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Brief of the R Street Institute, the Wikimedia Foundation, and Public Knowledge as Amici Curiae in Support of Respondent

Charles Duan

No. 18-1150

IN THE

Supreme Court of the United States

STATE OF GEORGIA, ET AL.,

Petitioners,

v.

PUBLIC.RESOURCE.ORG, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE R STREET INSTITUTE, THE WIKIMEDIA FOUNDATION, AND PUBLIC KNOWLEDGE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

In a brief that considers the relationship between statutes and other government works, the construction of the Table of Authorities is unusually a matter of salience. This table categorizes as "Statutes" any compilations of statutory law or works that would have been cited as law, including historical reprints or translations of statutory codes. The *Institutes of Gaius*, for example, are categorized as statutes despite originally being a private commentary, because starting with at least Valentinian III, Gaius was deemed to have legal force.

Cases

STATUTES

OTHER SOURCES

INTEREST OF *AMICI CURIAE*

Amici curiae[1] are nonprofit organizations interested in promoting balanced copyright law that appropriately weighs the public's interest in access to knowledge.

The R Street Institute is a nonpartisan public-policy research organization that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The Wikimedia Foundation is an organization that hosts and supports twelve free-knowledge projects including Wikipedia, whose mission is to develop and maintain factual and educational content created and moderated by volunteer content creators, and to provide this content free of charge.

Public Knowledge is an organization dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers touse innovative technology lawfully.

[1]All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no one other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Twenty-five centuries of history reject the foundation of Petitioners' case. In contending that it may assert federal copyright law against its citizens to block distribution of the *Official Code of Georgia Annotated*, the State of Georgia contemplates a bright line between its uncopyrightable statutes and all other edicts of government that "lack the force of law." No such line exists. On the contrary, sovereigns since antiquity have promulgated not only statutes but also proclamations, explanations, commentaries, and even annotations, all of which, even lacking "force of law," carry great weight for the rule of law and the functioning of government. History reveals not a binary divide between statutes and all else, but a spectrum of edicts of government.

To fill this historical void in the record, this brief 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 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 demonstrat-

ing the logic, motivations, and reasoning of the sovereign. Thus, governments have repeatedly treated nonbinding pronouncements as part and parcel of the law. Georgia's determinative distinction 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, and lawyers enjoy outsized power to shape the law toward their interests rather than the public's.

Third, annotations to the law are unlike the legal treatises and case reports to which Georgia analogizes. Historically, those private writings have been the domain of non-state-actor compilers; 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. To treat Georgia's annotations like a private case report or treatise would, then, be incongruous with history.

Though this case arises under the Copyright Act, the determinative principles must reach beyond that law. This is a case about 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 been published or withheld it. States have sometimes aggressively promoted promulgation and sometimes vigorously opposed it. But history lends to one inexorable conclusion: The law encompasses not just binding statutes but also nonbinding pronouncements of the sovereign, and foundational principles of limited government, popular sovereignty, and basic liberty depend on access to the law in whole.

ARGUMENT

I. Official Annotations Have Long Been Edicts of Government and Integral Parts of the Law

In the arc of history, Georgia's annotated code is not unusual. History is replete with sovereigns propounding annotated codes, official commentaries, and other nonbinding pronouncements, consideration of which is instructive not just on the disposition of this case, but also on basic theories of liberty and government.

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. 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."[2] 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.[3]

[2] Frederick Parker Walton, Historical Introduction to the Roman Law 109 (1903), *available online*; *see* 2 Livy, Ab Urbe Condita 3.33–.34, 3.57.10, at 109–13, 195 (B.O. Foster trans., Harvard Univ. Press 1919) (c. 27 B.C.), *available online*. Locations of authorities available online are shown in the Table of Authorities.

[3] *See* 4 Livy, *supra* note 2, at 9.46.5, at 351; Dig. 1.2.2.7, at 8 (Charles Henry Monro trans., 1904) (A.D. 533), *available online* (Pomponius).

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*.[4] *Jus scripta* was not just statutes, though.[5] Among other things, it encompassed the Senate's opinions, *senatusconsulta*, 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."[6] Nevertheless, *senatusconsulta* weighed heavily on judges, and magistrates ignored them at their peril.[7]

Roman written law also incorporated private legal scholars' opinions, in the form of responses to questions of law called *responsa prudentium*.[8] Even here the imperial imprimatur was important. Roman scholars were free to opine on cases in letters 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

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

[5] *See* G. INST. 1.2, at 1 (Edward Poste & E.A. Whittuck trans., 4th ed., Oxford, Clarendon Press 1904) (c. A.D. 161), *available online*.

[6] FRANK FROST ABBOTT, A HISTORY AND DESCRIPTION OF ROMAN POLITICAL INSTITUTIONS 233 (3d ed. 1911), *available online*; *see* G. INST., *supra* note 5, at 1.4, at 2; 3 POLYBIUS, THE HISTORIES 6.16.2, at 305–07 (W.R. Paton trans., London, W. Heinemann 1972) (c. A.D. 150), *available online*.

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

[8] *See* G. INST., *supra* note 5, at 1.7, at 2.

binding precedent.[9] 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."[10]

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*.[11] Though often called a "code," the *Corpus* was more than just the *Codex*. Concerned as Valentinian was with the proliferation of private commentaries, Justinian formed a Law Commission—not unlike Georgia's Code Revision Commission—to abridge the commentaries.[12] 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.[13]

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[9] DIG., *supra* note 3, at 1.2.2.49, at 18 (Pomponius); *see* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW sec. 426, at 190 (1909), *available online*; Kaius Tuori, *The Ius Respondendi and the Freedom of Roman Jurisprudence*, 51 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ (3E SÉRIE) 295, 297 (2004), *available online*.

[10] ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY 8–9 (1984); *see* De Responsis Prudentium, COD. TH. 1.4, at 19–20 (P. Krueger ed., Berlin, Weidmannsche Buchhandlung 1923) (A.D. 426), *available online*.

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

[12] *See id.* at 234–36.

[13] *See On the Confirmation of the Digest (Constitutio Tanta)* (A.D. 533) (prohibiting use or creation of other commentaries), *in* 1 DIG., *supra* note 3, at xxv, §§ 19, 21, at xxxiv; Giuseppe Falcone, *The Prohibition of Commentaries to the Digest and the Antecessorial Literature*, 9 SUBSECIVA GRONINGANA 1, 5–6 (2014).

The *senatusconsulta*, *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. Petitioners' 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.

China has favored promulgation of law since at least the Legalist–Confucian debate spanning the late Spring and Autumn Period, 591–453 B.C. The Legalist (*fajia*) school preferred efficient, predictable government under published laws.[14] 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.[15]

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.[16] A neighbor-

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

[15] *See* John W. Head & Yanping Wang, Law Codes in Dynastic China: A Synopsis of Chinese History in the Thirty Centuries from Zhou to Qing 49 (2005).

[16] *See* Ernest Caldwell, *Social Change and Written Law in Early Chinese Legal Thought*, 32 L. & Hist. Rev. 1, 14–15 (2014), *available online*.

ing leader criticized this publication, saying, "When the people know what the exact laws are, they do not stand in awe of their superiors."[17] Indeed, Confucius himself is apocryphally said to have lamented, "People will study the tripods, and not care to know their men of rank."[18]

Nevertheless, the Chinese would publish legal codes for millennia, complete with official but nonbinding commentary. 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.[19] The Tang code of A.D. 653 also included extensive commentaries; indeed its original title was "The Code and the Subcommentary."[20] 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."[21]

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.[22] In addition

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[17] *The Ch'un Ts'ew [Chunqiu]; with the Tso Chuen [Zuozhuan]* (c. 300 B.C.), *in* 5 JAMES LEGGE, THE CHINESE CLASSICS 609 (London, Trübner & Co. 1872), *available online*.

[18] HEAD & WANG, *supra* note 15, at 53.

[19] *See id.* at 93–96; XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA 23 (1997).

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

[21] *Id.* at 43; *see* HEAD & WANG, *supra* note 15, at 125.

[22] *See* DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 57, 65–66 (1967).

to the statutes (*lü*), the codes contained "sub-statutes" (*li*), descriptions of precedents often arising out of imperial edicts explaining *lü*.[23] 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.[24] The Qing code also included commentaries, some official and some private; the official commentaries were considered so integral to the statutes that they were often written in small print literally in between the lines of the statutory text.[25]

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

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.[26] When

[23] *See id.* at 64–65.

[24] *See id.* at 67.

[25] *See id.* at 69; Head & Wang, *supra* note 15, at 210 box VI-3.

[26] *See Introduction* to Stat. Realm xxi, xl (London, Dawsons 1810–1828), *available online*; Katharine F. Pantzer, *Printing the English Statutes, 1484–1640: Some Historical Implications*, *in* Books

Henry VII took the throne in 1485, Parliament also produced statutes, again officially in law French.[27] Yet when around 1490 the Crown commissioned William Caxton to print the statutes, Caxton did so in English.[28]

No doubt the lawyers of the time would have understood Caxton's translations, although emanations of the king, as not 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.[29] An English translation would have been considered not merely unofficial but indeed ambiguous.

Yet England made and promulgated these nonbinding explanations of the law 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.[30] That required the law to be not just public, but understandable to the English subject. Not long after Caxton's publication, lawyer and printer John Rastell would deem

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AND SOCIETY IN HISTORY 69, 71–73 (Kenneth E. Carpenter ed., 1983).

[27] *See Introduction*, *supra* note 26, at xli; Pantzer, *supra* note 26, at 74.

[28] *See Introduction*, *supra* note 26, at xli; Pantzer, *supra* note 26, at 74–75; STAT. HEN. VII (John Rae ed., London, John Camden Hotten 1869) (1489), *available online*.

[29] JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE [COMMENDATION OF THE LAWS OF ENGLAND] ch. 48, at 80 (Francis Grigor trans., London, Sweet & Maxwell 1917) (c. 1468–1471), *available online*; *see* 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 481 (3d ed. 1923), *available online* ("French continued to be the language of the law because the technical terms were nearly all French.").

[30] *See* Pantzer, *supra* note 26, 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 (2015).

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."[31]

Perhaps the Georgia code is not so arcane as law French, but the terseness of statutes can make them opaque absent interpretive aids. Both modern official annotations and 15th-century "Englishing" of statutes offer a window into the legislator's reasoning. Neither can be disregarded as part of the law.

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.[32]

The "publicists" supported printing the law of England, particularly in English, to improve social morals.[33] Lawyer–printer John Rastell, in praising the English translation of Henry VII's statutes (and in printing

[31]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), *available online*.

[32]*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, 326–27 (1998).

[33]*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).

his own translation of older statutes into that "vulgar tongue"), explained in 1519 that "knowledge of the said statutes" would allow people "better to live in tranquility and peace."[34] Politician-turned-poet Lord Brooke, after alluding to Gnaeus Flavius,[35] wrote:

> Again, laws order'd 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 . . . .[36]

Opponents of the publicists were primarily lawyers who stood to lose their monopoly over knowledge of the law.[37] 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.[38] 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.[39] Like the Confucians, the anti-publicists feared that "the unlearned by bare

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[34]Rastell, *supra* note 31, at 329.

[35]*See supra* note 3 and accompanying text.

[36]1 Fulke Greville, *Poems of Monarchy* (1670), *in* The Works in Verse and Prose Complete of the Right Honourable Fulke Greville, Lord Brooke 5, verse 268, at 101 (N.Y., AMS Press 1966) (1870), *available online.*

[37]*See* Ross, *supra* note 32, at 390.

[38]*See id.* at 354–55.

[39]William Hudson, *A Treatise on the Court of Star-Chamber* (c. 1621), *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), *available online*; *see* Ross, *supra* note 32, at 358.

reading" of the law without the training of the Inns of Court "might suck out errors" and thus "endamage themselves."[40] Worse yet, miscreants could use knowledge of law as "shifts to cloak their wickedness, rather than to gain understanding."[41] 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.[42]

But the most important—and insidious—objection to law printing was one "married uneasily" to a larger debate over absolutist monarchy.[43] Presaging Georgia's treatment 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.[44]

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.

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[40] 2 EDWARD COKE, *To the Reader*, *in* THE REPORTS OF SIR EDWARD COKE iii, xxxix–xl (London, J. Butterworth & Son 1826) (c. 1600), *available online*; *see* Ross, *supra* note 32, at 374–75.

[41] Hudson, *supra* note 39, at 2; Ross, *supra* note 32, at 376.

[42] *See* Ross, *supra* note 32, at 432–38.

[43] *Id.* at 452.

[44] *Id.* at 455; *see* 11 JAMES USSHER, *The Power Communicated by God to the Prince* (c. 1600), *in* THE WHOLE WORKS OF THE MOST REV. JAMES USSHER, D.D. 223, 349 (Dublin, Hodges, Smith, & Co. 1864), *available online*.

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

Publishing 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.[45] The parliamentary privilege of "freedom of speech" provides that "debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[46] The Houses of Parliament interpreted this liberty to entail a copyright-like power to prohibit anyone—even their own members—from publishing debates.[47]

Certainly, privilege was enforceable only by contempt, as the common law courts refused to apply and indeed disparaged the secrecy privilege.[48] But contempt punish-

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[45] *See* Clive Parry, *Legislatures and Secrecy*, 67 Harv. L. Rev. 737, 741–43 (1954). Parliamentary privilege differs from "Crown copyright" over statutes and the Bible. Crown copyright would be a poor antecedent for Georgia, given its origins in religious suppression.

[46] Bill of Rights, 1689, 1 W. & M. sess. 2, c. 2, 6 Stat. Realm 142.

[47] *See Wason v. Walter*, 38 Eng. Rep. 34, 45 (Q.B. 1868); Carl Wittke, *The History of English Parliamentary Privilege*, 26 Ohio St. U. Bull. No. 2, 50–51 (1921), *available online*; 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).

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

ments could be severe.[49] 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.[50]

Nevertheless, a healthy industry of printing parliamentary debates began during the Long Parliament of 1640.[51] Disregard of the privilege was flagrant: Members not only published their speeches but occasionally registered them with the Company of Stationers.[52] 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.[53]

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

[49] *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), *available online* (noting unlimited fines and imprisonment as possible punishments).

[50] 1 Journals of the House of Commons 125, 127 (1802) (resolution and order of Feb. 14, 1581), *available online*. 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*, *available online*.

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

[52] *See* Cromartie, *supra* note 51, at 35.

[53] *See id.* at 37.

but with private grievances.[54] But with the publication of parliamentary debates, an informed public could understand and thus engage in the political process: "Political discourse in printed texts encouraged readers to interpret conflict between king and Parliament, and subsequently among parliamentary factions, as an ongoing debate."[55] 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.[56]

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" and Madison's sentiment "all governments rest on opinion."[57] Publication of nonbinding, official pronouncements of the legislature thus engendered the most 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 starker impact on America: It instigated freedom of the press.

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[54] *See* David Zaret, *Petitions and the "Invention" of Public Opinions in the English Revolution*, 101 Am. J. Soc. 1497, 1509–10 (1996).

[55] *Id.* at 1530.

[56] *See id.* at 1532.

[57] 1 John Locke, An Essay Concerning Human Understanding 2.28.10–.12, at 476–80 (Alexander Campbell Fraser ed., Oxford, Clarendon Press 1894) (1689), *available online*; The Federalist No. 49 (James Madison); *see* Zaret, *supra* note 54, at 1540; Elisabeth Noelle-Neumann, *Public Opinion and the Classical Tradition: A Re-Evaluation*, 43 Pub. Opinion Q. 143, 144–47 (1979).

When English newspapers began printing parliamentary debates in the mid-1700s, the House of Commons remarkably did exercise its privilege.[58] 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.[59]

The 1768 Middlesex election affair reinvigorated debate reporting, and Parliament again tried to block it.[60] 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.[61] Most confessed and made contrition on their knees, but John Miller, publisher of the *London Evening Post*, refused to appear.[62] 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.[63] In an infamous move that triggered days of protests, the House of Commons, frustrated with Crosby for protecting Miller, threw the Lord Mayor into the Tower instead.[64]

It is easy to imagine how parliamentary censorship in 1771 might have influenced Revolution-era American thinking on liberty and speech. There is consid-

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[58] *See* Peter D.G. Thomas, *The Beginning of Parliamentary Reporting in Newspapers, 1768–1774*, 74 ENG. HIST. REV. 623, 623 (1959).

[59] *See id.* at 624.

[60] *See id.*

[61] *See* 17 THE PARLIAMENTARY HISTORY OF ENGLAND 59–62 (London, T.C. Hansard 1813), *available online*.

[62] *See* 17 *id.* at 85–90.

[63] *See* 17 *id.* at 98–102.

[64] *See* 17 *id.* at 157–58, 186–90; *Brass Crosby's Case*, 95 Eng. Rep. 1005, 1006–07 (K.B. 1771).

erable evidence that it did. 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";[65] a week later it ran an open letter of the pseudonymous English polemicist Junius, excoriating Parliament's actions.[66] Benjamin Franklin knew of the incident,[67] as did Samuel Adams, who called the affair "a stretch of arbitrary power."[68] Americans celebrated John Wilkes, the London alderman who helped orchestrate the showdown between Parliament and the printers,[69] for championing freedom of the press.[70]

Americans continued to find parliamentary privilege antithetical to their principles.[71] One member of Congress declared that congressional debates were "offered to the public view, and held up to the inspection of the world."[72] And when in 1796, the New York Assembly jailed newspaper writer William Keteltas for "a breach

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[65] *See London, April 2*, VA. GAZETTE (Alex Purdie & John Dixon), June 13, 1771, at 1, 2, *available online*.

[66] *See Letter of Junius, from the Public Advertiser, April 22*, VA. GAZETTE (Williamsburg, William Rind), June 20, 1771, at 1, *available online*.

[67] *See* Letter from Benjamin Franklin to Joseph Galloway (Apr. 20, 1771), *available online*, *in* 18 THE PAPERS OF BENJAMIN FRANKLIN 77 (Ellen R. Cohn et al. eds., 1974).

[68] *See* Letter from Samuel Adams to Arthur Lee (July 31, 1771), *in* 2 RICHARD HENRY LEE, LIFE OF ARTHUR LEE, LL. D. 173, 174 (Boston, Wells & Lilly 1829), *available online*.

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

[70] *See* Roger P. Mellen, *John Wilkes and the Constitutional Right to a Free Press in the United States*, 41 JOURNALISM HIST. 2, 8 (2015).

[71] *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 434–35 (1983).

[72] 1 Annals of Cong. 443 (Joseph Gales ed., 1834) (statement of Rep. Jackson on June 8, 1789), *available online*.

of the privileges" by reporting a debate, among his supporters was "Camillus Junius," a pseudonym that surely recalls the 1771 English episode.[73]

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[74] 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; 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,[75] interest in codification accelerated in the mid-1800s, a result of successes of the Napoleonic *Code Civil* and lobbying by Jeremy Bentham.[76] 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."[77] Virginia was one

[73] *See* Alfred F. Young, The Democratic Republicans of New York: The Origins, 1763–1797, at 482–87 (1967).

[74] *See* 17 U.S.C. § 506(a).

[75] *See, e.g.*, Laws & Liberties of Mass. (Max Farrand ed., Harvard Univ. Press 1929) (1648).

[76] *See* Charles Warren, A History of the American Bar 512–13 (1911), *available online*.

[77] Act to Provide for the Adoption, Printing and Distribution of the Code of Alabama, ch. 9, § 1, 1851 Ala. Acts 22 (Feb. 5, 1852), *avail-*

of the first to enact a civil code during this period,[78] and its experience particularly reflects both recognition of the public value of official annotations and a lack of concern for copyright exclusivity in them.

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."[79] The revisors, John M. Patton and Conway Robinson, produced five reports over the next few years in response.[80]

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."[81] In the section on amending pleadings at trial, for example, the report contains

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able online; ALA. CODE 797 (John J. Ormond et al. eds., 1852), *available online* (noting appointment of Henry C. Semple to this position).

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

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

[80] JOHN M. PATTON & CONWAY ROBINSON, REPORT OF THE REVISORS OF THE CODE OF VIRGINIA (Richmond, Samuel Shepherd 1847–1849), *available online*.

[81] 1 *id.* at ix.

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."[82] The revisors' reports are thus much like Georgia's annotated code, containing both statutes that were ultimately enacted into law and nonbinding explanatory annotations.[83]

Nevertheless, the revisors' annotations were openly copied. 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."[84] Among other things, the digest reproduces wholesale the annotation on pleading amendments.[85]

In its *amicus* brief in this case, Virginia contends (at 2) that without copyright protection, it might "cease production of an official annotated code." 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.[86] Indeed, the secretary of the commonwealth, Colonel George W. Munford, appeared to

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[82]4 *id.* ch. 177, § 7, at 873–74 n.*.

[83]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), *available online* (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.

[84]1 JAMES M. MATTHEWS, DIGEST OF THE LAWS OF VIRGINIA OF A CIVIL NATURE iv (Richmond, J.W. Randolph 1856), *available online*.

[85]1 *id.* ch. 19, § 7, n.5, at 235–36.

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

approve of Matthews's digest in the preface to Virginia's 1860 code.[87]

To be sure, the lack of litigation may reflect the more limited nature of copyright law at the time,[88] 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."[89] 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.[90] Virginia's 1887 code also contained notes and references to cases, for example on protecting householders from certain debt collections.[91] 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.[92]

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 revi-

[87]George W. Munford, *Preface* to VA. CODE iii, iii (2d ed. 1860), *available online*.

[88]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).

[89]Munford, *supra* note 87, at iii, v.

[90]*See* VA. CODE ch. 65, n., at 378.

[91]VA. CODE ch. 178, n. (1887).

[92]*See* E.C. Burks et al., *Preface* to VA. CODE iii, v.

sors 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."[93] They understood that the task of the state explaining the law devolves not from private pecuniary interests but from basic duties of a sovereign to its citizens.

II. History Counsels a Conservative Approach to State Assertion of Copyright in Legal Materials

History carries multiple insights relevant to disposition of the question presented, namely whether copyright law allows a government to muzzle access to official state-authored materials such as annotations to a legal code. Four 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 (e.g., at 3) that edicts of government for this case are limited to those that "establish any en-

[93] 4 Patton & Robinson, *supra* note 80, at iii–iv; *see also* Munford, *supra* note 87, at iv (compiler acknowledging that "he has felt the responsibility deeply, and no thought or labor has been spared in the earnest endeavor to accomplish the task"); Burks et al., *supra* note 92, at v ("[O]ur utmost endeavor has been to discharge our whole duty faithfully and conscientiously.").

forceable rights or obligations," then, is inconsistent with millennia of history.

From the beginning, nonbinding commentaries and annotations have carried legal weight. The Romans respected the nonbinding advice of the Senate and gave special weight to commentators having the imprimatur of *jus respondendi*.[94] The Qing dynasty code visually distinguished official and private commentaries, literally interweaving the former with the statutory text.[95] And 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.[96]

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[97] and English publicists[98] understood, law 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.[99] Promulgated law checks arbitrary government power, much to the chagrin of the Confu-

[94] *See supra* notes 5–10 and accompanying text. To avoid repetition, the "*see*" signal and phrase "and accompanying text" are omitted hereafter.

[95] *Supra* notes 22–25.

[96] *Supra* notes 38–42.

[97] *Supra* notes 14–15.

[98] *Supra* notes 33–36.

[99] *Supra* notes 54–57.

cians[100] and Colonel Oslow.[101] And promulgated law sets a historical marker of a society's culture, without which a study such as the present brief could not exist.

Nonbinding but official pronouncements of government 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."[102] It was the printing of parliamentary debates that spurred public participation in the legislative process.[103]

In particular, nonbinding pronouncements uniquely serve one 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.[104] 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.[105]

That the full body of law encompasses both binding and nonbinding texts counsels against discarding any of

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[100] *Supra* notes 16–18.

[101] *Supra* notes 60–64.

[102] *Supra* notes 30–31.

[103] *Supra* notes 54–57.

[104] 1 Johnson, *supra* note 20, at 43; *see* Dingledy, *supra* note 11, at 235.

[105] *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. Pub.Res.Org, Inc.*, 906 F.3d 1229, 1250–51 (11th Cir. 2018) (Pet. App. 43a–44a).

them from rights of public access as Georgia would have this Court do. 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.

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 such as Georgia 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.

Georgia's arguments find uneasy company with the ancient Confucians[106] and the English anti-publicists,[107] 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 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.[108]

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[106] *Supra* notes 14–15.

[107] *Supra* notes 37–44.

[108] *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).

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 its direction.[109] 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.[110] Georgia's 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, Georgia repeatedly analogizes to private 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. 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 of centuries. Justinian declared two commentaries, the *Digest* and *Institutes*, official components of the *Corpus Ju-*

[109] *Supra* note 42.

[110] *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).

ris Civilis alongside the statutes.[111] Annotations have been part of the Chinese legal tradition since at least the 200 B.C. Han dynasty code.[112] England did not develop a tradition of publishing official commentaries on laws until about the 20th century,[113] but annotated codes were frequent in Virginia and other states.[114]

By contrast, neither case reports nor private treatises have traditionally been promulgations of the state. Private treatises on law abounded in Rome, but the emperors distinguished the unofficial from the official through proclamations and *jus respondendi*.[115] English case reports were also understood to be private works: The medieval Year Books were unofficial and generally attributed to lawyers or law students,[116] and the nominate reports that followed identified the names of private compilers—Plowden, Dyer, Coke.[117] When Lord Coke opined in *Dr. Bonham's Case*[118] that the king's statutes were not above the law (an early exercise of judicial review), James I kicked him off the Court of Common Pleas and then in 1616 ordered Coke to "correct his *Reports*" of

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[111] *Supra* notes 11–13.

[112] *Supra* notes 19–25.

[113] *See* MAY, *supra* note 49, at 442; CABINET OFFICE, GUIDE TO MAKING LEGISLATION para. 11.9, at 78 (July 2017) (U.K.), *available online*.

[114] *Supra* notes 88–92.

[115] *Supra* notes 8–10.

[116] *See* 2 HOLDSWORTH, *supra* note 29, at 532–36; Michael Bryan, *Early English Law Reporting*, 4 U. MELB. COLLECTIONS 45, 46 (2009), *available online*.

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

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

the case.[119] Coke refused, and because the reports were his own and not the Crown's, he could.[120]

When Georgia deems its official annotated code 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 held the pen is of little consequence: The Justinian *Digest*[121] and Virginia codes[122] were also privately authored under commission and subsequently ratified. Nor is there much weight to Georgia's supposedly benign motive of using copyright to subsidize production of annotations—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 for Georgia is that by designating an annotated code as *official*, the 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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[119]Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 50 (1926).

[120]*See id.* at 50–51.

[121]*See* Dingledy, *supra* note 11, at 235.

[122]*See supra* notes 79–80.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A
Quotation and Citation Conventions

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 names are expanded.

Citations to Roman law and histories follow the classical format [book].[section].[sentence] throughout. Because Locke's *Essay* is also organized into books and sections, the same format is followed for it. For each, a specific translation or reprint is referenced; the volume and page numbers also given with the citations are indexed to that translation or reprint.

To ensure maximum accessibility of the historical works in this brief, public domain editions have been cited wherever possible.