Ohio Constitutional Interpretation

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There has been a good deal written on *why* state courts should independently interpret their state constitutions. Sixth Circuit Chief Judge Jeff Sutton, and others, have persuasively argued that state court judges should do more to look to their state constitutions as a source of rights independent of the Federal Constitution.[2] But there has not been nearly as much written about *how* state judges should interpret their state constitutions.[3] My purpose here is to deal with some of the interpretive issues that judges confront in interpreting state constitutional provisions. I will focus largely on the Ohio Constitution—after all, that is the state constitution I know the most about. But my hope—and strong suspicion—is that the principles I discuss will apply to the interpretation of other state constitutions.[4]

This Article endeavors only to scratch the surface. Because there has been so little scholarship on the methods of state constitutional interpretation, I aim only to cover a few threshold issues. I hope others will take up the topic and write more.

I begin with some background on the structure of the Ohio Constitution. I then argue that the appropriate methodology in construing the Ohio Constitution is to apply the original public meaning of a provision at the time of its adoption. I make both a descriptive and a normative claim. I argue that this methodology is rooted in precedent dating back to the Ohio Supreme Court's earliest interpretations of the Ohio Constitution. And I contend that there is a powerful normative case for original public meaning that derives from the structure of the Ohio Constitution and Ohio's democratic constitutional enactment and amendment process.

I then discuss some issues that arise in the interpretive process. I explain that the constitution's text should always be the primary consideration, and that because more recent constitutional amendments tend to be drafted like statutes, there will often be little need to venture beyond the text to ascertain original public meaning. For those instances when the text is not

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[2] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); *see also* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[3] Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 166 (1984) ("The question in the state courts no longer is whether to give independent attention to state constitutional issues, but how").

[4] Several other state supreme court justices in recent years have written on the appropriate interpretive methodologies for their own state constitutions. *See* Nels S.D. Peterson, *Principles of Georgia Constitutional Interpretation*, 75 MERCER L. REV. 1 (2023); Jay Mitchell, *Textualism in Alabama*, 74 ALA. L. REV. 1089 (2023); Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771 (2021).

determinative, I take up the question of what other materials should be considered and provide some historical resources for practitioners and judges.

Finally, I confront the most consequential exception to the Ohio Supreme Court's application of original public meaning: the Ohio Supreme Court's past practice of interpreting many provisions of the Ohio Constitution in "lockstep" with similarly worded provisions of the Federal Constitution. I argue that generally we should give minimal stare decisis effect to precedent that announces without analysis that a particular provision of the Ohio Constitution has the same meaning as a similar provision in the federal constitution. But, when we independently interpret the Ohio Constitution, we should do so based on the text and history of that document and not simply because we dislike the result ordained by federal precedent interpreting the FederalConstitution.

I. Background on the Ohio Constitution

In much of the writing on state constitutions there seems to be an underlying assumption that we should follow the same methods of interpretation that we employ in interpreting the Federal Constitution. And for the most part that's probably true. But there are differences between the Ohio and Federal Constitutions that necessarily impact the interpretive process.

In thinking about how to interpret the Ohio Constitution, it's important to understand something about its origins and structure. The Ohio Constitution we use today was enacted in its original form following a constitutional convention in 1851.[5] That Constitution replaced the 1802 Constitution[6] that had ushered Ohio into statehood.

Importantly, the 1851 Constitution was adopted directly by a vote of the people.[7] In the first 60 years of its existence, the Constitution was amended only a handful of times. These amendments occurred upon voter approval of legislative proposals.[8]

The most significant amendments came in 1912. Following a constitutional convention that year, voters adopted 34 proposed amendments, largely reflecting Progressive Era concerns: things like municipal home rule, workers compensation, and direct-democracy measures such as the referendum and the initiative.[9] In the years since, voters have continued to amend the Ohio Constitution, adopting amendments on topics as varied as livestock standards, casinos, and redistricting.[10] In total, the 1851 Constitution has been amended some 170 times by voters.

The Ohio Constitution is long—nearly 60,000 words. That's almost eight times longer than the United States Constitution. And it reads like a document that was drafted over a long period of time by a lot of different people. Article I is a bill of rights, the first provision of which sounds much like the preamble to the Declaration of Independence: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending

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[5] A major reason for its adoption is that in contrast to the Ohio Constitution of today, the Ohio Constitution of 1802 did not contain provision for amendment short of calling a constitutional convention. *See* OHIO CONST. of 1802, art. VII, § 5.

[6] The 1802 constitution was adopted at a constitutional convention by delegates who were elected by the people. *See* STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION 51–62 (2d ed. 2022).

[7] *See* OHIO CONST. Schedule, § 17 (1851).

[8] *See* Former OHIO CONST. art. XVI, § 1 (1851).

[9] *See* STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION 15-17 (2d ed. 2022).

[10] *See id.* at Appendix B.

life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."[11] Other provisions of the bill of rights contain parallels to the protections granted in the bill of rights of the Federal Constitution and are often written in the same sweeping terms as the federal charter.

Later amendments to the Ohio Constitution tend to be much more specific, often drafted with the type of precision one would expect to find in legislative enactments. Article XV, Section 6, for example, not only authorizes casino gambling in Ohio but lays out the exact parcels of land on which the casinos are to be built.

There was a lot of borrowing in the drafting of the Ohio Constitution. Some provisions were carried over from the 1802 Ohio Constitution. That constitution, in turn, drew principally on other state constitutions—particularly that of Tennessee.[12] The Ohio bill of rights likewise draws on guarantees included in other state constitutions and features some provisions traceable to the Northwest Ordinance.[13] Like the Federal Constitution, Ohio's constitution divides power among three branches of government and provides for a bicameral legislature. But there are important differences as well. Rather than concentrating authority in a single executive, the Ohio Constitution divides executive power among several independently elected executives.[14] Further, while the federal government is one of enumerated powers—Congress only has authority that is explicitly granted to it—state constitutions are "'not grants of power to the state, but [rather] apportion and impose restrictions upon the powers which the states inherently possess.'"[15] Thus, the Ohio legislature has broad police powers to enact legislation to provide for the general welfare.[16]

The Ohio Constitution is more democratic, and less republican, than the Federal Constitution. Judges are elected to terms and may not serve past the age of 70.[17] It permits the electorateto directly enact and repeal legislation through referendum and initiative procedures.[18] Moreover, the Ohio Constitution is far easier to amend than its federal counterpart. A resolution adopted by a simple majority of both houses of the General Assembly will put a constitutional amendment before the voters.[19] And as a result of an amendment approved following the 1912 constitutional convention, the voters themselves can place a constitutional amendment on the

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[11] Ohio Const. Art. I, Section 1.

[12] *See* JOHN D. BARNHART, VALLEY OF DEMOCRACY: THE FRONTIER VERSUS THE PLANTATION IN THE OHIO VALLEY, 1775-1818, 158 (1953).

[13] STEINGLASS & SCARSELLI, *supra* note __, at 105.

[14] *Compare* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America") *with* OHIO CONST. art. III, § 1 ("The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general . . .").

[15] See Angell v. Toledo, 153 Ohio St. 179, 181, 91 N.E.2d 250 (1950), quoting 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 12 (Walter Carrington, ed., 8th ed. 1927).

[16] See, e.g., State v. Martin, 168 Ohio St. 37, 40-42, 151 N.E.2d 7 (1958). At times, the Ohio Supreme Court has ascribed outer limits to the legislature's exercise of the police power, explaining that it may declare unconstitutional unreasonable exercises of the police power. *See, e.g.*, State v. Boone, 84 Ohio St. 346, 95 N.E. 924. In more recent years, the Court has stated that the "legislature can "enact *any* law that does not conflict with the Ohio or United States Constitution." Kaminski v. Metal & Wire Prods. Co., 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 60 (emphasis added).

[17] OHIO CONST. art. IV, § 6(C).

[18] OHIO CONST. art. II, § 1b–1c.

[19] OHIO CONST. art. XVI, § 1.

ballot through petitions signed by 10% of the state's electors.[20] A simple majority vote in either case is all that is needed to amend the constitution.

II. We Should Apply the Original Public Meaning of Ohio Constitutional Provisions

There is a compelling argument for an original public meaning methodology when it comes to interpreting the Ohio Constitution.[21] Such an approach is rooted in history and precedent and supported by the structure of the Ohio Constitution.

Under this framework, a constitutional provision has the meaning that would have been accessible to a member of the public at the time of its adoption. Generally speaking, this will be the meaning that would have been ascribed to it by a competent speaker of the English language at the time of its adoption.[22] Further, the meaning of a provision is fixed at the time of its adoption, and this fixed meaning constrains constitutional practice.[23]

Public meaning originalism recognizes that constitutions may sometimes employ legal terms of art, for example "the writ of habeas corpus."[24] This fact, however, does not render the communicative content of such terms inaccessible to members of the public as long as it is apparent from the text that the word or phrase is a term of art and it is "possible for members of the public to access the technical meaning through reasonable effort."[25]

A. *The Historical Case for an Original Public Meaning Approach*

There is strong evidence that originalism has historically been the predominant mode of interpreting the Ohio Constitution. Like Ohio's current constitution, Ohio's 1802 Constitution of 1802 vested the "judicial power" in the Supreme Court and in various inferior courts.[26] And in its

[20] OHIO CONST. art. II, § 1a.

[21] Many originalist theorists draw a distinction between constitutional interpretation and constitutional construction. See, e.g. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453; Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1. In this view, interpretation involves discerning "the communicative content (linguistic meaning). of constitutional text." Solum, at 457. Construction involves determining the "legal effect of the constitutional text." *Id*. On this understanding, there exists a "construction zone" involving cases where constitutional text does not provide determinative answers to legal questions because the provision at issue is "vague or irreducibly ambiguous," or because there are gaps or contradictions within the constitution. *Id*. at 458, 469. My focus in this article is on interpretation, not construction. I hope to return to the construction zone in a future work. My assumption, though, is that because of the specificity of many provisions of the Ohio Constitution, *see* infra III.C, the construction zone is narrow. Indeed, the relative detail of the Ohio Constitution would suggest that the construction zone is smaller for the Ohio Constitution than for the Federal Constitution.

[22] Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U.L. REV. 1953, 2027–28 (2021) [hereinafter Solum, *Public Meaning Thesis*].

[23] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) ("The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the Fixation Thesis"); *id*. (the Constraint Principle "holds that the original public meaning of the constitutional text should constrain constitutional practice).

[24] OHIO CONST. art. I, § 8.

[25] "In sum, the phrase 'original public meaning' refers to the meaning of the constitutional text at the time each provision was framed and ratified." Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807, 815 (2023). It is the "the meaning that is made *accessible* to the public by the constitutional text." *Id.* at 821.

[26] OHIO CONST., art. IV, § 1; OHIO CONST. of 1802, art. III, § 1.

earliest exercises of this power, the Ohio Supreme Court understood the judicial power to require that the Court apply the original meaning of the Ohio Constitution.

Ohio's *Marbury v. Madison*[27] is *Rutherford v. M'Faddon* (1807).[28] Although best known for establishing the principle of judicial review in Ohio, *Rutherford* is also evidence that immediately after the adoption of Ohio's first constitution, Ohio Supreme Court justices interpreted the Ohio Constitution based on the original meaning of that document and understood its meaning to be fixed at the time of its adoption.

At issue in *Rutherford* was an 1805 statute[29] that increased from $20 to $50 the damage threshold for cases that could be heard by a justice of the peace.[30] Justices of the peace were not lawyers; their proceedings were informal; and until 1819 they could hear cases in taverns.[31]

M'Fadden obtained a judgment for $32.50 against Rutherford in a proceeding held before a justice of the peace.[32] Rutherford challenged the judgment, arguing that it violated the guarantee of the 1802 Constitution that "the right of trial by jury shall be inviolate."[33]

At the outset, the justices confronted the question of whether they had the power of judicial review at all. In seriatim opinions, the two justices who decided the case agreed that they did.[34] Chief Judge Huntington explained that while the court was not "vested with any legislative authority," it must "compare the legislative *act* with the *constitution*" and if it "find[s] such act contrary to the constitution . . . it is the duty of the court to declare it *no law*."[35] Agreeing, Judge Tod noted that this duty flowed from the constitution itself, which vested "'the judicial power of the state, both in matters of law and equity,'" in the Supreme Court.[36] And because the constitution was "now a law," courts were "bound to test all matters of law by it."[37]

Having established the power of judicial review, the justices turned to the constitutionality of the enactment. In examining the meaning of the constitutional guarantee, Chief Judge Huntington placed the inquiry squarely on the understanding of "the right of trial by jury" at the time of the enactment of the constitution:

> To what right could the framers of our constitution have referred? To a right then existing, and which every citizen was entitled to; a right known and recognized by the laws then in force—or an indefinite right, which might hereafter be established, and be varied or fritted away, as succeeding legislatures and courts may think

[27] 5 U.S. 137 (1803).
[28] *See* ERVIN H. POLLACK, OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823, 71 (1952); the full text of the case is also available on the Ohio Supreme Court's website at 2001-Ohio-56. [add permalink]
[29] 3 Ohio Laws 14 (1805).
[30] *Id.* at 21.
[31] *See* DONALD E. MELHORN, JR., LEST WE BE MARSHALLED: JUDICIAL POWERS AND POLITICS IN OHIO, 1806-1812, 19 (2003).
[32] *Id.* at __.
[33] OHIO CONST. of 1802, art. VIII, § 8. *Cf.* OHIO CONST. art. I, § 5.
[34] William T. Utter, *Judicial Review in Early Ohio*, 14 MISS. VALLEY HIST. REV. 3, 9, n.17 (1927) ("William Sprigg, the third judge on the court did not sit for some obscure reason").
[35] POLLACK, *supra* note __, at 73-73 (emphases in original).
[36] *Id.* at 85 (Tod, J., concurring), quoting OHIO CONST. of 1802, art. III, § 1.
[37] *Id.*

> proper? Common sense gives the answer; they must have meant none other than a right then known and established.[38]

Thus, the appropriate question was "what that right was, at the time of the framing [of] the constitution."[39] And the answer: "the right of trial by jury, to which every citizen was entitled at that period, extended to all civil and criminal cases, except such as were expressly committed to the jurisdiction of justices of the peace, and that their jurisdiction embraced only some small criminal offences, and cases of contract without seal where the demand did not exceed twenty dollars."[40] Ergo, the legislative enactment violated the constitution.

In an early case decided after the adoption of the 1851 Constitution, the court also assumed that the appropriate inquiry focused on the original understanding of a constitutional provision.[41] In *State ex rel. Atty. Gen. v. Harmon*,[42] the Court was confronted with the meaning of the term "judicial power" in the Ohio Constitution.[43] The question under review was whether a statute that granted the Senate the power to conduct a trial in the case of a contested election infringed on the judicial power in violation of separation of powers principles. In answer to the question, the Court again made clear that the relevant inquiry was into the original understanding of the constitutional provision: "What constitutes judicial power, within the meaning of the constitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution."[44]

Over the years the Court has not been entirely consistent in its originalist methodology. In earlier cases, the Court applied an approach that might be characterized as "original intent originalism."[45] For example, in a 1946 case the court took up the application of a constitutional amendment that prohibited taxes on "the purchase of food for human consumption off the premises where sold" to the sale of milk through a vending machine in a large industrial facility.[46] In construing the amendment to prohibit the tax, the Court explained: "It is well settled that in the interpretation of an amendment to the Constitution the object of the people in adopting it should

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[38] *Id.* at 78.
[39] *Id.*; *see also id.* at 89 (Tod, J., concurring) ("[i]t remains for us to ascertain what the right of trial by jury was, when the constitution took effect").
[40] *Id.* at 79 (Huntington, C.J.).
[41] The Ohio Supreme Court was not alone in this understanding. In his influential treatise on state constitutions, Michigan Chief Justice Thomas Cooley explained:

> For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

Cooley, Constitutional Limitations (1st ed.), p. 66.
[42] 31 Ohio St. 250 (1877).
[43] OHIO CONST. art. IV, § 1.
[44] *Harmon* at 258.
[45] This is a "theory that holds that the constitutional preferences of the Framers and/or ratifiers should provide the legal content of constitutional doctrine." Solum, *Public Meaning Thesis*, *supra* note __, at 1965.
[46] Castleberry v. Evatt, 147 Ohio St. 30, 67 N.E.2d 861 (1946) (construing OHIO CONST. art. XII, § 12).

be ascertained and given effect and that the polestar in the construction of constitutional, as well as legislative, provisions is the intention of the makers and adopters."[47]

In more recent cases, however, the Court has emphasized the original public meaning of the provision at issue. Thus, it has said that "in construing constitutional text that was ratified by direct vote, we consider how the language would have been understood by the voters who adopted the amendment."[48] The Court explained further:

> The court generally applies the same rules when construing the Constitution as it does when it construes a statutory provision, beginning with the plain language of the text, *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 14, and considering how the words and phrases would be understood by the voters in their normal and ordinary usage, *District of Columbia v. Heller*, 554 U.S. 570, 576-577, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). But in ascertaining the intent of the voters who approved the amendment, our inquiry must often include more than a mere analysis of the words found in the amendment. *State ex rel. Swetland v. Kinney*, 69 Ohio St.2d 567, 570, 433 N.E.2d 217 (1982). The purpose of the amendment and the history of its adoption may be pertinent in determining the meaning of the language used. *Id.* When the language is unclear or of doubtful meaning, the court may review the history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide to assist the court in its analysis.[49]

Other recent cases have followed *Knab*'s injunction that the relevant inquiry is "how the language would have been understood by the voters who adopted the amendment."[50]

This is not to say that the Ohio Supreme Court has always followed originalist methods. Far from it. In many areas of the law, the court has paid scant attention to the original understanding of the constitutional provision at issue. In interpreting Ohio's Home Rule Amendment, for example, the Court has largely ignored the original understanding of the amendment and instead created a four-part test to determine whether municipal legislation impermissibly conflicts with a statewide law.[51] In a host of other cases, the Court has simply announced its interpretation of the constitutional provision at issue without evidencing any attempt to get at a provision's original public meaning.[52] And in other cases the Court has referenced the

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[47] *Id*. at 33.
[48] Centerville v. Knab, 162 Ohio St. 3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22; *see also* State v. Yerkey, 171 Ohio St.3d 367, 2022-Ohio-4298, 218 N.E.3d 749, ¶ 9 (2022).
[49] *Id.*
[50] State v. Fisk, 171 Ohio St.3d 479, 2022-Ohio-4435, 218 N.E.3d 852, ¶ 6; *see also* Yerkey, 171 Ohio St.3d 367, 2022-Ohio-4298, 218 N.E.3d 749, at ¶ 9; Siltstone Res., L.L.C. v. Ohio Pub. Works Comm'n, 168 Ohio St. 3d 439, 2022-Ohio-483, 200 N.E.3d 125, ¶ 39.
[51] See Timothy J. Lanzendorfer, *Originalism at Home: The Original Understanding of Ohio's Home Rule Amendment*, 73 CASE W. RES. L. REV. 1, 10–11 (2022); City of Dayton v. State, 151 Ohio St. 3d 168, 2017-Ohio-6909, 87 N.E.3d 176, 189-99 (DeWine, J., dissenting.)
[52] See, e.g., State v. Mole, 149 Ohio St. 3d 215, 2016-Ohio-5124, 74 N.E.3d 368; State v. Ferris, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985; State v. Bode, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156; State v. Brown, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496. These four cases are discussed in section IV.B of this article and in note 209.

constitutional debates on a particular provision, but employed no real analysis of the provision's original public meaning.[53]

Nonetheless, a review of Ohio Supreme Court precedent is noteworthy for what it does not show. Although the Court has not always employed an originalist methodology in its interpretation of the Ohio Constitution, there is little suggestion in our caselaw that any other mode of analysis is appropriate. The one notable exception comes in cases where the Ohio Supreme Court has determined that a provision of the Ohio Constitution has the same meaning as a provision of the Federal Constitution and deferred to the United State Supreme Court's interpretation. Setting these lockstepping decisions aside, I am not aware of a single decision in which the Ohio Supreme Court has ever suggested that the meaning of an Ohio constitutional provision has changed over time, or that the original understanding of a provision is no longer determinative. I return to the lockstepping cases in Section III of this Article.

B. *The Normative Case for an Original Public Meaning Approach*

There is a strong normative case for applying public meaning originalism in interpreting the Ohio Constitution. In my view, there are persuasive reasons to apply an original public meaning approach to the Federal Constitution.[54] That case is even stronger when it comes to the Ohio Constitution.

Recall that the 1851 Constitution was adopted directly by the voters of Ohio, and every subsequent amendment to the Constitution has been voted on and enacted by the people. Because every provision in the Ohio Constitution was voted on directly by the people through a formalized process, the document has an unquestionable democratic legitimacy. Indeed, the claim for democratic legitimacy in many ways is even more forceful for the Ohio Constitution than for the United States Constitution because the United State Constitution was not submitted directly to the people but was adopted through state ratifying conventions and amended through the process set forth in Article V of that document.[55]

The Ohio process of constitutional enactment and revision presupposes that the Constitution derives its legitimacy from the will of the people as reflected in the language that they have enacted.[56] And because it is the voters' approval of the constitutional text that makes the text law, a judge must construe that text as it would have been understood by the voters who approved it. To assign any other meaning than the original understanding of constitutional text replaces the democratically enacted meaning with a judge-created meaning.

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[53] See, e.g., Derolph v. State, 78 Ohio St. 3d 193, 203, 677 N.E.2d 733, 1997-Ohio-84.

[54] See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2003). My purpose here is not to undertake a wholesale justification of originalism as an interpretive theory generally, but rather to add additional reasons for the use of an original public meaning methodology in the interpretation of the Ohio Constitution.

[55] See Kurt T. Lash, *Originalism, Popular Sovereignty and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1445–46 (2007) (explaining that "[i]f the people could be directly appealed to, a mere majority would suffice for the creation of fundamental law" and that "[t]he supermajoritarian rules of Article V provide for the highest degree of democratic input by the people directly while still realistically allowing for constitutional change").

[56] Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610 (2004) ("[i]t is the adoption of the text by the public that renders the text authoritative").

A public meaning originalist approach to the Ohio Constitution also easily addresses the so-called "countermajoritarian" difficulty[57]—the concern that judicial review allows judges to thwart the will of the people by overturning democraticallyenacted laws. Many originalists interpreting the Federal Constitution[58] deal with this problem by presuming that laws created through the constitutional ratification process and the super-majoritarian amendment procedures of Article V "are the product of a more deeply democratic process" and thus "have earned the right to be treated as the will of the people and accordingly trump those laws passed through the ordinary political process."[59]

Under the Ohio Constitution, the link between popular sovereignty and judicial review is more direct and the tension less great. The Ohio Constitution was enacted directly by the people through majority vote in explicit acts of constitutional creation. Thus, there is no difficulty in concluding that a constitutional provision enacted directed by the people prevails over a legislative act enacted only indirectly by the people through their representatives in the legislature.

It is of course true that judges may sometimes get things wrong. They might mistakenly conclude that a legislative enactment violates the constitution. But in such cases, the Ohio Constitution provides two correction methods. First, under the Ohio Constitution, judges (including Supreme Court justices) are elected.[60] So, if the courts incorrectly interpret the constitution, voters can elect different judges.[61] Second, voters can take advantage of a relatively accessible process of constitutional amendment to either make their intent more explicit or to modify or repeal constitutional provisions that no longer reflect the will of the people.

Critics of originalism on the federal level often complain that originalists' claims for democratic legitimacy are unfounded because of limited voting rights in the founding era and a lack of representativeness at state ratification conventions.[62] And certainly one can make some of the same arguments about the electorate that adopted the 1851 Ohio Constitution. But the amendment provisions of the Ohio Constitution address these concerns. The document is relatively easy to amend, as is evidenced by the 170 amendments since 1851.[63] To the extent that

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[57] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

[58] *See* Lash, *supra* note __, at 1440 (identifying "popular sovereignty and the judicially enforced will of the people" as "the most common and most influential justification for originalism").

[59] *Id.* at 1445–46.

[60] Art. IV, Section 6.

[61] *See* Nathaniel M. Fouch, *"A Document of Independent Force": Towards a Robust Ohio Constitutionalism*, 49 U. DAYTON L. REV. 1, 24 (2023) ("Voting is the most basic, longest standing, and bluntest tool to check the [Ohio] Supreme Court"). Since the adoption of judicial elections in the 1851 Constitution, the people of Ohio have consistently defended their right to an elected judiciary. *Id.*

[62] See, e.g., United States v. Rahimi, 602 U.S. ___, ___, 144 S.Ct. 1889, 1905 (2024) (Sotomayor, J. concurring) ("a rigid adherence to history (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy").

[63] *See* STEINGLASS & SCARSELLI, *supra* note __, at Appendix B. Contrast this with the 27 amendments to the Federal Constitution, 10 of which were adopted together within two years of ratification.

And, if anything, it is becoming easier to amend the Ohio Constitution. In 1912, the requirement that a petition to place a constitutional amendment needed be signed by 10% of the state's electors seemed a fairly high bar—one that could not be met without widespread public support. In contrast, only 3% of the electors is required to place a simple referendum on the ballot. (A voter-enacted referendum is the functional equivalent of statute; it may be modified or repealed by the legislature.) Today, however, there exist a variety of firms who specialize in organizing paid signature

the Ohio Constitution doesn't represent the will of the people because it was enacted in an era when many were denied the right to participate in the democratic process, the current electorate has the ability to amend the Ohio Constitution. While the same argument could be made about the Federal Constitution, the relative difficulty of amending that document and relative ease of amending the Ohio Constitution make it far more forceful in the state context.

Indeed, the strongest arguments for a "living constitution" approach to the Federal Constitution center upon the difficulty of amending that document, with its requirement of ratification by three-fourths of the states.[64] Because it is so difficult for the people to amend the federal charter, living constitution theory empowers judges to update the Federal Constitution to reflect evolving values and circumstances.[65] But none of this holds true when it comes to the Ohio Constitution. Because the Ohio Constitution is relatively easy for the people to amend, there is no good reason for judges to do that work for them.[66] Whatever one thinks of living constitutionalism at the federal level, there is little justification for it in Ohio.

Finally, the Ohio Constitution itself presupposes that it will be altered by the people, rather than by judicial decisions. In addition to providing achievable standards for the submittal and adoption of constitutional amendments, the Constitution requires that every 20 years, the question "Shall there be a convention to revise, alter or amend the constitution[?]," be submitted to the voters.[67] Thus, the document itself presumes that the people must act to change its meaning—a supposition that is difficult to reconcile with the notion that its meaning changes over time.

III. Uncovering Original Public Meeting: Tools of Interpretation

If original public meaning is the appropriate inquiry, the next question is how to arrive at that meaning. This section is intended to be a guide for judges, practitioners, and others who are trying to ascertain the meaning of provisions of the Ohio Constitution. My goal here is to identify some of the available tools and to highlight some analytical issues that need to be confronted.[68]

A. *The First Consideration is Always the Constitutional Text*

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gathering efforts. So really all it takes to put a constitutional amendment on the ballot is a special interest group or wealthy donor with the means and willingness to fund the acquisition of the requisite signatures. Of course, this also presents the concern that only certain types of amendments—those that can attract the support of wealthy donors or well-financed groups—are likely to make it on the ballot.

[64] U.S. CONST. art. V.

[65] *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 115 (2010); *see, e.g.,* Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) ("[T]he words of the [Eighth] Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[66] *See* Hoffman v. Knollman, 135 Ohio St. 170, 181, 20 N.E.2d 221 (1939) ("The Constitution is the supreme law; it is the expression of the will of the people, subject to amendment only by the people, and neither the Legislature by legislative enactment, nor the courts by judicial interpretation, can repeal or modify such expression or destroy the plain language and meaning of the Constitution, otherwise there would be no purpose in having a Constitution."); *see also* Walker v. Cincinnati, 21 Ohio St. 14, 23 (1871) ("it is very clear that we have no power to amend the constitution, under the color of construction, by interpolating provisions not suggested by the language of any part of it.").

[67] OHIO CONST. art. XVI, § 3.

[68] For a more comprehensive treatment of Originalist methodology generally, see Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017). I largely agree with Solum's suggestions. My purpose here is to focus on particular aspects of Originalist methodology as it applies to the Ohio Constitution.

The Ohio Supreme Court has long held that the text is paramount in its interpretation of the Ohio Constitution.[69] Where the text supplies a determinative meaning, the Court has cautioned against relying on materials outside of the constitutional text to alter that meaning.[70]

As I explained in the previous section, Ohio applies an original public meaning approach to the construction of the Ohio Constitution.[71] This requires that in construing the constitutional text, the words of a constitutional provision must be understood as they would have been understood at the time of their adoption.[72] Thus, in one of the first cases involving construction of the 1851 Constitution, the Court explained that to give effect to all the Constitution's provisions "we have only to suppose that the convention used language with reference to its popular and received significance; and applied it as it had been practically applied for a long series of years."[73]

A more recent case provides a cogent summary of the text-first method of constitutional interpretation that controls in Ohio:

> The Ohio Constitution's language controls as written unless it is changed by the people themselves through the amendment procedures established by Article XVI. The Ohio Constitution is the paramount law of this state, and we recognize that its framers chose its language carefully and deliberately, employed words in their natural sense, and intended what the words said. . . Therefore, in construing the Ohio Constitution, our duty is to determine and give effect to the meaning expressed in its plain language. . . In doing that, we give undefined words in the Constitution their usual, normal, or customary meaning.[74]

The original public meaning of the text trumps all other considerations. But text, by itself, cannot always supply a determinative meaning. This might be because the meaning of words or phrases might have changed over time through a process of linguistic drift.[75] Or it might be because for certain provisions, the public meaning of the text incorporates a legal meaning.[76] Thus,

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69 *See, e.g.*, Hill v. Higdon, 5 Ohio St. 243, 247–48 (1855) (looking first to common meaning of constitutional text, in construing Ohio Constitutional provision); Newburgh Hts. v. State, 168 Ohio St.3d 513, 2022-Ohio-1642, 200 N.E.3d 189, ¶ 17 ("[I]n construing the Ohio Constitution, our duty is to determine and give effect to the meaning expressed in its plain language.").

70 *See, e.g.*, State v. Rose, 89 Ohio St. 383, 387, 106 N.E. 50 (1914) ("Where there is no doubt, no ambiguity, no uncertainty as to the meaning of the language employed by the constitution-makers, there is clearly neither right nor authority for the court to assume to interpret that which needs no interpretation and to construe that which needs no construction."); State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 9, 112 N.E. 138 (1915) ("[I]f the language [of the Ohio Constitution] is sufficiently plain to disclose that intent and purpose, then such construction must obtain as will give full force and effect thereto, even though it be attended with some difficulties.").

71 *See, e.g.*, State ex rel. Wirsch v. Spellmire, 67 Ohio St. 77, 83, 65 N.E. 619 (1902) ("The constitution . . . was framed by the constitutional convention, and adopted by a vote of the electors of the state; and the language is not to be understood as strained, technical, or mysterious, but so plain that any ordinary man may understand and comprehend it.").

72 Pfeifer v. Graves, 88 Ohio St. 473, 487, 104 N.E. 529 (1913) ("It is our duty to interpret the language of the constitution according to its fair and reasonable import and the common understanding of the people who framed and adopted it.").

73 Hill, 5 Ohio St. at 247–48.

74 Newburgh Hts., 168 Ohio St.3d 513, 2022-Ohio-1642, 200 N.E.3d 189, at ¶ 17.

75 Consider, for example, the directive of OHIO CONST. art. I, § 12, that "no conviction shall work corruption of blood."

76 Consider, for example, the guarantee that "[a]ll persons shall be bailable by sufficient sureties," OHIO CONST. art. I, § 9, or the command that "[n]o hereditary emoluments, honors or privileges, shall ever be granted or conferred by this state," art. I, § 17.

the Court has explained that in construing the Ohio Constitution, it looks "first to the text of the document as understood in light of our history and traditions."[77] In other words, history and tradition can help to put meat on the bones of underdeterminative constitutional text. There are a number of interpretive tools available to help discern how the original public meaning of the text. The subsections that follow address some of these. For purposes of this discussion, it is helpful to divide Ohio constitutional provisions into two types: (1) provisions of the 1851 Constitution and (2) later enacted constitutional amendments.[78]

B. *Interpreting the Original 1851 Constitution*

Many provisions of the Ohio Constitution remain unaltered (or have only been minimally changed) since the constitution's adoption in 1851. And some of these provisions date back to the original 1802 Constitution. These provisions tend to be written in the type of broad language that we associate with constitutions.[79] In the sections that follow, I will highlight some resources that are available in interpreting provisions of the 1851 Constitution.

1. The Ohio Constitution of 1802 and Ohio's Constitutional Proceedings

One obvious starting point in interpreting the 1851 Constitution is a consideration of Ohio's previous constitution, the Constitution of 1802. Ohio's first constitution was much shorter than its second—some 3,800 words compared with some 6,700 before amendments.[80] And it was written almost a half century prior in a territory still considered the frontier. Yet many of the provisions in Ohio's bill of rights are directly traceable to the Constitution of 1802.

The Ohio Supreme Court has generally assumed that a provision that was carried over from the 1802 constitution has the same meaning as was ascribed to it under the earlier constitution. For example, the jury trial guarantee has been understood to have the meaning it did at the time of the adoption of the 1802 constitution.[81] In another case, the court explained: "We adopt a familiar and salutary rule of interpretation when we hold that these words [from the 1802 constitution] were adopted into the present constitution with the same meaning they were known to have in that from which they were derived."[82]

It is conceivable that a provision carried over from the 1802 Constitution may have come to have a distinctive public meaning by 1851. If so, because we are aiming at the public meaning in 1851, evidence from closer to the adoption of the 1851 Constitution would be more persuasive than evidence dating back to 1802. But absent any indication that the 1851 ratifying public came

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[77] State v. Smith, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, ¶ 29.

[78] By dividing the provisions in this manner, I do not mean to suggest that the interpretive tools set forth in one section are necessarily exclusive to that section. There is a good deal of overlap and many of the interpretive tools outlined can be applied to both provisions that date back to the original 1851 constitution and also to subsequent amendments.

[79] *See* 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 401 (1995 ed.) (1888) (placing the Ohio Constitution of 1802 at the end of the "first period" of American state constitutional development and noting that "each period [was] marked by an increase in the length and minuteness" of the constitutions).

[80] MICHAEL F. CURTIN & JOE HALLETT, THE OHIO POLITICS ALMANAC __ (3d ed., 2015).

[81] *See* Mason v. State, 58 Ohio St. 30, 37, 50 N.E. 6 (1898) ("Our constitution declares that the right of trial by jury shall be inviolate. This means the right as it existed in this state at the adoption of the constitution of 1802."); *see also* Decker v. State, 113 Ohio St. 512, 150 N.E. 74 (1925) (concluding that an accused's "right to appear and defend in person and with counsel" in Article I, Section 10 of the 1851 Constitution has the same meaning as a similarly worded guarantee in the 1802 Constitution).

[82] State ex rel. Funck v. McCarty, 52 Ohio St. 363, 375, 39 N.E. 1041 (1895).

to have a novel understanding of such a provision, it is a fair default presumption that the provision had the same meaning in 1851 as it did in 1802.[83] Because a constitutional provision's meaning is fixed at the time of the provision's enactment,[84] we can presume—absent evidence to the contrary—that a provision in the 1851 Constitution that was directly carried over from the 1802 Constitution has the same meaning as the provision had in 1802.[85]

It is also the case that even when provisions are not textually similar, a comparison of the 1802 and 1851 constitutions may be useful. The 1851 Constitution was adopted in large part to address perceived inadequacies of the earlier constitution.[86] So an understanding of the earlier constitution will sometimes provide insight into the problems that voters sought to rectify with the enactment of the new constitution.[87] For example, the 1851 Constitution replaced a provision in the 1802 Constitution prohibiting discrimination against the poor in education[88] with a requirement that the legislature establish a "thorough and efficient system of common schools."[89] A comparison between the two might be useful to one interpreting the current provision.[90]

The historical records of the 1802 and 1851 constitutional conventions may also shed light on the contemporary understanding of a constitutional provision. This Court stated in an early case under the Constitution of 1851 that "although the debates of the convention can never overthrow a plain, unambiguous provision of the constitution, . . . they certainly may fortify us *in following the natural import of its language*, and legitimately aid in removing our doubts."[91] Though there is no record of debates from the 1802 Convention, a journal of proceedings is available online.[92] The debates and proceedings of the 1851 Convention are available online.[93] While there is little recorded debate on many of the provisions that were adopted at the 1851

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[83] For an in-depth treatment of the issues surrounding the use of a jurisdiction's antecedent constitutions in constitutional interpretation, see Jason Mazzone & Cem Tecimer, Interconstitutionalism, 132 YALE L.J. 326 (2022).
[84] See discussion of fixation thesis, *infra*.
[85] The Georgia Supreme Court has applied this principle in the interpretation of its constitution. *See* Elliott v. State, 305 Ga. 179, 183, 824 S.E.2d 265 (2019) ("Because the meaning of a previous provision that has been readopted in a new constitution is generally the most important legal context for the meaning of that new provision, and because we accord each of those previous provisions their own original public meanings, we generally presume that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary.").
[86] *See* STEINGLASS & SCARSELLI, *supra* note __, at 24 ("The Constitution of 1802 contained a number of major weaknesses that ultimately led to its complete revision in 1851. The most notable flaws concerned the supremacy of the General Assembly, the inefficiency of the judicial system, and the difficulty of amending the constitution.").
[87] *See, e.g.*, State ex rel. Atty. Gen. v. Cincinnati, 20 Ohio St. 18, 35 (1870) (construing Article XIII, Sections 1, 2, and 6, and describing the situation under the 1802 Constitution where the general assembly by special legislation created corporations).
[88] OHIO CONST. of 1802 art. VIII, § 25.
[89] OHIO CONST. art VI, § 2.
[90] *See* State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 28.
[91] Cass v. Dillon, 2 Ohio St. 607, 621 (1853) (emphasis added). *See also* Steele, Hopkins & Meredith Co. v. Miller, 92 Ohio St. 115, 122, 110 N.E. 648 (1915) ("The debates of a convention cannot have conclusive effect in the construction of the provisions of a Constitution. Yet they are not without importance where they tend to support a construction indicated by the language of an amendment; and they may show what was the mischief which was intended to be prevented under the new order by the adoption of the amendment.").
[92] JOURNAL OF THE CONVENTION, OF THE TERRITORY OF THE UNITED STATES NORTH-WEST OF THE OHIO, BEGUN AND HELD AT CHILLICOTHE (1802). [add permalink]
[93] REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO (1851). [add permalink]

convention—most of the drafting having been done in committees—these documents nonetheless shed light on the choices that particular language embodied and how the words that were used were understood at the time.[94] And the Supreme Court can and does make reference to these debates.[95]

2. *Other State Constitutions*

The United States Constitution "was not an important influence on the Ohio Constitution [of 1802]."[96] Instead, the Framers of Ohio's first constitution borrowed heavily from the constitutions of Tennessee (1796), Pennsylvania (1790), and Kentucky (1799), respectively.[97] They also borrowed from the Northwest Ordinance (1787), the organic law which had governed territorial Ohio.[98] Practitioners and judges seeking to ascertain a provision's original meaning may benefit from tracing provisions of the Ohio Constitution of 1851 to that of 1802 and ultimately back to the other state constitutions and organic laws from which they were derived.[99]

For example, in an early case interpreting a provision of the 1851 Constitution, the Ohio Supreme Court first performed a textual analysis of the relevant constitutional provision.[100] But the Court also explained that its textual reading was supported by the provision's history. Noting that the relevant provision[101] was "an almost literal copy" of a provision of the New York Constitution, the Court explained "[i]t cannot be supposed that those who borrowed this provision from the New York constitution, were ignorant of the objects and purposes for which it was there adopted; and it is but fair to presume that it was intended to effect the same purposes and objects here."[102]

But of course, the relevant inquiry is not what the provision meant at the time it was first promulgated in its original source, but what Ohioans would have understood it to mean at the time of its incorporation into the Ohio Constitution. Thus, tracing a provision back to its origins is only helpful insofar as there is evidence to demonstrate that voters who enacted the constitutional

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[94] Whittington, *The New Originalism*, *supra* note __, at 610 (noting that drafting history of Federal Constitution "may provide important clues as to how the text was understood at the time and the meaningful choices that particular textual language embodied").

[95] *See, e.g.*, Decker v. State, 113 Ohio St. 512, 518–23, 150 N.E. 74 (1925).

[96] STEINGLASS & SCARSELLI, *supra* note __, at 23.

[97] BARNHART, *supra* note __, at 158.

[98] 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 386 (1971).

[99] *See, e.g.*, Toledo City School Dist. Bd. Of Edn. v. State Bd. of Edn., 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 19. In fact, Chief Judge Huntington did exactly this in construing the right to a jury trial under the Northwest Ordinance in *M'Fadden*. *See* POLLACK, *supra* note __, at 77 ("For the purpose of ascertaining what was the right of trial by jury when our constitution was framed, I shall advert to the second article of compact, in the ordinance of congress, for the government of the territory of the United States, northwest of the river Ohio, passed the 13th of July, 1787.").

[100] Hill, 5 Ohio St. at 247–48

[101] OHIO CONST. art XIII, § 6 ("The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.").

[102] Hill at 248–49. For a later case, see State ex rel. Durbin v. Smith, 102 Ohio St. 591, 599, 133 N.E. 457 (1921) ("we attach great importance to the cases cited, especially to that of *Kadderly v. Portland*, supra, decided in 1903, by the Supreme Court of Oregon, for the reason that the report of debates of the Ohio constitutional convention shows clearly that the Ohio referendum provision was copied from the Oregon Constitution, and the debates of the Ohio convention disclose that the decision of the highest court of Oregon upon the initiative and referendum was fully considered by the Ohio constitutional convention").

provision would have understood the provision in the same way its historical antecedents were understood.

There are excellent resources on the historical origins of constitutional provisions. In 1906, Congress commissioned Francis Newton Thorpe to compile and edit a collection of all state constitutions and other organic laws up to that time.[103] The resultant seven-volume work is available online for free on multiple websites and provides a great source for comparing state constitutional provisions.[104] This can enable practitioners and judges to trace the genealogy of a given constitutional provision in the decades prior to its adoption.[105] Tracing the historical origin of a particular provision can be helpful in clarifying how a provision was understood at the time of its incorporation into the Ohio Constitution.[106] And it may also yield prior judicial opinions from other states construing the provisions which influenced the understanding of these provisions at the time of their adoption in Ohio.[107]

One caveat: for provisions traceable to other state constitutions or to the Federal Constitution, it is generally reasonable to assume that the Ohio public would have understood the provision to mean the same thing as the other state or Federal Constitution. This is because that was the meaning available to the Ohio public at the time of the provision's adoption. But of course, this doesn't mean that our reading should track the United States Supreme Court's or another state supreme court's *current* reading of the provision. Rather it means only that the relevant state or federal caselaw up to the provision's inclusion in the Ohio Constitution could have informed the public's understanding of the provision.[108]

3. Other Historical Materials

It's long been the case that "[t]he most neglected field in American history is the field of state history,—the constitutional and political history of the individual states."[109] Despite this, it's also true that "[t]oday's lawyers and judges, when analyzing historical questions, have more tools than ever before."[110] There are several works—both historical sources and more recent academic scholarship—of use in discerning the original public meaning of the Ohio Constitution. Former Ohio Chief Justice Carrington T. Marshall's *A History of the Courts and Lawyers of Ohio* and Dean Steven H. Steinglass and Gino J. Scarselli's *The Ohio State Constitution* provide a broad overview of the development of Ohio's Constitution and discuss some of the forces which

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[103] THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS (Francis Newton Thorpe ed., 1909).
[104] *See, e.g.*, Online Library of Liberty, Hathitrust, Google Books, UW Law Digital Commons [can add permalinks later]
[105] While this method of textual comparison could be unwieldly for a state with a newer constitution—having to sort through all 144 total state constitutions—it is perfectly feasible in Ohio. John Dinan, State Constitutional Politics: Governing by Amendment in the American States 23 (2018) (counting 104 state constitutions). There were only twenty-five different state constitutions that preceded Ohio's first constitution, and twenty-nine others adopted between 1802 and 1851. *Id.*
[106] *See, e.g.*, Toledo City School Dist. Bd. of Edn., 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, at ¶ 33.
[107] *See, e.g.*, Raudabaugh v. State, 96 Ohio St. 513, 516, 118 N.E. 102 (1917) ("[I]nasmuch as this state adopted the language of [other states'] earlier Constitutions it may be presumed that the constitutional convention at the time knew of the construction given them by their respective courts.").
[108] *See* 16 Am.Jur.2d, Constitutional Law, § 85 (2024).
[109] J. Franklin Jameson, *An Introduction to the Study of the Constitutional and Political History of the States*, 4 JOHNS HOPKINS U. STUDIES IN HIST. & POL. SCI. 5, 6 (1886).
[110] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 401 (2011).

influenced the adoption of certain provisions. Both have both been cited by the Ohio Supreme Court.[111] But these are by no means the only resources.[112]

Then-future Ohio Governor and United States Supreme Court Chief Justice Salmon P. Chase contributed highly influential *The Statutes of Ohio and of the Northwestern Territory, Adopted Or Enacted from 1788 to 1833 Inclusive: Together with the Ordinance of 1787; the Constitutions of Ohio and of the United States, and Various Public Instruments and Acts of Congress* (1833), which has been cited many times by the Ohio Supreme Court.[113] Chase's compilation of earlier Ohio and Northwestern territory laws may be of particular benefit when a constitutional provision has codified a pre-existing right because it can provide evidence of the contemporary understanding of the legislature's authority to regulate the exercise of that right.[114]

In addition, a researcher might want to consider subject-matter specific scholarship for useful background about particular constitutional provisions. For example, the mandate that the legislature establish a "thorough and efficient system of common schools" in Article VI, Sec. 2, was adopted in response to the common-school movement of the mid-1800s.[115] Thus a study of the literature and history of the movement would likely be of use in understanding the public meaning of "a thorough and efficient system of common schools" at the time of the provision's adoption in 1851.

4. Corpus Linguistics

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[111] *See, e.g.*, State ex rel. McCord v. Delaware Cty. Bd. of Elections, 106 Ohio St.3d 346, 2005-Ohio-4758, 835 N.E.2d 336, ¶ 33 (per curiam) (citing Steinglass & Scarselli); In re T.R., 52 Ohio St.3d 6, 14, 556 N.E.2d 439 (1990) (citing Marshall).

[112] There was a spate of constitutional scholarship surrounding Ohio's bicentennial, which resulted in the two-volume *The History of Ohio Law* (Michael Les Benedict & John F. Winkler eds., 2004) as well as the Cleveland State Law Review's 2004 symposium, "The Ohio Constitution - Then and Now," and resultant issue—Volume 51, Issue 3. [permalink] Additionally, the *Ohio History Journal* was established in 1887 and is still published biannually. The Ohio Historical Society provides a "free and fully searchable online archive" of issues spanning from 1887 through 2004, with issues from 2007 to the present available online through Kent State University. This journal contains many valuable historical resources.

In terms of historical sources, there are older annotated guides to the Ohio Constitution, including A. F. Perry & J. R. Swan's *Ohio Citizen—Summary of the Constitution and Statutes of the State of Ohio: Reduced to Questions and Answers for the Use of Schools and Families* (1844), George B. Okey and John H. Morton's *The Constitutions of Ohio of 1802 and 1851, with Notes of the Decisions Construing them, and References to the Constitutional Debates* (1873), Isaac Franklin Patterson's *The Constitutions of Ohio, Amendments, and Proposed Amendments* (1912), and William Herbert Page's *The Constitutions of the United States and of the State of Ohio, 1913: Thoroughly Annotated and Indexed* (1913).

[113] [permalink here]

[114] See, e.g., State v. Weber, 163 Ohio St.3d 125, 2020-Ohio-6832, 168 N.E.3d 468, ¶ 107 (DeWine, J. concurring) (citing to Chase's compilation as evidence that "colonial Americans understood intoxication could be grounds for the temporary suspension of one's ability to exercise a protected right").

There are also lists and anthologies of sources which are helpful to establishing historical context for Ohio's constitutional provisions. Chief Justice Marshall's work contains perhaps the most exhaustive bibliography of historical sources on Ohio law. William H. Vodrey and John F. Winkler have also contributed helpful lists of historical legal sources. See William H. Vodrey, Records and Sources of Ohio Law from 1787-1850, 17 Clev. St. L. Rev. 583 (1968); John F. Winkler, The Legal Literature of Ohio, in 2 THE HISTORY OF OHIO LAW 501, 506–07 (Michael Les Benedict & John F. Winkler eds., 2004). Each of these can be mined for sources that are frequently found online.

[115] *See* Ohio Cong. of Parents & Teachers, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, at ¶ 28.

One might also employ tools of corpus linguistics in ascertaining the original public meaning of a constitutional provision. By corpus linguistics, I mean the use of large searchable linguistic data sets of contemporary materials to ascertain the ordinary meaning of a word or phrase at the time of the adoption of a constitutional provision.[116] For example, one might utilize the Corpus of Historical American English which offers over 16 million words of text from books and magazines for each of the decades of the 1850s and the 1860s.[117] To date, the Ohio Supreme Court has not explicitly employed corpus linguistics analysis in any of its opinions, but as the field continues to develop, and as practitioners begin to use corpus linguistics in their briefing, one can easily imagine that it might do so in the future.

C. *Voter Approved Constitutional Amendments*

The ease of amendment of the Ohio Constitution has resulted in another key difference between our state charter and the federal charter: the Ohio Constitution is much more specific. The Federal Constitution—particularly in its rights guarantees—is frequently written with open-textured language.[118] Think of phrases like "cruel and unusual punishment"[119] or "unreasonable searches and seizures."[120] The Ohio Constitution contains some language of this sort, particularly in provisions that date back to 1851 and earlier.[121] But, by and large, the amendments that have been adopted since 1851 tend to be fairly specific.[122]

One can fairly criticize constitutional provisions that read like statutes. As Judge Sutton notes, "Bloated constitutions create the long-term concern that if you try to constitutionalize everything, you run the risk of constitutionalizing nothing."[123] But from an interpretive standpoint, the news isn't all bad: because statutes tend to be more specific and less open-textured, it is generally a lot easier to arrive at an agreed upon meaning of a statutory provision than a constitutional provision. And so, to the extent modern Ohio constitutional provisions are written like statutes, the interpretive task is less demanding.

The argument for a textual focus in determining original public meaning has particular force when considering voter-enacted constitutional amendments. Critics of the purposivist[124] approach to statutory construction often key in on the difficulty of ascertaining the objectives of

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[116] *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018).
[117] Available at https://www.english-corpora.org/coha/.
[118] "The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited." MacDonald v. Chicago, 561 U.S. 742, 854–855, 130 S.Ct. 3020, 177 L.Ed.2d 894 (Thomas, J., concurring).
[119] U.S. CONST. amend. VIII.
[120] U.S. CONST. amend. IV.
[121] *See, e.g.*, OHIO CONST. art. I, § 10, 14.
[122] Consider, for example, the recently enacted crime victims' rights amendment to the Ohio Constitution, art. I, § 10a. Unlike some of the more vaguely worded guarantees that apply to criminal defendants in the Ohio and federal Constitutions, the amendment is very specific. For example, a victim has a right "to be heard in any public proceeding, involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right to of the victim is implicated." Or consider Article XIV, Section 1, which creates an "Ohio Livestock Care Standards Board" to "establish standards governing the care and well-being of livestock and poultry," and sets forth the specific criteria for appointment of each member of the board.
[123] JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 358 (2021).
[124] Purposivism is "[t]he doctrine that a drafter's 'purposes,' as perceived by the interpreter, are more important than the words that the drafter has used," so that "a judge interpreter should seek an answer not in the words of the [law's] text but in its social, economic, and political objectives." SCALIA & GARNER, *supra* note __, at 438.

legislative assemblies comprised of numerous individual members.[125] But if it is hard to ascribe a purpose to a General Assembly comprised of 99 Representatives and 33 Senators in Ohio, consider how much more difficult is to ascribe a common objective to a million plus Ohioans who voted for a constitutional amendment. The only reasonable way to understand a constitutional amendment is by looking to the meaning that would have been made available to a voter through the text of the amendment.

Thus, the interpretation of Ohio constitutional amendments should always start with the constitutional text, and in most cases it will end there. But in *Knab*, the Ohio Supreme Court also stated that where the text is unclear, it is appropriate to consider "the history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide to assist the court in its analysis."[126]

In *Knab*, the question was whether a municipal corporation that expended resources responding to a false report of a crime constituted a "person" under Article I, Section 10a of the Ohio Constitution (colloquially referred to as "Marsy's Law"), and thus was entitled to receive restitution. The court looked at a variety of sources to determine whether an Ohio voter who voted for Marsy's Law would have understood its reference to "person" to include a corporation.[127] Significantly, the Court employed a largely textual analysis. It first looked to the dictionary definition of a person and the legal definition of a municipal corporation under Ohio law.[128] Thus, it concluded, "based on the common and ordinary usage of the word 'person' and the context within which that term is used in Marsy's Law, that the voters did not intend for a municipal corporation to qualify as a victim under that section."[129]

The court could have stopped there, but it went on to explain that "if any doubt remains about the voters' intent in enacting Marsy's Law, a review of the context surrounding its proposal and enactment resolves that doubt."[130] Here, the Court cited several extratextual sources to support the notion that the amendment was only intended to protect natural persons.[131]

Relying on sources beyond the language of the amendment itself to ascertain how a voter would have understood an amendment is a risky proposition—it's almost impossible for a later court to know what would have influenced a voter's understanding of a ballot proposition, and there will always be a temptation to cherry-pick sources that support the court's preferred reading.

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[125] *See id.* at 392 (describing collective intent in the context of legislation as "pure fiction because dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting on—or perhaps no views at all because they are wholly unaware of the minutiae").

[126] 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, at ¶ 22. One might read the sentence this sentence as endorsing purposivism in statutory construction. But it is better understood as simply reflecting the idea that a textual reading necessarily considers a statute's purpose through a close reading of the text. As Scalia and Garner explain, "the textualist regularly takes purpose into account, but in its concrete manifestations as deducted from a close reading of text." SCALIA & GARNER, *supra* note __, at 20. One could call these concrete manifestations the 'objective purpose' of the text—the purpose that a reasonable, informed reader of the text would take it to have.

[127] *Knab* at ¶ 26.

[128] *Id.* at ¶ 24–25.

[129] *Id.* at ¶ 29.

[130] *Id.* at ¶ 30.

[131] *Id.*

But because there may sometimes be reasons to look at other materials to understand the constitutional text, I will comment on a few possibilities.

1. Historical Context and Purpose

In *Knab*, the court said that where the text is ambiguous, it is appropriate to consider "the purpose of an amendment and the history of its adoption."[132] There is good reason to be careful with this statement. As discussed previously, many of the more recent amendments to the Ohio Constitution are written in precise language that resembles legislation, so there should be little need to look beyond the language itself. The purpose of a constitutional amendment is demonstrated most directly by the language that the people actually voted upon. So it will be the rare case in which a judge finds that a provision's language is ambiguous and inquiry into purpose is required.

But there are exceptions. Each amendment to the Ohio Constitution was crafted to deal with a specific problem—or set of problems—and these problems are often specific to the time in which the amendment was enacted. A voter who enacted such a constitutional amendment would likely have been aware of the evil that the constitutional provision was intended to remedy. Sometimes, then, an understanding of historical context will be useful in the textual analysis of a provision.

A good example is the 34 amendments that were adopted following the 1912 constitutional convention.[133] These amendments, which reflected Progressive Era concerns, were aimed at a particular set of problems. An understanding of the concerns that motivated the amendments is often helpful for a full understanding of their text.[134] For example, Article II, Section 34 states that "[l]aws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power." Read literally, and devoid of context, the "no other provision shall impair or limit this power" provision could be read to swallow up a host of constitutional protections. Under a broad reading, the legislature could pass a law—say, one that mandated pre-work prayer—and as long as the law was ostensibly for the purpose of promoting worker welfare it would trump the Ohio Constitution's religious freedom and conscience provisions.[135] Similarly, notwithstanding the Ohio Constitution's jury trial guarantee, the state legislature "could abolish the right to a jury trial in cases involving a dispute over an employment contract on the notion that an administrative dispute-resolution system would be better for workers."[136]

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[132] *Id.* at ¶ 22.

[133] The records of the 1912 Constitutional Convention are also available and may be of assistance in the interpretive process. *See* PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO (1912) [add permalink]. As one commentator has explained, the understanding of the amendments held by the delegates is important evidence of public meaning both because the delegates were representative of the general public and because the delegates communicated their views widely to the public. Timothy J. Lanzendorfer, *Originalism at Home: The Original Understanding of Ohio's Home Rule Amendment*, 73 CASE W. RES. L. REV. 1, 10–11 (2022).

[134] *See, e.g.*, Cleveland v. State, 157 Ohio St. 3d 330, 2019-Ohio-3820, 136 N.E.3d 466, ¶ 65–68 (DeWine, J., concurring in judgment only).

[135] *Id.* at ¶ 48 (DeWine, J., concurring in judgment only), citing OHIO CONST. art. I, § 7.

[136] *Id.* at ¶ 49 (DeWine, J., concurring in judgment only) , citing OHIO CONST. art. I, § 5.

But an understanding of historical context and the concerns that motivated the amendments' passage make clear that a voter in 1912 would not have understood the amendment to sweep nearly so broadly. The reason the drafters of section 34 felt it necessary to specify in the constitution that the legislature could pass minimum wage and other worker protection laws was because of *Lochner*-era[137] decisions that had concluded, on freedom of contract and substantive due process grounds, that the legislature could not regulate workers' hours and wages.[138] In this context it becomes clear that that a voter would have understood Section 34's statement that no other constitutional provision could impair the legislature's authority to pass laws providing for "the comfort, health, safety and general welfare of all employes" to refer to legislation similar in type to the first two enumerated items—legislation "regulating hours of labor and establishing a minimum wage."[139]

2. Extratextual Materials That Shed Light on Voter Understanding

At times the Court has looked at materials beyond the ballot language itself to help ascertain how a voter would have understood the language of a ballot amendment. In *Knab*, for example, the court cited to the ballot language for the amendment as well as a website created in support of the national victim rights movement that backed the amendment.[140]

There is an argument that can be made for considering other information available to voters at the time of a provision's adoption. After all, such information could impact a voter's understanding of a provision. And it will often be the case that there is a wealth of materials available about a proposed amendment and the campaign that led to its enactment. Indeed, because of the proximity in time, the variety and depth of original source materials available will typically be much greater for a judge interpreting the Ohio Constitution than for a judge interpreting an original provision of the United States Constitution.[141] But this wealth of information also creates considerable dangers. My goal in the paragraphs that follow is to discuss some of the most common types of non-textual materials that can be used to help understand how a voter would have understood a ballot proposal, and also to provide some appropriate cautions.

a. Ballot Language, the Official Explanation, and Arguments

Under Ohio law, a ballot board[142] prepares "ballot language" for constitutional amendments.[143] The ballot board also prepares an official "explanation" of the proposal to be voted on, "which may include its purposes and effects."[144] The board is also tasked with preparing arguments for and against the proposed amendment.[145] Any proposed amendment, the ballot language, the official explanations and the arguments are to be published for three consecutive weeks in a paper of general circulation in each county in the state. The Ohio Supreme Court has

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[137] 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).
[138] *Cleveland* at ¶ 64–74 (DeWine, J., concurring in judgment only); *see also* STEINGLASS & SCARSELLI, *supra* note __, at 50–51.
[139] *Id.*; *See also* Lima v. State, 122 Ohio St. 3d 155, 2009-Ohio-2597, 909 N.E.2d 616, ¶ 29 (Lanzinger J., dissenting).
[140] Knab, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, at ¶ 12, 30.
[141] G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 196 (1998).
[142] The ballot board consists of the Secretary of State, and two Republicans and two Democrats selected by the leaders of the General Assembly. R.C. 3505.061.
[143] OHIO CONST. art. XVI, § 1; art. II, § 1g.
[144] OHIO CONST. art. XVI, § 1; art. II, § 1g.
[145] OHIO CONST. art. XVI, § 1; art. II, § 1g.

jurisdiction over challenges to the ballot language, but it may not hold language to be "invalid unless it is such as to mislead, deceive or defraud the voters."[146]

As one might expect, the Court has frequently cited the ballot language when ascertaining the meaning of constitutional amendments. Indeed, beyond the text itself, one would be hard pressed to find better evidence of original public meaning than the actual language that appeared on voters' ballots. Nonetheless, there is the danger that the ballot language may not precisely reflect the terms of the actual amendment. The ballot board is composed of partisan actors who may have incentives to draft language that at least subtly favors one side or the other. And under the statutory standard of review, the Ohio Supreme Court polices only the outer boundaries of the board's discretion. Thus, the ballot language can inform the inquiry as to the original public meaning of an amendment's language, but it should not be used to alter its content.

Next in the hierarchy of materials that might have relevance in the interpretive process is the Ballot Board's official explanation of the proposed amendment.[147] While the ballot language is included on the ballot and therefore presumably read by the voter, the official explanation is made available primarily through the newspaper. Empirically, there is no evidence about how many voters actually read or rely upon the official explanation. One might guess that with declining newspaper circulation, the official explanation plays a lesser role today than it did in the past. But the official explanation is the product of a formal statutorily prescribed process.[148] At the very least, it provides some evidence of the contemporary understanding of a proposal.

In at least one case, the Ohio Supreme Court has found the official explanation to have some value in the interpretive process. In *State ex rel. Toledo v. Cooper*,[149] the Court premised its analysis largely on the text of the relevant constitutional provision. But it added, "if there was any doubt about the construction to be given to this whole section, it is clarified by the official explanation of the constitutional convention submitted to the people of the state when the section was adopted."[150]

There do not appear to be any cases where a court has looked to the arguments prepared by the ballot board in interpreting a constitutional provision. But one can certainly imagine that in an appropriate case the arguments could be of some assistance in ascertaining the original public meaning of a constitutional amendment.

b. Ballot Title

The Secretary of State is tasked with crafting a title for a proposed constitutional amendment that appears on the ballot.[151] The title "shall give a true and impartial statement of the measures in such language that the ballot title shall not be likely to create prejudice for or against the measure."[152] The committee promoting a ballot measure may propose a title to the Secretary of State, and the Secretary shall "give[] full consideration" to such a proposal.[153]

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[146] OHIO CONST. art. XVI, § 1; art. II, § 1g.
[147] *See* R.C. 3505.063.
[148] *See id.*
[149] 97 Ohio St. 86, 119 N.E. 253 (1917).
[150] *Id*. at 94. The court noted that the explanation "was printed and sent broadcast over the state." *Id.*
[151] R.C. 3519.21.
[152] *Id.*
[153] *Id.*

I am not aware of any case where the Ohio Supreme Court has used the ballot title as part of the interpretive process in construing a constitutional amendment. The title is not part of the amendment, so it should not be used to alter a textual meaning. But it was officially approved, and on the voter's ballot, so in an appropriate case, a litigant might present an argument that the ballot language is helpful in determining the original public meaning.

c. Campaign and other Contemporaneous Materials

More difficult questions arise when it comes to the consideration of other materials. Ballot initiatives are very often the subject of heated campaigns. There are television ads, literature pieces, campaign websites, newspaper articles, editorials and the like. Invariably, each side attempts to place its own spin on a proposal and convince citizens to vote its way.

One could argue that such materials are relevant to understanding how the public understood a proposal. After all, it's a pretty good bet that most voters primarily formed their impression of the proposal not from a proposal's legal language but from the public debate and campaign that surrounded the proposal.

Nonetheless, judges should be extremely reluctant to rely upon such materials. The sheer magnitude of such materials creates the danger that one will simply pick and choose items that support a preordained result. Moreover, judges lack the tools to assess how any one source actually influenced the public understanding of a proposal. How many people watched an ad, or read an editorial? Did it really have an impact? These are questions that judges are ill-equipped to answer.[154] Further, allowing the public debate to affect the judicial construction of a constitutional amendment creates perverse incentives. Supporters or opponents of a ballot measure could create materials with an eye to swaying a later judicial interpretation.

This does not mean that judges will never consider such materials. The Court in *Knab*—rightly or wrongly—found it helpful to look to the proponent's website in determining that the Marsy's Law amendment only covered natural persons.[155] And one can imagine that in a small minority of cases involving older provisions of the Ohio Constitution, resorting to such materials might be helpful in at least developing a broad understanding of the problems a ballot measure was meant to address. But judges should do so with great reluctance. Both the ease of amendment of the Ohio Constitution and the specificity with which modern ballot measures are written provide potent reasons to focus exclusively on the constitutional text in almost all cases.

IV. Interpreting Provisions that Parallel Provisions of the Federal Constitution

Earlier in this article, I made the claim that the Ohio Supreme Court has most often followed an original public meaning approach to the Ohio Constitution. That's mostly true, but as I noted, there is one significant exception. There is a wealth of caselaw in Ohio that says that a given provision of the Ohio Constitution has the same meaning as a parallel or roughly parallel provision of the Federal Constitution. Indeed, for most provisions with federal counterparts there is at least some authority that would suggest that the Ohio provision has the same meaning as its

[154] For similar cautions about the use of legislative history, see SCALIA, *supra* note __, at 35–36, ("Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility.").
[155] Knab, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, at ¶ 12, 30.

federal counterpart.[156] There are only a few provisions that the court has found to have a different meaning, most notably the right to bear arms,[157] the takings clause,[158] the prohibition against unreasonable searches and seizures,[159] and the guarantee of religious freedom.[160]

I won't reprise here the debate on lockstepping.[161] In my view the case against lockstepping is persuasive.[162] I treat it as a settled matter that state courts ought to independently interpret their state constitutions even when those constitutions contain provisions that parallel those in the Federal Constitution. To do otherwise is inconsistent with principles of federalism, potentially under-protective of individual rights, and inconsistent with the oath we take to our state constitutions.

But that still leaves an important interpretive question. How do we treat precedent where the Ohio Supreme Court has announced that a provision of the Ohio Constitution has the same meaning as its federal counterpart? Must a future court follow it based on principles of stare decisis, or should it give the constitutional provision independent meaning—attempting to discern the original public meaning of the provision in spite of prior "lockstepping" precedent?

I suggest a two-part answer. We should accord minimal stare decisis effect to unreasoned pronouncements of the Ohio Supreme Court that simply announce that a provision of the Ohio Constitution has the same meaning as its counterpart in the Federal Constitution. But we should not depart from prior precedent based simply on policy preferences. Instead, independently interpreting a provision of the Ohio Constitution requires doing the work of applying the original public meaning of that provision, as revealed by text and history.

A. *Unreasoned Pronouncements Announcing a Lockstep Interpretation of the Ohio Constitution are Entitled to Only Limited Stare Decisis Effect*

The most significant exception to originalism in our constitutional jurisprudence arises in situations where the Ohio Supreme Court has simply chosen to cede its interpretive authority by following in lockstep the United States Supreme Court's interpretations of so-called "parallel" or "analogous" provisions of the Federal and Ohio Constitutions. For example, the Ohio Constitution guarantees that: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."[163] Read in context, the Ohio provision's reference to the right to remedy in the "due course of law," seems very different than the Fourteenth Amendment's

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[156] *See, e.g.*, State v. Gustafson, 76 Ohio St.3d 425, 432, 668 N.E.2d 435 (1996) (state and federal constitutional protections against double jeopardy are "coextensive"); State v. Robinette, 80 Ohio St.3d 234, 245, 685 N.E.2d 762 (1997) (state and federal constitutional prohibitions against unreasonable searches and seizures are "coextensive"); Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 10 (state and federal constitutional protections of contracts are "coextensive").

[157] Arnold v. Cleveland, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993).

[158] Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

[159] State v. Farris, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985.

[160] Humphrey v. Lane, 89 Ohio St.3d 62, 728 N.E.2d 1039 (2000).

[161] Lockstepping refers to a state supreme court's "reflexive imitation of the federal courts' interpretation of the Federal Constitution" SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note __, at 174.

[162] Indeed, much of the commentary on state constitutional interpretation has focused on the treatment of state constitutional provisions that parallel provisions in the federal constitution.

[163] OHIO CONST. art. I, § 16.

prohibition on deprivation of life, liberty or property without "due process of law."[164] Nonetheless, the Ohio Supreme Court has announced that those provisions have the same meaning without ever analyzing the language or original understanding of the Ohio guarantee.[165]

The question that arises is whether we should give such pronouncements stare decisis effect. It has been said that "[t]he doctrine of stare decisis applies less rigidly in constitutional cases than it does in statutory cases because the correction of an erroneous constitutional decision by the legislature is well-nigh impossible."[166] And the Ohio Supreme Court has held that stare decisis "does not apply with the same force and effect when constitutional interpretation is at issue."[167]

It has been argued that the ease of amending state constitutions provides a stronger justification for stare decisis when it comes to state constitutional decisions than for stare decisis in the context of United States Supreme decisions construing the Federal Constitution.[168] But I don't find the argument conclusive for two reasons. First, as Justice Landau of the Oregon Supreme Court has explained "[i]f the ease of amendment is the relevant consideration, . . . the more important comparison is the relative difficulty of amending state constitutions in relation to legislative alteration of state statutes in response to state court statutory construction decisions."[169] Second, there is particular good reason to be reluctant to afford stare decisis effect to decisions in which the Ohio Supreme Court has adopted a lockstep reading of the Ohio Constitution without any independent analysis of the constitutional provision. After all, "[t]he precedential sway of a case is directly related to the care and reasoning reflected in the court's opinion."[170]

To the extent that stare decisis is a constitutional requirement, it comes from Article IV, Section 1 which vests the Ohio Supreme Court, and lower courts, with "the judicial power."[171] Identical language is found in the 1802 constitution.[172] There is a strong argument that at the time of its inclusion in the Ohio Constitution, the judicial power was understood to include at least a minimal recognition of the use of precedent.[173] And, assuming this is the case, a judge should

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[164] Former Oregon Supreme Court Justice Hans A. Linde has explained that "remedy by due course of law" provisions have origins that predate the Fifth Amendment and were generally understood to have very different meaning that the "due process" protection of the Fifth and Fourteenth Amendments to the United States Constitution. Hans A. Linde, *Without Due Process: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

[165] *See, e.g.*, Wilson v. Zanesville, 130 Ohio St. 286, 199 N.E. 187 (1935).

[166] GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 352 (2016)

[167] Rocky River v. State Emp. Relations Bd., 43 Ohio St.3d 1, 5, 539 N.E.2d 103 (1989); *see also* State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 37 (lead opinion) (stare decisis "is not controlling in cases presenting a constitutional question"); State ex rel. Ohioans for Secure and Fair Elections v. LaRose, 159 Ohio St.3d 568, 2020-Ohio-1459, 152 N.E.3d 267, ¶ 88 (Kennedy, J., concurring) ("stare decisis does not compel adherence to an incorrect interpretation of the Constitution").

[168] See, e.g., Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 274 (2001) (arguing that because "amending the state constitution is substantially easier" than correcting a federal constitutional decision "stare decisis should be applied with heightened rigor" to the Alabama Constitution).

[169] Jack Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 869 (2011).

[170] GARNER ET AL., *supra* note __, at 226.

[171] The original public meaning of the "judicial power" in the Ohio Constitution and the understanding of stare decisis incorporated therein, is one of many areas of Ohio constitutional law that could benefit from additional research.

[172] OHIO CONST. of 1802 art. III, § 1.

[173] See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U.L. REV. 803, 824–26 (2009) (arguing, based on historical evidence, that at the time of the adoption of the United States Constitution that judicial power would have been understood to incorporate a "minimal concept of precedent, which requires that some weight be given to a series of decisions."); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent and the Common Good*, 36 N.M.L. Rev. 419, 452 (2006) (concluding that at the time of the ratification of the United States Constitution the commonly understood meaning of "judicial power" included a

generally consider principles of stare decisis when deciding whether to overrule a prior interpretation of the Ohio Constitution.

But unreasoned pronouncements saying that a provision of the Ohio Constitution has the same meaning as the United States Supreme Court's interpretation of a provision of the Federal Constitution do not constitute an interpretation of the Ohio Constitution at all. At most, they are interpretations of the Federal Constitution, or perhaps more accurately a determination *not* to interpret the Ohio Constitution. Such pronouncements are inconsistent with the very notion of a written constitution and the idea that the judicial power vests in judges the authority and the duty to say what the law is.[174] They are also incompatible with the oath that we take to follow the Ohio Constitution.[175] When we say that the Ohio Constitution means whatever the United States Supreme Court says that the Federal Constitution means, we ignore our obligation to support the Ohio Constitution and we delegate away our duty to say what the law is.

I would adopt as a rule that, notwithstanding principles of stare decisis, the Ohio Supreme Court should reconsider prior pronouncements, made without any reasoned analysis, that provisions of the Ohio Constitution mean the exact same thing as differently worded provisions of the Federal Constitution.[176] The Court should not do so lightly. But in cases where a litigant has raised and preserved an argument under the Ohio Constitution, it is appropriate to revisit these unreasoned prior pronouncements.[177]

One might object that the rule I propose does not sufficiently protect potential reliance interests in prior holdings of the Court. But on close examination, such objections are overstated. To the extent that reliance interests exist, they arise from the holdings in particular cases, not from the generalized principle of interpretation that a particular provision of the Ohio Constitution has the same meaning as a provision of the Federal Constitution. In other words, a law enforcement agency might have a reliance interest in a determination that the Ohio Constitution allows officers to conduct *Terry*[178] stops.[179] But the agency doesn't have a reliance interest in the interpretive principle behind such a decision: that *Terry* stops are permissible under the Ohio Constitution because the Ohio Constitution means the same thing as the Federal Constitution, and the United States Supreme Court has said *Terry* stops are permissible. In other words, police are not relying

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conception of stare decisis that required judges to "give significant respect to prior analogous cases and . . . give significant reasons for overruling precedents"). It would seem a fairly good assumption that the ratifiers of Ohio's 1802 constitution had a similar understanding and that this understanding was shared by the public that adopted the 1851 constitution.

[174] TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors, 172 Ohio St.3d 225, 2022-Ohio-4677, 223 N.E.3d 371, ¶ 43, quoting Marbury v. Madison, 5 U.S. 137, 177, 2 L.Ed. 60 (1803).

[175] *See* OHIO CONST. art. XV, § 7; R.C. 3.23.

[176] *See* Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771, 782 (2021) ("Precedential effect [of lockstep-type opinions] is deserving only where the court gave fulsome analysis of why the provisions are coextensive.").

[177] The Ohio Supreme Court routinely rejects nominal but undeveloped state constitutional claims. *See, e.g.*, State v. Brinkman, 169 Ohio St.3d 127, 2022-Ohio-2550, 202 N.E.3d 651, ¶ 74; 170 Ohio St.3d 278, 2022-Ohio-3626, 211 N.E.3d 1174, ¶ 9, fn. 1; State v. Carter, __ Ohio St.3d __, 2024-Ohio-1247, __ N.E.3d __, ¶ 34. And the Court continues to prod litigants that it would have considered parallel state constitutional claims if they had been raised. *See, e.g.*, State v. Jordan, 166 Ohio St.3d 339, 2021-Ohio-3922, 185 N.E.3d 1051, ¶ 14; State v. Blanton, 171 Ohio St.3d 19, 2022-Ohio-3985, 215 N.E.3d 467, ¶ 45, fn. 1.

[178] 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[179] The Ohio Supreme Court has not directly considered this issue. *See* State v. Hairston, 156 Ohio St.3d 363, 2019-Ohio-1622, 126 N.E.3d 1132, ¶ 9, fn. 1 (in a case involving a *Terry* stop, declining to consider whether Article I, Section 14 of the Ohio Constitution provided different protections than the Fourth Amendment on the basis that the parties had not presented any arguments under the Ohio Constitution).

on the Ohio Constitution meaning the same thing as the Federal Constitution. They are relying on the outcome of that interpretation.

In my view, the Court should continue to consider reliance interests and other principles of stare decisis when it comes to overruling prior holdings of the court. But it need not do so when it makes the initial decision to independently interpret an Ohio constitutional provision rather than rely on a prior pronouncement that its meaning is the same as its federal counterpart. In other words, considerations of reliance interests properly come at the end of the interpretive process, not at the beginning. First, the Court should independently interpret the Ohio Constitution based upon the original public meaning of the provision at issue. Only when it arrives at a result that is different than its past precedent should it consider whether there are reliance interests that are sufficiently strong to compel adherence to that past precedent despite the fact that the original public meaning of the Ohio Constitution would suggest a different result.

My suspicion is that it will be a rare situation in which the Court determines that this is the case. This is because the cases in which the Ohio Supreme Court has adopted a lockstep reading of the Ohio Constitution are exclusively in the area of individual rights. In such cases, even if the Ohio Supreme Court abandons its prior interpretation, a citizen will still have the benefit of the United State Supreme Court's interpretation of the federal provision. This means that abandoning a lockstep reading will never give citizens fewer rights. Of course, one might point to other actors that have reliance interests in a lockstep interpretation. For example, law enforcement agencies could be said to have relied on the Court's interpretation of an Ohio constitutional protection as coextensive with a Fourth Amendment protection, or the legislature might be said to have relied upon a lockstep reading in determining that it could enact a particular piece of legislation. And non-government actors might have relied upon an understanding that the Ohio Constitution allowed the government to take certain measures in making their own decisions.[180] But as a general matter, one would think that a citizen's interest in obtaining the full extent of the liberties afforded by the Ohio Constitution outweighs the reliance interests of the government in suppressing those liberties, as well as the related interests of non-government actors that benefit thereby.[181]

B. *We Should Abandon Lockstep Interpretations when Text and History Demonstrate that a Different Interpretation is the Correct One*

Revisiting unreasoned lockstep interpretations of the Ohio Constitution makes sense. But it is not without its difficulties and dangers. There is little scholarly analysis of most provisions of the Ohio Constitution. A judge undertaking an originalist analysis of the Federal Constitution will generally have the benefit of numerous law review articles and other historical research. Not so for a judge who confronts a provision of the Ohio Constitution. In most cases, the judge will need to rely primarily on original source documents and prior Ohio Supreme Court caselaw.

An even greater concern is that a judge will use the opportunity simply to substitute his or her own policy preferences for the outcome dictated by adherence to United States Supreme Court

[180] Take for example, a developer who relied on an understanding that the Takings Clause of the Ohio Constitution meant the same thing as the Federal Constitution's Takings Clause in entering into an arrangement by which the government would acquire private property and then transfer that property to a developer for an economic development purpose. *See* Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

[181] Consider, for example, a case like *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Once one accepts the principle that the Equal Protection Clause of the Ohio Constitution prohibits desegregated schools, the reliance interests of governments and local communities in a segregated school system hardly seem comparable.

precedent. Justice Brennan's seminal article on New Federalism hinted at just such an approach.[182] Justice Brennan outlined a series of United States Supreme Court decisions which he considered under-protective of individual rights and suggested that state courts rely upon their state constitutions to provide enhanced protections.[183] He did not explicitly call on state judges to enact their policy preferences—and disavowed the notion that "ultimate constitutional truths invariably come prepacked in dissents, including [his] own"[184]—but the import of his article was that state courts needed to step in to fill the void left by an increasingly conservative United States Supreme Court.[185]

The Ohio Supreme Court has a decidedly mixed record when it comes to decisions in which the Court has chosen to revisit prior precedent holding that a provision of the Ohio Constitution has the same meaning as a similar provision of the Federal Constitution. In some cases, the Court has presented an at least somewhat reasoned analysis about the meaning of the Ohio constitutional provision at issue, explaining why it was appropriate to abandon its previous lockstep interpretation. But other cases are more in the order of judicial fiat. In those cases, the Court did not offer any meaningful analysis of the Ohio constitutional provision, but instead simply used the Ohio Constitution to constitutionalize its policy preferences.

An example of a case in which the Court engaged in a thoughtful constitutional analysis is *Arnold v. Cleveland*.[186] There the Court considered Article 1, Section 4 of the Ohio Constitution: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."

At the time *Arnold* was decided, the United States Supreme Court had not yet recognized that the Second Amendment guaranteed an individual right to bear arms[187] and the Second Amendment had not been declared applicable to the states.[188] In *Arnold*, the Ohio Supreme Court rejected the notion that the Ohio provision was coextensive with the federal guarantee and held that the provision protected an individual right to own firearms. It explained that "Section 4, Article I not only suggests a preference for a militia over a standing army, and the deterrence of governmental oppression, it adds a third protection and secures to every person a fundamental *individual* right to bear arms for 'their *defense and security*.' "[189]

The decision in *Arnold* was based on the text of the provision. But the Court also looked to the historical record. Noting that there was no recorded debate on the provision at either the 1802 or 1851 constitutional conventions, the court surmised that "no debate ensued over these provisions because the right to possess and use certain arms under certain circumstances was

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[182] Brennan, *supra* note __.
[183] *Id.*
[184] *Id.* at 502.
[185] State courts did, in fact, do this. *See* TARR, *supra* note __, at 179–80.
[186] 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993).
[187] *See* Dist. of Columbia v. Heller, 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).
[188] *See* McDonald v. Chicago, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).
[189] Arnold at 43 (emphasis in original).

widely recognized."[190] The court also explained that the right to bear arms for self-preservation and self-defense had a long historical progeny, citing Blackstone.[191]

Arnold's focus on text as informed by history and tradition laid the groundwork for Ohio's current state constitutional test: "In construing our state Constitution, we look first to the text of the document as understood in light of our history and traditions."[192] But there are other cases in recent decades where the Court—although not fully engaging with the history of the state constitutional provisions at issue—has relied upon the text of the Ohio provision to reach a result that differed from the federal precedent.

In *Humphrey v. Lane*[193] the Ohio Supreme Court held that Article I, Section 7, provides greater protections than the Free Exercise Clause of the First Amendment. In reaching this result, the Court leaned on the text of the Ohio provision, which contains substantially different wording than the federal provision. It noted that the Ohio provision included the phrase "nor shall any interference with the rights of conscience be permitted," a phrase which the court found "broader" than the federal guarantee.[194] It explained that while the federal guarantee "concerns itself with laws that *prohibit* the free exercise of religion," Ohio's guarantee makes laws that "tangentially affect religion . . . potentially unconstitutional."[195] On this basis, the Court declined to apply to claims arising under the Ohio Constitution the United States Supreme Court's decision in *Employment Division v. Smith*,[196] which held that the Free Exercise Clause does not relieve an individual of a duty to comply with neutral laws of general applicability. Instead, the Court held that to comply with the Ohio Constitution, a "state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest."[197]

The Court further explained that the standard it was applying was not a new standard. In its view, Ohio had traditionally employed for religious freedom claims the "compelling-state-interest test" utilized by the United States Supreme Court in *Wisconsin v. Yoder*.[198] But "the *Smith* decision made it clear that earlier federal jurisprudence on free exercise claims should not be relied upon when contemplating religion-neutral, generally applicable laws."[199] Thus, the court chose to decouple itself from federal precedent and retain its "traditional" standard for religious freedom claims.

In *Humphrey* and *Arnold,* the court relied upon clear textual differences between the federal and state constitutional provisions to justify its decision to independently interpret the Ohio Constitution. In contrast, in *Norwood v. Horney*,[200] the Court premised its departure from federal precedent on a different understanding of the relevant history. At issue in *Horney* was a city's use of its eminent domain power to take private property from a homeowner and turn it over to a private developer who sought to build a shopping center. The case presented issues similar to

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[190] *Id.*
[191] *Id.* at 44.
[192] Smith, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, at ¶ 29.
[193] 89 Ohio St.3d 62, 728 N.E.2d 1039 (2000).
[194] *Id.* at 67.
[195] *Id.*
[196] 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).
[197] Humphrey at 68.
[198] 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).
[199] Humphrey at 68.
[200] 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

those in the United State Supreme Court's decision in *Kelo v. New London*.[201] In examining the takings power, the Court undertook a historical survey that encompassed principles of natural law, the Northwest Ordinance, and decisions by federal and state courts. Based on this analysis, the Court rejected the United States Supreme Court's holding in *Kelo* which afforded wide deference to legislative findings in takings cases and allowed private property to be taken for purely economic benefit. Instead, it concluded that "the fact that [an] appropriation would provide an economic benefit to the government or community, standing alone, does not satisfy the public-use" requirement of the Ohio Constitution.[202]

In *Arnold*, *Humphrey* and *Horney* the Ohio Supreme Court relied upon varying combinations of text, history, and precedent to explain its decision to independently interpret the Ohio Constitution and abandon prior lockstep precedent.[203] But other Ohio Supreme Court decisions that independently construe a parallel provision of the Ohio Constitution failed to provide any meaningful basis in text or history to support their outcome. For example, in *State v. Mole*,[204] the Court dealt with a statute that made it illegal for a police officer to have sex with a minor when the officer was more than two years older than the minor. A three-justice plurality concluded that the provision violated "the Equal Protection Clauses of the Ohio and United States Constitutions."[205] The controlling vote came from a fourth Justice who concluded that the provision violated only the Ohio Constitution.[206]

What's most interesting about *Mole* is the complete lack of analysis of the Ohio Constitution. The plurality began its opinion with a vigorous endorsement of an independent interpretation of the Ohio Constitution. It proclaimed "we once again reaffirm that this court, the ultimate arbiter of the meaning of the Ohio Constitution, can and will interpret our Constitution to afford greater rights to our citizens when we believe that such interpretation is both prudent and not inconsistent with the intent of our framers."[207] And it explained that "even if we have erred in our understanding of the Federal Constitution's Equal Protection Clause, we find that the guarantees of equal protection in the Ohio Constitution independently forbid the disparate treatment of police officers" under the statute on review.[208]

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[201] 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).
[202] Horney at 356.
[203] This is not to say that any of the three cases are exemplars of independent constitutional analysis. All three can fairly be criticized for starting with the United State Supreme Court's construction of the parallel federal provision, a mode of analysis that would seem to presume that the federal guarantee is predominant. *See, e.g.*, Richard B. Saphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437, 452 (2004) ("But unless a state court provides at least some explanation for why it believes it must attend to the federal constitutional materials first . . . its assertion of true constitutional independence is at least suspect"). The decision to begin with the Federal Constitution is particularly troublesome in *Arnold* and *Horney* because the plaintiffs did not bring claims under the Federal Constitution. Further, *Humphrey* and *Horney* read more like reactions to controversial holdings of the United States Supreme Court (*Smith* and *Kelo*, respectively) than ground-up constructions of the Ohio constitutional provisions at issue. In *Horney*, in particular, the Court seemed more interested in explaining why the United States Supreme Court was wrong in *Kelo* than in independently interpreting the Ohio constitutional provision at issue. On the other hand, because all three cases were written against a backdrop of lockstep adherence to the federal court's construction of the Federal Constitution, there was perhaps some logic to starting with the federal precedent.
[204] 149 Ohio St. 3d 215, 2016-Ohio-5124, 74 N.E.3d 368.
[205] *Id.* at ¶ 68.
[206] *Id.* at ¶ 72 (Lanzinger, J., concurring in judgment only).
[207] *Id.* at ¶ 21.
[208] *Id.* at ¶ 23.

But after that rollicking start, the Court said absolutely nothing about the Ohio Constitution. It didn't examine the language of the Ohio constitutional provision, which contains markedly different language than its federal counterpart.[209] It didn't discuss its history, which predated the Civil War and the enactment of the Fourteenth Amendment. It didn't even cite the Article and Section of the provision of the Ohio Constitution that it purported to be interpreting! It simply applied the federal standard for rational basis review. The Court's only further mention of the Ohio Constitution came at the end of the opinion when it announced that "we are compelled to conclude that [the statute] violates the Equal Protection Clauses of the Ohio and United States Constitutions."[210]

It's hard to see *Mole* as anything other than a cynical attempt to insulate a decision that was dubious on federal constitutional grounds from review by the United States Supreme Court.[211] As the dissents pointed out, under traditional rational basis standards the statute easily passed federal constitutional muster.[212] And neither the plurality opinion nor the opinion concurring in judgment only offered any analysis to explain why the provision violated the Ohio Constitution.

In a similar vein, the Ohio Supreme Court concluded in *State v. Farris*[213] that Ohio's constitutional prohibition against unreasonable searches and seizures required the suppression of evidence that was seized following a violation of the *Miranda* rule. In doing so, it declined to follow the United States Supreme Court's determination that *Miranda*[214] only required the suppression of unwarned statements.[215] The court provided no analysis of the Ohio constitutional provision at issue. Nor did it endeavor to explain how the Ohio Constitution required that officers supply *Miranda* warnings. Instead, it rested its holding purely on policy grounds, stating "that to hold otherwise would encourage law enforcement officers to withhold *Miranda* warning and thus weaken Article 10, Section 1 of the Ohio Constitution."[216] The analysis in *Farris* can be pretty much boiled down to this: we rely on the Ohio Constitution to achieve the result we like because we can.

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[209] *See* Fouch, *supra* note __, at 24.
[210] Mole at ¶ 68.
[211] Of like ilk is the Ohio Supreme Court's decision in *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ("*Aalim I*"), *vacated on reconsideration by* State v. Aalim, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883 ("*Aalim II*"). In that case, the Court applied principles of federal procedural due process to hold that a statute mandating that certain juvenile cases be tried in adult court violated the due course of law provision of Article I, Section 16 of the Ohio Constitution. Aalim I at ¶ 28. In reaching this conclusion, the Court did not apply any analysis of the text or history of the Ohio provision.

Other cases in which the Ohio Supreme Court declared that a provision of the Ohio Constitution had a different meaning than a federal counterpart without any meaningful analysis of the Ohio provision include *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156 (holding that under the due course of law provision of the Ohio Constitution, a juvenile has a right to counsel for an offense for which there is the possibility of confinement even if confinement is not imposed, and therefore, an uncounseled juvenile adjudication may not be used as an enhancement for an adult OVI charge) and *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496 (concluding that a traffic stop conducted with probable cause and ensuing arrest by an officer outside of his jurisdiction violated Article I, Section 14 of the Ohio Constitution and required the suppression of evidence obtained as a result of the stop).
[212] Mole at ¶ 108 (Kennedy, J., dissenting); ¶ 113 (French, J., dissenting).
[213] 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985.
[214] 384 U.S. 436, 86 S.Ct. 1602; 16 L.Ed. 2d 694 (1966).
[215] United States v. Patane (2004), 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667.
[216] Farris at ¶ 49.

Cases like *Mole* and *Farris* demonstrate that "independent interpretation" of the Ohio Constitution can provide results-oriented judges a tool to get around federal constitutional holdings that they dislike. But it is hard to say that what the judges are doing in those cases is constitutional interpretation in any meaningful way. To the contrary, *Mole* and *Farris* constitute raw policymaking obscured in the rhetoric of independent state constitutional interpretation.

The lesson is that when the Ohio Supreme Court departs from past practice and restores the independent meaning of a provision of the Ohio Constitution it should do so in a principled way.[217] As I explained earlier in this article, the proper analytical framework for interpreting a provision of the Ohio Constitution requires analysis of the original public meaning of a provision, looking "first to the text of the document as understood in light of our history and traditions."[218] Thus, in independently interpreting the Ohio Constitution, the Court should not simply replace unreasoned lockstep precedent with an equally unreasoned independent reading of the Ohio Constitution.

V. Conclusion

As promised, this article only scratches the surface of Ohio constitutional interpretation. I have set out to deal with what, from my vantage point, are threshold issues: the proper methodology for Ohio constitutional interpretation, means of ascertaining original public meaning, and how to deal with precedent that ties the meaning of the Ohio Constitution to the United States Supreme Court's reading of the Federal Constitution. But there is much more to be done. I hope others will take up the challenge.

[217] *See generally* Benjamin White, *Prodigal Reasoning: State Constitutional Law and the Need for a Return to Analysis*, 86 U. CIN. L. REV. 1099 (2018); Pierre H. Bergeron, *A Tipping Point in Ohio: The Primacy Model as a Path to a Consistent Application of Judicial Federalism*, 90 U. CIN. L. REV. 1061, 1066-83 (2022); Fouch, *supra* note __, at 33–34.

[218] Smith, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, at ¶ 29.