § 101. It mattered little that Congress was fine with this reconciliation. To several members of the Court, this was not acceptable.

Given the exaggerated textualist concern—which many Justices made obvious during oral argument—Justice Breyer's compromise was

²⁰⁸ *Id.* at *17, *26, *38.

²⁰⁹ H.R. REP. 94-1476, at 57 (1974).

²¹⁰ *Id.*

²¹¹ *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 355 (1991) (quoting the legislative history indicating that Congress had chosen to avoid defining originality in order to "incorporate without change" the judge-made law around it).

to avoid the question of copyrightability altogether under the pretext of doing no more than was “necessary to resolve the parties’ dispute.”²¹² All the same, that avoidance was largely formal. While refraining from addressing the line-drawing and balancing that § 102(b) called for, the majority instead focused on fair use. The fair use doctrine has long been seen by the Court—and Congress—as a judge-made doctrine; and one where courts are at liberty to develop the law in incremental, common law style.²¹³ The Court’s own unanimous 1994 opinion in *Campbell v. Acuff-Rose Music, Inc.* had endorsed such an approach and generated much jurisprudence among lower courts around the doctrine.²¹⁴ The majority however did not just invoke fair use. It instead invoked fair use and expanded it to incorporate the exact same concerns that it had dodged under §102(b).²¹⁵ The line-drawing that several Justices were so worried about was now no longer problematic, given that it presented no *textual* conflict whatsoever. In thus moving the conversation—in substance even if not in form—from copyrightability to fair use, Justice Breyer’s opinion effectively blunted concerns about textualism and the fear of overriding Congress.

Justice Breyer’s compromise was insufficient for Justice Thomas, whose dissent voiced the textualist concern. Emphasizing the centrality of copyrightability, the dissent repeatedly asserted that “Congress rejected any categorical distinction” between types of computer code. It recognized the majority’s clever ploy in turning to fair use, noting despondently that the majority had invoked fair use to “remove copyright protection from declaring code” contrary to Congress’s

²¹² *Google*, 141 S. Ct. at 1197.

²¹³ *Id.* at 1197. The fair use doctrine was entirely a creation of courts in the nineteenth century. See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). It found no mention under prior copyright statutes. Congress eventually codified the doctrine in the Act of 1976. 17 U.S.C. § 107 (2020). Yet, it made clear that the codification was a mere restatement and that courts were to continue developing it further:

The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, *the courts must be free to adapt the doctrine to particular situations on a case-by-case basis*. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. REP. 94-1476, at 66 (emphasis added).

²¹⁴ 510 U.S. 569, 576 (1994).

²¹⁵ *Google*, 141 S. Ct. at 1201–02.

intention.²¹⁶ To Justice Thomas, “[t]he majority ha[d] used fair use to eviscerate Congress’ considered policy judgement.”²¹⁷ The majority was doing indirectly what it would not directly.

In one sense, Justice Breyer’s strategy certainly succeeded in *Google* and enabled him to reintroduce considerations of copyrightability into fair use, thereby preserving the line-drawing between idea and expression demanded by the law. All the same, his very reliance on this strategy to achieve a majority represents something of a complete capitulation to the extreme institutionalist concerns about the judicial role in copyright, manifested in textualism and beyond. In strong contrast to his opinions in *Kirtsaeng* and *Aereo*, Justice Breyer’s opinion in *Google* retreated altogether from any effort to interpret the statute (i.e., § 102(b)) for fear of losing the majority. Reframing the question as one of fair use was not without its costs, since fair use resists bright-line rules and emphasizes contextual rulings that are specific to a particular defendant’s use.²¹⁸

The coalition of textualist and non-textualist Justices that constituted the majority in *Google* thus rallied around fair use as the answer to the dispute. And while this certainly reinvigorated the role of fair use in copyright adjudication and of courts within that framework, it at the same time reaffirmed rather starkly the centrality of institutional concerns to the Court. Steering clear of Congress’s “policy judgement[s]” was not just a hallmark of its interpretive approach, but it now influenced the Court’s very framing and doctrinal choices. In *Google*, Justice Breyer conceivably failed to convince his colleagues that any line-drawing around copyrightability under § 102(b) was not an exercise in policy-making, forcing him to retreat to the defense of fair use where such line drawing was less of a “policy” choice, since fair use is very fact-specific and situational.

Google therefore highlights the Roberts Court’s entrenched copyright institutionalism. Refraining from “policy” engagement has long been a highlight of such institutionalism. *Google* reveals the reach of this credo. The Court’s disengagement with policy was not just about its refusal to “second-guess” Congress’s judgements, it was instead

²¹⁶ *Id.* at 1213 (Thomas, J., dissenting).

²¹⁷ *Id.* at 1220.

²¹⁸ In his opinion for the Court in *Kirtsaeng I*, Justice Breyer considered the fair use defense insufficient, whereas the dissent thought that many of the problems identified by the majority could be solved by fair use. *Kirtsaeng v. John Wiley & Sons, Inc.* (*Kirtsaeng I*), 133 S. Ct. 1351, 1364 (2013); *id.* at 1389 (Ginsburg, J., dissenting).

about the Court's unwillingness to exercise its own judgement in domains where such judgement might be conflated with policy and thus undermine the Court's institutional legitimacy.²¹⁹

IV. INSTITUTIONALISM AND COPYRIGHT'S LEGITIMACY CRISIS

The Roberts Court's copyright jurisprudence is characterized by two prominent features. The first is the complete absence of unanimity among the Justices of the Court on questions of substantive copyright law;²²⁰ and the second is the Court's increased engagement with adjectival copyright questions that implicate non-copyright principles and where it is by contrast able to generate a significant amount of unanimity, albeit artificially.²²¹ The two are hardly unrelated: the lack of unanimity on substantive questions is in stark contrast to the almost complete unanimity on adjectival ones, making the Roberts Court's overall engagement with copyright—at least facially—appear less fractured than it actually is. It is therefore plausible to assume that the Court's willingness to address non-core copyright questions was motivated in large measure by its inability to speak univocally on substantive copyright law.

The unanswered question is whether the manner of the Court's engagement with copyright has aided or hurt its legitimacy, the principal impulse behind the institutionalist turn. An overly simplistic analysis of the question in terms of the Court's unanimity overlooks the manner in which the two features described above have reaffirmed each other to enable the Court to steer clear of the heavily polarized "copyright wars." While it is true that the Roberts Court's turn to institutionalism on substantive copyright failed to generate greater consensus among the Justices, it nevertheless succeeded in firmly entrenching the idea that the Court was but a faithful agent of Congress in the domain of copyright law and thus obligated to ensure that its decisions did not directly or indirectly interfere with questions of "policy" where Congress was supreme. Even when disagreeing over their interpretation of the statute, the Justices uniformly committed to disengaging from the creation of copyright policy in what was a

²¹⁹ See David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 747 (2021).

²²⁰ Of the six substantive copyright decisions decided, *none* was unanimous.

²²¹ Of the six adjectival copyright decisions decided by the Roberts Court, five were unanimous, a remarkable difference from the Court's substantive copyright docket.

significant break even from the approach of the Rehnquist Court.²²² While the Court's turn to adjectival issues may have produced greater agreement on the Court, it too reaffirmed the Court's commitment to steering clear of copyright-specific policy considerations, given that procedural and remedial issues rarely embraced such specificity and instead drew on general principles. Avoidance of copyright policy thus formed a common theme in the Roberts Court's copyright docket: both in the Justices' individual interpretive approaches, as well as in their collective choice of issues to address.

While the avoidance of policy may have sounded primarily in the ideal of separation of powers, it also embodied a copyright-specific rationality that is easy to overlook. Since the beginning of the twenty-first century, U.S. copyright law has suffered from a readily discernible legitimacy crisis. The copyright system has come to be seen as little more than a mechanism of rent-seeking for special interest groups, rent-seeking that is structured as controlling the public's access to—and use of—original expression.²²³ While scholars disagree over the precise origins of and cause for this legitimacy crisis, the existence of such a crisis is uniformly acknowledged.²²⁴ The emergence of new technologies—of both copying and control—has only contributed to this crisis, with formal law coming to be seen as but one tool that creators and users could deploy in service of their goals.

Unwittingly, federal courts have contributed to this legitimacy crisis. As the copyright landscape became increasingly polarized, courts across the country handed down decisions that seemingly supported the

²²² The Roberts Court's disavowal of "policy" in its opinions—both majority and dissents—is particularly noteworthy. See *Golan v. Holder*, 565 U.S. 302, 334–35 (2012) (identifying "the host of policy and logistical questions" rendering the "matter [in]appropriate for judicial, as opposed to legislative, resolution"); *Kirtsaeng I*, 133 S. Ct. at 1373 (noting the majority's departure from Congress's "aim" and "design") (Ginsburg, J., dissenting); *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) ("This is not a free-ranging search for the best copyright policy."); *Georgia v. Public.Resource.Org, Inc. (PRO)*, 140 S. Ct. 1498, 1511 (2020) ("That appeal to copyright policy . . . is addressed to the wrong forum."); *Google*, 141 S. Ct. at 1220 ("The majority has used fair use to eviscerate Congress' considered policy judgment.") (Thomas, J., dissenting).

²²³ See, e.g., NEIL W. NETANEL, *COPYRIGHT'S PARADOX* 140 (2008); MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (2010).

²²⁴ See Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61 (2002) ("I have a theory about how copyright got a bad name for itself; and I can summarize it in one word: Greed."); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 15–16 (2010) ("Copyright law's legitimacy has suffered marked erosion in the public's view."); Paul Edward Gellar, *Beyond the Copyright Crisis: Principles for Change*, 55 J. COPYRIGHT SOC'Y 165, 175 (2008).

position of one interest group (including the public) over others.²²⁵ If one group succeeded in obtaining an expansive interpretation of an enumerated exclusive right, another would try and ensure a broad reading of fair use or of the first sale defense to counteract that. And with courts only ever focusing on the individual case (and connected precedents) each time, they developed a form of tunnel vision that precluded them from seeing their contributory role in the broader saga.

A prime example of a federal court's entanglement was the Second Circuit's 2001 decision in *Universal City Studios, Inc. v. Corley*.²²⁶ The case involved the application of § 1201 of the copyright statute, which deals with digital protection measures relied on by copyright owners to protect their works from copying.²²⁷ The provision was introduced in 1998 through the Digital Millennium Copyright Act (DMCA), and among other things, it renders both the circumvention of such digital protection measures and the trafficking in technologies of circumvention independently actionable.²²⁸ The defendant in the case had distributed an anti-circumvention code publicly (known as the DeCSS), but when sued under § 1201 relied on a host of arguments including the unconstitutional nature of the provision as well as the fair use doctrine as an embodiment of the First Amendment.²²⁹

The case generated an immense amount of interest and news coverage and came to be seen as something of a bellwether in a polarized copyright landscape.²³⁰ Numerous academics, industry groups and public interest entities filed amicus briefs before the court. In finding against the defendant, the Second Circuit undertook an elaborate analysis of the DMCA, its underlying goals, and their connection to

²²⁵ See, e.g., *Chamberlain Grp., Inc. v. Skylink Tech., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004); *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *RIAA v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999); *Kelly v. Arriva Soft Corp.*, 280 F.3d 934 (9th Cir. 2002); *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191 (3d Cir. 2003).

²²⁶ 273 F.3d 429 (2d Cir. 2001).

²²⁷ 17 U.S.C. § 1201(a) (2020).

²²⁸ *Id.* §§ 1201(a)(1)(A)-(a)(2).

²²⁹ *Corley*, 273 F. 3d at 436.

²³⁰ See Dow Jones, *Hollywood Studios Join Legal Battle to Stop DVD Copying*, N.Y. TIMES (Jan. 15, 2000), <https://archive.nytimes.com/www.nytimes.com/library/tech/00/01/biztech/articles/15disc.html>; *Movie Studios File DVD Hack Suit*, WIRED (Jan. 14, 2000), <https://www.wired.com/2000/01/movie-studios-file-dvd-hack-suit>; John Leyden, *2600 Withdraws Supreme Court Appeal in DeCSS Case*, REGISTER (July 4, 2002), https://www.theregister.com/2002/07/04/2600_withdraws_supreme_court_appeal.

the Constitution. Despite purporting to adopt an “evolutionary” and “narrow” approach to the broader questions so as to allow future courts to develop the law incrementally,²³¹ the court’s actual opinion did far more, including making far-reaching observations about the connection between fair use and the Constitution and the overall scope of fair use under the DMCA: “[f]air use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.”²³² That observation was hardly minimalist.

Compounding the court’s inability to avoid wading into the polarized copyright landscape was the reality that its holding was ineffective. Despite its issuance of an injunction, the anti-circumvention technology that was at issue in the case continued to be made available by various websites and defendants online, and in significant numbers even after the decision. The practice came to be seen as a form of political protest—against the decision in *Corley*, the DMCA, and the entire U.S. copyright system.²³³

Operating within this polarized landscape, the Court’s turn toward institutionalism has thus preserved not just its overall institutional legitimacy, but also its domain-specific legitimacy, i.e., within the copyright system. Discussions of legitimacy tend to focus on either institutional (court-specific) or system-wide legitimacy, often overlooking how the Court’s cautionary approach to a particular legal area with its own legitimacy crisis allows the Court to put some distance between its legitimacy concerns and those of the area under consideration. Instead of entangling questions of its own public legitimacy with public perceptions of copyright, the Roberts Court’s effort is to situate itself as a faithful agent merely executing Congress’s vision (“policy”) for the area. To the degree that a particular outcome could be seen as problematic, the fault—in this narrative—would lie with Congress, rather than the Court.²³⁴

²³¹ *Corley*, 273 F.3d at 445.

²³² *Id.* at 459.

²³³ See Kristin R. Eschenfelder & Anuj C. Desai, *Software as Protest: The Unexpected Resiliency of US-Based DeCSS Posting and Linking*, 20 INFO SOC’Y 101 (2002).

²³⁴ See, e.g., *American Broadcast Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 451 (2014) (“[T]o the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress.”); *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (“[C]ritics of our ruling can take their objections across the street, [where] Congress can correct any mistakes it sees.” (citations and quotation marks omitted)).

Assessing the Court's institutionalist turn in copyright against this metric presents a more complicated picture. On the one hand, the Court has undoubtedly succeeded in avoiding some of modern copyright's most vexing questions, both by refraining from hearing such cases and by deciding the few that it takes through non-policy approaches. Each of its interpretive decisions has been sufficiently narrow in scope: whether it be the Court's plain meaning textualism in *Star Athletica*,²³⁵ or its overt technological intentionalism in *Aereo*.²³⁶ Indeed, it is this narrowness that has fueled the criticism that the Court's copyright opinions do little more than decide the specifics of the case rather than clarify the law.²³⁷ The Roberts Court has therefore maintained a sufficient level of distance from the polarizing copyright wars, such that the Court's own institutional legitimacy is hardly seen as impacted by its copyright jurisprudence.

At the same time, the Court's restraint has not been altogether costless. While refraining from addressing substantive questions of copyright policy in its decision-making, the Court's retreat to an institutionalist methodology has revealed an independent set of fault lines among the Justices, who now disagree over the Court's precise mechanisms of policy avoidance in copyright law. In the process, it has introduced an altogether new set of divergences into the copyright landscape, ones that had never existed before. These new methodological divergences draw on public law disagreements among the Court's members and thus assume an overt political dimension.²³⁸

In short then, while the Roberts Court's institutionalist turn in its copyright jurisprudence may have immunized the Court from debates about copyright's own public legitimacy, it has significantly complicated those debates. Disagreements at the Court over copyright's core doctrines are as a result no longer substantive and driven by the competing normative considerations underlying copyright; they are instead premised on divergent views of law-making and statutory interpretation in copyright.

The Court's decision in *Google* captures this very dynamic and will in the coming years test the effect of the Court's institutionalist turn

²³⁵ *Star Athletica LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

²³⁶ *Aereo*, 134 S. Ct. at 2511.

²³⁷ See Shyamkrishna Balganesh, *Foreword: Clarifying the "Clear Meaning" of Separability*, 166 U. PA. L. REV. 79, 82 (2017).

²³⁸ See Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018).

on copyright's public legitimacy. In implicitly accepting the view that the copyrightability of computer software was a domain where Congress had spoken and the Court was therefore limited in its ability to interfere, the Court certainly refrained from engaging questions of "policy." All the same, its overt effort to reintroduce those considerations into fair use where Congress had empowered courts to be generative, showcased the Court's creative ability to lace its institutionalism with the malleability of copyright doctrine. *Google* will therefore be seen as either having confirmed the Court's inability to engage in any line-drawing judgments that implicate statutory copyright rules, or as revealing the subversive fecundity of fair use. Either way, the debate about copyright's legitimacy is certain to assume new vigor and the Court's institutionalism will be an integral part of it.

V. CONCLUSION

In the Roberts Court, copyright law has emerged as an important arena for the Court's emphasis on its institutional legitimacy. This has manifested itself in the Court's near-complete disengagement from issues of substantive copyright policy, both interpretively and in its selection of copyright cases to decide. The singular hallmark of the Roberts Court's approach to copyright law has been its inability to develop an appropriate equilibrium for its role within the copyright system.

To be sure, over the course of history, the nature and form of the Court's engagement with copyright law has indeed varied. During the nineteenth century, the Court freely developed an independent federal common law of copyright, which was seen as having an unproblematic existence alongside the statute.²³⁹ In the first half of the twentieth century, this trend mostly continued except that the Court's opinions justified their lawmaking through the barebones (and undeveloped) nature of the copyright statute.²⁴⁰ In the second half of the century, the Court's engagement with copyright became significantly more technocratic, with the advent of new technologies and the empowerment

²³⁹ See, e.g., *Banks v. Manchester*, 128 U.S. 244 (1888); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *Wheaton v. Peters*, 33 U.S. 591 (8 Pet.) (1834).

²⁴⁰ See, e.g., *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932); *Herbert v. Shanley Co.*, 242 U.S. 591 (1917); *Fox Film Corp. v. Knowles*, 261 U.S. 326 (1923); *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).

of the Copyright Office as an agency with subject-matter expertise.²⁴¹ The 1976 Act only exacerbated this modality of engagement, given its detailed nature. Yet here too, the Court succeeded in carving out a legitimate space for itself within the copyright system.

What is crucial to appreciate is that the Act of 1976 did very little on its own to alter the nature of the Court's engagement with the subject. Neither the Burger nor Rehnquist Courts treated the Act's comprehensiveness or level of detail as requiring a significant alteration in their approach to interpreting, applying, and supplementing the statute.²⁴² To the contrary, some of the Court's most far-reaching doctrinal modifications emerged after the enactment of the 1976 Act. It was only in the Roberts Court, a full three decades later, that Congress's structural machinations in the statute have commanded heightened respect.

The irony of such deference emerging after an extended time period is further compounded by a more obvious reality: the Court's extreme institutionalism has left it unclear about its place in the legal landscape of copyright. Even if it is a faithful agent of Congress tasked with interpreting the legislature's statutory intentions, the Court has been unable to converge around the scope and contours of that agency. While it is one thing to avoid upsetting statutorily delineated copyright policy, it is quite another to refrain from deciding an issue when Congress delegated that task to courts. The *a priori* politics of the Justices' individual positions on questions of interpretation and separation of powers has precluded any sense of uniformity or cohesion in the Court's methodology of engaging copyright. In this sense, the Court's institutionalism has made the Court something of an outsider to the copyright system.

The ultimate beneficiaries of the Roberts Court's institutionalist turn in copyright remain altogether unclear. The politics of copyright law remain unchanged by the Court's disengagement; and the Court's own political legitimacy appears altogether unaffected by its institutional maneuvering in copyright law. By contrast, unequivocally clear are the real victims of the Court's institutionalist capitulation in this area: copyright law and policy.

²⁴¹ See, e.g., *Mazer v. Stein*, 347 U.S. 201 (1954); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Goldstein v. California*, 412 U.S. 546 (1973); *Teleprompter Corp. v. Columbia Broadcasting*, 415 U.S. 394 (1974); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

²⁴² See *Aiken*, 422 U.S. 151; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340 (1991); *Stewart v. Abend*, 495 U.S. 207 (1990).