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The Law as Uncopyrightable: Merging Idea and Expression Within the Eleventh Circuit's Analysis of "Law-Like" Writing

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The Law as Uncopyrightable: Merging Idea and Expression Within the Eleventh Circuit’s Analysis of “Law-Like” Writing

CHRISTINA M. FROHOCK*

The Eleventh Circuit recently issued an opinion in Code Revision Commission v. Public.Resource.Org, Inc. that meditates on the law as much as resolves a dispute. For that reason alone, attention should be paid. A commission acting on behalf of the Georgia General Assembly and the State of Georgia filed a copyright infringement action against a non-profit organization that had disseminated annotated state statutes. The Eleventh Circuit took these modest facts and delivered a philosophical analysis of the nature of law, finding that statutory annotations are outside copyright protection because the true author of such “law-like” writing is “the People.” The court’s opinion respects democracy by amplifying the voice of the People. Such amplification works best, however, on narrow facts. Applied broadly, in line with the scope of the court’s philosophy, the opinion risks distorting the People’s voice by muting intragovernmental disagreements. That voice is more often cacophony than clarion call, and the loudest strain comes from the least representative branch. Focusing on the exercise of sovereign authority, a different area of copyright law supports the same case outcome. The law, along with law-like annotations, is uncopyrightable because its idea and its official expression merge.

INTRODUCTION	1270
I. THE LAW AS UNCOPYRIGHTABLE.....	1272

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A. <i>Georgia’s Copyright Claim</i>	1272
B. <i>The Sovereign as Author</i>	1276
II. IDEA AND EXPRESSION OF THE LAW	1283
A. <i>Distorting the People’s Voice</i>	1283
B. <i>Revisiting the Sovereign as Author</i>	1287
CONCLUSION.....	1299

INTRODUCTION

Government works lie in the public domain and outside copyright protection. From this premise, the Court of Appeals for the Eleventh Circuit in *Code Revision Commission v. Public.Resource.Org, Inc.* has fashioned a theory of the law that casts “the People” as both constructive authors and owners of all laws.¹ The theory is democratic and inspiring, relying on the foundational notion that “Governments . . . deriv[e] their just powers from the consent of the governed.”² Judges and legislators may be authors of the law in the practical sense that they put pen to paper and choose the words of an opinion or statute. But the People are “the reservoir of all sovereignty,” that is, of supreme authority or power.³ The chosen words of judges and legislators carry the force of law only because they express the voice of the People as true author.⁴ Lawmaking is both for the People and by the People.⁵

¹ *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1232, 1239 (11th Cir. 2018). This Article follows the Eleventh Circuit’s convention of capitalizing “the People.”

² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see Code Revision Comm’n*, 906 F.3d at 1240.

³ *Code Revision Comm’n*, 906 F.3d at 1232; *see Boumediene v. Bush*, 553 U.S. 723, 754 (2008) (discussing definitions of “sovereignty,” including de facto sovereignty as “the exercise of dominion or power” and de jure sovereignty as “a claim of right”); *see also Sovereignty*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Supreme dominion, authority, or rule.”); *Sovereign*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A person, body, or state vested with independent and supreme authority.”).

⁴ *Code Revision Comm’n*, 906 F.3d at 1239.

⁵ *Id.* at 1239–40; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2675 (2015) (noting “it would be perverse to interpret the term ‘Legislature’ in the Elections Clause so as to exclude lawmaking by the people”); *see also* Abraham Lincoln, U.S. President, Gettysburg Address (Nov.

In *Code Revision Commission*, on a matter of first impression and an admittedly close question, the Eleventh Circuit extended this theory of the law to the “law-like” writing of statutory annotations.⁶ The court identified three “hallmarks of law”: (1) the identity of the writer, (2) the authoritativeness of the written work, and (3) the process of creating the written work.⁷ Examining the official annotations accompanying the Georgia state statutes, the court concluded that all three hallmarks indicate that the annotations “are sufficiently law-like so as to be properly regarded as a sovereign work.”⁸ Just as statutes are uncopyrightable because they are authored by the People, so too are law-like annotations.

The *Code Revision Commission* opinion warrants close attention, though not for the obvious pressure point of the Eleventh Circuit’s parity between statutes and statutory annotations. Before the court even describes the law-like nature of annotations, it offers a rich philosophy of the law as expressing the sovereign voice of the People.⁹ This initial discussion is eloquent and sweeping. Perhaps too sweeping. The court’s opinion respects democracy by amplifying the voice of the People, yet such amplification works best on narrow facts. Applied widely, beyond the statutory annotations at issue in *Code Revision Commission* and in line with the scope of the court’s philosophy, the opinion risks distorting the People’s voice by muting intra-governmental disagreements. The judicial and legislative branches often disagree, with courts acting as overseers through judicial review.¹⁰ The People’s voice is mythic, closer to cacophony than clarion call. Casting the People as the voice behind all laws yields a discordant result: the loudest strain comes from the least representative branch.

Code Revision Commission stands as an exemplar of legal writing and reaches a desirable outcome on the facts, though future panels may entertain another area of copyright law to support the same

19, 1863) (Nicolay Copy) (describing “government of the people, by the people[,] for the people”).

⁶ *Code Revision Comm’n*, 906 F.3d at 1233.

⁷ *Id.* at 1232, 1242.

⁸ *Id.* at 1233.

⁹ *See id.* at 1239–41.

¹⁰ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see infra* notes 123–35 and accompanying text.

outcome. This Article will first describe the Eleventh Circuit's opinion and the Supreme Court precedent establishing the law as uncopyrightable. Next, the Article will show how the logic of the Eleventh Circuit's opinion approaches a *reductio ad absurdum*, specifically, that the People speak most loudly through the judiciary. Finally, the Article will offer an alternative approach based on the merger doctrine to decide the predicate facts of *Code Revision Commission*. Copyright law protects expressions rather than ideas. The law, along with law-like writing, is uncopyrightable because its idea and its official expression are inseparable. Application of the merger doctrine here is unconventional, but promising.

I. THE LAW AS UNCOPYRIGHTABLE

A. Georgia's Copyright Claim

The dispute in *Code Revision Commission* arose from the unauthorized dissemination of the Official Code of Georgia Annotated (the "Code").¹¹ The Code contains the text of statutes enacted by the General Assembly of Georgia, alongside annotations.¹² Statutory annotations comprise a variety of secondary authorities, including "history lines, repeal lines, cross references, commentaries, case notations, editor's notes, excerpts from law review articles, summaries of opinions of the Attorney General of Georgia, summaries of advisory opinions of the State Bar, and other research references."¹³ Although the annotations are not primary authorities and do not carry the force of law, they do carry legal significance.¹⁴ The Code itself declares the merger of statutes and annotations within the bound series, and the State of Georgia publishes both as "a single, unified edict."¹⁵ The

¹¹ *Code Revision Comm'n*, 906 F.3d at 1234–35.

¹² *Id.* at 1233.

¹³ *Id.*; see Amended Complaint ¶ 2, *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350 (N.D. Ga. Oct. 8, 2015), *rev'd*, 906 F.3d 1229 (11th Cir. 2018) (No. 15 Civ. 2594) ("The copyrighted annotations include analysis and guidance that are added to the O.C.G.A. by a third party publisher of the O.C.G.A. as a work for hire. These annotations include synopses of cases that interpret the O.C.G.A., summaries of Opinions of the Attorney General of Georgia, and summaries of research references related to the O.C.G.A.").

¹⁴ See *Code Revision Comm'n*, 906 F.3d at 1233.

¹⁵ *Id.* at 1233, 1248.

annotations shine a necessary research light, guiding the interpretation of statutes and legislative history.¹⁶

The State of Georgia acquired its statutory annotations through a code publishing contract with Matthew Bender & Co., Inc., a member of the LexisNexis Group (“Lexis”) that publishes legal resources.¹⁷ Lexis agreed to pay all costs for editing, publishing, and distributing the Code in exchange for an exclusive publishing right over both hard copies and electronic copies.¹⁸ Lexis paid the cost of editorial freedom, as well. Acting through its Code Revision Commission, Georgia placed a firm supervisory hand on Lexis’ work.¹⁹ The code publishing contract included instructions on creating, compiling, and arranging the annotations, and the Code Revision Commission controlled the final product.²⁰ Critical for the present dispute, Georgia also held the copyright in its own name over “all copyrightable parts of the Code.”²¹

Despite this copyright and publication lockdown by Georgia and Lexis, the Code remained available.²² Certainly, the statutes did. The general public could read the full statutes on the internet any time.²³ Under the terms of its contract, Lexis posted online an unannotated version of the Code free of charge.²⁴ The statutory annotations were also available, but less easily and freely. The general public could read the entire Code in libraries and universities throughout the state, and state agencies could distribute any portions of the Code within their administrative purview.²⁵ A private actor, however, could not distribute the Code without infringing on the state’s alleged copyright.²⁶

¹⁶ See *id.* at 1248–49 (“The annotations’ combination with the statutes means that any understanding of the statutory text arrived at without reference to the annotations is axiomatically incomplete.”).

¹⁷ *Id.* at 1234.

¹⁸ *Id.*; see Amended Complaint, *supra* note 13, ¶ 10.

¹⁹ *Code Revision Comm’n*, 906 F.3d at 1234.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *id.* at 1235 (discussing the Commission’s cease and desist letters to Public.Resource.Org for alleged copyright infringement).

Enter Public.Resource.Org (“PRO”). PRO is a nonprofit organization dedicated to “Making Government Information More Accessible.”²⁷ With pro bono support from law firms, grants from various foundations, and an online invitation to contribute a tax-deductible donation, PRO works to expand public access to government records and materials.²⁸ Its website includes “A Proposed Distributed Repository of All Primary Legal Materials of the United States,” a television network for the federal judiciary, and a call to action for the U.S. House of Representatives to “provid[e] broadcast-quality video of all hearings and the floor.”²⁹ In 2013, PRO purchased the Code in print form, scanned all 186 volumes including supplements, and uploaded the scanned pages to its website for free and unfettered access.³⁰ PRO also mailed USB drives containing the Code to Georgia legislators and distributed copies to other private organizations and websites in the hope of wider distribution.³¹

Not surprisingly, the Commission sent cease-and-desist letters to PRO, invoking Georgia’s copyright in all parts of the Code so copyrightable.³² The state focused its demand on the statutory annotations, as all parties agreed from the outset “that the Georgia statutes and the statutory numbering are not copyrightable.”³³ Again not surprisingly, PRO refused to cease or desist, taking the position that no part of the Code is copyrightable “because the law cannot be copyrighted.”³⁴ On July 21, 2015, acting on behalf of both the Georgia

²⁷ PUBLIC.RESOURCE.ORG, <https://public.resource.org/index.html> (last visited Jan. 29, 2019).

²⁸ *Id.*; *Code Revision Comm’n*, 906 F.3d at 1234–35.

²⁹ *Law.Gov*, PUBLIC.RESOURCE.ORG, <https://public.resource.org/law.gov/index.html> (last visited Jan. 29, 2019); *The Federal Judicial Center*, PUBLIC.RESOURCE.ORG, <https://public.resource.org/fjc.gov/index.html> (last visited Jan. 29, 2019); *The House of Representatives*, PUBLIC.RESOURCE.ORG, <https://public.resource.org/house.gov/index.html> (last visited Jan. 29, 2019).

³⁰ *Code Revision Comm’n*, 906 F.3d at 1235; *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1354 (N.D. Ga. 2017), *rev’d*, 906 F.3d 1229 (11th Cir. 2018); *see* Amended Complaint, *supra* note 13, ¶ 15.

³¹ *Code Revision Comm’n*, 906 F.3d at 1235.

³² *Id.*

³³ Plaintiff’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment at 1, *Code Revision Comm’n*, 244 F. Supp. 3d 1350 (No. 30-2594); *see* Amended Complaint, *supra* note 13, ¶ 14 (“Plaintiff does not assert copyright in the O.C.G.A. statutory text itself since the laws of Georgia are and should be free to the public.”).

³⁴ *Code Revision Comm’n*, 906 F.3d at 1235.

General Assembly and the State of Georgia, the Commission filed suit in the U.S. District Court for the Northern District of Georgia against PRO for copyright infringement.³⁵

The Commission sought an injunction requiring PRO to remove all “infringing materials from the internet” and preventing any future infringement.³⁶ Decrying PRO’s “well-laid plan” to challenge Georgia’s copyright, the Commission invoked the state’s copyright protection over “the original and creative annotations of the uncopyrightable state’s laws,” annotations that the state viewed as clearly “not the law.”³⁷ PRO responded by admitting the facts; it had published the Code as alleged.³⁸ PRO also effectively confirmed the Commission’s depiction of a well-laid plan, as it had “proudly scanned and posted online” the Code.³⁹ But PRO denied that those admitted facts gave rise to any claim because Georgia did not hold a valid copyright in the Code.⁴⁰ Alternatively, PRO argued that (1) the Code annotations lacked sufficient originality and creativity to be distinct from the basic idea of statutory annotations, and (2) its publication was fair use.⁴¹ PRO also filed a counterclaim, asking the court to declare that Georgia holds no enforceable copyright in any portion of the Code.⁴² PRO argued that only if the entire Code is “free, available, and useable to all” can individuals enjoy fair and equal access to the laws of the State of Georgia.⁴³ Undeterred by the lawsuit, PRO subsequently purchased the 2015 Code and uploaded

³⁵ *Id.*; see Plaintiff’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 33, at 1.

³⁶ Plaintiff’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 33, at 2–3; *Code Revision Comm’n*, 906 F.3d at 1235.

³⁷ Plaintiff’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 33, at 1–2.

³⁸ *Code Revision Comm’n*, 906 F.3d at 1235.

³⁹ Defendant’s Memorandum of Law in Support of Its Motion for Summary Judgment at 1, *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350 (N.D. Ga. 2017), *rev’d*, 906 F.3d 1229 (11th Cir. 2018) (No. 29-2594).

⁴⁰ *Code Revision Comm’n*, 906 F.3d at 1235; Defendant’s Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 39, at 5–11.

⁴¹ *Code Revision Comm’n*, 906 F.3d at 1233; see Plaintiff’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment, *supra* note 33, at 1; Defendant’s Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 39, at 11–24.

⁴² *Code Revision Comm’n*, 906 F.3d at 1235.

⁴³ Defendant’s Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 39, at 2.

all those volumes and supplements to its website.⁴⁴ For good measure, PRO also archived them on the internet.⁴⁵

On competing summary judgment motions, the district court concluded that because the statutory annotations in the Code are not enacted into law and do not carry the force of law, they are not in the public domain.⁴⁶ Accordingly, the court granted partial summary judgment to the Commission and rejected PRO's challenge to Georgia's copyright.⁴⁷ The court also rejected PRO's argument of insufficient originality and affirmative defense of fair use.⁴⁸ The court then issued a permanent injunction against PRO, enjoining "all unauthorized use, including through reproduction, display, distribution, or creation of derivative works," of the Code, ordering that PRO "remove all versions of the [Code] from its website," and ordering that PRO end all fundraising connected with its publication of the Code.⁴⁹

PRO appealed to the U.S. Court of Appeals for the Eleventh Circuit. There, the nonprofit found a receptive audience. Its mission statement that all aspects of the law belong to the People flourished into a judicial opinion that all aspects of the law are spoken by the People.⁵⁰

B. *The Sovereign as Author*

The Eleventh Circuit identified its "ultimate inquiry" in *Code Revision Commission* to be "whether a work is authored by the People, meaning whether it represents an articulation of the sovereign will."⁵¹ The district court had paid little mind to sovereign authorship, as it looked to Georgia law's own distinction between statutory law and nonstatutory commentary to situate annotations squarely

⁴⁴ *Code Revision Comm'n*, 244 F. Supp. 3d at 1354.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1356; see *Code Revision Comm'n*, 906 F.3d at 1235.

⁴⁷ *Code Revision Comm'n*, 906 F.3d at 1235.

⁴⁸ *Code Revision Comm'n*, 244 F. Supp. 3d at 1355–61; see *Code Revision Comm'n*, 906 F.3d at 1235.

⁴⁹ *Code Revision Comm'n*, 906 F.3d at 1235.

⁵⁰ See Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 39, at 2 ("The law belongs to the people . . . Making the O.C.G.A. free, available and useable to all allows everyone, whether he or she is a lawyer or layperson, journalist, teacher or student, part of a nonprofit charitable entity or a multinational corporation, or merely a concerned citizen—everyone—to better understand, use, and comply with the law.").

⁵¹ *Code Revision Comm'n*, 906 F.3d at 1232.

outside the law and inside copyright protection.⁵² Painting on “a relatively clean canvas,” the appellate court looked directly to the Copyright Act.⁵³

Authorship enjoys pride of place in both the Constitution and the Copyright Act.⁵⁴ Acting on its constitutional authority to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” Congress has extended copyright protection to “original works of authorship fixed in any tangible means of expression.”⁵⁵ Indeed, the protected copyright vests initially and immediately “in the author or authors of the work.”⁵⁶

In *Code Revision Commission*, the Eleventh Circuit interpreted the term “author” for certain government works to mean “the People.”⁵⁷ No citation follows that interpretation, and the court admitted that the precedents “establishing this doctrine are far from clear.”⁵⁸ The Supreme Court has offered little guidance on copyright authorship, driving the Eleventh Circuit to dust off nineteenth-century case law. Three opinions from the 1800s shed light on the issue of who owns the law.

First, in the 1834 case of *Wheaton v. Peters*, the Supreme Court pondered the “novel” and “interesting” questions surrounding whether its official reporter could assert and convey a copyright in Wheaton’s Reports, his publication of the high court’s opinions.⁵⁹ The parties disputed whether Wheaton himself had contributed anything creative, and the Court remanded to determine “whether the

⁵² See *Code Revision Comm’n*, 244 F. Supp. at 1356–57 (“Furthermore, a transformation of an annotation into one uncopyrightable unit with the statutory text would be in direct contradiction to current Georgia law.”).

⁵³ *Code Revision Comm’n*, 906 F.3d at 1239.

⁵⁴ See U.S. CONST. art. I, § 8, cl. 8; see also 17 U.S.C. §§ 101, 102, 201 (2012).

⁵⁵ U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 102(a).

⁵⁶ 17 U.S.C. § 201(a).

⁵⁷ *Code Revision Comm’n*, 906 F.3d at 1236.

⁵⁸ *Id.*; see also *id.* at 1232 (noting without citation that “all agree that a state’s codification cannot be copyrighted because the authorship is ultimately attributable to the People”).

⁵⁹ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654, 667–68 (1834).

said Wheaton as author, or any other person as proprietor,” had satisfied all requisites of the Copyright Act of 1790.⁶⁰ In remanding, the Court allowed for the possibility of a copyright interest in Wheaton’s Reports.⁶¹ But not in every page. The opinion ended by clarifying that the Reports’ core component was off limits from private ownership: “the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.”⁶² Wheaton could seek copyright protection over his “marginal notes and abstracts of arguments,” but nothing more.⁶³ Whatever the copyright statute required in terms of performance or conferred in terms of benefits, the law was outside its reach.⁶⁴

More than fifty years passed quietly on the issue. In 1888, the high court again waded into the interesting intersection between copyright law and the law in *Banks v. Manchester*.⁶⁵ There, the Court extended its *Wheaton* view to state court opinions.⁶⁶ *Banks* raised the

⁶⁰ *Id. Compare Wheaton*, 33 U.S. (8 Pet.) at 593 (“The complainants in their bill state, that Henry Wheaton is the author of twelve books or volumes, of the reports of cases argued and adjudged in the supreme court of the United States, and commonly known as ‘Wheaton’s Reports.’”), *with id.* at 648 (“Mr. Wheaton undertook the preparation and publication of the reports of the decisions of the court, under the appointment of the court. He furnished nothing original from his own mind.”); *see Callaghan v. Myers*, 128 U.S. 617, 648 (1888) (In *Wheaton*, “[t]his court held (1) that the plaintiffs could assert no common-law right to the exclusive privilege of publishing, but must sustain such right, if at all, under the legislation of [C]ongress; (2) that, under such legislation, there must have been, in order to secure the copyright, a compliance with the provisions of the statute in regard to the publication in a newspaper of a copy of the record of the title of the book, and in regard to the delivery of a copy of it, after publication, to the [S]ecretary of [S]tate.”).

⁶¹ *Callaghan*, 128 U.S. at 648–49 (“If this court had been of opinion that there could not have been a lawful copyright in the volumes of Wheaton’s Reports, it would have been useless to send the case back to the Circuit Court . . .”).

⁶² *Wheaton*, 33 U.S. (8 Pet.) at 668.

⁶³ *Callaghan*, 128 U.S. at 650.

⁶⁴ *Id.* at 649 (“Therefore, the only matter in Wheaton’s Reports which could have been the subject of the copyrights in regard to which the jury trial was directed was *the matter not embracing the written opinions of the court*, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index.” (emphasis added)).

⁶⁵ 128 U.S. 244 (1888).

⁶⁶ *Id.* at 253–54.

issue of whether a reporter for the Supreme Court of Ohio could obtain and convey “a copyright, for the use of the State,” in the publication of the court’s opinions and decisions, including the statement of the case and the syllabus.⁶⁷ The U.S. Supreme Court found that the entire publication “was exclusively the work of the judges” and that “the reporter was not the author of any part.”⁶⁸ Accordingly, the copyright claim failed.⁶⁹

The Court left open the question of whether the State of Ohio could claim a copyright for itself, but answered forcefully the question of whether judges could do so here: No.⁷⁰ The Ohio judges may have supplied the exclusive work for publication, but “[i]n no proper sense” did they fill the statutory role of author.⁷¹ Effectively, the Ohio law volumes lacked any author at all. As a matter of public policy and “always . . . a judicial *consensus*,” copyright law did not reach any writing “by judicial officers in the discharge of their judicial duties.”⁷² Quoting its unanimous view in *Wheaton*, the Court in *Banks* concluded with a description of all judicial writing in the public domain: “The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.”⁷³

One month after *Banks*, the Supreme Court decided *Callaghan v. Myers* and again considered whether volumes of state law reports are copyrightable.⁷⁴ There, a publishing firm brought suit for copyright infringement against competitors that had published the Illinois Reports.⁷⁵ The Reports contained opinions of the Supreme Court of Illinois, as well as “a large amount of matter original with” the court

⁶⁷ *Id.* at 245, 251.

⁶⁸ *Id.* at 251–52 (“Mr. De Witt . . . was not the author, inventor, designer, or proprietor of the syllabus, the statement of the case, or the decision or opinion of the court.”).

⁶⁹ *Id.* at 252.

⁷⁰ *Id.* at 253.

⁷¹ *Id.* (“In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note, be regarded as their author.”).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Callaghan v. Myers*, 128 U.S. 617, 617 (1888).

⁷⁵ *Id.* at 623.

reporter.⁷⁶ In addition to compiling and arranging legal work from the judges, the reporter had prepared a case syllabus or headnotes, a statement of case facts, and a table of cases cited and decided.⁷⁷ The reporter conveyed his copyright interest in the Illinois Reports to the plaintiff publishing firm, and that firm did not look kindly on the unauthorized publication of imitation volumes as “piracies on the copyrights of the plaintiff.”⁷⁸ Faithful to the theme of *Wheaton* and *Banks*, the defendants offered the “broad proposition . . . that these law reports are public property, and are not susceptible of private ownership.”⁷⁹ Simply put, the court reporter “was not an author” for copyright purposes.⁸⁰

Reaching the opposite outcome from *Wheaton* and *Banks*, the Supreme Court in *Callaghan* found the copyright valid.⁸¹ The difference in *Callaghan* was factual rather than analytical: the reporter for the Supreme Court of Illinois had contributed original work. The Court found that, other than the court opinions, every part of the Illinois Reports was “the work of the reporter, and the result of intellectual labor on his part.”⁸² Accordingly, as author, he could obtain a copyright over all parts other than the judicial opinions.⁸³ The law remained outside copyright’s grasp.

On the legislative side, Congress has settled the issue of copyright protection over federal government work. There is none. The Copyright Act provides that “[c]opyright protection . . . is not available for any work of the United States Government.”⁸⁴ For the work

⁷⁶ *Id.* at 620.

⁷⁷ *Id.*

⁷⁸ *Id.* at 621–22.

⁷⁹ *Id.* at 645.

⁸⁰ *Id.* at 646–47.

⁸¹ *Id.* at 663.

⁸² *Id.* at 645; *see id.* at 647 (finding “no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume which will cover the matter which is the result of his intellectual labor”).

⁸³ *Id.* at 650.

⁸⁴ 17 U.S.C. § 105 (2012) (“Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.”); *see id.* § 101 (defining “work of the

of a state government, the precedents of *Wheaton*, *Banks*, and *Callaghan* still apply.⁸⁵ Copyright law does not extend to state “government employees who are possessed of particular powers, namely the ability to promulgate official, binding edicts,” when they are promulgating such official, binding edicts.⁸⁶

Even with a trio of Supreme Court opinions and a federal statute in hand, the Eleventh Circuit Court of Appeals in *Code Revision Commission* confronted an age-old rule with only “implicit and unstated” foundations.⁸⁷ Government works are uncopyrightable, but why? To answer this question, the court looked to “first principles about the nature of law in our democracy.”⁸⁸ With citations ranging from *The Declaration of Independence* to James Madison in *The Federalist* to President Abraham Lincoln in *The Gettysburg Address* to Chief Justice John Marshall to Alexis de Tocqueville, the Eleventh Circuit described a philosophy of popular sovereignty.⁸⁹ Judges and legislators draft the law, but only as authorized delegates and “servants of the People.”⁹⁰ Whatever our servants produce not only belongs to us, but expresses our voice.⁹¹ The court describes the People as “the true authors” and “the constructive authors” of all laws, and writes favorably of a sister court’s description of the People as metaphorical authors.⁹² However lofty the description, the implication for copyright protection is clear. The People are “ultimately the source of our law,” and so the People are authors of the law, and so

United States government” as “a work prepared by an officer or employee of the United States government as part of that person’s official duties”).

⁸⁵ See *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1238–40 (11th Cir. 2018) (noting that Congress’ “partial codification of *Banks* for works created by the federal government leaves unmodified the rule as it applies to works created by the states”).

⁸⁶ *Id.* at 1246; see *id.* at 1251 (“A speech delivered by a judge, depending on the circumstances of the address, may or may not count as a work created by a government employee.”).

⁸⁷ *Id.* at 1239.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1239–40.

⁹⁰ *Id.* at 1239.

⁹¹ *Id.* (“When the legislative or judicial chords are plucked it is in fact the People’s voice that is heard.”).

⁹² *Id.* at 1239, 1241 (citing First Circuit Court of Appeals in *Bldg. Officials & Code Adm’rs v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980), for “metaphorical concept of citizen authorship”).

the People are owners of the law.⁹³ Thus, the law “is intrinsically public domain material and is freely accessible to all so that no valid copyright can ever be held in it.”⁹⁴

On the facts of *Code Revision Commission*, the Georgia statutes present an easy, prototypical case.⁹⁵ Although elected officials drafted the statutes as a matter of fact, the People are authors as a matter of law.⁹⁶ *De facto* authorship derives from a pen; *de jure* authorship derives from sovereignty. Statutory annotations present a difficult, novel case, inhabiting “a zone of indeterminacy” between government work that carries the force of law and government work that does not.⁹⁷ If such work is “sufficiently like the law” so as to be deemed an expression of the People’s voice, then copyright protection does not apply.⁹⁸ Considering the annotations at issue, the Eleventh Circuit identified three “critical markers” to identify the law: (1) the identity of the writer, (2) the authoritativeness of the work, and (3) the process of creating the work.⁹⁹ All three support the conclusion that the Georgia statutory annotations “are part and parcel of the law.”¹⁰⁰

First, the Eleventh Circuit identified the writer of the annotations as the heavy hand behind the drafting hand.¹⁰¹ Granted, private individuals at Lexis write the annotations.¹⁰² But Lexis has so little creative license under the terms of its code publishing contract with the state that “the Georgia General Assembly is the driving force” behind

⁹³ *Id.* at 1239–40.

⁹⁴ *Id.* at 1240.

⁹⁵ *Id.* at 1242.

⁹⁶ *Id.* at 1233.

⁹⁷ *Id.* at 1242.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1232 (“[W]e rely on the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created.”); *id.* at 1242 (“Put simply, there are certain things that make the law what it is. The law is written by particular public officials who are entrusted with the exercise of legislative power; the law is, by nature, authoritative; and the law is created through certain, prescribed processes, the deviation from which would deprive it of legal effect.”).

¹⁰⁰ *Id.* at 1243.

¹⁰¹ *See id.* at 1243–48.

¹⁰² *Id.* at 1243.

the writing.¹⁰³ The writer “in a powerful sense” is the Georgia legislature itself.¹⁰⁴ Second, the annotations are “authoritative sources on the meaning of Georgia statutes,” necessary for a complete and accurate understanding.¹⁰⁵ These interpretive tools appear within the Code alongside statutes, and the unified publication is “stamped with the state’s imprimatur.”¹⁰⁶ Finally, the process of creating annotations is “very closely related” to the process of creating statutes.¹⁰⁷ Pursuant to statute, the Georgia General Assembly voted to adopt annotations as “an integral part” of the Code, and each year the General Assembly votes to reaffirm the status of the Code as the official codification of state laws.¹⁰⁸

The Eleventh Circuit concluded, therefore, that the statutory annotations in Georgia’s Code “are attributable to the constructive authorship of the People.”¹⁰⁹ The annotations are “intrinsically public domain material, belonging to the People, and, as such, must be free for publication by all.”¹¹⁰ Case reversed, vacated, and remanded.¹¹¹ Georgia’s copyright claim failed.¹¹²

II. IDEA AND EXPRESSION OF THE LAW

A. *Distorting the People’s Voice*

A strong policy argument supports the result in *Code Revision Commission*.¹¹³ The law does not bind in a vacuum. Statutes and

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1248–49 (internal quotation omitted); *see id.* at 1250–52.

¹⁰⁶ *Id.* at 1248.

¹⁰⁷ *Id.* at 1252; *see id.* at 1252–54.

¹⁰⁸ *Id.* at 1253.

¹⁰⁹ *Id.* at 1255.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*; *see* *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 799 (5th Cir. 2002) (noting that “public ownership of the law means precisely that ‘the law’ is in the ‘public domain’ for whatever use the citizens choose to make of it[,] . . . not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse”); Josh Blandi, *Who Owns the Law?*, ABA L. PRAC. TODAY (Dec. 14, 2018), <https://www.lawpracticetoday.org/article/who-owns-law-access-justice/>.

court opinions must be promulgated, interpreted, understood, and debated. Divining meaning from the language of the law requires reference to “context, structure, history, and purpose,” together with common sense.¹¹⁴ Accordingly, the law comprises the words of statutes and opinions, as well as annotations and any other “part and parcel” provided by the government to illuminate those words.¹¹⁵ An informed public must have easy and free access to the law in this full, meaningful sense. Otherwise, the law stands as a foreign language with its official translation manual under lock and key.¹¹⁶ Copyright should not erect a barrier between the public and the laws that bind it.¹¹⁷

Of course, the Eleventh Circuit’s opinion renders less lucrative a code publishing contract like that between Lexis and Georgia. Incentives will shift without copyright protection for the end product, and parties may bargain for other benefits under the contract itself. Or companies may eschew state contracts altogether. The opinion does leave room for private authors—removed from the state’s editorial control, official stamp, and legislative vote—to claim copyright protection over all the annotations they care to write. Such independent and original works remain purely secondary authorities, discussing rather than resembling the law.

The Eleventh Circuit’s opinion is even more laudable from a democratic perspective, as it rests on a foundational concept of popular sovereignty and amplifies the voice of the People to deny copyright protection.¹¹⁸ On the facts of *Code Revision Commission*, that voice amplifies smoothly. The people of Georgia spoke through their

¹¹⁴ *Abramski v. United States*, 573 U.S. 169, 179 (2014) (construing language of federal gun statute) (internal quotation omitted).

¹¹⁵ *Code Revision Comm’n*, 906 F.3d at 1243.

¹¹⁶ *See id.* at 1249 (noting that “a full understanding of the laws of Georgia necessarily includes an understanding of the contents of the annotations”) (emphasis added).

¹¹⁷ *See Blandi*, *supra* note 113 (“The issue of access to the law goes beyond locating cases and statutes online: It is not just about finding the laws but is also about pairing them with annotations, history, metadata, and parallel citations that make cases and statutes more meaningful and helpful.”).

¹¹⁸ *See Code Revision Comm’n*, 906 F.3d at 1239–40, 1252.

elected legislators to author both the state statutes and the accompanying annotations.¹¹⁹ There, the legislature was the only governmental branch at work.¹²⁰ The Eleventh Circuit recognized that its philosophy of popular sovereignty would apply equally to the legislative and judicial branches, as “[s]tatutes and judicial opinions are the most obvious examples of what falls within the ambit of the rule.”¹²¹ Both legislative enactments and case opinions represent “the quintessential exercise of sovereign power.”¹²² Yet, combining those statutes and opinions becomes problematic. Looking beyond the narrow facts of *Code Revision Commission* and hearing the People’s voice through both the legislative and judicial branches at once, the sound amplifies into a distortion. The voice cracks on a grander stage.

Since at least 1803, when Chief Justice Marshall famously articulated the function of judicial review in *Marbury v. Madison*, the courts and the legislature have engaged in a dialogue to promulgate the law.¹²³ As coordinate branches, neither side may ride roughshod over the other.¹²⁴ But on matters within “the range of judicial cognizance,” the courts’ review function gives judges the final word.¹²⁵ On constitutional questions, in particular, “the federal judiciary is supreme in the exposition of the law.”¹²⁶ Although a federal court will grant Congress’ view “the most respectful consideration,” the court makes its own determination whether Congress has acted within its

¹¹⁹ *See id.* at 1254–55.

¹²⁰ *See id.*

¹²¹ *Id.* at 1242.

¹²² *Id.* at 1232; *see id.* at 1239.

¹²³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

¹²⁴ *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (Harlan, J., concurring in part and dissenting in part) (“As the Court is not justified in substituting its own views of wise policy for the commands of the Constitution, still less is it justified in allowing Congress to disregard those commands as the Court understands them.”).

¹²⁵ *Chi., Burlington & Quincy R.R. v. McGuire*, 219 U.S. 549, 569 (1911) (cautioning that “[t]he scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*”).

¹²⁶ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

powers.¹²⁷ A court may act even when the legislature remains passive.¹²⁸ Like their federal counterparts, Georgia state courts also exercise judicial review, dating back to the early 1800s.¹²⁹ In fact, the Georgia Constitution includes a Judicial Review Clause, granting the judiciary the power to declare void any legislative acts in violation of the state Constitution or the federal Constitution.¹³⁰

On the Eleventh Circuit's view of authorship, the People speak through both the legislative and judicial branches just as they "govern themselves through their legislative and judicial representatives."¹³¹ Yet, conflicts between the governmental branches are inevitable on constitutional questions, transforming the voice of the People from clarion call to cacophony. For a few recent examples, the high court has stepped in to rule on controversial legislation concerning health care, same-sex marriage, and gun control.¹³² Judicial review resolves those conflicts in favor of the courts' view.¹³³ The bench wins. Constitutions may be amended. But for now, as stakes

¹²⁷ *Mitchell*, 400 U.S. at 204 (Harlan, J., concurring in part and dissenting in part); see *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, [the Religious Freedom Restoration Act] contradicts vital principles necessary to maintain separation of powers and the federal balance.").

¹²⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (recognizing that "[a]n individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act").

¹²⁹ See, e.g., *Lathrop v. Deal*, 801 S.E.2d 867, 883 (Ga. 2017) (noting that "[b]y 1861, the doctrine of judicial review had been employed by Georgia courts for several decades").

¹³⁰ GA. CONST. art. I, § 2, para. V.

¹³¹ *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1239 (11th Cir. 2018).

¹³² See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574–75 (2012) (finding individual mandate in Affordable Care Act constitutional "because it can reasonably be read as a tax"); *United States v. Windsor*, 570 U.S. 744, 775 (2013) (finding the Defense of Marriage Act unconstitutional); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (finding District of Columbia gun-control statutes unconstitutional).

¹³³ See, e.g., *Sebelius*, 567 U.S. at 574–75; *Windsor*, 570 U.S. at 775; *Heller*, 554 U.S. at 635.

rise in interpreting the fundamental law, the loudest voice of the sovereign People comes from the distant branch: judges. Although Georgia elects its judges,¹³⁴ some state judges and all federal judges are unelected.¹³⁵ The voice from the bench is at once most and least representative.

B. *Revisiting the Sovereign as Author*

This implication from *Code Revision Commission* is odd—and perhaps avoidable. There may be a different route, steering away from the potential *reductio ad absurdum* in the Eleventh Circuit’s People-as-author theory while maintaining the policy-friendly case result.¹³⁶ And the Eleventh Circuit itself suggests the direction. The *Code Revision Commission* opinion contains the germ of another idea within copyright law: merger.

Just before analyzing the law-like nature of statutory annotations, the Eleventh Circuit states that “[w]hether or not a work is subject to the rule is dependent on whether the work is the law, or sufficiently like the law, so as to be deemed the product of the direct exercise of sovereign authority, *and therefore attributable to the constructive authorship of the People.*”¹³⁷ Omitting the final, italicized clause avoids entanglements arising from the People’s voice expressed on all sides of intragovernmental disagreements. Why are government works uncopyrightable? Because they are a direct exercise of sovereign authority. Ockham’s Razor slices off the answer there, before any authorship of the People.¹³⁸

¹³⁴ See GA. CONST. art. VI, § 7, para. I (“All superior court and state court judges shall be elected on a nonpartisan basis for a term of four years. All Justices of the Supreme Court and the Judges of the Court of Appeals shall be elected on a nonpartisan basis for a term of six years.”).

¹³⁵ See U.S. CONST. art. II, § 2, cl. 2 (providing that President may nominate, with advice and consent of Senate, “Judges of the supreme Court, and all other Officers of the United States”); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015) (“Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior. The Constitution permits States to make a different choice, and most of them have done so. In 39 States, voters elect trial or appellate judges at the polls.”).

¹³⁶ See *Code Revision Comm’n*, 906 F.3d at 1239–40.

¹³⁷ *Id.* (emphasis added).

¹³⁸ See 9 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 735 (Edward Craig ed., 1998) (“Ockham’s thought consistently shows a strong drive towards ontological

Taking a cue from the Eleventh Circuit, we focus the analysis on authorship. The sovereign is author. Full stop. The court dives deep, but we can run a copyright analysis without probing the ultimate source of the law.¹³⁹ The Framers designed our government as a comprehensive system, diffusing power among three coequal branches.¹⁴⁰ The fact that one branch is more or less representative of the People does not affect the exercise of sovereign authority within that branch. Sovereign authority, not representation, is key. Indeed, the concept of sovereignty is broader than popular sovereignty, as shown beyond the shores of the U.S. judicial branch. There are ways to structure a legitimate government other than of, by, and for the People. Kings, for example, derive their just powers from God.¹⁴¹ Divine right would render the Almighty the author for copyright purposes. But, then, would public ownership eclipse divine ownership? Could a deity suffer an infringement? We are getting far afield. Fortunately, we need not complicate matters by looking behind the individuals exercising sovereign authority to identify the root of their authority and, thus, the true, constructive, or metaphorical author of laws. No need to pull back the curtain. Laws are in the public domain whether issued from a democracy or a monarchy or otherwise. With any sovereign as author, copyright protection still fails to reach the law and law-like writing on an alternative basis: the merger doctrine.¹⁴² Government works lie in the public domain because the idea and the official expression of the law are inseparable.¹⁴³

economy and that he did on many occasions use the razor (which he himself formulated either as ‘a plurality should never be posited without necessity’ or as ‘it is pointless to do with more what can be done with fewer’); *see also* *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755, 765 (Fed. Cir. 2016) (O’Malley, J., concurring) (“As Ockham’s Razor advises, the simpler path is usually best.”).

¹³⁹ *See Code Revision Comm’n*, 906 F.3d at 1239.

¹⁴⁰ *See, e.g., United States v. Nixon*, 418 U.S. 683, 707 (1974).

¹⁴¹ *See Divine Right of Kings*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The political theory that the sovereign is a direct representative of God and has the right to rule absolutely by virtue of royal birth.”).

¹⁴² *Merger Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁴³ *See id.*

Taking another cue from the Eleventh Circuit, we begin with first principles embedded in the relevant opinions.¹⁴⁴ The idea of the law includes certain essential aspects, without which the idea itself collapses.¹⁴⁵ One such aspect is that the law is expressed. The Supreme Court in *Banks* recognized this aspect as self-evident: “the law” may take the form of either “a declaration of unwritten law, or an interpretation of a constitution or a statute.”¹⁴⁶ A constitution or a statute is already written, with a notable exception of the British Constitution.¹⁴⁷ By contrast, unwritten law must be *declared* to achieve legal status.¹⁴⁸

Declaration does not limit the sources of law. To say that the law is expressed is not to foreclose unannounced common-law principles or unarticulated rights. The common law is a rich source of rules and indeed often synonymous with “unwritten law.”¹⁴⁹ While cautioning against reading too far into the Constitution, the Supreme Court has long “acknowledged that certain unarticulated rights are implicit in enumerated guarantees,” including the right to be presumed innocent and the rights of privacy and association.¹⁵⁰ These “important but

¹⁴⁴ See *Code Revision Comm’n*, 906 F.3d at 1232 (“To navigate the ambiguities surrounding how to characterize this work, we resort to first principles.”).

¹⁴⁵ Cf. Bertrand Russell, *On Denoting*, 14 MIND 479, 484–85 (1905) (analyzing sentence “The King of France is bald” and observing that “if we allow that denoting phrases, in general, have the two sides of meaning and denotation, the cases where there seems to be no denotation cause difficulties both on the assumption that there really is a denotation and on the assumption that there really is none”).

¹⁴⁶ *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

¹⁴⁷ See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 367 (2012).

¹⁴⁸ See *Banks*, 128 U.S. at 253; *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) (observing that “courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state”).

¹⁴⁹ See, e.g., *Levy’s Lessee v. McCartee*, 31 U.S. 102, 110–11 (1832) (“It is too plain for argument, that the common law is here spoken of in its appropriate sense, as the unwritten law of the land, independent of statutable enactments.”); *Wheaton v. Peters*, 33 U.S. 591, 626 (1834) (noting in copyright context that “the source of exclusive ownership is therefore found in positive enactments, and not in any unwritten law”); *District of Columbia v. Heller*, 554 U.S. 570, 717 (2008) (Breyer, J., dissenting) (noting that certain state “laws were not only thought consistent with an *unwritten* common-law gun-possession right, but also consistent with *written* state constitutional provisions”).

¹⁵⁰ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579–80 (1980).

unarticulated rights . . . share constitutional protection in common with explicit guarantees” because they are fundamental to the enjoyment of those explicit guarantees.¹⁵¹ The document is greater than its text.¹⁵² In nontextual circumstances, courts and Congress do the work of expression, reading between the lines or outside the four corners.¹⁵³ Such expression often takes the form of a writing, but other forms suffice.¹⁵⁴

Expression of the law raises another essential aspect: the law is binding. Again, the Supreme Court in *Banks* recognized this aspect as self-evident: “the law, which, binding every citizen . . .”¹⁵⁵ Similarly, the Eleventh Circuit in *Code Revision Commission* described laws as “official, binding edicts.”¹⁵⁶ Nonlegal commands impose their own restraints and, in truth, may fit better with the word “laws.” The laws of physics, for example, are inescapable.¹⁵⁷ Morality and religion offer robust normative codes that can certainly feel inescapable. Adherents may pray (or insist) that the legal code overlaps. The Eleventh Circuit focuses on a law’s official status rather than its merit

¹⁵¹ *Id.* at 580; see *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

¹⁵² See *AMAR*, *supra* note 147, at 97 (“In addition to reading between the lines of the text and pondering the specific procedures by which the text was enacted and amended, we must take account of—and take a count of—how ordinary Americans have lived their lives in ordinary ways and thereby embodied fundamental rights.”).

¹⁵³ See *id.* at 47, 136 (noting that “we must read the Constitution as a whole—between the lines, so to speak” and describing authority of courts and Congress to recognize new rights from the “lived Constitution”).

¹⁵⁴ See, e.g., *Patterson v. Sec’y, Fla. Dep’t of Corr.*, 849 F.3d 1321, 1331 (11th Cir. 2017) (Jordan, J., dissenting) (recognizing that “Florida law does not require that a criminal judgment be in writing” but may be pronounced in open court, and citing *FLA. R. CRIM. P.* 3.700).

¹⁵⁵ *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

¹⁵⁶ *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1246 (11th Cir. 2018); see *id.* at 1247 (noting “the promulgation of binding legal edicts”); *id.* at 1249 (noting “binding legal effect”); *id.* at 1250 (noting “the status of binding law”); *id.* at 1252 (noting “the process by which the statutory provisions were made into binding law”).

¹⁵⁷ See generally JIM AL-KHALILI, *PARADOX: THE NINE GREATEST ENIGMAS IN PHYSICS* 34–38 (2012) (discussing rules of quantum mechanics).

or demerit: edicts bind every citizen, regardless.¹⁵⁸ The legal system is distinct and emits its own normative pull.¹⁵⁹

The link between expressed law and binding law is strongest in the criminal context. The Constitution contains an Ex Post Facto Clause precisely because substantive laws should not bind in retrospect.¹⁶⁰ The Clause was “intended to secure substantial personal rights against arbitrary and oppressive legislative action.”¹⁶¹ It is unjust to “punish[] as a crime an act previously committed, which was innocent when done,” to retroactively change the definition of crimes, or to increase the punishment for crimes previously committed.¹⁶² Even for nonpenal legislation, there is a centuries-old presumption that laws apply only prospectively absent specification otherwise.¹⁶³

Expression, then, is an essential aspect of the law and linked to its binding effect, always prospective and rarely retrospective. But the idea of the law as essentially expressed raises a question: Who provides the expression, most often in writing? Certainly, anyone can

¹⁵⁸ See H.L.A. HART, *THE CONCEPT OF LAW* 116–17 (3d ed. 2012) (“The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking it could not exist or for denying it the title of a legal system.”); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 132 (David Campbell & Philip Thomas eds., 1998) (“The existence of law is one thing; its merit or demerit another.”).

¹⁵⁹ See generally Jules L. Coleman, *The Architecture of Jurisprudence*, 121 *YALE L.J.* 2, 79 (2011) (“Law is indeed a normative social practice.”).

¹⁶⁰ U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1; see *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 399 (1789) (recognizing that “the true construction of the prohibition extends to criminal, not to civil, cases” because “[i]t is only in criminal cases, indeed, in which the danger to be guarded against, is greatly to be apprehended”); *Beazell v. Ohio*, 269 U.S. 167, 171 (1925) (emphasizing that Ex Post Facto Clause is “not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance”). See generally *Ex Post Facto*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining adjective entry as “[d]one or made after the fact; having retroactive force or effect”).

¹⁶¹ *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915).

¹⁶² *Beazell*, 269 U.S. at 169–70; *Collins v. Youngblood*, 497 U.S. 37, 43 (1990); see also *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987) (noting that “the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule,” but that “after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review”).

¹⁶³ See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842–44 (1990) (Scalia, J., concurring).

put pen to paper and write down words that read like an edict. Novels contain laws governing the characters in their fictional worlds.¹⁶⁴ But not just anyone can express what the Eleventh Circuit rightly calls “official, binding edicts.”¹⁶⁵ The law is special, unlike other collections of words in that the law is “an authoritative work that governs people’s lives.”¹⁶⁶ And the only one who can perform the magic trick of expressing such an authoritative work is the sovereign.

The Supreme Court in *Banks* is again instructive. There, the Court described “the whole work done by the judges” as “the authentic exposition and interpretation of the law.”¹⁶⁷ “Interpretation” presumes a preexisting law, and judges serve as interpreters on a daily basis.¹⁶⁸ Statutes must pass judicial review, while lower-court opinions may be affirmed or reversed. Common-law adjudication performs an “evolutionary process” on rules announced by judges in the first place.¹⁶⁹ At that first announcement of a rule, a judge’s work is different: making new law or declaring unwritten law.¹⁷⁰ Here, the Supreme Court’s use of “authentic exposition” is telling.¹⁷¹ Both

¹⁶⁴ See, e.g., J.R.R. TOLKIEN, *THE LORD OF THE RINGS: THE TWO TOWERS* 438 (50th Anniversary ed., Houghton Mifflin Co. 2004) (1954) (“Yet I am not free to do all as I would. It is against our law to let strangers wander at will in our land, until the king himself shall give them leave, and more strict is the command in these days of peril.”).

¹⁶⁵ Code Revision Comm’n v. Public.Resource.Org, Inc., 906 F.3d 1229, 1246 (11th Cir. 2018); see *id.* at 1247, 1249–50, 1252.

¹⁶⁶ *Id.* at 1251.

¹⁶⁷ *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

¹⁶⁸ See *id.*

¹⁶⁹ See *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 502 (1984) (recognizing that “common-law heritage” of *New York Times v. Sullivan* rule “assigns an especially broad role to the judge in applying it to specific factual situations” and noting that the rule “is given meaning through the evolutionary process of common-law adjudication; though the source of the rule is found in the Constitution, it is nevertheless largely a judge-made rule of law”).

¹⁷⁰ See *id.*; see also *Whitmore v. Arkansas*, 495 U.S. 149, 178 (1990) (noting that courts have “authority to expand or contract a common-law doctrine where necessary to serve an important judicial or societal interest”); *Livingston v. Jefferson*, 15 F. Cas. 660, 663 (Va. Cir. Ct. 1811) (describing common-law principle as “a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things”).

¹⁷¹ *Banks*, 128 U.S. at 253.

terms are part of ordinary language. “Authentic” is defined as “possessing authority that is not usu[ally] open to challenge,” with less common definitions including “legally valid” and “of an origin that cannot be questioned.”¹⁷² The primary definitions of “exposition” are “a setting forth of the meaning or purpose” and, specifically for a law, “an expounding of the sense or intent.”¹⁷³ When judges make or declare law, they expound with authority and validity.¹⁷⁴ With all due respect to the bench, other writers could provide a similarly eloquent account. But the work of judges is distinct because the judiciary’s exposition of the law is of unquestionable origin: it originates in sovereign power.

More than a century after *Banks*, and apparently comfortable with legal positivism, the Eleventh Circuit makes this point repeatedly through *Code Revision Commission*: “Legislators and judges, unlike other government workers, are peculiarly entrusted with the exercise of sovereign power to write or officially interpret the

¹⁷² *Authentic*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (5th ed. 1993).

¹⁷³ *Exposition*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (5th ed. 1993).

¹⁷⁴ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

law.”¹⁷⁵ A sovereign must act through the individuals who hold office, and only those individuals can express the law.¹⁷⁶ More specifically, individuals who hold office can express the law only when acting in their official capacities.¹⁷⁷

In this regard, the power of sovereign lawmaking is akin to the protection of sovereign immunity. When an individual acts in his official capacity, he is shielded from certain laws.¹⁷⁸ As the Supreme Court has explained, the relief sought in an official-capacity claim “is only nominally against the official and in fact is against the official’s office and thus the sovereign itself.”¹⁷⁹ The government entity rather than the named official is the real party in interest, which “is

¹⁷⁵ Code Revision Comm’n v. Public.Resource.Org, Inc., 906 F.3d 1229, 1247 (11th Cir. 2018); see *id.* at 1232 (legislative enactment and judicial opinion “represent the quintessential exercise of sovereign power”); *id.* at 1246 (recognizing “the works of certain government employees, which is to say government employees who are possessed of particular powers, namely the ability to promulgate official, binding edicts” and noting that “the government official must be entrusted with unique powers beyond those possessed by the typical government employee, such as the power to pronounce official interpretations of the law”); *id.* at 1247 (noting that “the rule in *Banks* is concerned with works created by a select group of government employees, because only certain public officials are empowered with the direct exercise of the sovereign power”); *id.* at 1247 n.3 (noting that “[s]overeign power isn’t delegated to the government at large—it is given to specific public officials to exercise in particular ways”); *id.* at 1248 (recognizing that “Georgia General Assembly is not simply composed of ordinary government employees but rather of public officials whose official duties peculiarly include the direct exercise of sovereign power”); *id.* at 1251 (describing “a work made in the exercise of the sovereign power to make or interpret the law”); see also LON L. FULLER, ANATOMY OF THE LAW 114 (1968) (“The legal positivist concentrates his attention on law at the point where it emerges from the institutional processes that brought it into being.”); HART, *supra* note 158, at 94–95 (describing “rule of recognition” for binding rules); AUSTIN, *supra* note 158, at 18–19 (describing laws as commands from superiors to inferiors).

¹⁷⁶ See *Code Revision Comm’n*, 906 F.3d at 1251–52 (contrasting a judge’s speech off the bench with a judge’s work on the bench and stating that “[o]nly those works that derive from the legitimate exercise of sovereign power, such as official interpretations of the law and the law itself, are assigned authoritative weight”).

¹⁷⁷ See *id.*

¹⁷⁸ See *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) (discussing tribal sovereign immunity and advising that “in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit”).

¹⁷⁹ *Id.* at 1292.

why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation.”¹⁸⁰ Grafting this distinction from sovereign immunity to sovereign lawmaking, nominal authorship of the law rests with the official, while real authorship rests with the office and thus the sovereign itself. That is why, when judges or legislators leave office, their successors automatically assume their role in the exposition and interpretation of the law. The opinion in *Banks* still issues from the Supreme Court long after the honorable service of the Justices who drafted it.¹⁸¹

Thus, sovereign authorship amounts to a conditional statement: if an edict is the law, then it is expressed by officials exercising sovereign power. In other words, official expression is inherent in the idea of the law. In copyright words, the idea encompasses the expression.

This entanglement of idea and expression is just what takes the law outside copyright protection. Courts have long recognized the axiom that copyright “protection is given only to the expression of the idea—not the idea itself.”¹⁸² The First Amendment promotes the free flow of information and ideas, while an author enjoys a limited monopoly on his original expression.¹⁸³ Congress has codified this balance in the Copyright Act: “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,

¹⁸⁰ *Id.*

¹⁸¹ See *Banks v. Manchester*, 128 U.S. 244 (1888).

¹⁸² *Mazer v. Stein*, 347 U.S. 201, 217 (1954); see *Baker v. Selden*, 101 U.S. 99, 103 (1879) (analyzing copyright infringement claim over bookkeeping system and noting that where the information a book “teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public”); *Whelan Assocs., v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1233–35 (3d Cir. 1986) (analyzing copyright infringement claim over computer program); *Digital Commc’ns Assocs., v. Softklone Distrib. Corp.*, 659 F. Supp. 449, 457–58 (N.D. Ga. 1987) (analyzing copyright infringement claim over computer program).

¹⁸³ See *Infodek, Inc. v. Meredith-Webb Printing Co.*, 830 F. Supp. 614, 621–22 (N.D. Ga. 1993).

or embodied in such work.”¹⁸⁴ So long as the idea/expression dichotomy obtains, copyright protection applies and covers only particular expressions.¹⁸⁵ Ideas remain in the public domain.¹⁸⁶

Under the doctrine of merger, the idea/expression dichotomy collapses, pulling copyright infringement claims down with it.¹⁸⁷ There is no mechanical formula for merger. As Judge Learned Hand lamented, decisions regarding the idea/expression dichotomy must “inevitably be ad hoc.”¹⁸⁸ But decisions must be made.¹⁸⁹ Under the merger doctrine, copyright protection does not apply “when an idea and its expression are so closely connected that there is only one way to express the idea.”¹⁹⁰ To prevent a monopoly on ideas, the expression loses protection “in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.”¹⁹¹ The Eleventh Circuit, for example, has found the arrangement of the “yellow pages” telephone directory uncopyrightable based on the doctrine of

¹⁸⁴ 17 U.S.C. § 102(b) (2012).

¹⁸⁵ See *Infodek*, 830 F. Supp. at 621–22.

¹⁸⁶ See *id.*

¹⁸⁷ See *Merger Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁸⁸ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’”); see *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1143 (11th Cir. 2007) (“At the margins, the distinction between idea and expression can be subtle and difficult.”).

¹⁸⁹ See *Peter Pan Fabrics*, 274 F.2d at 489; *BUC Int’l Corp.*, 489 F.3d at 1143.

¹⁹⁰ *Portionpac Chem. Corp. v. Sanitech Sys., Inc.*, 217 F. Supp. 2d 1238, 1245 (M.D. Fla. 2002); see *BellSouth Advert. & Publ’g Corp. v. Donnelley Info. Publ’g, Inc.*, 999 F.2d 1436, 1442 (11th Cir. 1993); *BUC Int’l Corp.*, 489 F.3d at 1144 (finding that selection of section headings in yacht listing “did not merge with the larger idea of describing a yacht”).

¹⁹¹ *BellSouth Advert. & Publ’g Corp.*, 999 F.2d at 1442 (quoting *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991)); see *Warren Publ’g, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1518 n.27 (11th Cir. 1997) (considering printed directory of cable television systems and finding that “expression of the principal community selection has merged with the idea, and thus the selection of principal communities is uncopyrightable”); *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 539 (3d Cir. 1986) (observing that “[i]t is on the basis of the merger principle that copyright has been denied to utilitarian ideas, such as forms”); see also *Dunlap v. G&L Holding Grp., Inc.*, 381 F.3d 1285, 1295 (11th Cir. 2004) (stating that “because ideas are substantively excluded from the protection of the Copyright Act, they do not fall within the subject matter of copyright”).

merger “[b]ecause this is the one way to construct a useful business directory.”¹⁹²

Similarly, there is only one way to construct a law: sovereign authorship. Because the sovereign office is author of the law—regardless of whether the People serve as backstop—there is no idea of the law separate from its official expression. A law without sovereign authorship is no law at all, rather a collection of words by another writer or a Platonic ideal that binds no one. Just as the arrangement of the “yellow pages” merges with the idea of a business directory, the official expression of the law merges with the idea of the law and, thus, is uncopyrightable.¹⁹³

In the case of the law, the doctrine of merger applies for the same reason as in other cases: copyright protection is unavailable because idea and expression are inseparable.¹⁹⁴ This inseparability arises from the very nature of the idea at issue. The Eleventh Circuit did not discuss merger in *Code Revision Commission*, other than relying heavily on the fact that the Georgia Code merges its statutes and annotations within a unified publication.¹⁹⁵ But the lower court did.¹⁹⁶ The U.S. District Court for the Northern District of Georgia rejected the merger doctrine in one paragraph.¹⁹⁷ In response to PRO’s summary judgment argument that the Code annotations lacked sufficient originality, the court found that “there are a multitude of ways to write a paragraph summarizing a judicial decision, and further, a

¹⁹² *BellSouth Advert. & Publ’g Corp.*, 999 F.2d at 1442 (“the arrangement has ‘merged’ with the idea of a business directory, and thus is uncopyrightable”); see *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463–64 (5th Cir. 1990) (rejecting copyright claim for exact copy of map lines because “the idea of the location of the pipeline and its expression embodied in the 1:250,000 maps are inseparable and not subject to protection”); *Matthew Bender & Co. v. Kluwer Law Book Publ’g, Inc.*, 672 F. Supp. 107, 112 (S.D.N.Y. 1987) (rejecting copyright claim for arrangement of information within legal treatise).

¹⁹³ See *BellSouth Advert. & Publ’g Corp.*, 999 F.2d at 1442.

¹⁹⁴ See generally *Merger Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁹⁵ See *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1232–33, 1245, 1248–49, 1254–55 (11th Cir. 2018); see also *id.* at 1233 (“Because we conclude that no copyright can be held in the annotations, we have no occasion to address the parties’ other arguments regarding originality and fair use.”).

¹⁹⁶ *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1357 (N.D. Ga. 2017), *rev’d*, 906 F.3d 1229 (11th Cir. 2018).

¹⁹⁷ *Id.*

multitude of ways to compile the different annotations” in the Code.¹⁹⁸ True enough. But off point. The district court’s observation does not defeat merger because the underlying framework here is unique.

In a conventional instance of merger, there is only one way or very few ways to express an idea, which any author can offer.¹⁹⁹ The law presents an unconventional instance of merger. For the law, there are many ways to express the idea, which only one author can offer. Legislators and judges have a multitude of word choices when drafting laws. Still, their expression is uncopyrightable because it is an essential aspect of the idea of the law.²⁰⁰ No other expression counts as the law, and there is no law without the expression.²⁰¹ Accordingly, the People are free to copy the chosen words, precisely and completely.²⁰²

So where does all this leave statutory annotations, the law-like writing at issue in *Code Revision Commission*? Exactly where the Eleventh Circuit put them: outside copyright protection. The Eleventh Circuit’s three markers of the law all imply that statutory annotations were “made in the exercise of sovereign power”: (1) “the of-

¹⁹⁸ *Id.*

¹⁹⁹ *See* BellSouth Advert. & Publ’g Corp. v. Donnelley Info. Publ’g, Inc., 999 F.2d 1436, 1442 (11th Cir. 1993).

²⁰⁰ *See Code Revision Comm’n*, 906 F.3d at 1232.

²⁰¹ *See* Kregos v. Associated Press, 937 F.2d 700, 715 (2d Cir. 1991) (Sweet, J., concurring in part and dissenting in part) (noting that “majority of cases have . . . followed the method in which merger becomes an issue only when the two works in question—the copyrighted one and the alleged infringement—appear on the surface to be similar, and under which merger is used as a reason for denying all copyright protection to the plaintiff and thereby excusing the defendant’s use of a similar or even identical expression”). *But see* C.B. Fleet Co. v. Unico Holdings, Inc., 510 F. Supp. 2d 1078, 1082 (S.D. Fla. 2007) (describing merger as a defense to infringement claim rather than as a basis to deny copyright protection in the first place, and stating “merger defense does not apply in instances where the infringing work is virtually identical to the copyrighted work or when the coordination of facts provided in the work are a result of independent testing”).

²⁰² *See, e.g.,* Am. Bankers Ins. Grp. v. United States, 408 F.3d 1328, 1332 (11th Cir. 2005) (noting that “the preeminent canon of statutory interpretation” requires a presumption that “legislature says in a statute what it means and means in a statute what it says there” (quoting *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004))).

ficial who created the work is entrusted with delegated sovereign authority,” (2) “the work carries authoritative weight,” and (3) “the work was created through the procedural channels in which sovereign power ordinarily flows.”²⁰³ When a work is properly viewed as authored by the sovereign, idea and expression merge to take the work outside copyright protection. The Eleventh Circuit concluded from its three-prong analysis that statutory annotations “would be attributable to the constructive authorship of the People, and therefore uncopyrightable.”²⁰⁴ The merger analysis above alters only a few words of the court’s conclusion: annotations would be attributable to *sovereign authorship*, and therefore uncopyrightable.

CONCLUSION

The Eleventh Circuit’s opinion in *Code Revision Commission* makes good law on good facts. Both the law and law-like writing belong in the public domain, and there is ample support from a policy perspective and a legal perspective to reach this desirable outcome. Although the court’s description of the People’s voice is democratic and inspiring, it may be too ambitious. Sovereign authorship is simpler and stronger, unlocking merger as an alternative and promising area of copyright law.

²⁰³ *Code Revision Comm’n*, 906 F.3d at 1232–33.

²⁰⁴ *Id.* at 1233; *see id.* at 1255.