# WHICH CONSTITUTION?

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## INTRODUCTION

A supermajority of state supreme courts interpret their constitutions using originalism.[1] Of the original thirteen colonies, all but Massachusetts have either reratified their constitutions in whole or adopted new constitutions but retained provisions appearing in older constitutions.[2] Thirty states have adopted a constitution other than their original constitutions and have retained provisions from previous constitutions without material change.[3] Given these facts, the question for an originalist state court is, when interpreting a provision in its

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1 *See* Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341, 345–57 (2017) (discussing state cases from the antebellum era to 2016 to show that a supermajority of state courts has continuously employed originalism to interpret their constitutions). According to Christiansen, thirty-eight of the fifty states employ originalism as the rule of interpretation. *Id.* at 357.

2 *See infra* note 3 (showing the original and current constitutions of states including the twelve original colonies that have adopted new constitutions: New Hampshire, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia).

3 *Compare* ALA. CONST. of 1819, *with* ALA. CONST.; ARK. CONST. of 1836, *with* ARK. CONST.; CAL. CONST. of 1849, *with* CAL. CONST.; CONN. CONST. of 1818, *with* CONN. CONST.; DEL. CONST. of 1776, *with* DEL. CONST.; FLA. CONST. of 1838, *with* FLA. CONST.; GA. CONST. of 1777, *with* GA. CONST.; ILL. CONST. of 1818, *with* ILL. CONST.; IND. CONST. of 1816, *with* IND. CONST.; IOWA CONST. of 1846, *with* IOWA CONST.; KY. CONST. of 1792, *with* KY. CONST.; LA. CONST. of 1812, *with* LA. CONST.; MD. CONST. of 1776, *with* MD. CONST.; MICH. CONST. of 1835, *with* MICH. CONST.; MISS. CONST. of 1817, *with* MISS. CONST.; MO. CONST. of 1820, *with* MO. CONST.; MONT. CONST. of 1889, *with* MONT. CONST.; NEB. CONST. of 1867, *with* NEB. CONST.; N.H. CONST. of 1776, *with* N.H. CONST.; N.J. CONST. of 1776, *with* N.J. CONST.; N.Y. CONST. of 1777, *with* N.Y. CONST.; N.C. CONST. of 1776, *with* N.C. CONST.; OHIO CONST. of 1802, *with* OHIO CONST.; PA. CONST. of 1776, *with* PA. CONST.; R.I. CONST. of 1842, *with* R.I. CONST.; S.C. CONST. of 1776, *with* S.C. CONST.; TENN. CONST. of 1796, *with* TENN. CONST.; TEX. CONST. of 1836, *with* TEX. CONST.; VA. CONST. of 1776, *with* VA. CONST.; W. VA. CONST. of 1863, *with* W. VA. CONST.

constitution that has an equivalent provision in a previous constitution, which original meaning governs? This Note argues that originalist courts should presume that the provision's original, original meaning governs unless there is evidence that the people intended to change its meaning when adopting the new constitution. State supreme courts that have addressed this issue have largely chosen this original, original meaning approach. This approach also lends greater clarity to courts and constitution drafters, produces more stability in the law, and has its foundation in the common law.

This Note proceeds in three parts. Part I provides an overview of common clauses that have remained largely unchanged throughout multiple constitutions of multiple states. Part II outlines the two main approaches to answering "which constitution."[4] Part III evaluates the strengths and weaknesses of each approach. Finally, the Note concludes by explaining why courts should use the original, original meaning approach to determine "which constitution" governs.

## I. OVERVIEW

### *A. Common Clauses*

Several constitutional clauses protect the same rights and have substantially similar language. These common clauses appear across both space (appearing in most states' constitutions) and time (appearing in multiple iterations of a state's constitutions). Particularly common are clauses providing for public education and those protecting privileges against unreasonable searches and seizures, cruel punishments, and self-incrimination.

#### 1. Search and Seizure Clauses

All fifty state constitutions have search and seizure clauses.[5] Pennsylvania has one of the oldest search and seizure clauses, first appearing in its 1776 constitution:

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4 Some scholars consider this issue to be a particular factor within "interconstitutionalism," that is, a polity's use of a previous constitution to give meaning to the same polity's current constitution. *See* Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 330 (2022); *see also id.* at 338–39 (discussing the interconstitutionalism issue as being applicable to interpretation of state constitutions because many current constitutions contain "holdover" provisions from prior constitutions, *id*, at 338).

5 Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 393 (2006) ("Each state has a constitutional analog to the Federal Fourth Amendment, and some have an explicit privacy provision that has no federal counterpart.").

> [T]he people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.[6]

Today, the Clause reads closer to the Federal Constitution's Fourth Amendment[7]:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant.[8]

## 2. Education Clauses

All states have constitutional provisions concerning education.[9] The oldest of these clauses appears in Massachusetts's first and only constitution from 1780, providing that it is

> the duty of the legislatures and magistrates . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings: sincerity, good humor, and all social affections and generous sentiments among the people.[10]

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6 PA. CONST. of 1776, Declaration of Rights, § X.

7 *Compare, e.g.*, U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."), *with* PA. CONST. art. I, § 8 ("The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant."); U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."), *with* MICH. CONST. art. I, § 17 ("No person shall be compelled in any criminal case to be a witness against himself . . . .").

8 PA. CONST. art. I, § 8.

9 Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 218 (2010).

10 MASS. CONST. pt. 2, ch. 5, § 2.

Courts have interpreted "to cherish" as mandating "an adequate education."[11] The Clause remained unchanged until 2022 when Massachusetts amended its constitution to add to its Tax Clause the directive "[t]o provide the resources for quality public education and affordable public colleges and universities."[12]

3. Cruel Punishment Clauses

All fifty state constitutions have some variation of a cruel punishment clause, except Connecticut, Vermont, and Illinois.[13] Maryland and Virginia appear to have the oldest of these clauses in their original 1776 Declarations of Rights, which provide that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[14]

4. Self-Incrimination Clauses

Today, forty-eight state constitutions have clauses protecting the privilege against self-incrimination.[15] Seven out of the original thirteen

11 Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL 218, 257 n.81 (Timothy Ready, Christopher Edley, Jr. & Catherine E. Snow eds., 2002) (first quoting MASS. CONST. pt. 2, ch. 5, § 2; and then quoting McDuffy v. Sec'y of the Exec. Off. of Educ., 615 N.E.2d 516, 545 (Mass. 1993)).

12 *See* MASS. CONST. amend. CXXI.

13 *See* Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 64 (2008); *see also* CONN. CONST.; VT. CONST. Illinois does not have a cruel punishment clause but does have a proportionate penalties clause that Illinois courts interpret as prohibiting "cruel or degrading punishment." *See* Frase, *supra*, at 70, 64, 70 (quoting People v. Miller, 781 N.E.2d 300, 307 (Ill. 2002)); *see also* ILL. CONST. art. I, § 11.

14 MD. CONST. of 1776, Declaration of Rights, art. XXII (the Maryland version adds "by the courts of law"); VA. CONST. of 1776, ch. I, § IX.

15 *See* ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 9; ARIZ. CONST. art. II, § 10; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 15; COLO. CONST. art. II, § 18; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, ¶ XVI; HAW. CONST. art. I, § 10; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 10; IND. CONST. art. I, § 14; KAN. CONST., Bill of Rights, § 10; KY. CONST. § 11; LA. CONST. art. I, § 16; ME. CONST. art. I, § 6; MD. CONST., Declaration of Rights, art. 22; MASS. CONST. pt. 1, art. 12; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 19; MONT. CONST. art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST. art. I, § 8(1); N.H. CONST. pt. I, art. 15; N.M. CONST. art. II, § 15; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 23; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. 2, § 21; OR. CONST. art. I, § 12; PA. CONST. art. I, § 9; R.I. Const. art. I, § 13; S.C. CONST. art. I, § 12; S.D. CONST. art. VI, § 9; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. 10; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 9; W. VA. CONST. art. III, § 5; WIS. CONST. art I, § 8(1), cl. 1; WYO. CONST. art. I, § 11. New Jersey provides a right against self-incrimination by statute and Iowa through judicial interpretation. Mary

colonies had a self-incrimination clause before the Federal Bill of Rights was ratified in 1791.[16] And many early states entered the Union with such a clause in their constitutions, such as Kentucky's 1792 constitution, which provides that "in all criminal prosecutions the accused hath a right . . . [not to] be compelled to give evidence against himself."[17]

### *B. The Effect of Lockstepping*

With so many common, old clauses appearing in multiple iterations of states' constitutions and with originalism's prominence as a method of interpretation in state courts, one might think that "which constitution" is an obvious and common question. After all, whenever a state court must consider the original meaning of a clause that is materially unchanged from prior iterations of the same state's constitution, the interpreter must determine which original meaning governs. But many states simply have not addressed the question. One reason for this is that some states assume without deeper inquiry that originalism means the original constitution's meaning. Another reason is lockstepping. "Lockstepping" is when a state court interprets a state constitutional provision the same way the U.S. Supreme Court has interpreted an equivalent provision in the Federal Constitution.[18] The "which constitution" question most commonly arises when interpreting old clauses, and old clauses like the ones above tend to have equivalent clauses in the Federal Constitution. This frequently gives states the opportunity to lockstep with the U.S. Supreme Court's interpretation of the Federal Constitution.[19] If states choose to lockstep, they may not address their own constitution's original meaning and thus bypass the "which constitution" question altogether.

Each of the clauses in Section I.A, except for clauses providing a right to education, have analogues in the Federal Constitution.[20] They are also some of the oldest state constitutional clauses—some states

Elizabeth Mann & Thomas A. Thomas, Comment, *To What Extent Does the Privilege against Self-Incrimination Protect an Accused from Physical Disclosures*, 1 VAND. L. REV. 243, 243 (1948).

16 *See* N.H. CONST. of 1784, art. I, § XV; MASS. CONST. pt. 1, art. 12; PA. CONST. of 1776, Declaration of Rights, § IX; DEL. CONST. of 1776, Declaration of Rights, § 15; MD. CONST. of 1776, Declaration of Rights, art. XX; VA. CONST. of 1776, ch. I, § VIII; N.C. CONST. of 1776, Declaration of Rights, § VII.

17 KY. CONST. of 1792, art. XII, § 10.

18 *See generally* M. Jason Hale, Note, *Federal Questions, State Courts, and the Lockstep Doctrine*, 57 CASE W. RSRV. L. REV. 927 (2007).

19 For more information on lockstepping, see *id.* at 941–44.

20 *See* U.S. CONST. amends. IV, V, VIII.

adopted such clauses even before 1791.[21] So, the states that have them have had more time to, and are thus more likely to have, adopted new constitutions. Additionally, these clauses tend to look quite similar to their federal counterparts, particularly the criminal-procedure-related clauses.[22] For example, the Federal Constitution shares substantially the same formulation of the Cruel Punishment Clause with Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Utah, Virginia, West Virginia, and Wisconsin.[23] Because of their similarity to the Federal Constitution, these are the kinds of provisions that states often choose to interpret in lockstep with the Federal Constitution,[24] even in states that purport to use originalist methods of interpretation.[25]

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21 *Compare, e.g.*, PA. CONST. of 1790, art. IX, § 9 ("[The accused in all criminal prosecutions] cannot be compelled to give evidence against himself . . . ."), *with* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). Note that scholarship supports the conclusion that the phrases "to give evidence" and "to be a witness" had the same meaning in 1791. *See* Richard A. Nagareda, *Compulsion "to Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575, 1603–23 (1999).

22 *Compare, e.g.*, U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."), *with* PA. CONST. art. I, § 8 ("The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant."); U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."), *with* MICH. CONST. art. I, § 17 ("No person shall be compelled in any criminal case to be a witness against himself . . . .").

23 *Compare* U.S. CONST. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), *with* ALASKA CONST. art. I, § 12 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), ARIZ. CONST. art. II, § 15, COLO. CONST. art. II, § 20, FLA. CONST. art. I, § 17, GA. CONST. art. I, § I, ¶ XVII, IDAHO CONST. art. I, § 6, IND. CONST. art. 1, § 16, IOWA CONST. art. 1, § 17, MINN. CONST. art. I, § 5, MO. CONST. art. I, § 21, MONT. CONST. art. II, § 22, NEB. CONST. art. I, § 9, N.J. CONST. art. I, § 12, N.M. CONST. art. II, § 13, N.Y. CONST. art. I, § 5, OHIO CONST. art. I, § 9, OR. CONST. art. I, § 16, TENN. CONST. art. I, § 16, UTAH CONST. art. I, § 9, VA. CONST. art. I, § 9, W. VA. CONST. art. III, § 5, *and* WIS. CONST. art. I, § 6. This means that twenty-two out of forty-seven states have near-identical clauses prohibiting cruel and unusual punishment.

24 *See, e.g.*, State v. Robinette, 685 N.E.2d 762, 771 (Ohio 1997) (lockstepping with the U.S. Supreme Court when interpreting Ohio's Search and Seizure Clause).

25 *See* Hale, *supra* note 18, at 942 (discussing how Louisiana follows the U.S. Supreme Court's jurisprudence for certain constitutional provisions). Note that Louisiana is one of the states that purports to use originalism to interpret its constitution. *See* Christiansen, *supra* note 1, at 357.

Lockstepping could sometimes be a reasonable answer to "which constitution." Where a state reratifies its constitution to adopt a provision analogous to the Federal Constitution it might adopt the federal jurisprudence surrounding that provision. For example, when Florida reratified and amended its constitution in 1968, it adopted the Self-Incrimination Clause from its 1885 constitution, a provision nearly identical to the Federal Constitution.[26] In the 1992 case *Traylor v. State* the Florida Supreme Court had an opportunity to address "which constitution" governed and whether the new Florida Constitution incorporated the meaning of the Federal Constitution's Self-Incrimination Clause.[27] But while the court referenced historical understandings of the Florida Constitution's Self-Incrimination Clause,[28] it effectively lockstepped with the U.S. Supreme Court and adopted *Miranda v. Arizona* into Florida's Self-Incrimination Clause jurisprudence.[29] The court did not take the opportunity to address the changes to the Florida Constitution or whether the 1968 reratification incorporated *Miranda*.[30]

So, despite analogous provisions in predecessor constitutions, similarities to the Federal Constitution lead many state courts to simply lockstep rather than ask "which constitution."[31] As a result, while there should theoretically be many opportunities for courts to consider "which constitution," few states have even asked the question.[32]

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26 *Compare* FLA. CONST. art. I, § 9 ("No person shall . . . be compelled in any criminal matter to be a witness against oneself."), *with* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). *See also* Miranda v. Arizona, 384 U.S. 436 (1966).

27 *See generally* Traylor v. State, 596 So. 2d 957 (Fla. 1992).

28 *See id.* at 964–65.

29 *See id.* at 965–66.

30 *See id.* at 964–66; *see also* Ross v. State, 45 So. 3d 403, 413 (Fla. 2010) (per curiam) ("As this Court has recognized, '[t]he protections enunciated in *Miranda* have been part of this State's jurisprudence for over a century pursuant to the Florida Constitution.'" (quoting Ramirez v. State, 739 So. 2d 568, 573 (Fla. 1999) (per curiam))).

31 *See, e.g.*, Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 61 (Ohio 1994) (interpreting the protections of the Ohio Constitution's free speech provision as coterminous with the protections of the First Amendment); *In re* D.M., 743 A.2d 422, 425 (Pa. 1999) (interpreting the Pennsylvania Constitution's search and seizure provision in lockstep with the Fourth Amendment), *rev'd sub nom*, Pennsylvania v. D.M., 529 U.S. 1126 (2000) (mem.).

32 *See, e.g.*, People v. Sporleder, 666 P.2d 135, 139–40 (Colo. 1983) (applying the federal *Katz* reasonable expectation of privacy test to the Colorado Constitution's Search and Seizure Clause); Johnson v. State, 912 S.W.2d 227, 233–34 (Tex. Crim. App. 1995) (en banc) (holding that the protections of the state's Search and Seizure Clause are coextensive with the protections of the Fourth Amendment); Bunch v. State, 43 S.W.3d 132, 138 (Ark. 2001) (interpreting the state constitution's Cruel and Unusual Punishment Clause identically to the Eighth Amendment).

## II. MAJOR APPROACHES

For those states that *have* addressed the issue, there are two major approaches to the "which constitution" question: Constitutional Continuity and Tabula Rasa.[33] Constitutional Continuity is the original, original meaning approach: It is a rebuttable presumption that the clause retains the original meaning from when it first appeared in one of the state's constitutions. Constitutional Continuity also includes the situation where State A adopts a provision from State B's constitution and the court concludes that State A also "imported" the original meaning of the provision as applied in State B—a method some call Imported Original Meaning.[34] The second approach is what this Note terms Tabula Rasa. There are two versions of Tabula Rasa: Tabula Rasa proper (Tabula Rasa), and Plain Meaning Tabula Rasa. Under Tabula Rasa, the original meaning of a constitutional provision resets whenever the state adopts a new constitution. Plain Meaning Tabula Rasa interprets a provision based on the current, unambiguous semantic meaning of the provision.

### *A. Constitutional Continuity*

#### 1. Original, Original Meaning

Of the states that have addressed this question, the Georgia Supreme Court has addressed it in the most depth and has chosen to adopt a Constitutional Continuity approach.

The Georgia Supreme Court uses original public meaning to interpret its constitution.[35] In the context of the "which constitution" question, Georgia employs Constitutional Continuity's rebuttable presumption that a provision of the state constitution incorporated into a new constitution "retain[s] the original public meaning that provision had at the time it first entered a Georgia Constitution."[36] The parties can rebut this presumption by bringing evidence that the framers and

33 The term "Constitutional Continuity" is derived from the Georgia Supreme Court's terminology, which refers to the first approach as "[t]he presumption of constitutional continuity." Elliott v. State, 824 S.E.2d 265, 269 (Ga. 2019). This Note coins the term "Tabula Rasa" to refer to the second approach.

34 *See* Mazzone & Tecimer, *supra* note 4, at 362.

35 *See* Ammons v. State, 880 S.E.2d 544, 555 (Ga. 2022) ("[W]e interpret the Georgia Constitution according to its original public meaning. And, of course, the Georgia Constitution that we interpret today is the Constitution of 1983; the original public meaning of that Constitution is the public meaning it had at the time of its ratification in 1982." (quoting *Elliott*, 824 S.E.2d at 268)).

36 *Id.* at 555 (quoting *Elliott*, 824 S.E.2d at 269).

ratifiers of the new constitution intended to change the meaning of the provision.[37]

The Georgia Supreme Court articulated the rule and its rationale in the 2019 case *Elliott v. State*:

> Because the meaning of a previous provision that has been readopted in a new constitution is generally the most important legal context for the meaning of that new provision, and because we accord each of those previous provisions their own original public meanings, we generally presume that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary.[38]

In *Elliott* the court interpreted Georgia's Self-Incrimination Clause,[39] the text of which had not changed from its first appearance in the 1877 constitution.[40] The specification of *material* change suggests that small alterations in wording, such as the minute changes to Florida's Self-Incrimination Clause from the 1885 to 1968 constitution, might still result in application of the original meaning of the Clause at the time of adoption.[41]

It is unclear what evidence other than a material change to the *text* constitutes enough evidence for the court to interpret a provision differently from its original meaning. In *Elliott*, the court cited to several cases that restated the Constitutional Continuity rule.[42] For example, in the 1955 case *Bibb County v. Hancock* the Georgia Supreme Court applied the original meaning of the Self-Incrimination Clause at the time of its addition to the Georgia Constitution of 1877.[43] The *Bibb County* court reasoned that "[i]t is clear . . . there was no intention to declare any new principle of law, but merely to continue in the new constitution the same provision of the old, with the same meaning."[44] This insinuates that evidence of intent other than changes to the text

37 *See Elliott*, 824 S.E.2d at 271 n.6 ("The presumption arising from a consistent and definitive construction, . . . like most legal presumptions, may be rebutted.").

38 *Id.* at 269.

39 *Id.* at 267.

40 *Compare* GA. CONST. of 1861, art. I (setting forth a list of fundamental rights but not including a self-incrimination clause), *with* GA. CONST. of 1877, art. I, § I, ¶ VI ("No person shall be compelled to give testimony tending in any manner to criminate himself."), GA. CONST. of 1945, art. I, § I, ¶ VI (same), *and* GA. CONST. art. I, § I, ¶ XVI (similar).

41 *See Elliott*, 824 S.E.2d at 269.

42 See *id.* at 269–70 (first citing Nelms v. Georgian Manor Condo. Ass'n, 321 S.E.2d 330, 332 (Ga. 1984); then citing Bibb County v. Hancock, 86 S.E.2d 511, 515 (Ga. 1955); and then citing State v. Cent. of Ga. Ry. Co., 35 S.E. 37, 41 (Ga. 1900)).

43 *See Hancock*, 86 S.E.2d at 515.

44 *Id.*

could be enough to rebut the presumption of constitutional continuity. Subsequent cases citing *Bibb County* suggest that "clear intention" means clear intention as demonstrated through changes, or lack of changes, to the text *or* as shown by other sources of evidence.[45] For example, in *City of Thomaston v. Bridges*, evidence of legislative intent as found in a state statute rebutted the presumption of constitutional continuity.[46]

The Rhode Island Supreme Court implicitly reached the same conclusion as *Elliott*, though it did not identify its rule as "Constitutional Continuity." In *City of Pawtucket v. Sundlun*, the court considered whether its method of funding public education violated the Education Clause of the Rhode Island Constitution by failing to provide equitable funding and a public school in every town.[47] The court first looked to the historical context of the first Education Clause adopted by the state into its 1842 constitution.[48] The court concluded that the 1842 constitution did not reflect any intent to create a school system requiring equitable funding or mandating public schools in every town.[49] This intent remained unchanged when the people of the state adopted a new constitution in 1986.[50] This was because the framers had reconsidered and revised the Education Clause for the 1986 constitutional convention, and despite being aware of the "numerous constitutional challenges to school finance provisions across the country," the framers (and thus the people) refused the opportunity to alter "the nature of the state's role in public education."[51] The court did not

45 *See, e.g.*, City of Thomaston v. Bridges, 439 S.E.2d 906, 909 (Ga. 1994) ("We recognize the well-established rule of construction that absent a clear indication to the contrary, this Court should accord to virtually identical language in successor provisions the same construction given the original language."); Gilbert v. Richardson, 452 S.E.2d 476, 479 (Ga. 1994) ("Absent any evidence that the legislature intended a different interpretation or to indicate that the electorate did not intend to extend sovereign immunity to counties, we hold the 1991 amendment's extension of sovereign immunity to 'the state and its departments and agencies' must also apply to counties." (quoting GA. CONST. art. I, § II, ¶ IX(e))).

46 *Bridges*, 439 S.E.2d at 909 (concluding that the court's rule of Constitutional Continuity must yield to the "cardinal rule of construction, which is to ascertain the true intention of the drafters and interpret the language to effectuate that intent" and so declining "to hold that a mere rule of construction [Constitutional Continuity] can prevail over the clear intent of the drafters").

47 *See* City of Pawtucket v. Sundlun, 662 A.2d 40, 42 (R.I. 1995).

48 *See id.* at 47.

49 *See id.* at 48.

50 *See id.* at 49.

51 *Id.* at 49–50. But note the open question of whose intent matters in adopting a constitution. To the extent the intent and reasonable understanding of the average voter who voted to ratify the constitution is what gives the constitution the force of law, it may be an important question what perception voters had at the time. If, on the other hand, we care only about what the framers intended or what "reasonable people familiar with its legal

speculate whether other evidence could show a change in the meaning of nearly identical texts. *City of Pawtucket* indicates that, at least in Rhode Island, failure to revise the text of the constitution is dispositive evidence that the intent of the framers, and thus the meaning of the clause, did not change with the adoption of a new constitution.

While it remains possible that courts will consider evidence beyond the text of the constitution to show changed meaning, in most cases the best evidence of clear intent will be changes to the text of the provision. This may be due to practical reasons such as stability and clarity. After all, it is difficult to ascertain a clear intent from disparate discussions in legislative history or public debate.[52]

### 2. Imported Original Meaning

Many states, especially newer, western states such as Alaska and Hawaii, did not construct their constitutions from scratch. In adopting a constitution when they entered the Union, new states looked to existing state constitutions for provisions to include in their own constitutions. For example, the cruel punishment clauses come in essentially three similar formulations,[53] each of which appear in constitutions of states that joined the union in 1789 or *earlier* and states that joined in 1864 or *later*.[54] In incorporating a provision from another constitution, some state courts also draw on the law of the source of the provision in question to interpret their own constitution. Thus, the original, original meaning of the provision may lie not in the state's constitution, but in a predecessor constitution from another state.

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context," would understand the clause to mean, the difference between what the framers understood versus what the individual voters understood matters less. Elliott v. State, 824 S.E.2d 265, 285 (Ga. 2019) (quoting Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 607 n.1 (2010) (Scalia, J., concurring in part and concurring in judgment)).

52 For an overview and discussion of various state courts' approaches to textual changes between constitutions, see Mazzone & Tecimer, *supra* note 4, at 366–78.

53 *Compare, e.g.*, NEV. CONST. art. 1, § 6 ("Excessive bail shall not be required . . . nor shall cruel or unusual punishments be inflicted . . . ."), ARIZ. CONST. art. II, § 15 ("Excessive bail shall not be required . . . nor cruel and unusual punishment inflicted."), *and* WASH. CONST. art. I, § 14 ("Excessive bail shall not be required . . . nor cruel punishment inflicted."), *with* N.C. CONST. art. I, § 27 ("Excessive bail shall not be required . . . nor cruel or unusual punishments inflicted."), VA. CONST. art. I, § 9 ("That excessive bail ought not to be required . . . nor cruel and unusual punishments inflicted . . . ."), *and* PA. CONST. art. I, § 13 ("Excessive bail shall not be required . . . nor cruel punishments inflicted.").

54 North Carolina joined the Union in 1789, Virginia in 1788, Pennsylvania in 1787, Nevada in 1864, Arizona in 1912, and Washington in 1889. BEN LEUBSDORF, KATHLEEN E. MARCHSTEINER & CAROL WILSON, CONG. RSCH. SERV., R47747, ADMISSION OF STATES TO THE UNION: A HISTORICAL REFERENCE GUIDE 3–4 (2026).

In *Golden Gateway Center v. Golden Gateway Tenants Association*, the California Supreme Court addressed whether the California Constitution's Free Speech Clause protected an association of tenants' ability to distribute newsletters and other leaflets by slipping them under the doors of residents in their apartment complex.[55] Article I, Section 2 of the California Constitution says that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[56] Unlike the Federal Constitution's Free Speech Clause, the text of California's Free Speech Clause does not merely prohibit infringement by the state; it could be interpreted to prohibit infringement by private parties.[57] Nevertheless, based on the historical context of the Clause's adoption into the California Constitution, the court held that the Clause only protects against state actions—not private action.[58]

The California Supreme Court relied on several historical factors for its conclusion. First, the debates over the California Constitution did not evidence intent that the Free Speech Clause protect against private infringement because the Clause was adopted with no debate at all.[59] Second, the Clause's California adoption history did not otherwise answer the question one way or another. Without evidence from the Clause's California history, the court looked to the clause's antecedent in the New York Constitution.[60] The court reasoned that many of the California Constitution framers came from New York, and because they adopted the New York Constitution's Free Speech Clause almost verbatim and without debate, the history of New York's Clause was relevant to interpreting the California Constitution.[61] In deciding on this methodology, the court cited prior caselaw for the proposition that "statutory language taken verbatim from a constitutional provision must be given the same meaning as the language in the constitutional provision 'unless a clear legislative intent to the contrary appears.'"[62] Sure enough, the history of New York's Free Speech Clause revealed that the framers intended to limit state action, not private

55 *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 799–800 (Cal. 2001).

56 CAL. CONST. art. I, § 2(a).

57 *See Golden Gateway*, 29 P.3d at 801.

58 *See id.* at 808.

59 *See id.* at 804.

60 *See id.*

61 *See id.*

62 *Id.* at 806 (quoting Stockton Civic Theatre v. Bd. of Supervisors, 423 P.2d 810, 816 (Cal. 1967)).

action.[63] Accordingly, the court ascribed that same intent to the framers of the California Constitution.[64]

While the court supported its conclusion with evidence from California,[65] the court's ruling fundamentally turned on historical evidence from New York. Support for this proposition lies in how the court contended with one of its previous cases: *Robins v. Pruneyard Shopping Center*. *Robins* applied the California Constitution's Free Speech Clause to "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[66] The court cabined the *Robins* protection against private actors to only situations where "the property is freely and openly accessible to the public."[67] The apartment complex was not open to public access, the court reasoned, so the *Robins* exception to the state action requirement did not apply and the tenants association did not have a right to distribute its newsletters under the California Constitution's Free Speech Clause.[68] Thus, though California free speech precedent suggested protection against private infringement, the court cabined that precedent due to the weight of historical evidence from a predecessor constitution.

Unlike in *Elliott*, the California Supreme Court did not even consider whether the adoption of intervening California constitutions could have changed the original meaning of its Free Speech Clause.[69] Intervening constitutions incorporated the language of the original Free Speech Clause adopted in 1849 near verbatim.[70]

Interestingly, the dissent *did* look at the incorporation of the Free Speech Clause in subsequent constitutions in 1879 and 1980.[71] The dissent concluded that the history of the Clause through subsequent adoptions confirmed that "the state free speech clause as originally drafted drew no distinction between state actors and private parties, impliedly therefore granting a free speech right that runs against both."[72] Discussed in greater detail in subsection II.B.2, the dissent,

63 *Id.* at 805–06.

64 *See id.* at 806.

65 The court pointed to the framers' focus on defining the contours of government power and the lack of positive evidence outside the text of intent to prohibit private encroachments. *See id.*

66 Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *see Golden Gateway*, 29 P.3d at 806.

67 *Golden Gateway*, 29 P.3d at 810. For additional support for the primary factors determining *Golden Gateway*'s outcome, see Mazzone & Tecimer, *supra* note 4, at 364 (summarizing the California Supreme Court's methodology in *Golden Gateway*).

68 *See Golden Gateway*, 29 P.3d at 810.

69 *See generally id.*

70 *See id.* at 826 (Werdegar, J., dissenting).

71 *See id.*

72 *Id.*

like the state in *Elliott*, would have had the court stop at the Clause's plain, "unambiguous language."[73] And a plain reading of the text foreclosed any state action limitation on the Free Speech Clause.[74]

California is not the only state to use the Imported Original Meaning approach to interpret their constitutions.[75] The Nevada Supreme Court used this approach when considering whether the Nevada Constitution's Jury Trial Clause included Justice Court civil actions when the amount in controversy is very small.[76] After looking to the text of the Clause and noting that the delegates omitted any threshold monetary amount, the court reasoned that the California Constitution, the predicate for the Nevada Constitution, did not impose a threshold amount in such cases.[77] The court added that the New York Constitution, which influenced the California Constitution, also allowed jury trials even when the claim was for only a very small amount of money.[78] Accordingly, based on text and history (from California and New York), the court held that Nevada's jury trial guarantee includes civil actions in the Justice Court where the amount in controversy is very small.[79]

### 3. Summary

The Constitutional Continuity approach is widespread among courts that have addressed the "which constitution" question. Few have considered whether subsequent adoptions can alter the meaning of a clause with as much depth as Georgia.[80] In general, courts instinctively look to the origin of the clause to consult its original meaning.

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73 *See id.* at 817, 817–18.

74 *See id.*

75 *See, e.g.*, Aftercare of Clark Cnty. v. Just. Ct. of L.V. Twp. *ex rel.* Cnty. of Clark, 82 P.3d 931, 935 (Nev. 2004) (per curiam); *see also* State v. Cookman, 920 P.2d 1086, 1091–92 (Or. 1996) (looking to its precursor constitution, the Indiana Constitution, and subsequent interpretations by the Indiana Supreme Court to support its interpretation of the Oregon Constitution's Ex Post Facto Clause).

76 *Aftercare*, 82 P.3d at 935.

77 *See id.*

78 *See id.*

79 *See id.*

80 *See, e.g.*, Brendtro v. Nelson, 720 N.W.2d 670, 682–83 (S.D. 2006) (considering the original meaning of Article III, Section 1 of the South Dakota Constitution and concluding that the right to "propose measures" (a) had not changed in subsequent amendments to the constitution, and (b) included "the power to propose repeal of existing laws"); People v. Tanner, 853 N.W.2d 653, 669 (Mich. 2014) (looking to the original meaning of Michigan's Self-Incrimination Clause in the first appearance of the Clause in the 1850 constitution but not addressing whether the new constitutions in 1908 and 1963 change the meaning of the Clause); Commonwealth v. Edmunds, 586 A.2d 887, 897–98 (Pa. 1991) (interpreting the Search and Seizure Clause with reference to the original meaning of the Clause in the original constitution of 1776 but not considering whether the meaning could have

### *B. Tabula Rasa*

The second approach to the "which constitution" question is Tabula Rasa. Theoretically, there are two types of Tabula Rasa: Tabula Rasa and Plain Meaning Tabula Rasa. Under Tabula Rasa, the original meaning of a constitutional provision "resets" upon ratification of a new constitution. Under Plain Meaning Tabula Rasa, the court applies the *literal* meaning of the words in the provision, so the meaning of a clause depends on the linguistics of the modern period when a court happens to interpret the clause. Courts have largely declined to apply either version of Tabula Rasa, with Plain Meaning Tabula Rasa advocated for most notably by the state in *Elliott* and the dissent in *Golden Gateway*.

#### 1. Tabula Rasa

Unlike Constitutional Continuity, under Tabula Rasa a provision is not presumed to incorporate the same meaning as its predecessor provision. In interpreting the provision, courts consider the original meaning of the text at the time of ratifying the constitution currently in force. For example, Ohio has had two constitutions since joining the Union, the 1802 constitution and the 1851 constitution.[81] The state first adopted a cruel punishment clause in its 1802 constitution and incorporated it unchanged (other than changing its location) into the 1851 constitution.[82] Under Tabula Rasa, the meaning of the Cruel Punishment Clause is fixed not in 1802 with the original adoption of the

changed through adoptions of subsequent constitutions); *cf.* Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1 (Tenn. 2000), *superseded by constitutional amendment*, TENN. CONST. art. I, § 36. Though there is no specific right to privacy clause in the Tennessee Constitution, the Tennessee Supreme Court held that the right to abortion is a "vital part of the right to privacy guaranteed by the Tennessee Constitution" and is "inherent in the concept of ordered liberty embodied in" the constitution and is therefore a "fundamental" interest. *Id.* at 25. In reaching this conclusion, the court spent little time discussing the precise source of the right in the constitution. *See id.* at 27 (Barker, J., dissenting in part and concurring in part). It relies instead on a previous case called *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). *See generally Planned Parenthood of Middle Tenn.*, 38 S.W.3d 1. The court also did not address what, if any, changes to the constitution could affect its interpretation of the right to privacy. It instead spends most of the opinion discussing the Federal Constitution and federal cases like *Roe* and *Casey*. *See id.* at 8–9. The court concluded that changes to federal doctrine, including *Casey*, do not apply to the state constitution because the protections in the Tennessee Constitution from which the right to privacy emanates "are more particularly stated than those stated in the federal Bill of Rights." *Id.* at 13.

81 *See* Steven H. Steinglass, *The Ohio Constitution: Its History and Its Future*, STATE CT. REP. (May 21, 2025), https://statecourtreport.org/our-work/analysis-opinion/ohio-constitution-its-history-and-its-future [https://perma.cc/U5V3-H83S].

82 *See* OHIO CONST. of 1802, art. VIII, § 13; OHIO CONST. art. I, § 9.

Clause but in 1851 with the ratification of the constitution currently in force.

Constitutional Continuity and Tabula Rasa may sometimes end up in the same place. They will produce the same outcomes where, at the time of the current constitution's ratification, the clause in question still carries the same meaning it had at the ratification of a previous constitution. But the outcomes will often differ because of "meaning creep" where the meaning changes a little bit from constitution to constitution until, ten constitutions down the line (looking at you, Georgia), the clause has a very different meaning from its first appearance in that state's constitution.

Where the Tabula Rasa approach matters most is when there is little evidence of changes in meaning. Constitutional Continuity's rebuttable presumption requires positive evidence of change. By contrast, Tabula Rasa requires positive evidence that the meaning remains the same. Thus, where there is little or no evidence of a change in meaning, the Tabula Rasa approach produces changes to the meaning while the Constitutional Continuity approach does not.

One question with Tabula Rasa is whether the changed meaning at the time of the most recent constitution (such as Ohio's currently-in-effect 1851 constitution) incorporates U.S. Supreme Court caselaw. This is the most likely to occur when a clause has related, high-profile cases that most reasonable voters would be familiar with, such as *Miranda v. Arizona*.[83] For example, if Georgia voters adopted a self-incrimination clause one year after *Miranda* with language substantially similar to the Federal Constitution's Self-Incrimination Clause, the state's highest court could reasonably conclude that the voters considered the "plain meaning" of their self-incrimination clause to incorporate *Miranda*. Constitutional Continuity does not have to address this issue directly because if there is evidence to rebut the presumption of constitutional continuity, that same evidence will also likely address whether the provision incorporated caselaw. But with Tabula Rasa, because the default presumption is a change in meaning, the court must consider whether the new meaning incorporates caselaw decided between the passage of the last constitution and the most recent constitution.

Though not in the context of addressing the "which constitution" issue, the Florida Supreme Court considered a similar question in *Planned Parenthood of Southwest and Central Florida v. State*.[84] There, the court examined whether the state constitution's Privacy Clause, adopted just seven years after *Roe v. Wade* was decided,[85] incorporated

83 Miranda v. Arizona, 384 U.S. 436 (1966).

84 *See* Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 81 (Fla. 2024).

85 *See* FLA. CONST. art. I, § 23; Roe v. Wade, 410 U.S. 113 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

a right to abortion.[86] The court ultimately concluded that it did not and overruled a previous case based in part on the grounds that the previous court failed to consider "how Florida voters would have understood the text of the provision."[87] Planned Parenthood argued, and the dissent agreed, that the Privacy Clause in Florida's 1980 Constitution incorporated *Roe* because "Florida voters would have internalized *Roe*'s definition of privacy when they voted for the privacy amendment."[88] While in this case the evidence did not show that the public understanding of "privacy" *was* informed by *Roe*, the court acknowledged that it *could* have been.[89]

2. Plain Meaning Tabula Rasa

Whereas Tabula Rasa employs the original meaning of a clause, Plain Meaning Tabula Rasa simply employs the current, plain meaning of the provision at issue without regard to its original meaning. Particularly with older provisions, Plain Meaning Tabula Rasa produces different results than Constitutional Continuity because the plain meaning will often have drifted from the original, original meaning of a provision. It will also produce different results than Tabula Rasa if plain meaning has drifted from the time of the ratification of the current state constitution.

In *Elliott*, the state advocated for the court to interpret the Self-Incrimination Clause "according to the plain meaning of its text—without considering the prior constructions given to the right."[90] Such an approach would effectively "limit the right against compelled self-incrimination to only oral and written testimony."[91] The dissent in *Golden Gateway* similarly would have interpreted the California Constitution's Free Speech Clause according to its plain, semantic meaning, without reference to the Clause's origins in the New York Constitution.[92] The dissent explained that the Free Speech Clause clearly showed that the framers of the Clause "drew no distinction . . . between state and private actors," and instead specified in plain language a right against "interference by either."[93] So, the plain, literal meaning

86 *See Planned Parenthood of Sw. & Cent. Fla.*, 384 So. 3d at 71.

87 *See id.* at 75, 75, 88.

88 *Id.* at 81; *see id.* at 101–02 (Labarga, J., dissenting).

89 *Id.* at 81–82 (majority opinion).

90 Elliott v. State, 824 S.E.2d 265, 274 (Ga. 2019).

91 *Id.*

92 *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 818–19 (Cal. 2001) (Werdegar, J., dissenting).

93 *Id.* at 818.

of the clause should control unless the clause is ambiguous (and it was not ambiguous according to the dissent).[94]

While most courts do not employ Plain Meaning Tabula Rasa, some courts endorse a "plain meaning" approach in theory, though few apply it to the degree of literalism advocated for by the state in *Elliott*. The Ohio Supreme Court makes clear that where the language in the constitutional provision being construed is not "obscure or of doubtful meaning," the court cannot use the provision's purpose, reasoning, or the *history of its adoption* to put such plain terms in doubt.[95] But the court also said that interpretation of the constitution seeks to give effect to "the object of the people" adopting it.[96] So the court *would* look to the original meaning of a provision and the surrounding context even when the *modern* reader might think the provision has an equally clear but different meaning. Additionally, some courts purport to apply plain meaning but consider the original understanding of the provision to be part of its "plain meaning."[97] Other courts explicitly do not allow the modern-day "plain meaning" of a provision to override what the historical analysis indicates the *original meaning* is, almost invariably requiring the court to consider the provision's history.[98]

### 3. Summary

Tabula Rasa's twin approaches are potential approaches to the "which constitution" problem. Tabula Rasa proper may even have some advantages over Constitutional Continuity. Nevertheless, the Tabula Rasa approaches are infrequently used when compared to their Constitutional Continuity counterpart.

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94 *See id.* at 825.

95 State *ex rel.* Wallace v. City of Celina, 279 N.E.2d 866, 868 (Ohio 1972) (quoting City of Cleveland v. Bd. of Tax Appeals 91 N.E.2d 480, 484 (Ohio 1950), *overruled by*, Denison Univ. v. Bd. of Tax Appeals, 205 N.E.2d 896 (Ohio 1965)). For a defense of a current plain meaning approach to interpreting the Federal Constitution, see Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022).

96 *Id.* (quoting Castleberry v. Evatt, 67 N.E.2d 861, 862 (Ohio 1946)).

97 *See* Fletcher v. Graham, 192 S.W.3d 350, 358–61 (Ky. 2006) (interpreting the Kentucky Constitution according to "the express language of the provision" and giving the words of the text "their plain and usual meaning," *id.* at 358, as evidenced by the context of the clause's passage, intent of the framers, constitutional convention debates, and caselaw).

98 *See, e.g.*, Hogan v. S. Methodist Univ., 688 S.W.3d 852, 857–59 (Tex. 2024) (noting that despite the "apparent simplicity of the constitutional text," the court's "bottom-line task is to identify what the constitutional provision would have meant to those who ratified it," *id.* at 857).

## III. METHODOLOGICAL CONSIDERATIONS

Whether Constitutional Continuity or Tabula Rasa is the correct approach to the "which constitution" question depends in part upon what makes a constitution valid and binding as law. If one considers the act of a majority of the individual voters in a democratic system to be what gives law its validity, then Tabula Rasa may be the right approach because it best represents what reasonable voters would have thought the constitution to mean when voting on it. On the other hand, if the relevant "intent" is that of the framers of the constitution, the legislature that proposes a new constitution, or a reasonable reader aware of the provision's legal context, Constitutional Continuity may be the proper approach.

### *A. Evaluating Constitutional Continuity*

#### 1. Strengths

Constitutional Continuity's greatest strength is the clarity it provides courts and constitution drafters, the stability it creates for constitutional law, and its foundation in the common law tradition.

Constitutional Continuity provides clarity because courts do not have to make or refute arguments from silence. Constitutional Continuity demands evidence of a change in meaning of the provision based on changes to the text, ratification debates, or other context from around the time of ratification.[99] This sets a clear standard the judiciary can apply and clear expectations that the framers of new constitutions are on notice of. And, in combination with an imputation to the ratifier of the "legal context,"[100] it limits courts' frolics into speculation on what the ratifiers were thinking about and could have conceived the words to mean at the time. Even if the court only considers the "reasonable reader" at the time of ratification, requiring positive evidence of change still limits speculation even if the court must make an inquiry into the ratifiers' understanding of the provision at the time they adopted it.

As the Georgia Supreme Court articulated, the "presumption of constitutional continuity helps maintain the stability of Georgia's constitutional law, while still yielding when other considerations make clear that the people have changed the meaning of a provision."[101] Constitutional Continuity can preserve stability by reducing the

99 *See* Elliott v. State, 824 S.E.2d 265, 270 (Ga. 2019).

100 *See id.* at 285 (quoting Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 607 n.1 (2010) (Scalia, J., concurring in part and concurring in judgment)).

101 *Id.* at 270.

amount of back and forth between the legislature and people on the one hand and the courts on the other. For while there is always the chance that the meaning of a provision *has* changed from one constitution to the next despite lack of change to the text, courts are much more likely to make mistakes in interpretation if they have *no* evidence of a change. Constitutional Continuity will thus produce fewer mistakes in interpretation and more stability because the people do not need to amend the constitution to correct the error.

Finally, Constitutional Continuity has a foundation in the common law understanding that a law that takes the roots of another law "brings the old soil with it."[102] This phrase is most often applied in the context of statutory interpretation,[103] but the concept holds in the constitutional context, especially with old phrases or terms of art built into the country's constitutional law such as "cruel and unusual punishments."[104] Admittedly, as discussed in greater detail in the next subsection, the benefit of its common law foundation may not apply to less historically recognizable phrases such as Florida's Privacy Clause.[105] While the phrase "to be let alone" may carry "a rich legal tradition," the average voter likely would not know this.[106] So, unless one imputes to the ratifier knowledge of the "legal context,"[107] the ratifier (the average reasonable voter) would likely understand "to be let alone" by its ordinary usage.

### 2. Challenges

Constitutional Continuity's main challenge is simply that it risks failing to implement the will of the people. If a provision's meaning *has* changed despite lack of evidence to rebut the presumption of continuity, the court will fail to implement the will that matters most—that

102 Hall v. Hall, 284 U.S. 59, 73 (2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)); *see also* Morissette v. United States, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . unless otherwise instructed.").

103 *See, e.g.*, Paxton v. Am. Oversight, 716 S.W.3d 535, 540 (Tex. 2025); DeSantis v. Dream Defs., 389 So. 3d 413, 421 (Fla. 2024); *In re* Childers-Gray, 487 P.3d 96, 102 (Utah 2021). *But see* State v. Winegardner, 413 P.3d 683, 686 (Ariz. 2018) (applying the common law rule of bringing the soil with the transplanted rule to Arizona's evidentiary rules).

104 U.S. CONST. amend. VIII.

105 *See* FLA. CONST. art. I, § 23.

106 Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 79 (Fla. 2024) (quoting FLA. CONST. art. I, § 23).

107 Elliott v. State, 824 S.E.2d 265, 285 (Ga. 2019) (quoting Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 607 n.1 (2010) (Scalia, J., concurring in part and concurring in judgment)).

of the people who ratified the constitution.[108] And if courts presumptively consider the original meaning to be the original, original meaning, it makes it more difficult for the people to actually change their constitution because they must generate enough evidence to rebut the presumption.[109] This is especially important in the *Planned Parenthood* context where Tabula Rasa could have protected the purported human right to abortion where Constitutional Continuity did not.

Courts that apply Constitutional Continuity get around this drawback by imputing familiarity with the constitution's legal context. In *Elliott*, the court explained that its interpretation of the provision was based on that of a reasonable person "familiar with [the provision's] legal context."[110] And Constitutional Continuity seems to demand such an imputation to retain its democratic legitimacy. By imputing to the ratifiers an understanding of the soil from which the provision came courts can justify presuming that the ratifier intended to retain the original, original meaning of the provision by failing to change the provision's text. This imputation is more palatable if one considers the relevant intent to be the intent of the *framers* of a constitution, who tend to be members of the legislature and thus more familiar with the law.[111] But it does not necessarily apply to the *ratifiers* of the constitution who include average state voters. Such ratifiers almost certainly do not know all the "legal context" of a particular provision—especially provisions with meanings that even learned scholars dispute such as cruel punishment and self-incrimination clauses. And it is the voice of the people that matters most in giving validity to a constitution—at least according to James Madison:

> As the instrument came from [the framers of the Constitution], it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people . . . . If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it

108 The primary account of constitutional legitimacy tends to be popular sovereignty, invoked by both originalists and living constitutionalists. *See* Mazzone & Tecimer, *supra* note 4, at 406–07.

109 *See id.* at 407; *see also* Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1442 (2022) ("Words are invested with legal validity only to the extent that they represent the communicated will of the people themselves.").

110 *Elliott*, 824 S.E.2d at 285 (quoting *Jerman*, 559 U.S. at 607 n.1 (Scalia, J., concurring in part and concurring in judgment)).

111 *See* CHRISTOPHER A. SIMON, BRENT S. STEEL & NICHOLAS P. LOVRICH, STATE AND LOCAL GOVERNMENT AND POLITICS 155 (3d ed. 2024) ("The process of initiating a convention begins with a formal call from the legislature, an action which all 50 state legislatures and the District of Columbia have the ability to undertake.").

> not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.[112]

On this basis, some scholars advocate for interpreting the Federal Bill of Rights as applied to the states based on its meaning at the time of incorporation in 1868.[113] Unlike the U.S. Constitution, however, state constitutions are relatively easy to amend, with most states requiring only a simple majority.[114] So if state courts make a mistake in interpreting a provision according to its original, original meaning, the people can amend their constitution to correct the judiciary with relative ease.[115] Further, exercising judicial restraint by limiting changes to interpretation of a state's constitution avoids the instability and illegitimacy of the court mistakenly concluding that the people intended to change the meaning of the clause when they did not. This is especially important because inertia might cause the people not to correct the court when it misinterprets the intended meaning of a provision. Since misinterpretation is always a possibility, all things being equal, it is better to err on the side of not changing things to maintain stability in state constitutional law.

### *B. Evaluating Tabula Rasa*

#### 1. Strengths of Tabula Rasa

The strongest argument for Tabula Rasa is that by adopting a new constitution, the people "respoke" the old constitution as they understand it at the time of ratification.[116] In an analogous context, Kurt Lash argues that incorporation of the Bill of Rights against the states via the Fourteenth Amendment should be understood to have "respoken" the words of the Bill of Rights in 1868.[117] In Lash's words:

> Whatever the original meaning of the 1791 amendments, the people of 1868 spoke those older rights into a new context, one

112 James Madison, Speech in Congress on the Jay Treaty (Apr. 6, 1796), *in* JAMES MADISON: WRITINGS 568, 574 (Jack N. Rakove ed.,1999).

113 *See, e.g.*, Lash, *supra* note 109, at 1441–49 ("An originalist interpretation of the Fourteenth Amendment not only calls for an 1868 understanding of provisions in the Bill of Rights . . . but it also requires an updated 1868 understanding of the Bill of Rights itself." *Id.* at 1441.).

114 *See* John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/GT5L-8B9L].

115 *But see* Mazzone & Tecimer, *supra* note 4, at 378 ("Small errors of judicial interpretation might evade future correction even as they have profound implications for constitutional meaning and the outcomes of cases.").

116 *See* Lash, *supra* note 109, at 1442–44.

117 *See generally id.*

> reflecting decades of battles over the meaning of the Bill of Rights and the importance of protecting those rights against both federal and state abridgment. An originalist interpretation of the Fourteenth Amendment not only calls for an 1868 understanding of provisions in the Bill of Rights incorporated against the states by way of the Privileges or Immunities Clause, but it also requires an updated 1868 understanding of the Bill of Rights itself.[118]

Of course, unlike the Fourteenth Amendment, states do not generally fight civil wars before adopting new constitutions. Further, Constitutional Continuity can be reconciled with Lash's reasoning since the "decades of battles over the meaning of the Bill of Rights," "the importance of protecting those rights against both federal and state abridgment,"[119] *and* fighting a civil war would likely be enough evidence to rebut the presumption of constitutional continuity.

### 2. Challenges of Tabula Rasa

The main challenge for Tabula Rasa is the instability that can arise from frequent changes to constitutional law. Tabula Rasa requires an assumption of changed meaning, even without evidence of change. It further requires assuming that the ratifiers of the provision were unaware of the provision's prior meaning and understood its text as a blank slate when it appeared before them at the convention. But it is equally plausible that when a ratifier signs off on a new constitution that contains a clause with materially the same language as a clause in a prior constitution, he assumes that the clause means the same thing it did in the prior constitution. And if courts assume changed meaning without evidence, there is a higher probability that the court will get it wrong. This leads to instability in constitutional law as the courts and the people go back and forth trying to interpret and correct the interpretation of their constitution.

A deeper problem is that when considering the understanding and intent of a large group of people such as the ratifiers of a state constitution, it is nearly impossible not to make some assumption or presumption about what a reasonable interpretation is. When employing Tabula Rasa, the court necessarily assumes that the ratifier will *not* consider the provision to incorporate the meaning of identical language in a predecessor constitution. When employing Constitutional Continuity, the court assumes the ratifier *does* consider the provision to incorporate the meaning of the predecessor constitution.

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118 *Id.* at 1441.
119 *Id.*

### 3. Strengths of Plain Meaning Tabula Rasa

Courts could theoretically apply Plain Meaning Tabula Rasa as a proxy for the intent of the ratifiers. This requires concluding that (a) the plain meaning of the text is how a reasonable voter would interpret the text, (b) the meaning that matters is that of the reasonable voter, and (c) the text's plain meaning has not changed from the most recent adoption of the state's constitution. Using plain meaning as a proxy also has an advantage when it comes to notice. If the meaning of the constitution is always the meaning that the reasonable person would ascribe to it, as advocated for by the State in *Elliott*,[120] then people will be more on notice of what the provision means. Whereas if the meaning of the constitution is based on its original, original meaning or the meaning it had decades or centuries ago at the ratification of the current constitution, the reasonable citizen of a state will have no awareness of what his constitution means.

### 4. Challenges of Plain Meaning Tabula Rasa

Using plain meaning as a proxy for the intent of the ratifiers is weaker the older a state's most recent constitution is. For example, Ohio and Indiana still use their 1851 constitutions[121] and Texas its 1876 constitution,[122] but the current plain meaning will likely have changed from what the ratifiers intended in 1851 or 1876. It is also weaker if the relevant reader is not the average voter, but a legislator, framer, or reasonable person familiar with the provision's legal context because they will interpret the provision by taking account of its legal context. Further, Plain Meaning Tabula Rasa risks constant instability in state constitutional law because the meaning of the constitution shifts frequently based on what the people of the day *think* it means, not necessarily what it *does* mean. Thus, the meaning of the constitution will not have any grounding in what the people voted for, rather it is grounded in meaning that shifts with the linguistics of the time. This instability eliminates any advantage gained by giving people notice because the meaning is always changing.

Issues of instability and the weaknesses in using plain meaning as a proxy are likely why courts do not use Plain Meaning Tabula Rasa

120 *See* Elliott v. State, 824 S.E.2d 265, 274 (Ga. 2019); *see also supra* note 90 and accompanying text.

121 *See* Steinglass, *supra* note 81; *Indiana Constitution*, IND. STATE LIBR. (June 5, 2024), https://www.in.gov/library/collections-and-services/indiana/subject-guides-to-indiana-collection-materials/indiana-constitution/ [https://perma.cc/XG7R-ZCPS].

122 *See Constitutions of Texas 1824–1876*, UNIV. OF TEX. AT AUS. SCH. OF L.: TARLTON L. LIBR. (Aug. 15, 2023, at 14:03 ET), https://tarlton.law.utexas.edu/constitutions/ [https://perma.cc/D4RX-R8ZA].

and why it has only shown up in a few cases such as *Elliott* and *Golden Gateway*—advocated for by the losing sides. This leaves the main battle for "which constitution" between Constitutional Continuity and Tabula Rasa proper.

## CONCLUSION: WHICH CONSTITUTION?

The rebuttable presumption of constitutional continuity may suffer from a presumption of the ratifiers' awareness of the previous constitution, but Tabula Rasa equally suffers from the opposite presumption. Thus, preference in method ultimately depends on what assumptions courts are willing to make about the ratifiers of a constitution. If a court is willing to assume familiarity with the legal context, between Constitutional Continuity and Tabula Rasa, Constitutional Continuity largely accounts for the risk of misinterpretation. In most cases, if ratifiers intend a different meaning than the one the provision has always had, there will often be at least *some* evidence of change in either the text, ratification debates, or impetus for the adoption of a new constitution. Further, Constitutional Continuity provides greater clarity in writing and interpreting new constitutions, greater stability in state constitutional law, and is grounded in the common law tradition that when "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[123] Overall, while Tabula Rasa is a valid approach, Constitutional Continuity's clarity, stability, and foundation is a better approach for deciding "which constitution."

123 Frankfurter, *supra* note 102, at 537.