GEORGIA V. PUBLIC.RESOURCE.ORG—A MISSED OPPORTUNITY FOR DEMOCRACY

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I. INTRODUCTION

On April 27, 2020, the U.S. Supreme Court decided *Georgia v. Public.Resource.Org, Inc.* (*Georgia v. PRO*).[1] It held that the state of Georgia was barred from holding a copyright in annotations made to and published alongside its official code because of the government edicts doctrine—the idea that governments cannot copyright certain works.[2]

Copyright "subsists . . . in original works of authorship fixed in any tangible medium . . . from which they can be perceived."[3] This intellectual property right gives the holder the general power to exclude others from copying their work (among other things).[4] Practically speaking, this endows the copyright holder with the ability to set a price. But the power to set a price comes at a cost. When a price is set, there will be a subset of people who wish to access the work but cannot.[5] This is known as deadweight loss.[6]

Not everyone may hold a copyright. The federal government is statutorily barred from doing so.[7] Other government bodies are barred from holding copyright in certain works through a judicially created doctrine—the government edicts doctrine.[8]

Before *Georgia v. PRO*, the exact scope of the government edicts doctrine was unclear. No Supreme Court case had touched the subject in over 130 years, and even then, there were only three major cases.[9] These few cases presented two main ideas. First, publications with the force of law were not eligible for

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1. *See* Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1498 (2020).
2. *See id.* at 1498–1504.
3. 17 U.S.C. § 102.
4. 17 U.S.C. § 106.
5. Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1843–44 (2014).
6. *Id.*
7. 17 U.S.C. § 105.
8. *See* Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1504 (2020).
9. *See id.* at 1498; Callaghan v. Myers, 128 U.S. 617, 619 (1888); Banks v. Manchester, 128 U.S. 244, 244 (1888); Wheaton v. Peters, 33 U.S. 591, 591 (1834).

copyright.[10] Second, legal works adopted by or published under the authority of the government cannot be copyrighted.[11] The Supreme Court clarified the scope of the doctrine in *Georgia v. PRO*, opting for a rule moderately aligned with the second idea: "copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties."[12]

In clarifying the scope of the government edicts doctrine, the Supreme Court faltered twice. First, the rule they promulgated is vague and formless, rendering it almost entirely meaningless. Second, the Court failed to consider democratic policy. This is particularly noteworthy given that the case involved the actions of democratic governments.

This Note seeks to fill the gap left by the Supreme Court by providing a policy framework for evaluating when it is proper to restrict access to a government work through copyright. The framework consists of two parts, each based on distinct policies.

The first policy considered is the incentive-access framework that underlies copyright law.[13] Its main thrust is that although the power to exclude puts limits on access, incentivizing creators with these rights is justified because this creates a system that produces more information than a free market.[14] It follows that when no incentives are needed to produce a work, a restriction in access is unjustified.[15] This constitutes the first part of the framework: the government should not be able to restrict access to one of its works when no incentives are needed for its production.

The second consideration is democracy. A democracy is a form of self-government where the people consent to be governed.[16] Since it is impossible for a large group of people to agree on exactly how to be governed, it is imperative that people identify with the *process* of governing.[17] In this way, an individual in the minority can consent to be governed because they identify

10. *See, e.g.*, Brief for the Petitioners at 19, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).

11. *See, e.g.*, Brief of Respondent at 19, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).

12. *Georgia*, 140 S. Ct. at 1508.

13. David W. Barnes, *The Incentives/Access Tradeoff*, 9 NW. J. TECH. & INTELL. PROP. 96, 98 (2010).

14. *See id.* at 97.

15. *See* Bracha & Syed, *supra* note 5, at 1850 ("However, for goods that are nonrivalrous in consumption—of which informational works are a paradigm example—exclusionary rights may function inefficiently, wastefully preventing uses that would not detract from simultaneous use by others. The justification for incurring this potential inefficiency is, of course, that without it some informational works may fail to be developed in the first place.").

16. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

17. Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 26 (2006).

with the process of governing.[18] In other words, they may disagree with the result but agree with the process by which that result was reached.

Democratic governments must be responsive to the public opinion for consent to be valid.[19] For a government to be truly democratic, there can be no inequalities of opportunity to meaningfully participate in forming public opinion.[20] If there are inequalities, then the minority's consent to be governed would be meaningless; they would not have the same opportunity to form the public opinion, so they cannot identify with the process of governing.[21]

Governmental restriction to access to certain works through copyright is tantamount to limiting the ability of some people to participate in the process of forming the public opinion. Certain government works carry great weight when informing the public opinion because they are official statements from the government itself on how it is governing. Copyrighting these works functions as a paywall. Those who can afford unlimited access to works thus have better information and can shape public opinion more effectively. For those unable to afford access, cost acts a barrier to influencing the public opinion effectively. This systematic tilt in who can meaningfully participate in the political process is undemocratic. Accordingly, the second prong of the framework states that it is improper to restrict access to government works through copyright when it would be undemocratic to do so.

In sum, this Note argues that it is improper to restrict access to a work produced or adopted by the government when copyright is not needed to incentivize the work or when it would be undemocratic to do so. Applying this policy framework, this Note will show that the Court reached the right decision with respect to Georgia's annotations, given the Court's limited options of either allowing copyright or destroying it completely. This Note will then show how restricting access to other government works depends on the nature of the works, rather than which governmental body created them.

This Note proceeds in five parts. Part II provides background on the government edicts doctrine and copyright law. Part III reviews *Georgia v. PRO* and argues that the rule created by the majority is inadequate. Part IV starts by reviewing the policies at play in considering when it is proper to restrict access to a work produced by a government. It then argues for this Note's policy framework and applies the framework to four categories of government works. Part V concludes.

18. *See id.* at 26–27, 29.
19. *See id.* at 29.
20. *See id.* at 33.
21. *See id.* at 26–27, 29.

II. BACKGROUND

This Part will explain what copyright law is, situate the government edicts doctrine within copyright, and explain the black letter law behind the government edicts doctrine that the Court relied on in *Georgia v. PRO*.

A. COPYRIGHT LAW

Copyright is a right granted to creators of marginally creative works, which empowers them to prevent others from copying their work.[22] Preventing others from copying is essential to a creator's ability to charge for a work.[23] Without copyright protection few would pay for a creative work, as they could obtain it elsewhere for free.[24] In this way, copyright incentivizes creators to create by guaranteeing them the right to restrict access and thereby the ability to set a price.

B. CONGRESSIONAL (IN)ACTION

By its text, the Copyright Act of 1976 does not prevent states or state governments from holding copyrights,[25] though it does prohibit the federal government from doing so.[26] In so doing, "Congress rejected efforts 'to extend the prohibition' against copyrighting U.S. government works 'to publications of State and local governments.'"[27]

C. THE ACCESS PROBLEM

When a price is set through the exclusionary power granted by copyright, it creates a class of people who wish to access a work but cannot afford it. At certain times, this is impermissible. Take the following example: A state obtained copyright protection over their criminal law and charged for access to it. Notions of fundamental fairness dictate that this is wrong. All citizens are required to know the law and structure their actions accordingly, but many would be unable to access it. The government edicts doctrine remedies this by barring the government from holding copyright in certain works, like the law itself.

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22. *See* 17 U.S.C. § 106; Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).

23. *See* Barnes, *supra* note 13, at 107.

24. *See id.* at 96–97.

25. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.14 (2021).

26. 17 U.S.C. § 105.

27. Brief for the Petitioners at 29, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150) (citing STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 129–30 (Comm. Print 1961)).

D. THE GOVERNMENT EDICTS DOCTRINE

Congress did not bar state or local governments from holding copyrights in certain works, but the courts have crafted a doctrine that does—the government edicts doctrine.[28] Prior to *Georgia v. PRO*, the exact scope of the doctrine was not clear, but there were two main ideas stemming from three 19th century cases. The first idea was that works with the force of law could not be copyrighted by the government.[29] The second was that legal works adopted by or published under the authority of the government cannot be copyrighted.[30] Under either theory, the government edicts doctrine prevents states from copyrighting the law.

E. THE CASES

1. Wheaton v. Peters

Wheaton v. Peters, decided in 1834,[31] was the first copyright case to ever reach the Supreme Court.[32] Wheaton, the Supreme Court's first official reporter, sued Peters, the second official reporter,[33] for copyright infringement.[34] Peters had copied from Wheaton's reports[35] and annotations[36] in preparing condensed reports of previous Supreme Court terms. Wheaton's reports contained no official Supreme Court or U.S. markings, solely "Henry Wheaton, Counsellor at Law,"[37] and were created without any supervision from the Court.[38] Wheaton argued that he had acquired a copyright in the Court's opinions "by judges' gift" after he had been appointed to report the Court's decisions by an act of Congress.[39]

The Court rejected this argument, stating that they were "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."[40] Interestingly, the Court spent perhaps the least amount of time on this issue, focusing the bulk of its lengthy analysis on

28. *See Georgia*, 140 S. Ct. at 1503–04.
29. *See, e.g.*, Brief for the Petitioners at 19, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).
30. *See, e.g.*, Brief of Respondent at 19, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).
31. Wheaton v. Peters, 33 U.S. 591, 591 (1834).
32. 1 NIMMER ON COPYRIGHT, *supra* note 25, § 5.12.
33. *See, e.g.*, Brief for the Petitioners at 32, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).
34. *Wheaton*, 33 U.S. at 612.
35. *Id.* at 617.
36. *Id.* at 651.
37. *See, e.g.*, Brief of Respondent at 26, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).
38. *See, e.g.*, *id.*
39. *Wheaton*, 33 U.S. at 614.
40. *Id.* at 668.

whether Wheaton could assert a common law claim to avoid compliance with formalities required for federal copyright protection and, if not, whether he had to comply with said formalities.[41] Ultimately, the Court remanded to the circuit court to determine whether Wheaton had complied.[42] By doing this, the Court implicitly held that there was copyrightable expression in Wheaton's reports, such as his annotations; if there was no copyrightable expression in the reports, there would have been no need to remand to determine whether the formalities were complied with.[43]

Thus, the government edicts doctrine was born—the idea that certain works produced by the government cannot be copyrighted.

2. Banks v. Manchester

More than fifty years later, the Supreme Court expounded on the government edicts doctrine with two more cases authored by Justice Blatchford. The first, *Banks v. Manchester*, was decided on November 19, 1888, less than one month before the second, *Callaghan v. Myers*.[44] In *Banks*, the state of Ohio gave Derby & Co. the exclusive right to report its highest court's decisions for two years, provided that the reporter would obtain a copyright in the reports on behalf of the state.[45] The reports included "not only the opinion . . . of the court . . . but also the statement of the case, and the syllabus," all of which were created by the judges.[46] Derby & Co. assigned its rights to the contract to Banks & Brothers.[47] After this, Manchester printed two cases nearly verbatim from Banks's reporter in the American Law Journal without Banks's permission, prompting a lawsuit for copyright infringement.[48]

The Court extended *Wheaton* from the federal judiciary to the state judiciary and held that the state could not hold a copyright in judges' work, including the statement of the case or the syllabus.[49] Justice Blatchford came to this conclusion for two reasons. First, he noted that judges are paid for their work, so they have no monetary interest in their works against the public.[50] Second, as a matter of policy, "the products of the labor done by judicial officers in the discharge of their judicial duties" cannot be copyrighted because "[t]he whole

41. *Id.* at 654–67.
42. *Id.* at 667–68.
43. Brief for the Petitioners at 33, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).
44. Banks v. Manchester, 128 U.S. 244, 244 (1888); Callaghan v. Myers, 128 U.S. 617, 617 (1888).
45. *Banks*, 128 U.S. at 246–48.
46. *Id.* at 251.
47. *Id.* at 247.
48. *See id.* at 247–49.
49. *See id.* at 252–53.
50. *Id.* at 253.

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."[51] Justice Blatchford held that the statement of the case was ineligible for copyright despite the fact that no judicial concurrence was required for its publication.[52]

3. Callaghan v. Myers

The Supreme Court decided *Callaghan v. Myers*, the last government edicts case (until *Georgia v. PRO*), on December 17, 1888.[53] Myers was the assignee of Norman L. Freeman, the Illinois reporter.[54] Unlike in *Banks*, Freeman himself created the syllabi and headnotes for the cases he reported.[55] But as in *Wheaton*, the reporters simply stated "By Norman L. Freeman, counselor at law."[56] Callaghan copied Myers's work wholesale, including the title of Myers's reports.[57] The Court held that Myers held a valid copyright in the non-judicially created parts of the works.[58] It reasoned,

> [A]lthough there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges, . . . there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume which will cover the matter which is the result of his intellectual labor.[59]

Drawing from his previous decision in *Banks*, Justice Blatchford set forth a rule that ostensibly turned on whether a work was created in the judge's official capacity. The Supreme Court then did not rule on the government edicts doctrine until *Georgia v. PRO*, some 130 years later.[60]

51. *Id.*
52. *See id.* at 250, 253–54.
53. Callaghan v. Myers, 128 U.S. 617, 617 (1888).
54. *See id.* at 619.
55. *Id.* at 621.
56. Brief of Respondent at 31, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150).
57. *See Callaghan*, 128 U.S. at 629.
58. *Id.* at 647.
59. *Id.*
60. *See Georgia*, 140 S. Ct. at 1498; *Callaghan*, 128 U.S. at 629.

III. CASE REVIEW AND CRITIQUE

A. THE CASE

1. Facts

Georgia v. Public.Resource.Org,, Inc., started on July 21, 2015 in the Northern District of Georgia.[61] Georgia's Code Revision Commission, on behalf of the State of Georgia, filed a lawsuit against Public.Resource.Org, Inc. (PRO) for infringing Georgia's copyright in the annotations accompanying its one and only official code,[62] the Official Code of Georgia Annotated (hereinafter OCGA).[63] PRO posted the entirety of the OCGA online, ignoring the State's cease-and-desist letters.[64] The district court found that PRO infringed the copyright in the OCGA annotations and that the affirmative defense of fair use did not apply.[65]

The Eleventh Circuit disagreed.[66] It found that the annotations were not copyrightable under the government edicts doctrine and reversed.[67] The Supreme Court granted certiorari and affirmed.[68]

The OCGA, published by Georgia, contains every Georgia statute, along with annotations.[69] The annotations contain, among other things,

> summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, . . . [and] information about the origins of the statutory text, such as whether it derives from a particular judicial decision or resembles an older provision that has been construed by Georgia courts.[70]

Beyond being a research tool, the annotations contain information important for the citizenry. Interested readers are able to learn from the annotations that various aspects of the Code are unenforceable, though the Georgia legislature

61. Complaint for Injunctive Relief at 2, 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), *aff'd*, 140 S. Ct. 1498 (2020) (No. 1:15-cv-2594-MHC), 2015 WL 4999975.

62. *Georgia*, 140 S. Ct. at 1505.

63. *Id.* at 1504.

64. *Id.* at 1505.

65. *Public.Resource.Org*, 244 F. Supp. 3d at 1356–61, *rev'd*, 906 F.3d 1229 (11th Cir. 2018), *aff'd*, 140 S. Ct. 1498 (2020).

66. *Public.Resource.Org*, 906 F.3d at 1243.

67. *Id.*

68. *See Georgia*, 140 S. Ct. at 1506, 1513.

69. *Id.* at 1504.

70. *Id.*

"has not bothered to narrow or repeal" them.[71] For example, the text of § 16-6-2 prohibits certain consensual acts, but the annotations reassure the 21st century reader that this part of the Code was held to violate Georgia's constitutional right to privacy, making it unenforceable.[72]

The annotations are assembled by the Code Revision Commission (the Commission) and published annually by the state legislature.[73] The Commission, established in 1977 by Georgia's legislature, is responsible for "consolidating disparate bills into a single Code for reenactment . . . and [for] contracting with a third party to produce the annotations."[74] It is funded from the pot of money allocated to the legislative branch, and a majority of the fifteen members must be elected Georgia legislators.[75]

Since 1978, the Commission has contracted with a division of LexisNexis to produce the annotations.[76] Per stipulation, any copyright in the OCGA vests in Georgia, but LexisNexis is granted the exclusive right to publish, distribute, and sell the OCGA, provided they limit the price of a hard copy to $412 and provide an unannotated version of the statutes online for free.[77] The Commission supervises Lexis's work and "specifies what the annotations must include in exacting detail."[78]

Once the annotations have been created, the Commission submits the proposed statutory text and annotations to the legislature for approval.[79] The legislature then (1) enacts the statutes, (2) merges the annotations with the statutes, and (3) publishes the final merged product.[80]

2. Chief Justice Roberts's Majority Opinion

Chief Justice Roberts's opinion started by reviewing precedent. From *Wheaton*, he gathered that judicial opinions are not copyrightable; from *Banks*, that works done by judges in their capacity as such are not copyrightable; and from *Callaghan*, a "limiting principle" that headnotes and syllabi created by the

71. *Id.* at 1512.

72. *See* GA. CODE ANN. § 16-6-2 (2021) (prohibiting acts of sodomy); *see also* GA. CODE ANN. §§ 21-2-131, 16-6-18, 16-15-9 (2021) (noting in the annotations that the statutes are unenforceable in key aspects).

73. *Georgia*, 140 S. Ct. at 1504.

74. *Id.*

75. *Id.*

76. *See id.* at 1505; GA. CODE ANN. § 1-1-1 (2021).

77. *Georgia*, 140 S. Ct. at 1505.

78. *Id.*; *see also* Joint Appendix (Volume 3 of 3) at 269–78, 286–427, *Georgia*, 140 S. Ct. 1498 (No. 18-1150) (specifying what the annotations must contain).

79. *Georgia*, 140 S. Ct. at 1504.

80. *Id.* at 1504–05; *see also* GA. CODE ANN. § 1-1-1.

reporter are copyrightable because the reporter "had no authority to speak with the force of law."[81]

From this, Roberts crafted a rule that focuses on the author: "[u]nder our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties."[82] Roberts also provided a surface-level policy justification: "The animating principle behind this rule is that no one can own the law. 'Every citizen is presumed to know the law,' and 'it needs no argument to show…that all should have free access' to its contents."[83] The majority thus crafted a rule based on the identity of the author and the context in which the work was created, but the majority did not connect it with deeply-held values or substantive policies.[84]

Moving on to application, the Court found that both parts of its test were satisfied. In evaluating the first part, whether the work was created by a legislator, the Court concluded that the Commission was "an adjunct to the legislature" and thus satisfied part one.[85] In reaching this decision, the Court first noted that the Commission was the author of the annotations under copyright law's work-for-hire doctrine.[86] It then relied on six key factors to find that the Commission was a legislator: (1) the Commission consists mainly of legislators, (2) it is funded from the part of the budget allocated to the legislative branch, (3) it was created *by* the legislative branch, (4) it was created *for* the legislative branch, (5) the statutes were merged with the annotations by the legislature, (6) and Georgia's highest court had held that the duties performed by the Commission are within the sphere of legislative authority.[87]

To find that the second part of the test, whether the annotations were part of the Commission's duties, was met, the Court solely relied on the proclamation of Georgia's highest court that "the Commission's preparation of the annotations is under Georgia law an act of 'legislative authority.'"[88]

With its rule created and applied, the Court moved on to rebutting counterarguments. The first was that the annotations should be copyrightable because the Copyright Act explicitly provides that annotations are eligible for

81. *Georgia*, 140 S. Ct. at 1506–07.
82. *Id.* at 1508.
83. *Id.* at 1507 (citing Nash v. Lathrop, 6 N.E. 559, 560–61 (Mass. 1886)).
84. *See id.* at 1508.
85. *Id.* at 1509.
86. *Id.* at 1508.
87. *Id.*
88. *Id.* at 1509 (citing Harrison Co. v. Code Revision Comm'n, 260 S.E.2d 30, 34–35 (Ga. 1979)).

copyright.[89] The Court agreed that annotations are eligible for copyright but said that for copyright to be granted, works must be authored, and the Commission does not qualify as an author under the government edicts doctrine.[90] The second counterargument was that Congress did not intend to abrogate states' ability to hold copyrights, as it explicitly barred the federal government, not state governments, from holding copyright in their works.[91] The Court countered that Congress never intended to abrogate the government edicts doctrine either.[92] The Court then wrestled with the third contention—that the appropriate rule should focus on whether the work carried the force of law.[93] To dismantle this argument, Roberts turned to *Banks*, which withheld copyright from dissenting and concurring opinions, as well as headnotes and syllabi produced by the court, all of which ostensibly lack the force of law.[94] The Court reiterated that the case's holding was directed at works prepared by a judge in their official capacity.[95]

Finally, Roberts noted the high "practical significance" of the OCGA,[96] indicating that there was more going on than a strict textual analysis. As an example, Roberts pointed to the aforementioned constitutional limitations on unrepealed statutes in the annotations.[97] That is, "[i]f everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit."[98] These concerns point to reasoning that is not solely textually-based but is also grounded in certain public policies.

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 1510.
93. *Id.* at 1511.
94. *See id.* at 1511–12.
95. *See id.* at 1511–12.
96. *See id.*
97. *Id.* ("Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal." (citation omitted)).
98. *Id.* at 1512–13. Roberts also opined that if this were the case, "[t]he less bold among us would have to think twice before using official legal works that illuminate the law we are all presumed to know and understand." *Id.* at 1513.

3. Justice Thomas's Dissent

Justice Thomas dissented, along with Justices Alito and Breyer.[99] Justice Thomas first noted his disagreements with the majority's application of their rule, then moved on to criticize the rule itself.[100]

Thomas constructed a rule he believed to align with precedent. Thomas's analysis of *Wheaton* agreed with the majority's in finding that judicial opinions cannot be copyrighted.[101] From *Banks*, Thomas derived that materials prepared by judges in their capacity as such are not authored, and the *Banks* Court did not "categorically prohibit[] [States] from holding copyrights."[102] Moving on to *Callaghan*, Thomas gleaned that a reporter's notes are copyrightable.[103] From this, Thomas derived a rule that focused on whether a work has the force of law: "statutes and regulations cannot be copyrighted, but accompanying notes lacking legal force can be."[104]

Moving on from his textual analysis, Justice Thomas recognized an important policy goal to support his legal force-only stance. In support of his argument that judges cannot be authors because their salary is paid by and represents the will of the people, he noted that "copyright law understands an author to be one whose work will be encouraged by . . . an exclusive right."[105]

In response to the majority's argument that a rule focusing on whether a work has the force of law incorrectly addresses concurring and dissenting opinions, Justice Thomas distinguished annotations from non-binding judicial opinions giving context of the case. He acknowledged that only the judgment has "legal effect" but retorted that concurrences and dissents are necessary for "provid[ing] pivotal insight into how the law will likely be applied in future judicial opinions."[106] Interestingly, this is precisely what the majority argued the annotations do—provide insight into how the law will be applied—but Justice Thomas did not distinguish the annotations from non-binding opinions.[107]

Drawing parallels between the annotations in the OCGA and the "privately created annotations" in *Callaghan*, Justice Thomas ultimately

99. *Id.* at 1513 (Thomas, J., dissenting). Justice Breyer abstained from joining Part II-A of the dissent, which dealt with precedent and the judicial role.

100. *Id.* at 1513–14.

101. *Id.* at 1514.

102. *Id.* at 1514–15.

103. *Id.* at 1515.

104. *Id.*

105. *Id.* at 1516.

106. *Id.* at 1520.

107. *See id.* at 1512–13 (majority opinion).

concluded that the annotations are copyrightable.[108] The annotations are not the law, he argued, because they are not enacted and are instead merely merged with enacted text.[109] As such, they do not embody "the will of the people."[110] Justice Thomas thus argued that the annotations should not be exempt from copyright protection.[111]

4. Justice Ginsburg's Dissent

Justice Ginsburg also dissented, along with Justice Breyer, focusing her disagreements entirely on the majority's application of the rule it announced.[112] The nub of her argument was that the annotations were not created in a legislative capacity.[113] Implicit in this is her acceptance of the majority's rule.

To rebut the majority's application of the first part of its test, Ginsburg argued that the scope of a legislature's duties is limited to making laws.[114] "'[T]o the judiciary' we assign 'the duty of interpreting and applying' the law . . . [whereas] the role of the legislature encompasses . . . 'making laws.'"[115] The annotations are interpreting laws, putting them within the province of the judiciary and not the legislature, she argued.[116]

As to the second part of the majority's test, Ginsburg argued that the annotations were not part of the legislative duty of making laws for three reasons. First, annotations are not laws because "annotating begins only after lawmaking ends."[117] Second, they are "descriptive rather than prescriptive."[118] And third, they are "given for the purpose of convenient reference."[119]

Justice Ginsburg only took the time to dismiss one counterargument: the merging of the annotations with the statutes did not make them law, because the Supreme Court of Georgia held that placing the annotations in the official code did not give them any official weight.[120] Thus, Justice Ginsburg's dissent primarily argued that the majority's rule was misapplied.

108. *See id.* at 1518 (Thomas, J., dissenting).
109. *Id.* at 1517.
110. *See id.*
111. *See id.* at 1522.
112. *See id.* at 1522–23 (Ginsburg, J., dissenting).
113. *See id.* at 1523.
114. *See id.*
115. *Id.* (citing Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)).
116. *See id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1524 (internal citations omitted).
120. *See id.*

B. CRITIQUE OF THE MAJORITY'S APPLICATION

To the majority's credit, it calculated an ostensibly clear rule from precedent—"copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties"—but its application is impractical and confusing, especially the second step.[121] To see how the rule was misapplied, it is first critical to be clear about the exact nature of the annotations.

1. Defining the Annotations

The annotations contain two key sets of information. First, they contain important information on how the law will be applied. They explain constitutional limitations on laws and judge-made exceptions to the laws.[122] As mentioned earlier, they mark certain aspects of unrepealed statutes as unconstitutional.[123] Also included in the annotations are statements by the state attorney general interpreting the law and explaining how it will be enforced.[124] All of this is essential information on how the statutes will be applied—information that the text of the statutes themselves simply does not supply.

Second, and closely related, the annotations also include information on how a statute should be interpreted.[125] For example, the annotations can include selected court interpretations of a statute.[126] Court opinions give precise and grounded examples of a statute's interpretations, providing vivid detail on the meaning of a statute that may not be understood from a plain-text reading. Further, many annotations explain the origin of a statute.[127] The origin of a statute can be key in determining the meaning of the text. Language that comes from common law can, and often does, mean something entirely different than the same language used in common parlance. Another example is the inclusion of law review articles.[128] Law review articles often work through the meanings, implications, and applications of key aspects of statutes. On their own, these do not carry much weight outside of academic circles. However, when cited by the legislature as an official aside to a statute, these articles serve as marginally authoritative interpretations.

Taking these two parts together, the annotations are the legislature's official guidelines on how the laws they have promulgated will be applied and

121. *See id.* at 1508 (majority opinion).
122. *See id.* at 1504, 1512.
123. *Id.* at 1512.
124. *See id.* at 1504.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

how they should be interpreted. With this characterization of the annotations in mind, the next step in showing that the majority misapplied their rule is to make clear what a legislator's duties are and how the annotations fall within them.

2. The Duty of a Legislature and the Role of the Annotations

The legislature's job is to solve problems by creating laws.[129] Legislators introduce bills to address certain problems. These bills become enforceable, binding law only if they pass bicameralism and presentment, two high hurdles.[130]

The annotations in this case are not laws that pass bicameralism and presentment and are therefore not within the duty of the legislature. Rather, the annotations are ex post interpretations and explanations of the law. This undertaking is more aligned to the judiciary's role. As *Marbury v. Madison* put it, "[i[t is emphatically the province and duty of the judicial department to say what the law is."[131] This is not to say that the annotations are not extremely valuable, or that the legislature should not create the annotations. It is just not their duty.

The holding of the Georgia Supreme Court that "the work of the Commission; i.e., selecting a publisher and contracting for and supervising the codification of the laws enacted by the General Assembly, including court interpretations thereof, is within the sphere of legislative authority" does not overturn this conclusion.[132] The nub of this counterargument has a few steps. First, it assumes that the state supreme court has the authority to interpret its own laws and constitution.[133] Second, therefore, if the court says that a task of the Commission is "within the sphere of legislative authority," it is authoritative.[134] The third step is where the error, the false inference, enters: something that is within the sphere of the legislature's authority is therefore their "dut[y]."[135]

To show the falsity of this inference, consider this example. When someone is assigned a job, say a partner at a law firm, their sphere of authority

129. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) ("Executives and judges handle individual cases; the legislature generalizes.").

130. *See, e.g.*, U.S. CONST. art. I, § 7. This happens in Congress and all states except Nebraska, which has a unicameral legislature.

131. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

132. Harrison Co. v. Code Revision Comm'n, 260 S.E.2d 30, 34–35 (Ga. 1979).

133. *See, e.g.*, U.S. CONST. amend. X.

134. *See* Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1508 (2020) (emphasis omitted) (citing *Harrison*, 260 S.E.2d at 34–35).

135. *See id.*

is always as big as or bigger than the sphere of their duties. This must be the case, otherwise the assigned duties would be meaningless.[136] If a law firm partner's role/duty is managing IP cases for large clients, it is certainly within her authority to direct an associate to stay at the office researching a key issue. This exercise of authority corresponds almost exactly with her duties. However, it is also within her authority to instruct maintenance staff to replace a hallway lightbulb. This is not within her duties at the law firm but is rather an auxiliary task that they have been given authorization to delegate.

The Commission's creation of the annotations is similar. It is not within their duties to create the annotations; it is an auxiliary task they have authority over. Accordingly, the statement from Georgia's Supreme Court does not override the fact that annotations are not within the scope of a legislature's duties, as the U.S. Supreme Court's test requires.

C. CRITIQUE OF THE MAJORITY'S RULE

Beyond being misapplied, the rule itself is problematic. When applying the rule, the Court created and utilized a framework that lower courts are likely to follow. Unfortunately, the framework allows the rule to be circumvented, severely blunting its efficacy. Moreover, the Court missed an easy opportunity to craft a broader rule, and this lapse has real-world consequences.

1. The Rule is Easily Circumvented

In deciding that each part was met, the Court relied on a sparse number of factors. In holding that the first part of the test was met, the Court relied entirely on six facts, but this Note will focus on the four that are easily evadable: First, the Commission consisted mostly of legislators.[137] Second, it was funded by the legislative budget.[138] Third, the Commission was created directly by the legislative branch.[139] And fourth, the annotations were merged with the Code under the legislature's authority.[140] To find that the second part was met, the Court only identified one factor: the Georgia Supreme Court had held that the Commission's production of the annotations was "an act of 'legislative authority.'"[141]

136. There can be concurrent duties. It can be two people's duty to ensure a task is completed.

137. *Georgia*, 140 S. Ct. at 1508.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1509 (citing Harrison Co. v. Code Revision Comm'n, 260 S.E.2d 30, 34–35 (Ga. 1979)).

With this framework in mind, states looking to maintain the copyright in their annotations can avoid the government edicts bar. To escape part one of the test, states can undertake a combination of the following: ensure that elected legislators only constitute a minority of that state's commission; move the commission to the executive branch; fund the commission with money from a branch other than the legislative branch; or merge the annotations without the legislature's approval. The Supreme Court's test would likely not be met if four of the six factors were not present.

The second part is seemingly easier to escape. The Court merely relied on a statement from Georgia's Supreme Court that the annotations were an act of legislative authority and inferred that their creation was therefore within the duty of a legislature.[142] It is doubtful that other states have such a holding from their respective supreme courts. Moreover, this inference can be challenged; a task that is within an entity's authority is not necessarily their duty. Thus, through the Supreme Court's precedent-setting application of its rule, it opened many loopholes for states to avoid the government edicts doctrine, rendering the rule ineffective.

2. The Rule is Not Broad Enough

More importantly, however, the Supreme Court missed the opportunity to create a broader rule. Under the current rule, no executive materials are covered.[143] Thus, statements from state attorneys general, state executive orders, and directives from state agencies can all be copyrighted. These are not mere speculations; Michigan has copyrighted its constitution, and South Dakota's executive orders are copyrightable by statute.[144] This is flatly incongruous. If annotations, which are not binding law, are not copyrightable, executive orders and state constitutions should also be ineligible for copyright. However, the Supreme Court did not address this issue, so these practices can be expected to continue.

3. Stakes

The stakes of these shortcomings are significant. The government produces large quantities of information, much of which has great political and

142. *Id.*

143. *Id.* at 1508.

144. Copyright Registration No. TX0002908667 (registered Apr. 16, 1990) (Michigan Constitution), http://cocatalog.loc.gov; S.D. CODIFIED LAWS § 2-16-6(b), § 2-16-8 (2021) (making South Dakota's executive orders copyrightable); *see also* Brief *Amici Curiae* of the Am. C.L. Union et al. in Support of Respondent at 4–6, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).

economic significance.[145] By copyrighting works, the government excludes part of the citizenry from accessing this information. This exclusion is inconsistent with democratic principles broadly recognized by the United States.[146] As the Second Circuit recognized:

> The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion. Government may add its own voice to the debate over public issues, but it may not attempt to control or reduce competition from other speakers. … Such actions are an exercise of censorship that allows the government to control the form and content of the information reaching the public.[147]

The rule's shortcomings stem from a failure to examine the policies at play in the government edicts doctrine. The remainder of this Note is dedicated to doing exactly that—grounding this issue in policy and arguing for a framework on which future rules should be based.

IV. A NEW FRAMEWORK

Works produced by the government or adopted by reference should not have their access restricted when no incentives are needed for that work's production or when it would be undemocratic to do so. Section IV.A brings in model codes and engineering standards to provide a more complete picture of works utilized by the government. Section IV.B provides detailed background on the policies at play in this area of law. Section IV.C explains two different metrics for measuring the success of the copyright system. Section IV.D pulls together the policy arguments into a cohesive framework. Finally, Section IV.E applies the framework to five types of works commonly utilized by the government.

A. MODEL CODES AND ENGINEERING STANDARDS: PRIVATE COPYRIGHT OVER BINDING LAW

This Note has already discussed two common types of government works: annotations, which have been explained, and legal documents, such as judicial opinions and statutes, which do not require explanation. But there is another important tool of lawmaking in the government's belt: utilizing privately developed model codes and standards. In short, when a private entity has

145. Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls over Government Information*, 45 SYRACUSE L. REV. 999, 1003 (1995).

146. *Id.* at 1007.

147. Legi-Tech, Inc. v. Keiper, 766 F.2d 728, 733 (2d Cir. 1985) (citations omitted).

developed a set of rules that the government wishes to use, the government will incorporate it into binding law.[148] These private works are often copyrighted, and thus a private entity often holds a copyright on binding law.[149] Since this is similar to when a government holds a copyright over a work, this Note will extend its analysis to cover standards and model codes. However, to do so requires a more detailed explanation of model codes and standards and how they are used.

Model codes and standards with binding power are developed by private organizations and later incorporated into the law.[150] Often they are copyrighted.[151] For example, an engineering standard detailing the design specifications of pressure vessels might be developed privately among boiler manufacturers, and the government might later enact it as law. Enacting that standard or model code is done in one of two ways. First, the government might "copy and paste" it into the law.[152] Second, the government might reference the code or standard as binding law—incorporation by reference.[153] In either case, the outcome is the same. A private entity holds the copyright to a piece of binding law.

Despite due process and democratic concerns, the government adopts model codes and standards because it conserves resources.[154] Developing the expertise necessary to competently rule a given area is extremely expensive and time-consuming.[155] It is wasteful for governments to redevelop codes or standards that already exist.[156]

Moreover, it is extremely important that standards and model codes are promulgated. Every time an email is sent, over 200 standards are utilized.[157] But standards are not limited to the internet. The federal government has incorporated about 9,500 standards by reference, covering fields like consumer safety and home sprinkler systems.[158] To further illustrate the importance of standards, consider the following example.

148. Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 739, 743 (2014).

149. *Id.* at 743.

150. *Id.* at 739.

151. *Id.* at 743.

152. Jim Sergent, Matt Wynn & Aamer Madhani, *They copied bills from corporations. These lawmakers say that's OK.*, USA TODAY (Dec. 17, 2019), https://www.usatoday.com/in-depth/news/investigations/2019/07/17/lawmakers-ok-with-copying-model-bills/3424549002.

153. Mendelson, *supra* note148, at 739.

154. *See id.* at 776.

155. *See id.*

156. *See id.* at 750.

157. Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193, 193 (2007).

158. Mendelson, *supra* note 148, at 739, 750, 752.

In 1904, a fire started in Baltimore and quickly grew to a size beyond the local fire department's ability to control.[159] Baltimore telegraphed for help, and many neighboring precincts responded.[160] However, upon arriving they found that their hoses did not fit Baltimore's hydrants.[161] They watched a large portion of the city burn to the ground, unable to help.[162] If the size of the hydrant and hose fitting were standardized, this would not have happened. By creating certainty, standards are both beneficial and necessary in today's market of technically complex goods.[163]

Yet standards create situations in which private entities can restrict access to binding law through copyright. To account for the full range of binding and explanatory works utilized by the government whose access might be restricted through copyright, the question thus becomes: when does copyright impermissibly restrict access to works in which copyright is held by the government or to works utilized by the government in which copyright is held privately?

B. POLICY BACKGROUND

Answering this requires examining policies relevant to the government edicts doctrine: the economic framework that underlies copyright law and democratic considerations.

1. The Incentive-Access Framework

The Framers of the Constitution authorized Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[164] This is the constitutional basis for Congress's creation of copyright and patent law. Implicit in this is a statement of the incentive-access framework—the paradigm by which copyright and patent law are justified.

Copyright and patent law ultimately protect ideas and information.[165] The complex system of laws guides this information through the market with rules on what information qualifies for protection and when the information can be

159. Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 KAN. L. REV. 279, 300 (2015).

160. *Id.*

161. *Id.*

162. *See id.* at 300–01.

163. Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 500 (2013).

164. U.S. CONST. art. I, § 8, cl. 8.

165. *See* Barnes, *supra* note 13, at 104.

used without incurring liability. But why does information need this complex set of rules for it to be bought and sold in the market?

Information is a unique good.[166] Unlike a tangible normal product bought and sold in commerce, information is "non-rivalrous in consumption" and "non-excludable in production."[167] Non-rivalrous means that information is costless for multiple people to enjoy once it has been produced, and non-excludable means that it is extremely difficult and often prohibitively expensive for producers to prevent consumers from using information once it is produced.[168] Each characteristic represents the view of a good from either the consumer's (non-rivalrousness) or the producer's (non-excludability) perspective.

Because of these characteristics, the free market has little incentive to produce information. Furthermore, consumers will not pay for information, as they can obtain it elsewhere—because it is non-excludable—for free—because it is non-rivalrous.[169] Because of this, in a truly free market producers are unable to recoup their costs unless they can find a purchaser willing to pay a large amount for the information upfront. But what customer would do that? Very few. True to the tragic nature of the commons, people are incentivized to underinvest in public goods—here, information.[170] Thus, consumers will wait for someone else to make the purchase and then find the information for free, or at least cheaper. Indeed, a group of consumers could coalesce to purchase the information at a lower price per person, but the costs of finding such a group and negotiating an agreement are often prohibitive. Based on these problems alone, there is little incentive for producers to invest into creating information for the public, so a truly free market produces very little intellectual property or information.[171]

This is problematic because information is extremely valuable to society.[172] It makes people more productive through technology, happier through artistic expression, and more informed as voters. The correct amount of information that should be produced is highly debated among IP scholars, but for this

166. *See* Bracha & Syed, *supra* note 5, at 1848.
167. Barnes, *supra* note 13, at 102.
168. *Id.* at 98–99, 102–03.
169. *See* Bracha & Syed, *supra* note 5, at 1848–50; Barnes, *supra* note 13, at 107.
170. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (describing the tragedy of the commons).
171. Barnes, *supra* note 13, at 99.
172. *See id.*

Note's purpose, it suffices to say that a free market does not produce nearly enough.[173] Thus, a system is needed to produce information.[174]

The copyright and patent systems remedy this problem. They do so by balancing the adverse interests of the producer and the consumer. Each brings persuasive arguments to the table. The consumer argues that morally, information should be free because once it has been produced, sharing it imposes no new cost on anyone else while having tremendous value.[175] Drawing on a more fundamental economic principle, the consumer also posits that in a market, the cost of a good should approach the cost of producing one additional unit of that good.[176] In the case of information, the cost of producing an additional unit of a particular piece of information is zero because it is non-rivalrous.[177] Thus, the consumer wants free *access* to information.

On the other hand, the producer desires *incentives* to make such information. Morally, the producer could argue that since they made it, they should be able to control who has access to it. Additionally, at the very least they need to have enough exclusion power over her information to recoup the costs of creation.[178] The producer also calls upon a bedrock economic principle to support her argument: "[i]f [information was] excludable, private markets could efficiently allocate resources to their production."[179] In other words, they argue that if information were excludable, the private markets could allocate it in a way that would maximize the value bestowed upon society—i.e., distribute it efficiently.[180] And therefore producers should have the right to exclude consumers from the information the producer created.[181] Thus, the consumer wants free *access* to information, while the producer wants *incentives*, in the form of rights to exclude, to create information.

These two competing interests are what incentive-access theory balances. The balancing is tricky—"[i]ncreased incentives may create more beneficial information, while increased access allows more people to benefit from it"[182]—but the reward is clear: "[o]nce the law identifies the goods for which

173. *Id.* at 97 n.7, 99.
174. *See id.*
175. *Id.* at 97–98, 106.
176. *Id.* at 100.
177. *Id.* at 106.
178. *Id.* at 97.
179. *Id.* at 100.
180. *See, e.g.*, Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1336 (1987).
181. *See* Barnes, *supra* note 13, at 116.
182. *Id.* at 121.

people must pay, who must pay, and for how long they must pay, markets do their work."[183] Determining the appropriate balance can be accomplished through the "Net Benefit Principle,"[184] which submits that "[a]n increase in exclusive rights to intellectual property is justified only when the value of increased creative activity resulting from increased incentives is greater than the value of the benefits lost from reduced access" and that "[a]n increase in access to intellectual property is justified only when the value of the benefits resulting from increased access is greater than the value of decreased creative activity resulting from decreased incentives."[185] Utilizing some version of this principle, Congress and the courts have crafted an extremely complex body of copyright law that is meant to reconcile the two competing interests, access and incentives, in a way that is most beneficial to society.[186] This is why copyright law exists, and it justifies copyright's mechanics. Economic theory, however, is not the only policy at play here.

2. Democracy

As a basic premise, democratic values should underlie any discussion of actions taken by a democratic government. But what exactly does it mean to be a democracy?

As theorized, a democratic government's power flows directly from the people.[187] For the government only has power because the people consent to be governed.[188] And "the laws are made by the same people to whom they apply"; there is no exempt upper class.[189] But even more essentially, a democratic government is one that normatively values autonomy and self-determination and allows for people to engage in the practice of self-determination as a whole.[190] "Self-government is about the authorship of decisions, not the making of decisions."[191] Thus, the hallmark of democratic

183. *Id.* at 110.

184. *Id.* at 122.

185. *Id.*

186. *Id.* at 97.

187. Brief of the R Street Inst. et al. as *Amici Curiae* in Support of Respondent's Acquiescence in the Petition at 12, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150) ("It is fundamental to the constitution (and Constitution) of this country that sovereignty derives from 'we the people.'" (quoting U.S. CONST. pmbl.)).

188. *Id.*; JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 95-99 (1690).

189. Post, *supra* note 17, at 25; *See also* Thomas Paine, *Common Sense*, in Nelson F. Adkins, ed, *Common Sense and Other Political Writings* 3, 32 (Liberal Arts, 1953).

190. *See id.* at 25–26.

191. *Id.* at 26.

governance is one where the people truly feel engaged in the process of governing themselves—in the process of authoring decisions.[192]

This is not the same thing as majoritarian rule.[193] Take, for example, a country that votes every morning on what to eat for dinner, yet bans public discussion.[194] Assuming the people do not have homogeneous tastes, every day there will be some people in the minority who must eat a dinner other than the one they selected.[195] The people in the minority are not engaged in the process of governing themselves because there was no public discourse, so they have had no opportunity to shape the public opinion and thereby affect the results of the daily dinner election.[196] Rather, they would feel that they are subject to the whims of the majority.[197]

Returning to the dinner example above, assume that the daily dinner election remains, but now public discourse is allowed. Dissenters can now voice their opinions on the mashed potatoes and green beans. From this, some minds will be instantly changed. Others will have rebuttals. "No, the mashed potatoes are better than the green beans because the green beans always have too much salt." Despite the discourse, some faction must eat a dinner they did not choose or desire. However, in this case, consent to be governed is not defeated because those in the minority feel they are engaged in the process of governing themselves by participating in the public debate.[198] Thus, it is of the utmost importance that individuals who disagree with the outcome of a government decision can identify with the process of self-government and still feel they are governing themselves, thereby giving meaningful consent to be governed.[199]

Democratic governance occurs in response to public opinion. This must be, because for a people to be self-governed, government must be responsive to the ideas of the people.[200] However, since the people rarely agree on one thing, the government must be responsive to the public opinion, the opinion that most accurately represents the singular will of the people.[201] Thus, because it is essential that minority political factions feel they are engaged in the process of governing themselves, it becomes essential that individuals feel that they are

192. *Id. See*, Locke, *supra* note 188 at § 95.
193. Post, *supra* note 17, at 25.
194. *See id.* at 26.
195. *See id.* at 26–27.
196. *See id.*
197. *See id.*
198. *See*, Locke, *supra* note 188 at §§ 96–97.
199. *See* Post, *supra* note 17, at 26–27, 29.
200. *See id.* at 29.
201. *See id.*

engaged in the process of forming the public opinion.[202] If this were not the case, the idea of consent to be governed would be defeated.[203]

The public opinion begins to form when individuals express their independent views.[204] From this, a dialogue is formed, and the public opinion is born.[205] Since it is vital that individuals participate in the formation of the public opinion, it is vital that individuals are able to express themselves freely.[206] This is a major reason the First Amendment exists—to protect the individual right of expression in order for individuals to engage in the process of forming the public opinion.[207]

A democratic government must therefore value individual self-determination—the ability to decide for yourself what your values are and what you want to do—highly.[208] In order for individuals to meaningfully participate in the formation of the public opinion and thereby identify with the process of self-government, they must first have the opportunity to reflectively and meaningfully determine their own opinion. Otherwise, participation in democratic processes has only token value, and consent to be governed is meaningless.

In sum, a democratic government is one that values the ability of individuals to be autonomous so that they can meaningfully engage in the process of forming the public opinion and thus truly be self-governed.[209]

A postulate of this definition is that a democratic government cannot systematically restrict the ability to engage in democratic processes like voting or the formation of public opinion.[210] When this happens (and it does in the real world),[211] there is a minority of similarly situated individuals that is not engaged in the process of governing themselves, thereby avoiding any consent to be governed. Of course, as a practical matter, there are individual instances

202. *See id.* at 27–28.

203. *See id.*

204. *See id.* at 29.

205. *See, e.g.*, JOHN STUART MILL, ON LIBERTY, 50 (1859) (describing how a "collision of adverse opinions" is how society finds "truth").

206. *See* Post, *supra* note 17, 29–30.

207. *Id.* at 27–28.

208. *See id.* at 27.

209. *Id.* at 25–26.

210. *See id.* at 33 ("Democracy requires only that inequities that undermine democratic legitimacy be ameliorated. It does not require this for reasons of fairness or distributive justice, or because of any philosophic commitments that stand outside of democratic debate and decision making, but simply because such inequities undermine democratic legitimacy.").

211. *See, e.g.*, *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box.*, ACLU (Aug. 17, 2021), https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020.

where someone's ability to engage in democratic self-government may be restricted, but this must be because it is simply impracticable to ensure that every individual has the exact same rights to engage in democratic processes.[212] What is clear, however, is that it is undemocratic for there to be a minority (or majority) that is unable to meaningfully engage in democratic processes. This flows directly from the very definition of democratic self-government.[213]

Having discussed the main policies at play, this Note now moves into a brief discussion of two of the metrics used to determine whether the copyright system's incentive-access framework is balanced appropriately.

C. METRICS OF THE COPYRIGHT SYSTEM

1. The Democratic Theory of Copyright

The idea of seeing copyright as a means to perpetuate democratic values states that "copyright . . . [should] enhance the democratic character of civil society."[214] Its metric is therefore whether the democratic culture of civil society is being enhanced by granting a copyright. This does not mean that every work should be free because there would be some deadweight loss. The democratic theory recognizes that most works would not be created absent artificial scarcity.[215] Thus, the theory recognizes that copyright is something that is in, but not of, the market.[216]

From this theory, at the very least, it is clear that it is proper to consider democratic values when evaluating the copyright system. However, this is not the most prominent theory.

2. The Economic Theory of Copyright

Classic economic theory is another metric by which copyright's efficacy is measured.[217] This theory has been prevalent for some time and is taken seriously by courts and scholars alike. Economists seek to maximize wealth and increase allocative efficiency.[218] In other words, these theorists are primarily concerned with creating the most amount of dollars—maximizing wealth—and putting works to their highest and best use—increasing allocative efficiency.

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212. *See*, Locke, *supra* note 188 at § 98.

213. Post, *supra* note 17, at 32.

214. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

215. *See id.*

216. *Id.*

217. *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

218. *See* Barnes, *supra* note 13, at 111–12, 122.

This theory has the benefit of being seemingly easy to apply. Good policies should maximize wealth at a low cost to society. However, in practice this is extremely difficult to do, especially ex ante. Even ex post, "the data [can be] maddeningly inconclusive."[219] Though difficult to apply, economic theory is thus also appropriate to consider when evaluating the copyright system.

Having reviewed the policies at play and common metrics of the copyright system's efficacy, this Note now moves into answering the question at hand by showing how the policies interact. When does copyright impermissibly restrict access to works whose copyrights are held by the government or to works whose copyrights are held privately but are nevertheless utilized by the government? The answer is: when there are no copyright incentives needed to produce the work or when it would be undemocratic to restrict access using copyright.

D. IDENTIFYING THE POLICIES AT PLAY AND HOW THEY INTERACT

This Note's answer is justified by three necessary principles. First, government works and government-utilized private works that would be produced regardless of any copyright incentive should not have their access restricted by copyright. This is because no incentive is needed and the incentive-access framework does not apply. Second, economics submits that allowing copyright in certain works, even works that utilized and created by the government maximizes efficiency. Third, democratic principles dictate that access to these works should not be restricted when it is undemocratic to do so.

For the sake of brevity, going forward this Note will refer to works that are copyrighted by the government or copyrighted by a private entity and utilized by the government as CGCPUG works (a loose abbreviation for Copyrighted by the Government or Copyrighted by a Private entity and Utilized by the Government).

1. Step One: When the Incentive-Access Framework Does Not Apply

First, access to CGCPUG works should not be restricted by copyright when the works do not fit into the incentive-access framework.

As discussed above a main objective of copyright law is to incentivize works that would not otherwise be made. By incentivizing these works, society ultimately benefits. But this benefit comes at the cost of access for a limited time.[220] The House Report accompanying the Copyright Act noted as much:

219. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 3 (2011).
220. *See* 17 U.S.C. § 302 (limiting copyright duration).

> Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and . . . when the limited term . . . expires and the creation is added to the public domain.[221]

However, when no incentive is needed for a work to be created, restricted access is without justification. Thus, CGCPUG works that need no incentive for creation should not have their access restricted via copyright.

2. Step Two: Maximizing Efficiency

Second, works that would not be created without copyright are extremely valuable to society. While they impose an access cost, they also fulfill a consumer need and create surplus wealth.[222] This is an extremely significant policy justification for copyright to many judges and scholars.[223] For example, in *Georgia v. PRO* the government was able to create first-class annotations that were then sold at economy rates.[224] By economic standards, society was made better because wealth was created when these annotations were sold at a low price. This could not have been done without copyright. Thus, CGCPUG works that are incentivized by copyright should be allowed to receive copyright.

3. Step Three: Democratic Principles Save the Day

Third, notwithstanding that a CGCPUG work needs incentives for creation, access to that work should not be restricted via copyright when it would be undemocratic to do so.

Democracy is of utmost importance in the United States. This is grounded in the First Amendment and the Supreme Court jurisprudence that follows, as described at length in Professor Bhagwat's article, *The Democratic First Amendment*.[225] In it, he details how each non-religious clause was intended to support democratic self-governance.[226] This has not been lost upon the Supreme Court's First Amendment jurisprudence; in fact, it is something that

221. H.R. REP. NO. 100-609, at 17 (1988).

222. *See, e.g.*, Landes & Posner, *supra* note 217, at 343.

223. *See, e.g.*, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1517 (2020) (Thomas, J., dissenting).

224. *Id.* at 1513 (pointing out that the OCGA costs $404, while comparable privately-produced annotations cost $2,750).

225. *See generally* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1111 (2016).

226. *Id.* ("What [the five clauses] have in common, however, is that each of the rights has as its primary goal the advancement of democratic self-governance.").

has been specifically articulated. For example, in *Walker v. Texas Division, Sons of Confederate Veterans*, the Court stated that "the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government."[227] Indeed, Professor Bhagwat recognizes that "[o]ver the past several decades, the Supreme Court has repeatedly taken the position that the primary—albeit not necessarily the only—reason why the First Amendment protects freedom of speech is to advance democratic self-governance."[228]

Since democracy is so important to this country's laws and values, it follows that the democratic government should not take actions opposed to democratic values. Unfortunately, however, allowing copyright in CGCPUG works can create an undemocratic systematic tilt in the citizenry's ability to participate in forming public opinion. To show this, it is necessary to be clear how CGCPUG works can relate to the formation of public opinion.

For individuals to participate in forming public opinion as it relates to governance, they first must have the ability to know how the government is governing, so that they can determine how their values align. The individuals can then determine and voice their opinion, thereby shaping public opinion. In this way, individuals can feel that they are engaged in the process of self-governance.

CGCPUG works can provide rich and unique insight into how the government is governing because they provide first-hand evidence of government actions (e.g., binding criminal law). Whether the government is promulgating a law, explaining its own statutes in annotations, or adopting a technical standard, it is explaining to the public how it is governing. As such, CGCPUG works can have high democratic value.

Given this, it can be undemocratic to restrict access to certain CGCPUG works via copyright. Since copyright creates deadweight loss, when copyright is granted in CGCPUG works that have high democratic value, like official annotations, a minority is created that is interested in the work but cannot access it. When this happens, there are two classes of citizens: one who can afford the CGCPUG work and one who cannot. The first class is better informed and able to participate in the formation of public opinion, while the second class is disadvantaged. This is undemocratic because it creates a systematic skewing in the availability of participation in democratic processes.

The final question is: how big must a group of citizens be to implicate democratic concerns? There will likely always be one individual who is unable

227. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).
228. Bhagwat, *supra* note 225, at 1098.

to equally participate in democratic processes. This does not raise any concerns. Two individuals who are unable to equally participate in democratic processes will also not raise concerns. The transformation from individuals to a group comes when there is a set of similarly situated individuals, a cognizable minority. Thus, restricting access is undemocratic when there is a cognizable minority that cannot equally participate in forming the public opinion.

Indeed, defining precisely when a cognizable minority exists is a difficult task and perhaps is almost always arbitrary. But this difficulty does not overturn the conclusion that it is undemocratic for a set of similarly situated individuals to have unequal access to democratic processes. Moreover, the line-drawing should be done by those better situated to decide this issue: Congress and the courts.

4. Summing the Policy Arguments Up

The government is well positioned to maximize efficiency by creating or utilizing copyrighted works. But copyright should not restrict access to CGCPUG works where copyright does not serve as an incentive to produce such works or where it would be undemocratic to do so—when it would restrict a cognizable minority's ability to equally engage in a democratic process.

E. ANALYSIS USING THE POLICY FRAMEWORK

To illustrate the need for further refinement in this approach, this Note will now use it to analyze four common types of works utilized by the government: core governing works, the OCGA, model housing codes, and engineering standards. Specifically, this Note will show that it may not always be undemocratic to restrict access to certain CGCPUG works.

It is worth noting that there is no distinction between whether a government body adopts one of the types of works above by reference, copies it in its entirety or manages its creation and retains the copyright. In each case, copyright stands as a barrier to access.

1. Core Governing Works

Certain works made by the government do not fit into the incentive-access framework. On the incentive side, the government does not need incentives to create them. The government's job is to rule: to make, interpret, and enforce the law.[229] In carrying out its job, the government is going to produce certain works to accomplish its task of ruling, regardless of whether it can obtain

229. Brief *Amici Curiae* of the Am. C.L. Union et al. in Support of Respondent at 7, *Georgia*, 140 S. Ct. 1498 (No. 18-1150).

copyright protection for them or not. This is also partly because the government has already been paid to create these works via taxes and thus does not need any further incentives.[230] These core governing works include works such as executive orders, constitutions, statutes, and opinions with their headnotes. Because core governing works do not need copyright to incentivize their creation, it is improper to have their access restricted via copyright under the first part of this Note's test. Accordingly, it is unnecessary to reach the democratic question.

2. Model Housing Codes

a) Is Copyright Needed to Incentivize Creation?

A thin form of copyright is likely needed to incentivize creation. Professor Goldstein notes:

> [I]t is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control and self-regulation to produce these codes; it is unlikely that without copyright they will cease producing them. A rule that confines protection to the literal text of these codes, and forecloses protection for their enacted versions, is consistent with the limited need for incentives in this field.[231]

Trade organizations that create model housing codes have strong incentives to standardize the building process.[232] However, there are costs associated with production that businesses may need to recoup. Thus, it is entirely appropriate that they receive protection that is "confine[d] . . . to the literal text of these codes."[233] However, what this statement overlooks is that the amount of copyright protection corresponds with the amount of creative input. The closer something is to a fact, the less protection it receives. If a copyrighted model code became binding and thus the law, it would become very close to a fact and would receive little protection. Thus, these works likely already receive the thin form of copyright needed to incentivize production.

b) Would it be Undemocratic to Restrict Access Via Copyright?

It would, however, be undemocratic to restrict access to an adopted model housing code via copyright. A cognizable minority is easily imaginable: parents who want to ensure that the future homes they buy will be safe for their

230. *See, e.g.*, Banks v. Manchester, 128 U.S. 244, 253 (1888).
231. 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.5.2, at 2:59 (3d ed. 2020).
232. *See id.*
233. *Id.*

children. These parents would wish to engage in shaping the rules but cannot afford to buy the model housing codes to understand the current law. Thus, it would be impermissible to restrict access to model housing codes using copyright.[234]

c) Conclusions

In sum, though a model housing code likely needs some form of copyright protection to be produced privately, its access should not be restricted because it would be undemocratic to do so. In other words, because of democratic concerns, governments should not utilize copyrighted model housing codes; they should bear the burden of producing the codes themselves.

3. Engineering Standards

a) Is Copyright Needed to Incentivize Creation?

The literature is sharply divided on whether copyright is needed to produce engineering standards.[235] Those who are against copyright bring strong arguments to the table.[236] For example, Professor Samuelson notes, among other things, that:

> First, SSOs [standard setting organizations] generally have ample incentives to develop standards for use by professionals in their fields. It is simply not credible to claim that organizations like the AMA [American Medical Association] and ADA [American Dental Association] would stop developing standard nomenclature without copyright protection. The fields they serve need these standards for effective communication with other health care providers, insurers, and government agencies.
>
> Second, SSOs generally do not actually develop the standards in which they claim copyrights. Rather, they typically rely upon volunteer service by experts in the field to develop standards and require volunteers to assign any copyright interests to the SSOs. The community development of a standard is a reason to treat the standard itself as a shared resource.
>
> Third, SSOs generally use the revenues they derive from selling or licensing the standards to subsidize other activities of their

234. It is worth noting that the Fifth Circuit in *Veeck v. Southern Building Code Congress International, Inc.* held that a model housing code should not be copyrighted. 293 F.3d 791, 793 (5th Cir. 2002) (en banc).

235. *See* Samuelson, *supra* note 157 (arguing against copyright in standards); Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 136–37 (2013) (arguing that abrogating copyright in standards destroys value so a different route should be pursued).

236. *See, e.g.*, Samuelson, *supra* note 157, at 193.

> organizations, rather than to recoup investments in making the standards. Even without copyright in the standards, SSOs can derive revenues from sales of print materials embodying the standard and value-added products or services.[237]

However, there are rebuttals to each point. Some SSOs, like the American Society for Testing and Materials (ASTM), develop some of their own standards (countering Professor Samuelson's second assertion).[238] Since these SSOs are organizations with dedicated employees, it is doubtful that they have the same incentives as a business in the industry to create engineering standards (countering point 1). Indeed, they take input from industry professionals, but there are still costs associated with gathering the information, organizing the information, holding committee meetings, and keeping the lights on (countering Professor Samuelson's third assertion).[239] All these tasks, which cost real world dollars, are necessary to produce a standard in some cases. To further rebut the third point, it is unlikely that an SSO that sells the official version of a standard will retain their revenues should copyright be removed. Why would an engineering firm pay for something when it can find an equal quality replacement for free or for cheaper? It follows that some SSOs need the ability to exclude to recoup their development costs.

A case study illustrates that SSOs likely need protection to incentivize creation.[240] In 2012, Congress mandated that government agencies ensure that free access to all of the codes they adopted by reference is provided.[241] Since government agencies cannot infringe on copyright, negotiations ensued.[242] The Pipeline and Hazardous Materials Safety Administration (PHMSA) of the Department of Transportation (DOT) was not successful in obtaining free access for every incorporated code.[243] Likely, many SSOs simply were not willing to lose the revenue.[244]

It is likely that SSOs did not provide free access because they needed the revenue, not because they were engaged in monopoly pricing.[245] As the same study showed, SSOs routinely charge equal or more for current editions of a

237. *Id.* at 222 (footnotes omitted).

238. *Standards Development in ASTM*, ASTM INT'L, https://www.astm.org/studentmember/StandardsProcess.html.

239. *See id.*

240. *See* Bremer, *supra* note 159, at 281 (noting that the PHMSA was unable to negotiate free access to all of its incorporated standards).

241. *Id.*

242. *See id.* at 282.

243. *Id.*

244. *See id.*

245. *See id.*

standard than for an older edition of the same standard that is adopted by reference.[246] This rebuts the contention that SSOs are engaged in monopoly pricing.[247] If an SSO was engaged in monopoly pricing, would it not charge more for a binding version than a newer version?

Thus, on balance, it is foreseeable that standards need some form of protection to incentivize their creation.

b) Would it be Undemocratic to Restrict Access via Copyright?

It would probably not be undemocratic, generally speaking, to restrict access to engineering standards via copyright, but this is a nuanced question. Take, for example, a standard regulating the thickness of pressure vessels. There are two groups imaginable. First, consider an engineering company. Suppose they want access to the work to engage in public discussion. This is certainly a valid democratic goal. But they likely already purchase the work as a cost of doing business. So, in a sense, they already have (or at least should have) access. This raises the question as to whether it is appropriate to have a standard as a cost of doing business. A complete discussion of this question is beyond the scope of this Note, but it suffices to say that allowing standards to remain a cost of doing business keeps the cost of regulation, at least in part, on those who are profiting from the industry and off the citizenry at large, which is normatively desirable.

Second, imagine a group of citizens who have technical knowledge and are interested in the standards for democratic purposes. It is hard to imagine a group such as this that does not already have access from being in the industry.

However, imagine a boiler explodes, killing dozens. It is then foreseeable that a group of people who have technical knowledge and are interested in viewing the standard for democratic purposes coalesces.

Thus, it is not clear that democratic concerns are always implicated by allowing copyright in a standard. This is a fact-heavy and time-sensitive inquiry. Therefore, allowing copyright in standards is not automatically undemocratic.

a) Conclusions

Engineering standards likely require some form of copyright protection. Unlike model housing codes, most engineering standards are much further removed from public interaction, so it is less likely that it would be undemocratic to restrict access to them with copyright. But as noted, there

246. *Id.* at 318.
247. *See id.*

may be instances where copyright should not be granted, and more refinement is thus needed as a rule is formed from this framework.

4. OCGA

a) Is Copyright Needed to Incentivize Creation?

Without a doubt, copyright is needed to incentivize creation of Georgia's official annotations. Without copyright protection, the state would not be able to grant Lexis the ability to be the sole producer of the annotations. Lexis would not produce these annotations without the ability to exclude others, as others could obtain the annotations for free, depriving Georgia of the ability to produce the annotations at no cost to the taxpayers. Thus, copyright is needed to produce the OCGA.

b) Would it be Undemocratic to Award Copyright?

As mentioned before, annotations are very important to the democratic process. They explain how the laws will be applied, and they provide more intimate information on the actions of the government.[248] Given the content and breadth of the annotations, there will always be an interested minority in this work who cannot afford it. Thus, it is impermissible to restrict access to the OCGA through copyright.

c) Conclusions

Removing copyright in these works would completely destroy their value. However, a democratic government perpetuating this systematic tilt in the opportunity for people to participate in democratic processes would go against its very nature. Accordingly, copyright should not restrict access.

d) The Supreme Court's Decision

The average citizen will likely not be searching the internet for the official code or its annotations, but democratic principles do not always cater to the average citizen. What is clearly undemocratic is a situation where a cognizable minority of people who wish to better engage in democratic process cannot do so. It is quite imaginable that there is an interested group of similarly situated citizens who wish to use the OCGA to better inform themselves but cannot.

Thus, given the binary the Supreme Court was presented with in *Georgia v. PRO*, allowing copyright or barring it entirely, the Court made the correct decision. Though the rule it laid down was vague and hard to apply, it managed to use that rule to reach the result that promotes democracy.

248. *See* Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1504, 1512 (2020).

V. CONCLUSION

The next problem to be resolved by Congress is remedying impermissible restrictions on access. This is beyond the scope of this Note. But it is worth noting that there is a range of options beyond the Court's binary of copyright versus no copyright. For example, one could require free, read-only online access to a work.[249] Large companies would likely purchase the official versions of the work, complete with better searching tools and other functionalities for the online versions. Yet lay persons would still be able to access the work for democratic purposes.

The policy framework for the proper rule entails economic and democratic considerations that extend beyond a mere examination of century-old cases. First, CGCPUG works should not have their access restricted when they do not fit in the incentive-access framework. Access should not be restricted when there are no incentives needed to produce. Second, CGCPUG works should not have their access restricted when it would be undemocratic to do so. Democratic governments should not take undemocratic actions.

249. Bremer, *supra* note 235, at 153–83.