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Interconstitutionalism

ABSTRACT. New constitutions aim to break from the past, but they rarely do. Instead, predecessor constitutions routinely influence how a new constitution is interpreted and applied. Past constitutions linger, even when the new constitution is the product of revolution or civil war. To explore this phenomenon, we take up a prevalent yet understudied practice of constitutional interpretation that we call "interconstitutionalism." By interconstitutionalism, we mean the use of a polity's antecedent constitution(s) to generate meaning for that same polity's current constitution. Courts and other interpreters regularly engage in interconstitutionalism, keeping alive the seemingly dead constitutions of the past. Interpretations of the U.S. Constitution regularly make use of the Articles of Confederation; state constitutional interpretation regularly involves comparison to predecessor state constitutions; and abroad, past constitutions play a starring role in making sense of nations' current governing charters.

This Article examines the multiple and often surprising dimensions of interconstitutional interpretive practices, drawing on examples from federal, state, and foreign courts. Understanding interconstitutionalist practices informs and challenges existing accounts of constitutional interpretation and adjudication. It also sheds light on the very nature of constitutional governance. A core commitment of modern constitutionalism is self-rule: government by the people. But interconstitutionalist practices challenge the very possibility of constitutions as self-governing charters. Interconstitutionalism means that past constitutions—those written and adopted by other people, for another political system, and now superseded—continue to hold sway. Yet, as the Article concludes, interconstitutionalism reveals a path forward for meaningful popular sovereignty and a basis for securing constitutional legitimacy.

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INTRODUCTION

Antonin Scalia famously called the Constitution of the United States "dead, dead, dead."[1] Scalia's characterization, shorthand for his originalist approach to constitutional interpretation,[2] represents one side of a debate.[3] On the other side are accounts of the U.S. Constitution as a living document whose meaning changes with the times, particularly in the hands of judges.[4] Whatever one's views[5] about whether the U.S. Constitution, or the constitutions of the states or of other nations, should be treated as deceased or as living, there would seem to be little question that *prior* constitutions—those once, but no longer, in force—are indeed dead.

Not so. As we demonstrate, a new constitution generally does not make a clean break from its predecessor governing charter. Quite the contrary, former constitutions routinely affect the interpretation and application of their successors.

In this Article, we take up a prevalent yet understudied practice of constitutional interpretation that we call *interconstitutionalism*. In a nutshell, interconstitutionalism is the use of a polity's antecedent constitution(s) to generate meaning for that same polity's current constitution. Courts and other interpreters regularly engage in interconstitutionalism, keeping alive past constitutions. Interpretations of the U.S. Constitution regularly utilize the Articles of Confederation; state constitutional interpretation often involves scrutinizing predecessor state constitutions; and in foreign countries, too, past constitutions play a starring role in interpreting current governing charters.

This Article examines the multiple and often surprising dimensions of interconstitutional practices, drawing on examples from federal and state courts as

1. Katie Glueck, *Scalia: The Constitution is 'Dead,'* POLITICO (Jan. 29, 2013, 8:26 AM EST), https://www.politico.com/story/2013/01/scalia-the-constitution-is-dead-086853 [https://perma.cc/M9Y6-G2W6].

2. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (introducing the benefits, and responding to critiques, of originalism). The academic literature defending originalism is enormous. For overviews, see ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2017); and Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

3. *See generally* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) (characterizing the landscape of disagreements between originalism and living constitutionalism).

4. *See, e.g.*, Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 126 (Amy Gutmann ed., 2018) (arguing that constitutional provisions set out "abstract moral principles and [that judges] must therefore exercise moral judgment in deciding what they *really* require").

5. We don't offer any.

well as courts abroad. Interconstitutionalism is everywhere. The practice extends well beyond the judiciary. Political leaders, for example, often speak about the U.S. Constitution in interconstitutionalist terms. President Lincoln invoked the Articles of Confederation at his 1861 inauguration to argue that the Constitution is perpetual and secession is therefore illegal.[6] President Franklin Delano Roosevelt invoked the Articles in support of his reading of broad congressional power in his 1937 fireside chat about the Supreme Court's obstruction of New Deal programs.[7] More recently, Missouri Senator Roy Blunt invoked the Articles at President Biden's 2021 inauguration in praise of what he called "determined democracy" as the Constitution's signal political innovation.[8]

Recognizing interconstitutionalism explains how courts apply constitutional provisions, complicates prevailing accounts of constitutional interpretation, and elucidates the nature of constitutional governance. Accordingly, we have three broad goals in this Article. The first is descriptive and anthropological: we seek to identify interconstitutionalism as a distinct interpretive practice, set out its features, catalog its forms, and examine its prevalence. In pursuing this goal, we collect evidence of the practice from courts in the United States and abroad and examine cases across time. We aim to provide a broadly representative descriptive account. At the same time, however, we recognize that our description is far from exhaustive. For every case we reference, there are many others we could have included instead. So, while we drill deeply into the examples we offer, a broad study of our type necessarily overlooks some nuances.

Our second goal is to bring interconstitutionalism into conversation with other accounts of constitutional interpretation. We show the ways in which interconstitutionalism reorients other interpretive approaches. For example, interconstitutionalism highlights weaknesses in approaches centered on the original

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6. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 579, 582 (Roy P. Basler ed., 1946) ("The Union is much older than the Constitution. . . . [T]he faith of all the then thirteen States expressly plighted and engaged that [the Union] should be perpetual, by the Articles of Confederation in 1778.").

7. Franklin D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), *in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122, 124 (1941) ("[The Constitution] is an easy document to understand when you remember that it was called into being because the Articles of Confederation . . . showed the need of a National Government with power enough to handle national problems.").

8. Roy Blunt, *Remarks at the Inauguration of President Joe Biden*, ABC NEWS, at 1:14, 1:44 (Jan. 20, 2021), https://abcnews.go.com/Politics/video/sen-roy-blunt-speaks-inauguration-75374946 [https://perma.cc/6LLN-2PQF] ("Once again, we renew our commitment to our determined democracy, forging a more perfect union. . . . The Constitution established that determined democracy with its first three words, declaring the People as the source of the government. The Articles of Confederation hadn't done that.").

public meaning of constitutional provisions.[9] Originalists have set forth elaborate arguments for discerning public meaning at ratification.[10] But interconstitutionalism defuses the significance of ratification when a new constitution reuses provisions from an earlier constitution. For interconstitutionalist courts, the meaning of repeated provisions dates back to their first use.

The third goal is more normative: we seek to understand interconstitutionalism's relationship to democratic self-governance. A core commitment of modern constitutionalism is democratic self-rule. Originalism, living constitutionalism, and other interpretive theories share an ultimate commitment to self-rule, even as they offer different ways to secure it. But interconstitutionalist practices challenge the nature of constitutions as self-governing charters. Interconstitutionalism means that past constitutions survive. They inform the meaning of any new document that "we the people" might adopt. As a result, creating a wholly new constitution is a very tall order. Indeed, as this Article shows, the pull of interconstitutionalism is so strong that even the conscious efforts of constitution-makers to liberate themselves from a past constitution do not easily succeed. Contemporary debates about rule by dead hand do not capture the extent to which the past constrains the present,[11] but attention to interconstitutionalism can help to ensure that a constitution tracks the preferences of its adopters. With

9. Originalism can usefully be understood as a "family of constitutional theories, almost all of which endorse two ideas: (1) that the meaning of the constitutional text is fixed at the time each provision is framed and ratified and (2) that fixed meaning ought to constrain constitutional practice." Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1958 (2021). The prevailing form is public-meaning originalism, which is characterized by the further claim that "the original meaning of the constitutional text is . . . the meaning that the text had for competent speakers of American English at the time each provision of the text was framed and ratified." *Id.* at 1957.

10. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 60 (1999) (arguing that the ratification process gave the Constitution's "text the meaning that was publicly understood"); Solum, *supra* note 9, at 1967-2001 (providing a positive argument based on theoretical linguistics and philosophy of language that the original meaning of constitutional text is the meaning the text had for competent speakers of American English at the time of framing and ratification); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1247-48 (2010) (arguing that original public meaning, focused on the understandings of those with authority to ratify constitutional text, promotes popular sovereignty); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 49 (2006) (drawing on the Constitution's terms and structure, its authorship and readership, and its source of authority to argue that constitutional meaning is found in "the hypothetical mind of the reasonable person" at ratification).

11. Frank H. Easterbrook, for example, claims that it is "word play" "[t]o say that 'the dead' . . . govern" because "[o]ld laws are enforced not because their authors want, but because the living want." Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998). But this claim does not account for the ongoing influence of abrogated constitutions.

this in mind, we identify some tools for drafting new constitutions. We also suggest that constitutional amendment might often be a better vehicle for securing constitutional change than replacing the constitution with a new charter.

Our Article proceeds in three parts. Part I lays out interconstitutionalism's key elements, distinctiveness from other interpretive approaches, and contributions to theories of interpretation and accounts of constitutional change.

Part II dives deep into the interconstitutional practices of courts. We organize a large set of raw material according to a series of principles, methods, and justifications that emerge from interconstitutionalist courts. Organizing the material in this way provides a basis for assessing interconstitutionalism as a distinct interpretive practice. Specifically, Section II.A focuses on constitutional continuity, a principle by which courts give a provision of an existing constitution the meaning it had the first time it appeared in a predecessor constitution—even if semantic or intended meaning changed by the time the current constitution was written and ratified. In Section II.B, we examine how new constitutions are deemed to ratify judicial decisions issued under previous constitutions. Section II.C then examines a shared understanding of interconstitutionalist courts: a new constitution validates and entrenches governmental power as it has been exercised unless it repudiates that practice under the former constitution.

Finally, in Part III, we discuss some of the benefits and risks of interconstitutionalism. We end by considering some larger implications—and a few puzzles—that interconstitutionalism poses for existing accounts of constitutional governance.

I. PRACTICE AND THEORY

This Part lays the groundwork for assessing interconstitutionalism. We first define interconstitutional interpretation, discuss its basic elements, and distinguish the practice from six other interpretive approaches. We then identify some contributions that interconstitutionalism makes to theories of interpretation and accounts of constitutional change. Finally, we extract from three categories of cases—interpretations of the U.S. Constitution, state constitutions, and foreign constitutions—features that are relevant to interconstitutionalist approaches.

A. Definition and Distinguishing Elements

By interconstitutionalism, we mean the interpretive practice of referring to a polity's antecedent constitution (or constitutions), textually or otherwise, to generate meaning for the same polity's current constitution. Three attributes of this formulation are worth highlighting.

First, interconstitutionalism is an interpretive *practice* rather than a *method* of constitutional interpretation because it can be deployed as an element of different methodological approaches. The invocation of an abrogated constitution might involve comparing the text of that document to its new counterpart (textualism); a comparison of the constitutional structures built into the two documents (structuralism); generation of original public meaning, or an inquiry into the intentions of the framers of the new constitution in light of the perceived virtues and vices of the abrogated constitution (originalism); or a combination of the foregoing—and, perhaps, other—interpretive methods. Because interconstitutional interpretation can be a tool for different existing interpretive methods,[12] we treat it as a "practice" rather than an independent method of constitutional interpretation.

Second, an essential attribute of interconstitutional interpretation is its intertemporal dimension. Interconstitutional interpretation is inevitably a retrospective endeavor: it looks back at the replaced constitution to gain insights into the meaning of the successor constitution.

Third, this retrospection, or intertemporality, looks to constitutions of the *same* polity. A court might, for example, invoke the 1777 New York Constitution to understand New York's current (1894) constitution. Or a court might look to the French Constitution of 1946 to generate meaning for the French Constitution of 1958. Consequently, interconstitutional interpretation has a decidedly *domestic* tilt. Constitutions of the *same* polity are the objects of the interconstitutional approach.

These defining features distinguish interconstitutionalism from six other interpretive practices that also involve textual comparisons: *cross-constitutional interpretation*, the practice of invoking foreign constitutions in determining the meaning of the domestic national constitution;[13] *intraconstitutional interpreta-*

12. For a discussion of various methods of constitutional interpretation in the United States, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3-121 (1982); and Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209 (1987).

13. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575-78 (2005) (invoking the constitutions and practices of other countries to support the claim that an evolving consensus across the globe rejects the practice of sentencing juvenile criminals to death). For a study documenting the U.S. Supreme Court's foreign-law references, see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005). The broader literature on transnational constitutional influence is voluminous. *See generally* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010) (examining how national constitutional courts engage with transnationalism).

tion, the practice of generating constitutional meaning by juxtaposing and analyzing different provisions within a single constitution;[14] *subunit comparison*, involving interpretations of the national constitution in a federal system by reference to the constitutions of its federal states (or other governmental subunits);[15] *bilingual or multilingual constitutional interpretation*, a comparison of different language versions of a single constitution;[16] *reference to foundational materials*, which involves the consideration of other historical documents with special importance

14. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 886 (1991) (invoking Article II's Opinion Clause when interpreting the Appointments Clause because both contain the phrase "Heads of Departments" and the two clauses "must be read in conjunction"). Intraconstitutional analysis often goes hand in hand with the textual method of constitutional interpretation that Akhil Reed Amar calls "intratextualism," the practice of "read[ing] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329-30 (1816) (invoking the status of the federal judiciary as a coordinate branch of the federal government and construing Article III's Vesting Clause in light of the Vesting Clauses of Articles I and II). The term "intra-constitutional" has also been used to distinguish domestic constitutional law and comparative constitutional law analyses. *See* Ran Hirschl, *Comparative Methodologies*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 11, 14 (Roger Masterman & Robert Schütze eds., 2019).

15. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 600-01 (2008) (explaining that the interpretation of the Second Amendment as guaranteeing an individual right of self-defense is "confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment"). Textual similarities and the fact that the Framers of the U.S. Constitution drew inspiration from existing state constitutions make them important resources for interpreting the Federal Constitution. *See* John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AM. ACAD. POL. SOC. SCI. 12, 13 (1988). Certain state constitutions are deemed *particularly* relevant: the Massachusetts Constitution of 1780, for instance, has a special place among state constitutions because of its age and its influence upon the Framers of the U.S. Constitution. *See* Paul C. Reardon, *The Massachusetts Constitution Marks a Milestone*, 12 PUBLIUS 45, 54 (1982). In other federal systems, state constitutions also influence interpretations of the national constitution. *See, e.g.*, DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 532 (3d ed. 2012) (describing the use of Länder constitutions in the Federal Constitutional Court's interpretation of the German Basic Law).

16. In polities with multiple officially recognized languages, linguistic differences among official versions of a constitution can clarify meaning. *See, e.g.*, *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) at 31 para. 44, 33 para. 47 (S. Afr.) (invoking the Afrikaans version of the Interim Constitution to resolve ambiguity in the English version). Elsewhere, translations prepared for different linguistic populations can also provide a basis for textual comparisons. *See* Christina Mulligan, Michael Douma, Hans Lind & Brian Quinn, *Founding-Era Translations of the U.S. Constitution*, 31 CONST. COMMENT. 1, 2 (2016).

(such as the Declaration of Independence);[17] and *interdraft comparison*, the practice of discerning the meaning of a constitution by reference to drafts generated by the body responsible for writing (and usually approving) the document.[18]

B. Interpretation, Continuity, Change

At its core, interconstitutionalism is about determining constitutional meaning in a context in which constitutions, drafted and ratified at a particular moment, have their own past. As an interpretive practice, interconstitutionalism rests on several grounds.

As a textual matter, some constitutions have specific provisions that reference a predecessor charter and thus *require* interconstitutionalist inquiry.[19] For example, Article 140 of the 1949 German Basic Law explicitly incorporates provisions of the 1919 Weimar Constitution mandating separation of church and state.[20]

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17. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 409-10 (1857) (enslaved party) (invoking the Declaration of Independence as "conclusive" evidence of "a perpetual and impassable barrier . . . between the white race and the one . . . reduced to slavery," and thus of the racial contours of American political membership), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9-14 (1999) (depicting the Declaration of Independence as part of our "thin constitution," with principles that inform and guide constitutional law).

18. On occasion, the U.S. Supreme Court and individual Justices have invoked drafts prepared for and considered by the Philadelphia Convention to interpret the U.S. Constitution. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 21 n.40 (1957) (observing that "'[n]either the original draft presented to the convention nor the draft submitted by the "Committee of Detail" contained the clause[s]'" of the Constitution providing for congressional authority over land and naval forces (quoting Supplemental Brief for Appellant and Petitioner on Rehearing at 68 n.37, *Reid*, 354 U.S. 1 (Nos. 701 & 713))); Nat'l Mut. Ins. v. Tidewater Transfer Co., 337 U.S. 582, 632 (1949) (Vinson, C.J., dissenting) (noting that during the Philadelphia Convention a "clause establishing inferior federal tribunals [was] excised from" a draft of the Constitution).

19. We flag here also the possible scenario in which two constitutions are in force at the same time. Arguably, post-Ottoman Turkey was simultaneously governed by the Ottoman Constitution of 1876 and the revolutionary Constitution of 1921. One indication that both documents were in force until the Republic of Turkey, established in 1923, adopted its first constitution in 1924 is that the 1924 Constitution expressly abrogated both the 1876 and the 1921 constitutions. *See* TESKILATI ESASIYE KANUNU [CONSTITUTION OF THE REPUBLIC OF TURKEY] Apr. 20, 1924, art. 104 (Turk.) ("The Constitutional Law of 1878 (1293) together with its amendments and the Organic Law of January 30, 1921 (1337), and the amendments thereto are hereby annulled."). For the English translation of the 1924 Constitution, see Edward Mead Earle, *The New Constitution of Turkey*, 40 POL. SCI. Q. 73, 89-100 (1925).

20. Grundgesetz [GG] [Basic Law], art. 140, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/7J6J-6WHY] ("The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.").

The Basic Law is thus explicitly interconstitutionalist: the relevant provisions of the Weimar Constitution are themselves a part of the Basic Law.[21]

Of course, incorporation of provisions of a predecessor constitution does not necessarily resolve the meaning of those provisions. In France, the 1958 constitution's references to predecessor charters have provided a basis for the Constitutional Council to identify and protect a series of unenumerated rights.[22] The Council's interconstitutionalist explanation for this outcome has proceeded in three steps. First, the preamble to the 1958 constitution states that "[t]he French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946."[23] Second, the 1946 preamble affirmed a commitment to the "fundamental principles recognized by the laws of the Republic."[24] Third, among such "fundamental principles" are protections of various rights not specified in the 1958 constitution itself.[25] On these grounds, the Council has reached back to identify rights not specified in the current constitution.[26] Thus, interconstitutionalism has created space for judicial innovation.

The U.S. Constitution also contains interconstitutionalist textual commands.[27] The Constitution makes two types of references to government under the Articles of Confederation.[28] First, the Constitution declares that "[a]ll Debts

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21. Fiji presents a quite different example. Its 1990 constitution contained a provision granting immunity to members of the military involved in the nation's 1987 coup and specified that this provision "shall not be reviewed or amended by Parliament." Fiji Const. ch. XIV, § 164, cl. 5 (1990). The 1997 constitution and the 2013 (current) constitution both preserved the immunity protection. *See* Fiji Const. ch. 10, § 155 (2013) ("[D]espite the repeal of the Constitution of 1990, Chapter XIV of the Constitution of 1990 continues in force in accordance with its tenor, and the immunity granted in Chapter XIV of the Constitution of 1990 shall continue."); Fiji Const. ch. 16, § 195, cl. 2 (1997) (similar).

22. *See* Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 727 (2010) (discussing decisions of the French Constitutional Council).

23. 1958 CONST. pmbl. (Fr.) (author's translation).

24. 1946 CONST. pmbl. (Fr.) (author's translation).

25. Orgad, *supra* note 22, at 727.

26. *See id.* ("Although not explicitly enumerated in the 1958 Constitution, the rights to strike, freedom of association, privacy, education, freedom of conscience, freedom of movement, and due process were all thereby recognized as constitutionally protected rights.").

27. Thus, Richard H. Fallon, Jr.'s assertion that "the Constitution is valid law and . . . the Articles of Confederation no longer are," Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1758 (2015), does not capture the full story.

28. Less explicitly, the Constitution's promise of a "more perfect Union," U.S. CONST. pmbl., can be understood as a reference to the "perpetual Union" under the Articles of Confederation, ARTICLES OF CONFEDERATION of 1781 pmbl., art. XIII, para. 2.

contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."[29] In other words, the Constitution does not eliminate contractual obligations the national government assumed under the Articles;[30] instead, prior obligations remain as valid as they were under the Articles.

Second, the Constitution makes two interconstitutionalist references concerning treaties. In designating the scope of the federal judicial power, Article III refers to "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[31] And in specifying what "shall be the supreme Law of the Land," the Supremacy Clause of Article VI refers first to "[t]his Constitution," then to "the Laws of the United States which shall be made in Pursuance thereof," and finally to "all Treaties made, or which shall be made, under the Authority of the United States."[32] Under both provisions, treaties validly ratified under Article IX of the Articles of Confederation[33] remain in force under the Constitution.[34] Cases arising under past treaties are within the federal judicial power; past treaties are supreme to state law.

Many current constitutions also contain holdover provisions from previous constitutions. Courts pay close attention to textual continuities because they understand that past meaning can inform efforts to discern present meaning. So, too, interpretation can benefit from attention to textual differences—variations in language between the current constitution and past constitutions. More generally, the present constitution might be viewed as improving upon an earlier constitution. Interpretation of the current constitution can thus be informed by reading its provisions as building upon or reorienting provisions of an earlier charter. Many invocations of the Articles of Confederation, for example, involve

29. U.S. CONST. art. VI, cl. 1.

30. *See* ARTICLES OF CONFEDERATION of 1781, art. XIII ("All bills of credit emitted, monies borrowed, and debts contracted by or under the authority of congress . . . shall be deemed and considered as a charge against the united States, for payment and satisfaction whereof the said united states and the public faith are hereby solemnly pledged.").

31. U.S. CONST. art. III, § 2.

32. *Id.* art. VI, cl. 2.

33. *See* ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1 ("The united states, in congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances . . . .").

34. This is no small matter: the provisions make clear that the 1783 Treaty of Paris did not evaporate with the Constitution.

an understanding of the Constitution as a document that remedies the shortcomings of the Articles.[35]

Interconstitutionalism thus highlights questions of time in constitutional interpretation.[36] Originalists claim that constitutional meaning is fixed at ratification.[37] That might sound like a clear rule, but it is clear only to the extent that a constitution is viewed as a single document. If a constitution is instead understood as one document in a series of charters, then choices emerge about the point in time at which meaning became fixed. The question arises: if today's constitution repeats provisions that were contained in a predecessor constitution, should we look to the meaning at the time the current constitution was ratified, or earlier, to the origin of those carried-over provisions?

As this Article shows, interconstitutionalist courts take the position that meaning is fixed at the time a provision first appeared in a polity's charter. On this view, evidence from the moment of repetition matters relatively little. That approach has profound implications for originalism at the state level because many states have had multiple constitutions. It also has implications for inter-

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35. *See, e.g.*, Evenwel v. Abbott, 578 U.S. 54, 82 (2016) (Thomas, J., concurring) ("The Framers' preference for majority rule . . . was a reaction to the shortcomings of the Articles of Confederation."); Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992) ("Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills."); Chisholm v. Georgia, 2 U.S. 419, 464 (1793) (opinion of Wilson, J.) ("The articles of confederation, it is well known, did not operate upon individual *citizens*, but operated only upon *States*[.] This defect was remedied by the national Constitution . . . .").

State courts have also described current state constitutions as remedying defects in prior state constitutions. *See, e.g.*, Exch. Drug Co. v. State Tax Comm'n, 117 So. 673, 676 (Ala. 1928) ("[A constitutional] provision . . . must be construed and allowed such operation as will secure the purpose for which it was introduced, and that purpose is to be ascertained from a just consideration of the causes in which it originated."); Streeter v. Paton, 7 Mich. 341, 346 (1859) ("Our present constitution was not the formation of a new government, but the continuation of a government under a previous constitution, whose supposed or real defects it was intended to correct . . . ."); Cruger v. Hudson R.R. Co., 12 N.Y. 190, 196 (1854) ("The provision in the constitution of 1846 . . . was intended to supply a defect or omission which existed in the previous constitution.").

36. *See generally* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001) (examining the project of democratic self-government across time).

37. *See, e.g.*, Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 804 (2022) ("The law is whatever was ratified at the time . . . ."); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1633 (2013) ("[C]ontemporary judges must give the Constitution the same meaning that it had at the time of ratification."); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013) (explaining that a central claim of originalism is that "the linguistic meaning of the constitutional text is fixed for each provision at the time that provision was framed and ratified").

pretations of the U.S. Constitution: besides directing greater attention to provisions retained from the Articles of Confederation and thus to their meaning in 1781 (rather than in 1788 or 1789), interconstitutionalism offers an account of how best to understand repetitions of constitutional text across time in later amendments.

For instance, four amendments to the U.S. Constitution—the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth—refer to "the right of citizens of the United States . . . to vote."[38] Akhil Reed Amar writes that, as a matter of intratextualism, this "strongly parallel language is a strong (presumptive) argument for parallel interpretation."[39] But parallel in what sense? A century separates the Fifteenth Amendment from the Twenty-Sixth. Amar, who here argues that "to vote" encompasses voting both on juries and in elections, views the first usage (the usage in the Fifteenth Amendment) as relevant to but not determinative of the phrase's meaning in the later voting amendments.[40] Interconstitutionalism offers a stronger rule: textual harmony occurs because repeated provisions carry the *exact* meaning of their first usage. This rule constrains later constitution-makers because it imposes specific meanings upon them. But its advantage is clarity: interpreters adhering to it need not rely on various sorts of evidence of different degrees of persuasiveness to harmonize (or perhaps distinguish) textual repetitions.

Interconstitutionalism also highlights the significance of extraconstitutional sources of constitutional meaning. Interconstitutionalist courts view constitutional text from an earlier charter as containing its complete meaning under the prior charter, including prior judicial interpretations of the provision. On this account, to understand the readopted provision, it is essential to understand what courts said about it in the past. Reading the text in isolation or consulting contemporary dictionaries or other sources of ratification-era meaning do not suffice. A repeated textual provision incorporates judicial decisions about it.

Stephen E. Sachs helpfully points to the relevance of "constitutional backdrops," which he defines as "subconstitutional rules that the Constitution prevents the usual actors from changing."[41] Sachs identifies three broad categories

38. U.S. CONST. amends. XV, XIX, XXIV, XXVI.

39. Amar, *supra* note 14, at 789.

40. *See id.*

41. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1879 (2012).

of backdrops: incorporation of external rules by reference;[42] insulation of external rules from change through ordinary legislation;[43] and "defeaters" that impose limitations on constitutional text.[44] Interconstitutionalism resonates with the first of these categories. As Sachs observes, the Constitution "incorporates certain rules by reference, giving them constitutional protection without including them in the text (or even specifying their content)."[45] Such rules cannot be discovered by interpreting the text itself.[46] Instead, understanding them requires attention to history and external sources of law, and thus the incorporated rules "come[] in pure."[47]

Consider the Seventh Amendment's command that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[48] Sachs notes that interpretation of the Seventh Amendment can be directed at discerning whether the public meaning of "rules of the common law" in 1791 was "the practices now current at Westminster" or something else.[49] But the actual content of those rules is not an issue of interpretation because it instead requires historical research into how the common law, properly understood, worked.[50] What the Framers (or the ratifying public) actually thought the Seventh Amendment preserved is of no significance on this account.[51]

Interconstitutionalism complicates the distinction Sachs offers between text subject to interpretation and incorporated requirements. "According to the rules of the common law" plainly references an external source. For interconstitutionalist courts, provisions may also incorporate preexisting sources even if they do not say so on their face. The meaning of a constitutional right against self-incrimination, for instance, might not present a matter for interpretation but

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42. *See id.* at 1820.

43. *See id.* at 1817 (noting, as an example, that although the Constitution does not specify how state borders should be drawn, it does limit changes to established state borders).

44. *See id.* at 1852–54 (discussing the example of an anti-entrenchment rule, which, as a limitation on the legislative powers granted in Article I, bars Congress from insulating its statutes from future legislative modification or repeal).

45. *Id.* at 1820.

46. *See id.* at 1823.

47. *Id.* at 1826.

48. U.S. CONST. amend. VII.

49. Sachs, *supra* note 41, at 1826.

50. *See id.*

51. *See id.*

simply incorporate the meaning the right had under a predecessor constitution.[52] An essential starting point, then, for discerning constitutional meaning is to determine whether a provision originates in the current constitution or in a predecessor.

Interconstitutionalism also invites fresh attention to issues of continuity and change in constitutional systems. Interconstitutionalism reinforces linkages between a current constitution and its predecessor charters. It thus resonates with other ways in which new constitutions carry old legal provisions. One clear example is the well-accepted idea that provisions of the 1791 Bill of Rights merely codify preexisting protections.[53] So, too, interconstitutionalism challenges notions that the origin point of an existing constitution is of special significance as a new beginning. Instead, interconstitutionalism suggests that, rather than indicating new creation, the moment of drafting or ratification might simply represent a point of readoption.

The continuity in interconstitutionalism casts some doubt on the prospects for constitutional change. It is commonly thought that the possibility of amending or replacing an existing constitution is a source of its legitimacy. For example, Jack M. Balkin writes that "[t]he best explanation of why the Constitution continues as law today is . . . [that] the text of the Constitution is law and the law continues in force until it is repealed or changed."[54] Balkin adds: "Americans could refuse to be bound by their existing Constitution and start over again."[55] Interconstitutionalism suggests, however, that it is impossible to start over because a new national charter will not break clean from the current one.[56]

Continuity is not, however, just an impediment. It can also be a healthy source of stability. Consider Thomas Jefferson's famous argument for regular

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52. *See infra* Section II.A.1 (discussing *Elliott v. State*, 824 S.E.2d 265 (Ga. 2019)).

53. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

54. Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 JERUSALEM REV. LEGAL STUD. 57, 59 (2013).

55. *Id.* at 60.

56. Tellingly, some commentators who have called for a constitutional convention have offered blueprints for a new document, yet many of these proposals track the existing constitution in significant ways, even as they aim for large-scale reform. *See, e.g.*, Jeffrey Rosen, *What if We Wrote the Constitution Today?*, ATLANTIC (Dec. 8, 2020), https://www.theatlantic.com/ideas/archive/2020/12/what-if-we-could-rewrite-constitution/617304 [https://perma.cc/4FN6-T24S] (reporting that all three teams of scholars — conservative, progressive, and libertarian — asked by the National Constitution Center to draft a new constitution from scratch chose to revise, rather than abolish and replace, the current Constitution); Delegates of the Democracy Const., *A New Constitution for the United States*, 61 DEMOCRACY J. (2021), https://democracyjournal.org/magazine/61/a-new-constitution-for-the-united-states [https://perma.cc/LX7Q-C4UZ] (proposing a new national constitution that tracks the structure of the existing Constitution and repeats many of its provisions).

episodes of constitution-making. Jefferson thought that because "[t]he earth belongs always to the living generation," "[e]very constitution, . . . & every law, naturally expires at the end of 19 years" (the period he determined to represent a single generation).[57] Jefferson's proposal easily looks "daft," in part because Jefferson never explained how society could function if its constitution and laws simply evaporated on a precise date.[58] Perhaps, though, Jefferson himself was interconstitutionalist. He might have understood that the transition from one constitution to the next is mostly a process of continuation, not rupture. Every nineteen years, then, the new generation might sleepily readopt most of the provisions inherited from the prior generation. If so, we need not worry about filling voids in our governing structures. Continuity might impede innovation, but preservation has its own benefits.

C. Federal, State, Global

In this Article, we consider three broad categories of interconstitutional interpretation. The categories correspond to the in-force constitution whose meaning is at issue. We take up interconstitutional practices for interpreting (1) the U.S. Constitution, (2) state constitutions, and (3) foreign constitutions. Providing a few preliminary words about each of these three categories will help set the stage for the analysis in Part II.

1. The U.S. Constitution

Use of the Articles of Confederation to understand the U.S. Constitution is a form of interconstitutionalism. The practice is common. In construing provisions of the Constitution, the U.S. Supreme Court regularly invokes the Articles, and for many reasons. One example is Chief Justice Marshall's opinion in *McCulloch v. Maryland*,[59] where, in holding that Congress has the power to incorporate a national bank, Marshall invoked a textual difference between the Articles of Confederation and the Constitution.[60] Although the word "expressly"

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57. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 12 THE PAPERS OF JAMES MADISON 382, 385 (Charles F. Hobson & Robert A. Rutland eds., 1979).

58. *See* AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840, at 420 (2021) ("What would be the legal status quo at the instant after constitutional expiration? A Hobbesian free-for-all state of nature?").

59. 17 U.S. (4 Wheat.) 316 (1819).

60. *Id.* at 406.

in the Articles accompanied enumerated congressional powers,[61] Marshall observed, nothing in the Constitution "requires that everything granted shall be expressly . . . described."[62] Further, Marshall noted, the Tenth Amendment does not refer to *express* congressional powers.[63] The omission supported the conclusion that Congress also enjoys implied powers under Article I,[64] such as the power to create the bank.[65]

It might be objected that the Articles of Confederation were not a constitution and that the first and only constitution of the United States is the Constitution of 1789.[66] On this account, whatever its usefulness elsewhere, interconstitutional interpretation has no relevance to the Federal Constitution. We disagree. To be sure, scholars have debated the legal status of the Articles, but largely in relation to a particular question of constitutional replacement: given that under Article XIII, any amendment required congressional approval and unanimous agreement by the legislatures of the states,[67] and given that the delegates to the Philadelphia Convention were tasked with offering amendments to the Articles (not jettisoning them altogether), was it lawful for the Constitution

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61. *Id.*; *see* ARTICLES OF CONFEDERATION of 1781, art. II ("Each State retains its Sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States in Congress assembled." (emphasis added)).

62. *McCulloch*, 17 U.S. at 406.

63. *See id.* at 406-07.

64. *Id.* at 353.

65. *Id.* at 425.

66. Putting aside the status of the Articles of Confederation, another form of interconstitutionalism involving the U.S. Constitution existed in the Civil War period. The Constitution of the Confederate States, adopted in 1861, was modeled on the 1789 U.S. Constitution. *See* Robert H. Smith, An Address to the Citizens of Alabama, on the Constitution and Laws of the Confederate States of America 7 (Mar. 30, 1861) ("[W]e have followed with almost literal fidelity the Constitution of the United States, and departed from its text only so far as experience had clearly proven that additional checks were required for the preservation of the Nation's interest."). Many cases from courts in Confederate states interpreting the Confederate Constitution invoked the U.S. Constitution. *See, e.g.*, *Ex parte* Coupland, 26 Tex. 386, 399-400 (1862) (upholding a conscription law as an exercise of the Confederate Congress's power to raise and support armies and explaining that the power "is given in our constitution, as it was originally in the constitution of the United States, and was placed in that for the purpose of correcting one of the leading defects in the articles of confederation," under which national defense was dependent upon states' supplying soldiers); Jeffers v. Fair, 33 Ga. 347, 354-55 (1862) (writing that "[o]ur Constitution . . . is a liberal copy of the Constitution of the United States" and thus "[w]hatever light . . . may be derived from American history, and whatever authority from eminent actors in the political arena, between the declaration of independence and our secession from the Union, are legitimate aids in . . . our inquiry [as to the meaning of the Confederate Constitution]").

67. ARTICLES OF CONFEDERATION of 1781, art. XIII.

to replace the Articles?[68] Regardless of issues of legality, there is consensus that the Constitution *replaced* the Articles as the governing national charter[69] and interconstitutional interpreters, including the Supreme Court, treat the Articles as having a constitutional status.[70] That suffices for our purposes.[71]

At the same time, context matters, and new national constitutions can arise from different national experiences. The U.S. Constitution was written and ratified to cure defects of the system of government under the Articles.[72] In that sense, the Constitution is a repudiation of the earlier regime. The *Federalist Papers* reflect the point: they describe the Constitution as correcting "the great and

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68. *Compare* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 462-87 (1994) (describing the Articles as a treaty among consenting sovereigns from which, under principles of international law, those sovereigns may withdraw in cases of breach, and invoking the democratic origins of the Constitution in support of the Constitution's legality), *with* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1058 (1984) (deeming the ratification of the Constitution "plainly illegal under the Articles of Confederation").

69. *See, e.g.*, Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1743 (2011) ("[T]he Constitution had sprung to life, a process in which 'We, the People' had altered various state laws and institutions in force prior to the Constitution's ratification and had abolished the old Articles of Confederation."); Fallon, *supra* note 27, at 1758 ("We agree, for example, that the Constitution is valid law and that the Articles of Confederation no longer are.").

70. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 599-600 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (referring to the Articles of Confederation as "the Constitution's precursor"); Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 135 n.16 (1960) (Black, J., dissenting) ("The *original* Articles of Confederation provided for congressional control of Indian affairs in Article 9. A similar provision is in the Commerce Clause of the present Constitution." (emphasis added)).

71. *See generally* Rosalind Dixon & Tom Ginsburg, *Introduction* to COMPARATIVE CONSTITUTIONAL LAW 1, 5 (Tom Ginsburg & Rosalind Dixon eds., 2011) (describing an approach to conceptualizing a constitution as "sociological and open-textured, and linked to the way in which national actors understand domestic legal norms as constitutional"). And, to be sure, many constitutional-law scholars have described the Articles of Confederation as America's first constitution. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 1.3, at 9 (5th ed. 2015) ("The Articles of Confederation were the first constitution of the United States."); SANFORD LEVINSON, CONSTITUTIONAL FAITH 130 (1988); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456 (1989).

72. Still, some interpreters emphasize the continuity of desirable features of the Articles of Confederation. In the anticommandeering cases, Justice Stevens, focusing on tools for efficient federal regulation, took the view that Congress retains the power it had under the Articles of Confederation to issue directives to state governments. *See* New York v. United States, 505 U.S. 144, 210 (1992) (Stevens, J., dissenting in part and concurring in part) (writing that the Articles gave "the Federal Government . . . the power to issue commands to the States" and that "[n]othing . . . suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles" because "[t]he Constitution enhanced, rather than diminished, the power of the Federal Government"); *see also* Printz v. United States, 521 U.S. 898, 945 (1997) (Stevens, J., dissenting) (similar).

radical vice[s] in the construction of the existing Confederation,"[73] and a response to its "palpable defect[s]."[74] Still, it would be wrong to say that the transition from the Articles to the Constitution is equivalent to the adoption of a new national charter following revolution, war, liberation, or another episode of great national transformation.

2. *State Constitutions*

State constitutions provide a rich database for examining interconstitutional interpretation. Thus far, the fifty states have together had a total of nearly 150 constitutions.[75] Thirty-one states have had at least two state constitutions;[76] Louisiana, with eleven constitutions, has had the most of any state.[77] When state courts interpret their current constitution, they regularly rely on interconstitutional interpretation. We examine many such decisions below.

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73. THE FEDERALIST NO. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

74. THE FEDERALIST NO. 21, at 138 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

75. *See State Constitutions Project*, NAT'L BUREAU ECON. RSCH., https://www.nber.org/research/data/state-constitutions-project [https://perma.cc/4AYJ-PDRN] ("There have been almost 150 state constitutions, they have been amended roughly 12,000 times, and the text of the constitutions and their amendments comprises about 15,000 pages of text."). The exact number of constitutions a state has had depends upon the definition of a new constitution. For example, Connecticut adopted its first state constitution in 1818; in 1955, the state incorporated all amendments to date into the body of the 1818 constitution, before adopting a new constitution again in 1968. *See* WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION 17, 21-22 (2d ed. 2012). Connecticut thus might be deemed to have had either two constitutions or three. Revisions made in 1792 to New Hampshire's second and current (1784) constitution were so extensive that even the state's highest court has sometimes treated the 1792 charter as a new constitution. *See* SUSAN E. MARSHALL, THE NEW HAMPSHIRE STATE CONSTITUTION 15 (2011). Using principally the database *State Constitutions Illustrated*, HEIN ONLINE, https://home.heinonline.org/content/state-constitutions-illustrated [https://perma.cc/8MJ5-L3BP], we count 146 state constitutions. Our figure excludes constitutions that merely codify amendments (thus we count two constitutions for Connecticut). It also excludes territorial charters and other pre-statehood documents.

76. This figure is based on our counting of individual state constitutions using *State Constitutions Illustrated*, *supra* note 75. *See also* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23 (1998) ("Only nineteen states still retain their original constitutions, and a majority of states have established three or more.").

77. W. LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION 3 (2011). *State Constitutions Illustrated* reports only ten constitutions for Louisiana because it excludes the state's 1861 secessionist constitution. *See State Constitutions Illustrated*, HEIN ONLINE, https://heinonline.org/HOL/Index?state=lacowconst&collection=statecon [https://perma.cc/38VK-EVT6] (entry for Louisiana). The 1861 constitution readopted the state's existing (1852) constitution with changes to delete references to the federal government. *See* JOHN M. SACHER, A PERFECT WAR OF POLITICS: PARTIES, POLITICIANS, AND DEMOCRACY IN LOUISIANA, 1824-1861, at 297 (2003).

In making sense of state constitutions and state-court decisions, some general considerations are relevant. One is that considerable variation exists among the states with multiple constitutions in how many constitutions each has had, how long constitutions have remained in place, and how long a state's current constitution has been in force. For example, Iowa and Rhode Island have each had two constitutions, but Iowa's two are separated by just 11 years,[78] while 144 years span Rhode Island's first and second constitutions.[79] Clustering has implications for interconstitutionalist practices. Constitutions adopted close in time to each other—because, say, they reflect close commonalities in language or because their actual drafters and ratifiers overlap—might be more easily compared than constitutions many decades apart.[80] At the same time, the number of constitutions a state has had also matters. Comparing Rhode Island's two charters is likely more manageable than comparing Illinois's four constitutions since 1818[81] or Georgia's ten constitutions since 1777.[82]

Interconstitutionalism requires attention to the different circumstances in which state constitutions are adopted. In some instances, a new state constitution represents a clean-up job: the state adopts a single charter to integrate amendments adopted over the years and to impose order.[83] In other instances, states adopt a new constitution to break new ground—that is, to secure change in the organization and operation of government or in the nature and scope of individual rights.[84] A new constitution that merely integrates and organizes has a much tighter connection to its predecessor than one that aims for reform: cleaning up necessarily requires paying close attention to the predecessor document. Political context likewise matters. While most new state constitutions have been adopted under ordinary political conditions, some have resulted from

78. *See* IOWA CONST. of 1846; IOWA CONST. of 1857.

79. *See* R.I. CONST. of 1842; R.I. CONST. of 1986.

80. *See, e.g.*, State *ex rel*. Bd. of Adm'rs of the Tulane Educ. Fund v. Bd. of Assessors, 35 La. Ann. 668, 670-71 (1883) (concluding that when, in 1879, framers of the new state constitution repeated a provision from the 1868 state constitution, they must have intended to retain the 1868 meaning as settled by case law).

81. ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION 3 (2011).

82. MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION 3 (2011).

83. *See, e.g.*, HORTON, *supra* note 75, at 43 (reporting that Connecticut's 1955 constitution "merely incorporated the forty-seven amendments to the constitution of 1818 into the body of the constitution").

84. *See, e.g.*, PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 28-33 (Oxford Univ. Press, 2d ed. 2012) (describing the economic downturn and global threats to democracy which led to the recognition of new rights, including to certain welfare benefits, in the 1938 New York constitution).

war.[85] In particular, after the Civil War, Congress required the former Confederate states (Tennessee aside) to adopt new constitutions, in accordance with federal specifications, as a condition of their readmission to the Union.[86] Unlike comparing two peacetime constitutions, comparing a prewar with a postwar constitution necessarily requires attention to a seismic intervening event (war).

Nineteen states have had just one state constitution.[87] While our investigation of interconstitutional practices necessarily excludes these states, it would be wrong to think they have not changed their governing charters. Every state has amended its constitution: together, state constitutions have been amended some 12,000 times,[88] with states averaging 1.3 constitutional amendments annually.[89] Massachusetts alone has amended its constitution, in place since 1780, 120 times.[90]

Although our investigation excludes states that have adopted just one constitution, constitutional amendment in such states does inform interconstitutionalism. Amending a constitution is typically easier and less momentous than adopting a new constitution. Amendments also normally account for and, to the extent that they do not override existing provisions, are read in harmony with, the constitution they amend. In other words, amendments produce change, but do not a new constitution make. Yet, our analysis of interconstitutionalism suggests that the same might also be true of new constitutions. A key lesson of interconstitutionalism is that past constitutions linger. When it comes to constitution-making, there are no blank slates. As such, if the choice is between

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85. Besides the Civil War experience, eleven states adopted new state constitutions after the Revolutionary War. Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 671 (2005). The other two original states, Connecticut and Rhode Island, revised their colonial charters. *Id.* at 671 n.3.

86. Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429; *see* PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860-1902, at 154-84 (2017) (describing the processes that led to new constitutions in former Confederate states).

87. This figure is based on our counting of individual state constitutions using *State Constitutions Illustrated*, *supra* note 75.

88. *The NBER/Maryland State Constitutions Project*, NAT'L BUREAU ECON. RSCH. & UNIV. MD., http://www.stateconstitutions.umd.edu/index.aspx [https://perma.cc/Q6LZ-KC3E] ("There have been almost 150 state constitutions, they have been amended roughly 12,000 times, and the text of the constitutions and their amendments comprises about 15,000 pages of text.").

89. *See* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 23 (2018) (providing annual amendment rates for state constitutions as of January 1, 2017).

90. *See* MASS. CONST., Arts. of Amend., https://malegislature.gov/laws/constitution [https://perma.cc/6SXY-4PPE] (listing all 120 amendments to the Massachusetts Constitution).

amending an existing constitution or adopting a new one, reformers might succeed through amendment more easily than through the ratification of a new charter. Further, interconstitutionalism suggests that amendment of an existing constitution might reflect self-governance better than even a highly democratic process to adopt a new constitution.

3. Foreign Constitutions

Having multiple constitutions is the global norm. One frequently cited study reports that the average lifespan of a national constitution is just nineteen years (remarkably, the very term Jefferson thought desirable).[91] Constitutional replacement occurs even faster in some regions.[92] Successive national constitutions invite interconstitutional interpretation, and the practice is widespread among courts and other interpreters in foreign nations.

Attention to foreign practices provides a fuller picture of interconstitutionalism than would a narrow focus on the United States. Many episodes of constitutional replacement occur under conditions of national vulnerability or crisis.[93] Factors that lead to episodes of national constitution-making include social and economic crisis, revolution, regime collapse, the end of war, and release from colonial rule.[94] Consequently, a new national constitution is often presented as an enduring break from a tainted past.[95]

For instance, in 2011, János Lázár, leader of the Fidesz parliamentary group, reportedly told the Hungarian Parliament immediately before voting on the new Hungarian Constitution "that the [new] Constitution represented something fundamental: a break with Hungary's communist past."[96] And when Kenya

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91. Tom Ginsburg, *Constitutional Endurance*, *in* COMPARATIVE CONSTITUTIONAL LAW, *supra* note 71, at 112, 112.

92. *See, e.g.*, Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 LAW & SOC'Y REV. 749, 752-53 (2012) (noting that "[t]he mean lifespan of constitutions [in Latin America] has been 16.5 years for all the constitutions enacted since independence").

93. For a classic statement on the origins of constitution-making, see Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995).

94. *See id.* at 370-71 ("[T]he link between crisis and constitution-making is quite robust.").

95. *See* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 300 (2003) ("[C]onstitutions are rarely written when political life is uneventful. Constitutions are typically drafted or substantially modified at moments of rupture, when there is a crisis, or change of regime, or opportunity of history.").

96. Judy Dempsey, *Hungarian Parliament Approves New Constitution*, N.Y. TIMES (Apr. 18, 2011), https://www.nytimes.com/2011/04/19/world/europe/19iht-hungary19.html [https://perma.cc/S34U-PF9X].

adopted a new constitution in 2010, commentators deemed it "a cornerstone of the effort to correct longstanding imbalances of power and prevent the kind of upheaval that followed deeply flawed elections."[97] Upon ratification, Energy Minister Kiraitu Murungi said that "Kenya has been reborn."[98] As these examples show, the adoption of a new national constitution often involves casting the prior constitution as a legally irrelevant—indeed, illegitimate—document. Again, consider Hungary: the preamble to its 2011 constitution declares that "[Hungary] do[es] not recognize the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid."[99] Some other countries have included abrogation articles in their newly adopted constitutions.[100]

Nonetheless, prior national constitutions rarely remain buried. In interpreting the existing national constitution, apex and constitutional courts routinely use the nation's earlier constitution(s), and not simply for contrast. Notions of constitutional continuity abound. Consider, for example, the decision of the Constitutional Court of South Africa in 1995, the court's first year in existence, in *Zantsi v. Council of State, Ciskei*.[101] South Africa's Interim Constitution gave the provincial and local divisions of the Supreme Court jurisdiction over "any inquiry into the constitutionality of any law applicable within its area of jurisdiction, other than an Act of Parliament."[102] In *Zantsi*, the Constitutional Court held that under this provision, the provincial and local divisions of the Supreme Court had power to review the constitutionality of laws of the provincial legislatures and the previously independent states that were passed before the Interim Constitution took effect—but not to review the "acts" of the apartheid-era national parliament.[103] The lower court had taken the view that "none of the [apartheid-era] legislatures of the Republic of South Africa or [of the independent states] 'were recognised by the vast majority of the subjects of the new South

97. Jeffrey Gettleman, *Kenyan Constitution Opens New Front in Culture Wars*, N.Y. TIMES (May 13, 2010), https://www.nytimes.com/2010/05/14/world/africa/14kenya.html [https://perma.cc/MEN9-2ES3].

98. Jeffrey Gettleman, *Kenyans Approve New Constitution*, N.Y. TIMES (Aug. 5, 2010), https://www.nytimes.com/2010/08/06/world/africa/06kenya.html [https://perma.cc/E5JL-R9NK].

99. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], NEMZETI HITVALLÁS. The quotation cited is from the English translation, which is available at *Hungary's Constitution of 2011*, CONSTITUTE PROJECT (Apr. 27, 2022), https://www.constituteproject.org/constitution/Hungary_2011.pdf [https://perma.cc/5TX2-8HJG].

100. *See, e.g.*, LIBER. CONST. art. 95(a) (adopted in 1986); Article 143, Dustūr Jumh. ūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005; NEPAL CONST. art. 308 (adopted in 2015).

101. *Zantsi v. Council of State, Ciskei* 1995 (4) SA 615 (CC) (S. Afr.).

102. S. AFR. (INTERIM) CONST., 1993 ch. 7, § 101(3)(c).

103. *See Zantsi*, 1995 (4) SA 615 at paras. 40-41.

Africa as the legitimate representatives of the people or as the legitimate legislatures for them'" and thus, in the new constitution, "the term 'Parliament, when used in its ordinary sense, does not include . . . any of those legislatures.'"[104] Rejecting this reasoning, Justice Trengove explained that, in fact, the Interim Constitution "makes provision for constitutional continuity, treating the 1983 Constitution of the Republic of South Africa as the previous Constitution,"[105] under which the apartheid-era national legislature was the parliament. Justice Trengove listed a series of points of continuity between the apartheid-era constitution and the country's new charter, including that "the name of the country remains the Republic of South Africa" and the Interim Constitution preserves various apartheid-era institutions of government and laws.[106]

Germany is also a clear example of a repudiated prior regime. Its present constitution is the product of wartime defeat and military occupation. The German Basic Law was adopted in West Germany in 1949 following approval by the occupying allies and was retained in 1990 as the constitution for the unified Germany.[107] German courts also see continuity in Germany's constitutional law: in construing the Basic Law, they frequently invoke the 1919 Weimar Constitution in ways that exceed the textual mandate concerning separation of church and state.[108] For instance, in 2004, the Federal Constitutional Court held that state laws providing for the institutionalization of criminals with "a special propensity [for] recidivism" violated the Basic Law[109] because the federal government had

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104. *Id.* at para. 34 (quoting *Zantsi v. Chairman of the Council of State* 1994 (6) BCLR 136 (CK) at 171 (S. Afr.)).

105. *Id.* at para. 35.

106. *Id.*; *see also* STEPHEN ELLMANN, AND JUSTICE FOR ALL: ARTHUR CHASKALSON AND THE STRUGGLE FOR EQUALITY IN SOUTH AFRICA 550 (2020) (describing Chief Justice Chaskalson's reliance, in a 1995 case holding that President Mandela had exceeded his powers, on a 1947 decision as "reflect[ing] the value . . . [Chaskalson] still saw in the best aspects of the old regime").

107. *See* KOMMERS & MILLER, *supra* note 15, at 42-43; *see also* Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 859 (2005) (describing the adoption of the new constitution by postwar Germany as an example of imposed constitutionalism).

108. *See, e.g.*, BVerfG, 2 BvR 2055/16, Jan. 14, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/01/rs20200114_2bvr205516.html [https://perma.cc/TZF3-RAWL] (invoking the Weimar Constitution in support of the conclusion that civil servants may not be removed via administrative acts); BVerfG, 1 BvR 1474/12, July 13, 2018, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/07/rs20180713_1bvr147412.html [https://perma.cc/HPL2-8GTN] (invoking the Weimar Constitution to show the constitutional origins of the right to association).

109. *Placement of Criminals in Detention Under Land Law (Known as Subsequent Preventive Detention) Unconstitutional*, BUNDESVERFASSUNGSGERICHT (Feb. 10, 2004), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2004/bvg04-011.html [https://perma

already exercised its concurrent regulatory power in that area of criminal law.[110] The court first held that, as a matter of tradition, the federal government's powers over criminal law included institutionalization measures.[111] In reaching this conclusion, the court invoked the Weimar Constitution of 1919 in which, the court said, the term "criminal law" covered "guarding and preventive consequences of wrongdoing."[112]

There is an essential lesson in the global reach and influence of interconstitutionalism. Jurists and scholars in the United States say that "we are all originalists,"[113] but interconstitutionalism points to a much broader assessment. Outside of the United States, the story has long been that historicist and, particularly, originalist approaches have generally been rejected.[114] The interconstitutional practices of foreign courts suggest otherwise. They suggest that we really might *all* be originalists.

As with any study of a practice in different countries, a global account of interconstitutionalism requires attention to context.[115] Recent comparative work on constitutional change offers three helpful insights. First, as with state constitutions, change can take the form of a new constitution or an amendment to an existing constitution and the choice between the two does not always reflect the

.cc/W33J-EK5H] (providing a summary of the decision in English); BVerfG, 2 BvR 834/02, Feb. 10, 2004, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/02/rs20040210_2bvr083402.html [https://perma.cc/L2E7-Y3YR].

110. BVerfG, 2 BvR 834/02, Feb. 10, 2004, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/02/rs20040210_2bvr083402.html [https://perma.cc/L2E7-Y3YR].

111. *Id.*

112. *Id.*

113. *E.g.*, Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011); *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Solicitor General of the United States).

114. *See, e.g.*, Grant Huscroft & Bradley W. Miller, *The Challenge of Originalism: Theories of Constitutional Interpretation*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 1, 10 (Grant Huscroft & Bradley W. Miller eds., 2011) ("Originalist theory has little purchase outside of the United States . . . ."); Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 838 ("American ideas of originalism are not widely adopted outside the United States . . . .").

115. Including, among other considerations, the different circumstances in which national constitutions are adopted, altered, or replaced; different interpretive methods; and differences in the role and power of courts.

degree of transformation that has actually occurred.[116] Even a regime change does not always involve (or involve immediately) the adoption of a new constitution.[117] Focused as it is on successive charters, interconstitutionalism thus necessarily includes some small-scale reforms—from one constitution to the next—and omits some large-scale changes because they involved mere amendments. Nonetheless, many of the most significant replacements of national constitutions have followed war, military occupation, or regime change.[118]

Second, comparative work shows a correlation between the frequency and extent of change: the more often a nation adopts a new constitution, the less extensive the changes from one charter to the next.[119] That insight suggests that for nations with a large number of constitutions, particularly in a short time period, interconstitutionalism is likely to show a high degree of continuity across constitutions compared to nations with a small number of constitutions, especially over a long time period.

Third, comparative scholarship demonstrates that while constitutions from different countries vary enormously, "when countries change their constitutions . . . the initial and subsequent documents tend to be highly similar to one another."[120] That finding reinforces the value of comparing constitutions within a single polity, on that polity's own terms, without—or at least before—bringing to bear insights from elsewhere.

II. FEATURES OF INTERCONSTITUTIONAL INTERPRETATION

This Part examines three core principles that emerge from interconstitutionalist case law. Section II.A focuses on constitutional continuity, the principle that provisions of a constitution must be given the meaning those provisions had the

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116. *See* David S. Law & Ryan Whalen, *Constitutional Amendment Versus Constitutional Replacement: An Empirical Comparison*, *in* ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 74, 75-76 (Xenophon Contiades & Alkmene Fotiadou eds., 2021) (reporting that, in terms of the proportion of text changed, amendments, on average, involve less change than do replacements, but that "many so-called replacements involve only small or incremental changes" and "some so-called amendments are, in reality, so great in magnitude that they amount in substance to replacements").

117. *See, e.g.*, Juliano Zaiden Benvindo, *Preservationist Constitutional Change in Latin America: The Cases of Chile and Brazil*, *in* ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE, *supra* note 116, at 403, 411-12 (describing the experience in Chile, where democratic transition did not involve adoption of a new constitution but instead amendments to the Pinochet-era constitution and drawing a contrast with Brazil where a new constitution followed democratic reform).

118. Law & Whalen, *supra* note 116, at 97.

119. *Id.* at 89.

120. *Id.* at 88.

first time they appeared in a constitution *of the same polity*. Section II.B turns to a second principle, *stare decisis maiorum*, whereby interconstitutionalist courts deem new constitutions with provisions from an earlier constitution to ratify judicial interpretations of the earlier provisions. Section II.C examines a third principle that interconstitutionalist courts follow: if a new constitution does not repudiate past exercises of governmental power under the former constitution, then it validates and entrenches the power as it was exercised.

A. Constitutional Continuity

If a provision of the current constitution appeared in identical or very similar form in a predecessor constitution, what is the relevant point in time for discerning its meaning? If one interprets the current constitution in isolation, a natural answer is when the current constitution was ratified (or, if the provision appears as an amendment, when the amendment was adopted). But interconstitutionalist courts differ. Asserting a principle of constitutional continuity, they contend that provisions of an existing constitution mean what they meant the first time they appeared in a constitution of the same polity — even if the provision's semantic or intended meaning changed by the time the current constitution was ratified.

1. Original, Original Public Meaning

For interconstitutionalist courts, when a word or phrase in a current constitution was also contained in a predecessor constitution of the same state or nation, its meaning must be discerned as of the date of the *earlier* constitution. In other words, to determine its meaning, courts look to when the word or phrase first appeared, not to when the current constitution was adopted. In explaining this approach, courts have said that the later constitution necessarily incorporates the meaning of words and phrases from the earlier constitution, unless the later constitution specifically repudiates that earlier meaning. This approach thus imposes upon those who draft and ratify new constitutions the public meaning of an earlier period. It also gives later generations the possibility of choosing words or phrases with present meanings that will bind those who incorporate the same words or phrases in a future constitution.

Georgia, which has had ten constitutions, provides a particularly rich setting for interconstitutionalism. And the Supreme Court of Georgia does not disappoint. Consider its 2019 decision in *Elliott v. State*,[121] a small case with a big theory. In *Elliott*, the court described what it called "important principles that guide

121. 824 S.E.2d 265 (Ga. 2019).

our interpretation of the Georgia Constitution."[122] These principles reflect an interconstitutionalist approach and have striking implications for the originalist method the court follows in interpreting the state constitution.

Defendant Andrea Elliott was stopped by the police for several traffic violations, including swerving in and out of her lane.[123] She refused to submit to a breath test and was arrested and charged with driving under the influence of alcohol.[124] State statutory law permitted the government to use a defendant's refusal to submit to alcohol testing at trial.[125] Elliott argued that the protection against compelled incrimination under the state constitution gave her the right to refuse the breath test in the first place and that the statute allowing her refusal to be used against her in a criminal prosecution was, as a result, unconstitutional.[126] The trial court denied Elliott's motion to suppress, and she appealed from that ruling.[127] The relevant provision of the 1983 state constitution provides: "No person shall be compelled to give testimony tending in any manner to be self-incriminating."[128] The Supreme Court of Georgia, adhering to an earlier ruling that this provision indeed confers a right to refuse a breath test, agreed with Elliott that the provision also bars admission at trial of the refusal.[129] It therefore reversed the trial court's denial of her motion to suppress.[130]

The *Elliott* court announced up front its adherence to an originalist methodology.[131] But, the court observed, the self-incrimination provision had a history within Georgia's constitutional system. It "first appeared in the Constitution of 1877, and was carried forward without material change into the Constitutions of 1945, 1976, and now our current Constitution of 1983."[132] That genesis required adherence to "two interpretive principles that arise from the provision's multiconstitutional history."[133]

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122. *Id.* at 268.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. GA. CONST. art. I, § I, para. XVI.

129. *Elliott*, 824 S.E.2d at 267 (citing Olevik v. State, 806 S.E.2d 505 (Ga. 2017)).

130. *Id.* at 296.

131. *Id.* at 268 ("[W]e interpret the Georgia Constitution according to its original public meaning. And, of course, the Georgia Constitution that we interpret today is the Constitution of 1983; the original public meaning of that Constitution is the public meaning it had at the time of its ratification in 1982.").

132. *Id.* at 269.

133. *Id.*

The first of these two principles is "[t]he presumption of constitutional continuity."[134] According to this principle, the court explained, "we generally presume that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary."[135] In other words, a "holdover"[136] provision retains its earlier meaning. The court provided two justifications for the principle. First, the court explained, earlier provisions are to be given "their own original public meanings," and the earlier meaning of a provision that is "readopted in a new constitution is generally the most important legal context for the meaning of that new provision."[137] That is, original public meaning at time one is strong evidence of original meaning at time two because "[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," and thus constitutions should be "expounded in the light of conditions existing at the time of their adoption."[138] The "broader context in which . . . text was enacted"[139] includes "other law—constitutional, statutory, decisional, and common law alike—that forms the legal background of the constitutional provision."[140] *Original, original public meaning* is an element of that context for readopted provisions. The second justification that the court offered is stability: presuming continuity "helps maintain the stability of Georgia's constitutional law" while also permitting change if "other considerations make clear" the people of the state have "changed the meaning of a provision."[141]

The Supreme Court of Georgia's second interpretive principle involves continuity in judicial construction. According to this principle, "[a] constitutional clause that is readopted into a new constitution and that has received a consistent and definitive construction is presumed to carry the same meaning as that consistent construction."[142] The court explained that this principle makes sense because the "framers" of a new constitution are "presumably cognizant of . . . the earlier [state] constitutions . . . and of the interpretations which this court had

134. *Id.*

135. *Id.*

136. *Id.* at 273.

137. *Id.* at 269.

138. *Id.* at 268-69 (quoting Clarke v. Johnson, 33 S.E.2d 425, 428 (Ga. 1945)).

139. *Id.* at 272 (quoting Olevik v. State. 806 S.E.2d 505, 513 (Ga. 2017)).

140. *Id.*

141. *Id.* at 270.

142. *Id.*

placed upon them."[143] But actual knowledge is not the basis for the approach. Instead, "the relevant question is . . . what was sufficiently part of the public legal context such that a presumption is appropriate."[144] Again, the principle promotes "consistency in the interpretation of legal language."[145]

Adhering to its two announced principles, the court concluded that as a matter of original public meaning, the 1983 constitution's self-incrimination provision extends to compelled acts (in addition to oral or written testimony) and prohibits admission at trial of a refusal to take an action—such as submitting to a breath test—that would be incriminating. We discuss the court's use of the second principle in the next section, where we discuss other cases that follow the same approach. For now, we focus on the court's application of its first principle, constitutional continuity.[146]

On that score, the *Elliott* court observed that the 1877 constitution "preserv[ed]" a preexisting common-law right against compelled self-incrimination.[147] Thus, understanding the meaning of the constitutional right required understanding the meaning of the common-law right "as it was understood in 1877."[148] Reviewing the history of the common-law right beginning with its English and colonial-era origins, the *Elliott* court reported that while the right began as a limited protection against incriminating statements that resulted from torture or compelled oaths, it "evolved considerably"[149] during the nineteenth century such that "around the time the Georgia Constitution of 1877 was ratified, a prominent view was that the right against compelled self-incrimination protected the accused from being compelled to provide, do, or say anything that might tend to incriminate him."[150] In particular, Georgia courts, applying the common-law right prior to the 1877 constitution, understood it as "forbidding a 'man . . . to accuse himself of any crime, or to furnish *any* evidence to convict himself of any crime.'"[151] And two years after the right was included in the

143. *Id.* (quoting McKnight v. City of Decatur, 37 S.E.2d 915, 918 (Ga. 1946)).

144. *Id.*

145. *Id.* at 271 (quoting City of Thomaston v. Bridges, 439 S.E.2d 906, 909 (Ga. 1994)).

146. *Id.* at 273.

147. *Id.*

148. *Id.*

149. *Id.* at 276.

150. *Id.* at 278.

151. *Id.* (quoting Marshall v. Riley, 7 Ga. 367, 370 (1849)).

1877 constitution, the Supreme Court of Georgia construed it to bar self-incrimination "by acts or words,"[152] with a reading that "mirrors language used in our decisions issued prior to the 1877 Constitution."[153]

Given their temporal proximity, the court reasoned, these pre- and postconstitution cases serve as "critical indicators of the original public meaning" of the 1877 provision.[154] As to the use at trial of a refusal to perform an act, the court found that while prerevolutionary colonial law permitted inferences from refusals to testify,[155] by the time of the 1877 constitution, Georgia courts, and those in other states, barred admission of refusals to answer questions or otherwise to provide incriminating evidence.[156] According to the court, because "[n]o subsequent developments clearly altered the meaning of the 1877 [self-incrimination] Provision," it is "strongly presumed to retain [under the 1983 constitution] the original public meaning that provision had at the time it was first adopted"—that is, the meaning in 1877.[157] Georgians may therefore refuse to submit to a breath test, and that refusal cannot be used against them at trial.[158]

The principle of constitutional continuity does not apply only to legal terms with a technical meaning. Consider the Tennessee Supreme Court's 1922 decision in *Neuhoff Packing Co. v. Sharpe*.[159] Article II, section 30 of the Tennessee Constitution of 1870 provides: "No article manufactured of the produce of this state, shall be taxed otherwise than to pay inspection fees."[160] In *Sharpe*, a maker of sausages, cured meats, and other products from livestock argued that this provision applied to his wares, exempting them from taxes except for inspection.[161] Rejecting this argument, the *Sharpe* court relied upon the original public meaning of the near-identical provision of the 1796 constitution. It held that even though the goods were manufactured, they were not manufactured from *the produce* of the state as that term was understood in 1796.[162] Instead, "[t]he term was

152. Day v. State, 63 Ga. 667, 667 (1879).

153. *Elliott*, 824 S.E.2d at 279.

154. *Id.*

155. *Id.* at 289.

156. *Id.* at 289-90.

157. *Id.* at 292.

158. *Id.* at 295.

159. 240 S.W. 1101 (Tenn. 1922).

160. TENN. CONST. art. II, § 30.

161. *Sharpe*, 240 S.W. at 1103.

162. *See id.* ("When the Constitution of 1796 was adopted, there were no packing houses in existence, artificial ice and refrigeration were unknown, and the manufacture of fertilizer and by-products out of the carcasses of animals were unthought of, and hence were not contemplated in inserting this section of the Constitution.").

limited to articles produced or grown 'from or on the soil,' or that that may be 'found in the soil,' and therefore excludes animals."[163]

The second half of the nineteenth century saw the development of packing houses, new refrigeration techniques, and fertilizer and other byproducts from animal carcasses.[164] While large-scale meat processing came only at the end of the nineteenth century, the industry was sufficiently well developed by 1870 that the *Sharpe* court could not have said that in *that* year there were no packing houses, that artificial ice and refrigeration were unknown, or that nobody had thought of making fertilizer or other byproducts from animal carcasses. It might be true that even in 1870 the products of slaughterhouses would not be understood as manufactured from the produce of Tennessee. But the *Sharpe* court never reached the issue. In its view, the 1870 state constitution had readopted a 1796 provision whose original meaning controlled.

Common Cause v. Forest[165] provides another example of constitutional continuity. In response to Hurricane Matthew in 2016, the North Carolina legislature convened a special session and quickly approved two disaster-recovery bills that the governor signed into law.[166] A group of North Carolina citizens challenged the two laws. They argued that there was insufficient opportunity for citizens to convey their views to their representatives because of how fast the laws were enacted. On this basis, the group concluded, the laws violated article I, section 12 of the state constitution, which was ratified in 1971 and provides that "the people have a right . . . to instruct their representatives."[167]

The North Carolina Court of Appeals rejected the argument. Judge Dietz's majority opinion centered on the original public meaning of the right-to-instruct provision—original, that is, as of 1776, the year in which the right first appeared in a constitution of North Carolina. Dietz explained that "[w]e are, of course, no longer governed by our State's 1776 Constitution," but "the language of the Right to Instruct Clause has never changed, and the framers of the 1971 Constitution gave no indication that the meaning of those words had changed when they chose to re-adopt them."[168] Invoking eighteenth-century dictionaries, legislative practices, and other historical sources, Dietz concluded that the "ordinary meaning" of "to instruct" was to provide information, and thus the right extended

163. *Id.* (quoting Benedict Bros. v. Davidson Cnty., 67 S.W. 806, 807 (Tenn. 1902)).

164. *See generally* JOSHUA SPECHT, RED MEAT REPUBLIC: A HOOF-TO-TABLE HISTORY OF HOW BEEF CHANGED AMERICA (2019) (describing the emergence of a national meat-production system in the second half of the nineteenth century).

165. 838 S.E.2d 668 (N.C. Ct. App. 2020), *appeal denied*, 851 S.E.2d 375 (N.C. 2020) (mem.).

166. *Id.* at 670.

167. *Id.* at 672 (quoting N.C. CONST. art. I, § 12).

168. *Id.*

only to advising representatives, not to telling them how to vote.[169] Dietz also cited post-1776 practices, noting that he had found "no example *ever* of legislators being compelled to vote in the manner that the people they represent commanded them to."[170] He concluded that there was no evidence that the 1776 meaning had changed when the right-to-instruct clause was adopted in the state's subsequent constitutions of 1868 and 1971.[171] Dietz concluded that the adoption of the emergency-relief laws did not violate the right to instruct because even under the short legislative schedule, members of the public were aware of the bills and had ample opportunity to convey their views about them to legislators – and that is all that the right protects.[172]

These examples of state courts invoking original, original public meaning are only a few of many.[173] State courts that consider original intent (or some combination of original intent and original public meaning) also identify the first time a provision appeared in a constitution of the state as the relevant reference point.[174] And backdating original meaning is not only a feature of state courts:

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169. *Id.* at 673.

170. *Id.*

171. *Id.* ("[E]ach time our State enacted a new Constitution . . . they included the same right to instruct clause although, at the time, it was universally understood that legislators were elected to act as representatives and to use their judgment to vote in ways that best reflected the will of their constituents.").

172. *Id.* at 674-75.

173. *See also* Conley v. Pate, 825 S.E.2d 135, 141 (Ga. 2019) (Peterson, J., concurring) (noting that the interpretation of the current Georgia Constitution's Cruel and Unusual Punishment Clause "requires consideration of its meaning in 1861," the year when the clause first entered a constitution of Georgia); Powell v. State, 834 S.E.2d 822, 830 (Ga. 2019) (Peterson, J., concurring) (citing *Elliott* with approval and noting that a "constitutional provision carried forward from [a] previous Constitution [is] presumed to carry with it the provision's original public meaning"); State *ex rel.* Shea v. Jud. Standards Comm'n, 643 P.2d 210, 222 (Mont. 1982) ("[T]he embodiment in a constitution of provisions found in previous constitutions, without change of verbiage, precludes the court from giving their language a meaning different from that ascribed to the previous constitutional provisions, unless there is something to indicate an intention of the framers in the new constitution to alter the accepted construction."); Henry v. State, 95 So. 67, 69 (Miss. 1923) (considering the intent of "[t]he Constitution makers in all three [past] instances," to discern the meaning of the term "tax collector" appearing in those constitutions as well as the current Mississippi Constitution of 1890).

174. *See, e.g.*, *In re* Advisory Op. to the Governor, 112 So. 2d 843, 846 (Fla. 1959) ("There is respectable authority for our referring to our previous constitutions in our effort to ascertain the intent of the framers of the pertinent provision in the present one."); Thompson v. Talmadge, 41 S.E.2d 883, 897 (Ga. 1947) ("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 to

on occasion, the U.S. Supreme Court and individual Justices have given constitutional text the meaning that comparable text had in the Articles of Confederation.[175] Foreign courts, too, have looked to first uses to discern the meaning of provisions of their national constitutions.[176] In each instance, interpretation of the current constitution involves looking back to a predecessor charter.

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them under the earlier instrument." (internal quotation marks omitted)); Williams v. Castleman, 247 S.W. 263, 265 (Tex. 1922) ("In determining the intention [of the people adopting a constitution] we may, of course, examine previous Constitutions, as well as the journals of the convention which framed the Constitution."); State v. Hagen, 67 So. 935, 938 (La. 1915) (noting that in "construing the provision in previous Constitutions, identical with that now under consideration, the court has apparently never for a moment doubted that they were intended to bear the same meaning, within the contemplation of that provision, and for some other purposes"); State v. Twenty-Second Dist. Judge, 33 La. Ann. 1227, 1227 (La. 1881) ("[T]o fully understand the intention of the framers of the present Constitution, we are materially aided by a consideration of the clauses of our previous Constitutions on the same subject.").

175. *See, e.g.*, Bond v. United States, 572 U.S. 844, 886 (2014) (Thomas, J., concurring) (referring to the Articles of Confederation, described as "[p]reconstitutional practice," to identify the meaning of the words "make Treaties" in Article II of the Constitution, and concluding that the "treaties entered into under the Articles of Confederation would not have suggested to the Framers that granting a power to 'make Treaties' included authorization to regulate purely domestic matters"); Austin v. New Hampshire, 420 U.S. 656, 660-61 (1975) (writing that Article IV of the Articles of Confederation, the precursor to the Federal Constitution's Privileges and Immunities Clause, "was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent"); United States v. Wheeler, 254 U.S. 281, 294 (1920) (reasoning that the Privileges and Immunities Clause of the Federal Constitution "makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations"); HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION OF THE UNITED STATES: DEDUCED FROM THE POLITICAL HISTORY AND CONDITION OF THE COLONIES AND STATES, FROM 1774 UNTIL 1788, AND THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, TOGETHER WITH OPINIONS IN THE CASES DECIDED AT JANUARY TERM, 1837, ARISING ON THE RESTRAINTS ON THE POWERS OF THE STATES 173 (Philadelphia, John C. Clark 1837) (commenting on the Court's decision in *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185 (1837), that "[a] reference to the articles of confederation will show the sense in which these terms are used in the constitution, in their bearing on this case").

176. *See, e.g.*, Gyamfi v. Attorney-General, [2020] GHASC 24 (Ghana) (referring to the 1969 constitution in construing the treaty ratification provision of the 1992 constitution); Pius Kibet Tott v. Uasin Gishu Cnty. Gov't (2018) eKLR para. 189 (E.L.C.K.) (Kenya) http://kenyalaw.org/caselaw/cases/view/146314 [https://perma.cc/F7Q9-6H7S] ("Article 40 of the Constitution of Kenya and section 75 of the repealed Constitution have the same intention of protecting the inalienable right to own land and to access the court if the right is violated and for prompt payment of compensation."); *Mansingh v. Gen. Council* 2014 (2) SA 26 (CC) at para. 2 n.5, paras. 4-5 (S. Afr.) (holding that section 84 of the South African Constitution, making the President "responsible for conferring honours," permitted the President to grant advocates the status of senior counsel because section 84 originated in the Constitution of 1910 and it was then understood to confer wide discretion on the head of state to confer honors); Howlin v. Morris [2006] 2 IR 321, 373-74 (Ir.) (concluding that, in evaluating a parliamentarian's claim

2. *Imported Original Meaning*

In discerning original, original meaning, some courts consider meaning developed in another jurisdiction and imported into the predecessor constitution. Consider the decision of the California Supreme Court in 2001 in *Golden Gateway Center v. Golden Gateway Tenants Ass'n*.[177] Article I, section 2(a) of the 1879 California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[178] *Golden Gateway Center* asked whether this provision allows for claims against nongovernmental actors for interfering with speech. It involved a claim by a California tenants association against a private landlord who sought to bar the association from distributing leaflets to individual apartments that the landlord controlled.[179] The Supreme Court of California held that the state constitutional protection of speech regulated only state actors and therefore did not reach the landlord's leaflet ban.[180]

The *Golden Gateway Center* court first determined, after a textual analysis, that the constitutional provision was "ambiguous" in that it "supports *either* the presence or absence of a state action limitation."[181] Accordingly, the court concluded, "we must look to the history behind California's free speech clause for guidance" on its meaning.[182] But which history? The *Golden Gateway Center* court deemed 1849 the relevant point in time because "the current incarnation of California's free speech clause is virtually identical to the free speech clause in the original California Constitution."[183] Taking the view that original meaning is what matters, the court reported that "[t]he original framers adopted this language with no debate."[184]

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to privileged telephone conversations, the relevant provisions of the 1937 Constitution of Ireland had to be understood by reference to their predecessors in the 1922 constitution); *Ex parte* Muctaru Ola Taju-Deen v. Commissioner [2001] SLSC 5 (Sierra Leone) (interpreting a provision of the 1991 constitution by referring to "the meanings that had been attributed to those words ['action' and 'suit'] under the 1978 Constitution, which we should not depart from").

177. 29 P.3d 797 (Cal. 2001).

178. *Id.* at 801 (quoting CAL. CONST. of 1879, art. I, § 2(a)).

179. *Id.* at 799-800.

180. *Id.* at 810.

181. *Id.* at 804.

182. *Id.*

183. *Id.*

184. *Id.* (emphasis omitted).

But the 1849 California debates were not the only relevant historical source of constitutional meaning. The court also invoked what it called "the historical antecedents of our [1849] free speech clause" and said that those antecedents "strongly suggest that the framers of the [1849] California Constitution intended to include a state action limitation."[185] The antecedents came from New York. The court explained that "many of the framers of the 1849 California Constitution came from New York" and that "in drafting the [1849 California] free speech clause, the framers borrowed from the free speech clause of the [1821] New York Constitution."[186] Because the California framers "adopted New York's free speech clause virtually unchanged and with no debate, the history behind New York's clause is relevant to interpreting California's free speech clause."[187]

The New York historical record was richer. The court reported that the evidence showed that "the framers of the [1821] New York Constitution intended its free speech clause 'to serve as a check on governmental, not private, conduct.'"[188] In reaching that conclusion, the court referenced statements from New York convention delegates about the purposes of the speech clause they had approved[189] and the overall design of the New York state constitution as limiting governmental (but not private) action.[190] In addition, the court pointed to "judicial statements" about the New York speech clause between 1821 and 1846, when New York adopted a new constitution while retaining (with small changes) the 1821 clause.[191]

Turning back, then, to California, the *Golden Gateway Center* court reasoned that the intent of the New York framers in 1821 could be attributed also to those in California in 1849: "Because the framers of the California Constitution adopted New York's free speech clause almost verbatim, we reasonably conclude they had the same intent as their New York counterparts."[192] On this point, the court invoked a 1967 decision for the proposition that "statutory language taken verbatim from a constitutional provision must be given the same meaning as the language in the constitutional provision 'unless a clear legislative intent to the contrary appears.'" [193] Moreover, the court reasoned, independent evidence

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185. *Id.*

186. *Id.*

187. *Id.* (citations omitted).

188. *Id.* at 805 (quoting SHAD All. v. Smith Haven Mall, 488 N.E.2d 1211, 1214 (N.Y. 1985)).

189. *See id.*

190. *See id.*

191. *Id.*

192. *Id.* at 806.

193. *Id.* (quoting Stockton Civic Theatre v. Bd. of Supervisors, 423 P.2d 810, 816 (Cal. 1967)).

about "the mindset of the framers of the 1849 California Constitution"[194] demonstrated a congruence with the New York notion of state action. The court explained that General Bennett Riley (the military governor) had called the 1849 California convention "for the purpose of providing such a government as California might need"[195] and that the framers were thus "focused on defining the scope of the *government's* power."[196] Accordingly, the court reported, "various delegates observed that the Constitution should protect against governmental action."[197] Finally, the court noted, "our extensive review of the history behind the adoption of California's free speech clause reveals *no* evidence suggesting that the framers intended to protect against private encroachments."[198]

To summarize the *Golden Gateway Center* court's methodology, what counts in determining the meaning of the speech provision of the current California Constitution is the original intent of the framers of the predecessor 1849 provision.[199] But their intent was that of the framers of the 1821 New York Constitution because some of the California framers came from New York (where the 1821 provision was reaffirmed in 1846) and because the California framers adopted their provision from the New York Constitution. In addition, independent evidence about the 1849 California process supported a state-action limitation to the speech provision. Temporally, then, original intent at time one determined intent (and meaning) at time two. Geographically, intent in New York determined intent in California.

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194. *Id.*

195. *Id.* (quoting OWEN C. COY & HERBERT C. JONES, CALIFORNIA'S CONSTITUTION 12 (1930)).

196. *Id.*

197. *Id.*

198. *Id.*

199. Writing in dissent, Justice Werdegar thought that the "unambiguous language" of article I, section 2(a) meant that its protections for speech applied against private as well as state actors. *Id.* at 817-18 (Werdegar, J., dissenting). In Werdegar's view, the majority's invocation of evidence from New York was misplaced because the opinion offered "no evidence that the framers of California's [1849] Constitution were aware of or indeed intended to adopt those aspects of the New York history that relate to state action," and the majority had not shown that the New York framers themselves intended to limit that state's speech provision to government action. *Id.* at 827.

While other courts in California[200] and courts in other states[201] have made use of imported original meaning, it is not an inevitable feature of interconstitutionalism. Importing original meaning requires that a state or nation's earlier constitution incorporated a provision from the constitution of another jurisdiction. Not all constitutions will meet that requirement and within a single constitution not every provision will lend itself to considerations of imported original meaning.

3. Similarities and Differences

It should follow from the principle of constitutional continuity that the meaning of a provision of a prior constitution that does *not* appear in the present constitution should no longer govern. But this point is more easily stated than practiced. Interconstitutionalist courts sometimes struggle to determine when a provision of a new constitution is sufficiently *similar* to one in a past constitution, such that the rule of constitutional continuity applies, or *different* enough to make the rule inapplicable. The choice matters a great deal, as do minor differences across constitutions. On one hand, the meaning of a provision in one constitution remains the same when it is adopted in identical form in a subsequent constitution. On the other hand, textual contrasts can demonstrate that the new constitution does something different from those before it. The challenge is deciding when text is sufficiently similar to trigger the first approach or sufficiently different to warrant the second. That challenge is especially acute where text seems to vary only slightly, and the issue is deciding what counts as a variation so small that meaning should be deemed unchanged.

Similar questions arise in the statutory context: in construing the meaning of a statute, courts sometimes consider, as a form of statutory history, textual modifications the legislature made to earlier enacted iterations of the statute.[202]

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200. *See, e.g.*, Taylor v. Palmer, 31 Cal. 240, 254 (1866) ("[T]he provision of the Constitution . . . was borrowed from the Constitution of New York . . . . The Constitutional Convention must therefore be understood to have used the word in the sense in which it had been used in the Constitution from which it was taken, which also was its popular sense.").

201. *See, e.g.*, Johns Hopkins Univ. v. Williams, 86 A.2d 892, 894-96 (Md. 1952) (explaining that the credit clause of Maryland's 1864 constitution, which first appeared in the state's 1851 constitution, was borrowed from New York's 1846 constitution, and examining the reasons for its adoption in New York); Green v. Graves, 1 Doug. 351, 364, 370 (Mich. 1844) (explaining that the provision of the 1835 Michigan Constitution limiting state power to incorporate "was borrowed from the constitution of New York" and invoking New York cases construing that state's provision).

202. *See, e.g.*, Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 296-97 (2022) (describing, as a form of statutory history, "amendment history," focused on "predecessor statutes

Textualist tools of this sort can be helpful in reading a constitution as well as a statute, but there are also differences between the two settings. Legislators, who may serve for many years,[203] have vast experience drafting and enacting statutes, and they operate with the assistance of teams of expert staffers;[204] statutes adhere to established conventions contained in detailed style guides[205] and are governed by statutory dictionaries;[206] statutes frequently contain definitional sections[207] and cross-references to other statutes;[208] and, finally, statutes contain their own rules of construction.[209] All of these factors support the (admittedly contestable) assumption that small differences in statutory text are the product of informed and deliberate legislative choice. A like assumption is less easily made with respect to constitutions generated sporadically by conventions or other ad hoc entities and lacking definitions, rules of construction, and other interpretive guides. Such differences may help explain why some interconstitutionalist courts deem small textual changes important, while others treat such changes as inevitable — and insignificant — outcomes of constitutional processes.

a. Inclusions and Omissions

Questions of similarity and difference have arisen in several different contexts. Sometimes, a later constitution omits something that was contained in a predecessor constitution or includes something that was not part of the earlier

that were enacted into law by an earlier Congress (and President)," and tracing different uses of statutory history by the Roberts Court).

203. *See* ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 60-61 (6th ed. 1998) (reporting on reelection rates in Congress).

204. *See* R. Eric Petersen, *Congressional Staff: Duties and Functions of Selected Positions*, *in* CONGRESSIONAL STAFF: SELECTED DUTIES, FUNCTIONS AND PAY LEVELS 1-20 (Daniel Hart ed., 2015) (cataloging the roles of staffers to the U.S. Congress).

205. *See, e.g.*, Staff of the Tex. Legis. Council, *Texas Legislative Council Drafting Manual*, TEX. LEGIS. COUNCIL (Sept. 2020), https://tlc.texas.gov/docs/legref/draftingmanual-87.pdf [https://perma.cc/9PEV-Q3MJ] (310 pages); Off. of Legis. Legal Servs., *Colorado Legislative Drafting Manual*, COLO. GEN. ASSEMBLY (Oct. 29, 2021) https://leg.colorado.gov/sites/default/files/drafting-manual-20211029.pdf [https://perma.cc/T8AU-PLUZ] (666 pages).

206. *See* 1 U.S.C. § 1 (2018) (requiring adherence to stated definitions of common words and rules of grammar "unless the context indicates otherwise").

207. *See, e.g.*, Patient Protection and Affordable Care Act of 2010 § 1251(e), 42 U.S.C. § 18011(e) (2018) (defining "grandfathered health plan"); *id.* § 1304, 42 U.S.C. § 18024 (2018) (defining various terms relating to markets and employers).

208. *See, e.g.*, *id.* § 1551, 42 U.S.C. § 18111 (2018) (incorporating definitions from the Public Health Service Act of 1944, § 2791, 42 U.S.C. 300(g)(g)-91 (2018)).

209. *See, e.g.*, *id.* § 1001(5), 42 U.S.C. § 300(g)(g)-14 (2018) (providing a statutory rule of construction); *id.* § 1101(e)(3), 42 U.S.C. § 18001(e)(3) (2018) (same); *id.* § 1302(b)(5), 42 U.S.C. § 18022(b)(5) (2018) (same).

constitution. Courts do not automatically deem an omission or inclusion a difference of interpretive significance. The U.S. Supreme Court's cases provide numerous examples. We have already mentioned *McCulloch v. Maryland*,[210] in which the omission of the term "expressly" counted in favor of implied and corollary congressional powers under the Constitution.

But compare *McCulloch* to the Court's approach to the Privileges and Immunities Clause of Article IV of the Constitution in cases involving recognition of a right to travel. Article IV of the Articles of Confederation contained a privileges and immunities clause, but it also specifically—expressly—protected a right of "free ingress and regress"[211] that is absent from the Constitution. For the Court, however, this textual difference does not seem to matter. For instance, concurring in *Zobel v. Williams*, in which the Court struck down on equal-protection grounds an Alaskan statutory scheme that allocated natural-resource-derived income to its citizens based on their years of residency,[212] Justice O'Connor relied on Article IV's "rights to travel and migrate interstate."[213] Explaining the source of these rights, O'Connor wrote:

> The [Constitution's Privileges and Immunities] Clause derives from Art. IV of the Articles of Confederation. The latter expressly recognized a right of "free ingress and regress to and from any other State," in addition to guaranteeing "the free inhabitants of each of these states . . . [the] privileges and immunities of free citizens in the several States." While the Framers of our Constitution omitted the reference to "free ingress and regress," they retained the general guaranty of "privileges and immunities." Charles Pinckney, who drafted the current version of Art. IV, told the Convention that this Article was "formed exactly upon the principles of the 4th article of the present Confederation." Commentators, therefore, have assumed that the Framers omitted the express guaranty merely because it was redundant, not because they wished to excise the right from the Constitution.[214]

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210. 17 U.S. (4 Wheat.) 316, 406 (1819); *see supra* text accompanying notes 59-65.

211. ARTICLES OF CONFEDERATION of 1781, art. IV.

212. 457 U.S. 55, 56 (1982).

213. *Id.* at 79 (O'Connor, J., concurring); *see also* New York v. O'Neill, 359 U.S. 1, 12 (1959) (Douglas, J., dissenting) ("The right to free ingress and egress within the country and even beyond the borders is a basic constitutional right, though it is not contained *in haec verba* in the Constitution. It had been included in the Articles of Confederation, Article IV . . . .").

214. *Zobel*, 457 U.S. at 79-80 (O'Connor, J., concurring) (footnote and citation omitted).

Perhaps there is something to this assessment.[215] But it is hard to square with the approach in *McCulloch*. Chief Justice Marshall there did not say that, as under the Articles of Confederation, a congressional power must be *expressly* enumerated or else it does not exist. Nor did he determine that "expressly" was omitted in the Constitution merely because it would be redundant.[216] Quite the opposite: in *McCulloch*, omission of a single word was a meaningful difference.

Consider also the 1999 decision *Cohen v. State*,[217] in which the New York Court of Appeals held that a state statute withholding compensation from legislators until the passage of the annual state budget did not violate the 1947 amendment to the state constitution (of 1938) providing (in article III, section 6) that "[e]ach member of the legislature shall receive for his services a like annual salary, to be fixed by law" and that "[n]either the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he shall have been elected, nor shall he be paid or receive any other extra compensation."[218] The *Cohen* majority took the view that because the withholding statute involved a prospective, generally applicable, and temporary withholding of salary payments, it did not "un-fix" legislative salaries in violation of the constitution.[219]

Judge Smith dissented, arguing that the 1947 amendment should be understood in light of the provisions of earlier constitutions that either gave no salary to legislators (thus limiting who could serve) or capped, as a constitutional matter, the amount legislators could receive (such that salaries could not be adjusted in light of the amount of work or cost of living).[220] By requiring the predictable payment of a specific salary, as set by statute, Smith reasoned, the amendment put "legislative compensation beyond the political fray."[221] Further conditioning salary payments upon passage of the budget, Smith concluded, "thwarts . . . [the

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215. *Cf.* Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 421 (2017) ("[A] difference in language does not necessarily imply that the Constitution has a different meaning from the Articles of Confederation. Instead, the variation in wording might simply reflect an alternative manner of drafting.").

216. Justice Scalia has proven more attentive to Article IV differences. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 418 (2012) (Scalia, J., concurring in part and dissenting in part) (observing, in a case involving a challenge to state law regulating noncitizens, that the privileges and immunities clause of Article IV of the Articles of Confederation extended to "free inhabitants," while that of the Constitution is limited to "Citizens").

217. 720 N.E.2d 850 (N.Y. 1999).

218. *Id.* at 852-53, 858, 863.

219. *Id.* at 853-54.

220. *Id.* at 860-61, 863 (Smith, J., dissenting).

221. *Id.* at 860-61.

amendment's] purpose of removing personal financial considerations from legislative proposals."[222] For the majority, inclusion in the current constitution was of no significance. For Smith, it was everything.

Omission was also significant in the Texas Court of Appeals' 1886 decision in *McInturf v. State*.[223] The defendant, convicted of an 1878 murder and sentenced to life imprisonment,[224] argued that his sentence was unconstitutional because the 1859 penal code, in force at the time of the crime, imposed a mandatory sentence of death; application of a subsequent state law allowing for the alternative of life imprisonment was, he claimed, an ex post facto punishment.[225] He also argued that the death penalty was unavailable at the time of his crime,[226] pointing to a complicated sequence of laws[227] that, in his view, indicated that the 1869 constitution, which permitted juries to impose the alternative of life imprisonment, had superseded the 1859 statute, and that the 1876 constitution, which made no mention of punishment for murder, superseded that of 1869.[228] Thus, the defendant claimed, in 1878, the year of his crime, Texas law did not punish first-degree murder—and would not do so until new legislation in 1879.[229] In other words, an omission in the 1876 constitution should have allowed the defendant to get away with murder.

The Texas Court of Appeals rejected this argument. It took the view that the provision of the 1869 constitution allowing juries to impose life imprisonment had to be read in conjunction with, rather than as superseding, the 1859 criminal statute,[230] so that the 1876 constitution eliminated only the alternative punishment provision, leaving intact the 1859 law imposing the death penalty.[231] Put differently, it was wrong to read the jury-commutation provision of the 1869

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222. *Id.* at 862.

223. 20 Tex. Ct. App. 335 (1886).

224. *Id.* at 350.

225. *Id.* at 350–51.

226. *Id.* at 351.

227. In 1858, Texas criminal law punished murder of the first degree by death or by life imprisonment. In 1859, the criminal law was changed to make death the mandatory sentence for murder of the first degree. In 1869, the Texas Constitution gave jurors the right to substitute life imprisonment for the death penalty. The 1876 constitution "contained no provision whatsoever with regard to the punishment for murder" and was "wholly silent upon the subject." In 1879, the Texas legislature enacted a law specifying that the penalty for murder of the first degree was either death or life imprisonment. *Id.*

228. *Id.*

229. *Id.* at 351–52.

230. *Id.* at 352.

231. *Id.* at 352–53.

constitution as authorizing the death penalty and also wrong to read the omission of that provision in 1876 as repealing the authorization. The omission had legal significance in that it altered the powers of juries, but not the significance the defendant claimed it did.[232]

An omission also mattered in a recent case before the Turkish Constitutional Court.[233] In 2018, the Turkish Parliament enacted a statute authorizing the executive branch to change or repeal certain specified laws in order to conform with Turkey's recent transition to a presidential system.[234] The statute also contained a provision granting the executive power to change or repeal "other laws" for the same purpose—but without enumerating which laws were covered.[235] The Constitutional Court rejected a challenge that this latter provision violated the nondelegation doctrine of the Turkish Constitution of 1982.[236] In its decision, the court referred to the absence in the Constitution of a provision that had existed in the previous Constitution of 1961: Article 64 of that constitution required parliament to enumerate laws specifically when it permitted executive repeal.[237] The court concluded that the absence of a similar provision in the current Constitution demonstrated that an enumeration was no longer required.[238]

b. Single Word Choices

In other cases, courts confront variations in a single word from one constitution to the next and must decide whether such variations represent a legally significant difference—and thus whether the principle of constitutional continuity is triggered.[239] Here, too, it is difficult to discern any general rule. Accordingly, deliberate insertion of a new word in a later constitution might end up having no effect, while an inadvertent word change might lead to unanticipated

232. This still left the problem that life imprisonment was not an available penalty at the time of the defendant's crime. But the court thought that a lesser penalty than the law mandated did not constitute application of an ex post facto law. *Id.* at 353.

233. Anayasa Mahkemesi [AYM] [Constitutional Court], July 5, 2018, E. 2018/100, K. 2018/79 (Turk.).

234. *Id.*

235. *Id.*

236. *Id.* para. 26.

237. *Id.* para. 25.

238. *Id.*

239. *See, e.g.*, DePascale v. State, 47 A.3d 690, 711 (N.J. 2012) (Patterson, J., dissenting) (reasoning that the shift from "compensation" in the 1844 state constitution to "salaries" in the 1947 state constitution, with respect to payments to judges, showed the framers "can be presumed to have accorded different meaning to the two terms").

reform. Uncertainty in the application of the principle of constitutional continuity means that drafters and ratifiers of a new constitution cannot easily predict whether they have succeeded in preserving or breaking from a predecessor charter.

For example, in the 1985 case *Harden v. Garrett*,[240] the Supreme Court of Florida ruled that it lacked power under the 1968 constitution to hear a claim of election irregularities brought by a candidate for the state House of Representatives. In reaching its decision, the court emphasized "[t]he addition of a single word" to the 1968 constitution from its 1885 predecessor.[241] That single word was "sole," added to the provision that "[e]ach house shall judge of the qualifications, elections, and returns of its own members."[242] With each house now being the "sole judge," the *Harden* court concluded, there was a "shift from the earlier delegation of power concerning legislative election contests," and the case had to be dismissed.[243]

Another example: is "shall" different from "ought"? In *State v. Berger*,[244] the Supreme Court of North Carolina invalidated on separation-of-powers grounds a state law allowing the legislature, rather than the governor, to appoint members of three state commissions and prohibiting the governor from firing the commissioners except for cause.[245] Dissenting in part, Justice Newby observed that while the current (1971) state constitution specifies that "[t]he legislative, executive, and supreme judicial powers of the State government *shall* be forever separate and distinct from each other,"[246] the state's two preceding constitutions (of 1776 and 1868), specified that the three branches "*ought* to be forever separate and distinct."[247] For Newby, however, that difference did not suggest that the present constitution protects each branch from incursions by the others more strongly. Citing both a report of the commission that drafted the constitution and an 1825 case, Justice Newby concluded that "ought" and "shall" mean the same thing: an imperative.[248]

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240. 483 So. 2d 409 (Fla. 1985).

241. *Id.* at 411.

242. *Id.*

243. *Id.*

244. 781 S.E.2d 248 (N.C. 2016).

245. *Id.* at 257-58.

246. *Id.* at 265 (Newby, J., concurring in part and dissenting in part) (citing N.C. CONST. art. I, § 6 (emphasis added)).

247. *Id.* (quoting N.C. CONST. of 1776, A Declaration of Rights, § IV; N.C. CONST. of 1868, art. 1, § 8 (emphasis added)).

248. *Id.* at 265 n.16 (citing EMERY DENNY, REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION 73-75 (1968); Smith v. Campbell, 10 N.C. (3 Hawks) 590, 591, 598 (1825)).

c. Punctuation

In still other cases, punctuation varies from one constitution to the next. Interconstitutionalist courts must decide when such variations should generate differences in legal meaning—in other words, how the principle of constitutional continuity applies. Two cases dealing with a single comma illustrate the challenge.

Scarborough v. Robinson,[249] decided by the North Carolina Supreme Court in 1879, concerned procedural requirements for enacting a statute. The 1868 North Carolina Constitution (as amended) provided, in article II, section 23, that "all bills and resolutions of a legislative nature shall be read three times in each house, before they pass into laws; and shall be signed by the presiding officers of both houses."[250] In *Scarborough*, both chambers of the state legislature had approved a bill regulating public schools and then adjourned without the President of the Senate or the Speaker of the House signing the legislation.[251] The North Carolina Secretary of State subsequently refused to recognize the unsigned bill as lawful.[252] A school superintendent, desiring enforcement of the law, sought a writ of mandamus to compel the President and Speaker to sign the bill.[253] The lower court granted the writ.[254]

The North Carolina Supreme Court dismissed the case on separation-of-powers grounds.[255] The court rejected the plaintiff's argument that, under the state constitution, the signatures of the Senate President and House Speaker were not required to give a bill legal effect. The plaintiff had emphasized that in article II, section 23, the semicolon preceding the signature provision meant that "[t]he signatures are a mere certificate or authentication of what the legislature has done, not a part of legislation."[256] The court disagreed. It looked to the 1776 state constitution, which also contained a signature provision in article XI.[257] In the 1776 constitution, however, a comma rather than a semicolon immediately preceded that signature provision: "That all bills shall be read three times in each House, before they pass into laws, and be signed by the Speakers of both

249. 81 N.C. 409 (1879).

250. *Id.* at 419 (quoting N.C. CONST. of 1868, art. II, § 23).

251. *Id.* at 415.

252. *Id.* at 412.

253. *Id.* at 415.

254. *Id.* at 412.

255. *Id.* at 429.

256. *Id.* at 413.

257. *Id.* at 419.

Houses."[258] Rather than conclude that the semicolon in 1868 imposed a different meaning from the 1776 comma, though, the court viewed the semicolon and the comma as functionally equivalent, such that signatures are mandatory for bills to take legal effect.[259]

The Tennessee Supreme Court took a different view of a comma-versus-semicolon issue in *Williams v. Carr*.[260] A state statute divided counties entitled to two or more state senators under the state constitution's apportionment rules into geographically separate senatorial districts with one senator apiece.[261] The *Williams* court held that the statute violated article II, section 6 of the state constitution of 1870,[262] which provided that "when a senatorial district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district."[263]

The government argued that the semicolon after "adjoining" was the result of a scrivener's error and that there should instead be a comma.[264] Once a comma is substituted, the government argued, the last clause of article II, section 6 ("no county shall be divided in forming a district") would be understood to apply only where the senatorial district is composed of more than one county.[265] On this reading of the provision, the statute would be valid. In support of its argument, the government pointed to the 1796 state constitution, which contained a provision identical except for a comma after the word "adjoining."[266] The government argued that replacement of this comma with a semicolon in the 1834 constitution was a drafting error, one repeated in the 1870 constitution.[267]

The *Williams* court thought the government might have been correct that the comma was a drafting error, but it nonetheless refused to accept the government's reading of the 1870 constitutional provision as having the same meaning as the 1796 text. The court explained:

> There is some indication that the Constitutional Convention of 1834 intended to adopt the sentence as it appeared in the previous Constitution but that, for some reason it was submitted to the people with the semi-

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258. N.C. CONST. of 1776, art. XI.

259. *Scarborough*, 81 N.C. at 419.

260. 404 S.W.2d 522 (Tenn. 1966).

261. *Id.* at 524.

262. *Id.* at 528-29.

263. *Id.* at 522-23 (quoting TENN. CONST. art. II, § 6, *amended by* TENN. CONST. art. II, § 5).

264. *Id.* at 525.

265. *Id.*

266. *Id.* at 526 (quoting TENN. CONST. of 1796, art. II, § 6).

267. *Id.*

> colon in place of the comma, and this semi-colon appeared in the new Constitution. The Constitutional Convention of 1870 adopted [the same provision] of the Constitution of 1834 as a part of the Constitution of 1870. There seems to be no doubt that when this Constitution was submitted to the people for their approval, a semi-colon, and not a comma, followed the word "adjoining". . . . Since this portion of the Constitution was twice adopted by the people in the form in which it now appears; that is, with the semi-colon present, instead of a comma, no valid argument can be made that this Section of the Constitution should be read as if a comma, rather than a semi-colon, were present.[268]

In *Williams*, then, a semicolon in one constitution could not be treated as a comma in another. For the *Williams* court, the new constitution differed in punctuation from the preceding charters, even if the difference was the product of inadvertent change, and the task of the court was to give the new punctuation its legal effect. Perhaps the only real lesson, when *Williams* is juxtaposed with *Scarborough*, is that in Tennessee interconstitutionalist courts attach greater importance to minor punctuation than their counterparts do in North Carolina.

4. Consistency and Intratextualism

Consistency across constitutions can also inform—even contradict—intratextual inquiry. *Spears v. Davis*,[269] decided by the Supreme Court of Texas in 1966, concerned two state senators who sought to run for the position of state attorney general in the 1966 general election. At the heart of the case lay issues of timing, so dates matter. One senator, Franklin Spears, had been elected on November 6, 1962, to a four-year senatorial term; his election was certified on November 23, 1962.[270] The other senator, Galloway Calhoun, Jr., had been elected on November 3, 1964, with certification on November 20, 1964, but because of a pending reapportionment of the legislature, an entirely new senate would be elected in 1966 and thus Calhoun would not serve the normal four-year term in office.[271] Importantly, both of these senators were members of the legislature when it approved a salary raise for the state attorney general to take effect on September 1, 1965.[272]

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268. *Id.*

269. 398 S.W.2d 921 (Tex. 1966).

270. *Id.* at 924.

271. *Id.*

272. *Id.*

Article 3, section 18 of the Texas Constitution provides: "No Senator or Representative shall, during the term for which he was elected, be eligible to . . . any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term . . . ."[273] Invoking this provision, the Chairman of the State Democratic Executive Committee refused to place the names of Spears and Calhoun on the primary ballot for the attorney general position. The Chairman determined that the senators were ineligible because the two-year attorney general term began on January 1, 1967 and therefore overlapped with the senatorial terms.[274] In making this determination, the Chairman took the view that a senator's term begins when a new state legislature convenes in the January following the state's November elections.[275] Thus, in the Chairman's view, Spears's term started on January 8, 1963, the date when the legislature convened, and would end four years later on January 8, 1967.[276] Under this calculation, Spears's senatorial term would overlap by eight days with the term of the new attorney general.[277] Spears was thus ineligible to run, and Calhoun was ineligible for similar reasons.[278]

The two senators petitioned the Supreme Court of Texas for a writ of mandamus compelling the Chairman to include their names on the ballot.[279] The senators argued that their terms began the day they were elected (or, at latest, the day the electoral results were certified).[280] In their view, they were therefore constitutionally eligible to run for the position of attorney general because they would have completed their terms as senators prior to January 1.

Under the state constitution of 1876, the start of the term for members of the House is expressly fixed as "the day of their election," but there is no comparable provision for senators.[281] The Chairman, resorting to intratextualism and the expression-exclusion canon, argued that because the constitution specifies the election day for House members, the start date for senatorial office must necessarily be different. If the same start date applied, then the constitution would say so.[282]

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273. TEX. CONST. art. III, § 18.

274. *Spears*, 398 S.W.2d at 924.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 922.

280. *Id.* at 924.

281. *Id.* at 925 (citing TEX. CONST. art. III, §§ 3-4).

282. *Id.* at 927.

The *Spears* court disagreed with the Chairman's analysis, instead taking an interconstitutional approach. It observed that prior state constitutions had followed a similar formula, specifying the beginning of a House member's term but not that of a senator.[283] The proper conclusion, the court thought, was that a senator's term *also* begins the day the senator is elected to office.[284] Textual consistency across the state's multiple constitutions demonstrated that the omission of a start date for senators reflects a commitment to concise phrasing, rather than an indication that senators and House members begin their terms on different dates.[285] The two senators were thus eligible to run for the position of attorney general because their terms would expire before January 1, 1967.[286] In sum, in *Spears*, interconstitutionalism and the principle of constitutional continuity *overcame* an intratextualist conclusion that omission signals a difference in legal meaning. The fact that the *same* omission occurred in the sequence of state constitutions was evidence of efficient wording, not differential treatment of senators and House members.

5. *The Problem of Disparate Provisions*

An inverse problem arises with respect to disparate provisions of constitutions. Under the principle of constitutional continuity, a clause repeated in a later constitution has the same meaning as the clause in the predecessor constitution. But clauses can appear in different places from one constitution to the next, so interconstitutionalist courts must decide when the location of a provision is sufficiently continuous to retain meaning.

In the 2007 case of *People v. Gajadhar*,[287] the New York Court of Appeals considered whether the state constitution ratified in 1894 allows criminal defendants to consent to a deliberating jury of fewer than twelve jurors.[288] On the third day of deliberations, one of the twelve seated jurors fell ill.[289] The defendant agreed to continuing with the eleven remaining jurors.[290] The jury convicted the defendant on charges of felony murder and attempted robbery.[291] On appeal, the defendant argued that his consent to deliberations continuing with fewer than

283. *Id.* at 926 (citation omitted).

284. *Id.*

285. *Id.* at 928.

286. *Id.* at 927-28.

287. 880 N.E.2d 863 (N.Y. 2007).

288. *Id.* at 863.

289. *Id.*

290. *Id.*

291. *Id.* at 864-65.

twelve jurors was invalid under article I, section 2 of the state constitution,[292] a provision allowing for waiver of the right to a jury trial in certain specified circumstances.[293] The Court of Appeals rejected the defendant's argument and held that the waiver was valid.[294] In reaching this conclusion, the court traced the history of the state's jury-waiver provisions and their relationship to judicial rulings.

The court started with the provision of the 1846 state constitution that allowed parties in civil cases to waive their right to a jury trial.[295] State courts had understood that 1846 provision to permit parties in civil cases to agree to juries of fewer than twelve members.[296] In addition, in 1858, the Court of Appeals had held in *Cancemi v. People*,[297] that a criminal verdict by an eleven-member jury was invalid because the 1846 state constitution made waiver available *only* in civil cases.[298] In 1894, when New York adopted its fourth constitution, it retained the civil-jury waiver provision from its 1846 constitution.[299]

In 1938, New York amended the state constitution of 1894 to permit criminal defendants in noncapital cases to waive a jury trial in favor of a bench proceeding.[300] A constitutional convention later that year adopted certain procedural requirements for such waivers to take effect.[301] The court held that, with the 1938 changes, *Cancemi* no longer applied and a criminal defendant was entitled to consent to fewer than twelve jurors.[302] It reasoned that because, after 1846, courts had understood the civil-jury waiver provision to permit fewer than twelve jurors as well as foregoing a civil jury trial altogether, the 1938 criminal-jury waiver provision had to be read in the same manner.[303] In other words, the constitution's "evolving text" was to be read against judicial constructions of a

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292. N.Y. CONST. art. I, § 2.

293. *Gajadhar*, 880 N.E.2d. at 865.

294. *Id.*

295. *Id.* at 865-66. Under the 1846 constitution, "[t]he trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever. But a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law." N.Y. CONST. of 1846, art. I, § 2.

296. *Gajadhar*, 880 N.E.2d at 865-66.

297. 18 N.Y. 128 (1858).

298. *Id.* at 136-38.

299. N.Y. CONST. of 1894, art. I, § 2.

300. *Gajadhar*, 880 N.E.2d at 866-67.

301. *Id.* at 867.

302. *Id.* at 868-69.

303. *Id.*

different, though related, constitutional provision.[304] A defendant who could waive a jury trial entirely could also agree to a jury of eleven.[305]

6. *Summary*

Interconstitutional courts use prior constitutions to interpret the provisions of the current constitution. In doing so, courts have confronted numerous attendant questions about the proper role of past constitutions in making decisions today. Of particular significance is adherence to original public meaning at the time a provision first appeared in a constitution (or original, original public meaning), rather than original public meaning at the time of the ratification of the constitution under interpretation. That approach has implications for the work of those who write and ratify a new constitution, challenges accounts of originalism developed around interpretations of the U.S. Constitution that deem ratification the moment at which meaning is fixed, and invites attention to exercises of popular sovereignty when a new constitution is adopted to replace one previously in force.[306]

Interconstitutionalist courts have also paid close attention to textual similarities and differences from one constitution to the next, but they have taken different views on when a textual variation suffices to alter constitutional meaning. That outcome, too, raises questions about the capacity of constitution-makers—who, given the length of time between constitutions and the processes by which constitutions are adopted, might have just one shot at succeeding—to ensure their work is implemented by courts. In the hands of judges, an inadvertent comma might generate unanticipated constitutional meaning; a changed word might fail to accomplish a planned reform. Small errors of judicial interpretation might evade future correction even as they have profound implications for constitutional meaning and the outcomes of cases.

B. Stare Maiorum Decisis

From issues of textual continuity, we turn to how interconstitutionalist courts treat judicial rulings made under a predecessor constitution. Many courts follow a principle that judicial decisions under a previous constitution remain

304. *Id.* at 868.

305. *Id.* at 869. The court did add a qualification, noting that consent to fewer than twelve jurors was permissible at least in the context (of the defendant's case) where deliberations had started and one juror had become unavailable. *Id.*

306. *See infra* Part III.

valid and binding even *after* a new constitution is adopted.[307] This principle, which we call *stare maiorum decisis*,[308] has a long pedigree. The nineteenth-century *American and English Encyclopedia of Law* summarized the case law thus: "When a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new constitution, . . . it must be presumed to have been adopted with a knowledge of that interpretation, and the courts will feel bound to adhere to it."[309]

State courts have long taken the position that if a later constitution includes a provision unchanged from an earlier constitution, the later constitution incorporates the case law of the state's highest court[310] interpreting the provision of

307. While we focus on state courts, many foreign courts also take the same approach. *See, e.g.*, Boateng v. Nat'l Media Comm'n [2012] GHASC 33 (Ghana) (opinion of Atuguba, J.S.C.) (invoking pre-1992 cases in finding requirements for original jurisdiction met under the 1992 constitution, because "the original jurisdiction of this court has been conferred in almost identical language in the 1969 and 1979 past Constitutions of Ghana and has been consistently interpreted in the same manner by the Supreme Court"); Ó Maicín v. Ireland [2014] IESC 12 (Ir.) (Hardiman, J., dissenting) (observing, in a case where the majority rejected claims that the 1937 constitution confers a right to a bilingual criminal jury, that the official language provision of Article 8 is "very similar" to Article 4 of the 1922 constitution and that judicial decisions under both constitutions recognize that Ireland is "legally constituted as a bilingual country" (alterations omitted)); F.M.G. v. Republic (2013) eKLR (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/92766 [https://perma.cc/SPL6-QR6G] (deeming cases interpreting criminal procedural provisions of the 1963 constitution, which were "carried over to" the 2010 constitution, to be "as relevant and applicable today as . . . before this latter constitution was promulgated").

308. Literally, adherence to the decisions of our ancestors.

309. 3 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 679 (John Houston Merrill ed., Long Island, Edward Thompson 1887).

310. We consider here only interpretations by the courts of the state that readopts a provision. As an analog to imported public meaning, *see supra* Section II.A.2, many state courts have taken the view that a constitutional provision borrowed from the constitution of another state brings with it the past constructions of the provision by that other state's courts, *see, e.g.*, Heinssen v. State, 23 P. 995, 999 (Colo. 1890) ("[T]hese provisions of the Colorado constitution were borrowed from Illinois. Hence, so far as such provisions had received a definite construction by the supreme court of Illinois prior to their adoption by this state, it is . . . to be presumed that we adopted such construction with the provisions."); Davis v. Hudson, 11 N.W. 136, 140 (Minn. 1881) ("[T]here would be but little room for doubt that our constitutional provision was borrowed from the constitution of Ohio, and that its borrowers had in mind the identical construction which had been given to it by the courts of that state."). Thomas M. Cooley expressed this same view in his influential treatise on constitutional law. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 52 (Boston, Little, Brown & Co. 1st ed. 1868) ("[W]here a particular statute or clause of the constitution has been adopted in one State from the statutes or constitution of another, after a judicial construction had been put upon it in such last-mentioned State, it is but just to regard the construction to have been adopted, as well as the words . . . .").

that earlier constitution.[311] Hence, the Supreme Court of California said in 1883 in a case under the state's 1879 constitution: "Since the organization of the present Supreme Court it has been repeatedly held that we would follow, as authoritative, the construction placed upon any provision of the Constitution of 1849, by the highest judicial tribunal created by and under that Constitution."[312] Many other courts follow a similar approach.[313]

The approach bears some similarity with interpretive canons that courts use in the realm of statutory interpretation. In particular, courts have invoked legislative inaction as a basis for deeming a prior judicial interpretation of a statute correct. William N. Eskridge, Jr. describes "acquiescence" and "reenactment" as two types of legislative inaction.[314] In cases involving acquiescence, courts "conclude[] that Congress' failure to overturn a judicial or administrative interpretation is evidence that Congress has acquiesced in that interpretation of the statute."[315] In cases involving reenactment, "the acquiescence argument is buttressed by reenactment of the interpreted statute without material change."[316] Eskridge himself criticizes these canons on various grounds.[317] However, use of a similar approach with respect to judicial interpretations of constitutional pro-

311. Less clear is what happens when a constitution repeats a provision from an earlier, but not the immediately preceding, constitution. At least one state supreme court has taken the view that a break in the chain renders irrelevant earlier judicial constructions. *See* Rathjen v. Reorganized Sch. Dist. R-II of Shelby Cnty., 284 S.W.2d 516, 524 (Mo. 1955) (declining to apply the "firmly settled" rule that readopted provisions presumptively carry preexisting constructions).

312. Davis v. Superior Ct. of S.F., 63 Cal. 581, 582 (1883).

313. *See, e.g.*, Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 264 (Fla. 2005) ("[T]he principle that the Legislature 'is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed,' . . . is equally applicable on the constitutional level.") (quoting Fla. Dep't of Child. & Fams. v. F.L., 880 So. 2d 602, 609 (Fla. 2004)); Succession of Lauga, 624 So. 2d 1156, 1165 (La. 1993) ("When a constitutional provision is identical or very similar to that of a former constitution, it is presumed that the same interpretation will be given to it as was attributed to the former provision."); Paper Supply Co. v. City of Chicago, 317 N.E.2d 3, 9 (Ill. 1974) ("When this court, prior to the adoption of the Constitution of 1970 has defined a term found therein, sound rules of construction require that it be given the same definition unless it is apparent that some other meaning was intended."); Richardson v. Hare, 160 N.W.2d 883, 886 (Mich. 1968) ("Where a constitutional provision has received a settled judicial construction, and is afterward 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." (internal quotation marks omitted)).

314. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71 (1988).

315. *Id.*

316. *Id.*

317. *Id.* at 95-96, 114.

visions raises unique challenges. Congress and other legislatures are well-positioned to monitor and correct errors by courts when they interpret and apply statutes.[318] Members of Congress and congressional committees have an interest in tracking the effect and fate of statutes. Congressional staffers have the knowledge and resources to keep tabs on how courts implement federal laws and to bring attention to any needed statutory reforms. Congress's regular sessions create ongoing opportunities (whether taken advantage of or not) for it to amend statutes to respond to judicial errors. Given these factors, it is reasonable to assume acquiescence if no legislative response is made.

Although some courts view statutes and constitutions as equally subject to a rule of acquiescence,[319] constitutions arguably present quite different considerations. A convention that drafts a constitution typically dissolves once its work is done; ratifying bodies—whether state-level conventions or the electorate on voting day—also lack the permanence of a legislature. Neither retains an ongoing role to observe how courts treat constitutional provisions and to initiate a response if courts get things wrong. Further, while it is certainly possible to gear up the constitution-making or constitution-amending process in response to a judicial ruling, the task is more arduous than bringing a statutory revision to the legislative floor. Moreover, to apply a rule of acquiescence when a new constitution is adopted is to imagine that the drafting and ratifying processes consider every pertinent judicial ruling—perhaps across many decades—on every readopted provision of the predecessor constitution. Courts might realistically "assume that, when Congress enacts statutes, it is aware of relevant judicial precedent,"[320] but it is fair to wonder whether the same assumption about constitution-makers is warranted.

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318. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991) (reporting an average of twelve Supreme Court overrides per Congress from 1975-1990). For an analysis of the declining frequency of congressional overrides, see, for example, Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CALIF. L. REV. 205, 209 (2013) (reporting that overrides of Supreme Court decisions "plummeted dramatically" during 1991-2000, to an average of 5.8 overrides per Congress).

319. *See, e.g.*, Kuhn v. La. Highway Comm'n, 142 So. 149, 150 (La. 1932) (invoking the rule of statutory interpretation that "[w]hen a law has been interpreted by the court having final jurisdiction to interpret it, and is afterwards re-enacted without any substantial change in its language, the presumption is that the lawmaker has approved of the interpretation" to conclude that "[t]he presumption is that the Constitutional Convention of 1898, of 1913, and of 1931, in retaining in the Constitution of each of those years the substance of the language of article 156 of the Constitution of 1879 [governing takings of property], intended that it should have the same meaning that this court had given to it . . . otherwise the language would have been changed").

320. Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010).

Stare maiorum decisis also raises some intriguing questions about originalist methodology and judicial precedent and about the capacity of sovereign people to generate constitutional change. On one hand, the approach promotes stability in constitutional law because prior judicial decisions are not invalidated whenever a new constitution is adopted. On the other hand, the approach makes it difficult to address erroneous or unpopular judicial rulings even via the dramatic step of replacing the constitution under which those rulings were made. The approach also suggests some limitations on the ability of courts to overturn their *own* past rulings after adoption of a new constitution. This Section examines the scope and implications of *stare maiorum decisis* and considers how a new constitution can successfully overcome judicial precedents.

1. *Ratification of Judicial Rulings*

A nineteenth-century criminal case from Tennessee neatly illustrates the principle of *stare maiorum decisis*. In 1871, in *Craig v. State*,[321] the Tennessee Supreme Court held unconstitutional the prosecution and conviction of a defendant in Shelby County, Tennessee, for larceny committed aboard a ship bound for Memphis but while at port on the Arkansas side of the Mississippi River.[322] The Tennessee criminal code provided that criminal offenses committed within the state or within five miles of the state's borders, on board a boat navigating state waters, could be prosecuted in any county through which the boat passed or in the county where its journey ended.[323]

The *Craig* court held that the prosecution and conviction under this jurisdictional provision violated section 9 of the Declaration of Rights (article I) of the 1870 (and current) Tennessee constitution.[324] Section 9 provides that in criminal prosecutions "the accused hath the right to . . . 'a speedy public trial by an impartial jury of the county in which the crime shall have been committed.'"[325]

In overturning the conviction, the *Craig* court invoked two of its 1860 decisions under the predecessor 1834 constitution.[326] In *Armstrong v. State*, the court had invalidated, under a provision of the 1834 constitution identical to that of section 9, a state statute providing that "[w]hen an offence is committed on the

321. 50 Tenn. (3 Heisk.) 227 (1871).

322. *Id.* at 231.

323. *Id.* at 229 (quoting TENN. CODE ANN. § 4981).

324. *Id.* at 229-30.

325. *Id.* at 229 (quoting TENN. CONST. art. I, § 9).

326. *Id.* at 229-30.

boundary of two or more counties, or within a quarter of a mile thereof, the jurisdiction is in either county."[327] In *Kirk v. State*, the court had also held invalid, under the same provision of the 1834 constitution, a state law that allowed for a criminal prosecution to be moved to a different county if a fair and impartial jury could not be assembled in the county where the crime was actually committed.[328]

In *Craig*, the court reasoned that because the 1870 constitution contained the same protection for prosecution in the county where the crime was committed that the court had interpreted in *Armstrong* and *Kirk*, the 1870 constitution had validated those two earlier rulings.[329] Adhering to those rulings required reversal of the defendant's conviction. The court explained that "[t]here is no difference, in principle, between these cases and the section of the Code now under consideration" and "[t]he Convention which recently formed the new Constitution of this State, permitted the clause in the declaration of rights, to remain unaltered, with a full knowledge, as is to be presumed, of the decisions above mentioned."[330] More simply, repetition of the 1834 provision meant adherence to the court's previous interpretations and applications of it.

A century later, the Supreme Court of Texas took a similar approach in *LeCroy v. Hanlon*.[331] There, the court held that a forty-dollar civil-action filing fee, allocated to the state's general-revenue fund, violated the 1876 constitution's "open courts" provision,[332] which states: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[333] In construing the provision to bar the filing fee, the *Hanlon* court observed that "[e]very Texas Constitution has contained an open courts provision with the identical wording" even as "[o]ther Bill of Rights sections, in contrast, have been amended over the years."[334] According to the court, at the 1875 state constitutional convention, delegates debated and reworked other provisions of the preexisting 1869 constitution but "skipped over" the open-courts provision, which, the court said, "[a]pparently . . . was uncontroversial."[335]

That history, in the view of the *Hanlon* court, indicated the 1876 constitution had ratified earlier judicial decisions construing the right to open court. The

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327. 41 Tenn. (1 Cold.) 338, 340 (1860) (quoting TENN. CODE ANN. § 4976); *accord id.* at 341-42.

328. 41 Tenn. (1 Cold.) 344, 346 (1860).

329. *Craig*, 50 Tenn. at 230.

330. *Id.*

331. 713 S.W.2d 335 (Tex. 1986).

332. *Id.* at 336.

333. *Id.* at 339 (quoting TEX. CONST. art. I, § 13).

334. *Id.*

335. *Id.* at 340.

court identified four rulings liberally construing the right prior to 1876: an 1852 case allowing a plaintiff to bring a lawsuit even though the court with designated jurisdiction was not yet organized; two 1854 cases recognizing a constitutional right to appeal; and an 1860 case stating that these three prior rulings were based on the open-courts provision and, additionally, applying that provision to allow a lawsuit filed outside of the plaintiff's county of domicile (as required by a state statute) to go forward when that county had no court clerk.[336] According to the *Hanlon* court, "[t]he people ratified the court's approach" in these earlier cases "by passing an identical provision in the 1876 Constitution."[337]

None of these earlier cases involved a filing fee. But the *Hanlon* court reasoned that their "ratification" meant that the court had been on the right track in its generous approach to understanding the right to open court and in consistently striking down interferences with it.[338] With that point established, the *Hanlon* court turned to explain why the filing fee itself was invalid. The court reasoned that because the open-courts provision is not surplusage, it protects additional rights beyond the separate (and more general) due-process right in the state constitution: the open-courts provision "specifically guarantees all litigants . . . the right to their day in court."[339] That right is a "substantial right" under the state constitution, such that "the legislature cannot arbitrarily or unreasonably interfere with a litigant's right of access to the courts."[340] Under this standard, the court concluded, the filing fee was unconstitutional because, even though filing fees are generally permissible as a means to fund courts, the challenged fee was a general-revenue measure unrelated to the costs of court operations.[341]

If filing fees seem trivial, consider a larger possible consequence of *stare maiorum decisis* for constitutional change. If, next year, the United States adopts a new constitution that retains some provisions of the current Constitution, readoption could ratify judicial interpretations of the repeated provisions.[342] If so,

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336. *Id.* at 340 & n.5.

337. *Id.* at 340.

338. *Id.*

339. *Id.* at 341.

340. *Id.*

341. *Id.*

342. Ratification can apply to judicial decisions based on structural principles, too. *See, e.g.*, Reelfoot Lake Levee Dist. v. Dawson, 36 S.W. 1041, 1047 (Tenn. 1896) (invalidating a delegation of taxing power to a levee district by reasoning that because the 1870 state constitution permitted delegations of legislative power only to counties and incorporated towns, it had validated a judicial ruling, under the 1796 constitution, inferring from constitutional structure a general ban on legislative delegations), *overruled by* Arnold v. City of Knoxville, 90 S.W. 469 (Tenn. 1905).

it would no longer matter whether courts were correct in holding that due process confers substantive rights,[343] in interpreting "speech" to include corporate election spending,[344] or in taking an expansive view of Congress's commerce powers.[345] Scores of other interpretations would likewise be ratified. *Stare maiorum decisis* is a significant obstacle to constitutional change.

2. *Errors Ratified*

What if the earlier judicial decision under the prior constitution was incorrect in the eyes of a current court and under the present constitution? For instance, what if the current court thinks the proper method of constitutional interpretation is original public meaning but the earlier court followed a different interpretive approach?

Some state courts have suggested that a ratified judicial decision can displace the original meaning of a constitutional provision. For these courts, the later constitution precludes correction of the preceding error because the error itself has been ratified.

Eason v. State,[346] decided by the Tennessee Supreme Court in 1873, involved a defendant convicted of capital murder. He claimed that his right under article I, section 9 of the 1870 state constitution to "a speedy public trial by an impartial jury of the county in which the crime shall have been committed" was violated because ten of the jurors had read about his case in the newspaper.[347] A state statute provided that a juror's exposure to the media was not disqualifying so long as the juror affirmed during voir dire that he could still render an impartial verdict based upon the evidence and the law.[348] The ten jurors in the defendant's case so affirmed.[349] The Supreme Court held the state statute unconstitutional and vacated the conviction.[350]

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343. U.S. CONST. amends. V, XIV; *see* Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("[T]he Due Process Clause does not secure *any* substantive rights . . . .").

344. U.S. CONST. amend. I; *see* Citizens United v. FEC, 558 U.S. 310, 344-50 (2010) (holding unconstitutional limits on corporate independent expenditures).

345. U.S. CONST. art. I, § 8; *see* Gonzales v. Raich, 545 U.S. 1, 58 (Thomas, J., dissenting) ("[T]he Commerce Clause empowers Congress [only] to regulate the buying and selling of goods and services trafficked across state lines.").

346. 65 Tenn. 466 (1873).

347. *Id.* at 467-69.

348. *Id.* at 468.

349. *Id.* at 467.

350. *Id.* at 478.

In construing the 1870 constitution's "impartial jury" provision, the *Eason* court took an original-public-meaning approach—but with an eye to judicial displacement. The state's two prior constitutions, of 1796 and 1834, contained an "impartial jury" provision identical to that in the 1870 constitution.[351] Invoking the "definition of our standard lexicographer," the court reasoned that the "primary idea" is that "a man who is 'impartial' is one 'who is not biased in favor of one party more than another;' who is 'indifferent; unprejudiced; disinterested; as an impartial judge or arbitrator.'"[352] However, the court found that after 1796, case law had developed a "secondary" meaning of "impartial jury" that now controlled. The court explained:

> [D]uring the existence of the Constitution of 1796 and 1834, the legal meaning of "an impartial jury," was one which had neither formed nor expressed an opinion as to the guilt or innocence of the accused, whether from conversing with the witnesses, or hearing them converse, or hearing a narrative and detail of the facts.[353]

Five cases decided between 1830 and 1857 created a "settled meaning" for the constitutional provision that "none are impartial who have formed or expressed their opinions," including on the basis of secondary reports.[354] That same meaning, the court held, attaches to the 1870 constitutional guarantee because the 1870 constitution must be understood to have "incorporated" the earlier judicial constructions.[355] "When the Constitution of 1870 was adopted, the same language, which had thus been judicially interpreted, was again readopted, and, we have a right to presume, with full knowledge of its uniform interpretation in the Constitution of [1796] and 1834."[356] Accordingly, "this interpretation of the language becomes incorporated with the Constitution of 1870 as part of the fundamental law of the State."[357] Faithful adherence to the incorporated interpretation meant that a juror exposed to media coverage of issues in a case was not impartial.

Eason hews closely to past judicial interpretations of constitutional provisions. Although the *Eason* court began with dictionary definitions, it quickly turned to how judges historically understood the term "impartial." Because later

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351. *See* TENN. CONST. of 1796, art. XI, § 9; TENN. CONST. of 1834, art. I, § 9.

352. *Eason*, 65 Tenn. at 469.

353. *Id.* at 473-74.

354. *Id.* at 474.

355. *Id.*

356. *Id.*

357. *Id.*

constitutions repeated the impartiality provision without abrogating earlier judicial interpretations, those interpretations held fast. Because the constitution-makers did not correct the courts' interpretations, they were ratified as a constitutional matter.

At this point, it is useful to return to *Elliott v. State*, the 2019 decision of the Supreme Court of Georgia in which the court held that the self-incrimination clause of the state constitution confers a right to refuse an alcohol-breath test and bars the government's use of that refusal against a defendant at trial.[358] There, the court announced that "[a] constitutional clause that is readopted into a new constitution and that has received a consistent and definitive construction is presumed to carry the same meaning as that consistent construction."[359] According to the court, cases since ratification of the 1877 constitution—in which the self-incrimination provision was first adopted—reflected a "consistent and definitive construction" that the provision protected individuals from "being forced to perform incriminating acts"[360] and therefore that construction is presumed to be "carried forward into the 1983 Constitution."[361]

In *Elliott*, the government argued that adherence to prior constructions would prevent the court itself from "ever reconsidering previous decisions no matter how wrong."[362] The *Elliott* court responded tersely that "[t]he presumption arising from a consistent and definitive construction . . . like most legal presumptions, may be rebutted."[363] The court did not explain the grounds for a rebuttal, saying only that "this is not a case that calls us to articulate precisely when such a presumption may be rebutted."[364] An open question here is how (or whether) usual stare decisis factors apply to past decisions that a new constitution incorporates. For example, does the existence of a new constitution allow less weight to be given to cases decided under the prior constitution when interpreting an identical provision? Or does the adoption of the later constitution against the background of cases mean courts must give more weight to those earlier cases? *Elliott* doesn't tell us. Nevertheless, the court refused to entertain the government's argument that its rulings in cases under the 1877 constitution were incorrect when decided as a matter of original public meaning.[365] In the

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358. 824 S.E.2d 265 (Ga. 2019).

359. *Id.* at 270.

360. *Id.*

361. *Id.* (citing Olevik v. State, 806 S.E.2d 505, 516-17 (Ga. 2017)).

362. *Id.* at 271.

363. *Id.* at 271 n.6.

364. *Id.*

365. *Id.* at 286 ("[W]e do not determine conclusively that *Day* was correctly decided . . . .").

court's view, regardless of whether those cases were correctly decided, they "established a well-settled interpretation of the self-incrimination right . . . [that] was carried forward into subsequent Georgia Constitutions . . . ."[366] That ended the matter.

Even more strikingly, the court found no merit in the government's position that it should "start over" and give a "plain meaning" interpretation to the self-incrimination clause precisely "because the 1983 Constitution was a 'new' constitution that was meant as a departure from established jurisprudence."[367] The government emphasized that the 1983 constitution was "ratified not as an amendment . . . but as an entirely new constitution" and pointed to the provision of the 1983 constitution itself that "repealed 'all previous Constitutions and amendments thereto.'"[368] The court responded that "[w]e have consistently and definitively construed the right . . . to bar compelled acts, and there is nothing . . . that rebuts the presumption that the scope of the right remains unchanged."[369] More generally, there was "no evidence whatsoever that the 'new' 1983 Constitution was meant to wipe away nearly 200 years of Georgia constitutional law."[370]

The government also argued that adherence to interpretations under former constitutions should only occur if the text of the existing constitution is ambiguous.[371] The court rejected this argument because it understood prior cases as part of the "broader context" or "legal background" against which text must be read.[372] The government's error, then, was in thinking that words had meaning only "in isolation" and that meaning is determined solely by "[t]he common and customary uses of . . . words" devoid from context.[373]

The court found similarly meritless the government's contention that there was no evidence that members of the ratifying public were aware of or understood the court's case law on self-incrimination—and thus that the better approach was to limit the self-incrimination provision to oral testimony, according to its plain meaning.[374] For the court, what mattered was "the understanding of the text by reasonable people familiar with its legal context."[375] When the public

366. *Id.*

367. *Id.* at 274.

368. *Id.* at 285 (quoting GA. CONST. art. XI, § I, para. VI).

369. *Id.* at 274.

370. *Id.* at 286.

371. *Id.* at 271-72.

372. *Id.* at 272 (quoting Olevik v. State, 806 S.E.2d 505, 514 (Ga. 2017)).

373. *Id.* (quoting Chan v. Ellis, 770 S.E.2d 851, 853 (Ga. 2015)).

374. *See id.* at 285.

375. *Id.*

approved the 1983 constitution, a "sufficiently consistent and definitive" line of cases since 1877 had established that "the legal context of the text . . . extended to affirmative acts," not just oral testimony.[376]

Eskridge has shown that courts avoid strict application of the reenactment canon in statutory interpretation, often assuming that "Congress was not aware of the judicial . . . interpretation and, therefore, could not be charged with any form of [its] approval by its failure to overturn it."[377] Courts also suggest that, even though Congress has not overruled the interpretation, it "has acted as though the interpretation were not [a] settled one," such as by enacting inconsistent statutes;[378] and they argue that "subsequent legislative inactivity cannot ratify a clearly erroneous prior interpretation."[379] Against this backdrop, and given that opportunities to repudiate judicial interpretations of constitutions are few and far between, *Elliott*'s insistence that the 1983 state constitution incorporates earlier judicial interpretations of comparable provisions is especially striking.

3. Overcoming the Rule

While affirmation of prior judicial decisions is a strong default rule for interconstitutionalist courts, it can be overcome. A new constitution can contain provisions repudiating judicial rulings under the prior constitution even as the new constitution repeats provisions from the earlier constitution.

Hungary provides a dramatic example. In 1949, Communist leaders in Hungary adopted a constitution based on the Soviet Union's.[380] In 1989, that constitution was significantly amended, though not replaced, in anticipation of the adoption of a new constitution for a post-Communist Hungary.[381] Among the 1989 amendments were provisions creating a constitutional court with broad powers of judicial review.[382] Over the next two decades, that court played a significant role in Hungary's transition to democracy and in securing individual

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376. *Id.*

377. Eskridge, *supra* note 314, at 75.

378. *Id.* at 76.

379. *Id.*

380. *See* Balázs Fekete, *Law I of 1946 and Law XX of 1949: Continuity or Discontinuity in Traditional Hungarian Constitutionalism?*, *in* A HISTORY OF THE HUNGARIAN CONSTITUTION: LAW, GOVERNMENT AND POLITICAL CULTURE IN CENTRAL EUROPE 184, 202 (Ferenc Hörcher & Thomas Lorman eds., 2018).

381. *See id.* at 212.

382. *See id.*

rights.[383] In contrast to other former Eastern Bloc nations, however, Hungary did not implement a new post-Communist constitution during this period.

In 2011, following the landslide election of Viktor Orbán's Fidesz party, the Hungarian Parliament adopted a new constitution, known as the Fundamental Law, which took effect at the beginning of 2012.[384] The Fundamental Law asserts a continuity with Hungary's pre-1944 constitutional tradition. The preamble states: "We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation;" "[w]e do not recognise the suspension of our historical constitution due to foreign occupations;" and "[w]e do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid."[385] Article R further provides that "[t]he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal [i.e., preamble] . . . and the achievements of our historical constitution."[386] In 2013, the Fundamental Law was amended with a series of provisions curtailing the powers of the Constitutional Court. Among these amendments was the following provision: "The decisions of the Constitutional Court taken prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions."[387]

This 2013 repeal provision must be understood as an element of democratic backsliding in Hungary, a now near-autocratic nation despite its membership in the European Union.[388] Nonetheless, the repeal provision serves as a useful example for considering more generally how new constitutions might set aside prior case law under an earlier constitution. The government of Hungary has

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383. *See* László Sólyom, *Introduction to the Decisions of the Constitutional Court of the Republic of Hungary*, *in* CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 1, 2-5 (László Sólyom & Georg Brunner eds., 2000).

384. *See* János Kis, *Introduction: From the 1989 Constitution to the 2011 Fundamental Law*, *in* CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW 1, 3-5 (Gábor Attila Tóth ed., 2012).

385. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmbl. (2011). We have relied upon the English translation available at *Hungary's Constitution of 2011 with Amendments Through 2013*, CONSTITUTE PROJECT (Apr. 27, 2022), https://www.constituteproject.org/constitution/Hungary_2013.pdf [https://perma.cc/Q875-G2G2].

386. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. R(3).

387. *Id.* Closing and Miscellaneous Provisions (amended); *see* Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution*, *in* CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 111, 117 (Armin von Bogdandy & Pál Sonnevend eds., 2015) (discussing the 2013 amendments).

388. *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 79-80 (2018).

said that the purpose of the repeal amendment "is to ensure that the provisions of the Fundamental Law are construed in the context of the Fundamental Law, independently of the system of the former Constitution."[389] In fact, the Hungarian government has claimed that the repeal provision *empowers* the Constitutional Court, insofar as it liberates the court from its own precedents under the old constitution while leaving it free to rule as it did in the past.[390]

The Hungarian government has also emphasized that the repeal provision does not wipe away all prior decisions of the Constitutional Court. Here, the government points to specific language in the repeal provision: "without prejudice to the legal effects." According to the government, this language means that the repeal provision does not resurrect laws that the court invalidated before 2012.[391] Further, the Hungarian government has argued, the Constitutional Court can refer to prior decisions that reflect the "historical constitution," or the constitutional regime in place prior to occupation.[392] This is because the Fundamental Law itself specifies in article R that its provisions "must be construed in harmony with . . . the achievements of the historical constitution" of Hungary.[393] And "[a]s to which aspect of the historical constitution the Constitutional Court takes into consideration in the course of its construction," the government says this "is left to . . . [the court's] sole deliberation."[394] The full impact of the repeal amendment, once combined with these elements of continuity, remains to be seen. For its part, the Hungarian Constitutional Court has staked out another point of continuity: it has taken the position that referring to pre-2012 cases is legitimate with respect to provisions of the Fundamental Law that were carried forth from the nation's prior constitution.[395]

The Hungarian experience points to multiple issues that may follow from efforts to include in a new constitution a provision repealing or abrogating prior case law.[396] First, adopting a repeal provision raises a question of scope: whether,

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389. Venice Comm'n, *Background Document on the Fourth Amendment to the Fundamental Law of Hungary*, COUNCIL OF EUR. 11 (Apr. 24, 2013), https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-REF(2013)019-e [https://perma.cc/2TZB-HY9L].

390. *Id.* at 12.

391. *Id.* at 11.

392. *Id.* at 12.

393. *Id.*

394. *Id.*

395. *See* Katalin Kelemen & Max Steuer, *Constitutional Court of Hungary (Magyarország Alkotmánybírósága)*, OXFORD CONST. L. (July 2019), https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e802 [https://perma.cc/3U8E-MPZC].

396. In an extensive report, the Venice Commission criticized the repeal amendment as an unwarranted attack on the Hungarian Constitutional Court. *See* Venice Comm'n, *Opinion on the*

as in the case of Hungary, to use a sledgehammer that abrogates most prior judicial decisions or to direct a scalpel at cases on a particular subject or under a particular provision of the constitution. In either instance, the challenge is adopting language that accurately captures the set of cases sought to be repealed. Second, then, is whether the repeal provision specifies the cases repealed or instead those retained. Third is the question of whether repeal wipes the slate clean (so that a future court may rule on an issue exactly as it did in the past) or prevents a future ruling that repeats what has been repealed. Fourth, and relatedly, is whether in future cases raising novel legal issues courts may invoke repealed cases and their reasoning. Fifth, if courts are themselves responsible for interpreting and applying the repeal provision, they might adopt a narrow understanding of it and thereby limit its effects. The repeal provision might, therefore, usefully contain its own rule of construction, though again courts might limit the reach of that rule.

4. Summary

Interconstitutional interpretation preserves judicial decisions reached under constitutions that have since been replaced. Courts do not start afresh simply because the old constitution has been discarded and a new one adopted. Instead, interconstitutional courts assume that if a later constitution includes a provision unchanged from an earlier constitution, the later constitution incorporates case law interpreting it. Indeed, the new constitution might even be deemed to incorporate past cases that, in hindsight, were erroneously decided. Thus, affirmative steps are needed if a new constitution is to eliminate past judicial decisions. Inclusion of a repeal or abrogation provision in the new constitution may limit the influence of past case law, but courts might limit its effects.

C. Power and Practice

In a parallel practice to *stare maiorum decisis*, interconstitutionalist courts also take the view that a later constitution can validate exercises of governmental power that were subject to question under the preceding constitution. In other words, power as practiced becomes ratified by the new constitution, absent a clear repudiation.

Fourth Amendment to the Fundamental Law of Hungary, COUNCIL OF EUR. ¶¶ 90-94 (June 17, 2013), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e [https://perma.cc/MZK9-YTHE].

1. *Ratification of Legislative Power*

It is not enough for constitution-makers to know and understand all provisions of prior constitutions or court cases construing and applying those provisions. Interconstitutionalist courts have found that later constitutions can validate exercises of legislative power that might previously have invoked questions as to whether the legislature was acting in a manner consistent with its constitutional authority. Legislative practice that a later constitution does not disavow is a source of legislative authority.[397]

Bowling v. Carnahan, decided by the Tennessee Supreme Court in 1937, involved a challenge to the power of the state legislature to enact laws regulating election tiebreaking.[398] The case concerned a tie between two candidates for the office of justice of the peace.[399] Operating under the relevant state statute, the election commissioners broke the tie and named the winning candidate.[400] The losing candidate argued that the legislature had no constitutional authority to empower the commissioners to make the choice.[401]

The 1870 Tennessee Constitution itself was silent on how to resolve tied elections, with the exception of gubernatorial elections: article 2, section 3 specified that if two candidates for governor received the same number of votes, the members of the legislature selected which of the two would serve.[402] Tennessee's two prior constitutions (of 1796 and 1834) contained the same mechanism for gubernatorial elections but did not otherwise specify how to resolve tied electoral outcomes.[403]

In *Bowling*, the Tennessee Supreme Court upheld the challenged statute as a proper exercise of legislative power to regulate ties in elections for state office, including by authorizing election commissioners to break a tie.[404] The court reasoned that such legislative power was implied because it had been exercised continuously by the state legislature beginning under the first state constitution of

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397. We discuss state court cases, but foreign courts have followed a similar approach. *See, e.g.*, Corte Costituzionale [Corte Cost.] [Constitutional Court], 10 luglio 1981, n.129, ¶ 4 (It.), https://www.giurcost.org/decisioni/1981/0129s-81.html [https://perma.cc/W4NX-28D8] (invoking practices under the 1848 Albertine Statute to hold that the 1948 Constitution gives parliament autonomy over its own budget, immune from external audit).

398. 100 S.W.2d 232 (Tenn. 1937).

399. *See id.* at 232-33.

400. *See id.* at 233.

401. *See id.*

402. *See id.* at 234.

403. *Id.*

404. *Id.* at 235.

1796.[405] And with two subsequent constitutions having failed to restrict the power, it must be understood as legitimated.[406] The court wrote: "[T]he power of the Legislature here assailed has been too long asserted and too long recognized to be challenged successfully at this date."[407]

No court had ruled under the earlier constitutions that the legislature had the power to regulate electoral ties. Thus, the *Bowling* court took the view that an uncorrected legislature's own interpretation of the original constitution settled meaning for later constitutions. The court explained that the failure of the 1834 and 1870 conventions to impose any new restrictions on the legislature "must be treated as an approval of the legislative construction of the Constitution of 1796."[408] Accordingly, for interconstitutionalist courts, a legislature's own interpretation of its power under a past constitution may determine the power it enjoys under the current constitution, in the same way a new constitution can entrench a court's rulings under the previous constitution.

At the same time, continuity in legislative power does not wholly displace the ability of courts to decide whether the new constitution authorizes the legislature to continue to assert the power it claims. The Tennessee Supreme Court's own 1871 decision in *Harrison, Pepper & Co. v. Willis*[409] demonstrates the point. In that case, the court rejected a constitutional challenge to a state statute imposing a tax on lawsuits to be paid by the losing party in the litigation.[410] The plaintiff in the case, who had lost at trial, argued that the litigation tax infringed the provision of the 1870 state bill of rights, article 1, section 17, guaranteeing that "the courts shall be open, and every one, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."[411] The plaintiff argued that the tax meant justice was no longer "administered without sale" under the 1870 constitution and therefore was invalid. Except for some differences in punctuation (not relevant here), an identical right and justice provision was contained in the first and second state constitutions (of 1796 and 1834, respectively).[412]

The *Willis* court began its analysis by referring to historical practices. After noting that the constitutional provision at issue was originally based upon

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405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. 54 Tenn. (7 Heisk.) 35 (1871).

410. *Id.* at 49-50.

411. *Id.* at 40 (quoting TENN. CONST. of 1870, art. I, § 17).

412. *Id.* at 37-38.

the Magna Carta,[413] the court offered two historical observations. First, state statutes providing for taxes on litigation were first enacted three years after the original 1796 state constitution and remained in place through two subsequent constitutional conventions.[414] Second, both the 1834 and 1870 constitutions specified that "all laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by the Legislature."[415] The court deemed these two points "persuasive" evidence that litigation taxes were constitutional.[416]

Because the court deemed past practice persuasive, but not determinative, it turned to constitutional structure and constitutional text (in that order) to conduct an independent analysis.[417] As to structure, the court concluded that under the design of the state constitution, safeguards against government abuses of taxing powers lay principally in the political process and not the courts.[418] Indeed, in this very case, continuity of practice demonstrated the adequacy of the political safeguards: two constitutional conventions had the opportunity to end litigation taxes but neither did so.[419] Textually, the court observed that the state constitution exempted certain specified types of property from taxation but contained no prohibition on taxing lawsuits.[420] It then turned to considerations of original public meaning. Citing several historical sources, the court explained that in 1796, there existed a "long fixed, well-known meaning and legal construction" of the phrase "right and justice, without sale, denial, or delay" by which "the law may impose terms [i.e., fees] upon the right of litigation, provided the same be uniform and in the shape of a public tax for the general benefit."[421] In the court's assessment, adherence to this original public meaning rendered the litigation tax valid under the 1870 constitution.[422]

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413. *Id.* at 36.

414. *Id.* at 39-40.

415. *Id.* at 39.

416. *Id.* at 40.

417. *Id.*

418. *See id.* at 41.

419. *See id.* at 42-43.

420. *See id.* at 43.

421. *Id.* at 45-47.

422. *See id.* at 46.

2. *Ratification of Judicial Power*

Bowling and *Willis* sustained legislative power. But other branches can also benefit from the interconstitutional idea that practices under prior constitutions inform the scope of governmental authority under the current constitution.

Courts themselves can secure power through judicial practices that preceded ratification of the current constitution. For example, in the 1899 case of *Stevens v. Truman*,[423] the California Supreme Court upheld a provision of the California Code of Civil Procedure granting courts the power to determine amounts due to court reporters for their services and to direct payments to the reporters from state funds.[424] The law was challenged on the ground that it conferred a legislative power upon the judiciary in violation of article III, section 1 of the 1879 state constitution,[425] which mandated separated powers.[426] In rejecting the challenge, the *Stevens* court explained that a similar law had operated under the prior 1849 state constitution, which contained an analogous requirement of separated powers.[427] The court wrote that "[s]ubstantially the same legislation was put in force as early as 1861, and has been in force ever since" and that "[t]he section of the constitution of 1849 is identical with the section of the constitution of 1879 relied upon."[428] While, the court noted, this history was "perhaps, not conclusive," the fact that courts had "exercised the power under the old and new constitutions for nearly 40 years" provided a "practical construction of these instruments" with "great weight" in assessing the legitimacy of the power.[429]

3. *Statutory Changes*

Even as consistency in legislative practice across constitutions informs legislative power, interconstitutional courts have also made clear that ratification of past practice does not preclude future *statutory* change. Statutes themselves do not become entrenched just because they were not abrogated by a later constitution.

The 1860 decision *In re Cooper*[430] is illustrative. In that case, the New York Court of Appeals reviewed a lower court holding that an applicant to the state

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423. 59 P. 397 (Cal. 1899).

424. *See id.* at 398.

425. CAL. CONST. of 1879, art. III, § 1.

426. *See Stevens*, 59 P. at 397-98.

427. *See id.* at 398.

428. *Id.* (citation omitted).

429. *Id.* at 398-99.

430. 22 N.Y. 67 (1860).

bar could not be admitted to practice under an 1860 New York statute conferring a diploma privilege upon law graduates of Columbia University. The lower court took the view that the 1846 state constitution impliedly gave exclusive power to the judiciary to admit lawyers and that the statute was therefore unconstitutional.[431] In reaching its result, the lower court made four key points. First, the 1777 constitution had specifically given the state courts the power to admit lawyers, as article XXVII provided.[432] Second, the 1822 constitution did not contain a comparable provision; indeed, it was entirely silent on the issue of admission of lawyers.[433] Third, in 1822, the state legislature had enacted a statute requiring attorneys to be licensed by the courts in the same manner as under the 1777 constitution.[434] And fourth, while the 1846 constitution also contained no provision governing the admission of lawyers, it was "adopted with full knowledge of the power possessed and exercised"[435] by the courts under the previous constitution. For the lower court, "the [proper] inference is that [the 1846 constitution] was intended to confirm [judicial] power" to admit lawyers, as exercised under the 1822 statute.[436]

The Court of Appeals reversed.[437] It agreed with the lower court's basic approach: the Court of Appeals referred to the "familiar rule" that "a statute which in some measure conflicts with a previous statute, but which it does not in terms repeal, simply abrogates so much of the former statute as is inconsistent with the new enactment, leaving the residue in force" and that "the effect of a new constitutional provision upon preexisting statutes is the same."[438] Nonetheless, the Court of Appeals took the view that the lower court had erroneously elevated a power that courts exercised as a matter of statutory law to constitutional status and therefore beyond further legislative control.[439] The lower court's approach was wrong because it would mean that "such parts of our existing statutes as were not abrogated by the new Constitution would be rendered . . . unchangeable" by the legislature itself.[440] In other words, a statute's pedigree was evidence of legislative power, but such power necessarily included the ability to alter or repeal the statute.

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431. *See id.* at 86-91.

432. *See id.* at 80; N.Y. CONST. of 1777, art. XXVII.

433. *See In re Cooper*, 22 N.Y. at 91.

434. *See id.*

435. *Id.*

436. *Id.*

437. *See id.* at 94-95.

438. *Id.* at 91.

439. *See id.* at 91-92.

440. *Id.* at 92.

4. Summary

Even when, as is typical, a constitution identifies governmental powers and assigns those powers to a branch of government, there will often remain questions about the exact scope of and limits to those powers. Courts can, of course, issue rulings that determine whether a governmental power is validly exercised. Sometimes though, a governmental actor's exercise of power might go unchallenged or unaddressed through the judicial system. Interconstitutionalist courts typically take the position that a subsequent constitution that does not repudiate a tradition of exercised power ratifies that power as constitutionally valid. The approach promotes stability in the operations of government. But it also means that governmental actors can secure authority, and perhaps amass significant power beyond what the constitution textually assigns them, by avoiding challenges to their activities. Interconstitutionalism thus requires ongoing attention to what government actors are actually doing—so that excesses in power are not left unchallenged—and a close focus at the time of adopting a new constitution on what governmental actors did under the predecessor charter. Constitution-makers must, therefore, understand tradition as well as text.

III. ASSESSING INTERCONSTITUTIONALISM

This Part turns to an assessment of interconstitutionalism. It also considers some broader implications of the practice. The discussion is organized around three themes. First, interconstitutionalism's implications for those who draft and ratify a new constitution. Second, some challenges to and lessons for established approaches of constitutional interpretation. And third, implications for popular sovereignty and democratic constitutionalism.

A. Vigilant Constitution-Makers

Interconstitutional practices have important implications for drafting and ratifying a new constitution. In particular, such practices counsel careful attention to and precise understanding of the preexisting legal regime. Constitution-makers must be vigilant.

Constitutional drafters and ratifiers who repeat language from a prior constitution are understood by interconstitutional courts to be adopting the earlier public meaning of that language and not the meaning the language has to the generation adopting the new constitution. Constitutional drafters and ratifiers who fail to abrogate prior judicial interpretations of the text are also understood to have incorporated those interpretations. So, too, can failure to repudiate past exercises of governmental power entrench that power.

In addition, the vigilant constitution-maker must anticipate the possibility that courts will interpret novel constitutional language in light of the meaning of other provisions contained in past constitutions. Accordingly, constitution-makers must do more than focus on the corresponding predecessor clause. They must also pay attention to the earlier constitution and the cases decided under it.

New constitutions, of course, do not have to discard the past. There might be good reasons and support for continuity. But the strong default of continuity imposes the need to understand the predecessor regime and clearly assert any breaks from it. If a new constitution is to break from the constitutions previously in place, it will often be necessary for the new charter to repudiate its predecessors with clarity sufficient to overcome the default rules that interconstitutional practices have generated. The result is that those who imagine themselves to be putting in place a new constitution with words that mean what they mean to the public today can easily end up bound by the past in ways unanticipated and undesired.[441] Avoiding that outcome requires attention to what earlier constitutions said and did and how prior courts read and applied them.

Here, a contrast between interconstitutionalism and intratextualism is useful. Intratextualism invites consideration of "the Constitution as its own dictionary of sorts."[442] Intratextualism thus relies upon those who write a constitution or constitutional amendments to understand other provisions of the same document. It makes sense to attribute to the makers of a new constitution knowledge of its own provisions and how they relate to each other. It also makes

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441. The problem takes on particular form for public-meaning originalism. Consider two constitutions of a single state: constitution one is later replaced by constitution two. Constitutions one and two contain an identically worded clause, A1 and A2, respectively. As to A2, there are four possible communicative intentions: (1) a first-order communicative intention to convey some content—a concept or proposition—via A2; (2) a second-order communicative intention to convey the same content A1 conveyed to the public at the time constitution one was framed and ratified; (3) a second-order communicative intention to convey the same content that judges assigned to A1 in constitution one; and (4) a second-order intention to convey the original public meaning of A2 in constitution two at the time constitution two was framed and ratified. *See* Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 303-12 (2020) (discussing communicative intentions in constitutional communication and the distinction between first- and second-order communicative intentions). It is possible that these four communicative intentions are identical. If not, there is an important question as to what A2 means. Public-meaning originalism might insist, on grounds of democratic legitimacy, that the fourth communicative intention wins out. *See* Solum, *supra* note 9, at 2004-05. Under an interconstitutionalist approach, however, the third might instead prevail. We are indebted to Lawrence B. Solum for the points in this footnote.

442. Amar, *supra* note 14, at 789.

sense to take the same approach to those who later *amend* the existing constitution.[443] But those two scenarios stand apart from the interconstitutionalist idea that *past* constitutions are also assumed to be known and understood. Intratextualism's dictionary of the single constitution is far more accessible than the dictionary interconstitutionalism demands of earlier constitutions and cases decided under them.

Interconstitutionalism thus asks much. There is no certainty that the members of a constituent assembly will be experts on prior constitutions and past judicial interpretations, or that there will be enough experts to cover the full range of issues. The risks may be particularly acute with respect to constitutions drafted by populist assemblies.[444] The initial processes for drafting a new constitution might also be secretive, precluding the opportunity for outside experts to provide information about earlier constitutions and judicial decisions reached under them. Moreover, the drafting process might not easily accommodate attention to established judicial doctrine. Grand arguments for securing new rights or reforming basic structures are likely to generate far more interest than the case-law nuances and their overhang effects. New constitutions are also often drafted under pressing circumstances and with time constraints: command of prior constitutional law might be desirable but also a luxury.[445]

In addition, it could easily seem implausible to drafters and ratifiers that the very document they are replacing and the court decisions under it would have continuing relevance. By the time a proposal is released to the public, broader debate over basic provisions might also muffle nuanced input from experts about

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443. A practice related to interconstitutionalism involves invocations of an existing constitution's repealed provisions to generate meaning for its current provisions. *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497, 500 (1956) (citing the Eighteenth Amendment (repealed in 1933 by the Twenty-First) to illustrate concurrent federal-state jurisdiction). Similar challenges might arise — depending on what happens to the repealed provisions. In the case of the U.S. Constitution, the original text is never physically altered even as amendments change it. *See* Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1774-94 (2005) (setting out the historical choices that led to preserving the original text and attaching amendments to the end of the document). From a comparative perspective, that approach has become anomalous. *See* Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMPAR. L. 641, 678 (2014) ("In contrast to modern constitutions that interweave new formal amendments into the existing text, the United States Constitution remains unchanged as formal amendments are appended chronologically to it."). But perhaps there is an advantage to this approach: it is harder to forget about provisions that remain on the printed page even if they no longer have the force of law.

444. *See* Paul Blokker, *Populism and Constitutional Change*, *in* ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE, *supra* note 116, at 294, 304-05 (describing the role of constituent assemblies in Latin American countries).

445. *See* Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636, 638 (2011) (noting that it is "often the case" that "constitutional decision-makers face significant time constraints on constitution-making").

earlier jurisprudence pertaining to individual clauses. Expert voices about the details of the past might easily be drowned out by public debate about what is being proposed for the future.[446]

Indeed, there is no guarantee that members of the public called on to assess constitutional terms will readily understand them in the context of judicial decisions. Some such knowledge seems possible. Many Americans, for example, know about *Miranda* warnings[447] and knew that (until recently) the Constitution protected a right to abortion.[448] But these points of knowledge might well be exceptions. Most American constitutional-law professors could not even explain the case law under *every* provision of the U.S. Constitution. Perhaps, then, vigilance suggests the need for surveys conducted at the time of ratification to assess the degree to which public understanding of constitutional provisions reflect case law, in the same way that surveys are used in trademark cases to determine consumer association between marks and goods.[449] But this is far from an ideal measure. No survey is likely to be able to cover all doctrinal rules. And respondents might prefer to answer in ways they hope constitutional provisions *will* be interpreted rather than in a way that reflects knowledge of how provisions were interpreted in the past.

Vigilance, then, can be a very tall order. Return to the decision of the Supreme Court of Georgia in *Elliott v. State*.[450] There, in describing the work of the "framers" of the 1983 Constitution, the Georgia Court reported that "[s]ome committee members . . . expressly admitted that they did not understand the meaning of certain clauses of the Bill of Rights" and avoided making changes because of their own uncertainty about how changes would be construed in light of case law under the prior constitution.[451] Among other things, some committee members worried that, owing to preexisting case law, the committee would "open up a keg of worms" if it "monkey[ed] with" the double jeopardy clause.[452] The chair of the committee, a member of the Supreme Court of Georgia, also

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446. In South Africa, for example, in 1996, the Constitutional Assembly invited public input and it received more than two million submissions. *See* Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK. L. REV. 809, 816 (2001).

447. *See* Miranda v. Arizona, 383 U.S. 436 (1966).

448. *See* Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2228 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

449. *See* 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:158 (5th ed. 2021).

450. 824 S.E.2d 265, 267 (Ga. 2019).

451. *Id.* at 286.

452. *Id.* (quoting *Meeting of the Subcomm. to Revise Section I, Select Comm. on Const. Revisions, 1977-1981*, at 103-06 (Ga. Oct. 4, 1979)).

gave other members a lesson in the hazards of interconstitutionalism: "Justice Bowles noted 'change should be made where change is necessary[,] but' courts view a change in words as 'an intention on the part of the framers to give it a different meaning from the meaning that theretofore existed.'"[453]

For the *Elliott* court, this committee history led to the conclusion that "the framers of the 1983 Constitution generally understood themselves to be proposing the preservation of existing law when they left language unchanged"[454]—rather than the other possibility, that they were boxed in by a lack of familiarity with prior cases. In that sense, there is some irony to Justice Boggs's concurring opinion in *Elliott*. Justice Boggs observed that "the people could reconsider" the self-incrimination provision of the 1983 constitution and "if . . . the people of Georgia see fit to take our self-incrimination law in a different direction, a clear understanding of the scope and impact of our decision here today may aid in informing their decision."[455] But given the majority's approach, pursuing a different direction is far easier said than done, particularly if writing or ratifying new text is seen as monkeying with what was in place or spilling worms from a keg.

B. Interpretive Lessons

Interconstitutionalism offers some lessons for and poses challenges to prevailing theories of constitutional interpretation—particularly as those theories have developed around interpretations of the U.S. Constitution. Among originalists, whose attention has focused overwhelmingly on the U.S. Constitution, the prevalent view is that the relevant time point at which original public meaning of constitutional text is fixed is ratification.[456] That commitment raises some puzzles, as amendments to the U.S. Constitution have been ratified at different times.

One such puzzle concerns repetitions of text at different times. Does, for example, "due process of law" in the Fourteenth Amendment, applicable to the states, mean the same thing as "due process of law" in the Fifth Amendment,

453. *Id.* (quoting *Meeting of the Full Comm.*, *Select Comm. on Const. Revisions, 1977-1981*, at 22-29 (Ga. Nov. 9, 1979)).

454. *Id.*

455. *Id.* at 297 (Boggs, J., concurring).

456. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 117 (2011).

applicable to the federal government?[457] The four words are the same, but public meaning in 1868 might not have been that in 1791.[458]

A second puzzle concerns incorporation of the provisions of the Bill of Rights against the states through section one of the Fourteenth Amendment: is the original public meaning of the Bill of Rights provisions, as applied to the states, deemed fixed as of 1791, when the Bill was ratified, or as of 1868, the year of the incorporating Fourteenth Amendment?[459] If the public meaning of the rights protected by the Bill of Rights did not change between 1791 and 1868, the choice would not matter. But there is substantial evidence that many rights protected in the Bill of Rights had a significantly different meaning in 1868 than they did in 1791.[460] The choice of date thus matters.

Other complications quickly emerge. If the 1868 meaning controls as a matter of incorporation, does it also have a feedback effect and now apply to the federal government, thereby displacing the 1791 public meaning?[461] Or does originalism require one understanding of the Bill of Rights provisions for the federal government and another for the states? Scholars have generated sophisticated commentary on these and related questions.[462] We do not revisit those debates here in detail but instead flag the value of greater engagement with the

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457. Justice Frankfurter thought so. *See* Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

458. *See, e.g.*, Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 510 (2010) (reporting that as a matter of original public meaning the Fourteenth Amendment Due Process Clause protects substantive rights, but the Fifth Amendment Due Process Clause does not).

459. *See* New York State Rifle & Pistol Ass'n v. Bruen, 141 S. Ct. 2111, 2137 (2022) (acknowledging "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").

460. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 274 (1998) (exploring how the original Bill of Rights was "reconstructed" to protect individuals, particularly individuals belonging to minority groups, from majoritarian state governments); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 304-18 (2017) (documenting the differences between freedom of speech as of 1791 and as incorporated).

461. *See, e.g.*, AMAR, *supra* note 460, at 281 (describing the "feedback effect" that incorporation has upon the Bill of Rights as applicable to the federal government); Akhil Reed Amar, Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 178 (2008) ("In the process of 'incorporating' these rights against states, the Fourteenth also reglossed the earlier amendments and gave America a more liberal, more individualistic Bill of Rights than did the Founders."); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) ("When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings.").

462. *See supra* notes 458-461.

interconstitutionalist practices of courts, particularly those at the state level, which have extensive experience deciding the moment at which to fix public meaning.

With respect to repetitions of identical (or nearly identical) text (the first puzzle), interconstitutionalist courts have determined that the public meaning must be deemed fixed the first time the text appears in a constitution and, therefore, is not displaced by evolutions in public meaning at later moments of ratification. Thus, interconstitutionalism contests originalist claims that the moment of ratification controls and offers an approach that would resolve the puzzles originalism encounters when earlier text is later repeated. Originalists focused on the U.S. Constitution have not engaged with these perspectives of interconstitutionalist courts. They would benefit from doing so. In particular, if a new constitution brings with it the prior public meaning of repeated text, the case is even stronger for deeming amendments that repeat text from the same constitution to retain the public meaning when that text first appeared. We might well doubt the capacity of those who write and ratify a new constitution to scrutinize predecessor constitutions. But those who amend a constitution can be expected to know what is in the document they are reworking—and to include new text when old meaning is undesired. Following the example of interconstitutionalist courts, then, the public meaning of due process of law in the Fourteenth Amendment is, presumptively, that of the Fifth Amendment in 1791.[463]

As to incorporation, interconstitutionalism suggests a different lesson. Had the Fourteenth Amendment repeated the provisions of the Bill of Rights—"No

463. Ryan C. Williams reports that the public meaning of due process of law evolved from 1791 to 1868 such that the Fourteenth Amendment, but not the Fifth, "encompassed a recognizable form of substantive due process." Williams, *supra* note 458, at 415. Following an interconstitutionalist approach, such evolution would not matter because the 1791 public meaning would continue to apply. As we have seen, though, under the principle of *stare maiorum decisis*, a later repetition of text might ratify judicial constructions, even when inconsistent with earlier public meaning. In his account, Williams does point to judicial constructions, but almost all involve state courts and state constitutional due-process and law-of-the-land provisions. *See id.* at 460-66. As to the Fifth Amendment itself, Williams cites three Supreme Court cases: dictum in *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539 (1852), suggesting that there would be a due-process problem if Congress were to prevent purchasers of a good later patented from using the good; citations, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), to five state-court cases that reflected notions of substantive due process under state law; and Chief Justice Taney's assertion in *Dred Scott* that the Fifth Amendment—understood substantively—invalidated prohibition, as under the 1820 Missouri Compromise, of slavery in federal territories, *see* 60 U.S. (19 How.) 393, 450 (1856). *See* Williams, *supra* note 458, at 466-68. These cases do not present much basis for changed meaning under *stare maiorum decisis*. Neither *Bloomer* nor *Murray's Lessee* contains holdings grounded in a substantive account of Fifth Amendment due process and with the Civil War and ratification of the Thirteenth Amendment, it would be odd to conclude that the Fourteenth Amendment ratified the Fifth Amendment analysis in *Dred Scott*.

State shall make any 'law respecting an establishment of religion,'"[464] and so on—an interconstitutionalist approach would backdate to 1791 the public meaning of those provisions. Instead, section one of the Fourteenth Amendment (the Due Process Clause aside) contains brand new rights-protecting text: section one deems "all persons born or naturalized in the United States" to be "citizens of the United States and of the State wherein they reside," and it bars states from making or enforcing laws that "abridge the privileges or immunities of citizens of the United States" or from "deny[ing] to any person . . . the equal protection of the laws."[465] Novelty matters to interconstitutionalist courts comparing a current constitution to a constitution replaced. Novelty should also matter in understanding rights the Fourteenth Amendment protects—and the meaning of incorporated provisions of the Bill of Rights. In particular, the new text of the Fourteenth Amendment gives public meaning as of 1868 the principal role. If the Fourteenth Amendment's Privileges or Immunities Clause incorporates provisions of the Bill of Rights,[466] the relevant question is the meaning of *that* clause in 1868,[467] not the 1791 meaning of Bill of Rights provisions.[468]

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464. U.S. CONST. amend. I.

465. *Id*. amend. XIV.

466. While incorporation has occurred via the Due Process Clause, some consider the Privileges or Immunities Clause the better vehicle. *See, e.g.*, McDonald v. Chicago, 561 U.S. 742, 756 (2010).

467. In the *Slaughter-House Cases*, the Supreme Court famously reasoned that because the Fourteenth Amendment refers to privileges and immunities of citizens of the United States, those privileges and immunities are not the same privileges and immunities in Article IV. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77-79 (1873). While that view has generated substantial criticism, the textual difference is what supports modern conceptions of rights. *See* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 735 (2000) (arguing that the Court "articulated a fairly comprehensive general theory" by which "the Clause does not protect ordinary common-law interests against state deprivation" but "does protect rights that owe their existence to the Federal government, its National character, its Constitution, or its laws," particularly, but not only, those protected in the Bill of Rights (quoting *Slaughter-House Cases*, 83 U.S. at 79)).

468. *See, e.g.*, Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1147 (2011) (explaining, in a discussion of Sixth Amendment jury trials, that "[i]ncorporation suggests that, in state cases, the constitutional text the Court is technically interpreting is the Due Process Clause, and thus Reconstruction understandings of due process and its relation to the Bill of Rights should be important"). Justice Stevens thought that because states were bound by the Fourteenth Amendment but not (directly) by provisions of the Bill of Rights, those provisions (even when incorporated) might constrain states differently than they do the federal government. *See McDonald*, 561 U.S. at 883-84 (Stevens, J., dissenting).

C. *Sovereignty*

A dominant account of constitutional legitimacy, particularly in the United States, is popular sovereignty: a constitution is legitimate because it reflects the will of the people.[469] Notions of popular sovereignty take different forms,[470] but the core idea, announced in the Declaration of Independence, is that governments "deriv[e] their . . . powers from the consent of the governed" and "the People" always have "the Right . . . to alter or abolish" their existing government and "to institute new Government."[471] Popular sovereignty does not require ordinary citizens themselves to carry out governmental functions.[472] Nor is it necessary for citizens today themselves to have consented in the past to the existing form of government: so long as there is a right to change government in the future, the people today can legitimately be bound by the consent of predecessors.[473] Indeed, popular sovereignty accounts emphasize that enforcement of past expressions of popular will is essential to protecting the possibility of such

469. *See* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 912 ("In word and deed, the Constitution's biggest idea is popular sovereignty. Here, the people rule."). Popular sovereignty is not, of course, the only basis of constitutional legitimacy. *See, e.g.*, Solum, *supra* note 441, at 331-39 (identifying five dimensions of normative constitutional legitimacy — democracy, legality, transparency, justifiability, and process — and distinguishing that theory from positive constitutional legitimacy).

470. *See* Christopher W. Morris, *The Very Idea of Popular Sovereignty: "We the People" Reconsidered*, 17 SOC. PHIL. & POL'Y 1, 11-23 (2000) (discussing competing notions of popular sovereignty).

471. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

472. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1436 (1987) (describing the emergence of popular sovereignty in the revolutionary era, by which "[a]s sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers" with the check that "the People at all times retained the ability to revoke or modify their delegations . . . .").

473. *See* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott 2d ed. 1836) (statement of James Wilson at the 1787 Pennsylvania ratifying convention) ("[I]n our governments, the supreme, absolute, and uncontrollable power *remains* in the people . . . . The consequence is, that the people may change the constitutions whenever and however they please.").

expressions in the future.[474] Originalists primarily justify their methodology on the grounds of popular sovereignty,[475] as do living constitutionalists.[476]

Interconstitutionalism challenges some basic ideas about constitutional governance and popular sovereignty. The most important undertaking by a sovereign people is the adoption of a new constitution. Yet, the pervasiveness of interconstitutional practices suggests that there are significant constraints on a sovereign people's ability to chart their own course. Interconstitutionalism means that it is difficult to break from a past regime, even if the point of the new constitution is to repudiate the predecessor system of government. Even when the new constitution is the product of war, revolution, or the overthrow of oppressive rule, the predecessor charter often exerts continuing influence going forward.[477] Making a new constitution is not like shaking an Etch A Sketch.[478]

Indeed, interconstitutionalism suggests it might be *harder* to achieve reform by adopting a new constitution than it is by merely *amending* the existing constitution. Amendments are usually adopted with close attention to existing constitutional provisions and their meaning. Adoption of a new constitution, by contrast, is typically a forward-looking process, with less attention to old text and with all the risks of approving textual provisions that, in light of the provisions' pedigrees, courts might deem to mean something quite different from the

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474. *See* WHITTINGTON, *supra* note 10, at 155.

475. *See, e.g.*, Easterbrook, *supra* note 11, at 1121 ("The fundamental theory of political legitimacy in the United States is contractarian, and contractarian views imply originalist . . . interpretation by the judicial branch."); Jeffrey Goldsworthy, *The Case for Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION, *supra* note 114, at 42, 57 ("The strongest normative argument for originalism . . . appeals, not to the authority of the dead hand of the past, but to the authority of the living hand of the present . . . .").

476. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 278 (2011) ("We must recognize that [living constitutionalism] is an account . . . of the processes of constitutional decisionmaking, and their basis in democracy and in the ideals of popular sovereignty." (footnote omitted)); DAVID A. STRAUSS, THE LIVING CONSTITUTION 37-38 (2010) (arguing that living constitutionalism promotes self-rule through laws of "general acceptability to successive generations"); Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1758 (2007) (describing "[t]he living Constitution" as "a product of" various "cycles of popular sovereignty" (footnote omitted)).

477. The experience in Poland after the end of Soviet occupation illustrates the point. *See* Aleksandra Kustra-Rogatka, *The Polish Constitutional Court and Political "Refolution" After 1989: Between the Continuity and Discontinuity of the Constitutional Narrative*, 6 WROCLAW REV. L. ADMIN. & ECON. 62, 90 (2016).

478. *See Etch a Sketch*, SPIN MASTER, https://etchasketch.com [https://perma.cc/D682-C676].

understandings of those who write and ratify the new constitution—and perhaps even deliberately thwart constitutional reform.[479]

At the same time, it would be rash to conclude that interconstitutionalism is merely an unwelcome interference with the ability of the sovereign people to govern themselves. From a democratic perspective, interconstitutionalism also has some points in its favor. One prism through which to consider the democracy-enhancing aspects of interconstitutionalism is by comparison to cross-constitutional interpretation, or the interpretive practice of referring to constitutions of other polities in interpreting the domestic constitution.[480] Although many courts engage in cross-constitutional interpretation, the practice has generated substantial criticism grounded in notions of popular sovereignty.[481]

Concerns with cherry-picking plague cross-constitutional interpretation. It is difficult to survey and report on *all* of the world's constitutions. But if courts and other constitutional interpreters report on just some foreign constitutions, they invite criticism that they are not really engaged in a search for constitutional meaning but are instead invoking sources to buttress determinations they have already made.[482] Such concerns are substantially reduced in interconstitutional interpretation. There, the set of relevant constitutions is both defined and manageable. Thus, French judges are less likely to be questioned for selection bias when they quote from the 1946 French Constitution in their opinions than when they quote from the Constitution of Mongolia. Relatedly, while the past might seem like a "foreign country,"[483] constitutional interpreters are likely to know better and be able to use more accurately their own polity's former constitutions than they can use the constitutions of other nations. American judges are likely better positioned to understand the Articles of Confederation than they are, say, the Constitution of the People's Republic of China. Other domestic observers are

479. In Brazil, for example, the Supreme Court got in the way of the nation's transition to democracy. Diego Werneck Arguelhes & Mariana Mota Prado, *'Resistance by Interpretation': Supreme Court Justices as Counter-Reformers to Constitutional Changes in Brazil in the 90s*, *in* CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA 167, 174 (Richard Albert, Carlos Bernal & Juliano Zaiden Benvindo eds., 2019) (describing how Supreme Court Justices in Brazil initially read the 1988 democratic constitution "with old lenses" so as to limit new mechanisms of constitutional adjudication that the constitution had created).

480. *See supra* Section I.A.

481. *See* Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 2015 MICH. ST. L. REV. 1, 126; *see also* JACKSON, *supra* note 13, at 153 (observing that "arguments for resistance [to foreign law] are found in democratic theory and concerns for sovereignty").

482. On the "cherry-picking" problem in comparative constitutional law, see RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 19, 187-88 (2014).

483. L.P. HARTLEY, THE GO-BETWEEN 1 (1953).

also well-positioned to assess whether the judges have faithfully made use of prior domestic charters.[484] These features, too, help promote self-rule.

Functionalist arguments *in favor of* looking at foreign constitutions[485] apply *more* forcefully to interconstitutionalism. A new constitution typically responds to the perceived deficiencies of its predecessor while also continuing in place successful aspects of the prior document.[486] Accordingly, an antecedent constitution will often have more functional relevance to the successor constitution than will any other constitution. Again, interconstitutionalism promotes a closer fit with popular sovereignty.

Critics of cross-constitutional interpretation also argue that the *self-given* nature of a constitution renders reference to foreign law utterly inconsistent with democratic constitutionalism.[487] That concern has far less traction when interpreters look to their *own* former constitutions. Of course, there might be *other* democracy-based reasons to resist uses of a prior constitution. That prior constitution itself might have been inconsistent with modern notions of democracy because, say, it corresponded with a repressive regime or contained antidemocratic provisions. Additionally, and independent of how a former constitution is perceived, interconstitutionalism might trigger more general anxieties about uses of history in constitutional interpretation and adjudication. Invoking an old constitution to interpret an extant one is susceptible to dead-hand criticisms. On balance, though, interconstitutional interpretation can secure more buy-in from interpreters and the general public than cross-constitutional interpretation.

These points of comparison with cross-constitutional interpretation allow for some more general conclusions about interconstitutionalism and popular sovereignty. In the end, the democratic upside to interconstitutionalism might be its constraining nature. Although constraint makes constitutional change difficult and can thwart the objectives of those who write a new charter, it also provides a basis for constitutional legitimacy. Interconstitutionalism requires those who seek proper constitutional change to understand the nation's past. It also

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484. *See The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 528 (2005) ("One of the difficulties of using foreign law is that you don't understand what the surrounding jurisprudence is." (statement of Justice Antonin Scalia)).

485. *See, e.g.*, JACKSON, *supra* note 13, at 116-17.

486. On the other hand, cross-national engagement might prove more advantageous to understanding the distinctive functioning of one's own constitutional system. *See id.* at 117. For one thing, the new constitution might unreflectively repeat features of its predecessor. *See* Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899, 905-06 (2016).

487. JACKSON, *supra* note 13, at 120-21; *see also* Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 6-13 (Sujit Choudhry ed., 2006) (summarizing conventional arguments against consulting foreign constitutional ideas).

requires that change be clear and decisive — and reflected in the proposal and ratification of new constitutional text. Textual change is what signals to the sovereign people that something new is being proposed to them. Textual change is also the surest way the people themselves can signal to courts and other interpreters the breaks their new constitution has made from the past. Textual continuity, on the other hand, casts doubt on claims, particularly those made after the new constitution is ratified, that rupture has occurred, and that all past commitments, understandings, and practices must be set aside.

CONCLUSION

Interconstitutionalism is a pervasive feature of systems of constitutional government. It is impossible to make sense of how courts interpret constitutional provisions without recognizing the impact that prior constitutions and the cases decided under them have on contemporary judicial decision-making. Likewise, theories of constitutional interpretation are incomplete when limited to a single, in-force constitution and without accounting for that constitution's predecessors. Writing and ratifying a new constitution demands close attention to prior constitutions, the cases interpreting their provisions, and the attendant traditions of governmental powers. Most importantly, securing democratic governance and popular sovereignty requires as much attention to a nation's constitutional past as to its contemplated future constitutional regime. For those who make or interpret constitutions, for those who seek to understand a constitution's impact, and for anyone governed by constitutional rule, interconstitutionalism cannot be ignored.