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Editor's Note

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The Rediscovery of Georgia's Original Constitutions

Stephen J. Greenway, Jr.*

Georgia's constitutional history contains not one but ten state constitutions, and since 1845 the Supreme Court of Georgia has held the ultimate authority to interpret those constitutions. Litigants often urge the Georgia Supreme Court to engage in "lockstepping" and reflexively follow the Supreme Court of the United States' interpretation of the federal Constitution when interpreting the Georgia Constitution.¹ However, with its re-commitment² to textualism and originalism as the primary methods of constitutional interpretation,³ the Georgia Supreme Court, case by case, is recovering the original meaning of Georgia's constitutions. It is in the spirit of this state constitutional rediscovery

*Editor, *Annual Survey of Georgia Law*, MERCER L. REV., Vol. 75.

1. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018) (arguing that "[t]here is no reason . . . that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way" and describing the phenomenon of lockstepping as "[a] grave threat to independent state constitutions" and a "key impediment to the role of state courts").

2. Interpreting the Georgia Constitution according to its original public meaning is "not a new idea." *Olevik v. State*, 302 Ga. 228, 235, 806 S.E.2d 505, 513 (2017). See, e.g., *Padelford, Fay & Co. v. Savannah*, 14 Ga. 438, 454 (1854) ("[T]he Constitution, like every other instrument made by men, is to be construed in the sense in which it was understood by the makers of it at the time when they made it."); *Collins v. Mills*, 198 Ga. 18, 22, 30 S.E.2d 866 (1944) ("A provision of the constitution is to be construed in the sense in which it was understood by the framers and the people at the time of its adoption.").

3. See *Lathrop v. Deal*, 301 Ga. 408, 428, 801 S.E.2d 867, 882 (2017) ("When we inquire into the meaning of a constitutional provision, we look to its text, and our object is to ascertain the meaning of the text at the time it was adopted.") (citation omitted); *Session v. State*, 316 Ga. 179, 192, 887 S.E.2d 317, 327 (2023) ("[W]e interpret the Georgia Constitution according to its original public meaning.' 'And, of course, the Georgia Constitution that we interpret today is the Constitution of 1983; the original public meaning of that Constitution is the public meaning that it had at the time of its ratification in 1982.'" (quoting *Elliott v. State*, 305 Ga. 179, 181, 824 S.E.2d 265 (2019))).

that the *Mercer Law Review* dedicates this year's issue of its *Annual Survey of Georgia Law*.

Why should anyone care about state constitutional law? A number of reasons come to mind, beginning first with our system of federalism. The Federal Constitution secures the fundamental rights and liberties of all citizens, and the United States Supreme Court interprets those rights and liberties in the cases that come before it. Additionally, state constitutions like Georgia's also protect individual rights. In fact, the scope of those state-specific rights sometimes surpass those outlined in the Federal Constitution.

As one of the thirteen original states, Georgia boasts its own rich legal heritage. While Georgia's state constitution may mirror the Federal Constitution in some respects, it deserves independent interpretation based on its unique text and history. Studying state constitutional law underscores a basic truth about federalism: the scope of rights secured by state constitutions are based on each state's own history and tradition and are fundamentally distinct from those in the Federal Constitution. This distinction equips attorneys with two separate legal grounds when arguing cases involving constitutional rights, which becomes particularly advantageous when the federal doctrine does not favor a client's case.

Studying state constitutional law through a textualist and originalist lens also illuminates a state's distinct approach to legal challenges. For example, the Georgia Supreme Court's originalist decisions in cases such as *Olevik v. State*⁴ and *Elliot v. State*⁵ highlight Georgia's right against compelled self-incrimination, rooted in the Georgia Constitution's unique text and history. You might question why the Georgia Supreme Court should interpret the text of the Georgia Constitution according to Georgia's legal history. Once again, the answer lies in principles of American federalism, and the fact that divergent approaches across the states is a consistent theme in the story of American government.⁶ Therefore, where not preempted by a decision of the United States Supreme Court, the Georgia Supreme Court should interpret the extent of state constitutional guarantees, such as gun rights, privacy rights, and religious freedom—in alignment with the distinct provisions of Georgia's

4. 302 Ga. 228, 240, 806 S.E.2d 505, 516 (2017) (construing the Georgia Constitution's protection against compelled self-incrimination to also cover incriminating acts and, thus, broader than the United States Supreme Court's interpretation of the right against compelled self-incrimination under the Fifth Amendment).

5. 305 Ga. 179, 223, 824 S.E.2d 265, 296 (2019) (construing the Georgia Constitution's protection against self-incrimination to exclude the admission of evidence that a suspect refused to consent to a chemical breath test).

6. See generally JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021).

constitution, which embody the unique virtues embraced by the people of Georgia when they ratified it.⁷

A greater understanding of state constitutional law is also more likely to activate state-level democracy. When more people understand the protections afforded by their state constitution, greater participation in popular referendums aimed at reinforcing or amending state constitutional rights becomes more likely to occur.⁸

There are also a number of novel state constitutional questions yet to be resolved in Georgia that require greater exploration. For example, the Takings Clause under the Georgia Constitution contains a “Damaging Clause,” the scope of which has never been fully expounded.⁹ Georgia’s standing doctrine, as University of Georgia School of Law Professor Randy Beck explains in this year’s *Annual Survey*,¹⁰ was only recently expounded upon by the Georgia Supreme Court last year.¹¹ And in the

7. *Elliott*, 305 Ga. at 182, 824 S.E.2d at 269 n.4 (“Since the people are the ultimate ‘makers’ of the Georgia Constitution, this requires a focus on the public meaning, not the subjective intent of the drafters.”).

8. The United States Supreme Court’s originalist opinion in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), for example, has set off a flurry of democratic initiatives to determine the scope of abortion rights under state constitutions. *See, e.g.*, Jo Ingles, *Ohio votes in favor of amending the state constitution to enshrine abortion rights*, NPR (Nov. 7, 2023), <https://www.npr.org/2023/11/07/1209092670/2023-results-key-ohio-elections> [<https://perma.cc/V883-FN6Y>]; Laura Kusisto & Joe Barrett, *Kansas Votes to Protect Abortion Rights in State Constitution*, WALL ST. J. (Aug. 3, 2022), <https://www.wsj.com/articles/kansas-abortion-vote-results-11659440554>. Likewise, the United States Supreme Court’s decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) frees the states to experiment with constitutional amendments that address political gerrymandering. Julie Carr Smyth, *Amendment aimed at reforming Ohio’s troubled political mapmaking system edges toward 2024 ballot*, ASSOCIATED PRESS (Oct. 2, 2023), <https://apnews.com/article/election-2024-redistricting-ohio-cd3e97eaa050f78d41e85d9392a19e5d> [<https://perma.cc/6VK5-DP4G>].

9. *Diversified Holdings, LLP v. City of Suwanee*, 302 Ga. 597, 615, 807 S.E.2d 876, 890–91 (2017) (Peterson, J., concurring) (observing that the Just Compensation Clause in the Georgia Constitution is “broader than the federal Takings Clause” because it provides that “private property shall not be taken *or damaged* for public purposes without just and adequate compensation *being first paid*”) (quoting GA. CONST. art. I, § 3, para. 1(a)). *See also* Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 344 (2018) (“More than half of the state constitutions contain a takings clause that is materially different from the federal one, in that it prohibits property from being both ‘taken’ and ‘damaged’ or ‘injured’ for public use without just compensation.”).

10. *See* Randy Beck, *Standing to Litigate Public Rights in Georgia Courts*, 75 MERCER L. REV. 297, 300 (2023) (“The Georgia Supreme Court [has] concluded that the clause vesting ‘judicial power’ in state courts in Article VI, § 1, para. 1 [of the Georgia Constitution] does indeed presuppose a requirement of standing to sue, but under more relaxed standards than federal precedent.”).

11. *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm’rs*, 315 Ga. 39, 39, 880 S.E.2d 168, 171 (2022) (holding that the Georgia Constitution requires that a “plaintiff

post-*Dobbs* era, the scope of the Georgia Constitution's right to privacy is the object of great interest to attorneys and citizens alike.¹² Unlike the Federal Constitution, which is consistently mined by legal scholars in search of niche topics for journal articles, Georgia's Constitution is often overlooked. An increase in research and scholarship focused on the Georgia Constitution would undoubtedly benefit both legal practitioners and the judiciary. Moreover, members of the United States Supreme Court increasingly cite the Georgia Constitution when interpreting the original meaning of the Federal Constitution.¹³ Thus, a greater scholarly emphasis on Georgia's early constitutions might also influence the interpretation of federal constitutional provisions in future cases.

Studying state constitutional law also serves as an important catalyst for propelling Georgia's law school graduates to careers of service at the state level. While some recent graduates may not consider it "prestigious" to return to Atlanta, Columbus, Rome, or Macon as it would be to begin one's career in Washington, D.C., Georgia's state and local legal systems are deeply in need of recent law school graduates who are passionate about their communities and upholding the rule of law.¹⁴ State courts,

must have a cognizable injury that can be redressed by a judicial decision" in order to "invoke a Georgia court's 'judicial power'").

12. See, e.g., Anthony Michael Kreis, *Opinion: Heed Georgia Constitution on abortion*, ATLANTA-J. CONST. (June 30, 2022), <https://www.ajc.com/opinion/opinion-heed-georgia-constitution-on-abortion/35S2LR7L6BBS7AG4NVUTD4TXSY/> <https://perma.cc/QN45-JUBK> (arguing that the Georgia Constitution protects "a basic right to abortion").

13. *Moore v. Harper*, 600 U.S. 1, 33 (2023) (interpreting the Elections Clause); *Smith v. United States*, 599 U.S. 236, 247 n.10 (2023) (interpreting the Venue and Vicinage Clauses); *Fulton v. City of Philadelphia*, Pennsylvania, 141 S. Ct. 1868, 1902 (2021) (Alito, J., concurring) (interpreting the Free Exercise Clause); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 n.13 (2020) (interpreting the Sixth Amendment right to jury trial); *Timbs v. Indiana*, 139 S. Ct. 682, 696 n.2 (2019) (Thomas, J., concurring) (interpreting the Eighth Amendment's prohibition on excessive fines applicability to the states via the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 554 (1997) (O'Connor, J., dissenting in part) (interpreting the Free Exercise Clause); *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (interpreting the Eighth Amendment's prohibition on cruel and unusual punishment); *Faretta v. California*, 422 U.S. 806, 829 n.38 (1975) (interpreting the Sixth Amendment right of self-representation); *Murdock v. Pennsylvania*, 319 U.S. 105, 123 n.5 (1943) (Reed, J., dissenting) (interpreting tax exemptions under the First Amendment); see also *Powell v. State of Ala.*, 287 U.S. 45, 63 (1932) (discussing the Sixth Amendment right to counsel in capital cases). Georgia's Constitution has also been cited in challenges involving § 2 of the Voting Rights Act of 1965. See *Holder v. Hall*, 512 U.S. 874, 898 n.4 (1994) (Thomas, J., concurring).

14. See Cedra Mayfield, *Chief Justice Urges Newly Admitted Attorneys to Address 'Lawyer Deficit'*, DAILY REPORT (Aug. 23, 2023), <https://www.law.com/dailyreportonline/2023/08/23/chief-justice-urges-newly-admitted-attorneys-to-address-lawyer-deficit/?slreturn=20231028171539#:~:text=Boggs%2C%20who%20lives%20in%20rural,for%20litiga>

which hear the majority of civil and criminal cases docketed in the United States each year,¹⁵ are where most of the legal action takes place, and Georgia law school graduates who care about federal constitutional rights should also consider how they can best use their careers to make a tangible impact on state law by engaging with the state constitution.

To provide law students, practitioners, and scholars with insights into state constitutional interpretation in Georgia, Presiding Justice Peterson has published *Principles of Georgia Constitutional Interpretation* in this year's *Annual Survey of Georgia Law*.¹⁶ In his article, Presiding Justice Peterson explains how the Georgia Supreme Court has rejected "lockstepping" in favor of interpreting the Georgia Constitution independently from federal constitutional interpretations. The myriad differences between Georgia's Constitution and its federal counterpart, Presiding Justice Peterson asserts, results in frequent opportunities for novel state constitutional interpretation by the Georgia Supreme Court. He argues that, to perform state constitutional interpretation well, the Georgia Supreme Court depends on the parties to present informed arguments guided by the court's interpretative principles. To that end, Presiding Justice Peterson has authored the seminal article on Georgia constitutional interpretation to date, offering readers a deeper understanding of the constitutional methodology and practice of the Georgia Supreme Court.

This year's *Annual Survey of Georgia Law* also features student notes that discuss cases from the survey period in which the Georgia Supreme Court's applied originalist and textualist principles in interpreting provisions of the Georgia Constitution.¹⁷

nts%20living%20in%20poverty [https://perma.cc/G46H-CTJS] (quoting Chief Justice Boggs as saying, "the need is great and the reward in helping others is immeasurable").

15. Ct. STATS. PROJECT, NAT'L CTR. FOR STATE Cts., FEDERAL AND STATE CASELOAD TRENDS, 2012–2021, <https://www.courtstatistics.org/court-statistics/state-versus-federal-caseloads> [https://perma.cc/V2VT-GA8P] (showing that "[b]etween 2012 and 2021, an average of 98.5% of U.S. court cases were filed in state courts" whereas "[o]nly 1.5% were filed in federal courts").

16. See Nels S.D. Peterson, *Principles of Georgia Constitutional Interpretation*, 75 MERCER L. REV. 1 (2023).

17. See J. Bailey Hotard, Note, *Commissioners Shoot for the Moon, Citizens Land Among Stars: The Supreme Court of Georgia Affirms Citizen Referendum Power in Camden County v. Sweatt*, 75 MERCER L. REV. 413 (2023); A. Tyler Kelly, Note, *Mama Knows Best: Raffensperger v. Jackson Ushers In a New Framework for Professional Licensing Challenges and Recognizes a Right to Work for Lactation Providers Under the Georgia Constitution's Due Process Clause*, 75 MERCER L. REV. 437 (2023); Rachel N. Ratajczak, Note, *A Run for Your Money: The Supreme Court of Georgia in Taylor v. Deverux Foundation, Inc. Upholds the Constitutionality of the Statutory Cap on Punitive Damages*, 75 MERCER L. REV. 457 (2023); Clay Wright, Note, *Confederate Standoff: The Georgia*

A greater emphasis on state constitutional law provides a fuller understanding of the American constitutional system. Several law schools in Georgia¹⁸ and throughout the Nation¹⁹ already have courses or seminars dedicated to the study of state constitutional law. Perhaps Mercer University and the remaining Georgia law schools will soon join them. Ultimately, the *Mercer Law Review* hopes that the publication of Presiding Justice Peterson's foundational article on Georgia constitutional interpretation will serve as the beginning of a renewed effort by the entire Georgia legal community to engage with the original meaning of Georgia's constitutions.

Supreme Court Clarifies Standing Requirements in Sons of Confederate Veterans v. Henry County Board of Commissioners, 75 MERCER L. REV. 477 (2023).

18. The University of Georgia School of Law offers "State Constitutional Law" as an elective course. *State Constitutional Law*, UNIV. OF GA. SCH. OF L., <https://www.law.uga.edu/courses/state-constitutional-law#:~:text=This%20course%20will%20consider%20the,development%20of%20U.S.%20constitutional%20law> [<https://perma.cc/84T3-7YHT>] (last visited Nov. 28, 2023). In 2022, Emory University School of Law hosted a conference on state constitutional law featuring Former Chief Justice Nahmias. *2022 Conference on State Constitutional Law*, EMORY UNIV. SCH. OF L., <https://law.emory.edu/centers-and-programs/center-for-federalism-and-intersystemic-governance-conferences.html> [<https://perma.cc/V94Q-AKBB>] (last visited Nov. 28, 2023).

19. To name just a few: Harvard, Notre Dame, and Stanford Law Schools all offer a dedicated state constitutional law course.