

# Chapter 1

## The Commons

Over half a millennium, a revolution in land occurred across England. Fields that had by custom and tradition been held as a **commons**, available to all commoners for grazing, farming, and other uses, were enclosed and converted to private ownership, primarily by lords and nobles. Enclosure of the commons sometimes happened by erection of physical barriers like fences, sometimes by agreement with the local farmers and commoners, and sometimes by acts of Parliament. The enclosure movement was controversial, arguably increasing productivity of land but also sparking riots among those losing rights. But the result was that, by the end of the 19th century, the commons had largely turned into private land. See generally Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. STATE L. REV. 221, 252–61 (1995); James Boyle, *The Second Enclosure Movement*, 66 LAW & CONTEMP. PROBS. 33, 34–36 (2003).

Property law is roughly concerned with private rights in resources. A commons<sup>1</sup> seems the opposite of that—a resource for which no one holds a right to exclude. As such, the notion of a commons seems to fly in the face of theories justifying property ownership as an institution. Indeed, the **tragedy of the commons** concept, namely that commons resources will tend to be overexploited because no one has an incentive to limit their use, would suggest that a commons is an inferior manner of resource management compared to private ownership.

Yet commons are, for lack of a better term, common. A commons can arise because a resource is too hard to appropriate to one owner (like the air), because society agrees to treat a resource as non-appropriable (like a public park), or because legal institutions insufficiently govern the resource (like the deep sea or space,

---

<sup>1</sup>Despite its appearance, “commons” is typically treated as a singular noun.

though some treaties govern those). Especially in the world of intellectual property, tremendous swaths of information are in the commons, owned by no one. Among other things, that is why you are free to learn all the property law doctrines and ideas you could possibly desire.

Theories of the commons—why they arise, how they operate, who manages them, why they survive despite the tragedy of the commons—are extensive and complex. The focus of this chapter is narrower. It considers how law, and property law in particular, interacts with a commons. How do laws divide the realm of private ownership from the commons? What happens when a property owner interferes with access to a commons? And to what extent can interests in a commons be understood as property rights?

## 1.1 Public Use Rights to Water

Waterways are a classic example of a commons. Generally there is no need for permission to sail a boat down a river or swim in a lake—even if nearby landowners may have property rights in the water. The **public trust** doctrine explains why.

### *Lawrence v. Clark County*

254 P.3d 606, 608-09 (Nev. 2011)

The public trust doctrine is an ancient principle thought to be traceable to Roman law and the works of Emperor Justinian. *See State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989). Justinian derived the doctrine from the principle that the public possesses inviolable rights to certain natural resources, noting that “[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.” The Institutes of Justinian, Lib. II, Tit. I, § 1 (Thomas Collett Sandars trans. 5th London ed. 1876). He also stated that “rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.” *Id.* § 2.

The doctrine was thereafter adopted by the common law courts of England, which espoused the similar principle that “title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the King” and that such title “is held subject to the public right.” *Shively v. Bowlby*, 152 U.S. 1, 13, 14 S.Ct. 548, 38 L.Ed. 331 (1894). . . .

Courts in this country have readily embraced the public trust doctrine. In 1821, in the first notable American case to express public trust principles,

the Supreme Court of New Jersey observed that citizens have a common right to sovereign-controlled waterways:

The sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

*Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J.1821).

Thereafter, the United States Supreme Court similarly recognized that “when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use.” *Martin et al. v. Waddell*, 41 U.S. 367, 410, 16 Pet. 367, 10 L.Ed. 997 (1842).

Fifty years later, in what has become the seminal public trust doctrine case, the Supreme Court decided *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). In *Illinois Central* the Court noted that because the State of Illinois was admitted to the United States on “equal footing” with the original 13 colonies, it, like the colonies, was granted title to the navigable waters and the lands underneath them. For Illinois, that meant that upon its admission, it held title to its portion of the waters of and lands beneath Lake Michigan. However, the waters and lands underneath Lake Michigan were not freely alienable by the State of Illinois—its title to those areas was “different in character from that which the State holds in lands intended for sale.” More specifically, it possessed only “title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” As a result, the Court concluded that the Illinois Legislature’s attempted relinquishment of such trust property to the Illinois Central Railroad

is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public . . . The State can no more abdicate its trust over property in which the whole people are interested than it can abdicate its police powers in the administration of government and the preservation of the peace.

While the Court noted that such lands need not, under all circumstances, be perpetually held in trust, it recognized that in effecting transfers, the public interest is always paramount, providing that “[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.” *Id.*

#### Note

As public uses of waters expanded, so too did the public trust doctrine. In New Jersey, the courts extended the public trust doctrine to protect recreational uses. It then extended the public’s right to access the “wet sands,” which is land extending from the ocean to the average high tide water mark, to include access via certain “dry sands.”

#### ***Matthews v. Bay Head Imp. Ass’n***

471 A.2d 355 (N.J. 1984)

. . . In order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned dry sand areas as well as the foreshore. The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches. . . . We [previously] held that where a municipal beach is dedicated to public use, the public trust doctrine “dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.” 61 N.J. at 309, 294 A.2d 47. . . .

We now address the extent of the public’s interest in privately-owned dry sand beaches. This interest may take one of two forms. First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches . . . namely, the right to sunbathe and generally enjoy recreational activities.

Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities. . . .

Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea. . . .

The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean. This was a principal reason why in [earlier cases] we held that municipally-owned dry sand beaches "must be open to all on equal terms . . . ." We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.

We perceive no need to attempt to apply notions of prescription, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73 (Fla.1974), dedication, *Gion v. City of Santa Cruz*, 2 Cal.3d 29, 465 P.2d 50, 84 Cal.Rptr. 162 (1970), or custom, *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), as an alternative to application of the public trust doctrine. Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Avon*, 61 N.J. at 309, 294 A.2d 47.

Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will

depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

### Notes and Questions

1.1. Do the rights covered by the public trust doctrine preexist the state, or are they pure creatures of law? When may courts change public trust rules? When they do so, are the rules changing or is the court explaining that the rule "always" thus, but is only now being announced? Does anything turn on this distinction? As we will see, how we define such changes has implications on whether a property owner may claim that the state is committing a constitutional violation by "taking" land without just compensation.

1.2. When a court alters preexisting conceptions of the right to exclude should anything be due to the property owner? Does your conception of what the public trust doctrine is help determine your answer to this question?

1.3. **Other theories of expanding public access rights.** Courts have used other doctrines to expand public access to private lands, including theories of prescriptive easements, "implied dedication," and customary uses. See generally 4-34 POWELL ON REAL PROPERTY § 34.11. As an example of implied dedication, the California Supreme Court declared:

Although "No Trespassing" signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide

whether the owner's activities have been adequate. If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.

*Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 41, 465 P.2d 50, 58 (1970). On custom, see, e.g., *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) ("The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.").

**1.4. Politics!** Do not overlook the role of the political process in questions of beach access. Following the *Gion* ruling noted above, the California legislature added Cal. Civ. Code § 1009, which opines that "[o]wners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes" and that the "stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property." It therefore provides that "no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use." Does the availability of a legislative remedy if landowners organize and convince the legislature to act suffice to address the concerns about cases like *Matthews*?

**1.5. Conflicting uses.** Once the public has the right of access to private land, what other limits on private ownership follow? See, e.g., *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) (private landowner's construction of tower on beach did not interfere with customary public rights).

**1.6. Public Policy.** Are expansions of public access rights by the courts beneficial? What kinds of incentives do they create? Consider the following criticism:

Commentators were severe in their criticism of *Gion-Dietz*, noting not only departure from precedent, the failure to consider total loss to the owner, and the prohibition of taking property without compensation, but also that the case created an ob-

vious inequity and would prove counterproductive to the public policy espoused. [Citations of critical commentary omitted.]

The inequity addressed by commentators appears when weighing penalties against rewards to landowners having no immediate use for their property so that permitting public use poses no interference or impairment. Those landowners who were neighborly and hospitable in permitting public use were penalized by *Gion-Dietz* by loss of their land, while those excluding the public by fencing or other means were rewarded by retention of their exclusive use. While virtue is usually its own reward, the law does not usually penalize the virtuous. The decision was asserted to be counterproductive because landowners to avoid prescriptive dedication would now exclude the public from using open and unimproved property for recreation purposes. Thus the very policy sought to be furthered would be defeated. (*County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, 564, 126 Cal.Rptr. 765, 767, points out that one of the reactions to *Gion-Dietz* was “soaring sales of chain link fences.”)

*Cnty. of Los Angeles v. Berk*, 26 Cal. 3d 201, 228-31, 605 P.2d 381, 398-401 (1980) (Clark, J., dissenting). But expanding access offers benefits of its own:

The law of beach access in Hawaii has an enormous, incalculable impact on social life. Though the law limits the property rights of beachfront owners as they are defined elsewhere, it increases the wealth of every single person in the state by giving them a right to go to the beach anywhere in the state. Everyone, no matter how poor, has a backyard on the beach. Individuals and families go the shore in the morning to swim or surf before work. Families gather to watch the sun go down in the evening. Even if they only have a small apartment inland, they have a right to sit outside on the beach wherever they please. It affects the range of options people have, their daily routine, and the sense of satisfaction of almost everyone.

Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1329 (2014).

1.7. Many European nations recognize (either by tradition or statute) a “right to roam” on private lands (excluding homestead or cultivated areas). Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility As Rationale for Limiting the Right to Exclude*, 23 GEO. INT’L ENVTL. L. REV. 211 (2011). The right to roam often encompasses the picking of berries, mushrooms, and the like. Open access used to be the norm for unenclosed land in the United States until the late 1800s; open range laws allowed cattle grazing on unimproved lands. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 674 (2011); *Nashville & C.R. Co. v. Peacock*, 25 Ala. 229, 232 (1854) (“Our present Code contains similar provisions, which show conclusively that the unenclosed lands of this State are to be treated as common pasture for the cattle and stock of every citizen.”). Pressure to close the range and forbid the crossing of uncultivated or unenclosed land came from three sources: farmers, who were relying less on free range livestock; railroads, who wished to avoid liability for cattle collisions; and southern planters, who viewed closed range laws as a mechanism for limiting the independence of newly emancipated African-American farmers. Sawers, *supra*, at 681-84; R. Ben Brown, *Free Men and Free Pigs: Closing the Southern Range and the American Property Tradition*, 108 RADICAL HIST. REV. 117, 119 (Fall 2010) (“When the most important political and economic project of the post-Reconstruction era became recapturing the labor of African Americans to produce staple crops, restricting African American access to open range resources became a priority.”).

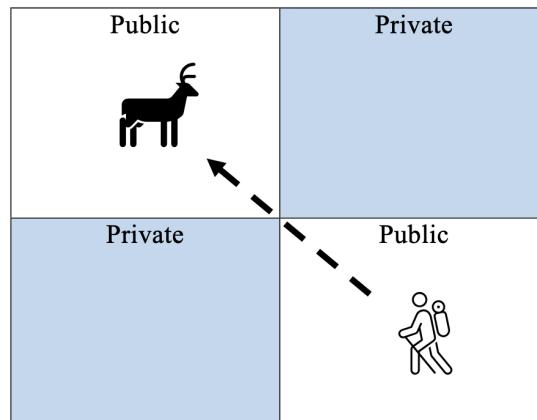
## 1.2 Public Lands

### ***Iron Bar Holdings, LLC v. Cape*** 131 F.4th 1153 (10th Cir. 2025)

**TYMKOVICH, Circuit Judge.**

The American West contains millions of acres platted into alternating squares of public and private land in a manner resembling a checkerboard. The question presented is whether a private landowner can prevent a person from stepping across adjoining corners of federal public land—a technique called “corner-crossing.”

Appellant Iron Bar Holdings, LLC, owns a checkerboarded ranch in south-central Wyoming. Enmeshed within its holdings are federal and state public plats. The only way to access the federal or state land, other than aircraft, is by corner-crossing.



**Figure 1.1:** The court's diagram of corner-crossing.

Anyone familiar with the game checkers can visualize this corner-crossing problem: to move diagonally across the board, a piece must momentarily occupy the space on and above the opponent's squares. If the opposing player could foreclose that move, the opponent would be unable to travel the board.

Iron Bar seeks to prevent elk hunters, like Appellees, from corner-crossing under the theory that diagonal moves on the checkerboarded land are a trespass. The district court granted Appellees access. While the dispute may seem trivial, at its core, it implicates centuries of property law and the settlement of the American West.

This case turns on the interplay of state and federal law enacted against the backdrop of private settlement of public lands and the property disputes that inevitably followed among rival interests. Over a century ago, the Supreme Court held that private landowners cannot erect barriers which bar complete access to public lands based on the 1885 Unlawful Inclosures Act. And the Tenth Circuit has interpreted the UIA to allow corner-crossing if access to public lands is otherwise restricted. Those cases control and require us to affirm the district court.



**Figure 1.2:** Photographs from the 10th Circuit's opinion.

## I. Background

[The Tenth Circuit offers a fascinating history of the checkerboard distribution of land. All you need to know is that Iron Bar's holdings prevent access to some public parcels except by corner-crossing.]

In the fall of 2020, Bradley Cape, Zachary Smith, and Phillip Yeomans traveled from Missouri to Elk Mountain to hunt elk. Upon arriving in Wyoming, the Hunters [made their way to the USGS marker indicating the public-private land corner.] In seeking to prohibit corner-crossing, Iron Bar had erected signposts over the United States Geological Survey marker [as shown in Figure 1.2]. . . . The Hunters could not fit between the signposts and under the chain to corner-cross, but they were undeterred by this odd barricade: “one by one, each grabbed one of the steel posts and swung around it, planting their feet only” on [public land], but passing through the airspace above Iron Bar’s [land]. There is no showing that the Hunters did any damage to Iron Bar’s property. . . .

The Hunters returned to the area in 2021. This time, they brought a steel A-frame ladder to avoid even touching Iron Bar’s signposts [as shown in Figure 1.2].

Iron Bar’s staff . . . confronted the Hunters multiple times. They also interfered with the Hunters’ activities by driving motorized vehicles across

public parcels to scare away game. As in 2020, there is no evidence the Hunters made physical contact with or damaged Iron Bar's property.

[Iron Bar tried to have the Hunters prosecuted for trespassing, but the Hunters were acquitted. Iron Bar then sued the Hunters for civil trespass.]

## II. Analysis

[The court held that Iron Bar had property rights in airspace, so therefore] the Hunters' stepping through Iron Bar's airspace would be a civil trespass. [Nevertheless, we] conclude the district court did not err in dismissing Iron Bar's claims despite Wyoming civil trespass law. The UIA and case law interpreting it have overridden the state's civil trespass regime in this context.

### *1. The Unlawful Inclosures Act (1885)*

As discussed above, the UIA was passed to harmonize the rights of private landowners and those accessing public lands. The UIA, 43 U.S.C. §§ 1061-1066, declares “[a]ll inclosures of any public lands . . . to be unlawful.” The Act, accordingly, prohibits:

the maintenance, erection, construction, or control of any such inclosure . . . ; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and prohibited.

The UIA also restricts obstruction of settlement on or transit over public lands:

No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands . . .

In short, the two sections together provide that any inclosure of public land is prohibited, and no one may completely prevent or obstruct another from peacefully entering or freely passing over or through public lands.

We ask then, what is an *inclosure*? The textual inquiry begins with dictionary definitions, so we start there. Black's Law Dictionary contemporaneously defined "inclosure" as "the act of freeing land from rights of common, commonable rights, and generally all rights which obstruct cultivation and the productive employment of labor on the soil."<sup>25</sup>

Iron Bar argues the district court erred in finding for the Hunters because the term "inclosure" is limited to fenced-in tracts of land. While a fence may be the most common way of creating an inclosure, the term's definition does not limit the meaning in such a manner. Importantly, the UIA's text makes plain in two ways that inclosure does not refer solely to physical fencing. First, § 1063 explicitly prohibits obstructing "transit over public lands . . . by force, threats, intimidation, or by any fencing or *inclosing*." If "fencing" was coextensive with "inclosing" the statute would not include both "fencing or inclosing." Second, § 1061 makes clear that the statute applies to "all inclosures of any public land," not just those done through fencing. As Wyoming territorial justices observed long ago, "[t]he fence is made for beasts; the law is made for man." *United States v. Douglas-Willan Sartoris Co.*, 22 P. 92, 97 (Wyo. 1889). So a purely legal barrier erected by "no trespassing" signs—like a virtual wall—could be considered an inclosure under the UIA.

....

#### **D. Federal Courts and the Checkerboard**

[The court reviewed multiple cases on the UIA; only the relevant ones are below.]

[In 1897], the Supreme Court interpreted the UIA for the first time. *Camfield v. United States*, 167 U.S. 518 (1897). The government accused a rancher-defendant of building a fence that "inclosed and appropriated to the[ir] exclusive use and benefit" about "20,000 acres of public lands" in

---

<sup>25</sup>This definition also accords with the traditional Lockean conception of "common" property. JOHN LOCKE, *Of Property, in SECOND TREATISE ON GOVERNMENT* 34 ch. V (London 1690) ("It is true, in land that is common in England or any other country, where there are plenty of people under government who have money and commerce, no one can enclose or appropriate any part without the consent of his fellow-commoners; because that is left common by compact—*i.e.*, by the law of the land, which is not to be violated.").

Colorado. . . . The Court held that, in passing the UIA, “[C]ongress exercised its constitutional right of protecting the public lands from nuisances erected upon adjoining property.” Put another way, the UIA constitutionally proscribes *nuisances* effecting public land inclosures. The Court found that Camfield’s fence was “clearly a nuisance” considering “the obvious purposes of this structure, and the necessities of preventing the inclosure of public lands.”

*Leo Sheep* is the Supreme Court’s most recent case on the UIA. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). [The public land was the Seminoe River, surrounded on its southeast side by land privately owned by different parties. When the landowners stopped permitting the public to pass, the government built a dirt road to the river, over Leo Sheep’s land.] [The] government argued that “settled rules of property law”—including the easement by necessity doctrine and the UIA—established an implicit easement to build a road. The Court held that the government does not have “an implied easement to build a road across land” in the checkerboard. *Id.* The Court held that the easement by necessity doctrine is generally not available to the sovereign because the “[g]overnment has the power of eminent domain.”\* [Nor did the UIA reserve a right of roadbuilding.] With this holding, *Camfield* and the UIA were left intact because both were not “of any significance in this controversy” given that Leo Sheep’s “unwillingness to entertain a public road without compensation can[not] be a violation of” the UIA.

*U.S. ex rel. Bergen v. Lawrence*, 848 F.2d 1502 (10th Cir. 1988), [confirmed *Camfield*’s holding that a fence on private lands that prevents corner-crossing violates the UIA. In particular,] we held that *Leo Sheep* was limited in its application to the government’s assertion of an implied easement, which is a permanent, physical intrusion on private property. Outside of that context, *Camfield* controls.

### *E. Application*

As our review of these cases demonstrate, courts have not been entirely consistent in their review of checkerboard cases. Courts have analyzed similar fact patterns under both a nuisance law approach, such as in *Camfield*, and a no-implied-easement approach, such as in *Leo Sheep*. However in-

---

\*Eminent domain is the government power to take private property. Under the Fifth Amendment, the government can do so but must compensate the owner.—Eds.

congruous those cases are in theory, their application to Iron Bar's claim is made straightforward by *Bergen*: a barrier to access, even a civil trespass action, becomes an abatable federal nuisance in the checkerboard when its effect is to inclose public lands by completely preventing access for a lawful purpose.

Iron Bar urges us to broadly apply *Leo Sheep* and reject the nuisance-oriented approach set forth in *Camfield* and adopted by *Bergen*. It contends that *Camfield* and *Bergen* are just "fence cases" and should not be extended to private party trespasses. But we are bound by *Bergen* absent en banc review by this court.

The core principle of the UIA, as reiterated in *Bergen*, is that a landowner cannot maintain a barrier "which encloses public lands and prevents" access for a "lawful purpose." The barrier itself is not a UIA violation—but it becomes one when its effect is to inclose. That was simply not at issue in *Leo Sheep*.

In *Bergen*, we found *Camfield* was dispositive while *Leo Sheep* was "inapplicable" to the case because the UIA did not create easements or servitudes. In other words, *Bergen* concluded the easement question was "simply not at issue" because "the district court did not grant . . . any easement across [the] private lands . . . ."

*Bergen*'s logic can perhaps be best explained the following way. *Leo Sheep*'s holding is narrow; the government does not have an "*implied* easement" to "construct a road for public access" in the checkerboard. That makes sense since the effect of the road would have been a permanent, physical appropriation of *Leo Sheep*'s property with no corresponding benefit. In those cases, the "traditional rule" generally governs: If "the government appropriate[s] a right to invade, compensation [is] due." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 156 (2021). Even the nuisance cases would have required those crossing the checkerboard to pay for damages to private property. But that the government lacks "an implied easement to build a road across" the transcontinental railroad grants does not foreclose all physical invasions.

Even so, Iron Bar points to language in *Leo Sheep* suggesting that *no* access right survives its holding. Yet the Court carefully explained that "[t]hese rights-of-way are referred to as 'easements by necessity.'" *Leo Sheep*, 440 U.S. at 679 (emphasis added). The UIA, in contrast, contemplates a limited physical intrusion necessary to abate a nuisance—inclosure of the

public lands. *Camfield*, 167 U.S. at 525. And the Court has repeatedly held that “many government-authorized physical invasions . . . are consistent with longstanding background restrictions on property rights”—including “requiring him to abate a nuisance.” *Cedar Point Nursery*, 594 U.S. at 160. Iron Bar’s argument ignores that the reciprocal of preventing the right to exclude is to permit access. If a checkerboard landowner cannot impede access to public lands, then there is impliedly an access right.

Ultimately, we find that corner-crossing does not rise to the level of “an implied easement to build a road across land that was originally granted to the Union Pacific Railroad.” *Leo Sheep*, 440 U.S. at 669. While we recognize the doctrinal inconsistencies at play and that the access right here functionally operates like a limited easement, *Bergen* forecloses that approach.

Further, *Leo Sheep*’s fact pattern took the landowner’s conduct outside the realm of nuisance law. There, the government bulldozed

a dirt road extending from a local county road to the reservoir across both public domain lands and fee lands of the Leo Sheep Co. It also erected signs inviting the public to use the road as a route to the reservoir.

The Court was plainly rejecting the government’s overreach. Moreover, it carefully explained that the UIA concerned “the type of incursions on private property necessary to reach public land.” Nothing in the UIA case law suggests the government has the power to build a public road without compensation. If that was what the Hunters were asking for—rather than a momentary corner-cross—*Leo Sheep* may well foreclose their case.

[The Court rejected various other arguments, and held that the UIA was not a taking under the Fifth Amendment.]

### III. Conclusion

The western checkerboard and UIA reflect a storied period of our history. Whatever the UIA’s merits today, it—and the case law interpreting it—remain good federal law. Applying that law here, Iron Bar cannot implement a program which has the effect of “deny[ing] access to [federal] public lands for lawful purposes[.]” So the district court was correct to hold that the Hunters could corner-cross as long as they did not physically touch Iron Bar’s land.

We affirm.

**Notes and Questions**

1.8. As discussed with respect to the public trust doctrine, the law of trusts and easements can be invoked to protect public rights to use privately owned land. *Iron Bar*, on the other hand, rejects an easement-based characterization and instead draws from the doctrine of nuisance. Does one approach strike you as better than the others? Indeed, do any of these doctrines fit these situations precisely? What is the value of using existing property concepts to describe the public right, rather than just coming up with a new concept?

1.9. The court concludes that corner-crossing is a trespass under Wyoming law, despite the public right to access public lands. Is that necessarily correct? In *State v. Shack*, 58 N.J. 297 (1971), the Supreme Court of New Jersey held that entering a farmer's land was not a trespass when done to provide essential services to migrant workers living there. Could you plausibly define "trespass" so as not to exclude corner-crossing as well?

1.10. Is there a limit to the public's right of corner-crossing? What if thousands of people a day start climbing ladders over Iron Bar's ranch? What if the volume of crossers interferes with Iron Bar's operations—perhaps constituting a nuisance? Does Iron Bar have any remedies, and against whom?

## 1.3 Human Genes

### ***Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*** 569 U.S. 576 (2013)

**Justice THOMAS delivered the opinion of the Court.**

Respondent Myriad Genetics, Inc. (Myriad), discovered the precise location and sequence of two human genes, mutations of which can substantially increase the risks of breast and ovarian cancer. Myriad obtained a number of patents based upon its discovery. This case involves claims from three of them and requires us to resolve whether a naturally occurring segment of deoxyribonucleic acid (DNA) is patent eligible under 35 U.S.C. § 101 by virtue of its isolation from the rest of the human genome. . . .

## I

Myriad discovered the precise location and sequence of what are now known as the BRCA1 and BRCA2 genes.\* Mutations in these genes can dramatically increase an individual's risk of developing breast and ovarian cancer. The average American woman has a 12- to 13-percent risk of developing breast cancer, but for women with certain genetic mutations, the risk can range between 50 and 80 percent for breast cancer and between 20 and 50 percent for ovarian cancer. Before Myriad's discovery of the BRCA1 and BRCA2 genes, scientists knew that heredity played a role in establishing a woman's risk of developing breast and ovarian cancer, but they did not know which genes were associated with those cancers.

Myriad identified the exact location of the BRCA1 and BRCA2 genes on chromosomes 17 and 13. . . . Knowledge of the location of the BRCA1 and BRCA2 genes allowed Myriad to determine their typical nucleotide sequence.<sup>†</sup> That information, in turn, enabled Myriad to develop medical tests that are useful for detecting mutations in a patient's BRCA1 and BRCA2 genes and thereby assessing whether the patient has an increased risk of cancer.

Once it found the location and sequence of the BRCA1 and BRCA2 genes, Myriad sought and obtained a number of patents. Nine composition claims from three of those patents are at issue in this case. Claims<sup>‡</sup> 1, 2, 5, and 6 from [Myriad's] patent are representative. The first claim asserts a patent on “[a]n isolated DNA coding for a BRCA1 polypeptide,” which has “the amino acid sequence set forth in SEQ ID NO:2.” SEQ ID NO:2 sets forth a list of 1,863 amino acids that the typical BRCA1 gene encodes. Put

---

\* On the assumption that most people know what genes are these days, the Court's extensive discussion of the science of genetics has been omitted. If you would like a summary or refresher, here is one. Inside all human cells (as well as the cells of any living thing) are molecules called DNA. A DNA molecule is made up of small chemicals called nucleotides, which are sequentially strung together. There are four such nucleotides, abbreviated A, T, G, and C. A “gene” is the informational sequence of these nucleotides, which determines how the cell will construct protein molecules. —Eds.

<sup>†</sup>Technically, there is no “typical” gene because nucleotide sequences vary between individuals, sometimes dramatically. Geneticists refer to the most common variations of genes as “wild types.”

<sup>‡</sup>Recall that “claims” in patents are the legally operative language that defines the scope of what infringes, akin to a property boundary. —Eds.

differently, claim 1 asserts a patent claim on the DNA code that tells a cell to produce the string of BRCA1 amino acids listed in SEQ ID NO:2.

[The other patent claims describe different parts of the BRCA1 and BRCA2 gene sequences.]

## C

Myriad's patents would, if valid, give it the exclusive right to isolate an individual's BRCA1 and BRCA2 genes (or any strand of 15 or more nucleotides within the genes) . . . . But isolation is necessary to conduct genetic testing, and Myriad was not the only entity to offer BRCA testing after it discovered the genes. [So did one of the defendants, Dr. Harry Ostrer, thereby prompting this case.]

## II

### A

Section 101 of the Patent Act provides:

Whoever invents or discovers any new and useful . . . composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

We have “long held that this provision contains an important implicit exception[:] Laws of nature, natural phenomena, and abstract ideas are not patentable.” Rather, “‘they are the basic tools of scientific and technological work’” that lie beyond the domain of patent protection. As the Court has explained, without this exception, there would be considerable danger that the grant of patents would “tie up” the use of such tools and thereby “inhibit future innovation premised upon them.” This would be at odds with the very point of patents, which exist to promote creation. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (Products of nature are not created, and “‘manifestations . . . of nature [are] free to all men and reserved exclusively to none’”).

The rule against patents on naturally occurring things is not without limits, however, for “all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas,” and “too broad an interpretation of this exclusionary principle could eviscerate patent law.” As we have recognized before, patent protection strikes a del-

icate balance between creating “incentives that lead to creation, invention, and discovery” and “imped[ing] the flow of information that might permit, indeed spur, invention.” We must apply this well-established standard to determine whether Myriad’s patents claim any “new and useful . . . composition of matter,” or instead claim naturally occurring phenomena.

## B

It is undisputed that Myriad did not create or alter any of the genetic information encoded in the BRCA1 and BRCA2 genes. The location and order of the nucleotides existed in nature before Myriad found them. Nor did Myriad create or alter the genetic structure of DNA. Instead, Myriad’s principal contribution was uncovering the precise location and genetic sequence of the BRCA1 and BRCA2 genes within chromosomes 17 and 13. The question is whether this renders the genes patentable.

Myriad recognizes that our decision in *Chakrabarty* is central to this inquiry. In *Chakrabarty*, scientists added four plasmids to a bacterium, which enabled it to break down various components of crude oil. The Court held that the modified bacterium was patentable. It explained that the patent claim was “not to a hitherto unknown natural phenomenon, but to a non-naturally occurring manufacture or composition of matter—a product of human ingenuity ‘having a distinctive name, character [and] use.’” The *Chakrabarty* bacterium was new “with markedly different characteristics from any found in nature,” due to the additional plasmids and resultant “capacity for degrading oil.” In this case, by contrast, Myriad did not create anything. To be sure, it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention.

Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry. In *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, this Court considered a composition patent that claimed a mixture of naturally occurring strains of bacteria that helped leguminous plants take nitrogen from the air and fix it in the soil. The ability of the bacteria to fix nitrogen was well known, and farmers commonly “inoculated” their crops with them to improve soil nitrogen levels. But farmers could not use the same inoculant for all crops, both because plants use different bacteria and because certain bacteria inhibit each other. Upon learning that several nitrogen-fixing bacteria did not inhibit each other, however, the patent applicant combined them into a single inoculant and obtained

a patent. The Court held that the composition was not patent eligible because the patent holder did not alter the bacteria in any way. His patent claim thus fell squarely within the law of nature exception. So do Myriad's. Myriad found the location of the BRCA1 and BRCA2 genes, but that discovery, by itself, does not render the BRCA genes "new . . . composition[s] of matter," § 101, that are patent eligible.

Indeed, Myriad's patent descriptions highlight the problem with its claims. For example, a section of [Myriad's] patent's Detailed Description of the Invention indicates that Myriad found the location of a gene associated with increased risk of breast cancer and identified mutations of that gene that increase the risk. In subsequent language Myriad explains that the location of the gene was unknown until Myriad found it among the approximately eight million nucleotide pairs contained in a subpart of chromosome 17. . . . Many of Myriad's patent descriptions simply detail the "iterative process" of discovery by which Myriad narrowed the possible locations for the gene sequences that it sought. Myriad seeks to import these extensive research efforts into the § 101 patent-eligibility inquiry. But extensive effort alone is insufficient to satisfy the demands of § 101.

Nor are Myriad's claims saved by the fact that isolating DNA from the human genome severs chemical bonds and thereby creates a nonnaturally occurring molecule. Myriad's claims are simply not expressed in terms of chemical composition, nor do they rely in any way on the chemical changes that result from the isolation of a particular section of DNA. Instead, the claims understandably focus on the genetic information encoded in the BRCA1 and BRCA2 genes. If the patents depended upon the creation of a unique molecule, then a would-be infringer could arguably avoid at least Myriad's patent claims on entire genes (such as claims 1 and 2 of [Myriad's] patent) by isolating a DNA sequence that included both the BRCA1 or BRCA2 gene and one additional nucleotide pair. Such a molecule would not be chemically identical to the molecule "invented" by Myriad. But Myriad obviously would resist that outcome because its claim is concerned primarily with the information contained in the genetic *sequence*, not with the specific chemical composition of a particular molecule.

Finally, Myriad argues that the PTO's past practice of awarding gene patents is entitled to deference . . . We disagree. . . . Congress has not endorsed the views of the PTO in subsequent legislation. . . . Further undercutting the PTO's practice, the United States argued in the Federal Circuit

and in this Court that isolated DNA was *not* patent eligible under § 101, and that the PTO’s practice was not “a sufficient reason to hold that isolated DNA is patent-eligible.” These concessions weigh against deferring to the PTO’s determination.<sup>7</sup>

....

### III

It is important to note what is *not* implicated by this decision. First, there are no method claims before this Court. Had Myriad created an innovative method of manipulating genes while searching for the BRCA1 and BRCA2 genes, it could possibly have sought a method patent. But the processes used by Myriad to isolate DNA were well understood by geneticists at the time of Myriad’s patents “were well understood, widely used, and fairly uniform insofar as any scientist engaged in the search for a gene would likely have utilized a similar approach,” and are not at issue in this case.

Similarly, this case does not involve patents on new *applications* of knowledge about the BRCA1 and BRCA2 genes. Judge Bryson aptly noted that, “[a]s the first party with knowledge of the [BRCA1 and BRCA2] sequences, Myriad was in an excellent position to claim applications of that knowledge. Many of its unchallenged claims are limited to such applications.”

Nor do we consider the patentability of DNA in which the order of the naturally occurring nucleotides has been altered. Scientific alteration of the genetic code presents a different inquiry, and we express no opinion about the application of § 101 to such endeavors. We merely hold that genes and the information they encode are not patent eligible under § 101 simply because they have been isolated from the surrounding genetic material.

[Justice Scalia’s concurrence is omitted.]

#### Notes and Questions

1.11. The doctrine of “patent eligibility” (also called “subject matter eligibility”), at issue in *Myriad*, has been applied to exclude patenting of computer-

---

<sup>7</sup>Myriad also argues that we should uphold its patents so as not to disturb the reliance interests of patent holders like itself. Concerns about reliance interests arising from PTO determinations, insofar as they are relevant, are better directed to Congress.

implemented financial processes, see *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014), and diagnostic methods of adjusting drug dosages, see *Mayo Collaborative Servs. v. Prometheus Lab's, Inc.*, 566 U.S. 66 (2012). The effect of these decisions is to place these ideas and others into an “information commons” that is not subject to patent protection, and thus available to anyone to use. Such exclusions of subject matter from patentability have been controversial, with Congress regularly considering legislation to overturn these decisions.

1.12. The Court’s rationale for excluding certain ideas from patent eligibility is fundamentally an economic one: the “basic tools of scientific and technological work” must remain open to everyone so that “future innovation premised upon” those basic tools can occur. This is sometimes called a concern for **downstream innovation**—that exclusive property rights can prevent non-owners from being socially productive. Do you agree? Consider the following possible responses:

- Without the economic incentive of patent protection, no one would put in the effort to make discoveries of natural phenomena like the BRCA genes.
- Patent protection enables firms to invest time and money to turn scientific discoveries into commercial products—running clinical trials, getting regulatory approval, marketing, and so on. (This is called **commercialization** theory.)
- Even if downstream innovation is a concern, it would be better to have a single firm coordinating all the downstream researchers to make sure that everyone is working as productively as possible without duplication; a single patent-holding firm can do this. (This is a response to the tragedy of the commons.)

1.13. On the flip side, the downstream innovation rationale is not the only one that justifies the patent ineligibility of human genes. Perhaps the most obvious explanation is that natural phenomena simply exist in nature; they preexist any human activity and thus belong to no one. This is a traditional explanation, which applies to a wide variety of natural products and phenomena. But human genes add another dimension—they are a part of people, and the idea that some company can get a patent on something *inside your body* is intuitively strange at best. Indeed, it was this latter concern that motivated the American Civil Liberties Union to litigate the *Myriad* case in the first place. See JORGE CONTRERAS, THE GENOME DEFENSE 12–13 (2021).

Notice that these arguments are property-based arguments—human genes ought not be patentable, either because they belong to the common heritage of all humanity, or because genes belong to individuals as part of their bodies. Even

though a commons operates like nobody owns it, it is often justified on the theory that everyone owns it. How well do these arguments translate to physical resource commons, like water and public lands?

## 1.4 Text of the Law

### *State of Georgia v. Public.Resource.Org, Inc.*

590 U.S. 255 (2020)

**Chief Justice ROBERTS delivered the opinion of the Court.**

....

The State of Georgia has one official code—the “Official Code of Georgia Annotated,” or OCGA. The first page of each volume of the OCGA boasts the State’s official seal and announces to readers that it is “Published Under Authority of the State.”

The OCGA includes the text of every Georgia statute currently in force, as well as various non-binding supplementary materials. At issue in this case is a set of annotations that appear beneath each statutory provision. The annotations generally include summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and a list of related law review articles and similar reference materials. In addition, the annotations often include editor’s notes that provide information about the origins of the statutory text, such as whether it derives from a particular judicial decision or resembles an older provision that has been construed by Georgia courts.

The annotations in the current OCGA were prepared in the first instance by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the [Code Revision Commission, an office created by and part of the Georgia Legislature]. The agreement between Lexis and the Commission states that any copyright in the OCGA vests exclusively in “the State of Georgia, acting through the Commission.” Lexis and its army of researchers perform the lion’s share of the work in drafting the annotations, but the Commission supervises that work and specifies what the annotations must include in exacting detail. Under the agreement, Lexis enjoys the exclusive right to publish, distribute, and sell the OCGA. In exchange, Lexis has agreed to limit the price it may charge for the OCGA and to make an unannotated version of the statutory

text available to the public online for free. A hard copy of the complete OCGA currently retails for \$412.00.

**B**

Public.Resource.Org (PRO) is a nonprofit organization that aims to facilitate public access to government records and legal materials. Without permission, PRO posted a digital version of the OCGA on various websites, where it could be downloaded by the public without charge. PRO also distributed copies of the OCGA to various organizations and Georgia officials.

[Georgia and the Code Revision Commission sued PRO for copyright infringement, and the Supreme Court granted certiorari.]

**II**

We hold that the annotations in Georgia’s Official Code are ineligible for copyright protection . . . . A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author. Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered the “authors” of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.

**A**

We begin with precedent. The government edicts doctrine traces back to a trio of cases decided in the 19th century. In this Court’s first copyright case, *Wheaton v. Peters*, the Court’s third Reporter of Decisions, Wheaton, sued the fourth, Peters, unsuccessfully asserting a copyright interest in the Justices’ opinions. In Wheaton’s view, the opinions “must have belonged to some one” because “they were new, original,” and much more “elaborate” than law or custom required. Wheaton argued that the Justices were the authors and had assigned their ownership interests to him through a tacit “gift.” The Court unanimously rejected that argument, concluding 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.”

That conclusion apparently seemed too obvious to adorn with further explanation, but the Court provided one a half century later in *Banks v.*

*Manchester.* That case concerned whether Wheaton's state-court counterpart, the official reporter of the Ohio Supreme Court, held a copyright in the judges' opinions and several non-binding explanatory materials prepared by the judges. The Court concluded that he did not, explaining that "the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note" cannot "be regarded as their author or their proprietor, in the sense of [the Copyright Act]." Pursuant to "a judicial *consensus*" dating back to *Wheaton*, judges could not assert copyright in "whatever work they perform in their capacity as judges." Rather, "[t]he 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."

In a companion case decided later that Term, *Callaghan v. Myers*, the Court identified an important limiting principle. As in *Wheaton* and *Banks*, the Court rejected the claim that an official reporter held a copyright interest in the judges' opinions. But, resolving an issue not addressed in *Wheaton* and *Banks*, the Court upheld the reporter's copyright interest in several explanatory materials that the reporter had created himself: headnotes, syllabi, tables of contents, and the like. Although these works mirrored the judge-made materials rejected in *Banks*, they came from an author who had no authority to speak with the force of law. Because the reporter was not a judge, he was free to "obtain[] a copyright" for the materials that were "the result of his [own] intellectual labor."

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

The animating principle behind this rule is that no one can own the law. "Every citizen is presumed to know the law," and "it needs no argument to show . . . that all should have free access" to its contents. Our cases give effect to that principle in the copyright context through construction of the statutory term "author." Rather than attempting to catalog the materials that constitute "the law," the doctrine bars the officials responsible for creating the law from being considered the "author[s]" of "whatever

work they perform in their capacity” as lawmakers. Because these officials are generally empowered to make and interpret law, their “whole work” is deemed part of the “authentic exposition and interpretation of the law” and must be “free for publication to all.”

If judges, acting as judges, cannot be “authors” because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either. Courts have thus long understood the government edicts doctrine to apply to legislative materials.

Moreover, just as the doctrine applies to “whatever work [judges] perform in their capacity as judges,” it applies to whatever work legislators perform in their capacity as legislators. That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills. These materials are part of the “whole work done by [legislators],” so they must be “free for publication to all.”

Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.

**B****1**

[The Court concluded that the Code Revision Commission was tantamount to the Georgia legislature, and therefore was a “legislator” for purposes of the above rule.]

**2**

The second step is to determine whether the Commission creates the annotations in the “discharge” of its legislative “duties.” It does. Although the annotations are not enacted into law through bicameralism and presentment, the Commission’s preparation of the annotations is under Georgia law an act of “legislative authority,” and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws. Georgia and Justice GINSBURG emphasize that the annotations do not purport to provide authoritative explanations of the law and largely summarize other materials, such as judicial decisions and law

review articles. But that does not take them outside the exercise of legislative duty by the Commission and legislature. Just as we have held that the “statement of the case and the syllabus or head note” prepared by judges fall within the “work they perform in their capacity as judges,” so too annotations published by legislators alongside the statutory text fall within the work legislators perform in their capacity as legislators.

In light of the Commission’s role as an adjunct to the legislature and the fact that the Commission authors the annotations in the course of its legislative responsibilities, the annotations in Georgia’s Official Code fall within the government edicts doctrine and are not copyrightable.

### III

[The Court rejected Georgia’s statutory interpretation arguments that the Copyright Act had abrogated the edicts of government doctrine.]

Georgia also appeals to the overall purpose of the Copyright Act to promote the creation and dissemination of creative works. Georgia submits that, without copyright protection, Georgia and many other States will be unable to induce private parties like Lexis to assist in preparing affordable annotated codes for widespread distribution. That appeal to copyright policy, however, is addressed to the wrong forum. As Georgia acknowledges, “[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” And that principle requires adherence to precedent when, as here, we have construed the statutory text and “tossed [the ball] into Congress’s court, for acceptance or not as that branch elects.”

Turning to our government edicts precedents, Georgia insists that they can and should be read to focus exclusively on whether a particular work has “the force of law.” . . . But that framing has multiple flaws.

Most obviously, it cannot be squared with the reasoning or results of our cases—especially *Banks*. *Banks*, following *Wheaton* and the “judicial consensus” it inspired, denied copyright protection to judicial opinions without excepting concurrences and dissents that carry no legal force. As every judge learns the hard way, “comments in [a] dissenting opinion” about legal principles and precedents “are just that: comments in a dissenting opinion.” Yet such comments are covered by the government edicts doctrine because they come from an official with authority to make and interpret the law. . . .

The same goes for non-binding legislative materials produced by legislative bodies acting in a legislative capacity. There is a broad array of such works ranging from floor statements to proposed bills to committee reports. Under the logic of Georgia’s “force of law” test, States would own such materials and could charge the public for access to them. . . .

Georgia minimizes the OCGA annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.

If everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A State could monetize its entire suite of legislative history. With today’s digital tools, States might even launch a subscription or pay-per-law service.

There is no need to assume inventive or nefarious behavior for these concerns to become a reality. Unlike other forms of intellectual property, copyright protection is both instant and automatic. It vests as soon as a work is captured in a tangible form, triggering a panoply of exclusive rights that can last over a century. If Georgia were correct, then unless a State took the affirmative step of transferring its copyrights to the public domain, all of its judges’ and legislators’ non-binding legal works would be copyrighted. And citizens, attorneys, nonprofits, and private research companies would have to cease all copying, distribution, and display of those works or risk severe and potentially criminal penalties. Some affected parties might be willing to roll the dice with a potential fair use defense. But that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial. The less bold among us would have to think twice before using official legal

works that illuminate the law we are all presumed to know and understand.

Thankfully, there is a clear path forward that avoids these concerns—the one we are already on. Instead of examining whether given material carries “the force of law,” we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.

[Dissents by Justices Thomas and Ginsburg are omitted.]

### Notes and Questions

**1.14. Where do laws come from?** You probably take for granted that you have access to cases, statutes, and regulations through electronic databases. But how do those texts of the law get from lawmakers to you?

For legislation, the Government Printing Office publishes statutes, in the order of enactment, in a book series called the *Statutes at Large*. Some statutes never make it past this point, but the text of some important statutes are rearranged by topic and reprinted every six years in another government publication, the *U.S. Code*. In other words, the *Statutes at Large* are the actual enactments, while the *Code* is technically just a helpful guide.<sup>2</sup> The *U.S. Code Annotated* and *U.S. Code Service* are independent, privately published books by West and LexisNexis, respectively, which happen to use the same volume and section numbers as the *U.S. Code*, but contain additional annotations and other materials.

Regulations and other federal agency decisions are published in order of issuance in the *Federal Register*, another government publication. Again as a matter of convenience, some regulations are reorganized by topic and published annually in the *Code of Federal Regulations*. While most agencies publish through the *Federal Register*, a few maintain their own publications (the *Federal Communications Commission Record*, for example), and some like the Department of Justice have no official form of promulgation at all.

Judicial decisions are the most complicated. When a federal judge today issues an opinion, it is posted on PACER, the federal electronic docket service (or, in the case of the Supreme Court, just on its website). A “reporter” collects these opin-

---

<sup>2</sup>This is complicated by the fact that Congress has enacted some of the titles of the *U.S. Code* into positive law.

ions and publishes them in a volume. For the Supreme Court, there is an official reporter who publishes the *U.S. Reports*. There are also two private reporters of Supreme Court decisions: the *Supreme Court Reporter* by West and the *Lawyers' Edition* by LexisNexis. There is no official reporter for other decisions; the *Federal Reporter* and *Federal Supplement* for appellate and district court decisions are privately published by West.

This of course just covers print publications; electronic media are yet another story. And we haven't even touched on state law yet. What a mess! Does this strike you as a tragedy of the commons, borne of a lack of property rights in legal texts? Or corporate meddling with a resource that belongs to the public?

1.15. According to Chief Justice Roberts, "it needs no argument to show . . . that all should have free access" to the law. Let's make the argument anyway. Here are a few possibilities:

- Due process: government cannot hold people liable for violations of law that they cannot read.
- Equal protection: those of less financial means still deserve "first-class" access to the law.
- Free speech: political discourse and self-governance require that citizens be able to know the laws.
- We the people: since sovereign power arises from the people, the people own the laws that they write.

Can you think of other rationales? How do these apply with respect to the nonbinding annotations at issue in the case? For that matter, do any of these rationales seem applicable to other forms of property?

1.16. What if a private entity writes a model code that is subsequently incorporated into the law? For example, the International Code Council is a private organization that writes a variety of building and housing safety codes. As written, ICC's codes are just recommendations; they are also properly the subject of copyrights owned by ICC. But almost all U.S. jurisdictions mandate compliance with ICC codes. Is there a public right to access or redistribute a mandatory, private building code without permission? See *Am. Soc'y for Testing & Materials v. Pub.Res.Org, Inc.*, 84 F.4th 1262 (2023).