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ARTICLE

COPYRIGHT IN THE TEXTS OF THE LAW: HISTORICAL PERSPECTIVES

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Recently, state governments have begun to claim a copyright interest in their official published codes of law, in particular arguing that ancillary materials such as annotations to the statutory text are subject to state-held copyright protection because those materials are not binding commands that carry the force of law. Litigation over this issue and a vigorous policy debate are ongoing.

This article contributes a historical perspective to this ongoing debate over copyright in texts relating to the law. It reviews the history of government production and use of annotations, commentaries, legislative debates, and other related information relevant to the law but not pure statutory text, from Rome and China to England and America. These historical episodes reveal three lessons of relevance to the debate. First, there is consistent recognition that "the law" is not

 Director, Technology and Innovation Policy, R Street Institute, Washington, D.C. This article represents the author's individual views and does not necessarily reflect the views of other scholars at the R Street Institute. This article is largely based on an amicus curiae brief that the author filed with the Supreme Court. See Brief for R Street Institute et al. as Amici Curiae Supporting Respondent, Georgia v. Public.Resource.Org, Inc., 139 S. Ct. 2746 (2019) (No. 18-1150). The author would like to thank John Bergmayer, Frederick W. Dingledy, Vera Eidelman, G.S. Hans, Phillip R. Malone, Andrew Marcum, Jef Pearlman, Christina Pesavento, Meredith F. Rose, Sherwin Siy, Erik Stallman, Jennifer Urban, others involved in the Public Resource litigation, and the staff of the Library of Congress for their valuable insights and assistance that contributed to the author's thinking on this subject matter. He would also like to thank the editors of the New York University Journal of Intellectual Property and Entertainment Law for their excellent suggestions and revisions to this article.

limited to binding statutory language. Second, exclusivity over nonbinding legal texts such as annotations, whether through copyright or other means, confers undue power on government and the legal profession over the public. Third, annotations and other nonbinding legal texts are historically distinguishable from case reports or private treatises, contrary to the arguments generally proffered by the copyright-claiming states. These lessons militate toward broad exclusion from copyright of state-authored informative legal texts, whether binding or not.

INTRODUCTION

The antecedents to copyright law are full of colorful historical episodes, but few outdo the time that the Mayor of London was thrown in jail.[1] In 1771, the British House of Commons initiated a campaign against several newspaper publishers, exercising an early copyright-like power to restrict publication of its speeches and debates.[2] Most of the publishers acquiesced in Commons' assertion of "parliamentary privilege," but one, John Miller of the *London Evening Post*, had a different idea.[3] Executing a plan hatched with London alderman John Wilkes, a renowned hero of freedom on both sides of the Atlantic, Miller lay in wait for Parliament's messenger to come arrest him.[4] When the messenger arrived, the Lord Mayor of London, Brass Crosby, asserted sole jurisdiction for arrests in his city and then charged the messenger with false imprisonment.[5] Enraged at this act of defiance, Commons summoned Crosby to answer for his actions.[6] Crosby was adjudged in breach of parliamentary privilege, and followed by a throng of Londoners cheering him on for his bravery, the Lord Mayor paraded himself into custody in the Tower of London.[7]

Thankfully, the Printers' Case of 1771 was a dying gasp of legislative restrictions on reporting debates—Congress has not imprisoned anyone recently[8]—but governments today appear no less keen on cutting off the flow of important legal texts they produce.[9] In *Code Revision Commission ex rel. General Assembly of Georgia v. Public.Resource.Org, Inc.*,[10] the State of Georgia asserts that it possesses

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[1] *See generally infra* text accompanying notes 123–127.

[2] *See* Peter D.G. Thomas, *The Beginning of Parliamentary Reporting in Newspaper*s, 1768–1774, 74 ENG. HIST. REV. 623, 628–30 (1959).

[3] *See* Horace Bleackley, Life of John Wilkes 261 (J. Lane 1917).

[4] See id.; The Annual Register, or a View of History, Politics, and Literature, for the Year 1771, 63–64 (6th ed., London, W. Otridge & Son 1803) [hereinafter The Annual Register].

[5] *See* 17 THE PARL. HIST. ENG., 96–97 (1813); THE ANNUAL REGISTER, *supra* note 4, at 64.

[6] *See* 17 THE PARL. HIST. ENG., *supra* note 5, at 102–04.

[7] *See id.* at 157–58; THE ANNUAL REGISTER, *supra* note 4, at 66–69; BLEACKLEY, *supra* note 3, at 262.

[8] *See* Amber Phillips, *How Would Congress Jail Trump Officials? History Says It's Not Easy*, WASH. POST (May 15, 2019, 1:08 PM), https://www.washingtonpost.com/politics/2019/05/15/how-would-congress-jail-trump-officials-history-says-its-not-easy/.

[9] *See, e.g.*, Brief for Arkansas et al. as Amici Curiae Supporting Petitioners at 3, Georgia v. Public.Resource.Org, Inc., 139 S. Ct. 2746 (2019) [hereinafter Brief for Arkansas et al.] (No. 18-1150) (arguing on behalf of 14 states that states require copyright protections in their official codes).

[10] Code Revision Comm'n ex rel. Gen. Assembly of Ga. v. Public.Resource.Org, Inc. (*Code Revision Comm'n II*), 906 F.3d 1229 (11th Cir. 2018), *cert. granted, Public.Resource.Org, Inc.*,

a copyright sufficient to prevent the copying or redistribution of the *Official Code of Georgia Annotated*, the sole official source of law in the state.[11] The state concedes that the statutory language itself is not subject to copyright protection by virtue of its being an edict of government.[12] Yet, it argues that ancillary matter in the official code, in particular the annotations containing citations to case law and legislative history, are not edicts of government for purposes of copyright law and thus are amenable to copyright protection sufficient to prevent copying of the official code *in toto*.[13]

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139 S. Ct. 2746 (2019). On April 27, 2020, just prior to this article's publication, the Supreme Court issued a decision in favor of Public.Resource.Org, Inc., holding that no copyright inheres in "non-binding, explanatory legal materials created by a legislative body vested with the authority to make law." Georgia v. Public.Resource.Org, Inc. (*Public.Resource.Org Opinion*), No. 18-1150, slip op. at 1–2 (U.S. Apr. 27, 2020) (emphasis omitted). The historical analysis in this article is not affected by the Court's decision, but a few notes are worthwhile. The majority opinion by Chief Justice Roberts appeals to the unfairness that could occur if copyright law enables the state to prepare an "economy-class version of the Georgia Code" and an annotated one for "first-class readers." *Id.* at 17. That analysis closely follows the discussion below, *infra* Section III.B, on how copyright in legal annotations can hand undue power to the state and members of the legal profession, who will tend to be those "first-class readers." Justices Thomas and Ginsburg, in separate dissents, premise their views in favor of copyrights in legal annotations on the notion that those annotations carry no legal force. *See Public.Resource.Org Opinion,* No. 18-1150, slip op. at 7 (Thomas, J., dissenting) ("[T]hese annotations do not even purport to embody the will of the people because they are not law."); *id.* at 3 (Ginsburg, J., dissenting) (arguing that annotations should be copyrightable because they "are descriptive rather than prescriptive"). Yet these dissenting views disregard the important political role that nonbinding pronouncements of government have played throughout history. *See infra* Section III.A. Finally, Justice Thomas attempts to distinguish judicial opinions from legislative work on the grounds that in 17th century England, judicial opinions were the property of the sovereign. *See Public.Resource.Org Opinion*, No. 18-1150, slip op. at 6 (Thomas, J., dissenting). That argument overlooks the fact that the works of Parliament in that historical period were also a matter of sovereign exclusivity under the royal prerogative. *See infra* text accompanying notes 90–93.

[11] *See* GA. CODE ANN. § 1-1-1; Brief for Petitioners at 20–21, *Public.Resource.Org, Inc*., 139 S. Ct. 2746 (2019) (No. 18-1150) [hereinafter Brief for Petitioners].

[12] See Brief for Petitioners, supra note 11, at 20; cf. State v. Harrison Co., 548 F. Supp. 110, 113–14 (N.D. Ga. 1982) (citing relevant case law).

[13] *See* Brief for Petitioners, *supra* note 11, at 20 ("Properly stated, the question here is whether the OCGA's *annotations*, which lack the force of law, are eligible for copyright protection.").

Much has been written on the merits of copyright in state legal texts such as annotated legal codes, from perspectives of copyright law,[14] constitutional rights,[15] economic incentives,[16] effects on key industries,[17] and public policy.[18] Yet scant attention has been paid to history.[19] This is unfortunate, because a review of the history of law and legal publication in fact reveals numerous useful precedents that inform the debate on copyright protection for texts of the law. History in particular can answer the question fundamental to the State of Georgia's contentions: whether there is in fact a clear distinction between binding statutes carrying the force of law, which are decidedly not copyrightable, and all other authorial products of government.

To fill this historical void in the record, this article surveys nonbinding pronouncements, particularly attached to statutes or codes of law, across time and around the world, from Rome and China to England and America. This historical

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[14] *See, e.g.*, Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTELL. PROP. L. 205, 224–26 (2019); Brief for American Intellectual Property [Law] Association as Amicus Curiae Supporting Respondent, *Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150); Brief for The Copyright Alliance as Amicus Curiae Supporting Petitioners, *Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150).

[15] *See, e.g.*, Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondent, *Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150); Brief for Center for Democracy and Technology and Cato Institute as Amici Curiae Supporting Respondent, at 4–13, *Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150).

[16] *See, e.g.*, Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 Fordham Intell.Prop. Media & Ent. L.J. 173, 225–31 (1998).

[17] *See, e.g.*, Brief for American Library Association et al. as Amici Curiae Supporting Respondent, *Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150); Brief for Matthew Bender & Co., Inc. as Amicus Curiae Supporting Petitioners, *Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150); Brief for Internet Association as Amicus Curiae Supporting Respondent, *Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150).

[18] *See, e.g.*, Tussey, *supra* note 16, at 231–33 (considering constitutional objectives for copyright); Irina Y. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 HASTINGS COMM. & ENT. L.J. 81, 115 (2000) (arguing that "the state's ownership of copyright in primary law materials runs afoul of the fundamental public policy principle that citizens in a democratic society must have uninhibited access to the laws"). The author deeply regrets being unable to cite every excellent brief filed by his colleagues and others in this litigation.

[19] The scholar who comes closest to doing so is Professor Dingledy of William & Mary Law School, though his research focuses on historical access to the law generally, rather than the particular issue of nonbinding legal texts. *See* Frederick W. Dingledy, *From Stele to Silicon: Publication of Statutes, Public Access to the Law, and the Uniform Electronic Legal Material Act*, 111 L. LIBR. J. 165 (2019) [hereinafter Dingledy 2019]. The author extends special thanks to Professor Dingledy for a great deal of assistance with his research.

review—which traverses a Roman whistleblower, the Justinian Code, a dark side of Confucianism, English libertarianism, New York suppressing the press, and the Mayor of London being thrown in jail—reveals multiple important lessons that question the basis upon which Georgia's argument stands.

First, "the law," or that class of government edicts for which the interest of unrestricted citizen access is at its apex, is not limited to statutes of binding force. Law, and access thereto, serves many purposes: advising citizens on the state's normative views, crystallizing popular opinion on future policy, and delineating the relationship between citizen and state. Nonbinding pronouncements serve these purposes too, by demonstrating the logic, motivations, and reasoning of the sovereign, which is why governments have repeatedly treated nonbinding pronouncements as part and parcel of the law. A determinative distinction between binding law and other state-authored works has not existed for millennia.

Second, concealment of nonbinding legal pronouncements has long handed undue power to both the state and the legal bar. Where the reasons behind the law are not made available to the public, the sovereign enjoys outsized discretion over citizens. Furthermore, lawyers enjoy outsized power to shape the law toward their interests rather than the public's. These imbalances in power, both plainly anti-democratic and anti-libertarian in the broadest senses of those terms, demonstrate a danger in allowing states to have control over nonbinding state-authored works that often contain the reasons and logic of the sovereign and the law.

Third, states such as Georgia often support their claims for copyright by analogizing their annotations to privately authored case reports and legal treatises, both of which historically have been subject to copyright.[20] Yet, history shows that annotations to the law are unlike legal treatises and case reports. Historically, those private writings have been the domain of non-state-actor compilers;[21] as such, they are not traditional edicts of government. By contrast, codes of law—complete with annotations—have long been pronouncements of the sovereign's intentions.[22] To treat state-authored annotations like a private case report or treatise would thus be incongruous with history.

These lessons ultimately point in the same direction: exclusivity in state-authored legal texts, even those that do not carry direct legal force, can have and

[20] *See infra* note 180 and accompanying text.
[21] See *infra* notes 186–192 and accompanying text.
[22] *See infra* notes 181–185 and accompanying text.

have had grave legal consequences, and important public interests are served by ensuring that those works are broadly available to the public without restriction.

To be sure, little of this history speaks directly to the doctrines of copyright law. But the determinative principles for the relevant edicts-of-government doctrine under copyright law have always reached beyond the mere text of the statute. Those determinative principles are founded upon the relationship of a sovereign to its citizens, and what the state may withhold from them, regardless of the legal means. The relevant history is that of the law and how states have published or withheld it.

This article proceeds as follows. Section I gives a brief introduction to the practice of legal publication of annotated codes and the litigation that has given rise to the debate over copyright in legal texts.[23] Section II turns to historical episodes relating to annotations, commentaries, legislative histories, and other nonbinding but official texts of the law.[24] Section III synthesizes conclusions from these historical instances to draw lessons for the consequences of state-owned copyrights in those nonbinding but official texts.[25] The final section concludes.[26]

I
BACKGROUND

To set the stage for the historical discussion of state involvement with nonbinding but official legal texts, this section provides a brief background on the situation that has given rise to copyright litigation over annotations to official state legal codes.

A. State Publication of Annotated Codes

When legislatures enact laws, the record of those enactments is not automatically organized into topical volumes.[27] Statutes, or "session laws," have historically been organized serially in order of enactment.[28] Indeed, in early England, the statutes were literally sewn together in serial order to form rolls of attached parchment, which gives rise to the term "enrollment" of laws.[29]

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[23] *See infra* Section I.

[24] *See infra* Section II.

[25] *See infra* Section III.

[26] *See infra* Conclusion.

[27] *See, e.g.*, Erwin C. Surrency, *The Publication of Federal Laws: A Short History*, 79 L. LIBR. J. 469, 470–71 (1987) (describing early American practice of sending bills to newspapers for publication, under the Records Act of 1789).

[28] *See, e.g.*, 1 U.S.C. § 112 (2018); *id.* at 471–72.

[29] *See* G.R. Elton, *The Rolls of Parliament, 1449–1547*, 22 HIST. J. 1, 4 (1979).

Yet, multiple times throughout history, governments have recognized the value of preparing organized compilations or revisions of the extant statutes.[30] These are called "codes," after the most famous historical compilation, the Roman *Codex* of Justinian I.[31] Today, the *United States Code* is a familiar official code of law produced by the United States government,[32] and every state maintains a code or compilation of its laws as well.[33] Many of the states do not have in-house publishing resources, and so they outsource the printing and even preparation of their codes; increasingly as well, print versions are being dropped for online-only access to official legal codes.[34]

The public-private partnership for publication of state legal codes is largely responsible for provoking questions of copyright in those codes.[35] Because the private publishers seek to make profits from their partnerships with the states, they receive indirect value if copyright exclusivities inhere in the official codes that they prepare.[36] Unsurprisingly, those publishers impress upon the states that copyright protection in at least some aspect of their official legal codes is important to demand.[37]

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[30] See, e.g., Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U. L.J. 335, 340–55 (1953) (describing codification efforts in Europe and the United States).

[31] *See* CODEX JUSTIANIANUS (Paulus Krueger ed., Berlin, Weidmannsche Buchhandlung 1877) (c. A.D. 534). The literal word "codex" refers to nothing more than a bound book.

[32] *See* 1 U.S.C. § 204(a) (2018).

[33] *See* Street & Hansen, *supra* note 14, at 219 n.82, addendum (2019).

[34] *See id.*; Street & Hansen, *supra* note 14, at 220.

[35] The federal government is precluded from asserting copyright in this manner because by the terms of the Copyright Act, no copyright inheres in federal government works. *See* 17 U.S.C. § 105 (2018).

[36] *See* Street & Hansen, *supra* note 14, at 221 & n.92 (citing research); Brief for Matthew Bender & Co., Inc. as Amicus Curiae Supporting Petitioners at 9–13, Georgia v. Public.Resource.Org, Inc., 139 S. Ct. 2746 (2019) (No. 18-1150). The assumption throughout this article is that the state is the author and the original copyright recipient, so that benefits from any copyright inure to the publisher by virtue of contracts with the state. If the publisher or other third party is the original author of material in the codes, then different questions would arise. *See* Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 896 F.3d 437, 440 (D.C. Cir. 2018) (considering "whether private organizations whose standards have been incorporated by reference can invoke copyright and trademark law to prevent the unauthorized copying and distribution of their works").

[37] *See* Brief for Arkansas et al, *supra* note 9, at 20.

B. The Public.Resource.Org Litigation

On the other side of this debate over copyright in state legal materials is Carl Malamud, the self-described "rogue archivist" who operates the organization Public.Resource.Org ("Public Resource") that is dedicated to "making the laws easier to use and read" for the public.[38] In 2013, Public Resource scanned and uploaded to its website the entirety of the *Official Code of Georgia Annotated*, thereby triggering a series of cease-and-desist letters and ultimately a federal copyright lawsuit from the State of Georgia in 2015.[39]

Before the district court, Public Resource argued that its copying and distribution of the official Georgia code were permissible, either because the code as an edict of government was not amenable to copyright protection, or because Public Resource's copying and distribution constituted permissible fair use of a copyrighted work.[40] The district court rejected both arguments and found Public Resource's acts to be infringing.[41] Regarding copyrightability, the district court recognized that government edicts were not subject to copyright protection, but following guidance of the U.S. Copyright Office, the court held that annotations to an official code were distinguishable and thus copyrightable.[42] Turning to fair use, the court found that Public Resource, though a nonprofit organization, nevertheless "profits" from grants, donations, and public recognition;[43] in combination with the fact that the whole work was copied and the effect on Georgia's market for the work was substantial, the district court found no fair use.[44]

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[38] Michael Hiltzik, *Georgia Claims that Publishing its State Laws for Free Online is 'Terrorism'*, L.A. TIMES (July 27, 2015, 12:31 PM), https://www.latimes.com/business/hiltzik/la-fi-mh-state-of-georgia-copyright-wall-20150727-column.html; Adam Liptak, *Accused of 'Terrorism' for Putting Legal Materials Online*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/us/politics/georgia-official-code-copyright.html.

[39] *See* Code Revision Comm'n *ex rel.* Gen. Assembly of Ga. v. Public.Resource.Org, Inc. (*Code Revision Comm'n II*), 906 F.3d 1229, 1235 (11th Cir. 2018).

[40] *See* Code Revision Comm'n v. Public.Resource.Org, Inc. (*Code Revision Comm'n I*), 244 F.Supp. 3d 1350, 1355 (N.D. Ga. 2017), *rev'd*, *Code Revision Comm'n II*, 906 F.3d 1229.

[41] *See id.* at 1361.

[42] *See id.* at 1356 (quoting U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 313.6(C)(2), 717.1 (3d ed. 2014)).

[43] *See id.* at 1359. Before the Eleventh Circuit, the author noted in an amicus brief that this argument of the district court was plainly inconsistent with the law. *See* Brief for Public Knowledge et al. as Amici Curiae Supporting Appellant at 16–23, *Code Revision Comm'n II*, 906 F.3d 1229 (11th Cir. 2018) (No. 17-11589).

[44] *See Code Revision Comm'n I*, 244 F. Supp. 3d at 1360–61.

On appeal, the Eleventh Circuit reversed the district court on the copyrightability issue and thereby did not address fair use.[45] Recognizing that the "question is a close one," the Court of Appeals recognized the need for a test for whether a state-authored work is subject to copyright and identified three relevant factors: "the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created."[46] Applying those factors, the court held that the official Georgia code was "sufficiently law-like so as to be properly regarded as a sovereign work," in total including the annotations.[47] As a result, the court concluded that "the People are the ultimate authors of the annotations," and so "the annotations are inherently public domain material and therefore uncopyrightable."[48]

The State of Georgia petitioned for certiorari in March 2019.[49] Unusually, Public Resource acquiesced in the petition, agreeing that the "Court's review is warranted" because the precedents and doctrine are "difficult to apply when a work does not fall neatly into a category, like statutes or judicial opinions, already held to be edicts."[50] The Supreme Court granted the petition for a writ of certiorari on June 24, 2019.[51]

II
OFFICIAL ANNOTATIONS HAVE LONG BEEN EDICTS OF GOVERNMENT AND INTEGRAL PARTS OF THE LAW

In assessing how history can inform the Public Resource litigation and the question of copyright in legal texts generally, the initial observation must be that state-authored but nonbinding legal materials, such as official statutory annotations, are far from unusual. History is replete with sovereigns propounding annotated codes, official commentaries, and other nonbinding pronouncements, and consideration of these historical examples is instructive not just on the disposition of the *Code Revision Commission* case, but also on basic theories of liberty and government.[52] This section endeavors to present several examples of these historical

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[45] See Code Revision Comm'n II, 906 F.3d at 1233.

[46] *Id.* at 1232–33.

[47] *Id.* at 1233.

[48] *Id.*

[49] *See* Petition for Writ of Certiorari for Plaintiffs-Appellees, Georgia v. Public.Resource.Org, Inc., 139 S. Ct. 2746 (2019) (No. 18-1150).

[50] Brief in Opposition of the Petition for Writ of Certiorari at 9, *Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150).

[51] *See Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150).

[52] See generally infra Section III.

legal texts and the motivations behind them, reactions to them, and consequences of them, to assist in answering the copyright question.[53]

A. Rome: Official Commentaries Were Jus Scripta from the Republic Through Justinian

The Roman Republic and Empire repeatedly treated official though nonbinding commentaries as a component of the law, and valued promulgation of both.[54] As early as 450 B.C., the Roman Republic publicized the famed Law of the Twelve Tables, inscribed in bronze and posted in the public square, thereby quelling a threatened class war arising from "the complaint on the part of the *plebs*, that the law was an affair of mystery."[55] In 304 B.C., a court clerk named Gnaeus Flavius became a local hero by leaking the Roman pontiffs' secret interpretations of the Twelve Tables, winning him high political offices.[56]

Emphasis on publicizing law developed into the Roman concept of *jus scripta*, written law that held a place higher than unwritten, customary law, *jus non scripta*.[57]

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[53] For an article on legal history, a few notes on conventions are in order. Spelling and capitalization have been modernized in quotations from historical sources, without notation, to simplify readability. Chinese transliterations have been canonicalized to *Pinyin*, and *j* is used rather than the consonantal *i* (e.g., *jus* rather than *ius*). No changes have been made to titles of works to facilitate locating them in catalogs, though historical abbreviations of personal names are expanded, and titles of Roman treatises are abbreviated according to Bluebook conventions. Page number citations to Roman law and histories follow the classical format [book].[section].[sentence] throughout. Because Locke's *Essay Concerning Human Understanding* is also organized into books and sections, the same format is followed for it. For each of these specially-paginated historical works, a specific translation or reprint is referenced; the volume and page numbers also given with the citations are indexed to that translation or reprint. Finally, to ensure maximum accessibility of the historical works in this Article, public domain editions have been cited wherever possible.

[54] For an overview of Roman publication of law, see generally Dingledy 2019, *supra* note 19, at 172–79.

[55] FREDERICK PARKER WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW, at 82–89 (Edinburgh W. Green & Sons, 1903); *see* 2 LIVY WITH AN ENGLISH TRANSLATION IN FOURTEEN VOLUMES, 3.33–.34, 3.57.10, at 109–13, 195 (B.O. Foster trans., Harvard Univ. Press 1922) (c. 27 B.C.).

[56] *See* 4 LIVY WITH AN ENGLISH TRANSLATION IN FOURTEEN VOLUMES, 9.46.5, at 351 (B.O. Foster trans., Harvard Univ. Press 1926) (c. 27 B.C.); THE DIGEST OF JUSTINIAN 1.2.2.7, at 8 (Charles Henry Monro trans., 1904) (c. A.D. 533).

[57] *See* THE INSTITUTES OF JUSTINIAN 1.2.10, at 6 (J.B. Moyle trans., 5th ed., Clarendon Press 1913) (c. A.D. 533) (comparing this division to Athenian and Lacedaemonian practice that "observed only what they had made permanent in written statutes").

Jus scripta was not limited only to statutes, though.[58] Among other things, it encompassed the Senate's opinions, *senatus consulta*, which at least during the Republic were treated as nonbinding commentary on statutes: "It could not annul a *lex*. . . . It could, however, interpret enactments of the popular assembly."[59] Nevertheless, *senatus consulta* weighed heavily on judges, and magistrates ignored them at their peril.[60]

Roman written law also incorporated private legal scholars' opinions, in the form of responses to questions of law called *responsa prudentium*.[61] Even here the imperial imprimatur was important. Roman scholars were free to opine on cases to judges, but starting with Augustus, the emperors conferred *jus respondendi* upon select scholars, such that their answers were "in pursuance of an authorization" and thus effectively binding precedent.[62] Multiplication of unofficial commentaries prompted Valentinian III in A.D. 426 to issue the Law of Citations, designating several prominent jurists as official—but not binding, for when the jurists "were all ranged on one side and an imperial rescript was on the other, the latter would prevail."[63]

The apex of symbiosis between private commentary and imperial power was Justinian I's law of A.D. 529–534, modernly called the *Corpus Juris Civilis*.[64] Though often called a "code," the *Corpus* was more than just the *Codex*. Concerned

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[58] *See* GAIUS, INSTITUTES OF ROMAN LAW 1.2, at 1 (Edward Poste trans., 4th ed., Clarendon Press 1904) (c. A.D. 161).

[59] FRAN FROST ABBOTT, A HISTORY AND DESCRIPTION OF ROMAN POLITICAL INSTITUTIONS 233 (3d ed., Harvard Univ. Press 1911); *see id.* 1.4, at 2; 3 POLYBIUS, THE HISTORIES 6.16.2, at 305–07 (W.R. Paton trans., Harvard Univ. Press 1972) (c. A.D. 150). By the time of the Empire, *senatus consulta* were considered statutes, owing to the decline of the *comitia* representing the people. *See id.* 1.4, at 2; THE INSTITUTES OF JUSTINIAN, *supra* note 57, 1.2.5, at 5.

[60] *See* ROBERT C. BYRD, THE SENATE OF THE ROMAN REPUBLIC: ADDRESSES ON THE HISTORY OF ROMAN CONSTITUTIONALISM 44 (1995); A. Arthur Schiller, *Senatus Consulta in the Principate*, 33 Tul. L. Rev. 491, 492 (1959).

[61] *See* GAIUS, INSTITUTES OF ROMAN LAW, *supra* note 58, 1.7, at 2.

[62] THE DIGEST OF JUSTINIAN, *supra* note 56, 1.2.2.49, at 18; *see* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW sec. 426, at 190 (Columbia Univ. Press 1909); Kaius Tuori, *The Ius Respondendi and the Freedom of Roman Jurisprudence*, 51 REVUE INTERNATIONALE DES DROITS L'ANTIQUITE (3E SERIE) 295, 297 (2004). There appears to be some debate as to the reliability of evidence for the *jus respondendi* and its effect. Some scholars treat it as a license to opine on law, such that others may not issue *responsa* at all; the latter view appears fairly weak.

[63] ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY 8–9 (Univ. of Pa. 1984); CODEX THEODOSIANUS 1.4, at 19–20 (Paulus Krueger ed., Weidmannsche Buchhandlung 1923) (c. A.D. 426).

[64] Frederick W. Dingledy, *The Corpus Juris Civilis: A Guide to Its History and Use*, 35 LEGAL REFERENCE SERVICES Q. 231 (2016).

as Valentinian was with the proliferation of private commentaries, Justinian formed a Law Commission (not unlike Georgia's Code Revision Commission that prepared its official code[65]) to abridge the commentaries.[66] The resulting *Digest* was, in effect, an official annotation to the *Codex*, and yet the *Digest* received no lesser treatment as a component of Justinian's law.[67]

The *senatus consulta*, *jus respondendi*, and *Digest* reflect a consistent inclusion of nonbinding annotations and commentaries as a critical part of the complete body of law in Rome. Any distinction between statutes and annotations is difficult to reconcile with this important precedent to American government.

B. Dynastic China: Official Annotations Literally Intertwined with Statutory Law

Like Rome, historical China treated official annotations as integral components of the law, meriting promulgation to the same extent as statutes.[68]

China has favored promulgation of law since at least the Legalist-Confucian debate spanning the late Spring and Autumn Period, 591–453 B.C.[69] The Legalist (*fajia*) school preferred efficient, predictable government under published laws.[70] By contrast, the Confucians eschewed written law in favor of *li*, or virtue, theorizing that written laws would encourage mere compliance rather than moral perfection, and preferring the discretion over punishment that *li* offered rulers.[71]

The Legalists prevailed as early as 536 B.C., when the kingdom of Zheng publicly displayed its penal text (*xing shu*), cast onto three-legged vessels.[72] A neighboring leader criticized this publication, saying, "When the people know what

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[65] *See* Code Revision Comm'n *ex rel.* Gen. Assembly of Ga. v. Public.Resource.Org, Inc., 906 F.3d 1229, 1234 (11th Cir. 2018).

[66] *See* Dingledy, *supra* note 64, at 234–36.

[67] *See On the Confirmation of the Digest (Constitutio Tanta)*, *in* 1 THE DIGEST OF JUSTINIAN, *supra* note 56, at xxv, §§ 19, 21, at xxxiv (prohibiting use or creation of other commentaries, other than translations to Greek or "paratitla"); Giuseppe Falcone, *The Prohibition of Commentaries to the Digest and the Antecessorial Literature*, *in* 9 SUBSECIVA GRONINGANA 1, 5–6 (2014).

[68] For an overview of the history of Chinese legal codes, see generally John W. Head & Yanping Wang, Law Codes in Dynastic China: A Synopsis of Chinese History in the Thirty Centuries from Zhou to Qing (Carolina Academic Press 2005).

[69] *See id.* at 48–57.

[70] See Liang Zhiping, Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture, 3 J. CHINESE L. 55, 80–84 (1989).

[71] *See* HEAD & WANG, *supra* note 68, at 49 (2005).

[72] See Ernest Caldwell, Social Change and Written Law in Early Chinese Legal Thought, 32 L. & HIST. REV. 1, 14–15 (2014).

the exact laws are, they do not stand in awe of their superiors."[73] Indeed, Confucius himself is apocryphally said to have lamented, "People will study the tripods, and not care to know their men of rank."[74]

Nevertheless, the Chinese would publish legal codes for millennia, complete with official but nonbinding commentary.[75] The Han dynasty code of about 200 B.C. supposedly included decisions from prior dynasties (*ko*) and "comparisons" (*bi*) to be used as precedent; these had less binding power than the statutes but nevertheless were included in the code.[76] The Tang code of A.D. 653 also included extensive commentaries; indeed its original title was "The Code and the Subcommentary."[77] It is "probable that the commentary was an integral part" of the code, omission of which "would have deprived the unsuspecting reader of a great deal of necessary information, as well as of explanations without which the meaning and intent of the articles [i.e., statutes] could not properly be understood."[78]

Nonbinding annotations to the law were especially prominent in the Ming dynasty code of 1585, which would evolve into the Qing dynasty code of 1740.[79] In addition to the statutes (*lü*), the codes contained "sub-statutes" (*li*), which literally translates to "principle, pattern, norm, or example," and which contained descriptions of precedents often arising out of imperial edicts explaining *lü*.[80] The sub-statutes were widely recognized not to be statutes, but nevertheless carried such interpretive force that they might effectively nullify the original intent of the statute.[81] The Qing code also included commentaries on the statutes (but not the sub-statutes), some official and some private; the official commentaries were considered

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[73] *The Ch'un Ts'ew [Chunqiu]; with the Tso Chuen [Zuozhuan]*, *in* 5 JAMES LEGGE, THE CHINESE CLASSICS 609 (London, Trübner & Co. 1872).

[74] HEAD & WANG, *supra* note 68, at 53. Commentators have questioned the reliability of these Confucian claims. *See* Herrlee Glessner Creel, *Legal Institutions and Procedures During the Chou Dynasty*, *in* ESSAYS ON CHINA'S LEGAL TRADITION 26, 37–40 (Jerome Alan Cohen et al. eds., 1980), *quoted with approval in* HEAD & WANG, *supra* note 68, at 55–56.

[75] *See* HEAD & WANG, *supra* note 68, at 93-96, 125, 210.

[76] *See id.* at 93–96; Xin Ren, Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China 23 (Univ. of Pa. 1997).

[77] Wallace Johnson, *Introduction* to THE T'ANG CODE 3, 39, 43 (Wallace Johnson trans., Princeton Univ. Press 1979) (c. A.D. 653).

[78] *Id.* at 43; HEAD & WANG, *supra* note 68, at 125.

[79] *See* DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA EXEMPLIFIED BY 190 CH'ING DYNASTY CASES 57, 65–66 (Harvard Univ. Press 1967).

[80] *See id.* at 64–65.

[81] *See id.* at 67.

so integral to the statutes that they were often written in small print literally in between the lines of the statutory text.[82]

Three millennia of Chinese history reveal a commitment to government promulgation of the law, both statutes and official annotations. The Han through Qing codes are thus strong markers of the close ties between official annotations and law.

C. England, 1485–1490: Nonbinding "Englished" Law Secures the Crown's Authority

Throughout the history of England, official but nonbinding pronouncements have been a critical component of the law, even from the first days of printed matter.

While there is much to be gleaned from the formative years of the parliamentary statute in medieval English times,[83] this article begins with the critical moment of the introduction of printing to England at the end of the 15th century. The evidence from this time demonstrates that nonbinding legal texts were an integral part of the law worthy of public promulgation no less than statutes.

At the onset of printing in the late 15th century, the official language of English law was not English. Statutes were titled in Latin and officially written in so-called "law French," as exemplified by William de Machlinia's 1484 printing of Richard III's statutes.[84] When Henry VII took the throne in 1485, Parliament also

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[82] *See id.* at 69; HEAD & WANG, *supra* note 68, at 210 box VI-3.

[83] It was during this time that the concept of statutory legislation, and indeed the word "statute" itself, came into being. *See* H.G. Richardson & George Sayles, *The Early Statutes, Part I*, 50 L.Q. REV. 201, 202–03 (1934). One primary lesson from medieval English law is that the law is not the same as enacted statutes: an unenacted royal writ directed to a specific person could come to be a statute of general applicability by popular acclaim, for example. *See* David K. Millon, *Circumspecte Agatis Revisited*, 2 L. & HIST. REV. 105, 107–08 & n.7 (1984). Conversely, statutes enacted by Parliament were seen as "affirmances of the ancient law"—essentially commentaries on the common law—resulting in the courts occasionally disregarding statutes that they found to be in conflict with the common law. *See* Thomas Bonham v. Coll. of Physicians (Dr. Bonham's Case), 77 Eng. Rep. 638 (C.P. 1610) (Coke, C.J.) (describing medieval cases rejecting statutes in this manner).

[84] *See Introduction* to THE STATUTES OF THE REALM, at xxi, xl (London, Dawsons 1810), [hereinafter Introduction]; Katharine F. Pantzer, *Printing the English Statutes, 1484–1640: Some Historical Implications*, *in* BOOKS AND SOCIETY IN HISTORY 69, 71–73 (Kenneth E. Carpenter ed., 1983).

produced statutes, again officially in law French.[85] Yet when around 1490 the Crown commissioned William Caxton to print the statutes, Caxton did so in English.[86]

No doubt the lawyers of the time would have understood Caxton's translations, although as emanations of the king, not as law. The prevailing view was that law could be "express[ed] more aptly in French than in English" owing to the many technical terms of law French.[87] An English translation would have been considered not merely unofficial but indeed ambiguous.

Yet England made and promulgated these nonbinding explanations of the law—at no cost to English subjects—because doing so served important purposes. By informing the public on the law, the Crown hoped to instill virtue in its subjects—and, selfishly, to propagandize its own majesty and justness.[88] That required the law to be not just public, but understandable to the average English subject. Not long after Caxton's publication, lawyer and printer John Rastell would deem Henry VII "worthy to be called the second Solomon" by virtue of having the statutes "written in the vulgar English tongue and to be published, declared, and imprinted so that then universally the people of the realm might soon have the knowledge of the said statutes."[89]

Perhaps a state legal code is not so arcane as law French, but the terseness of statutes can make them opaque absent interpretive aids. Official annotations offer a window into the legislator's reasoning just as "Englishing" of statutes did in the 15th century. Neither can be disregarded as part of the law.

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[85] *See Introduction*, *supra* note 84, at xli; Pantzer, *supra* note 84, at 74.

[86] *See Introduction*, *supra* note 84, at xli; Pantzer, *supra* note 84, at 74–75; THE STATUTES OF HENRY VII (John Rae ed., London, John Camden Hotten 1869) (c. 1489). Pantzer puts the date of Caxton's publication at 1490, but the facsimile copy dates it to 1489.

[87] JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIÆ, *translated in* COMMENDATION OF THE LAWS OF ENGLAND 80 (Francis Grigor trans., Sweet & Maxwell 1917) (c. 1468–1471); *see* 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW, at 481 (3d ed. 1923) ("French continued to be the language of the law because the technical terms were nearly all French.").

[88] *See* Pantzer, *supra* note 84, at 73–75; David J. Harvey, THE LAW EMPRYNTED AND ENGLYSSHED: THE PRINTING PRESS AS AN AGENT OF CHANGE IN LAW AND LEGAL CULTURE 1475–1642, at 24 (Hart Publ'g 2015).

[89] John Rastell, *Prohemium* to THE ABBREVIATION OF THE STATUTES (1519), *reprinted in* 1 TYPOGRAPHICAL ANTIQUITIES 327, 328–29 (Joseph Ames & William Herbert eds., London, Soc'y of Antiquaries 1785) (spelling modernized, *see supra* note 53). The various editions of *Typographical Antiquities* give different titles and dates for Rastell's work; the original appears to be lost.

To be sure, England did not allow for unrestricted access to the law.[90] Authority to print the statutes and other official documents was (and technically still is) closely held by royal prerogative and monopolized by the King's or Queen's Printer;[91] the printing of case reports and other common law texts was also monopolized under a patent for printing the common law.[92] But these elements of what today is called "Crown copyright" should provide little solace to states who assert the monopoly of copyright in their legal texts: along with the general printing monopoly of the Stationers' Guild and the Star Chamber decrees of 1586 and 1637, the prerogative and patent were elements of the English government's comprehensive scheme to censor information and dominate the press out of fear of inciting in England the religious unrest of the Protestant Reformation.[93] American states presumably do not justify their copyright claims upon religious censorship.

D. England, 1520–1640: Promulgated Explanations of Law Counteract Absolutist Monarchy

The printing press sparked a debate over the propriety of printing the law, a debate that reveals grave risks in restricting access to official but nonbinding edicts of government.[94]

The "publicists" supported printing the law of England, particularly in English, to improve social morals.[95] Lawyer-printer John Rastell, in praising the English translation of Henry VII's statutes (and in printing his own translation of older statutes into that "vulgar tongue"), explained in 1519 that "knowledge of the

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[90] *See* JOSEPH CHITTY, JR., A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN; AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 238–41 (London, Joseph Butterworth & Son 1820) (describing "prerogative copyright" of the Crown).

[91] *See* MINISTRY OF JUSTICE, REVIEW OF THE EXECUTIVE ROYAL PREROGATIVE POWERS: FINAL REPORT 32 (2009).

[92] *See* H.J. Byrom, *Richard Tottell—His Life and Work*, 8 LIBR. 4TH 199, 223–25 (1927) (describing a dispute over whether abridgments of statutes fell under the jurisdiction of the Queen's Printer or under the common law printing patent).

[93] *See* Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520–1640*, 146 U. PA. L. REV. 323, 338–39, 417 n.269 (1998); *see also* An Act for Abolishing of Diversity of Opinions in Certain Articles Concerning Christian Religion 1539, 31 Hen. 8 c. 14.

[94] *See* Ross, *supra* note 93, at 326–27.

[95] *See id*. at 329–42; Howard Jay Graham, *"Our Tong Maternall Maruellously Amendyd and Augmentyd": The First Englishing and Printing of the Medieval Statutes at Large*, 1530–1533, 13 UCLA L. REV. 58, 70–72 (1965).

said statutes" would allow people "better to live in tranquility and peace."[96] Politician-turned-poet Lord Brooke, after alluding to Gnaeus Flavius,[97] wrote:

> Again, laws ordered must be, and set down
> So clearly as each man may understand,
> Wherein for him, and wherein for the crown,
> Their rigor or equality doth stand. . . .[98]

Opponents of the publicists were primarily lawyers who stood to lose their monopoly over knowledge of the law.[99] The arguments of these "anti-publicists" illuminate why access to the law ought to encompass official annotations.

The anti-publicists generally did not oppose publishing binding law, protesting instead publication of the reasoning behind the law.[100] It is "assuredly no matter of necessity to publish the reasons of the judgment of the law, or *apices* [fine points] or *fictiones juris* to the multitude," wrote one lawyer.[101] Like the Confucians, the anti-publicists feared that "the unlearned by bare reading" of the law without the training of the Inns of Court "might suck out errors" and thus "endamage themselves."[102] Worse yet, miscreants could use knowledge of law as "shifts to cloak their wickedness, rather than to gain understanding."[103] More selfishly, the anti-publicists feared that publicizing the law would deny the bar the ability to characterize and evolve the law through in-guild decisions and manuscript-exchange norms that controlled the development of precedents.[104]

But the most important—and insidious—objection to law printing was one "married uneasily" to a larger debate over absolutist monarchy.[105] Presaging

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[96] Rastell, *supra* note 89, at 329 (spelling modernized).

[97] *See supra* note 56 and accompanying text.

[98] 1 FULKE GREVILLE, *Poems of Monarchy*, *in* THE WORKS IN VERSE AND PROSE COMPLETE 5, 101 (New York, AMS Press 1966) (1870) (spelling modernized).

[99] *See* Ross, *supra* note 93, at 390.

[100] *See id.* at 354–55.

[101] William Hudson, *A Treatise on the Court of Star-Chamber*, *in* 2 COLLECTANEA JURIDICA, CONSISTING OF TRACTS RELATIVE TO THE LAW AND CONSTITUTION OF ENGLAND 1, 1–2 (Francis Hargrave ed., London, W. Clarke & Sons 1792) (spelling modernized); *see* Ross, *supra* note 93, at 358.

[102] 2 EDWARD COKE, *To the Reader*, *in* THE REPORTS OF SIR EDWARD COKE iii, xxxix–xl (London, J. Butterworth & Son 1826) (c. 1600); *see* Ross, *supra* note 93, at 374–75.

[103] Hudson, *supra* note 101, at 2; Ross, *supra* note 93, at 376.

[104] *See* Ross, *supra* note 93, at 432–38 (reviewing the bar's use of manuscript copying policies and marginal notes, which "inculcated conventions of reading . . . that guided the amendment of texts").

[105] *Id.* at 452.

Georgia's view of its official code as the state's intellectual property, many anti-publicists supposed that because the Crown was the sole fount of power, the law was its "property"; as such there was no more need for the monarch to explain a law than for a parent to explain punishing a child.[106]

Few would accept absolutism today; the contrary view that law binds the sovereign is foundational to American government. And insofar as absolutism is rejected, one ought also to reject the anti-publicists'—and Georgia's—corollary view that sovereign explanations of the law do not implicate access concerns.

E. England, 1640–1642: Printing of Parliamentary Debates Plants Seeds of Democracy

The publishing of English parliamentary debates in the mid-1600s demonstrates how access to nonbinding but official materials, in this case legislative history, fosters popular sovereignty and public representation.

Parliament, even today, nominally holds the power to render its debates secret and to punish those who publish its proceedings.[107] The parliamentary privilege of "freedom of speech" provides that "Debates or Proceedings in Parlyament [sic] ought not to be impeached or questioned in any Court or Place out of Parlyament [sic]."[108] The Houses of Parliament interpreted this liberty to entail a copyright-like power to prohibit anyone—even their own members—from publishing debates.[109]

Certainly, privilege was enforceable only by contempt, as the common law courts refused to apply and indeed disparaged the secrecy privilege.[110] But contempt

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[106] *Id.* at 455; *see* 11 JAMES USSHER, *The Power Communicated by God to the Prince*, *in* THE WHOLE WORKS OF THE MOST REV. JAMES USSHER, D.D. 223, 349 (Charles Richard Elrington ed., Dublin, Hodges, Smith, & Co. 1864) ("And who seeth not what confusion would be brought, as well into a family as a state, if a son or a servant, or a subject might have liberty to stand upon terms and chop logic with his father master, or prince, and refuse to yield obedience to their commands, until he should see some reason for it?").

[107] *See* Clive Parry, *Legislatures and Secrecy*, 67 HARV. L. REV. 737, 741–43 (1954). Parliamentary privilege differs from Crown copyright discussed above.

[108] Bill of Rights, 1 W. & M. sess. 2, c. 2 (1689), 6 THE STATUTES OF THE REALM 143 (Eng.) (London, Dawsons 1819).

[109] *See* Wason v. Walter, [1868] 38 Eng. Rep. 34, 45 (QB); Carl Wittke, *The History of English Parliamentary Privilege*, 26 OHIO ST. U. BULL. 2, 50–51 (1921); H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1252–53 (2010).

[110] *See, e.g.*, *Wason*, 38 Eng. Rep. at 45; The King v. Wright, [1799] 101 Eng. Rep. 1396, 1399 (KB) ("it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated").

punishments could be severe.[111] In 1581, the House of Commons charged its member Arthur Hall with "publishing the conferences of this House abroad in print," and sentenced him with expulsion, a fine of 500 marks (about $130,000 today), and six months' imprisonment in the Tower.[112]

Nevertheless, a healthy industry of printing parliamentary debates began during the Long Parliament of 1640.[113] Disregard of the privilege was flagrant: Members not only published their speeches but occasionally registered them with the Company of Stationers.[114] Apart from sanctions against Sir Edward Dering for publishing not just speeches but also private conversations of Parliament, parliamentary privilege was essentially unenforced during this period.[115]

It was a good thing, too, that printing of debates flourished through the Long Parliament, because promulgation of those debates arguably catalyzed modern participatory democracy. Prior to 1640, the average English subject petitioned Parliament not for public policy change but with private grievances.[116] With the publication of parliamentary debates, an informed public could understand and thus engage in the political process: "[p]olitical discourse in printed texts encouraged readers to interpret conflict between King and Parliament, and subsequently among parliamentary factions, as an ongoing debate."[117] In particular, printed political debates allowed for a new form of petitioning Parliament, in which proponents of change could stir up support by presenting and critiquing the speeches of members.[118]

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[111] *See* THOMAS ERSKINE MAY, A TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 88–92 (10th ed., London, William Clowes & Sons, Ltd. 1893) (noting unlimited fines and imprisonment as possible punishments).

[112] 1 H.C. JOUR. 125, 127 (1802) (Eng.) (resolution and order of Feb. 14, 1581). To be sure, this was not Commons' only charge against Hall, and Hall's publication was apparently particularly salacious. On the present-value computation, see Eric W. Nye, *A Method for Determining Historical Monetary Values*, https://www.uwyo.edu/numimage/currency conversion.htm (last visited Mar. 27, 2020).

[113] *E.g.*, SPEECHES AND PASSAGES OF THIS GREAT AND HAPPY PARLIAMENT: FROM THE THIRD OF NOVEMBER, 1640, TO THIS INSTANT JUNE, 1641 (London, William Cooke 1641); A.D.T. Cromartie, *The Printing of Parliamentary Speeches November 1640–July 1642*, 33 HIST. J. 23, 23 (1990).

[114] *See* Cromartie, *supra* note 113, at 35.

[115] *See id.* at 37.

[116] *See* David Zaret, *Petitions and the "Invention" of Public Opinion in the English Revolution*, 101 AM. J. SOC. 1497, 1509–10 (1996).

[117] *Id.* at 1530.

[118] *See id.* at 1532.

Printing parliamentary debates thus gave rise to "public opinion" as a political force. Public opinion, in turn, gave way to notions of popular sovereignty, including Locke's "law of opinion"[119] and Madison's "all governments rest on opinion."[120] Publication of nonbinding, official pronouncements of the legislature thus engendered this fundamental principle of American government.

F. Great Britain and New York, 1762–1796: Suppression of Debate Printing Sparks Demand for Freedom of Speech

Debate printing in the next century had a starker impact on America: it instigated freedom of the press.

When English newspapers began printing parliamentary debates in the mid-1700s, the House of Commons remarkably did exercise its parliamentary privilege.[121] In January 1762, Commons imprisoned the printer of the *London Chronicle* for printing a speech of the Speaker, deterring further printing of debates for several years.[122]

The 1768 Middlesex election affair reinvigorated debate reporting, and Parliament again tried to block it.[123] In what came to be called the Printers' Case of 1771, the House of Commons, led by its member Colonel George Oslow, summoned eight newspaper printers for contempt of privilege by printing debates.[124] Most confessed and made contrition on their knees, but John Miller, publisher of the *London Evening Post*, refused to appear.[125] Commons sent for Miller's arrest but was thwarted by Brass Crosby, Lord Mayor of London, who asserted sole jurisdiction for arrests in his city.[126] In an infamous move that triggered days of protests, the

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[119] 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 2.28.10–.12, at 476–77 (Alexander Campbell Fraser ed., Oxford, Clarendon Press 1894) (c. 1689).

[120] THE FEDERALIST NO. 49 (James Madison); *see* Zaret, *supra* note 116, at 1540; Elisabeth Noelle-Neumann, *Public Opinion and the Classical Tradition: A Re-Evaluation*, 43 PUB. OPINION Q. 143, 144–46 (1979).

[121] *See* Thomas, *supra* note 2, at 623.

[122] *See id.* at 624.

[123] *See id.*

[124] *See* 17 PARL. HIST. ENG., *supra* note 5, at 59–62. That treatise was originally titled *Cobbett's Parliamentary History* after its proprietor William Cobbett, but in 1810 Cobbett was imprisoned for criticizing the government's military discipline. *See* J.C. TREWIN & E.M. KING, PRINTER TO THE HOUSE: THE STORY OF *HANSARD* 94–101 (Methuen 1952).

[125] *See* 17 PARL. HIST. ENG., *supra* note 5, at 85–90.

[126] *See id.* at 98, 101.

House of Commons, frustrated with Crosby for protecting Miller, threw the Lord Mayor into the Tower instead.[127]

It is easy to imagine how parliamentary censorship in 1771 might have influenced Revolution-era American thinking on liberty and speech. There is considerable evidence that it did.[128] The *Virginia Gazette* predicted that "the present dispute about the liberty of the press will, in all probability, give a mortal wound to arbitrary power";[129] a week later it ran an open letter of the pseudonymous English polemicist Junius, excoriating Parliament's actions.[130] Benjamin Franklin knew of the incident,[131] as did Samuel Adams, who called the affair "a stretch of arbitrary power."[132] Americans celebrated John Wilkes, the London alderman who helped orchestrate the showdown between Parliament and the printers,[133] for championing freedom of the press.[134]

Americans continued to find parliamentary privilege antithetical to their principles.[135] One member of Congress declared that congressional debates were "offered to the public view, and held up to the inspection of the world."[136] And when in 1796, the New York Assembly jailed newspaper writer William Keteltas for "a

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[127] *See id.* at 157–58, 186–90; *Brass Crosby's Case*, [1771] 95 Eng. Rep. 1005 (K.B.) 1005–07.

[128] For another historian connecting the Printers' Case to the development of American freedom of the press, see JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 23 (Oxford Univ. Press 1988).

[129] *See* Alex Purdie & John Dixon, *London, April 2*, VA. GAZETTE, June 13, 1771, at 1, 2.

[130] *See* William Rind, *Letter of Junius, from the Public Advertiser*, April 22, VA. GAZETTE, June 20, 1771, at 1.

[131] *See* Letter from Benjamin Franklin to Joseph Galloway, *in* 18 THE PAPERS OF BENJAMIN FRANKLIN 77 (Ellen R. Cohn et al. eds., Yale Univ. Press 1974).

[132] *See* Letter from Samuel Adams to Arthur Lee, *in* 2 RICHARD HENRY LEE, LIFE OF ARTHUR LEE, LL. D. 173, 174 (Boston, Wells & Lilly 1829).

[133] *See* Peter D.G. Thomas, *John Wilkes and the Freedom of the Press (1771)*, 33 BULL. INST. HIST. RES. 86, 88–91 (1960).

[134] *See* Roger P. Mellen, *John Wilkes and the Constitutional Right to a Free Press in the United States*, 41 JOURNALISM HIST. 2, 8 (2015). Mellen misattributes several colonial newspaper reports to Wilkes's earlier printing disputes; in fact those papers were referring to the Printers' Case.

[135] *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 434–35 (1983). *Compare* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 511–12 (1983), *with* Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 192–94 (1984). Anderson and Levy appear to agree that public opinion about parliamentary privilege played into views on sedition laws and thus the free speech clause; they disagree as to the degree to which legislatures themselves asserted the privilege.

[136] 1 ANNALS OF CONG. 443 (Joseph Gales ed., 1834) (statement of Rep. Jackson on June 8, 1789).

breach of the privileges" by reporting a debate, among his supporters was "Camillus Junius," a pseudonym that surely recalls the 1771 English episode.[137]

There is little daylight between parliamentary privilege and copyright when it comes to a legislature suppressing publication of nonbinding yet official pronouncements. In both cases the state levies powerful, even criminal[138] remedies against its citizens for publicizing information crucial for public dialogue. History has denounced state-asserted privilege as contrary to freedoms of speech and press;[139] state-asserted copyright ought to fare no better.

G. Virginia, 1846–1887: The Commonwealth Annotates Official Codes Despite Flagrant Copying

Although the states of America have been making legal codes since before they were states,[140] interest in codification accelerated in the mid-1800s as a result of successes of the Napoleonic *Code Civil* and lobbying by Jeremy Bentham.[141] Some of the resulting codes were annotated, such as Alabama's 1852 code, for which the General Assembly directed "a suitable person to make head notes to the titles, chapters, and articles."[142] Virginia was one of the first to enact a civil code during this period,[143] and its experience particularly reflects both recognition of the public value of official annotations and a lack of concern for copyright exclusivity.

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[137] *See* ALFRED F. YOUNG, THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS 1763–1797, at 482–87 (Univ. of N.C. Press 1967).

[138] *See* 17 U.S.C. § 506(a) (2018).

[139] *See supra* notes 121–137 and accompanying text.

[140] *See, e.g.*, THE LAWS AND LIBERTIES OF MASSACHUSETTS (Max Farrand ed., Harvard Univ. Press 1929) (1648).

[141] *See* CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 512–13 (Little, Brown, and Co. 1911). Other commentators correctly observe that there was not necessarily a "codification movement" insofar as most of the codification efforts failed, but nevertheless there was a wave of interest in and debate on the topic of codification. *See* Robert W. Gordon, *Book Review*, 36 VAND. L. REV. 431, 434 (1983) (reviewing CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT, A STUDY OF ANTEBELLUM LEGAL REFORM (1981)) (inferring that Cook shows "that a codification movement never really existed").

[142] Act to Provide for the Adoption, Printing and Distribution of the Code of Alabama, ch. 9, § 1, 1851 ALA. ACTS 22 (Feb. 5, 1852); ALA. CODE 797 (John J. Ormond et al. eds., Montgomery, Brittan and De Wolf 1852) (noting appointment of Henry C. Semple to this position).

[143] *See* Kent C. Olson, *State Codes*, *in* VIRGINIA LAW BOOKS: ESSAYS AND BIBLIOGRAPHIES 1, 5–6 (W. Hamilton Bryson ed., Am. Philosophical Soc'y 2000). Virginia already had a long tradition of compilations and revisions of its laws. *See generally* Dingledy 2019, *supra* note 19, ¶¶ 47–59, at 183–88.

In 1846, the General Assembly of Virginia appointed a commission "to revise and digest the civil code of this commonwealth," and in so doing to include "such notes and explanations as they shall deem essential to a clear understanding of the same."[144] The revisors, John M. Patton and Conway Robinson, produced five reports over the next few years in response.[145]

The revisors' reports are notable because they contain not just a code of law but also extensive annotations summarizing and analyzing case law. To head off criticisms that their revisions would undermine existing case law, Patton and Robinson presented their proposed code "accompanied by notes referring to decisions, and giving such explanations as we deemed essential to a clear understanding of our views."[146] In the section on amending pleadings at trial, for example, the report contains an extensive annotation laying out the cases and concluding that the judicial decisions "go to show the propriety of that statute; we approve the mode in which, under it, justice was administered."[147] The revisors' reports are thus much like a state annotated code, containing both statutes that were ultimately enacted into law and nonbinding explanatory annotations.[148]

Nevertheless, the revisors' annotations were openly copied.[149] In 1856, attorney James M. Matthews published his *Digest of the Laws of Virginia*, which not only copied the text of the statutes but also explicitly reproduced "the very valuable notes of the Revisors of the Code, contained in their Reports to the Legislature."[150] Among other things, the digest reproduces wholesale the annotation on pleading amendments.[151]

In its amicus brief in the *Georgia v. Public.Resource.Org, Inc.* case, Virginia contends that without copyright protection, it might "cease production of an official

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[144] Act to Provide for the Revisal of the Civil Code of This Commonwealth, ch. 34, § 1, 1845 VA. ACTS 26 (Feb. 20, 1846).

[145] JOHN M. PATTON & CONWAY ROBINSON, REPORT OF THE REVISORS OF THE CODE OF VIRGINIA (Richmond, Samuel Shepherd 1847–1849). The reports are unnumbered and bound inconsistently, so volume numbers are used to identify each of the five reports.

[146] 1 *id.* at ix.

[147] 4 *id.* ch. 177, § 7, at 873–74 n.*.

[148] The enacted code did not contain the explanatory annotations, so they could not be binding law. *See, e.g.*, VA. CODE ch. 177, § 7, at 672 (1849) (lacking annotation from the revisors' report noted above). Curiously, other annotations were added to the enacted and published code; their provenance is unclear. *See, e.g.*, ch. 177, § 4 note, at 671.

[149] *See* 1 JAMES M. MATTHEWS, DIGEST OF THE LAWS OF VIRGINIA OF A CIVIL NATURE iv (Richmond, J.W. Randolph 1856).

[150] *Id.*

[151] 1 *id.* ch. 19, § 7, n.5, at 235–36.

annotated code."[152] Yet the Commonwealth's actions belie its claim. No copyright suit against Matthews or his publisher appears to exist, despite the legislature's knowledge of its copyright registration and of the value of its work.[153] Indeed, the Secretary of the Commonwealth, Colonel George W. Munford, appeared to approve of Matthews's digest in the preface to Virginia's 1860 code.[154]

To be sure, the lack of litigation may reflect the more limited nature of copyright law at the time,[155] but the important point is that the copyright incentive was unnecessary. Even without it, Virginia continued undeterred to publish not only official codes but also annotations. The act authorizing publication of the 1860 code directed the secretary to include "such notes in each case of repeal, alteration, or amendment."[156] Munford did so extensively, providing both well-researched citations to case law and analysis of legislative history, for example opining on the supersessional effect of Virginia's 1847 telegraph statutes.[157] Virginia's 1887 code also contained notes and references to cases, for example, on protecting householders from certain debt collections.[158] In their preface to the 1887 code, the revisors note it was "much desired" to have fuller references within the code; tellingly, the obstacle to their doing so was not a lack of copyright or compensation, but excess page length.[159]

That Virginia produced annotated official codes for decades despite knowing its annotations were being copied shows that copyright was not a necessary incentive for state production of annotated codes. The revisors and preparers of those annotations would no doubt agree. In the prefaces to the 1849, 1860, and 1887 Virginia codes, they all acknowledge "a deep sense of [the] importance" of the legislature's charge not merely to compile the laws but to provide a "clear understanding of the same."[160] They understood that the task of the state explaining

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[152] Brief for Arkansas et al., *supra* note 9, at 2.

[153] *See* Act to Provide for the Publication of the Code of Virginia, ch. 2, §§ 3, 7, 1849 VA. ACTS 255 (Aug. 16, 1849).

[154] George W. Munford, *Preface* to VA. CODE iii, iii (2d ed., Richmond, Ritchie, Dunnavant & Co. 1860).

[155] The published revisors' reports appear to lack formalities. Furthermore, there was "painful uncertainty" on whether abridgments, such as Matthews' digest, were infringing. Story's Ex'rs v. Holcombe, 23 Fed. Cas. 171, 172 (C.C.D. Ohio 1847).

[156] Munford, *supra* note 154, at iii, v.

[157] *See* VA. CODE ch. 65, §30 at 337.

[158] VA. CODE ch. 178, §20 at 674 (1887).

[159] *See* E.C. Burks et al., *Preface* to VA. CODE iii, v (1887).

[160] 4 PATTON & ROBINSON, *supra* note 145, at iii–iv; *see also* Munford, *supra* note 154, at iv (compiler acknowledging that "he has felt the responsibility deeply, and no thought or labor has

the law devolves not from private pecuniary interests but from basic duties of a sovereign to its citizens.

III
HISTORY COUNSELS A CONSERVATIVE APPROACH TO STATE ASSERTION OF COPYRIGHT IN LEGAL MATERIALS

History carries multiple insights relevant to disposition of the question of copyright in state legal texts, namely whether copyright law allows a government to muzzle access to official state-authored materials, such as annotations to a legal code. Three such conclusions are discussed below.

A. Edicts of Government, and Law Generally, Are Not Limited to Acts of Binding Legal Force

First, the law consists not merely of sovereign acts carrying binding force. Pronouncements of government instead fall on a spectrum of binding power. Georgia's repeated insistence that edicts of government for this case are limited to those that "establish any enforceable rights or obligations,"[161] then, is inconsistent with millennia of history.

From the beginning, nonbinding commentaries and annotations have carried legal weight.[162] The Romans respected the nonbinding advice of the Senate and gave special weight to commentators having the imprimatur of *jus respondendi*.[163] The Qing dynasty code visually distinguished official and private commentaries, literally interweaving the former with the statutory text.[164] Furthermore, the 16th-century anti-publicists who acquiesced in printing statutes but feared giving the uneducated masses the "*apices* or *fictiones juris*"—points and fictions of legal reasoning that explained the rules—illustrate the potency of those nonbinding sources of law.[165]

The consistent blurring of what constitutes the law is unsurprising, because the purpose of promulgated law is broader than merely putting citizens on notice of punishable acts. As the Chinese legalists[166] and English publicists[167] understood, law

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been spared in the earnest endeavor to accomplish the task"); Burks et al., *supra* note 159, at v ("[O]ur utmost endeavor has been to discharge our whole duty faithfully and conscientiously.").

[161] Brief for Petitioners, *supra* note 11, at 3.

[162] *See* discussion *supra* notes 54–60 and accompanying text.

[163] *See* discussion *supra* notes 62–67 and accompanying text.

[164] *See* discussion *supra* notes 68–82 and accompanying text.

[165] *See* discussion *supra* notes 100–106 and accompanying text.

[166] *See* discussion *supra* notes 69–74 and accompanying text.

[167] *See* discussion *supra* notes 95–98 and accompanying text.

promotes civic virtue and informs people of the will of the sovereign. Promulgated law enables citizens, apprised of the sovereign's reasoning, to participate in government and to sway that reasoning based on public opinion, as Parliament learned from publishing its debates.[168] Promulgated law checks arbitrary government power, much to the chagrin of the Confucians[169] and Colonel Oslow.[170] Moreover, promulgated law sets a historical marker of a society's culture, without which a study such as the present article could not exist.

Nonbinding but official pronouncements of government at issue in this case serve these purposes equally, if not *a fortiori*. It was announcement of English law not in its binding law-French form but in the unofficial vulgar tongue that enhanced the Crown's reputation and advised the people on how to live in "tranquility and peace."[171] It was the printing of parliamentary debates that spurred public participation in the legislative process.[172]

In particular, nonbinding pronouncements uniquely serve an essential function of law: statutory interpretation and construction. Both China and Rome recognized that the statutes alone could not clearly expound the law, so their official commentaries contained "a great deal of necessary information" for understanding statutes.[173] And official explanations of law are, in Justice Scalia's words, "ordinarily *the* most persuasive" extrinsic information for judicial construction, a theory put into practice by the Georgia courts that have repeatedly relied on the state's official annotations.[174]

That the full body of law encompasses both binding and nonbinding texts counsels against discarding any of them from rights of public access in view of copyright or other laws. History and contemporary practices show that a nonbinding official pronouncement can play an important role in delineating the rights of citizens, making it no less a part of "the law," and no less an edict of government, than a statute.

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[168] *See* discussion *supra* notes 107–118 and accompanying text.
[169] *See* discussion *supra* notes 71–74 and accompanying text.
[170] *See* discussion *supra* notes 123–127 and accompanying text.
[171] *See* discussion *supra* notes 83–89 and accompanying text.
[172] *See* discussion *supra* notes 116–120 and accompanying text.
[173] 1 Johnson, *supra* note 77, at 43; *see* Dingledy, *supra* note 64, at 235.
[174] Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring); *see* Code Revision Comm'n ex rel. Gen. Assembly of Ga. v. Public.Resource.Org, Inc., 906 F.3d 1229, 1250-51 (11th Cir. 2018).

B. Control over the Reasons and Explanations of Law Confers Undue Power on Government and the Legal Profession

History also reveals the danger of allowing states the power to restrain access to nonbinding legal pronouncements, whether under copyright law or otherwise. That power can exacerbate both government centralization and undue influence of the bar.

The arguments of states wishing to wield copyright against their citizens find uneasy company with the ancient Confucians[175] and the English anti-publicists,[176] who preferred the absolutist sovereign meting out law and punishment while leaving those without means blind to the reasons. No doubt this regime promotes obedience, but to contemporary ears it smacks of autocracy. Similarly, should a state such as Georgia exercise its copyright privilege to deny access to reasoning contained in official annotations, the state would potentially wield undue power. It could, for example, selectively conceal its views on whether a statute should be construed narrowly or broadly, perhaps leading risk-averse citizens to forgo rights or liberties they otherwise would enjoy.[177]

Control over official annotations to law also hands improvident power to the bar. The anti-publicist English lawyers knew that legal printing stood to cost them their monopoly over the written reasoning of the law and thus their political power to shape the direction of legal reform.[178] New York lawyer James Coolidge Carter similarly led opposition to state codification efforts in the 1850s, again to maintain the bar's control over evolving the law.[179] State assertion of copyright also places the official annotations largely in the hands of well-funded lawyers, raising the same concern that those with the most access to the official, promulgated commentary—and thus the ability to shape it—are a professional class uncharacteristic of the general public.

C. Unlike Case Reports or Treatises, Annotated Official Codes Are a Traditional State Dictum

Attempting to avert the strangeness of a state wielding copyright against citizens, states such as Georgia and their supporters repeatedly analogize to private

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[175] *See* discussion *supra* notes 71–74 and accompanying text.

[176] *See* discussion *supra* notes 100–106 and accompanying text.

[177] *Cf.* Yates v. United States, 135 S. Ct. 1074, 1090 (2015) (Alito, J., concurring) (relying in part on a statute's nonbinding title to narrow construction).

[178] *See* discussion *supra* note 104 and accompanying text.

[179] *See* Mathias Reimann, *The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 110–13 (1989).

legal treatises and headnotes to cases, supposing that the state, as annotator of the official code, is acting less like a government and more like a private scholar.[180] History again disputes this claim, because unlike treatises and case reports, official annotated codes of law have long been the province of sovereigns.

State-published annotations are a tradition going back centuries.[181] Justinian declared two commentaries, the *Digest* and *Institutes*, official components of the *Corpus Juris Civilis* alongside the statutes.[182] Annotations have been part of the Chinese legal tradition since at least the 200 B.C. Han dynasty code.[183] England did not develop a tradition of publishing official commentaries on laws until about the 20th century,[184] but annotated codes were frequent in Virginia and other states.[185]

By contrast, neither case reports nor private treatises have traditionally been promulgations of the state.[186] Private treatises on law abounded in Rome, but the emperors distinguished the unofficial from the official through proclamations and *jus respondendi*.[187] English case reports were also understood to be private works: the medieval Year Books were unofficial and generally attributed to lawyers or law students,[188] and the nominate reports that followed identified the names of private

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[180] In particular, they rely on *Callaghan v. Myers*, 128 U.S. 617 (1888), which held copyrightable a private court reporter's headnotes and syllabi, and *Howell v. Miller*, 91 F. 129 (6th Cir. 1898), which dealt with a privately prepared statutory code. *See* Brief for Petitioners, *supra* note 11, at 37, 41–42.

[181] *See supra* Section II.A–.B.

[182] *See* discussion *supra* notes 64–67 and accompanying text.

[183] *See* discussion *supra* notes 75–82 and accompanying text.

[184] Starting in 1882, the Public Bill Office prepared summaries of bills introduced in Parliament. *See* MAY, *supra* note 111, at 442; 260 PARL. DEB., H.C. (3d ser.) (1881) 423–24 (Eng.). These summaries are now published and called "explanatory notes." *See* CABINET OFFICE, GUIDE TO MAKING LEGISLATION para. 11.9, at 78 (July 2017). "Briefs" attached to bills in Parliament date back to at least the 17th century, but it is likely that the briefs were never made public. *See* MAY, *supra* note 111, at 441; 6 H.C. JOUR. 570 (1651) (resolving that "Mr. Speaker ought not to open any Bill, nor to command the same to be read, unless a Brief thereof be first delivered unto him").

[185] *See* discussion *supra* notes 140–160 and accompanying text.

[186] *Cf.* Tussey, *supra* note 16, at 174 n.1 (1998) (distinguishing "primary law," the "direct products of judicial, legislative, and executive action," from "[s]econdary law" made up of "treatises, casebooks, encyclopedias, and practice guides"). Unsurprisingly, contemporary commentators classify case reports as state-promulgated works because, today, they frequently are. *See, e.g.*, 28 U.S.C. § 411(a) (2018) (providing for printing of the *United States Reports*).

[187] *See* discussion *supra* notes 61–67 and accompanying text.

[188] *See* 2 HOLDSWORTH, *supra* note 87, at 532–36; Michael Bryan, *Early English Law Reporting*, 4 U. MELB. COLLECTIONS 45, 46 (2009).

compilers—Plowden, Dyer, Coke.[189] When Lord Coke opined in *Dr. Bonham's Case*[190] that the king's statutes were not above the law (an early exercise of judicial review), James I kicked him off the court and then in 1616 ordered Coke to "correct his *Reports*" of the case.[191] Coke refused, and because the reports were his own and not the Crown's, he could.[192]

To be sure, the common law printing patent encompassed treatises in addition to Year Books, perhaps implying that England placed private treatises on the same level as case law.[193] But insofar as the Crown at that time had a "custom of granting privileges for the printing of whole classes of books" besides legal texts,[194] the fact that Littleton's treatise on land tenures was one such monopoly is not indicative of much.

When states such as Georgia deem their official annotated codes akin to treatises and case reports, it grates against history that has long treated official codes as mouthpieces of the state. That a private firm under state commission often holds the pen in preparing these codes is of little consequence: the Justinian *Digest*[195] and Virginia codes[196] were also privately authored under commission and subsequently ratified. Nor is there much weight to the states' supposedly benign motive of using copyright to subsidize production of annotations[197]—the state was free to subsidize a private treatise under a private publisher's own name; that would make for a different case but also for a far less valuable treatise owing to the absence of "Official" on the cover.

The inescapable conclusion is that by designating an annotated code as *official*, a state is not an ordinary market participant. It instead taps into a long arc of history of sovereigns propounding their will through pronouncements, binding or not, upon their citizens. Those pronouncements are part and parcel of the law, and they are edicts of government to which citizens are entitled access.

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[189] *See* W.S. HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 89–90 (1925).

[190] Thomas Bonham v. Coll. of Physicians (Dr. Bonham's Case), [1610] 77 Eng. Rep. 638 (C.P.).

[191] Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 50 (1926).

[192] *See id.* at 49–50.

[193] *See* Byrom, *supra* note 92, at 223–24.

[194] *See id.* at 229.

[195] *See* Dingledy, *supra* note 64, at 235.

[196] *See* discussion *supra* notes 143–160 and accompanying text.

[197] *See* Brief for Arkansas et al., *supra* note 9, at 20–23.

CONCLUSION

The English jurist Sir Frederick Pollock posited that "the greater have been a lawyer's opportunities of knowledge, and the more time he has given to the study of legal principles, the greater will be his hesitation in the face of the apparently simple question, What is Law?"[198] The State of Georgia and others (and Pollock, for that matter) suppose a simple answer: the law is statutes, and nothing more. Yet history stretching as far back as ancient Rome and China refutes that simple equation. The law is and long has been an amalgam of texts of varying levels of compulsion, including commentary, dicta, preambles, and indeed annotations.

The history reviewed in this article demonstrates governments sometimes aggressively promoting publication and enjoying the benefits of doing so, and sometimes vigorously opposing publication in ways that reveal substantial harms to society. That history, in the end, demonstrates that the value of access to the law, with which copyright can interfere, spans beyond binding statutory texts; foundational principles of limited government, popular sovereignty, and basic liberty depend on access to the law in whole.

[198] FREDERICK POLLOCK, FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 4 (London, Macmillan & Co. 1896).