DO PRECEDENTS TAKE PRECEDENCE? STARE DECISIS AND OREGON CONSTITUTIONALISM

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There is often unavoidable tension between state constitutionalism and stare decisis. Recognition of the principle that state constitutional provisions have independent legal significance frequently runs counter to a significant body of case law decided under the assumption that parallel provisions of the state and federal constitutions have the same meaning.[1] Strict adherence to stare decisis would preclude a court from departing from such "lockstep" adherence to federal constitutional analysis.[2] At the same time, it would saddle the courts with precedents that are often demonstrably at odds with the language and intended meaning of the state constitution.

The virtues of stare decisis are well known.[3] Adherence to

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[1] For a number of years—particularly after the Burger Court—state courts tended to assume that provisions of state constitutions had the same meaning as did parallel provisions of the federal Constitution. *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 1-4 n.10 (1995) ("A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of the Warren era has left state constitutional law in a condition of near atrophy is [sic] some states."). In the 1970s and 1980s, a number of state courts "rediscovered" state constitutionalism, often referred to as "the new judicial federalism." See ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 20–36 (2009) for an excellent introduction to the transformation of state constitutional law.

[2] Most courts, in fact, continue to follow the "lockstep" approach to state constitutional interpretation. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002) ("[T]he majority of state courts, on most issues, engage in an analysis in lockstep with their federal counterparts.").

[3] There is quite a bit of scholarship on the subject of stare decisis, in general, and on the subject of originalism and stare decisis, in particular. For an interesting historical introduction to the development of the doctrine generally, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, (1999) (discussing historical examination of the evolution of the Supreme Court's overruling rhetoric by tracing the evolution of important strands of the Rehnquist Court's doctrine of stare decisis from founding-era treatises to early applications in the Marshall and Taney Courts). On originalism and stare decisis, see Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 2–3 (2007); and Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST.

precedent promotes stability and predictability in the law.[4] It ensures that similarly situated people will be treated similarly.

But it should not be forgotten that stare decisis is judge-made policy. Adherence to precedents is not constitutionally required (except, perhaps, indirectly to the extent that capricious failure to adhere to precedents can run afoul of constitutional requirements of equal treatment or due process).[5] And strict adherence to the principle is not costless.

In a sense, strict adherence to stare decisis, at least in constitutional cases, can itself be unconstitutional.[6] Inflexible commitment to a prior constitutional decision that is demonstrably incorrect, for example, exalts a non-constitutional, judicially created policy of consistency over the constitution—properly construed—itself.

In my view, unbending adherence to stare decisis in state constitutional decision-making is unwise and untenable.[7] Sometimes, earlier cases were ill-considered or downright wrongly decided. The costs of adherence to such cases, in terms of the credibility of the courts and the legitimacy of their decisions, outweighs the benefits of blind adherence to them as a matter of precedent. Think about it. If courts were inexorably bound to

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COMMENT. 257, 258–59, 262–63 (2005).

[4] *See, e.g.*, Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 450, 464–65 (2010); Lee, *supra* note 3, at 652–53, 661–62.

[5] Consider the federal due process line of cases regarding state court definitions of "property" that may not be taken without compensation. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain a regulation that deprives land of all economically beneficial use . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

[6] For vigorous defenses of the position that stare decisis is unconstitutional, *see generally* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) ("Stare decisis is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution! It would have judges apply, in preference to the Constitution, that which is not consistent with the Constitution."); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) ("[T]he practice of following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution."). Others take a different view, arguing that the doctrine of stare decisis is itself one of constitutional magnitude. *See, e.g.*, Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 572 (2001) ("Stare decisis . . . is a doctrine of constitutional magnitude.").

[7] My own views on the subject are set out more fully in Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 867–71 (2011).

precedent, *Plessy v. Fergusson*[8] would still be the law of the land.

I am aware that some have suggested that, in the case of state—as opposed to federal—constitutional decision making, the pull of stare decisis actually should be stronger.[9] State constitutions, the argument goes, are easier to amend than the federal Constitution. So, because erroneous state constitutional decisions can be relatively more easily remedied by constitutional amendment, the courts should feel more bound by their precedents.

I think such arguments are flawed. While the relative ease with which law may be amended seems a fair consideration, it is not clear to me that the benchmark is the difficulty with which the *federal* Constitution may be altered. More pertinent, it seems to me, is the fact that the state constitution is the highest source of law in the state and, compared with other sources of *state* law, remains difficult to amend.[10]

That does not mean that state courts should be free to reconsider, willy-nilly, any and all prior cases simply because those courts would have preferred a different outcome. There must be principles that govern the exercise of a court's judgment about whether, in a given case, the costs exceed the benefits of adherence to precedents.

The Oregon Supreme Court has wrestled openly with these questions in the last several years. The court moved from a more rigorous adherence to the principle of stare decisis to a more nuanced and flexible approach to the pull of precedent in state constitutional cases. The result has been a fair amount of housecleaning, as the court has unhesitatingly overruled a number of prior state constitutional decisions. A review of the court's recent decisions, however, reveals that it has been cautious to jettison prior cases only when circumstances warrant.

For a number of years, the Oregon Supreme Court rigorously followed the doctrine of stare decisis. In its statutory construction

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[8] Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

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

[10] *See* WILLIAMS, *supra* note 1, at 351 ("Regardless of the relative ease of amending state constitutions when compared with the federal Constitution, the fact remains that, in an absolute sense, state constitutions are the highest source of law in any given state, and they are much harder to change than common law or statutory law.").

decisions, for example, it adhered to the notion that, when it determined the meaning of a statute, its interpretation became part of the statute itself, "as if written into it at the time of its enactment."[11] In the court's view, only the legislature possessed the power to remedy any errors; the court declared itself essentially powerless to correct mistakes in the construction of statutes.

In its constitutional cases, the court similarly adhered to a version of stare decisis that left very little room for correction of past errors. A controversial free speech case, *State v. Ciancanelli*,[12] illustrates the point. In that case, the State asked the court to overrule prior case law on the ground that it could not be justified by the court's adopted approach to constitutional interpretation, which turned on the understanding of the constitution at the time of its framing.[13] The prior case law broadly held that a regulation of speech is unconstitutional unless confined to one of a very limited list of "historical exception[s]"—regulations like fraud and criminal solicitation that the framers would most certainly have understood the state retained the authority to regulate.[14] The State argued

[11] Stephens v. Bohlman, 838 P.2d 600, 603 n.6 (Or. 1992) ("When this court interprets a statute, that interpretation becomes a part of the statute as if written into it at the time of its enactment."); *see also* State v. King, 852 P.2d 190, 195 (Or. 1993) ("When this court interprets a statute, the interpretation becomes a part of the statute, subject only to a revision by the legislature.").

[12] State v. Ciancanelli, 121 P.3d 613 (Or. 2005). The case was controversial because the subject was the constitutionality of a statute that prohibited sexual conduct in a public show. *Id.* at 614.

[13] *Id.* at 616–17. In *Priest v. Pearce*, the Oregon Supreme Court described the principles of state constitutional interpretation in terms of three considerations: "[i]ts specific wording, the case law surrounding it, and the historical circumstances that led to its creation." Priest v. Pearce, 840 P.2d 65, 67 (Or. 1992). Subsequent cases explained that the objective in examining those considerations is to "discern the intent of the drafters of [the provision at issue] and the people who adopted it." State v. Hirsch, 114 P.3d 1104, 1109 (Or. 2005). At times, the analysis has taken on a distinctly originalist flavor. *See, e.g.*, Lakin v. Senco Prods., Inc., 987 P.2d 463, 468 (Or. 1999) ("[W]hatever the right to a jury trial in a civil case meant in 1857, it has the same meaning today."). More recently, however, the court has cautioned that, "[t]he purpose of that analysis is not to freeze the meaning of the state constitution in the mid-nineteenth century. Rather it is to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances." State v. Davis, 256 P.3d 1075, 1078 (Or. 2011).

[14] The leading case is *State v. Robertson*, in which the court set out the basic method of analysis for challenges to government regulation of free expression:

> Article I, section 8 . . . forbids lawmakers to pass any law 'restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever,' beyond providing a remedy for any person injured by the 'abuse' of this right. This forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first

that the existing doctrine was developed without regard to the widely held nineteenth-century understanding that constitutional free expression guarantees prohibited only prior restraint.[15]

The court was not persuaded. At the outset, the court acknowledged that its prior case law had been adopted without any examination of the intended meaning of the relevant constitutional provision.[16] The court further acknowledged that the State was correct that its case law could not be reconciled with what most mid-nineteenth-century courts and treatise writers said about the nature of constitutional free expression guarantees.[17] But, the court continued, stare decisis requires that the existing case law must be accorded a presumption of validity.[18] That means, the court explained, that even if current case law runs counter to the law prevailing in the mid-nineteenth-century, there must be evidence that the framers of the Oregon Constitution intended to follow that prevailing view.[19] The court found in the historical record no evidence of precisely what the framers of the state constitution thought about the issue.[20] It therefore concluded that the State failed in its burden.[21]

Whatever one may think of state constitutional interpretation

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> American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.

State v. Robertson, 649 P.2d 569, 576 (Or. 1982) (footnote omitted) (citation omitted). The *Robertson* approach to free expression analysis is significantly more protective of individual rights than, say, federal First Amendment analysis. For example, while under *Roth v. United States*, obscenity is not expression protected by the First Amendment, Roth v. United States, 354 U.S. 476, 485 (1957), under *State v. Henry*, it is protected by the Oregon Constitution, State v. Henry, 732 P.2d 9, 17 (Or. 1987).

[15] *Ciancanelli*, 121 P.3d at 622.

[16] *Id.* at 618.

[17] *See id.* at 622, 623, 624. The court acknowledged evidence that, "during the late eighteenth and early nineteenth centuries, most American courts and legal treatises tended to treat the right of free speech as a very limited one, guaranteeing to the individual only a freedom from prior restraint." *Id.* at 622.

[18] *Id.* at 617 ("A decent respect for the principle of *stare decisis* dictates that this court should assume that its fully considered prior cases are correctly decided.").

[19] *See id.* at 628–29.

[20] *See id.* at 630. The court found that, although most judges and commentators in the mid- to late-nineteenth-century held the view that constitutional free expression guarantees prohibited only prior restraint, there nevertheless were a few writers who held to a more comprehensive view of the guarantees—what the court associated with a "natural rights" view. *Id.* at 624–25. The problem was, the court explained, nothing in the historical record confirmed that the framers of the Oregon Constitution adhered to the traditional view. *Id.* at 630.

[21] *Id.* at 631.

generally, or of free expression doctrine in particular, *Ciancanelli* represents a very strong version of stare decisis. It clothed existing doctrine with a presumption of validity, even though it had been adopted without anything like the analysis that the court ordinarily requires. And it reaffirmed that existing doctrine based on little more than an absence of evidence that it was incorrect.

More recent decisions signaled a shift in the court's thinking, however. That shift began with a non-constitutional case, one involving the interpretation of the state financial responsibility statute. But the court's explanation of the doctrine of stare decisis was stated in much broader terms, expressly embracing constitutional precedents as well.

The case was *Farmers Insurance Company of Oregon v. Mowry*.[22] The specific issue is not important for our purposes.[23] What is important is that the state's financial responsibility statute had been interpreted in a particular way in a case decided twenty years earlier.[24] That prior case was controlling. The only issue before the court was whether to adhere to it.[25] Recall that, at least to that point, the Oregon courts adhered to an especially rigid "rule of prior construction," which purported to divest the court of authority to reconsider prior statutory construction decisions.[26] In *Mowry*, therefore, the court had to address first whether it would adhere to its rule of prior construction before entertaining the prospect of overruling its earlier interpretation of the statute.

The court abandoned the old rule of prior construction.[27] In the process, it engaged in a wide-ranging discussion of the doctrine of

[22] Farmers Ins. Co. v. Mowry, 261 P.3d 1 (Or. 2011).

[23] The issue was whether an exclusion from automobile liability insurance coverage that violated the minimum insurance required by the state financial responsibility statute resulted in the invalidity of the exclusion (leading to the full coverage that would have been available under the policy but for the exclusion) or the enforceability of the exclusion as to any coverage above that statutory maximum. *See id.* at 2. Thus, in *Mowry*, the insured purchased a policy with coverage limits of $100,000 per person, but subject to an exclusion for personal injury to the insured or any person using the insured's car. *Id.* at 2–3. The insured argued that the exclusion violated the minimum liability coverage of $25,000 required by the state financial responsibility statute. *See id.* at 4. The question was whether, assuming that the exclusion did violate the $25,000 minimum, the remedy is the total invalidation of the exclusion—resulting in coverage of $100,000, or the invalidation of the exclusion only up to the statutory minimum—resulting in $25,000 in coverage. *Id.*

[24] In *Collins v. Farmers Ins. Co.*, the court held that an exclusion that violated the financial responsibility statute remained enforceable as to any coverage beyond the statutory minimum. Collins v. Farmers Ins. Co., 791 P.2d 498, 499 (Or. Ct. App. 1990).

[25] *Mowry*, 261 P.3d at 2.

[26] *Ciancanelli*, 121 P.3d at 617–18.

[27] *Mowry*, 261 P.3d at 6.

stare decisis and the question whether to apply it rigorously or with some flexibility.[28] The court began by acknowledging the "'undeniable importance of stability in legal rules and decisions,'" an importance that is "based on the values of predictability, fairness, and efficiency."[29] But the court also recognized a countervailing need to "'correct past errors.'"[30] Given those competing values, the court explained, stare decisis must not be "'arbitrary and inflexible.'"[31]

The court noted that those competing values may weigh differently in different contexts—common-law, statutory, or constitutional.[32] In the case of constitutional analysis, the court noted, while stability and reliability certainly are important, it is also important for the court to be able to correct erroneous decisions, because "'[t]his court is the body with the ultimate responsibility for construing our constitution, and, if we err, no other reviewing body can remedy that error.'"[33]

In the case of statutory interpretation, in contrast, the legislature is readily capable of amending a statute in response to what it may perceive as an erroneous construction of its legislation.[34] The court noted that, because of that fact, earlier cases indulged an assumption of "legislative acquiescence" in prior interpretations, leading the court to adopt its rule of prior construction.[35] In *Mowry*, however, the court questioned the validity of the assumption and disavowed the rule of prior construction.[36] The court then proceeded to consider whether to overrule its prior construction of the financial responsibility statute.[37] In the end, the court decided to adhere to its earlier decision.[38] Noting the special importance of stability and predictability in the area of commercial transactions, the court concluded that, while the correctness of the earlier decision was a matter of reasonable dispute, more is required to upend established expectations.[39]

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[28] *Id.* at 5–8.
[29] *Id.* at 5 (quoting Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 237 (Or. 2000)).
[30] *Mowry*, 261 P.2d at 5 (quoting *Stranahan*, 11 P.3d at 237).
[31] *Id.* (quoting *Stranahan*, 11 P.3d at 237).
[32] *Id.*
[33] *Id.* at 5–6 (quoting *Stranahan*, 11 P.3d at 237).
[34] *Id.* at 7.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 9.
[38] *Id.* at 11.
[39] *Id.* at 8, 11.

The court's comments on constitutional analysis are especially significant. They signaled something of a retreat from the more rigorous view of stare decisis applied in cases such as *Ciancanelli*. To be sure, the court mentioned that existing case law—especially case law that has a significant degree of history behind it—enjoys a presumption that an earlier case was rightly decided.[40] But, at the same time, the court emphasized the importance of correctness to the legitimacy of its work, as well as the relative difficulty of remedying error by constitutional amendment.[41]

Consistently with that signal, the court set about reconsidering a number of prior state constitutional decisions almost immediately. The court's decision to do so, however, was not the product of simple disagreement with earlier opinions. Its recent cases reflect three important considerations that the court takes into account in determining when it is appropriate to reexamine its state constitutional precedents.

First, there is the question whether the precedent in question was mere dictum or was adopted without thorough consideration in accordance with the court's usual method of determining the meaning of the state constitution. Second, even if the precedent had been thoroughly considered, was it nevertheless demonstrably incorrect? Third, even if thoroughly considered, is the existing precedent in direct conflict with other existing case law?

Let's begin with an example of the first consideration, whether the precedent was dictum or adopted without careful analysis. In *State v. Christian*,[42] the issue was the constitutionality of a local ordinance prohibiting the possession of a firearm in a public place that the owner recklessly failed to unload.[43] The defendant charged with violating that ordinance challenged it on the ground that it was unconstitutionally overbroad under article I, section 27, of the state constitution.[44]

Now "overbreadth" is a constitutional doctrine first developed by

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[40] *Id.* at 5 n.3 (identifying the age of the precedent in question as a significant factor).

[41] *Id.* at 5.

[42] State v. Christian, 307 P.3d 429 (Or. 2013).

[43] *Id.* at 431–32. City of Portland Ordinance 14A.60.010(A) provided: "It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, . . . recklessly having failed to remove all the ammunition from the firearm." PORTLAND, OR., CODE § 14A.60.010(A).

[44] *Christian*, 307 P.3d at 432. Article I, section 27, of the Oregon Constitution provides that "[t]he people shall have the right to bear arms for the defence [sic] of themselves, and the State." OR. CONST. art. I, § 27.

the United States Supreme Court in the context of free expression cases.[45] In a nutshell, the doctrine permits a person to challenge the facial constitutionality of a law not because it violates his or her constitutional rights, but because it could "chill" the constitutional free expression rights of others.[46] The origin and rationale of the doctrine derive from concerns unique to free expression, and United States Supreme Court cases limit it to First Amendment challenges.[47]

Nevertheless, in two prior cases, the Oregon Supreme Court had applied it in the altogether different context of right-to-bear-arms cases. In the first of the two cases, *State v. Blocker*,[48] the court simply referred to the overbreadth doctrine as developed by the United States Supreme Court and, without further ado, concluded that "it is proper" to evaluate challenges under article I, section 27, the same way.[49] Similarly, in *State v. Hirsch*,[50] the court simply cited *Blocker* and applied the same overbreadth analysis to a challenge brought under the right-to-bear-arms guarantee.[51]

In *Christian*, however, the city, whose ordinance was at issue, invited the court to reconsider whether it is appropriate to apply overbreadth analysis outside of the free expression context.[52] The court accepted the invitation, examined the prior cases, and concluded that they lacked any justification "for recognizing overbreadth challenges in freedom of expression and assembly cases . . . in the context of Article 1, section 27, cases[.]"[53] In the two earlier cases, the *Christian* court explained, it had simply borrowed from federal constitutional analysis without adequately explaining

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[45] *See generally* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 1 (discussing the overbreadth doctrine in free expression cases); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970) (summarizing the overbreadth doctrine).

[46] *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech . . . ."); Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973) ("It has long been recognized that the First Amendment needs breathing space . . . . Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

[47] *See, e.g.*, Schall v. Martin, 467 U.S. 253, 268 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.").

[48] State v. Blocker, 630 P.2d 824 (Or. 1981), *overruled by Christian*, 307 P.3d at 429.

[49] *See id.* at 827.

[50] State v. Hirsch, 114 P.3d 1104 (Or. 2005), *overruled by Christian*, 307 P.3d at 429.

[51] *See id.* at 1107–08.

[52] *Christian*, 307. P.3d at 433.

[53] *Id.* at 438–41.

why it was appropriate to do so in the context of an article I, section 27 (right to bear arms); as such, the court concluded the earlier cases must be overruled.[54]

The second consideration that I mentioned is whether the earlier decision was demonstrably incorrect. Of course, "incorrect" is a difficult concept to pin down. There can be, and often are, reasonable disputes about the "correct" interpretation of a constitutional provision. What I am referring to is something different; something about which reasonable persons will not disagree. Ordinarily, this will require some consensus about the principles that govern proper state constitutional interpretation in the first place. In Oregon, the courts have developed a fairly settled group of interpretive principles that give primacy of attention to the words of the constitution, interpreted in the light of the meaning and purpose that would have been understood by its framers.[55] Certainly that leaves a lot of room for reasonable differences of opinion. But, at the very least, it requires that a state constitutional doctrine find support in the reasonable construction of the constitutional text.[56]

That absence of support in the constitutional text explains a recent decision in which the Oregon Supreme Court abandoned nearly ninety years of precedent. The constitutional provision is article I, section 11, which guarantees every defendant in a criminal case the right to trial "in the county in which the offense shall have been committed . . . ."[57] By its terms, it guarantees a defendant the right to insist that trial take place in a particular county—the county where the crime occurred.[58] Since 1923, however, the Oregon Supreme Court interpreted that provision to require the state to prove venue as a material allegation of its case.[59] If, at the

[54] *Id.* at 440.

[55] *See supra* note 16.

[56] It has been suggested that there are possible doctrines of constitutional significance that are not rooted in the text of a constitutional document. *See, e.g.*, LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION xx (2008) (discussing "[t]he idea that the Constitution's text—the 'visible' Constitution—couldn't answer all the questions people might have about what the Constitution commands and what it forbids" and the "incompleteness of the Constitution's text and the way it necessarily left open such basic questions as the one about what the Constitution includes and what it excludes"). I do not mean to rule out such possibilities. My point is simply that any constitutional doctrine that purports to be an *interpretation* of the document must find support in the reasonable construction of the words in that document.

[57] OR. CONST. art. I, § 11.

[58] *Id.*

[59] State v. Casey, 213 P. 771, 777 (Or. 1923) ("The place where the crime was committed is a material and jurisdictional allegation . . . and requires that the prosecution prove, beyond a

end of the State's case, the State's witnesses had failed to mention the name of the county where the crime occurred, a defendant could obtain a dismissal of all charges with prejudice.[60]

In *State v. Mills*, the court reexamined article I, section 11, its wording,[61] its historical underpinnings,[62] and its interpretation.[63] In brief, the court concluded that nothing in the wording of the provision suggested anything about matters of proof.[64] Examining the historical development of the contrary doctrine, the court observed that earlier decisions had apparently conflated a longstanding *common law* requirement that venue be proven (to establish the jurisdiction of the court) with the constitutional guarantee, which was rooted in entirely different concerns about fairness and inconvenience to a criminal defendant.[65]

The earlier decisions that effectively grafted the common law proof requirement onto the constitutional guarantee, the court explained, had done so without any analysis or explanation.[66] The 1923 decision that had first announced the new rule of proof simply declared it in a sentence, followed by a citation to article I, section 11, with no further elaboration.[67] Overruling the prior cases, the

reasonable doubt."), *overruled by* State v. Mills, 312 P.3d 515, 527—28 (2013).

[60] *See, e.g.*, State v. Roper, 595 P.2d 1247, 1251 (Or. 1979) (noting that the trial court erred in failing to grant motion for judgment of acquittal for want of proof of venue); State v. Turner, 234 P.3d 993, 995 (Or. Ct. App. 2010) (noting that a trial on stipulated facts was reversed because of failure to include proof of venue); State v. Panek, 917 P.2d 500, 503–04 (Or. Ct. App. 1996) (noting an error in the denial of motion for judgment of acquittal because of lack of proof of venue).

[61] *Mills*, 312 P.3d at 518–20.

[62] *Id.* at 520–24.

[63] *Id.* at 524–27.

[64] "By its terms," the court explained, "the constitutional provision guarantees an accused in a criminal proceeding a right to have the trial occur in a particular place. . . . It does not specify anything about elements of proof." *Id.* at 518–19. The court further noted that article I, section 11, includes guarantees of a number of trial-related rights—the right to a public trial, to an impartial jury, the right to be heard by defendant or counsel, the right to a copy of the accusation, the right to confront witnesses, among others—none of which pertains to matters of proof. *Id.* at 519.

[65] *Id.* at 520–24 (discussing the common law rules of venue and vicinage). The court explained that, "[a]t common law, it was long the general rule that proof of venue was necessary to establish the jurisdiction of the court," a rule that was rooted in early common law "notions about the authority of juries." *Id.* at 520. In contrast, the court explained, the constitutional venue guarantee originated in colonial dissatisfaction with the British practice of requiring trials for sedition and treason to be conducted in England. *Id.* at 522–23. "[N]othing in the historical record," the court said, suggests that the framers of state or federal venue guarantees intended to incorporate the common-law proof requirement. *Id.* at 523.

[66] *Id.* at 524–25.

[67] *Id.*

court in *Mills* explained that

> [a]lthough this court does not lightly overrule an earlier constitutional decision, it has determined that the need to correct past errors may outweigh the importance of stability when the application of the court's interpretive analysis . . . demonstrates that the earlier case or cases find little or no support in the text or history of a disputed constitutional provision.[68]

While an absence of support in the constitutional text may lead to a reconsideration of precedent, so also can a literalistic reading of a provision divorced from its historical context. State constitutional provisions often are phrased in absolutes, stating without qualification or exception that "no law shall" violate a given right or guarantee.[69] Often, however, even a cursory review of the historical context will show that those who adopted such phrasing did not understand or intend that it be applied literally. The Oregon Supreme Court's decision in *State v. MacBale*[70] illustrates a case in which a failure to take into account that historical context justified a reconsideration of an earlier, literalistic interpretation of the state constitution.

At issue in that case was article I, section 10, of the Oregon Constitution, which guarantees that, "[n]o court shall be secret, but justice shall be administered, openly."[71] The issue arose in the context of a criminal case in which the defendant was accused of rape.[72] The defendant, claiming that the victim made false accusations against him, sought to offer evidence that the victim had falsely accused men of raping her on two earlier occasions and that she had done so for the purposes of financial gain.[73] He moved under Oregon's rape shield law for a hearing to determine the admissibility of that evidence.[74] He also asked that the hearing be conducted in public.[75] The trial court denied the request for a public

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[68] *Id.* at 527 (citation omitted).

[69] *See, e.g.*, OR. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."); OR. CONST. art. I, § 30 ("No law shall be passed prohibiting emigration from the State.").

[70] State v. MacBale, 305 P.3d 107 (Or. 2013) (en banc).

[71] OR. CONST. art. I, § 10.

[72] *Macbale*, 305 P.3d at 109.

[73] *Id.*

[74] *Id.* at 109, 110.

[75] *Id.* at 109.

hearing on the ground that the rape shield law requires that such hearings occur *in camera*.[76] Defendant filed a petition for a writ of mandamus ordering the trial court to conduct the hearing in public, arguing that the provision in the rape shield law calling for a closed hearing violated the state constitutional guarantee that courts will operate openly and not in secret.[77]

Defendant's argument did not lack support. In *Oregonian Publishing Co. v. O'Leary*,[78] the Oregon Supreme Court had declared unconstitutional a statute requiring in-camera hearings to determine whether a witness who had invoked the privilege against self-incrimination could be compelled to testify.[79] The court had explained that the "open courts" guarantee of article I, section 10, "is written in absolute terms; there are no explicit qualifications to its command that justice shall be administered openly."[80]

In *MacBale*, however, the court backed off from such an absolutist reading of the guarantee. The court noted that *O'Leary* had been decided without any reference to the court's now-settled approach to state constitutional interpretation.[81] Specifically, the court explained, *O'Leary* had "simply assumed" that the constitution was meant to be read literally and without regard to its historical context.[82] The court then embarked on a detailed account of the history of the open courts provision, noting that, at the time that the state constitution was adopted, the framers would have understood that judges retained "broad latitude to control their courtrooms, including taking such actions as may be necessary to protect vulnerable participants in judicial proceedings, including victims, from harassment or embarrassment."[83] "Given that latitude," the court concluded, "the right of access that Article I, section 10, secures, although broad, is not absolute."[84] *O'Leary*, the court explained, had "overstated" the significance of the unqualified phrasing of the constitution.[85]

A prior decision also may prove "incorrect" because a significant

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[76] *Id.* at 109–10.
[77] *Id.* at 110.
[78] Oregonian Publ'g Co. v. O'Leary, 736 P.2d 173 (Or. 1987).
[79] *Id.* at 174–75.
[80] *Id.* at 176.
[81] *Macbale*, 305 P.3d at 115.
[82] *Id.*
[83] *Id.* at 117.
[84] *Id.* at 117–18.
[85] *Id.* at 116.

assumption on which it was based has changed or has proven to be erroneous. The Oregon Supreme Court's decision on the admissibility of eyewitness testimony in criminal cases, *State v. Lawson*,[86] illustrates that point.

Over thirty years earlier, the court had adopted a rule regarding the admissibility of eyewitness testimony in *State v. Classen*.[87] Under that rule, the court first was required to determine whether the process leading to the identification of a person was suggestive.[88] If so, then the prosecution was required to satisfy the court that the identification nevertheless was sufficiently reliable.[89] In making that determination, *Classen* held that the court should consider such things as the opportunity that the witness had to get a clear view of persons involved at the time, the attention that the witness gave to identifying features, the timing and completeness of the description that the witness gave after the event, the certainty with which the witness made the identification, and the lapse of time between the initial and subsequent identifications.[90] Doctrinally, the rule was an amalgam of due process considerations, state evidence law, and social science data.[91]

In *Lawson*, the court addressed the continuing viability of the *Classen* rule in light of several decades of social science research suggesting that some of the assumptions underlying the court's earlier decision were questionable.[92] For instance, while *Classen* identified as a factor demonstrating the reliability of eyewitness identification the certainty with which the witness made the identification, subsequent research demonstrates that retrospective self-reports of certainty are "highly susceptible to suggestive procedures and confirming feedback."[93] Moreover, although generally a poor indicator of identification accuracy, witness

[86] State v. Lawson, 291 P.3d 673, 690 (Or. 2012).
[87] State v. Classen, 590 P.2d 1198, 1203 (Or. 1979).
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] The court, for example, cited several law review articles and various model rules of police and other pre-arraignment procedure. *Id.* at 1201–02 nn.3–6. It should be noted that the Oregon Constitution lacks a due process clause. *See generally* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970) (stating that Oregon does not have a due process clause). Thus, *Lawson* is not, strictly speaking, a *state* constitutional decision. But the point that it makes certainly applies to state constitutional precedents.
[92] State v. Lawson, 291 P.3d 673, 678 (Or. 1979).
[93] *Id.* at 688.

certainty has a "substantial potential to influence jurors."[94] The court concluded that, "[i]n light of the scientific findings . . . the methodology set out in *Classen* is not adequate to the task of ensuring the reliability of eyewitness identification evidence that has been subjected to suggestive police procedures."[95]

The third and final consideration arises when a longstanding precedent also may, over the course of time, have become inconsistent with later case law. The inconsistency in the cases can leave the court with no choice but to abandon one line of cases or another. A good example of that particular problem is *State v. Savastano*.[96] The question in that case was whether the state constitutional guarantee of equal privileges and immunities applied to prosecutorial charging decisions.[97] The defendant was accused of embezzling some $200,000 from her employer over a period of sixteen months.[98]

State law permitted the prosecutor to aggregate multiple theft transactions if the thefts had been committed against the same victim within a 180-day period.[99] The prosecutor aggregated the individual theft transactions by month, charging defendant with sixteen counts of theft.[100] The aggregation resulted in a number of charges of first degree aggravated theft, because of the total amount of money involved.[101] Defendant challenged the constitutionality of the prosecutor's aggregation of charges, arguing that it violated article I, section 20, of the Oregon Constitution,[102] which guarantees that "[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."[103] According to defendant,

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[94] *Id.*

[95] *Id.* at 690. The court noted that, since *Classen*, more than 2,000 scientific studies had been conducted concerning the reliability of eyewitness identification. *Id.* at 685. The court summarized much of that research in its opinion and included at the end of the opinion an appendix setting out in greater detail the literature. *Id*. at 685–88, 700–11.

[96] State v. Savastano, 309 P.3d 1083 (Or. 2013).

[97] *Id.* at 1085.

[98] *Id.*

[99] *Id.* at 1085–86. *See* OR. REV. STAT. § 164.115(6)(b) (2012) ("The value of single theft transactions may be added together if the thefts were committed . . . [a]gainst the same victim . . . within a 180-day period.").

[100] *Savastano*, 309 P.3d at 1085.

[101] *Id.* at 1086. *See* OR. REV. STAT. § 164.057(1)(b) (2012) ("A person commits the crime of aggravated theft in the first degree, if . . . [t]he value of the property in a single or aggregate transaction is $10,000 or more.").

[102] *Savastano*, 309 P.3d at 1086.

[103] OR. CONST. art. I, § 20.

the Oregon Supreme Court previously had held in *State v. Freeland*,[104] that article I, section 20, requires all government officials to exercise their discretion in accordance with a preexisting policy.[105] In this case, the defendant argued that the prosecutor conceded that there was no such preexisting policy.[106] In response, the State conceded that *Freeland* required such a preexisting policy.[107] But *Freeland*, the State argued, could not be reconciled with later cases and should be overruled.[108]

The Oregon Supreme Court agreed with the State. The court began by reviewing the text and historical context within which the privileges and immunities provision was adopted.[109] It noted that, while the text of the constitution speaks to the legislature's authority to draw classifications among its citizens, "a requirement that the government apply a coherent, systematic policy—or any policy at all—in all decisions involving its citizens is not apparent from its text."[110] The court further noted that a review of the history of the provision likewise "does not support a general requirement that the government must make decisions according to a 'systematic policy.'"[111]

The court acknowledged that, nevertheless, *Freeland* did conclude that article I, section 20, imposed such a requirement.[112] The problem was, the court added, subsequent decisions did not appear to have followed it.[113] Indeed, the court observed, its post-*Freeland* decisions "are not always easy to reconcile with the reasoning in *Freeland*."[114] Under the circumstances, the court concluded, it was appropriate to overrule the decision.[115]

In conclusion, the Oregon Supreme Court clearly has charted a new course with respect to the role of stare decisis in state constitutional interpretation. The court has moved from a tradition

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[104] State v. Freeland, 667 P.2d 509 (Or. 1983), *overruled by* State v. Savastano, 309 P.3d 1083 (Or. 2013).

[105] *Savastano*, 309 P.3d at 1087–88.

[106] *Id.* at 1086.

[107] *See id.* at 1088 ("*Freeland* should be overruled because Article I, section 20, does not require a prosecutor to apply a 'coherent, systematic policy' to a charging decision like the one at issue here.").

[108] *Id.* at 1087.

[109] *Id.* at 1089–91.

[110] *Id.* at 1090.

[111] *Id.*

[112] *Id.* at 1096–97.

[113] *Id.* at 1097.

[114] *Id.*

[115] *Id.* at 1102.

of more rigorously adhering to precedent to a practice of applying the doctrine of stare decisis with more flexibility. The court now recognizes that, particularly because of its role as the final arbiter of the meaning of the Oregon State Constitution, the need to correct past errors sometimes can outweigh competing considerations of stability and predictability. My hope is that this brief description of recent cases demonstrates that the court has weighed those competing considerations in a thoughtful and principled manner.