

IN THE BALANCE: THOUGHTS ON BALANCING AND
ALTERNATIVE APPROACHES IN STATE CONSTITUTIONAL
INTERPRETATION[†]

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*“Thou art weighed in the balances, and art found wanting.”*¹

The scales Lady Justice holds conjure notions of balance and fairness because the scales “may be the mechanism by which . . . a person ‘receives that which is due, . . . no more and no less.’”² The scales can represent the ways in which courts balance competing interests in a particular case. However, “[t]he scales, like the sword, have potential for absolute rather than compromised outcomes.”³ This essay explores the different ideas represented by the scales, examining two approaches to constitutional adjudication: one approach has been described as a “balancing” approach and the other approach may be called a “categorical” approach. In particular, this essay examines the two approaches from the perspective of Oregon courts, which have identified problems associated with a balancing approach and yet have found it difficult to abandon balancing altogether.

Like other descriptions used in discussing constitutional interpretation, the labels “balancing” and “categorical” are necessarily imprecise. As we discuss below, what we call here the “categorical” approach is sometimes associated with what others have described as “modest literalism” and also “textualism.” It does not necessarily imply the “originalist” textualism often associated

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¹ *Daniel* 5:27 (King James).

² Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 *YALE L.J.* 1727, 1755 (1987) (quoting CESARE RIPA, *BAROQUE AND ROCOCO PICTORIAL IMAGERY* 120 (Edward A. Maser ed., 1971)).

³ *Id.* at 1755.

with Justice Antonin Scalia, although it has similarities to that approach—and, as we argue, some of the same strengths and weaknesses as a way of deciding constitutional cases. “Balancing,” too, is an imprecise term, but, as we elaborate below, it captures one common way in which courts interpret and apply constitutional (and other) texts.

Moreover, although this essay at times discusses the balancing approach and the categorical approach as methods of constitutional “interpretation,” they might more accurately be called methods of constitutional “adjudication” or “application.” “Interpretation” suggests examining the meaning of a constitutional provision as a conceptual matter. The balancing approach and the categorical approach, however, are ways of understanding how constitutional text operates in particular cases, which, of course, is the way constitutional law proceeds. Rather than defining one word or phrase in the constitution—what does “unreasonable” or “expression” mean—those approaches analyze how a constitutional provision functions in relation to a set of facts: Is a police officer’s warrantless search of the curtilage unreasonable? Is an advertisement on a city bus protected expression? Nonetheless, because most scholarly discussions regarding the balancing and categorical approaches speak in terms of “interpretation,” and because “interpretation,” broadly defined, could be said to include adjudication and application, we use that word in this essay.

Although a balancing approach can take different forms, at its core, balancing as a means of deciding constitutional cases involves weighing the competing interests implicated by the constitutional provision at issue in light of the facts of a particular case.⁴ Balancing may, at least in some cases, stand in contrast to a textual approach to constitutional interpretation; because the constitutional provisions under consideration rarely use the words “balancing” or “interests,” the balancing approach often requires courts to look

⁴ T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987) (“[A] balancing opinion . . . [is] a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests.”). Of course, courts engage in balancing in many other areas of law, such as determining whether relevant evidence should be excluded because its “probative value is substantially outweighed” by other considerations. FED. R. EVID. 403; OR. EVID. CODE 403. In other contexts, balancing may present different advantages or difficulties not explored in this essay.

beyond the text in considering the interests at stake.⁵ Even when the constitutional text arguably invites balancing, such as when the constitution uses the word “unreasonable,”⁶ the interests to be balanced will not necessarily be found in the text.⁷

The balancing approach is ubiquitous in federal constitutional analysis.⁸ It also appears in cases in state courts, particularly when state courts apply federal constitutional analysis in the interpretation of state constitutional provisions that have federal analogues.⁹ In Oregon, which embarked on a path of independent interpretation of its own constitution some thirty years ago, the Oregon Supreme Court shifted to a greater emphasis on the text of the constitutional provisions that it was interpreting.¹⁰ That approach, in turn, caused the Oregon court to attempt to interpret and apply the words used by the constitution’s framers and to look with greater skepticism at balancing tests that weighed competing “interests” not spelled out in the constitutional provisions themselves. Thus, in an array of cases beginning in the late 1970s and early 1980s, the Oregon court identified problems associated

⁵ See Jack L. Landau, *Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law*, 43 WILLAMETTE L. REV. 251, 254 (2007) (noting that Justice Hans Linde was averse to balancing “precisely because constitutional texts do not support it”).

⁶ *E.g.*, U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .”).

⁷ Aleinikoff, *supra* note 4, at 947 (“The interests considered in balancing opinions may or may not, be grounded in the Constitution.”).

⁸ See, *e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 357 (2003) (“[M]any constitutional cases employ a ‘balancing’ test in which the case-specific consequences that favor one outcome are weighed against the case-specific consequences that favor the opposite outcome.”); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 2 (1987) (“[A]part from issues of the Court’s own jurisdiction, no area of constitutional law was immune from Powell’s balancing approach.” (footnote omitted)). As discussed below, it is important to note, however, that the Court has started to reject the balancing approach, at least in some constitutional cases. See *infra* text accompanying notes 48–50 (discussing the Court’s rejection of a balancing test in *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010)); Kathleen M. Sullivan, *Categorization, Balancing, and Government Interests*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 241, 241 (Stephen E. Gottlieb ed. 1993) (“[T]here is currently a significant movement afoot on the Supreme Court to eliminate balancing from constitutional law in favor of categorical approaches.”).

⁹ See *infra* Part II.A, (discussing Oregon cases where balancing approach has been used). For a case from another state that has used the balancing approach, see, for example, *State v. Downey*, 945 S.W.2d 102, 110 (Tenn. 1997) (adopting federal balancing test to analyze sobriety roadblocks under the state constitution).

¹⁰ See, *e.g.*, *State v. Clark*, 630 P.2d 810, 814–17 (Or. 1981) (engaging in analysis of Oregon’s privileges or immunities provision independent of federal equal protection analysis, focusing on the text, the history surrounding adoption of the privileges or immunities provision, and the case law interpreting that provision).

with using a balancing approach in constitutional cases and began exploring alternative approaches.¹¹

One of the alternative modes of analysis that the Oregon court explored has been called a categorical approach. Like a balancing approach, a categorical approach can take different forms.¹² In Oregon, the court focused on the constitutional text to identify relevant categories of rights, interests, or government actions that the constitution's drafters intended to protect, require, or prohibit.¹³ After defining the scope of those categories, the court would determine if the conduct at issue—whether private conduct or government action—came within the constitutionally prescribed category.¹⁴ That determination generally led to the court's resolution of the case, regardless of whether competing "interests," if balanced against one another, might have suggested a different result.¹⁵ For example, if a publication fell within the category of "speech," the government could not regulate that expression—absent a well-established historical exception—even if the government had a compelling reason for doing so. Thus, while the categorical approach allowed the court to avoid the case-by-case weighing of opposing interests, it often required the court to engage in line-drawing when deciding whether a particular private or government action fell within the scope of the category.¹⁶

¹¹ See, e.g., *Libertarian Party of Or. v. Roberts*, 750 P.2d 1147, 1151 (Or. 1988) ("A court's proper function is not to balance interests but to determine what the specific provisions of the constitution require and to apply those requirements to the case before it.")

¹² See Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 672–73 (1983) (discussing different forms of the categorical approach, specifically in the context of the First Amendment).

¹³ See, e.g., *Libertarian Party of Or.*, 750 P.2d at 1151–55 (holding that an Oregon statute requiring a political organization to obtain electoral support of five percent was constitutional in part because the statute did not infringe upon a right within the freedom of "political expression" category); *City of Portland v. Tidyman*, 759 P.2d 242, 244 (Or. 1988). See generally Schlag, *supra* note 12, at 673 (identifying that within the category of free speech are subcategories, including political and commercial speech).

¹⁴ See *Libertarian Party of Or.*, 750 P.2d at 1152–55; see also *Tidyman*, 759 P.2d at 245–46 (holding that the Oregon statute classifying the operation of an adult bookstore as a public nuisance was unconstitutional because the activity fell within the "free expression" category under an Article 1, section 8 analysis).

¹⁵ See *Tidyman*, 759 P.2d at 247–48, 249 n.12 (concluding that a balancing test was inappropriate and that the statute at issue was unconstitutional, regardless of the state's interest in protecting the public from obscene "adult" materials).

¹⁶ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 792 (2d ed. 1988) (discussing how a categorical approach involves applying "the lines the Court has drawn" to distinguish protected and unprotected activity). As discussed more fully below, those who criticize a categorical approach argue that it does not avoid the weighing of interests. See *id.* (noting that those who advocate for balancing argue that although balancing "takes the form of an

Of course, these two approaches did not arise in a vacuum, and they are relevant only in helping to understand how particular constitutional provisions are applied in actual cases. Courts interpreting the constitution must inevitably start with the text, and both a categorical approach and a balancing approach begin from that premise. But the text of provisions found in both the U.S. Constitution and the Oregon Constitution can support both approaches: some constitutional provisions are “impossibly absolute,” and others are “inherently indeterminate.”¹⁷ For example, as discussed more fully below, article I, section 8 of the Oregon Constitution provides, in part, that “[n]o law shall be passed restraining the free expression of opinion,”¹⁸ which appears to be a categorical prohibition of laws expressly restricting free expression. In contrast, article I, section 9 of the Oregon Constitution protects people “against unreasonable search, or seizure”¹⁹ and thus appears to invite case-by-case analysis of what qualifies as “unreasonable.” Beyond the text, both approaches may also account for values and interests that are not explicitly set out in the text, but that nevertheless underlie the constitutional purposes. The categorical approach maintains its focus on the text by examining the interests that the framers enshrined in the constitution, and the balancing approach maintains its flexibility by focusing on the often more contemporary interests asserted by the parties in a particular case.²⁰ Thus, while both approaches examine the text and certain values or interests in trying to understand and apply the meaning of a constitutional provision, the approaches diverge in how they define and examine the text and relevant interests.

In this essay, we begin by introducing the “balancing” approach to constitutional adjudication and discussing some of the flaws that the Oregon court perceived in that approach. We then examine Oregon’s use of an alternative, categorical approach to interpreting key constitutional provisions, as well as several more recent cases in which the Oregon Supreme Court has seemed to question (or has

explicit evaluation of the importance of the governmental interests said to justify each challenged regulation, similar judgments underlie . . . categorical definitions” (footnote omitted)).

¹⁷ Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 851 (2011).

¹⁸ OR. CONST. art. I, § 8.

¹⁹ OR. CONST. art. I, § 9.

²⁰ See Aleinikoff, *supra* note 4, at 945; Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 305–06 (1992).

been asked to question) the implications of a “strong” categorical approach. The essay concludes by suggesting that courts should acknowledge that, while each approach has flaws as a comprehensive theory of constitutional interpretation both approaches can be valuable tools in deciding state constitutional cases.

I. THE BALANCING APPROACH TO CONSTITUTIONAL INTERPRETATION

Professor Aleinikoff has offered a thoughtful analysis and critique of balancing in federal constitutional decision making.²¹ He defines balancing as an approach that identifies the competing interests at stake in a particular case and reaches a decision by assessing the relative values of those interests.²² Aleinikoff argues that the balancing approach was first explicitly adopted by the U.S. Supreme Court in the late 1930s and early 1940s when the Court began to approve state and federal social legislation that had been held unconstitutional in earlier years.²³ He traces the impetus for balancing back to turn-of-the-century attacks by Holmes and other legal realists on legal formalism and the related push for a more pragmatic approach to constitutional interpretation.²⁴

Aleinikoff suggests that constitutional cases from the first half of the nineteenth century—including leading opinions by Justices Marshall, Story, and Taney—had recognized and addressed the strong competing “interests” often at stake in constitutional adjudication—“federal versus state, public versus private, executive versus legislative, free versus slave.”²⁵ Those cases were not decided, however, by judicial balancing of those interests, but more often were resolved in a “categorical” fashion.²⁶ Thus, in *Cooley v. Board of Wardens*,²⁷ the Court reviewed a state’s rule regarding the use of local pilots for ships entering the Philadelphia harbor to determine whether those rules impermissibly interfered with

²¹ See generally Aleinikoff, *supra* note 4, at 943–45 (describing the rise of the “balancing” approach and how it has transformed adjudication of constitutional issues).

²² *Id.* at 945. See also POSNER, *supra* note 8, at 63 (“A balancing test means the weighing of case-specific consequences . . .”).

²³ See Aleinikoff, *supra* note 4, at 948–49, 952–63 (discussing the historical origins of balancing analysis).

²⁴ See *id.* at 949, 954–58.

²⁵ *Id.* at 949.

²⁶ *Id.*

²⁷ *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851).

Congress's power to regulate interstate commerce.²⁸ In doing so, the Court did not balance the state's interest in regulation against the burden on interstate commerce; rather, the Court examined Congress's constitutional authority to regulate interstate commerce and shipping and determined that Philadelphia's rules concerned "local necessities of navigation" and were not of a "nature" that required a uniform federal rule.²⁹ That is, once the Court categorized the state rules as focused on local—rather than national—issues, the Court determined that the rules were permissible.

Once the balancing approach did emerge—as the Court began to uphold New Deal and other regulatory legislation in 1937—the Court applied it frequently.³⁰ The Court used balancing to analyze cases involving the Commerce Clause,³¹ executive privilege,³² and the Takings Clause.³³ In the latter half of the twentieth century, balancing became "the central metaphor for procedural due process analysis"³⁴ and "the key principle of the Fourth Amendment,"³⁵ and the approach now "dominates major areas of constitutional law."³⁶ Balancing has also long been an important aspect of First

²⁸ *Id.* at 319; Aleinikoff, *supra* note 4, at 950.

²⁹ Aleinikoff, *supra* note 4, at 950–51 (quoting *Cooley*, 53 U.S. at 319).

³⁰ See Aleinikoff, *supra* note 4, at 953, 963–65. Although Professor Aleinikoff asserts that balancing became "widespread, if not dominant" in constitutional interpretation, he focuses almost entirely on U.S. Supreme Court cases and does not consider state constitutional interpretation. *Id.* at 943–44. However, for almost a decade before Aleinikoff's article, the Oregon Supreme Court consistently was expressing an aversion to balancing in cases interpreting the state constitution. See, e.g., *Sterling v. Cupp*, 625 P.2d 123, 129 (Or. 1981) (criticizing "elasticity in the face of important public policies" of the federal right to privacy and noting the text of the state constitution provided a "more cogent premise" for analysis).

³¹ See, e.g., *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670–71 (1981) (finding that Iowa's truck-length limitations unconstitutionally burdened interstate commerce because the illusory state safety interest was outweighed by significant impairment of federal interest in "efficient and safe interstate transportation").

³² See, e.g., *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.").

³³ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("[T]he Court's [taking] decisions have identified several factors that have particular significance [including] . . . [t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations."). Professor Aleinikoff compiled an extensive list of the types of cases in which the Court has applied a balancing test. See Aleinikoff, *supra* note 4, at 971.

³⁴ Aleinikoff, *supra* note 4, at 965.

³⁵ *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)) (internal quotation marks omitted).

³⁶ *Id.* at 965.

Amendment analysis, although, as we shall see, the Court has moved towards a more categorical approach in at least some cases.³⁷

Defenders of balancing argue that it “provide[s] flexibility without sacrificing legitimacy.”³⁸ The balancing approach recognizes that legal decisions have practical implications and that a pragmatic, flexible approach to judicial decision-making often produces more useful decisions—and decisions more attuned to circumstances unknown to the constitution’s framers—than a purely logical or mechanistic approach. Moreover, as balancing was embraced by the post-New Deal Court, it had the virtue of providing a rationale for decisions that permitted social ends favored by the judges.³⁹ By focusing on what were described as objectively identifiable “interests,” balancing also claimed to avoid a fundamental challenge to the legitimacy of judicial review in a democratic system—that judges simply decide cases on the basis of the result that they subjectively prefer.⁴⁰ Advocates of balancing agreed that judges had to make “choices” in interpreting and applying constitutional provisions—cases could not simply be decided by applying logic and mechanical formulas—but they argued that they were able to identify the interests at stake, weigh them objectively, and by that process reach defensible decisions.⁴¹ As a result, those supporting balancing say that it “fits our usual conceptions and metaphors of justice, fairness, and reasonableness.”⁴²

Simply articulating these claims in support of balancing suggests some of the limitations of the approach, and judicial experience with balancing reveals other shortcomings. Even beginning with Aleinikoff’s uncontroversial definition of balancing as the identification and weighing of different interests implicated in the analysis of a particular constitutional provision, we confront an

³⁷ *Id.* at 966 (“Balancing, of course, has had a long affair with the First Amendment.”); see also Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1449 (1962) (indicating that the balancing test used in First Amendment analysis distorts the meaning of the amendment); Alexander Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4, 13 (1961) (“[T]he ‘balancing theory’ is . . . an unusable[] figure of speech.”); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 251–52 [hereinafter Meiklejohn, *The First Amendment is an Absolute*] (discussing Justice Harlan’s understanding of the balancing doctrine). *But see infra* text accompanying notes 48–50 (discussing the categorical approach applied by the Supreme Court in a recent First Amendment case).

³⁸ Aleinikoff, *supra* note 4, at 961.

³⁹ *Id.* at 962–63.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 962.

initial difficulty with the concept, because it focuses on “interests,” but fails to describe how those interests are to be determined and weighed.⁴³ Aleinikoff notes that when balancing is applied, for example, to a statute criminalizing the distribution of child pornography challenged under the First Amendment, it may involve weighing “the evil” of the distribution of child pornography against “the expressive interests, if any, at stake.”⁴⁴ Yet the First Amendment itself is structured as a restriction on government action—“Congress shall make no law . . .”—and, in its reference to expression, explicitly refers only to free speech and the press.⁴⁵ Thus, there is no textual suggestion that the “evil” sought to be addressed by a statute restricting expression is an “interest” that the Court should be concerned with at all. Nor is there any textual support for the notion that a statute limiting expression should be evaluated to determine whether it is consistent with the First Amendment by balancing those two interests. Indeed purely as a textual matter, the First Amendment looks more like an absolute restriction on laws “abridging the freedom of speech,”⁴⁶ and there is,

⁴³ That definition also assumes that there are interests that can be determined and weighed, which can be a particularly problematic assumption when examining provisions in state constitutions that allocate government power. It may be difficult to analyze those provisions in terms of government interests because those provisions can be viewed as “formulat[ing] how government is to govern” rather than describing “how judges are to exercise judicial review.” *City of La Grande v. Pub. Emps. Ret. Bd.*, 576 P.2d 1204, 1210 (Or.), *aff’d on reh’g*, 586 P.2d 765 (Or. 1978). For example, in interpreting Oregon’s home rule provision in article XI, section 2, of the Oregon Constitution to determine whether the state could require cities to provide police officers and firemen with retirement and insurance benefits, the Oregon Supreme Court avoided balancing the interests of the state and the local government:

The accommodation of state and local authority over the processes of city government at least involves comparable interests—the citizens’ interests in responsible government, in elections, in official accountability, in the procedures of policy planning and decision, taxing and borrowing, and the like. . . . When a comparison of competing policies is pressed . . . to all conflicts between state and local acts, . . . it must often involve a choice among values that have no common denominator either in or outside the constitution.

Id. at 1210–11. The court determined that, in applying Oregon’s home rule provision, it could not resolve a conflict between state and local policy based purely on interest-balancing because the dispute could not be framed in terms of “government” interests, and policy decisions had to be left to the other branches of government. *Id.* Thus, the assumption underlying the balancing approach—that there are interests that can be determined and weighed—may not be justified in applying certain constitutional provisions.

⁴⁴ Aleinikoff, *supra* note 4, at 946 (quoting *New York v. Ferber*, 458 U.S. 747, 763–64 (1982)) (internal quotation marks omitted).

⁴⁵ U.S. CONST. amend. I.

⁴⁶ *Id.*; Hans A. Linde, “*Clear and Present Danger*” *Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1183 & n.66 (1970) (suggesting that the First Amendment is “an ‘absolute’ prohibition against *making such laws* [directed in terms against speech]”). See also Meiklejohn, *The First Amendment is an Absolute*, *supra* note 37, at 246–48

of course, a vast literature on “absolutist” as opposed to “balancing” interpretations of the First Amendment.⁴⁷

Yet an absolutist approach to the First Amendment presents its own issues. Once certain expressive conduct is identified as “speech,” particularly “political speech,” it generally follows that no government regulation of the timing or dissemination of that expression is permitted. In *Citizens United v. Federal Election Commission*, for example, the Court eschewed the balancing approach often applied in First Amendment cases and adopted a more categorical or absolutist approach to government restrictions on political expression by any individual or group: if the expression was political speech, it could not be restricted.⁴⁸ In dissent, Justice Stevens argued that the Court had consistently rejected an “absolutist” approach to the First Amendment,⁴⁹ noting that when “restrictions [on speech in particular settings] are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.”⁵⁰ At the very least, *Citizens United* illustrates the shifting use of balancing and categorical approaches by different members of the Court and the kinds of arguments that can be made in support of or opposition to each.

Despite the Court’s categorical approach in *Citizens United*, the Court uses balancing in many areas of constitutional law, and the debate over its strengths and weaknesses continues. In addition to the criticisms noted above, Aleinikoff marshals other objections to the balancing approach, beginning with the observation that balancing requires a court to “measur[e] the unmeasurable . . . [and] compare the incomparable.”⁵¹ He goes on to question the ability of courts to identify the myriad of interests—individual, group, and governmental—at stake in many constitutional cases, and the

(discussing Justice Black’s “absolutist thesis” regarding the First Amendment and other provisions of the Bill of Rights).

⁴⁷ See, e.g., TRIBE, *supra* note 16, at 792–94 & nn.19–30 (discussing the “absolute” versus “balancing” controversy and citing authorities on each side).

⁴⁸ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 347–56 (2010).

⁴⁹ *Id.* at 420 (Stevens, J., dissenting) (quoting *Fed. Elec. Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482 (2007)).

⁵⁰ *Id.* at 419–22 (footnote omitted). Oregon, too, has taken its “categorical” approach to free expression cases down a path that some have criticized. As we discuss below, the Oregon Supreme Court’s holding that various limits on campaign expenditures and contributions are unconstitutional under the state constitution has led to efforts to overturn that result by constitutional amendment. See *infra* notes 134–49 and accompanying text.

⁵¹ Aleinikoff, *supra* note 4, at 972 (alterations in original) (quoting Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 748 (1963)).

appropriate measurement of those interests,⁵² before raising an entirely different set of questions centered on whether balancing is an appropriate method of constitutional interpretation at all.⁵³ Our purpose here, however, is not to repeat or evaluate academic criticisms of the balancing approach, but to examine the experience in Oregon with “balancing” and alternative interpretive models, and we now turn to some of those issues.

II. BALANCING IN OREGON

A. Oregon’s Application of a Balancing Approach

The balancing approach emerged in the U.S. Supreme Court as a method of constitutional interpretation without much debate or discussion regarding why it was superior to other methods of interpretation.⁵⁴ And because the Court used that approach, many state courts followed suit.⁵⁵ Oregon was no exception. In a World War II-era case deciding whether a union’s picketing of an employer with the intent to cause the employer to violate a union shop agreement with a different union qualified as protected speech, the court relied on federal and state cases that balanced the free speech aspect of picketing with the allegedly unlawful effort by the picketing union to pressure the employer.⁵⁶ While recognizing a right to free speech, which could in certain circumstances include picketing, the court also identified other interests that required protection: “[i]f democratic institutions are to survive, underlying

⁵² See Aleinikoff, *supra* note 4, at 974–79.

⁵³ See *id.* at 984, 986–89, 991–93. Aleinikoff describes the criticisms that focus on the difficulties of using a balancing approach as “internal” criticisms, because they accept the premise that balancing is an appropriate way of approaching constitutional law. *Id.* at 972, 982. He describes the criticisms of the concept of balancing as “external” objections. *Id.* at 984.

⁵⁴ See *id.* at 948–52 (discussing the Court’s decisions that pre-date an explicit balancing approach and noting that, although “balancing was a major break with the past,” the Court did not “purport to be doing anything novel or controversial” in adopting that approach).

⁵⁵ Hans Linde, *Are State Constitutions Common Law?*, in *INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM* 91, 99 (Robert F. Nagel ed., 1995) (“Many state courts adopted the Supreme Court’s recent interest-balancing formulas, . . . but probably the explanation is nothing more cynical than the state courts’ uncritical assumption that any Supreme Court doctrine is generic constitutional law.”).

⁵⁶ See *Markham & Callow, Inc. v. Int’l Woodworkers of Am.*, 135 P.2d 727, 734–35, 750–58 (Or. 1943). The court presumably was applying the First Amendment, rather than article I, section 8 of the Oregon Constitution, although it did not cite or quote either provision. It referred to “free speech” generally, cited cases applying the First Amendment, and briefly discussed “rights of free speech” guaranteed by the Fourteenth Amendment. *Id.* at 750, 755.

principles of freedom must not be tainted by the injection of hostile class-conscious discrimination in to [sic] the fundamental law.”⁵⁷ And noting the importance of labor peace during wartime—“the context of total war and the terrible urgency of unimpeded production for national defense”—the court described its “delicate task” as “balancing the opposed interests of liberty [*i.e.*, free speech] and national security.”⁵⁸ Thus, in a classic instance of balancing, the court weighed the union’s interest in engaging in a particular kind of speech (picketing) for a particular purpose (pressuring an employer to terminate its agreement with a different union) against the interests of labor peace, compliance with the existing contract, and the war effort. Not surprisingly, perhaps, the court upheld the trial court’s injunction prohibiting the picketing.⁵⁹

Similarly, the Oregon court used a balancing approach when it interpreted the “equal privileges or immunities” clause of the Oregon Constitution⁶⁰ in a case challenging the state’s system of school funding.⁶¹ That system was based in part on local property taxes, with the result that tax rates required to fund schools adequately depended in large part upon the property values in individual school districts.⁶² Under the state’s system, there were significant variances in per-pupil school budgets, which the plaintiffs contended resulted in unequal educational opportunities for students around the state.⁶³ The court reviewed federal and state decisions interpreting both the Equal Protection Clause of the U.S. Constitution and similar provisions in state constitutions, as well as state constitutional provisions relating specifically to schools.⁶⁴ Interestingly—and inconsistent with the text of the provision—the court repeatedly referred to article I, section 20 of the Oregon Constitution as an “equal protection clause.”⁶⁵ Ultimately, the court concluded that it should determine whether the school financing system violated the state constitution’s equal privileges or immunities provision using an approach adopted by

⁵⁷ *Id.* at 758.

⁵⁸ *Id.*

⁵⁹ *Id.* at 749.

⁶⁰ Article I, section 20, of the Oregon Constitution provides: “[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” OR. CONST. art. I, § 20.

⁶¹ *Olsen v. State ex rel. Johnson*, 554 P.2d 139, 140 (Or. 1976).

⁶² *Id.* at 140–41.

⁶³ *Id.*

⁶⁴ *See id.* at 142–44.

⁶⁵ *E.g., id.* at 142.

the New Jersey Supreme Court:

Its approach could be termed a balancing test. Under this approach, the court weighs the detriment to the education of the children of certain districts against the ostensible justification for the scheme of school financing. If the court determines the detriment is much greater than the justification, the financing scheme violates the guarantee of equal protection.⁶⁶

The court recognized the disparate resources available to school districts—and to students—depending on a district’s tax base, but concluded that the interest in local control of schools, including school funding and budgets, outweighed the plaintiffs’ interest in equal educational opportunity.⁶⁷

In *State v. Ivory*,⁶⁸ the Oregon Supreme Court again relied on balancing to decide whether a delay in bringing a defendant to trial violated his speedy trial rights under the federal and state constitutions.⁶⁹ The court first noted that U.S. Supreme Court cases interpreting the federal constitutional right to a speedy trial required it to balance four factors—“the length of the delay, . . . whether [the] defendant [had] asserted his right to a speedy trial, . . . the reasons for the delay, and . . . prejudice to the defendant.”⁷⁰ Turning to the state constitutional speedy trial guarantee, the court observed that the guarantee was phrased differently, requiring not a speedy trial, but that “justice . . . be administered . . . without delay.”⁷¹ Notwithstanding the textual differences, the court followed earlier cases in holding that the federal analysis was “appropriate to test the [state constitutional] guarantee,” and turned its attention to the facts of the case “to see if the correct balance was struck.”⁷² The court ultimately held that the defendant

⁶⁶ *Id.* at 145 (citing *Robinson v. Cahill*, 303 A.2d 273, 281–82 (N.J. 1973)).

⁶⁷ *See id.* 146–49.

⁶⁸ *State v. Ivory*, 564 P.2d 1039 (Or. 1977).

⁶⁹ *Id.* at 1040–41. Although *Ivory* has not been overruled, the analysis in that case has been modified in subsequent cases. *See State v. Harberts*, 11 P.3d 641, 650–51 (Or. 2000) (discussing modifications to the *Ivory* analysis). Perhaps most interestingly for present purposes, the court in *Harberts* suggested that when it considers the relevant speedy trial factors, it does not “follow the federal practice of balancing the conduct of the defendant against the conduct of the state” but instead “considers all the relevant factors and assigns ‘weight’ to them.” *Id.* at 651 (citations omitted).

⁷⁰ *Ivory*, 564 P.2d at 1041; *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972) (listing the factors).

⁷¹ *Ivory*, 564 P.2d at 1042 (quoting OR. CONST. art. I, § 10).

⁷² *Id.* at 1042, 1043.

had shown sufficient prejudice by demonstrating that potentially favorable witnesses might be unavailable because of the state's delay.⁷³ Accordingly, the court ordered that the indictment be dismissed.⁷⁴

B. Oregon's Critique of a Balancing Approach

As the Oregon courts tentatively began to explore independent analysis of the Oregon Constitution,⁷⁵ they focused on the textual differences between the federal and Oregon Constitutions and tried to make sense of those differences and of the words used by the framers, rather than simply adopting the "balancing of interests" approach commonly applied at the federal level.⁷⁶ In doing so, the Oregon Supreme Court began identifying shortcomings with balancing. In a 1988 case, the court rejected a small political party's challenge under both the state and federal constitutions to state laws that set minimum levels of public support for a party to be able to have the names of its party's candidates placed on the ballot.⁷⁷ The party had argued that, under federal equal protection principles—which the party argued also applied to analysis of the Oregon Constitution—its interests in political participation and access to the ballot outweighed the state's interest in regulating the election process.⁷⁸ The court rejected the plaintiffs' attempt to import the federal balancing approach into state constitutional analysis:

The difficulty with this balance-of-interests argument is that it assumes that a court can and should attach values to the conflicting interests asserted, aggregate the resulting values and then compare the aggregates to arrive at a decision concerning the constitutionality of the statutes. A

⁷³ See *id.* at 1044.

⁷⁴ See *id.* at 1045.

⁷⁵ As discussed in greater detail below, the writings of Justice Hans Linde, even before he was a member of the Oregon Supreme Court, influenced many developments in Oregon law. See, e.g., *Olsen v. State ex rel. Johnson*, 554 P.2d 139, 143, 143 n.2 (Or. 1976) (citing Hans A. Linde, *Without "Due Process" Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 141 (1970)) (observing that, although in earlier cases the court had made no distinction between the federal equal protection clause and Oregon's equal privileges or immunities provision, the provisions were not necessarily "equivalents," and the Oregon courts could "decide that the equal protection clause of the Oregon Constitution is broader than that of the Federal Constitution" (citations omitted)).

⁷⁶ See e.g., *Libertarian Party of Or. v. Roberts*, 750 P.2d 1147, 1151–54 (Or. 1988).

⁷⁷ See *id.* at 1147–48.

⁷⁸ See *id.* at 1151.

court, however, cannot divine the relative importance of interests absent reference to the constitution itself; it is in the constitution that competing interests are balanced. A court's proper function is not to balance interests but to determine what the specific provisions of the constitution require and to apply those requirements to the case before it.⁷⁹

Here, the court raises two different, but related, criticisms of balancing. First, the court states that the relevant constitutional interests were balanced when the constitution was drafted and adopted, and those interests should not be recalibrated by the courts.⁸⁰ Constitutional interpretation based on balancing may stray from the text and history surrounding the adoption of the constitution, when the focus should instead be on the very document that the court is purporting to interpret.⁸¹ Second, the court suggests that courts are ill-equipped to look outside the constitution to determine the particular interests at stake, value those interests, aggregate the values, and then compare them.⁸² Those points, of course, echo the critique of balancing offered by Aleinikoff and others.

The Oregon Supreme Court offered a different explanation of the benefits of avoiding balancing and applying a more textual approach to constitutional interpretation in *Sterling v. Cupp*.⁸³ In that case, male inmates sued to enjoin prison officials from assigning female guards to certain duties involving male prisoners, raising both federal and state constitutional claims.⁸⁴ The court of appeals had affirmed a trial court order enjoining prison officials from assigning female guards "to any position in which the job description or actual duties include[d] frisks or pat-downs of male

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ Some have taken this argument further, asserting that taking the government interest into account at all in the balancing analysis, particularly in criminal cases, is "illegitimate" because it involves "weigh[ing] values explicitly enunciated in the Constitution (the individual's rights) against values that are extrinsic to the written instrument (the government's interests)." Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, in PUBLIC VALUES IN CONSTITUTIONAL LAW *supra* note 8, at 137, 138; *see also id.* at 138–39 (noting, and disagreeing with, critique of balancing involving government interests).

⁸² *Libertarian Party of Or.*, 750 P.2d at 1151.

⁸³ *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981).

⁸⁴ *Id.* at 125, 126.

prisoners, except in emergency situations.”⁸⁵ The court of appeals upheld that order based on the prisoners’ federal “right to privacy,” though the court noted that “[t]he source of this right is not entirely clear.”⁸⁶ Although the Oregon Supreme Court acknowledged that the right to privacy protected by “unexpressed penumbras” of the U.S. Constitution might be implicated by the case, the court instead focused on article I, section 13 of the Oregon Constitution,⁸⁷ noting that “[t]he proper sequence is to analyze the state’s law, including its constitutional law, before reaching a federal constitutional claim.”⁸⁸

Article I, section 13 of the Oregon Constitution provides, “[n]o person arrested, or confined in jail, shall be treated with unnecessary rigor.”⁸⁹ The court in *Sterling* stated that article I, section 13 was also a clearer ground upon which to base its decision because “it has an unquestioned source in a provision expressly included in the political act of adopting the constitution.”⁹⁰ Analysis under the Oregon Constitution would be grounded in the text of a constitutional provision, rather than in a more subjective right not expressed in the text. In addition, because the federal “privacy” right was not grounded in the text, it was more susceptible to being weighed against, and overcome by, subjective public policy concerns: “‘privacy’ poses the paradox that its elasticity in the face of important public policies contradicts its theoretical premise as a right so fundamental as to be implied in the national Constitution; by contrast, Article I, section 13, itself makes necessity the test of the practices it controls.”⁹¹ Thus, rather than balancing the prisoners’ “right to privacy” against other public policy concerns, the court looked to see (1) whether the male prisoners were being subjected to “rigorous” practices and (2) if so, whether those practices were necessary.⁹²

⁸⁵ *Sterling v. Cupp*, 607 P.2d 206, 209 & n.4 (Or. Ct. App. 1980) (internal quotation marks omitted) (quoting trial court order), *aff’d*, 625 P.2d 123 (Or. 1981).

⁸⁶ *Id.* at 207 & n.1 (citations omitted).

⁸⁷ *Sterling*, 625 P.2d at 129.

⁸⁸ *Id.* at 126.

⁸⁹ OR. CONST. art. I, § 13.

⁹⁰ *Sterling*, 625 P.2d at 129.

⁹¹ *Id.*

⁹² *See id.* at 129–30. The court did not seem troubled by the prospect of examining the state’s assertion that its practices were necessary, a review that arguably could involve the court in weighing the state’s asserted administrative or penal reasons for its practices against the alternatives—and that certainly could involve identifying and balancing various interests. *See id.* at 132.

The court's decision in *Sterling* highlights several other advantages of basing its decision on a constitutional text, rather than relying on a vaguely defined, unwritten right to privacy. The court suggested that the legitimacy of its decision was enhanced because the decision was based on an "unquestioned source" that was adopted by the "political act" of those who approved the state constitution, rather than on the subjective views of judges as to the scope of an unstated right to privacy.⁹³ And that textual grounding avoids the possibility that a later case might reach a different result because the government had identified sufficiently important or compelling interests to overcome the individual's privacy right.⁹⁴ The balancing approach can encourage legislators to "busy themselves with inserting whatever prefatory recitals courts have quoted in sustaining similar laws."⁹⁵ Moreover, that approach can shift power to the government, allowing laws to be enacted that arguably exceed constitutional limits, as long as the government can cite sufficient justification.⁹⁶

In *City of Portland v. Tidyman*, the Oregon Supreme Court elaborated on its emerging critique of balancing by focusing on the danger of deferring to the government's articulated "interests" in regulating conduct—expression, in *Tidyman*—that arguably is subject to constitutional protection.⁹⁷ There, the court declined to allow a city's stated justifications to overcome the constitutional right to expression when it analyzed whether a city ordinance that regulated the location of "adult businesses" violated article I, section 8 of the Oregon Constitution.⁹⁸ The city had attempted to defend its ordinance in part by relying on a list of findings included in the regulation that explained that the regulation was necessary to address the harmful effects that adult businesses allegedly had on surrounding areas.⁹⁹ The court noted that "such a recital gains nothing for the validity of the legislation" because the text of the ordinance itself regulated the content of expression, rather than its

⁹³ *Id.* at 129.

⁹⁴ See David Cole, *The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1747 (2007) (book review) ("The Framers of the Constitution did not simply say 'the government may engage in any practice whose benefits outweigh its costs'").

⁹⁵ *City of Portland v. Tidyman*, 759 P.2d 242, 247 (Or. 1988).

⁹⁶ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 191 (2d ed. 1978).

⁹⁷ See *Tidyman*, 759 P.2d at 246–47.

⁹⁸ *Id.* at 243.

⁹⁹ *Id.* at 247.

effects.¹⁰⁰ Rather than allowing a “one-time legislative determination” regarding the effects of such expression to outweigh the value of the speech, the court suggested that a valid regulation must be directed at the actual effects of speech.¹⁰¹

In justifying its approach, the court began by explaining that “[e]xpression that is offensive to many is likely also to be seen as harmful, and there is little political incentive to repeal laws made in apprehension of harm from offensive expression when the danger fails to materialize.”¹⁰² Thus, if the government could restrict expression by relying on the hypothetical harmful effects of that expression, the government could essentially restrict any expression if it could come up with possible harmful effects to justify the restriction.¹⁰³ If the court accepted the government’s justification, the court would reset the constitutional balance established by article I, section 8—which, based on the Oregon court’s reading of the text, weighs heavily in favor of expression—to favor the government, based on the government’s own justifications.¹⁰⁴ Instead of employing that approach, the Oregon Supreme Court focused on the constitutional text’s strong protection of expression.¹⁰⁵ *Tidyman* identifies the risks associated with allowing courts to set the balance based on seemingly plausible justifications—whether included in the statute or ordinance or simply raised in later litigation—that are not grounded in the text of the constitution, rather than looking to the constitution itself to determine the balance that has already been struck. Additionally, the *Tidyman*, anti-balancing approach has the virtue of keeping the court out of the awkward position of accepting at face value the substance and weight of the interests identified by the legislature,

¹⁰⁰ *Id.* at 247–48.

¹⁰¹ *Id.* at 248.

¹⁰² *Id.* at 250.

¹⁰³ See DWORKIN, *supra* note 96, at 191. Moreover, as the court noted in *Tidyman*, if a law restricting expression is justified by supposed harmful effects, but does not require the harmful effects to be shown, the government may continue to regulate that expression, even when the harmful effects are no longer present. See *Tidyman*, 759 P.2d at 251 (“If a law specifies the harm and not only the expression, its valid application depends on demonstrating the specified harm under changing conditions, not on mere apprehension.” (footnote omitted)).

¹⁰⁴ See *Tidyman*, 759 P.2d at 247.

¹⁰⁵ *Id.* at 244 (“[T]he clause is addressed to lawmakers at the time they consider making a law and forbids the enactment of a law directed in terms against any subject of speech, writing, or printing that cannot be shown to fall within an old or modern version of a well-established historical exception that the constitutional guarantees demonstrably were not meant to displace.”).

even if they seem contrary to reality, or of second-guessing the legislature's assessment of the "state's" interests.¹⁰⁶

At times, critiques of balancing have also emerged in dissenting opinions, such as in cases where the majority has imported a federal balancing analysis. For example, in *State v. Tourtillott*,¹⁰⁷ a state police game officer stopped the defendant at a game roadblock, and, upon checking her license as part of the standard procedure, discovered that the defendant was driving with a revoked license.¹⁰⁸ In her prosecution for driving with a revoked license, the defendant challenged the stop under the Fourth Amendment and article I, section 9, of the Oregon Constitution.¹⁰⁹ Relying largely on federal analysis of the Fourth Amendment, the court applied a balancing test and upheld the stop under the federal and state constitutions.¹¹⁰ The court concluded that the stop was not unreasonable, because "the governmental interest in the enforcement of laws for the preservation of wildlife in th[e] state is sufficiently substantial" to outweigh the "minimal intrusion" on the rights of people who were stopped at the roadblock.¹¹¹ The majority acknowledged, however, that "[a]s with any balancing test, its application to a particular set of facts may prove to be difficult."¹¹² Nonetheless, as we discuss below, because the search and seizure provisions of both the federal and Oregon Constitutions prohibit only "unreasonable" searches and seizures¹¹³—a standard that suggests that a variety of factors related to the search should be considered and weighed—a balancing test may be more appropriate than it would be in interpreting other constitutional provisions.

For present purposes, however, our focus is on Justice Linde's dissent in *Tourtillott* and the critique of balancing that he offers there. Justice Linde first emphasizes the practical difficulties of the majority's balancing test:

[T]he majority's approach is unworkable because it purports

¹⁰⁶ See *id.* at 247.

¹⁰⁷ *State v. Tourtillott*, 618 P.2d 423 (Or. 1980).

¹⁰⁸ *Id.* at 424–25.

¹⁰⁹ *Id.* at 425.

¹¹⁰ *Id.* at 427, 430.

¹¹¹ *Id.*

¹¹² *Id.* at 433.

¹¹³ Compare U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."), with OR. CONST. art. I, § 9 ("No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure . . .").

to strike the “balance” ad hoc, limited to the particular police stop on the date and at the location in this case. It does not and cannot provide rules for the legality of police stops at other locations and different times. . . . But the purpose of legal rules, and particularly constitutional rules, is to govern official conduct toward the vast majority of citizens against whom no evidence is obtained, not to provide a defense for the few who end up in court.¹¹⁴

Although balancing provides flexibility to courts in making their determinations, it can result in ad hoc decisions that are unpredictable and that provide little guidance to citizens, government officials, and lower courts.¹¹⁵

Justice Linde also took the occasion of this fairly routine search case to set out a more comprehensive critique of the identification and comparison of the interests for purposes of constitutional balancing, regardless of the particular constitutional provision at issue. He argued that the majority’s analysis in *Tourtillott* skewed the interests at stake in the case:

The easiest and most common fallacy in “balancing” is to place on one side the entire, cumulated “interest” represented by the state’s policy and compare it with one individual’s interest in freedom from the specific intrusion on the other side, as the majority does here. What balance is likely to be struck between the momentary inconvenience of one person stopped to answer a question and the protection of thousands of the public’s deer? Yet it is plain that to “balance” one person’s rights with cumulated majoritarian interests in this fashion flies in the face of the premise of constitutionally guaranteed individual rights against the state. The semantic “balance” looks different when it matches the freedom of thousands of citizens from being stopped and questioned by police officers against the chance that one or a few will admit to a hunting or fishing violation.¹¹⁶

¹¹⁴ *Tourtillott*, 618 P.2d at 442 (Linde, J., dissenting).

¹¹⁵ See, e.g., Linde, *supra* note 55, at 99 (“[T]he point of the [balancing] formulas is to let courts decide *ad hoc* between competing values”); Cole, *supra* note 94, at 1737 (“[Under a balancing approach,] the Constitution loses almost any sense of a binding precommitment, and is reduced to a cover for judges to impose their own subjective value judgments on others.”).

¹¹⁶ *Tourtillott*, 618 P.2d at 441–42 (Linde, J., dissenting).

As Justice Linde articulated the problem, depending on how the competing interests are framed, the balancing approach may diminish the importance of an individual's rights by contrasting those rights with the government's goal of protecting the interests of the entire state of Oregon.¹¹⁷ Even if the court could translate some interests into a "common currency" to provide a basis for comparison,¹¹⁸ other interests may simply be incommensurable.¹¹⁹ Whether or not Justice Linde's dissent offers a better interpretation than the majority opinion of the search and seizure provision of the Oregon Constitution—which, after all, invites some balancing of competing interests by prohibiting only "unreasonable" searches and seizures—it is a thoughtful critique of the shortcomings of open-ended balancing.

III. THE OREGON EXPERIENCE: MODEST LITERALISM AND THE CATEGORICAL APPROACH

Robert Nagel and Justice Jack Landau have used the term "modest . . . literalism" to describe the approach commonly used by Oregon courts in undertaking constitutional interpretation.¹²⁰ Under that approach, "[t]he key is rooting the judicial decision in the text of the constitution."¹²¹ That approach recognizes that "[f]idelity to a constitution need not mean narrow literalism," and can also take into account other considerations.¹²² In the end, however, the court's interpretation must be rooted in the

¹¹⁷ Although perhaps less likely to arise in state constitutional analysis, the tendency of the balancing approach to weigh in favor of the government is arguably even more tangible in the context of national security. Particularly in a post-9/11 world, "when the potential costs of a catastrophic terrorist attack are placed on the scale, the concerns of constitutional rights and civil liberties are almost inevitably outweighed." Cole, *supra* note 94, at 1737.

¹¹⁸ See, e.g., Aleinikoff, *supra* note 4, at 973 ("The problem for constitutional balancing is the derivation of the scale needed to translate the value of interests into a common currency for comparison.").

¹¹⁹ See, e.g., Haynes v. Burks, 619 P.2d 632, 637 (Or. 1980) ("We know no scales that provide a common denominator for the 'weight' of an extra month's pretrial imprisonment and the 'weight' of prosecution neglect, or good faith necessity, or deliberate delay. . . . The proper disposition in the individual case is not a question of addition and subtraction but of examining the relevance of each element in giving effect to the constitutional guarantee [of a speedy trial]."); Hans A. Linde, *The Shell Game of "Interest" Scrutiny: Who Must Know What, When, and How?*, 55 ALB. L. REV. 725, 734 (1992) (noting that Justice Scalia has proposed to abandon the scheme of "incommensurate interests").

¹²⁰ Landau, *supra* note 5, at 253 (quoting INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM, *supra* note 55, at 5).

¹²¹ *Id.* at 255.

¹²² Linde, *supra* note 55, at 100.

constitution and not solely in external considerations.¹²³

As we have described, the focus of Oregon courts on the text of the constitution has gone hand in hand with their aversion to balancing. Only two provisions of the Oregon Constitution expressly mention balancing—both are victims' rights provisions added by recent amendment¹²⁴—and most provisions are not framed in terms of interests to be weighed against one another. Instead, at least as the Oregon court has interpreted the text, the constitution sets out many provisions in categorical terms. Applying the categorical approach, the court looks to the constitutional text for the relevant categories, defines those categories, and then places certain rights, interests, or governmental action (legislative or executive) into one of those discrete categories, a process that often leads directly to the court's decision.¹²⁵ In contrast to balancing, “[c]ategorization is the taxonomist's style—a job of classification and labeling. . . . Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement.”¹²⁶

Like Oregon's interest in independent state constitutional interpretation generally, concerns about balancing and the consideration of alternatives derived initially from articles and opinions by Hans Linde, a University of Oregon law professor for many years and a member of the Oregon Supreme Court from 1977 until 1990.¹²⁷ Linde's views were embraced by most other members

¹²³ *Id.* (“But fidelity to a constitution means at least to identify what clause is said to invalidate the challenged law, to read what one interprets, and to explain it in terms that will apply beyond the case at issue, not to substitute phrases that have no analogue in the state's charter.”).

¹²⁴ See OR. CONST. art. I, § 42 (granting crime victims certain rights, in part, “to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal and juvenile court delinquency proceedings”); see also OR. CONST. art. I, § 43 (applying the same goal, providing protections to victims in criminal prosecutions from criminal defendants both before and during trial). The “balance” language in both article I, section 42 and article I, section 43 was included in those provisions when they were originally adopted in 1999. See OR. CONST. art. I, §§ 42, 43 (containing the history and passage in 1999).

¹²⁵ See Landau, *supra* note 5, at 259 (reviewing the court's discussion of the correct method of adjudicating state constitutional issues).

¹²⁶ Sullivan, *supra* note 8, at 241.

¹²⁷ A number of Linde's articles and opinions are collected in INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM, *supra* note 55. For a thoughtful and sympathetic—but not uncritical—review of Linde's approach, see Patricia M. Wald, *Hans Linde and the Elusive Art of Judging: Intellect and Craft Are Never Enough*, 75 TEX. L. REV. 215, 216 (1996) (book review). See also Philip P. Frickey, *Honoring*

of the Oregon Supreme Court, even if the justices disagreed on the application of those interpretive principles in particular cases.¹²⁸ In embracing Linde's views and exploring alternatives to balancing, the Oregon Supreme Court began to apply a more categorical approach in a number of cases in the late 1970s and early 1980s.¹²⁹

One of the clearest examples of the Oregon Supreme Court's categorical approach is in the court's cases interpreting article I, section 8, of the Oregon Constitution—Oregon's free expression provision.¹³⁰ Article I, section 8 provides, “[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.”¹³¹ In *State v. Robertson*,¹³² the Oregon Supreme Court interpreted that provision as an absolute prohibition on laws restraining free expression, subject only to “some historical exception[s] that w[ere] well established when the first American guarantees of freedom of expression were adopted.”¹³³ In applying article I, section 8, the court first examines whether the law in question focuses on the *content* of speech or, instead, proscribes certain effects of speech that the legislature has determined to be harmful.¹³⁴ In the former case, the state can prohibit the expression only if it comes within a

Hans: On Linde, Lawmaking, and Legacies, 43 WILLAMETTE L. REV. 157, 161 (2007) (highlighting Justice Linde's “unique contribution” with respect to state constitutional law); Louis H. Pollak, *Judge-Professor Linde*, 70 OR. L. REV. 679, 680–82 (1991) (discussing Justice Linde's achievements in highlighting the paramount importance of interpretation and application of state constitutional law). For examples of Linde's critique of balancing, see *State v. Tourtillott*, 618 P.2d 423, 441–42 (Or. 1980) (Linde, J., dissenting) (“The easiest and most common fallacy in ‘balancing’ is to place on one side the entire, cumulated ‘interest’ represented by the state's policy and compare it with one individual's interest in freedom from the specific intrusion on the other side”); Linde, *supra* note 119, at 735 (“An escape into balancing is tempting because the court appears to state a rule while avoiding one.”); Linde, *supra* note 46, at 1182 (“One function to be asked of a rule in constitutional law, as in any other body of law, is that it communicate an understandable standard. It is not enough if a doctrine explicates the difficult balance of competing considerations that lead the Justices of the United States Supreme Court to a particular decision, and often enough a split decision at that.”).

¹²⁸ See, e.g., *Oregonian Publ'g Co. v. O'Leary*, 736 P.2d 173, 178 (Or. 1987) (“The government cannot avoid a constitutional command by ‘balancing’ it against another of its obligations.” (citations omitted)).

¹²⁹ David Schuman, *Using State Constitutions to Find and Enforce Civil Liberties*, 15 LEWIS & CLARK L. REV. 783, 787, 789–90 (2011).

¹³⁰ *Id.* at 783.

¹³¹ OR. CONST. art. I, § 8.

¹³² *State v. Robertson*, 649 P.2d 569 (Or. 1982).

¹³³ *Id.* at 576.

¹³⁴ *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 132 P.3d 5, 12 (Or. 2006) (summarizing the *Robertson* test).

well-established historical exception to the otherwise absolute rule in favor of protecting the expression.¹³⁵ In the latter case, the court determines whether the law limits expression in order to prevent the harmful effects or focuses directly on prohibiting the effects without referring to expression at all; the court analyzes the laws differently depending on which category they come within.¹³⁶ The precise contours of article I, section 8, analysis are less important here than the fact that the court proceeds by *categorizing* the law at issue as one that regulates the content of speech or not. If it does regulate the content of speech, then the court considers whether the law (and the speech that it regulates) falls within another category—that of well-established historical exceptions to the rule against restrictions on speech. If it does, the speech is not protected. Similarly, if the law regulates the effects of speech, the court determines which of the two categories described above it comes within, and proceeds on different analytical tracks depending on the answer. Thus, rather than engaging in a balancing analysis, the court's interpretation is "plainly rooted in the categorical nature of the constitutional text."¹³⁷

In *State v. Ciancanelli*,¹³⁸ the court directly rebuffed the state's attempt to set aside the *Robertson* framework and return to a balancing approach that would weigh the speaker's interest in free expression against the state's interest in regulating speech that it deemed to be harmful.¹³⁹ The Oregon courts thus continue to employ the text-based categorical approach in free speech cases. Yet the court's adherence to that approach is not without controversy. Just as the more categorical approach that the U.S. Supreme Court has taken towards the regulation of political speech led it to strike down restrictions on such speech in *Citizens United*,

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Landau, *supra* note 5, at 268. The *Robertson* approach was followed in many later Oregon cases, including *Tidyman*, discussed above.

¹³⁸ *State v. Ciancanelli*, 121 P.3d 613 (Or. 2005) (statute prohibiting "live public show" in which participants engage in "sexual conduct" violated free expression rights under article I, section 8, of Oregon Constitution).

¹³⁹ *See id.* at 614, 615 n.3, 631 (reaffirming the *Robertson* framework and rejecting "the malleable and indistinct 'balancing' test proposed by the state"). For a more complete discussion of the Oregon Supreme Court's free expression cases from *Robertson* to *Ciancanelli*, see Landau, *supra* note 5, at 265–77; Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 840–53 (2000) (outlining the Oregon Supreme Court's treatment of article 1, section 8 of the Oregon Constitution).

the Oregon court's similar approach led it to hold unconstitutional limits on campaign expenditures and contributions.¹⁴⁰ That decision, however, resulted in an almost-successful effort to amend the constitution to overturn the court's decision¹⁴¹ and to a call by a member of the court, who had joined in striking down the campaign finance regulations, for the court to revisit its earlier decision.¹⁴²

The court has extended the categorical approach to its interpretation of other constitutional provisions. For example, in *Oregonian Publishing Co. v. O'Leary*,¹⁴³ the court considered a constitutional challenge under Oregon's open courts provision—a part of article I, section 10 of the Oregon Constitution—to a statute that closed certain pre-trial proceedings to the public.¹⁴⁴ Article I, section 10 provides, in part, “[n]o court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay.”¹⁴⁵ The court read that provision in categorical terms: “Section 10 is written in absolute terms; there are no explicit qualifications to its command that justice shall be administered openly. In order to be constitutional, a proceeding must either not be secret or not ‘administer justice’ within the meaning of section 10.”¹⁴⁶ The court went on to analyze whether or not the statutory pre-trial hearing at issue in that case—one to determine whether a witness should be granted immunity and compelled to testify in the prosecution of a different person—fell into the categories of “secret” and of “administer[ing] justice.”¹⁴⁷

In undertaking that inquiry, the court noted that, similarly to article I, section 8, the framers of the Oregon Constitution undoubtedly intended some narrow, well-established historical exceptions to the absolute terms of the open courts provision, such

¹⁴⁰ *Vannatta v. Keisling*, 931 P.2d 770, 773 (Or. 1997).

¹⁴¹ Citizens opposed to the decision backed two initiative measures in 2006—a constitutional measure that would amend the Oregon Constitution to permit regulation of campaign expenditures and contributions and a statutory measure establishing such regulations. *Hazell v. Brown*, 287 P.3d 1079, 1081 (Or. 2012). Voters narrowly rejected the constitutional measure, but passed the statutory measure. *See id.* The background is described in *id.* at 1081–85.

¹⁴² *Id.* at 1087–93 (Durham, J., concurring in part and dissenting in part). Justice Durham urged the court to reconsider *Vannatta* and characterized the court's earlier decision in that case as “absolute,” “extreme,” and “suspect.” *Id.* at 1089–90.

¹⁴³ *Oregonian Publ'g Co. v. O'Leary*, 736 P.2d 173 (Or. 1987).

¹⁴⁴ *Id.* at 174.

¹⁴⁵ OR. CONST. art. I, § 10.

¹⁴⁶ *O'Leary*, 736 P.2d at 176.

¹⁴⁷ *Id.* at 176–77.

as jury deliberations and the conferences of collegial courts.¹⁴⁸ Nonetheless, because the court determined that the hearing both was secret and involved the administration of justice, it held that the statute authorizing the hearing violated article I, section 10.¹⁴⁹ In reaching that decision, the court in *O'Leary* rejected the primary rationale relied on by the court of appeals in upholding the statute.¹⁵⁰ The court of appeals had balanced the requirements in article I, section 10, that justice be “administered openly” and that no court be secret, against the secrecy interests of the witness who would be compelled to testify at the hearing at issue.¹⁵¹ The Oregon Supreme Court began by dismissing any secrecy interest of the witness because it would not be “of a constitutional dimension.”¹⁵² Even more important to the court was the “unqualified command” of article I, section 10: “[t]he government cannot avoid a constitutional command by ‘balancing’ it against another of its obligations.”¹⁵³ Thus, the court squarely rejected a balancing approach in favor of a categorical approach rooted in the text.¹⁵⁴

The court’s categorical approach to the open courts provision is again at issue in a pending case involving the Oregon rape-shield law.¹⁵⁵ That law provides that, when the defendant in a sexual misconduct prosecution seeks to introduce evidence of the victim’s past sexual behavior, the trial court is to hold a hearing closed to the public to determine whether the evidence will be relevant at trial.¹⁵⁶ In a mandamus proceeding now before the Oregon Supreme Court, a criminal defendant argues that the open courts provision, as interpreted in *O'Leary*, renders the rape shield law unconstitutional and that the pre-trial hearing must be open to the public.¹⁵⁷ The state argues that the pre-trial hearing, because it only determines whether the proffered testimony is relevant, and is not an adjudication, does not involve the “administration of justice.”¹⁵⁸ The state also takes issue with *O'Leary*’s “absolute”

¹⁴⁸ *Id.* at 177.

¹⁴⁹ *Id.* at 178.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ OR. REV. STAT. § 40.210 (2013).

¹⁵⁶ *Id.* § 40.210(4)(b).

¹⁵⁷ Mandamus Proceeding Relator’s Brief at 2–3, *State v. MacBale*, No. S060079 (Or. Mar. 28, 2012), 2012 WL 1717953, at *2–3.

¹⁵⁸ Adverse Party State of Oregon’s Brief on the Merits at 27, *MacBale*, No. S060079, 2012

approach to the open courts provision and argues that a proper interpretation of the provision requires consideration of the interests of the victim as well as those of the defendant and the public.¹⁵⁹

Application of the categorical approach also has proven to be complicated in other cases, such as those interpreting Oregon's remedy clause, which also is part of article I, section 10, of the Oregon Constitution.¹⁶⁰ The remedy clause provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."¹⁶¹ The Oregon Supreme Court has held that, under the remedy clause, a person has a right to a remedy for an "injury" to person, property, or reputation if that person would have had a remedy for such an injury at common law.¹⁶² Some decisions have suggested that the inquiry under the remedy clause is essentially categorical: if Oregon law provided a remedy at common law, that remedy is protected against legislative alteration by article I, section 10, but if Oregon law did not provide a remedy at common law, a person is not entitled to a remedy under article I, section 10.¹⁶³ The court has also held, however, that the legislature can modify a protected remedy if it "provide[s] a constitutionally adequate substitute remedy."¹⁶⁴ The court has not provided a single standard for what qualifies as "constitutionally adequate."¹⁶⁵ Although the court has not engaged in pure interest-balancing to determine what is constitutionally adequate, the court

WL 2153203, at *27.

¹⁵⁹ *Id.* at *5, *28–29. Shortly before this article was published, the Oregon Supreme Court issued its decision in the case involving the Oregon rape-shield law. *State v. MacBale*, SC S060079, 2013 WL 3864322 (Or. July 25, 2013). In *MacBale*, the court held that "a hearing to determine the admissibility of evidence under OEC 412 does not constitute an administration of justice for purposes of Article I, section 10, and . . . the legislature may provide that such a hearing be closed to the public." *Id.* at *13.

¹⁶⁰ *See, e.g.*, *Howell v. Boyle*, 298 P.3d 1 (Or. 2013) (tracing and analyzing some of the Oregon Supreme Court's cases involving the remedy clause).

¹⁶¹ OR. CONST. art. I, § 10. For a discussion of state remedy clauses in general, and of Oregon's remedy clause in particular, see David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199–1200, 1220 (1992).

¹⁶² *E.g.*, *Clarke v. Or. Health Scis. Univ.*, 175 P.3d 418, 432 (Or. 2007).

¹⁶³ *E.g.*, *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 354, 356–57 (Or. 2001) ("The legislature lacks authority to deny a remedy for injury to absolute rights that existed when the Oregon Constitution was adopted in 1857.").

¹⁶⁴ *Id.* at 356–57.

¹⁶⁵ *Clarke*, 175 P.3d at 436 (Balmer, J., concurring) ("The difficulty, of course, in this as in other Remedy Clause cases, is determining whether a substituted remedy is constitutionally adequate. This court has not articulated a precise test, and it probably is not possible to do so.").

has acknowledged that “not every constitutional provision can be reduced to a neat formula that avoids the necessity of applying careful judgment to the facts and circumstances of each case.”¹⁶⁶ Thus, in remedy clause cases, the court has interpreted the constitution to require both a categorical inquiry—whether a remedy existed at common law—and an inquiry more akin to balancing—whether a substitute remedy is “adequate,” that is, whether a substitute remedy is “substantial.”¹⁶⁷

In the Oregon Supreme Court’s most recent remedy clause case, the court again acknowledged that determining “the precise contours” of what qualifies as a substantial remedy is likely impossible.¹⁶⁸ Instead, the court relied largely on its prior case law to determine whether the amount of damages awarded to the plaintiff in that case qualified as substantial.¹⁶⁹ In response, the dissent took an essentially categorical approach to the remedy clause, arguing that the only substitute remedy permitted by the constitution was “a fully restorative remedy.”¹⁷⁰ That is, according to the dissent, a person either does or does not have a constitutionally protected right to be “fully restor[ed]” for the injury that he or she suffered, and if the legislature or the courts limit any injured person to a remedy that is less than the amount needed to provide full monetary restoration for the injury, that lesser remedy violates the remedy clause.¹⁷¹

¹⁶⁶ Howell v. Boyle, 298 P.3d 1, 17 (Or. 2013).

¹⁶⁷ *Id.* at 9.

¹⁶⁸ *Id.* at 10.

¹⁶⁹ *Id.* at 11.

¹⁷⁰ *See id.* at 27 (De Muniz, J., pro tempore, dissenting).

¹⁷¹ *See id.* The dissent did not argue that a statutory remedy that provides a smaller monetary award to an injured party, but gives that person some offsetting procedural or substantive advantage, necessarily violates the remedy clause. *Id.* at 25 (discussing possible *quid pro quo* in limiting remedies). For example, the Oregon Supreme Court has consistently stated that the workers’ compensation system is not inconsistent with the remedy clause, even though the monetary payments it provides for an injured worker may be less than what the worker might have recovered in a negligence action. *See, e.g.,* Clarke v. Or. Health Scis. Univ., 175 P.3d 418, 438 (Or. 2007) (Balmer, J., concurring) (noting that the workers’ compensation scheme provides workers with a “substantial remedy” because, although workers may receive less than they would in a successful negligence action, workers are not required to prove employer negligence to recover compensation); Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 357 (Or. 2001) (“[T]his court implicitly has recognized the legislature’s constitutional authority to substitute workers’ compensation for the common-law negligence cause of action for work-related injuries.”). The court has reasoned that the advantages the system gives the worker—eliminating the need to show the employer’s negligence and precluding defenses such as contributory negligence, among others—make the remedy an adequate substitute for the negligence action against the employer that the statutory scheme replaces. *See, e.g.,* Clarke, 175 P.3d at 438 (Balmer, J., concurring);

The remedy clause cases also illustrate that modest literalism and a categorical approach alone do not provide satisfactory answers in all cases of constitutional interpretation. There are gaps in the constitutional text, and the court often must address those gaps.¹⁷² Even if there is no gap in the text, there are different ways of determining what the text means.¹⁷³ That is, even if the text is categorical, the court still must define and determine the scope of the categories. And, once the categories have been established, the court must choose the category into which the particular conduct, case, or government action will be placed: is the proceeding in which the court will determine whether the victim's past sexual behavior is relevant in the accused's trial the "administration" of justice? Is the contribution of money to a political candidate speech? Under a categorical approach, the court's "yes" or "no" answers to those questions will likely determine the result in the case—and the court's answers often will depend on the same kind of identification and evaluation of competing interests and the same potentially subjective process of choosing for which the balancing approach has been criticized.

IV. CONCLUSION

As the Oregon experience illustrates, it is difficult to foreclose an entire method of constitutional interpretation,¹⁷⁴ and even if possible, it would not necessarily be desirable.¹⁷⁵ Nonetheless, it is

Smothers, 23 P.3d at 357.

¹⁷² CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 80 (1996) ("Often text, structure, and history produce gaps, ambiguities, or otherwise insoluble interpretive difficulties.").

¹⁷³ Justice Landau argues that "[i]f there is a weakness in the Linde legacy" of modest literalism, it was Linde's "failure to provide a theoretical foundation for determining what the text of a state constitution means." Landau, *supra* note 5, at 256. That "interpretive vacuum," he suggests, was filled within a few years after Linde left the bench "with a rigid, if revisionist, originalism that has produced constitutional decisions justified by resort to original intent, often with the most tenuous connection to constitutional text and only the most fragile relation to core principles of Linde's constitutionalism." *Id.*

¹⁷⁴ See Sullivan, *supra* note 8, at 241, 254 ("You simply cannot do everything with boxes that you can do with balancing. . . . At the margin, having to use one technique will sometimes bring about outcomes foreclosed by the alternative method.").

¹⁷⁵ Notably, even Justice Linde, probably the Oregon Supreme Court's most thoughtful and consistent critic of balancing, stated that "[t]he Court need not settle on a single structure of formulas for judging all constitutional claims." Linde, *supra* note 119, at 735; see also SUNSTEIN, *supra* note 172, at 11 ("In its purest form, enthusiasm for genuinely case-specific decisions makes no sense. . . . In some circumstances, however, enthusiasm for rules is senseless too."); Aleinikoff, *supra* note 4, at 1002 ("[I]t is probably wrong to search for a single theory for understanding and interpreting the Constitution." (footnote omitted)).

useful to understand the benefits and limitations of different methods of constitutional interpretation.

A balancing approach that considers multiple factors or interests may be appropriate—or even textually mandated—when interpreting constitutional provisions that require comparison and context or that defy precise definition. As noted, both article I, section 9, of the Oregon Constitution and the Fourth Amendment to the U.S. Constitution require the court to decide what searches or seizures are “unreasonable,” a word that lends itself to interpretation using balancing and case-by-case determinations.¹⁷⁶ For example, in *Tourtillott*, the game roadblock case, the court justified its application of a balancing test because, under the Fourth Amendment, “the key test is reasonableness.”¹⁷⁷ Because of the inherently fact-bound nature of a reasonableness inquiry, the court found that a balancing test was “uniquely adapted to make [a reasonableness] determination. The facts and circumstances of each type of seizure must be balanced in determining its permissibility.”¹⁷⁸ The court’s statement in *Tourtillott* acknowledges that some provisions of the constitution cannot be easily reduced to a categorical formula—even though bright-line, categorical tests might be preferable to a reasonableness standard, for purely administrative reasons. And, indeed, lawyers and judges familiar with search and seizure cases appreciate the infinite variety of factual settings in which police and citizens interact.

Similarly, article I, section 16 of the Oregon Constitution requires, in part, that “all penalties shall be *proportioned* to the

¹⁷⁶ Justice Linde has suggested that “words like ‘fundamental,’ ‘qualified fundamental,’ ‘compelling,’ ‘important,’ ‘rational,’ ‘reasonable,’ ‘substantial,’ and ‘necessary’ are only adjectives to be used by judges on judicial review.” Linde, *supra* note 122, at 734. Although Linde is correct that those words, when used by judges, may provide only limited guidance to legislators and the public, he does not address the fact that judges are required to use and interpret those words when forms of them appear in the constitutional text itself, as do the words “unreasonable” and “unnecessary.” OR. CONST. art. I, § 9; OR. CONST. art. I, § 13.

¹⁷⁷ *State v. Tourtillott*, 618 P.2d 423, 434 (Or. 1980). Reasonableness in that context was the key test not because the court was eager to interject its subjective views into search decisions, but because, as noted earlier, both the Fourth Amendment and article I, section 9 of the Oregon Constitution explicitly prohibit “unreasonable” searches and seizures. *Compare* U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”), with OR. CONST. art. I, § 9 (“No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure . . .”).

¹⁷⁸ *Tourtillott*, 618 P.2d at 434. *See also* Stith, *supra* note 81, at 154 (“The touchstone of the Fourth Amendment is, after all, the requirement of ‘reasonableness’— . . . [the Court’s] effort here to balance opposing interests and to make commonsense judgments is especially appropriate.”).

offense.”¹⁷⁹ Again, proportion is a concept that is defined in relative terms.¹⁸⁰ Although a proportionality inquiry may not involve pure interest balancing, it requires examination of the relationship between different factors—in article I, section 16, between the “penalt[y]” and the “offense.”¹⁸¹ So, at least when interpreting some constitutional provisions, a balancing approach appears to be consistent with the constitutional text.

In contrast, some constitutional provisions are, in fact, written in absolute terms, and a categorical approach may help illuminate the distinctions drawn in the text. As noted, article I, section 8 of the Oregon Constitution provides that “[n]o law shall be passed restraining . . . free expression . . . but every person shall be responsible for the abuse of this right.”¹⁸² Relying solely on the text, speech can be categorized either as an “abuse” of the right to free expression, as protected expression, or as expression that would otherwise be protected but that is unprotected because it comes within an historical exception.¹⁸³ Similarly, article I, section 10 provides, in part, that “[n]o court shall be secret, but justice shall be administered, openly and without purchase.”¹⁸⁴ The text of that provision suggests that courts secretly administering justice violate the constitution, but courts openly administering justice do not. At least when considering the text standing alone, a categorical approach may be a useful—and perhaps accurate—way to understand a constitutional provision. Even if other considerations may ultimately trump a literalist, categorical approach in a particular case, a firm grounding in the constitutional text can at least avoid some of the problems of open-ended, subjective balancing, including its potentially ad hoc and subjective character. Moreover, such an approach focuses the court’s attention on the task of giving coherence and meaning to sometimes indefinite constitutional provisions in the context of deciding concrete cases—

¹⁷⁹ OR. CONST. art. I, § 16 (emphasis added). *See generally* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 3–11 (2009) (discussing proportionality in general); Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 804–17 (2008) (discussing article I, section 16 of the Oregon Constitution).

¹⁸⁰ *See, e.g.*, *State v. Rodriguez*, 217 P.3d 659, 668 (Or. 2009) (quoting *State v. Wheeler*, 175 P.3d 438, 441 (Or. 2007)) (discussing the meaning of the term “proportioned” and noting that it indicates a comparative relationship).

¹⁸¹ *Id.* at 668 (internal quotation marks omitted).

¹⁸² OR. CONST. art. I, § 8.

¹⁸³ *State v. Robertson*, 649 P.2d 569, 576 (Or. 1982).

¹⁸⁴ OR. CONST. art. I, § 10.

a task that may be more consonant with a court's institutional strengths than the identification and balancing of competing interests, which may be better suited to constitution drafters.

Yet the limitations of a categorical approach also must be kept in mind. As we have discussed, constitutional terms are often broad and imprecise; their proper interpretation may depend on text, context, history, and structure—not simply on dictionary definitions. There can be a false simplicity in the categorical approach, which presents constitutional interpretation as a series of binary, either/or choices, as in the Oregon free speech and open courts cases discussed above. Those choices can be stark and may not accommodate the nuance or fine-tuning that can be important in constitutional adjudication. Moreover, although a categorical approach, at first blush, appears to avoid the subjective, policy-related choices involved in the open-ended balancing of interests, that does not mean that the approach avoids the need for judges to make choices among possible interpretations, to choose which category particular private conduct or government action comes within, and to determine which answer to a constitutional question is the right one—or at least the better one.

Perhaps most importantly, courts should recognize that, as Oregon's remedy clause cases illustrate, these two approaches are not mutually exclusive,¹⁸⁵ and that there are other ways of analyzing constitutional provisions.¹⁸⁶ Ultimately, the court's role is to interpret and apply the constitution, even when that requires the court to invalidate the legislature's policy choice, either as it applies in a particular case or generally.¹⁸⁷ Whether a court uses a

¹⁸⁵ See, e.g., Aleinikoff, *supra* note 4, at 996 (“[T]here is plenty of room between literalism and balancing.”).

¹⁸⁶ See, for example, David Strauss's argument for what he calls a “common law” approach to federal constitutional interpretation in David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–88 (1996). Strauss cites only U.S. Supreme Court cases (except for two English cases from 1608 and a federal appeals court decision by Judge Richard Posner), although his analysis applies, in the main, to state constitutional interpretation as well. *Id.* at 882, 893, 931. Focusing on state constitutional analysis, Justice Landau surveys a number of interpretive approaches and then outlines some “core considerations” that, he argues, “provide satisfactory answers to legitimacy concerns in most cases involving interpretation of state constitutions” in Landau, *supra* note 17, at 858.

¹⁸⁷ See, e.g., *State v. Rodriguez*, 217 P.3d 659, 668 (Or. 2009) (“It is not the role of this court to second-guess the legislature's determination of the penalty or range of penalties for a crime. However, it is the role of the court to ensure that sentences conform to requirements that have been in our constitution for 150 years.”); *Clarke v. Or. Health Scis. Univ.*, 175 P.3d 418, 432 (Or. 2007) (“[Oregon's remedy clause] is not merely an aspirational statement, but was intended by the framers of the Oregon Constitution to preserve for future generations,

balancing approach, a categorical approach, or some other methodology, judges must make choices about what particular constitutional provisions mean.¹⁸⁸ Each method of interpreting the constitution articulates that choice in a different way, and each method can be criticized because of the limits of that articulation. Balancing can be attacked for failing to articulate the choice as a substantive, text-based rule that can be replicated and consistently applied to different factual settings, and a categorical approach can be attacked for lack of transparency as to the inevitable weighing of interests.¹⁸⁹ Nonetheless, each method, in the end, requires the same judicial role—a thoughtful, deliberate choice by the court, informed by both the constitutional text and the interests at stake in its interpretation.

Oregon courts have made a significant contribution to state constitutional interpretation by recognizing and articulating the drawbacks of an open-ended interest balancing approach and considering more text-based, sometimes categorical, approaches. Yet they also have concluded that a categorical approach still leaves a court with choices to make, choices that can be difficult and that can involve at least some filling of textual gaps, some subjectivity, and some comparative assessment of the competing private and government interests that are at stake. In making decisions in hard constitutional cases, perhaps the best that courts can do is to consider a variety of potential interpretive approaches and modestly acknowledge that no one approach will always and clearly direct them to a satisfactory interpretation of a constitutional provision.

against legislative or other encroachment, the right to obtain a remedy for injury to interests in person, property, and reputation.”).

¹⁸⁸ Thomas A. Balmer, *What's a Judge to Do?*, 18 YALE J.L. & HUMAN. 139, 146 (2006) (book review) (“[I]n the real world, judges are required to make choices and . . . those choices matter.”); Wald, *supra* note 127, at 224 (“[J]udges, whatever formulae or roadmaps they use, at some point come face to face with the need to decide and articulate what values are enconced in unavoidably vague terms in constitutions and laws and further to decide which of those values trump others.”).

¹⁸⁹ Compare Linde, *supra* note 119, at 735 (“An escape into balancing is tempting because the court appears to state a rule while avoiding one.”), with Wald, *supra* note 127, at 224 (“[B]alancing . . . puts th[e] judicial function out front[, while an attempt to avoid balancing only] surrounds and protects and delays it by a series of structural lead-ins [because, ultimately,] the beast awaits . . .”). Stated differently, “the ‘balancers’ are right in concluding that it is impossible to escape the task of weighing the competing considerations, . . . [but] categorical rules, by drawing clear lines, are usually less open to manipulation . . . [and] speak[] directly to the legislature.” TRIBE, *supra* note 16, at 792–93.