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Some Thoughts About State Constitutional Interpretation

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I have been asked to offer my thoughts about state constitutional interpretation. That is a generous invitation; "state constitutional interpretation" covers a lot of ground. To avoid my response from becoming unmanageably long, I have decided to focus on what I see as some core issues pertaining to the interpretation of state constitutions, which I have organized in terms of three questions: "whether," "when," and "how."

By "whether," I refer to the question of whether state constitutions should be given independent legal significance at all. The issue arises when a state constitutional provision concerning individual rights finds a parallel in the federal constitution. Some contend that recognizing the independent significance of state constitutions is not worth the trouble and that, in fact, state constitutions are not even "constitutional." I think those who take such positions offer some interesting and provocative perspectives. But I suggest that, in the real world, they do not undermine the essential legitimacy of state constitutionalism.

By "when," I refer to the timing of state constitutional interpretation in relation to the interpretation of parallel provisions of the federal Constitution. There are several different approaches. Some take the position—known as the "primacy" position—that courts always should begin constitutional analysis with state constitutions and proceed to federal constitutional analysis only if a state constitution does not provide an answer to the issue at hand. Others take the opposite view—known as the "interstitial" view—that courts should begin with the federal Constitution and reach state constitutional provisions only if the federal Constitution fails to afford complete relief. Still others take a sort of middle position, arguing that engaging in state constitutional analysis

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depends on a weighing of a variety of factors. I am, for reasons that I will explain, firmly of the primacy perspective.

By "how," I refer to questions of interpretive method or theory. This, of course, is a subject that has received an astonishing amount of attention from legal scholars over the past 50 years, at least with respect to the federal Constitution. It is difficult to find a general law review that does not sport at least one article that struggles with "the counter-majoritarian difficulty" and the legitimacy of federal judicial review. Little attention has been paid to state constitutional interpretive method or theory, however. That is unfortunate. The legitimacy concerns that have prompted the outpouring of scholarship about federal judicial review over the last half-century are, although somewhat different in nature, no less important in the case of state judicial review. Judges, lawyers, and scholars should pay more attention to state constitutional method or theory.

As for the specifics of how I think state constitutional method should work, I offer no grand unified theory. Principally, that is because, in my view, no grand unified theory exists that is completely satisfactory. None eliminates judgment from the interpretive process. That does not mean that interpretation is a free-for-all. Some principles of state constitutional interpretation can serve to address legitimacy concerns and will be useful in the vast majority of cases.

In brief, I suggest that the proper method of interpretation of state constitutions depends on the nature of the provision involved. Interpretation of more recently adopted and specific provisions—which are often accompanied by a well-developed historical record—should closely hew to the wording as understood by those who adopted them. Older, more open-ended provisions, in contrast—those often unaccompanied by a well-developed historical record (if any record at all)—require a more dynamic approach to interpretation, one that searches for a more general principle that may be applied to modern circumstances.

State constitutional interpretation also must take into account the doctrine of stare decisis and the effect of prior judicial decisions. But I propose that, in the case of state constitutional interpretation, the pull of stare decisis may not be as strong as it is in other contexts.

Finally, there will be cases in which rules of interpretation will not yield a clear answer as to the meaning of a constitutional provision. In such cases, courts simply must do the best that they can. The important principle, it seems to me, is for courts to show their math and be candid about the elements of judgment that are entailed in arriving at a given interpretation.

I. WHETHER: THE LEGITIMACY OF STATE CONSTITUTIONALISM

The first question is whether we should bother with state constitutional interpretation at all. It may seem an odd question, but the fact is that there are scholars who challenge the legitimacy of the enterprise. And there are state courts that refuse to give independent significance to state constitutions, at least when parallel provisions exist in the federal constitution.[2]

The justifications for ignoring the independent significance of state constitutions seem to boil down to three criticisms of state constitutions and the cases that interpret them: State constitutions are not "constitutional" in the first place; state constitutional law decisions are incoherent; and such decisions serve unnecessarily to fragment our nation's laws. Let's briefly consider each of those criticisms.

A. Whether State Constitutions Are "Constitutional"

The first criticism of state constitutionalism has to do with the nature of the constitutions themselves, particularly in comparison with the federal Constitution: State constitutions are not very "constitutional." The criticism is aimed at the form of state constitutions as well as their content.

The forms of state constitutions often differ from the federal Constitution.[3] State constitutions frequently are quite long and detailed. While the federal Constitution comprises a mere 8,700 words, the average length of a state constitution is four times that, and the longest state constitution (Alabama's) clocks in at over 350,000 words. Partly, this is because state constitutions are relatively easy to amend. Tallies of state constitutional amendments run into the several thousands, compared to a total of 26 or 27 (depending on how you count them)[4] amendments of the federal Constitution.[5]

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2. In fact, it appears that a majority of states do so. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002) ("[T]he majority of state courts, on most issues, engage in an analysis in lockstep with their federal counterparts."). For an example of a spirited defense of such lockstep interpretation in the search-and-seizure context, see Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 MISS. L.J. 345 (2007).

3. For excellent introductions to "the distinctiveness of state constitutionalism," *see* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 6-28 (1998); *see also* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 20-36 (2009).

4. I refer to the debate over the question whether the Twenty-Seventh Amendment, which Congress first transmitted to the states for ratification in 1789, was lawfully ratified when Michigan became the 38th state to ratify it, in 1992. Some have argued that, although Congress never specified a time limit for ratification, the Constitution implies one. *See, e.g.*, Steward Dalzell & Eric Beste, *Is the Twenty-Seventh Amendment*

The subjects of the state constitutions are considerably more wide-ranging than their federal counterpart, and include such matters as local governments, education, taxation and public finance, and corporations, along with more unusual topics such as state lotteries and the regulation of charitable organization bingo games,[6] the width of ski trails,[7] the taxation of golf courses,[8] the regulation of automatic teller machines,[9] and (my favorite) the sale of liquor by the individual glass.[10]

The length, relative malleability, and variety of sometimes seemingly mundane and "nonconstitutional" subjects that state constitutions often include has, as G. Alan Tarr observed, "prevented many scholars from taking state constitutions seriously."[11] As one such scholar, James A. Gardner, observed, those who would put such matters into a constitution as the right to ski are "simply a frivolous people who are unable to distinguish between things that are truly important and things that are not."[12]

Some scholars have gone so far as to suggest that the problem is worse than length, or susceptibility to change, or silly subjects; rather, it is that state constitutions are not actually "constitutional" in the first place. Professor Gardner, for instance, has suggested that state constitutions do not satisfy the basic Lockean requirements of "constitutional positivism," that is, the idea that state constitutions have legitimacy as "fundamental" law derived from the voluntary choice of autonomous and independent individuals.[13] Because the citizens of the states are neither autonomous nor truly independent—by virtue of their

200 Years Too Late?, 62 GEO. WASH. L. REV. 501 (1994); *see also* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION xvii-xxi, 3 (2008).

5. *See generally* JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 8-11 (2006).

6. OR. CONST. art. XV, § 4(2).

7. N.Y. CONST. art XIV, § 1.

8. CA. CONST. art. X, § 2.

9. TEX. CONST. art 16, § 16.

10. OR. CONST. art. I, § 39.

11. TARR, *supra* note 3, at 2.

12. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 819-20 (1992) [hereinafter Gardner, *Failed Discourse*].

13. James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1028-30 (1993) ("[S]tate constitutions, to put it bluntly are not 'constitutional' as we understand the term."). Professor Gardner has refined and developed his critique of state constitutionalism in JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005). In that work, he does not contend that state constitutionalism has no place at all; rather, he contends that state constitutional interpretation must be appreciated in the context of the larger federal system in which the states exist as "agents of federalism" with a role to play in limited circumstances. *Id.* at 228-67. *See also* Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 224 (2006) (book review) (questioning whether Gardner's view of federalism "is overly myopic for state constitutionalism").

obligations as citizens of the nation—their state constitutions are not truly "constitutional."

Personally, I regard complaints about the form and substance of state constitutions as much ado about very little. Of course, state constitutions are different from the federal Constitution. But that does not necessarily mean that they are any less "constitutional."

State constitutions perform the function that we expect of constitutions: they constitute.[14] They allocate power derived from the people who ratify them among branches or departments of government and then set limits on the exercise of that power. To be sure, the exercise of that power is sometimes subject to the superior authority of the federal government. But the extent to which the federal governmental power supersedes the authority of the states should not be exaggerated. The fact is that, in the real world, Americans are governed more extensively, more completely by state law that is enacted pursuant to state constitutional authority than by federal law.[15]

In that vein, it bears remembering that it was not until after the Civil War that the Fourteenth Amendment was adopted and not until the early twentieth century that courts began to apply the federal Bill of Rights to the states through the Due Process Clause of that amendment.[16] Thus,

14. *Cf.* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5 (2005) (the federal Constitution is "not merely a text but a deed—a *constituting*") (emphasis in original).

15. WILLIAMS, *supra* note 3, at 3 ("Most Americans' daily lives are governed much more directly by *state* rather than federal laws, as enacted (and limited) pursuant to the provisions of 50 state constitutions."); *see also* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1636 (2010) ("Over the past thirty years, state courts have eclipsed the U.S. Supreme Court in shaping the meaning of constitutional values, both in their home states and throughout the nation."). According to the National Center for State Courts, the state appellate courts received over 280,000 appeals in 2007, the most recent year for which data have been analyzed. The 43 states reporting data to the NCSC issued over 7,000 written opinions that year. *See* Nat'l Ctr. for State Courts, Court Statistics Project, (2010), *available at* http://www.ncsconline.org/D_Research/CSP/CSP_Main_Page.html. That same year, the U.S. Supreme Court received a total of 8,241 filings, resulting in a total of 67 signed opinions. CHIEF JUSTICE JOHN ROBERTS, 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10 (2008), *available at* http://www.supremecourt.gov/publicinfo/year-end/2008year-endreport.pdf.

16. Scholarship on the incorporation of the Bill of Rights through the Fourteenth Amendment is truly voluminous. Among recent works that contain useful summaries are 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 160-85 (1998); AMAR, *supra* note 14, at 363-80; RAOUL BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 155-89 (2d ed. 1997); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (2006); and WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988). For an interesting history of the construction of the history of the Reconstruction amendments, see generally PAMELA BRANDWEIN, RECONSTRUCTING

for the first century (and then some) of our nation's existence, it was the state constitutions—not the federal Constitution—that supplied the principal guarantees of individual rights.[17] During that time, no one gave a second thought to the independent legal significance of those state constitutions.

It was not until the mid-twentieth century, when the United States Supreme Court began to interpret the federal Bill of Rights more liberally than state courts had been interpreting state constitutions, that state constitutional jurisprudence atrophied. In the face of federal constitutional decisions that were more protective of individual rights, state courts came to regard state constitutional interpretation—at least interpretation of state bills of rights—as academic.[18] But, with the emergence of a more conservative Supreme Court in the 1970s, a number of state courts returned to their own state constitutions as sources of individual rights more protective than those recognized under the federal Constitution.[19] It was at that point that criticism of the "new judicial federalism" began, along with criticism of it as if it were some sort of aberration from a more nationalistic constitutional norm.[20] Thus, the "new" judicial federalism was not actually very new.

B. The Incoherence of State Constitutional Decisions

A second criticism of state constitutionalism is that it is incoherent. Critics contend that regarding state constitutions as independently

RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999).

17. *See generally* Robert K. Kirkpatrick, *Neither Icarus nor Ostrich: State Constitutions as Independent Sources of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1836 (2004) ("[F]or the first 175 years after the adoption of the federal Constitution, state constitutions were the primary guarantors of individual rights."); *see also* Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall Is Dead—Long Live Gunwall!,"* 37 RUTGERS L.J. 1169, 1171 (2006) ("Throughout the nineteenth century and until the growth of the national government during and after the New Deal, the focus of American constitutional law was at the state level."); Morton J. Horowitz, *Republican Origins of Constitutionalism*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 148, 148 (Paul Finkelman & Stepen E. Gottlieb eds., 1991) ("American constitutional law in any real functional sense before the Civil War is American state constitutional law.").

18. *See, e.g.*, JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1-1 n.11 (1992) ("A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of Warren Court decisions left state constitutional law in a condition of near atrophy in most states.").

19. For an excellent historical introduction to the transformation of state constitutional law, see generally WILLIAMS, *supra* note 3, at 113-34.

20. *See, e.g.*, Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988) (criticizing the apparent liberal political agenda of the new judicial federalism).

significant has done little more than provide state courts with an opportunity to depart from federal constitutional principles and reach results more pleasing to those courts than the federal law would otherwise allow. Gardner, for example, has complained that state constitutional law consists of "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[21] He is not alone. Professor James Diehm has similarly referred to the "perplexing melange [sic] of disparate constitutional principles" reflected in state constitutional decisions.[22] Even some state judges have criticized their colleagues' state constitutional decisions as result-oriented opportunism.[23]

I think those complaints are fair criticism. State constitutional decisions can be perplexing, and some do lend themselves to the allegation that they are little more than opportunities for state courts to avoid federal constitutional precedent. But granting the truth of that criticism does not justify the conclusion that critics draw from it, that is, that the source of the incoherence is the fact that state constitutions are not "constitutional" in the first place.[24]

I am hardly the first to observe that the same incoherence charge fairly may be—and has been—leveled at U.S. Supreme Court decisions interpreting the apparent gold standard of constitutionalism, the federal Constitution.[25] Case law applying the Fourth Amendment has come in for a particularly brutal beating in scholarly journals lately. One

21. Gardner, *Failed Discourse*, *supra* note 12, at 763.

22. James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 244 (1996); *see also* George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979) (objecting to California state constitutional decisions as "result-oriented").

23. *See, e.g.*, Commonwealth v. Amendola, 550 N.E.2d 121, 127 (Mass. 1990) (Nolan, J., dissenting) ("It seems that, whenever we wish to expand the rights of defendants in criminal cases, we simply invoke the Massachusetts Constitution without so much as a plausible argument that the Massachusetts Constitution requires the expansion."); Commonwealth v. Panetti, 547 N.E.2d 46, 49 (Mass. 1989) (Nolan, J., dissenting) ("Equally gratuitous is the court's conclusion . . . that seizure of the defendant's conversation violated [Article] 14 . . . No authority is cited. No analysis is advanced to support this conclusion. It is simply a naked ipse dixit without logic.").

24. *See, e.g.*, Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 400 n.33 (1998) ("Of course, the absence of a coherent discussion of state constitutions in state courts may reflect a weakness in judicial opinions, rather than a theoretical flaw in state constitutionalism.").

25. As my colleague Judge David Schuman has remarked, "[p]erhaps 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." David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH L. REV. 274, 277 n.18 (1992) (emphasis in original).

observer contends that the Court's case law is "arbitrary, unpredictable, and often border[s] on incoherent."[26] Another regards the case law as a "mass of contradictions and obscurities."[27] Yet another declares that Fourth Amendment case law is "an embarrassment."[28] If incoherence in the case law is the relevant test, the federal Constitution would appear to be hardly more "constitutional" than its state law counterparts.

C. The Fragmentation Complaint

A third criticism of state constitutionalism is that it leads to the fragmentation of the law. Particularly in the area of criminal procedure, critics complain that the independent interpretation of state individual rights guarantees creates an inconsistent patchwork of constitutional law that, when considered in conjunction with federal criminal procedure, becomes confusing for state and law enforcement officials.[29]

That state constitutionalism leads to the fragmentation of the law is obviously correct. But it strikes me as an especially weak argument against the legitimacy of state constitutional law. Much as uniformity might make for a more tidy system of law, the fact remains that we live in an untidy system of dual sovereignty, a "compound republic," as Madison described it.[30] State constitutions are the highest law of sovereign entities,[31] and judges take an oath to enforce that law.[32]

As for the effect of the fragmentation of the law on federal and state officials, again, I think much is made over very little. Variation in the

26. David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2005).

27. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

28. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

29. *See, e.g.*, Diehm, *supra* note 22, at 244 ("New Federalism has led to the fragmentation of constitutional criminal procedure jurisprudence. On a multitude of issues, the federal courts and the courts of each of the fifty states are reaching different conclusions based on different constitutions.") (footnote omitted); Deukmejian & Thompson, *supra* note 22, at 995 ("The need for a single rule understood by all citizens is buttressed by the need for a uniform rule comprehensible to federal and state officers.").

30. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

31. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819) ("In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.").

32. *See* Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U. L. REV. 621, 627 (2005) ("State supreme court judges take oaths to support and uphold their state constitutions faithfully and diligently, and are therefore obliged to faithfully and diligently apply them."); James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1513 (1998) (state judges violate their oaths if they fail to give independent significance to state constitutions).

law is a time-honored feature of our federal system of government.[33] As long as there are states, there will be differences in the law. In fact, variations in substantive law have existed for more than two centuries. I am aware of no empirical evidence that state and federal authorities have proven unequal to the task of keeping track of the differences.

II. WHEN: THE TIMING OF STATE CONSTITUTIONAL INTERPRETATION

If a state constitutional provision has a counterpart in the federal Constitution—as often is so in the case of individual rights—there arises an interesting question about which constitution should be addressed first, the state or the federal. The subject has generated a fair amount of discussion among judges and scholars.[34] Essentially three schools of thought have emerged.

The first school of thought is known as the "primacy" or "first-things-first" approach. Not surprisingly, it proposes that, in cases potentially implicating both state and federal constitutions, courts should begin with the state constitution. The rationales for this approach are both theoretical and practical.

Theoretically, there is no logical reason for turning to the federal Constitution if a state constitution affords complete relief. The argument goes something like this: Provisions of the federal Bill of Rights apply to the states through the Due Process Clause of the Fourteenth Amendment. That means that, if, in a given case, the state constitution affords a person complete relief, there has been no deprivation of due process. The necessary conclusion is that, in such a case, there is no occasion even to apply the federal Bill of Rights.[35]

33. *See* State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983) ("Diversity is the price of a decentralized legal system, or its justification. . . ."); Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1081 (1997) (variations between state and federal law are "a normal incident of separate sovereignties").

34. For a good summary of the different approaches to the timing of state constitutional interpretation and the scholarship supporting and criticizing each approach, *see generally* WILLIAMS, *supra* note 3, at 140-77.

35. This rationale for the first-things-first approach was first set out in Hans A. Linde's path-breaking article, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133 (1970). *See also* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). The Oregon Supreme Court expressly adopted the approach in *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981) (state constitutional analysis must precede federal analysis "not for the sake either 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"). The primacy approach also has been adopted in New Hampshire and Maine. *See* State v. Ball, 471 A.2d 347, 350-52 (N.H. 1983); State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984).

The practical rationale derives from the doctrine of federal jurisdiction reflected in the U.S. Supreme Court's decision in *Michigan v. Long*.[36] If a state court decision rests on clearly stated "independent state grounds" that are at least as protective of individual rights as the federal Constitution, the federal courts regard themselves as lacking even jurisdiction to review such decisions. A state court decision on the meaning of the state's constitution, in other words, is final, and predicating a decision on such a state constitutional ground can put an earlier end to appellate review than resting the same decision on federal law grounds.

A second approach, known as the "supplemental" or "interstitial" approach, is essentially the reverse of the primacy approach. Adherents to this view assert that it is appropriate to begin with the federal Constitution and turn to the state constitution only if the federal counterpart fails to afford relief.[37]

This approach is understandable, at least in the sense that, for so many years, state courts fell into the habit of addressing federal constitutional arguments without even considering a state constitutional claim.[38] It also has been justified on efficiency grounds. The argument is that an already existing body of federal law exists for state courts to employ; only if that body of law proves inadequate should state courts invest in creating a different body of law.

A third approach is a variation on the second. Known as the "criteria" approach, it presumes that parallel state and federal constitutional provisions are identical in meaning. State courts following the criteria approach then will entertain a departure from that presumption and consider an independent interpretation of the state

36. Michigan v. Long, 463 U.S. 1032, 1038-39 (1983). The rule actually dates back about 50 years earlier than that. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the nonfederal ground is . . . adequate to support the judgment.").

37. The New Mexico Supreme Court adopted this approach, explaining that "when federal protections are extensive and well-articulated, state court decisionmaking [sic] that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide. . . ." State v. Gomez, 932 P.2d 1, 7 (N.M. 1997) (quoting *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982).

38. Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225, 241-42 (2007) ("Actually, this method should not be surprising given the prior domination of federal constitutional law in areas such as search and seizure. In some sense, the conditioned response of lawyers and judges is to look at the Federal Constitution first.").

provision only if certain specified criteria are satisfied.[39] The rationale for this approach seems to be a concern that departures from federal constitutional law have the potential to appear willful and result-oriented and thus need to be specially justified.[40]

It strikes me that neither the interstitial nor the criteria approach addresses the logical and practical justifications for the first-things-first approach. Neither reflects an appreciation of the fundamental notion that state constitutions are separate and independent sources of law. Instead, both treat state constitutional law as an option that the courts may or may not, depending on the case, wish to entertain.

The notion that a federal court decision about the federal Constitution somehow presumptively binds state courts in their construction of their own constitution seems to me especially difficult to defend. I have yet to see anyone explain by what mechanism the U.S. Supreme Court possesses the authority to determine the meaning of state constitutions. To the contrary, the notion seems quite at odds with the Court's own independent state grounds jurisprudence. As the Court declared in *Minnesota v. National Tea Co.*,[41] "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."

39. The approach is often traced back to a concurring opinion of New Jersey Supreme Court Justice Alan Handler in *State v. Hunt*, 450 A.2d 952 (N.J. 1982), in which he complained that "[t]here is a danger . . . in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of constitutional doctrine may be the eventual result of such an expedient approach." *Hunt*, 450 A.2d at 963-64 (Handler, J., concurring). According to Justice Handler, "[it] is therefore appropriate, . . . to identify and explain standards or criteria for determining when to invoke our State Constitution as an independent source for protecting individual rights." *Id.* at 965. He identified seven criteria: (1) textual differences between state and federal constitutions; (2) historical evidence that the state provision was intended to be more protective than the federal counterpart; (3) preexisting state law; (4) differences in state and federal structure; (5) matters of particular state or local concern; (6) particular state history and traditions; and (7) state public attitudes. *Id.* at 965-67.

The Washington Supreme Court, in *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986), essentially adopted Justice Handler's suggestion and decided that it will entertain a departure from the presumption that parallel provisions of the state and federal constitutions have identical meaning based on "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." For an excellent account of the development of the criteria approach in the courts, *see generally* Spitzer, *supra* note 17.

40. *See, e.g.*, State v. Stever, 527 A.2d 408, 415 (N.J. 1987) (state constitution should be treated as independent of the federal Constitution "only when justified by [s]ound policy reasons") (alteration in original) (internal quotations omitted).

41. Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940); *see also* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution.").

III. HOW: STATE CONSTITUTIONAL INTERPRETATION METHOD

Once we decide whether to interpret the state constitution and determine when it is appropriate to do so, there remains the third question that I have posed, namely, how we should ascertain what the particular constitutional provision at issue means. That question usefully may be subdivided into two subsidiary questions. First, why should we even care about the particular method of state constitutional interpretation? Second, what is the "best" approach to determining the meaning of state constitutional provisions? We will take these questions one at a time.

A. Why Method Matters

The first question is why any particular method of interpretation even matters. This raises a familiar question of constitutional theory, usually framed in terms of the legitimacy of judicial review.[42] No provision of the federal Constitution confers on the courts the mantle of superiority in determining the meaning of its terms. Nevertheless, ever since *Marbury v. Madison*[43] (and certainly since *Cooper v. Aaron*[44]), the federal courts have asserted their final authority to determine the meaning of constitutional provisions and, if necessary, invalidate legislation that runs afoul of the Constitution as judicially interpreted.

This presents, in Alexander Bickel's famous phrasing, the "counter-majoritarian difficulty": how do we explain the authority of unelected federal judges to invalidate legislation that is the product of decisions by democratically elected representatives?[45] The usual response is to assert, harkening back to *Marbury*, that constitutions are law, and judges are uniquely suited to determine what the law is by application of principles of legal interpretation.

I think that there is less to the counter-majoritarian difficulty than the wealth of scholarship on federal constitutional theory appears to suggest. Among other things, it assumes that the norm against which we evaluate judicial review is majoritarian democracy, when it seems to me

42. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3 (1982) (referring to the legitimacy of judicial review as "[t]he central issue in the constitutional debate of the past twenty-five years").

43. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (proclaiming the authority of the courts "to say what the law is").

44. Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution. . . .").

45. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1986). The "counter-majoritarian difficulty" has spawned literally thousands of books and articles. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

that there is an awful lot of the original Constitution that is decidedly undemocratic—its toleration of slavery, the lack of direct election of senators, the presidential veto, the Electoral College, and the appointment of judges, among other things.[46] The Bill of Rights itself is essentially a series of limitations on the exercise of majoritarian authority. What the framers of the federal constitution created was not a popular democracy, but a republic of fairly elaborate checks and balances.[47]

Aside from that, it strikes me that the problem that has engendered the legitimacy debate—the fact that federal judges are not elected—simply does not apply to most state courts engaging in judicial review under their state constitutions. Most state judges *are* elected.[48] The counter-majoritarian difficulty, then, is not so difficult in the case of state judicial review.[49]

That fact does not lessen the importance of legitimacy concerns. State constitutions do not expressly anoint the courts with the authority to finally determine the meaning of state constitutions. (Although some, which authorize advisory opinions, do seem implicitly to presume the

46. *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001).

47. It is sometimes suggested that the framers drew a clear distinction between the "republic" that the framers created and popular "democracy." Some historians chafe at the notion that such a clear distinction was recognized at the time. *See, e.g.*, WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 110-14 (2001) (discussing the sometimes interchangeable usage of "republican" and "democratic" in political rhetoric of the founding era). What is well recognized, though, is the fact that the framers understood that the government that they created was not a "pure" democracy, but one that included many checks on the excesses of majoritarian power. *See generally* GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC: 1776-87, 594-95 (1969).

48. The National Center for State Courts reports that, "[o]f the 1,243 state appellate judges, 1,084, or 87 percent, stand for some form of election, and 659, or 53 percent, stand for contestable election. Of 8,489 trial court judges (general-jurisdiction courts), 7,378, or 87 percent, stand for some form of election, and 6,560, or 77.3 percent, stand for . . . contestable election." Nat'l Ctr. for State Courts, *Judicial Selection and Retention FAQs*, http://www.ncsc.org/topics/judicial-officers/judicial-selection-and-retention/faq.aspx#How many state judges are elected (last visited August 24, 2010).

49. If anything, it raises the opposite concern, which Kermit Hall and others have aptly labeled "the majoritarian difficulty." According to Hall, "[t]he question raised in the states today, where almost all appellate court judges face some form of election, is not how unelected/unaccountable judges can be justified in a political system committed to democracy, but how elected and hence popularly accountable judges can be justified in a system committed to constitutionalism." Kermit L. Hall, *Judicial Independence and the Majoritarian Difficulty*, *in* THE JUDICIAL BRANCH 60, 64 (Kermit T. Hall & Kevin T. McGuire eds., 2005); *see also* Amanda Frost & Stefanie Linduist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 731 (2010) ("[E]lective judiciaries pose a risk to the rule of law, which is compromised whenever a judge's ruling is influenced by majority preferences.").

supremacy of judicial review.)[50] State court judges, even if elected, still have to explain why they get the last word about the meaning of the state constitution over the interpretations of elected representatives of other branches of state government. Again, the answer seems to be that state constitutions, like the federal Constitution, are law, and courts are in the best position to interpret laws in accordance with settled principles of legal interpretation. It seems to me that, if state constitutions are not law or if their interpretation is not governed by legal principles, then there is no solid basis for courts to assert their authority as final arbiters of state constitutional meaning. Rules matter.

Apart from legitimacy concerns, there are other reasons for state courts to be concerned about identifying the rules that justify their decisions on matters of constitutional interpretation. To begin with, precisely because state court judges so often are elected, it seems important that their opinions reveal the bases for their decisions so that they may stand accountable to the voters who elect them and so that the voters may have a basis on which to decide whether to return them to the bench. Moreover, as Professor Lawrence Friedman has aptly observed, "completely theorized" appellate court decisions provide better guidance to lower courts, lawyers, government officials, and the public, so that all may more readily predict the course of the law and its likely application to their affairs.[51]

50. *See, e.g.*, COLO. CONST. art VI, § 3 ("The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives."); FLA. CONST. art. IV, § 1 (c) ("The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties."); ME. CONST. art. VI, § 3 ("The Justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives."); MASS. CONST. pt. II, ch. 3, art. 2 ("Each branch of the legislature, as well as the governor or the council, shall have the authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."); MICH. CONST. art. III, § 8 ("Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date."); R.I. CONST. art. X, § 3 ("The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly."); S.D. CONST. art. V, § 5 ("The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions."). *See generally*, Jonathan D. Persky, *"Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155 (2005).

51. *See* Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 268 (2007); *but see* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734, 1737 (1995) (extolling virtues of "incompletely theorized" judicial decisions—reflecting agreement

B. The Rules of Interpretation

1. The Usual Suspects

Of course, that leaves the question as to *which* rules should govern the interpretation of state constitutions. Debates about the rules of constitutional interpretation tend to focus on federal constitutional interpretation and tend to be framed in terms of a contest between several competing approaches: "strict construction," "originalism," and "living constitutionalism." I think that a brief review of those familiar arguments provides a useful context for a discussion of how state constitutions should be interpreted.

a. Strict Construction

"Strict construction" is a slippery term, more often employed by politicians than by judges and scholars of constitutional interpretation. I think it is fair to say, though, that it is frequently used to refer to a fairly literal, textual approach to interpretation. Justice Hugo Black is often cited as a proponent of this particular approach, which purports to take the constitutional text as we find it and strictly interpret it according to its terms. The arguments against such an approach to interpretation are straightforward.

To begin with, there is the impossibly absolute nature of some constitutional commands. Take the First Amendment. It says that "Congress shall make no law abridging the freedom of speech or of the press."[52] Does the amendment literally mean "*no* law"? Does it mean, for example, that Congress is bereft of constitutional authority to criminalize interstate fraud? Does it really apply only to congressional legislation and not to any other form of governmental infringement on the rights of free speech, such as a Federal Communications Commission rule prohibiting use of the broadcast spectrum to criticize the President? Does it really apply only to "speech" and the "press" and not to congressional abridgment of the right to expression through handwritten letters? The answer to all of the foregoing questions is, of course, no. To hold a constitution to its strict, literal wording is plainly impossible.

In addition, there is the fact that many constitutional provisions are inherently indeterminate. The Fourth Amendment and many state constitutional counterparts guarantee the right to be free of

about results justified by "low-level or mid-level principles and taking a relatively narrow line"—in the face of difficult decisions in the context of a complex, pluralistic system).

52. U.S. CONST. amend. I.

"unreasonable" searches and seizures.[53] What does "unreasonable" mean? Does it not, by its very nature, depend on the circumstances of each case? In a similar vein, consider federal and state constitutional protections from "cruel and unusual punishment."[54] What is "cruel"? Even worse, what on earth does it mean for a punishment to be "unusual"? For that matter, what is a "punishment"? The answer to none of those questions is obvious, certainly not by reference to a dictionary of ordinary meaning or some other similar tool of strict construction.

b. Originalism

"Originalism," like "strict construction," covers a lot of ground. But, in a general sense, it refers to the mode of constitutional interpretation that regards the meaning of a provision as frozen in time in accordance with the intentions or understandings of its framers or others at the time of its adoption.[55] This mode of constitutional interpretation is most often justified by reference to democratic theory.[56] Originalism, the argument goes, addresses the counter-majoritarian difficulty by respecting the will of those who, in accordance with democratic processes, adopted the constitution in the first place.[57] The interpretation of a constitution is understood to be constrained by its text and by the examination of objectively verifiable historical evidence of what those who adopted it intended or understood it to mean.

Originalism also is frequently justified by reference to an analogy: Constitutions are law—specifically, written law. Centuries of legal tradition have produced principles that guide the interpretation of written

53. U.S. CONST. amend. IV.

54. *See, e.g.*, U.S. CONST. amend. VIII.

55. In the 1980s, originalist scholars tended to emphasize the original *intentions* of the framers of the Constitution. *See, e.g.*, BERGER, *supra* note 16, at 402. In the 1990s, however, that conception of originalism tended to give way to one that emphasized original *public meaning*, that is, the meaning of the Constitution's terms that would have been understood by a reasonable person at the time of ratification. *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1124-33 (2003) ("original public meaning" is the single correct approach to interpreting the Constitution). For an interesting account of the transition, see generally Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

56. *See, e.g.*, Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 664 (2009) ("The central conceit behind originalism as a mode of judicial constitutional interpretation is that it is more consistent with constitutional democracy than are its competitors.").

57. *See, e.g.*, 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.").

laws such as contracts, wills, deeds, and treaties. In keeping with the notion that the interpretation of constitutions is a process guided by legal principles, the argument asserts, constitutions should be guided by those same legal principles, which tend to emphasize the intentions of the makers of the instruments at issue.[58]

Originalism does sound good. It posits a method of interpretation that ostensibly eliminates a judge's personal preferences from the interpretation process.[59] But it, too, has garnered some significant criticisms.

Opponents of originalism frequently point out that its advocates do not explain why it is not at least as anti-democratic for the judgment of long-dead framers to trump the will of living citizens who are being subjected to a constitution that they have never had the opportunity to vote for.[60] As Thomas Jefferson famously declared, "the earth belongs . . . to the living."[61] One generation, he said, cannot bind another.[62]

Moreover, critics observe, the analogy to contracts and other written instruments is imperfect, at best. The people to whom the constitution now applies were not parties to it in the usual sense; they were not the instruments' makers, whose intentions are generally controlling.[63] And it is at least debatable that the founders—at least the founders of the federal Constitution—would have understood that the intentionalist interpretive

58. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 145 (1990) ("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.").

59. *See, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 376 (1988) ("A peculiar charm of original intent analysis is that the judge employing it seems to escape the subjectivity as well as the creativity that otherwise would color the judicial process in constitutional litigation."); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) ("The point is that in principle the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge's own ideological stance.").

60. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS IN THE MAKING OF THE CONSTITUTION xv n* (1996) ("[Originalism] is always in some fundamental sense anti-democratic, in that it seeks to subordinate the judgment of present generations to the wisdom of their distant (political) ancestors."); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 10 (2006) ("No one has yet explained how the consent of some of our ancient ancestors, and in my case someone else's ancestors—or for that matter the consent of only some today—can bind those alive today who have not consented.").

61. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* JEFFERSON: POLITICAL WRITINGS, at 593 (Joyce Appleby & Terence Ball eds., 1999).

62. *See id.*

63. *See, e.g.*, Greene, *supra* note 56, at 665 ("The 'parties' to our Constitution are the American people as a collective over a 220-year period, which complicates the analogy between the Constitution and an ordinary contract.").

conventions that might have routinely applied to some legal instruments such as contracts were applicable to constitutions, as well.[64] Arguably, in other words, originalism suggests that originalism was not intended by the framers in the first place.

Critics also contend that originalism simply cannot deliver on its promise of making constitutional interpretation an objective endeavor and restraining the exercise of judicial power. That is because originalism fails to account for the fundamental indeterminacy that inheres in ascertaining what happened in the past.[65] Specifically, critics cite the difficulty of identifying a single intention or understanding with respect to large groups of people particularly when, in many cases, we actually know that there was little or no contemporaneous agreement about the meaning or effect of a provision.[66]

In addition, assuming that identifying a collective intention or understanding is possible, there remains the inevitable problem of identifying the appropriate level of generality with which the significance of the historical "facts" should be described. Regardless of what the historical record may show about the intentions or understandings of people in the past, frequently it will not show an appropriate level of generality with which to characterize those intentions or understandings; rather, the solution is a matter of judgment.[67] The notion that an originalist mode of interpretation provides an objective method of interpretation is illusory.

c. The "Living Constitution"

A third approach to constitutional interpretation is one that advocates for a "living" constitution. According to proponents, the

64. *See, e.g.*, LEVY, *supra* note 59, at 331 ("[N]o evidence, not a shred, exists to show that the Framers meant, wanted, or expected future generations to construe the Constitution as they, the Framers, had."); *see also* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (originalism cannot be reconciled with late-eighteenth century interpretive conventions); *see also* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991).

65. *See, e.g.*, Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 91 (2010) ("[O]riginalism misperceives the nature of history by presuming that it has an objective meaning that can be discovered if one is only diligent enough to search through enough ancient material.").

66. The Fourteenth Amendment is an excellent example. *See* Greene, *supra* note 56, at 666 ("Where Fourteenth Amendment incorporation is involved, the task of locating a single original understanding becomes nearly impossible.").

67. *See, e.g.*, Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1094 (1989) ("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?").

meaning of a constitution is not static or fixed in time, as the originalists contend. Rather, the meaning of the constitution is dynamic, capable of changing in response to changing conditions in society.[68] Framed in that manner, living constitutionalism may be seen not so much as a method of interpretation as a reaction against originalism. In fact, it is challenging to find any consistent approach to the technique of affirmatively interpreting the constitution among adherents of this school of thought.[69]

Living constitutionalism is generally justified by one of three arguments, one pragmatic, one descriptive, and a third—ironically—originalist. The pragmatic argument is that, aside from the fact that originalism cannot deliver on its promise of objectivity, relying on the process of formally amending a constitution is simply unrealistic. Changes in society and technology, adherents argue, simply happen too quickly for the cumbersome amendment process to keep up.[70] The descriptive argument is that only living constitutionalism comports with an accurate account of what has actually occurred in constitutional law over the last century. *Brown v. Board of Education*[71] is usually Exhibit A for living constitutionalists, a decision that they contend cannot be justified either by strictly textual construction or originalism, but which everyone, living constitutionalists presume, agrees was correctly decided.[72] The originalist argument is that the very open-ended generality with which framers so often craft constitutional provisions

68. As Justice William Brennan declared in a 1985 speech, "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." Justice William Brennan, Speech to the Text and Teaching Symposium at Georgetown Univ. (Oct. 12, 1985) *quoted in* BERGER, *supra* note 16, at xviii. *See also* DAVID STRAUSS, THE LIVING CONSTITUTION 1 (2010) ("A 'living constitution' is one that evolves, changes over time, and adapts to new circumstances without being formally amended.").

69. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 ("[T]he phrase 'living constitution' has about it a teasing imprecision that makes it a coat of many colors.").

70. *See, e.g.*, STRAUSS, *supra* note 68, at 115 ("The Article V process is cumbersome; it requires the agreement of two-thirds of each house and three-quarters of the states. That is just too difficult a process to be a realistic means of change and adaptation. Some form of living constitutionalism is inevitable, and necessary, to prevent the Constitution from becoming either irrelevant or, worse, a straitjacket that damages the society by being so inflexible.")

71. Brown v. Topeka Bd. of Educ., 347 U.S. 83 (1954).

72. Strauss, for example, contends that originalism is untenable because, under an originalist view of the federal Constitution, racial segregation of public schools would be constitutional, the government would be free to discriminate against women, the federal government (to which the Fourteenth Amendment does not apply) would be free to discriminate on the basis of race, states could redistrict without regard to the one-person-one-vote principle, and many consumer protection and environmental laws would be beyond the power of Congress. STRAUSS, *supra* note 68, at 12-18.

suggests that they themselves intended that the interpretation of such clauses be capable of adaptation.[73]

The problems with living constitutionalism as a comprehensive theory of interpretation are easy enough to list. First, the fact that formally amending the constitution is difficult hardly explains why it may simply be discarded in favor of less formal judicial fiat. It could be that the framers wanted the process of amending the Constitution to be difficult. Indeed, it is often argued that the very fact that the framers took the trouble to spell out the process for amending the Constitution suggests that other forms of "amendment" are not legitimate.[74]

Second, the fact that living constitutionalism more comfortably accommodates what has happened historically in terms of constitutional interpretation in cases such as *Brown* hardly establishes that such an approach provides any guidance as to how, on a forward looking basis, a constitution *should be* interpreted. Aside from that, before living constitutionalists get too carried away with their notion that attempting to interpret a constitution to accommodate current values and conditions is necessary and good, they should stop and contemplate a few counterexamples such as *Lochner v. New York*[75] and *Korematsu v. United States*.[76]

Third, aside from the inherent circularity of the originalist argument, there is the fact that, assuming that the framers intended us to be free to "adapt" broad provisions to current conditions, living constitutionalism fails to explain what principles govern the process of adaptation. It is all well and good to say, for example, that "cruel and

73. Jack M. Balkin, for example, declares that "[t]he notion of a Constitution that evolves in response to changing conditions . . . began at the founding itself. The framers expected that their language, not their intentions, would control future generations. They created, in John Marshall's words, 'a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.'" Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE MAGAZINE, August 29, 2005, *available at* http://www.slate.com/id/2125226.html. David Strauss argues that even James Madison adopted the living constitution view, shown by the evolution of Madison's views of the constitutionality of the Bank of the United States. According to Strauss, while Madison originally took the view that the Constitution did not authorize Congress to create the bank, he took a different view 25 years later, in light of the intervening history of public acceptance of such congressional authority. STRAUSS, *supra* note 68, at 123-24. *See also* RAKOVE, *supra* note 60, at xv ("[Because] the framers and many of the ratifiers were themselves decidedly empirical in their approach to politics, it seems rather beside the point to ask how they would act today. Whatever else we might say about their intentions and understandings, this much seems clear: They would not have denied themselves the benefit of testing their original ideas and hopes against the intervening experience that we have accrued since 1789.").

74. BERGER, *supra* note 16, at 402 ("The sole and exclusive vehicle of change the Framers provided was the amendment process[.]").

75. Lochner v. New York, 198 U.S. 45 (1905).

76. Korematsu v. United States, 323 U.S. 214 (1944).

unusual punishment" cannot be held to an eighteenth-century standard. It is quite another to explain precisely how we are to discern what else the standard entails. Supporters of living constitutionalism often cite with approval the "evolving standards of decency" standard without explaining where it comes from and without confronting the problem that defining a constitutional limitation on majoritarian power by reference to majoritarian standards is not much of a limitation.

2. How Interpretation Should Work

The three "usual suspects" of constitutional interpretation by no means exhaust the full range of theoretical possibilities. There are many others that have been proposed. Nearly all, however, present some variation on themes raised by the three that are the most frequently debated. And all suffer from the same fundamental inadequacies. There simply is no theory of constitutional interpretation that fully and completely addresses the legitimacy issues associated with judicial review and removes the element of judgment from the equation.[77] Each will come up short at some point.

That does not mean that we should simply give up. To begin with, it seems to me that discussions about constitutional theory and interpretive method have been dominated by concern for the hardest of constitutional cases, which lends a rather distorted perspective to the enterprise.

That this is so is understandable. The sorts of cases that are of interest to constitutional scholars tend to be those that are most difficult and perplexing, the very ones most resistant to explanation by reference to a set of *a priori* rules. It is not much fun talking about easy cases.

The problem is that, in the real world, the vast majority of the cases that courts must decide are, frankly, not so difficult. In nearly all of them, the application of rules of interpretation leads to results that judges can agree on, the public can accept, and future litigants can rely on. The fact that those rules may come up short in the hardest of cases does not mean that the rules lack value and must be discarded.

Discussions about constitutional theory and methods of interpretation also have been distorted by the preoccupation of so many scholars with federal—as opposed to state—constitutional law.[78] Again, I understand why that is so. If for no other reason than marketability,

77. *See* Laurence Tribe, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 73 (1997) ("I am doubtful that any defensible set of ultimate 'rules' [of constitutional interpretation] exists. Insights and perspectives, yes; rules, no.").

78. *See, e.g.*, Devins, *supra* note 15, at 1639 (noting state constitutional law's "poor cousin" reputation among legal academics).

scholars understandably focus on matters of easily transferrable national interest; it is hard to market expertise in Wyoming constitutional law.

But it must be acknowledged that, as I have pointed out, the vast majority of cases—even constitutional cases—are not federal, but are state law cases. Moreover, it seems to me that some of the arguments about constitutional theory do not work quite as well when applied to state constitutionalism.

Take the common criticisms of originalism, for instance. I have mentioned the difficulties inherent in identifying the intentions of framers or voters long dead from as many as two centuries past. Many state constitutions, however, are not two centuries old. They are not even one century old.[79] Quite a few have been completely revised three, four, as many as ten times and as recently as the last few decades.[80] And, in the case of more recently revised constitutions, there exist fairly complete official records of proceedings, which have been prepared explicitly with a view to aiding the courts in determining what the framers intended. It seems to me that, in such cases, the ordinary arguments against a more originalist approach to interpretation do not work all that well.

In other words, even though I do not think that a completely satisfactory theory of constitutional interpretation exists, I believe that there are some core considerations that provide satisfactory answers to legitimacy concerns in most cases involving interpretation of state constitutions. With that in mind, let me turn to what I think those core considerations are.

a. The Importance of Text

The principal feature of legitimate state constitutional interpretation must be the text and respect for the written word. The fact that each and every state is governed by a written constitution is of more than academic significance. The decision of the framers to commit their constitutive decisions to the written word could not have been intended as an idle act. It seems obvious that they and the voters who adopted those constitutions understood that the written words would have legal

79. WILLIAMS, *supra* note 3, at 364-79 (discussing states, including New Jersey, Louisiana, and Virginia, that have amended their constitutions during the twentieth century).

80. TARR, *supra* note 3, at 23-25 (noting that Louisiana's current constitution is its eleventh version); WILLIAMS, *supra* note 3, at 28. *See also*, John Joseph Wallis, *NBER/ University of Maryland State Constitution Project*, www.stateconstitutions.umd.edu (last visited Feb. 22, 2011) (searchable database of every state constitution throughout U.S. history).

force.[81] When a state constitution, for example, provides that the state superintendent of public instruction must be elected by a vote of the people, no one would regard it as legitimate for a court to conclude that the governor possesses the constitutional authority simply to appoint a person to the office. The text matters.[82]

That the text must be paramount seems especially clear in the case of state constitutional interpretation. State constitutions, for instance, are much easier to amend. Thus, the common living constitutionalism argument in favor of more "flexible" interpretation of the federal constitutional text—that the federal Constitution is so difficult to amend—simply does not apply in the case of state constitutions.

State constitutions are also frequently crafted in far greater detail than their federal counterpart. This is due, in large part, to the fact that, by the nineteenth century, the framers of state constitutions saw their work in different terms from those of the framers of the federal Constitution a century earlier.[83] The notion of a constitution as positive law, but superior to that of statutory law, became embedded and resulted in often lengthy and detailed constitutions that included not just the usual matters of government organization and limitations on governmental power, but also a wide variety of "constitutionalized" public policy choices.[84]

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81. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 54 (1999) ("[O]nly a fixed text can provide judicial instruction and therefore be judicially enforceable against legislative encroachment.").

82. That does not necessarily mean that the constitutional text is all there is to constitutional law. I acknowledge the possibility that there are principles of constitutional magnitude that are not expressed in the text of a constitution itself. State constitutions, for example, often themselves acknowledge rights and privileges that are not enumerated in their text. *See, e.g.*, OR. CONST. art. I, § 33 ("This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people."). For an interesting take on that subject, *see generally* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

83. *See, e.g.*, Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1176 (1987) (by the early nineteenth century reliance on natural law waned and gave way to conception of a constitution in terms of the written charter).

84. As G. Alan Tarr explains:

> Over the course of the [nineteenth] century, state constitutions increasingly became instruments of government rather than merely frameworks for government. Whereas early state constitutions—and the federal Constitution—engaged in little detailed policymaking, most state constitutions by midcentury had begun to specify what state legislatures could not do and how they would conduct their business. By the end of the nineteenth century, restrictions on state legislatures had proliferated and had been supplemented by similarly detailed provisions regarding local government, plus a healthy—or, according to twentieth-century constitutional reformers—unhealthy dose of constitutional legislation.

TARR, *supra* note 3, at 133-34.

b. The Importance of Context

Of course, words do not have meaning standing alone. They derive their meaning from the contexts in which they are used. In the case of state constitutions, at least two sorts of context are significant.

The first has to do with structural or semantic context: the surrounding words, sentences, and other constitutional provisions within which the terms in dispute are situated. I suppose that much is obvious. But a word of caution is in order when considering the context of a state constitutional provision, because, in many cases, a state constitution consists of a multitude of provisions on a wide variety of subjects, adopted at different times and reflecting markedly different political underpinnings. (The frequent absence of a single, overarching political theory expressed in state constitutions is one of the arguments advanced by those who contend that state constitutions are not "constitutional.") Provisions of the same constitution, for example, may date from the ascendency of Jacksonian democracy, the Progressive Era, the era of the New Deal, the post-War boom, or the decade of the Contract with America. Different provisions of the same constitution may have been drafted by the framers in a constitutional convention a century or more ago, experienced legislators or legislative committees, or untrained citizen activists. As a result, some common assumptions about the uses of context—assumptions of consistency, for example—may not apply in the case of state constitutions.[85]

The second type of important context is historical. All state constitutional provisions, whether old or recent, were adopted at a specific point in history. The meaning of a given term at the time of its adoption always will be at least relevant, whether one is an originalist or a living constitutionalist.[86] If, for example, a seventeenth-century statute refers to the prohibition of "nunneries," it is useful to understand that, at the time, the word could mean something rather different from what it has come to mean today. In the seventeenth century, the term sometimes was employed to refer to brothels, not convents. It seems obvious to me

85. *Id.* at 194 ("For state judges, the penetration of the state constitution by successive political movements makes the task of producing coherence even more difficult than it has been for federal judges. . . . Insofar as a state constitution does not reflect a single perspective, an interpreter cannot always look to the whole to illuminate the meaning of its various parts.").

86. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) ("Although there are very few strict originalists, virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.").

that such information would be useful in deciding what a provision like that means.

That leads to the question whether that original, understood meaning is anything more than interesting. I think that it is.

State constitutions are commands; their purpose is to describe for future government officials and citizens the powers of government and the limitations on the exercise of those powers.[87] As commands, they rather naturally invite consideration of what the command is designed or intended to accomplish.[88] And, consistently with the command nature of state constitutional provisions, it is frequently clear that the framers or voters who adopted them intended that their intentions or understandings be important. As I have mentioned, state constitutions are the subjects of frequent revision and even more frequent amendment. Those changes often are accompanied by fairly extensive records as to the intentions or understandings of the framers or the voters, prepared with the obvious expectation that those records will be relevant to later judicial determinations of their meaning.[89] In such cases, the familiar argument against originalism in the context of federal constitutional interpretation—that it is unclear that the framers themselves would have understood that their intentions or understandings would count—does not apply to state constitutions, or at least does not apply with the same force.

Having said that state constitutional interpretation should reflect the views of their makers still is not sufficient. *Which* makers should we care about? Framers at a constitutional convention? Legislators? Voters? Depending on how that question is answered, different types of evidence become important to judges in their interpretation of state constitutions. It is common to speak of "framers" and, as a result, to resort to records of constitutional conventions.[90] The practice is

87. *Cf.* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 52 (2006) ("The federal Constitution is not a poem, a novel (chain or otherwise), a manifesto, or a treatise. The federal Constitution is a blueprint—an instruction manual, if you will—for a particular form of government.").

88. *Cf.* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 269 (1990) ("Characterizing a statute as a command makes it natural to think of interpretation in terms of ascertaining the drafters' wants. . . .").

89. *See, e.g.*, William C. Rava, *Toward a Historical Understanding of Montana's Privacy Provision*, 61 ALB. L. REV. 1681, 1682-83 (1998) (emphasizing that the exhaustive history of deliberations concerning recent constitutional revision makes those deliberations "uniquely relevant").

90. *See, e.g.*, State v. Schneider, 197 P.3d 1020, 1025 (Mont. 2008) (explaining that to interpret the state constitution the court must "conduct an independent review to determine the separate and particular intent of the framers of the Montana Constitution"); State *ex rel*. Johnson v. Gale, 734 N.W.2d 290, 303 (Neb. 2007) ("It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution."); Halverson v. Miller, 186 P.3d 893, 897 (Nev. 2008) (examining

understandable (evidence of the views of framers is often readily available), but in my view, not quite the right focus. The authoritative character of state constitutions derives from their adoption by a vote of the people, not from the views of their drafters.[91] Thus, it should be the views of the voters who adopted state constitutions that should be the focus of the interpretation of those documents. Evidence about what framers or drafters had in mind might be relevant; the framers were themselves voters, and their views might have been available to voters.

Even then, I think that more must be said in the way of refining this interpretive process. It is one thing to say that we must look to the views of the voters, but it is another to identify precisely what we mean by their "views." Again, it is common for state court judges to speak of the "intentions" of the voters as the determinant of state constitutional meaning.[92] As I have noted, however, it is frequently objected that it is untenable to speak of such specific intentions, either because it makes no sense to assume that such a large group of individuals as voters can have a collective intent or because there is no way the historical materials are sufficient to demonstrate such intentions.

In the case of state constitutional interpretation, those arguments have somewhat less force. As I have pointed out, state constitutions tend to consist of frequently and recently amended texts, often accompanied by an extensive and detailed record as to the problem that precipitated a particular provision and the intentions or expectations of its makers as to the manner in which the provision solves that problem. In such cases, the intentions or expectations of voters are readily identifiable. It seems to me that, in such cases, those intentions or expectations can and should be respected.

constitutional language "to carry out the intent of the framers of Nevada's Constitution") (internal quotation marks omitted); Riley v. R.I. Dep't of Envtl. Mgmt., 941 A.2d 198, 205 (R.I. 2008) ("In construing provisions of the Rhode Island Constitution, our chief purpose is to give effect to the intent of the framers."); Dexter v. Bosko, 184 P.3d 592, 595 (Utah 2008) ("[We] inform our textual interpretation with historical evidence of the framers' intent.") (internal quotation marks omitted).

91. *See* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT 77, 79 (1988) (stating that ratifier intent "is *the* original intent in a constitutional sense") (emphasis in original); *see also* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) ("[T]he intentions of the ratifiers, not the Framers, is in principle decisive. . . ."). Some courts have recognized the principle, as well. *See, e.g.*, Sierra Club v. Dep't of Transp. of Haw., 202 P.3d 1226, 1241 (Haw. 2009) ("Because constitutions derive their power and authority from the people who draft and adopt them, we have long recognized that the Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it. . . ."); Monaghan v. Sch. Dist. No. 1, 315 P.2d 797, 801 (Or. 1957) ("The constitution derives its force and effect from the people who ratified it and not from the proceedings of the convention where it was framed.").

92. *See* cases cited *supra* note 90.

An example from my own state's constitutional case law may serve to illustrate. Oregon's constitution contains an interesting and somewhat ambiguous provision concerning the governor's veto authority. Article V, section 15a, provides that the governor has the authority to veto "any provision in new bills declaring an emergency."[93] On the surface, the text is capable of meaning at least two different things. On the one hand, it could mean that the governor has authority to veto "any provision" in a bill that contains an emergency clause. On the other hand, it could mean that the governor has the authority to veto an emergency clause itself. If anything, the former seems to be the more plausible interpretation. And, in fact, that is the way that the governor of Oregon interpreted the provision when he decided to veto three substantive provisions of a bill concerning public employee retirement benefits, claiming the authority under Article V, section 15a, by virtue of the fact that the bill contained an emergency clause.[94] The authority of the governor to do that was challenged in *Lipscomb v. Board of Higher Education*.[95]

The Oregon Supreme Court acknowledged the ambiguity of the constitutional text and resorted to the historical context of the provision for guidance.[96] It turns out that the provision dated back to 1921, when Oregon's initiative and referendum system was still relatively new and, importantly, regarded with some hostility by the state legislature.[97] Because, under the law at the time, citizen referral of legislation had to take place before a law went into effect, the legislature took to inserting emergency clauses in its legislation, making the legislation effective immediately upon passage and rendering it effectively immune from referral.[98] In response to that practice, a constitutional amendment was proposed, giving the governor the authority to veto the emergency clause, thus enabling citizens to refer the legislation to a vote of the people.[99]

To the Oregon Supreme Court, understanding that background was critical to its determination of the breadth or narrowness with which to read the veto provision, because "[i]dentifying the reasons for the amendment bears on interpreting what this new power was meant to be."[100] The details about those reasons were readily available, particularly in contemporaneous press accounts. Those sources, the court concluded, "leave little doubt what the sponsors and the public

93. OR. CONST. art. V, § 15a.
94. *See* Lipscomb v. Bd. of Higher Educ., 753 P.2d 939, 940-41 (Or. 1988).
95. *Id.*
96. *See id.* at 946-47.
97. *Id.* at 944.
98. *Id.* at 943-44.
99. *See id.* at 944-46.
100. *Id.* at 943.

understood [the provision] to mean at the time of its enactment."[101] The court concluded that the authority conferred by Article V, section 15a, was narrowly limited to the authority to veto an emergency clause alone.[102]

In other cases, however, such evidence of specific intent or understanding is not possible. This is especially so in cases involving state constitutional provisions that are older, quite broad, and open-ended. The older a constitutional provision and the further away from its adoption, the less likely it will be that there will be a useful historical record concerning the original meaning, the problem precipitating its adoption, and its understood purpose or effect. And, in the meantime, conditions and circumstances may have changed in ways not imagined by those who originally adopted the provision.

In such cases, it seems to me, it is necessary to take a different approach to state constitutional interpretation. All available evidence must be consulted to determine as much as possible an *underlying principle* that the provision reflects and that may be applied to current circumstances.[103]

101. *Id.* at 947.

102. *Id.*

103. This is not a novel idea. The notion of a more "dynamic" approach to interpretation, which may become less tethered to original intentions as the distance from the time of adoption increases, was suggested in the context of statutory construction in the 1980s by Bill Eskridge and Phil Frickey. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 616 (1988) ("[W]here the statutory text is not specific and clear and where the original legislative expectations have been overtaken by changes in society and law over time," the weight given to the text and history will be relatively "slight."); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 5-6 (1994) ("[S]tatutory interpretation is *dynamic*. . . . [A]s the distance between enactment and interpretation increases, a pure originalist inquiry becomes impossible and/or irrelevant."). In some ways, the notion of such dynamic interpretation was suggested by Cardozo in his famous work, *The Nature of the Judicial Process*, when he observed that broader constitutional provisions are subject to more adaptive interpretive possibilities, while, as a constitution becomes more detailed and specific, "it loses flexibility, the scope of interpretation contracts, the meaning hardens." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83-84 (1921).

The idea that evidence of original intentions or understandings concerning a constitutional provision may yield a more general principle to be applied to modern circumstances, likewise, has been proposed by many others. *See, e.g.*, Dorf, *supra* note 86, at 1766 (1997) ("Most, if not all, of us are . . . moderate originalists; we are interested in the framers' intent on a relatively abstract level of generality.") (internal quotation marks omitted) (footnote omitted). It has also been suggested by some courts. *See, e.g.*, State v. Rogers, 4 P.3d 1261, 1270 (Or. 2000) (the goal of state constitutional interpretation is "to understand the wording in the [sic] light of the way the wording would have been understood and used by those who created the provision and to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise") (citation omitted) (internal quotation marks omitted).

Take Oregon's search and seizure provision, which states, in part, that no law may 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."[104] The provision dates from 1857 and was plainly based on the Fourth Amendment.[105] There is a complete absence of direct historical evidence as to what its framers intended or what the voters understood the provision to mean at the time; the provision was adopted without debate in the constitutional convention, and there is no record of any public discussion during ratification.[106]

We could attempt to reconstruct from more general historical sources what was likely the common understanding of a search and seizure guarantee. As it turns out, though, there is no real consensus about what late eighteenth- and early nineteenth-century citizens thought about search and seizure law. The debate is especially fierce over the intended meaning of the Fourth Amendment, which was the source for nearly all state constitutional search and seizure guarantees.[107]

But, even assuming that we could reconstruct what the framers or voters would have understood the search and seizure guarantee to mean in 1857, we would still be faced with the problem of applying that understanding to modern search and seizure issues. Does the

104. OR. CONST. art. I, § 9.

105. *See generally* Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 OR. L. REV. 819 (2008).

106. *See* Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)*, 37 WILLAMETTE L. REV. 469, 515 (2001) (search and seizure provision passed with "no reported comment or debate").

107. The debate centers on whether the framers of the Fourth Amendment understood the search and seizure guarantee to include a preference for warrants. Strictly speaking, the Fourth Amendment does not say anything about that one way or the other. It consists of two clauses, one guaranteeing a right to be secure from unreasonable searches and seizures, and another requiring that warrants not be issued except on probable cause. Several schools of thought have emerged. One contends that the framers understood the Fourth Amendment to imply a preference for warrants. *See generally* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791 (2009). Another contends that the Fourth Amendment merely requires that searches and seizures not be unreasonable. *See generally* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). Still another contends that the first clause of the Fourth Amendment was intended only to be a preamble and that the only purpose of the Amendment was to impose a limitation on the issuance of warrants. *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). Still another suggests that Davies does not go far enough and that the Fourth Amendment was originally understood only to restrict the issuance of warrants for the search of *houses*. *See generally* David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581 (2008).

constitution, for example, prohibit police officers from placing GPS locators on a suspect's automobile without first obtaining a warrant?[108]

Originalism of the traditional sort that looks for original meaning or intended application, simply does not work in such cases. The fact is that, in 1857, law enforcement practices and technology looked nothing like they do now.[109] Judges, who rode circuit, were routinely unavailable to issue warrants.[110] And even the most primitive radio transmitters were not to be invented for more than half a century. At best, what the examination of the text of the provision and its historical context will reveal is a general principle—for example, the protection of personal privacy from unwarranted government intrusion—that may be applied to modern circumstances.

Of course, the use of historical materials to provide context for a state constitutional provision and clues as to an appropriate level of generality with which to characterize the significance of those materials is fraught with difficulty. Judges are not often trained historians. But the fact that we are not experts does not mean that we are at liberty to simply disclaim the task. We must do our best to do it right. I have discussed elsewhere some of the problems that judges and lawyers encounter when inquiring into the historical circumstances of a state constitutional provision, and I will not repeat the discussion here.[111] Suffice it to say that examination of historical materials requires care and good judgment in the selection of materials, in the evaluation of the weight to ascribe to those materials, and in describing the significance of those materials.

108. *See*, *e.g.*, State v. Campbell, 759 P.2d 1040, 1049 (Or. 1988) (because placing a radio transmitter on a private individual's vehicle would represent a "staggering limitation on personal freedom," police must obtain a warrant before doing so); *see also* United States v. Maynard, 615 F.3d 544, 555-67 (D.C. Cir. 2010) (Fourth Amendment requires a warrant before placing a GPS locator on vehicle); United States v. Pineda-Moreno, 591 F.3d 1212, 1216-17 (9th Cir. 2010) (no warrant is required for securing a GPS locator to an automobile in public space); United States v. Garcia, 474 F.3d 994, 996-98 (7th Cir. 2007) (no warrant required).

109. *See generally* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 176-78 (1989) ("[T]he nineteenth-century police, taken as a whole, were far removed from modern urban law enforcement institutions."); Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law*," 77 MISS. L.J. 1, 222 (2007) ("[T]he modern police officer, and the modern police department, bears little resemblance to the framing-era constable working under the direction of the justice of the peace.").

110. Under Oregon's original constitution, for example, each of four justices of the Oregon Supreme Court was required to sit as a circuit court judge in designated counties at least twice a year. OR. CONST., art. VII (original), § 8. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 140-43 (2d ed., 1985) (describing circuit-riding practices of early to mid-nineteenth century judiciaries).

111. *See generally* Jack L. Landau, *A Judge's Perspective on the Use of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451 (2004).

c. Precedent and the Rule of Stare Decisis

Constitutional law consists of more than just the words of the constitution itself or even the process of interpreting those words. In nearly all cases, a question of constitutional interpretation will not be one of first impression and will, instead, be addressed in the context of prior judicial pronouncements or applications of the provision at issue. The question then arises: what weight should be accorded those prior interpretations of the state constitution? The question is especially important in the case of state constitutional interpretation, because the process of giving independent significance to state constitutional provisions—particularly individual rights provisions—often requires departing from prior case law that simply assumed that similar state and federal constitutional provisions have the same or similar meaning.

The virtues of stare decisis generally are familiar: adhering to prior decisions promotes stability, coherence, efficiency, and predictability, as well as promoting equal treatment under the law.[112] On the surface, at least, it seems intuitively comfortable to assume that those virtues support adhering to the principle of precedent in constitutional cases.

Other considerations cut against those virtues, however. It may become clear, for example, that a precedent was incorrectly decided either because of mistakes in research or reasoning or because it was based on assumptions or premises that have since been subject to significant change. Or, with the passage of time, there may develop a consensus that a prior decision has proven unworkable. The underlying concern, in each case, is the familiar one of legitimacy: Is the legitimacy of judicial review threatened more by continued adherence to doubtful precedent than by abandoning that precedent in favor of a decision more consonant with principled constitutional interpretation?

The question has prompted much debate among scholars. Some contend that, in the context of constitutional interpretation, stare decisis is not merely poor policy, but actually unconstitutional. The theory is that, if a constitution is supreme law, incorrect interpretations of it must be as unconstitutional as any legislation or executive decisions that are rendered in violation of its provisions.[113] Others contend that the virtues

112. For an interesting take on the historical development of the doctrine of stare decisis, *see generally* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAN. L. REV. 647 (1999).

113. *See, e.g.*, Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) ("Stare decisis is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution! It would have judges apply, in preference to the Constitution, that which is not consistent with the Constitution."); *see also* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) ("[T]he practice of

of judicial restraint that are promoted by adherence to precedent outweigh those of abandoning prior decisions in favor of "correct" constitutional interpretation.[114] Still others contend that stare decisis is not merely good policy, but more importantly is a principle of constitutional magnitude.[115]

Meanwhile, among the courts, there have emerged notions of "strong" and "weak" versions of stare decisis, depending on the nature of the decision. It is customary to trace the taxonomy to Justice Brandeis and his dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, in which he famously asserted that stare decisis "is not . . . universal inexorable command," but may depend on the source of law involved; in the case of the federal constitution, he asserted, the pull of precedent is perhaps less forceful because of the tremendous difficulty of correcting judicial decisions by constitutional amendment.[116] That notion, in turn, has been picked up by some who propose that state constitutional adjudication should be subject to an especially strong pull of stare decisis because such decisions are amenable to correction by constitutional amendment much more easily than are their federal constitutional counterparts.[117]

This is not the place for me to wrestle with the many subtle and difficult issues posed by the interplay between constitutional theory and stare decisis.[118] But I do offer a few general observations about stare decisis as it pertains to state constitutional interpretation.

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following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution.").

114. *See, e.g.*, Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005) (arguing that, because of the importance of judicial restraint, adherence to precedent is more important than arriving at correctly reasoned, originalist constitutional decisions).

115. *See, e.g.*, Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 572 (2001) ("Stare decisis, . . . is a doctrine of constitutional magnitude. . . .").

116. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting); *see also* Comm'r v. Estate of Church, 335 U.S. 632, 677 (1949) (Frankfurter, J., dissenting) (drawing a distinction between overruling a constitutional decision "without waiting for the leadenfooted process of constitutional amendment" and respecting a prior construction of "what Congress has enacted with ample powers on its part quickly and completely to correct misconstruction.").

117. *See, e.g.*, Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 274 (2001) ("While congressional correction of a federal constitutional decision is nearly impossible, amending the state constitution is substantially easier. Because it is far easier for the Legislature and the people to make extra-judicial corrections to any clearly erroneous interpretations of the state constitution, the doctrine of stare decisis should be applied with heightened rigor to the 1901 Constitution.").

118. The subject has become popular in the law reviews in recent years. *See, e.g.*, Symposium, *Originalism and Precedent*, 5 AVE MARIA L. REV. 1 (2007); Symposium,

I take as given the benefits of adhering to the doctrine of stare decisis, even in the context of state constitutional interpretation. Who would be willing to say that stability, coherence, efficiency, and predictability are not important values in any system of law? But it also seems to me that the pull of stare decisis, with all of its virtues, must have limits. Precisely because constitutional interpretation is supposed to be driven by the application of legal principles, and not by the personal predilections of judges, if a prior decision turns out to have been incorrectly decided, judges should, if anything, be eager to correct the mistake.

That is because precedent, in effect, compromises the integrity of interpretation; adherence to prior cases that were wrongly decided means that, in a very real sense, cases are not being decided in accordance with the law.[119] When a prior case is truly incorrect, then, it seems to me that the very legitimacy concerns that always lurk behind state constitutional decision-making suggest that precedent should give way to principle.

I am skeptical of the argument that, because state constitutions are easier to amend than the federal constitution, state constitutional decisions should be subject to a stronger, not a weaker, pull of precedent. To begin with, why the benchmark should be the process for amending the federal constitution is not obvious to me. It seems to me that the point is not how state constitutions compare with the federal constitution, but rather the nature of state constitutions as *constitutions* in relation to other forms of state law.[120] If the relative ease of amendment is the relevant consideration, then it seems to me that the more important comparison is the relative *difficulty* of amending state constitutions in relation to legislative alteration of state statutes in response to state court statutory construction decisions. Thus, as with federal constitutional precedent, state constitutional precedent, if anything, should be less subject to the constraints of stare decisis.

That does not mean that, as some scholars suggest, stare decisis should not apply at all. The argument that precedent must give way to a correct interpretation of a constitution presupposes that an obviously "correct" interpretation exists. I have no doubt that, in many cases, that is precisely the case. And, in such cases, if it can be shown that prior

Can Originalism Be Reconciled with Precedent? A Symposium on Stare Decisis, 22 CONST. COMMENT. 257 (2005).

119. *See* Paulsen, *supra* note 113, at 289 ("Whatever one's theory of constitutional interpretation, a theory of stare decisis, poured on top and mixed in with it, always corrupts the original theory.").

120. WILLIAMS, *supra* note 3, at 351 ("Regardless of the relative ease of amending state constitutions when compared with the federal Constitution, the fact remains that, in an absolute sense, state constitutions are the highest source of law in any given state, and they are much harder to change than common law or statutory law.").

cases cannot be reconciled with the wording of the constitution properly considered in its context and in light of applicable rules of construction, the prior cases should be abandoned. An excellent example may be found in my own state's case law.

In 1993, the Oregon Supreme Court declared in *Lloyd Corp. v. Whiffen*[121] that the Oregon Constitution protects the right of individual citizens to collect initiative petition signatures on the premises of shopping centers. The court identified nothing in the state constitution that says anything about such a right. The court simply declared that the right to collect signatures in the "common areas" of shopping centers is "implicit" in the nature of the initiative process, subject to reasonable time, place, and manner restrictions.[122] The decision was especially odd, given that the court had just decided, a matter of a few months earlier, to adopt a more or less originalist approach to state constitutional interpretation, which emphasized fidelity to the text and the historical context of a state constitutional provision.[123]

Over the course of the next seven years, much litigation resulted over the nature of this state constitutional right, its source, its contours, and its extent. (What, for example, constituted the "common areas" of "shopping centers"?) Each time the matter came to the Supreme Court, the court could not muster even a majority to decide such questions.[124] Meanwhile, in *Stranahan v. Fred Meyer*,[125] it was suggested that *Whiffen* should be overruled because it could not be reconciled with the court's adopted principles of constitutional interpretation and had proven unworkable. The court agreed.[126] Not only that, the court declared that it was willing to consider other prior rulings under the state 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

121. Lloyd Corp. v. Whiffen, 849 P.2d 446 (Or. 1993).

122. *Id.* at 452-53.

123. Priest v. Pearce, 840 P.2d 65, 67 (Or. 1992) (interpretation of a provision of the state constitution consists of three steps, namely, analysis of "[i]ts specific wording, the case law surrounding it, and the historical circumstances that led to its creation").

124. In one case, *State v. Cargill*, 851 P.2d 1141 (Or. 1993), the supreme court held the petition for three years before concluding that it could not reach a decision and affirmed the lower court by an equally divided court. In another, *State v. Dameron*, 853 P.2d 1285 (Or. 1993), the court generated six different opinions without a majority agreeing on any single theory of the case.

125. Stranahan v. Fred Meyer, 11 P.3d 228 (Or. 2000).

126. *Id.* at 243.

> usual paradigm for considering and construing the meaning of the provision in question.[127]

Precisely.

But it is not always easy to establish that a prior case actually was wrongly decided. And later courts cannot be seen to jettison the decisions of earlier courts merely because they disagree with them. Particularly when the prior cases involve the interpretation of older, broader, more open-ended provisions for which neither language nor history provide clearly correct answers, it seems to me that the arguments in favor of a less robust stare decisis simply do not apply.

Moreover, in my view, in order for stare decisis to apply, the earlier decision must represent a considered and authoritative attempt to determine the meaning of a given constitutional provision. If a prior decision includes a passing *dictum* concerning the meaning or effect of a constitutional provision, I do not think it is necessarily entitled to any weight in future cases. A prior decision must draw its authoritative nature from the fact that the decision was reached by means of application of appropriate principles of law.

In a similar vein, it seems to me that a prior decision is entitled to stare decisis effect only if it represents an application of the principles of state constitutional interpretation that a court has made applicable to the task.[128] A prior decision, for example, that merely assumes without any analysis that a state individual rights provision has the same meaning that the federal courts have given its parallel provision in the federal Bill of Rights should have no particular binding effect.

This is important in the context of state constitutional interpretation, for it is often the case that, before the state constitutional "revolution" of the 1980s, state courts tended to interpret their own constitutions without much regard for interpretive principles, indeed, without much regard for the independent significance of state constitutions at all.[129] Such decisions, in my view, should not impede a more coherent state constitutionalism.

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127. *Id.* at 237.

128. *Cf.* Randy E. Barnett, *Trumping Precedent With Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 267 (2005) ("[A]ny epistemic presumption of correctness should only be extended to previous decisions that actually attempted to discern original meaning. Decisions that abjure original meaning can hardly be presumed to have been correctly decided on originalist grounds.") (internal quotations omitted).

129. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976) (noting that state courts fell "into the drowsy habit of looking no further than federal constitutional law.").

d. Hard Cases and Candor

Most state constitutional cases can be decided correctly on the basis of the principles that I have described. In fact, most state constitutional cases could be decided on the basis of practically any set of recognized interpretive principles—textualist, originalist, or otherwise—mainly because most cases are capable of resolution by reference to a fairly unambiguous constitutional text.[130] In spite of the impression that the deluge of academic analysis of constitutional decisions might otherwise suggest, most cases are not that difficult.

But some are. Some, in fact, are quite difficult, because of ambiguity of the text, a lack of information about what the framers or voters understood it to mean, the passage of time, and the occurrence of changes that neither framers nor voters could have possibly imagined. In such cases, the rules—any rules—will come up short.

For example, in cases involving older rights provisions that are broad and open-ended, courts will confront the problem of generalization; that is, at what level of generality or specificity should the court describe the principle that the wording and the history of a state constitutional provision reveal? The problem, as I have earlier noted, is unavoidable. Unless, for instance, a nineteenth-century right to bear arms provision is to be limited to nineteenth-century weapons technology—a position that I assume to be obviously untenable—some sort of generalization is necessary to apply the provision to modern circumstances. The question is the particular level of generality that is appropriate.

There is no easy answer to that question. Some scholars suggest that the solution is to employ the level of generality that the wording and the history suggest is appropriate.[131] Aside from the inherent circularity

130. *See, e.g.*, Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think* (2008), 108 MICH. L. REV. 859, 861-62 (2010) (book review) (Although the vast majority of appellate court decisions are unanimous, academic writing on the subject is skewed by an emphasis on "the most difficult statutory and constitutional questions, the most indeterminate legal issues, the ones most likely to leave the impression (fair or not) that the policy preferences of the judges . . . enter the mix. . . ."); Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 272-73 (2008) ("Even in the most ideologically contested domains, most decisions are unanimous. . . ."). *See also* Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U.L. REV. 1409, 1409-10 (2000) (Although Seventh Circuit judges Richard A. Posner and Frank Easterbrook's theoretical writings reveal approaches to interpretation that "are as far apart as two judges could be," their actual decisions show remarkable unanimity, showing the relationship between theories of interpretation and outcomes to be "quite limited.").

131. Robert Bork, for example, asserts that "[o]riginal understanding avoids the problem of the level of generality . . . by finding the level of generality that interpretation of the words, structure, and history of the Constitution fairly supports." BORK, *supra* note

of the suggestion, it strikes me that there is no way to be sure about the answer; any number of different levels of generality will be perfectly consistent with the wording and the history of a given provision.

Precisely how judges actually do, as well as how they should, decide such indeterminate questions has been the subject of vigorous and searching scholarship for nearly a century, at least since the publication of Cardozo's famous *The Nature of the Judicial Process*.[132] Some insist that the inquiry always should be tied to established legal principles, in particular, what we know about the original meaning of the provision.[133] Others propose that more "pragmatic" considerations, such as the social or economic consequences of different decisions, should be taken into account.[134] Still others suggest that larger constitutional values—Justice Breyer's "active liberty" comes to mind—are key to deciding these difficult cases.[135]

I am not prepared to stake out a position in that particular skirmish; I am not aware of anything about the nature of state constitutions that intrinsically favors one approach over another. What I do contend, however, is that, whatever a court determines is the appropriate consideration or set of considerations in deciding these hardest of hard cases, it should be candid about what it is doing.

Once again, my concern is legitimacy. Even in cases in which rules fail—in fact, *especially* in cases in which rules fail—it seems to me important for courts to be transparent about their reasoning. Because the principal rationale for judicial review is that the interpretation of constitutions entails the application of legal principles, courts should explain their interpretive decisions, so that it is clear that they have a basis in reason and not merely the personal policy preferences of the judges involved.[136] Moreover, because of the fact that so many state

58, at 150; *see also* Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 679 (1991) ("[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.").

132. *See generally* CARDOZO, *supra* note 103.

133. *See generally* Tribe, *supra* note 77, at 37-47.

134. *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK (2008).

135. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

136. *See* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990-91 (2008) ("[J]udges are charged with the responsibility of adjudicating legal disagreements between citizens. As such, their decisions are backed with the collective and coercive force of political society, the exercise of which requires justification. It must be defended in a way that those who are subject to it can, at least in principle, understand and accept. To determine whether a given justification satisfies this requirement, judges must make public the legal grounds for their decisions. Those who fail to give sincere legal justifications violate this condition of legitimacy."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("A requirement that judges give

court judges are elected, it becomes especially important for them to lay bare their decisions in a candid way, so that those decisions may be fairly evaluated by the electorate.[137] Aside from that, candor in judicial decision-making is critical to providing guidance to future litigants; if the decisions are being made for reasons other than those stated, then the stated reasons may serve only to lead future litigants astray.[138]

I am aware of arguments against such candor in judicial decision-making, arguments that—strangely enough—are also predicated on legitimacy concerns. Some argue that a certain amount of subterfuge is necessary to preserve doctrinal clarity and to make judicial decisions appear driven by the application of neutral and mechanical doctrinal principles.[139] In my view, no one will be actually fooled by the subterfuge and legitimacy will be undercut in the process.[140]

For instance, some courts that have staked out a more or less originalist approach to state constitutional interpretation will strain to support their decisions by references to historical sources and the supposed intentions or understandings of the framers in ways that are simply not credible. A good example is presented by the decision of the Oregon Supreme Court in *State v. Cookman*,[141] which required the court to assess the meaning of the state *ex post facto* clause, part of the original Oregon Constitution of 1857. As it turns out, the framers of the constitution adopted the without recorded debate. The court nevertheless found the intended meaning of the clause by reasoning that the clause appeared to be patterned after a similarly worded provision of the 1851

reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power. In the absence of an obligation of candor, this constraint would be greatly diluted. . . .").

137. *See, e.g.*, GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 35 (2009) ("[T]ransparency enables the citizenry to assess the correctness or wisdom of judicial decision-making and is therefore central to the legitimacy of constitutional interpretation by independent courts.").

138. *See, e.g.*, Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1300 (2008) ("Insofar as the functions of judicial opinions include those of providing guidance to parties who must structure their affairs in accordance with law and judges who must render decisions in accordance with law, it is important that judicial opinions speak as fully and candidly as they can to why the court decided as it did. If a court issues opinions that speak only of doctrine where doctrine does not capture all of the factors driving its decisions, parties and judges looking to act in such a way as to not run afoul of that court will lack all the information they need to do so.").

139. *See, e.g.*, Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1388 (1996) ("[A]uthoritativeness, or the related concept of institutional legitimacy, may also be significantly preserved through the avoidance of candor.").

140. *See* Shapiro, *supra* note 136, at 737 ("[L]ack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.").

141. State v. Cookman, 920 P.2d 1086 (Or. 1996).

Indiana Constitution, which was based on a similarly worded provision of the 1816 Indiana Constitution, which, in turn, had been interpreted by the Indiana Supreme Court in 1822, which interpretation the Oregon court found dispositive because the Indiana court's decision was, at least theoretically, "available" to the framers of the Oregon Constitution 35 years later.[142] Does anyone really believe that the voters in Oregon had in mind the 1822 Indiana Supreme Court decision concerning the 1816 Indiana Constitution when they approved the 1857 Oregon Constitution? Of course not.

IV. CONCLUSION

There is much more to state constitutional interpretation than what I have covered—canons of construction, presumptions of constitutionality, the use of historical materials evidencing the intentions or understandings of voters, the relevance of the interpretation of state constitutional provisions from other states (particularly of provisions borrowed from other states), the weight to be given contemporaneous legislative construction of state constitutional provisions, and the special challenges associated with resolving inconsistencies in frequently amended state constitutions are just a few of the many issues that easily come to mind. I have attempted to address what I see as the three core issues related to the interpretation of state constitutions—the foundational question regarding whether we should engage in state constitutional interpretation at all; the secondary question pertaining to the timing of such interpretation, particularly in relation to the interpretation of parallel provisions of the federal constitution; and, finally, some fundamental issues relating to the method of determining what state constitutions mean.

More can and should be said about even the questions that I have addressed. As I have noted, state constitutional interpretation is a subject that is woefully underappreciated both by the courts and scholars. That is truly unfortunate, for state constitutions and their interpretation are becoming ever more significant in our "compound republic," as state—not federal—courts are confronted with the most difficult and controversial social issues of the day.

142. *Id.* at 1093.