MILES TO GO: A RESPONSE TO DR. NICHOLAS COLE'S SPEECH AT THE THIRD ANNUAL ROBERT F. WILLIAMS LECTURE ON STATE CONSTITUTIONAL LAW

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I very much enjoyed Dr. Nicholas Cole's speech at the Third Annual Robert F. Williams Lecture on State Constitutional Law. I think his idea of using computers to graphically represent the process of negotiated drafting of text by groups is fascinating.[1] I cannot wait to see and use the computer tools that Dr. Cole and his colleagues are creating.[2]

[*] Judge, Appellate Court of Maryland. Thank you to Eleanor "Nelly" Meschino, University of Maryland Carey Law, Class of 2024, for outstanding research assistance. I apologize for all of the self-citation, but a guy has to get his SSRN ranking up somehow. Finally, in a small effort to promote academic fairness and equity, I have adopted the "fair citation rule," which requires the listing of the names of all authors of a published work in contravention of Bluebook Rule 15.1, which allows "*et al.*" to replace the names of three or more authors, even in the first citation. *See* Jennifer Elisa Chapman, *Citation Ethics: Towards an Ethical Framework of Legal Citation*, *in* THE ROLE OF CITATION IN THE LAW: A YALE LAW SCHOOL SYMPOSIUM 377, 391–92 (Michael Chiorazzi ed., 2022).

1. *See* Nicholas P.S. Cole, *Writing America's Constitutions: Understanding the Drafting and Re-Drafting of America's Foundational Texts*, 75 RUTGERS U. L. REV. 1069, 1090–91 (2023) [hereinafter Cole, *Writing America's Constitutions*]; *see also* Nicholas Cole, Alfie Abdul-Rahman & Grace Mallon, *A Framework for Modeling and Visualizing the U.S. Constitutional Convention of 1787*, 21 INT'L J. ON DIGIT. LIBRS. 191, 191 (2020) [hereinafter Cole et al., *A Framework*].

2. *See, e.g.*, THE QUILL PROJECT, https://www.quillproject.net/m2/ (last visited June 7, 2024); *see also* Cole, *Writing America's Constitutions*, *supra* note 1, at 1089–90 (describing the program and new innovations in it).

I have a few concerns, however, about the feasibility and usability of these tools in my home state of Maryland.[3] I have three categories of concern: (1) the dearth and unsuitability of our state constitutional convention records; (2) the project's inability to capture external sources of ideas (as opposed to ideas that developed organically in a constitutional convention); and (3) that the project will lead, inexorably, to originalist interpretations of state constitutional provisions only, rather than also using other interpretive techniques that help interpreters to come to the best possible constitutional interpretations. I will address each of these concerns in turn. In the end, I conclude that while Dr. Cole's work presents an exciting step toward understanding and interpreting state constitutions, we still have miles to go.[4]

I. PROBLEMS WITH CONVENTION RECORDS

Dr. Cole imagines that he can take the records of the proceedings of state constitutional conventions and determine what the provisions of state constitutions mean.[5] I do not think it will work the way he thinks. State constitutional convention records are not nearly as good as Dr. Cole hopes.[6] In my home state, for example, he will be sorely disappointed by the records of our five constitutional conventions (held in 1776, 1851, 1864, 1867, and 1967).[7]

3. This brings to mind a favorite sketch from *Late Night with David Letterman*, in which Dr. Norman Hoffman, an expert in historical dentistry, criticized the highly acclaimed movie, REDS, for its inaccurate portrayal of dentistry in Russia in 1917. *See generally Late Night with David Letterman* (NBC television broadcast Feb. 2, 1982). There, as here, the criticism is from a limited perspective.

4. Although I need to get my SSRN ranking up, *see supra* n.*, Robert Frost does not.

5. Cole, *Writing America's Constitutions*, *supra* note 1, at 1070–72.

6. *Compare id.* at 1072, 1090 (observing that "in some cases [state constitutional convention] records were either poorly kept . . . or have been subsequently lost, and . . . that not all accounts . . . are to be trusted" but concluding that such concerns should not be "overstated"), *and* Cole et al., *A Framework*, *supra* note 1, at 207 (acknowledging that source material is a "significant problem" but concluding that although they may "need to be collated for the first time from a variety of sources, they are nevertheless likely to be available in most cases in sufficient detail and with sufficient [provenance] to allow our model to work"), *with* Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1170–71 (describing deficiencies in state constitutional convention records).

7. For a short description of Maryland's constitutional history, including these five constitutional conventions, see HERBERT C. SMITH & JOHN T. WILLIS, MARYLAND POLITICS AND GOVERNMENT: DEMOCRATIC DOMINANCE 134–51 (2012); DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 1–10 (Praeger ed., 2006) [hereinafter FRIEDMAN, THE MARYLAND STATE CONSTITUTION]; CONST. CONVENTION COMM'N, *Constitution Making in Maryland*, *in* REP. OF THE CONSTITUTIONAL CONVENTION

The completeness of our state constitutional convention records is, ironically, in exactly inverse proportion to their continued significance. We have beautiful records from our 1967 constitutional convention, whose work was, unfortunately, rejected by the voters and never went into effect.[8] We have serviceable records from our constitutional conventions of 1851 and 1864, which produced short-lived constitutions that have minimal continuing significance. We have terrible and incomplete remaining convention records from the constitutional conventions of 1776 and 1867.[9] As to 1776, at which much of our current Declaration of Rights was adopted,[10] there were very few records retained.[11] The convention secretary, Gabriel Duvall,[12] took a vow of

COMMISSION: MARYLAND 25–68 (1967); CARL N. EVERSTINE, THE GENERAL ASSEMBLY OF MARYLAND (1980) (3-volume set); Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 639–43 (1998) [hereinafter Friedman, *Maryland Declaration of Rights*].

8. Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528, 533–34 (1999); JOHN P. WHEELER, JR. & MELISSA KINSEY, MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967–1968, at 2–7, 191–212 (1970) (discussing why the proposed constitution failed to garner enough votes). That is not to say that the 1967 constitutional convention and the draft constitution it proposed has not had continuing influence. In fact, the whole point of my article, *Magnificent Failure Revisited*, is to show that many, but not all of its ideas, have subsequently been added to the Maryland Constitution by piecemeal amendment. Friedman, *supra* at 597–98.

9. Friedman, *Maryland Declaration of Rights*, *supra* note 7, at 640, 642.

10. *See id.* at 639–40, 647–76 (comparing in charts the text of the current Declaration of Rights with previous draft and adopted versions).

11. *Id.* at 640 n.40; *see* PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775, & 1776, at 126 (Baltimore: James Lucas & E.K. Deaver 1836); *see* THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977). *See generally* Brady, *supra* note 6, at 1173–74 (discussing convention secrecy in various state constitutional conventions).

12. Ironically, Gabriel Duvall is significant to this story only because he left no trace of his work as convention secretary. Apparently, he also left few traces of his work at his next job, as an associate justice of the Supreme Court of the United States. There, however, his failure to leave a trace of his work has led to scholarly debate on whether he was the least significant Supreme Court Justice in American history. *See, e.g.*, ERNEST SUTHERLAND BATES, THE STORY OF THE SUPREME COURT 109–10 (1936) (identifying Duvall as the least significant Justice); Irving Dilliard, *Gabriel Duvall*, *in* 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 419, 419–20, 428 (Leon Friedman & Fred L. Israel eds., 1969) (rejecting Bates' claim); *see also* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 468–69 (1983) (identifying Duvall as one of the least significant Justices); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 496 (1983) (rejecting Currie's claim and bestowing title on Justice Thomas Todd); *see also* Jed Handelsman Shugerman, Marbury *and Judicial Deference: The Shadow of* Whittington v. Polk *and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 68 n.46 (2002). There are, of course, many for whom a rating of "least significant" would be an improvement.

secrecy, pledging never to reveal what the delegates discussed.[13] And he kept his word. Similarly, the 1867 constitutional convention, which drafted the constitution that governs Maryland today, did not keep its own records at all.[14] What we have remaining is from contemporaneous

13. Friedman, *Maryland Declaration of Rights*, *supra* note 7, at 640 n.40. During his lecture, Dr. Cole was asked if the fact that William Jackson, the Secretary to the federal constitutional convention in Philadelphia, burned his notes after the convention argued against a theory of constitutional interpretation based on the framer's intent. Cole, *Writing America's Constitutions*, *supra* note 1, at 1080–81. *See generally* Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1625–26 (2012) (discussing what was destroyed and what was retained); MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 1 (2015). Dr. Cole rejected this notion and argued that Jackson had acted unilaterally in destroying his notes (and thereby suggested that the constitutional convention did not share his desire that its deliberations be kept secret). I find myself more closely aligned with the questioner's apparent view that Jackson burning his notes supports the view that the constitutional framers did not anticipate and did not agree that their intention would control. *Compare* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–88 (1985) (arguing framers did not anticipate their intentions to control interpretation), *with* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 79 (1988) (arguing framers expected ratifiers' intentions to control interpretation). There is, however, no such debate with respect to Gabriel Duvall's secrecy. Duvall was not acting unilaterally but at the specific direction of the 1776 Maryland constitutional convention, which emphatically did not want its deliberations revealed. Friedman, *Maryland Declaration of Rights*, *supra* note 7, at 640 n.40; PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, *supra* note 11, at 209; THE DECISIVE BLOW IS STRUCK, *supra* note 11. Of course, in 1776, participating in a state constitutional convention was treasonable; by 1789, participating in the federal constitutional convention was patriotic, though arguably illegal under the Articles of Confederation.

14. Friedman, *Maryland Declaration of Rights*, *supra* note 7, at 642. The 1864 Maryland constitutional convention had been held during the Civil War. A substantial majority of the convention delegates were "Unconditional Unionists," that is, what history has called "Radical Republicans." SMITH & WILLIS, *supra* note 7, at 142; FRIEDMAN, THE MARYLAND STATE CONSTITUTION, *supra* note 7, at 6–7; William Starr Myers, *The Maryland Constitution of 1864*, 19 JOHNS HOPKINS U. STUD. HIST. & POL. SCI. 353, 358–60 (1901) [hereinafter Myers, *Constitution of 1864*]. The provisions of the 1864 constitution were certainly considered radical for the times: emancipating the enslaved people, providing universal free education, and requiring loyalty oaths of the former slaveowners and Southern sympathizers, which effectively froze them out of the political sphere. SMITH & WILLIS, *supra* note 7, at 143; FRIEDMAN, THE MARYLAND STATE CONSTITUTION, *supra* note 7, at 7–8; Myers, *Constitution of 1864*, *supra*, at 398–99, 404–05, 431–32. The 1867 constitutional convention was intended to roll back all of those progressive innovations and restore things to how they were before the Civil War. FRIEDMAN, THE MARYLAND STATE CONSTITUTION, *supra* note 7, at 8–9; William Starr Myers, *The Self-Reconstruction of Maryland, 1864–1867*, 27 JOHNS HOPKINS U. STUD. HIST. & POL. SCI. 9, 120–24 (1909) [hereinafter Myers, *Self-Reconstruction*]; Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 437 n.143 (2012) [hereinafter Friedman, *Special Laws*]. The delegates to the 1867 constitutional convention were all Democrats, many of whom had been excluded

newspaper accounts from the *Baltimore Sun*, compiled fifty years later by Philip Perlman.[15] Perlman did a decent job with what he had, but the *Baltimore Sun* was not a neutral observer.[16] Only in the last few years were accounts from a rival newspaper, the *Baltimore American and Commercial Advertiser*, unearthed and made available.[17] The *Baltimore American* had a different editorial slant, and its accounts are sometimes different from those of the *Baltimore Sun*.[18] A modern researcher must guess where between them the truth lies.

Worse still, the things about which the 1867 constitutional convention delegates fought and raged are not the issues about which the modern constitutional interpreter is likely to be interested.[19] The Maryland constitutional convention of 1867 was held in the aftermath of the Civil War.[20] The issues that concerned the convention delegates

from participation in 1864. SMITH & WILLIS, *supra* note 7, at 144; FRIEDMAN, THE MARYLAND STATE CONSTITUTION, *supra* note 7, at 8; Myers, *Self-Reconstruction*, *supra*, at 113. Immediately after the 1867 convention convened, a delegate proposed using the 1851 constitution (not the 1864 constitution) as the basis for their work. Friedman, *Special Laws*, *supra*, at 437 n.143; PHILIP B. PERLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, at 53–54, 57–58 (1923); JOHN J. CONNOLLY, REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION: REPORTS OF THE 1867 MARYLAND CONSTITUTIONAL CONVENTION BY THE BALTIMORE AMERICAN AND COMMERCIAL ADVERTISER, at i (2018). Critically for these purposes, consonant with their view of their task, the convention delegates also voted not to pay for a transcript of the proceedings. PERLMAN, *supra*, at 5; CONNOLLY, *supra*, at ii. Apparently, the Maryland experience is not unique, and several state constitutional conventions failed to keep transcripts of their proceedings, leaving newspaper compilations as the primary—or only—record of the proceedings. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 365–69 (2d ed. 2023) (discussing uses of newspaper compilations in state constitutional interpretation).

15. PERLMAN, *supra* note 14, at 5. Perlman later served as Solicitor General of the United States. CONNOLLY, *supra* note 14, at ii–iii; OFF. OF THE SOLIC. GEN., *Solicitor General: Philip B. Perlman*, U.S. DEP'T OF JUST., https://www.justice.gov/osg/bio/philip-b-perlman [https://perma.cc/Y6HY-9NU4] (Sept. 18, 2023).

16. CONNOLLY, *supra* note 14, at ii–iii (describing *Baltimore Sun*'s politics and, as a result, the slant found in Perlman's *Debates*, and noting that Perlman's "compilation of the *Sun*'s reports provides no commentary and little context"). By contrast, Connolly does a terrific job of contextualizing the events.

17. *Id.* at iv, xxviii, xxxi–xxxiii (describing *Baltimore American* accounts).

18. *Id.* at iv–vi; *see also* Brady, *supra* note 6, at 1177–78 (discussing Maryland constitutional convention of 1867).

19. *See* CONNOLLY, *supra* note 14, at v n.12 ("delegates often agonized over insignificant issues . . . while ignoring major issues"); *see also* Myers, *Self-Reconstruction*, *supra* note 14, at 113 n.2 (stating that the debates of the 1867 Maryland constitutional convention "were largely of minor interest, [there having been] no great questions of policy dividing the delegates").

20. *See* SMITH & WILLIS, *supra* note 7, at 144; *see also* FRIEDMAN, THE MARYLAND STATE CONSTITUTION, *supra* note 7, at 15; Friedman, *Maryland Declaration of Rights*, *supra* note 7, at 641–42.

included discussions (often in the most racist language imaginable) of the right of the former owners of enslaved people to reimbursement from the federal government for the termination of slavery,[21] and the rights of formerly enslaved people to vote,[22] serve as witnesses,[23] and receive public education.[24] They discussed whether "paramount allegiance" was owed to the federal government.[25] And they discussed whether voters and officeholders would be required to swear oaths that they were and had always been loyal to the United States.[26] Even if we had an accurate transcription of these debates, I am not sure that I would want to read them (in text or in Dr. Cole's cool graphics) or that they would help me decide questions of modern constitutional interpretation.

Thus, I am concerned that Dr. Cole has significantly overestimated the quality, reliability, and frankly, the interpretive value of constitutional convention records in Maryland.[27]

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21. CONNOLLY, *supra* note 14, at xii, xiv–xvii.

22. PERLMAN, *supra* note 14, at 227–28, 231–38, 300; *see also* CONNOLLY, *supra* note 14, at xvii–xviii, 342, 354, 358–63, 486.

23. PERLMAN, *supra* note 14, at 156–64, 167–70, 320–21, 324, 340–47, 433; *see also* CONNOLLY, *supra* note 14, at xviii–xix, 52, 57, 78, 80–81, 124, 152, 165–67, 183–91, 201–14, 512, 565, 571, 606–12, 670–71, 714–17.

24. PERLMAN, *supra* note 14, at 198–203, 243–48, 251–57, 439; *see also* CONNOLLY, *supra* note 14, at xix–xx, 64–66, 289–95, 371–74, 372 n.287, 377–78, 398–400, 475 n.328, 506–07, 615–17. For more on the 1867 constitutional convention's discussion of public education, *see* FRIEDMAN, THE MARYLAND STATE CONSTITUTION, *supra* note 7, at 203 n.3. (discussing Hornbeck v. Somerset County Bd. Educ., 295 Md. 597, 624-28 (1983) and Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1155 (1993))

25. CONNOLLY, *supra* note 14, at 102. A provision requiring "paramount allegiance" to the federal government was added to the constitution in 1864. Friedman, *Maryland Declaration of Rights*, *supra* note 7, at 651, 687 n.174. The "paramount allegiance" provision was replaced in 1867 by the current Article 2, which simply restates the supremacy of federal law. *See* PERLMAN, *supra* note 14, at 99–101, 104–07, 381–82; *see also* CONNOLLY, *supra* note 14, at 54, 71–73, 92–94, 101–04; Friedman, *Maryland Declaration of Rights*, *supra* note 7, at 648, 685 nn.144 & 146.

26. *See* PERLMAN, *supra* note 14, at 49–50, 167; *see also* CONNOLLY, *supra* note 14, at vii–viii, 15–16, 16 n.70, 144 n.142, 145, 193, 200, 581–83; *see also* Dan Friedman, *Does Article 17 of the Maryland Declaration of Rights Prevent the Maryland General Assembly from Enacting Retroactive Civil Laws?*, 82 MD. L. REV. 55, 77–79 (2022) [hereinafter Friedman, *Ex Post Facto*].

27. I am interested in how Dr. Cole will treat the relationship between provisions adopted by sequential constitutional conventions in the same state. As I have noted, many of the provisions of Maryland's current Declaration of Rights were originally adopted at the Constitutional Convention of 1776. *See supra* note 10. The subsequent constitutional conventions then readopted those provisions with little or often no changes. Some constitutional provisions likewise were readopted without much change from the 1851 or 1864 constitutions into the 1867 constitution. I have often wondered how to think about

II. PROBLEMS WITH EXTERNAL SOURCES OF IDEAS

I am also concerned that Dr. Cole's project design will miss the sources of ideas when they are external to the constitutional convention.[28] His project design seems to assume that ideas are born in constitutional conventions, are discussed and changed by the interaction of delegates at the constitutional conventions, and that, at the end of the convention, the ideas emerge as collaboratively drafted provisions.[29] Historical research has shown, however, that that is not always—or even often—how it works.[30] Again, my home state of Maryland provides a few useful examples of how constitutional provisions arise from external sources—but my story begins in the Commonwealth of Virginia.

In the spring of 1776, the Virginia convention appointed a twenty-seven-member committee to draft a Declaration of Rights.[31] George

these readoptions. *See* Friedman, *Ex Post Facto*, *supra* note 26, at 80 n.106; Dan Friedman, Jackson v. Dackman Co.: *The Legislative Modification of Common Law Tort Remedies Under Article 19 of the Maryland Declaration of Rights*, 77 MD. L. REV. 949, 958, 963–64, 966–67, 966 n.92 (2018) [hereinafter Friedman, *Article 19*] (asking whether an interpreter should measure original public understanding of Maryland's "open courts" provision in 1215, 1225, 1671, 1776, 1851, 1864, or 1867); *see also* Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 378–92 (2022) (discussing subsequent readoption of constitutional provisions); 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTION FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 81 (2006). These readoptions provide a significant interpretive problem for an original public meaning originalist. From when should the original public meaning be measured? From when the provision was first adopted? From when it was readopted? I am not sure how Dr. Cole's project, which appears to treat each constitutional convention as an independent silo, will account for subsequent constitutional conventions in the same state.

28. A review of the Quill software shows that there is a commentary screen in which someone can add this sort of material. Someone still has to create that content. *See* THE QUILL PROJECT, *supra* note 2.

29. *See* Cole, *Writing America's Constitutions, supra* note 1, at 1076–79 (describing rules of parliamentary procedure); *see also* Cole et al., *A Framework*, *supra* note 1, at 191–93, 204–06 (describing an original textual proposal, a series of amendments that are accepted and rejected by committees, subcommittees, and the convention body by parliamentary procedures to arrive at a single negotiated text).

30. *See generally* Brady, *supra* note 6, at 1196 & nn.176–182 (regarding external sources, interstate borrowing of constitutional provisions, and interstate interpretations); Mazzone & Tecimer, *supra* note 27, at 339–43, 362–378; Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 975–78 (1994) (describing interstate borrowing as a careful process of balancing the parochial needs of a single state against the general trend of American constitutionalism); *see also* G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 729–30 (1998).

31. *See* 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 34 (1974); 1 THE PAPERS OF GEORGE MASON, 1725–1792, at 274 (Robert A. Rutland ed., 1970)

Mason quickly tired of the committee deliberations.[32] He and his friend, Thomas Ludwell Lee, then put together their own draft declaration of rights, drawing from sources including *Magna Carta*, the English Bill of Rights of 1689, Coke's Institutes, and Blackstone's Commentaries.[33] Mason and Lee then gave their draft to the drafting committee to work on. The drafting committee made revisions to Mason and Lee's draft and added eight additional proposed provisions.[34] The resulting draft was read aloud to the convention body on May 27, 1776, and was sent by courier throughout the mid-Atlantic states.[35] It was published in the *Maryland Gazette* on June 13, 1776.[36] That May 27, 1776 draft of the Virginia Declaration of Rights then was used as a model in America and beyond,[37] including by the Maryland Constitutional Convention meeting then in Annapolis.[38] The Maryland Constitutional Convention referred

[hereinafter PAPERS OF GEORGE MASON]; *see also* Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 934–35 (2002) [hereinafter Friedman, *Tracing the Lineage*]; Dan Friedman, *Who Was First?: The Revolutionary-Era State Declarations of Rights of Virginia, Pennsylvania, Maryland, and Delaware*, 97 MD. HIST. MAG. 476, 478 (2002) [hereinafter Friedman, *Who Was First?*].

32. *See* PAPERS OF GEORGE MASON, *supra* note 31, at 274; *see also* Friedman, *Tracing the Lineage*, *supra* note 31, at 935.

33. *See* PAPERS OF GEORGE MASON, *supra* note 31, at 275, 279–82; *see also* Friedman, *Tracing the Lineage*, *supra* note 31, at 935, 942, 966, 1002.

34. Friedman, *Tracing the Lineage*, *supra* note 31, at 935; *see also* Friedman, *Who Was First?*, *supra* note 31, at 478–79.

35. Friedman, *Tracing the Lineage*, *supra* note 31, at 935–36 & nn.21–23; *see also* Friedman, *Who Was First?*, *supra* note 31, at 478–79.

36. Friedman, *Tracing the Lineage*, *supra* note 31, at 936; *see also* Friedman, *Who Was First?*, *supra* note 31, at 479; PAPERS OF GEORGE MASON, *supra* note 31, at 276; R. Carter Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention, 1787*, 22 WM. & MARY Q. 301, 304 n.12 (1965).

37. Friedman, *Tracing the Lineage*, *supra* note 31, at 932 & nn.1–3 (describing the influence of the May 27, 1776 draft of the Virginia Declaration of Rights on the American Declaration of Independence, the French Declaration of the Rights of Man, and the bills and declarations of rights of many of the American states); *see also* Friedman, *Who Was First?*, *supra* note 31, at 478.

38. Because of the timing of adoption, and the lack of convention records, it was initially unclear whether Maryland's drafters worked from Delaware's draft or Delaware's drafters worked from Maryland's draft. *See* Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. REV. 641, 649 (1898) (suggesting that Delaware preceded Maryland); *see also* Friedman, *Tracing the Lineage*, *supra* note 31, at 941 n.48 (listing sources that, following Farrand, have been unsure or placed Delaware first). We now have conclusively resolved this question and know that the Maryland framers worked first, relying on the Virginia draft, and that the Delaware framers worked second, borrowing extensively from the Maryland draft. *See* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776–1791, at 54–55 (1955); *see also* Friedman, *Tracing the Lineage*, *supra* note 31, at 941–45, 944 n.56 (listing sources agreeing that Maryland drafted its declaration of rights before Delaware); Friedman, *Who Was First?*, *supra* note 31, at 482.

the matter to a drafting committee, whose deliberations were most definitely not recorded.[39] Only by comparing the Maryland drafts to the Virginia May 27, 1776 draft can we see the changes that the Maryland framers made and make educated guesses as to the reasons for those changes. For example, the Maryland drafters took five separate rights that Virginia's draft only protected in the criminal context and, by separating them out, made them, at least arguably, applicable in both the criminal and civil contexts.[40] This interstate transfer and modification is sometimes the only information we have about the adoption of a constitutional provision, and it is invisible to Dr. Cole's process.

Here's a related example. Dr. Cole reports an interesting story about the Wyoming Constitutional Convention of 1889.[41] When the Wyoming convention convened, the Wyoming delegates were in a rush to complete their work before the U.S. Congress recessed.[42] As a result, the convention delegates planned to borrow many constitutional provisions from sister states in what has been called a "scissors-and-paste" process.[43] Although they initially considered adopting a "law of the land"-style provision,[44] they later decided to adopt a "due process of law"-style

39. Friedman, *Tracing the Lineage*, *supra* note 31, at 937, 946; *see also* Friedman, *Who Was First?*, *supra* note 31, at 480; Friedman, *Ex Post Facto*, *supra* note 26, at 71–72, 72 n.65.

40. Friedman, *Ex Post Facto*, *supra* note 26, at 72–73 (identifying (1) the right against self-incrimination; (2) the right to venue; (3) the right to due process; (4) the right to trial by jury; and (5) protections against retroactive legislation). *See also* Friedman, *Tracing the Lineage*, *supra* note 31, at 947, 964–67; Friedman, *Who Was First?*, *supra* note 31, at 484–87.

41. Cole, *Writing America's Constitutions*, *supra* note 1, at 1090–91.

42. *See* ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION 3–4 (2011) (noting the delegates completed their task in twenty-five days); LEWIS L. GOULD, WYOMING: A POLITICAL HISTORY, 1868–1896, at 111–12 (1968).

43. Phil Roberts, *Wyoming Becomes a State: The Constitutional Convention and Statehood Debates of 1889 and 1890 and Their Aftermath*, WYOHISTORY.ORG (Nov. 8, 2014), https://www.wyohistory.org/encyclopedia/wyoming-statehood [https://perma.cc/UUN9-AZSP]; *see also* KEITER & NEWCOMB, *supra* note 42, at 4 (describing the convention "unabashedly borrow[ing] language and provisions from other state constitutions"); Michael J. Horan, *The Wyoming Constitution: A Centennial Assessment*, 26 LAND & WATER L. REV. 13, 30 (1991) ("A rush job in its creation, [the Wyoming Constitution of 1889] is largely a stitching together of borrowings from other states."); Richard Kenneth Prien, *The Background of the Wyoming Constitution*, at iii, iv (1956) (M.A. thesis, University of Wyoming) (ProQuest) (examining Wyoming delegates' borrowing of constitutional provisions by analyzing neighboring states' constitutions). There is, of course, nothing wrong with states borrowing constitutional provisions from their sister states. Fritz, *supra* note 30 (describing convention delegates' attitudes toward interstate borrowing).

44. I am not sure on which state's constitution the Wyoming delegates were considering patterning their "law of the land"-style provision. Professor Tarr has generally identified

provision instead.[45] Dr. Cole points out that his computer program was able to trace the "law of the land"-style provision that the Wyoming delegates had originally considered back to (1) Coke's exposition of the Magna Carta;[46] (2) its use in the Maryland Declaration of Rights of 1776;[47] and (3) Elliot's *Debates*.[48] While the computer may be able to recognize the pattern of words, it would be hard-pressed to tell the story of the "law of the land"-style provisions and their relationship to "due process of law"-style provisions.

Here is how I might begin to tell this story. As noted above, George Mason and Thomas Ludwell Lee wrote the May 27, 1776 draft of the Virginia Declaration of Rights. In it, they proposed a single article listing the rights of people accused of crimes, including the right "that no man be deprived of his liberty except by the law of the land, or the judgment of his peers."[49] On receipt of this Virginia draft, the Maryland framers

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the Colorado, Pennsylvania, Illinois, and Montana constitutions as models for the Wyoming delegates, while Professor Michael J. Horan has identified the constitutions of North Dakota, Montana, and Idaho as particularly important to the Wyoming framers. *Compare* Tarr, *supra* note 30, at 734, *with* Horan, *supra* note 43, at 19 n.51 (citing T.A. LARSON, HISTORY OF WYOMING 247 (2d ed. 1978)). Professor Keiter notes that the Wyoming Constitutional Convention delegates discussed the Colorado constitution more than 20 times (although mostly with respect to topics of mineral taxation and eminent domain) and less frequently discussed the constitutions of Pennsylvania, Montana, Illinois, Nebraska, and Nevada. KEITER & NEWCOMB, *supra* note 42, at 7–8. Captain Prien carefully noted that the "due process of law"-style provision that was ultimately adopted by the Wyoming Constitutional Convention is identical to provisions in the Montana, South Dakota, and Washington constitutions. Prien, *supra* note 43, at 43. Unfortunately, he did not conduct a similar analysis with regard to the "law of the land"-style provision that it replaced. *Id.* Finally, Professor Lewis Gould found that the Wyoming framers "showed little originality, taking most of the Wyoming constitution from the documents in effect in North Dakota, Montana, and Idaho." GOULD, *supra* note 42, at 112. By my research, however, none of the states that have been listed above had a "law of the land"-style provision that Wyoming could have been borrowing from, and the source that they were using must have been elsewhere, either from another state heretofore unidentified as a source for Wyoming's drafting or directly from Coke.

45. *See* Cole, *Writing America's Constitutions*, *supra* note 1, at 1090; *see generally* JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 719 (Cheyenne, The Daily Sun, Book and Job Printing 1893) (showing a successful motion of Delegate Teschemacher to delete the clause, "in any manner destroyed" from "law of the land"-style provision); *id.* at 728 (showing a successful motion of Delegate Burritt to replace the "law of the land"-style provision (as modified by the previous motion) with a "due process of law"-style provision).

46. Cole, *Writing America's Constitutions*, *supra* note 1, at 1091.

47. *See id.*

48. *See id.*

49. Friedman, *Tracing the Lineage*, *supra* note 31, at 960 (quoting VA. CONST. decl. of rts. art. X (May 27, 1776)). There is no doubt that Mason and Lee, in writing this "law of the land" provision, were restating and tailoring to their needs the language of Coke's

apparently (1) recognized that this language was derived from the Magna Carta; (2) decided that Virginia's formulation was too limited for Maryland's needs both because it only protected liberty rights and only protected them in the criminal context; and (3) reinstated the traditional language from the Magna Carta to ensure that the right was protected in both the civil and criminal context and secured not only liberty interests, but also interests in life and property.[50] Many Revolutionary-era bills and declarations of rights then followed these examples and adopted a variety of constitutional provisions based on the Magna Carta's "law of the land" language.[51] In 1789, however, James Madison and the First U.S. Congress rejected the "law of the land" language and adopted the language of "due process of law" into the Fifth Amendment to the U.S. Constitution.[52] This difference in the choice of language was either

description of the Magna Carta. *See id.* at 966 (citing WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, WITH A HISTORICAL INTRODUCTION 375 (2d ed. 1914); HOWARD, *supra* note 31, at 120–21).

50. Friedman, *Tracing the Lineage*, *supra* note 31, at 967; *see generally id.* at 960 (quoting MD. CONST. decl. of rts. art. XXI (August 27, 1776 draft) (currently codified at MD. CONST. decl. of rts. art. XXIV)). This is the Maryland provision that Dr. Cole is describing. Cole, *Writing America's Constitutions*, *supra* note 1, at 1091 (citing Maryland Declaration of Rights of 1776).

51. *See* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 974–76 (listing the various states that adopted similar "law of the land"-style provisions); *see also* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 435 (2010); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 203 (1992) (highlighting the "law of the land" provision in New York's Constitution).

52. U.S. CONST. amend. V. There is, apparently, little historical evidence to explain the choice. Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447, 510–11 (2022); *see also* Williams, *supra* note 51, at 445; Riggs, *supra* note 51, at 948.

absolutely immaterial[53] or intensely important,[54] depending on whom you ask. From those sources, however, at least two strands of interstate borrowing followed.[55] Some states adopted (and readopted) "law of the land"-style provisions.[56] Other states—especially after the adoption of the 14th Amendment in 1868—adopted "due process of law"-style provisions.[57] And beyond the choice of which general model to follow, there were state-specific variations in text and intended scope, history of adoption, and post-adoption practice. And, of course, this interstate borrowing had important formal and informal interpretive consequences.[58] The results are a rich tapestry of similarities and differences.[59] My point here is that while Dr. Cole's computer program

53. *See, e.g.*, HOWARD, *supra* note 31, at 120–21 ("The phrase ['law of the land'], held by Coke to be synonymous with 'due process of law,' is the essential assurance that the law is above rulers and ruled alike, that power, wherever vested, can have no capricious exercise, and that those minimal safeguards which are expected from a system founded on justice will be furnished."); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 299–301 (1968) (noting many state courts "cit[ed] Coke, that 'due process of law' and 'law of the land' are synonymous, both referring to the guarantee of the Magna Carta"); *id. at* 212 ("The precedent for a variation in language had been set in the Fifth Amendment to the Federal Constitution, which, instead of 'law of the land,' had used 'due process of law,' *the two phrases having the same meaning*.") (emphasis added). For what it's worth, Maryland treats our "law of the land" provision as providing similar but not identical protections to that of the federal due process provisions of the Fifth and Fourteenth Amendments. *See, e.g.*, Att'y Gen. v. Waldron, 426 A.2d 929, 940–41 (Md. 1981) (describing the provisions as "so intertwined that they, in essence, form a double helix, each complementing the other"). *See infra* note 54.

54. *See, e.g.*, Crema & Solum, *supra* note 52, at 462–67, 510–25 (arguing that "law of the land"-style provisions have a different intended meaning from "due process of law"-style provisions).

55. HOWARD, *supra* note 53, at 479–82 (listing states' due process provisions and variations).

56. My state of Maryland is a good example of a state that has a "law of the land"-style provision. We adopted ours in 1776 and readopted it in our 1851, 1864, and 1867 constitutions with little debate and few changes. *See* Friedman, *Maryland Declaration of Rights*, *supra* note 7, at 660. For a short discussion of the interpretive issues arising from these subsequent readoptions, see *supra* note 27.

57. Wyoming, as Dr. Cole notes, eventually adopted a "due process of law"-style provision, which remains in its constitution today. *See* Cole, *Writing America's Constitutions*, *supra* note 1, at 1090 (discussing Wyoming Constitutional Convention of 1889); WYO. CONST. art. I, § 6.

58. *See* Mazzone & Tecimer, *supra* note 27, at 362–77; *see also* Friedman, *Special Laws*, *supra* note 14, at 450–54 (discussing that authoritative interpretations by the highest court at the time of borrowing are mandatory precedents but that other sister state interpretations can also be persuasive precedents depending on certain considerations).

59. Maryland again provides an interesting example of such differences. In the absence of a textual guarantee of the "equal protection of laws" in our constitution, our state's highest court has inferred such a protection in our "law of the land" provision. *See* Att'y Gen. v. Waldron, 426 A.2d 929, 940–41 (Md. 1981). Moreover, the Court held that this

can show you what happened in Wyoming in 1889 and locate some of its antecedents, it is unable to show them in the overall context of the interstate spread of styles of constitutional provisions.[60]

I have one more Maryland example, in which the idea for a constitutional provision began with an external source, but I confess that I do not know whether or not it would turn up in Dr. Cole's analysis. At the 1864 Maryland Constitutional Convention, delegates were discussing adding a prohibition on the legislature enacting special laws.[61] Delegate Henry Stockbridge of Baltimore City rose and said that there are similar provisions in other state constitutions and that, "[p]erhaps the most full and ample is that in the constitution of Indiana, on page 352 of the book of constitutions."[62] Remarkably, we have a copy of the book that Delegate Stockbridge was discussing[63] and on page 352 of that book, as Delegate Stockbridge promised, is Article IV, Section 22 of the Indiana Constitution of 1851—one of that constitution's three prohibitions on local and special laws.[64] I do not know whether Dr. Cole's investigative technique, focused as it is on the ideas developed at each convention, would pick up this idea, brought in from THE AMERICAN'S GUIDE.

These examples demonstrate, I hope, that many of the ideas at a constitutional convention do not originate inside the convention but are

implied guarantee is similar but not identical to the guarantee provided by the 14th Amendment. *Id.* ("Although the Maryland Constitution contains no express equal protection clause, we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights."). For an analysis of *Waldron* as consistent with the avoidance of unthinkable outcomes, see Dan Friedman, *The Special Laws Prohibition, Maryland's Charter Counties, and the "Avoidance of Unthinkable Outcomes,"* 83 MD. L. REV. ONLINE 28, 59–60 (2023).

60. *See generally* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 4–5 (1998) (describing styles and fashions in state constitutions); Tarr, *supra* note 30, at 732 (same).

61. 2 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 877 (Annapolis, Richard P. Bayly 1864).

62. *Id.* For the full story of the adoption of the special laws provision—such that it is—see Friedman, *Special Laws*, *supra* note 14, at 436–42.

63. The book to which Delegate Stockbridge was referring is formally entitled: THE AMERICAN'S GUIDE: COMPRISING THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION; THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTIONS OF THE SEVERAL STATES COMPOSING THE UNION (Philadelphia, J.B. Lippincott & Co. 1864). The Archives of Maryland has published online a copy of this volume "known to have been used by W.R. Cole, Secretary, Constitutional Convention of 1864." *Volume 420*, ARCHIVES OF MD. ONLINE (Oct. 6, 2023), https://msa.maryland.gov/megafile/msa/speccol/ [https://perma.cc/7LWA-GUGX]. For more on the importance of THE AMERICAN'S GUIDE at state constitutional conventions of the 19th Century, see Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 211–12 (2000); Fritz, *supra* note 30, at 976 nn.112–13.

64. THE AMERICAN'S GUIDE, *supra* note 63, at 352–53. The other two can be found in article IV, section 23 and article I, section 23 of the Indiana Constitution of 1851.

brought with the delegates as part of an older constitution, a sister state constitution, or from other sources. It is not clear, however, how well Dr. Cole's project can account for these external sources of ideas.

III. LIMITATIONS OF INTERPRETING EXCLUSIVELY THROUGH CONSTITUTIONAL CONVENTION'S INTENT

There is no doubt that the information that Dr. Cole hopes to obtain and graphically represent is valuable information for the state constitutional interpreter. It is information that originalist interpreters need and want.[65] Moreover, in my home state, our highest court has repeatedly held that the primary goal of constitutional interpretation is to effectuate the framers' and ratifiers' intent: "Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument's drafters and the public that adopted it."[66] Thus, the information that Dr. Cole is gathering and will graphically display is important information for state constitutional interpretation.[67]

65. Dr. Cole is clear that he is not advocating for a particular theory of constitutional interpretation. Cole, *Writing America's Constitutions*, *supra* note 1, at 1069 (stating that his essay "does not purport to offer any theory of constitutional interpretation"). But his methodology provides information that is only useful to historical analyses, meaning that it will result in and necessarily favor originalist-style interpretation.

66. State Bd. of Elections v. Snyder, 76 A.3d 1110, 1123 (Md. 2013). For additional cases where the court has emphasized the importance of effectuating the intent of the framers and ratifiers, see Bernstein v. State, 29 A.3d 267, 279–80 (Md. 2011); Abrams v. Lamone, 919 A.2d 1223, 1239–40 (Md. 2007); Lamone v. Capozzi, 912 A.2d 674, 684–85, 692 (Md. 2006); Fish Mkt. Nominee Corp. v. G.A.A., Inc., 650 A.2d 705, 708–09 (Md. 1994); Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 770 (Md. 1983); Brown v. Brown, 412 A.2d 396, 398–99 (Md. 1980); Cnty. Council for Montgomery Cnty. v. Supervisor of Assessments of Montgomery Cnty., 332 A.2d 897, 899 (Md. 1975); Howard v. Skinner, 40 A. 379, 380–81 (Md. 1898); Silver v. Magruder, 32 Md. 387, 397 (1870); Smith v. Thursby, 28 Md. 244, 260 (1868); Thomas v. Owens, 4 Md. 189, 225 (1853). *See also* Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y. 341, 380–81 (2017) (compiling cases). *But see* Michael L. Smith, *Idaho's Law of Constitutional Interpretation: Lessons from* Planned Parenthood Great Northwest v. State, 59 IDAHO L. REV. 411, 423–28 (2023) (critiquing Christiansen's categorization of cases as reflecting originalism). It is worth noting that the Supreme Court of Maryland's definition quoted above—like Mr. Christiansen's definition, *id.* at 344 ("originalism is broadly defined here as including both original-intent originalism, and original-public-meaning originalism")—elides the theoretical difference between original intent and original public meaning originalism and the implications of those differences. *See, e.g.*, Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378–82 (2013) (discussing differences between original intent and original public meaning originalism); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086–87, 1101 (1989).

67. WILLIAMS & FRIEDMAN, *supra* note 14, at 358–70 (discussing uses of history in state constitutional interpretation).

It is not, however, the only relevant information. Courts do not always, or even often, decide cases on originalist grounds (even when they say they do).[68] There is a substantial literature criticizing originalism.[69] And originalism, at least as described in the academy and as applied to the federal constitution, is not a perfect fit for state constitutions.[70] That is, originalism is not a perfect means for interpreting state constitutions.

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68. *See, e.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH 123–24, 173 (2018).

69. It is beyond my scope to review the critiques of originalism. As I wrote some years ago:

> Critics dispute every step of the originalist analysis, arguing that there is no countermajoritarian difficulty or that it is significantly overstated; that the range of potential interpretations is effectively constrained by other means; that the constitutional Framers themselves did not intend for their views to control, but instead drafted the Constitution to allow development, that it is impossible to determine with certainty (and at appropriate levels of generalization) the original public understanding, or that it is even appropriate to allow the "dead hand" of our Revolutionary-Era [ancestors] to govern our current affairs. Finally, and most importantly, originalism's critics charge that it is ironically ineffective in constraining judicial activism.

Friedman, *Special Laws*, *supra* note 14, at 434–35.

70. By this I mean that originalism developed in response to the so-called "countermajoritarian difficulty," the seeming paradox that in a democratic society, unelected judges can overrule democratically adopted legislation based on what might be their idiosyncratic view of what the federal Constitution requires. Friedman, *Special Laws*, *supra* note 14, at 433–34; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1385 (2001); *see also* Donald G. Gifford, Richard C. Boldt & Christopher J. Robinette, *When Originalism Failed: Lessons from Tort Law*, 51 FLA. ST. U. L. REV. 1, 5 (2023) (describing, defining, and critiquing "thick originalism"). Originalism proceeds from the assumption, true in the federal courts but not universally in the state courts, that judges are unelected. Friedman, *Special Laws*, *supra* note 14, at 435 & n.133 (pointing out that Maryland appellate judges are subject to retention elections). Originalism also proceeds from assumptions about the need to constrain judges based on the relative difficulty of amending the federal constitution—an assumption that simply is not true about state constitutions. *Id.* at 435; *see* Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 233 (1984) (regarding ease of state constitutional amendment). Originalism, consciously or unconsciously, also draws strength from the stature of our federal constitutional framers. *See generally*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 218 (2008) (expressly identifying filiopietistic appeal of originalism); R.B. Bernstein, *Charles A. Beard: Foe of Originalism*, 2 AM. POL. THOUGHT 302, 304 (2013). While such filiopiety may at least be understandable in discussing the federal founders (although I have my doubts), it makes no sense when discussing the Maryland framers of 1867. *See* CONNOLLY, *supra* note 14, at v, xxi–xxiv, 1 n.64 (describing rampant, unrepentant racism of 1867 Maryland Constitutional Convention delegates); *id.* at xxiv (stating that "[o]riginalist techniques feel more legitimate when the framers include George Washington, James Madison, and Alexander Hamilton, as compared to [1867 Maryland Constitutional Convention delegates] Montgomery Peters, Frederick Nelson, and Joseph Wickes"). Finally, evidence of both the framers' and the

More importantly, I believe that constitutional interpretation is improved by considering a variety of different interpretive tools.[71] I have used techniques of textualism, structuralism, moral interpretive theory, critical race theory, comparative constitutionalism, common law constitutional interpretation, as well as originalism to look at provisions of the Maryland Constitution and Declaration of Rights.[72] I have suggested that:

> [Judges] must use [their] judgment to develop the best possible interpretation of a constitutional provision that is constrained by a reasonable reading of the constitutional text and informed by the history of that provision's adoption, subsequent judicial and scholarly interpretation in this and comparable jurisdictions, core moral values, political philosophy, and state as well as American traditions.[73]

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ratifiers' intent are available to originalists studying the federal constitution in ways that are not often available to those studying state constitutions, although Dr. Cole's project will certainly improve access to materials about the state framers (although not the state ratifiers). *See supra* note 14.

71. Friedman, *Ex Post Facto*, *supra* note 26, at 59 n.13 (arguing that use of multiple perspectives improves interpretive outcomes). Other commentators have described this as a "pluralistic" method of constitutional interpretation. *See, e.g.*, Smith, *supra* note 66, at 419–20 (discussing Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193 (1987); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8 (1984); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1757–60 (1994)); *see also* Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 19, 35 (1990) (identifying three theories of interpretation–doctrinal, historical, and responsive–and concluding that what theory to apply depends on the circumstances).

72. Friedman, *Special Laws, supra* note 14, at 412; Friedman, *Article 19*, *supra* note 27, at 950; Friedman, *Ex Post Facto, supra* note 26, at 63; Dan Friedman & Barnett Harris, *Is Federal Congressional Redistricting in Maryland Governed by Article III, Section 4 of the State Constitution? An Analysis of the Trial Court Decision in* Szeliga v. Lamone, 83 MD. L. REV. 1261, 1270 (2024). Most recently, I have employed a new interpretive theory, which I call the "avoidance of unthinkable results," in which a constitutional interpreter simply (but transparently) refuses to apply an interpretation that yields an unthinkable outcome. Friedman, *supra* note 59, at 55–56.

73. Friedman, *Special Laws*, *supra* note 14, at 467; *see also* Richard C. Boldt, *Constitutional Structure, Institutional Relationships and Text: Revisiting Charles Black's White Lectures*, 54 LOY. L.A. L. REV. 675, 693 (2021) (discussing how structuralism as a supplement to textualism "has the potential to broaden the information that litigants are likely to bring to the adjudicative process and to broaden the perspective of the judges charged with evaluating the resulting claims"); DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 5 (2002) ("[N]o single grand theory can successfully guide judges or provide determinate—or even sensible—answers to all constitutional questions. Only an amalgam

Put simply, judges should use all available interpretive tools and then use their reasoned judgment to select the best possible interpretation.[74] My point is simply that Dr. Cole's data, while it will be important, will not answer all interpretive questions, but instead push us towards originalist interpretations. Moreover, constitutional interpreters use the material available. If the only material available is historical, interpreters will default to interpretations that sound in originalism. We will do well to remember to supplement what we learn from Dr. Cole's computers. To achieve the best possible interpretations, we still need to do the hard work to look at state constitutional provisions from many perspectives.

* * * *

Let me return to where I started. Dr. Cole's project is truly exciting. I cannot wait to use his computer program. My critiques are only that it will appear to be a panacea and will appear to provide answers to all interpretive questions. In fact, however, hard work will still remain, both to interpret what his data means and to integrate materials from sources outside of state constitutional conventions. There will remain, therefore, miles to go.

of theories will do."). Of course, it is not crucial that a constitutional interpreter uses only the interpretive techniques that I have discussed here or calls the techniques by the names that I have called them. Rather, what matters is that they use all of the available tools to come to the best possible constitutional interpretation. And, it is the role of the judge, exercising reasoned judgment, to select the best possible constitutional interpretation.

74. Richard C. Boldt, Essay, *Reasoned Judgment*, 82 MD. L. REV. ONLINE 104, 106–07 (2023) (describing use of "reasoned judgment" in constitutional interpretation).