INVOCATIONS OF MEMORY IN STATE CONSTITUTIONAL LAW

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INTRODUCTION

There has been a recent surge of interest in state constitutional law. As federal constitutional law has become an increasingly inhospitable home for certain rights, commentators and advocates have looked to state constitutions as an alternative. This trend is not without precedent. Four decades ago, Justice William Brennan influentially highlighted the capacity of state constitutions to safeguard rights, especially when the U.S. Supreme Court adopted a more conservative stance towards parallel rights in the federal constitution.[1] In more contemporary discussions, figures such as Judge Jeffrey Sutton and Justice Goodwin Liu have promoted the study of state constitutions.[2] Judge Sutton has famously argued that neglecting to leverage both federal and state legal arguments is like a basketball player opting for a single free throw shot when two shots are available.[3] Interest in state constitutional law has grown all the more in the years after that observation, especially after the overturning of *Roe v. Wade*.

In his new book, *Memory and Authority*, Jack Balkin provides insightful explanatory frameworks for understanding uses of history in constitutional interpretation.[4] While the book focuses primarily on federal constitutional interpretation, Professor Balkin highlights three attributes of state constitutional law. First, he points out that state constitutional provisions have sometimes served as a precursor or model for federal constitutional provisions.[5] Second, akin to its federal equivalent, state

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[1] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495, 501–03 (1977).

[2] *See, e.g.*, JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 194–96 (2018); Hon. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1331, 1336–37 (2017).

[3] SUTTON, *supra* note 2, at 173–74.

[4] JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 3–5 (2024).

[5] *Id.* at 60–61.

constitutional doctrine represents a platform for what he calls, "cafeteria originalis[m]." By this, he means that originalism is often merely one of several approaches a judge may consider, rather than the sole method.[6] At the same time, he acknowledges that originalism in state judicial decision making is on the rise.[7] Lastly, Balkin observes that there are relatively fewer legal arguments invoking the framers of state constitutions than those of the federal constitution.[8] He surmises that the relative simplicity of amending state constitutions, as opposed to the federal constitution, may contribute to this difference in esteem.

This Symposium Essay discusses the roles of history and memory within the realm of state constitutional law. Building on Professor Balkin's observations, I offer two claims. The initial argument, delineated in Part I, is descriptive. While the practice of state constitutional law often mirrors that of federal constitutional interpretation, the use of history in state constitutional interpretation has unique characteristics, both with respect to text and ethos.[9] Regarding textual analysis, understanding the language of a state constitution often involves engaging with a concept referred to by some scholars as "interconstitutionalism."[10] This phenomenon occurs when a single governmental body has operated under multiple constitutions. Often, language present in the current constitution can be traced back to similar or identical terms in preceding documents. This historical overlap leads to complex interpretive challenges. Further complexity arises with the application of originalism to these challenges,[11] compelling interpreters to determine the precise "original" moment to consider: the adoption of the new constitution or that of an older iteration. The relatively frequent adoption of new state constitutions—beyond mere amendments—introduces interpretative principles that are unnecessary at the federal level, fostering historical interactions that are distinct from those in federal constitutional practice. Moreover, state courts sometimes invoke the ethos and unique histories of their states when interpreting the proper reach of rights-based and structural doctrines. These moves are especially prominent when a state court is interpreting a state constitutional provision differently than the way a parallel provision has been interpreted in the federal constitution or in other state constitutions.

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[6] *Id.* at 73. Balkin suggests that this eclectic originalism is possibly more prevalent in state constitutional law than in its federal counterpart, attributing this to the experimental nature of state court arguments. *Id.*

[7] *Id.* at 73 & 290 n.43 (first citing SUTTON, *supra* note 2, at 20, 174–76; then citing Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771, 782 (2021); and then citing Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341 (2017)).

[8] *Id.* at 73.

[9] These two modalities—text and ethos—are among the eleven offered by Balkin: Text, Structure, Purpose, Consequences, Judicial Precedent, Political Settlement/Convention, Custom, Natural Law, Ethos, Tradition, and Honored Authority. *Id.* at 22.

[10] *E.g.*, Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 330 (2022).

[11] *See supra* note 6 and accompanying text.

The second assertion, presented in Part II, adopts a more aspirational tone. Numerous scholars have advocated for the inclusion of marginalized voices in historical arguments. Despite being in the majority, the voices of women and people of color were often historically suppressed through structural and physical violence. Therefore, their historical views and voices can unwittingly be overlooked today without attention and care.[12] This is not a minor problem to be treated as an unfortunate feature of the past before quickly moving on and deploying historical arguments that continue to mute and ignore their perspectives. I have previously contended that neglecting to incorporate these perspectives introduces ethical, democratic, and empirical challenges.[13] In Part II of this Essay, I observe that the distinctive nature of state constitutional analysis suggests that incorporating marginalized voices into the historical narrative of state constitutions may differ from the federal approach across both dimensions explored in Part I: textual interpretative principles and ethos. State constitutions present both unique opportunities and unique risks.

In both Parts of this discussion, Georgia will play an outsized role as a case study for several reasons. First, Georgia's current state constitution, ratified in 1983, was the most recently adopted state constitution in the United States until Alabama's recent adoption of a new constitution in 2022. Second, as a Southern state that seceded from the Union and was defeated in the Civil War, Georgia enacted multiple constitutions during the Reconstruction Era, which reflected varying degrees of inclusivity. Notably, the 1868 constitution was developed and approved by a racially diverse group of citizens, incorporating people of color (or, rather, men of color) into the narrative of the state's early constitutional legacy. Third, as one of the original thirteen colonies, Georgia's history provides a broader backdrop than states that joined the Union later. Lastly, Georgia has adopted explicit principles of constitutional interpretation, including originalist principles, making it an insightful case study for examining the role of history in state constitutional law.

I. DISTINCTIVE FEATURES OF HISTORY IN STATE CONSTITUTIONAL LAW

A. Interconstitutionalism and Textual Canons

State constitutional interpretation often involves contending with what Jason Mazzone and Cem Tecimer have called "interconstitutionalism." They have described the phenomenon as "use of a polity's antecedent constitution(s) to generate meaning for that same polity's current constitution."[14] As they observe, "[c]ourts

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[12] *See* Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization*, 2022 SUP. CT. REV. 111, 115; Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 391–92 (2018).

[13] Fred O. Smith, Jr., *The Other Ordinary Persons*, 78 WASH. & LEE L. REV. 1071, 1075–78 (2021).

[14] Mazzone & Tecimer, *supra* note 10, at 326.

and other interpreters regularly engage in interconstitutionalism, keeping alive the seemingly dead constitutions of the past."[15] While this is a routine feature of constitutions outside of the United States, it is also a feature much closer to home because thirty states have adopted more than one constitution. Depending on how one counts, Georgia, for example, is on its tenth. Moreover, state constitutions are frequently amended. Because of the existence of successive constitutions, canons of interpretation have developed in state constitutional interpretation that are distinct from federal constitutional interpretation.

Two canons of interpretation are of particular import. First, if the state high court has interpreted a provision, and then the provision is readopted, the text means what it meant before.[16] As the Louisiana Supreme Court put it in *Succession of Lauga*, "[w]hen a constitutional provision is identical or very similar to that of a former constitution, it is presumed that the same interpretation will be given to it as was attributed to the former provision."[17] Or in the words of the North Carolina Supreme Court in *Williamson v. City of High Point*, when an old provision reappears in a new constitution, "it will be presumed to have been retained with a knowledge of the previous construction, and the courts will feel bound to adhere to it."[18] This is a common presumption in state constitutional law.[19]

A complexity arises in states that rely on originalism as their chief interpretative methodology,[20] which has led to a second canon in at least one state. The puzzle is

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[15] *Id.*

[16] *See, e.g.*, Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 263–64 (Fla. 2005); Succession of Lauga, 624 So. 2d 1156, 1165 (La. 1993); State *ex rel.* Ashcroft v. Blunt, 813 S.W.2d 849, 854 (Mo. 1991); Paper Supply Co. v. City of Chicago, 317 N.E.2d 3, 9 (Ill. 1974) (applying prior construction "unless it is apparent that some other meaning was intended"); Richardson v. Hare, 160 N.W.2d 883, 886 (Mich. 1968) (same); First Trust Co. of Lincoln v. Smith, 277 N.W. 762, 773 (Neb. 1938) ("[W]hen the form of words used in the constitution is borrowed from an older source, it comes laden with its previous meaning." (citation and punctuation omitted)); Williamson v. City of High Point, 195 S.E. 90, 94–95 (N.C. 1938); *Ex parte* W. Union Tel. Co., 76 So. 438, 438–39 (Ala. 1917); Elliott v. Ashby, 52 S.E. 383, 384 (Va. 1905); Cline v. State, 37 S.W. 722, 728 (Tex. Crim. App. 1896).

[17] 624 So. 2d at 1165.

[18] 195 S.E. at 95.

[19] *See supra* note 16.

[20] *See* Elliott v. State, 824 S.E.2d 265, 288 (Ga. 2019); Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n, 990 N.W.2d 122, 132 (Wis. 2023) ("Just as the purpose of statutory interpretation is to determine what the statutory text means, the purpose of constitutional interpretation is to determine what the constitutional text meant when it was written, commonly called the original public meaning or original understanding."); State v. Barnett, 537 P.3d 212, 215 (Utah 2023); Matthews v. Indus. Comm'n of Ariz., 520 P.3d 168, 174 (Ariz. 2022); Commonwealth v. Rose, 81 A.3d 123, 127 (Pa. Super. Ct. 2013), *aff'd*, 127 A.3d 794 (Pa. 2015). At least two justices on the Alabama Supreme Court have, in multiple concurring opinions, pressed for originalism to serve as that state's dominant mode of state constitutional interpretation. *See* Barnett v. Jones, 338 So. 3d 757, 766 (Ala. 2021); LePage v. Ctr. for

this: if a court is required to determine the original public meaning of a provision that has appeared in multiple versions of the constitutions, what period do we look to in searching for the "original" meaning? Specifically, when seeking the "original" meaning, should the focus be on the period when the current constitution was ratified, or should it be on the initial instance the provision was incorporated into the constitution? In other words, if a constitutional clause is enacted in one state's constitution at Time 1 (T1) and subsequently reincorporated in a new constitution for the same state at Time 2 (T2), does the common understanding of the term at T1 hold relevance?

This puzzle has led to this second canon: Regardless of whether a provision has previously received an authoritative interpretation, courts should nonetheless still presume that a provision means at T2 (or T3 or T4 or T10) what it meant at T1. As the Georgia Supreme Court put it:

> Because the meaning of a previous provision that has been readopted in a new constitution is generally the most important legal context for the meaning of that new provision, and because we accord each of those previous provisions their own original public meanings, we generally presume that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary. . . . This presumption of constitutional continuity helps maintain the stability of Georgia's constitutional law, while still yielding when other considerations make clear that the people have changed the meaning of a provision.[21]

The assumption that continuity in constitutional provisions equates to an unchanged interpretation warrants a closer examination for several reasons. First, when a new constitution incorporates an uninterpreted provision, it is overly optimistic to assume that the electorate is fully aware of the original public intentions behind it. This is particularly doubtful when significant time has elapsed between the provision's initial adoption and its most recent inclusion. Second, the argument for "stability" holds less water in defending the presumption of continuity than it does for the presumption of authoritative interpretation. If all prior constitutional interpretations were wiped from the books whenever a new constitution was adopted, this could cause great instability. However, if the provision has not been previously interpreted, the concern for stability is much less pressing. After all, what exactly is being destabilized if there is no existing interpretation to be upended?

Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591, at *9 (Ala. Feb. 16, 2024) (Parker, C.J., concurring); *id.* at *27 (Cook, J., dissenting).

[21] *Elliott*, 824 S.E.2d at 269–70.

Moreover, the continuity presumption worsens, rather than ameliorates, some of the most severe ethical and democratic problems that accompany originalism. The earlier we go in our nation's history, the fewer people who participated in making known what they thought words in our laws meant. Exclusion on the basis of race, sex, and class were the norm at our nation's Founding, not the exception. *Most* adults (and even most citizens) could not vote. When we apply past "public" meaning without any consultation of what the majority thought (i.e., women and people of color), we amplify these anti-democratic norms. We also perpetuate past harm inflicted against those who came before.

Certainly, there might be a stronger justification for referring to historical interpretations to understand the meaning of a provision in the context of the federal constitution, considering its longevity and the singular document under interpretation. However, when the document in question has been adopted more recently, relying on earlier meanings can seem like an unnecessary dismissal of past legal injustices and acts of dehumanization. This approach appears even less tenable considering the baseless assumption that the adoption of a new constitution signifies an intention to replicate the actions of predecessors precisely, especially when the argument that discontinuity would lead to instability seems relatively weak.

B. Ethos

Another modality worthy of consideration at the state level is the degree to which state constitutional arguments sometimes depend on a state-specific ethos, rather than a broader national ethos. Consider, for example, the following three appeals to ethos. First, in the oft-cited case of *Ravin v. State*,[22] the Alaska Supreme Court concluded that it violated their state constitutional right to privacy to prohibit private marijuana possession and consumption.

> Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.[23]

Another appeal to a state's historical ethos was made in the 1987 case of *State v. Henry*,[24] when the Oregon Supreme Court ruled that, under the Oregon Constitution, speech that includes obscene content was safeguarded, rendering a law that

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[22] 537 P.2d 494, 503–04 (Alaska 1975).

[23] *Id.* at 504.

[24] 732 P.2d 9, 16–17 (Or. 1987).

criminalized the distribution of such material unconstitutional. Appeals to the state's historical ethos informed the court's rhetorical choices:

> [A]lthough Oregon's pioneers brought with them a diversity of highly moral as well as irreverent views, we perceive that most members of the Constitutional Convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others.[25]

Around the same time, one of the most fascinating approaches to historical ethos arose from Hawaii. By way of statute, "the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and give consideration to the 'Aloha Spirit.'"[26] Embodied in the Aloha Spirit are "kindness," "unity," agreeability, "humility," and "patience." "'Aloha' means mutual regard and affection and extends warmth in caring with no obligation in return. 'Aloha' is the essence of relationships in which each person is important to every other person for collective existence."[27]

In addition to the broad appeals to states' historical ethos represented in these three authorities, state courts also sometimes expressly reference the founders of their state, by name, to inform their legal arguments. When Pennsylvania recently considered whether the state's system of funding public education violated the equal protection clause, the detailed opinion observed that "[e]ven before education became part of the Constitution, our founders recognized its importance. William Penn, in his 1681 Frame of Government of Pennsylvania, the Commonwealth's first charter, provided for the creation of schools, and Penn himself believed that no cost should be spared in providing for education."[28] The opinion is not unique in Pennsylvania in terms of referencing William Penn as evidence of the state's oldest values. A few years earlier, for example, when the state Supreme Court considered whether legislative districts in the state were unconstitutionally gerrymandered under the state constitution, the court engaged in a detailed explication of the state's history. "Our Commonwealth's centuries-old and unique history has influenced the evolution of the text of the Free and Equal Elections Clause, as well as our Court's interpretation of that provision," the court observed.[29] It added that "the general character of our Commonwealth during the colonial era was reflective of the

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[25] *Id.* at 16.

[26] Act of May 19, 1986, ch. 202, § 1, 1986 Haw. Sess. Laws 349, 349 (codified at HAW. REV. STAT. § 5-7.5 (2024)).

[27] *Id.*

[28] William Penn Sch. Dist. v. Pa. Dep't of Educ., 294 A.3d 537, 549 (Pa. Commw. Ct. 2023).

[29] League of Women Voters v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018).

fundamental desire of Pennsylvania's founder, William Penn, that it be a haven of tolerance and non-discrimination for adherents of various religious beliefs . . . ."[30]

More broadly, state constitutional opinions also reference the intentions of the "framers" of their state constitutions, even if they do not always cite them by name. Consider Texas, though it is far from alone on that score.[31] In *Heitman v. State*, for example, the Texas Criminal Court of Appeals relied in part on the intentions of the framers of the Texas Constitution when concluding that the state's protection against unreasonable searches was likely broader than the federal counterpart.[32] In reaching this conclusion, the court noted that "the constitution and the citizens of this state" chose to make the Bill of Rights the first article of the document.[33] In the same opinion, the court cited specific proposals offered by delegates at the State's founding to show that "the framers of the 1845 constitution did not intend for our state constitution to be interpreted in lock-step with the federal constitution."[34]

II. PERIL AND PROMISE

When we appeal to history today in service of constitutional arguments, there are democratic, informational, and ethical risks.[35] On the democratic front, we risk

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[30] *Id.* It should be observed, however, that William Penn might be a singular figure in terms of his prominence in state constitutional arguments. There appear to be fewer instances, for example, of Rhode Island courts referencing the beliefs of Roger Williams or of Georgia courts referencing the beliefs of James Oglethorpe. *But see, e.g.*, Allen v. Thomas, 458 S.E.2d 107, 109 (Ga. 1995) (Sears, J., dissenting) ("From the time 'Georgia was founded as a "New Eden" to embody the humanitarian visions of its creator, General James Oglethorpe,' this State has highly prized the Great Writ as 'one of the basic procedural safeguards against tyranny . . . .'" (footnote omitted)).

[31] *See, e.g.*, Republican Party of Texas v. Dietz, 940 S.W.2d 86, 89 (Tex. 1997) ("We also may consider such things as the purpose of the constitutional provision, the historical context in which it was written, the collective intent, if it can be ascertained, of the framers and the people who adopted it, our prior judicial decisions, the interpretations of analogous constitutional provisions by other jurisdictions, and constitutional theory."); Dawkins v. Meyer, 825 S.W.2d 444, 448 (Tex. 1992) ("Because [the appellant's] proffered construction of article III, section 19 would violate the intent of the framers of our constitution, we decline to adopt it."). Other states also consider framers' intentions. *See* Brown v. Gianforte, 488 P.3d 548, 557 (Mont. 2021) ("Even in the context of clear and unambiguous language . . . we have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." (quoting Nelson v. City of Billings, 412 P.3d 1058 (Mont. 2018))); Am. Bush v. City of S. Salt Lake, 140 P.3d 1235, 1239 (Utah 2006) ("We thus inform our textual interpretation with historical evidence of the framers' intent.").

[32] 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).

[33] *Id.*

[34] *Id.*

[35] A deeper exposition of the ideas reflected in this paragraph can be found in prior work. *See generally* Smith, *supra* note 13.

embracing documents based on the past assent of "the people," when most people's views were not heard. On the informational front, there is a risk that if we don't consult the voices of subjugated people, we will reach an inaccurate answer to the question of what an ordinary member of the public would have thought about a word or phrase at any given time. Words like "cruel and unusual," "equal," or "liberty" might have meant something different to the enslaved Black woman, or the Native person dispossessed of their land than it meant for constitutional drafters. For instance, an enslaved Black woman, separated from her children and sold into slavery, might perceive this as a gross violation of what "liberty" means.[36]

As for ethics, there's the risk of inflicting posthumous harm on those who were locked out of democracy (and the ruling class's conceptions of humanity).[37] Individuals today can be complicit in past harms. So much of what the law protects is one's ability to leave a legacy, whether that be through testamentary disposition, procreation, or participating in the creation of governing documents that outlast us.[38] If a cruel inhumanity blocked many (and often, most) adults in the United States from an equal ability to engage in legacy-making pursuits, we can deepen that harm to those excluded individuals if we use history in ways that act as if it is a non-problem, or a minor problem, to decide what "the public" thought two hundred years ago if we cannot meaningfully investigate what subordinated members of the public thought.

These perils are as true in the context of state constitutional law as they are in federal constitutional law. In some ways, the perils are worse. When Mississippi and Alabama adopted new constitutions around the turn of the twentieth century, they not only did this without regard for the voices of Black Americans, they passed constitutions with the *goal* of excluding them.[39]

Discussions persist as to how to engage in accurate, inclusive originalism and historically emphasized two textual canons which appear in state constitutional law in light of the fact that, in many states, new constitutions have been adopted over time. It also emphasized ways that state constitutional law depends not only on arguments about America's national ethos, but also make more specific arguments about states' ethos, history, and values. There are ways that these features can either deepen or mitigate some of the historical, ethical, and empirical problems associated with originalist legal argumentation.

A. Textual Canons

As observed, in the realm of state constitutional law, two distinct interpretive principles have emerged, setting it apart from federal constitutional interpretation.

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[36] *See generally* Goodwin, *supra* note 12.

[37] For a deeper account of the ideas reflected in this paragraph, see generally Fred O. Smith, Jr., *On Time, (In)equality, and Death*, 120 MICH. L. REV. 195 (2021).

[38] *See* Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471, 1507–08 (2020).

[39] Hunter v. Underwood, 471 U.S. 222, 224 (1985) (observing this history of the 1901 Alabama constitution).

The first principle posits that if a provision found in the current state constitution was also present in a previous version of the constitution and had been subject to authoritative interpretation, such previous interpretations should presumptively dictate the meaning of the provision in the current constitution. The second principle suggests that when a provision recurs in successive versions of the state constitution, the understanding of the provision by the public at the time of its initial inclusion is presumed to reflect the public's understanding of the same or a similar provision in the most recent version of the constitution.

Both presumptions come with potential costs that can worsen the ethical, democratic, and informational costs of originalism. Let's take both in turn.

1. The Prior Authoritative Construction Canon

Sometimes a provision might have been authoritatively construed in a manner that failed to account for the views of politically subjugated groups, even when there is credible reason to believe that the members of that subjugated group would have viewed the text differently. Similarly, the provision might have been authoritatively construed in a manner that clashes with contemporary democratic and ethical values.

To concretize this observation, consider the "social status provision" in the Georgia constitution. Under that provision, "[t]he social status of a citizen shall never be the subject of legislation."[40] The provision was added to the state constitution during Reconstruction in 1868, the only time a significant number of Black Americans participated meaningfully in political life in the state until the 1960s roughly one hundred years later.[41] At the time of its adoption, white conservative opponents of this progressive constitution singled out this provision as cause for concern. One such critic was Benjamin Hill, who had served as a Georgia senator during the Civil War and would go on to serve in Congress when Black Americans were driven out of national politics at the end of Reconstruction.[42] He lamented that should the new constitution be adopted, and should this new social status provision be enacted, it would spell the demise of laws designed to separate the races.[43]

A year after the adoption of the constitution, however, a conservative state Supreme Court ruled that the provision meant precisely the opposite of what the

[40] Scott v. State, 39 Ga. 321, 324 (1869) (discussing GA. CONST. of 1868, art. I, § 11).

[41] *See* George Justice, *Reconstruction Conventions*, NEW GA. ENCYC. (Sept. 30, 2020), https://www.georgiaencyclopedia.org/articles/government-politics/reconstruction-conventions/ [https://perma.cc/XK9T-X35M]; W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 313–14 (1935).

[42] *See Benjamin Harvey Hill*, *Biography*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/H000587 [https://perma.cc/RG3W-83KF] (last visited Nov. 27, 2024).

[43] *See* B.H. Hill, *Speech on the Situation*, NEWNAN HERALD, Mar. 21, 1868, at 1.

progressive 1868 state constitutional convention almost certainly intended. In 1869, the Georgia Supreme Court confronted the question of whether the state's criminal ban on interracial marriage violated the social status clause.[44] The court found that the ban was entirely compatible with the new clause. Because "the Constitution forever prohibits legislation of any character, regulating or interfering with . . . social status," the provision "leaves social rights and status where it finds them. It prohibits the Legislature from repealing any laws in existence, which protect persons in the free regulation among themselves of matters properly termed social, and it also prohibits the enactment of any new laws on that subject in future."[45] Prior to the newly adopted constitution, the court further explained, "[t]here was no law to compel them to group together in social connection, persons who did not recognize each other as social equals."[46] Allowing interracial marriage and social integration would upset that prior state of affairs and therefore would violate the constitution's prohibition against making "the social status of [a] citizen . . . the subject of legislation."[47]

While the social status provision has subsequently lain moribund, in recent years, there have been some attempts to rouse it. Last year, in *Session v. State*, the Georgia Supreme Court confronted the question of whether a sex offender registry statute, as applied to an offender who moved to Georgia from another state, violated the social status provision.[48] The court rejected the argument. And in doing so, it confronted the racist interpretation that the Georgia Supreme Court imposed upon the "social status" provision in 1869. It opined that "shameful" cases like the 1869 opinion

> serve as a reminder that we focus on history not because it is always good, but because the rule of law requires it. To discern the meaning of legal text, we must determine its original public meaning—what the language meant at the time and place in history when it was enacted. Original public meaning is an interpretive methodology that promotes the rule of law by, among other things, constraining judges. By its application, we limit ourselves to only those interpretations of legal text that can be supported by text, history, and context. The meaning produced by those interpretations can only be as good as our history.[49]

While the past interpretation was racist, "a proper application of our interpretive methodology requires honest grappling with that history; we cannot wish it away."[50]

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[44] *Scott*, 39 Ga. at 321.
[45] *Id.* at 324.
[46] *Id.* at 325.
[47] *Id.* at 321.
[48] 887 S.E.2d 317, 328–29 (Ga. 2023).
[49] *Id.* at 328.
[50] *Id.*

And in any event, subsequent cases like *Loving v. Virginia* sapped the 1869 opinion of "[a]ny such meaning."[51]

This case exposes the limits of the authoritative prior construction canon. The most recent Georgia constitution was adopted not in 1868, but in 1983. As such, the relevant question in determining the original public meaning is how the public would have understood the statute in 1983—after the Civil Rights Movement, after *Loving v. Virginia*, and near the time Martin Luther King, Jr. Day became a state holiday. To presume that voters intended to give renewed force to a racist, anachronistic 1869 case is an unsupported if not unsupportable conclusion.

This is not to suggest that the authoritative construction canon lacks all persuasive force. There are indeed situations where it is more logical to deduce that the framers of the newest constitution were aware of the earlier interpretation. Consider, for instance, if a state high court had interpreted or applied the meaning of a provision just a year prior to the adoption of the newest constitution. Or likewise, consider if a provision were so salient that there was reason to believe that the general populace was aware of an earlier interpretation. In either circumstance, evidence might support the argument that the adopters of the most recent constitution intended to preserve the earlier interpretation. Additionally, even apart from these two circumstances, stability and administrability might justify a presumption that prior precedent controls. Discarding all precedents as obsolete with the adoption of each new constitution would be grossly inefficient.

Nonetheless, this presumption must at times be revisited, with its validity varying according to the context. Originalists employing the prior-construction canon need to keep their focus on the crucial question: What did the public intend at the time the document being analyzed was adopted? Ignoring this principle can lead to perplexing scenarios, such as the need to consider a precedent from 1869 that was likely irrelevant to the public awareness in 1983. Prioritizing the understandings of those who adopted the most recent constitution is vital, as it aligns with the demands of the rule of law.

More critically, by not adequately considering the perspectives of the latest constitution's adopters, we miss an opportunity to address some democratic and ethical challenges associated with overemphasizing a historically distant viewpoint that may perpetuate anti-democratic and unethical norms. The drafting and ratification of the 1983 constitution saw meaningful participation from women and people of color.[52] Recognizing their perspectives is not just a requirement of the rule of law; it also ensures that our approach to constitutional interpretation avoids complicity in the legal marginalization of past individuals whose voices were excluded.

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[51] *Id.* at 328–29 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

[52] George D. Busbee, *An Overview of the New Georgia Constitution*, 35 MERCER L. REV. 1, 3 (1983).

To navigate these complex considerations, we do not have to discard the presumption entirely, but we should approach its application with critical inquiries that place the recent public interpretation at the forefront. These inquiries should include:

> (1) *The recency of authoritative construction or application*: When was the constitutional provision last authoritatively constructed or applied? A more recent construction lends greater strength to the presumption.
> (2) *Subsequent developments*: Have there been any legal or societal developments that make the previous construction outdated or irrelevant?
> (3) *Historical exclusion*: Was the earlier construction made during a period of legal exclusion, and is there evidence to suggest that those excluded from political and legal discourse might have held differing views from the limited demographic that initially construed it?

By addressing these questions, we can align state constitutional interpretation more closely with the understandings and intentions of the public at the time the most recent provision was enacted, facilitating a more inclusive, more democratic, and more accurate approach.

2. The Continuity Canon

There are also risks that attend the presumption that a contemporary constitution intended to bear the same meaning as at its initial adoption. That is, even when a provision has not been authoritatively construed—perhaps *especially* when a provision has not been authoritatively construed—placing exclusive focus on the first time a provision appeared in a state constitution can lead to the wrong answer. By "wrong," here, I mean an answer that is inconsistent with the likely original public meaning as of the time the operative document was enacted. By "wrong," I also mean that it can deepen harm to those who could not previously participate in the political process by virtue of their identity or social status.

Imagine a state adopts a new constitution in 2024, incorporating a clause first established in 1789. Should we then assume that the electorate of 2024 imbues every term in that clause with the same meaning and significance as those alive in 1789? Did the word "equal" convey the same meaning to an average person in 1789 as it does today? What about "liberty"? Regarding legal terminology, such as "due process," wouldn't today's legal community perceive this concept differently compared to their counterparts two centuries ago?

Moreover, when interpreting legal provisions as retaining their original meaning, courts must recognize that this assumption holds less weight in situations where there is credible evidence suggesting a diverse understanding of terms among historically excluded groups. This discrepancy arises from the traditional reliance on a narrow range of sources, like legal treatises and laws, which were often created by a distinct minority. When considering the broader populace—especially when

including women and people of color who were historically excluded from legislative processes—the presumed understanding of legal terms becomes less certain. Therefore, in cases where evidence of a wide-ranging consensus is lacking, greater emphasis should be placed on interpreting the constitution based on the more readily ascertainable views of those who framed the most recent, operative version of the document.

A recent opinion from the North Carolina Supreme Court exemplifies these themes and challenges, as the court looked to an eighteenth-century conception of the right to vote freely, despite interpreting a constitution that was adopted in 1971. In *Harper v. Hall*, at issue was the proper interpretation of a clause in the North Carolina Constitution that succinctly reads: "All elections shall be free."[53] In a series of high-profile opinions, the state's high court had wrestled with the clause's implications for challenges to electoral redistricting maps that intentionally suppress voters' political power on the basis of their perceived membership in a disfavored political party. To the extent such maps lock one party in power, giving them the power to govern irrespective of voters' will, are such elections "free"?

In *Harper IV*, North Carolina Supreme Court's most recent opinion on the subject, it ruled that it did not violate the state's free elections clause to intentionally suppress voters' power on account of their political power.[54] In reaching this conclusion, the Court was interpreting a provision that was included in the state's operative constitution, adopted in 1971. But they were also interpreting a clause with much deeper historical pedigree. A free elections clause appeared in the state's very first constitution, adopted in 1776. This set up a now familiar interpretive puzzle: Do we care more about what North Carolinians thought about voting rights in 1971, or about how the right to vote would have been understood in 1776? Presuming that voters in 1971 had the same views about the right to vote as men and women in 1776 could produce radically different consequences, both because our conception of egalitarian norms and democratic inclusion have shifted, and because a wider range of people would have been able to participate in making their views about voting known in 1971, after the passage of the Fifteenth Amendment and, more consequentially, the passage of the Voting Rights Act of 1965.

Even though its most recent constitution was adopted in 1971, the state Supreme Court looked to 1776 to determine what its free election clause meant. The provision could not broadly protect universal suffrage, the court observed, because some people were denied the right to vote in 1776, based on characteristics like land ownership:

> [E]ven though our 1776 constitution stated that elections were "free," N.C. Const. of 1776, Declaration of Rights, § VI, other provisions limited the scope of that phrase. Notably, "free elections" did not mean that everyone could vote, N.C. Const. of

[53] 886 S.E.2d 393, 432 (N.C. 2023) (discussing N.C. CONST. art. I, § 10).
[54] *Id.* at 416.

> 1776, § VII (limiting the right to vote for senators to "freemen" who were at least twenty-one years old, lived in their county of residence for at least one year, and owned at least fifty acres of land in the same county for the preceding six months) . . . .[55]

At the risk of understatement, it is plausible that voters in 1971 did not generally believe that the right to vote should be legally confined to major landowners or men or a race of people deemed eligible to be "free." It is unnecessarily retrogressive to adopt a 1776 set of understandings to interpret a 1971 document.

B. Ethos

A final point is that appeals to a state's ethos are also opportunities for the construction of inclusive historical narratives. Precisely *because* there has been less ingrained myth-making about state framers and values than federal framers and values, state courts interpreting state constitutions have an opportunity to ensure that the narratives that are constructed account for voices of women, indigenous persons, and other people of color where possible. For example, the reference to "the Aloha spirit" in construing the Hawaii constitution may well serve as an example, drawing on heritage that is deeper than moment of colonization.[56] The colonization of Hawaii, like the colonization of the rest of the United States, was a brutal project that involved doing violence to the culture of a people.[57] The state constitution's embrace of ideals that predate colonizers is less complicit in that violence than a doctrine that ignores the existence and values of the colonized in constituting the state's constitutional memory.[58]

CONCLUSION

Balkin's inclusion of state constitutions in his important work is valuable, especially as individuals look more and more to those documents to secure rights. In the way of both text and ethos, state constitutional law is distinctive, leading both to peril and promise. On the textual front, one distinctive feature of state constitutional law is the need to interpret similar provisions in successive constitutions. This

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[55] *Id.* at 432.

[56] State v. Wilson, 543 P.3d 440, 459 (Haw. 2024) ("In Hawai'i, the Aloha Spirit inspires constitutional interpretation.").

[57] *See generally* HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I (1999).

[58] For an illuminating discussion of constitutional memory, and the subordination that can occur in that sphere, see generally Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022). Furthermore, in the American South, another example might be deeper reliance on Reconstruction Era legislatures that, for a brief moment, included Black freedmen. *See* DU BOIS, *supra* note 41, at 313–14.

is especially true when original public meaning serves as the constitutional lodestar. The duty to divine the intent of the public when the most recent constitution was adopted is counterbalanced by the fact that (a) stability of precedent is important as a practical matter and (b) the intentions of the public will sometimes be to carry forward a provision's prior meaning. Still, looking to the first moment of adoption to understand constitutional text can lead to an absurd place. A doctrine that leads to interpreting a twentieth-century constitution to restrict voting rights in light of eighteenth-century exclusion from the franchise is, on its face, worthy of close examination.[59] So too a doctrine that invites one to look to a long-ago court's racist anti-interracial marriage views to understand a 1983 provision.[60]

In the way of ethos, state courts sometimes draw on their unique histories, and the views of their specific framers, to interpret their state constitutions. This may provide some promise, however, to the extent that a state's understanding of its identity may sometimes be less durable than the grander constitutional myth-making that has taken place at the national level. Voices of persons excluded from our national constitutional memory can still have a place in an increasingly important place: state constitutional memory.

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[59] *See Harper*, 886 S.E.2d at 432.

[60] *See supra* note 51 and accompanying text.