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The Misadventure of Copyrighting State Law

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THE MISADVENTURE OF COPYRIGHTING STATE LAW

Eric E. Johnson¹

ABSTRACT

Many states have asserted copyright over their own official state legal texts, limiting access to those materials and attempting to monetize them. This Article aims to provide helpful analysis for state officials deciding whether to pursue such policies and for courts reviewing challenges to such practices. Prior scholarship in this area has focused on the issue of whether such copyright assertions can be valid under federal law given the inherent conflicts they pose to due process and democratic ideals. This Article aims to expand this dialogue in a couple of ways—first, by situating the controversy within the broader arc of legal history, and second, by focusing on matters of present-day practicalities and economics. In so doing, the thrust of this Article is to go beyond arguing that states must surrender their copyright claims over state legal materials and to concentrate instead on providing reasons why states should see it in their own interest and the interest of their citizens to renounce such claims. The policy arguments this Article sets out—including with regard to business behavior, political engagement, and fiscal responsibility—end up providing not merely reasons for states to abstain from aggressive copyright claiming, but also reasons for reviewing courts to deny such claims, including by way of fair use analysis.

With the aim of providing insight into matters of practicality and economics, this

¹ Associate Professor of Law, University of Oklahoma College of Law. For comments, feedback, and helpful conversations, I am grateful to Chris Odinet, Erin Sheley, Melissa Mortazavi, Roger Michalski, Diedre Keller, Guy A. Rub, Marshall Leaffer, Dan Chow, Sam Ernst, Amanda Reid, Josh Sarnoff, Doris Long, Peter Yu, Bob Hu, Ned Snow, and Kit Johnson. I also thank Bethany Davenport, Mat Payne, and the rest of the members of the *Kentucky Law Journal* for their very excellent work on this symposium.

Note that throughout this article, various state-law citations are to proprietary published materials. See, e.g., *infra* note 13 (citing to the West publication of the California Code). This has been done in accordance with the most recent edition of *The Bluebook*, which instructs that statutes are to be cited either to the *West Annotated California Codes* or *Deering's California Codes, Annotated*. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, at 252 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). These are proprietary sources. When recently checked, *West's Annotated California Codes* was available for a one-time purchase of \$17,245 or a monthly price of \$1,114. See *West's Annotated California Codes*, THOMPSON REUTERS, <https://store.legal.thomsonreuters.com/law-products/Statutes/Westsreg-Annotated-California-Codes-Annotated-Statute--Code-Series/p/100028444> [<https://perma.cc/7A6G-JF7F>]. *Deering's California Codes Annotated*, which is published by LexisNexis, was priced at \$4,664. See *Deering's California Codes Annotated*, LEXISNEXIS STORE, <https://store.lexisnexis.com/products/deerings-california-codes-annotated-skuSKU7329/details> [<https://perma.cc/42LF-J9VS>]. *The Bluebook's* requirement to cite to such expensive sources is indicative of the entanglement of the law and our means of communicating about it with monetized access points. With regard to citations to state court cases, I am grateful for the *Kentucky Law Journal's* forbearance in permitting cites first to official state reporters followed by parallel citations to West regional reporters, notwithstanding *The Bluebook's* contrary instruction.

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Article assumes that state legislators and officials are acting in good faith—and are not motivated by a desire to undermine constitutional values—when they enter into deals with private legal publishers to monetize official state legal information. The question is, then, what good-faith motivations might a state have in attempting to use copyright to put official state legal information behind a paywall? I look at the plausible answers and respond to them. One answer is that proprietary/closed-access systems are “low cost.” I explain why this is an economic misunderstanding. Another reason is a strong faith that public-private partnerships are an efficient means of delivering public goods. I explain why a public-private partnership structure in this context is problematic. Another reason is a belief that harm done by limitations on access to the law is merely of theoretical or academic concern. I explain why that is not the case.

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INTRODUCTION

Going back more than a century, states have sought to make exclusive copyright claims over the official written texts that embody state law—statutes, annotated codes, and judicial opinions. In practice, states do this through exclusive deals with legal publishers. A hundred years ago, this translated into higher prices for law books. Today, this means the law ends up in databases accessible via paid subscriptions, with pricing pitched at law-firm levels. Nominal alternative access is provided with cumbersome paper copies in selected libraries or through frustrating web-based access of a sufficiently low quality that it can push searchers to pay for proprietary access or give up. Many scholars and activists find these practices deeply troubling, and they have worked to craft arguments to persuade courts to reject state copyright claims that would restrict access to official legal materials.

Yet state legislators and officials in great numbers seem to see their states' practices as untroubling. In this Article, I hope to offer reasoning persuasive not only to reviewing courts but to the state decisionmakers themselves who choose proprietary closed-access publishing arrangements and are motivated to fight for them when challenged.

I do not believe state officials and legislators choose pay-for-access publishing because they are out to undermine due process, the rule of law, economic liberty, or the foundations of democracy. But I hope to explain why using copyright claims over state law does all these things—and not in a merely theoretical way that only a purist or academic could care about, but in a meaningful, real-world way that we should all care about. Along the way, I hope to show why state decisionmakers should be worried that frustrating access to official state law materials increases transaction costs and legal uncertainty, thus acting as a drag on the economy.

Because I am focused on the public-policy choice to restrict or open up access to the written law, I will not be focusing on copyright doctrine itself. The analysis in this piece should, however, be helpful to courts in deciding copyright cases in this area, since public-policy analysis plugs into the legal analysis of copyright in a few ways—including with regard to issues of copyrightability and fair use. But the audience I am keeping most in mind are state legislators and state officials. I hope to persuade them to pursue a policy of making the letter of the law maximally accessible without payments, subscriptions, terms of service, or anything else that would come between the law itself and those who want to know about it.

It will be easy to lose our bearings in this controversy if we do not straightforwardly acknowledge some subtleties. When considering the views of open-access advocates on the one side and profit-seeking publishers on the other, it is important to see that the choice is not between an open society and a secret-police state. Pay-to-access publishing companies and open-access proponents alike are keenly aware of the societal value of legal information. And everyone on all sides of this issue would agree with the phrase, "The public should have access to the law." But what does "the law" mean in such a statement?

This is where we encounter important nuances. Is "the law" to which the public needs free access just the text of statutes passed by the legislature and the raw opinions issued by the courts? (That would seem to be the position of

proprietary-access proponents.) Or does “the law” to which the public needs access also include numbering, annotations, headnotes, and other things provided by the state to facilitate understanding of and accurate reference to the law? And what would count as “access”? Is it enough, for instance, to have a single state-sanctioned website that requires agreement to terms and conditions, allows no outside linking to internal pages, and has only crude search capabilities?²

These are the real choices at stake. Thus, let me be clear that I am arguing for the strong version of the proposition—that access to state legal material should be unlimited; that everyone should be free to copy, rearrange, and re-publish all official, state-owned information about the law; and that anyone should be allowed to innovate with new tools for searching it and making use of it.

A recent legal battle has encapsulated the real-world embodiment of the choices involved in copyrighting state law—the State of Georgia’s copyright lawsuit against the non-profit corporation Public.Resource.Org, Inc.³ I will use that litigation and its underlying facts as a recurring example in talking about questions of public access to official state-owned legal information. But this article is not about that litigation as such, and I intend for my analysis to be helpful long after the Georgia controversy passes into the books. As I discuss below, governments have waxed and waned in their willingness to allow citizens maximal access to the law. And they have done this for a very long time—thousands of years, in fact. Thus it seems likely the question will endure as to the extent to which states should provide free access to the letter of the law.

Part I of this Article frames the issue historically and gives some background on copyright law. Part II reviews the principal public-policy concepts that have often driven courts to reject government copyright claims over legal materials—those being due-process/rule-of-law concerns and the notion of the people’s authorhood of the law. Part III lists plausible reasons that state legislators and officials would be attracted to a closed/pay-for-access system and then offers corresponding responses grounded in practicality and economics.

I. SOME HISTORY: FROM BABYLON TO ATLANTA

In this Part, I will provide a whirlwind tour of the history of public access to the written letter of the law—from ancient times through the modern era. In bringing us

² These have been problems in the recent past with Lexis-provided free access, as documented in recent litigation. See Decl. of Clay Johnson, submitted as Ex. K with Defendant’s Motion for Summary Judgment, at 5–8, *Code Revision Commission v. Public.Resource.Org, Inc.*, No. 1:15-CV-02594-MHC (N.D. Ga. May 17, 2016), https://law.resource.org/pub/us/code/ga/pro_v_georgia/gov.uscourts.gand.218354.29.13.pdf [<https://perma.cc/2BAP-3M3C>]. Notably, when I checked in December 2018, the Lexis site seemed considerably improved along these lines, although it seems plausible that these improvements were provoked by current litigation and could thus prove transitory.

³ The Eleventh Circuit opinion is *Code Revision Comm’n ex rel. Ga. v. Public.Resource.Org*, 906 F.3d 1229 (11th Cir. 2018). The Eleventh Circuit docket is available at https://law.resource.org/pub/us/code/ga/pro_v_georgia/appeal_11th_circuit/gov.uscourts.ca11.17-11589_Docket.html. The Northern District of Georgia docket is available at https://law.resource.org/pub/us/code/ga/pro_v_georgia/gov.uscourts.gand.218354.docket.html.

up to the present day, I briefly recount the evolution of copyright doctrine in this area. In talking about copyright, I will not systematically review the relevant cases. Others have done so.⁴ Instead, I will provide some examples of state attempts to make access to the law proprietary and copyright law's reactions to these.

The selected-highlights history presented here will help to convey the fundamental nature of what is at stake. As will become clear, the history of citizen access to the law is, in the context of Anglo-American law, tied to the greater arc of the history of Western Civilization and the long-lasting struggle over its essential values.

A. Ancient Times

The issue of public access to the law has a history as long as the history of law itself. With reflection, that is not surprising as the same things that made ancient law accessible to the public also served to preserve it for archeologists.

Among the earliest known sources of written law is the Code of Hammurabi of Babylon.⁵ More than 3,700 years old, it was the eponymous work of the great King Hammurabi,⁶ who established Babylon as a sprawling empire covering the Fertile Crescent.⁷

The Code of Hammurabi was discovered by archeologists in the winter of 1901–1902 as a set of carvings on a monument of black volcanic rock.⁸ The stone slab—almost eight feet high and more than five feet around⁹—is engirdled with a list of laws numbered one to 282, plus an introduction and an epilogue.¹⁰ These laws embrace a wide array of subjects—contracts, torts, agency, and jurisdiction, among others.¹¹ In terms of its legal substance, the Code of Hammurabi has both surprising

⁴ See Irina Y. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 HASTINGS COMM. & ENT. L.J. 81, 84–97 (2000) (providing a brief history of cases involving copyright and publisher-exclusivity claims over primary legal materials in the states); L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 749–82 (1989) (reviewing and working to synthesize principal cases elucidating copyright doctrine in this area, with a particular emphasis on the issue of “star pagination,” the in-line notation of a prior volume’s page breaks); see also J. Denis Moran, *Copyright: Words and Phrases*, in 81 OPINIONS OF THE ATTORNEY GENERAL OF THE STATE OF WISCONSIN 45, 45–55 (1993–1994) (reviewing cases and providing a synthesis, relying heavily on Patterson & Joyce, *supra*); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 5.12 (2018). In a related vein, see Timothy K. Armstrong, *Crowdsourcing and Open Access: Collaborative Techniques for Disseminating Legal Materials and Scholarship*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J., 591, 597–98 (2010) for a discussion about crowdsourced efforts at open-access to primary legal materials.

⁵ Erwin J. Urch, *The Law Code of Hammurabi*, 15 A.B.A. J. 437, 437 (1929).

⁶ See *id.*

⁷ *Id.*

⁸ Donald G. McNeil, *The Code of Hammurabi*, 53 A.B.A. J. 444, 444 (1967).

⁹ Urch, *supra* note 5, at 438.

¹⁰ *The Code of Hammurabi*, THE AVALON PROJECT (L. W. King, trans.), <http://avalon.law.yale.edu/ancient/hamframe.asp> [<https://perma.cc/LUS3-DRXK>].

¹¹ McNeil, *supra* note 8, at 446; Urch, *supra* note 5, at 440.

modern relevance¹² and cringy ancient harshness.¹³

Ensuring public access to the law seems to have been an integral part of Hammurabi's code project and its concomitant commitment to justice.¹⁴ Hammurabi's epilogue to the code provides:

[L]et the oppressed, who has a case at law, come and stand before this my image as king of righteousness; let him read the inscription, and understand my precious words: the inscription will explain his case to him; he will find out what is just, and his heart will be glad . . .¹⁵

Not all ancients were in accord, however. Hammurabi's devotion to the accessibility of the text of the law, in fact, stands in stark contrast to the situation many centuries later in Ancient Rome under the infamous Emperor Caligula. The reign of Caligula was a catalog of horrors. Among other things, he is said to have relieved his boredom during intermission at a gladiator event by ordering an entire section of the audience thrown into the arena to be eaten by animals.¹⁶

Given that context, it is notable that a modern court would call Caligula's implementation of a closed-access policy to legal information "[o]ne of the most hateful acts" of his reign.¹⁷ Having promulgated tax laws, Caligula initially refused

¹² As a result of Hammurabi's commitment to making law accessible—and choosing basalt as a publishing medium—his code has continuing usefulness as it continues to be cited by courts right up to the present. *See, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 491 (2008) (regarding awarding of multiple damages for particularly harmful acts, citing to the Code of Hammurabi's ten-times damages measure for stealing a goat); *Michaels v. CH2M Hill, Inc.*, 171 Wash. 2d 587, 612, 257 P.3d 532, 545 (2011) (rejecting the firm's arguments, in a negligence suit against an engineering firm for a collapse at a sewage treatment facility, regarding duty and proximate causation with citation to the Code of Hammurabi for the proposition that house builders were liable for collapses of houses not built strong enough).

¹³ As one example, Section 7 provides that buying a sheep without a contract or witness was constructive theft and punishable by death. *The Code of Hammurabi*, *supra* note 10, at § 7. I take it that whatever is signified by the English word "contract" in the translation refers to a written contract in the original. Any legitimate sale representing a mutually agreed upon exchange between two parties, in the absence of a written agreement, could be construed as a contract formed by words or conduct. *See, e.g.*, CAL. COM. CODE § 2201 (West 2018) (stating that some sales contracts need not be in writing); *id.* § 2204 (asserting that contracts can be manifested by conduct alone).

¹⁴ The text was widely published. *See Urch*, *supra* note 5, at 438. In addition, the monumental form of the stele testifies to an emphasis on the law being viewable by all. *See id.* (discussing the form of the stele). Notably, the code's epilogue also references the form of publication—"upon memorial stone"—in saluting its own accessibility to the public. *The Code of Hammurabi*, *supra* note 10, at The Epilogue ("I have in Babylon the city where Anu and Bel raise high their head, in E-Sagil, the Temple, whose foundations stand firm as heaven and earth, in order to bespeak justice in the land, to settle all disputes, and heal all injuries, set up these my precious words, written upon my memorial stone . . .").

¹⁵ *The Code of Hammurabi*, *supra* note 10, at The Epilogue. Other references are "and pious statute did he teach the land," "let righteousness go forth in the land: by the order of Marduk, my lord, let no destruction befall my monument," "[w]hen he reads the record, let him pray with full heart to Marduk," and "I expounded all great difficulties, I made the light shine upon them." *Id.*

¹⁶ GREGORY S. ALDRETE, *DAILY LIFE IN THE ROMAN CITY* 124 (2004) ("Once at some games at which he was presiding, the emperor Caligula became bored because there were no criminals to be executed during the intermission. His solution was to order his guards to throw an entire section of the crowd into the arena to be eaten by animals.")

¹⁷ *Cutler Corp. v. Latshaw*, 374 Pa. 1, 5, 97 A.2d 234, 237 (Pa. 1953) ("One of the most hateful acts

to post those laws in public view at all—thus ensnaring citizens in a legal trap.¹⁸ When Caligula finally gave in to the people’s demands to make the laws public, he famously did so by posting them high up and in small letters—with the aim of preventing citizens from reading them or making a copy.¹⁹ Caligula thus exerts a continuing influence on the law today as an example of law done wrong. In particular, U.S. courts have used Caligula’s closed-access publication as an analogy for explaining what is fundamentally unfair about excessively vague statutes—that they are “a trap for the innocent,” incompatible with fundamental justice.²⁰

Hundreds of years later in Rome, the tides had shifted to the other extreme when Emperor Justinian I undertook to codify Roman law, one of the primary aims of the project being to make the law accessible at low cost.²¹ His digests attest to this:

In the future may they have laws that are straightforward as well as brief, and easily available to all, and also such that it is easy to possess the books containing them, so that men may not need to obtain with a great expenditure of wealth volumes containing a large quantity of redundant laws, but the means of procuring them for a trifling sum may be given to both rich and poor and great learning be available at a very small cost.²²

Thus it was that two millennia ago a Roman emperor articulated an aspiration not much different than that championed by open-access advocates today. It should be noted that there were some aspects of Justinian’s code project that would be unwelcome to modern proponents of open access. For one, he did not tolerate bootleg copies of his code; he also condemned secondary sources.²³ But, in context, his

of the ill-famed Roman tyrant Caligula was that of having the laws inscribed upon pillars so high that the people could not read them.”)

¹⁸ 1 SUETONIUS, *THE LIVES OF THE CAESARS: GAIUS CALIGULA* 469 (G. P. Goold ed., J. C. Rolfe trans., 1913) (“When taxes of this kind had been proclaimed, but not published in writing, inasmuch as many offences were committed through ignorance of the letter of the law, he at last, on the urgent demand of the people, had the law posted up, but in a very narrow place and in excessively small letters, to prevent the making of a copy.”).

¹⁹ *Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring) (“Indeed, it is not unlike the practice of Caligula, who reportedly ‘wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.’” (citing 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 46 (1765))); SUETONIUS, *supra* note 18, at 469.

²⁰ *See, e.g., United States v. Cardiff*, 344 U.S. 174, 176–77 (1952) (“Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which [the statute under consideration] on its face apparently gave him the right to withhold.” (citation omitted)); *Parker v. Levy*, 417 U.S. 733, 774–75 (1974) (Stewart, J., dissenting) (stating that vague statutes are constitutionally defective because “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))); *Huddleston v. United States*, 415 U.S. 814, 834 n.* (1974) (Douglas, J., dissenting) (“For application of a law that sends people to prison for years where Congress has not made it clear they should be there is only another device as lacking in due process as Caligula’s practice of printing the laws in small print and placing them so high on a wall that the ordinary man did not receive fair warning.” (citation omitted)).

²¹ Iain Stewart, *Mors Codicis: End of the Age of Codification?*, 27 *TUL. EUR. & CIV. L.F.* 17, 23, 30 (2012).

²² PAUL DU PLESSIS, *BORKOWSKI’S TEXTBOOK ON ROMAN LAW* 62 (5th ed. 2015).

²³ Stewart, *supra* note 21, at 33 (2012).

directives along these lines should be understood as means of ensuring accuracy and uniformity—which in turn serve the overarching goal of protecting citizen access to the law.²⁴ Justinian’s values regarding the publication of the written law are foundational to the civilian legal tradition and deeply influential on the common law as well.

B. Modern Times

Let’s fast-forward to 1848 A.D., when American law-reformer David Dudley Field succeeded in getting the state of New York to adopt a code of civil procedure to replace its then byzantine doctrines of common-law pleading.²⁵ Field’s trailblazing work—which became known as the Field Code—served as a model for the later-created Federal Rules of Civil Procedure.²⁶

Important for our purposes, at least part of what motivated Field was that he despised the idea of law being closed off to citizens.²⁷ He found it unacceptable that to comprehend the law one would have to search through reported cases—an exercise that left the law discernable only to trained lawyers and those who could hire them.²⁸ Field maligned case reporters as “sealed books.”²⁹ He saw his code as the remedy.³⁰

To gain acceptance of his code, Field had to convince lawyers and judges that it was a good idea, and he promoted it as a labor-saving device for the bench and bar.³¹ But he also made an argument with a more society-wide focus: He claimed that the “publication of a [c]ode will diffuse among the people a more general and accurate knowledge of their rights and duties, than can be obtained in any other manner.”³²

After Field’s success with civil practice, he went on to contracts, torts, and property,³³ trying “to set out principles of law exhaustively, concisely, and with great clarity of language.”³⁴ Field was not as successful when it came to codifying substantive law as he was with procedural law.³⁵ But the broader efforts of Field and his fellow reformers did bear fruit as the “spiritual parents” of the American Law Institute’s Restatements of Law,³⁶ a project which sought to take the decentralized

²⁴ See *id.*

²⁵ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 293–94 (3d ed. 2005); Eric E. Johnson, *Trade Secret Subject Matter*, 33 *HAMLIN L. REV.* 545, 548 (2010).

²⁶ Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 *YALE J. L. & HUMAN.* 149, 152–54 (2007).

²⁷ See *id.* at 153–54.

²⁸ See *id.* at 153–54, 157.

²⁹ Johnson, *supra* note 25, at 548.

³⁰ Grossman, *supra* note 26, at 152–54.

³¹ *Id.* at 153–54.

³² *Id.*

³³ See FRIEDMAN, *supra* note 25, at 302.

³⁴ *Id.*

³⁵ See Grossman, *supra* note 26, at 154–55 (discussing Field’s success in getting California to adopt his Civil Code, in modified form in 1872, but noting that the California courts moved to a practice of interpreting the code such that they operated in a common-law mode).

³⁶ FRIEDMAN, *supra* note 25, at 304.

web of pronouncements in the common law and distill them to easily understood statute-like precepts.³⁷

Matching Field’s work as an example of the recurring project to open up the law to public access, there are also many modern examples of the recurring impulse to remove the law from the public domain and tie it up with proprietary arrangements.

In 1906, for instance, the State of Nebraska argued to its state supreme court that the opinions of that court should be subject to proprietary ownership, so that sales of copies could fund the purchase of books for the state library.³⁸ The Supreme Court of Nebraska pointedly disagreed that the purpose of publishing its opinions was to raise money—it was, the court thought, “to make the opinions of the court easily accessible to all the citizens.”³⁹

A particularly useful example—because it compellingly compares to the present-day controversy in Georgia—is that of Connecticut in the 1880s. The State of Connecticut entered into a deal to make Banks & Brothers the exclusive publisher of the Supreme Court of Connecticut’s decisions.⁴⁰ Connecticut patted itself on the back for an arrangement that allowed the public to get the material at what it saw as a fair price—\$2.00 per volume.⁴¹ When a rival publisher challenged the arrangement, seeking to publish the opinions quicker and cheaper in a weekly magazine, the Supreme Court of Connecticut repulsed it, holding that state officials could not be compelled to give copies of new opinions to the magazine to transcribe on the rationale that doing so would breach the state’s contract.⁴² The court reasoned, “The judges and the reporter are paid by the state, and the product of their mental labor is the property of the state, and the state . . . has taken to itself the copyright. . . . It is for the state to say when and in what manner it will publish these volumes.”⁴³

C. Most Recently

Today, public access to the letter of the law continues to be a contested concept, and Connecticut’s stance 136 years ago is strangely echoed today in Georgia.

The state government of Georgia, through its legislatively created Code Revision Commission (CRC),⁴⁴ has aggressively pursued a copyright claim against Public.Resource.Org, a non-profit organization that seeks to allow the public to freely download Georgia’s official code, the Official Code of Georgia Annotated

³⁷ See *id.*

³⁸ See *Nebraska v. State Journal Co.*, 77 Neb. 752, 754–55, 110 N.W. 763, 764 (1906).

³⁹ *Id.*; see also Dmitrieva, *supra* note 4, at 110 (citing the case as an example of states attempting to generate revenue from publishing legal materials).

⁴⁰ See *In re Gould & Co.*, 53 Conn. 415, 419; 2 A. 886, 896 (Conn. 1885).

⁴¹ *Id.*

⁴² See *id.*

⁴³ *Id.*

⁴⁴ *Rep. Johnnie Caldwell Issues Statement on Copyright Lawsuit*, GA. HOUSE OF REPRESENTATIVES (July 29, 2015), <http://www.house.ga.gov/mediaServices/en-US/pressReleases.aspx> [<https://perma.cc/UT4Y-ZXDA>].

(OCGA).⁴⁵ Led by open-access advocate Carl Malamud,⁴⁶ Public.Resource.Org purchased a print copy of the ostensibly copyrighted OCGA, scanned it, and posted it in the open on the web.⁴⁷ Not shy about its willingness to get into a fight, the organization sent copies on flash drives to various Georgia legislators.⁴⁸ The CRC sued and won its motion for partial summary judgment in the district court,⁴⁹ but that victory was later overturned by the Eleventh Circuit, which held the annotations in the OCGA to be uncopyrightable.⁵⁰ (At the time of this writing, CRC and the State of Georgia have petitioned the U.S. Supreme Court for a writ of certiorari.⁵¹)

The State of Georgia argued that it held the copyright to the OCGA annotations,⁵² and on that basis, Georgia has a deal with Lexis purportedly giving Lexis exclusive publishing rights to the OCGA and its annotations.⁵³ Georgia argued to the Eleventh Circuit that its deal with Lexis “reflects the success of the Georgia General Assembly in providing tangible benefits . . . to its citizens while still maintaining a small government footprint and low taxes.”⁵⁴ Like Connecticut did in the 1800s, Georgia today trumpets the arrangement for making the law available to citizens at what it sees as a fair price: just \$404 for a complete printed copy.⁵⁵ As to the non-profit’s stance that the official code would be better for citizens of Georgia if it were free, the state riposted, “These irresponsible and uninformed opinions of third parties should not dictate how the sovereign State of Georgia provides benefits to its citizens.”⁵⁶

The technical thrust of Georgia’s argument is that the OCGA includes annotations of various sorts—that is, text other than the law itself.⁵⁷ Thus, Georgia has argued that it is not restricting the distribution of the plain statutory text, which it maintains people are free to copy.⁵⁸ But Georgia’s stance on the free reproducibility of statutory text was not a willing policy choice. Georgia already tried and failed to claim exclusive rights over the statutory text itself.⁵⁹

In the 1982 case of *Georgia v. Harrison Co.*, the State of Georgia filed a

⁴⁵ The latest in the case is the issuance of an opinion by a panel of the Eleventh Circuit. Code Revision Comm’n *ex rel.* Ga. v. Public.Resource.Org, 906 F.3d 1229 (11th Cir. 2018).

⁴⁶ See Brief of Appellee Code Revision Comm’n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga. at 11, Code Revision Comm’n *ex rel.* Georgia v. Public.Resource.Org, 906 F.3d 1229 (11th Cir. 2018) (No. 17-11589) (listing Carl Malamud as the founder of the organization).

⁴⁷ *Code Revision*, 906 F.3d at 1235.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1255.

⁵¹ See Petition for a Writ of Certiorari, *Georgia v. Public.Resource.Org, Inc.*, No. 18-1150 (U.S. Mar. 1, 2019), https://www.supremecourt.gov/DocketPDF/18/-181150/90326/20190301141255519_Georgia%20Certiorari%20Petition%20-%20to%20Printer.pdf [<https://perma.cc/RKV7-R36U>].

⁵² Brief of Appellee Code Revision Comm’n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 46, at 2–3, 20–21.

⁵³ *Id.* at 3–5, 19.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.*

⁵⁶ *Id.* at 20.

⁵⁷ *Id.* at 20–21.

⁵⁸ See *id.* at 18, 20–21.

⁵⁹ *Id.* at 18.

copyright infringement suit against a legal publisher that had, without Georgia's authorization, published a preliminary version of the codification of Georgia statutes.⁶⁰ The preliminary version had been prepared and distributed with the aim of soliciting comments before the code's effective date.⁶¹ Michie—the authorized publisher and a precursor to present-day Lexis—registered the copyright for Georgia to use in its lawsuit.⁶² Georgia argued that prior cases denying copyright over statutes were ones where the alleged copyright holder was an individual, not a state government.⁶³ Thus, Georgia argued, its copyright over its own law was not excluded by *stare decisis* and should be upheld.⁶⁴ The tack didn't work: The court denied the injunction and held that states were, like everyone else, unentitled to a copyright over law.⁶⁵

Another state that has been aggressive in claiming copyright over its law is Oregon—but it eventually took a different path than Georgia. In 2008, Oregon's Office of Legislative Counsel sent cease-and-desist letters to the operators of websites that had openly posted Oregon's official code, the Oregon Revised Statutes (ORS).⁶⁶ In one such letter, to the website Justia, Oregon's attorney asserted that the ORS was the copyrighted work of the state's Legislative Counsel Committee.⁶⁷ The letter explained that the committee did not claim copyright over “the text of the law itself,” but the committee did claim copyright in, among other things, the arrangement of the law's text and the numbering of the sections.⁶⁸

Amiable in tone, Oregon's letter acknowledged Justia's public-interest mission but nonetheless insisted that posting the ORS on the web was illegal.⁶⁹ As a rationale for the necessity of copyright enforcement, the letter offered that ORS sales and licensing revenue financially supported the Legislative Counsel Committee's work in compiling, publishing, and, ironically, “making the law accessible to the public.”⁷⁰ Thus, Oregon's counsel invited Justia to enter into good-faith negotiations for a license—or else face a copyright lawsuit.⁷¹

The exchange of letters was made public, and Oregon faced an onslaught of

⁶⁰ See *Georgia v. Harrison Co.*, 548 F. Supp. 110, 111–13 (N.D. Ga. 1982), *vacated per stipulation*, 559 F. Supp. 37 (N.D. Ga. 1983).

⁶¹ *Id.* at 112–13.

⁶² *Id.*

⁶³ *Id.* at 114.

⁶⁴ *Id.*

⁶⁵ *Id.* at 115, 117.

⁶⁶ Notably, the ORS lacked the kind of annotations that are woven into the OCGA and form the proffered distinguishing factor that Georgia has been hoping will give it a different outcome in its current battle against Public.Resource.Org. See, e.g., Letter from Dexter Johnson, Legislative Counsel, Or. Legislative Counsel Comm., to Tim Stanley, Chief Exec. Officer, Justia Inc. (Apr. 7, 2008), <https://public.resource.org/scribd/2526821.pdf> [<https://perma.cc/F6XK-P5WZ>].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* (“Although we applaud the public interest mission of Justia Inc. to make the law easy to find and use at no charge, the fact remains that your company has illegally displayed the copyrighted work product of the Committee . . .”).

⁷⁰ *Id.*

⁷¹ *Id.*

criticism.⁷² But in addition to being bad policy in the minds of many, Oregon's position was also—as many pointed out—legally untenable.⁷³ Oregon's lawyers must have quickly concluded the same thing. In the end, Oregon said it was choosing not to enforce a claim of copyright over the text of the ORS.⁷⁴

Idaho is a state with still a different experience. In 1949, the Idaho legislature passed a law providing that copyright in statutory compilations would be taken in the name of the state's chosen publishing company and then assigned to the state.⁷⁵ Thus, at that time, Idaho chose to pursue a closed-access/proprietary model. In 1993, Idaho redoubled its position by adding to its law a new code section titled "Idaho Code is property of the state of Idaho."⁷⁶ The section specified that the taxpayers and the state have a copyright on the code and provided that anyone who copied or distributed the law for commercial advantage—even if indirect—would owe royalties, and copies could be impounded.⁷⁷ In purporting to create a copyright entitlement, prescribing the test for infringement, and providing for remedies, the Idaho statute is a nullity, as it is unambiguously preempted by federal law.⁷⁸ But the implication was clear: Idaho would use the full machinery of the state to enforce any arguable claim under federal law to prevent people from copying and distributing Idaho law. Then in 2015, Idaho considered reversing course and embracing open access.⁷⁹ Legislation introduced that year would have repealed the 1949 and 1993 laws and replaced them with an explicit dedication of statutory materials to the public domain.⁸⁰ That provision, however, did not become law.⁸¹ Idaho law today continues to reflect a stance of maintaining a state monopoly over the state's legal text.⁸²

Mississippi is another state that has made a proprietary claim of ownership over its laws. Mississippi statutory law includes a code section that, like Idaho's law, provides for copyrights over its statutory code, annotations, notes, and indexes, to be taken originally by publishers and then assigned to the state.⁸³ Mississippi's statute

⁷² See, e.g., Tim Armstrong, *Can States Copyright Their Statutes?*, HARV. INFO/LAW (Apr. 16, 2008), <https://web.archive.org/web/20180803122652/http://blogs.harvard.edu/Infolaw/2008/04/16/can-states-copyright-their-statutes/> [https://perma.cc/7MP6-VQ8H] ("As a policy matter, allowing a state (or anybody else) to monopolize publication and distribution of statutes is a terrible idea. It does nothing to incentivize the creation of new expressive works and prevents improvements in the accessibility of public domain materials.").

⁷³ See, e.g., *id.*

⁷⁴ *Id.*

⁷⁵ IDAHO CODE ANN. § 73-210 (West 2018).

⁷⁶ 1993 Idaho Sess. Laws § 9-352 (repealed 2015). The statute was replaced by IDAHO CODE ANN. § 74-123 (West 2018) with the same language.

⁷⁷ *Id.*

⁷⁸ See 17 U.S.C. § 301 (2012).

⁷⁹ H.B. 174, 63d Leg., 1st Reg. Sess. (Idaho 2015).

⁸⁰ *Id.* ("Idaho Code, including the statutes themselves, notes, annotations, indexing, and the organizational and numbering scheme . . . shall be entirely in the public domain for purposes of federal copyright law. No copyright in the Idaho Code shall be claimed by the state of Idaho or any other entity.").

⁸¹ See IDAHO CODE ANN. § 73-210 (West 2018).

⁸² *Id.*

⁸³ MISS. CODE ANN. § 1-1-9 (West 2018); see also Dmitrieva, *supra* note 4, at 118 (discussing the example of Mississippi).

additionally bears its teeth by providing for a civil fine of \$1,000 per day for anyone who “uses any part of any act passed by the Mississippi Legislature . . . in any manner other than as authorized by” a joint committee of the Mississippi Legislature.⁸⁴ While the fine would be preempted under federal copyright law,⁸⁵ Mississippi apparently means to signal its intent to enforce its claim, as the secretary of state’s website warns, “[T]he laws of Mississippi are copyrighted by the State of Mississippi. Users are advised to contact the Joint Committee . . . for information regarding publication and distribution of the official Mississippi Code.”⁸⁶

But Mississippi’s bark is not necessarily backed with a bite. Public.Resource.Org scanned in a copy of the Mississippi Annotated Code—as it did with Georgia—and thus managed in 2013 to provoke a cease and desist letter demanding removal of the code.⁸⁷ But as of 2018, the Mississippi Annotated Code remains available on Public.Resource.Org’s website.⁸⁸ The issue apparently has remained unlitigated. That leaves the accessibility status of Mississippi’s law in limbo, potentially keeping alive the state’s latent litigation threat. Unfortunately, that is likely to chill productive uses of the code.⁸⁹

Thus, in the present day, states using copyright to thwart open access to state-owned legal materials remains an active, contested issue, one that is still very much in flux. Having researched in this area, my perception is that there is a slow trend toward more and more law being made publicly available, but that movement seems to be driven by litigation and activist efforts, not by a shift in philosophy among states legislators and officials toward valuing open access to the law. On balance, it seems the impulse to restrict liberty with regard to the written law is as alive as it has ever been. Moreover, there is enough of a variety in the forms of legal texts (codes, statutes with annotations, quasi-official commentary, etc.) and enough nuance in copyright law, that there is little likelihood any court decision in the foreseeable future will cause states to give up hope of being able to leverage

⁸⁴ MISS. CODE ANN. § 1-1-9 (West 2018).

⁸⁵ See 17 U.S.C. § 301 (2012).

⁸⁶ *Mississippi Law*, MISSISSIPPI SECRETARY OF STATE, <http://www.sos.ms.gov/Education-Publications/Pages/Mississippi-Code.aspx> [<https://perma.cc/B49Y-2XMQ>]. The state’s claim to copyright over its statutory law is in contradistinction to its stance regarding the state constitution, which “is published for free distribution.” *Id.*

⁸⁷ Letter from Larry A. Schemmel, Special Assistant Attorney Gen., State of Miss., to Carl Malamud, Public.Resource.Org (Oct. 7, 2013), <https://law.resource.org/pub/us/code/ms/ms.gov.20131007.pdf> [<https://perma.cc/2DPE-S8HW>]; see also Mike Masnick, *Mississippi The Latest State To Claim Copyright Over Official Compilation Of Its Laws*, TECHDIRT (Oct. 14, 2013, 11:47 AM), <https://www.techdirt.com/articles/20131012/23510924854/mississippi-latest-state-to-claim-copyright-over-official-compilation-its-laws.shtml> [<https://perma.cc/J2HE-TTBX>].

⁸⁸ See, e.g., *Official State Codes*, Public.Research.Org (search for “Mississippi”), [https://archive.org/details/govlaw?and\[\]=subject%3A%22mississippi.gov%22](https://archive.org/details/govlaw?and[]=subject%3A%22mississippi.gov%22) [<https://perma.cc/CN9J-7NF2>].

⁸⁹ Along these lines, it should be noted that this and other state codes posted by Public.Resource.Org remain difficult to use, as they exist as scanned-in images of book pages rather than easily searched text files. Regarding chilling effects, see, for example, Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 196 (2010) (“[T]he architecture of law can be blamed for its effect on parties beyond the courtroom and the four corners of a statute.”).

copyright to exert a proprietary claim over legal materials. That suggests it is important to consider the issue from the perspective of the states—as this Article endeavors to do—asking what their motivations are and should be.

In closing this section, I want to express that I am not trying to villainize copyright-claiming states. In fact, some context is in order: It seems particularly hard to paint these states as reprobates when what may be the most prominent learned society of American lawyers and legal scholars—the American Law Institute (ALI)—is itself an assiduous copyright claimant. Notwithstanding the ALI’s intellectual heritage in the work of David Dudley Field, the institute’s renowned Restatements of Law are held out of the public’s reach. Electronic access to the ALI’s restatements is through proprietary databases HeinOnline, Westlaw, and Lexis,⁹⁰ and print volumes are extremely pricey for a curious citizen.⁹¹ Although the American Law Institute sees itself as “an institution founded and continued in a spirit of voluntarism and commitment to the public good,”⁹² it seems not to view public access to the law as part of that mission.⁹³

Thus, state decisionmakers that choose closed-access for their legal materials have some distinguished company.

D. Copyright as the Means of Closing Access

There would be no controversy about public access to the law without copyright or some similar legal entitlement for exercising exclusive control over textual information. If everyone were unambiguously free to copy and redistribute all text, then public access would be a *fait accompli*. But that is not the case since copyright law creates a contestable basis for states and legal publishers to argue they have monopoly rights over the state’s written information about the law.

In the United States copyright law is federal statutory law⁹⁴ enacted by Congress pursuant to the authority of the Progress Clause.⁹⁵ Copyright covers, among other things, works of authorship consisting of written words that have requisite

⁹⁰ AM. LAW INST., ANNUAL REPORT 20 (2016-2017), https://www.ali.org/media/filer_public/a5/bd/a5bdd202-2c50-4549-a842-26095116e3b8/2016-2017_annual_report_web.pdf [<https://perma.cc/GMB3-FUVZ>].

⁹¹ The three-volume Restatement of Contracts (Second) in print is \$190.50. See *Restatement of the Law Second, Contracts*, ALI, <https://www.ali.org/publications/show/contracts/> [<https://perma.cc/UVZ4-ZU7C>].

⁹² AM. LAW INST., *supra* note 90, at 2 (quoting the Honorable Robert Shenton French).

⁹³ The ALI states that its publishing activity is carried out for the purpose of raising revenue and for ensuring their work is “disseminated to practicing lawyers, judges, academics, and students throughout the world”—notably leaving the public off of that list. *Id.* at 20. Note, however, that the ALI has a website, ALI Adviser, that provides some access to certain portions of restatement material: “One of the site’s exclusive features is public access to approved black letter on current projects. For example, during the 94th Annual Meeting, the *Adviser* regularly shared approved black letter with the public.” *Id.* at 19. The referenced website is THE ALI ADVISER, www.thealiadviser.org [<https://perma.cc/7CPE-AH93>].

⁹⁴ There are a few exceptions—although ones that are not important for purposes of the instant Article. See, e.g., Deidré A. Keller, *Limiting Lessons from Property: Reimagining the Public Domain in the Image of the Public Trust Doctrine*, 107 KY. L.J. (forthcoming 2019) (discussing aspects of common-law copyright).

⁹⁵ U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [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 . . .”).

originality.⁹⁶

The first copyright statute was passed in 1790.⁹⁷ It did not speak specifically to the issue of whether primary sources of law could be copyrighted. As it turned out, that issue was relevant to the very first copyright case decided by the U.S. Supreme Court—the 1834 case of *Wheaton v. Peters*.⁹⁸ The case involved two battling reporters of decisions of the U.S. Supreme Court: Henry Wheaton and Richard Peters, Jr.⁹⁹ The Court’s opinion made a number of key holdings, cementing the case’s role as foundational to much of U.S. copyright law.¹⁰⁰ With specific regard to the copyrightability of judicial opinions, the *Wheaton* opinion stated, albeit in dicta, “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.”¹⁰¹ Despite the apparent strength of conviction of this statement—or perhaps because of it—the U.S. Supreme Court cited no legal authority nor did it provide any logic-based argument.¹⁰²

After *Wheaton*, various lower courts held—also without much analysis or citation to authority—that compiling statutes or opinions and adding notes and other matter to them could make the resulting primary legal sources copyrightable.¹⁰³

Eventually, Congress engaged with the question of whether government legal works would be susceptible to copyright. A 1906 draft of what eventually became the Copyright Act of 1909 would have excluded from copyrightability all “official acts, proceedings, laws, or ordinances of public authorities—federal, state, or municipal,” as well as “judicial decisions” and “any government publication.”¹⁰⁴ This provision was, however, strongly opposed by legal publishers of state judicial opinions.¹⁰⁵ And the publishers’ lobbying efforts prevailed—at least with regard to works of state governments. The 1909 Act’s explicit exclusion of government works was in the end limited to those of the U.S. government.¹⁰⁶ But Professors L. Ray Patterson and Craig Joyce report that the statute’s omission to say anything about the copyrightability of primary sources of state law was approved with the understanding

⁹⁶ 17 U.S.C. § 102 (2012) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . Works of authorship include . . . literary works . . .”).

⁹⁷ Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

⁹⁸ 33 U.S. (8 Pet.) 591, 598–99 (1834).

⁹⁹ Patterson & Joyce, *supra* note 4, at 731.

¹⁰⁰ *Id.* (referring to the case as the “cornerstone of American copyright law”).

¹⁰¹ *Wheaton*, 33 U.S. (8 Pet.) at 668.

¹⁰² *Id.*; see also Dmitrieva, *supra* note 4, at 84; Patterson & Joyce, *supra* note 4, at 734.

¹⁰³ Little v. Gould, 15 F. Cas. 604 (C.C.N.D.N.Y. 1851) (No. 8394) (holding that even though the text of a New York Court of Appeals opinion is free of copyright, the state could claim protection for “notes and references” and have a copyright over the volumes); Davidson v. Wheelock, 27 F. 61 (C.C.D. Minn. 1866) (holding that the state of Minnesota could not claim a copyright over its statutes, but could claim a copyright over “marginal notes or references”).

¹⁰⁴ Patterson & Joyce, *supra* note 4, at 753 (quoting Draft of Feb. 28, 1906, *reprinted in* E.F. BRYLAWSKI & A. GOLDMAN, LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT XXXII (1976)).

¹⁰⁵ *Id.*

¹⁰⁶ Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1075 (repealed 1976) (“[N]o copyright shall subsist in the original text of . . . any publication of the United States Government, or any reprint, in whole or in part, thereof . . .”).

that it would leave undisturbed case law that had already held that the text of judicial opinions was uncopyrightable and that it would leave further development of copyright law in this area to the courts.¹⁰⁷

The contemporary incarnation of copyright law is the Copyright Act of 1976. It carries over the 1909 Act's explicit denial of copyright over federal works.¹⁰⁸ And similarly, it makes no provision for denying copyright to works of state or local governments.¹⁰⁹

Thus, it is crystal clear that federally created legal materials are uncopyrightable, including federal statutes and federal court opinions. But with Congress abstaining from saying anything explicit about the copyrightability of state primary legal authority, the door was left open for states to attempt to lay proprietary claims over their law, strike exclusive-access deals with publishers, and wait for pushback in the form of public-policy-type arguments.¹¹⁰ Those are explored in the next section.

II. SOME IDEALISM: RIGHTS OF CITIZENS AND AUTHORS

In this part, I will review two leading legal arguments—which are also abstract policy arguments—for the proposition that states should not be able to encumber access to the law with copyright claims: due process arguments and the public-ownership theory.

A. *Due Process / Rule of Law*

A cluster of arguments about due process and fundamental tenets of the rule of law may be the most common and most straightforward rationale for opposing copyright-exclusivity over state law. A starting concept is that of notice—the idea that due process requires notice, or at least constructive notice, and that notice requires open access to the law.

One older case in this vein, *Banks & Bros. v. West Publishing Co.*, is worth a particular look because it may be the earliest case to offer an in-depth rationale, starting from an absence of precedent.¹¹¹ The case, heard in federal court, concerned

¹⁰⁷ Patterson & Joyce, *supra* note 4, at 753–55 (“[T]he compromise that excluded state decisions and statutes was not that they should have copyright protection, but that the issue should be left to the courts. All of the participants in shaping this provision of the 1909 Act seem to have understood and agreed that copyright for a publication containing government works was prohibited under existing case law.”).

¹⁰⁸ 17 U.S.C. § 105 (1976). It is worth noting that this a front-and-center feature of U.S. copyright law. The copyright code as created by the 1976 Act starts at Section 101. Patterson & Joyce, *supra* note 4, at 750 n.105. Thus, the provision exempting federal works from copyright's scope occurs early in the code—even prior to delimiting infringement (§ 106) and laying out fair use (§ 107). 17 U.S.C. §§ 106–07 (1976). Regarding the relation of this provision to the 1909 Act, see Patterson & Joyce, *supra* note 4, at 752, for a discussion of how Section 105's federal-works prohibition is a carry-over from the 1909 Act.

¹⁰⁹ Dmitrieva, *supra* note 4 at 82 (discussing copyrights in state primary legal materials and making comparison with federal materials).

¹¹⁰ Many of these public policy arguments would be prosecuted via the fair use doctrine. At any rate, in my abbreviated discussion, I don't mean to speak of public policy to the exclusion of fair use.

¹¹¹ *Banks & Bros. v. West Publ'g Co.*, 27 F. 50, 59 (C.C.D. Minn. 1886).

alleged exclusive rights to the opinions of the Supreme Court of Minnesota.¹¹² The federal court noted that a common-law property right or statute-based copyright in the judicial opinions of the judges of the state court would necessarily include the right to withhold publication.¹¹³ Yet, the federal court observed that recognizing such a right to squelch publication would conflict with “a maxim of universal application that every man is presumed to know the law.”¹¹⁴ The *Banks & Bros.* court reasoned that “freedom of access to the laws, or the official interpretation of those laws” needs to be “co-extensive with the sweep of the maxim.”¹¹⁵ The court drew on an analogy to Caligula—though it didn’t reference the famously depraved emperor by name—to explain that it was inconsistent under our system of government to expect obedience to laws while frustrating the reading of them.¹¹⁶

Perhaps the best exposition of the due-process/rule-of-law line of thinking was the First Circuit’s 1980 opinion in *Building Officials & Code Administrators International, Inc. (“BOCA”) v. Code Technology, Inc.*, a case involving the re-publication of ostensibly copyrighted building codes that had been enacted into law in Massachusetts.¹¹⁷ The *BOCA* court held that it is a requirement of due process that people have notice of the law’s mandates—giving them a meaningful choice to avoid the negative consequences of not obeying it.¹¹⁸

That of course makes sense in theory. But there’s a practical problem the *BOCA* court appreciated: We are long past the days of Hammurabi where the whole law could be expressed in 282 rules. Today’s law is complicated and voluminous. Of course not even licensed lawyers have it committed to mind.¹¹⁹ This practical reality is made to fit with the ideals of due process through the concept of constructive notice. The *BOCA* court explained:

So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due

¹¹² *Id.* at 56–57.

¹¹³ *Id.* at 57.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* (“The act of that emperor who caused his enactments to be written in small letters, on small tablets, and then posted the latter at such height that none could read the letters, and at the same time insisted upon the rule of obedience, outraging as it did the relations of governor and governed under his own system of government, has never been deemed consistent with or possible under ours.”).

¹¹⁷ *Bldg. Officials & Code Adm’rs Int’l v. Code Tech., Inc.*, 628 F.2d 730, 731 (1st Cir. 1980) [hereinafter *BOCA*]. While the *Building Officials* decision specifically concerned statutory text, other cases have upheld the same principle with regard to judicial opinions. *See, e.g.*, *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (“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.”).

¹¹⁸ *BOCA*, 628 F.2d at 734 (“Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions.”).

¹¹⁹ A widely held expectation of lawyers is that they will know how to look up the law, rather than have it committed to memory.

process entitles them.¹²⁰

Importantly, the *BOCA* court was not swayed by the argument that the building code was made available to the public in an authorized way by its copyright owners.¹²¹ As the *BOCA* court observed, the exclusive rights of the copyright owner include the right to halt all distribution and reproduction of a copyrighted work.¹²² The *BOCA* court thus pointed out that this power to shut off access has due process implications. The court suggested this incident of copyright protection could not be squared with the due process requirement that members of the public have the right to examine the law to which they are subject.¹²³

B. *The People's Authorhood*

The other principle rationale for the uncopyrightability of law combines notions of democracy and property: Copyright cannot exclude the public from having the right to reproduce and distribute the law because, in a democracy, the public is the author and thus owner of the laws.¹²⁴

This idea of citizen-ownership as a justification for denying copyright exclusivities goes back at least to the *Banks & Bros.* case in 1886.¹²⁵ Along with the due process story, the citizen-ownership view was persuasive to the *BOCA* court, which found the “metaphorical concept of citizen authorship” to be a common thread woven through various prior cases.¹²⁶ In *BOCA*, the First Circuit wrote, “The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.”¹²⁷

In another modern building code case, *Veeck v. Southern Building Code Congress International*, the Fifth Circuit relied upon the public-ownership theory in allowing wholesale copying of building codes enacted into law, explaining:

Even when a governmental body consciously decides to enact proposed model building codes, it does so based on various legislative considerations, the sum of which produce its version of “the law.” In performing their function, the lawmakers represent the public will, and

¹²⁰ *BOCA*, 628 F.2d at 734.

¹²¹ *Id.* at 734.

¹²² *Id.* at 734–35 (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932)). In *Fox Film Corp. v. Doyal*, the U.S. Supreme Court explained, “The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.” *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

¹²³ *BOCA*, 628 F.2d at 735.

¹²⁴ *Id.* at 734.

¹²⁵ *Banks & Bros. v. West Publ'g Co.*, 27 F. 50, 57 (C.C.D. Minn. 1886) (“Each citizen is a ruler,—a law-maker—and as such has the right of access to the laws he joins in making and to any official interpretation thereof.”).

¹²⁶ *BOCA*, 628 F.2d at 734.

¹²⁷ *Id.*

the public are the final “authors” of the law.¹²⁸

A particularly ebullient expression of the public ownership theory can be found in plaintiff-activist Peter Veeck’s celebratory headline announcing his court victory. In bold red font, his website asked, “Who Owns the Law?”¹²⁹ And it provided the answer, in bold: “YOU DO!”¹³⁰

The most forceful expression of the people’s authorhood argument, and the most intellectually probing, is probably the 2018 opinion of the Eleventh Circuit in the Georgia case of *Code Revision Commission v. Public.Resource.Org.*¹³¹

Acknowledging *BOCA* and *Veeck*,¹³² but seeing additional factual complexity in Georgia’s copyright claim over elements of the OCGA that lacked the force of law, the *Code Revision* court found that there was a need to embark on an examination of “first principles.”¹³³ It did so by citing to the Declaration of Independence, the Federalist Papers, *Marbury v. Madison*, Tocqueville’s *Democracy in America*, and the Gettysburg Address.¹³⁴ Delving into the operating system of the United States in this way, the court determined that the OCGA annotations were uncopyrightable.¹³⁵

Though lacking the force of law, the court found the creation, approval, and publishing of the annotations in the OCGA to be “an exercise of sovereign power.”¹³⁶ And since “the People, as the reservoir of all sovereignty, are the source of our law,” the annotations were necessarily constructively authored by the people, making them “intrinsic public domain material.”¹³⁷

To delimit the scope of the use that the public could make of the OCGA, the *Code Revision* court leaned with favor on *Veeck*’s analysis indicating that the public authorhood doctrine protects a greater scope of defendant conduct than what might meet minimum due-process standards:

We disagree that the question of public access can be limited to the minimum availability that [the copyright-claimant building code congress] would permit. . . . [The] concept of free access to the law [does not require] a factual determination [nor is it] limited to due process, as the term is understood today. Instead, 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. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse. If a citizen wanted to place an advertisement in a newspaper quoting the Anna, Texas building code in order to indicate his dissatisfaction with its

¹²⁸ *Veeck v. S. Bldg. Code Cong. Int’l*, 293 F.3d 791, 799 (5th Cir. 2002).

¹²⁹ Shubha Ghosh, *Copyright as Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653, 655 (2004).

¹³⁰ *Id.*

¹³¹ See *Code Revision Comm’n ex rel. Ga. v. Public.Resource.Org.*, 906 F.3d 1229 (11th Cir. 2018).

¹³² *Id.* at 1240–41.

¹³³ *Id.* at 1232.

¹³⁴ *Id.* at 1240, 1248 n.3. The court also cited a large number and wide variety of more contemporary sources.

¹³⁵ *Id.* at 1255.

¹³⁶ *Id.* at 1232.

¹³⁷ *Id.*

complexities, it would seem that he could do so.¹³⁸

In fact, the *Code Revision* court twice quoted *Veck*'s "simply to amuse" language to underscore the sweep of the privilege springing from the people's role as author.¹³⁹

III. SOME REALISM: ECONOMICS AND PRACTICALITIES

Given the way prior cases have placed freedom to access legal texts as central to due process and ideals of democratic sovereignty, why is it that states recurrently seek arrangements that close public access to the law? To me, it is implausible that legislators and state officials are motivated by a desire to undermine due process or democracy. So, then, what is the motivation? To the extent it could be legally permissible for a state to make proprietary claims over its legal information, why would a state want to do so? Why would state legislators and officials not only want to enter into exclusive deals that limit access to state legal information, but also put in the time, effort, and expense of policing that exclusivity with litigation?

This Part speculates on answers to those questions and then offers responses. The reason some speculation is necessary is that states rarely give reasons for why they are pursuing a closed-access policy. For the most part, they just do. In this sense, the *Code Revision* litigation is helpfully illuminating: It pushed one state, Georgia, to commit to writing at least some reasons as to why it believes closed access makes for good public policy.¹⁴⁰ It has to be acknowledged that briefs are written by lawyers after the fact—thus they may not correspond well to the motivations of parties pre-dating the litigation. What is more, briefs may reveal little about what motivates a party to continue the fight onward to court and the appeals process. Nonetheless, Georgia's brief offers clues, and I lean on it in conjecturing a state's motivations to pursue a pay-for-access plan for state legal information.¹⁴¹

A. *The Default: Inertia and the Paper Legacy*

The starting place for conjecturing as to why states pursue closed-access strategies is inertia. Today's state officials and legislators are dealing with a hand-

¹³⁸ *Veck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791, 799 (5th Cir. 2002).

¹³⁹ *Code Revision*, 906 F.3d at 1241, 1247 n.2.

¹⁴⁰ See Brief of Appellee Code Revision Comm'n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 46, at 18–19.

¹⁴¹ The appellate brief at the Eleventh Circuit provides reasons as to why Georgia would consider it good public policy to pursue its closed-access/proprietary model of distributing official legal information. See *id.* at 17–19. The district court brief for summary judgment says little in the public policy vein and adds nothing of substance over the appellate brief. The brief in the district court does argue that Georgia's choice keeps prices low. See Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment at 4–5, *Code Revision Comm'n ex rel. Ga. v. Public.Resource.Org*, 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 1:15-CV-02594-MHC). But the appellate brief contains the same argument stated the same way. Brief of Appellee Code Revision Comm'n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 46, at 19.

me-down system for memorializing, storing, and disseminating legal materials. And while today it is easy to put documents on the web and instantly make them available to everyone everywhere, state governments are working with an ever-lengthening line of judicial and legislative output that goes back a century or more. That means all states were previously forced to deal with a paper-based system of books for statutes and cases—and all the cumbersomeness and expense that came along with that. Dealing with for-profit publishers as a means of getting that work done—and getting it done consistently and competently—was no doubt a very practical choice.

Idaho presents a good example of how today's state legal information structure is a carryover from the book era. Idaho's 1949 code section concerning copyright over Idaho's compiled statutes¹⁴² is part of a stretch of related provisions inextricably bound up with a paper-based reality. The 1949 code section has requirements phrased with reference to "size of type to be used,"¹⁴³ "pocket parts,"¹⁴⁴ and "grade and weight of paper."¹⁴⁵ There is an explicit provision in the law for seventy-five sets to be maintained for the use of legislators.¹⁴⁶ And revealing anxieties about books walking off, there is a prohibition on selling the compilations coupled with an exception that allows book-for-book exchanges with libraries of other states and territories.¹⁴⁷

Idaho's legal-research architecture, of course, makes sense only in a pure-paper world. And once you put yourself in those shoes, it is hard not to sympathize with those in the Idaho capitol who saw the need to partner with an experienced legal publishing company—one that happened to use copyright as a key foundation of its business model—to make sure it all got done.

With all that machinery in motion, having worked well enough for decades, it is predicable that when digital technologies come along state governments would be receptive to the offers from their well-worn publishing vendors to make the digital transition. Under such circumstances, it takes forceful volition to move to open-access. State governments, of course, already have their hands full with the normal business of governing. Combine that with an absence of organized, politically savvy interest groups to make the case for open access and it is hardly surprising that so many states today have wound up preserving a middleman's role for the for-profit legal publishers.

Thus, a copyright-based closed-access legal materials regime is the default. What is important now is that states recognize it as such—something arrived at by historical accident, built around the needs of an antiquated business model rather than democratic and liberty-based ideals of public access. Thus, in the next section, I talk about what states might plausibly see as the upside of closed access other than the convenience of avoiding change.

¹⁴² IDAHO CODE ANN. § 73-210 (West 2018).

¹⁴³ *Id.* § 73-205.

¹⁴⁴ *Id.* § 73-201.

¹⁴⁵ *Id.* § 73-205.

¹⁴⁶ *Id.* § 73-212.

¹⁴⁷ *Id.* § 73-211.

B. About the Upside: A Perception of Privately Provided Value

As mentioned, the *Code Revision Commission v. Public.Resource.Org* litigation provides a window into rationales a state can articulate for maintaining a closed-access system for state-owned legal materials. Featured among those rationales is the notion that contracts between states and traditional legal publishers constitute public-private partnerships¹⁴⁸—and thus a favored way of providing government services—and that the resulting proprietary system entails delivering legal information at a lower cost to the public.¹⁴⁹ Additionally, copyright-based arrangements with traditional publishers are endorsed as making legal materials available to users for low prices and providing limited web-based access for free.¹⁵⁰ I discuss those rationales in this section.

i. Public-Private Partnerships and Low Costs

States may champion a copyright-based arrangement with a traditional legal publisher as a “public-private partnership” that delivers a public good at a low cost. The definition of public-private partnership is contested in the literature,¹⁵¹ but the phrase roughly means a deal between a government and a private firm to arrange for the providing of a public service.¹⁵² As a way of providing public goods, public-private partnerships have a long history. An agreement between government and a for-profit firm for the provision of a public service appears to go back at least to the 1400s when Luis de Bernam, a nobleman from France, won the right to charge fees for the transportation of cargo on the Rhine River.¹⁵³

There are plausible theoretical reasons why the sorts of structures that fit under the banner of public-private partnerships can be beneficial for the public—such as by gaining efficiencies through access to expertise and financing.¹⁵⁴ But critics warn that the incantation of public-private partnerships can also be part of a “language

¹⁴⁸ Brief of Appellee Code Revision Comm’n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 46, at 17 (“THE STATE’S PURPOSE IN PUBLISHING THE OCGA AND USING A PUBLIC-PRIVATE PARTNERSHIP TO DO SO WAS FOR THE BENEFIT OF THE CITIZENS OF GEORGIA”).

¹⁴⁹ See, e.g., *id.* at 18–19.

¹⁵⁰ See, e.g., *id.* at 19.

¹⁵¹ See Swapnil Garg & Sachin Garg, *Rethinking Public-private Partnerships: An Unbundling Approach*, 25 TRANS. RES. PROCEDIA 3789, 3790 (2017) (identifying the public-private partnership as a “contested concept”).

¹⁵² *Id.* at 3793–94.

¹⁵³ *Id.* at 3791. Another early example is from the 1600s, when Britain awarded the East India Company rights of exploration and exploitation of Asia in return for a share of what the company took away. *Id.*

¹⁵⁴ See, e.g., Jens K. Roehrich, Michael A. Lewis, & Gerard George, *Are Public-Private Partnerships a Healthy Option? A Systematic Literature Review*, 113 SOC. SCI. & MED. 110, 113 (2014) (“The often-stated policy aim of PPPs, part of the New Public Management logic, is to achieve higher efficiency by bundling investments, infrastructure and service delivery in order to draw on expertise and sometimes financial resources” (citations omitted)).

game” that masks the “the encouragement of private providers to supply public services at the expense of public organisations.”¹⁵⁵ One commentator—arguing in favor of privatization—observed that terms such as “privatization” and “contracting out” engender negative reactions, while “alternative delivery systems” and “public-private partnership” can help foster acceptance.¹⁵⁶

In recent decades, public-private partnerships have soared in trendiness.¹⁵⁷ In 1982, when the Georgia legislature decided to create the OCGA and to make a deal with a private firm to publish it,¹⁵⁸ “public-private partnership” was surging as a popular term.¹⁵⁹ And while there once was pushback about whether public-private partnerships were a wise choice for policymakers, today it seems political opposition has largely vanished and the desirability of public-private partnerships has become orthodoxy.¹⁶⁰

A common fallacy with regard to public-private partnerships is that, as a general characteristic, they lower costs. Georgia’s appeals court brief exemplifies this. The state argued that its deal with Lexis was “a low cost method” for producing an annotated code and that the deal ensured that Lexis “bears the costs of publication in exchange for the exclusive right to sell the [code] and the right to a share of the profits from those sales.”¹⁶¹ Further on in its brief, the state contrasted the current state of affairs with a model of unrestricted access, which would require, the state claimed, that “the State[] and its tax payers . . . bear the entire cost of the OCGA publication.”¹⁶²

Yet the idea that public-private partnerships transfer costs away from taxpayers is mistaken.

First, as a matter of basic economics, this sort of rationale is premised on a confusion about the idea of cost. Cost describes the amount of resources devoted to something.¹⁶³ It is distinct from what any one party pays. This is not a matter of mere

¹⁵⁵ Nilufa Akhter Khanom, *Conceptual Issues in Defining Public Private Partnerships (PPPs)*, 6 INT’L REV. BUS. RES. PAPERS 150, 154 (2010).

¹⁵⁶ See *id.*; see also Carsten Greve, *Public-Private Partnerships in Scandinavia*, 4 INT’L PUB. MGMT. REV., no. 2, 2003, at 59, 60.

¹⁵⁷ See Ryan Holeywell, *Public-Private Partnerships Are Popular, But Are They Practical?*, GOVERNING (Nov. 2013), <http://www.governing.com/topics/transportation-infrastructure/gov-public-private-popular.html> [<https://perma.cc/N33M-UVEB>] (describing public-private partnerships as “all the buzz” and, in sub-headline, as “trendy”).

¹⁵⁸ Brief of Appellee Code Revision Comm’n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 46, at 17–19.

¹⁵⁹ See *Ngram Viewer*, GOOGLE BOOKS, <https://books.google.com/ngrams> [<https://perma.cc/GGU4-2H7G>] (type in “private-partner partnership” into the text box; then type in “2008” as the final date; then click “search lots of books”).

¹⁶⁰ See Holeywell, *supra* note 157 (“Increasingly, it seems the discussion of [public-private partnerships] isn’t about whether it’s wise for governments to enter the deals; it’s about how governments can best facilitate them.”).

¹⁶¹ Brief of Appellee Code Revision Comm’n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 46, at 19.

¹⁶² *Id.* at 20.

¹⁶³ See, e.g., Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1730 & n.61 (1995) (speaking in the context of broadcast communications policy, “[e]conomic costs are the costs (including opportunity costs) of

semantics—it is substantive. For instance, in the case of Georgia’s code, the cost of the OCGA is the amount of resources poured into creating the code by the State of Georgia and by Lexis (represented largely by salary dollars for state and Lexis employees), plus the additional costs borne by users in having to endure the more cumbersome access necessitated by the paywall, and so forth.¹⁶⁴ Lexis is not a charity, of course, so assuming this deal is working as Lexis intended and is operating in the black, all of Lexis’s costs not borne by the state are passed on to subscribers, licensees, and purchasers of physical copies.

This constancy of cost is a general feature of public-private partnerships. They do not magically create “free money”—despite having that perception among many.¹⁶⁵ As one commentator said in the context of public-private partnerships for providing transportation infrastructure, “[C]itizens ultimately pay for the project, either through tax dollars or tolls.”¹⁶⁶

While tolls—whether for driving on a road or accessing a legal database—do not function to lower the cost of a government service to taxpayers, they can and do concentrate the financial burden on certain taxpayers. This can be a genuine policy choice, and it is often an intentional part of the design of transportation infrastructure.¹⁶⁷ Creating a new toll-based expressway to avoid congestion on existing roads ends up benefiting those persons who both find the road useful and who can afford to pay for the privilege of getting where they are going faster. Concomitantly, such a toll-based system places the lion’s share of the financial burden with those persons. Individuals that could productively use the expressway but who can’t afford it are not entirely out of luck. Such persons have the option of taking the surface streets or sitting in stop-and-go traffic on clogged freeways—still getting where they are going, albeit more slowly. What is important to understand is that such a policy choice is not about lowering costs, it is about shifting the burden among taxpayers. Also, it bears pointing out that such a policy choice involves one set of concerns when it comes to access to faster roads, but a different and probably more urgent set of concerns when it comes to accessing the law—a task that goes to the core character of our democratic society.

resources employed in communicating, not necessarily the prices charged by (perhaps monopolistic) owners of those resources”).

¹⁶⁴ See Decl. of Clay Johnson at 5–8, submitted as Ex. K with Defendant Public.Resource.Org, Inc.’s Memorandum of Law in Support of its Motion for Summary Judgment, *supra* note 2 (regarding the cumbersomeness of the Lexis-maintained website for free access to statutory text); Krattenmaker & Powe, *supra* note 163, at 1730 & n.61 (regarding opportunity costs).

¹⁶⁵ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-44, HIGHWAY PUBLIC-PRIVATE PARTNERSHIPS: MORE RIGOROUS UP-FRONT ANALYSIS COULD BETTER SECURE POTENTIAL BENEFITS AND PROTECT THE PUBLIC INTEREST 72 (2008) [hereinafter GAO-08-44], <https://www.gao.gov/new.items/d0844.pdf> [<https://perma.cc/X3C9-KP6T>] (“There is no ‘free’ money in highway public-private partnerships”). See also Holeywell, *supra* note 157 (quoting Robert Puentes of the Brookings Institution regarding the perception of “free money”). See also *id.* (quoting Joshua Schank, head of a transportation think tank, that misperceptions about public-private partnerships are “fueled by . . . ‘public officials who want to escape the reality that if they want better infrastructure, somebody’s got to pay for it, and that somebody’s got to be taxpayers’”).

¹⁶⁶ Holeywell, *supra* note 157.

¹⁶⁷ See GAO-08-44, *supra* note 165 at 25.

All that being said, it is in fact possible that a particular mode of producing or distributing something—goods, services, or legal information—can work out as having a lower cost. To truly involve a lower cost, however, one means of production or distribution must somehow be more efficient than another. In this way, a public-private partnership might indeed offer a lower cost than direct government provision of services. On the other hand, direct provision of public services might work out to be more efficient. Whether one or the other is more efficient will depend on the particularities of any given situation.

Efficiencies leading to lower costs for public-private partnerships are decidedly plausible in the transportation context. A report by the Government Accounting Office (GAO) found that roadway public-private partnerships can potentially lower the total costs of a project by, for instance, disciplining the decision-making process to more efficiently use resources.¹⁶⁸ Yet the same report warns such efficiencies “are not assured and can be achieved only through careful, comprehensive analysis to determine whether public-private partnerships are appropriate in specific circumstances and, if so, how best to structure them.”¹⁶⁹

So while it is possible that an arrangement like the Lexis/Georgia deal is more economically efficient and thus truly lower-cost, such a case would have to be carefully made. And with regard to the Lexis/Georgia deal, such a case was not made, either in Georgia’s appellate briefing or, apparently, anywhere else.¹⁷⁰ Meanwhile, the reverse could be true: There are several plausible reasons why the Lexis/Georgia deal could increase costs. In fact, the most straightforward thing one might expect is that the Lexis deal would increase costs by way of rent-seeking, as monopolies tend to do in the absence of vibrant competition in a free market.¹⁷¹ With regard to toll roads, the GAO has observed that public-private partnerships have the strong potential to increase costs:

[I]t is likely that tolls on a privately operated highway will increase to a greater extent than they would on a publicly operated toll road. There is also the risk of tolls being set that exceed the costs of the facility, including a reasonable rate of return, should a private concessionaire gain market power because of the lack of viable travel alternatives.¹⁷²

There are other cost considerations that have to be taken into account as well. Various supervisory tasks remain with the government and are necessarily borne by the public treasury. That is to say that governments using public-private partnerships

¹⁶⁸ *Id.* at 74–75.

¹⁶⁹ *Id.* at 75.

¹⁷⁰ Cf. Cate Long, *DealBook’s Questionable Argument on Privatization*, REUTERS: MUNILAND (July 15, 2013, 10:36 PM), <http://blogs.reuters.com/muniland/2013/07/15/dealbooks-questionable-argument-on-privatization/> [<https://perma.cc/EV55-SG3T>] (“Whenever I see advocacy like [transactional attorney and public-private partnership advocate Kent] Rowey’s, I look for real economic analysis that justifies privatization. It’s never there.”); see also Holeywell, *supra* note 157 (quoting the same).

¹⁷¹ See, e.g., Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 665 (2012) (discussing rent seeking).

¹⁷² See GAO-08-44, *supra* note 165, at “highlights” page.

must also factor in the costs of supervising their private partner.¹⁷³

In contemplating whether exclusive-rights deals with traditional legal publishers should be looked on favorably as a species of public-private partnership, it also bears keeping in mind that there is a history of governments entering public-private partnerships that seemed like good deals at the time, only to later be revealed as deeply problematic. Some deals might even be characterized as giveaways to private firms.¹⁷⁴ In one notorious example, the City of Chicago leased 36,000 metered parking spaces for a term of seventy-five years to an investor group in return for an upfront \$1.1 billion.¹⁷⁵ Certainly that seems like a lot of money. But a later report by the city inspector general found that the city undervalued the deal by nearly \$1 billion.¹⁷⁶ That view seems bolstered by the investor group's own note-issuance document, which predicts taking in a minimum of \$11.6 billion from Chicago motorists over the lease term—resulting in a profit of \$9.58 billion before taxes, interest, and depreciation.¹⁷⁷ Thus, the Chicago parking meter lease, once the true economics were known, turned out to be an “egregious municipal scam[.]”¹⁷⁸

A public-private partnership doesn't have to amount to a giveaway to end up being regrettable. One concern is that the contract underlying a public-private partnership can deprive a government of the policymaking flexibility it may need in the future. A well-known example is the Route 91 toll road in Orange County, California, created out of a public-private partnership in the early 1990s.¹⁷⁹ The State of California entered a public-private partnership for the creation and operation of the toll road¹⁸⁰—ostensibly offloading risk, increasing flexibility, and adding capacity that would reduce congestion. Problems surfaced some years later, however, when California realized it needed to add capacity to the route to relieve further congestion and decrease accident rates.¹⁸¹ Unfortunately for the state, it was confronted with a non-compete provision in its original deal that prohibited additional capacity within a one-and-a-half-mile zone along the path of the toll

¹⁷³ See *Government Objectives: Benefits and Risks of PPPs*, WORLD BANK GROUP, <https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives> [<https://perma.cc/7DYU-778D>].

¹⁷⁴ See, e.g., Holeywell, *supra* note 157.

¹⁷⁵ See Brian Eckhouse, Amanda Albright, & Martin Z Braun, *Public-Private Partnerships*, BLOOMBERG: QUICKTAKE (Oct. 16, 2018, 10:55 AM EDT), <https://www.bloomberg.com/quicktake/public-private-partnerships>.

¹⁷⁶ *Id.*

¹⁷⁷ See Darrell Preston, *Morgan Stanley Group's \$11 Billion Makes Chicago Taxpayers Cry*, BLOOMBERG (Aug. 9, 2010, 12:01 AM EDT), <https://www.bloomberg.com/news/articles/2010-08-09/morgan-stanley-group-s-11-billion-from-chicago-meters-makes-taxpayers-cry>.

¹⁷⁸ Long, *supra* note 170. Note that within the range of structures that could be called public-private partnerships, the Chicago parking meters lease functions largely like a secured debt transaction. See Julie A. Roin, *Privatization and the Sale of Tax Revenues*, 95 MINN. L. REV. 1965, 1968 (2011) (“Rather than true privatization transactions, it is more accurate to describe these deals as loans repayable out of future governmental revenues.” (footnote omitted)).

¹⁷⁹ See generally Marlon G. Boarnet & Joseph F. Dimento, *The Private Sector's Role in Highway Finance: Lessons from SR 91*, 25 UC BERKELEY ACCESS MAG., no. 1, Fall 2004, <https://cloudfront.escholarship.org/dist/prd/content/qt9q69608s/qt9q69608s.pdf> [<https://perma.cc/Q393-WQA2>].

¹⁸⁰ *Id.* at 27.

¹⁸¹ *Id.* at 28–29.

road.¹⁸² To add the capacity that Southern California drivers needed, the government ended up buying its way out of the deal,¹⁸³ paying \$207.5 million for a \$130 million project.¹⁸⁴

So public-private partnerships can go spectacularly wrong. But even if a public-private partnership is a sensible proposition economically, there are concerns a government ought to have about preserving values of democratic participation when an essential government service is involved. As Professor Celeste Pagano has observed in the transportation context, private partners do more than just provide financial muscle and business acumen, they also play a governance-like role in that they “become responsible for providing an essential governmental service that will affect the greater community.”¹⁸⁵ And if that is cause for concern with roads, it is all the more important when it comes to access to legal information. Pagano has argued that to uphold democratic values in making decisions about entering such private arrangements in the toll-road context, “affected parties should have meaningful access to information about the proposal” and this should “include the ability of the public to review facts about privatization proposals, bids, and contracts.”¹⁸⁶ That is clearly something that needs to be thought about in exclusive-rights deals with legal publishers. Notably, with the Georgia/Lexis deal, key aspects of the arrangements have not been revealed publicly—even in the course of litigation.¹⁸⁷

ii. Low Prices

Moving beyond the issue of low costs and public-private partnerships, another argument made by Georgia in support of its closed-access model is that the OCGA is available for a low price.¹⁸⁸ Note that the low-price argument is distinct from the low-cost argument. While the low-cost argument is about the allegedly lessened burden on taxpayers, the low-price argument is concerned with the price paid by persons to get access to the OCGA. In particular, Georgia has heralded the fact that the OCGA is available for just \$404 for a complete set of printed volumes.¹⁸⁹

In some ways, this is a difficult argument to grapple with, because “low price”¹⁹⁰ is a vague term. Insofar as brass-tacks economic analysis goes, “low price” is

¹⁸² *Id.* at 29.

¹⁸³ *See id.* at 29.

¹⁸⁴ Holeywell, *supra* note 157.

¹⁸⁵ Celeste Pagano, *Proceed with Caution: Avoiding Hazards in Toll Road Privatizations*, 83 ST. JOHN’S L. REV. 351, 375 (2009).

¹⁸⁶ *Id.* at 375–76.

¹⁸⁷ For example, the full contractual arrangements were not revealed in the motion papers. *See, e.g.*, Agreement for Publication dated Dec. 27, 2006 between Code Revision Commission and Matthew Bender & Co. at 20, submitted as Ex. F with Defendant Public.Resource.Org, Inc.’s Memorandum, *supra* note 2 (referencing in section 5.1 an incorporated Exhibit D with pricing information, but which is not included in the litigation exhibit).

¹⁸⁸ Brief of Appellee Code Revision Comm’n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 4653, at 19.

¹⁸⁹ *Id.* (referring to the price in 2016).

¹⁹⁰ The brief speaks of a “price” that is “low.” *See id.*

probably meaningless when used in an absolute sense. But let's suppose that "low price" means a price that a buyer would brush off as being relatively insignificant in making a decision about whether to purchase something. This seems to be what Georgia meant. So, is \$404 a low price? It is low only if you presuppose a certain consumer. For instance, such a price might be low for a full-time legal professional in Georgia. Yet \$404 is extremely high for an out-of-state attorney only intermittently and infrequently interested in Georgia law. It is higher still for a curiosity seeker whose fleeting interest in seeing the OCGA was piqued by a newspaper article.

Even supposing a given price is a "low price" in the abstract for a given consumer, it is hard to know how much of the price is artificially boosted by the publisher's monopoly, since monopolies have the ability to charge prices far in excess of the cost of production.¹⁹¹ That may be less of a problem in Georgia's specific situation—at least with regard to the print edition—since part of its deal with Lexis is that the state exercises control over the price.¹⁹² In this vein, Georgia has said that its contractual right to keep the price low was an important consideration for entering into the Lexis contract.¹⁹³ But print editions are less and less important all the time. Certainly as a general matter, when it comes to copyright-based means of publishing state law, the concept of low prices must be carefully scrutinized.

iii. Lower-Tier Free Access

Another perceived upside of state deals with traditional legal publishers is that they commonly include a provision for a lower-tier of free online access. The Georgia deal, in particular, requires Lexis to provide the unannotated text on a public website for free.¹⁹⁴ This is a contractual requirement that Lexis fulfilled on a bare-bones basis.

As the World Bank has warned about public-private partnerships in general, the "[p]rivate sector will do what it is paid to do and no more than that."¹⁹⁵ That describes what Lexis did with its free-access website. To say that the site lacked user-friendliness would be a serious understatement. I can personally attest, as someone who has tried to use Lexis's free websites in the past and who also can access to the subscription version of Lexis, that moving from a free state-law Lexis website to the subscription-based Lexis feels like finally being allowed out of the cupboard under the stairs. Some of the lugubrious qualities of the free site were memorialized in the papers filed in the *Code Revision Commission v. Public.Resource.Org* litigation: blank screens when viewed with certain browsers, intermittent security alerts, a

¹⁹¹ See, e.g., Patterson & Joyce, *supra* note 4, at 734 (noting that after the *Wheaton* decision, entrepreneurs rushed to begin publishing reports of cases that had previously been difficult to access because of artificially high monopoly pricing).

¹⁹² Code Revision Comm'n *ex rel.* Ga. v. Public.Resource.Org, 906 F.3d 1229, 1234 (11th Cir. 2018).

¹⁹³ Brief of Appellee Code Revision Comm'n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 46, at 4.

¹⁹⁴ *Code Revision*, 906 F.3d at 1234.

¹⁹⁵ *Government Objectives: Benefits and Risks of PPPs*, *supra* note 173.

search function that defaults to searching only the words in the table of contents rather than the text of the statutes, an inability to bookmark or directly come back to pages within the website, a claimed prohibition on the use of the data on the website by “public non-profit users,” and a requirement, as part of the terms and conditions all users are required to click through, that users submit to the personal jurisdiction of the New York courts.¹⁹⁶

Things seem to have changed somewhat. Having recently checked in with Lexis’s public-access website, I found it greatly improved, with most of the problems listed above apparently taken care of. It seems plausible that the visibility of the issue occasioned by the pending appeal in the *Code Revision* litigation may have been an encouragement to Lexis to spruce things up.

The more important point is that even if Lexis does provide a user-friendly website, that does not mean that Georgia taxpayers are getting something of value that they could not get otherwise. If bulk data is made available free of copyright restrictions, public-minded do-gooders and tech-savvy entrepreneurs can and will figure out how to package it for productive use. In essence, Google’s multi-billion-dollar success has largely been about its ability to take publicly available data and make it more searchable and usable. And the entire Federal Register is now easily searchable for free online because of the federal government’s decision to make the unprocessed bulk data available to the public and the subsequent actions of three programmers who then used that data as the basis for an entry in an “Apps for America” contest.¹⁹⁷

C. About the Downside: A Belief the Harm’s Theoretical

The discussion to this point has covered how the history of paper-based legal information systems made copyright claims a default choice for states and how perceived benefits of public-private partnerships and lower costs have led to a perception of an upside in sticking with closed access. This section concerns the perceived downside.

For state legislators and officials to forge ahead with copyright-based proprietary claims that limit access to state legal information, there must be a perception that the downside is minimal or at least outweighed by the upside. My guess is that state legislators and officials view the issue of limitation on access to be a trivial one for citizens left on the other side of the paywall. That is, if legislators and officials agree that citizens must be accorded access to the law that governs them,¹⁹⁸ then those state

¹⁹⁶ See Decl. of Clay Johnson at 5–8, submitted as Ex. K with Defendant Public.Resource.Org, Inc.’s Memorandum of Law in Support of its Motion for Summary Judgment, *supra* note 2; see also Plaintiff’s Responses to Defendant’s Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment at 24–26, *Code Revision Comm’n ex rel. Ga. v. Public.Resource.Org*, 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 1:15-CV-02594-MHC).

¹⁹⁷ See Decl. of Beth Simone Noveck at 4–6, submitted as Ex. C with Defendant Public.Resource.Org, Inc.’s Memorandum of Law in Support of its Motion for Summary Judgment, *supra* note 2.

¹⁹⁸ See, e.g., Brief of Appellee Code Revision Comm’n on Behalf of & for the Benefit of the Gen. Assembly of Ga., & the State of Ga., *supra* note 46, at 18 (“Accordingly, the State was not required to

decision-makers must see the limitations on access that result from exclusive publisher deals to be substantively unimportant. The concerns of open-access proponents, in the views of such officials and lawmakers, must be mostly theoretical, having little or no real-world importance.

If that is the case, then in an era of tight budgets and frustrated taxpayers, it shouldn't be a surprise that fiscal concerns tip the balance in favor of a closed system. What is more, if the due-process/democratic concerns are merely a theoretical problem, then it makes sense that state actors would think a theoretical solution is sufficient. They might reason that as long as there is some way for citizens to get access—such as by making a trip to a library or office somewhere¹⁹⁹—then it doesn't matter that such access is cumbersome to the point of deterring all but the most doggedly persistent.

Let's take the due-process/rule-of-law concerns and unpack them the way a state official might. We start with the aphorism *ignorance of the law is no excuse*.²⁰⁰ The straightforward rationale for this is that if ignorance were an excuse, there would be an incentive to avoid learning the law so as to avoid the obligation to obey it.²⁰¹ That would lead to an absurd outcome. Thus, our system of law and government rejects excuses based on willful ignorance, putting the onus on citizens to learn the law or risk being surprised when its sanctions are applied. Yet if citizens are not able to access the law, their ignorance cannot be seen as willful. In such a circumstance, a lack of access means we must either jettison due-process/rule-of-law/fundamental-fairness norms, or, if we are committed to those norms, we must excuse persons' noncompliance with the law so long as they can plead ignorance—a choice that would invite lawlessness.

When you put the argument this way, it's easy to imagine how a well-meaning legislator or state official would respond: This is, one might say, a contrived thought experiment that does not reflect everyday reality. People do not, for instance, need access to statutes or judicial opinions to know that murder is against the law. It's common knowledge. And not having access to statutes or judicial opinions cannot cause people to be ignorant of speed limits or intersections where stopping is required. Speed limit signs and stops signs ensure public access to those mandates of the law.

But, of course, laws change. Suppose a new law is passed. How can the justice system fairly expect citizens to know about a law that didn't exist previously? If it is an everyday sort of law—one that is a practical constraint on the actions of regular people—then, realistically, citizens will find out about it without looking through law books. A new law prohibiting cell phone usage while driving in a school zone,

issue an official codification of its laws, but did so in an effort to better inform its citizens.”).

¹⁹⁹ See, e.g., Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment, *supra* note 141, at 7 (reciting that there are sixty places in Georgia, including libraries and law enforcement offices, where citizens are allowed to access the OCGA on a CD-ROM).

²⁰⁰ See *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910) (“[I]nnocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse.”).

²⁰¹ See, e.g., *People v. O'Brien*, 96 Cal. 171, 176, 31 P. 45, 47 (Cal. 1892) (“If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. . . . The plea would be universally made. . . .”).

for instance, would be accompanied by a flurry of news reports. Temporary signage near schools and a billboard campaign would get the word out as well. Word-of-mouth would take over from there. In later years, the message about what the law requires would be perpetuated through driver's education courses and parents teaching their kids to drive. Access to law books would be superfluous in such a case.

In other words, it seems fair to assume that the everyday law—the law ordinary citizens need to know to navigate society on a day-to-day basis—is already accessible to the public because it diffuses into common knowledge.

What is really at stake when we talk about copyright claims over primary source legal materials, a state legislator or official might reason, is citizen access to obscure law that few people need to understand. Such not-everyday law would include the law needed by a business registering as an LLC, a litigant filing a summary judgment motion, or a wealthy person doing estate planning—and so forth. This not-everyday law, one might think, was never going to be used by everyday citizens except under special circumstances in which they would be hiring an attorney—and it is reasonable to expect those attorneys to pay for access. And for professionals or firms that need recurring access to a particular body of law relevant to their business—building contractors, pharmacists, or accountants, for instance—then it would seem to be not too much to expect for those people and firms to pay for access as part of their cost of doing business.

We know that this line of common-sense argument is plausible: Everyday citizens have not had ready access to the OCGA for decades, yet the sky hasn't fallen in Georgia.

Now let's keep putting ourselves in the position of a state legislator or official and work out a further what-if. What if citizens *could* access the non-everyday law for free? To make the question more concrete: What if there were unrestricted reproduction of and access to the OCGA for free? In such a case, of course, nearly all citizens would leave it unread. A scattered few would read portions of it. Some people would look into bits and pieces of it to satisfy idle curiosity. If they lacked legally training, such people might not understand it. Worse, such people might misunderstand what they read. Some non-legally trained bloggers would no doubt access legal texts and make some unnuanced or flatly mistaken observations. Let's label these as "dilettante users," and let's stipulate that they will be few and sporadic.

Who will be the non-dilettante users? That is, who will make widespread, systematic, constructive use of the OCGA if it is offered for free? The answer would seem to be clear: lawyers, businesses, and various professionals. And these non-dilettante users would, one could readily reason, be precisely the people who would have paid to access the law had they been required to do so.

Thus from this line of reasoning one could conclude that doing away with copyright claims over the law will not make the law newly accessible to anyone in any meaningful way; instead, it will allow some to take a "free ride." In other words, a common-sense-motivated state legislator or official could plausibly assume that allowing unfettered reproduction and distribution of a state-owned legal source like the OCGA will not, in any meaningful, real-world sense, make a difference in the accessibility of the law. Instead, a lack of payment for access will mean that these professionals and businesses will do what they were going to do anyway, but they

won't be funding it themselves—they will be sticking taxpayers with the bill.
So what is wrong with this argument?

i. Democratic/Due-Process Hygiene

The first response is that the state ought to allow dilettante users to have full access to the law of their state—even if they don't make “good” use of it—because doing so is a matter of good democratic hygiene.²⁰²

Society must practice democratic/due-process habits even when they are superfluous so that they will be strong when they are truly needed. We already understand this with regard to freedom of speech: We scrupulously uphold the right of silly people to say silly things that cannot reasonably be characterized as adding anything of value to the marketplace of ideas—that the international space station is causing earthquakes, for instance. We do this so that free speech is strong when society really needs it. For the same reasons, we ought to have an unwavering commitment to keeping the state's legal information fully open and accessible.

ii. Lost Deals

The second response is that the above common-sense line of argument makes bad assumptions. It is not a defensible assumption that all or nearly all constructive/non-dilettante users would pay for access. State legislators and officials should consider that there are many plausible users of state legal texts who are neither in-state law firms, nor amateur bloggers. Let's call these users “in-between users.”

One such group of in-between users is in-house counsel. Many companies may not have subscription access for their in-house attorneys.²⁰³ But that does not mean that in-house attorneys would not make productive use of access to legal materials if they were there. Being able to read up on the law could help in-house counsel better document their deals and avoid uncertainty in transactions, and to the extent those effects exist, open access to the law would add to economic growth and efficiency.

Also consider out-of-state in-house attorneys. We can suppose such persons will have enough familiarity with the law in their own state to be comfortable doing routine transactions with in-state businesses. But suppose a company is considering doing business with a firm in a state without open-access to official state legal information. The out-of-state in-house counsel might want to do some quick legal research about the other state's law before entering into a contract. Many such nascent contracts will be small enough in terms of dollar value that it would not make sense to hire an outside law firm or to obtain a Westlaw or Lexis subscription.²⁰⁴ In

²⁰² Cf. Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL'Y 203, 273–74 (2004) (discussing democracy-based rationales for transparency in administrative agency work).

²⁰³ This can be expected where in-house attorneys tend to do routine work—in a field in which they already know the applicable law—while outside law firms are hired for outside-the-normal-course litigation and non-recurring transactional work. See Michael J. Morse, *Partnering with In-House Counsel*, GPSOLO, July–Aug. 2004, at 38, 40.

²⁰⁴ See *infra* note 208 and accompanying text for a discussion of database subscription prices.

such cases, lack of access to the other state's law creates friction—transaction costs, to use the economists' term—that can deter firms from doing business with firms in a closed-access state. Certainly it must be the case that, at the margins, deals have been lost in Georgia and other states because of hurdles encountered when trying to access the law.

How many deals are lost and how large is the economic impact from lack of ready access in such situations? That is impossible to say without speculation or an expensive empirical investigation. But barring that, we know that increased transaction costs from legal uncertainty are a serious concern as a matter of economic theory—in fact, transaction costs have been one of the driving preoccupations of the law-and-economics movement.²⁰⁵ And in the absence of hard empirical data, it is prudent to err on the side of lowering transaction costs. This is particularly so when you consider the diminutive fiscal scale of deals between states and publishers. As a concrete example, consider that Georgia has received about \$85,000 a year in revenues from its Lexis deal.²⁰⁶ Just a few lost business opportunities could swamp whatever gains might be attributed to such a publishing deal. And if the marginal legal uncertainty caused by Georgia's limitations on access to legal information is significant with regard to even a tiny fraction of a percentage of total business activity, then the economic loss could be quite large in dollar value, considering that the state of Georgia's annual GDP contribution is more than a half a trillion dollars.²⁰⁷

iii. Lost Influence and Innovation

Another problem with the above-outlined common-sense argument is that it does not consider the ways in which in-between users of free legal information can help a state to have increased influence beyond its borders.

²⁰⁵ See, e.g., Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (seminal article laying the groundwork for showing the importance of transaction costs in choosing among legal rules); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 686 (1986) (describing how social-norms-based systems can offer lower transaction costs compared to formal law among farmers and ranchers in a rural region of California); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 277 (2004) (exploring how sharing may lower transaction costs compared to market-based exchanges by importing relevant information and providing more motivation for clearing excess capacity in certain kinds of goods).

²⁰⁶ See Plaintiff's Responses to Defendant's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment, *supra* note 196, at 18 (“[T]he Commission received \$85,747.91 in licensing fee royalties” in 2014). This may give us some rough measure of the amount of money at stake for Georgia. Receipts from Lexis, of course, can't tell the whole story. A full balance sheet must include money Georgia saved by not having state employees do work on the OCGA that was done by Lexis, plus the expenses incurred in supervising the work done by Lexis. Nonetheless, the \$85,000 figure indicates the financial scale involved, making it plausible that a handful of foregone business opportunities because of the friction introduced by Lexis's closed-access model could make it a losing proposition for the state's economy.

²⁰⁷ See *Gross Domestic Product by State: Second Quarter 2018* (BEA 18-62) at 8, U.S. BUREAU OF ECONOMIC ANALYSIS (Nov. 14, 2018), <https://www.bea.gov/system/files/2018-11/qgdppstate1118.pdf> [<https://perma.cc/6PW8-9YRG>].

Such in-between users could be lawyers in other states. For argument's sake, we can stipulate that most law firms will pay for Westlaw or Lexis. Even so, many law firms often get state-based subscription packages, which primarily provide access to in-state statutes and cases.²⁰⁸ Researching outside the jurisdiction with such packages incurs substantial extra charges.²⁰⁹ This means that out-of-state litigators will, in marginal situations, be deterred from exploring a closed-access state's law for use as persuasive authority in briefs in other states.²¹⁰ Thus, at the margins, we can expect a decrease in the influence of a closed-access state's law beyond that state's borders.

Other productive in-between users would be journalists and scholars. Government information is fuel for productive journalism and academic research about governing. This notion has been a key rationale for the open-records and sunshine laws that are ubiquitous in the United States.²¹¹ It would be difficult, or perhaps impossible, to provide a meaningful quantitative estimate of the value of journalism and academic research that could result from unfettered access to state law. But I will use myself as an anecdotal example. As a professor at an accredited law school, I have access to Westlaw and Lexis. But Google and wide-open publicly accessible websites are in many contexts easier to use than Westlaw or Lexis.²¹² Thus, putting anything behind a paywall slows me down, and, like all researchers, I only have so much time. If I am reaching for an example to use in class or in a paper I am writing, I will often choose it based on what is most accessible. Other researchers and teachers will of course do the same.

²⁰⁸ See, e.g., Randy Foreman, *Useful Resources for Federal Court Practice*, MICH. B.J., Feb. 2007, at 46, 46 ("A 'Michigan only' subscription with Lexis or Westlaw tends to be the norm. But most of these plans, while providing ample Michigan cases and statutes, generally come up somewhat short when it comes to the federal materials that we need."); Jill Schachner Chanen, *Sole Survivor: Going on Your Own Can Be Scary Unless You Know What to Budget and Where to Look*, 84 A.B.A. J., June 1998, at 60, 65 (noting that Westlaw and Lexis offer low-cost subscriptions for solo practitioners, citing the example of \$125 per month for Illinois state and federal unlimited access via Lexis with each additional state costing \$75).

²⁰⁹ Chanen, *supra* note 208, at 65.

²¹⁰ A difference in subscription packages may lead to one advantage of large firms and government law offices over smaller firms and solo practitioners. See, e.g., J. Jason Boyeskie, *A Matter of Opinion: Federal Rule of Appellate Procedure 32.1 and Citation to Unpublished Opinions*, 60 ARK. L. REV. 955, 972-73 (2008) ("[A] real stratification of client representation is created. Larger firms and government entities, which can more easily absorb the costs of full electronic access to cases, have a strategic advantage over smaller firms and individual practitioners that do not have the same resources. This creates a disparity where larger firms' clients and the government are afforded better representation." (footnotes omitted)); Sarah Wise, *Show Me the Money! The Recoverability of Computerized Legal Research Expenses by the Prevailing Party in the Federal Circuits*, 36 CAP. U. L. REV. 455, 456 (2007) (stating that an annual subscription to a top-of-the-line Westlaw package was \$13,512 for a firm of one to two people, and substantially lower per lawyer at \$52,236 for a firm of sixteen to twenty people).

²¹¹ See, e.g., Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (2012); Government in the Sunshine Act, 5 U.S.C. § 552b (2012); Freedom of Information Act, 5 U.S.C. § 552 (2012). The purpose of the Freedom of Information Act (FOIA) is to "ensure an informed citizenry, vital to the functioning of a democratic society" and "to open agency action to the light of public scrutiny." U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989).

²¹² Cf. Armstrong, *supra* note 4, at 593 (discussing advantages of linking legal source documents to create a "seamless web of knowledge that improves upon the practical experience of using reference sources in paper form").

While requiring a subscription to get the fullest, quickest, most efficient access to state law will not transform any state into a dictatorship, it is nonetheless true that if you put something behind a paywall, you are going to stifle productive thinking about it. And that is going to decrease debate and democratic participation. It might be impossible to gauge the size of this effect, but it has been frequently observed that the best ideas often come to people when they aren't searching for them. If easy, casual, open browsing of state law is not allowed, we don't know what we are missing in terms of new ideas to improve law and government.²¹³

Certainly it is the case that a state that makes its law more accessible will have more influence in what has been called the “laboratory of democracy.”²¹⁴ As Justice Brandeis wrote, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²¹⁵ That laboratory of democracy is at its most effective when state legal information—the “experimental data,” to speak in laboratory terms—is not behind paywalls or other barriers.²¹⁶ It is impractical or impossible to quantify such effects.²¹⁷ But there is good reason to think that they are positive and substantial.

CONCLUSION

The law and governmental institutions of the United States can rightfully claim a special place in the unfolding history of humanity's advances in democracy, liberty, and the rule of law. Given that mantle, we should probably see it as an embarrassment that state governments have been lagging behind Hammurabi's policy of 3,700 years ago of making the written law readily accessible to all. But there is more to it. As this Article has sought to show, not only does proprietary, closed access make us, in an important sense, less civically progressive than a Babylonian king, it is also economically and practically troublesome.

Thinking carefully through the issues with a real-world focus shows that it is unwarranted to believe that no real harm is done by states fighting to uphold copyright claims over the law. To the contrary, it is fair to presume that there is genuine harm done to values of democratic governance as well as to economic productivity and growth. The snag is that such harms are largely concealed, hidden in the noise of the marketplace of ideas and in the workings of a big economy. But these troubles should not be considered *de minimis*—particularly when compared

²¹³ Cf. *id.* at 594–97 (discussing the benefits of open access to legal scholarship); Benjamin J. Keele, *Copyright Provisions in Law Journal Publication Agreements*, 102 L. LIBR. J. 269, 270 (2010) (discussing the same).

²¹⁴ See *Hart v. State*, 368 N.C. 122, 141; 774 S.E.2d 281, 294 (N.C. 2015) (“[A]n individual state may serve as a laboratory of democracy and experiment with new legislation in order to meet changing social and economic needs.” (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting))).

²¹⁵ *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

²¹⁶ Cf. Steven Shavell, *Should Copyright of Academic Works be Abolished?*, 2 J. LEGAL ANALYSIS 301, 327–29 (2009) (discussing points for and against the impact of free access to scholarly works in science, and concluding that the positive social benefits from eliminating copyright for these works would be “substantial”).

²¹⁷ Cf. *id.* (not engaging in a quantitative analysis).

with the very modest scale of royalties that states receive in their deals with legal publishers. Instead, state governments should do fresh thinking about the distribution of the letter of the law, and states should consider that the way to squeeze the most value out of the law may be to let it go free.