

## *When Stranahan Doesn't Get You Where You Need to Go - Advocating for New Approaches to Interpreting the Oregon Constitution*

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In *State v. Hemenway*, 353 Or 129, 295 P3d 617, *vac'd as moot on ground that the defendant had died*, 353 Or 498, 302 P3d 413 (2013), Justice Jack Landau wrote separately to urge reconsideration of the Oregon Supreme Court's stated approach to interpreting the Oregon Constitution by giving effect to the "original intent" of its framers. It remains to be seen whether there is broader interest on the court in changing its approach to constitutional interpretation. In the meantime, Justice Landau's concurrence in *Hemenway* serves as a reminder that attorneys can and should look for opportunities to advance the interests of their clients through principled arguments for alternative interpretations of the Oregon Constitution. Properly framing and developing the record for a case today could create the platform for a change of doctrine years from now. Following are some thoughts to get you started.

### **Original Intent: Still the Rule (Except When It Isn't)**

Unless and until the Oregon Supreme Court announces a change in its approach to interpreting the Oregon Constitution, advocates must be prepared to argue their cases based on the current analytical frameworks. The court has adopted two different frameworks for interpreting the Oregon Constitution, one for its original provisions and one for provisions that were adopted or amended at later dates.

The Oregon Supreme Court's approach to interpreting original provisions of the Oregon Constitution is set out in *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992). Under *Priest*, a court must consider three factors:

- (1) The wording of the provision;
- (2) The historical circumstances leading up to the enactment of the provision; and

- (3) Prior case law interpreting that provision.

*Priest*, 314 Or at 415–17. The court applies a different analytical framework to constitutional provisions that were adopted or amended after the original constitution, borrowing from *PGE v. BOLF's* framework for statutory interpretation: "[T]he first level of analysis is to examine text and context. That level includes subsidiary principles of statutory construction that are relevant . . . . Only if the legislative intent remains unclear after an examination of text and context does the court consider legislative history." *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 560, 871 P2d 106 (1994).

It is the court's later decision in *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 11 P3d 228 (2000), that drew Judge Landau's critique in *Hemenway*. In *Stranahan*, the court expressed a willingness to reconsider pre-*Priest* and pre-*Ecumenical Ministries* interpretations of the Oregon Constitution when a party offers "a principled argument" suggesting that the earlier decision was wrongly decided. *Stranahan*, 331 Or at 54. The court would give "particular attention," it said, to arguments that either present new information about the meaning of the constitutional provision or demonstrate a "failure [of the court in its earlier decision] to follow its usual paradigm for considering and construing the meaning of the provision in question. *Id.* According to the court, "it long as been the practice of this court to 'ascertain and give effect to the intent of the framers [of the provision at issue] and the people who adopted it.'" *Id.* (quoting *Jones v. Hoss*, 132 Or 175, 178, 285 P 205 (1930)).

As Justice Landau points out in his *Hemenway* concurrence, it would have been an error for the court in *Stranahan* to suggest that it has always interpreted the Oregon Constitution by giving effect to the framers' intent. *Hemenway*, 353 Or at 155 (Landau, J., concurring). For example, the

court has construed the state constitutional compulsory process clause in the same way the United States Supreme Court construes the similar federal counterpart, without reference to the intent of the framers of the Oregon Constitution. *Id.* (citing *State v. Mai*, 294 Or 269, 272, 656 P2d 315 (1982)). And even under *Stranahan*, a pre-*Priest* and pre-*Ecumenical Ministries* decision of the Supreme Court expressing a non-originalist interpretation of the Oregon Constitution will govern unless and until the court changes it.

A number of resources exist for an advocate arguing for an interpretation of a constitutional provision under *Priest* or *Ecumenical Ministries*. The authors recommend starting with chapter 1 of the Oregon State Bar BarBook, *Oregon Constitutional Law* (2013), and chapter 7 of the Oregon State Bar BarBook, *Interpreting Oregon Law* (2009).

### Justice Landau's Critique of *Stranahan*

*Hemenway* involved the search and seizure provision of the Oregon Constitution, Article I, section 9, and the admissibility of evidence obtained through a consent search that follows an illegal stop. The state argued that the court should disavow the exploitation test announced in *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), because the court in *Hall* did not follow the court's "usual paradigm" when it interpreted Article I, section 9. *Hemenway*, 353 Or at 137. The court declined the state's invitation to overrule *Hall*, opting instead to clarify and refine the exploitation test. *Id.* at 149.

Justice Landau concurred in the court's decision, but wrote separately to offer a critique of *Stranahan*. After questioning the suggestion in *Stranahan* that originalism was well established in the Oregon Supreme Court's precedents, he proceeded to critique the merits of originalism as the exclusive methodology for interpreting the Oregon Constitution. Justice Landau argued that utilizing original intent to interpret a provision contained in the original constitution of 1857 is problematic because: (1) the historical record often does not reveal the intent of the framers; (2)

it is unclear whether the framers meant for their intent to matter in future constitutional interpretations; and (3) a strict adherence to original intent "makes the state's highest law little more than a historical artifact of an era that few in this century actually would choose as a determinant of individual rights and government authority—an era, it should be remembered, when women possessed few political and civil rights, when the common law recognized no protections for workers, and when the people decreed that a 'negro' or 'mulatto' who did not already reside in the state when the constitution was adopted was not permitted to reside in Oregon." *Hemenway*, 353 Or at 157 (Landau, J., concurring). Agreeing with the court's decision not to undertake an originalist interpretation of Oregon's constitutional search and seizure guarantees, he "counsel[ed] the exercise of caution and skepticism in assessing the significance of such nineteenth-century intentions and understandings as we interpret other provisions of the original constitution, as well." *Id.* at 160.

### Advocating for Change

Justice Landau's concurrence in *Hemenway* gives no express indication as to whether others on the court share his interest in rejecting originalism as the exclusive methodology for interpreting the Oregon Constitution. The authors express no opinion here on whether such a change is desirable. But if change is to come, it most likely will be prompted by one or more lawyers who carefully frame a case to facilitate that outcome and who present the court with the record necessary to apply a different methodology. Without pretending to offer a comprehensive guide to effecting such change, following are some suggestions on how to get there.

1. **Start early.** The earlier a lawyer identifies a potential issue of constitutional interpretation, the earlier he or she can (and should) preserve the arguments and build whatever record is necessary to analyze the constitutional provision under your proposed methodology.

**2. *Some cases might be easier than others.*** Although some in the bar perceive an increasing willingness in our appellate courts to disavow precedent believed to be wrongly decided, *stare decisis* remains a powerful hurdle to changing the law. It will be difficult enough to convince the court to change its methodology for interpreting a constitutional provision without also asking it to alter long established precedent interpreting a particular constitutional provision. The authors suggest that a new paradigm is more likely to arise in the context of interpreting a constitutional provision that has not yet been interpreted by the court or which is not the subject of clear precedent.

**3. *Don't forget the framers' intent.*** Most critics of originalism, including Justice Landau, recognize that historical context - including the framers' intent - is always relevant to constitutional interpretation. See *Hemenway*, 353 Or at 157 (Landau, J., concurring). Justice Landau observed, for example, that when it comes to newer constitutional provisions that carry extensive historical records, it often makes sense to closely examine evidence of intent. *Id.* It is a virtual certainty that the framers' intent will remain a factor in any substitute for strict originalism that the Oregon Supreme Court might adopt, so counsel must be prepared to use (or explain away) any evidence we have of that intent.

**4. *Bring principled creativity to your argument.*** If the Oregon Supreme Court were to limit or reject originalism as a methodology for interpreting our state constitution, what would be established in its place? Justice Landau does not offer a complete answer in his *Hemenway* concurrence, saying only as noted above that historical context will always be relevant. (But see Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837 (2011), for insight into what he, as one member of the Oregon Supreme Court, might advocate.) One may comfortably assume that analysis of a constitutional provision's text, context and historical background will remain as part of the analysis and should be argued thoroughly in any case. After that, the advocate

can be creative in arguing other factors that can be relevant in a principled approach to constitutional interpretation. What might also find its way into the methodology?

a. Precedent already is a factor in the *Priest* analysis, and *stare decisis* is often cited as a relevant factor when interpreting a constitution. Perhaps that is obvious; of course a lawyer will address prior decisions of the court on the same or similar provision. A more complete analysis, however, will address whether application of *stare decisis* in the circumstances of a given case truly advances the values for which it is invoked, including predictability and stability in the law.

b. The practical consequences of different interpretations might be considered. Few would deny that the contextual analysis of a constitutional provision would properly include whether a particular interpretation would be in direct conflict with the mandates of another constitutional provision. Likewise, few would argue that judges should decide cases based on their personal policy preferences. In between those extremes is fertile ground for advocacy. Which interpretation is more consistent with principles of justice? Which interpretation is more consistent with fundamental principles animating the state constitution (and what are those, anyway)? Which interpretation is more consistent with sound policy, and is it ever permissible to consider that? This is where the development of an evidentiary record can be key. It also is the best subject for effective *amicus curiae* support.

c. A court might find prudential considerations, such as the impact of a particular interpretation on the work of judicial, legislative and administrative officials, to be relevant.

d. Finally, there is no shortage of theories and analytical devices that legal theorists have brought to bear on constitutional problems - ethics, economics and natural law, to name a few. It would be surprising if any of those were identified as factors to be considered in a new methodology for judicial interpretation of the

Oregon Constitution, but looking at a case and the constitutional provision at issue through different prisms might provide persuasive support for a desired outcome.

Applying a strict originalist interpretation of the Oregon Constitution might not produce a clear answer in the circumstances of a particular case, or it might produce an answer that is inconsistent with a client's goals. These thoughts scratch the surface of what attorneys can consider when taking up Justice Landau's invitation in *Hemenway* to advocate for a new approach.



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