Oregon Law Review
Winter 2000 - Volume 79, Number 4
(Cite as: 79 Or. L. Rev. 793)

JACK L. LANDAU*

Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation

Hurrah for revolution and more cannon-shot!
A beggar upon horseback lashes a beggar on foot.
Hurrah for revolution and cannon come again!
The beggars have changed places but the lash goes on.

[*794]

INTRODUCTION

The legitimacy of state constitutionalism seems all but taken for granted. After three decades of experimentation and debate, state courts have come routinely to give independent significance to their state constitutions, without reference to federal court decisions construing correlative provisions of the Federal Constitution. n2 The "new federalism" is no longer new. n3

There remains the question whether the state constitutional "revolution" has made any difference. No doubt it has in terms of substantive law. The very impetus for resort to state constitutional interpretation was the perception that the federal courts - in particular, the United States Supreme Court - during the Burger era were engaged in a systematic effort to dismantle the civil rights jurisprudence of the Warren Court. State courts stepped into the breach with decisions substantially more protective of civil rights. n4

Whether that is all that can be said of state constitutionalism is the focus of this Article. Rather than focus on the substantive results of constitutional decisions, I target the methods of the decisions themselves. Federal court decisions - in particular, United States Supreme Court decisions - long have been criticized for their failure to reflect any coherent theory of constitutional meaning. n5 The question I address is whether the same criticism may be leveled at state constitutional decisions.

I begin by briefly addressing the importance of constitutional interpretive theory, summarizing the range of interpretive possibilities, reviewing current federal constitutional decision-making practices, and identifying examples of various approaches to interpretation that the courts apply in determining the meaning **[*795]** of the Federal Constitution. n6 After laying that groundwork, I devote the majority of my effort to an examination of the practice of state constitutional decision making. I have chosen to focus on the case law of a single jurisdiction to permit more in-depth analysis without the Article becoming unwieldy. I have selected the case law of Oregon for this study because, for several decades, Oregon has been at the forefront of the state constitutional revolution and, as a result, has perhaps the most well-developed body of state constitutional case law in the nation. n7

In short, I have encountered some interesting patterns in my examination of the Oregon state constitutional decisions. To begin with, the Oregon courts are very methodologically conscious. They have adopted, in fact, a "template" that, on its face, applies to all questions of state constitutional interpretation. According to the template, Oregon courts determine the meaning of a given provision of the state constitution by examining the text of the provision itself, its historical context, and the case law construing it. n8 The template is originalist in orientation. Yet the decisions provide no explanation as to why an originalist interpretive approach was adopted. Indeed, the Oregon courts - like courts generally - appear unaware of the considerable body of criticism of that interpretive approach. Moreover, and more interesting for my purposes, the Oregon courts do not consistently follow their own originalist template.

Instead, careful examination of the state constitutional decisions over the past thirty years reveals at least a half dozen different interpretive approaches taken by the Oregon courts, depending on the particular constitutional provision at issue. At times, the courts' decisions are indeed originalist in orientation. But at other times, the history of a provision and the intentions or probable understandings of its framers prove entirely irrelevant. Instead, the court unapologetically will appeal to the text alone, to judicially created doctrine, to constitutional structure, even - of all things - to federal law.

I conclude that, although selected Oregon decisions employ some interesting rhetoric about constitutional interpretation, in **[*796]** practice, the decisions resort to essentially the same interpretive practices that may be found in countless federal constitutional decisions over the past half century. To return to the question that I posed at the outset, state constitutionalism - at least the state constitutionalism reflected in the Oregon cases that I have examined - appears to have made little difference other than to provide the courts an opportunity to arrive at different results than the application of federal law otherwise would require.

I

CONTEXT

Before embarking on my detailed examination of Oregon constitutional interpretation, it seems appropriate to provide some theoretical and historical context. I begin by addressing the question why it is important even to engage in the examination. I then briefly describe the variety of approaches to constitutional interpretation reflected in federal court decisions about the meaning of the United States Constitution. Finally, I describe - again, briefly - the development of state constitutionalism generally.

A. The Significance of Constitutional Interpretation

State and federal constitutions provide the basic blueprints for our systems of government, allocating powers, obligations, and rights among federal and state governments and their citizens. The blueprints, however, provide little detail. To the contrary, they are exasperatingly blurry in many key respects. n9 The Federal Constitution, for example, prohibits the infliction of "cruel and unusual punishment." n10 Yet it provides no definition of the phrase. It fails even to include any

examples of what constitutes a punishment that is "cruel and unusual." Similarly, the Oregon Constitution provides that no citizen may be denied "equal privileges or immunities." n11 But it fails to provide a list of what constitutes a "privilege" or an "immunity."

It thus falls on someone to explain what the vague provisions **[*797]** of state and federal constitutions mean. In fact, it falls on a host of individuals and institutions to interpret the state and federal constitutions. Members of state legislatures and of the United States Congress interpret the Federal Constitution in making decisions about the appropriate exercise of their legislative powers. Governors and presidents interpret their constitutions in determining the conduct of administrative agencies, in issuing executive orders, or in determining whether to veto particular bills. Police officers interpret state and federal constitutions in evaluating whether a suspect has waived his or her constitutional rights before agreeing to answer investigative questions. n12

The question, of course, is whose interpretation of a constitution is authoritative. When there is disagreement about the meaning of a constitutional provision, who determines which interpretation is the correct one? Unfortunately, neither state nor federal constitutions explicitly identify who is assigned the task of authoritatively determining their meaning. Nevertheless, since Marbury v. Madison, n13 the courts have asserted that they occupy the role of final arbiters of constitutional meaning. They have justified that assertion on the ground that a constitution is law, and it is one of the functions of the courts to interpret and determine the nature, scope, and effect of law. n14

Constitutions are, in particular, written law, and this carries **[*798]** with it significant implications. Most important, for my purposes at least, is the implication that there must be limits to what state and federal constitutions can be said to establish. n15 Constitutions cannot be interpreted willy-nilly to mean whatever an interpreter wishes. The United States Constitution, for example, provides that one qualification for the office of president is that the candidate be at least thirty-five years of age. n16 The courts could not determine that the Constitution does not mean what it says - that, say, a minimum age of eighteen will suffice. Such a "construction" of the Constitution would be regarded as illegitimate. State and federal constitutions would lose any force of authority if their language could be so easily ignored in favor of the ideas and ideals of the courts. Likewise, the courts themselves would lose any legitimacy in asserting their role as the final arbiters of the "meaning" of constitutions. For if the language of the documents imposes no limits on those who interpret them, the courts are in no better position than anyone else to assert the authority to have the final say as to what they mean.

Thus, preserving the authoritativeness of the constitutions and the legitimacy of the courts requires that constitutional meaning in some sense be justifiable in terms other than the personal preferences of the judges who determine that meaning. n17 Interpretive theory provides a justification. It establishes rules by which constitutional meaning is ascertained, rules that exist independent of those who must apply them.

I hasten to assert an important qualification at this point. I am not suggesting that interpretive rules determine how decisions themselves are made. The psychology of judicial decision making is no doubt much more complex than the application of neutral principles of constitutional interpretation. But those **[*799]** principles do provide explanations for the decisions that are reached by those or other means. I take it as given, in other words, that what appears in judicial opinions is not necessarily an explanation of how a court arrived at a decision. It is, instead, a justification for the decision. n18 It is the use of interpretive theory to justify particular decisions that is the focus of my attention.

Precisely what constitutes a coherent "interpretive theory" is an interesting question. A wide variety of different approaches has been suggested, and there is far from any consensus on the **[*800]** matter. n19 Some constitutional scholars, for example, have suggested that the reasonable interpretation of the text of a constitution should be the principal focus. n20 Others have suggested that "originalism" is the only appropriate interpretive approach. n21 **[*801]** Such scholars contend that a written constitution by its very nature suggests that those who enacted it by democratic processes intended it to have some particular effects and any departure from that intended effect is antidemocratic. n22 Still others maintain that the ascertainment of original intent is fraught with difficulties, and that it is really impossible to conjure up the collective intentions of people who lived 150 or 200 years ago. n23 Other scholars contend that, even accepting the plausibility of identifying original intent, there is no good reason for constraining present generations by the dead hand of framers who lived in radically different times. n24 Finally some contend that the textualist **[*802]** and originalist approaches both are inadequate, that both are excessively concerned with connecting constitutional interpretation with an authoritative source. These scholars propose what is known as a "common-law" approach to the development of constitutional law, in which the constitutional text is but one of many factors that come into play in justifying a judicial decision. n25 This is but a sample of the rich literature that exists addressing the theoretical possibilities.

B. Interpretation and the Federal Constitution

Although the importance of interpretive theory to the legitimacy of judicial review seems plain enough, it has received scant attention in judicial opinions concerning the construction of the Federal Constitution. To the contrary, federal courts - in particular, the United States Supreme Court - employ a wide variety of interpretive approaches in ascertaining the meaning of federal constitutional provisions. n26

At times, the Court has employed a fairly strict textual approach to the Constitution, treating the task of interpretation more or less as an exercise in sentence diagraming, without regard to the intentions of those who drafted the text in the first place. n27 Perhaps the most extreme example is the Court's opinion **[*803]** in the infamous Slaughterhouse Cases. n28 In that opinion, the Court effectively eviscerated the Privileges and Immunities Clause of the Fourteenth Amendment on the basis of its syntax, the clause referring only to the "privileges and immunities of citizens of the United States," not the privileges and immunities of the citizens of the states themselves. n29

At other times, the Court has construed the Constitution without regard to its language, paying more attention to "structural" concerns that are more or less implicit in the document as a whole. For more than a century, for example, the Court consistently has maintained that the Eleventh Amendment prohibits a citizen from suing his or her own state in federal court, even though the amendment says nothing of the sort. n30

[*804] In a related vein, the Court at times has divined the existence of constitutional rights by reference not to the text of any particular constitutional provision, but rather to incorporeal "emanations" or "penumbras" that implicitly flow from the text. The Court's controversial opinion in Griswold v. Connecticut n31 illustrates the practice. In that case, the Court ascertained that the Federal Constitution guaranteed a "zone of privacy" by virtue of certain "penumbras, formed by emanations from" the specific guarantees of the First, Third, Fourth, and Ninth Amendments. n32

[*805] Griswold, in turn, laid the groundwork for the Court's recognition in Roe v. Wade n33 of a constitutional right to an abortion, a right that certainly is difficult to defend on strictly textual or originalist grounds. n34

In a substantial number of cases, the Court has employed a decidedly originalist approach to constitutional interpretation. n35 **[*806]** For example, in determining that obscenity is not protected by the First Amendment, the Court relied on the historical record of regulation of obscenity at English common law and in prerevolutionary America. n36 The Court held that, in light of the extensive regulation of obscenity that existed at the time of the enactment of the First Amendment, it is unlikely that the Framers understood obscenity to be "speech" within the meaning of the Constitution. n37 Similarly, in determining the scope of congressional power to exclude a member elected to serve n38 and in ascertaining the constitutionality of congressional term-limit legislation, n39 the **[*807]** Court devoted an extraordinary amount of attention to reconstructing the intentions of the Framers as reflected in a wide variety of historical sources.

And yet, in a substantial number of other cases, the Court flatly declines to adopt an originalist approach to interpreting the Constitution. The Cruel and Unusual Punishment Clause of the Eighth Amendment, for example, obviously was not understood at the time of adoption to prohibit capital punishment. The constitutional text itself prohibits the deprivation of life only without due process of law. n40 Nevertheless, the Court has adopted an "evolving community standards" approach to the interpretation of the clause, which permits the court, at least in some instances, to conclude that the death penalty is unconstitutional. n41

In a related practice, the Court frequently will pay little, if any, heed to constitutional text or history and focus instead on the development of a coherent doctrine concerning the particular rights involved. An excellent example may be found in the Court's regulatory takings jurisprudence. The genealogy of the court's twentieth century takings cases traces not to the Constitution, but to a few lines of dictum in Justice Holmes's famous opinion in Pennsylvania Coal Co. v. Mahon. n42 "The general rule at least," Holmes wrote, "is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." n43 Since then, the Court has wrestled continuously - and largely unsuccessfully - with determining not what the framers understood the takings clause to mean, but how to develop a coherent regulatory takings doctrine based on Holmes's reference **[*808]** to regulation going "too far" in Pennsylvania Coal. n44

Clearly, from the viewpoint of interpretive theory, the case law of the United States Supreme Court is in a state of considerable disarray. Indeed, the lack of adherence to any consistent interpretive approach has spawned a fairly steady stream of criticism of the legitimacy of the Court's decisions throughout this century, but especially following its historic decisions in Brown v. Board of Education n45 and Roe v. Wade n46

C. The State Constitutional Revolution

However incoherent, federal constitutional analysis dominated for the better part of a century even state court decisions concerning the meaning of state constitutional counterparts to federal constitutional provisions. Precisely why state courts chose to employ federal constitutional analysis to state constitutional questions is not entirely clear. n47 It appears that the courts assumed **[*809]** that, notwithstanding frequent textual variations between state and federal constitutional provisions,

the framers of the state constitutions must have intended that their constitutions have the same effect as their federal parallels. As the Oregon Supreme Court characteristically explained with respect to federal and state constitutional self-incrimination clauses, "nothing turns upon the variations of wording in the constitutional clauses." n48 Whatever the reason, the practice became well-nigh universal.

At least until the 1970s. At that point, state courts around the country began to question the assumption that parallel state and federal constitutional provisions must have identical meaning. Conventional wisdom attributes the genesis of this "revolution" to a 1977 law review article by Justice William Brennan. Brennan's article called for state courts to independently construe their own state constitutions to provide civil rights protections in the wake of United States Supreme Court decisions professing increasing disinclination to find such protections in the federal constitution. n49 His article is regularly characterized as a "clarion call to state judges to wield their own bills of rights." n50

Actually, the call occurred earlier than that. In 1970, Professor Hans Linde published his ground-breaking article, Without "Due **[*810]** Process," n51 in which he issued a plea for recognition of the independent significance of state constitutions. Indeed, there are scattered instances of state courts doing precisely that even earlier. n52 The Brennan article, however, did focus national attention on the subject. And whoever was first to issue the clarion call, the fact remains that it was not until the Burger Court emerged as openly hostile to Warren Court activism that the state courts were given a reason to heed it. n53

Early state constitutional decisions, in fact, were openly reactive to federal constitutional jurisprudence. And this fact led to **[*811]** substantial early criticism of the "new federalism" as nothing more than a result-oriented opportunity for more liberal state courts to circumvent what they perceived as unacceptably conservative federal constitutional decisions. n54 A more "mature" state constitutionalism soon emerged, however, which asserted the appropriateness of independent interpretation of state constitutions on theoretical grounds independent of particular case outcomes. n55

[*812] The question soon arose: Exactly when is it appropriate to examine state constitutional provisions independent of their federal constitutional counterparts? Two schools of thought emerged. n56 One counsels attention to state constitutions before looking to the Federal Constitution. n57 Often denominated the "first things first" approach, n58 it is premised on notions of logic, n59 judicial economy n60 and a commitment to the enforcement of state law. n61 **[*813]** The other approach encourages resort to state constitutional provisions only when the Federal Constitution proves in some way unsatisfactory. n62 The approach reflects a view that state constitutions are merely supplemental to the Federal Constitution. n63

Although state courts and academic commentators have devoted much attention to this question of when to engage in independent state constitutional interpretation, surprisingly little attention has been devoted to how the independent interpretation should be accomplished. n64 A few courts have taken up the **[*814]** subject in general terms. The Vermont Supreme Court, for example, has cataloged the variety of arguments that it might consider relevant in ascertaining the meaning of its state constitution, among them the resort to historical materials, the constitutional text, and reliance on economic and sociological data. n65 The court's catalog was deliberately open-ended. "The imaginative lawyer," the court said, "is still the fountainhead of our finest jurisprudence." n66

A few other states have gone further and have attempted to draw some definitive conclusions about the proper methodology for state constitutional interpretation. The New Jersey Supreme Court, for instance, divided all provisions of its constitution into two categories, certain "great ordinances" and the remaining, **[*815]** lesser, more detailed provisions that announce "no principle of government." n67 The former provisions are interpreted so that the "underlying spirit, intent and purpose" are applied to "the problems of the day." n68 The latter are read more literally. n69 The North Carolina Supreme Court employs a similar dichotomy, giving broad, purposive reading to "great ordinances" and narrow construction to detailed administrative provisions. n70 These cases reflect a sensitivity to the distinctiveness of state constitutions, which - unlike their federal counterpart - frequently include detailed, statute-like provisions on a wide variety of subjects ranging from the issuance of pollution control bonds to the details of public school finance. n71

The Oregon Supreme Court, too, has explicitly adopted a methodology for the interpretation of its constitution. It is to the development and application of that methodology that I now turn.

II

OREGON CONSTITUTIONAL INTERPRETATION

A. Before the Revolution: A Prehistory of Oregon Constitutional Interpretation

Oregon's constitution was approved by the people in 1857 and went into effect in 1859. n72 Records of the constitutional convention **[*816]** that led to the adoption of the constitution are sketchy. n73 From the available evidence, it appears that no one paid much attention to the question of judicial review generally, much less to the particulars of state constitutional interpretation. n74 The courts, however, had no trouble in figuring out what to do. Following the interpretive conventions of the middle-to late-nineteenth century, n75 the court tended to spend little time justifying its reading of state constitutional provisions. When the plain meaning of the constitutional text did not suffice, the courts resorted **[*817]** to a more or less originalist approach, n76 frequently supplemented by reference to contemporaneous construction, n77 well-known maxims of statutory or constitutional construction, n78 and to the constructions of similar provisions by courts in other jurisdictions. n79

Interpreting state constitutional provisions that paralleled the Federal Constitution proved different. In those cases, the clear preference of the Oregon courts was simply to treat the state and federal provisions as if they were one and the same. This was true even when there were obvious textual differences between state and federal provisions.

For example, the Fourteenth Amendment to the United States Constitution provides that "no State shall make or enforce any **[*818]** law which shall abridge the privileges or immunities of citizens of the United States." n80 Article I, section 20, of the Oregon Constitution uses some of the same words but is very different: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." n81 As early as 1919, in State v. Savage, n82 the Oregon Supreme Court recognized the difference in the wording, as well as its potential significance. The provisions of the state constitution, the court observed, "are the antithesis of the Fourteenth Amendment in that they prevent the enlargement of

the rights of others while the Fourteenth Amendment prevents the curtailment of rights." n83 Nevertheless, the court repeatedly and explicitly held that the scope of the state and federal clauses is identical, that is, the meaning of the state provision is defined by United States Supreme Court case law applying the Fourteenth Amendment. As the court declared in its 1958 decision in Plummer v. Donald Drake Co.:

> The controlling principles which guide the courts in determining questions of alleged unconstitutional discrimination ... are the same whether it is the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States which is invoked or the privileges and immunities provision in article I, section 20, of the Oregon Constitution. Fundamentally, classification is a matter committed to the discretion of the legislature, and the courts will not interfere with the legislative judgment unless it is palpably arbitrary. n84

The court also held that the state and federal takings clauses "are identical in language and meaning," in spite of the fact that, strictly speaking, they are not. n85 Similarly it held that, as to the meaning of the state and federal self-incrimination clauses, "nothing turns upon variations of wording in the constitutional clauses." n86

The court flirted with the idea that those state constitutional **[*819]** provisions have independent significance. Indeed, there are a few scattered instances in which the court based a decision on a state constitutional provision independent of its federal counterpart, but those decisions far from reflect a fundamental shift in thinking about state constitutional interpretation. As early as 1961, in City of Portland v. Welch, n87 the Oregon Supreme Court held that it was "self evident" that local police censorship of commercial films violated article I, section 8, of the Oregon Constitution and that, "although we rely upon our own constitution," it was clear that such censorship violated the Federal Constitution as well. n88 But five years later, in Minielly v. State, n89 the court addressed an argument predicated on both state and federal constitutional guarantees of freedom of expression by reference to federal court decisions concerning the First Amendment alone. n90

Similarly, in 1976, in State v. Olsen, n91 the court declined to employ the fundamental rights component of existing Fourteenth Amendment case law to a challenge brought under article I, section 20, of the Oregon Constitution. The court acknowledged that "we have repeatedly and explicitly held or unequivocally inferred that the scope of the equal protection clause of the Oregon Constitution and the Fourteenth Amendment is the same." n92 It nevertheless announced "this does not mean that we cannot decide that the equal protection clause of the Oregon Constitution is broader than that of the Federal Constitution." n93 In declining to incorporate all of the federal equal protection analysis, the court offered no independent analysis of the language or history of the relevant provisions of the state constitution. The court merely cited the analysis of a New Jersey **[*820]** decision on similar facts, which it stated it found satisfactory. n94 That the Olsen decision signaled no significant shift in analysis is demonstrated by the court's decision in City of Klamath Falls v. Winters n95 in 1980. In that case the court explained that, although

> [it] is true that the provisions of article I, section 20, of the Oregon Constitution are not identical with those of the Fourteenth Amendment ... in the usual case

> substantially the same analysis is applicable in determining whether there has been a denial of equal protection of the laws or a grant of a privilege or immunity on terms not equally applicable to all citizens. n96

The significance of such cases should not be underestimated. They reflect a transition period in the thinking of the court, during which it gradually grew to accept the possibility that, at least in some instances, there might be opportunities for state constitutional provisions to have independent significance. The late 1970s, in fact, produced an increasing number of decisions in which the court openly entertained - if ultimately to sidestep - the possibility. Thus, for example, in the City of Klamath Falls decision, the court suggests that "in the usual case substantially the same analysis" applies to state and federal equal protection guarantees, leaving open the possibility that the court could carve out exceptions in unusual cases. n97

A key factor in this transition appears to have been the publication of Hans Linde's law review article, Without "Due Process." n98 In that important article, then-professor Linde suggested that state and federal constitutional provisions that for years had been treated as identical might more properly be regarded as distinct on the basis of differences in text and enactment history. n99 **[*821]** In particular, Linde assailed the Oregon Supreme Court's cases holding that the state guaranty of a remedy for wrongs committed, expressed in article I, section 10, of the Oregon Constitution, constituted a state version of the Federal Due Process Clauses of the Federal Constitution. In making his argument, Linde cited textual differences, including the fact that article I, section 10 makes no mention of the words "due process," and the distinct historical sources for the state and federal clauses.

The Oregon Supreme Court at first seems to have regarded Linde's point as having merely academic significance. In its 1974 decision in School District No. 12 v. Wasco County, n100 the court commented that the due process claim based on article I, section 10, of the Oregon Constitution was ill-founded, because "Professor Linde demonstrates that this section is not a due process provision, but, rather, has to do with the protection of legal remedies **[*822]** which assert interests recognized in tort law." n101 The court nevertheless concluded that Linde's demonstration was beside the point, "because when this court has treated article I, section 10, as a due process clause, it has shown no inclination to treat it substantially different from the federal interpretation of the Fourteenth Amendment." n102

But before long, the court began to warm to the broader significance of Linde's argument. Although it continued to treat state and federal constitutional provisions as equivalents, it held out the possibility - usually with a citation to Without "Due Process" - that such might not always be the case. Thus, for example, in State v. Ivory, n103 the court held that, although it had determined to adopt the federal speedy trial analysis in a case brought under the state constitution, "it may be that an interpretation of a comparable Oregon constitutional provision which differs from the view taken by the Supreme Court of similar federal constitutional language would be appropriate in some cases." n104 Similarly, in State ex rel. Reed v. Schwab, n105 the court held that although state and federal equal protection provisions are not identical, it was appropriate to apply the federal analysis. n106 In a footnote, the court noted: "For examples of cases in which the applicability of article I, section 20 and the Equal Protection Clause might not be identical, see Linde, Without 'Due Process.'" n107

The significance of the 1970s decisions, and Linde's article, should not be overestimated, however. The fact remains that, **[*823]** throughout the decade, the court still clung to its practice of treating state and federal constitutional provisions as essentially fungible. It should be recalled that the City of Klamath Falls case was published in 1980, ten years after the publication of Without "Due Process" and a full two years after Linde was sworn in as a member of the Oregon Supreme Court.

Change did come, but with a marked lack of fanfare. In retrospect it is striking, in fact, how the court so nonchalantly embarked on what later would be referred to as its constitutional "revolution." In some cases, the nonchalance came easily, because there was little or no prior case law to impede the independent construction of the state constitution. In State v. Kessler, n108 for example, perhaps the earliest example of the Oregon Supreme Court's new approach to state constitutional construction, the court confronted a challenge brought under article I, section 27, of the Oregon Constitution, which guarantees the right to bear arms. The court began by observing that the scope of the provision previously had not been analyzed by the Oregon courts. Decisions construing the Second Amendment to the United States Constitution, the court said, "are not particularly helpful" because the wording of the federal provision "differs substantially from our state provision," and, in any event, the Second Amendment had not yet been held to apply to the states. n109 Whereupon, the court embarked on an extended analysis of the historical background and textual significance of Oregon's differently worded constitutional guarantee. n110 I leave for later discussion the particulars of the court's analysis. n111 Suffice it to say at this juncture that it was distinctly different from the existing case law construing the Second Amendment. n112

In other cases, the nonchalance was no less present, but it was **[*824]** rather more difficult to pull off. In such cases, substantial precedent did exist that called for uniform construction of state and federal constitutional provisions, and the court was forced to employ some artful maneuvers to produce the impression that it was keeping with prior practice. Illustrative is the court's opinion in State v. Clark, n113 a 1981 case in which the criminal defendant challenged the constitutionality of a state law that afforded those charged by district attorney information with a preliminary hearing but not those charged by grand jury indictment. The defendant, charged by grand jury indictment and denied a preliminary hearing, argued that, among other things, the statute violated his constitutional right to equal protection. n114 In his brief on appeal, the defendant did not cite article I, section 20, of the Oregon Constitution, but rather relied on the Fourteenth Amendment. n115

The Oregon Supreme Court nevertheless declared that, because the defendant did not "spell out the distinct premises" of his equal protection attack, it was free to examine the application of the Oregon Constitution before turning to any federal constitutional analysis. n116 Indeed, the court commented in a footnote that it was required to do so. n117 Interestingly, the only authority the court could muster for that assertion was a case in which the court had held that state statutory claims always must be disposed of before examining constitutional claims. n118 It was clear **[*825]** that, in Clark, the court was on a mission, and it was not going to let the briefing of the parties get in the way.

The court then launched into an analysis of the language and history of article I, section 20, of the Oregon Constitution. n119 Again, I leave for later discussion the particulars of the court's new analysis, but, as in Kessler, the court's analysis of the state constitution in Clark was wholly distinct from the traditional equal protection analysis that had been developed by the federal courts under the Fourteenth Amendment. n120 What is important to note at this point is how the court attempted

to demonstrate that it was doing nothing new. Indeed, it relied on an 1891 decision, the earliest to construe article I, section 20, and then declared that the analysis it described "has thus been clear from the earliest judicial discussion of article I, section 20 ...." n121 However, the court failed to note that the 1891 decision itself relied on, and quoted extensively from, federal court decisions construing the Fourteenth Amendment. n122 The court did mention its prior cases, but only in passing and casting them in an entirely new light:

> This court often has stated that for most purposes analysis under article I, section 20, and under the Federal Equal Protection Clause will coincide, although of course a law found to be invalid under article I, section 20, would not also be tested under the Federal Constitution. n123

The court cited School District No. 12 and Savage, but, of course, neither case said anything about the primacy of state constitutional analysis. That much was utterly unprecedented. Thus, as with the briefing of the parties, a determined court was not **[*826]** about to let prior case law stand in the way of its new mission: to determine the meaning of the Oregon Constitution independent of - indeed, before even considering - any federal constitutional analysis.

Clark was no aberration, either. Within the space of a few short years, the court took the same approach in determining the meaning of Oregon's constitutional provisions concerning free speech, n124 free exercise of religion, n125 search and seizure, n126 and remedies for wrongs committed, n127 among others. Indeed, as early as 1986, one member of the court went so far as to proclaim that "I should like to think that the Oregon Constitutional Revolution has been accomplished. The primacy of our state's constitution, so long neglected, is now accepted by all." n128 What remains to be examined is precisely how the court has gone about assigning meaning to the Oregon Constitution since the advent of the "Oregon Constitutional Revolution." It is that subject that is the focus of the remainder of this article.

B. After the Revolution: The Methodologies of Oregon Constitutionalism

In embarking on its constitutional "revolution," the Oregon Supreme Court invoked no particular interpretive theory. In some cases, the court noted distinct differences between the texts of parallel federal and state constitutional provisions. In other cases, the court relied on textual differences and differences in the historical context of the adoption of the various constitutional texts. In still other cases, the court appeared not to consider the text or the history of a state constitutional provision at all, but rather relied on the basic structure of the constitution or on political theories that only incidentally related to the wording or the history of the constitutional provision at issue. For the first decade of the revolution, the court seemed content to focus on constructing an independent constitutional jurisprudence, without devoting much attention to the manner in which it arrived at that result.

Ultimately, however, the court became more self-conscious **[*827]** about interpretive methodology, at least ostensibly so. In 1992, it announced a methodology that, on its face, appears applicable to all provisions of the state constitution. It requires examination of the text of a given

provision, its enactment history, and any prior case law construing it. It is overtly originalist in orientation.

The court has applied the methodology in a number of cases. But in a surprising number of cases it has not. In particular, the court has declined to apply its originalist orientation to any provision that already has been subject to interpretation by some other means. Instead, the court has continued to rely on a rather wide variety of interpretive approaches in giving independent meaning to the Oregon Constitution. By my count, there are at least six distinctly different interpretive strategies that the court has employed in its interpretation of the state constitution.

1. Interpretation as Archeology: Originalism

The predominant interpretive approach reflected in Oregon appellate case law unquestionably is traditional originalism. The practice of construing the Oregon Constitution to reflect the meaning originally intended at the time of enactment dates back at least to the 1863 case of Noland v. Costello. n129 In Noland, the Oregon Supreme Court addressed the constitutionality of a statute that increased the jurisdictional authority of justices of the peace to $ 250 from $ 100, the jurisdictional level that existed in the territory before statehood. The constitution provided that justices of the peace may be invested with "limited" authority. n130 It was argued that the reference to "limited" suggested that justices of the peace have no greater authority than what existed at the time the constitution was adopted. The court rejected the argument by reasoning that "if the framers of the constitution had intended to limit them to one hundred dollars, they could and certainly would have used different and more appropriate language to embody their intention." n131

[*828] In the following century, the court routinely invoked the intentions of the framers to justify one interpretation or another. Perhaps the best example is the court's 1936 decision in Jory v. Martin. n132 At issue was the constitutionality of a legislatively enacted pay raise for the governor. Article XIII, section 1, of the Oregon Constitution provided that "the governor shall receive an annual salary of fifteen hundred dollars." n133 In 1930, the Legislative Assembly enacted a law that provided for a raise to the then-considerable sum of $ 7,500. n134 A taxpayer who thought that $ 1,500 was quite enough challenged the legislation, arguing that it found no authority in the state constitution.

The court first looked to the text of the provision and observed that nothing in it expressly prohibited the legislature from enhancing the governor's salary. The court then turned to the enactment history of article XIII, section 1, to ascertain whether the framers nevertheless intended such a prohibition. The court quickly concluded that they did not:

> That they did not so intend clearly appears from the proceedings of the convention, as shown by the Journal of the Constitutional Convention .... It appears from these published reports of the proceedings of the convention that, while section 1 of article XIII was being considered, Mr. John C. Peebles, a member from Marion county, moved to amend, by adding to the end of the section the following words:

> "Provided, further, That the salaries of the judges shall not be subject to increase, and the salaries of the Governor and Secretary shall never exceed two thousand dollars nor that of the Treasurer exceed twelve hundred dollars."
>
> and that this proposed amendment was rejected. It further shows that on the same day, Mr. William H. Packwood, a member from Curry county,
>
> "moved to amend section 1, on salaries, by striking out all after the word 'offices,' in fifth line, and insert the words 'nor shall the pay of any officer in this state be diminished or increased, **[*829]** except as provided for in the first section for the making of amendments to this constitution;' which was disagreed to."
>
> It will thus be seen that the question of whether section 1 of article XIII, as framed by the convention and as adopted by the people, would have the effect of prohibiting the legislature from increasing these salaries was considered by the framers and that they were of the opinion that it did not have that effect and that, since the proceedings of the convention were published in the two then leading newspapers of the state, the Oregon Statesman and the Oregonian, it would seem to follow that the people, in adopting the constitution, were of the same opinion and intended to leave the matter of increasing these salaries, whenever a necessity therefor should arise, to the discretion of the legislature. n135

Thus, the court resorted to the records of the constitutional convention to determine whether the drafters of the provision originally intended it to bar future increases.

The court did not stop there, however. It noted that, in 1887, a controversy had erupted over the constitutionality of a proposed salary increase for judges, whose salaries likewise were prescribed by article XIII, section 1. n136 The legislature had solicited opinions from various members of the original constitutional convention of 1857 and, the court noted, each of the opinions that were submitted supported the authority of the legislature to enact legislation increasing judicial salaries:

> All the men whose opinions are quoted above sat in the convention which framed the constitution, all were regarded as among the ablest lawyers of the state .... Manifestly, no other persons at that time were better qualified to express an opinion as to the meaning of the constitution, or could speak more authoritatively, than these men, and, therefore, their opinions upon the very question which we are now called upon to decide ought not lightly to be disregarded. While it is true ... that the constitution derives its force from the people who ratified it and not from the convention which framed it, yet these proceedings of the convention and the opinions of the men who took a leading part in framing the constitution are of great value in interpreting the meaning of the constitution n137

The court did not stop there, either. The court further observed that in the legislative sessions of 1860, 1862, and 1864, the Legislative Assembly enacted provisions for the governor to receive **[*830]** per diem, mileage, and related travel expenses in addition to his regular salary. n138 Not only that, the court noted, in 1893, 1895, and 1905, the legislature enacted outright salary increases for the governor without constitutional challenge. n139

From all that historical exegesis, the court concluded:

> The object of construction, as applied to a written constitution, is to give effect to the intention of the people in adopting it and when any particular provision of the constitution has received a practical construction for a period of 76 years ... and such construction has been acquiesced in by the people for that whole period, the court should not apply a different construction to that provision unless its unconstitutionality is established beyond all reasonable doubt. n140

The decision reveals an unmistakable commitment to ascertaining the actual, subjective intentions of those who framed the constitution and, by implication, of the people who enacted it into law.

In many of its post-revolution decisions concerning provisions of the Oregon Constitution that are patterned after, or textually similar to, provisions of the Federal Constitution, the court has exhibited a similar commitment to ascertaining how such provisions were understood by the framers or the people in 1857.

An early example is the court's decision in State v. Kessler, n141 in which the court confronted the question whether a statute prohibiting the possession of a billy club violated the constitutional guarantee of the people's "right to bear arms for the defence [sic] of themselves, and the State," contained in article I, section 27, of the Oregon Constitution. n142 The court began its analysis of the provision by openly declaring its commitment to an originalist interpretive strategy:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the **[*831]** needs of the moment. n143

It then embarked on a history of article I, section 27, tracing its origin to the Indiana Constitution of 1851, which borrowed from the constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania, significant portions of which were patterned after the English Bill of Rights of 1689. n144 From its historical analysis, the court traced the constitutional language to the English and colonial American fear that standing armies might be used to oppress an unarmed populace as well as a concern of frontier society for personal safety. n145

From that conclusion, the court reasoned that the "arms" citizens are guaranteed the right to possess are those weapons that would have been used by early settlers for both personal and military defense. n146 The court noted that, in the colonial and revolutionary war era, colonists usually were armed with a single gun that was used for hunting, protection, and militia duty, as well as a hatchet, sword, and knife. n147 Thus, the court concluded, the right to bear "arms" is not limited to firearms, but includes hand-carried weapons used for defense. Clubs are just such hand-carried weapons, the court then declared. Indeed, the court said, clubs were among the first weapons of personal safety, and their use continues to the present day. Finding no principled basis on which to distinguish clubs from the sort of hand-carried weapons of personal safety that the colonists

routinely used, the court concluded that the possession of such a weapon was constitutionally protected:

> Our historical analysis of article I, section 27, indicates that the drafters intended 'arms' to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. n148

A few years later, in State v. Delgado, n149 the court returned to the subject of the right to bear "arms" under article I, section 27. This time, the question involved the impact of technological improvements to weaponry that have taken place since the time of **[*832]** the framing of the constitutional right. The defendant was charged with carrying a switchblade knife, in violation of state law. The defendant challenged the constitutionality of the law, arguing that, under article I, section 27, of the Oregon Constitution, he had the right to bear such an "arm" for his personal safety. The state argued that a switchblade is not a weapon commonly used for personal defense and therefore is not an "arm" within the meaning of article I, section 27. n150

Citing its opinion in Kessler, the court framed the issue in the following terms:

> The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon's constitution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. n151

To answer that question, the court said, required resort to the history of knives. Whereupon the court briefly recounted the history of the "fighting knife," from Roman times through the Middle Ages and the Renaissance to early colonial and nineteenth-century America. n152 On the basis of its historical analysis, the court concluded:

> It is clear, then, that knives have played an important role in American life, both as tools and as weapons. The folding pocketknife, in particular, since the early 18th century has been commonly carried by men in America and used primarily for work, but also for fighting. n153

The real issue, the court then said, was whether the spring operation of the switchblade renders it so different from its historical antecedent that it could not have been within the contemplation of the constitutional drafters. n154 The court quickly responded that the framers

> must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the **[*833]** period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned. n155

Thus, the court concluded, the switchblade was indeed the sort of weapon that the framers of the Oregon Constitution would have contemplated as being used for self defense, and the statute prohibiting possession of the weapons therefore was unconstitutional. n156

In 1992, the Oregon Supreme Court more or less formalized its originalist approach to constitutional interpretation in Priest v. Pearce. n157 As usual, the court did so with little fanfare. It simply announced that the proper method of analyzing the meaning of a provision of the Oregon Constitution consists of three steps, namely, analysis of "its specific wording, the case law surrounding it, and the historical circumstances that led to its creation." n158 Interestingly, although Priest has since come to be cited as the leading case for the three-step historical analysis of constitutional provisions, n159 history proved not very helpful in resolving the particular interpretive problem debated in that case.

The specific issue in Priest was whether the right to bail guaranteed by article I, section 14, of the Oregon Constitution, applied during the pendency of an appeal by an individual convicted of a crime other than murder or treason. Article I, section 14, provides that "offences [sic], except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption **[*834]** strong." n160 The court began its analysis with the text of the provision, reasoning that, although the first sentence stated in unqualified terms a right to bail, the second sentence - referring as it does to "evident" proof or strongly presumed guilt - suggests that the provision applies only to pretrial detention. n161 Indeed, the court went so far as to say that the second sentence "becomes meaningless" if the right applies during the pendency of an appeal: "When a court or jury has found guilt beyond a reasonable doubt, proof hardly can be said to be other than 'evident;' the presumption of guilt hardly can be said to be other than 'strong.'" n162 Although the answer seemed clear enough from the text, the court turned to the second and third steps of its analysis, but it found neither case law nor any evidence of the framers' intentions from the usual historical sources. n163 The court then simply concluded that, because nothing in the case law or the enactment history of article I, section 14, controverted what the text suggested, the section cannot be read to guarantee a right to bail during the pendency of an appeal. n164

Since 1992, the three-step methodology of Priest has shaped the court's analysis of the intended meaning of various provisions of the Oregon Constitution. Although the analysis is broken down into distinct steps, the ultimate goal remains historical, that is, ascertaining the meaning of the provision at issue as understood by the mid-nineteenth century framers. Lakin v. Senco Products, Inc., n165 is a good example.

In Lakin, the court addressed whether a statutory cap on noneconomic damages in a civil negligence action violated the constitutional right to a jury trial provided in article I, section 17, of the Oregon Constitution. The constitution provides that, "in all civil cases," the right to a jury trial "shall remain inviolate." n166 The court framed the issue as required in Priest: "In analyzing the meaning of a provision of the Oregon Constitution, this court looks to the specific wording of the provision, the case law surrounding it, and the historical circumstances that led to its **[*835]** enactment." n167

The court began with the text of article I, section 17, commenting in clearly originalist terms:

> No party questions that this is a civil case or that plaintiffs had a right to a jury trial for their claims. No party argues that "inviolate" has a different meaning today than it did when article I, section 17, was adopted in 1857 as part of the original Oregon Constitution. Thus, for purposes of this case, whatever the right to a jury trial in a civil case meant in 1857, it has the same meaning today. n168

Finding nothing in the text of article I, section 17, that provided the answer, the court turned to the relevant case law. That, too, proved less than helpful, for the cases cited stood for no more than the general proposition that the constitution guarantees a jury trial in those classes of cases in which there was a right to a jury trial at the time of its adoption. n169

The court then turned to the historical circumstances that led to the enactment of article I, section 17. The court recounted the history of the right to a jury trial generally from its first mention in the Magna Carta to its development at English common law, and the adoption of the common law by the American colonies. The court also detailed the extent to which the right to a jury trial was guaranteed in early Oregon territorial enactments and described how the text of the constitutional provision found its sources in the constitutions of Indiana and Ohio. n170 From that information, the court concluded

> that the framers of the Oregon Constitution clearly understood the meaning of the right to [a] jury trial in a civil case and that they intended that that right would remain "inviolate," i.e., secure against violation or impairment, in the new State of Oregon. It follows, therefore, that whatever the right to "Trial by Jury" meant in 1857, it means precisely the same thing today. n171

That meant, the court said, that the determinative question is whether the assessment of damages was something that the framers would have understood to have been a function of a jury. Turning once again to historical sources, the court observed that, **[*836]** indeed, the determination of the amount of damages to be awarded in a civil action was considered to be within the exclusive province of the jury at the time of the adoption of article I, section 17. Consequently, the court concluded, legislation limiting the amount of damages the jury may award in a civil case cannot be reconciled with the constitutionally guaranteed right to a jury trial. n172

In subsequent cases, the Oregon courts have applied the same originalist analysis to a variety of other provisions of the state constitution, including the prohibition against ex post facto laws, n173 the grand jury quorum requirement, n174 the separate vote requirement for constitutional amendments, n175 and the one-subject limitation on legislative enactments. n176 In each case, the court attempted to ascertain constitutional meaning by discovering what the framers would have intended or would have understood a provision to mean at the time of the adoption of the constitution.

A few things must be said about the manner in which the Oregon courts have engaged in their originalist analysis of the state constitution. First, the Oregon courts have never explained why originalism is appropriate in the first place. It certainly is not the only interpretive possibility. Indeed, as I have mentioned, judicial attempts to reconstruct constitutional meaning by resort to historical materials have been the subject of sustained criticism for decades. The Oregon courts seem unaware of the criticism, however. In no case of which I am aware has any Oregon court

attempted to defend the legitimacy of originalist constitutional interpretation. Its legitimacy is taken for granted.

Second, the proper focus of the Oregon courts' originalism is not entirely clear. In particular, the courts appear to have some difficulty identifying whose intentions are to be ascertained. Theoretically, if anyone's intentions should be controlling, it should be those who enacted the constitution into law, namely the people. The intentions of the framers, that is, the drafters of the constitution at the 1857 convention, should be beside the point. n177 Yet most opinions that refer to original "intentions" do **[*837]** so with respect to those who drafted the constitution, as reflected by the records of the convention of 1857. This is understandable as it is much easier to find records of the convention than it is to reconstruct what the people likely understood the constitution to mean in 1857. But it is still difficult to justify. In a few - surprisingly older - opinions, the court has acknowledged the problem. In Monaghan v. School District No. 1, n178 for example, the court resorted to records of the constitutional convention concerning the drafting of a particular provision. Almost apologetically, the court explained that although

> [t]he constitution derives its force and effect from the people who ratified it and not from the proceedings of the convention where it was framed, ... we are permitted to consider some of the circumstances, conditions and personalities present at that time as a source of help but not as a matter necessarily conclusive upon our own judgment. n179

Similarly, in Jory v. Martin, n180 an even older case, the court justified its citations to the convention by reasoning that, because the proceedings of the convention were published in two leading newspapers in Salem and Portland, "it would seem to follow that the people, in adopting the constitution, were of the same opinion" as was expressed at the convention. n181

Third, in a related vein, there seems to be some vagueness about what precisely constitutes the "history" of a constitutional provision. Tethered to no particular vision of whose intentions are controlling, the opinions appear to range far and wide in their sources in determining the historical facts. Sources range from the Magna Carta, n182 to Blackstone's Commentaries, n183 to Charles **[*838]** Dickens novels. n184 The connection to the intentions of the framers sometimes can be quite attenuated.

Sometimes the court will also employ fictions to bridge the gap between the historical record and the framers. In State v. Cookman, n185 for example, the court addressed the meaning of article I, section 21, the state ex post facto clause. The court found little help in the record of the 1857 convention. It did discover that the Oregon provision was patterned after a similar provision in the 1851 Indiana Constitution, which, in turn, was substantially similar to a provision in the 1816 Indiana Constitution. n186 The court then turned to an 1822 decision of the Indiana Supreme Court construing the ex post facto clause of the 1816 Indiana Constitution. n187 The court found the opinion both instructive and relevant, because it was "a decision that was available to the framers of the Oregon Constitution when they decided to adopt the Indiana ex post facto provision in our state constitution." n188 The court made no reference to the extent to which the case actually was known to anyone in the 1857 convention or to whether a copy of the decision even existed in Oregon at the time. n189 The court was content to employ a fiction that it was entitled to rely on the 1822 Indiana decision as evidence of the intentions of the framers of the Oregon Constitution because

theoretically it was "available," having been decided some years earlier, regardless of whether the framers actually knew about the decision.

Fourth, there is also some lack of clarity as to how the courts **[*839]** decide the level of specificity with which they will describe original intentions. That is, the same set of historical facts in any given case may give rise to any number of different levels of generalization, each of which is perfectly consistent with the historical facts. n190 For an excellent illustration, consider the right to bear arms cases.

The Oregon Supreme Court has concluded that, in guaranteeing the right to bear "arms," the state constitution protects only the "sort" of weapons that would have been used by the framers for their personal or military defense. Precisely how is a court to determine whether a modern-day weapon is the "sort" of weapon that the framers would have used? Necessarily, the answer entails examining the historical record to determine the nature of weaponry in the early-to mid-nineteenth century. However, any number of generalizations legitimately may be derived from examination of that record.

That very problem surfaced in an Oregon Court of Appeals decision, Oregon State Shooting Ass'n v. Multnomah County, n191 in which the court was required to determine the constitutionality of a local ordinance that prohibited the public possession of "assault weapons" such as semi-automatic rifles. Obviously, semi-automatic rifles did not exist in 1857. The question for the court was, in light of Kessler and Delgado, whether such weapons would have been used by the framers. A majority of the court, sitting en banc, examined the historical record and concluded that semi-automatic rifles were not the "sort" of arms that the framers would have used in the mid-nineteenth century. n192 **[*840]** The majority noted that, although repeating firearms had been produced by 1857, they were primitive at best and not widely available. n193 In his dissent, Judge Walter Edmonds complained that the historical record showed that repeating rifles were available, although not commonly possessed, and that, therefore, the record was sufficient to demonstrate that the framers would have considered them the "sort" of weapons to which the protection of article I, section 27, applied. n194

The difference between the two opinions lay not in a disagreement about the state of the historical record. Both agreed that repeating rifles were available, but not commonly possessed. The source of the disagreement lay in the articulation of what that historical record showed. In truth, that is likely a problem in any case in which conclusions are being drawn from a historical record. But the problem seems especially obvious in the case of originalist constitutional interpretation. And the Oregon courts appear not to have noticed it.

2. Doctrinal "Interpretation": Free Expression and the Oregon Constitution

Article I, section 8, of the Oregon Constitution, provides that "no law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." n195 Given the long tradition of originalist interpretation of the Oregon Constitution, it would seem fair to assume that the Oregon courts would ascertain the meaning of the provision by examining the historical record for evidence of what the framers would have intended. That is not what the courts have done, however.

The Oregon Supreme Court did flirt with such an approach in a 1960 decision, State v. Jackson, n196 in which the court addressed the constitutionality of a state law prohibiting the creation and distribution of obscene materials. The defendant argued that the statute amounted to a prior restraint, in violation of article I, section 8. The court began by indulging in a brief history of state regulation of speech, noting that two currents of thought existed **[*841]** on the matter. On the one hand, the court explained, the English regarded free speech with no particular sanctity; indeed, the press was regarded as an "instrument of mischief." n197 On the other hand, the court continued, there was a strong reaction to censorship borne of the seventeenth-century licensing acts. n198 There resulted a general sentiment crystallized in Blackstone's Commentaries:

> In this, and other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. n199

Thus, the court commented, at English common law, there developed a distinction between the prior restraint of publication and the punishment for the publication after the fact. The former was regarded as unlawful; the latter was not. n200

The court noted that, although Blackstone's characterization of the law had been subjected to substantial, even "persuasive," criticism, article I, section 8, "appears to adopt the formula of the Commentaries." n201 The text of the provision does consist of two clauses, one prohibiting "restraint" of free expression, and the other permitting punishment for "abuse" of the right. Having arrived at that conclusion, however, the court then retreated. The statute at issue did not really impose a prior restraint. Accordingly, the court concluded that it was not really necessary to determine the meaning and applicability of article I, section 8. n202

Coincidentally, the year that the Oregon Supreme Court decided Jackson was the same year that Leonard Levy published his ground-breaking study of the history of free speech, Legacy **[*842]** of Suppression. n203 In that study, Levy laid waste to the romantic, but ahistorical, claims of early-twentieth-century writers that the framers of the constitutional guarantees of freedom of expression intended broadly to wipe out the common law of sedition and any penalties for the free expression of opinions of any sort. n204 To the contrary, Levy concluded, what the framers most likely had in mind was the common law, as characterized by Blackstone in his Commentaries; that is to say, the framers most likely intended constitutional guarantees of freedom of speech to prohibit prior restraint - censorship - but not the imposition of civil or criminal penalties for publication after the fact. n205

But the Supreme Court never followed up on the dictum of Jackson concerning the intended scope of article I, section 8. Nor has the court ever addressed the significance of Levy's research or the research of others since 1960 either confirming or challenging the thesis that the framers

probably understood the First Amendment and contemporaneous state constitutional guarantees of freedom of expression to accomplish little more than what was reflected in the common law. Instead, in its 1982 decision in State v. Robertson, n206 the court assigned a meaning to the clause that only tangentially related to its intended meaning by the framers in the mid-nineteenth century. Indeed, the meaning assigned to the clause bore only a superficial relationship to **[*843]** the text of article I, section 8. What the court substituted was a "doctrine" of free expression developed largely independent of the text and history of article I, section 8. As it turns out, the doctrine was developed as a proposed method of analysis of cases arising under the First Amendment to the Federal Constitution.

At issue in Robertson was the constitutionality of a statute that made it a crime to coerce another person "to engage in conduct from which he has a legal right to abstain, or to abstain from engaging in conduct which he has a legal right to engage" by means of threats of publishing some private fact about the person. n207 Specifically, the defendant challenged it as unconstitutionally overbroad. n208 Responding to the challenge, the Oregon Supreme Court articulated, in an entirely novel fashion, the scope of the protection that article I, section 8, affords against overbroad enactments. In doing so, however, the court did not announce it was embarking on a new course in the construction of the constitution. Rather, in a fashion that is by now familiar, the court simply described its new construction of article I, section 8, as if it always had been so, with a nonchalance that, in retrospect, seems startling. Indeed, the Robertson analysis, later articulated as a neat, multi-part formula, n209 was not described as such in the Robertson opinion itself. Instead, the various pieces of the formula appear sprinkled throughout the opinion, almost as asides.

With Justice Linde writing, the court began by describing the problem of overbreadth in general terms, comparing and contrasting it with the problem of unconstitutional vagueness:

> When a statute is attacked as vague, for failing to define and communicate its coverage, the statute sometimes can be saved by a judicial interpretation that gives it the required definiteness. It is the court's obligation to do so when this can be done without departing too far from what the legislature sought to accomplish or what the statute itself can convey to a reader. But when such a saving construction cannot be attributed to the legislature with reasonable fidelity to the legislature's **[*844]** words and apparent intent, the statute is invalid as enacted, and it is immaterial whether the particular case in which it is challenged would be immune from a validly drawn law.
>
> A narrowing construction similarly may save a statute attacked as "overbroad," unless the constitutional guarantee invoked against the statute forbade its very enactment as drafted. Article I, section 8, for instance, forbids lawmakers to pass any law "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," beyond providing a remedy for any person injured by the "abuse" of this right. This forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal

> assistance in crime, some forms of theft, forgery and fraud and their contemporary variants. n210

Further describing the law concerning overbreadth, the court continued:

> That an offense includes the use of words is not in itself fatal to the enactment of a prohibition in terms directed at causing harm rather than against words as such. Communication is an element in many traditional crimes. As stated above, article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences.... It means that laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end. n211

Thus, in the course of a "for instance" aside, the court completely rewrote the law of free expression in Oregon. First, article I, section 8, protects only speech, not forbidden results. Thus, if a law targets a forbidden effect and incidentally restrains speech, it is constitutionally innocuous. Second, if it targets speech either "as an end in itself or as a means to some other legislative end," the law will fail unless it is "wholly confined" within a "historical exception" that was "well established" either **[*845]** at the time of the adoption of the First Amendment or at the time of the adoption of the Oregon Constitution.

It bears emphasis that, in articulating this new conception of the rights of free expression, the court did not engage in its usual originalist analysis. It did not trace - as did the court in Jackson - the origins of article I, section 8, discuss the historical context within which it was enacted, or examine the records of the constitutional convention of 1857 to determine whether such was the construction intended by its framers. Indeed, Jackson is not once cited in the Robertson opinion. To be sure, there is some mention of history as part of the new Robertson test - article I, section 8, constrains any restraint on free speech unless the restraint falls wholly within a well-established historical exception. But the Robertson court made no attempt to justify the historical exception test itself or the otherwise absolute effect of article I, section 8, by reference to the intentions of the framers. Likewise, the court did not attempt to justify its new analytical framework by reference to prior cases. The fact is that there were no such cases to which the court could have referred. The cases, Jackson in particular, could in no way be reconciled with the court's new approach.

Whence came the Robertson analysis, then? The answer to the question lies in recalling who the author of the opinion was, namely Justice Linde. Before coming to the court in 1978, Linde had written several law review articles concerning recent United States Supreme Court First Amendment decisions. Among those articles was a 1970 critique of the Supreme Court's decision in Brandenburg v. Ohio. n212 In that decision, the Court held an Ohio criminal syndicalism statute unconstitutional on the ground that it failed to draw a distinction between constitutionally protected advocacy and "incitement to imminent lawless action." According to the Court, only when speech is directed to such incitement "and is likely to incite or produce" such lawless action may it be the basis for criminal prosecution. n213 In his article, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, n214 Linde challenged the Supreme Court's decision as

untenable. According to Linde, the Court's **[*846]** reading of the First Amendment in Brandenburg, although perhaps more protective than past formulations, did not go far enough.

The linchpin of Linde's analysis was that the text of the First Amendment states a limitation on legislative authority; it is not, in the first instance at least, an instruction to the courts as to the nature of the rights of citizens as against their government. n215 That, said Linde, is important, because the limitation on legislative authority contains no qualifications. Thus, there is no provision in the First Amendment for balancing the interests of citizens against the competing interests of the government. To the contrary, it declares that "Congress shall make no law" abridging freedom of speech. In consequence, Linde asserted, if a legislature enacts a law directed in terms against speech, the law violates the First Amendment:

> The First Amendment invalidates any law directed in terms against some communicative content of speech or of the press, irrespective of extrinsic circumstances either at the time of enactment or at the time of enforcement, if the proscribed content is of a kind which falls under any circumstances within the meaning of the First Amendment. n216

In other words, if the subject of the legislative prohibition is "speech" within the meaning of the First Amendment, it is prohibited, plain and simple.

That does not mean, Linde hastened to qualify, that legislatures are powerless to address the adverse consequences of speech. What they must do is focus on those consequences and the acts, attempts, or conspiracies that cause them. What they must not do, he insisted, is focus on the words that are merely presumed to create the risk of such consequences:

> If you proscribe particular revolutionary acts, or attempts or **[*847]** conspiracies to commit them, then words inciting to such acts may perhaps be punishable if the evidence shows that they create imminent serious danger. But stick to such proscriptions; if your bill presumes the danger and directly outlaws the words themselves, it proposes a law "abridging the freedom of speech" forbidden you by the First Amendment. n217

The text of the First Amendment supplied the principal justification for Linde's proposed analysis. While acknowledging that "attention to text earns only professional scorn in constitutional law," Linde quipped, "when one of among many constitutional limitations is literally directed against lawmaking, might the text perhaps embody a reason that even realists can respect?" n218 Linde also offered practical, political justifications. Legislation against outrageous speech, he suggested, is difficult to repeal. When the perceived outrage has passed from public concern, there is little impetus to clear the statute books of laws that could cause future mischief. n219 Moreover, he argued, the analysis that he proposed has the virtue of simplicity; it is easy for legislators and citizens to understand. n220

It is no great secret that, once a member of the Oregon Supreme Court, Linde seized upon Robertson as an opportunity to employ his proposed First Amendment analysis. n221 The near-absolutist approach to free speech protection, with its demand that **[*848]** legislatures focus on effects and not speech, is unmistakably an outgrowth of the Clear and Present Danger article. The

problem, of course, is that article I, section 8, is not the First Amendment. That the court seemed not to notice certainly is surprising. That the author of the opinion was Linde - who certainly did notice - is ironic in the extreme. One of the country's leading proponents of state constitutionalism essentially shoe-horned into the state constitution an analysis that was originally designed for the Federal Constitution.

The Robertson analysis proved less easy to understand and apply than Linde had hoped. Although simple enough in the abstract, the analysis turned out to be devilishly difficult to apply in specific cases. The "historical exception" analysis proved especially problematic. According to Robertson, a law directed at speech was unconstitutional unless it was "wholly contained" within an "historical exception" that was "well established" during either the revolutionary period or the years before statehood. n222 But because Robertson offered no explanation of the terms, and, because there was no other textual or historical source for them, the court was forced to simply flesh them out from case to case. What, for example, constituted a sufficiently "well-established" historical exception? Robertson listed several examples such as fraud, perjury, solicitation, and some variants of theft and forgery. n223 However, the court supplied no guidance as to how it arrived at that list or how it was to be determined whether another crime appropriately could be added to the list. Particularly in light of the possibility that the framers understood that article I, section 8, extended no more protection than did the common law - that is to say, that the framers understood that virtually any speech would have been subject to an historical exception, given that the constitution prohibited only prior restraint - the search for "well-established" historical exceptions appeared doomed from the outset.

Not surprisingly, since Robertson, the court has not identified a single "well-established" historical exception. In State v. Moyle, n224 for example, the court addressed the constitutionality of a state harassment statute. n225 The state asserted that the modern **[*849]** statute fell within a well-established exception for verbal harassment that dated back at least as early as the Waltham Black Act of 1723. The court, however, found that the evidence was not sufficient to demonstrate a "well-established" historical exception. In particular, the court noted that the Waltham Black Act had been repealed by the time of statehood and that only a few states - not including Oregon - had such statutes by the mid-nineteenth century. n226

In State v. Henry, n227 the court confronted the constitutionality of an obscenity statute. n228 Again, the state argued that obscenity had been the subject of state regulation for centuries, n229 and that, **[*850]** in contrast to Moyle, there was even a closely analogous Oregon territorial statute regulating the distribution of obscene materials. n230 Nevertheless, the court found the historical exception not sufficiently "well established."

And in Moser v. Frohnmayer, n231 the court held unconstitutional a statute that prohibited use of automatic telemarketing devices for commercial solicitations. n232 Again, the state argued that commercial advertisements or solicitations had been subject to state regulation for many years; indeed, that it was not until the mid-twentieth century that anyone even had argued that commercial solicitation was entitled to constitutional protection. n233 Nevertheless, the court concluded, without explanation, that the historical evidence was inadequate to constitute a "well-established" historical exception. n234 More than one commentator has complained that cases such as Moyle, Henry, and Moser leave the distinct impression that no matter what the state of the historical record in a given case, litigants will be in the position of the mythical Tantalus, with a "well-established" historical exception always just out of their reach. n235

[*851] The court also has shown occasional discomfort with the results that would be dictated by the strict application of the Robertson analysis. As a result, on occasion, the court has found it necessary to create exceptions or to modify the analysis. In re Fadeley n236 is perhaps the most obvious example of the court's creation of an exception. At issue in that case was the constitutionality of various judicial canons that prohibit a judge from personally soliciting campaign contributions for his or her election candidacy. n237 Oregon Supreme Court Justice Edward Fadeley admitted that he had violated the canons but argued that the canons violated his right to free speech guaranteed by article I, section 8. n238 The canons undeniably regulated speech. Thus, under Robertson, they should have been unconstitutional unless wholly contained within a well-established historical exception. But the court held otherwise.

The court certainly began its opinion in Robertson fashion: "This court has repeatedly held that the provision means what it says: although certain harmful effects of speech may be forbidden, restrictions aimed not at the harm but at the content of the speech itself normally are impermissible." n239 But then it took an abrupt turn away from its precedent, commenting that "not even article I, section 8, is absolute - there are exceptions to its sweep." n240 One such exception, the court ultimately held, was occasioned by the qualifying effect of a competing constitutional provision that authorized the Oregon Supreme Court to discipline judges for violating rules of judicial conduct. n241 In any **[*852]** event, the court added, sometimes the right to speak, write, or print freely on any subject must be balanced against larger public interests, as in the case of the public interest in regulating certain professions, such as judges. n242 The decision is startlingly inconsistent with Robertson and its conceptual underpinnings as Justice Linde had articulated them. n243

An example of the court's modification of the Robertson analysis can be found in State v. Stoneman. n244 At issue in that case was the constitutionality of a state statute that outlawed the purchase or possession of child pornography. n245 By its terms, the statute was directed at free expression; the content of books, photos, or films determined the extent to which their purchase or possession would give rise to criminal liability. Under the uncompromising analysis described in Robertson, the statute would be unconstitutional unless it was wholly contained within a well-established historical exception. Of course, the court's prior historical exception cases - particularly Henry - suggest that the court was not likely to find an exception applicable to the child pornography statute. Thus, it would be expected that the court would have found the statute unconstitutional.

But that is neither the analysis that the court applied nor the result that it reached. As in Fadeley, the court began its opinion **[*853]** by invoking Robertson and proclaiming "the breadth of our state's constitutional guarantee of free expression." n246 The court then assumed that the statute proscribed certain forms of expression and addressed whether it was wholly contained within a well-established historical exception. With a citation to Henry, the court quickly concluded that it was not. n247 The court did not stop there, however.

At that point, the court recanted its assumption that the statute was directed at speech. The real focus of the statute, the court held, was the prevention of harm to children. n248 The fact that the statute did not explicitly say that proved no impediment to the court's conclusion. The production of child pornography, the court reasoned, "necessarily involves harm to children." n249 Therefore, by prohibiting commerce in such material, the legislature implicitly had set its sights on harmful effects, not speech. n250 That, of course, is a substantial modification of the original Robertson

analysis, the very heart of which was the principle that, to avoid the broad protective sweep of article I, section 8, legislatures were required explicitly to focus on harmful effects, not speech. Under Stoneman, the focus on harmful effects need not be explicit; it may be inferred. That is not much different from the United States Supreme Court's decision in Brandenburg, the criticism of which - ironically - gave birth to the analysis adopted in Robertson in the first place. n251

[*854]

3. Interpretation by Implication: The Right to Gather Intiative Petition Signatures on Private Property

Free expression is not the only area in which the Oregon courts have departed from the originalist interpretive methodology of Priest. In cases construing other provisions of the Oregon Constitution, the courts likewise have given no attention to original intent. But, unlike the Robertson line of cases, the courts have not relied on a free-standing doctrine either. In these cases, the courts have inferred that certain specific constitutional rights or limitations necessarily follow from a given constitutional provision, regardless of whether the text of the provision actually says anything one way or the other.

The principal case in point is the Oregon Supreme Court's controversial opinion in Lloyd Corp. v. Whiffen. n252 The issue was whether the owner of a large shopping center could constitutionally be required to allow private citizens to gather initiative petition signatures on shopping center property. The Lloyd Corporation owned a large shopping center, the "Lloyd Center." When certain private citizens insisted on soliciting initiative petition signatures at the Lloyd Center, the owner applied to the court for an injunction to prevent such activity from occurring on its property. n253 The defendant signature gatherers argued that they had a constitutional right, secured by article IV, section 1, of the Oregon Constitution, to collect initiative petition signatures on private property. n254

Article IV, section 1, reserves to the people the power to enact laws by initiative and referendum and prescribes in general terms the enactment process:

> (1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.
>
> (2)(a) The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.
>
> (b) An initiative law may be proposed only by a petition signed by a number of qualified voters equal to six percent of the total number of votes cast for all candidates for Governor **[*855]** at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.
>
> (c) An initiative amendment to the Constitution may be proposed only by a petition signed by a number of qualified voters equal to eight percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition. n255

The Lloyd Corporation argued that the constitution said nothing about creating a right to gather initiative petition signatures on private property. n256 The defendants argued that, nevertheless, without an opportunity to gather signatures where voters are likely to congregate - in places such as shopping centers - the initiative and referendum process that article IV, section 1, provides would be compromised. n257 The Lloyd Corporation countered that to do that would amount to compelling it to relinquish possession of its private property without compensation in violation of article I, section 18, of the Oregon Constitution, and the Fifth Amendment. n258

It should be remembered that Whiffen was decided after Priest. In responding to the parties' arguments, therefore, the court - in theory, at least - should have looked first to the text to determine whether article IV, section 1, says anything about creating a right to gather initiative petition signatures at any particular location. Of course, article IV, section 1, says nothing of the sort. It only reserves the right of the initiative and requires that a certain number of signatures be gathered to qualify an initiative measure for an election. The court also should have looked to the enactment history of the provision. Had the court done so, it would have found no support for the notion that the framers intended to create a right that would require private property owners to give up the right to exclude members of the public who wish to solicit initiative petition signatures. The fact of the matter is that such a notion had never occurred to anyone at the turn of the century. It was not until the 1940s that it was first suggested **[*856]** that private property owners might not have the unfettered right to exclude members of the public from using their premises for purposes of political expression. n259 Thus, as with Robertson, following the traditional originalist approach of Priest should have led the court to a relatively straightforward answer.

But, once again, that is not what the court did. The court began by noting Oregon's "long-established tradition of respect for the initiative process." n260 Then, citing a dissenting opinion from a Michigan Supreme Court case, the court commented that "'access to people is the life blood of the initiative power.'" n261 It is therefore "'implicit in article IV, section 1,'" the court concluded, "'that the people must have adequate opportunities to sign the petitions that are necessary for them to act as legislators.'" n262 The court also observed that the process of gathering the necessary number of signatures is substantially impaired - indeed, almost doubled in time, by the evidence in at least one prior case - if conducted in public parks and on sidewalks, as opposed to shopping malls. n263 Impairing the initiative process, "'one of our society's most precious rights,'" is simply unacceptable, the court commented. n264 "Thus," it concluded, "where the process of gathering signatures can occur is of vital importance in making effective the purposes of article IV, section 1." n265 To "make effective the purposes of article IV, section 1," the court announced a right of the public to solicit initiative petition signatures in the "common areas" of shopping centers, subject to reasonable time, place, and manner restrictions. n266

[*857] Interestingly, the court did not define what it meant by "common areas" or, for that matter, "shopping centers." The court did refer to a portion of the United States Supreme Court's decision in Marsh v. Alabama, n267 in which the Court held that "the more an owner [of private property], for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." n268 Marsh was the "company town" case in which a Jehovah's Witness was arrested for handing out religious literature on the sidewalk of a town that was owned completely by a ship-building company. It is not at all clear what the Oregon court meant in quoting from Marsh, whether the focus of the court's reasoning was the factual context of the case, the functional equivalency of a

company-owned town and an ordinary American municipality, or the scope of the property owner's invitation to the public to treat private property as public property. Moreover, the court left entirely unexplained precisely why anything the United States Supreme Court had to say in a First Amendment case had any relevance to an Oregon case not decided under the Oregon free-expression clause.

As for the Lloyd Corporation's takings argument, the court first noted that neither party had suggested that the takings clauses of the state and federal constitutions should be interpreted differently. n269 "Therefore," the court decided, "we assume, without deciding, that the analysis would be the same under both constitutions." n270 This was an odd thing for an Oregon court to say years after the supposedly successful Oregon constitutional revolution. Recall that in Clark, no party had argued that article I, section 20, should be interpreted differently from the Fourteenth Amendment; indeed, the defendant in that case had disclaimed any interest in relying on the state constitution. The court nevertheless declared its obligation to examine the state constitution independent of the Federal Constitution in that case. n271 Why the same obligation did not apply in Whiffen the court did not explain. In any event, relying on federal cases construing the Fifth Amendment in similar circumstances, the court quickly concluded that requiring private property owners **[*858]** to permit citizens to exercise state-permitted rights of free expression did not constitute a taking of property under the Federal Constitution. n272

The opinion drew a vigorous dissent from Justice W. Michael Gillette and two other members of the court. n273 Gillette took the majority to task for failing to pay adequate attention to the text of article IV, section 1, and its enactment history: "The majority cites nothing in the history of or the case law concerning article IV, section 1, to justify its conclusion. Indeed, it does not even deign to discuss those topics." n274 The majority offered nothing in reply to justify its departure from the originalist interpretive methodology that ordinarily applies to the construction of the Oregon Constitution.

Whiffen was bound to cause no end of mischief. Its interpretative foundation was so evanescent that it could not provide any principled guidance for later courts attempting to flesh out the scope of the right that the court discovered "implicit" in article IV, section 1. And mischief is exactly what happened.

In State v. Cargill, n275 for example, the court of appeals decided that the public had a right to solicit initiative petition signatures at a local Fred Meyer department store. Decided before Whiffen, the court based its decision on its conclusion that the store contained public areas that were "a modern replacement for the town square or park." n276 Fred Meyer petitioned for review by the Oregon Supreme Court, and the court accepted. After three years, however, the court could not reach a decision on the case. Even after the publication of the Whiffen decision, the court ultimately was forced to give up, and the case was affirmed without opinion by an equally divided court. n277

The court had another occasion to confront the issue in State v. Dameron. n278 In that case, the defendant had been convicted of criminal trespass for soliciting initiative petition signatures on a sidewalk outside the entrance to another Fred Meyer department store. The defendant had argued that he had a constitutional **[*859]** right to be on the premises, but the trial court disagreed. The supreme court reversed, but in the process generated six different opinions.

The lead opinion, by Justice George Van Hoomisen, held that the state had failed to prove that the Fred Meyer store involved was not like the shopping center in Whiffen to which the public's

rights under article IV, section 1, attached. n279 Van Hoomisen emphasized that his was a decision based on non-constitutional grounds. n280

Justice Richard Unis, in contrast, concurred in the result, but wrote that he would have decided the case on the constitutional ground asserted by the defendant. According to Unis, there was sufficient evidence in the record to determine that the Fred Meyer store in that case was like the shopping center at issue in Whiffen, although his opinion did not describe precisely what it was about the Fred Meyer store in Dameron that made it "like" the shopping center in Whiffen. n281

Justice Thomas Tongue agreed with Unis that there was sufficient evidence to determine the constitutionally significant characteristics of the Fred Meyer store at issue. n282 To supply the criteria for making that decision, Tongue advocated adoption of a three-part test articulated in a decision of the New Jersey Supreme Court. n283 That test involved balancing (1) the nature and the "primary use" of the property; (2) the nature and extent of the public's invitation to use the private property; and (3) the purpose of the expressive activity to be conducted on private property. n284 Tongue also suggested that the guarantee of free expression in article I, section 8, provided an independent basis for the defendant's assertion of a constitutional right to solicit initiative **[*860]** petition signatures on private property. n285 Interestingly, in arriving at that conclusion, Tongue avoided the interpretive methodology required by Robertson by simply declaring that Robertson involved the issues of vagueness and over-breadth and therefore was distinguishable. n286 Instead, Tongue advocated a theory of free expression adopted by the California and New Jersey Supreme Courts in similar cases. n287

Justice Fadeley concurred in both Van Hoomisen's lead opinion and in Unis's concurrence, although it is not entirely clear how that was possible. n288

Justice Gillette, in a dissent, reiterated that there simply was no right to solicit initiative petition signatures, explicit or implicit, in article IV, section 1. n289 Justice Edwin Peterson joined in that dissent, but also joined in the lead opinion, reasoning that, because of the court's decision in Whiffen, the state was obliged to prove that the Fred Meyer store at issue was different from the shopping center in Whiffen. n290

The court of appeals fared no better in attempting to divine the nature and scope of the right created in Whiffen. For example, in Safeway, Inc. v. Jane Does 1 through 50, n291 Safeway asked for a declaration as to whether all of its ninety-one stores in Oregon are subject to the public's right to solicit initiative petition signatures in the common areas of "shopping centers." The court of appeals declined to answer the question as a matter of law and, instead, developed a list of evidentiary factors by which it could be determined whether a given commercial establishment is of the type that is subject to the right created in Whiffen:

> In cases in which we and the Supreme Court have held that such a right exists, we have considered non-exclusive factors such as the size and configuration of the premises, its relationship to other businesses in the area, whether the premises are bordered by public or private properties, whether the premises are intersected by public streets and sidewalks, whether the premises and adjoining multiple privately owned businesses **[*861]** open directly onto public areas, and whether there are public transportation stops adjacent to the premises. Also pertinent to the inquiry are the scope of business endeavors that are included in the surrounding area and

> conducted on the premises, the characteristics of the invitation to the public by the businesses in the area, the availability of areas for the public to congregate for noncommercial purposes, the number of people who frequent the premises and the purposes for which the premises and common areas are used. n292

Then in Wabban v. Brookhart, n293 the court took a slightly different approach. The court held that two HomeBase retail outlets were not subject to the public's right to collect initiative petition signatures on private property. In so doing, it characterized the inquiry in the following terms: "The question before us is whether these premises, by reason of HomeBase's express or implied invitation to the public, are a forum for assembly by the community." n294

But in Stranahan v. Fred Meyer, n295 the court took still another approach. In that case, Fred Meyer had arrested a citizen for refusing to leave the sidewalk outside the store where she had been gathering initiative petition signatures. She brought an action for false arrest against the store. This time it was the store that asserted a constitutional right, the right to exclude members of the public from private property. The trial court permitted the jury to decide the case, and it returned a verdict for the individual. n296 A majority of the court, sitting en banc, upheld the verdict. In the lead opinion authored by Judge - now Justice - William Riggs, four members of the court held that there was sufficient evidence from which to conclude that the Fred Meyer store in that case was "like" the shopping center at issue in Whiffen and the Fred Meyer store in Cargill. n297 For the four members in the lead opinion, "like" meant that the store had similar square footage, similar weekly gross receipts, similar physical layout, and that it leased out at least some space to tenant businesses. n298 Why those particular physical characteristics had **[*862]** constitutional significance, the lead opinion did not explain. Judge - now Justice - Susan Leeson concurred. According to Leeson, the lead opinion missed the constitutional point, which was that, by operating a commercial enterprise that invited members of the public to enter and spend money, Fred Meyer had lost any right to exclude members of the public except by reasonable time, place, and manner restrictions. n299 Four other members of the court dissented, arguing that the only test that made constitutional sense was one that permitted solicitation of initiative petition signatures on private property only to the extent that the owner of the property invited the public to treat the property as public space. n300

What is most interesting for my purposes is the wide array of interpretive approaches that have been brought to bear from Whiffen to Stranahan. In Whiffen itself, the court relied on rights that are "implicit" in the language of the state constitution, **[*863]** but also resorted to federal constitutional case law and to the law - or rather to a dissenting opinion - from another state court. The dissenting justices relied on the text of the Oregon Constitution and its intended meaning as revealed in relevant historical sources. In subsequent cases, the Oregon courts resorted to federal law, to the law of California and New Jersey, or to no law at all.

Eventually - perhaps inevitably - the Supreme Court abandoned Whiffen altogether. In 1999, the court accepted review of the court of appeals' decision in Stranahan and took the opportunity to reexamine article IV, section 1, from scratch. n301 This time, the court returned to its originalist interpretive tradition to determine whether those who adopted the disputed provision intended implicitly to create a constitutional right to collect initiative petition signatures on private property. n302 Interestingly, the court did not invoke Priest in the process. Priest, the court said, applied only to provisions of the Oregon Constitution that were adopted in 1857. n303 Instead, the court applied what it characterized as a "slightly different" methodology tailored to constitutional provisions enacted by the initiative process. n304 More about that later. n305 For present purposes, it suffices

to observe that the court concluded that "after considering the text, the relevant case law, and the history of the initiative and referendum provisions of article IV, section 1, we have found nothing to support the conclusion set out in Whiffen," that is, that there is a constitutional right to solicit initiative petition signatures on private property over the objections of the property owner. n306 Thus, the court's indulgence in constitutional interpretation by implication came to a definitive end. Whether Stranahan signals a more consistent approach to constitutional interpretation, however, remains an open question. n307

[*864]

4. Deja vu All Over Again: Interpretation by Reference to Federal Law

Of course, the linchpin of the state constitutional revolution has been the notion that state constitutions have force and effect independent of the Federal Constitution and therefore are entitled to independent interpretation. As I have noted, that does not necessarily mean that state constitutions always will be interpreted before parallel federal constitutional provisions. Some state courts will inquire as to the meaning of their state constitution only when it has first been determined that the Federal Constitution has not been offended. In Oregon, however, the courts have planted themselves firmly in a different camp. They have adopted the "first things first" approach to constitutional interpretation; that is to say, the Oregon courts always will determine the meaning of the Oregon Constitution before delving into the meaning of a federal constitutional counterpart.

The Oregon Supreme Court's decision in Clark is but one of many examples. Recall in that case that the defendant had disclaimed reliance on the privileges and immunity provision of the Oregon Constitution and relied instead on the Fourteenth Amendment. That did not stop the court from expounding on the meaning of article I, section 20, of the state constitution. The court proclaimed an obligation to do so. n308

The court's decision in State v. Kennedy n309 provides another illustration of the point. In that case, the defendant raised a double jeopardy challenge to his criminal convictions, citing both the state and federal constitutional double jeopardy clauses. n310 The Attorney General suggested that the court should decline to address the applicability of the state double jeopardy clause, because the defendant had failed to suggest any distinct analysis **[*865]** under the state constitution. n311 The court rejected the Attorney General's suggestion. According to the court, "an Oregon court should not readily let parties, simply by their choice of issues, force the court into a position to decide that the state's government has fallen below a nationwide constitutional standard," when the matter may be disposed by application of state law. n312

At least that is how it works in theory. In practice, the Oregon courts have turned out to be less than completely faithful to the "first things first" doctrine. In a substantial number of cases - long after the state constitutional revolution was declared won - they have continued to resort to federal constitutional law before determining independently the meaning of a parallel state constitutional provision. n313 There are, in fact, at least three different ways in which federal law continues to influence the interpretation of the Oregon Constitution.

a. Federal Law as Persuasive "Authority"

First, in a number of cases, the Oregon courts will resort to federal constitutional case law for its "persuasive" force. On the surface, at least, this seems innocuous enough. The courts are not relying on federal law because they feel bound to do so, but rather because they choose to do so.

In Billings v. Gates, n314 for example, the court addressed the proper constitutional standard to determine whether the denial of medical treatment to an inmate amounts to "cruel and unusual punishment" in violation of article I, section 16, of the Oregon Constitution. Specifically, the issue was whether merely negligent denial of medical treatment could amount to a violation of article I, section 16. n315 After citing the originalist methodology of Priest, the court examined the text of the provision, noting that the language "cruel and unusual punishments shall not be **[*866]** inflicted" suggested that only the prohibition of intentional acts were prohibited. n316 The court then proceeded to the enactment history and the prior Oregon case law construing article I, section 16. n317 Unfortunately, the court found little insight in the usual historical sources, the constitutional convention having passed the clause without any recorded discussion. n318 The court also noted that the prior case law proved less than helpful because the decisions customarily resorted to federal law without first engaging in a separate state constitutional analysis. n319

At that point, the court turned to federal law for help. It began by noting that federal court decisions may prove helpful, "'particularly when they provide insight into the origins of provisions common to the state and federal bills of rights,'" which seems perfectly consistent with the originalist orientation of Priest. n320 But then having said that, the court turned to a 1976 United States Supreme Court decision in which the Court determined that the denial of medical treatment to inmates amounted to cruel and unusual punishment only when there is "'deliberate indifference to serious medical needs of prisoners.'" n321 Only such a deliberate indifference standard, the Court held, could offend the "evolving standards of decency" reading of the Eighth Amendment. n322 The Oregon Supreme Court then simply declared that it found the United States Supreme Court's decision "persuasive" and adopted it as the standard under article I, section 16. n323

This strikes me as rather odd. If the objective of Oregon constitutional interpretation is to ascertain the intentions of the framers in 1857, as the court said it is in Priest, how is it that a 1976 federal decision about the Federal Constitution sheds light on those intentions? Certainly it is conceivable that a twentieth- **[*867]** century federal court decision that explains the historical underpinnings of a common constitutional provision could prove helpful in understanding the intended meaning of a state constitutional provision. But the Oregon court in Billings drew no such historical insights from the federal case law. The court merely noted that the United States Supreme Court had concluded that the "deliberate indifference" standard was necessary to comply with the Eighth Amendment and that it found the opinion "persuasive." Later in the opinion, the court noted that the "deliberate indifference" standard is the only one that is consistent with the text of article I, section 16, which - as the court earlier had noted - suggested that only intentional conduct triggered the protection of the state constitution. n324 If that is so, then what did the federal case law add to the analysis? The federal case clearly either was irrelevant or was window dressing.

The court similarly found federal constitutional law "persuasive" in State v. Brown, n325 in which it first addressed the question of whether to adopt an "automobile exception" to the warrant requirement of article I, section 9, the search and seizure provision of the Oregon Constitution. n326 In a brief opinion, the court declared there is such an exception, provided that the automobile is mobile at the time it is stopped by the authorities and that probable cause exists for the search of the

vehicle. n327 Before declaring that to be the law, the court did not examine the language of article I, section 9 - which, of course, says nothing about an automobile exception. Nor did the court examine the historical record to determine whether the framers would have intended that the court have the authority to fashion such exceptions. The court cited two United States Supreme Court decisions applying the Fourth Amendment, n328 quoted briefly from them, and concluded **[*868]** that it found them "persuasive." n329 The court emphatically denied that it was deciding the case on federal constitutional grounds. "We wish to make clear," the court stated, "that we are deciding this case independent of federal law; we decide this case under the Oregon Constitution and not the Federal Constitution. We cite the United States Supreme Court decisions only because we believe they are persuasive." n330

Once again, however, the court failed to explain precisely what it was about the two Supreme Court cases that it found persuasive. Justice Linde, in fact, authored a strongly worded dissent that, among other things, called the majority on its failure to engage in any meaningful independent Oregon constitutional analysis: "It may be tempting to adopt another court's reasoning by reference rather than to spell out one's own, but in areas such as search and seizure law, quotations only beg the question why the quoted opinion is more persuasive than other opinions or academic critiques that are not quoted." n331 The majority declined to respond to Linde's complaint.

b. "Assuming" the Identity of State and Federal Law

In a second category of cases, the Oregon courts decline to address first the meaning of a state constitutional provision and instead assume, without deciding, that parallel state and federal constitutional provisions have identical meaning and then decide the case accordingly. This practice already has revealed itself in the Whiffen decision, in which the court addressed the argument that requiring a land owner to permit the public to solicit initiative signatures on its private property amounted to an uncompensated taking of property under both the state and federal constitutions. n332 The court in that case simply noted that, because no one had suggested that article I, section 18, of the Oregon Constitution, and the Takings Clause of the Fifth Amendment should be interpreted differently, it would assume that they have the same meaning. n333 Whiffen turns out not to be an aberration. Indeed, the Oregon courts have shown a singular **[*869]** reluctance to tackle the independent significance of the state takings clause.

Early on, of course, the Oregon courts determined that the state and federal takings clauses "are identical in language and meaning." n334 Some twenty years later, in Fifth Avenue Corp. v. Washington County, n335 the Oregon Supreme Court reflected that same assumption. In Fifth Avenue Corp., the court held that an owner is entitled to compensation for inverse condemnation based on designating land as "greenway" property only if the owner can show that he or she is "precluded from all economically feasible private uses" pending the ultimate purchase for the greenway or if the owner can show that the designation caused "virtually irreversible damage." n336 In arriving at that conclusion, the court did not examine the language of article I, section 18, much less any historical materials to ascertain the intended meaning of the provision. Instead, the court cited New York case law that construed the Fifth Amendment. n337

Several years later, however, in Suess Builders Co. v. Beaverton, n338 the court backed off from its categorical statement that the federal and state takings clauses are identical and held that "although the basic thrust of the Fifth Amendment and art[icle] I, [section] 18, is generally the same

... the criteria of compensable 'taking for public use' under art[icle] I, [section] 18, are not necessarily identical." n339 The court seemed poised to embark on an independent investigation of the intended meaning of the state takings clause. But the court never followed through. Since Suess Builders Co., the court has not once attempted to discern the meaning of article I, section 18, certainly not by applying the interpretive methodology of Priest. Instead, the court has been content merely to assume, without deciding, that the state and federal takings clauses have the same meaning.

For example, in Department of Transportation v. Lundberg, n340 landowners challenged the constitutionality of a local sidewalk **[*870]** dedication ordinance on the basis of both the state and federal takings clauses. The court held: "Defendants, however, do not suggest any different analysis under the Oregon Constitution than under the United States Constitution. Therefore, we assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution." n341

Similarly, in Stevens v. Cannon Beach, n342 the owners of beachfront property challenged the constitutionality of a state law that prohibited building on the dry sand areas of the beach. They relied on both the state and federal takings clauses. But the court held that "because plaintiffs have not made a separate argument under the state constitution, we will assume for the purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution." n343

To the same effect is GTE Northwest, Inc. v. Public Utility Commission. n344 In that case, GTE challenged the constitutionality of a rule that required it to make space available in its facilities for competitors. Although GTE alleged a taking of property under both state and federal takings clauses, the court held that, because "GTE offers no separate analysis under the state constitution.... we assume, without deciding, that the analysis is the same under article I, section 18, of the Oregon Constitution, and the Takings Clause of the Fifth Amendment." n345

This practice of assuming that parallel state and federal constitutional provisions have identical meanings, frankly, is difficult to understand. The court has gone to great lengths to reassert the importance of its "first things first" approach to state constitutionalism. Even when the parties have not articulated a separate analysis under the state constitution, as in Kennedy, the court has proclaimed its commitment to identifying the meaning of a relevant state constitutional provision before turning to the Federal Constitution. Indeed, even when the parties have disclaimed an interest in the state constitution, as in Clark, the court nevertheless has professed an obligation to apply the state constitution before resorting to federal constitutional analysis. But for some reason, the "first things first" approach does not apply to the takings **[*871]** clause. n346

c. Old-fashioned "Lockstep" Analysis

In some cases, the Oregon courts do not adopt federal constitutional analysis because, after consideration of its merits, the courts find it persuasive. Nor do the courts merely assume, for the sake of argument, that federal law controls. The courts simply adopt federal law as state law without further explanation. This is especially surprising, given the state's longstanding commitment to state constitutionalism. But the fact remains that, in some cases, the courts simply have declined to do anything other than continue to rely on federal law.

State v. Mai n347 is perhaps the most obvious example. At issue in that case was the constitutionality of a law that permits a trial judge to prohibit a criminal defendant from calling a witness to the stand because the defendant failed to disclose the identity of the witness before trial. The defendant argued that the law conflicted with his right to compulsory process, as guaranteed in article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the Federal Constitution. After quoting the state and federal constitutional provisions, the court declared that "we construe the state compulsory process clause in the same way as the Supreme Court construed the virtually identical federal counterpart in Washington v. Texas." n348 There was no pretense of declaring that the federal court was merely "persuasive." The court simply declared that the state and federal clauses were effectively interchangeable. In the years since the Mai decision, the court has returned to article I, section 11, but not once has it questioned the reliance on federal constitutional case law to ascertain **[*872]** the meaning of the state constitutional provision. n349

State v. Rogers n350 is another good example. In that case, the defendant challenged the constitutionality of the state's death penalty law on the ground that the penalty amounted to cruel and unusual punishment in violation of both state and federal constitutions. The court responded to the argument by declaring that "the standard for determining whether punishment is cruel and unusual is whether 'the punishment [is] so proportioned to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.'" n351 There is no further analysis, no examination of the text of the cruel and unusual punishment clause of article I, section 16, of the Oregon Constitution, no resort to historical materials to determine what the framers intended the clause to mean. Instead, the court merely quoted a 1921 case, Sustar v. County Court. n352 In Sustar, likewise, the court engaged in no independent analysis of the Oregon Constitution. The court merely announced its standard and cited a United States Supreme Court decision rendered under the Cruel and Unusual Punishment Clause of the Eighth Amendment, Weems v. United States. n353

A similar reasoning process is reflected in State v. Bridewell, n354 in which the Oregon Supreme Court applied an "emergency doctrine" exception to the warrant requirement of article I, section 9, of the Oregon Constitution. In arriving at its decision, the court simply noted that "this court has recognized the existence of an 'emergency doctrine' exception to the warrant requirement in the context of investigation of crime" n355 and cited an earlier case, State v. Miller. n356 The problem is that, in Miller, the Oregon Supreme Court's discussion of the justification for adopting an "emergency doctrine" exception consisted of a description of federal law, followed by a citation to a United States Supreme Court decision. n357 There is no mention in Miller of article I, section **[*873]** 9, at all. Thus, the court effectively treated the state and federal constitutional search and seizure provisions as fungible, a practice that the court supposedly had disavowed completely years earlier.

5. Constitutional Interpretation as Statutory Construction: The Interpretation of Constitutional Provisions Enacted by Initiative

Oregon is one of two dozen states in which the citizens have "retained" the right to enact legislation, including amendments to the state constitution, by direct democracy. n358 Once enacted by a vote of the people, constitutional amendments produced by the initiative process become part

of the state constitution and are no less authoritative than are the original provisions enacted in 1857 or constitutional amendments that originated in the Legislative Assembly. n359

Because constitutional provisions that originated in the 1857 convention and those enacted by initiative have equal effect, it would stand to reason that the courts would subject them to the same interpretive rules. Nevertheless, under Oregon law, provisions **[*874]** of the Oregon Constitution that were enacted through the initiative process are subject to a different interpretive process than are other constitutional provisions.

The leading case for this rule is Ecumenical Ministries of Oregon v. Oregon State Lottery Commission. n360 In that case, the plaintiffs - a group of citizens and civic organizations opposed to state-sponsored gambling - challenged the constitutionality of a state statute that permitted the Oregon State Lottery Commission to license video poker gaming devices in restaurants and bars. n361 The plaintiffs relied on article XV, section 4(7), which provides that "the Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon." n362 The provision had been enacted by initiative some ten years earlier as part of a larger series of amendments that created a State Lottery Commission to operate a state lottery. The precise issue before the court was whether the authorization of video poker in restaurants and bars amounted to the authorization of the operation of "casinos" in the state.

In addressing that issue, the court began by describing what it characterized as "an orderly method of analyzing ambiguous terms in constitutional provisions adopted through the initiative process." n363 That process, the court held, was the same one that it had developed for the interpretation of statutes, which consists of a three-step analysis:

> This court applies to the construction of a statute the same method of analysis ... that it applies to the construction of an initiated constitutional provision. That is, the first level of analysis is to examine text and context. That level includes subsidiary principles of statutory construction that are relevant to this case. In determining the meaning of the text of a statute, words of common usage that are not defined in the statute typically are to be given their plain, natural, and ordinary meaning. And, the context of a statutory provision includes other provisions of the same statute and other statutes on the same subject. Only if the legislative intent remains unclear after an examination of text and context does the court consider legislative history. n364

[*875]

The court cited its seminal decision on the construction of statutes, PGE v. Bureau of Labor and Industries, n365 which it had decided the previous year.

It is important to understand what was entailed in adopting the PGE methodology for the interpretation of constitutional amendments enacted by initiative. The principal feature of the PGE methodology is its rigidly sequential nature. It is, in essence, a reformulation of the turn-of-the-century "plain meaning rule." n366 The objective of the interpretive endeavor is ascertaining the intentions of the legislature. n367 But those intentions are derived by following a three-step process. The first step involves examining the text in its context, along with appropriate rules of textual construction. n368 The focus at the first step of the analysis is to determine whether the disputed provision is "ambiguous," which the court defines as reasonably capable of more than one

construction. If the language is unambiguous, the interpretive exercise is at an end. n369 The court cannot examine other extrinsic evidence of the intentions of the legislature, such as legislative history. Only if the disputed language is ambiguous can the court proceed to the second and third steps, examining legislative history and, if necessary, substantive canons of construction. n370

That it is impermissible to examine legislative history in the absence of a patent ambiguity reflects a more textualist approach to statutory construction than the court's appeals to the "intentions of the legislature" otherwise would seem to imply. And that textualist approach finds expression in the manner in which the court has applied PGE in particular cases. The fact is, since the court announced its intention to adhere to the three-step methodology, the court has resorted to legislative history in a relatively **[*876]** small percentage of cases. n371 In that light, it is interesting to see how the court applied its PGE methodology to the construction of the state constitution.

Turning back to Ecumenical Ministries, in applying the methods of statutory construction to article XV, section 4(7), the court first ascertained the common, ordinary meaning of the constitutional term "casino" by reference to a dictionary. n372 The court concluded that, in common usage, a "casino" is a physical structure for gambling. n373 The court also consulted portions of the lottery amendments, which referred to prohibiting the use of terminals or devices that directly dispensed money to players and which also referred to prohibiting lottery retailers from engaging exclusively in the business of selling lottery tickets. n374 In combination, the court concluded, those provisions suggested that, in enacting the "casino" prohibition of article XV, section 4(7), the people most likely intended to prevent the establishment of enterprises "engaged exclusively" in lottery-related activities, not to prevent a restaurant or a bar from operating a video poker game. n375

The court's opinion drew two separate concurring opinions from Justice Fadeley and from Justice Unis, both of whom objected to the new methodology that the majority employed. In both cases, the concurring justices objected to the failure of the court to examine the "legislative history" of article XV, section 4(7). Fadeley complained:

> The intent of the voters who adopted the constitutional amendment must control our interpretation and application of it. It is the touchstone for any interpretation of an initiated measure. The best evidence of that intent, in an initiated amendment, is found in the material that all voters had before them when they voted, namely, the caption and question portions of the ballot title, which are printed directly on all ballots used by all absentee and regular voters to cast their votes. In determining the voters' intent, I cannot join the lead opinion **[*877]** in relegating to a secondary status the one thing that all voters are most likely to read before voting to amend the constitution. n376

Unis similarly complained:

> I am not willing ... to join that part of the opinion that suggests that this court should put on analytical "blinders" so as to avoid considering relevant information as to what the voters intended in enacting an initiated constitutional provision. In interpreting an initiated constitutional provision, this court should consider available

> sources of information that bear on the interpretation of the provision. For example, even if the text and context seem unambiguous, I believe that this court should examine sources of information that were available to the voters that may disclose the voters' understanding and intent in enacting an initiated constitutional provision. n377

The majority did not respond to either Fadeley's or Unis's complaints.

The court's adoption of a special methodology for the construction of provisions of the constitution enacted by initiative raises several interesting questions. To begin with, is the Ecumenical Ministries/PGE methodology different from the approach used for the interpretation of other constitutional provisions? For if not, then what is the point of describing the interpretive process in such special terms?

It seems clear to me that the Ecumenical Ministries/PGE approach to interpreting constitutional provisions enacted by initiative is, indeed, different from any of the interpretive approaches that I have described thus far. In particular, it departs from the traditional methodology of Priest in its refusal to examine historical materials in the absence of an ambiguity in the constitutional text. No such condition ever has been employed in interpreting portions of the Oregon Constitution that were enacted either by referendum or as part of the original constitution in 1857.

In Lipscomb v. Board of Higher Education, n378 for example, the court addressed the meaning of article V, section 15a, enacted by the people after referral from the legislature in 1921. That provision authorizes the governor to veto "any provision in new bills declaring an emergency." n379 On the surface, at least, the provision seems unambiguously to authorize the governor to veto **[*878]** "any provision" in a bill that contains an emergency clause. The court did not stop at the text, however. Indeed, openly disdainful of any rule that prohibited examination of historical materials in the quest for the voters' intent, n380 the court consulted a wide range of materials, including the ballot title, materials in the Voters' Pamphlet, and news media articles that might have influenced voter thinking at the time. n381 On the basis of that historical inquiry, the court concluded that, whatever might be suggested by a surface reading of the text, the voters really intended to authorize the governor to veto only an emergency clause itself, to combat the tendency of legislators to insert emergency clauses to thwart the possibility of referral to the voters. n382

That leads to the even more interesting question of why the court feels it necessary to employ such a different methodology for the interpretation of constitutional provisions enacted by initiative. The answer is not immediately obvious, given that constitutional **[*879]** provisions enacted by initiative are no less "constitutional," that is, they have no different legal effect than provisions enacted after referral by the legislature or adoption by the people in 1857. The court did not address that issue in Ecumenical Ministries.

It did recently touch on the subject in Stranahan, however. Recall that, in that decision, the court abandoned its line of cases beginning with Lloyd Corp. v. Whiffen, n383 which recognized an implied right to collect initiative petition signatures on private property. In doing so, the court first observed that adherence to original intent long has been the touchstone of Oregon constitutional interpretation. n384 The ascertainment of original intent, the court noted, generally is accomplished by reference to a provision's text, its enactment history, and the previous cases construing it, as provided in Priest. n385 But the court held that, in the case of provisions enacted by initiative, Priest

does not apply, and instead, Ecumenical Ministries does. n386 Why? Here is what the court offered by way of explanation:

> We make that distinction because of the inherent difference between original constitutional provisions and those later adopted or amended by legislative referral or initiative petition. As to the former, the drafters of the constitution crafted those provisions and submitted them to the people for approval without the benefit of an existing constitutional framework. In contrast, provisions or amendments created through either legislative referral or initiative petition are adopted by the people against the backdrop of an existing constitutional framework. It follows that, with respect to the latter provisions, it is the people's understanding and intended meaning of the provision in question - as to which the text and context are the most important clue - that are critical to our analysis. n387

Interestingly, that explanation is followed immediately by a footnote, which cautions: "We continue to emphasize that, in either case, our focus must be on the intent of the enactors of the provision at issue." n388

Thus, it is clear that the court perceives an "inherent difference" between original provisions and those later enacted by initiative. **[*880]** That difference is that the former provisions are enacted "without the benefit of an existing constitutional framework," while the latter provisions are enacted against the backdrop of such an existing framework. Why that difference justifies distinct interpretive approaches, however, the court never explains. Instead, it simply asserts, ipse dixit, that "it follows." The problem is that it does not necessarily follow. Merely because one provision was enacted against a constitutional backdrop does not explain why it is subject to a different interpretive approach - and potentially a different interpretation - than identical language that was enacted without such a backdrop.

The court's closely following footnote does not help matters. If anything it muddies the waters even more. The court declares that, under Priest and Ecumenical Ministries, the interpretive objective remains the same: "the intent of the enactors of the provision at issue." The court appears to be suggesting that there is no real difference between the interpretive regimes of Priest and Ecumenical Ministries. But, if that is so, what is the point of insisting, as the court clearly does in Stranahan, that each applies only in specified cases? Either there is a difference between the interpretive approaches, or there is not. If there is, then there should be an explanation that justifies it. If there is not, then the court should not persist in drawing the distinction.

That is not to say that there are no possible justifications for the application of different interpretive methodologies in the case of constitutional provisions enacted by different means. Some have argued that, because of certain perceived defects in the initiative process - in particular, the avoidance of the deliberative checks that ordinarily are a product of the legislative process - judicial review of constitutional and statutory provisions enacted by initiative should be different than review of enactments that are products of the usual processes. Philip Frickey, for example, suggests that, for similar reasons, in the interpretation of initiated measures, courts should be less deferential and apply interpretive rules that are more demanding of the text. n389 **[*881]** Jane Schacter, in a much-quoted study, has suggested that measures that are products of the initiative power warrant more demanding interpretive rules because they are so poorly drafted and because

social science research demonstrates that voters do not exercise their initiative powers in an informed way. n390

But, even assuming the validity of those critiques of the initiative process, it does not appear that the particular "plain meaning" approach of Ecumenical Ministries is responsive to them. If anything, the Oregon courts' approach runs counter to the criticism. If, for example, initiative measures are subject to suspicion because they are so often poorly drafted, why would the courts require the application of a textualist interpretive approach that more often than not ignores extrinsic evidence of voter intent?

That the Ecumenical Ministries methodology explicitly expropriates the court's methodology for the construction of statutes suggests that the court may be thinking that initiated constitutional amendments tend to be more detailed and statutory in nature and thus are entitled to the different interpretive approach. Recall that some courts, such as New Jersey and North Carolina, draw distinctions between portions of their state constitutions that can be regarded as "great ordinances" and other portions **[*882]** that are more narrow and "statutory" in nature and then employ different interpretive approaches to the different types of constitutional provisions. n391 The problem is that there is no necessary parallel between the substance of a constitutional provision and the manner in which it was enacted. Some provisions of the Oregon Constitution that were enacted by initiative consist of very vague, high sounding, declarations of principle. The initiative provisions of article IV, section 1, qualify. n392 So also might the broadly worded guarantees of a recently enacted crime victims' bill of rights. n393 By the same token, there are some very detailed "statutory" provisions in the Oregon Constitution that either date back to the original 1857 version or were enacted after referral by the legislature, such as article IV, section 6, dealing with reapportionment, n394 or article VI, section 10, concerning county home rule, n395 or article VIII, section 2, regarding the common school fund. n396

Examination of the prior case law offers no clues either. The fact is, before Ecumenical Ministries, sometimes the court interpreted initiated constitutional provisions by applying interpretive rules drawn from statutory construction, and sometimes it did not. n397 More specifically, sometimes the court declined to examine the enactment history of a constitutional provision because its meaning was clear from the text, and sometimes it **[*883]** pursued the historical record regardless of the absence of an apparent ambiguity. There is, thus, no good explanation for the court's interpretive choice. The court simply made it, and it shows no sign of reconsidering the matter.

6. A Question of Balance: Constitutional Interpretation by Balancing

A bedrock principle of Oregon constitutionalism has been that the state constitution cannot be interpreted by ad hoc balancing of one interest against another. This stands in stark contrast to the "Two-Tiered Scrutinies, Three-Pronged Tests, Four-Factored Analyses, Sensitive Balances and sundry exotica currently occupying the United States Supreme Court's menagerie" n398 of constitutional jurisprudence. The resistance to balancing is rooted in the writings of Linde and a respect for the constitutional text. Recall, for example, his Clear and Present Danger article, which criticized federal free expression cases for failing to accept the fact that the First Amendment

contains an unqualified prohibition, not a conditional suggestion that requires a weighing of competing individual and government interests. n399

The same criticism found its way into numerous Oregon constitutional cases as the court repeatedly rejected calls for adoption of one balancing test or another. In Libertarian Party of Oregon v. Roberts, n400 the court offered perhaps its most complete statement of its general approach to constitutional interpretation:

> The difficulty with this balance-of-interests argument is that it assumes that a court can and should attach values to the conflicting interests asserted, aggregate the resulting values and then compare the aggregates to arrive at a decision concerning the constitutionality of the statutes. A court, however, cannot divine the relative importance of interests absent reference to the constitution itself; it is in the constitution that competing interests are balanced. A court's proper function is not to balance interests but to determine what the specific provisions of the constitution require and to apply those requirements to the case before it. n401

[*884]

Thus, for example, in State v. Stoneman, n402 when the state asserted that Oregon's extraordinarily protective guarantee of free expression should be subject to a balancing as against the state's strong interest in protecting children against the harmful effects of pornography, the court demurred: "Article I, section 8, does guarantee freedom of expression without qualification ... and is, consequently, incompatible with a balancing approach." n403

Yet, for all the court's proud pronouncements about the incompatibility of balancing with categorical constitutional commands, the Oregon case law reflects a surprising amount of good old-fashioned federal-type balancing.

Excellent examples may be found in, of all places, cases construing the free expression guarantees of article I, section 8. Indeed, I already have noted how the Oregon Supreme Court's decision in In re Fadeley held that, notwithstanding the unqualified prohibition against restraints on free expression, "not even article I, section 8, is absolute - there are exceptions to its sweep." n404 Similarly, in In re Lasswell, n405 the court held that article I, section 8, is not the absolute prohibition that it seems to be in other cases. Lasswell was a disciplinary proceeding in which a prosecutor was charged with violating a rule prohibiting certain extrajudicial statements about pending litigation. n406 The prosecutor challenged the constitutionality of the rule as a violation of article I, section 8. The court held that, although the rule certainly restrained speech in a sense, it did not violate article I, section 8, because, on balance, the prosecutor's rights of free expression were outweighed by the criminally accused's right to a fair trial. n407

It is hard to understand how the court reconciles either Fadeley or Lasswell with its categorical rejection of balancing **[*885]** free expression rights in Stoneman. If, as the court said in Stoneman, the unqualified nature of article I, section 8, renders it "incompatible with a balancing approach," the balancing analysis that the court employed in both Fadeley and Lasswell is simply wrong.

Free expression is not the only area in which Oregon courts have engaged in the balancing of constitutional interests. Recently, they have employed balancing analysis to the privileges and immunities provision of article I, section 20, as well.

It did not start out that way. Following the Oregon Supreme Court's announcement of its distinctive approach to privileges and immunities analysis in Clark, the court turned a decidedly cold shoulder to suggestions that it incorporate the sort of "rational basis" examination that is a familiar part of federal equal protection analysis. Such analysis balances the individual's constitutional right of equal protection against the legislature's constitutional power to enact legislation in the public interest. n408 Classifications - at least those that are not regarded as inherently "suspect" or those that do not implicate fundamental rights - are upheld as long as they are supported by a conceivably rational basis. n409 In Hale v. Port of Portland, n410 the plaintiffs challenged the constitutionality of a cap on governmental tort liability, arguing that the cap had no rational basis. n411 The court responded that "[this] is a test drawn from federal equal protection doctrine (and akin to 'balancing') that for purposes of article I, section 20, has been superseded by our more recent decisions." n412

[*886] Yet barely a year after Hale, in Sealey v. Hicks, n413 the court opened the door to the very rational basis analysis that it earlier had so brusquely rejected. At issue in that case was the constitutionality of an eight-year statute of ultimate repose for product liability actions. In upholding the statute against a challenge brought under article I, section 20, the court commented that "if the legislature attempted to deny a recovery to specific individuals, or to permit the courts to deny such a recovery to arbitrarily chosen members of the same class, article I, section 20, might be violated. But that is not the case here." n414 That sounds an awful lot like rational basis analysis, although the court did not use the precise words. According to the Sealey court's formulation of article I, section 20, legislative classifications are permissible as long as they are not arbitrary.

That, at least, is the way the court read its Sealey decision in a case decided the following term, Seto v. Tri-County Metropolitan Transportation. n415 The plaintiffs in that case challenged a statute prescribing judicial review procedures for a specific public project, which departed from the review procedures that ordinarily applied. The court held that the classification was in the nature of a geographical classification "inherent in any project-specific public works," and that, as such, it was "tested by whether the legislature had authority to act and whether the clarification has a rational basis." n416 Sealey was cited as authority. n417 Similarly, in State v. Tucker, n418 in which a defendant challenged the constitutionality of the state death penalty statute, the court held that article I, section 20, required that the statute establish "clear, rational, and definite criteria for determining whether a defendant should receive a life sentence." n419

Since Sealey, the Oregon Court of Appeals likewise has read article I, section 20, to permit legislative classifications so long as they are rationally related to a legitimate legislative end. For example, in Withers v. State, n420 the court addressed the constitutionality of a state public school financing scheme that resulted in **[*887]** significant disparities in spending per pupil from one district to another. Relying on the Oregon Supreme Court's decision in Seto, the court held that "under article I, section 20, the state may not deny a member of a 'true class' of citizens a privilege that the state provides to others, unless that difference in treatment has a rational basis." n421

Rational basis examination is not the only form of balancing that the Oregon courts have adopted in applying article I, section 20. The courts also have determined that, depending on the nature of the classification, something more demanding than rational basis analysis may be

required. Indeed, in some cases, Oregon's article I, section 20, jurisprudence has taken on a distinctively federal "feel."

This development actually began at a surprisingly early stage. Barely a year after the publication of the seminal Clark decision, in Hewitt v. SAIF, n422 the court addressed the constitutionality of a statute that permitted an unmarried woman to collect workers' compensation death benefits upon the death of an unmarried man with whom she had cohabited, but made no provision for death benefits to an unmarried man upon the death of an unmarried woman with whom he cohabited. n423 The court held that some legislative classifications may be regarded as "inherently suspect" and may therefore be subject to particularly demanding scrutiny. n424 Gender-based classifications are such classifications. They may be justified only on the basis of genuine "biological differences." n425

The court of appeals then applied Hewitt in reaching its conclusion in Tanner v. OHSU n426 that legislative and administrative distinctions drawn on the basis of sexual orientation are likewise "inherently suspect" and may be justified only by genuine differences **[*888]** between homosexual and heterosexual individuals. n427 At issue in that case was the constitutionality of a state hospital employee benefits policy that provided health and life insurance benefits to employee spouses but not to the unmarried domestic partners of its homosexual employees. The state argued that the policy distinguished only between married and unmarried employees. The court, however, held that, because homosexual employees could not legally marry, the policy had the effect of discriminating on the basis of sexual orientation, and that the effect could not be justified by any differences between heterosexual and homosexual employees. n428 The court explicitly relied on the suspect classification analysis of Hewitt in reaching its conclusions. n429

It is perhaps not surprising that the Oregon courts gravitated towards such balancing analyses under article I, section 20. Notwithstanding the apparently unqualified nature of the text of the section, it seems obvious that it cannot be read to prohibit all legislative distinctions. In a very real sense, every legislative enactment draws distinctions, and the constitution cannot be read to prohibit every legislative enactment. On the other hand, merely because the legislature necessarily must draw distinctions does not mean that all of its distinctions must be permissible. Otherwise, article I, section 20, loses any meaning. Thus, it is probably inevitable that even the Oregon courts ultimately would give in to some form of balancing of the interests of the individual and the constitutional prerogatives of the legislature. Nevertheless, it is interesting - ironic, even - to observe the extent to which the Oregon courts, which struggle so hard to maintain a distinctive state constitutional jurisprudence, have found it necessary to follow federal constitutional practices.

CONCLUSION

Clearly, the Oregon courts employ a variety of interpretive approaches in assigning meaning to the Oregon Constitution. The question remains whether there is any sense to the manner in which the courts do so. Is there, in other words, a pattern or an overriding theory that explains the practice of Oregon constitutionalism?

[*889] The answer, unfortunately, appears to be no. As I have shown, in its decision in Priest v. Pearce, the Oregon Supreme Court adopted an interpretive approach that, at least on its face, applies to the construction of all provisions of the Oregon Constitution. But a review of the cases since the publication of that decision demonstrates that such is simply not the case.

In some cases, the Oregon courts apply the originalist interpretive methodology of the Priest decision, but in many other cases, they do not. Free expression cases continue to be decided on the basis of a methodology that was developed in reference to the Federal First Amendment. Until very recently, cases concerning the solicitation of initiative petition signatures were decided on the basis of rights inferred from, but not stated in, the text of the state constitution entirely without reference to original intentions. Takings cases continue to be decided under the expressly stated assumption that federal and state constitutional takings clauses have identical meaning and effect, without respect to the text or intended meaning of either one. Cruel and unusual punishment cases are decided by expressly adopting federal constitutional law without any independent analysis of the state constitutional provision, text or history. And constitutional provisions enacted by initiative are subjected to an entirely different interpretive approach patterned after the methodology that the Oregon courts apply to the construction of statutes.

It is tempting to suggest that the Oregon courts have merely decided to adhere to lines of authority that existed prior to Priest rather than to re-examine them under the new methodology. But the fact of the matter is that, even in cases of first impression decided after Priest, the courts have departed from Priest's originalism. In Whiffen, for example, the court did not mention Priest, although the case had been decided a year earlier. Similarly, Ecumenical Ministries applied its "statutory" construction methodology without attempting to distinguish Priest, decided the previous year.

Moreover, it is difficult to understand how precedent could serve to explain the courts' failure to apply Priest to all constitutional provisions. By giving independent significance to the Oregon Constitution, the Oregon courts already had departed from substantial precedents holding that parallel federal and state constitutional provisions were identical in meaning and effect. Why **[*890]** precedent should prove an insurmountable hurdle in one instance but not in another I do not understand.

The substance of the constitutional provisions at issue also do not explain the varying interpretive methodologies that are applied to them. Oregon courts do not, for example, apply different methodologies depending on whether the provisions at issue are truly "constitutional," as do some other courts. Likewise, there appears to be no discernible pattern in the substantive nature of the cases to explain the different interpretive approaches that are brought to bear. Individual rights cases, for example, are not systematically treated differently from governmental structure cases. The right to bear arms cases, free expression cases, takings cases, and equal privileges or immunities cases all are subject to different interpretive approaches.

Complicating matters is the fact that the Oregon courts are fairly flexible in the manner in which they adhere to their state constitutional interpretive practices. Lock-step application of federal law, for example, is supposed to be inconsistent with the very premises of state constitutionalism, yet the Oregon courts continue to do it in many cases. A "first things first" approach similarly is supposed to foreclose consideration of federal constitutional law before consideration of state constitutional law regardless of the positions of the parties, yet the courts routinely assume the identity of state and federal takings law unless the parties argue otherwise. Balancing of constitutional interests is supposed to be at odds with Oregon constitutional interpretation, yet, in their free expression and equal privileges or immunities cases, the courts have expressly resorted to balancing.

In short, there appears to be nothing systematic about Oregon's approach to constitutional interpretation. The courts have merely resorted to the same practices of the federal courts

interpreting the Federal Constitution. That is, the courts apply a variety of approaches depending on the constitutional provisions at issue, but in ways that reflect no coherent approach to the role of the courts in assigning meaning to the constitution.

This is no trifling matter of academic technicality. As I noted early on, behind every instance of judicial construction of a constitution lurks the specter of legitimacy. If state courts such as Oregon's wish to assert the supremacy of judicial construction of their constitutions, they must be able to explain their decisions in terms other than the personal preferences of those who make **[*891]** them. The constitutions themselves do not assign the courts such supremacy, after all. In the absence of a coherent theory of constitutional interpretation, the courts are hard pressed to explain why their decisions are entitled to the supremacy that so often is claimed for them.

In making these observations, I wish to make clear that I am not suggesting that the Oregon courts should have adopted a single, monolithic approach to constitutional interpretation, originalist or otherwise. It may be that there are good reasons to apply different interpretive approaches to different constitutional provisions. The New Jersey and South Carolina courts, for example, have articulated a plausible rationale for classifying constitutional provisions and applying different interpretive approaches to each classification. Other similar approaches may be justifiable.

My point is that there is no evidence that the Oregon courts have made any attempt to think of constitutional interpretation in any such coherent fashion. In my view, this is truly unfortunate. Over the last three decades, state courts participating in the state constitutional revolution have had the opportunity to take a fresh look at the most fundamental questions about constitutional interpretation and the legitimacy of judicial review. Unencumbered by two centuries of largely incoherent federal jurisprudence on the subject, state courts have been free to stake out new territory and make conscious choices about their constitutional interpretive practices. The Oregon courts, however, have squandered that opportunity. Satisfied with merely departing from federal jurisprudence, the Oregon courts simply have declined to engage in the difficult task of identifying a coherent jurisprudence of their own.

Thus, to return to the question that I posed at the outset of this article, it appears clear that Oregon's constitutional revolution has made a difference in the sense that it has departed from the lock-step federal constitutional analysis of the past. It also has made a difference in offering original analyses of specific clauses of the Oregon Constitution. But in a larger sense, in the sense of offering an improved approach to constitutional theory and legitimate judicial review, the Oregon constitutional revolution has made no difference at all.

FOOTNOTES:

* Judge, Oregon Court of Appeals; Adjunct Professor of Law, Willamette University College of Law. This article is adapted from a thesis submitted in partial fulfillment of the requirements for an LL.M. at the University of Virginia School of Law. I would like to thank A.E. Dick Howard for many thoughtful suggestions throughout the research and preparation of this article. I would also like to thank Diane Bridge, Jennifer Friesen, Sue Leeson, Hans Linde, Virginia Linder, Mario Madden, Roy Pulvers, and David Schuman for their comments on earlier drafts.

n.1 William Butler Yeats, The Great Day, in Selected Poems and Three Plays of William Butler Yeats 176 (1986).

n2. One leading scholar, for example, reports an "exponential increase in protective state constitutional opinions" since 1970. Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims, and Defenses 3 (1992).

n3. See, e.g., Randall T. Shepard, The Renaissance in State Constitutional Law: There Are a Few Dangers, But What's the Alternative?, 61 Alb. L. Rev. 1529, 1529 (1998) ("The renaissance in state constitutional law is nearly in full bloom."); G. Alan Tarr, Constitutional Theory and State Constitutional Interpretation, 22 Rutgers L.J. 841, 841 (1991) ("The willingness to look to state constitutions is no longer confined to a few adventuresome courts; state courts throughout the nation now participate in developing state civil liberties law."); Ronald K.L. Collins, The Once "New Judicial Federalism" and Its Critics, 64 Wash. L. Rev. 5 (1989).

n4. See infra notes 48-56 and accompanying text.

n5. See infra notes 27-47 and accompanying text.

n6. See infra notes 10-47 and accompanying text.

n7. See, e.g., David Schuman, Advocacy of State Constitutional Law Cases: A Report from the Provinces, 2 Emerging Issues in St. Const. L. 275, 275 (1989) ("[A] report from Oregon is not from some provincial and primitive venue but - with respect to state constitutional law - from the capital of the future itself.").

n8. See infra notes 158-77 and accompanying text.

n9. Cf. Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 6 (1991) ("In the Constitution of the United States, men like Madison bequeathed to subsequent generations a framework for balancing liberty against power. However, it is only a framework; it is not a blueprint.").

n10. U.S. Const. amend. VIII.

n11. Or. Const. art. I, 20.

n12. See, e.g., Jennifer Friesen, State Courts as Sources of Constitutional Law: How to Become Independently Wealthy, 72 Notre Dame L. Rev. 1065, 1070 (1997) ("Every state public servant, from elected state representatives asked to vote on questionable legislation, to the janitorial supervisor at a rural school district faced with discharging an employee, can expect, at some time, to make a constitutional law decision in the course of his or her official duties.").

n13. 5 U.S. (1 Cranch) 137 (1803). Strictly speaking, Marbury established only the authority of the courts to interpret the Constitution, "to say what the law is." Id. at 177. Judicial supremacy in constitutional interpretation was not asserted explicitly until Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("The federal judiciary is supreme in the exposition of the law of the Constitution...."). See generally Gerald Gunther, The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 25 (1964).

n14. This, of course, is the central problem of constitutional law and has dominated the attention of scholars for over a century. My purpose is merely to acknowledge the issue and its importance, not to comment on it. See Rebecca L. Brown, Accountability, Liberty, and the Constitution, 98

Colum. L. Rev. 531, 531 (1998) ("Honk if you are tired of constitutional theory."). Among the major works in the area are Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (1988); Jesse H. Choper, Judicial Review and the National Political Process (1980); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); and Alexander M. Bickel, The Supreme Court and the Idea of Progress (1970).

n15. See, e.g., Muller v. Oregon, 208 U.S. 412, 420 (1908) ("It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action ....").

n16. U.S. Const. art. II, 1.

n17. See, e.g., Philip Bobbitt, Constitutional Fate: Theory of the Constitution 3 (1982) (referring to the legitimacy of judicial review as "the central issue in the constitutional debate of the past twenty-five years"); Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063, 1063 (1981) (stating that legitimacy is "the historic obsession of normative constitutional law scholarship"); Hans A. Linde, E Pluribus - Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 168 (1984) ("What sparks today's theorizing about the legitimacy of judicial review is doubts about the legitimacy of its substance.").

n18. There is a wealth of writing concerning the nature of the judicial decision-mak ing process. Perhaps the best known is Benjamin N. Cardozo, The Nature of the Judicial Process (1921). Other familiar works on the topic include Joel Levin, How Judges Reason: The Logic of Adjudication (1992); Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (1961); and Jerome Frank, Law and the Modern Mind (1930). For a collection of articles by judges on the judicial decision-making process, see Shirley S. Abrahamson et al., Judges on Judging: A Bibliography, 24 St. Mary's L.J. 995 (1993).

Recognizing a distinction between the principles of decision making and the principles of decision explaining dates back at least as far as the Legal Realist tradition of the 1920-50 era. Karl Llewellyn, for example, suggested that "only by happenstance will an opinion accurately report the process of deciding. Indeed, I urge flatly that such report is not really a function of the opinion at all ...." Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 56 (1960). Robert Leflar similarly commented:

It is hard on the reader to tell him that what was said in the decision conference may be different from what is said in the opinion, and that the opinion must be read in the light of that understanding; nevertheless, that is largely the situation. The reasons for the decision relied on in the conference may have been neither fully developed nor expressed in terms of formal legal principles or rules, but they were real reasons. The judge to whom the case is assigned is then in effect told to make it look good. That is an overstatement, because he is expected to be honest in what he writes, and is expected to set forth the case accurately. But he is expected to make the court's decision, or the majority's position, look good. And logic is an excellent tool, like a brush in an artist's hand, for doing this job.

Robert A. Leflar, Some Observations Concerning Judicial Opinions, 61 Colum. L. Rev. 810, 817 (1961). Others have made the same point. See, e.g., Ruggero J. Aldisert, Opinion Writing 3.3 (1990) (drawing distinction between "decision making and decision justifying"); Robert J. Martineau, Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory

Construction, 62 Geo. Wash. L. Rev. 1, 26 (1993) ("In understanding the significance of the appellate court opinion in the statutory construction process, the most crucial distinction is between the making of the decision by the judges on the panel to affirm or reverse, and the reasoned explanation of the decision given in the written opinion.").

In suggesting this distinction I do not mean to adopt the more cynical view of some that opinions are merely rationalizations or the more nihilistic view of deconstructionists that constitutional interpretation ultimately is indeterminate. Such conclusions do not necessarily follow from the assertion that opinions do not always describe the thought processes of the decision makers in arriving at their decisions.

n19. For a thoughtful introduction to the general subject of constitutional interpretive theory, see William A. Kaplin, The Process of Constitutional Interpretation: A Synthesis of the Present and a Guide to the Future, 42 Rutgers L. Rev. 983 (1990).

n20. Frederick Schauer, for example, proposes that the text acts as a presumptive limit on judicial construction. He likens the limitation to a frame:

The language of a clause, whether seemingly general or seemingly specific, establishes a boundary, or a frame, albeit a frame with fuzzy edges. Even though the language itself does not tell us what goes within the frame, it does tell us when we have gone outside it....

....

The language of the text, therefore, remains perhaps the most significant factor in setting the size of the frame. Those clauses that look quite specific are those where the frame is quite small, and thus the range of permissible alternatives is equivalently small. Those clauses that look much more general are those with a substantially larger frame, giving a much wider range of permissible alternatives....

....

We can thus view these linguistic frames as telling an interpreter, for example the Supreme Court, which areas are legitimately within the province of interpretation, which subjects are properly the business of the interpretation. An interpretation is legitimate (which is not the same as correct) only insofar as it purports to interpret some language of the document, and only insofar as the interpretation is within the boundaries at least suggested by that language.

Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 430-31 (1985). Justice Hugo Black probably is the most well-known proponent of this approach to constitutional interpretation. See, e.g., In re Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting); Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (Black, J., dissenting).

n21. By "originalism," I refer loosely to the school of thought that regards "original intent" or the intentions of the adopters of a constitution as not merely relevant, but authoritative. The literature on the subject is voluminous. Prominent defenses of the interpretive approach include Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review (1999); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997); and Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977). For an introduction to the controversy over originalism, see Daniel A. Farber, The Originalism

Debate: A Guide for the Perplexed, 49 Ohio St. L.J. 1085 (1989). Other articles on the debate include Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980); Erwin Chemerinsky, The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review, 62 Tex. L. Rev. 1207 (1984); Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226 (1988); H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985); and Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781 (1983).

n22. Robert Bork, for example, writes:

If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: "Law."

Robert H. Bork, The Tempting of America: The Political Seduction of the Law 145 (1990); see also Edwin Meese III, The Supreme Court of the United States: Bulwark of a Limited Constitution, 27 S. Tex. L. Rev. 455, 465 (1986) ("The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law. To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered.").

n23. Critics of originalism cite two principal problems in this regard. First, there is the problem of understanding the past on its own terms. Relying on the work of Hans-Georg Gadamer and others, those critics charge that it is indeed impossible to understand the past free from our own prejudices and preconceptions. See, e.g., Brest, supra note 21, at 221-22. Second, there is the problem of how best to describe history. Historical evidence may be described at various levels of specificity, and the choice of which level of specificity to adopt cannot be found inherently in the historical evidence. See Tribe & Dorf, supra note 9, at 65-80, 100-04; see also Farber, supra note 21, at 1094 ("A crucial question for originalists, then, is to determine the proper level of generality. Should we view the eighth amendment as requiring judges to apply some general concept of what is 'cruel and unusual'? Or should they ask only what specific punishments the framers meant to forbid?").

n24. Michael Klarman provides a nice summary of the dead-hand problem: "The Framers are not us. Indeed, in most ways the Framers do not even remotely resemble us, and it is not clear that they have a great deal of relevance to say about how we should govern ourselves today." Michael J. Klarman, Antifidelity, 70 S. Cal. L. Rev. 381, 383 (1997).

Klarman explains that the Framers were ideologically different in that, among other things, they tended to believe it acceptable to hold property in human beings, and they tended to believe that property ownership constituted a necessary qualification to participation in public affairs. Id. at 383-84. He also notes that their material circumstances were vastly different from our own, as were their views of religion and natural law. Id. For additional comments on the dead-hand problem, see Brest, supra note 21, at 225, and Tushnet, supra note 21, at 787.

n25. David Strauss, for example, writes:

The common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time. And it is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by "we the people," that best explains, and best justifies, American constitutional law today.

David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 879 (1996); see also Harry H. Wellington, Interpreting the Constitution: The Supreme Court and the Process of Adjudication 78 (1990) ("[A] common-law method of judicial review best explains American constitutional law, and ... while far from perfect it is normatively superior to rival approaches.").

n26. See, e.g., 5 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure 23.1, at 214 (3d ed. 1999) ("The Court's approach varies depending on when the opinion was written, which justice wrote the opinion, and what the subject matter of the opinion is."). Philip Bobbitt, in his highly influential Constitutional Fate, describes six types of "constitutional argument" that are reflected in the case law of the Supreme Court: historical, textual, structural, prudential, doctrinal, and ethical. Bobbitt, supra note 17, at 7.

n27. Resort to a constitutional "plain meaning rule" dates back at least to the era of Chief Justice John Marshall. See, e.g., Sturges v. Crowninshield, 17 U.S. (1 Wheat.) 122, 202-03 (1819):

If in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

Id. Three quarters of a century later, the Court similarly declared:

Where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since ... constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed ... to engage in [detailed] refinements. The simplest and most obvious interpretation ... if in itself sensible, is the most likely to be that meant by the people in its adoption.

Lake County v. Rollins, 130 U.S. 662, 670-71 (1889); see also Reid v. Covert, 354 U.S. 1, 8 n.7 (1957) ("This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning."); United States v. Sprague, 282 U.S. 716, 731 (1931) ("Where the intention is clear there is no room for construction and no excuse for interpolation or addition.").

n28. 83 U.S. (1 Wall.) 36 (1872).

n29. Commentary, most of it critical, on The Slaughterhouse Cases is extensive. See, e.g., Michael Les Benedict, Preserving Federalism: Reconstruction and the Waite Court, 1978 Sup. Ct. Rev. 39; Loren G. Beth, The Slaughterhouse Cases - Revisited, 23 La. L. Rev. 487 (1963); Daniel A. Farber & John E. Muench, The Ideological Origins of the Fourteenth Amendment, 1 Const. Comment. 235 (1984); Michael J. Gerhardt, The Ripple Effects of Slaughterhouse: A Critique of a Negative Rights View of the Constitution, 43 Vand. L. Rev. 409 (1990); Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863 (1986); Walter F. Murphy, Slaughterhouse, Civil Rights, and Limits on Constitutional Change, 32 Am. J. Juris. 1 (1987).

n30. Strictly speaking, the Eleventh Amendment says only that the federal judicial power does not extend to suits commenced against a state "by Citizens of another state." U.S. Const. amend. XI (emphasis added). In Hans v. Louisiana, 134 U.S. 1 (1890), the Court nevertheless held that it prohibited suit against any state in federal court. The Court acknowledged that "the letter" of the Constitution said otherwise but insisted that its "reason" required that result: "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?" Id. at 15. Some years later, the Supreme Court explained: "Manifestly, we cannot ... assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control." Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (emphasis added); see also Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97-99 (1984) (noting that notwithstanding the more limited language of the Eleventh Amendment, "the principle of sovereign immunity is a constitutional limitation on the federal judicial power"). Even more recently, the Court has confirmed:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms. That presupposition, first observed over a century ago in Hans v. Louisiana, has two parts: first, that each state is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent .... For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) (citations omitted); see also Florida Prepaid v. Coll. Sav. Bank, 527 U.S. 627 (1999).

It has been argued that the Eleventh Amendment was never intended to constitutionalize sovereignty at all. See, e.g., William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983). As Tribe notes, however, it is unlikely that the Court will undo a century of jurisprudence on the subject: "To do so, while perhaps restoring an historically correct understanding of the eleventh amendment, would inevitably disrupt the entire complex of doctrines ... surrounding the balance of

power between the states and the federal government." Laurence H. Tribe, American Constitutional Law 175 n.8 (2d ed. 1988).

n31. 381 U.S. 479 (1965).

n32. Id. at 484. The Court explained:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one.... The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. Of course, the Court's opinion drew a famous dissent from the great textualist, Justice Black:

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not.... I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.

Id. at 508-10 (Black, J., dissenting).

For critical commentary on the decision see, for example, Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 7-12 (1971) (stating that the Court's opinion is "unprincipled" and "illegitimate"); John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 928-29 (1973); and Paul G. Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Mich. L. Rev. 235 (1965).

n33. 410 U.S. 113 (1973).

n34. Much ink has been spilled over the legitimacy of the Court's decision in Roe. See, e.g., Ronald Dworkin, Life's Dominion (1993); Laurence H. Tribe, Abortion: The Clash of Absolutes (1990); Annette E. Clark, Abortion and the Pied Piper of Compromise, 68 N.Y.U. L. Rev. 265 (1993); Ely, supra note 32; Richard A. Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159; Margaret G. Farrell, Revisiting Roe v. Wade: Substance and Process in the Abortion Debate, 68 Ind. L.J. 269 (1993); Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375 (1985); Philip B. Heymann & Douglas E. Barzelay, The Forest and the Trees: Roe v. Wade and Its Critics, 53 B.U. L. Rev. 765 (1973); John T. Noonan, Jr., The Root and Branch of Roe v. Wade, 63 Neb. L. Rev. 668 (1984); Donald H. Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569 (1979); Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal

Protection, 44 Stan. L. Rev. 261 (1992); David A. Strauss, Abortion, Toleration, and Moral Uncertainty, 1992 Sup. Ct. Rev. 1.

n35. As the Court explained:

The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to correctly interpret its meaning.

Knowlton v. Moore, 178 U.S. 41, 95 (1900); see also Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 545 (1959); South Carolina v. United States, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.").

n36. Roth v. United States, 354 U.S. 476 (1957).

n37. The Court noted that, as of 1792, thirteen of the fourteen states that had ratified the Constitution provided for the prosecution of libel and that all fourteen made blasphemy, profanity, or both a statutory crime. Id. at 482. The Court further noted that a number of states had made it a crime to publish "obscene" materials. Id. at 483. Citing eight such states, the Court concluded that "there is sufficiently contemporaneous evidence to show that obscenity ... was outside the protection intended for speech and press." Id.

n38. Powell v. McCormack, 395 U.S. 486 (1969). In Powell, the Court held that, under Article I, Section 2, of the Federal Constitution, Congress does not have the authority to exclude one of its members. Representative Adam Clayton Powell had been re-elected to serve in the 90th Congress as a representative from a district in New York. Allegations that he had engaged in misconduct during the previous congressional term, however, led to the appointment of a Select Committee to determine whether he would be eligible to take a seat in the 90th Congress. The Committee found that, although Powell met the requirements of Article I, Section 2, he had, indeed, engaged in misconduct, including diverting House funds for personal use and making false expenditure reports. As a result of those findings, the House voted to exclude Powell and declared his seat vacant.

In reaching its conclusion, the Court conducted a detailed examination of English and American legal history concerning qualifications of membership in legislatures to determine the "intent of the Framers." Id. at 547. The Court found that the "relevant historical materials" revealed that Congress lacked the power, in effect, to add to the qualifications stated in Article I, Section 2. Id. at 522. The "relevant historical materials" included records of the English experience with qualifications of membership in Parliament, the record of the Constitutional Convention, excerpts from The Federalist, and the first 100 years of congressional practice following the adoption of the Constitution. Id. at 522-42.

n39. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). The Court framed the issue as whether the states have authority to "add qualifications" to those listed in Article I, Section 2. Id. at 787. The Court began by explicitly reaffirming the historical analysis in which it engaged in Powell. Id. at 787-98. But, noting that Powell addressed only the extent to which the Framers would have understood that Congress lacked the power to add qualifications to Article I, Section 2, the Court delved back into that history to focus more particularly on the extent to which the Framers likewise

would have understood that the states lacked the same power. Once again, the Court resorted to the record of the Constitutional Convention, records of the ratification debates, excerpts from The Federalist, and congressional experience. Id. at 806-19.

n40. See, e.g., Leonard W. Levy, Origins of the Bill of Rights 240 (1999) ("Death itself was an acceptable punishment. Life can be extinguished by the state if it provides due process of law to convict an offender."). On the subject of original intent and the death penalty, see generally H. Bedau, The Courts, the Constitution, and Capital Punishment (1977), and Raoul Berger, The Cruel and Unusual Punishments Clause, in The Bill of Rights: Original Meaning and Current Understanding 303 (Eugene W. Hickock, Jr. ed., 1991).

n41. "The Court recognized ... that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion).

n42. 260 U.S. 393 (1922).

n43. Id. at 415.

n44. The commentary on the Court's takings cases is too extensive to be listed here. Interesting analyses include Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985); William Fischel, Regulatory Takings: Law, Economics, and Politics (1995); Bruce Ackerman, Private Property and the Constitution (1977); Robert Brauneis, The Foundation of Our "Regulatory Takings" Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon, 106 Yale L.J. 613 (1996); Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Carol M. Rose, Mahon Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984); and Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964). For an overview of the historical evidence as to the intended meaning of the Takings Clause, see William M. Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694 (1985). See also Harry N. Scheiber, The "Takings" Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development, in The Bill of Rights: Original Meaning and Current Understanding 233 (Eugene W. Hickock, Jr. ed., 1991).

n45. 347 U.S. 483 (1954). For critical analyses of Brown, see, for example, Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955), and Alfred H. Kelly, The Fourteenth Amendment Reconsidered: The Segregation Question, 54 Mich. L. Rev. 1049 (1956).

n46. Christopher Wolfe, for example, writes:

What was once a distinctively judicial power, essentially different from legislative power, has become merely another variant of legislative power. Indeed, it would not be an exaggeration to say that the emergence of judge-made constitutional law has been the most striking characteristic of our federal courts since the end of the nineteenth century.

Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law 3 (1986).

n47. It is commonly asserted that the Warren Court's increased reliance on the Federal Constitution as the basis for protecting individual rights simply rendered state constitutions irrelevant. See Friesen, supra note 2, 1-1(a) n.10 ("A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of the Warren era left state constitutional law in a condition of near atrophy in some states."); Shirley S. Abrahamson, Reincarnation of State Courts, 36 Sw. L.J. 951, 957 (1982) ("As the federal constitutional guarantees grew during the Warren Court years, the protection of individual rights under the state constitutions almost came to a halt."); A.E. Dick Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873, 878 (1976) (noting state courts "fell into the drowsy habit of looking no further than federal constitutional law"). But the practice of assuming the essential fungibility of parallel state and federal constitutional provisions seems to have originated well before the Warren era. See infra notes 81-91 and accompanying text.

n48. State v. Cram, 176 Or. 577, 580, 160 P.2d 283, 284 (1945).

n49. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

n50. Cathleen C. Herasimchuk, The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?, 68 Tex. L. Rev. 1481, 1492 (1990); see also John D. Boutwell, The Cause of Action for Damages Under North Carolina's Constitution: Corum v. University of North Carolina, 70 N.C. L. Rev. 1899, 1910 n.70 (1992) (noting that Justice Brennan "is primarily responsible for this revamping of federalism"); Steve McAllister, Comment, Interpreting the State Constitution: A Survey and Assessment of Current Methodology, 35 U. Kan. L. Rev. 593, 593 (1987) ("In 1977, Justice Brennan gave impetus to the state constitutional law renaissance by publishing an article advocating state constitutional interpretation.").

n51. Hans A. Linde, Without "Due Process": Unconstitutional Law in Oregon, 49 Or. L. Rev. 125 (1970). Linde, in turn, contends that "contemporary discussion" of state constitutional interpretation began even earlier, with the publication of Robert Force, State "Bill of Rights": A Case of Neglect and the Need for a Renaissance, 3 Val. U. L. Rev. 125 (1969). See Linde, supra note 17, at 175. Other early articles calling for increased attention to state constitutional interpretation include Jerome B. Falk, The State Constitution: A More than "Adequate" Nonfederal Ground, 61 Cal. L. Rev. 273 (1973), and A.E. Dick Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873 (1976).

n52. Oregon, for example, adopted an exclusionary rule long before the United States Supreme Court did so under the Fourth Amendment. See, e.g., State v. Laundy, 104 Or. 443, 204 P. 958 (1922). So did Iowa. See State v. Sheridan, 96 N.W. 730 (Iowa 1903).

n53. See, e.g., Earl M. Maltz, The Political Dynamism of the "New Judicial Federalism," 2 Emerging Issues in St. Const. L. 233, 235 (1989) ("The revival of interest in state constitutionalism is generally conceded to be a reaction to the Burger Court's perceived hostility to Warren Court activism and its extension."). For a review of the Warren Court's significant decisions in their political context, see Lucas A. Powe, Jr., The Warren Court and American Politics (2000). For an analysis of the more conservative shift in recent Supreme Court decisions, see generally David

Kairys, With Liberty and Justice for Some (1993), and The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986 (Herman Schwartz ed., 1987).

The United States Supreme Court itself provided further impetus to resort to state constitutional interpretation with its decision in Michigan v. Long, 463 U.S. 1032 (1983), in which the Court declared that it would not review state court decisions explicitly based on state constitutional law:

When ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, [the Court] ... will not undertake to review the decision.

Id. at 1040-01. The Court required that the independent grounds be made clear "by a plain statement" that any reference to federal law is for the purpose of guidance only and not as a matter of compelling authority. Id. at 1041.

n54. See, e.g., Ronald K.L. Collins, Reliance on State Constitutions - Away from a Reactionary Approach, 9 Hastings Const. L.Q. 1, 3-5 (1981); George Deukmejian & Clifford K. Thompson, Jr., All Sail and No Anchor: Judicial Review Under the California Constitution, 6 Hastings Const. L.Q. 975 (1979); Earl M. Maltz, False Prophet - Justice Brennan and the Theory of State Constitutional Law, 15 Hastings Const. L.Q. 429 (1988).

n55. For an account of the development of this approach to state constitutionalism, see Randall T. Shepard, The Maturing of State Constitution Jurisprudence, 30 Val. U. L. Rev. 421 (1996). See also Tarr, supra note 3, at 841-42 ("State courts' reliance on state constitutions has become less opportunistic, and their opportunistic use of state constitutions less acceptable.").

Even that more "mature" approach to state constitutionalism has not satisfied some commentators, however. Perhaps most prominent among the critics of state constitutionalism is James A. Gardner. His article, The Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761 (1992), sets forth an extended critique of independent construction of state constitutions. According to Gardner, "state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements." Id. at 763. The source of this state of affairs is not a lack of ingenuity among state judges, but rather that state constitutions are intrinsically incapable of serving as the basis for a coherent body of law:

I conclude that the failure of state constitutional discourse reflects a much deeper failure, a failure of state constitutionalism itself. The central premise of state constitutionalism is that a state constitution reflects the fundamental values, and ultimately the character, of the people of the state that adopted it. This premise, however, cannot serve as the foundation for a workable state constitutional discourse because it is not a good description of actual state constitutions; it embraces theoretical inconsistencies that undermine its value as a framework for coherent discourse; and it takes an obsolete and potentially dangerous view of the texture and focus of American national identity.

Id. at 764. Gardner contrasts this "impoverished" state of affairs with the "extraordinarily rich" nature of federal constitutional discourse and concludes that state constitutionalism is simply unnecessary; even worse, he concludes, state constitutionalism threatens the development of a coherent set of fundamental national moral and political values. Id. at 723-32.

Not surprisingly, Gardner's thesis has generated a considerable amount of controversy. See, e.g., Rex Armstrong, State Court Federalism, 30 Val. U. L. Rev. 493 (1996); Hans A. Linde, State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse, 24 Rutgers L.J. 927 (1993); David Schuman, A Failed Critique of State Constitutionalism, 91 Mich. L. Rev. 274 (1992). It is not my purpose to join the battle in this article. Suffice it to say that, although I share some of Gardner's skepticism about the coherence of state constitutionalism, I do not share his view that its source lies in the nature of the beast. In particular, I find his comparison of state and federal constitutional "discourse" to be unpersuasive. To characterize the nature of federal constitutional discourse as anything but equally incoherent is wishful thinking, at best. See id. at 277 n.18 ("Perhaps I am more reluctant ... to abandon 'impoverished' state constitutionalism in favor of its 'successful,' 'rich,' and 'vigorous' federal analogue because I find recent federal constitutionalism to be impoverished - not because it is increasingly conservative, but because it is increasingly petulant, shrill, formulaic, and intellectually incoherent.").

Gardner is not the only critic of state constitutionalism. See, e.g., Collins, supra note 54, at 2 (stating that although rediscovery of state constitutions is a "good omen," too often it has been "used as a utilitarian device for perpetuating the constitutional expansionism wrought by the Warren Court"); Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147, 1160 (1993) (stating that state constitutionalism is rooted in an "anachronism or romantic myth" of the distinctiveness of state characteristics and identities).

n56. That is, two schools of thought in addition to the "lock-step" approach still adopted by some states. See, e.g., State v. Buchanan, 504 N.W.2d 400 (Wis. 1993) ("The law of search and seizure under the Wisconsin Constitution, however, has been routinely and consistently conformed to the law developed by the United States Supreme Court under the Fourth Amendment."). For a slightly different taxonomy - describing five interpretive approaches - see Peter J. Galie, Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role, 4 Emerging Issues in St. Const. L. 225 (1991).

n57. See generally Friesen, supra note 2, at 17 ("Truly independent use of state constitutions requires that courts and counsel ... rely first and solely on state grounds for a decision whenever it is possible to do so without infringing on a federal right ...."). Oregon is among the states that follow this approach. See, e.g., Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981) ("The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim."). Friesen reports that the other states that follow the first things first approach include Arizona, Florida, Louisiana, Maine, Montana, New Hampshire, North Carolina, Texas, Utah, Washington, and Wyoming. Friesen, supra note 2, 1-5(a).

n58. See, e.g., Wallace P. Carson, "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 19 Willamette L. Rev. 641 (1983); Hans A. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379 (1980).

n59. Linde, supra note 58, at 383 ("Just as rights under the state constitutions were first in time, they are first also in the logic of constitutional law."); see also Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981) ("This [primary resort to the state constitution] is required, not for the sake of parochialism or of style, but because the state does not deny any right claimed under the Federal Constitution when the claim before the court in fact is fully met by state law.").

n60. See, e.g., West v. Thomson Newspapers, 872 P.2d 999, 1005 (Utah 1994) ("Another practical reason for adhering to a consistent method of addressing state and federal constitutional issues is the time and expense saved by avoiding multiple trips through state and federal appellate courts.") (Hall, J., concurring); State v. Perry, 610 So. 2d 746, 750 (La. 1992) ("An improper by-pass of a state constitutional or legal question by this court may result in an unnecessary federal constitutional decision, a remand of the case by the Supreme Court, or both.").

n61. Judge Rex Armstrong, of the Oregon Court of Appeals, explained the point in these terms:

State judges are obliged to interpret their state constitutions independently, if they are to do the job that they have been given.

When I became a judge on the Oregon Court of Appeals, I took an oath to support the Oregon Constitution. That means, in a case before our court involving a challenge to the validity of a state statute under the Oregon Constitution, I am obliged to uphold the constitution. To do that, I have to decide what the constitution means. That is the task assigned to me as a state judge.

Armstrong, supra note 55, at 494-95 (1996); see also Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 835 (Cal. 1991) ("We are not a branch of the federal judiciary; we are a court created by the Constitution of California and we owe our primary obligation to that fundamental document.") (Mosk, J., concurring); State v. Ball, 471 A.2d 347, 350 (N.H. 1983):

When state constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people.

n62. See Friesen, supra note 2, 1-4(e) ("Some state supreme courts, and many advocates, analyze an overlapping state constitutional claim only when they are dissatisfied with the result that would be dictated by current federal doctrine."); see also Stewart G. Pollock, State Constitutions as Separate Sources of Fundamental Rights, 35 Rutgers L. Rev. 707, 718 (1983). States that follow this approach include Massachusetts, Commonwealth v. Upton, 458 N.E.2d 717 (Mass. 1983), New Jersey, State v. Hempele, 576 A.2d 793 (N.J. 1990), and Rhode Island, Pimental v. Dep't of Transp., 561 A.2d 1348 (R.I. 1989).

n63. Friesen, supra note 2, 1-4(e) ("This selective use of state law reflects a view that the state constitution is a supplemental, rather than a first line source of constitutional rights."); see also Project, Developments in the Law: The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1356-67 (1982) (stating that state constitutional interpretation should only be invoked as supplement when protection under Federal Constitution is unavailable).

n64. As one prominent commentator has complained:

What is striking is how little attention scholars and jurists have paid to the relationship between constitutional theory and state constitutional law. Constitutional theorists have continued to announce theories of constitutional interpretation that are really only theories of how to interpret a single constitution - the rough equivalent of announcing a literary theory that pertains to but a single work. More important for our purposes, state jurists and state constitutional scholars, with a few isolated exceptions, have ignored recent constitutional theory in interpreting state constitutions.

Tarr, supra note 3, at 842-43. The few exceptions tend to address the subject in broad, theoretical terms. David Keyser, for example, illustrated several different schools of interpretation by means of mock opinions. David R. Keyser, State Constitutions and Theories of Judicial Review: Some Variations on a Theme, 63 Tex. L. Rev. 1051 (1985). Thomas Morawetz similarly outlines the possibilities in general terms, focusing on originalism and various "nonoriginalist" alternatives. Thomas Morawetz, Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law, 26 Conn. L. Rev. 635 (1994). Rachel Van Cleave focuses mainly on the questions of whether and when to engage in state constitutional interpretation, but briefly addresses at the end of her article the debate over originalism as an appropriate method of interpretation. Rachel A. Van Cleave, State Constitutional Interpretation and Methodology, 28 N.M. L. Rev. 199 (1998). Harold Levinson also authored a short article narrowly focusing on the use of Constitutional Convention records in state constitutional cases. L. Harold Levinson, Interpreting State Constitutions by Resort to the Record, 6 Fla. St. U. L. Rev. 567 (1978).

n65. State v. Jewett, 500 A.2d 233 (Vt. 1985). The court listed the various approaches not as mutually exclusive alternatives:

Thus, it is important that the attorney consider the various approaches that can be taken to state constitutional argument. We will outline some of them in the paragraphs that follow. The advocate in appellate argument may wish to combine several of these approaches, having in mind that any collegial tribunal contains members with varying legal backgrounds and philosophies. What is appealing to one justice may be unpersuasive to another. Therefore, wise counsel will use every tool available in his or her efforts to convince.

Id. at 236.

n66. Id. at 237.

n67. Vreeland v. Byrne, 370 A.2d 832 (N.J. 1977). James Gray Pope supports the New Jersey court's attempt to divide the state constitution into constitutional and constitutional (he uses a shift in typeface to signal the distinction) provisions, but asserts that the court's emphasis on the subject matter of a particular provision as the litmus test is untenable. James Gray Pope, An Approach to State Constitutional Interpretation, 24 Rutgers L.J. 985 (1993). According to Pope, characterizing a provision according to its subject matter is entirely arbitrary. He urges that courts should make the distinction by reference to the extent to which it truly was "enacted by the people." Id. at 996-99. Whether an enactment may be regarded as having been truly enacted by the people depends on "such factors as the quality ... and duration of public discussion, the rate of voter participation, and the sharpness with which the issue is presented." Id. at 998. For a critique of Pope's proposal, see James A. Gardner, What Is a State Constitution?, 24 Rutgers L.J. 1033 (1993).

n68. Vreeland, 370 A.2d at 832.

n69. Id.

n70. Corum v. Univ. of North Carolina, 413 S.E.2d 276 (N.C. 1992).

n71. See, e.g., G. Alan Tarr, Understanding State Constitutions 189 (1998) ("While state constitutions contain statements of broad principle, they also contain a range of other provisions of varying detail and specificity, including some that resemble statutes. This raises the question of whether a single interpretive approach is appropriate for the disparate provisions.").

n72. Unlike most states, Oregon has not wholly revised its constitution since the original was enacted, although it has been amended a number of times since then. See generally Tarr, supra note 71, at 23-24 (noting that only nineteen states retain their original constitutions, and most have established three or more). Like most states - at least most western states - Oregon's constitution largely consists of provisions borrowed from other states' constitutions, principally Indiana's. See generally W.C. Palmer, The Sources of the Oregon Constitution, 5 Or. L. Rev. 200 (1926).

n73. The principal source of information about the convention is Carey's compilation of portions of the journal of proceedings and newspaper reports from the Weekly Oregonian and the Oregon Statesman, the newspapers of Portland and Salem, respectively. The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857 (Charles H. Carey ed., 1926) [hereinafter The Oregon Constitution]. The "journal," however, contained little information concerning the substance of the debates, and the newspaper accounts are not entirely reliable; the editor of each of the two papers was a delegate to the convention, and the reporting of the proceedings was not always unbiased. See David Schuman, The Creation of the Oregon Constitution, 74 Or. L. Rev. 611, 622 (1995).

n74. The convention devoted nearly a week to the "Judicial Department Article," but the issues were mostly arcane: jurisdiction of county courts, the organization of grand juries, number and terms of supreme court justices, and the like. The Oregon Constitution, supra note 73, at 185-96, 212-17; see also Schuman, supra note 73, at 623-24. The Judicial Department Article that the convention adopted in 1857 was almost wholly revised in 1910. Id. The most lively debate during the convention concerning the judiciary occurred during consideration of a state bill of rights, specifically concerning the extent to which judges - as opposed to juries - would have the final say as to questions of law in jury trials. Several delegates vigorously supported the supreme authority of juries, decrying the institution of a "judicial monarchy." The Oregon Constitution, supra note 73, at 314.

n75. On the interpretive conventions of the nineteenth century, see William D. Popkin, Statutes in Court: The History and Thoery of Statutory Interpretation (1999); Hans W. Baade, "Original Intent" in Historical Perspective: Some Historical Glosses, 69 Tex. L. Rev. 1001 (1991); William S. Blatt, The History of Statutory Interpretation: A Study in Form and Substance, 6 Cardozo L. Rev. 799 (1985); and R. Randall Kelso, Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History, 29 Val. U. L. Rev. 121 (1994). See also G. A. Endlich, A Commentary on the Interpretation of Statutes (1888); Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 241 (1857); Joseph Story, Commentaries on the Constitution of the United States 427-55 (1833).

n76. The Oregon courts never referred to "originalism" as an interpretive approach, but they frequently referred to the framers' intentions or, more generally, the purpose or "object" of the disputed constitutional provision. See, e.g., State v. Shaw, 22 Or. 287, 288, 29 P. 1028, 1028 (1892) ("The history and object of this constitutional provision, and the mischief against which it was aimed, should be kept steadily in view."); Rugh v. Ottenheimer, 6 Or. 231, 234 (1877) ("It is a rule in construing constitutions ... that we look to the circumstances which surrounded the law given at the time it was enacted, and ascertain if we can, the object of the law and the right to be protected."); Simpson v. Bailey, 3 Or. 515, 517 (1869) (rejecting proposed construction because "such a construction we apprehend was never contemplated by the convention").

n77. See, e.g., State ex rel. Taylor v. Lord, 28 Or. 498, 535-36, 43 P. 471, 480-82 (1896) (noting that a proposed construction "has, for almost a quarter of a century, received a practical exposition to the contrary by executive and legislative departments, each of which is as much bound to obey the constitution as the courts; and to this exposition the courts would be bound to yield ... unless satisfied that it is repugnant to the plain provisions of the constitution"). For similar explanations, see Eddy v. Kincaid, 28 Or. 537, 558, 41 P. 156, 158 (1895); State ex rel. Taylor v. Pennoyer, 26 Or. 205, 212, 37 P. 906, 906 (1894); Templeton v. Linn County, 22 Or. 313, 327, 29 P. 795, 800 (1892); Biggs v. McBride, 17 Or. 640, 650-51, 21 P. 878, 881 (1889); and Cline v. Greenwood, 10 Or. 230, 240 (1882).

n78. The court was especially fond of citing to standard treatises concerning statutory and constitutional construction, in particular the treatises of Cooley and Sedgwick. See, e.g., Philomath Coll. v. Wyatt, 27 Or. 390, 453-54, 31 P. 206, 218 (1892) (citing Cooley); David v. Portland Water Comm., 14 Or. 98, 119, 12 P. 174, 183 (1886) (citing Cooley); Putnam v. Douglas County, 6 Or. 328, 331 (1877) (citing Sedgwick); Fleischner v. Chadwick, 5 Or. 152, 155 (1877) (citing Sedgwick).

n79. See, e.g., State ex rel. Bell v. Frazier, 36 Or. 178, 182-83, 59 P. 5, 7 (1899) (relying on construction of similar provision in New York Constitution); Northup v. Hoyt, 31 Or. 524, 529, 49 P. 754, 755 (1897) (referring to construction of New Hampshire Constitution); Warren v. Crosby, 24 Or. 558, 567, 34 P. 661, 664 (1893) (referring to construction of New Jersey Constitution); State v. Wright, 14 Or. 365, 371, 12 P. 708, 710 (1887) (referring to construction of Louisiana Constitution); Fleischner v. Chadwick, 5 Or. 152, 155 (1874) (referring to construction of Maryland Constitution).

n80. U.S. Const. amend. XIV.

n81. Or. Const. art. I, 20.

n82. 96 Or. 53, 184 P. 567 (1919).

n83. Id. at 59, 184 P.2d at 570.

n84. 212 Or. 430, 437, 320 P.2d 245, 248 (1958); see also State v. Pirkey, 203 Or. 697, 703, 281 P.2d 698, 701 (1955) (holding that state and federal equal privileges and immunities clauses "are alike in that they constitute similar limitations upon legislative action for the protection of the individual from arbitrary or capricious legislation").

n85. Cereghino v. State Highway Comm'n, 230 Or. 439, 370 P.2d 694 (1962).

n86. State v. Cram, 176 Or. 577, 580, 160 P.2d 283, 284 (1945); see also State v. Hennesey, 195 Or. 355, 365, 245 P.2d 875, 880 (1952) (giving identical construction to Fifth Amendment and article I, section 12, self-incrimination clauses).

n87. 229 Or. 308, 367 P.2d 403 (1961).

n88. Id. at 320-21, 367 P.2d at 405-06.

n89. 242 Or. 490, 411 P.2d 69 (1966).

n90. The plaintiff was a deputy sheriff - a civil service position - who announced his intention to run for the elected position of county sheriff. State law prohibited a civil service employee from running for public office unless he or she immediately resigned upon announcing candidacy for the public office. The plaintiff argued that, among other things, the statute violated his rights of free expression guaranteed by the First Amendment and by article I, section 8, of the Oregon Constitution. The court held that the statute was unconstitutionally overbroad, but cited only First Amendment cases in the process. Id. at 499-507, 411 P.2d at 73-77.

n91. 276 Or. 9, 554 P.2d 139 (1976).

n92. Id. at 15-16, 554 P.2d at 142-43.

n93. Id. at 16, 554 P.2d at 143.

n94. Id. at 20, 554 P.2d at 145.

n95. 289 Or. 757, 619 P.2d 217 (1980).

n96. Id. at 774-75, 619 P.2d at 227.

n97. Id.

n98. Linde, supra note 51.

n99. The broader focus of the article was "the constitutional premises for judicial review of regulatory policies." Id. at 126. More particularly, Linde wished to comment on two recent Oregon Supreme Court decisions, Leathers v. City of Burns, 251 Or. 206, 444 P.2d 1010 (1968), and State v. Fetterly, 254 Or. 47, 456 P.2d 996 (1969), both of which implicated a "due process" right originating in the state and federal constitutions. Linde suggested that, in reviewing those decisions and others like them, it is important to establish the "constitutional premises," including the sources of such rights as the "due process" right that the court mentioned. Linde, supra note 51, at 129-35. In that context, Linde proceeded to examine the question of whether there existed a "due process" right under the Oregon Constitution. After examining a number of potential sources of such a right under the state constitution, Linde proclaimed that "the central and essential fact in this examination is not what is found in these sections, but what is not there. Oregon has no 'due process' clause." Id. at 135. In conducting this examination, Linde emphasized the differences between the texts of the federal and state constitutions as well as differences in the historical contexts in which each was enacted. Comparing the privileges or immunities clause of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment, for example, Linde noted the differences in texts, adding that "the difference in the two constitutional texts is not happenstance. They were placed in different constitutions at different times by different men to enact different historic concerns into constitutional policy." Id. at 141. In concluding the article, Linde offered broader suggestions

concerning the proper analysis of state regulatory policies. It is here that Linde set out his justification for state constitutional interpretation generally:

The logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional decisions second, and federal constitutional issues last....

Where a state law unavoidably faces a serious claim of constitutional right, the basis for that claim in the state constitution should be examined first, before any issue under the Federal Fourteenth Amendment. To begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state's constitution are ineffective to protect the asserted right and that only the intervention of the Federal Constitution stands between the claimant and the state.... In the fields of freedom of ideas, criminal procedure, and compensation for the taking of property, there is no reason to accept such an assumption that the values enshrined in a state's constitution, in, say, 1859, must today fall short of those in the Federal Bill of Rights of 1789. And to add a reference to the corresponding state provision as an afterthought to a holding under the federal guarantee is worse than merely backwards: A holding that a state constitutional provision protects the asserted claim in fact destroys the premise for a holding that the state is denying what the Federal Constitution would assure.

Id. at 182.

n100. 270 Or. 622, 529 P.2d 386 (1974).

n101. Id. at 632, 529 P.2d at 390-91.

n102. Id. at 632, 529 P.2d at 391. Two years later, Justice Kenneth O'Connell returned to the subject in a specially concurring opinion in Tupper v. Fairview Hosp. and Training Ctr., 276 Or. 657, 556 P.2d 1340 (1976). After noting that Linde "strongly argued" that article I, section 10, represented a state due process clause, he argued: "Assuming, without deciding that this is so, it seems clear that the two constitutional provisions are the same insofar as each would prohibit the deprivation of the interests specified in the respective provisions of the Federal and Oregon Constitutions without fair procedures generally associated with the term 'due process.'" Id. at 667-68, 556 P.2d at 1346.

n103. 278 Or. 499, 564 P.2d 1069 (1977).

n104. Id. at 505 n.2, 564 P.2d at 1043 n.2.

n105. 287 Or. 411, 600 P.2d 387 (1979).

n106. The court upheld the constitutionality of a rule of the Oregon Court of Appeals that prohibited parties appearing pro se from presenting oral argument. The court began by noting that the Equal Protection Clause and article I, section 20, "are not identical," but then went on to hold, without explanation, that "it is not invidious discrimination" to maintain such a rule. Id. at 418-19, 600 P.2d at 391-92.

n107. Id. at 417 n.1, 600 P.2d at 391 n.1.

n108. 289 Or. 359, 614 P.2d 94 (1980).

n109. Id. at 361-62, 614 P.2d at 95.

n110. Id. at 363-70, 614 P.2d at 95-99.

n111. See infra notes 142-49 and accompanying text.

n112. That is not to say that there is a clearly defined approach to the construction of the Second Amendment. The United States Supreme Court has yet to decide whether the amendment amounts to a guarantee of an individual citizen's right to bear arms free from state and federal government regulation or merely a guarantee of the state's right to regulate gun ownership free of federal interference. See generally Rotunda & Nowak, supra note 26, at 14.2; Randy E. Barnett & Don B. Kates, Under Fire: The New Consensus as the Second Amendment, 45 Emory L.J. 1139 (1996); Andrew D. Herz, Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility, 75 B.U. L. Rev. 57 (1995); Don B. Kates, Handgun Protection and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983); Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989).

n113. 291 Or. 231, 630 P.2d 810 (1981).

n114. Id. at 233, 630 P.2d at 812.

n115. Brief for Defendant at 9, State v. Clark, 291 Or. 231, 630 P.2d 810 (1981).

n116. The court noted that the defendant had cited only a decision of the Supreme Court of California, which was based on the California State Constitution. Clark, 291 Or. at 235-36, 630 P.2d at 813-14.

n117. The court commented that the defendant "could not have excluded issues of state law by pitching his attack on 14th amendment grounds." Id. at 233 n.1, 630 P.2d at 812 n.1.

n118. The court cited State v. Spada, 286 Or. 305, 594 P.2d 815 (1979). In that case, the defendant had argued that he had a constitutional right to certain discovery information from the prosecution. He did not address whether the statute entitled him to the information but rested his claim solely on the Due Process Clause of the Fifth Amendment. In addressing the defendant's argument, the court in Spada commented that:

Defendant puts the cart before the horse. It is basic that determination of Oregon statutory law is antecedent to any claim under the federal constitution, because the State does not violate any of a defendant's constitutional rights if, under this court's interpretation of the controlling statutes, those rights are in fact protected.

Id. at 309, 594 P.2d at 817.

n119. Clark, 291 Or. at 235-41, 630 P.2d at 813-17.

n120. For an overview of Federal Fourteenth Amendment jurisprudence, see generally Rotunda & Nowak, supra note 26, at 18-1 to 18-4.

n121. Clark, 291 Or. at 239, 630 P.2d at 815. The court cited In re Oberg, 21 Or. 406, 28 P. 130 (1891).

n122. The petitioner in that habeas corpus case was a constable who had arrested a sailor as an absconding debtor. An 1889 state statute made it unlawful to arrest sailors for debt. The constable was fined $ 20, and, when he failed to pay the fine, he was imprisoned. In his habeas corpus

petition, he challenged the constitutionality of the 1889 statute on the ground that it was "class legislation" prohibited by article I, section 20, of the Oregon Constitution. The court rejected his challenge, holding that the statute represented a reasonable occupational regulation in the public interest and, as such, was not "class legislation." In reaching that conclusion, the court quoted from the opinion of Justice Stephen Field in Soon Hing v. Crowley, 113 U.S. 703 (1885). In re Oberg, 21 Or. 406, 28 P. 130 (1891).

n123. Clark, 291 Or. at 243-44, 630 P.2d at 818 (citations omitted).

n124. See State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982).

n125. See Salem Coll. & Acad. v. Employment Div., 298 Or. 471, 695 P.2d 25 (1985).

n126. See State v. Campbell, 306 Or. 157, 759 P.2d 1040 (1988).

n127. See Cole v. Dep't of Revenue, 294 Or. 188, 655 P.2d 171 (1982).

n128. See State v. Owens, 302 Or. 196, 208, 729 P.2d 524, 531 (1986) (Gillette, J., concurring).

n129. 2 Or. 57 (1863).

n130. The Oregon Constitution states:

The judicial power of the state shall be vested in a supreme court, circuit courts, and county courts, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law, in accordance with this constitution.... Justices of the peace may also be invested with limited judicial powers.

Or. Const. art. VII, 1 (amended 1910).

n131. Noland, 2 Or. at 58.

n132. 153 Or. 278, 56 P.2d 1093 (1936).

n133. The Oregon Constitution provided:

The governor shall receive an annual salary of fifteen hundred dollars. The secretary of state shall receive an annual salary of fifteen hundred dollars. The treasurer of state shall receive an annual salary of eight hundred dollars. The judges of the supreme court shall each receive an annual salary of two thousand dollars. They shall receive no fees or perquisites whatever for the performance of any duties connected with their respective offices; and the compensation of officers, if not fixed by this constitution, shall be provided by law.

Or. Const. art. XIII, 1 (repealed 1956).

n134. Or. Code 67-601 (1930).

n135. Jory, 153 Or. at 288-89, 56 P.2d at 1097.

n136. Id. at 289-90, 56 P.2d at 1097-98.

n137. Id. at 292, 56 P.2d at 1098.

n138. Id. at 293-94, 56 P.2d at 1099.

n139. Id. at 294-95, 56 P.2d at 1099.

n140. Id. at 298, 56 P.2d at 1100.

n141. 289 Or. 359, 614 P.2d 94 (1980).

n142. Or. Const. art. I, 27.

n143. Kessler, 289 Or. at 362, 614 P.2d at 95.

n144. Id. at 363-70, 614 P.2d at 95-99.

n145. Id.

n146. Id. at 368, 614 P.2d at 98.

n147. Id.

n148. Id. at 372, 614 P.2d at 100.

n149. 298 Or. 395, 692 P.2d 610 (1984).

n150. Id. at 397-99, 692 P.2d at 610-11.

n151. Id. at 400-01, 692 P.2d at 612 (footnote omitted).

n152. Id. at 401-02, 692 P.2d at 613-14.

n153. Id. at 403, 692 P.2d at 614.

n154. Id.

n155. Id.

n156. Id. at 404, 692 P.2d at 614.

n157. 314 Or. 411, 840 P.2d 65 (1992).

n158. Id. at 415-16, 840 P.2d at 67.

n159. Priest has come to be the standard citation in any Supreme Court decision in which the court adopts its originalist orientation to constitutional construction. See, e.g., Lakin v. Senco Prods., Inc., 329 Or. 62, 987 P.2d 463 (1999); State v. Sutherland, 329 Or. 359, 987 P.2d 501 (1999); State v. Baker, 328 Or. 355, 976 P.2d 1132 (1999); Armatta v. Kitzhaber, 327 Or. 250, 959 P.2d 49 (1998); State ex rel. Caleb v. Beesley, 326 Or. 83, 949 P.2d 724 (1997); Vannatta v. Keisling, 324 Or. 514, 931 P.2d 770 (1997); Bryant v. Thompson, 324 Or. 141, 922 P.2d 1219 (1996); State v. Cookman, 324 Or. 19, 920 P.2d 1086 (1996); Billings v. Gates, 323 Or. 167, 916 P.2d 291 (1996); McIntire v. Forbes, 322 Or. 426, 909 P.2d 846 (1996); Greist v. Phillips, 322 Or. 281, 906 P.2d 789 (1995); Neher v. Chartier, 319 Or. 417, 879 P.2d 156 (1994); State v. Conger, 319 Or. 484, 878 P.2d 1089 (1994); Oberg v. Honda Motor Co., 316 Or. 263, 851 P.2d 1084 (1993); State v. Lajoie, 316 Or. 63, 849 P.2d 479 (1993); State v. Boots, 315 Or. 572, 848 P.2d 76 (1993).

n160. Or. Const. art. I, 14.

n161. Priest, 314 Or. at 416-17, 840 P.2d at 67.

n162. Id. at 416, 840 P.2d at 67.

n163. Id. at 417-19, 840 P.2d at 68-69.

n164. Id. at 419, 840 P.2d at 69.

n165. 329 Or. 62, 987 P.2d 463 (1999).

n166. Or. Const. art. I, 17.

n167. Lakin, 329 Or. at 68, 987 P.2d at 467.

n168. Id. at 69, 987 P.2d at 468.

n169. Id.

n170. Id. at 69-76, 987 P.2d at 468-72.

n171. Id. at 72, 987 P.2d at 469-70.

n172. Id. at 81, 987 P.2d at 474.

n173. See State v. Cookman, 324 Or. 19, 920 P.2d 1086 (1996).

n174. See State v. Conger, 319 Or. 484, 878 P.2d 1089 (1994).

n175. See Armatta v. Kitzhaber, 327 Or. 250, 959 P.2d 49 (1998).

n176. See McIntire v. Forbes, 322 Or. 426, 909 P.2d 846 (1996).

n177. See generally Charles A. Lofgren, The Original Understanding of Original Intent?, 5 Const. Comment. 77, 79 (1988) (noting that originators of Federal Constitution "were clearly hospitable to the use of original intent in the sense of ratifier intent, which is the original intent in a constitutional sense"); Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 375 n.130 (1981) ("The intentions of the ratifiers, not the Framers, is in principle decisive."); Brest, supra note 21, at 215 ("If the intent of the framers is to be attributed to the provision, it must be because the other adopters have in effect delegated their intention-votes to the framers.").

n178. 211 Or. 360, 315 P.2d 797 (1957).

n179. Id. at 367, 315 P.2d at 801.

n180. 153 Or. 278, 56 P.2d 1093 (1936).

n181. Id. at 289, 56 P.2d at 1097.

n182. See, e.g., Bryant v. Thompson, 324 Or. 141, 147-48, 922 P.2d 1219, 1221-22 (1996); State v. Boots, 315 Or. 572, 592, 848 P.2d 76, 87 (1993).

n183. See, e.g., Lakin v. Senco Prods., Inc., 329 Or. 62, 70, 987 P.2d 463, 468-69 (1999); State v. Cookman, 324 Or. 19, 29-30, 920 P.2d 1086, 1092-93 (1996); State v. Conger, 319 Or. 484, 499, 878 P.2d 1089, 1097 (1994).

n184. In State v. Delgado, the Oregon Supreme Court observed:

Charles Dickens, in his novel Martin Chuzzlewit, published in 1842 shortly after his return from America, referred to a certain Scadder, who "picked his teeth with a sort of young bayonet that flew out of his knife when he touched a spring." This suggests that America could have been the origin of the switchblade.

298 Or. 395, 403 n.6, 692 P.2d 610, 614 n.6 (1984).

n185. 324 Or. 19, 920 P.2d 1086 (1996).

n186. Id. at 28-29, 920 P.2d at 1091-92.

n187. Strong v. State, 1 Blackf. 193, 196 (Ind. 1822).

n188. Cookman, 324 Or. at 31, 920 P.2d at 1093 (emphasis added).

n189. Access to legal materials was notoriously difficult in the pre-war West. Oregon adopted the Iowa code as its territorial code, for example, simply because the only copies of statutes in the territory in the 1840s were from Iowa. F.I. Herriott, Transplanting Iowa's Laws to Oregon, 5 Or. Hist. Q. 139, 143 (1904). There may have been at least some access to Indiana Reports at the time of the convention, as there are citations to Blackford's Reports in a few pre-1857 decisions. Baldro v. Tolmie, 1 Or. 176, 177 (1855); Day v. Kent, 1 Or. 123, 128 (1854); Knighton v. Burns, 10 Or. 549, 552 (1847). The point remains, however, that the Oregon courts are content merely to assume the framers' access to and knowledge of such reports.

n190. See generally Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057 (1990) (asserting the inevitability of the problem, but insisting that it does not render constitutional analysis wholly arbitrary). Some originalists insist that there is less to the problem than meets the eye. Justice Antonin Scalia, for example, argues that the proper role of the judge is to articulate "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., concurring). Michael Perry similarly argues that a judge "should try not to articulate the most general aspect of the original understanding of a constitutional provision at a level of generality any broader than the relevant materials ... warrant." Michael J. Perry, The Legitimacy of Particular Conceptions of Constitutional Interpretation, 77 Va. L. Rev. 669, 679 (1991). Of course, such arguments are question begging. The choice of articulating "the most specific level" of generality itself cannot be justified by resort to the historical materials and instead reflects other values brought into the analysis. Moreover, there is no objective definition of what in fact is "the most specific level" of generality.

n191. 122 Or. App. 540, 858 P.2d 1315 (1993).

n192. Id. at 544, 858 P.2d at 1318.

n193. Id. at 549, 858 P.2d at 1321.

n194. Id. at 557, 858 P.2d at 1326 (Edmonds, J., dissenting).

n195. Or. Const. art. I, 8.

n196. 224 Or. 337, 356 P.2d 495 (1960).

n197. Id. at 346-47, 356 P.2d at 499-500.

n198. Id.

n199. Id. at 347, 356 P.2d at 499-500 (quoting 4 William Blackstone, Commentaries 151).

n200. Id. at 346-47, 356 P.2d at 499-500.

n201. Id. at 348, 356 P.2d at 500.

n202. Id. at 350-51, 356 P.2d at 501.

n203. Leonard W. Levy, Legacy of Suppression (1960).

n204. Stanley Brubaker, for example, writes:

There exists what we might call a romantic understanding of the original intent of the First Amendment's speech and press clauses.... But since 1960, none has been able to claim plausibly that if this is the only meaning of free speech, it is the one intended by those who wrote and ratified the First Amendment.

Stanley C. Brubaker, Original Intent and Freedom of Speech and Press, in The Bill of Rights: Original Meaning and Current Understanding 82, 83 (Eugene W. Hickok, Jr. ed., 1991).

n205. Levy updated and revised his work in Leonard W. Levy, The Emergence of a Free Press (1985). In the more recent publication, Levy has retreated from the assertion that the framers intended merely to incorporate the common law. He now acknowledges that the press actually enjoyed a remarkable freedom before the turn of the century and that some of the framers expressed a broader view of the First Amendment than is reflected in Blackstone's Commentaries. Nevertheless, he adheres to his principal contention that meaningful conceptions of free expression did not emerge until after passage of the Sedition Act of 1798. Id. at x-xii. For a critical review of the more recent work, see David M. Rabban, The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History, 37 Stan. L. Rev. 795 (1985).

n206. 293 Or. 402, 649 P.2d 569 (1982).

n207. Or. Rev. Stat. 163.275(1)(e) (1981).

n208. The defendant had demurred to the indictment on that ground, and the state appealed. Robertson, 293 Or. at 404, 649 P.2d at 571.

n209. The Robertson analysis is variously characterized in terms of a two-part test, see, e.g., Fidanque v. State ex rel. Oregon Gov't Standards and Practices Comm'n., 328 Or. 1, 5-6, 969 P.2d 376, 378 (1998), or a four-part test, see, e.g., State v. Stoneman, 323 Or. 536, 543-46, 920 P.2d 535, 539-41 (1996).

n210. Robertson, 293 Or. at 411-12, 649 P.2d at 575-76 (footnotes omitted).

n211. Id. at 416-17, 649 P.2d at 578-79.

n212. 395 U.S. 444 (1969).

n213. Id. at 447.

n214. Hans A. Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 Stan. L. Rev. 1163 (1970).

n215. Hans Linde writes:

The first amendment, however, is addressed expressly to lawmakers. It is not, in the first instance, an instruction to courts directing judges to protect freedom of speech, press, assembly, and petition. That judicial role indeed follows from judicial review. But the apprehension expressed in the first amendment is that legislators might decide to establish a religion, or prohibit the exercise of another, or suppress disfavored speech or publications by law, not that executive officers might do

so illegally. So the first amendment forbade Congress to make such laws long before a judicial role in defining those freedoms was established.

Id. at 1175.

n216. Id. at 1183.

n217. Id. at 1179.

n218. Id. at 1175.

n219. Hans Linde writes:

Rarely is there any political incentive to initiate and carry out an effort to repeal repressive laws against unpopular and annoying forms of speech. It is a quixotic undertaking, thankless and very likely futile. Who would have bothered to try to repeal Ohio's Criminal Syndicalism Act in the decades since all danger from the Wobblies must have been forgotten? Who would propose legislation to "legalize" revolutionary propaganda, or obscenity, or other offensive expression? We have long ago come to rely on the courts to clean out the statute books when it no longer matters.

Id. at 1181.

n220. Id. at 1182.

n221. David Schuman, for example, has observed that "Oregon free speech law ... derives from a Stanford Law Review Article," citing to Linde's Clear and Present Danger article. Schuman, supra note 7, at 283. Judge Rex Armstrong similarly observed that "Oregon's free-speech analysis is based on an analysis presented by then-Professor Linde in a 1970 article published in the Stanford Law Review." Armstrong, supra note 55, at 499. Bill Long traces the Robertson analysis both to the Clear and Present Danger article and to a symposium speech that Linde presented at Willamette University College of Law. William R. Long, Requiem for Robertson: The Life and Death of a Free-Speech Framework in Oregon, 34 Willamette L. Rev. 101, 105-06 (1998).

n222. State v. Robertson, 293 Or. 402, 412, 649 P.2d 569, 576 (1982).

n223. Id.

n224. 299 Or. 691, 705 P.2d 740 (1985).

n225. The statute, ORS 166.065, provided:

(1) A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, the actor:

....

(d) Subjects another to alarm by conveying a telephonic or written threat to inflict serious physical injury on that person or to commit a felony involving the person or property of that person or any member of that person's family, which threat reasonably would be expected to cause alarm.

Or. Rev. Stat. 166.065(1)(d)(1985).

n226. The court noted that only seven states had such statutes. Moyle, 229 Or. at 696, 705 P.2d at 744. The Oregon territorial legislature did enact such a statute as well, in 1850, but the statute was repealed in 1853. Id.

n227. 302 Or. 510, 732 P.2d 9 (1987).

n228. The obscenity statute, ORS 167.087, provided:

A person commits the crime of disseminating obscene material if the person[ ] knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.

Or. Rev. Stat. 167.087(1)(1985).

n229. The English recognized the authority of the state to regulate obscene conduct at common law as early as 1663. See Le Roy v. Sr. Charles Sedley, 1 Keble 620 (K.B. 1663). Regulation of obscene literature was recognized in Rex v. Curl, 2 Strange 789 (K.B. 1727). Most early cases were concerned with the blasphemous character of obscenity. But, by the early nineteenth century, a wholly secular crime of obscene libel had become well recognized. See generally Frederick F. Schauer, The Law of Obscenity 6 (1976) ("By the beginning of the 19th century, however, the common-law crime of obscene libel had matured and was used against works which were purely sexual in content, without the necessity of political or religious implications.").

In America, obscenity was first regulated by statute in Massachusetts in 1711. See Ancient Charter, Colony Laws and Province Laws of Massachusetts Bay (1814). Still, other colonies did not follow suit until nearly a century later, probably because the substantial influence of religion on earlier colonial culture made such statutes unnecessary. See generally Morris L. Ernst & Alan U. Schwartz, Censorship: The Search for the Obscene 9-10 (1968); Martha Alshuler, Origins of the Law of Obscenity, 2 Technical Report of the Comm'n on Obscenity and Pornography 65, 75 (1971). By the mid-nineteenth century, however, most states had enacted anti-obscenity statutes. See Daniel Barnhart, The Oregon Bill of Rights and Obscenity: How Jurisprudence Confounded Constitutional History, 70 Or. L. Rev. 907 (1991).

n230. An 1853 territorial statute made it unlawful for any person to "import, print, publish, sell or distribute any book or any pamphlet, ballad, printed paper or other thing containing obscene language ... manifestly tending to the corruption of the morals of youth." Or. Stat., ch. 11, 10 (1853).

n231. 315 Or. 372, 845 P.2d 1284 (1993).

n232. ORS 759.290 provides that "no person shall use an automatic dialing and announcing device to solicit the purchase of any realty, goods or services." Or. Rev. Stat. 759.290(1) (1999).

n233. The state pointed out, for example, that in 1932, the United States Supreme Court had held that regulation of commercial advertisement did not violate federal equal protection guarantees, Packer Corp. v. Utah, 285 U.S. 105 (1932), and that ten years later, the Court held that a constitutional right to distribute commercial advertisements could not be acquired by printing protected speech on the back side, Valentine v. Chrestensen, 316 U.S. 52 (1942). Moser, 315 Or. at 377, 845 P.2d at 1286-87.

n234. The court's entire discussion of the state's historical exception argument was: "The cases cited by [the state] lend little support to the notion that restrictions on advertising or commercial solicitations were well established when the 'first American guarantees of freedoms of expression were adopted.' As in State v. Henry, defendants have not established an historical exception." Moser, 315 Or. at 378, 845 P.2d at 1287 (citations omitted).

n235. See, e.g., Long, supra note 221, at 119 ("The implication of this approach to history when evaluating free speech claims is roughly the equivalent of setting the high-jump bar at 7' 0" in a junior high track meet: It is virtually impossible to clear."); Barnhart, supra note 229, at 917 ("One can never know whether an exception is 'well established' until the court says so.").

n236. 310 Or. 548, 802 P.2d 31 (1990).

n237. Canons 7B(7) and 7D of the Code of Judicial Conduct ... provided:

B. A judge may not:

....

(7) personally solicit campaign contributions; but a judge may establish committees to secure and manage financing and expenses to promote the judge's election and to obtain public statements of support for the judge's candidacy;

....

D. The provisions of this canon apply to each judge in the state at all times and to any other person who becomes a candidate for an elective judicial office.

Fadeley, 310 Or. at 550-51, 802 P.2d at 32-33.

n238. Id. at 552, 802 P.2d at 33-34.

n239. Id. at 559, 802 P.2d at 37.

n240. Id. at 559, 802 P.2d at 38.

n241. The court noted that, in 1976, the people enacted an amendment to article VII, section 8, which contained a specific reference to the right of the court to discipline judges for "wilful violation of any rule of judicial conduct." Or. Const. art. VII, 8 (amended 1976). The court then held that "when the people, in the face of a pre-existing right to speak, write, or print freely on any subject whatever, adopt a constitutional amendment that by its fair import modifies that pre-existing right, the later amendment must be given its due." Fadeley, 310 Or. at 560, 802 P.2d at 38.

n242. Fadeley, 310 Or. at 561, 802 P.2d at 38-39 ("The right to speak, write, or print freely on any subject whatever, is not absolute. It may be curtailed, for example, in the regulation of certain professions."). The court cited as an example the regulation of public comments by district attorneys during the course of a trial. In the case of In re Lasswell, 296 Or. 121, 673 P.2d 855 (1983), it upheld such a regulation because, on balance, the interests of the criminally accused outweighed the interests of the district attorney to speak freely. Fadeley, 310 Or. at 563, 802 P.2d at 40.

n243. Justice Richard Unis, joined by Justice George Van Hoomisen, dissented on precisely those grounds. According to the dissent, the majority departed from the Robertson analysis and, in

particular, created too broad an exception to the protections of article 1, section 8. Fadeley, 310 Or. at 580-91, 802 P.2d at 50-57 (Unis, J., concurring in part and dissenting in part).

n244. 323 Or. 536, 920 P.2d 535 (1996).

n245. ORS 163.680 provided:

It is unlawful for any person to pay or give anything of value to observe sexually explicit conduct by a child known by the person to be under 18 years of age, or to pay or give anything of value to obtain or view a photograph, motion picture, videotape or other visual reproduction of sexually explicit conduct by a child under 18 years of age.

Or. Rev. Stat. 163.680(1) (1995).

n246. Stoneman, 323 Or. at 541, 920 P.2d at 538.

n247. As in Henry, the state in Stoneman argued that the 1853 territorial statute constituted a historical exception. The court responded that "without more, that territorial statute did not sufficiently and clearly establish [an] historical exception within which the statute under review in the present case could be said 'wholly' to fall." Id. at 545, 920 P.2d at 541.

n248. Id.

n249. Id. at 546, 920 P.2d at 541.

n250. Id. at 548, 920 P.2d at 542.

n251. Free expression is not the only area in which the court has resorted to atextual or ahistorical doctrine to give meaning to the constitution. The court has employed similar practices in the area of search and seizure law. In State v. Campbell, 306 Or. 157, 759 P.2d 1040 (1988), for example, the court defined what constitutes a "search" within the meaning of article I, section 9, of the Oregon Constitution. In so doing, however, the court did not engage in any historical analysis to determine what the framers would have understood the term to mean. It instead adopted almost verbatim a definition proposed in a law review article in the Minnesota Law Review concerning the Fourth Amendment, Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974).

n252. 315 Or. 500, 849 P.2d 446 (1993).

n253. Id. at 503, 849 P.2d at 447-48.

n254. Id. at 504, 849 P.2d at 448.

n255. Or. Const. art. IV, 1.

n256. Whiffen, 315 Or. at 504, 849 P.2d at 448.

n257. Defendants claimed that the Lloyd Center's restrictions "virtually eliminated petitioning without significantly advancing legitimate interests" of private property owners. According to defendants, "if expressive rights are now to be unnecessarily burdened, then this entire enterprise will sink like a stone." Petition for Review of Defendants at 14, 17, Lloyd Corp. v. Whiffen, 315 Or. 500, 849 P.2d 446 (1993).

n258. Whiffen, 315 Or. at 504, 849 P.2d at 448.

n259. It was not until Marsh v. Alabama, 326 U.S. 501 (1946), that the United States Supreme Court held that members of the public may have a First Amendment right to engage in the exercise of their rights of free expression on at least some private property, in that case, a "company town." It was not until 1968, in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), that the Court first held that shopping centers might be subject to the same treatment as the sidewalks in the company town in Marsh.

n260. Whiffen, 315 Or. at 511, 849 P.2d at 452.

n261. Id. (quoting Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337, 363 (Mich. 1985) (Williams, J., dissenting)).

n262. Id. at 512, 849 P.2d at 452 (quoting State v. Cargill, 100 Or. App. 336, 343, 786 P.2d 208, 211 (1990), aff'd by an equally divided court, 316 Or. 492, 851 P.2d 1141 (1993)) (emphasis added).

n263. Id. at 512, 849 P.2d at 452-53.

n264. Id. (quoting Lloyd Corp. v. Whiffen, 307 Or. 674, 684, 773 P.2d 1294, 1299 (1989)).

n265. Id. at 512-13, 849 P.2d at 453.

n266. Id. at 513, 849 P.2d at 453.

n267. Marsh v, Alabama, 326 U.S. 501, 506 (1946).

n268. Id.

n269. Lloyd Corp. v. Whiffen, 315 Or. 500, 506, 849 P.2d 446, 449 (1993).

n270. Id.

n271. See supra notes 113-24 and accompanying text.

n272. Whiffen, 315 Or. at 506-07, 849 P.2d at 449.

n273. Chief Justice Carson and Justice Peterson joined in the dissent. Id. at 528-56, 849 P.2d at 461-77 (Gillette, J., dissenting).

n274. Id. at 544 n.7, 849 P.2d at 470 n.7.

n275. 100 Or. App. 336, 786 P.2d 208 (1990).

n276. Id. at 344, 786 P.2d at 212.

n277. State v. Cargill, 316 Or. 492, 851 P.2d 1141 (1993).

n278. 316 Or. 448, 853 P.2d 1285 (1993).

n279. The court noted:

It was incumbent on the state to prove beyond a reasonable doubt at trial that the Fred Meyer "one-stop shopping center" within the Center in this case was not analogous to the shopping center in Whiffen.... This the state utterly failed to do ....

Id. at 461-62, 853 P.2d at 1292.

n280. Id. at 462, 853 P.2d at 1293.

n281. Id. at 471, 853 P.2d at 1299 (Unis, J., concurring).

n282. Id. at 472-88, 853 P.2d at 1299-1308 (Tongue, J., concurring).

n283. Justice Tongue actually suggested that the court needed no test at all, but rather should be content to decide whether article IV, section 1, applies on a case-by-case basis. Id. at 476, 853 P.2d at 1302. If the court wanted a test anyway, he said, it should adopt the test employed in State v. Schmid, 423 A.2d 615 (N.J. 1980). Id.

n284. Id. at 476-77, 853 P.2d at 1302.

n285. Id. at 479, 853 P.2d at 1304.

n286. Id. at 483-84, 853 P.2d at 1306.

n287. Tongue cited both Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979), aff'd, 447 U.S. 74 (1980), and State v. Schmid, 423 A.2d 615 (N.J. 1980). Dameron, 316 Or. at 479-83, 853 P.2d at 1304-06.

n288. Id. at 464, 853 P.2d at 1294 (Fadeley, J., concurring).

n289. Id. at 491, 853 P.2d at 1310 (Gillette, J., dissenting).

n290. Id. at 490, 853 P.2d at 1310 (Peterson, J., concurring in part and dissenting in part).

n291. 141 Or. App. 541, 920 P.2d 168 (1996).

n292. Id. at 544-45, 920 P.2d at 170 (footnote omitted).

n293. 142 Or. App. 261, 921 P.2d 409 (1996).

n294. Id. at 265, 921 P.2d at 411.

n295. 153 Or. App. 442, 958 P.2d 854 (1998).

n296. Id. at 444-48, 958 P.2d at 857-60.

n297. Id. at 454-55, 958 P.2d at 863.

n298. The lead opinion based its decision entirely on the physical characteristics of the store:

The shopping center at issue in this case is approximately 110,000 square feet. That is about the same size as the Raleigh Hills Fred Meyer shopping center discussed in Dameron, and significantly larger than the Hawthorne Fred Meyer shopping center discussed in Cargill. The shopping center at issue here has parking lots on three sides, and all of the customer entrances open onto the parking lots. The shopping center conducts approximately 18,000 transactions per week through the main checkout stands, excluding sales that occur in the separate departments, such as jewelry and nutrition, which have their own cash registers. It sells a wide range of consumer products, from food and beverages to clothing, sporting goods, automotive goods, electronics, housewares, drugs, and jewelry. It has tenant businesses that provide banking services, shoe repair, and dry cleaning. A beauty salon and a Vista Optical store also are tenants. A separate home improvement center is located in a building across a public street.

Like the shopping center at issue in Cargill, the shopping center at issue here is designed to meet a wide range of consumer needs. The shopping center endeavors to provide a wide range of products and services on the premises because it wants its customers to meet all of their consumer needs, and spend all of their consumer dollars, at the shopping center. Fred Meyer has, for its own advantage, extended a broad invitation to the public to come to its shopping center. None of the entrances, including entrances to the tenant businesses, is accessible from a public sidewalk. A public street separates the main shopping center from the home improvement center. A wide array of commercial services is available at this shopping center and in the surrounding area. In sum, the Fred Meyer shopping center at issue here is physically similar to those at issue in Dameron and Cargill, it is used for similar purposes, and the scope of its invitation to the public is equally broad. This evidence supports the trial court's conclusion that the shopping center at issue here is a "large shopping center," as that term has been used in cases such as Dameron.

Id. (citation omitted).

n299. Id. at 471-80, 958 P.2d at 872-77 (Leeson, J., concurring).

n300. Id. at 481-97, 958 P.2d at 877-87 (Landau, J., dissenting).

n301. Stranahan v. Fred Meyer, Inc., 331 Or. 38, 11 P.3d 228 (2000).

n302. Id. at 54, 11 P.3d at 237 ("We note that, when construing provisions of the Oregon Constitution, it long has been the practice of this court 'to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it.'") (quoting Jones v. Hoss, 132 Or. 175, 178, 285 P. 205 (1930)).

n303. Id. at 54-55, 11 P.3d at 237-38.

n304. Id.

n305. See infra notes 357-96 and accompanying text.

n306. Stranahan 331 Or. at 65, 11 P.3d at 243.

n307. The court went so far as to invite suggestions that other decisions cannot be squared with the Priest methodology:

We remain willing to reconsider a previous ruling under the Oregon Constitution whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question.

n308. Id. at 54, 11 P.3d at 237 (emphasis added). That would suggest that the court is willing to reconsider cases such as Robertson and Clark, which certainly would represent a major shift in the court's approach to constitutional interpretation. See supra notes 117-19 and accompanying text.

n309. 295 Or. 260, 666 P.2d 1316 (1983).

n310. Id. at 262, 666 P.2d at 1318.

n311. Id. at 265-66, 666 P.2d at 1320.

n312. Id. at 266-67, 666 P.2d at 1320-21.

n313. For an interesting quantitative analysis of the extent to which the Oregon Supreme Court follows its own "first things first" doctrine, see generally John W. Shaw, Comment, Principled Interpretations of State Constitutional Law: Why Don't the "Primacy" States Practice What They Preach?, 54 U. Pitt. L. Rev. 1019 (1993). The author examined fifty-two opinions from the 1988 and 1991 terms in which both state and federal constitutional claims were implicated and found that in only twenty-one of those cases did the court adhere to the primacy doctrine of state constitutional interpretation. Id. at 1041-43.

n314. 323 Or. 167, 916 P.2d 291 (1996).

n315. Id. at 169-70, 916 P.2d at 294.

n316. Id. at 173-76, 916 P.2d at 296-97.

n317. Id. at 176-78, 916 P.2d at 297-98.

n318. Id. at 178, 916 P.2d at 298.

n319. Id. at 177, 916 P.2d at 298.

n320. Id. at 178, 916 P.2d at 298 (quoting State v. Kennedy, 295 Or. 260, 267, 666 P.2d 1316, 1321 (1983)).

n321. Id. at 179, 916 P.2d at 299 (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

n322. Estelle, 429 U.S. at 106.

n323. "'Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so.'" Billings, 323 Or. at 178-79 n.13, 916 P.2d at 298 n.13 (quoting Kennedy, 295 Or. at 267, 666 P.2d at 1321).

n324. Id. at 180, 916 P.2d at 299.

n325. 301 Or. 268, 721 P.2d 1357 (1986).

n326. The constitution provides:

No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Or. Const. art. I, 9.

n327. Brown, 301 Or. at 274-75, 721 P.2d at 1360-61.

n328. United States v. Ross, 456 U.S. 798 (1982); Carroll v. United States, 267 U.S. 132 (1925).

n329. Brown, 301 Or. at 275-76, 721 P.2d at 1361-62.

n330. Id. at 274, 721 P.2d at 1361.

n331. Id. at 284, 721 P.2d at 1366-67 (Linde, J., dissenting).

n332. See supra notes 265-66 and accompanying text.

n333. Lloyd Corp. v. Whiffen, 315 Or. 500, 512-13, 849 P.2d 446, 433 (1993).

n334. Cereghino v. State, 230 Or. 439, 444-45, 370 P.2d 694, 697 (1962).

n335. 282 Or. 591, 581 P.2d 50 (1978).

n336. Id. at 614, 581 P.2d at 63.

n337. The court paid particular attention to Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976). It also cited Jensen v. City of New York, 369 N.E.2d 1179 (N.Y. 1977); N.Y. Tel. Co. v. Town of North Hempstead, 363 N.E.2d 694 (N.Y. 1977); and Charles v. Diamond, 360 N.E.2d 1295 (N.Y. 1977).

n338. 294 Or. 254, 656 P.2d 306 (1982).

n339. Id. at 259 n.5, 656 P.2d at 309 n.5 (emphasis added).

n340. 312 Or. 568, 825 P.2d 641 (1992).

n341. Id. at 573 n.4, 825 P.2d at 644 n.4.

n342. 317 Or. 131, 854 P.2d 449 (1993).

n343. Id. at 135 n.5, 854 P.2d at 452 n.5.

n344. 321 Or. 458, 900 P.2d 495 (1995)

n345. Id. at 468 n.6, 900 P.2d at 501 n.6.

n346. Even when the parties rely solely on state constitutional law, the court has proven disinclined to examine the text and history of article I, section 18, to determine its intended meaning. Dodd v. Hood River County, 317 Or. 172, 855 P.2d 608 (1993), bears out the point. In that case, the owners of property located in a forestry zone applied for a conditional-use permit to build a single-family dwelling. When they first acquired the property, the applicable zoning allowed such construction, but because the zoning since had changed, the application was denied. The landowners challenged the constitutionality of the decision, arguing that it amounted to a taking of property. The court held that there was evidence that the timber on the property was capable of generating at least some profitable use and that, as a result, under Fifth Avenue, there was no taking. The court declined to reconsider its decision in Fifth Avenue, which was based on federal constitutional law. Id. at 185-86, 855 P.2d at 615-16.

n347. 294 Or. 269, 656 P.2d 315 (1982).

n348. Id. at 272, 656 P.2d at 317.

n349. See, e.g., State v. Lajoie, 316 Or. 63, 849 P.2d 479 (1993).

n350. 313 Or. 356, 836 P.2d 1308 (1992).

n351. Id. at 380, 836 P.2d at 1323.

n352. 101 Or. 657, 201 P. 445 (1921).

n353. 217 U.S. 349, 367 (1910).

n354. 306 Or. 231, 759 P.2d 1054 (1988).

n355. Id. at 235, 759 P.2d at 1057.

n356. 300 Or. 203, 709 P.2d 225 (1985).

n357. The court explained: "The emergency doctrine is a carefully and narrowly drawn exception to the warrant requirement. When the premises is a dwelling, the state must make a strong showing that exceptional emergency circumstances truly existed." Id. at 229, 709 P.2d at 244 (quoting Vale v. Louisiana, 399 U.S. 30, 34 (1970)).

n358. Or. Const. art. IV, 1, allocates the legislative power of the state to the Legislative Assembly, subject to the people's "reserved" powers of initiative and referendum. For general descriptions of the initiative and referendum powers and the history of their exercise, see generally Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall (1989), and David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States (1984). See also David B. Magelby, Direct Legislation in the American States, in Referendums Around the World: The Growing Use of Direct Democracy 218 (David B. Magelby & Austin Ranney eds., 1994). On the origins of the rights of initiative and referendum in Oregon, see generally David Schuman, The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System," 67 Temp. L. Rev. 947 (1994).

n359. See, e.g., Norman J. Singer, 2 Sutherland Statutory Construction 36.05 (4th ed. 1986) (stating that statutes enacted by legislature and by initiative have equal force and effect); see also Westerberg v. Andrus, 757 P.2d 664, 670 (Idaho 1988) ("In construing a law for both definitional and constitutional purposes, courts see no essential difference between measures enacted by initiative and referendum and those created through the usual legislative process. Neither is superior to the other, and are treated as equal in regard to their force, effect, and limitations."). I am aware of no Oregon case that actually addresses this issue. Nevertheless, the Oregon courts have never drawn a distinction, in terms of legal effect, between statutes or constitutional provisions enacted by initiative or by the ordinary legislative process. To the contrary, the courts always have given such enactments equal effect.

n360. 318 Or. 551, 871 P.2d 106 (1994).

n361. See Or. Rev. Stat. 461.215(1) (1999) ("The Oregon State Lottery Commission may initiate a game or games using video devices ....").

n362. Or. Const. art. XV, 4(7).

n363. Ecumenical Ministries, 318 Or. at 559, 871 P.2d at 110.

n364. Id. at 560, 871 P.2d at 111 (citations omitted).

n365. 317 Or. 606, 859 P.2d 1143 (1993).

n366. For critical analyses of the methodology, see Steven J. Johansen, What Does Ambiguous Mean?: Making Sense of Statutory Analysis in Oregon, 34 Willamette L. Rev. 219 (1998), and Jack L. Landau, Some Observations About Statutory Construction in Oregon, 32 Willamette L. Rev. 1 (1996).

n367. PGE, 317 Or. at 610, 859 P.2d at 1145 ("In interpreting a statute, the court's task is to discern the intent of the legislature.").

n368. Id.

n369. Id. at 611-12, 859 P.2d at 1146. The court stated:

If the legislature's intent is clear from the above-described inquiry into text and context, further inquiry is unnecessary. If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history.

Id.

n370. Id. at 612, 859 P.2d at 1146.

n371. Out of 198 statutory construction cases published since PGE, the Oregon Supreme Court has resorted to legislative history in 42 of them. That is to say, in 79% of the cases, the court determined that the meaning of the statute at issue was clear from an examination of its text.

n372. Ecumenical Ministries of Oregon v. Oregon State Lottery Comm'n, 318 Or. 551, 560-61, 871 P.2d 106, 112 (1994) (quoting Webster's Third New International Dictionary 347 (1976)).

n373. Ecumenical Ministries, 318 Or. at 560-61, 871 P.2d at 111.

n374. Id. at 562, 871 P.2d at 113.

n375. Id.

n376. Id. at 575, 871 P.2d at 119 (Fadeley, J., concurring).

n377. Id. at 577-78, 871 P.2d at 120 (footnote omitted) (Unis, J., concurring).

n378. 305 Or. 472, 753 P.2d 939 (1988).

n379. Or. Const. art. V, 15a.

n380. The court stated:

While plaintiffs rely on this history of article V, section 15a, defendants urge us to disregard the historical evidence of its purpose and scope. They argue that resort to legislative history is improper when the meaning of the text is "plain" or "unambiguous."

This and similar formulations are often recited, but in practice they do not and should not confine the court to historically blind exegesis. A case dealing with the allocation of legislative and executive power by the state's charter of government cannot be treated as if it involved the use of parol evidence to vary the words of a private contract. When one side to a dispute over the meaning of a public law urges a court not to look at or consider materials presented by the other side for its reading of the law, this only invites doubt whether the materials might show that the "plain meaning" is not so plain after all. That is the case here.

In practice, also, courts rarely see disputes over interpretation when the opposing party cannot show a possible alternative reading of the words, which it claims to be correct in context. That, too, is true in this case.

Lipscomb, 305 Or. at 484, 753 P.2d at 946 (footnotes omitted).

n381. Id. at 480-84, 753 P.2d at 943-46.

n382. The court stated:

Contemporaneous materials widely available to the voters in 1921, particularly the explanation by a committee of legislators in the official Voters' Pamphlet, leave no doubt that the amendment to article V, section 15a, was intended to authorize the Governor to veto a declaration of emergency in a bill so as to protect the opportunity of voters to petition for a referendum. Although the wording of the amendment also could suggest a much broader power to veto individual provisions of nonappropriation bills, it is not believable that such a broad power would have gone unmentioned and undebated if anyone had understood the amendment as defendants now contend.

Id. at 486, 753 P.2d at 947.

n383. See supra notes 252-305 and accompanying text.

n384. Stranahan v. Fred Meyer, Inc., 331 Or. 38, 54, 11 P.3d 228, 237 (2000).

n385. Id. at 55, 11 P.3d at 237.

n386. Id. at 57, 11 P.3d at 239.

n387. Id.

n388. Id. at 58 n.12, 11 P.3d at 239 n.12.

n389. Philip P. Frickey, Interpretation on the Borderline: Constitution, Canons, Direct Democracy, 1996 Ann. Surv. Am. L. 477. Frickey's principal concern is that lawmaking by initiative is in tension with the federal constitutional guarantee of a republican form of government. Id. at 478-79. His premise is that Article IV, Section 4, of the Federal Constitution - generally known as the "Guaranty Clause" - reflects the Framers' concerns that representative government is an essential component of republican government. Id. at 482-85. Representative government, Frickey suggests, provides the opportunity for deliberation by elected officials insulated from momentary public passions. Id. Direct democracy does not. Therefore, he argues, direct democracy is at odds with republican values and, if the process is not unconstitutional, at least its products should be subject to more searching review; in particular, he argues that the application of certain "limiting canons" of construction properly may inject republican values into the interpretive process. Id. at 510-26. For a critique of Frickey's proposal, see Jack L. Landau, Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules, 34 Willamette L. Rev. 487 (1998).

n390. Jane S. Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 Yale L.J. 107 (1995). Schacter focuses on the existence of, and impossibility of ascertaining, "voter intent." She argues that the interpretive questions that arise from the enactment of initiative measures generally are too complicated and technical to justify any assumption that the voters possessed any articulable intentions. Id. at 126-28. According to Schacter, voters generally have little knowledge about the substance of the measures that they enact and are especially vulnerable to manipulation by the drafters during the enactment process. Id. at 127-30. She proposes that courts should forthrightly acknowledge these "pathologies" inherent in the direct democracy process and address them by permitting interested parties, in effect, to create post-enactment legislative history about the purpose of the enactment and the legal context in which it was enacted.

Id. at 155-57. She also proposes that courts apply stricter interpretive rules that would limit the effect of initiative measures because of the inherently suspect enactment processes that produced them. Id. at 156-59. For a critique of her proposal, see Landau, supra note 389.

n391. See supra notes 68-72 and accompanying text.

n392. Or. Const. art. IV, 1 (amended 1998).

n393. Or. Const. art. I, 42 ("to preserve and protect the rights of crime victims to justice"). The provision was declared unconstitutional in Armatta v. Kitzhaber, 327 Or. 250, 959 P.2d 49 (1998), on the ground that it contained too many constitutional amendments to be submitted to the voters in a single enactment.

n394. Article IV, section 6(1), states:

A senatorial district shall consist of two representative districts. Any Senator whose term continues through the next regular legislative session after the effective date of the reapportionment shall be specifically assigned to a senatorial district. The ratio of Senators and Representatives, respectively, to population shall be determined by dividing the total population of the state by the number of Senators and by the number of Representatives.

Or. Const. art IV, 6(1).

n395. Id. art. VI, 10.

n396. Id. art. VIII, 2.

n397. Compare Roseburg Sch. Dist. v. City of Roseburg, 316 Or. 374, 851 P.2d 595 (1993) (expressly applying sequential, statutory construction methodology to constitutional provision enacted by initiative), with Lloyd Corp. v. Whiffen, 315 Or. 500, 849 P.2d 446 (1993) (declining to apply traditional text-based statutory construction analysis and invoking rule of liberal construction of constitutional provision favoring individual rights).

n398. David Schuman, The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection," 13 Vermont L. Rev. 221, 221 (1988).

n399. See supra notes 214-20 and accompanying text.

n400. 305 Or. 238, 750 P.2d 1147 (1988).

n401. Id. at 246, 750 P.2d at 1151.

n402. 323 Or. 536, 920 P.2d 535 (1996).

n403. Id. at 542, 920 P.2d at 539.

n404. In re Fadeley, 310 Or. 548, 559, 801 P.2d 31, 38 (1990).

n405. 296 Or. 121, 673 P.2d 855 (1983).

n406. Oregon Code of Professional Responsibility Disciplinary Rule (DR) 7-107 provides that a lawyer or firm associated with the prosecution or defense of a criminal matter cannot make certain "extrajudicial statements [for] ... public communication" that concern the accused or the conduct of the trial.

n407. The word "balance" actually does not appear in the opinion. The court spoke instead of the fact that the prohibition imposed by DR 7-107 was relatively narrowly tailored and was not punitive in nature. It targeted the "incompatibility" between a prosecutor's official function and free speech. Lasswell, 296 Or. at 125, 673 P.2d at 857. In Fadeley, 310 Or. at 563, 802 P.2d at 40, the court later characterized its holding in the case as "balancing."

n408. See generally Rotunda & Nowak, supra note 26, 18.3.

n409. Id. The United States Supreme Court also has applied an intermediate tier of review in cases of gender-based discrimination. In such cases, government classifications are permissible only if "substantially" related to an important government objective. See, e.g., Craig v. Boren, 429 U.S. 190 (1976).

n410. 308 Or. 508, 783 P.2d 506 (1989).

n411. ORS 30.270(1) provided:

Liability of any public body or its officers, employees or agents acting within the scope of their employment or duties on claims within the scope of [their employment] shall not exceed:

(a) $ 50,000 to any claimant for any number of claims for damage to or destruction of property, including consequential damages, arising out of a single accident or occurrence.

(b) $ 100,000 to any claimant for all other claims arising out of a single accident or occurrence.

(c) $ 300,000 for any number of claims arising out of a single accident or occurrence.

Or. Rev. Stat. 30.270(1) (1987).

n412. Hale, 308 Or. at 524, 783 P.2d at 515.

n413. 309 Or. 387, 788 P.2d 435 (1990).

n414. Id. at 398, 788 P.2d at 440.

n415. 311 Or. 456, 814 P.2d 1060 (1991).

n416. Id. at 467, 814 P.2d at 1066.

n417. Id.

n418. 315 Or. 321, 845 P.2d 904 (1993).

n419. Id. at 338, 845 P.2d at 915.

n420. 133 Or. App. 377, 891 P.2d 675 (1995).

n421. Id. at 385, 891 P.2d at 679.

n422. 294 Or. 33, 653 P.2d 970 (1982).

n423. ORS 656.226 provided:

In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by such man, and children

are living as a result of that relation, the woman and the children are entitled to compensation under [the workers' compensation statutes] the same as if the man and woman had been legally married.

Or. Rev. Stat. 656.226 (1981).

n424. Hewitt, 294 Or. at 46, 653 P.2d at 978.

n425. Id.

n426. 157 Or. App. 502, 971 P.2d 435 (1998).

n427. Id. at 523-24, 971 P.2d at 447.

n428. Id. at 524-25, 971 P.2d at 447-48.

n429. Id. at 522-23, 971 P.2d at 446-47.