Mercer Law Review

Volume 75
Number 1 *Annual Survey of Georgia Law*

Article 4

12-2023

Principles of Georgia Constitutional Interpretation

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I. INTRODUCTION

The Supreme Court of Georgia routinely emphasizes the importance of interpreting the Georgia Constitution on its own terms, and not merely importing federal interpretations of the federal Constitution.[1] That makes sense, "[r]eal federalism means that state constitutions are not mere shadows cast by their federal counterparts, always subject to change at the hand of a federal court's new interpretation of the federal Constitution."[2] But independent interpretation of the Georgia Constitution is often easier to talk about than to do.

It might seem to some that the need for novel state constitutional interpretation would be a rare occurrence, and on the federal level, that's probably right.[3] But the Georgia Constitution is quite different from its

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1. *See, e.g.,* Elliott v. State, 305 Ga. 179, 187–88, 824 S.E.2d 265, 272 (2019) ("Questions of the construction of the State Constitution are strictly matters for the highest court of this State. The construction of similar federal constitutional provisions, though persuasive authority, is not binding on this state's construction of its own Constitution.") (quoting Pope v. City of Atlanta, 240 Ga. 177, 178, 240 S.E.2d 241, 242 (1977)); Sons of Confederate Veterans v. Henry Cty. Bd. of Comm'rs, 315 Ga. 39, 45 n.4, 880 S.E.2d 168, 175, 175 n.4 (2022) (SCV). *See also* Black Voters Matter Fund, Inc. v. Kemp, 313 Ga. 375, 391–400, 870 S.E.2d 430, 443–449 (2022) (Peterson, J., concurring).

2. Olevik v. State, 302 Ga. 228, 234 n.3, 806 S.E.2d 505, 512 n.3 (2017).

3. Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257, 276 (2022) ("Of course, when dealing with a more than two-century-old document comprising a

federal counterpart: it constitutes a government of plenary power instead of the federal government's limited enumerated powers;[4] it is much longer;[5] it is much more detailed;[6] there have been many more versions;[7] its current version is much newer;[8] and it is amended far more often even within versions.[9] These differences naturally create far more interpretive opportunities and challenges. And, making things even more challenging, there is far less state-specific scholarship and research material on which to rely than exists regarding the federal Constitution.[10]

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total of only 7,591 words, issues of true constitutional first impression may be few and far between.").

4. *See* DeKalb Cnty. Sch. Dist. v. Ga. State Bd. of Educ., 294 Ga. 349, 352, 751 S.E.2d 827, 831 (2013) ("[T]he lawmaking power of the General Assembly is 'plenary.'") (quoting Bryan v. Ga. Pub. Serv. Comm., 238 Ga. 572, 573, 234 S.E.2d 784, 785 (1977)); *cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012) ("The Federal Government is acknowledged by all to be one of enumerated powers. That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers.") (citation and quotations omitted).

5. *See Constitution of the State of Georgia*, GEORGIA SECRETARY OF STATE BRAD RAFFENSPERGER, https://sos.ga.gov/search?division=&board=&type=&query=georgia+constitution [https://perma.cc/E2ZY-GH45] (last visited Aug. 26, 2023) (44,343 words).

6. *See, e.g.,* GA. CONST. art. III, §§ 8 ("Insurance Regulation"), 10 ("Retirement Systems"), art. VII § 2 ("Exemptions from Ad Valorem Taxation"), Art. IX § 5, para. 5 ("Limitation on Local Debt").

7. *See Elliott*, 305 Ga. 182, 824 S.E.2d at 268 ("unlike the United States, the State of Georgia has had ten constitutions since declaring independence from Great Britain").

8. 1983 Ga. Laws 5183–5186 (proclamations of the Secretary of State and the Governor declaring the new Constitution ratified and effective as of July 1, 1983); 1983 Ga. Laws 5188 (noting that the constitution proposed by the General Assembly was approved by a vote of 567,663 to 211,342).

9. The United States Constitution has been amended twenty-seven times in its long history, most recently in 1992. *See Constitution of the United States*, United States Senate, https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm [https://perma.cc/3KEE-6L9X]. The Georgia Constitution of 1983, by contrast, has been amended 89 times in the last 40 years. *See Constitution Of the State of Georgia*, GEORGIA SECRETARY OF STATE BRAD RAFFENSPERGER, 88, https://sos.ga.gov/sites/default/files/2022-02/state_constitution.pdf [https://perma.cc/XW8B-D6FB] (last visited Aug. 26, 2023) (showing 85 amendments ratified to the Georgia Constitution as of 2018), 2022 Ga. Laws 394A (ratifying two more amendments in 2020), and Georgia Secretary of State Brad Raffensperger, *Past Election Results, November 2022, Statewide Elections*, https://results.enr.clarityelections.com/GA/115465/web.307039/#/summary [https://perma.cc/7RV9-J9YD] (last visited Aug. 6, 2023) (ratifying two more amendments in 2022).

10. *See* Clint Bolick, *Principles of State Constitutional Interpretation,* 53 ARIZ. ST. L.J. 771, 771, 777 (2021) ("State constitutionalism . . . is [] vital yet underdeveloped[.] . . .Despite renewed interest in state constitutionalism, state court jurisprudence and legal scholarship are almost entirely devoid of established or even suggested principles[.]"); *see also* Session v. State, 316 Ga. 179, 191, 887 S.E.2d 317, 327

The Georgia Supreme Court has the ultimate responsibility for interpreting the Georgia Constitution; the court's interpretations generally cannot be overturned even by the Supreme Court of the United States.[11] So it is really important that the court get the Georgia Constitution right. The court is more likely to get it right with a properly functioning adversarial process. This requires that parties make good arguments, informed by the interpretive principles that the court will apply. But many of those principles are not well-known, and a full understanding of them requires a broad survey of many Georgia cases.

My principal goal in writing this Article is to provide a useful aid to lawyers and judges by identifying and explaining those interpretive principles; so far as I can tell, no such guide presently exists.[12] I make no claim to identify or explain the principles exhaustively, but I hope that what follows will prove helpful for those facing interpretive questions in the future.

To that end, the Article unfolds as follows. Section II lays out the core interpretive principles that frame Georgia constitutional interpretation: textualism and originalism. Section III identifies two unique challenges

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(2023) (noting provision in question had "been construed only rarely by Georgia's appellate courts" despite its 155-year history); Ammons v. State, 315 Ga. 149, 163, 880 S.E.2d 544, 554–55 (2022) (rejecting a claim under the Georgia Constitution's Privileges and Immunities Clause, and relying on the federal provision, as well as its interpretations and scholarship, as key context in the absence of Georgia-specific authorities); *id.* at 168, 880 S.E.2d at 557–58 (Ellington, J., concurring) (declining to "rul[e] out the possibility" that the Georgia Privileges and Immunities Clause does more than its federal counterpart).

11. *See* Montana v. Wyoming, 563 U.S. 368, 377 n.5 (2011) ("The highest court of each State, of course, [is] 'the final arbiter of what is state law.'") (quoting West v. American Telephone & Telegraph Co., 313 U.S. 223, 236 (1940)). *But see* Moore v. Harper, 143 U.S. 2065, 2090, (2023) (Kavanaugh, J., concurring) (speculating about the appropriate standard for "a federal court [to] employ to review a state court's interpretation of state law in a case implicating the Elections Clause"). Of course, if the meaning of a provision of the Georgia Constitution violates federal law, the Supremacy Clause of the federal Constitution forbids its application. *See* Session v. State, 316 Ga. at 194, 887 S.E.2d at 329. But that's all the Supremacy Clause does—forbid the application of the offending provision. *See* U.S. CONST. art. VI, cl. 2. ("This Constitution . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). It does not change the meaning of the state provision.

12. Judges in other states have authored articles with similar goals. *See, e.g.,* Bolick, *supra* note 10, at 5 (article by Arizona Supreme Court justice discussing state constitutional interpretation generally with a focus on Arizona); Jay Mitchell, *Textualism in Alabama*, 74 ALA. L. REV. 1089 (2023) (article by Alabama Supreme Court justice discussing Alabama interpretive principles generally applicable to constitutions and statutes); *see also* Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411 (2012) (article by now-judge of the Appellate Court of Maryland discussing interpretive methodologies for Maryland Constitution).

for constitutional interpretation in Georgia: determining what time frame is "original" for purposes of the original public meaning of a given provision, and determining what role federal precedent interpreting federal provisions has in interpreting similar state provisions, especially in the light of the fact that state constitutions are independent documents that must be principally understood through the lens of their own unique history and context. Section IV, therefore, identifies and explains the key interpretive principles that help courts and litigators grapple with those challenges. Section V offers three case studies of decisions applying these principles. Section VI raises some observations and open questions about the interpretive presumptions discussed in Section IV. Section VII addresses two additional considerations that will often impact Georgia constitutional analysis. Section VIII offers practical research tips and a source guide to aid courts and litigants in doing the research to meet these various challenges. Finally, Section IX offers some concluding thoughts.

II. TEXTUALISM AND ORIGINALISM

I start with some basic principles that should be familiar from other contexts of legal interpretation. Because the meaning of legal text is fixed at the time of adoption—that is, it does not change over time—we interpret legal text according to the public meaning of the text at the time that it was adopted: the original public meaning. And it is the meaning of the text that controls, not subjective views of legislators or other atextual considerations. This focus on the text, however, requires more than simply finding an era-appropriate dictionary and stringing together a series of definitions. Words are ultimately dependent on their surroundings for meaning, and so proper textualism also requires consideration of history and context.

A. Original Public Meaning

Provisions of the Georgia Constitution are to be understood according to their original public meaning.[13] That phrase—original public meaning—is "simply shorthand for the meaning the people understood a provision to have at the time they enacted it."[14] It refers to "the sense in which it was understood by the makers of it at the time when they made

13. *Elliott*, 305 Ga. at 181, 824 S.E.2d at 268 ("We have often explained that we 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 [provision] is the public meaning it had at the time of its ratification in 1982.").

14. *Olevik*, 302 Ga. at 235, 806 S.E.2d at 513.

it."[15] And because constitutions and their amendments must be ratified by the people, after being proposed by the General Assembly,[16] the "makers" of the constitution include both "the framers and the people at the time of [the provision's] adoption."[17] Note, though, "it is 'the understanding of the text by reasonable people familiar with its legal context' that is important, not whether every citizen understood the particular meanings of a constitutional provision."[18] This does not mean, however, "that the meaning assigned to constitutional language is based on the subjective understanding available only to some special group. On the contrary, it is always the original public meaning that controls."[19] This reference to a reasonable, informed person "is not a description of some particular or specific subset of the populace."[20] Rather, it is a reminder that context is indispensable in understanding the meaning of words, and context "sometimes takes work to understand."[21] This interpretive method is not a new idea; as the Supreme Court of Georgia announced emphatically within the first decade of its existence, "the 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." [22] As if this was not clear enough, the court

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15. *Id.* at 235–36, 806 S.E.2d at 513 (quoting Padelford & Fay Co. v. Mayor and Aldermen of the City of Savannah, 14 Ga. 438, 454 (1854) (emphasis in the original).

16. *See* GA. CONST. art. X, § 1, para. 1 ("Proposals [by the General Assembly] to amend the Constitution"), para. 4 ("Constitutional convention[s] [called by the General Assembly]"), and para. 2 (submission of amendments to the people after one of those processes).

17. *Olevik*, 302 Ga. at 236, 806 S.E.2d at 513 (quoting Collins v. Mills, 198 Ga. 18, 22, 30 S.E.2d 866, 869 (1944)); *Elliot*, 305 Ga. at 182 n.4, 824 S.E.2d at 269 ("the people are the ultimate 'makers' of the Georgia Constitution . . . . [a]ll of our constitutions were the result of voter ratification or a constitutional convention" but "we do not consider the subjective intent of individual lawmakers even when the electorate's role is more attenuated").

18. *Elliott*, 305 Ga. at 207, 824 S.E.2d at 285 (citation and punctuation omitted); Smith v. Baptiste, 287 Ga. 23, 33, 694 S.E.2d 83, 90 (2010) (Nahmias, J., concurring) (explaining that contemporaneous sources are useful in seeking to interpret the meaning of a constitutional text "because they demonstrate what intelligent and informed people at the time understood the language . . . to mean"); Georgia Motor Trucking Ass'n v. Georgia Dep't of Revenue, 301 Ga. 354, 357, 801 S.E.2d 9, 12 (2017) ("A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws[,] and with reference to them. Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption.") (quoting Clarke v. Johnson, 199 Ga. 163, 166, 33 S.E.2d 425, 428 (1945)).

19. State v. Sass Grp., LLC, 315 Ga. 893, 898 n.7, 885 S.E.2d 761, 767 n.7 (2023).

20. *Id.*

21. *Id.*

22. Padelford & Fay Co. v. Mayor and Aldermen of the City of Savannah, 14 Ga. 438, 454 (1854) (emphasis in the original). *See also SCV*, 315 Ga. at 50 n.8, 880 S.E.2d at 178

then doubled down in even stronger language: "To deny this is to insist that a fraud shall be perpetrated upon those makers or upon some of them."[23] And again in 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."[24]

B. Plain Meaning

When Georgia courts "inquire into the meaning of a constitutional provision, [they] look to its text, and [their] object is to ascertain 'the meaning of the text at the time it was adopted.'"[25] In doing so, Georgia courts "afford the constitutional text its plain and ordinary meaning, view the text in the context in which it appears, and read the text in its most natural and reasonable way, as an ordinary speaker of the English language would."[26] "Where a word has a technical as well as a popular meaning, the courts will generally accord to it its popular signification, unless the nature of the subject indicates, or the context suggests, that the word is used in a technical sense."[27]

Most of Georgia's principles of textualism apply generally to all kinds of legal texts: constitutions,[28] statutes,[29] regulations,[30] uniform court rules,[31] rules of professional conduct,[32] and the like. As the Georgia Supreme Court stated in interpreting agency regulations, rules of statutory construction "apply to all positive legal rules," not merely statutes.[33] Accordingly, in considering applicable interpretive principles

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n.8 (noting that the Georgia Supreme Court "was constitutionally authorized in 1835 and then statutorily created by the General Assembly in 1845," and its "first opinions were handed down in 1846").

23. *Padelford*, 14 Ga. at 454.

24. *Collins*, 198 Ga. at 22, 30 S.E.2d at 869.

25. Lathrop v. Deal, 301 Ga. 408, 801 S.E.2d 867, 882 (2017) (quoting *Georgia Motor Trucking Ass'n*, 301 Ga. at 357, 801 S.E.2d at 12).

26. Camden Cnty. v. Sweatt, 315 Ga. 498, 509, 883 S.E.2d 827, 836 (2023) (quoting McInerney v. McInerney, 313 Ga. 462, 464, 870 SE2d 721, 725 (2022)); *see also Ga. Motor Trucking Ass'n*, 301 Ga. at 356, 801 S.E.2d at 12 (same).

27. *Ga. Motor Trucking Ass'n*, 301 Ga. at 356, 801 S.E.2d at 12 (quoting *Clarke*, 199 Ga. at 164, 33 S.E.2d at 427).

28. *Sass Grp.*, 315 Ga. at 893, 885 S.E.2d at 763.

29. Deal v. Coleman, 294 Ga. 170, 172, 751 S.E.2d 337, 341 (2013).

30. City of Guyton v. Barrow, 305 Ga. 799, 805, 828 S.E.2d 366, 371 (2019).

31. Undisclosed LLC v. State, 302 Ga. 418, 420, 807 S.E.2d 393, 396 (2017).

32. *Cf.* In the Matter of Mignott, No. S23Y0974, 2023 Ga. LEXIS 229, at *3 (Ga. Oct. 24, 2023) ("We construe the GRPC according to the principles that we ordinarily apply in the interpretation of legal text.") (cleaned up).

33. *City of Guyton*, 305 Ga. at 805, 828 S.E.2d at 371.

for plain meaning, one is not necessarily limited to citing only cases interpreting constitutional provisions.[34]

"One place to look for ordinary meaning is contemporaneous dictionaries from around the time when the text was adopted."[35] That said, relying on dictionaries alone is unwise; "[d]ictionaries cannot be the definitive source of ordinary meaning in questions of textual interpretation because they are acontextual, and context is a critical determinant of meaning."[36] So any resort to dictionaries must "recognize this limitation" in order to be useful.[37]

Other sources of contemporary usage may also be helpful. For example, when a term is apparently used in a legal context, agreement among legal sources as to the typical meaning of that term can be good evidence that the constitution uses the term in that same way.[38] The same principle may hold for other technical or specialized terminology in a given field of work or study. But this principle is not necessarily limited to technical phrases or terms of art—any reliable source of common usage can be relevant in the search for original public meaning.

This focus on the meaning of the words, though, is not done in a vacuum. Words are best understood in the light of their context and history. "Indeed, 'the primary determinant of a text's meaning is its

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34. *See, e.g., Ga. Motor Trucking Ass'n*, 301 Ga. at 356, 801 S.E.2d at 12 (applying statutory interpretation principles in interpreting constitution).

35. *Sass Grp.*, 315 Ga. at 898, 885 S.E.2d at 767.

36. *Id*. at 899, 885 S.E.2d at 767 (citing ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 70 (2012)); Jones v. State, 304 Ga. 594, 602, 820 S.E.2d 696, 703 (2018) (declining to apply dictionary definitions when argument based upon them "view[ed] one word in isolation and ignore[d] context").

37. *Sass Grp.*, 315 Ga. at 899, 885 S.E.2d at 767; Camp v. Williams, 314 Ga. 699, 702, 879 S.E.2d 88, 90–91 (2022) ("although examination of dictionary definitions of a single word is not a substitute for a broader consideration of context and history, reviewing dictionaries from the era of the statute's enactment may assist in determining its meaning"; "[s]o understood," they may be useful) (citation omitted).

38. *Sass Grp.*, 315 Ga. at 899, 885 S.E.2d at 767 (confirming the meaning of the word "action" shown by contemporary dictionaries with "common usage [i]n both judicial decisions and statutes"). The court further explained,

> To be sure, in other instances, 'action' can be understood as a reference to things other than a lawsuit, such as a claim [within a lawsuit] . . . . But 'action' is ordinarily and more commonly used to mean a case or lawsuit, and other contextual clues within the Constitution confirm that to be the case with respect to the specific provision at issue here.

Id. at 900, 885 S.E.2d. at 768. For more on the use of such authorities, *see* Section VIII (b), *infra*, pp. 44–45.

context.'"[39] Several different kinds of context warrant consideration, such as the relevant text's particular constitutional provision (including grammar and punctuation),[40] the provision's structure, and other related provisions.[41] Another important context is how words of the relevant text are used elsewhere in the constitution, even in unrelated provisions.[42] And history, as the next section lays out, is particularly significant for understanding the original meaning of provisions which originated in a previous constitution.

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39. *Camp*, 314 Ga. at 703, 879 S.E.2d at 91 (quoting *City of Guyton*, 305 Ga. at 804, 828 S.E.2d at 371); *see also City of Guyton*, 305 Ga. at 805, 828 S.E.2d at 371 (explaining that this interpretive principle applies to all "positive legal rules").

40. *Sass Grp.*, 315 Ga. at 900–01, 885 S.E.2d at 768 ("We may also 'refer to the rules of English grammar, inasmuch as those rules are the guideposts by which ordinary speakers of the English language commonly structure their words,' and the drafters of the constitutional amendment are presumed to know the rules of grammar.") (quoting *Deal*, 294 Ga. at 170, 172–73, 751 S.E.2d at 341).

41. *Sass Grp.*, 315 Ga. at 900–01, 885 S.E.2d at 768 ("Our determination that the exclusivity requirement in Paragraph V relates to lawsuits rather than claims is further confirmed by the context of other language in Paragraph V and other parts of the same section of the Constitution . . . . We would ordinarily say that attorney fees, litigation expenses, or damages would be awarded *in* a lawsuit at its conclusion . . . . It would not make sense, by contrast, to say that such items shall be awarded 'in' a claim . . . . Because we presume that the same meaning of 'action' applies throughout subparagraph (b), this phrasing offers further support that 'action' as used in the exclusivity provision refers to the entire lawsuit.") (citations omitted) (emphasis in the original); *Camden County*, 315 Ga. at 510, 883 S.E.2d at 837 ("To read subparagraphs (b) (1) and (2) as granting strictly coextensive powers, as the County urges us to do, would require us to ignore the phrase 'or ordinances, resolutions, or regulations adopted pursuant to subparagraph (a)' in the text of subparagraph (b) (2), a reading that would violate well-established tenets of constitutional interpretation that generally require each part of the text be given a sensible reading and not be rendered superfluous."); *see also Camp*, 314 Ga. at 703–04, 879 S.E.2d at 91–92 (looking to "two features of O.C.G.A. § 21-2-6 [to] show that 'qualifications' are best understood to include . . . the pre-requisites for seeking and holding office": first, the use of the words "'seek and hold' office . . . suggests that an elector may show that [a] candidate is not 'qualified' to run for office—not merely that he would not be qualified to serve, if elected," and second, another subsection of the statute "uses the word 'qualifications' to refer to a procedural pre-requisite," namely, that "if a candidate pays his qualifying fee with a check that is returned for insufficient funds, 'the superintended shall automatically find that such candidate has not met the qualifications for holding the office being sought'").

42. *Sass Grp.*, 315 Ga. 902, 885 S.E.2d at 769 (applying presumption "that the same meaning attaches to a given word or phrase wherever it occurs in a constitution; and where a word or phrase is used in one part of a constitution in a plain and manifest sense, it is to receive the same interpretation when used in every other part, unless it clearly appears, from the context or otherwise, that a different meaning should be applied to it") (quoting *Clarke*, 199 Ga. at 164–65, 33 S.E.2d at 427); *see also Camp*, 314 Ga. at 705, 879 S.E.2d at 92 ("Turning to broader statutory context, this understanding [of qualifications] also comports with the use of related terminology and related provisions in the elections code" regarding qualifications, qualifying, and eligibility).

III. UNIQUE GEORGIA CONSTITUTIONAL CHALLENGES FOR ORIGINAL PUBLIC MEANING

At least one aspect of "original public meaning" is relatively uncontroversial on a federal level: the time period that "original" references.[43] "Original" is generally understood to mean (1) the time at which the U.S. Constitution was ratified,[44] or (2) the time at which amendments were ratified.[45] For purposes of the meaning of the Bill of Rights as incorporated against the States, some suggest that the time of the ratification of the 14th Amendment, which so incorporated them, is also relevant;[46] however that presently-contested point is ultimately

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43. *See, e.g.,* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U.L. REV. 1371, 1373 (2019) (explaining that "[o]riginal intent and original public meaning" philosophies "share the view that the meaning of a constitutional provision was fixed at the time it was enacted," and proposing at third view in which originalists seek original meaning "under [an] ['Joriginal methods['] approach"); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 277 (2014) ("I have defined original meaning as the likely original understanding of the text at the time of its adoption by competent speakers of the English language who are aware of the context in which the text was communicated for ratification."); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 12 (2008) ("[O]ne should look for what readers of the historically-situated text would have understood the constitutional language to express."); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003) ("Original" seeks "the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted").

44. *See, e.g.,* Mark Moller & Lawrence B. Solum, *Corporations and the Original Meaning of "Citizens" in Article III*, 72 HASTINGS L.J., 169 (2020); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 453 (2018); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A reply to Professor Zephyr Teachout*, 107 NW. U.L. REV. COLLOQUY 180 (2013).

45. *See, e.g.,* Stephanie H. Barclay et. al, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505 (2019); Marla D. Tortorice, *Originalism and the Eighth Amendment*, 54 NO. 2 CRIM. LAW BULLETIN ART 3 (2018); Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 1, 68 (2014) ("Obviously, the original public meaning of the Fourteenth Amendment was frozen for all time on July 9, 1868, when it was finally ratified.").

46. *See* New York State Rifle & Pistol Association, Inc., v. Bruen, 142 S. Ct. 2111, 2138 (2022) ("We [ ] acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope"; "We need not address this issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry"); *compare* National Rifle Ass'n v. Bondi, 61 F.4th 1317, 1322–24 (11th Cir. 2023) (concluding that 1868 is the appropriate time frame for interpreting the Second

decided, the number of possible options for the time that counts as "original" is usually only one, and never more than two.

The same relative clarity does not hold true for state constitutions. We have only ever had one federal Constitution. But many states have had multiple constitutions; by one count, thirty-one of the fifty states have had more than one constitution in their history.[47] Sometimes a later constitution carries forward provisions from previous constitutions.[48] When that happens, what point is "original" for purposes of assessing the original public meaning of a carried-forward provision—the time when it entered the first constitution in which it appeared, or the time when it was carried forward into the current constitution? And what about provisions carried forward through a series of constitutions?

In one sense, the answer is simple; the time which is "original" is the time of the adoption of the current constitution, because the current constitution is the constitution being interpreted. As the Supreme Court of Georgia has said, "the Georgia Constitution that we interpret today is the Constitution of 1983; the original public meaning of that Constitution is the public meaning it had at the time of its ratification in 1982."[49] But that simple answer is often incomplete.

"[M]any of the provisions of the Constitution of 1983 first originated in an earlier Georgia Constitution; unlike the United States, the State of Georgia has had ten constitutions since declaring independence from Great Britain."[50] This has crucial implications for our discussion above about fixed meaning, history, and context. As the Georgia Supreme Court said nearly eight decades ago, "A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them.

Amendment as applied to the states), *reh'g en banc granted*, *vacated by* National Rifle Ass'n v. Bondi, 72 F.4th 1346 (11th Cir. 2023), *with* Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 244 (5th Cir. 2022) (Ho, J., concurring) ("[T]he lead dissent suggests that, whatever 'due process' may have meant in 1868, fidelity to original public meaning requires us to separately inquire whether 'due process' may have meant something different in 1791. That's fair enough, as an intellectual matter. But[,] in fairness to the majority, the lead dissent does not point to a single Supreme Court decision holding that we should interpret Fifth Amendment due process differently from Fourteenth Amendment due process."); Mark Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, not 1868*, 31 HARV. J.L. & PUB. POL'Y PER CURIAM 1 (2022).

47. Jason Mazzone & Cam Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 346 (2022) ("Thus far, the fifty states have together had a total of nearly 150 Constitutions. Thirty-one have had at least two state constitutions; Louisiana, with eleven Constitutions, has had the most of any state.")

48. *See Elliott*, 305 Ga. at 182, 824 S.E.2d at 269.

49. *Id.* at 181, 824 S.E.2d at 268.

50. *Id.* at 181–82, 824 S.E.2d at 268.

Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption."[51] If this is so even when the prior laws were mere statutes (and it is),[52] logic suggests that it would be even more so when the prior law was a provision in a previous constitution which the framers elected to retain in materially identical form.

The similarity between many provisions of the Georgia Constitution (especially in the Bill of Rights) and the U.S. Constitution poses an additional challenge. Given the nature of press coverage and public attention paid to the Supreme Court of the United States, it is reasonable to imagine that most members of the Georgia public are more familiar with at least some decisions of that Court interpreting the federal Constitution than they are with Georgia Supreme Court decisions interpreting the Georgia Constitution. So what happens when the United States Supreme Court has interpreted, say, the federal Due Process Clause, to mean something that the Georgia Supreme Court has never interpreted the materially identical Georgia Due Process Clause to mean? Which of the divergent meanings controls? One could reasonably argue that the best public understanding of the text would be the federal interpretation, because it is reasonable to suppose that more members of the public are aware of the federal interpretation.

But public meaning is about more than merely counting heads; determining the public meaning of a state constitution must necessarily be done through the lens of the unique nature of state constitutions. And a critical aspect of state constitutions is that they exist independently of their federal counterpart.[53] An interpretive approach that uncritically presumed state provisions meant the same as their federal equivalents would undermine that independence. Indeed, that would mean that when a state provision and its federal corollary had been interpreted differently, the framers of a new Georgia constitution seeking to retain the state meaning would have to change the state text in order to accomplish that goal. Such an approach simply misunderstands the independence of state constitutions. Again, "[r]eal federalism means that state constitutions are not mere shadows cast by their federal

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51. *Clarke*, 199 Ga. at 166, 33 S.E.2d at 428 (quoting 11 AM. JUR. *Constitutional Law* § 63).

52. *See Georgia Motor Trucking Ass'n*, 301 Ga. at 356, 801 S.E.2d at 12.

53. *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 173 (2018) ("State constitutions create independent limits on state and local powers, limits that may do more or less than their counterpart guarantees in the Federal Constitution.").

counterparts, always subject to change at the hand of a federal court's new interpretation of the federal constitution."[54]

Over time, the Georgia Supreme Court has identified and applied several interpretive principles to help grapple with these and other interpretive challenges posed by Georgia's ten constitutions. The next section identifies and explains those principles.

IV. KEY INTERPRETIVE PRINCIPLES FOR THE GEORGIA CONSTITUTION

These Georgia-specific challenges naturally require interpretive principles tailored to those challenges. The first two principles outlined below address complexities that multiple constitutions create. The remainder generally arise from the nature of state constitutions.

A. Presumption of Constitutional Continuity

As already discussed, the meaning of legal text is fixed at the time that it is adopted; that meaning does not change over time, absent intervening action by the text's author. This "fixation thesis"[55] has profound implications for interpreting a constitutional provision carried forward from one constitution to the next. One such implication (which is essentially a way of restating that the meaning is fixed) is that whatever meaning a provision of the constitution has on the first day of that provision's existence remains that provision's meaning for so long as that provision exists. If a new constitution is adopted, and the new constitution contains a provision with text materially identical to that of the old provision (which existed until the new constitution replaced it), the most natural point of reference for the meaning of the new provision is the meaning that the old provision had immediately before adoption of the materially identical new provision. And because meaning is fixed, the meaning the old provision had immediately before adoption of the new provision was the meaning the old provision had on its first day of existence.

This is the idea behind our first Georgia-specific interpretive principle: the presumption of constitutional continuity.[56] Under this principle, the Supreme Court of Georgia will "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

54. *Olevik*, 302 Ga. at 234 n.3, 806 S.E.2d at 512 n.3.

55. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) ("The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the Fixation Thesis.").

56. *See Elliott*, 305 Ga. at 182, 824 S.E.2d at 269.

it first entered a Georgia Constitution, absent some indication to the contrary."[57] The court identified two principles that, when combined, necessarily result in this presumption. First, "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."[58] And second, the court "accord[s] each of those previous provisions their own original public meanings."[59] In other words, each time a provision is carried forward into a new constitution, interpreters of the new constitution look back to the meaning of the previous provision. And because that previous provision is properly interpreted according to its original public meaning, it is the meaning that the previous provision had at the beginning of its existence that counts. These two principles taken together necessarily mean that a provision carried forward from, say, the 1877 Constitution through the 1945 and 1976 Constitutions into the 1983 Constitution presumably means today what it meant on the first day it entered the 1877 Constitution, "absent some indication to the contrary."[60]

This is a principle that has been applied from time to time throughout Georgia's history, and consistently since the adoption of our current 1983 Constitution.[61] While there are relatively few decisions applying it before

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57. *Id.* at 183, 824 S.E.2d at 269.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See Elliott*, 305 Ga. at 183, 824 S.E.2d at 269–70 (citing *Lathrop*, 301 Ga. at 428–32, 801 S.E.2d at 875–78 (interpreting art. I, § 2, para. 5 of the Constitution of 1983 in the light of the original meaning of the provision as it first appeared in the Constitution of 1861); *Georgia Motor Trucking Ass'n*, 301 Ga. at 366, 801 S.E.2d at 17–18 (interpreting provision of the Constitution of 1983 in the light of the meaning of amendments to the Constitution of 1945 that were carried forward); *Baptiste*, 287 Ga. at 24–28, 694 S.E.2d at 85–87 (considering meaning of 1983 provision in part in the light of the meaning of its predecessor provisions); *id.* at 32–39, 694 S.E.2d at 90–93 (Nahmias, J., concurring) (same); Nelms v. Georgian Manor Condo. Ass'n, 253 Ga. 410, 413, 321 S.E.2d 330, 332 (1984) (considering history of 1877 provision carried forward in the 1945 and 1976 Constitutions, and concluding that the provision's meaning remained unchanged "[a]s the language of this paragraph remained unchanged in the 1976 Constitution"); Bloomfield v. Liggett & Myers, Inc., 230 Ga. 484, 484, 198 S.E.2d 144, 145 (1973) (interpreting art. I, § 1, para. 4 of the Constitution of 1945 in the light of the original meaning of the same provision in the Constitution of 1877); Bldg. Auth. of Fulton Cty. v. State, 253 Ga. 242, 246–48, 321 S.E.2d 97, 102–03 (1984) (following 1910 decision under 1877 Constitution to resolve similar issue under 1983 Constitution); Bibb Cnty v. Hancock, 211 Ga. 429, 432, 86 S.E.2d 511, 515 (1955) ("It is clear that, in placing [a provision from the Constitution of 1877] in the Constitution of 1945, there was no intention to declare any new principle of law, but merely to continue in the new Constitution the same provision of the old, with the same meaning."); State v. Cent. of Ga. R. Co., 109 Ga. 716, 728, 35 S.E. 37, 41 (1900) (absent constitutional

1983, a consideration of Georgia's constitutional history and the timing of the creation of the Georgia Supreme Court offers an explanation why. A principle for interpreting provisions carried forward without material change from a previous constitution can be applied exclusively in cases involving such provisions, and it was not until 1945 that we saw a new constitution that (1) was in effect after the Georgia Supreme Court's creation, (2) was modeled heavily after its predecessor, and (3) lasted more than a few years. The Georgia Supreme Court was created in 1845 and began issuing decisions in 1846.[62] By that time, the Constitutions of 1777 and 1789 were already obsolete; the Constitution of 1798 would have only a decade and a half of life remaining.[63] The Civil War and its aftermath unsurprisingly led to substantial and repeated changes in the constitutional order; in only an eight-year period, Georgia saw three new constitutions: 1861 (written by Confederates seceding from the Union),[64] 1865 (unsuccessfully seeking readmission after defeat; although this constitution mainly tracked its 1861 counterpart, it lasted only three years),[65] and 1868 (written almost entirely by supporters of the Union).[66] And then the Constitution of 1877 (written almost entirely by former Confederates as Reconstruction ended) was adopted in large part to repudiate many of the facets of the 1868 Constitution.[67] In short, the first seven constitutions offered few opportunities for the Georgia Supreme Court to interpret provisions carried forward without material change from previous constitutions. The 1945 Constitution was the first constitution following the creation of the Georgia Supreme Court that (1) remained in effect for more than a few years and (2) largely carried forward provisions from its predecessor,[68] and thus was the first real fertile ground for considering the interpretive implications of continuity.

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text making clear a provision was intended to change the law, constitutional text should be interpreted consistent with the law that preceded it).

62. *See SCV*, 315 Ga. at 50 n.8, 880 S.E.2d at 178 n.8 (noting that the Georgia Supreme Court "was constitutionally authorized in 1835 and then statutorily created by the General Assembly in 1845," and its "first opinions were handed down in 1846").

63. There were a handful of reported trial court opinions that predated the Georgia Supreme Court, but even those postdated the adoption of the 1798 Constitution. *Id.* (noting that "[c]ertain decisions of Georgia's superior courts from as early as 1805 were collected and reported over several decades").

64. ALBERT B. SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA 1732–1968, 240, 242–47 (Revised ed. 1970); *see also* MELVIN B. HILL, THE GEORGIA STATE CONSTITUTION 10 (2d ed. 2018).

65. SAYE, *supra* note 64, at 256, 260–61; HILL, *supra* note 64, at 11–12.

66. SAYE, *supra* note 64, at 264–65, 267–271; HILL, *supra* note 64 at 12–15.

67. SAYE, *supra* note 64, at 279, 283–90; HILL, *supra* note 64, at 15–16.

68. *See* Robert N. Katz, *The History of the Georgia Bill of Rights*, 3 GA. ST. U.L. REV. 83, 85 n.15 (1986) (noting impact of 1877 Constitution on the drafting of the 1983

The next interpretive principle we consider (also based on provisions carried forward without material change from a previous constitution) began to be applied in the immediate aftermath of the adoption of the 1945 Constitution.

B. Presumption of a Consistent and Definitive Construction

The previous principle (the "presumption of constitutional continuity") focuses on the original meaning of a provision at the time it first entered a Georgia Constitution.[69] This next principle focuses on judicial interpretation of a provision between the time of its initial appearance and the time that it was carried forward into our current 1983 Constitution. This principle, the presumption of a consistent and definitive construction, teaches that when a provision has been consistently and definitively construed by the Georgia Supreme Court, and is then carried forward into the 1983 Constitution without material change, it is presumed to carry forward the construction the court had placed on it.[70]

Like the presumption of constitutional continuity, this presumption has been applied for a long time, although I am not aware of any obvious examples that predate the adoption of the 1945 Constitution.[71] The first clear examples of this presumption's application came in the two years

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Constitution, and that 90% of the 1945 Constitution was carried forward from the 1877 Constitution).

69. *See Elliott*, 305 Ga. at 182, 824 S.E.2d at 269.

70. *Id.* at 184–85, 824 S.E.2d at 270–71.

71. At least one pre-1945 decision applied what might be viewed as a version of this principle to the 1877 Constitution, although it did so not with constitutional text carried forward, but with preexisting statutory language that was incorporated into the 1877 Constitution:

> The constitution of 1877 does not alter the law in regard to the right of the jury to be the judges of it independently of the instructions of the court thereon. It simply re-enacts, in identical language, the provisions of the Code thereon. It emphasizes it by inserting it in the constitution; *but it put it there subject to the construction which had been put on the same words in the Code. Had the convention of 1877 intended to change the construction of those words, it would have altered them.*

Hill v. State, 64 Ga. 453, 470–71 (1880) (emphasis added). Another pre-1945 decision read a provision of the 1877 Constitution as having the same construction given to its predecessor in the 1868 Constitution, even though the relevant language had changed and without assessing the nature of the change (an approach I cannot recommend). *See* Wright v. Hirsch, 155 Ga. 229, 235, 116 S.E. 795, 797–98 (1923) ("The above cases were decided under the constitution of 1868; but this fact does not render these decisions inapplicable to the proper construction of the provision in the constitution of 1877 on this subject, although the provision upon the same subject in the former constitution is somewhat different from that in the latter.").

following the 1945 Constitution's adoption, and applied the principle even more broadly than present precedent requires.[72] In 1946, the Georgia Supreme Court considered a provision of the 1945 Constitution that required locally-issued bonds to be approved by a majority of the qualified voters voting in an election.[73] That provision had existed in materially identical form in the 1868 Constitution, and had been interpreted on the point in question.[74] The original 1877 Constitution changed the relevant language (which the court also interpreted),[75] and then was amended in 1918 to change it again (and the court again interpreted it).[76] The 1945 Constitution's language departed from both versions of the 1877 Constitution's language, but in a way that was "almost identical" to the 1868 language.[77] The court held that:

> The framers of the revised Constitution were presumably cognizant of the foregoing provisions of the earlier constitutions, and of the interpretations which this court had placed upon them. Accordingly, when the provision here under consideration is viewed in the light of its background, it seems perfectly clear that it was intended to . . . return[] to the rule as embodied in the Constitution of 1868[.][78]

The next year, the Georgia Supreme Court was called to decide the Three Governors Controversy, a dispute over who the rightful governor was following the 1946 election in which the victor had died after winning the election but before taking office.[79] A version of the constitutional provision that governed elections had been in every constitution since it first entered the 1798 Constitution by amendment, and had been "written into the [1945] Constitution exactly as it appeared in the Constitution of 1877."[80] In determining the meaning of the constitutional provision that governed elections, the court cited two different treatises

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72. McKnight v. Decatur, 200 Ga. 611, 615, 37 S.E.2d 915, 918 (1946); Thompson v. Talmadge, 201 Ga. 867, 886–88, 41 S.E.2d 883, 898–99 (1947).

73. *McKnight*, 200 Ga. at 613–614, 37 S.E.2d at 917.

74. *Id.* at 614, 37 S.E.2d at 917 (citing Black v. Cohen, 52 Ga. 621, 628 (1874)).

75. *Id.* at 614–15, 37 S.E.2d at 917–18 (citing Gavin v. City of Atlanta, 86 Ga. 132, 136–37, 12 S.E. 262, 263–64 (Ga. 1890)).

76. *Id.* at 616, 37 S.E.2d at 918 (citing Chapman v. Summer Consol. School District, 152 Ga. 450, 457, 109 S.E. 129, 132 (1921) and Goolsby v. Stephens, 155 Ga. 529, 538–39, 117 S.E. 439, 444 (1923)).

77. *Id.*

78. *Id.*

79. *See Talmadge*, 201 Ga. at 882, 41 S.E.2d at 896; *see also* CHARLES S. BULLOCK III, ET AL., THE THREE GOVERNORS CONTROVERSY: SKULLDUGGERY, MACHINATIONS, AND THE DECLINE OF GEORGIA'S PROGRESSIVE POLITICS (2015).

80. *Talmadge*, 201 Ga. at 886, 41 S.E.2d at 898.

for the consistent and definitive construction principle.[81] The first treatise described the principle this way: "Framers of a new constitution who adopt provisions contained in a former Constitution, to which a certain construction has been given, are presumed as a general rule to have intended that these provisions should have the meaning attributed them under the earlier instrument," such that "[t]he embodiment . . . of provisions found in previous constitutions[ ] precludes the court from giving their language a meaning different from that ascribed to the previous constitutional provisions."[82] This, the court said, was "stated more strongly than [the court] would be willing to put it."[83] Instead, the court explained, "[w]e would prefer to say that the meaning placed upon the language by such legislative construction will be presumed to have been the meaning intended by those who adopted a constitution, rather than that, as the quoted rule states, the courts are precluded by such construction."[84] The court went on to state that the rule was "perhaps more correctly stated" more modestly in the second treatise:

> It is an established rule of construction that, where a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new or revised constitution, or amendment, it will be presumed to have been retained with a knowledge of the previous construction, and courts will feel bound to adhere to it.[85]

The court then stated that the principle extended beyond judicial construction: "Prior legislative construction is likewise, presumed to have been adopted by subsequent adoption of the provision so construed."[86] The court observed that the legislature had acted under previous versions of the provision in ways that reflected a particular understanding of it—concluding that, when carried forward into the 1945 Constitution, "presumably it was intended to have the same meaning."[87]

More conventional applications of this principle followed, refocusing it on judicial constructions. Two years after *Thompson v. Talmadge*, the court interpreted a provision carried forward from the 1877 Constitution, and concluded that it carried with it the construction given to it by the

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81. *Id.* at 885, 41 S.E.2d at 897.
82. *Id.* at 885, 41 S.E.2d at 897–98 (quoting 11 AM. JUR. *Constitutional Law* § 67).
83. *Id.* at 885, 41 S.E.2d at 898.
84. *Id.*
85. *Id.* (quoting 16 C.J.S. *Constitutional Law* § 35).
86. *Id.* at 885–86, 41 S.E.2d at 897 (quoting 16 C.J.S. *Constitutional Law* § 35).
87. *Id.* at 887, 41 S.E.2d at 898.

court under the previous constitution.[88] At least two other cases were similarly decided under the 1945 Constitution,[89] and then a number of cases through the 1980s and 1990s.[90] And while this is by now a well-settled Georgia principle, it bears mention that it is a principle also employed by a number of other states.[91]

C. Federal interpretations of similar provisions are persuasive authority only, and their persuasive power depends on whether the decision was rooted in similar principles.

I began this Article by noting the long-standing principle that a state supreme court's interpretation of its own state's constitution generally cannot be overruled by federal courts. And yet, many state high courts explicitly cede interpretation of their state constitution to federal courts by "lockstepping" provisions of their constitution to federal interpretations of the federal Constitution.[92] As I detail below, the Georgia Supreme Court has been inconsistent on this point, over the years purporting to lockstep some provisions of the Georgia Constitution while explaining in other cases that such a practice generally is not appropriate. This next interpretive principle addresses this issue.

While most of the Georgia Constitution is different from the federal Constitution, some provisions—especially in the Georgia Bill of Rights—are very similar, and some are identical. In my experience, Georgia lawyers often argue such state and federal provisions identically, presuming that they have the same meaning. But this does not make much sense when you think about it. A federal provision adopted in the late 1700s may well have an original public meaning that differs from that of a Georgia provision adopted in 1861 (ironically, the first Georgia Constitution to have a bill of rights) or 1877, especially if it was then carried forward through a number of successive constitutions.

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88. Griffin v. Vandegriff, 205 Ga. 288, 53 S.E.2d 345 (1949).

89. *See* Aldrich v. State, 220 Ga. 132, 137 S.E.2d 463 (1964); *Hancock*, 211 Ga. at 431–32, 86 S.E.2d at 514–15.

90. *See, e.g.*, Atlanta Indep. Sch. Sys. v. Lane, 266 Ga. 657, 657–59, 469 S.E.2d 22, 24–25 (1996); City of Thomaston v. Bridges, 264 Ga. 4, 5–6, 439 S.E.2d 908–09 (1994); Toombs Cnty. v. O'Neal, 254 Ga. 390, 390–92, 330 S.E.2d 95, 96–97 (1985); *Nelms*, 253 Ga. at 410, 321 S.E.2d at 332–33 (1984).

91. *See Elliott*, 305 Ga. at 185, 824 S.E.2d at 271 (collecting cases applying the principle from Florida, Louisiana, Missouri, Illinois, Michigan, Nebraska, North Carolina, Alabama, Virginia, and Texas).

92. *See* JEFFREY S. SUTTON, *supra* note 53, at 20, 76, 174–178, 183 (explaining "lockstepping" as when a state court reflexively interprets a state constitutional provision as having the same meaning that federal courts have given an equivalent federal provision).

The interpretive principle necessary to resolve these questions arises from the nature of state constitutions and Georgia interpretive norms discussed above. Decisions of the Supreme Court of the United States interpreting a federal provision are merely persuasive authority for interpreting a Georgia equivalent. [93] The persuasive force of such federal decisions depends on the nature of the provisions and the analytical approach taken by the federal court; that is, federal decisions are persuasive when (1) the federal provision and the state provision share the same text, history, and context, and (2) the federal decision was guided by that same text, history, and context.[94] Both of these points require an affirmative showing that is not necessarily made by the mere observation that a provision of our Constitution was enacted with similar language. If lawyers want the Georgia Supreme Court to adopt an interpretation informed by federal precedent, they would be well advised to prove both points.[95]

Nevertheless, over the years the Georgia Supreme Court has sometimes asserted that certain provisions of the Georgia Bill of Rights should be construed consistent with their federal equivalents, often in confusing ways. One key example is the right to free speech. The court has, for decades, followed federal precedent on speech issues, without ever explaining why.[96] And yet the court has also said that the Georgia Constitution's protection of speech is more robust than its federal equivalent.[97] So far as I can tell, the court has never actually reconciled those holdings.[98] And at least one federal district court has expressed

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93. *See Elliott*, 305 Ga. at 186–89, 824 S.E.2d at 272–73.

94. *Id.* at 188, 824 S.E.2d at 273.

95. By its logic, this principle would seem to apply primarily to federal precedent decided after initial adoption of the similar state provision. Federal precedent decided *before* initial adoption of a state provision that mirrored the federal provision so interpreted would presumably be strong evidence of the original public meaning of the state provision.

96. *See, e.g.,* Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 255 n.5, 297 S.E.2d 250, 253 n.5 (1982) ("In the absence of controlling state precedent, this court has applied analogous First Amendment standards when construing the state constitution.") (citing Retail Credit Co. v. Russell, 234 Ga. 765, 218 S.E.2d 54 (1975), and Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974)). Although the cases cited for this proposition did in fact rely on federal precedent in considering the Georgia Constitution alongside its federal equivalent, neither case attempted to explain why that reliance was proper, much less announce a broad rule of federal precedent's general applicability to the state constitution.

97. *See* K. Gordon Murray Prods. v. Floyd, 217 Ga. 784, 792, 125 S.E.2d 207, 213 (1962) (holding that prior restraint permissible under First Amendment nevertheless violated Georgia Constitution).

98. The closest the court appears to have come is noting the incongruity and expressing doubt about the asserted breadth of Georgia's free speech provision. *See* Grady v. Unified Gov't of Athens-Clarke Cnty., 289 Ga. 726, 731, 715 S.E.2d 148, 151–52 (2011) ("[O]ur cases saying that Georgia's constitutional protection of free speech is broader than that provided

skepticism that the Georgia Supreme Court's statements about state constitutional breadth actually line up with its actions: "[T]he Georgia Supreme Court's general characterization of its jurisprudence notwithstanding, when analyzing sign ordinances, 'Georgia courts have consistently applied United States Supreme Court precedent, drawing no analytical distinction between the state and federal constitutions."[99] And I have noted it is odd to presume the Georgia Constitution's provision means the same as its federal equivalent, given that the provisions have dramatically different text.[100]

The Georgia Supreme Court appears to have been more consistent in applying Fourth Amendment precedents in interpreting Paragraph XIII, the Georgia Constitution's right against unreasonable search and seizure,[101] although not without at least initial disagreement.[102]

Judge Dorothy Beasley of the Court of Appeals of Georgia—a scholar of the Georgia Constitution in her own right,[103] and one of the framers of the 1983 Constitution[104]—expressed serious doubt about interpreting Paragraph XIII in this manner.[105] Other Georgia appellate judges have

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by the First Amendment offer none of the legal reasoning one would normally expect for such an important constitutional point. We do not foreclose the possibility that solid reasons supporting that conclusion may exist, although Grady has not offered any.").

99. Kennedy v. Avondale Estates, Ga., 414 F. Supp. 2d 1184, 1216 (N.D. Ga. 2005) (citation omitted).

100. *See* Maxim Cabaret, Inc. v. City of Sandy Springs, 304 Ga. 187, 195–96, 816 S.E.2d 31, 39 (2018) (Peterson, J., concurring); Tucker v. Atwater, 303 Ga. 791, 794 n.3, 815 S.E.2d 34, 35 n.3 (2018) (Peterson, J., concurring); *compare* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assembly") *with* GA. CONST. art. I, § 1, para. 5 ("No law shall be passed to curtail the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty").

101. *See* GA. CONST. art. I, § 1, para. 13.

102. *See* Brown v. State, 293 Ga. 787, 791 n.6, 750 S.E.2d 148, 154 n.6 (2013) ("we have held that Paragraph XIII is applied in accord with the Fourth Amendment" as to search and seizure) (citing Brent v. State, 270 Ga. 160, 162, 510 S.E.2d 14, 16 (1998)). In neither *Brown* nor *Brent* did the court do any actual analysis of whether the two provisions should be construed similarly. And in *Brent*, Justice Benham dissented from that holding. *See Brent*, 270 Ga. at 163, 510 S.E.2d at 17 (Benham, J., dissenting) ("Because I cannot agree that the majority opinion has properly interpreted Art. I, Sec. I, Par. XIII of the Georgia Constitution as being exactly coextensive with the Fourth Amendment of the U.S. Constitution, I must dissent.")

103. *See* Hon. Dorothy Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 EMORY L.J. 341 (1985).

104. Vol. 22, Transcripts of Mtgs., Master Index at 240, available at https://www.ga supreme.us/wp-content/uploads/2023/11/Vol.-21-SCOCR-Transcripts-of-Mtgs.-Legislative-Overview-Committee-Vol.-III.pdf [https://perma.cc/NH63-LXGP] (last visited Dec. 7, 2023).

105. *See* Wells v. State, 180 Ga. App. 133, 135–39, 348 S.E.2d 681, 684–86 (1986) (Beasley, J., concurring specially).

periodically pointed out that Paragraph XIII might differ from the Fourth Amendment in some circumstances.[106] And, more recently, the Georgia Supreme Court has articulated a different ground in rejecting arguments that the state and federal provisions should be read together: not that the two provisions mean the same, but that the parties arguing for a different interpretation had not carried their burden to show it was correct.[107]

Indeed, it is difficult to square lockstepping with a focus on original public meaning. By its own logic, it suggests that the interpretation of the Georgia Constitution should change every time the U.S. Supreme Court (and perhaps also lower federal courts!) interprets the federal Constitution in a new or different way. And lockstepping is often applied even when the state text differs materially from the federal text, as Georgia's historical approach to free speech demonstrates. Simply put, lockstepping appears wholly incompatible with the principles of fixed meaning, textualism, and the independence of state constitutions.[108]

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106. *See, e.g.,* State v. Stephens, 252 Ga. 181, 187 n.1, 311 S.E.2d 823, 828 n.1 (1984) (Smith, J., dissenting) ("This court is free, under the Georgia Constitution, to reject the 'rule' of Illinois v. Gates and retain the Aguilar-Spinelli framework for reviewing hearsay affidavits offered to support the issuance of search warrants."); Lo Giudice v. State, 251 Ga. 711, 715 n.6, 309 S.E.2d 355, 357 n.6 (1983) (Smith, J. dissenting) ("Apart from any consideration of the Supreme Court's interpretation of the Fourth Amendment in Hester and subsequent cases, this court is free, under the Georgia Constitution, to provide for greater protection of individual rights than under federal law.").

107. *See, e.g.,* White v. State, 307 Ga. 601, 602 n.2, 837 S.E.2d 838, 842 n.2 (2020) (explaining that because the defendant made "no argument that state law provides a rule substantively different as applied to this case from that of the Fourth Amendment," the "case therefore present[ed] no occasion for consideration of whether Paragraph XIII differs from the Fourth Amendment in some circumstances"); *Olevik*, 302 Ga. at 234 n.3, 806 S.E.2d at 512 n.3 (rejecting argument because party "offers no reason that we should interpret Paragraph XIII differently in this context" and observing that any independent interpretation of Paragraph XIII must be grounded in the text, context, and history of the Georgia provision); *see also* Hinkson v. State, 310 Ga. 388, 398 n.5, 850 S.E.2d 41, 51 n.5 (2020) (same, citing *White* and *Olevik*).

108. *See, e.g.,* State v. Turnquest, 305 Ga. 758, 769–70, 827 S.E.2d 865, 875 (2019) (rejecting a lockstepping argument, at length, in the due process context: "there is no significant evidence from either English common law as it was understood in 1776 or Georgia law or the broader American legal context of the 1860s that any right, let alone the due process right, was understood to require suspects in custody to receive any sort of warnings in order for their otherwise voluntary statements to be admissible. And although the federal context may have changed in 1966 by virtue of *Miranda*, nothing in the legal history leading up to the adoption of our current Paragraph I in 1983 indicates that our state constitutional due process right was understood by Georgians and Georgia courts to have changed in the same way. And so, if we interpret the Georgia right to due process independently of the federal right, no prophylactic warning would be required . . . . Indeed, it is difficult to conceive how or why Georgians would delegate to the United States

D. Provisions with Common-Law Roots are Generally Understood by Reference to the Common Law

It has long been well-settled Georgia law that "[i]n construing a constitution, a safe rule is to give its words such significance as they have at common law; especially if there is nothing in the instrument to indicate an intention by its framers that the language in question should have a different construction."[109] This is particularly so for provisions that guarantee a right that existed at common law; when "a constitutional provision incorporates a pre-existing right, the provision cannot be said to create that right—it merely secures and protects it."[110] In this way and others, the common law of England (as distinct from what one might call "decisional law," namely the body of binding authority produced by courts in interpreting statutes or the constitution)[111] plays a vital role in understanding the background law of Georgia. By a 1784 statute, Georgia has adopted and maintained the common law of England as it existed as of May 14, 1776,[112] except where it has been superseded by statute or constitution.[113] So, for example, the Georgia Supreme Court

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Supreme Court the authority to alter the meaning of the Georgia Constitution by unknown future federal decisions"). The Georgia Supreme Court made a similar observation in a case applying Fourth Amendment principles to decide a state constitutional issue. *See Olevik*, 302 Ga. at 234 n.3, 806 S.E.2d at 512 n.3 ("interpreting Paragraph XIII in a manner consistent with the Fourth Amendment does not mean that our interpretation of Paragraph XIII must change every time the Supreme Court of the United States changes its interpretation of the Fourth Amendment").

109. State v. Cent. of Ga. Ry. Co., 109 Ga. 716, 728, 35 S.E. 37, 41 (1900).

110. *Elliott*, 305 Ga. at 212, 824 S.E.2d at 288.

111. *See* Crum v. Jackson Nat'l Life Ins. Co., 315 Ga. 67, 75, 880 S.E.2d 205, 210 (2022) ("The cases Jackson cites are not part of the body of common law from England that our General Assembly adopted in the late eighteenth century . . . . Instead, they are part of a body of decisional law that interprets and applies Georgia statutes dealing with insurable interests. This distinction is significant[.]"). Decisional law can, however, still be a very useful indicator of original public meaning, especially for provisions adopted after the time of the decisional law.

112. O.C.G.A. § 1-1-10(c)(1) ("The following specific laws and parts of laws are not repealed by the adoption of this Code and shall remain of full force and effect, pursuant to their terms, until otherwise repealed, amended, superseded, or declared invalid or unconstitutional: . . . An Act for reviving and enforcing certain laws therein mentioned and adopting the common laws of England as they existed on May 14, 1776, approved February 25, 1784. (For the adopting Act of 1784, see Prince's 1822 Digest, p. 570; Cobb's 1851 Digest, p. 721; and Code of 1863, Section 1, paragraph 6.")); State v. Chulpayev, 296 Ga. 764, 780, 770 S.E.2d 808, 821 (2015) ("The common law of England as of May 14, 1776, has long been the backstop law of Georgia").

113. *Lathrop*, 301 Ga. at 412 n.9, 801 S.E.2d at 871 n.9 ("In 1784, our General Assembly adopted the statutes and common law of England as of May 14, 1776, except to the extent that they were displaced by our own constitutional or statutory law. That adoption of English statutory and common law remains in force today.") (citation omitted).

recently relied heavily on the common law "as it was understood in 1776" to conclude that Georgia's self-incrimination provision did not require *Miranda*-style warnings before asking a DUI suspect to submit to a breath test.[114]

V. CASE STUDIES

A trilogy of cases about the Georgia Constitution's application to Georgia's DUI laws better explains how these abstract principles apply in practice.

A. Olevik and a Consistent and Definitive Construction

Frederick Olevik was arrested for DUI, and the arresting officer then read him the statutorily mandated implied consent notice, which included the instruction that "Georgia law requires you to submit to state administered chemical tests."[115] Olevik submitted to a test of his breath, which showed a blood alcohol content of 0.113. He filed a motion to suppress, seeking to exclude the test results because the implied consent notice violated his state constitutional right against compelled self-incrimination. The trial court denied the motion, finding that he voluntarily submitted to the test.[116]

On appeal, Olevik argued that the Georgia Constitution's right against compelled self-incrimination[117] (Paragraph XVI) afforded him the right to refuse to submit to the chemical test of his breath, thus, the language of the notice that Georgia law required him to submit was misleading.[118] He made no argument under the federal right against compelled self-incrimination guaranteed by the Fifth Amendment, as precedent from the Supreme Court of the United States makes clear the federal right does not apply to acts.[119] At the time, the Supreme Court of Georgia's decision in *Klink v. State*[120] precluded his argument.[121]

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114. *See Turnquest*, 305 Ga. at 769, 827 S.E.2d at 875.

115. *Olevik*, 302 Ga. at 231, 249, 806 S.E.2d at 510, 521–22 (quoting O.C.G.A. § 40-4-67.1(b)(2) (2017)).

116. *Id.* at 231, 806 S.E.2d at 510.

117. *See* GA. CONST. art. I, § 1, para. 16.

118. *Olevik*, 302 Ga. at 230, 806 S.E.2d at 510.

119. *See* Schmerber v. California, 384 U.S. 757, 764 (1966) (explaining that the right against compelled self-incrimination bars compelling "communications" or "testimony," but "compulsion which makes a suspect or accused the source of real or physical evidence does not violate it.") (punctuation omitted).

120. Klink v. State, 272 Ga. 605, 533 S.E.2d 92 (2000).

121. *Olevik*, 302 Ga. at 231, 806 S.E.2d at 510.

In *Klink*, the court had rejected similar arguments regarding both blood and breath tests on the basis that "[t]he right to refuse to submit to state administered testing is not a constitutional right, but one created by the legislature."[122] But since *Klink* had been decided, its holding regarding blood tests had been invalidated by more recent federal developments.[123] In that light, the *Olevik* court concluded that "doubt naturally arises about the soundness of our parallel statement in *Klink* that the Georgia Constitution also does not protect against compelled breath testing."[124] The court thus revisited its previous (and cursory) self-incrimination holding.[125]

The court began by observing that if it was, "construing Paragraph XVI in the first instance, we might conclude that the scope of Georgia's right against compelled self-incrimination is coterminous with the right guaranteed by the Fifth Amendment to the United States Constitution, which is limited to evidence of a testimonial or communicative nature."[126] But the court recognized that it was "not meeting Paragraph XVI for the first time; this constitutional provision has been carried over from prior constitutions, and it has brought with it a long history of interpretation."[127] The court explained the importance of prior constructions in the interpretive process, and then began its analysis at the beginning of the provision's history.[128]

The court noted that a version of the Georgia right against compelled self-incrimination first entered a Georgia Constitution in 1877, and had remained materially identical ever since.[129] The court observed that only two years after the adoption of the 1877 Constitution containing that provision, the court held in *Day v. State*[130] that the constitutional right against self-incrimination "protected a defendant from being compelled to incriminate himself by acts, not merely testimony."[131] Although the

122. *Klink*, 272 Ga. at 606, 533 S.E.2d at 94.

123. *See* Williams v. State, 296 Ga. 817, 821, 771 S.E.2d 373, 376 (2015) (applying U.S. Supreme Court decision in Missouri v. McNeely, 569 U.S. 141, (2013), and overruling case law on which *Klink* relied to the extent it had held that blood tests of DUI suspects were always permissible under exigent circumstances doctrine); *see also* Birchfield v. North Dakota, 579 U.S. 438, 476 (2016) (holding blood tests for blood alcohol not permissible as search incident to arrest).

124. *Olevik*, 302 Ga. at 233, 806 S.E.2d at 512.

125. *Id.*

126. *Id.* at 235, 806 S.E.2d at 513.

127. *Id.*

128. *Id.* at 235–238, 806 S.E.2d at 513–15.

129. *Id.* at 239, 806 S.E.2d at 515.

130. 63 Ga. 667 (1879).

131. *Olevik*, 302 Ga. at 239, 806 S.E.2d at 515 (citing *Day*, 63 Ga. at 669).

court in *Day* "did not explain its broad interpretation,"[132] a few years later the court provided more explanation in *Calhoun v. State*,[133] stating that the Georgia constitutional right "was modeled after the common law . . . . right from which it was derived,"[134] and thus "protects one from being compelled to furnish evidence against himself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature."[135] The court then traced the subsequent history, noting that the provision was carried forward without material change into the 1945, 1976, and 1983 Constitutions, and that the court continued to apply *Day*'s interpretation under each constitution. The state argued that the court had erred in *Day*, had been wrong ever since, and should change course. Without deciding whether *Day* was rightly decided in the first instance, the court rejected the state's conclusion: "[E]ven if the State were right that *Day* (and all the other cases that have since followed it) misread the constitutional text, we are no longer governed by the 1877 Constitution that *Day* interpreted."[136] And "the adoption of a new constitution containing materially identical language already clearly and authoritatively construed by this Court is strongly presumed to have brought with that language our previous interpretation."[137] Accordingly, "[t]he people of Georgia, by ratifying that constitutional text, ratified the scope of Paragraph XVI as *Day* explained it."[138]

The court then applied this construction to the claim presented. "Paragraph XVI prohibits compelling a suspect to perform an act that itself generates incriminating evidence; it does not prohibit compelling a suspect to be present so that another person may perform an act generating such evidence."[139] Thus, whether Paragraph XVI prevents the State from requiring the defendant to consent to a breath test "depends on the details of the test."[140] The court noted that a breath test "requires

132. *Id.* at 239, 806 S.E.2d at 515–16 (citing Calhoun v. State, 144 Ga. 679, 680–81, 87 S.E. 893 (1916)).

133. 144 Ga. 679, 87 S.E. 893 (1916).

134. *Olevik*, 302 Ga. at 239–40, 806 S.E.2d at 516.

135. *Id.* at 240, 806 S.E.2d at 516 (quoting *Calhoun*, 144 Ga. at 681, 87 S.E. at 893).

136. *Id.* at 241, 806 S.E.2d at 516.

137. *Id.* at 241, 806 S.E.2d at 516–17.

138. *Id.* at 241, 806 S.E.2d at 517; *see also Aldrich*, 220 Ga. at 135, 137 S.E.2d at 464 (*Day*, *Calhoun*, and other cases "had construed the word 'testimony' to embrace any evidence when the identical clause containing this word was written into the 1945 Constitution. The universal rule of construction requires a holding that the framers of that Constitution intended for it to have the meaning theretofore given it by construction").

139. *Olivek*, 302 Ga. at 243, 806 S.E.2d at 518.

140. *Id.*

the cooperation of the person being tested because a suspect must blow deeply into a breathalyzer for several seconds in order to produce an adequate sample. As the State conceded at oral argument, merely breathing normally is not sufficient."[141] In other words, "for the State to be able to test an individual's breath for alcohol content, it is required that the defendant cooperate by performing an act,"[142] and "[c]ompelling a defendant to perform an act that is incriminating in nature is precisely what Paragraph XVI prohibits."[143] Accordingly, the court's decision seventeen years earlier in *Klink* that there was no constitutional right to refuse a breath test was unsound, and, after a *stare decisis* analysis, the court overruled *Klink* and other cases "to the extent they hold that Paragraph XVI of the Georgia Constitution does not protect against compelled breath tests or that the right to refuse to submit to such testing is not a constitutional right."[144]

In short, the Georgia Constitution's right against compelled self-incrimination applied more broadly than its federal equivalent.[145] It did so as a result of the Georgia-specific history and context embodied in a long line of case law that informed the original public meaning of Paragraph XVI when it was carried forward into the 1983 Constitution without material change.[146] And that pre-1983 precedent that informed the original public meaning of the 1983 Constitution warranted overruling post-1983 precedent that got that meaning wrong.[147]

B. Elliott, Constitutional Continuity, Common Law, and Federal Precedent

Recognition that a provision of the Georgia Constitution applies differently from its federal equivalent sometimes raises additional questions about other applications, and that is precisely what happened in the wake of *Olevik*. Although the U.S. Supreme Court has interpreted the Fifth Amendment to the U.S. Constitution to bar the government from introducing a defendant's exercise of their Fifth Amendment right against compelled self-incrimination against them,[148] it has also held that this right "does not bar the State from using [a refusal to submit to a breath test], in part because the Fifth Amendment gives [defendants]

141. *Id.*
142. *Id.* at 244, 806 S.E.2d at 518.
143. *Id.* at 244, 806 S.E.2d at 519.
144. *Id.* at 246, 806 S.E.2d at 520.
145. *Id.* at 240, 806 S.E.2d at 516.
146. *Id.*
147. *Id.* at 231, 806 S.E.2d at 510.
148. *See* Griffin v. California, 380 U. S. 609 (1965).

no right to refuse to act in the first place."[149] So after *Olevik* made clear that the Georgia Constitution affords a right to refuse that the U.S. Constitution does not, the question naturally arose whether the Georgia Constitution also prohibited the use of that constitutionally-protected refusal against a defendant at trial. The Georgia Supreme Court answered this question in *Elliott v. State*.[150]

The court began by articulating at some length applicable interpretive principles, including the presumptions of constitutional continuity and a consistent and definitive construction. The court then went on to address the State's request for the court to overrule *Olevik*; after extensive historical analysis, the court concluded that *Olevik* properly found a consistent and definitive construction of Paragraph XVI and reaffirmed its holding. The court then turned to whether Paragraph XVI prevented the State's use of refusal evidence.[151]

The court started its analysis by assessing the 1965 case of *Griffin v. California*,[152] the U.S. Supreme Court's precedent that determined the Fifth Amendment prohibited prosecutors from using silence against a defendant.[153] The Georgia Supreme Court noted that if *Griffin* had been "rooted in text, history, and context shared by the 1877 [version of Paragraph XVI (the 1877 Provision)], it would be persuasive as we determine the original public meaning" of that provision.[154] But *Griffin* was not so rooted; indeed, it has been met with considerable criticism since the day it was decided as lacking "foundation in the [federal] Constitution's text, history, or logic."[155] Because its analysis lacked any focus on shared text, history, and context, the court concluded that "*Griffin* cannot answer the question before us today, and we must undertake our own analysis."[156]

The court moved to the text of the 1877 Provision, which was inconclusive, and then continued on to consider the history and context

149. *Elliott*, 305 Ga. at 179, 824 S.E.2d at 267; *see also* South Dakota v. Neville, 459 U.S. 553, 566 (1983) (holding that admission of the defendant's refusal to consent to a blood-alcohol test does not violate the Fifth Amendment, because undergoing a blood-alcohol test is not an act of a testimonial or communicative nature).

150. *Elliott*, 305 Ga. at 179–80, 824 S.E.2d at 267–68.

151. *Id.* at 209, 824 S.E.2d at 287.

152. 380 U.S. 609 (1965).

153. *Elliott*, 305 Ga. at 209–10, 824 S.E.2d at 287.

154. *Id.* at 210, 824 S.E.2d at 287.

155. *Id.* (citing Mitchell v. United States, 526 U.S. 314, 341 (1999) (Thomas, J., dissenting)); *Mitchell*, 526 U.S. at 331–41 (Scalia, J., dissenting, joined by Rehnquist, C. J., and O'Connor and Thomas, JJ.); Carter v. Kentucky, 450 U. S. 288, 305–07 (1981) (Powell, J., concurring); *Griffin*, 380 U. S. at 617–23 (Stewart, J., joined by White, J., dissenting).

156. *Elliott*, 305 Ga. at 211, 824 S.E.2d at 287–88.

of the provision. The court assessed pre-Revolutionary common law and concluded that "[t]he common law as it was understood in 1776 did not prohibit a trial court from admitting evidence that a defendant refused to speak or otherwise provide incriminating evidence against himself."[157] But this conclusion did not resolve the original meaning of the 1877 Provision. Developments in America between the Revolution and the late 1870s shifted the approach regarding the "admissibility of defendants' refusal to incriminate themselves."[158] And decisions of the Georgia Supreme Court during that time reflected that shift, moving in a direction that protected defendants from having their assertion of their self-incrimination right used against them.[159] Cases decided in the years shortly after adoption of the 1877 Constitution confirmed this approach, although those cases did not cite the 1877 Provision specifically; instead, they appeared to be "common law" cases, but "this suggests that the common law they apply was part of the preexisting common law that was incorporated into the 1877 Provision."[160] The court concluded from all of this that the original public meaning of the 1877 Provision "prohibited admission of a defendant's refusal to speak or act as evidence against him."[161]

Again, however, this conclusion about the original public meaning of the 1877 Provision did not resolve the case, because "the 1877 Provision does not apply today[,] Paragraph XVI of the 1983 Constitution does."[162] That said, the presumption of constitutional continuity meant that the court presumed that "Paragraph XVI as it is found in the 1983 Constitution carries the same meaning as that of the 1877 Provision."[163] The court also observed that, unlike in *Olevik*, there was no consistent and definitive line of cases interpreting the 1877 Provision that might trigger that presumption; much of the relevant cases simply applied the common law that informed the 1877 Provision's original meaning, and not subsequent interpretation of that Provision that might be carried forward with it into future constitutions.[164] The court's next step was to assess whether anything that happened following the adoption of the

157. *Id.* at 213, 824 S.E.2d at 289.
158. *Id.*
159. *Id.* at 213–17, 824 S.E.2d at 289–92.
160. *Id.* at 218, 824 S.E.2d at 292.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 218, 824 S.E.2d at 293.

1877 Provision might rebut the presumption of constitutional continuity such that the 1983 provision's meaning would differ from that of 1877.[165]

The court concluded that no such meaning-changing developments occurred, rejecting the State's two arguments to the contrary.[166] The State first argued that a long line of Georgia cases "provided that silence when the circumstances require an answer, denial, or other conduct may amount to an admission."[167] The court found this line insufficient to rebut continuity, because little of it engaged with constitutional issues, other cases questioned that line's compatibility with the Georgia Constitution, and the main line of cases was overruled before adoption of the 1983 Constitution.[168] And, in any event, the State's "line of cases did not hold that a defendant's silence was always admissible, only that it was admissible when circumstances dictated that the defendant should have responded, rendering the silence an adoptive admission."[169] The State's second argument was that federal cases interpreting the Fifth Amendment were persuasive and supported their position. The court quickly rejected that argument, acknowledging contrary federal precedent but finding it unpersuasive because it was based on a more limited federal right.[170]

The court thus applied the presumption of constitutional continuity such that the original public meaning of the 1877 Provision was carried forward into 1983's Paragraph XVI. Because that 1877 original meaning prohibited admission of a defendant's exercise of the self-incrimination right, so too does Paragraph XVI. And because Paragraph XVI affords the right to refuse a breath test, it also "precludes admission of evidence that a suspect refused to consent to a breath test."[171] In short, Paragraph XVI affords the same kind of right that the Fifth Amendment affords (prohibiting admission of a defendant's exercise of the self-incrimination right those constitutional provisions secure), but for reasons different from federal law, and with applications different from federal law.

C. Turnquest and Federal Precedent.

The final installment of this constitutional trilogy followed soon after. In *Miranda v. Arizona*,[172] the United States Supreme Court "imposed on

165. *Id.* at 219–21, 824 S.E.2d at 293–94.
166. *Id.* at 218–21, 824 S.E.2d at 293–95.
167. *Id.* at 219, 824 S.E.2d at 293.
168. *Id.* at 219–21, 824 S.E.2d at 293–94.
169. *Id.* at 221, 824 S.E.2d at 294.
170. *Id.* at 221, 824 S.E.2d at 294–95.
171. *Id.* at 223, 824 S.E.2d at 296.
172. 384 U. S. 436 (1966).

law enforcement a requirement to provide persons in custody with a prophylactic warning of their rights before subjecting those persons to interrogation."[173] The right against compelled self-incrimination is among those rights,[174] although federal law does not require *Miranda* warnings before asking an arrestee to submit to a breath test, because submitting to a breath test is not an act within the protection of the federal version of the right against compelled self-incrimination.[175] But in the wake of *Elliott*, a Georgia trial court found that *Miranda* warnings must be given before asking an arrestee to submit to a breath test. The State appealed, arguing that the U.S. Constitution requires no such thing, and that the Georgia Constitution should not be interpreted as requiring such a warning either.[176]

The Georgia Supreme Court observed that nothing in the text of Paragraph XVI required warnings,[177] and also quickly disposed of any suggestion that *Miranda* was persuasive authority for interpreting the Georgia Constitution. "[E]ven to the extent that *Miranda* was a construction of one or more federal analogues to provisions found in the Georgia Constitution, it certainly involved no consideration of shared language, history, or context,"[178] and so "*Miranda* and its progeny offer us no meaningful guidance as to whether Paragraph XVI of the Georgia Constitution independently requires warnings like those set forth in *Miranda*."[179]

As in *Elliott*, the court considered the common law as it was understood in 1776, Georgia law as of the time of adoption of the 1877 Provision, and the larger American legal context at the same time.[180] It concluded that there was "no significant evidence" from those sources "that the right to be free from compelled self-incrimination was understood to require suspects in custody to be warned of that right—or any other constitutional right—in order for their otherwise voluntary statements to be admissible."[181] Indeed, the United States Supreme Court "held around the turn of the 20th century that the Fifth Amendment right against compelled self-incrimination does not require a confession to be preceded by warnings that the suspect's words could

173. *Turnquest*, 305 Ga. at 758, 827 S.E.2d at 867–68.
174. *Id.* at 759, 827 S.E.2d at 869.
175. *Id.* (citing United States v. Wade, 388 U. S. 218, 221–23 (1967)).
176. *Id.* at 759–60, 827 S.E.2d at 868–69.
177. *Id.* at 761, 827 S.E.2d at 870.
178. *Id.*
179. *Id.*
180. *Id.* at 761–66, 827 S.E.2d at 870–73.
181. *Id.* at 765–66, 827 S.E.2d at 872.

be used against him."[182] Accordingly, the original public meaning of the 1877 Provision did not require *Miranda*-like warnings, and that meaning was presumptively carried forward into the 1983 Constitution under the presumption of constitutional continuity.[183]

The court then considered whether post-1877 Georgia cases might have given rise to a consistent and definitive construction that would rebut the continuity presumption. Although some cases encouraged warnings to be given as "the 'better practice,'"[184] no case suggested that "warnings were a [state] constitutional prerequisite to admissibility of otherwise voluntary statements prior to the adoption of the 1983 Constitution."[185] Thus, no consistent and definitive construction supporting warnings existed.

In short, no relevant consideration supported interpreting the Georgia Constitution to require *Miranda*-style warnings: not the text, not the original public meaning of the 1877 Provision presumptively carried forward through constitutional continuity, and not post-1877 cases that might have constituted a consistent and definitive construction. Accordingly, Paragraph XVI did "not require that a suspect in custody be warned of any constitutional rights before being asked to submit to a breath test."[186] Based on the same history, the court also arrived at a similar (albeit much briefer) conclusion under Georgia's Due Process Provision:[187]

> [A]lthough the federal [due process] context may have changed in 1966 by virtue of *Miranda*, nothing in the legal history leading up to the adoption of our current Paragraph I in 1983 indicates that our state constitutional due process right was understood by Georgians and Georgia courts to have changed in the same way.[188]

Following these conclusions, the court then grappled with *Price v. State*,[189] a decision from 1998 that *Miranda* warnings must precede a request to perform field sobriety tests.[190] The *Price* court announced that holding without analysis and without explaining what source of law

182. *Id.* at 765, 827 S.E.2d at 872 (citing Powers v. United States, 223 U.S. 303, 313–14 (1912)).

183. *Id.* at 768, 827 S.E.2d at 874.

184. *Id.* at 767, 827 S.E.2d at 873 (quoting Davis v. State, 122 Ga. 564, 565, 50 S.E. 376 (1905)).

185. *Id.* at 767, 827 S.E.2d at 873–74.

186. *Id.* at 768, 827 S.E.2d at 874.

187. *See* GA. CONST. art. I, § 1, para. 1.

188. *Turnquest*, 305 Ga. at 769, 827 S.E.2d at 875.

189. 269 Ga. 222, 498 S.E.2d 262 (1998).

190. *Id.* at 225–26, 498 S.E.2d at 265–66.

compelled its conclusion (beyond noting that the challenge was raised "on state law grounds");[191] for that reason, although *Price* did not claim to be decided under the Georgia Constitution, the court in *Turnquest* performed a *stare decisis* analysis and overruled *Price* to the extent it could be understood as representing a state constitutional holding.[192]

Taken together, these three cases illustrate the broad range of meanings that Georgia constitutional rights with federal equivalents may have. The Georgia Constitution can afford more rights than the federal Constitution (*Olevik*); [193] it can afford roughly the same protection, although sometimes for different reasons and with different applications (*Elliott*);[194] and it can provide less protection (*Turnquest*),[195] although then the state court must be sure to apply the broader federal right (assuming it is raised).[196] And to determine which of these possibilities applies to a particular provision requires considerable analysis of text, history, and context through the lens of the applicable interpretive principles.

VI. OBSERVATIONS ABOUT THE INTERPRETIVE PRESUMPTIONS

With those case studies in mind, the presumption of constitutional continuity and the presumption of consistent and definitive constructions warrant several observations.

A. Both presumptions apply only when constitutional text is carried from one constitution to another "without material change."[197]

When text is changed in a material way, a change in meaning is generally presumed.[198] This means that the presumption about carrying forward the same words and phrases (continuity) and the inferences to be drawn from consistently interpreted text (consistent and definitive constructions) require careful assessment of the change before

191. *Id.* at 225, 498 S.E.2d at 264–65.

192. *Turnquest*, 305 Ga. at 771–75, 827 S.E.2d at 876–79.

193. *Olevik*, 302 Ga. at 240, 806 S.E. 2d at 516.

194. *Elliott*, 305 Ga. at 179–80, 824 S.E.2d at 267.

195. *Turnquest*, 305 Ga. at 770, 827 S.E. 2d at 875.

196. *Olevik*, 302 Ga. at 234 n.3, 806 S.E.2d at 512 n.3.

197. *Elliott*, 305 Ga. at 182–83, 218, 824 S.E.2d at 269–70, 292–93.

198. *See, e.g.*, Harvey v. Merchan, 311 Ga. 811, 822, 860 S.E.2d 561, 573 (2021) (citing Jones v. Peach Trader Inc., 302 Ga. 504, 514, 807 S.E.2d 840, 848 (2017) (applying principle in statutory context); *see also* Garcia-Jarquin v. State, 314 Ga. 555, 558, 878 S.E.2d 200, 203 (2022) (Bethel, J., concurring) ("By changing the jurisdictional definition from the crime (capital felonies) to the punishment (cases in which a sentence of death was or could be imposed), the new constitutional language eliminated a large category of cases from this Court's jurisdiction[.]").

determining whether and to what extent previous meaning or construction might carry forward. As the Georgia Supreme Court observed in interpreting Georgia's equivalent to the federal Takings Clause,[199] "[g]iven the textual changes to the Just Compensation Provision that followed, particularly in 1960, 1978, and 1983, we must bear in mind that we cannot apply uncritically our decisions interpreting old versions of a constitutional provision to new language."[200]

B. In some cases, the presumption of a consistent and definitive construction and the presumption of constitutional continuity may point in different directions.

Over time, judicial construction of a constitutional provision may depart from the provision's original public meaning. If that construction becomes consistent and definitive, then the two presumptions might be said to point in different directions. In that light, it is important to remember that both presumptions are merely that: presumptions, and not conclusive ones.[201] The Georgia Supreme Court has not yet had occasion "to articulate precisely when such a presumption may be rebutted."[202] One possibility is a comparison of the relative strengths of the presumptions. If, on the one hand, the original meaning of the oldest version is very clear, or subsequent construction in a different direction is not truly consistent or definitive, then constitutional continuity would likely carry the day. On the other hand, if the original meaning was not crystal-clear, and a line of subsequent construction was markedly both consistent and definitive, the construction would likely prevail. And one hopes that cases in which the two presumptions apply with nearly identical force will be quite rare; such a case would require a clear original public meaning that the court then consistently and definitively departs from across constitutions. In such rare cases, it would be important to consider whether other interpretive principles may also be of help; for example, (and as discussed later) statutes are presumed constitutional and a challenger has to show "clear" and "palpable"

199. U.S. CONST. amend. V.

200. Dep't of Transp. v. Mixon, 312 Ga. 548, 558, 864 S.E.2d 67, 75 (2021) (citing Stratacos v. State, 293 Ga. 401, 408, 748 S.E.2d 828, 834–35 (2013)).

201. *See Elliott*, 305 Ga. at 186 n.6, 824 S.E.2d at 271 n.6 (noting that "the presumption arising from a consistent and definitive construction, however, like most legal presumptions, may be rebutted"); *see also Talmadge*, 201 Ga. at 885, 41 S.E.2d at 898 ("We would prefer to say that the meaning placed upon the language by such legislative construction will be presumed to have been the meaning intended by those who adopted a constitution, rather than that, as the quoted rule states, the courts are precluded by such construction.").

202. *Elliott*, 305 Ga. at 186 n.6, 824 S.E.2d at 271 n.6.

unconstitutionality.[203] That showing may be difficult to make when involving an under-determinate constitutional provision.

Another possible focus in such rare cases where the original public meaning and the subsequent consistent and definitive construction diverge might be the kind of text at issue. As already discussed, most provisions find much of their meaning in their history and context, and construction of those provisions' predecessors is a key part of that history and context. But the meaning of some text is so palpably obvious that history and context has less of an interpretive role to play. For example, the 1983 Constitution provides that "[n]o person shall be eligible for election to the office of Governor or Lieutenant Governor unless such person . . . shall have attained the age of 30 years by the date of assuming office."[204] No matter how definitively and consistently a previous line of decisions might have interpreted thirty to mean thirty-five, a reasonable drafter who wanted the age set at thirty would have little choice but to continue to use "thirty." In an implausible case like that, there would appear to be little room for the consistent and definitive construction to inform the original public meaning of the 1983 provision.

C. Because the second presumption requires not merely a construction, but a "consistent and definitive" construction, it may not always be clear just how consistent and definitive a construction has to be in order to qualify.

Exactly when a line of cases is "consistent and definitive" may sometimes be difficult to determine. In most cases where the court has found a consistent and definitive construction, the construction has a long (or at least lengthy in time) pedigree.[205] But the Georgia Supreme Court has never held that this long and detailed history is necessary. Indeed, there is reason to think it may not necessarily always be. The Georgia Constitution provides that "[t]he decisions of the Supreme Court

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203. *See, e.g.*, Ammons v. State, 315 Ga. 149, 163, 880 S.E.2d 544, 554–55 (2022) ("As an initial matter, Ammons's burden to establish this claim is a difficult one . . . .and Ammons's task is made all the more difficult because, to make this argument, she is asserting a novel and quite expansive construction of a provision of the Georgia Constitution that has received little attention since it was enacted").

204. GA. CONST. art. V, § 1, para. 4.

205. *See, e.g.*, *Elliott*, 305 Ga. at 202–04, 824 S.E.2d 282–83 (covering "at least six of our decisions under the 1877 Constitution . . . . reaffirmed [under] the 1945 Constitution," and confirmed in "several cases decided . . . under the Constitution of 1976"); Raffensperger v. Jackson, 316 Ga. 383, 389, 888 S.E.2d 483, 490 (2023) (relying on six cases over three successive constitutions to "'reveal[ ] a consistent and definitive construction' of the Due Process Clause") (quoting *Elliott*, 305 Ga. at 184, 824 S.E.2d at 270).

shall bind all other courts as precedents."[206] And only one such decision is necessary in order to be binding.[207] So while a single decision with a binding holding might sometimes be "definitive," under the right circumstances, it is possible it might also be "consistent" if there are no inconsistent cases. And, in any event, such a case may constitute evidence of a settled meaning that, when supported by other data points, would show the original meaning of a new provision even without the presumption.[208]

D. The presumption that a consistent and definitive construction of an old provision is carried forward may have significant implications for stare decisis.

In a sense, the presumption flowing from a consistent and definitive construction could be understood as privileging pre-1983 constitutional precedent over post-1983 constitutional precedent, as the older precedent would be indicators of original meaning in ways that the newer precedent is not.[209] This may be a good way to view *Olevik* and its progeny, in which the Georgia Supreme Court overruled post-1983 constitutional precedent in favor of pre-1983 constitutional precedent that it concluded showed the original meaning of the 1983 Constitution. A related implication may be that the presumption imposes a greater hurdle for overruling pre-1983 cases, even if they were arguably wrong when originally decided.

"Stare decisis is," of course, "not an inexorable command,"[210] but, whatever one thinks about it,[211] it would be going too far to say that

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206. GA. CONST. art. VI, § 6, para. 6.

207. *See* State v. Almanza, 304 Ga. 553, 558 n.4, 820 S.E.2d 1, 6 n.4 (2018) ("Of course, once a Georgia appellate court has decided the issue, all lower courts of the state must follow that decision.").

208. *Cf. Mixon*, 312 Ga. at 559 n.8, 864 S.E.2d at 76 n.8 ("This case does not require us to consider whether *Baranan* and its progeny constituted a consistent and definitive construction of the Just Compensation provision . . . . [b]ut *Baranan*'s constitutional construction is at least *relevant* to the meaning of the language as used in subsequent constitutions."); *see also id.* (quoting *Elliott* 305 Ga. at 187, 824 S.E.2d at 272 for the proposition that the "presumption arising from a consistent and definitive construction is simply a reflection" of the principle that we look to the context in which the text was enacted in determining its meaning).

209. Cazier v. Georgia Power Co., 315 Ga. 587, 588, 883 S.E.2d 517, 518 (2023) (Peterson, J., concurring in the denial of certiorari) ("If—as it appears to me—our post-1983 decisions pronounced deference principles without proper grounding in our cases interpreting the *earlier* versions of the Constitution, then those post-1983 decisions do not shed light on the original public meaning of the Separation of Powers Provision.").

210. *Cook*, 313 Ga. at 485, 870 S.E.2d at 769 (citations and punctuation omitted).

211. *Compare id.* at 501–04, 870 S.E.2d at 780–81; *with id.* at 508–519, 870 S.E.2d at 784–92 (Peterson, J., dissenting, joined by Bethel and Ellington, JJ.); *Ammons*, 315 Ga. at

decisions under an old constitution are categorically beyond the court's overruling reach.[212] But, as a practical matter, the fact that one must analyze whether a pre-1983 precedent is part of a consistent and definitive construction must at least urge caution—perhaps in the form of an inquiry into whether such a case is part of such a construction—before overruling it under the same analytical framework the Georgia Supreme Court uses as to post-1983 constitutional precedent. Although the word "overruling" may be inapt as to pre-1983 precedent that is not consistent or definitive and that the court finds unpersuasive; if a pre-1983 precedent is not baked into the meaning of a 1983 provision, then to some extent the adoption of the 1983 Constitution could be understood as superseding that old precedent.

E. Since Elliott's synthetization of Georgia cases on constitutional interpretation, the presumption of a consistent and definitive construction has been subjected to two different criticisms.

1. The first objection is about how the presumption applies to arguably clear text.

In *Ammons v. State*, two justices argued in dissent that the application of the principle was inappropriate when text was apparently clear and the first cases that explicitly considered the text arrived at a conclusion they felt was consistent with that text, but was contrary to a consistent and definitive construction in the other direction.[213] The dissenting justices argued that a presumption permitting judicial precedent to overcome clear text could be understood as privileging the understandings of lawyers over those of the general public, expressing particular concern over one passage from *Elliott*: namely, that "it is the understanding of the text by reasonable people familiar with its legal

168–74, 880 S.E.2d at 558–62 (Pinson, J., concurring, joined by Warren, J.); *and* Miles C. Skedsvold, *To Stand By Things (Wrongly) Decided: Thinking About Stare Decisis After Justice Peterson's Dissent in Frett v. State Farm*, GA. L. REV. BLOG, https://georgialawreview.org/post/634-to-stand-by-things-wrongly-decided-thinking-about-stare-decisis-after-justice-peterson-s-dissent-in-frett-v-state-farm [https://perma.cc/Z4J4-T3JS] (last visited Sep. 4, 2023).

212. *See Talmadge*, 201 Ga. at 885, 41 S.E.2d at 898 ("It may be that [one treatise's articulation of the presumption of a consistent and definitive construction] is stated more strongly than we would be willing to put it"—i.e., that constructions of a provision under a prior constitution are permanently fixed in the re-enacted provision—"We would prefer to say that the meaning placed upon the language by such legislative construction will be presumed to have been the meaning intended by those who adopted a constitution, rather than that . . . the courts are precluded by such construction.").

213. 315 Ga. at 174–75, 880 S.E.2d at 562 (Colvin, J., concurring in part and dissenting in part, joined by McMillian, J.) (citing Drake v. State, 75 Ga. 413 (1885)).

context that is important," not whether "every citizen understood the particular meanings of a constitutional provision."[214] To the extent that this language of *Elliott* can be read to privilege the subjective understandings of a select group over the public meaning, in my view the objection was well-founded.

Importantly, though, a unanimous court (including the justices who dissented in *Ammons*) has since clarified that language:

> *Elliott* . . . should not be understood as suggesting that the meaning assigned to constitutional language is based on the subjective understanding available only to some special group . . . . the reference to 'reasonable people familiar with [the] legal context' . . . . conveys that the legal context must be considered in discerning the meaning of the language, and that legal context sometimes takes work to understand.[215]

And this principle is even clearer when viewed through the lens of the sources that courts properly rely on to determine relevant context:

> The sources we consider in that analysis are not private or subjective; constitutional history, statutory history, decisional law, and similar sources are objective sources of publicly discoverable meaning properly within our consideration. And this is so whether or not every member of the public is aware of the substance of those sources.[216]

In other words, the focus is not on how many members of the public would have been aware of a particular meaning; instead, the focus is on objective, publicly available sources of meaning, and not subjective or private sources of meaning.[217]

2. The second objection arises from the indisputable fact that some consistent and definitive constructions cannot really be said to have construed any particular text in that provision.

For example, we acknowledged in *Turnquest* that in assessing the scope and application of the Due Process Provision, "what process is 'due' almost always has been determined from extratextual sources."[218] Accordingly, a line of cases consistently and definitively interpreting the application of the Due Process Provision will rarely have done any actual

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214. *Id.* at 181 n.30, 880 S.E.2d at 566 n.30 (quoting *Elliott*, 305 Ga. at 207, 824 S.E.2d at 285).

215. *Sass Grp.*, 315 Ga. at 898 n.7, 885 S.E.2d at 767 n.7.

216. *Id.*

217. *Id.*

218. *Turnquest*, 305 Ga. at 769, 827 S.E.2d at 874.

construction of the Provision's text.[219] And it may indeed strike some as a bit odd, in such circumstances, to apply a principle the terms of which are about "construction." Two justices have expressed some skepticism that the presumption of a consistent and definitive construction should properly apply if the court did not construe the actual words themselves, suggesting that "the rationale behind the prior-construction canon depends on finding a prior construction of the language that we presume the people or legislature were aware of and carried forward[.]"[220]

I see at least two different reasons, though, why the principle might still apply in the absence of real construction of the text itself.

For one thing, the theoretical rationale for the principle does not totally depend on actual construction having been done. Instead, it is rooted in the legal principles that decisions of the Georgia Supreme Court are binding within the state's legal system,[221] and that "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."[222] Given that the court's decisions interpreting legal text are binding on lower courts, an informed public considering the meaning of a proposed constitution would generally look to the court's interpretations of the same legal text in previous provisions as the best evidence of their meaning at the time the provisions were carried forward into the new constitution. And again: if such a construction is at least a plausible application of the text (that is, not the "thirty' means 'thirty-five" example discussed above), then a reasonable drafter and ratifier would surely choose different words to achieve a different meaning. There's no obvious reason why that would be so for decisions that did actual construction of a previous provision's text, but not so for less textual decisions that nonetheless still announced the meaning of a previous provision in a binding, consistent, and definitive manner. That said, even if a line of cases need not necessarily be textually rigorous to

219. *See, e.g., Raffensperger*, 316 Ga. at 388, 888 S.E.2d at 490 (demonstrating this phenomenon in the context of occupational licensing: "We discerned [the right to be pursue a lawful occupation, free from unreasonable government interference] not merely from precedent, but also as a 'consistent and definitive' understanding of Georgia's Due Process Clause. Across each successive constitution following the addition of the Due Process Clause in 1861, we articulated a consistent and definitive understanding of how the Due Process Clause applied to occupational licensing and the ability to pursue a lawful occupation.") (citations omitted).

220. *Ammons*, 315 Ga. at 174 n.23, 880 S.E.2d at 561 n.23 (Pinson, J., concurring and joined by Warren, J.) (suggesting a possible distinction between consistent and definitive "conclusions" and "constructions").

221. *See* GA. CONST. art. VI, § 6, para. 6 ("The decisions of the Supreme Court shall bind all other courts as precedents.").

222. *Elliott*, 305 Ga. at 182–83, 824 S.E.2d at 269 (citing cases).

trigger this presumption, it must at least purport to interpret a particular constitutional provision for it to comprise a consistent and definitive construction of that provision.[223] The rationale for the presumption of a consistent and definitive construction is provision-specific.

For another, one might also think of such lines of non-textualist decisions as "liquidating" the meaning of the constitutional provision. As the Supreme Court of the United States has observed, "a regular course of practice can liquidate and settle the meaning of disputed or indeterminate terms and phrases in the Constitution."[224] One of the authorities the Court cited for that proposition, an article in the Stanford Law Review by professor Will Baude,[225] explains in more detail that liquidation was a concept generally understood at the framing of the federal Constitution, by which post-enactment practice and judicial decisions "liquidated," or elucidated the meaning of, otherwise under-determinant[226] constitutional provisions.[227] The whole point of the consistent and definitive construction principle, of course, is that although the consistent and definitive case law is post-enactment as to the constitution it was interpreting at the time, it is pre-enactment for the constitution we interpret now. And so, if post-enactment practice and precedent can be a way of determining meaning, such post-enactment precedent that is pre-enactment as to the relevant constitution should be able to do so even more.

These observations are—to be clear—simply observations. None have yet been definitively answered the Georgia Supreme Court, and it should be clear that nothing said here purports to resolve any of these questions. Still, they represent part of the next wave of difficult questions to be resolved in interpreting the Georgia Constitution.

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223. *Id.* at 218, 824 S.E.2d at 293 (determining that despite numerous decisions generally about admissibility of a defendant's exercise of his self-incrimination right, those decisions did not amount to a consistent and definitive construction because "few of the cases were actual interpretations of the 1877 Provision of the sort necessary to support the presumption arising from a consistent and definitive construction").

224. *Bruen*, 142 S. Ct. at 2136.

225. *See* William Baude, *Constitutional Liquidation* 71 STANFORD L. REV. 1 (2019).

226. Liquidation is a concept that applies only to under-determinant provisions; any explanatory force it carries here does not extend to provisions with a clear original public meaning. *See id.* at 13–16 ("If first-order interpretive principles make the meaning clear in a given context, there is no need to resort to liquidation. This is the beginning of *Federalist No. 37*'s discussion of liquidation, which stresses that liquidation is necessary when and because a new legal provision is 'more or less obscure and equivocal.'") (citation omitted).

227. *Id.*

VII. OTHER CONSIDERATIONS

The principal focus of this Article is the theory, method, and practice of interpreting the Georgia Constitution, but I would be remiss not to make note of various other considerations in persuading a court to arrive at a particular original public meaning of a particular provision. After all, even though the search for original public meaning usually involves some historical inquiry, "[t]he job of judges is not to resolve historical questions in the abstract; it is to resolve legal questions presented in particular cases or controversies."[228] "That 'legal inquiry is a refined subset' of a broader 'historical inquiry,' and it relies on 'various evidentiary principles and default rules' to resolve uncertainties"—like when the historical evidence is mixed or sparse.[229] Key examples of that include the presumption of constitutionality, and what I will call the interpretive-burden principle.

A. The Presumption of Constitutionality

Georgia courts have long recognized that they must presume a statute is constitutional, and any litigant who says otherwise has the burden to prove it.[230] Accordingly, a statute is treated as constitutional until a court has held that it is not. Having said that, this presumption is just that—a presumption. When a litigant shows that certain acts are contrary to the original public meaning of the constitution, the constitution itself says that those acts "are void, and the judiciary shall so declare them."[231] In novel cases, the burden this principle imposes on a challenger is often dispositive. That is the point of our next principle.

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228. *Bruen*, 142 S. Ct. at 2130 n.6.

229. *Id.* (quoting William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 803 (2019)).

230. *Ammons*, 315 Ga. at 163, 880 S.E.2d at 554 ("We presume that statutes are constitutional, and before an act of the General Assembly can be declared unconstitutional, 'the conflict between it and the fundamental law must be clear and palpable and this Court must be clearly satisfied of its unconstitutionality.'") (quoting S&S Towing & Recovery, Ltd. v. Charnota, 309 Ga. 117, 117, 844 S.E.2d 730, 731 (2020)); *see also* Session v. State, 316 Ga. 179, 191–92, 887 S.E.2d 317, 327 (2023); *see also* Taylor v. Devereux Foundation, Inc., 316 Ga. 44, 52, 885 S.E.2d 671, 681 (2023) ("the party challenging the statute bears the burden to show that the statute 'manifestly infringes upon a constitutional provision or violates the rights of the people'") (quoting Atlanta Oculoplastic Surgery, P.C., v. Nestlehutt, 286 Ga. 731, 732, 691 S.E.2d 218, 221 (2010)); *see also* Flint River Steamboat Co. v. Foster, 5 Ga. 194, 194 (1848).

231. GA. CONST. art. I, § 2, para. 5.

B. The Interpretive-Burden Principle

In interpreting the Georgia Constitution, the burden to support a claim about the original public meaning of the provision falls on the proponent of that claim.[232] The Supreme Court of Georgia most recently discussed this principle in *Ammons*, although the principle was not new.[233] In rejecting the claim that Georgia's Privileges and Immunities Clause "add[s] a significant measure of extra or prophylactic protection of rights beyond what the provisions recognizing those rights cover," the court explained that "Ammons's burden to establish this claim is a difficult one."[234] This is so, the court explained, not merely because Georgia courts typically presume statutes are constitutional, but because "to make this argument, [Ammons was] asserting a novel and quite expansive construction of a provision of the Georgia Constitution that has received little attention since it was enacted."[235] And that is a problem, the court said, because "[c]onstruing a constitutional provision . . . as an original matter[ ] requires careful attention[,] to not only the language of the clause in question, but also its broader legal and historical context[.]"[236] Indeed, as a practical matter, "[t]his kind of analysis is especially difficult when the language in question was first enacted long ago and rarely interpreted since, because those important contextual clues can be more difficult to unearth, and the ordinary meaning of language can change over time."[237] Given Ammons's failure to make "even the prima facie showing" that her proposed meaning of the clause was probable,[238] let alone "meet the burden required to

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232. *See Ammons*, 315 Ga. at 163, 880 S.E.2d at 554.

233. Wright v. Hirsch, 155 Ga. 229, 233, 116 S.E. 795, 797 (1923) ("We should go at a snail's gait in declaring legislative enactments, and especially tax acts, upon which the very life of the State depends, unconstitutional and void . . . . A legislative act will never be set aside in a doubtful case . . . . In approaching a question involving the constitutionality of legislation, we should saturate our minds with the above principle, and should never in a case of doubt pronounce invalid the action of the legislative department of the government."); *Olevik*, 302 Ga. at 234, 806 S.E.2d at 512 (rejecting argument because party "offers no reason that we should interpret Paragraph XIII differently in this context" and observing that any independent interpretation of Paragraph XIII must be grounded in the text, context, and history of the Georgia provision); White v. State, 307 Ga. at 602 n.2, 837 S.E.2d at 842 n.2 (2020) (same); *see also* Hinkson v. State, 310 Ga. at 398 n.5, 850 S.E.2d at 51 n.5 (2020) (same, citing *White* and *Olevik*).

234. *Ammons*, 315 Ga. at 163, 880 S.E.2d at 554.

235. *Id.*

236. *Id.*

237. *Id.* at 164, 880 S.E.2d at 555.

238. *Id.* at 163, 880 S.E.2d at 555; *see also id.* at 164, 880 S.E.2d at 555 (criticizing Ammons for meeting the originalist challenge with "isolated text from the constitutional

establish . . . the expansive reach that Ammons would have [had the court] recognize," the court rejected her claim without "need [to] reach any definitive conclusions as to the scope of Paragraph VII."[239]

The court again applied this principle in *Session v. State*.[240] There, the court confronted a novel argument about the meaning of the Georgia Constitution's Social Status Provision.[241] The court explained that it need not reach the argument that this provision "means something else today" than it did when it was first ratified in 1868 because—in keeping with the *Ammons* principle—"Session [had] not show[n] that he would prevail under any such meaning."[242]

The interpretive-burden principle thus recognizes that a court need not always arrive at a definitive understanding of a given provision's meaning to reject a litigant's constitutional claim; it is sufficient that the litigant did not carry their burden.[243] Though this principle will often be tied up with the presumption of constitutionality,[244] the two are not coterminous.

In addition to the normal pull of *stare decisis* and the presumption of constitutionality, therefore, it seems that at least some Georgia constitutional disputes will be resolved by reference to a litigant's failure to carry their burden in supporting their proffered interpretation—highlighting the need to develop thorough and sound research methods.

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provision, [ ] a single dictionary, and" reliance "on general statements from a handful of [ ] decisions that [did] not interpret the relevant constitutional language").

239. *Id.* at 164, 880 S.E.2d at 555; *see also id.* at 168, 880 S.E.2d at 557–58 (Ellington, J., concurring) ("writ[ing] separately . . . to emphasize" that while "Ammons has not marshalled authorities sufficient to persuade [the Court] that [the State Privileges and Immunities Clause] does more than guarantee existing, enumerated rights to all citizens of the United States who reside in Georgia, we are not ruling out the possibility that [it] does do more."). A recent decision of the United States Supreme Court has made a similar point. *See Bruen*, 142 S. Ct. at 2130 n.6 ("In our adversarial system of adjudication, we follow the principle of party presentation. Courts are thus entitled to decide a case based on the historical record compiled by the parties.") (citation omitted).

240. 316 Ga. 179, 887 S.E.2d 317 (2023).

241. *See* GA. CONST. art. I, § 1, para. 25 ("The social status of a citizen shall never be the subject of legislation.").

242. *Session*, 316 Ga. at 195, 887 S.E.2d at 329 ("Session has offered no [] plausible construction of the Provision that would prohibit criminalizing certain types of conduct on the theory that it would create a disfavored class comprising those convicted of such crimes.").

243. *Id.*; *see also id.* at 192, 887 S.E.2d 327 (citing *Ammons* for the same proposition).

244. *See Ammons,* 315 Ga. at 162, 880 S.E.2d at 554–55 (covering both topics in a section titled "Ammons has not met her burden to establish that the implied consent statutes" are unconstitutional); *see also Session*, 316 Ga. at 192, 887 S.E.2d at 327 (similar).

VIII. PRACTICAL RESEARCH TIPS

As a law clerk of mine once said: "Originalism is hard, and it makes me tired." He was not wrong. But originalism is worth doing right–despite the challenge–because it is important. It is a critical element of the rule of law; it constrains judges by limiting them "to only those interpretations of legal text that can be supported by text, history, and context."[245]

As this Article demonstrates, interpreting the Georgia Constitution according to its original public meaning can require significant effort and considerable research.[246] To that end, this section identifies some resources (in addition to the constitutional text and that of relevant statutes) that may assist in that effort.[247]

A. Contemporary Dictionaries, Including Legal Dictionaries

As discussed in Section II(A), contemporary dictionaries can sometimes provide good evidence of the original meaning of particular words or phrases in a provision.[248] By contemporary, I mean dictionaries published around the time that the relevant legal text was adopted.[249] There is no exact formula for determining at what point a dictionary predates or postdates a provision by too long to be probative—but, in all

245. *Session*, 316 Ga. at 194, 887 S.E.2d at 328.

246. *Ammons*, 315 Ga. at 163, 880 S.E.2d at 554–55 (rejecting the argument that Georgia's Privileges and Immunities Clause "add[s] a significant measure of extra or prophylactic protection of rights *beyond* what the provisions recognizing" other constitutional rights "cover," because—in addition to the presumption of constitutionality—"she is asserting a novel and quite expansive construction of a provision of the Georgia Constitution that has received little attention since it was enacted"); *cf. Bruen*, 142 S. Ct. at 2130 n.6 (explaining that the "'legal inquiry'" into the nature and scope of codified, preexisting rights "'is a refined subset' of a broader 'historical inquiry,' and it relies on 'various evidentiary principles and default rules' to resolve uncertainties," most notably "the principle of party presentation") (citations omitted).

247. To be clear, this source guide is illustrative, not exhaustive, and the usefulness of any given source must always be evaluated in the context of the particular legal question.

248. *Sass Grp.*, 315 Ga. at 898, 885 S.E.2d at 767 ("One place to look for ordinary meaning is contemporaneous dictionaries from around the time when the text was adopted.") (citations omitted).

249. *See* Phillip A. Rubin, *War of the Words: How Courts Can Use Dictionaries in Accordance With Textualist Principles*, 60 DUKE L.J., 167, 186 (2010) (stating that "the relevant time period is the one contemporary to the drafting of the provision," but noting that, "[b]ecause of the inevitable time delay between collection citations [or assembling of the corpus] and publication of the dictionary, dictionaries must lag" a couple years "behind the current use of language"—"[a]nd [sometimes] usage can change quickly"); *cf.* United States v. Rosario, 7 F.4th 65, 75 (2d Cir. 2021) (Rakoff, J., concurring) (criticizing the use of mid-twentieth century dictionaries to discern the original meaning of a statute passed in 2015).

events, any sound use of a dictionary must have a reasoned claim to be representing the original public meaning of the words defined.

Legal dictionaries like *Black's* may also be useful, though they are not interchangeable with standard English dictionaries. While any word appearing in statutes or the constitution is necessarily appearing in a legal document, not every word used in statutes or the constitution is necessarily to be understood in a legal sense.[250] Others are "legal" words—by which I mean they are words that refer to legal concepts or are directed at legal processes. That might be standards of review,[251] reference parts of a legal proceeding,[252] or other similar legal-system-facing terms.[253]

As discussed in Section II(A), though, the "examination of dictionary definitions of a single word is not a substitute for a broader consideration of context and history."[254] "Dictionaries cannot be the definitive source of ordinary meaning in textual interpretation because they are a-contextual, and context is a critical determinant of meaning."[255] Any resort to dictionaries must "recognize this limitation" to be useful.[256]

B. Legal Authorities as Evidence of Usage or Relevant History

Just as "[c]ontemporary dictionaries are primarily intended to report current usage,"[257] various legal authorities like cases, statutes, regulations, or even treatises and practice manuals, can provide valuable

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250. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, *supra* note 43, at 1201–02 (2003) ("Dictionaries define words, but often not in context. This is especially significant because legal words and phrases can sometimes be used as terms of art, with nuances of meaning not well captured by standard dictionaries reflecting lay usage . . . . [regular d]ictionaries also typically define only words, not words and phrases.") (citation omitted).

251. *See* Fla. Rock Indus., Inc v. Clayton Co. Bd. of Commr's., 316 Ga. 380, 381, 888 S.E.2d 573, 574 (2023) (Peterson, P.J., concurring in the denial of certiorari) (citing BLACK'S LAW DICTIONARY, among other things, for the proposition "that the phrase 'substantial evidence' had an identifiable, stable meaning in the law by the time many of our state's review provisions were enacted").

252. *Sass Grp.*, 315 Ga. at 898–99, 885 S.E.2d at 767 (considering the word "action," used in its legal sense, to describe the scope of the recently-enacted sovereign immunity waiver).

253. *See* State v. Britton, 316 Ga. 283, 292, 888 S.E.2d 157, 165 (2023) ("The word 'depose' in this context means 'to testify [or] to bear witness,") (citing *Depose*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

254. *Camp*, 314 Ga. at 702, 879 S.E.2d at 90.

255. *Sass Grp.*, 315 Ga. at 898–99, 885 S.E.2d at 767.

256. *Id.* at 899, 885 S.E.2d at 767.

257. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1642 (2017).

evidence of usage and relevant history—particularly for words used in a legal sense.[258] Note the differences, though, in using legal authorities in these ways from reviewing them for "legal context." Whereas "legal context" refers to the broader legal landscape into which a new provision is placed, leading to many presumptions about knowledge of existing law,[259] specific versus general provisions,[260] and even the relationship of statutory law to the common law,[261] the consideration of legal authorities as evidence of usage or history (as the case may be) offers evidence about the sense and semantic context in which a particular word or phrase is used.[262] A reasonable observer, after all, might well look to other legal uses of the same word or phrase to form an opinion about its public meaning, and (all other things being equal) would be wise to conclude that it is being used in the more common or usual sense.[263]

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258. *Sass Grp.*, 315 Ga. at 899, 885 S.E.2d at 767 ("This understanding of 'action' as a lawsuit or proceeding in which claims are brought finds further support in common usage. In both judicial decisions and statutes, 'action' is more commonly used to refer to a 'whole lawsuit' rather than a claim.").

259. *See, e.g.,* Crum v. Jackson Nat'l Life Ins. Co., 315 Ga. 67, 77, 880 S.E.2d 205, 212 (2022) ("[W]e presume that the legislature enacted the new statute 'with full knowledge of' the extant body of decisional law." (citing Dove v. Dove, 285 Ga. 647, 649, 680 S.E.2d 839, 842 (2009)).

260. *See, e.g.,* Burkhardt v. Burkhardt, 275 Ga. 142, 142–43, 142 n.2, 561 S.E.2d 822, 823, 823 n.2 (2002) (citing Savannah v. Savannah Elec. & Power Co., 205 Ga. 429, 436–37, 54 S.E.2d 260, 265 (1949)).

261. *See, e.g., Crum*, 315 Ga. at 77, 885 S.E.2d at 212 (explaining that "where the General Assembly, in a comprehensive effort, stitched together a new statutory scheme using only pieces of the extant body of decisional law on the subject—the most reasonable inference is that the legislature accepted the rules of decisional law that it codified and rejected those rules it did not"); Couch v. Red Roof Inns, Inc., 291 Ga. 359, 364, 729 S.E.2d 378, 383 (2012) (determining that while a familiar canon of statutory construction provides that statutes "in derogation of the common law . . . must be limited strictly to the meaning of the language employed," this means only that the operation of a statute must not be "extended beyond the plain and explicit terms of the statute,"; "when the Legislature says something clearly—or even just implies it—statutes trump cases.") (citations omitted).

262. *See, e.g., Fla. Rock Indus., Inc.*, 316 Ga. at 380–81, 887 S.E.2d at 574 (Peterson, J., concurring in the denial of certiorari) ("[I]t appears that the phrase 'substantial evidence' had an identifiable, stable meaning in the law by the time many of our state's review provisions were enacted . . . . And that meaning, it seems to me, apparently referred to something more than *literally any* evidence.").

263. *See Sass Grp.*, 315 Ga. at 900, 885 S.E.2d at 768 (examining legal sources indicating a meaning of "action" closer to claim-within-a-lawsuit, instead of a lawsuit as a whole, but concluding "'action' is ordinarily and more commonly used to mean a case or lawsuit, and other contextual clues within the Constitution confirm that to be the case with respect to the specific provision at issue [t]here").

C. Legislative Records as Evidence of Usage or Relevant History

When read and considered correctly, legislative records may also provide circumstantial evidence of how words were used,[264] and certainly provides data points for reconstructing relevant legal history. One particularly notable example of a useful legislative record is the transcribed meetings of the drafters of the 1983 Constitution. These transcripts take up twenty-two volumes, and the Georgia Supreme Court cites to them with some frequency.[265] Some similar materials exist for at

264. *See* Solum, *Triangulating Public Meaning*, *supra* note 257, at 1654, 1656 ("The method of studying the constitutional record is the most familiar and widely practiced approach to originalist research," but "[f]rom the perspective of original public meaning originalism, it is important to understand the limited role of the drafting history."); see also Will Baude, *2023 Scalia Lecture: Beyond Textualism?*, HARV. J.L. & PUB. POL'Y, at 2–3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4464561 [https://perma.cc/R9BX-HJRP] ("One could say that textualism has won, and we have Justice Scalia to thank for it . . . . Now, it is possible that to get us to this place, Justice Scalia sometimes made textualist claims that were a *bit* overbroad. For instance, he came close to insisting that the use of legislative history was completely illegitimate. In fact, it probably is okay to use legislative history so long as you're very careful and clear about how you're using it and what proposition you're using it to reflect.") (citations omitted).

265. *Session*, 316 Ga. at 194 n.7, 887 S.E.2d at 328 n.7 (citing transcripts for proposition that the "drafters of the 1983 Constitution appear not to have grappled with the history" of the constitutional provision in question); *Ammons*, 315 Ga. at 161, 880 S.E.2d at 553 ("[N]o reasonable observer during the drafting and ratification of the 1983 Constitution would have understood the provisions of the proposed new constitution without reference to the construction of their predecessors."); Barrow v. Raffensperger, 308 Ga. 660, 676 n.16, 695–97, 697 n.28, 842 S.E.2d 884, 898 n.16, 910–11, 911 n.28 (2020) (competing interpretations between the majority and dissent of various passages in the transcripts); *Elliott*, 305 Ga. at 208–09, 824 S.E.2d at 286; Perdue v. Palmour, 278 Ga. 217, 220, 600 S.E.2d 370, 373 (2004); Perdue v. Baker, 277 Ga. 1, 5–7, 7 n.32, 586 S.E.2d 606, 610–11, 610 n.32 (2003) (demonstrating changes in drafts to add the word "chief" onto the executive power vesting clause and expressly state that "[t]he other executive officers shall have such powers as may be prescribed by this Constitution and by law"); *see also* Gwinnett Cnty. Sch. Dist. v. Cox, 289 Ga. 265, 308, 710 S.E.2d 773, 803 (2011) (Nahmias, J., dissenting) (citing the transcripts to show the committee understood that "when you start naming [the kinds of special schools the Constitution has in mind,] you could think of fifty million different kinds'" so it was "better not to name them at all, let the laws provide'"; but also making clear that "[t]he best evidence, of course, is not what various framers said to each other at various points during the process, but what they ultimately drafted together . . . [and] that the citizens of Georgia then ratified"); State v. Murray, 286 Ga. 258, 269, 687 S.E.2d 790, 797 (2009) (Nahmias, J., dissenting) ("This interpretation is also consistent with the brief discussion of the new constitution's phrasing that I have found in the records of the Select Committee on Constitutional Revision" showing an understanding that the words conveyed "the Court's authority to review cases before decision by the Court of Appeals and to do so by standing order applying to a category of cases.").

least the 1877 and 1945 Constitutions, as well. The 1877 records have been digitized, but, to my knowledge, the 1945 records have not.[266]

As for usage: such records are real world examples of words and phrases being used and discussed in (largely) the same context as the provisions in which they appear.[267] The legislators, invited guests, and sometimes members of the public, are, after all, reasonably presumed to be informed speakers of the language from the relevant time period. And the transcripts of those meetings may even furnish evidence of what a reasonably informed member of the public would have understood the words to mean.[268]

And as for history: these records often provide an account (sometimes imperfect) of the process by which a provision reaches its enacted form, which can shed light on how best to understand the enacted words.[269]

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266. Until recently, these records—while public documents—have been largely inaccessible to lawyers and trial judges, (so far as I know) held primarily in certain government offices and law school libraries. But the Georgia Supreme Court recently made those digital records in its possession available electronically on the court's website, so that anyone with internet access can use them. *See* https://www.gasupreme.us/wp-content/uploads/2023/11/Vol.-21-SCOCR-Transcripts-of-Mtgs.-Legislative-Overview-Committee-Vol.-III.pdf [https://perma.cc/NH63-LXGP] (last visited Dec. 7, 2023).

267. *See supra* note 104; Solum, *Triangulating Public Meaning*, *supra* note 257, at 1656 ("The drafting history, like any other text from the period, can shed light on the conventional semantic meanings of the words and phrases that comprise the constitutional text. In other words, the drafting history can provide evidence of conventional semantic meaning . . . . [It] may be a valuable source because it provides usages of the words that are likely to refer the senses in which the words would have been understood by the public" and "provide evidence that confirms or disconfirms a hypothesis that a particular provision gives rise to a contextual enrichment.").

268. Solum, *Triangulating Public Meaning*, *supra* note 257, at 1657 ("Debates over ratification of a constitutional provision have significant advantages over the drafting history as evidence of public meaning. Many ratifiers of the unamended [federal] Constitution were not participants in the drafting process; the perspective of these ratifiers is similar to that of the public." And "[these] ratification debates . . . were conducted in a variety of forums: in the ratifying conventions, newspapers, pamphlets, and broadsheets. Both supporters and opponents of the constitution participated in the debates" and "amendments [were] debated in state legislatures . . . accompanied by public debate[s.]"); Vasan Kesavana & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, *supra* note 43, at 1132 (advocating for the use of even non-public writings of the framing generation to ascertain the original public meaning of the federal Constitution, but making clear that the authors' position "is not a theory of anyone's intent or intention. Nor is it a theory of anyone-in-particular's understanding. Nor is it a theory of the collective intention of a particular body of people, or [even] of a society as a whole. *It is a theory of the meaning of words, phrases, and clauses of legal text.*") (emphasis in the original).

269. Solum, *Triangulating Public Meaning*, *supra* note 257, at 1655 (explaining that "[t]he first component" of studying the constitutional record "is [the] examination of precursor provisions and proposals" because they "provide[] insight into the language of

But what should be clear, however, is that these records are relevant evidence only for those purposes—not for back-dooring arguments about purpose or intention.[270] As the Georgia Supreme Court explained in *Olevik*, "considering what the framers of our Constitution understood the words they selected to mean can be a useful data point in determining what the words meant to the public at large."[271] But using these sources to determine the subjective intentions of specific framers and then interpreting the text in accord with those few subjective intentions[272] would miss the point; the proper focus is solely on objective public meaning, not subjective private meaning.[273]

And, to be clear, such records are at most "only evidential. For a variety of reasons, it is at least possible that the public meaning of that text will diverge from the meaning supported by the evidence [contained in] the drafting history."[274]

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constitutional provision. Where the language is similar or identical, discussion of the meaning of the precursor provision may provide insight into the language of the constitutional text." And "[w]here the language is different, the differences may illuminate the meaning—especially if the drafting history focuses on the difference.").

270. *See supra* note 17 and accompanying text (citing *Elliott* and *Olevik* for the proposition that the subjective intentions and purposes of drafters and ratifiers are all irrelevant to Georgia Constitutional interpretation).

271. *Olevik*, 302 Ga. at 238, 806 S.E.2d at 515 (2017); *accord* Epping v. Columbus, 117 Ga. 263, 269, 43 S.E. 803, 806 (1903) (*overruled on other grounds by* Harrell v. Town of Whigham, 141 Ga. 322, 80 S.E. 1010 (1914)).

272. Which has happened from time to time. *See, e.g.,* Neal v. State, 290 Ga. 563, 570, 722 S.E.2d 765, 772 (2012) (Hunstein, C.J., concurring) ("[T]he constitutional history of the 1983 Constitution makes clear that the framers intended for the division of jurisdiction between the two appellate courts to remain unchanged"); *Cox*, 289 Ga. at 270, 710 S.E.2d at 779 ("Based on these comments by the drafters and participants in the framing of the 1983 Constitution, we conclude that it was their clearly understood and plainly expressed position that 'special schools' in Art. VIII, Sec. V, Par. VII (a) meant those schools that enrolled only students with certain special needs or taught only certain special subjects and did not include general K-12 schools . . . ."); Grissom v. Gleason, 262 Ga. 374, 376, 418 S.E.2d 27, 29 (1992) (stating that "the legislative history of the 1983 Constitution does not support the *Denton* opinion's conclusion that 'impartial and complete' must mean something different than equal protection").

273. *Olevik*, 302 Ga. at 238, 806 S.E.2d at 515 ("If the subjective intent of one legislator out of 236 casts little light on the meaning of ordinary legislation, such subjective views can hardly carry more weight for a Constitution that had hundreds of thousands of citizens who voted on its ratification."); *Sass Grp.*, 315 Ga. at 898 & n.7, 885 S.E.2d at 767 & n.7.

274. Solum, *Triangulating Public Meaning*, *supra* note 257, at 1656 (discussing phenomena like "echo chamber effects," where the process of legislators discussing terminology gives them an understanding that members of the public would not share, and the practice of drafting language meant to convey one impression to the public and another to special groups like the Supreme Court).

D. Government-Generated Reports as Evidence of Usage and History

Historical government-generated reports may be similarly useful.[275] Examples of these materials include Attorney General Opinions,[276] studies published by the Institute for Government,[277] and Georgia bar journals.[278] Just like legislative history materials, historical government generated reports can provide evidence of usage and legal history[279]; again, provided that the use of such materials does not morph into a search for subjective intention or purpose,[280] and provided that one understands that the value is "only evidential" and not conclusive.[281]

E. Interpretive Texts and Treatises

A diligent practitioner may also find it valuable to consult interpretive treatises. Of course, such sources are mainly useful conceptually, as opposed to shedding light on any particular provision, but because they address many of the concepts identified in this Article in greater depth and breadth, they are frequently cited as support for interpretive first principles in Georgia's appellate courts. Examples of such interpretive treatises include:

> Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012);
>
> Bryan Garner et al., *The Law of Judicial Precedent* (2016); and
>
> Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3rd ed. 2011).

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275. *Id.* ("The drafting history, [just] like any other text from the period, can shed light on the conventional semantic meanings of the words and phrases that comprise the constitutional text.").

276. Office of the Attorney General, *Opinions*, available at https://law.georgia.gov/opinions [https://perma.cc/SVV3-WQTL] (last visited Nov. 21, 2023); *see e.g.,* Moore v. Ray, 269 Ga. 457, 458–59, 499 S.E.2d 636, 637 (1998); Undercofler v. Eastern Airlines, Inc., 221 Ga. 824, 830–33, 147 S.E.2d 436, 441–42 (1966); Gormley v. Taylor, 44 Ga. 76, 82 (1871).

277. *See, e.g.,* INSTITUTE OF GOVERNMENT, UNIVERSITY OF GEORGIA, JUDICIAL ADMINISTRATION IN GEORGIA, A CASE STUDY (1972) (discussing and recommending proposals for judicial reform).

278. *See* State Bar of Georgia, *Georgia Bar Journal Archives*, https://www.gabar.org/newsandpublications/georgiabarjournal/archive.cfm [https://perma.cc/SA73-Z7W7] (last visited Nov. 21, 2023).

279. *Supra* notes 255–265.

280. *Supra* note 264.

281. *Supra* note 265 and accompanying text.

F. Texts, Treatises, and Law Review Articles Concerning Legal History.

Though they are frequently drafted too late to provide evidence of contemporary usage or meaning, sometimes books about legal history provide useful historical context for understanding words or provisions—at least as a jumping off point for further research. Of course, not all texts and treatises are created equal, and it is important to consider a source's credibility and thoroughness before asking a court to rely on it. A few examples of which I am aware for Georgia-specific legal history are:

> Melvin B. Hill Jr. & G. Laverne Williamson Hill, *The Georgia State Constitution* (2d ed. 2018);[282]
>
> Albert B. Saye, *A Constitutional History of Georgia* (1948); and
>
> Walter McElreath, *A Treatise on the Constitution of Georgia* (1912).

For legal history more broadly, examples include:

> William Blackstone's Commentaries on the Laws of England,[283] and
>
> The Federalist Papers.

For subject-matter treatises that address the common law and other relevant context:

> 5 Wayne R. LaFave et al., *Criminal Procedure* (4th ed. Nov. 2022 update);
>
> Wayne R. LaFave, *Search & Seizure* (6th ed. 2022);
>
> 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 229 (11th ed. 1863);
>
> *Wigmore on Evidence* (3d ed. 1941);
>
> Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (2d Ed. 1871);
>
> Edward Coke, *Institutes of the Lawes of England* (1628–1644); and

282. There are a few earlier editions of this book, as well.

283. The Georgia Supreme Court has long recognized Blackstone as the leading expert on the common law. *See, e.g.,* Undisclosed LLC v. State, 302 Ga. 418, 424–26, 425 n.8, 807 S.E.2d 393, 399, 399 n.8 (2017) (citing cases).

> Joseph Story, *Commentaries on the Constitution of the United States* (1833).

Last, the few law review articles that examine various subjects of Georgia legal history may be helpful. Examples include:

> R. Perry Sentell, Jr., *Official Immunity in Local Government Law: A Quantifiable Confrontation*, 22 GA. ST. U. L. REV. 597, 599 (I) (2006);[284]
>
> R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405, 407 (II) (B) (1993);[285]
>
> Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27, 35 (1988);[286] and
>
> Frank J. Vandall, *Tort Liability of Public Officials*, 29 MERCER L. REV. 303, 304–305 (I) (1977).[287]

G. Specialty or Historical Databases

Finally, it pays to know where to look when ordinary legal databases are short on resources. For older historical materials in particular, traditional research databases are often incomplete. In those situations, other databases (some subscription-based) include:

> HeinOnline (commercial internet database service launched in 2000);[288]
>
> Georgia Archives: Virtual Vault (digital images of predecessor versions of the Georgia Constitution);[289]

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284. https://readingroom.law.gsu.edu/gsulr/vol22/iss3/5/ [https://perma.cc/48NG-5K2Y] (last visited Nov. 21, 2023).

285. https://readingroom.law.gsu.edu/gsulr/vol9/iss2/5/ [https://perma.cc/57EY-Q93Y] (last visited Nov. 21, 2023).

286. This article is on file with the *Mercer Law Review*.

287. This article is on file with the *Mercer Law Review*.

288. HEINONLINE, https://heinonline.org/HOL/Welcome [https://perma.cc/86ST-XBYY] (last visited Nov. 21, 2023).

289. *Georiga Archives: Virtual Vault*, UNIV. SYS. OF GA., https://vault.georgiaarchives.org/digital/collection/adhoc/search [https://perma.cc/6FBE-FAS2] (last visisted Nov. 21, 2023).

JSTOR (digital library of academic journals, books, and primary sources);[290] and

Historical Georgia Digests and Codes (collection represents all of the various versions of the laws of Georgia beginning "from its first establishment as a British province" through the Code of 1933 which remained in effect until 1981).[291]

IX. CONCLUSION

How, then does a creative litigator use all of this? In cases involving provisions that the Supreme Court of Georgia has already construed, these principles may be helpful in arguing that the court has been wrong. Any such argument, however, has to contend not merely with the challenges inherent in making such a showing, but also with the additional obstacle of *stare decisis*. *Stare decisis* applies with less force in constitutional cases, but it still applies;[292] the court has explained that the reduced force is best understood as making the strength of the reasoning of the challenged decision particularly important in assessing *stare decisis*.[293]

But other Georgia constitutional provisions lack meaningful interpretive precedent. And when approaching a provision on a blank slate, a proper understanding of the first principles of Georgia constitutional interpretation is an enormous competitive advantage. Georgia trial courts generally lack the time and resources to do this kind of interpretation themselves, and the Georgia Supreme Court operates under tight constitutional deadlines that leave little margin for engaging in extensive historical research unaided by the parties. And, as explained above, a party arguing for a novel interpretation of the constitution bears the burden to show their interpretation is correct. Failing to carry that burden may dispose of their claims without requiring the court to determine definitively what the relevant provision actually means.

And there are many provisions of the Georgia Constitution that are either blank slates or are under-interpreted; I will offer one example that someone else pointed out first. Paragraph XVII of the Georgia Bill of Rights has several provisions which track the federal Constitution, and

290. JSTOR, https://www.jstor.org [https://perma.cc/8N6E-ZUQ2] (last visited Nov. 21, 2023).

291. *Historical Georgia Digests and Codes*, UNIV. OF GA. SCHOOL OF LAW, https://digitalcommons.law.uga.edu/ga_code/ [https://perma.cc/L96D-RPZV] (last visited Nov. 21, 2023).

292. *Olevik*, 302 Ga. at 244–46, 806 S.E.2d at 519.

293. *Id.*

one that does not.[294] It tracks the federal Constitution in prohibiting excessive bail and excessive fines, and prohibiting cruel and unusual punishment.[295] But it goes beyond the federal Constitution in also providing that "nor shall any person be abused in being arrested, while under arrest, or in prison,"[296] and has done so in materially identical form since that clause's introduction in 1868.[297] So what does this Georgia-specific clause mean?

Almost forty years ago, Georgia Court of Appeals judge Dorothy Beasley asserted that "[t]he history of Georgia courts' treatment of paragraph XVII is a case study of a general abdication of judicial responsibility."[298] Writing in 1985, she observed at that time that "there have been few reported cases in which the 'abuse' provision has been expressly invoked."[299] And things have not improved; as far as I can tell, onlyopinions of Georgia appellate courts have considered the provision since her article are (1) a 1993 decision of the Court of Appeals noting the presence of a claim under the provision, but declining to address it because a federal due process claim also present was sufficient to rule for the plaintiff,[300] and (2) two 1996 special concurrences that Judge Beasley authored noting that the provision may well have been relevant

294. GA. CONST. art. I, § 1, para. 17.

295. *Id.*

296. *Id.*

297. BEASLEY, *supra* note 103, at 384.

298. *Id.* at 345.

299. *Id.* at 389.

300. Long v. Jones, 208 Ga. App. 798, 800, 432 S.E.2d 593, 595-96 (1993) (concluding that because "minimum federal constitutional standards dictate reversal of the summary judgment order, we need not consider whether Georgia's constitutional prohibition against abuse may provide more protection to Long than federal due process standards"). *Long* did not discuss whether a private right of action existed to enforce the Georgia provision.

(although unaddressed by the majority).[301] What this provision means[302] and how it might apply in particular circumstances is only one of many, many Georgia constitutional questions awaiting proposed answers from thoughtful and creative litigators who understand and apply the principles explained here.

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301. Cunningham v. State, 221 Ga. App. 341, 342, 471 S.E.2d 273, 275 (1996) (Beasley, C.J., concurring specially) ("I fully concur but believe it important to point out that, although defendant does not cite the Georgia Constitution as support for his position, it applies. The Bill of Rights provides: 'nor shall any person be abused in being arrested, while under arrest, or in prison.' . . . . The court's charge on excessive force comported with this important right, which guards the lone arrestee from the unnecessary use of the physical power of the State. And the evidence did not, as a matter of law, require a finding of abuse.") (quoting GA. CONST. 1983, art. I, § 1, para. 17); Cherokee Cnty. v. N. Cobb Surgical Assocs., P.C., 221 Ga. App. 496, 500, 471 S.E.2d 561, 564 (1996) (Beasley, C.J., concurring specially) ("I concur but point out that, if there is any lingering doubt about Cherokee County's liability, it vanishes in the light of the constitutional prohibition against 'any person being abused in being arrested, while under arrest, or in prison.' . . . . Cherokee County took custody of McFarland not only to transport him to the hospital for emergency medical aid but also to charge him with aggravated assault (O.C.G.A. § 16-5-21). That is evident from the fact that warrants were immediately obtained by Cherokee County officers to search his residence and his body for evidence in connection with such a charge. It could hardly be argued that it would not be an abuse to fail or refuse to obtain medical aid for McFarland after he was shot. The statutes discussed in the majority opinion are an affirmative implementation of this constitutional prohibition.") (quoting GA. CONST. 1983, art. I, § 1, para. 17).

302. A federal district court considering a claim under the Georgia provision alongside federal due process and Eighth Amendment claims determined that the Georgia provision would provide at least as much protection as the federal provisions. *See* Boyd v. Nichols, 616 F. Supp. 2d 1331, 1346 (M.D. Ga. 2009) (citing *Long*, 208 Ga. App. at 800, 432 S.E.2d at 595-96). Curiously, the court then concluded that because the federal claims failed, so did the Georgia claim, and expressly refused to "reach the question" of whether the Georgia provision provided more protection than the federal provisions. *Id.*