ZOMBIE STATE CONSTITUTIONAL PROVISIONS

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INTRODUCTION

On November 3, 2020, Alabama voters approved the opaquely named "Authorize Legislature to Recompile the State Constitution Measure."[1] As described by the state's Fair Ballot Commission, the ballot measure would permit the Alabama legislature to "(1) remove racist language" and "(2) remove language that is repeated or no longer applies," among other

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1. *Alabama Amendment 4, Authorize Legislature to Recompile the State Constitution Measure (2020)*, BALLOTPEDIA, https://ballotpedia.org/Alabama_Amendment_4,_Authorize_Legislature_to_Recompile_the_State_Constitution_Measure_(2020) [https://perma.cc/V9B6-3A4W] (last visited Oct. 8, 2020).

things.[2] The racist language in question? In one portion, the constitution still prescribed that "[s]eparate schools shall be provided for white and colored children."[3] Another section, though technically repealed by another amendment in 2000,[4] remained in place memorializing that the "[l]egislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro."[5] Though both these provisions were deemed unenforceable under the Federal Constitution following blockbuster Supreme Court decisions,[6] the provisions remained in the state constitutions, undisturbed. And even in 2020, the measure to eliminate this language passed only by a margin of 67% to 33%.[7] Proposals to remove the language had twice failed since the year 2000—although the vocal opponents of those proposals objected allegedly not to preserve the language itself but rather on the grounds that revising the language would have various unintended consequences for taxation or school funding.[8]

Alabama's language may have lasted longest, but many other state constitutions contained similar provisions well into recent history. It was only in 2002 that Oregon voted to remove a provision, dating to 1857, providing, among other things, that "[n]o free negro, or mulatto, not residing in this state at the time of the adoption of this constitution, shall come, reside, or be within this State, or hold any real estate."[9] Even in 2002, a significant percentage of Oregon voters still voted to keep the provision.[10] Since 2000, voters in Florida, New Mexico, Kansas, and Wyoming have eliminated parallels to "alien land laws" in the state

2. Fair Ballot Comm'n, *2020 Statewide November 3, 2020, General Election Constitutional Amendment Ballot Statements*, ALA. SEC'Y OF ST., https://www.sos.alabama.gov/alabama-votes/voter/ballot-measures/statewide [https://perma.cc/PJ4L-KMEK] (last visited Oct. 8, 2021).

3. ALA. CONST. art. XIV, § 256.

4. *Alabama Interracial Marriage, Amendment 2 (2000)*, BALLOTPEDIA, https://ballotpedia.org/Alabama_Interracial_Marriage,_Amendment_2_(2000) [https://perma.cc/A7LF-4KJT] (last visited Oct. 8, 2021).

5. ALA. CONST. art. IV, § 102.

6. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

7. Brian Lyman, *Alabama Voters Approve an Amendment to Remove Racist Language from State Constitution*, USA TODAY (Nov. 6, 2020, 8:49 AM), https://www.usatoday.com/story/news/nation/2020/11/06/alabama-votes-allow-purge-racist-constitutional-language/6185508002/ [https://perma.cc/UF3S-T4CG].

8. *Id.*

9. Peter Prengaman, *Oregon's Racist Language Faces Vote*, AP NEWS (Sept. 27, 2002), https://apnews.com/article/73342de50ead01c8f7d869692b336dbb [https://perma.cc/65PU-U3L3].

10. *Oregon Remove Constitutional References to Race, Measure 14 (2002)*, BALLOTPEDIA, https://ballotpedia.org/Oregon_Remove_Constitutional_References_to_Race,_Measure_14_(2002) [https://perma.cc/VP58-T8CM] (last visited Oct. 8, 2021).

constitutions that forbid Asian immigrants from owning property,[11] in part as a result of the efforts of Professor Jack Chin and the Alien Land Law Project.[12]

Today's state constitutions remain full of sections that can be characterized as "zombie provisions"—clearly or arguably unenforceable clauses and amendments that stick with us, toward sometimes unclear effect and with potentially harmful consequences. The "zombie" phenomenon is becoming more well known in an adjacent context, although zombie-ism appears with (perhaps alarming) frequency in different strands of legal scholarship.[13] Pertinent for our purposes, both judges and scholars have used the term "zombie laws" or "zombie statutes" to describe legislation rendered unenforceable by a constitutional decision or other laws but that nevertheless "remain[s] on the books."[14] Even more recently, several scholars have identified judicial opinions as another area pervaded by the undead.[15] Despite widespread rejection of disturbing precedents on topics ranging from slavery to women's rights,[16] these "artifacts that are culturally unrecognizable" persist and resurface in

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11. News Release, Nat'l Asian Pac. Am. Bar Assoc., NAPABA, APABA-SF, and GOAABA Celebrate the Repeal of the Alien Land Law from Florida's Constitution (Nov. 10, 2018), https://www.apabasfla.org/wp-content/uploads/2018/12/PRESS-RELEASE-_-NAPABA-APABA-SF-GOAABA-CELEBRATE-FLORIDA-CONSTITUTION-REPEAL-OF-ALIEN-LAND-LAW-National-Asian-Pacific-American-Bar-Ass1.pdf [https://perma.cc/Z8HF-XQTR]; Prengaman, *supra* note 9. Florida, at least, rejected a repeal of this language as recently as 2008. Mary Shanklin, *Florida's 'Last Vestige of Discrimination,' Alien Land Law, Remains in Constitution for Now*, ORLANDO SENTINEL (Aug. 15, 2017), https://www.orlandosentinel.com/classified/realestate/os-florida-alien-land-law-20170814-story.html.

12. Prengaman, *supra* note 9; *see* Associated Press, *Kansas Strikes Law Banning Asians from Inheriting Property*, DESERET NEWS (June 4, 2002, 10:40 AM), https://www.deseret.com/2002/6/4/19658827/kansas-strikes-law-banning-asians-from-inheriting-property [https://perma.cc/3WM3-EZHN]; *see generally* Gabriel J. Chin, Roger Hartley, Kevin Bates, Rona Nichols, Ira Shiflett & Salmon Shomade, *Still on the Books: Jim Crow and Segregation Laws Fifty Years After* Brown v. Board of Education, 2006 MICH. ST. L. REV. 457 (2006).

13. *E.g.*, Adam Chodorow, *Death and Taxes and Zombies*, 98 IOWA L. REV. 1207 (2013) (considering application of estate and income tax law to the undead); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1120 (2015) (using zombie analogy to describe First Amendment law as "a body of doctrine robbed of its animating spirit of expressive equality and enslaved in the service of economic power").

14. *See* Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. (forthcoming 2022); Jonathan Zittrain, *The Supreme Court and Zombie Laws*, MEDIUM (July 2, 2018), https://medium.com/@zittrain/the-supreme-court-and-zombie-laws-2087d7bb9a75; *see also Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) (explaining that courts hold laws unenforceable rather than erase them).

15. *See* Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 84–85 (2020); Daniel B. Rice, Repugnant Precedents and the Court of History (Sept. 28, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920497.

16. Rice, *supra* note 15, at 41–42, 60.

modern caselaw,[17] raising questions about whether they should ever have precedential value, the harms continued invocation of these decisions may perpetuate, and how and whether courts should repudiate them.

This Essay canvasses the zombie phenomenon in modern state constitutions. Although there are strong parallels to zombie legislation, state constitutions deserve their own treatment. To be sure, in many cases, subject matter addressed in one state's code can be found in a different state's constitution, like the multitude of amendments in Alabama's constitution governing the playing of bingo games in various counties.[18] And like statutes, direct democratic participation shapes the content of many state constitutional provisions.[19] But as sources of law, state constitutions exist somewhere on a spectrum, with statutes at one pole and the Federal Constitution at the other. As constitutions, these state documents are meant to apply for long durations and are subject to particular amendment procedures, making them more resistant to change than the average statute (though certainly not as fixed as the Federal Constitution).[20] These similarities and differences merit separate discussion of the zombie provisions of state constitutions and what, if anything, should be done about them.

This Essay proceeds in three parts. First, it uses the state constitutions to examine the ambiguities in what counts as a "zombie," identifying both core and more peripheral cases, as well as some constitutional provisions that do not quite qualify as zombies but nonetheless seem potentially worrisome. Next, it considers the harms that zombie provisions may cause, exploring these harms alongside those identified in related contexts ranging from covenants running with land to unenforceable or unenforced statutes. The final Part considers in detail both the arguments for and against removal and the different methods by which zombie provisions might be rejected or removed. Since 2020, there have been several efforts in individual states to remove currently unenforceable state constitutional provisions.[21] This Essay is thus a timely exploration of both what makes

17. *Id.* at 2.

18. *Compare* ALA. CONST. amends. 612, 440, 506, 508, *with* WIS. STAT. ch. 563 (2019–20).

19. Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 690–99 (2011).

20. Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html [https://perma.cc/4FWX-QCNA]; Sutton, *supra* note 19, at 692–93.

21. Multiple states besides Alabama have sought to remove racial language in state constitutions. *See* Elana Lyn Gross, *Alabama, Utah, Nebraska Remove Racist Language from State Constitutions*, FORBES (Nov. 4, 2020, 4:44 PM), https://www.forbes.com/sites/elanagross/2020/11/04/alabama-utah-nebraska-remove-racist-language-from-state-constitutions/?sh=5a8e0e636130 [https://perma.cc/N9XH-ECMX]; Gerald Harris, *TN Senate Approves Proposed Amendment Removing Slavery from*

these provisions problematic and some of the nuanced and difficult questions involved in any decision to neutralize them.

I. IDENTIFYING ZOMBIES

A. Core Cases

There are several examples of what clearly constitutes a zombie provision. First and foremost, a state constitutional provision can become a zombie when a court declares its enforcement against the law, usually the Federal Constitution, or when a provision becomes obviously unlawful in light of a federal decision declining to enforce or order the enforcement of a similar provision (perhaps one from a different state). In a recent article, Allan Vestal chronicled a variety of state constitutional provisions that are substantively unconstitutional under federal law.[22] The substantively unconstitutional provisions he discussed are divided into four categories: those that ban same-sex marriage,[23] authorize racially segregated public schools,[24] impose religious tests (typically, requiring belief in God) for a person to hold office, or impose similar tests on those seeking to serve as a witness.[25] There are surely other scattered provisions besides these that fall into the substantively unconstitutional category. Until 2000—thirty-three years after *Loving v. Virginia*[26]—there was still a provision banning interracial marriage in Alabama.[27] Even once repealed, the anti-miscegenation law was left in place with the addition of a note of annulment.[28] Although not a "state" provision, Puerto Rico (along with Oregon) retains a constitutional provision requiring less than a unanimous

TN Constitution; 4 Republicans Vote Against, WREG MEMPHIS (Mar. 17, 2021, 7:15 PM), https://www.wreg.com/news/tn-senate-approves-proposed-amendment-removing-slavery-from-tn-constitution-4-republicans-vote-against/ [https://perma.cc/3KJ6-6XVL]. In addition, there has been some recent action to remove provisions banning same-sex marriage. Dan Avery, *Efforts to Repeal Virginia's Gay Marriage Ban Test State's Progressive Credibility*, NBC NEWS (Feb. 12, 2021, 11:39 AM), https://www.nbcnews.com/feature/nbc-out/efforts-repeal-virginia-s-gay-marriage-ban-test-state-s-n1257636 [https://perma.cc/2STH-2M5G]. Most recently, Louisiana targeted a Jim-Crow-era jury law rendered unconstitutional by a 2020 decision. *See* German Lopez, *Louisiana Votes to Eliminate Jim Crow Jury Law with Amendment*, VOX (Nov. 6, 2018, 10:41 PM), https://www.vox.com/policy-and-politics/2018/11/6/18052540/election-results-louisiana-amendment-2-unanimous-jim-crow-jury-law [https://perma.cc/TR5R-7NHJ].

22. Allan W. Vestal, *Removing State Constitution Badges of Inferiority*, 22 LEWIS & CLARK L. REV. 1151, 1155–56 (2018).

23. *Id.* at 1161–63.

24. *Id.* at 1159–60.

25. *Id.* at 1156–59, 1163–64.

26. 388 U.S. 1 (1967).

27. *Alabama Interracial Marriage, Amendment 2 (2000)*, *supra* note 4.

28. ALA. CONST. art. I, § 102.

verdict to convict a defendant of a serious offense,[29] despite the Supreme Court's contrary holding in *Ramos v. Louisiana.*[30]

Some zombie provisions were created by means other than a judicial decision on constitutionality. For instance, a state constitutional provision can be directly rendered unenforceable by a federal constitutional amendment. Michigan's constitution, for example, requires people to be twenty-one years of age to vote[31] in violation of the Twenty-Sixth Amendment, which sets the voting age at eighteen.[32] Along with court decisions and federal amendments, a federal statute may also leave part of the state constitution unlawful. Idaho's constitution prohibits "[t]he employment of children under the age of fourteen (14) years in underground mines,"[33] although together the Fair Labor Standards Act and federal regulations restrict anyone under the age of sixteen from "[m]anufacturing, mining, or processing occupations."[34] North Dakota's slightly more permissive rule, which bans children under twelve from "mines, factories and workshops," is also superseded by those federal rules.[35]

Naturally, the Federal Constitution has its own "zombie provisions" under this broad definition.[36] The "three-fifths" clause—which declared that enslaved persons counted as three-fifths of a freeman for the purposes of calculating congressional apportionment—of course remains in the United States Constitution alongside the Fourteenth Amendment, which finally repealed it.[37] Within the Thirteenth Amendment there remains a possible loophole permitting involuntary servitude and slavery as punishment for crimes.[38] Zombie provisions are thus hardly unique to the state constitutions, but there is a potentially important difference: the

29. P.R. CONST. art. II, § 11; *see* Lopez, *supra* note 21.

30. 140 S. Ct. 1390, 1405 (2020).

31. MICH. CONST. art. II, § 1.

32. U.S. CONST. amend. XXVI.

33. IDAHO CONST. art XIII, § 4.

34. 29 U.S.C. § 212; 29 C.F.R. § 570.33(a) (2021).

35. N.D. CONST. art. XI, § 24.

36. Indeed, there was a minor brouhaha in 2011 when Republican members of the House of Representatives read the Constitution aloud to celebrate it as a session, while omitting some "zombie provisions": passages relating to slavery. Philip Rucker & David A. Fahrenthold, *After Wrangling, Constitution Is Read on House Floor, Minus Passages on Slavery*, WASH. POST (Feb. 25, 2011), https://www.washingtonpost.com/national-politics/after-wrangling-constitution-is-read-on-house-floor-minus-passages-on-slavery/2011/01/06/ABLmphD_story.html.

37. U.S. CONST. art. I, § 2; *id.* amend. XIV, § 2; *see also* Janai Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399, 1409 n.37 (2019).

38. U.S. CONST. amend. XIII; *see* Caroline M. Kisiel, *Loopholes Have Preserved Slavery for More Than 150 Years After Abolition*, WASH. POST (Jan. 27, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/01/27/loopholes-have-preserved-slavery-more-than-150-years-after-abolition/ [https://perma.cc/S2WV-PCPB].

Federal Constitution is notoriously difficult to amend, let alone strike text from.[39] The state constitutions, by contrast, are comparatively easy to amend, although processes differ from state to state; some may be amended by legislative initiative, others by popular referendum, and in others, a convention may be proposed to the electorate on a periodic basis.[40] Owing to the difficulty of the federal amendment process, the average person may perceive the continuation of unenforceable and unused federal provisions as true historical artifacts in the federal context—an indictment of the Founding generation, perhaps, but not something for which current lawmakers deserve blame.[41] Whether the same assumption holds in the states, where the bars to modification are much lower, is not clear.

B. Peripheral Cases

Apart from the core cases where there is direct or obvious conflict between a state constitutional provision and some superseding source of law, there are additional categories of provisions that seem likely to fall victim to the zombie phenomenon. The text of state constitutional provisions can by itself render a provision unenforceable, but if one

39. Posner, *supra* note 20; Sutton, *supra* note 19, at 692–93.

40. Sutton, *supra* note 19, at 690–99.

41. I note here that the Federal Constitution has plenty of provisions falling into the other two categories discussed in this Part: "peripheral cases," where a facially neutral provision is plagued by a disturbing history or where a provision uses otherwise outmoded language, and "related monsters," where a provision is arcane and unenforced but may threaten to revive with new applications. For example, as a peripheral case, the federal provisions on "direct" taxation were assuredly meant to limit the taxes paid by owners of enslaved persons, but they have had much broader lives. *See* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4–5 (1999). It is likewise full of gendered language. *See* Robert Natelson, Opinion, *A Woman as President? The Gender-Neutral Constitution*, WASH. POST (Oct. 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/28/a-woman-as-president-the-gender-neutral-constitution/ [https://perma.cc/F67T-SDTF]. As for related monsters, one could point to provisions like the one forbidding the importation of enslaved persons from being abolished before 1808 (a provision explicitly forbidden in Article V from being amended before 1808), U.S. CONST. art. I, § 9; *id.* art. V, or perhaps the Third Amendment, U.S. CONST. amend. III, the subject of some (more or less) serious proposals for reinvigoration. Margot Harris, *Third Amendment Memes Are Having a Moment After the National Guard Was Deployed Amid Nationwide Protests*, INSIDER (June 9, 2020, 2:05 PM), https://www.insider.com/3rd-amendment-memes-spike-call-for-military-national-guard-protests-2020-6 [https://perma.cc/568D-29FL]; Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209 (1991); Alexander Zhang, *The Forgotten Third Amendment Could Give Pandemic-Struck America a Way Forward*, ATLANTIC (Oct. 21, 2020), https://www.theatlantic.com/ideas/archive/2020/10/could-third-amendment-protect-against-infection/616791/ [https://perma.cc/J5RS-ALM2]. For an interesting look at several more "odd clauses" of the Federal Constitution, see generally JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS (2011).

broadens the lens to examine the circumstances in which any given state constitutional provision was adopted, one might also discover an unlawful purpose lurking in the darkness. Of course, depending on one's approach to state constitutional interpretation, opinion is likely to differ about the utility of convention records and other historical material in assessing the meanings of provisions or applying them.[42] Nevertheless, because state courts sometimes turn to historical material—including convention debates and journals—to aid in the interpretation of provisions,[43] it is useful to consider the different sorts of evidence that judges might find when examining convention or other historical evidence.

There is little doubt that the most prevalently unlawful material in this historical evidence relates to race. A few initial observations are in order. First, much explicitly racist discussion at constitutional conventions pertains to provisions that are now unconstitutional on their face. For example, discussions of provisions mandating segregation of schools by race or banning interracial marriage naturally involved racist tropes.[44]

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42. There has not been much written about the uses of history in state constitutional interpretation, a topic I am exploring in another work in progress. *But see* Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341 (2017); Jorge M. Farinacci-Fernós, *Constitutional Law—Original Explication: A Democratic Model for the Interpretation of Modern State Constitutions*, 42 W. NEW ENG. L. REV. 1, 10 (2020). There has been some work on the uses of ballot pamphlets, particularly in the state of California. *See* Stephen Salvucci, Note, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871 (1998). State convention records have been of some more interest to scholars interested in the process of state constitution-making, rather than interpretation. *E.g.*, Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199 (2000); Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65 (2019). As my future work explores, it may prove instructive to compare the weaknesses of these state sources to those that have been criticized for their use in federal constitutional interpretation. *See, e.g.*, John F. Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753 (2012).

43. For examples of state courts using convention evidence in state constitutional construction, see *People ex rel. Cosentino v. County of Adams*, 413 N.E.2d 870, 871 (Ill. 1980); *Hodes & Nauser, MDs v. Schmidt*, 440 P.3d 461, 492 (Kan. 2019); *Cohen v. Att'y Gen.*, 259 N.E.2d 539, 544 (Mass. 1970); *Wagner v. Milwaukee Cnty. Election Comm'n*, 666 N.W.2d 816, 824 (Wis. 2003). *But see Rasmussen v. Baker*, 50 P. 819, 824 (Wyo. 1897) ("The debates of the convention are not a very reliable source of information upon the subject of the construction of any particular word or provision of the constitution. As we understand the current of authority and the tendency of the courts, they may for some purpose, but in a limited degree, be consulted in determining the interpretation to be given some doubtful phrase or provision; but, as a rule, they are deemed an unsafe guide."). *See also City of Tacoma v. Taxpayers of Tacoma*, 743 P.2d 793, 797–98 (Wash. 1987) (examining ballot pamphlet sent to voters); *Ramsey v. City of North Las Vegas*, 392 P.3d 614, 621 (Nev. 2017) (same).

44. In the Alabama convention, for instance, the discussion of the anti-miscegenation provision highlighted the need for "the preservation of the purity of blood of each of the races," JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION

Notably, though, racist arguments also animated discussions of facially neutral provisions. This is probably most evident in discussions of provisions relating to elections, which often had the clear aim of disenfranchising Black voters.[45] Second, some of the most atrocious material comes from constitutions that have subsequently been replaced, like the conventions associated with Arkansas's 1868 constitution,[46] Louisiana's 1898 constitution,[47] or Virginia's 1902 constitution.[48]

Several constitutions with troubling convention evidence, however, remain operative, including South Carolina's 1895 constitution and Alabama's 1901 constitution. The nature of this evidence runs the gamut. In framing the discussion of facially neutral voting provisions, for instance, a South Carolina delegate in 1895 encouraged the white men to come together in discussing suffrage to ensure "future generations that they shall have the blessings of Anglo-Saxon civilization and liberty in

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OF THE STATE OF ALABAMA, HELD IN THE CITY OF MONTGOMERY, COMMENCING MAY 21ST, 1901, at 471 (1901) [hereinafter ALABAMA 1901 PROCEEDINGS], and delegates debated the prospect that "Chinese and Indians" be added to the ban on Black and white intermarriage, *id.* at 928. Other scholars have noted the existence of this sort of racial language in the convention discussions of school segregation. Chin et al., *supra* note 12, at 472–73; Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67, 68 (2001); Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J. 1, 6–15 (2006); *Recent Cases: Equal Protection—Race Discrimination—Eleventh Circuit Reverses Dismissal of Discrimination Claim Relying on Historical and Statistical Evidence.*—Lewis v. Governor of Alabama*, 896 F.3d 1282 (11th Cir. 2018).*, 132 HARV. L. REV. 771, 771 (2018) [hereinafter *Recent Cases*].

45. Other scholars have also noted some of this racist language in this context. *See* Debo P. Adegible, *Voting Rights in Louisiana: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 413, 416–17 (2008); Chin et al., *supra* note 12, at 462; Flynt, *supra* note 44, at 71; Maatman, *supra* note 44, at 6–15; R. Burnham Moffat, *The Disfranchisement of the Negro, from a Lawyer's Standpoint*, 42 J. SOC. SCI. 31 (1904); *Recent Cases*, *supra* note 44, at 771.

46. Arkansas delegate discussing the franchise in 1868 went on a several-minutes-long diatribe about the poverty of African culture and advancement, postulating that all famous and learned Africans were really white. DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK, JANUARY 7TH, 1868, UNDER THE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 2D, 1867, AND THE ACTS OF MARCH 23D AND JULY 19TH, 1867, SUPPLEMENTARY THERETO, TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 115–17 (1868) [hereinafter ARKANSAS 1868 PROCEEDINGS].

47. The president of the Louisiana convention's closing speech included a string of horrible remarks, including a lament that they could not draft "the exact constitution" they would have liked, which would have included "universal white manhood suffrage, and the exclusion from the suffrage of every man with a trace of African blood in his veins." Moffat, *supra* note 45, at 33.

48. A delegate to the Virginia convention, in discussing a requirement that applicants registering to vote be able to explain any constitutional provision requested by officers, noted that the clause would "be efficient, because it will act 'in terrorem' upon the negro race. They believe that they will have a hostile examination . . . and they will not apply for registration." 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION: STATE OF VIRGINIA 2973 (1906).

this State," going on to note the threat of the "black substratum."[49] Other times, racist language was used more generally to frame the mission of the convention itself. The president of that same convention read a wide-ranging opening speech that homesteads needed to be provided to South Carolinians to prevent them from becoming "the Arabs of the desert or the wandering Jews of Russia," endorsed "separate education of the races" in arguing that individuals should be able to choose which schools their tax dollars supported, and encouraged white delegates to come together "to so fix the election laws that [their] wives, [their] children and [their] homes w[ould] be protected and Anglo-Saxon supremacy preserved."[50] Another delegate at the close of the convention lamented that had they been a truly "free people" in drafting the state constitution, "we would have negro slavery."[51] The opening speech at the Alabama convention in 1901 asked delegates: "[W]hat is it that we want to do? Why, it is, within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[52] The chairman went on to discuss the Civil War and his doubt that Northern states meant "to elevate the black man" so much as "to humiliate the white man" of the South.[53]

In historical material, one can find more abstract indicia of racial animus even in procedural interstices. Alabama's convention contains a disturbing petition from a Black medical doctor, Willis Stearns, who began his letter to the convention by noting that "no member of the negro race is represented in your august body to speak one word for us."[54] His petition is both proud and tragic; he simultaneously compliments the system of chattel slavery, looks forward to "how intelligent" the Black population will "become one hundred years from now," and reminds the drafters that the constitution will be a "monument" by which future generations judge them in encouraging them to extend the franchise to Black residents on a fair basis.[55] For all his efforts, the reading of his petition was followed by a motion that his petition not be included in the official proceedings.[56] The petition did end up being sent to the committee working on elections (which, of course, did suggest provisions with the effect of disenfranchising Black citizens).[57]

Likewise, some Alabama delegates objected to the mere *stenographic reporting* of the convention because they did not want records of their

49. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 464–65 (1895).

50. *Id.* at 11–12.

51. *Id.* at 731.

52. ALABAMA 1901 PROCEEDINGS, *supra* note 44, at 9.

53. *Id.* at 10.

54. *Id.* at 308.

55. *Id.* at 309–12.

56. *Id.* at 312.

57. *Id.*

white supremacy preserved.[58] One person in favor of recording thought objection to the stenographer pointless because the "real reasons" for their approaches were so obvious and history would prove that the "white people were right" in any case.[59] An objector explicitly hoped that the convention would not be recorded because "[t]here will be things done and said in this convention that we do not want the Northern papers to have . . . that we do not want to go before the court of the United States."[60] (This turned out to be prescient. In *Hunter v. Underwood*,[61] the Supreme Court in fact used much of the evidence from Alabama's state constitutional convention to find a provision unconstitutional under the Fourteenth Amendment where the law disenfranchised those convicted of crimes involving "moral turpitude."[62])

Hunter illustrates an important point: convention evidence has been used in the past to declare state constitutional provisions unenforceable. In the 1960s, for instance, multiple federal courts used nineteenth-century convention evidence to strike down "unremitting and ingenious"[63] ways that states continued to try to restrict voting rights.[64] There may well be other troubling historical evidence in convention records or ballot materials pertaining to extant neutral provisions. In addition to racial prejudice, one can certainly imagine that evidence of gender bias, religious animus, hostility to communists or other political groups, and other, perhaps more banal unconstitutional motivations might exist.

There are some problems involved in using historical evidence to flag likely zombie provisions. First, and most obviously, not all convention members had the same motivations in endorsing a particular provision, nor did voters who (depending on the state's procedures) may have been responsible for its ultimate adoption. In the case of some of the voting restrictions, even the most aggressively anti-Black conventions had some delegates who seemed more motivated by class animus toward poorer whites or in favor of extending civil rights (at least under some circumstances) to Blacks.[65] And conventions in other states in fact have heartwarming evidence, such as the discussion from delegates in Hawaii—before *Loving v. Virginia*—about why it was important to include a

58. *See* Maatman, *supra* note 44, at 8.

59. 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 60–61 (1901).

60. *Id.* at 71.

61. 471 U.S. 222 (1985).

62. *Id.* at 229.

63. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

64. *See, e.g.*, *id.*; *Louisiana v. United States*, 380 U.S. 145 (1965).

65. Maatman, *supra* note 44, at 11–12. An Arkansas delegate actually confronted racist remarks allegedly made about the "odor" of Black convention delegates by saying he preferred that to "the smell of treason" (alluding to the Civil War). ARKANSAS 1868 PROCEEDINGS, *supra* note 46, at 109–10.

provision recognizing the sanctity of interracial marriage even though they knew it might pose problems for them in getting the new state constitution past federal congressional delegates from Southern states.[66] Similarly, an Alaskan delegate worried that a residency requirement being debated in one part of the state constitution was too close to one that had been deployed nefariously against Black citizens in Louisiana.[67] Returning to the troubling evidence, though, we must ask ourselves what should matter—clarity or quantity? Whether the evidence pertains to a specific provision, a procedure, or simply framed the convention itself? These are difficult questions. Some authors have asserted that where judges have proof of *any* sort of problematic historical evidence when assessing the effects or implementation of a constitutional provision, it can form the basis for an especially strong equal protection claim.[68]

Apart from the peripheral zombie cases involving provisions with troubling histories, other provisions raise the mirror image of the problem: facially troubling text but little evidence of either explicitly discriminatory motivations or any efforts to use the provisions toward an unconstitutional effect. In his article describing federally unconstitutional portions of state constitutions, Allen Vestal also describes "symbolically exclusionary" provisions: those that are dated because of their use of gendered language, Christian references, or discussion of benefits for Confederate soldiers.[69] The substantive unlawfulness of these is far from clear, but they may transmit messages of exclusion that seem contrary to the spirit (if not the letter) of federal constitutional law. Gendered language has certainly caused some problems in family law and estate planning, where cases have been brought to determine how qualifiers like "man and woman" or "husband and wife" apply to same-sex couples.[70] And while few can imagine anyone today trying to use some of the provisions using only "he" instead of "he or she" or "they" toward a substantively exclusionary end, that is not unprecedented. The *Indianapolis Star* carried a column wondering if use of the word "he" in the Federal Constitution's provision on qualifications for representatives prevented "Miss Jeannette Rankin" from running for Congress, noting that anti-suffragists intended to press that argument.[71]

66. 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII: 1950, at 17–18 (1961).

67. PAPERS OF ALASKA CONSTITUTIONAL CONVENTION: 1955–1956, at 3302 (1981).

68. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 124 (2008).

69. Vestal, *supra* note 22, at 1165–76.

70. *See, e.g.*, *Celia v. Appel*, 102 Va. Cir. 386 (2019).

71. *Does Constitution Permit Woman to Serve in House?*, INDIANAPOLIS STAR, Nov. 19, 1916, at 53.

C. Related Monsters

Beyond the racist or racially motivated provisions, more commonplace yet parallel questions arise where convention evidence reflects concern about a very specific (and often arcane) problem. Perhaps a provision has never been declared unconstitutional, but it has had no applications in decades. Perhaps it is openly flouted. Are these provisions zombies? If unconstitutional or otherwise unlawful provisions are unenforceable, these are at best unenforced. Yet their continued existence may raise the possibility of their reemergence, which might yield selective enforcement or worrisome new applications. Alternatively, they may be clearly outdated and unlikely to return, but some might find their persistence deeply strange or outmoded. If they are not zombies, arcane provisions might be something else—maybe werewolves, harmless arcana by day, terror by oncoming nightfall.[72]

State constitutions are of course full of archaic provisions, several of which have been noted by other scholars.[73] This is no small wonder: as one author observed now nearly fifteen years ago, two-thirds of the operative state constitutions are over a century old.[74] One of the foremost scholars of state constitutional law, Robert Williams, has authored at least two pieces questioning whether particular state constitutions are "obsolete."[75] Some provisions relate to archaic practices: issues that were once a problem or concern but that the passage of time has rendered bizarre. Seven states have provisions relating to dueling,[76] usually (but not exclusively) preventing those who duel from holding office.[77] Tennessee's

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72. I am grateful for a conversation with Chris Griffin and Carol Rose that generated this analogy. My clever colleague Niko Bowie points out that the Halloween-themed analogies are nearly endless: "Frankensteins (provisions that go off and do things beyond their drafters' intentions), mummies (provisions that seek to embalm some temporary compromise forever), vampires (provisions that wouldn't survive if exposed to the daylight of public scrutiny)." E-mail from Nikolas Bowie, Assistant Professor, Harvard L. Sch., to Author (Aug. 11, 2021, 11:34 AM) (on file with author).

73. Vestal, *supra* note 22, at 1154 (discussing prohibitions on dueling); Richard Briffault, *Foreword: Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 948 (2003) (discussing the "laughably low dollar limits" imposing ceilings on the amount of debt that the government can take on).

74. G. Alan Tarr, *Introduction*, *in* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME 3: THE AGENDA OF STATE CONSTITUTIONAL REFORM 1, 4 (G. Alan Tarr & Robert F. Williams eds., 2006).

75. *See* Robert F. Williams, *Is the Wisconsin State Constitution Obsolete? Toward a Twenty-First Century, Functionalist Assessment*, 90 MARQ. L. REV. 425, 431 (2007); Robert F. Williams, *Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?*, 87 OR. L. REV. 867, 905 (2008).

76. Vestal, *supra* note 22, at 1154.

77. *See, e.g.*, OR. CONST. art. II, § 9; TENN. CONST. art. IX, § 3. *But see* ALA. CONST. art. IV, § 86 (authorizing the legislature to pass "such penal laws as it may deem expedient to suppress the evil practice of dueling"). There is an interesting history behind

constitution provides free access to "the printing press" so that residents can "examine the proceedings of the Legislature."[78] The constitutions of most states have some provision relating to the quartering of soldiers, some broader than the federal Third Amendment.[79] At last check, none had *ever* been litigated.[80] Time will tell whether climate change dooms to the same fate New York's constitutional provisions on the proper width of ski trails or the California Constitution's discussion of golf course taxation.[81]

Provisions on financing are another source of obsolescence. The Massachusetts Constitution—the oldest state constitution[82]—still prescribes that all mentions of money in the constitution shall have their value computed by a certain shillings and pence of silver.[83] Tennessee sets the salaries of its legislators at "$1,800.00 per year,"[84] substantially less than they are currently paid.[85] In addition to these examples, there are also plenty of outmoded fines and fees that have never been updated.[86] Constitutional mandates about how much states must spend on education are often comically miniscule. California's constitution requires a spend of $180 per pupil,[87] roughly fifty times less than it currently spends.[88] Delaware's constitution likewise requires the legislature to set aside $100,000 for public education,[89] a 1/20,000 fraction of its annual

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anti-dueling provisions—despite their deep historical pedigree, many went unenforced until attitudes (particularly in the South) changed after the Civil War. *See generally* C.A. Harwell Wells, Note, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805 (2001).

78. TENN. CONST. art I, § 19.

79. Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 144–45 (1993).

80. *Id.* at 146.

81. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 819 (1992).

82. Margaret H. Marshall, Speech, *"Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1640 (2004).

83. MASS. CONST. pt. 2, ch. VI, art. III.

84. TENN. CONST. art. II, § 23. California has similarly low salary requirements for its teachers: $2,400 per year. CAL. CONST. art IX, § 6.

85. *2020 Legislator Compensation*, NAT'L CONF. OF ST. LEGISLATURES (June 17, 2020), https://www.ncsl.org/research/about-state-legislatures/2020-legislator-compensation.aspx [https://perma.cc/NM57-ZUNR].

86. *E.g.*, TENN. CONST. art. VI, § 14 ("No fine shall be laid on any citizen of this state that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars.").

87. CAL. CONST. art IX, § 6.

88. EMILY PARKER, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 4 (2016), http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/2LUV-C2RJ].

89. DEL. CONST. art. X, § 2.

education budget.[90] Richard Briffault has also pointed out the "laughably low dollar limits" that constrain municipal indebtedness.[91]

There are other parts of state constitutions that, like the financial provisions, are not quite irrelevant but nonetheless seem outdated. Some states have provisions that discuss the particulars of maintaining telephone or telegraph lines.[92] Special provisions relating to railroads,[93] mining,[94] and even "electric light plant[s]"[95] or "terminal grain elevators"[96] exist in other states. Some constitutions have broad statements of morality, such as Idaho's provision that "[t]he first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality."[97] North Dakota likewise prescribes that all schools shall have instruction impressing upon the student "the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind."[98] Although there may still be some life left in these provisions, they certainly read as vestiges of a bygone era.

By extension, of course, if one goes beyond the "core" arcane cases to the "peripheral," evidence of arcane purposes behind more neutral provisions abounds. As one example, a general derision toward corporations and corporate interests pervades some state constitutions still in effect.[99] In my own work, I have explored various legal problems presented by street grading, the process of raising and lowering streets to cheapen the cost of travel.[100] Because owners often were not compensated for changes in the level of the street that did not directly confiscate property, homes and businesses were sometimes left atop precipices or behind steep berms, which many contemporaries perceived as unfair and unjust.[101] In addition to various common-law changes that arose to confront this problem, over half of the state constitutions were amended

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90. PARKER, *supra* note 88, at 4.

91. Briffault, *supra* note 73.

92. IDAHO CONST. art. XI, § 13; S.D. CONST. art. XVII, § 11.

93. IDAHO CONST. art. XI, §§ 6, 11; S.D. CONST. art XVII, §§ 10–16; TEX. CONST. art. X, § 2.

94. IDAHO CONST. art. I, § 14; S.D. CONST. art. XIII, §§ 14–15.

95. N.D. CONST. art. XII, § 10.

96. N.D. CONST. art. X, § 19.

97. IDAHO CONST. art. III, § 24.

98. N.D. CONST. art. VIII, § 3.

99. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875 TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO 728 (1907).

100. *See* Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341 (2018) [hereinafter Brady, *The Damagings Clauses*]; Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167 (2016) [hereinafter Brady, *Property's Ceiling*].

101. *See generally* Brady, *Property's Ceiling*, *supra* note 100, at 1218.

to deal with problems largely having to do with street grading or flooding caused by infrastructure development, as convention evidence makes clear.[102] The need for aggressive grading soon went out of vogue: while horse-drawn transport was far cheaper on flatter roads, the car could make quicker work of steeper hills.[103] But the constitutional language remained: provisions requiring compensation for property "damaged," "injured," or "destroyed" for public use or, in some instances, limiting recovery to situations involving "[m]unicipal and other corporations and individuals" who damaged property in the course of the "construction or enlargement of their works, highways, or improvements."[104] Attempts to broaden the reach of these works beyond street grading have met with (at best) mixed results. In some states but not others, damage caused by the police in the course of a pursuit or search triggers the compensation requirement.[105]

Convention records contain a great deal of evidence. They even have their comedic moments: take, for example, the Alaska constitutional convention in the 1950s, which included an exciting coconut delivery from the Hawaii convention (but only two coconuts for an entire convention)[106] and concluded with everyone applauding a delegate who had not spoken the entire time.[107] In other cases, however, convention records expose the outdated or narrow reasons that a provision was enacted, again raising questions about what judges should do when encountering this evidence in interpreting provisions.

II. THE DANGERS ZOMBIES POSE

A. Learning from Related Contexts

I have described various categories of unenforceable or unenforced provisions but without confronting a critical question: What dangers or harms do these provisions really pose? Here, it is helpful to turn to a few analogous contexts where scholars and lawyers have spent more time

102. Brady, *The Damagings Clauses*, *supra* note 100, at 355–60. The last states to adopt constitutional changes like these were Alaska and Hawaii, and they appear to have done so not because of grading, but due to new infrastructural "villains: freeway builders and utility companies." *Id.* at 361.

103. Brady, *Property's Ceiling*, *supra* note 100, at 1199–1200.

104. Brady, *The Damagings Clauses*, *supra* note 100, at 359 (quoting PA. CONST. of 1874, art. XVI, § 8).

105. *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 38–39 (Minn. 1991); *Steele v. City of Houston*, 603 S.W.2d 786, 788, 793 (Tex. 1980). *But see Eggleston v. Pierce County*, 64 P.3d 618, 626–27 (Wash. 2003) (declining to apply damagings or takings clauses); *Customer Co. v. City of Sacramento*, 895 P.2d 900, 901 (Cal. 1995) (same); *Bray v. Houston County*, 348 S.E.2d 709, 709, 711 (Ga. Ct. App. 1986) (same).

106. PAPERS OF ALASKA CONSTITUTIONAL CONVENTION: 1955–1956, *supra* note 67, at 1341.

107. *Id.* at 3981.

examining the problems, risks, and costs associated with unenforceable legal devices. There are two sources of legal obsolescence that come immediately to mind.

The first is the canonical case of zombie-ism: "zombie laws," or legislation that persists "on the books" for years after being declared unenforceable by a court ruling. Despite its relatively recent origins,[108] two federal courts have already used the "zombie" moniker.[109] The example provided of a "zombie law" in a recent Fifth Circuit decision is instructive. In that case, the litigants asked for an injunction against the enforcement of a Houston ordinance "allow[ing] only registered voters to circulate petitions for initiatives and referenda."[110] The city still opposed the injunction, even though the United States Supreme Court had declared an identical Colorado statute a federally unconstitutional restriction on political speech nearly twenty years earlier.[111]

There are scores of zombie statutes that one can identify from the constitutional law corpus. Laws severely restricting or banning abortion in various ways that remained on the books after *Roe v. Wade*,[112] statutes prohibiting same-sex marriage after *Obergefell v. Hodges*,[113] and anti-sodomy provisions after *Lawrence v. Texas*[114] provide just a few examples.[115] And of course, just as there are related monsters in state constitutional law, there are related monsters in the statutory context, too. If there are large numbers of zombie statutes, there are even more vast numbers of arcane statutes that were targeted to old problems and that have gone for long periods without enforcement.[116]

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108. The term appears to have originated in the last five years. *See* Kathleen Harris, *Federal Government to Axe 'Zombie Laws' from Canada's Criminal Code*, CBC NEWS (Mar. 7, 2017, 5:29 PM), https://www.cbc.ca/news/politics/criminal-code-reform-zombie-laws-1.4013869 [https://perma.cc/DFZ4-784S]; Zittrain, *supra* note 14. Although she did not use the term "zombie," Judith Royster evoked the undead nearly thirty years ago in writing about the Supreme Court's revival of repudiated statutory language in federal Indian law, calling it "reminiscent of a horror movie villain, defeated in the final scenes and officially dead. But as the closing credits roll, the faint continuing throb of a heartbeat can be detected, and soon sequel after sequel resurrects the villain to continue its course of destruction." Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 20 (1995).

109. *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020); *We the People PAC v. Bellows*, 512 F. Supp. 3d 74, 90 n.5 (D. Me. 2021).

110. *Pool*, 978 F.3d at 309–10.

111. *Id.* at 309; *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186–87 (1999).

112. 410 U.S. 113 (1973).

113. 576 U.S. 644 (2015).

114. 539 U.S. 558 (2003).

115. Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L.J. 1135, 1199 (2019); *see also* Wasserman, *supra* note 14, at 19–20.

116. Daniel Rice has written about the long-term nonenforcement of the Logan Act (and its consequences). Daniel B. Rice, *Nonenforcement by Accretion: The Logan Act*

In addition to statutes, covenants running with the land likewise raise the specter of zombie-ism. Although the term "covenants" sounds ancient,[117] these portions of deeds or property records that explicitly restrict owners' use and enjoyment of property remain an incredibly important land use tool. Covenants bind the nearly one-quarter of Americans living within homeowners' associations.[118] In part because of their ubiquity, other scholars have analogized covenants to private constitutions.[119] When put on significant numbers of properties at the time of land subdivision and development, these promises act as long-term agreements that bind all successor owners and dictate a vision for the community for the future. In at least one state, courts even refer to the drafters of covenants as the "framers."[120] In private law—and the law of property, in particular—these legal instructions can persist for long periods of time and long after similar provisions have been declared unenforceable or unconstitutional.

Both arcane and illegal covenants abound. To be sure, new exurban subdivisions often come with shiny new restrictions, and homeowners' associations usually retain the power to update and impose restrictions as part of their ongoing governance authority,[121] making obsolescence a smaller risk in those contexts. But many American cities from Maryland to California are full of old subdivisions.[122] Accordingly, it does not take long to find strange and outdated restrictions. In Massachusetts, a restriction extending into the 1990s banned "Quonset huts,"[123] half-

and the Take Care Clause, 55 HARV. J. ON LEGIS. 443, 518–22 (2018). And yet another author has kept track of all the wildly outdated criminal laws that remain on the books (maintaining a companion Twitter account). *See generally* MIKE CHASE, HOW TO BECOME A FEDERAL CRIMINAL: AN ILLUSTRATED HANDBOOK FOR THE ASPIRING OFFENDER (2019); A Crime a Day (@CrimeADay), TWITTER, https://twitter.com/CrimeADay?s=20 [https://perma.cc/UAF5-6FVD] (last visited Oct. 8, 2021).

117. Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1614 (2021) (describing covenants as evoking "biblical allusions and nightmares from first-year property courses").

118. *HOA Statistics*, IPROPERTYMANAGEMENT, https://ipropertymanagement.com/research/hoa-statistics [https://perma.cc/LK8U-NM4V] (last visited Oct. 8, 2021). Other authors put the statistic as closer to one-in-five, though "nearly 60% of recently built single-family houses" are in HOAs. Wyatt Clarke & Matthew Freedman, *The Rise and Effects of Homeowners Associations*, 112 J. URB. ECON. 1, 1 (2019).

119. *E.g.*, Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 927 (1987).

120. *Maddalena v. Brand*, 388 N.E.2d 337, 339 (Mass. App. Ct. 1979) (citing *Chase v. Walker*, 45 N.E. 916, 917 (Mass. 1897)).

121. *See, e.g.*, *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1283 (Cal. 1994); *Hidden Harbour Ests., Inc. v. Basso*, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981).

122. MARC A. WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING 50, 69–70 (1987).

123. *Brand*, 388 N.E.2d at 339.

cylindrical, metal pre-fab structures that were produced in large numbers to house soldiers in the Second World War and were briefly marketed as a solution to the housing crisis in the postwar years.[124] In the past few decades, several courts have been asked to interpret covenants that involve "slaughterhouses."[125] More troublingly, and as recent research has documented all too well, properties continue to be burdened by restrictions that purport to prevent certain races or religions from acquiring property,[126] despite the fact that these sorts of restrictions were clearly invalid after the Supreme Court's 1947 decision in *Shelley v. Kraemer*.[127]

B. Probing Potential Harms

The work that has been done on covenants and zombie statutes can yield generative comparisons for those interested in state constitutional law. In those contexts, scholars and some judges have tended to identify three different sorts of harms that unenforceable language may cause: first, a risk of revival; second, expressive harm associated with persistence; and finally, the minimal (but not nonexistent) risk of misplaced reliance or legal error.

1. REVIVAL

Zombie state constitutional provisions clearly present one of the risks that is posed by both zombie laws and unlawful covenants: the chance that if the law rendering these provisions unenforceable is changed, the provision will roar back to life. For example, imagine that a Supreme Court decision that rendered some statute unenforceable is overturned

124. Tom Vanderbilt, *After the War: Quonset Huts and Their Integration into Daily American Life*, *in* QUONSET HUT: METAL LIVING FOR A MODERN AGE 63, 68–71, 102 (Julie Decker & Chris Chiel eds., 2005).

125. *James O. v. Chai Ctr. for Living Judaism, Inc.*, No. A-4088-13T1, 2016 WL 4262655, at *4 (N.J. Super. Ct. App. Div. Aug. 15, 2016) (per curiam); *Mun. Elec. Auth. of Ga. v. 2100 Riveredge Assocs.*, 348 S.E.2d 890, 892 (Ga. Ct. App. 1986).

126. *See* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 229 (2013); Megan Johnson, *Clauses that Discriminate Against Races Still Exist on Some Massachusetts Home Deeds*, REALESTATE (June 23, 2020, 9:21 PM), http://realestate.boston.com/buying/2020/06/23/racist-clauses-still-exist-on-some-massachusetts-home-deeds/ [https://perma.cc/4YAG-NHQ8]; Brief of the Jewish Coalition for Religious Liberty as Amicus Curiae in Support of Petitioner at 9, *Tree of Life Christian Schs. v. City of Upper Arlington*, 139 S. Ct. 2011 (2019) (No. 18-944), *denying cert. to* 905 F.3d 357 (6th Cir. 2019).

127. 334 U.S. 1 (1948).

years after the fact. The statute that remains on the books might be put back into effect without new legislative intervention.[128]

This question tees up an observation: obviously, zombie-ism is to some extent in the eye of the beholder. No matter one's political stripes or policy preferences, one can find a zombie law that seems not just unobjectionable but even desirable to retain. The persistence of an unenforceable state constitutional provision can signal resistance. State constitutional provisions have often served this function across history. In the early 1900s, the federal Eighteenth Amendment and the Volstead Act combined to prohibit the sale, transport, and manufacturing of alcohol in the United States.[129] In several states, those opposed to Prohibition pursued various means of state constitutional change to adopt clearly incompatible amendments (such as those increasing the amount of alcohol by volume necessary to make a beverage alcoholic), both to pursue every loophole possible but also to throw down a gauntlet, challenging federal Prohibition openly.[130]

Several zombie provisions no doubt continue in present-day state constitutions for this very reason. Many who oppose same-sex marriage and abortion no doubt hope that a future Supreme Court decision will breathe new life into dormant state rules, whether they are statutory restrictions on abortion or same-sex marriage or potentially applicable provisions of the state constitution.[131] In Virginia, for example, efforts to erase same-sex marriage laws have failed repeatedly in the years since these laws became unconstitutional, and "the state's 2006 constitutional

128. Zittrain, *supra* note 14; *see also* Eric Fish, *Judicial Amendment of Statutes*, 84 GEO. WASH. L. REV. 563 (2016).

129. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 4 (2006).

130. Sean Beienburg, *Neither Nullification nor Nationalism: The Battle for the States' Rights Middle Ground During Prohibition*, 7 AM. POL. THOUGHT 271, 285–97 (2018). Although likely less clearly for the purpose of open challenge, a state constitutional provision can also be interpreted by a judge in a way that seemingly conflicts with federal pronouncements. For myriad examples from criminal procedure, see Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 229, 237–52 (2008).

131. Very few state constitutions mention abortion specifically, and even then, those discuss funding. COLO. CONST. art. V, § 50 ("No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion . . . ."); R.I. CONST. art. I, § 2 ("Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."); *see generally* Michael R. Braudes, *State Constitutional Regulation of Abortion*, 19 U. BALT. L. REV. 497 (1990). Of course, other state constitutional provisions pertaining to "life" or otherwise could, absent controlling federal precedents, be given new meanings.

amendment prohibiting gay unions remains for the time being."[132] On the opposite side of the typical political spectrum—and although not a state constitutional example—others are no doubt glad that zombie provisions of the federal Voting Rights Act remain on the books.[133]

For those who are glad an unenforceable provision remains, the persistence of zombie provisions is desirable because it helps short-circuit the processes that would need to take place to re-enact these laws (or, in the case of constitutional provisions, add new amendments to the state constitution). But the corollary to that is that actors in favor of the provision need not incur the costs—political or otherwise—that come with needing to replace unenforceable provisions that have been excised during their period of non-enforcement. In other contexts, scholars have aptly shown that political actors can be more sensitive to the political costs and benefits of particular acts than fiscal ones.[134] Given the role that state legislators play in initiating or approving the changes to state constitutions,[135] allowing zombie provisions to persist helps legislators avoid the political costs they would incur in having to get the same constitutional provision reintroduced after a period of unenforceability.

It also merits mention that provisions more aptly characterized as related monsters—like arcane provisions that have long gone unenforced—can likewise be revived and given new meaning without requiring legislatures to incur political costs. The statutory context provides many examples. In criminal law, "broadly written laws passed in the 1980s that were dormant or near dead—the 'zombie laws' of the drug war—are being employed in ways their drafters likely did not intend" in order to cover the opioid crisis. Specifically, the "so-called federal 'crack house' law"—which prohibits owners of property and others from making premises available for the storing, distribution, or use of controlled substances—is now being invoked to thwart safe injection sites run by nonprofits.[136] In private law, while drafters do not bear the political costs for their inclusion of provisions, they may bear reputational ones associated with inserting a new and draconian restriction. For this reason,

132. Julie Moreau, *States Across U.S. Still Cling to Outdated Gay Marriage Bans*, NBC NEWS (Feb. 18, 2020, 9:44 AM), https://www.nbcnews.com/feature/nbc-out/states-across-u-s-still-cling-outdated-gay-marriage-bans-n1137936 [https://perma.cc/KZ4P-P7MK].

133. *See Shelby County v. Holder*, 570 U.S. 529 (2013); 52 U.S.C. § 10303.

134. YUN-CHIEN CHANG, PRIVATE PROPERTY AND TAKINGS COMPENSATION: THEORETICAL FRAMEWORK AND EMPIRICAL ANALYSIS 75–89 (2013) (examining empirical evidence from takings in Taiwan to assess validity of the "fiscal illusion" and "political interest" theories); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345–47 (2000).

135. Sutton, *supra* note 19, at 693–99.

136. Alex Kreit, *The Opioid Crisis and the Drug War at a Crossroads*, 80 OHIO ST. L.J. 887, 901–04 (2019).

just as with statutes, some old covenants occasionally rise from the dead, brought into litigation in a modern homeowner's efforts to ban a new and unanticipated use. Covenants targeted toward old-timey nuisance uses like glue factories have reemerged as the basis for claims that property owners have the right to keep houses of worship or solar panels out of their neighborhoods.[137] The same risk of revival attends long-dormant constitutional provisions, even if they are not quite true zombies.

2. SIGNALING

In addition to the potential dangers of revival, the mere persistence of zombie provisions may cause expressive harms, depending on the content of the provision. As Deborah Hellman has observed in discussing federal equal protection law, the content of a law—such as one mandating segregation—conveys meaning about the worth and value of the regulated person or conduct.[138] These messages may generate real harms—actual differential treatment of individuals or groups denigrated by the law's persistence—or, at the very least, psychological wounds.[139]

In one of the related contexts already discussed—covenants running with land—the expressive harm associated with unenforceable law has been well documented. As scholars Carol Rose and Rick Brooks have discussed, years after the decision rendering them unenforceable in *Shelley v. Kraemer*, covenants restricting the race of titleholders or users of property continued to act in pernicious ways despite their unenforceability.[140] In addition to several cases brought by property owners directly seeking loopholes in *Shelley*,[141] the persistence of racial covenants acted as a powerful "signal[] of neighborhood intent to remain all white."[142] Especially in the earlier years, buyers may not have been aware of their unenforceability, and, in any event, racial covenants clearly indicated the neighborhood's hostility to prospective Black purchasers.[143]

The likelihood of expressive harm may vary, of course, depending on the content of the zombie provision. But it may also vary by virtue of its

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137. *James O. v. Chai Ctr. for Living Judaism, Inc.*, No. A-4088-13T1, 2016 WL 4262655, at *2 (N.J. Super. Ct. App. Div. Aug. 15, 2016) (per curiam); *see Faler v. Haines*, 962 N.Y.S.2d 500, 502 (N.Y. App. Div. 2013); Brady, *supra* note 117, at 1680–81.

138. *See* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 3 (2000); *see also* Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 53–65 (2021) (disaggregating types of expressive harm or wrongs that government acts, including speech, may cause).

139. Schragger, *supra* note 138, at 59.

140. BROOKS & ROSE, *supra* note 126, at 172–74, 179–81.

141. *Id.*

142. *Id.* at 187.

143. *Id.* at 189.

procedural history. Is the harm worse where state officials have remained passive in efforts to remove offensive language or where state officials (or the voting public) have affirmatively declined to remove it? There are plenty of examples of legislators or voters declining to remove both racist provisions and those hostile to other protected groups.[144] Thankfully, all states have now gotten rid of their explicitly racist provisions as of last fall. But it is still appalling to imagine the expressive harm that minority residents suffer when a significant percentage of their home-state electorate repeatedly votes against removal.[145]

3. ERROR

Although it certainly seems uncommon—and thus, this paragraph is mercifully brief—the persistence of zombie provisions may also present a risk of actual legal error. By this, I mean judicial reliance on or invocation of a provision despite its unenforceability. Just across the border, in Canada, a 2016 court "mistakenly relied" on a portion of the country's Criminal Code still in print even though it had been struck down in a 1990 Supreme Court decision.[146] One hopes (but probably cannot be sure) that in most chambers, the magic of Westlaw and LexisNexis annotations ordinarily prevents most zombie statutes and zombie provisions from wreaking similar havoc.

III. LAYING ZOMBIES TO REST

A. Complicating the Decision

Although I have identified some potential harms associated with zombie state constitutional provisions, there may also be harms associated with removing these provisions—meaning the decision to remove should not be undertaken lightly. First, and rather basically, as a matter of interpretation, some zombie provisions may shed light on the meaning of other provisions or parts of the constitutional text, giving them interpretive value that would be lost with their eradication.[147] And second, the persistence of some provisions that qualify as zombie provisions may actually seem like an unqualified good, particularly where a state constitutional rule is protective but under-protective compared to more

144. *See* Lyman, *supra* note 7; Moreau, *supra* note 132.

145. *See* Lyman, *supra* note 7.

146. Sarah Sutherland, *Zombie Laws*, CANADIAN LEGAL INFO. INST. BLOG (Oct. 29, 2018), https://blog.canlii.org/2018/10/29/zombie-laws/ [https://perma.cc/4BP9-TE5R].

147. *Cf.* Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165 (2015).

recent federal laws. To take a rather extreme example, it is hard to imagine a world in which the federal government decides to undo labor laws that protect children. If the federal government did, however, state constitutional provisions about minimum working ages would exist to fill the gaps.[148] In some cases, then, a zombie provision might act as a backstop to protect locally recognized rights that have duplicate federal protection should federal rules ever change.

Quite apart from the potential benefits of these "duplicate" zombie provisions, it is also contestable whether zombie state constitutional provisions are really generating the harms that I have identified—particularly the expressive ones. For one thing, most people are unaware that their state has a constitution,[149] and even lawyers routinely seem ignorant of the possibility of state constitutional claims.[150] Judges, too, issue rather few state constitutional decisions.[151] Even where people are aware of their state constitutions, their assumptions about them may be similar to assumptions they make about the Federal Constitution. They seem inherently like historical artifacts in ways that statutes and repeatedly reinserted deed provisions may not.[152]

Although that might suggest the risk of harm is lesser in the state constitutional context than others, there are two rejoinders. First, most people are unaware of their deed and state code provisions, too.[153] Yet campaigns to remove archaic language in those contexts are ongoing. In describing racial covenants, Carol Rose and Rick Brooks note that while no one seeks to enforce racial covenants today, removing the language "punctuate[s] the point that times have changed," acts as "a symbol of social support," and "send[s] a different signal to those to come."[154] Changing state constitutional provisions, particularly those that have become zombie provisions by virtue of illegality, would seem to carry the same beneficial social signals.

Another rejoinder is that the outdated nature of many state constitutional provisions may in fact be signaling the unimportance of these documents to members of the state public. This of course raises a chicken-and-egg problem: it is hard to tell whether people do not take their

148. *See, e.g.*, IDAHO CONST. art XIII, § 4; N.D. CONST. art. XI, § 24.

149. Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 813–14 (2010).

150. Sutton, *supra* note 19, at 688.

151. Gardner, *supra* note 81, at 763–65.

152. *See supra* note 41 and accompanying text.

153. Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 746–47 (2010); Jill Rosen, *Americans Don't Know Much About State Government, Survey Finds*, JOHNS HOPKINS UNIV. HUB (Dec. 14, 2018), https://hub.jhu.edu/2018/12/14/americans-dont-understand-state-government/ [https://perma.cc/4FDT-KVUA].

154. BROOKS & ROSE, *supra* note 126, at 230.

state constitutions seriously because of their length, arcane provisions, and underuse by lawyers and judges or if all of those consequences flow from general opinions of or ignorance toward the documents as a whole. At least two other authors have discussed the idea that updating state constitutions is necessary to preserve their legitimacy in the eyes of the public. Advocating specifically for updates to the New York State Constitution, Peter Galie and Christopher Bopst have argued that "[b]y trivializing its content, [archaic state constitutional] provisions have done more than discourage reading: they have derogated from the constitution's character as a fundamental document, engendering disrespect if not ridicule."[155]

Another reason that one might oppose removal is on the grounds that it artificially whitewashes history, permitting a symbolic erasure that perpetuates a narrative that society is past all that disagreement (when reality is much messier).[156] The repugnant and arcane parts of state constitutions are, for better or worse, parts of the story of each state. Some are reminders of the myriad ways that state governments facilitated oppression. Even the arcane provisions can be reminders of how state governments perpetuated lasting environmental harm through extraction and alteration of the landscape. In the related context of racial covenants, some homeowners believe that they should remain on the books to permit historians to easily study how they affected neighborhood segregation and residents to achieve power by openly flouting them.[157] Retaining zombie state constitutional provisions could have the same positive effects.

This is a complicated problem. Worries about erasing history can galvanize those who repudiate racism just as it can embolden others committed to ignoring it. The phrase, "erasing history," after all, is in common use by those committed to preserving other defunct aspects of the American past, like monuments to the Confederacy (a land use I am on record elsewhere opposing).[158] Monuments are different from

155. Peter J. Galie & Christopher Bopst, *Constitutional "Stuff": House Cleaning the New York Constitution—Part I*, 77 ALB. L. REV. 1385, 1388 (2014).

156. The decision in *Shelby County v. Holder* has been criticized as prematurely declaring victory over the nefarious past in this way. *See* Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies that We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55, 74–77 (2016).

157. *See* Justin Wm. Moyer, *Racist Housing Covenants Haunt Property Records Across the Country. New Laws Make Them Easier to Remove.*, WASH. POST (Oct. 22, 2020, 6:00 AM), https://www.washingtonpost.com/local/racist-housing-covenants/2020/10/21/9d262738-0261-11eb-8879-7663b816bfa5_story.html [https://perma.cc/F5GL-GD2Q] (quoting Alana Hackshaw, Black resident of subdivision containing racist covenants, as saying, "I'm supportive of anything that challenges it, but I don't want this history erased.").

158. *See* Keisha N. Blain, *Destroying Confederate Monuments Isn't 'Erasing' History, It's Learning from It*, WASH. POST (June 19, 2020), https://www.washingtonpost.com/outlook/2020/06/19/destroying-confederate-monuments-isnt-erasing-history-its-learning-it/ [https://perma.cc/KNF5-DF5B]; Brief of

constitutional provisions, of course; they are more visible in front of courthouses and town squares and serve as ongoing tributes in ways that old and buried text may not.[159] At the very least, though, monuments teach that it can be hard to tell whether arguments to preserve some symbol—be it manuscript or metal—are about confronting history or celebrating it. There is a related argument against removing zombie state constitutional provisions, one that—unfortunately—the monument analog likewise makes clear. The process of removal itself can cause its own damage, surfacing simmering tensions and prejudices.[160] With respect to state constitutional provisions, forcing an action on removal will reveal through referendum how many people are apathetic about a provision one finds deeply offensive, as well as how many affirmatively wish to retain it.

An even more basic question plagues the zombie state constitutional provisions: Should scarce legislative and other resources really be directed toward removing them? A Colorado activist, for instance, said in 2020 that removing the state's same-sex marriage ban from the constitution would take years and that her organization's resources were best devoted to other priorities.[161] And who can blame her? In the best-case scenario, someone must still shepherd a proposed change or deletion through some sort of legislative or popular initiative process, which requires informing voters about the proposed change and rallying support for it. In Virginia, for instance, a state senator has begun the process to remove that state's same-sex marriage ban, but that process will take sustained effort for a minimum of two additional years.[162] State legislatures may already be inundated with bills that they lack time to consider.[163] And removal can be even more difficult or time-consuming, depending on the state's processes for change. Calling a constitutional convention to reevaluate an entire

Amici Curiae Property Law Professors in Support of Appellants, *Taylor v. Northam*, No. 210113, 2021 WL 3918940 (Va. Sept. 2, 2021).

159. *See Taylor v. Northam*, No. 210113, 2021 WL 3918940, at *12 (Va. Sept. 2, 2021) ("The Governor's evidence shows that at the time that the Commonwealth accepted the Lee Monument, the Lee Monument was a tribute to the southern citizenry's pre-Civil War way of life."); Beth D. Jacob, *Confederate Monuments that Remain*, ABA HUM. RTS. MAG. (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/confederate-monuments/.

160. In my former home of Charlottesville, for instance, it was the city's decision to remove the Confederate monument that spurred locals to organize a white supremacist rally that ended in multiple deaths and injuries, leaving aside the community scars. *See* CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 1 (Louis P. Nelson & Claudrena N. Harold eds., 2018).

161. Moreau, *supra* note 132.

162. Avery, *supra* note 21.

163. *See* Anika Singh Lemar (@anikasinghlemar), TWITTER (Aug. 20, 2021, 1:11 PM), https://twitter.com/anikasinghlemar/status/1428781844183535625?s=20 [https://perma.cc/GVB8-BSR4].

constitution can engender enormous opposition from the public, whether their concerns are valid or ill-informed.[164]

The same questions about removal costs arise in covenant law. The consensus is that racial and otherwise illegal restrictions should be obliterated, but occasionally, one hears murmurs that efforts would be best directed at current problems, not eradicating old and unenforceable provisions.[165] And depending on the state, removing old covenants from deeds can be quite difficult.[166] Ordinarily, the party "burdened" by the covenant has to obtain the consent of the "benefitted" parties—other neighbors—to obtain express permission.[167] Alternatively, an owner can go to court to try to have a covenant removed by court order if a judge determines that "changed conditions," "abandonment," or some other doctrine warranting termination applies.[168] In some states, laws set a maximum cap for the duration of restrictions, usually around thirty years.[169] Although one might be less likely to find obsolete or illegal covenants in those states, most of those statutes still contemplate the possibility of renewal or otherwise apply the cap only as of a certain date (leaving room for older covenants to persist).[170]

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164. *E.g.*, Rex Nelson, Opinion, *Constitutional Inertia*, ARK. DEMOCRATIC GAZETTE (Oct. 20, 2019, 1:43 AM), https://www.arkansasonline.com/news/2019/oct/20/constitutional-inertia-20191020/ [https://perma.cc/K2JU-ZMYX] (recalling the Arkansas electorate's sixty-three percent opposition to a new state constitution after a 1980 convention that only seven percent of the public knew about).

165. *See* Sara Clemence, *Is There Racism in the Deed to Your Home?*, N.Y. TIMES (Aug. 19, 2021), https://www.nytimes.com/2021/08/17/realestate/racism-home-deeds.html [https://perma.cc/UM2B-AKZ5] ("'I would never speak against or minimize things that people do to register that they have some level of displeasure, at the minimum, around these kinds of things,' said Elaine Gross, president of ERASE Racism, a Long Island organization that promotes racial equity. 'I do think that is important. Would I say that it's the most important action that needs to be done? No.'"); *see also* Moyer, *supra* note 157.

166. Patrick Barta, *Eliminating Restrictions from a Property Deed*, WALL ST. J. (Apr. 25, 2003, 11:59 PM), https://www.wsj.com/articles/SB121379918796784349 [https://perma.cc/Q4PF-9W9R].

167. *See* BROOKS & ROSE, *supra* note 126, at 170.

168. For a list and discussion of all the potentially applicable termination doctrines, see Comment, *Removing Old Restrictive Covenants—An Analysis and Recommendation*, 15 U. KAN. L. REV. 582, 583–85 (1967).

169. Note, *Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 953 n.85 (2009).

170. *See id.*; GA. CODE ANN. § 44-5-60 (2021) (providing for cap, but with automatic renewal if subdivisions have more than fifteen burdened parcels); MASS. GEN. LAWS ch. 184, § 23 (2021) (applying cap to covenants drafted after July 16, 1887); MINN. STAT. § 500.20 (2020) (applying cap to covenants drafted after August 1, 1959). Even in states that do not have a cap, state marketable title statutes may require the periodic re-recording of interests for them to be effective, which might also have the effect of ending restrictions not re-recorded. *See* Comment, *supra* note 168, at 587.

Somewhat more promisingly, some recent legislation attempts to deal specifically with the problem of removal of racist covenants. Several of these statutes enable owners to file a petition without cost in a local court to obtain release, short-circuiting the need for a full court hearing or the need to seek permission.[171] A Virginia law that took effect in 2020 both authorizes clerks to refuse to record deeds containing racist provisions and permits real property owners to file certificates releasing these provisions with the local land records office without the aid of an attorney.[172] Other permutations authorize owners to sue homeowners' associations (HOAs) with racist covenants or affirmatively require HOAs to get rid of them.[173] While these laws go a long way toward streamlining the process of removal, they still require owners to opt in and expend time and effort. And as one state has discovered, the laws authorizing removal can themselves raise difficult questions. In Washington State just this year, an appellate court split over the issue whether a statute authorizing petitions to "strike" racist covenants means those covenants must be physically removed from the land records or whether inclusion of a court order declaring the provision's unenforceability is sufficient.[174] The majority and dissent largely disagreed on the questions discussed in this Section: whether continued retention of the provision is more harmful or whether obliteration is.[175] The Washington Supreme Court recently agreed to review the case.[176]

Given scarce resources, questions will also arise about how to prioritize which zombie provisions to target. Not all zombies are long dead or were long lived. Same-sex marriage bans date to 2002 and were invalidated rather recently, in 2015.[177] Religious tests, however, have medieval origins and were struck down by the Supreme Court as early as 1961—now sixty years ago,[178] and yet they persist.[179] Should both be

171. OR. REV. STAT. § 93.274 (2019); WASH. REV. CODE § 49.60.227 (2021).

172. VA. CODE ANN. §§ 55.1-300 to -300.1 (2021).

173. BROOKS & ROSE, *supra* note 126, at 227–28.

174. *May v. Spokane County*, 481 P.3d 1098, 1099–1100 (Wash. Ct. App. 2021).

175. *Id.* at 1104 ("By its plain terms, RCW 49.60.227 provides a method for repudiating racially restrictive covenants while still preserving the historical record and integrity of a property's chain of title. . . . A policy of whitewashing public records and erasing historical evidence of racism would be dangerous."); *id.* at 1114 (Fearing, J., dissenting) ("The time has come to rip, from the pages of official records, white inscriptions of supremacy. The time has come to tear down monuments to slavery and racial segregation on display in this public square.").

176. *May v. County of Spokane*, 489 P.3d 258 (Wash. 2021).

177. *Obergefell v. Hodges*, 576 U.S. 644, 674 (2015); Vestal, *supra* note 22, at 1161–62.

178. *Torcaso v. Watkins*, 367 U.S. 488 (1961); Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 55, 73 (2015).

179. Vestal, *supra* note 22, at 1163.

considered equally undead, or should the lifetime of a provision or its death date affect where resources are directed? Is a law that has been dead for longer less likely to return, meaning provisions that have been recently declared unconstitutional should be the first slated for removal? Or should efforts be directed to provisions that cause the gravest expressive or other harm, however that is measured? What about those provisions that may be technically unenforceable but that retain adoring fans and proponents?[180] All the puzzles that I have discussed indicate why the debate over removing zombie provisions is challenging, with both removal and retention carrying attendant risks, costs, and benefits.

B. Broadening the Weapons

The complexity involved in assessing zombie provisions counsels in favor of creating ready opportunities and different methods for people to choose, either directly or through their representatives, whether and how to retain symbols of a repugnant past.[181] The brief ideas offered here are only a start, and they do not address all the potential concerns associated with taking on the zombie provisions. But they do attempt to address some of the valid concerns those worried about removal may have about either the costs of the removal process or artificially concealing history, while minimizing some of the risks that zombie provisions do pose.

First, we might consider ways of lowering the inertia required to confront a zombie provision. One option would be to recognize more judicial flexibility to ignore zombie provisions that have long gone unenforced, ameliorating some of the concerns that a dormant provision might be revived while avoiding the cost of formal amendment to the state constitution. Although it is probably contrary to a truly textualist approach, in the statutory context, a court can decide not to interpret a statute to "effectively prohibit activity that has gone on apace during the entire time

180. Miriam Seifter has helpfully described the existence of "constitutional community" as an important feature in shaping the direction of constitutional law—the audience of people who "pay attention to, interpret, discuss, and invoke the constitution." Miriam Seifter, *Extra-Judicial Capacity*, 2020 WIS. L. REV. 385, 386. Several zombie provisions have substantial "constitutional communities," regardless of their unenforceability. *See supra* notes 131–33 and accompanying text.

181. Virginia, for instance, repealed its law prohibiting the removal of Confederate monuments after the election of a new state legislature. Virginia also removed several zombie provisions from its statutory rolls, including "laws that banned interracial marriage, blocked school integration, and prohibited black and white Virginians from living in the same neighborhoods." *Governor Northam Signs Landmark Legislation on Historic Justice, Equity*, VA. GOVERNOR RALPH S. NORTHAM (Apr. 11, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856052-en.html [https://perma.cc/Q6UD-XUA4].

the statute has been on the books."[182] This process implicates the delightfully arcane term "desuetude," "the idea that if a law is left unenforced for a long time despite numerous enforcement opportunities, it may lose all legal force because a negative custom has grown up against it."[183] Fans of the doctrine usually identify the ways that inconsistent enforcement chafes against ideas of fair notice or provides proof of the law's unreasonableness and loss of favor among the public.[184] Though most often invoked by criminal defendants,[185] the doctrine of desuetude is rarely applied and remains controversial for its seeming conflicts with separation-of-powers principles.[186]

A few scholars have considered whether some doctrine of disuse—similar to desuetude in the statutory context or "abandonment" in the covenant context—should blunt the future enforcement of long-dormant parts of constitutions.[187] Desuetude bears a close relationship to the equitable doctrines of abandonment and waiver, in which a right may cease to be enforceable after long periods of non-enforcement by the party responsible for enforcement.[188] Accordingly, the doctrine would not necessarily apply to all zombie provisions. It might reach those provisions that had long gone unenforced in the face of violation, but not those that had always been irrelevant.[189] Nevertheless, this might ameliorate the most significant risks associated with zombie provisions. Elsewhere in areas

182. *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1583 (S.D. Ind. 1996) (declining to interpret eighty-year-old statute to apply to this sort of conduct).

183. John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 565 (2014). Cass Sunstein has argued that the statutes at issue in *Lawrence v. Texas*—eventually declared unconstitutional—could have been struck down as desuete. Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 73 (2003).

184. Stinneford, *supra* note 183, at 567–68.

185. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006).

186. *Id.* at 2213–14, 2218.

187. *See* Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMPAR. L. 641 (2014); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962). Darrell Miller has suggested that desuetude might shape understandings of the federal Second Amendment. Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J.L. & PUB. POL'Y 223, 227 (2016). John Stinneford has argued that the term "unusual" in the Cruel and Unusual Punishment Clause of the Federal Constitution contemplates some version of desuetude. Stinneford, *supra* note 183, at 538–39.

188. These principles animate much of property law, including adverse possession and the law of covenants. *See Crown Lumber Co. v. McCoy*, 124 S.W. 834, 835 (Ky. 1910) (stating that "[e]quity aids the vigilant; not those who sleep upon their rights" in adverse possession cases); *Scharer v. Pantler*, 105 S.W. 668, 669 (Mo. Ct. App. 1907) (discussing equitable background for rules that covenants can be terminated by abandonment or acquiescence).

189. Arthur Bonfield, for instance, would require total nonenforcement plus awareness of that nonenforcement for the doctrine to apply. Bonfield, *supra* note 187, at 561.

from constitutional to property to criminal law, courts generally disfavor sudden change and seek to protect the expectations that people develop based on the underlying legal regime.[190] Even if only those zombie state constitutional provisions that have long gone unenforced could be given narrow interpretations, that might still cover most of the substantively unconstitutional provisions (not to mention many of the outdated ones).

Of course, desuetude is controversial even in the field of statutory interpretation; the doctrine is both narrowly applied and triggers serious concerns about judges infringing on the territory of duly elected legislators.[191] Reviving desuetude may carry its own risks as well, connecting back to the point that zombie-ism is in the eye of the beholder; dormant provisions that have the potential to bring genuinely good changes could fall to the scythe. As a practical matter, judges have seemed hostile to perceived invocations of the desuetude doctrine in state constitutional law specifically. An Illinois appellate court in 1889 enforced an old constitutional provision requiring "all official writings . . . [to be] preserved and published in no other than the English language" to invalidate a Chicago ordinance requiring the city to publish translations of its "proceedings, notices and ordinances" in German in local newspapers.[192] Chicago's lawyer argued that translations into German were done "in all large cities where there is a large number of German-American citizens," noting that Chicago had been translating laws into German and publishing them in the paper for thirty years.[193] The court invalidated the Chicago ordinance, noting that "no provision of the constitution becomes obsolete by neglect."[194] Other courts have been similarly hostile to arguments about constitutional obsolescence due to intervening legislative acts.[195]

If some version of desuetude is not a clear option, judicial interpretation can still blunt the force and continued effect of obsolete

190. *See* Maureen E. Brady, *Defining "Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1464–66 (2015) (discussing applications of Due Process Clause in criminal law context that protect against "sudden change"); Christopher Serkin, What Property Does (unpublished manuscript) (on file with author).

191. Scott Andrew Shepard, *Adverse Possession, Private-Zoning Waiver & Desuetude: Abandonment & Recapture of Property and Liberty Interests*, 44 U. MICH. J.L. REFORM 557, 605 (2011).

192. *McCoy v. City of Chicago*, 33 Ill. App. 576, 576, 580 (1889).

193. *Id.* at 578–79. He also cited a section of John Dillon's treatise on Municipal Corporations discussing a concept similar to desuetude, in which Dillon observed that in construing a statute or municipal charter, a municipality might be estopped from changing position once third parties have relied on an earlier construction in which they acquiesced. *Id.* (citing 1 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS §§ 87, 93 (3d rev. ed. 1881)).

194. *McCoy*, 33 Ill. App. at 582.

195. *See, e.g.*, *State ex rel. Williams v. Cage*, 199 So. 209, 214 (La. 1940).

provisions. In the federal context, despite several attempts to invoke the Third Amendment banning the nonconsensual quartering of soldiers, federal courts have continued to interpret it narrowly.[196] In the case of the "damagings" clauses of state constitutional eminent domain provisions, the constitutional language was drafted broadly to require compensation for property "damaged" or "injured" by government acts, but court interpretations within a few years essentially narrowed the application of the clauses to the exact set of circumstances that drafters contemplated: harms from street grading, embankment construction, and flooding.[197] But worrisomely (or not),[198] nothing prevents a future court from resurrecting a long-dormant state constitutional provision with a new interpretation but the thin reed of *stare decisis*.[199]

Of course, zombie provisions can be eliminated through official channels and procedures not involving the judiciary. The few state constitutional conventions that have succeeded in recent years have often discussed reducing obsolescence and eliminating illegal sections as primary aims,[200] though as I have observed, the process of initiating an amendment or convention can be costly. Some states have attempted to reduce these costs somewhat by convening "constitutional commissions," bodies of specialists that periodically review the state constitution at regular intervals.[201] Commissions have different degrees of power (or powerlessness), with some mostly producing research on areas in need of reform, others official recommendations to legislators or the governor, and others direct proposals to the electorate for change.[202]

These commissions—or other forms of mandatory, periodic review—offer an attractive option for revisiting zombie provisions. Commissions are attractive in part because by nudging legislators or the public to reconsider zombie provisions, they force individuals to vote clearly either to retain or to jettison them. Elsewhere in law, information-forcing rules or regulations are perceived as salutary because they reveal positions that might affect other parties' choices and interactions.[203] Using

196. *See Engblom v. Carey*, 677 F.2d 957, 959 (2d Cir. 1982); Bell, *supra* note 79, at 140–43.

197. Brady, *The Damagings Clauses*, *supra* note 100, at 388.

198. I have argued elsewhere that the damagings clauses deserve a broader interpretation than they have been given. *Id.* at 400–14.

199. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 942 (2018).

200. *E.g.*, *N.C. State Bar v. DuMont*, 286 S.E.2d 89, 94 (N.C. 1982).

201. Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 4 (1996).

202. *See id.*

203. *E.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95–100 (1989); Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861

commissions to make legislators take positions on zombie provisions could provide valuable information about that legislator's views to the voting public. Unfortunately, commissions will not be uncontroversial. The states that have them often seek to disempower or eliminate them, whether for budgetary reasons or naked political ones.[204]

There are probably other ways of lowering the inertia that may be causing zombie provisions to stick around and pose risks, but a different tack on the problem would examine options besides outright removal or amendment of zombie text. This would require creativity. But why do the states need to follow the example of the Federal Constitution, where change is possible only through the addition of new text? Concerns about the erasure of history would be less salient if zombie provisions were struck through or even included in annotations rather than bowdlerized.[205] Racial covenants often are not physically cut out from new deeds, but evidence of their repudiation is instead attached to future documents.[206] Just as many scholars encourage the states to be vanguards in recognizing and protecting various rights,[207] perhaps they should also be vanguards in considering the ways they might symbolically reject unenforceable provisions through text and annotation. (I leave unaddressed, for the moment, the aesthetic concerns that might be raised about a state constitution full of cross-outs and comment bubbles.)[208]

CONCLUSION

Suggestions in the preceding Section aside, the best solution for zombie state constitutional provisions may be the uncomfortable one: those seeking to remove them must use established processes, long and frustrating though they may be, to eliminate zombie provisions. It takes

(2006); Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 3 (2012).

204. *See, e.g.*, Lisa Riley Roche & Dennis Romboy, *Constitutional Revision Commission Independence May End*, DESERETNEWS (Feb. 7, 2011, 6:36 PM), https://www.deseret.com/2011/2/7/20369120/constitutional-revision-commission-independence-may-end [https://perma.cc/FM56-NMDX]; Sun Sentinel Ed. Bd., *In Florida, the Empire Strikes Back*, S. FLA. SUN SENTINEL (Feb. 4, 2021), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-constitution-review-commission-20210204-e2xctm3q5vhsvbkcs5z54bp2q4-story.html [https://perma.cc/2496-MXV9].

205. On the origins of the term bowdlerization, see Llewellyn Joseph Gibbons, *Digital Bowdlerizing: Removing the Naughty Bytes*, 2005 MICH. ST. L. REV. 167, 168.

206. Of course, there is still disagreement about whether this is enough. *See supra* note 175 and accompanying text.

207. *E.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2 (2018).

208. *Cf.* Martin Veitch, *The Travesty of 'Track Changes*,*'* IDG CONNECT (Mar. 28, 2013, 8:05 AM), https://www.idgconnect.com/article/3579693/martin-veitch-global-the-travesty-of-track-changes.html [https://perma.cc/494B-EPRL].

time, energy, and organization to tackle the problems in state constitutions. Some legislators have valiantly taken on the illegal aspects of state constitutions, and others may pursue similar clean-up efforts in the future. Perhaps law schools can help through clinical offerings and sponsored projects, as the members of the University of Cincinnati's Alien Land Law Project did in order to strike state constitutional rules prohibiting Asians and others from owning property.[209] The aim of this short Essay has been to raise questions about the zombie provisions and other troubling aspects of state constitutional history. Given efforts to remove racist and other outdated parts of private law to send signals about the future, are there reasons why public law should be any different? At a minimum, one hopes that by putting questions about the persistence of the zombie provisions on the table, we can begin to debate and contextualize them with more nuance.

209. *See* Jamie Bronstein, *Sowing Discontent: The 1921 Alien Land Act in New Mexico*, 82 PAC. HIST. REV. 362, 391 (2013).