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Without "Due Process"

Unconstitutional Law in Oregon

TEN YEARS AGO, I reviewed for a survey issue the state of constitutional litigation in Oregon.[1] The chief exhibit was a decision in which the Oregon Supreme Court had invalidated a truck rental regulation under a misconception of the due process clause of the federal fourteenth amendment.[2] Now two recent decisions make it timely to look once again at judicial review of legislation in Oregon. The issues to be discussed with respect to the premises and manner of judicial review go well beyond these recent decisions and are not peculiar to Oregon.

It can be said at the outset that the intervening decade displays no repetition of the truck rental case. The Oregon court has not followed or even cited its opinion in *Hertz Corporation v. Heltzel*.[3] It has repeatedly rejected similar constitutional attacks on state or local regulatory policies. The present reexamination, then, is not triggered by a startling judicial *tour de force*; nor would there be point in cataloguing these past holdings as such. The results in the cases have by and large been unexceptionable. They should have been entirely predictable. Nevertheless, attacks on regulations under claims that may be conveniently lumped as "substantive due process" continue to be pressed. The Oregon opinions have not succeeded in explaining the constitutional premises that support the holdings. The explanations rather encourage

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[1] Linde, *Constitutional Law—1959 Oregon Survey*, 39 OR. L. REV. 138 (1960).

[2] Hertz Corp. v. Heltzel, 217 Or. 205, 341 P.2d 1063 (1959), *discussed in* 39 OR. L. REV. at 143-152.

[3] *Id.* For the fate of *Hertz* elsewhere, *see* note 133 *infra*.

habitual routine attacks, under "due process" or its rhetorical equivalents, against the validity of irksome laws or ordinances. The imprecision of the conventional rhetoric gives little guidance whether such a claim in a factually appealing situation might possibly win judicial sympathy or whether it is futile on its face, and the lack of a theoretical basis does not help the briefing of the claims that are litigated.

Thus a decade's cases, regardless of their outcomes, offer an occasion to review the constitutional premises for judicial review of regulatory policies in Oregon, in the hope that a systematic analysis of its tools and methods may be helpful to counsel and courts. So delimited, the topic regrettably excludes the interesting recent work of the Oregon Supreme Court in the lively constitutional fields of criminal procedure, the federal first amendment, and conflict between the state and federal spheres of policy, except insofar as these bear tangentially on the analysis. Regrettably, also, a systematic presentation must go back to fundamentals at the risk of pedantry. Perhaps "risk" is an understatement; some may find this entire analysis to be an exercise in pedantry. There is a good deal of material to be organized, and I hope that sectioning it may make distinct topics and questions more manageable.

I. THE CASES

The two recent decisions that make this review timely are *Leathers v. City of Burns*[4] and *State v. Fetterly*.[5]

Leathers was a suit for declaratory judgment and injunction against the enforcement of two ordinances adopted in 1949 by the city of Burns, Oregon to regulate the unloading and storage of petroleum fuels. One ordinance, No. 349 as amended in 1959 and 1964, provided, after other sections dealing with the storage of flammable liquids:

> No underground tank shall be kept or maintained for the storage of flammable liquids if such tank has a capacity in excess of 3,000 gallons, and no more than 4,000 gallons total capacity for all tanks shall be maintained by any one garage, service station, residence or other business.

Ordinance No. 350 provided:

> WHEREAS, the unloading of large quantities of petroleum fuels at other than bulk distribution plants is considered by the Common Council of the City of Burns to be extremely dangerous because of probable conflagration, . . .
>
> . . . now therefore,
>
> BE IT ORDAINED BY THE CITY OF BURNS:
>
> Section 1. No vehicle having a conbined [*sic*] maximum capacity of over 2200 gallons shall be allowed to unload petroleum fuel with a flash point of less than

[4] 87 Or. Adv. Sh. 125, 444 P.2d 1010 (1968).
[5] 88 Or. Adv. Sh. 753, 456 P.2d 996 (1969).

one hundred degrees Fahrenheit within the corporate limits of the City of Burns except at bulk distributing plants now in existence or hereafter authorized by the Common Council of the City of Burns.[6]

This ordinance continued with a prohibition against self-service gasoline stations.

The plaintiff attacking these ordinances was a service station operator who did not obtain his gasoline from one of the six bulk plants in Burns but rather transported it from Portland in two trailers, one of 5,000 gallons and one of 4,300 gallons capacity. Since Ordinance 350 forbids unloading vehicles of this capacity in Burns, plaintiff would leave one of his large trailers for storage outside the city limits, transferring its contents to the station by means of an 1,800 gallon tank truck, and exchanging it when empty for a full trailer from Portland. This method of complying with the ordinance was more burdensome and costly than direct deliveries from his trailers to his station. The station tanks, installed by plaintiff in 1966, also far exceeded the limit set by Ordinance 349. He therefore sued to have the two ordinances declared "illegal and void" and to enjoin their enforcement.

The complaint asserted that the ordinances were variously "arbitrary and unreasonable;" that rather than having a reasonable relation to the maintenance of public health, safety, or welfare they actually endangered these and therefore "deprived plaintiff of his property without due process of law" contrary to the federal fourteenth amendment and article I, sections 10, 18, and 21 of the Oregon constitution; and that they created an unreasonable distinction between types of fuel deliveries in violation of the federal equal protection clause and Oregon constitution article I, section 20.[7] After a demurrer was overruled, there

[6] 87 Or. Adv. Sh. 125, 126, 444 P.2d 1010, 1011 (1968).

[7] The actual text stated these constitutional claims:

XI

"Said ordinance has no reasonable relation to the maintenance of public health, safety or welfare, and by its terms creates conditions which are injurious to the public safety and welfare. Said ordinance, to the extent applicable to or enforceable against plaintiff, his property or business, deprives plaintiff of his property without due process of law, contrary to Amendment XIV to the Constitution of the United States and Sections 10, 18 and 21 of Article I of the Constitution of the State of Oregon.

XII

"Said ordinance is unlawfully discriminatory and creates an unreasonable and unlawful distinction between off-street deliveries of petroleum products to bulk plants and off-street deliveries to garages and service stations, all in violation of Amendment XIV to the Constitution of the United States, and Article I, Section 20 of the Constitution of the State of Oregon. Said ordinance arbitrarily and unreasonably places plaintiff's business in a distinct and separate class, and arbitrarily attempts to distinguish between plaintiff's business of making off-street deliveries to bulk plants. There is no peculiarity in the character or operation of plaintiff's business or in the making of off-street deliveries to his service station, nor any distinction between the nature and character of such deliveries and the

was an extensive trial at which expert witnesses testified on the causes, prevention, and control of gasoline fires in general and on the local conditions, topography, traffic accident rates, and fire-fighting capabilities of the city of Burns in particular. At its conclusion, the trial judge gave his oral opinion that the experts had persuaded him by a preponderance of the evidence that the ordinances had no reasonable basis and were therefore unconstitutional. While this oral opinion referred to no constitutional provision, precedent, or other legal premise, the written declaratory judgment and decree subsequently entered found both ordinances "invalid and unenforceable as applied to plaintiff" as a deprivation of property without due process of law, citing the federal fourteenth amendment and sections 10 and 18 of Oregon's article I.

On appeal, the Oregon Supreme Court reversed the judgment as to Ordinance No. 350 but affirmed as to No. 349. The opinion, by Justice Lusk, reviewed the trial evidence bearing on the safety considerations in dispute and concluded that the restriction on deliveries from large tankers fell within the limits of permissible legislative choice, while there was no sufficient evidence of any safety advantages in the restriction on the size of underground storage tanks. Justices Goodwin and O'Connell dissented from that part of the decision invalidating the storage ordinance.

The second recent decision, *State v. Fetterly*, sustained the constitutionality of Oregon's motorcycle-helmet requirement. OR. REV. STAT. § 483.443, added in 1967 to the subchapter of the Motor Vehicle Code dealing with equipment,[8] provides that "[n]o person shall operate or ride on a motorcycle unless he is wearing protective headgear of a type approved by the department" of Motor Vehicles. Defendant appealed from a $5.00 fine for operating a motorcycle without wearing the required helmet. He asserted that the statute violates the due process and equal protection clauses of the federal fourteenth amendment, the federal ninth and tenth amendments, and sections 1, 20, and 33 of the Oregon constitution, and furthermore, that it is an "unreasonable extension of the police power of the State of Oregon."[9]

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nature and character of off-street deliveries to bulk plants within defendant City of Burns, which justifies the separate treatment accorded them by said ordinance.

. . .

XIV

"Said ordinance deprives plaintiff of the equal protection of the law contrary to Amendment XIV to the United States Constitution and grants special privileges and immunities in violation of Article I, Section 20 of the Constitution of the State of Oregon." Brief for Appellant at 8-11. Paragraph XIII (not quoted) also raised an interesting separate claim that the city had exceeded its delegated powers. *See* notes 103-105 and accompanying text *infra*. The claims were realleged in the second cause of action. Brief for Appellant at 17-19.

[8] Or. Laws 1967, ch. 393.

[9] Brief for Appellant at 4-5, 12, State v. Fetterly, *supra* note 5.

The Oregon Supreme Court rejected these claims. Justice Holman's opinion assumed that the "police power" might be used to regulate private conduct only when the regulation is reasonably related to public health, safety, morals, or other phases of public welfare, and found this relation in the risk to other traffic posed by a motorcycle out of control because the operator has been struck by some flying object. Having established this "real and substantial relationship to public safety" the court held the statute to be "within the police power and therefore constitutional,"[10] without further citation or analysis of any constitutional provisions.

II. THE CONSTITUTIONAL PREMISES

As examples of judicial review, these recent Oregon decisions are not untypical of "substantive due process" litigation in state courts.[11] In Oregon such constitutional attacks on state or local regulations seem neither particularly common nor particularly uncommon. In the supreme court they probably average less than one a year, though more may be made pro forma in trial courts, assailing a law as "arbitrary" or "unreasonable" without, perhaps, even intending any specific constitutional claim. Not only the function of judicial review is taken for granted—laws can be "unconstitutional" and courts may be asked to declare them so—but equally taken for granted are the rhetorical categories of the debate: "due process" and "equal protection," the "police power" and "reasonableness," "invidious discrimination" and "rational basis," and the "presumption of validity." When one is confronted with a law that is squarely adverse, but arguably unjust, outmoded, or silly, it might seem downright negligent not to toss in a claim of unconstitutionality. The event is in the hands of the court, and miracles can happen. After all, Mr. Leathers got to keep his oversized station tanks in Burns.

In this familiar process of judicial review, however, little attention is given to the constitutional law that is invoked. The very familiarity of the professional verbal shorthand obscures the governing premises; eventually the habitual clichés obliterate and supplant the constitutional provisions they purport to apply.

Does it matter? It is perhaps not superfluous to begin with a reminder that a premise in the constitutional texts is necessary if a court

[10] 88 Or. Adv. Sh. 753, 755-757, 456 P.2d 996, 997-998 (1969).

[11] *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958); Hoskins & Katz, *Substantive Due Process in the States Revisited*, 18 OHIO ST. L.J. 384 (1957); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950). *See also* Dykstra, *Legislative Favoritism Before the Courts*, 27 IND. L.J. 38 (1951).

is to set aside legislative action. Familiar as we now find it, judicial authority to say that what lawmakers have enacted as law is not the law nevertheless remains an extraordinary power. John Marshall went to great lengths to derive it from the judicial necessity to choose between applying the text of a law and a conflicting text of a written constitution.[12] Even so, the legitimacy of judicial review then and now has never ceased to be the subject of dispute, as state court judges do not hesitate to point out when it is exercised by the United States Supreme Court.[13] But without such a conflict with a written constitutional provision, there is no basis for any general judicial power to invalidate a law if it is "bad" enough.

Once stated, these propositions would seem to belabor the obvious, but for the fact that a different view is not only possible but seems more nearly to describe state constitutional litigation in action. This view may be summarized as follows: Whatever its origins, judicial review has become firmly established as an essential institution in the American structure of government, perhaps a result more of its separation of powers rather than dependent on constitutional texts. Although the constitutional restraints invoked against governmental action are found enshrined in various provisions of the federal and state bills of rights and the federal fourteenth amendment, the evolving content of these restraints must inevitably reflect contemporary conceptions that cannot be confined either within the vague, imprecise words of the ancient texts nor within the assumptions of those who wrote them. Since the appeal in fact is to the human judgment of each generation of judges, it does not matter very much on what constitutional hook that

[12] "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803).

[13] "It is our earnest hope... that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide... the validity of state action, whether it deems such action wise or unwise." CONFERENCE OF CHIEF JUSTICES, REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS 29-30 (1958).

judgment is hung. What judges *really* do is to decide the merits and express the decision in the terminology of constitutional law. For this purpose, the conventional rhetoric is perfectly serviceable as long as everyone understands and agrees to the real process.

There is not much wrong with this version as a description of judicial review in action but it does not describe the law. The trouble with realism as a source of legal premises, with the view that what courts really do is the law, is that it does not serve well to tell judges what they ought to do. It also, consequently, does not offer much help toward preparing a compelling brief or argument that will persuade a court on what the constitutional law of a case is. There is a certain frustrating circularity in arguing that a court ought to apply the law that the court says it is.

Let us, therefore, return to the proposition that textual premises matter in constitutional litigation. There is no such thing as "unconstitutionality" at large. And the textual premises differ from each other. A judgment of unconstitutionality that misapplies a constitutional provision can be wrong, not only when judged by extra-legal standards of agreement or disagreement, but in the lawyer's sense that it ought to be reversed on appeal or overruled.

No naiveté is intended. Undeniably the constitutional text requires interpretation; courts must decide what the words *mean*. "Those who apply the rule to particular cases" went Marshall's argument, "must of necessity expound and interpret that rule."[14] Battles rage over what role verbal meaning, historic purposes, and present needs should play in the interpretation. The answer must differ for different kinds of text. For the moment, the point is merely that the "rule" to be interpreted means a rule stated in the constitution, not one made up out of whole cloth. Judges must give meaning to the rule now, but what the judicial decision applies was first a political decision that others deemed worthy of constitutional magnitude. Had it not been made, or were it repealed, that particular basis for judicial review would disappear. Unless one begins judicial review with this recognition that it arises out of the constitutional text, one never even reaches a question of interpretation. *Judicial review is a consequence of the constitutional rule, not the rule a consequence of judicial review.*

The hierarchy of constitutional premises. What prompts this pre-

[14] Marbury v. Madison, *supra* note 12. Marshall's argument has, of course, often been subjected to careful critical scrutiny, most recently by Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. Certainly it asserts not the slightest claim for any generalized judicial surveillance over unreasonable, unjust, arbitrary, or otherwise outrageous legislation apart from conflict with a specific constitutional provision.

liminary excursion into the premises of constitutional litigation may be illustrated by the handling of our two recent examples.

In *Leathers*, as stated before,[15] one theory of the complaint was that the Burns city ordinances "deprived plaintiff of his property without due process of law, contrary to Amendment XIV to the Constitution of the United States and Sections 10, 18 and 21 of Article I" of the Oregon constitution. A second claim asserted unlawful discrimination "in violation of Amendment XIV . . . and Article I, Section 20" of the Oregon constitution.

The circuit court judge held the realist's view of constitutional law described above; he would not obscure the act of judgment by referring to the Constitution or other citations.[16]

The supreme court summarized the complaint as claiming that "the ordinances violate the due process and equal protection clauses of the federal and state constitutions."[17] In approaching plaintiff's federal due process and equal protection contentions against Ordinance 350, the opinion states, without further citation: "What we hold applies equally to plaintiff's claim of violation of comparable provisions of the Constitution of Oregon."[18] After these contentions were rejected with respect to the delivery ordinance, the limitations of the storage ordinance (No. 349) were held to be "an unwarranted regulation of a legitimate business and a violation of plaintiff's rights under the Due Process Clause of the Fourteenth Amendment,"[19] without further reference to other constitutional provisions.

In *Fetterly*, the motorcycle-helmet case, the Oregon court merely recites defendant's list of constitutional provisions in stating his grounds of appeal and does not refer to them again. The remainder of the brief opinion is phrased in terms of balancing the "police power" against "personal liberty" and lists the numerous decisions of other state courts that, with a couple of exceptions, have sustained similar legislation.[20]

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[15] *See* note 7 *supra*.

[16] "THE COURT: Well, Gentlemen, I'm not going to take the time, which I don't have, to write out a decision on this case. I'm going to give you the decision here from the Bench.

"And as I always do—I can remember years ago, I used to sit and listen to the judge wade through his decision and then tell me who won. By the time he got there, I hardly knew what he said. So I'm going to tell you first this Court does find for the Plaintiff. This Court does find that both of the ordinances are unconstitutional and that they are void and invalid." Brief for Appellant at 39-40, Leathers v. City of Burns, 87 Or. Adv. Sh. 125, 444 P.2d 1010 (1968). The judge went on to explain why the expert testimony persuaded him that the ordinances lacked a reasonable basis in promoting public safety or welfare and were therefore unconstitutional.

[17] 87 Or. Adv. Sh. 125, 444 P.2d 1010, 1011 (1968).

[18] *Id.* at 136, 444 P.2d at 1015.

[19] *Id.* at 142, 444 P.2d at 1018.

[20] 88 Or. Adv. Sh. 753, 456 P.2d 996 (1969).

These opinions are not exceptional in slurring over the several different state and federal constitutional provisions. A few weeks before *Leathers*, the court in *City of Portland v. James* spoke of the "due process and equal protection clauses of both the United States and Oregon Constitutions" in holding another ordinance invalid under the "due process clause of Article I, Section 10 of the Oregon Constitution" as well as the fourteenth amendment and other provisions.[21] Other opinions have treated article I, section 20 as the equivalent of the federal equal protection or due process clauses.[22]

Convenient as it may be to reduce the diverse federal and state premises in this manner to a single body of "constitutional law," there are two things wrong with it. First, it contradicts the hierarchical logic of the federal constitutional premises. Second, the provisions of the federal and Oregon constitutions are not in fact alike.

First, the logical relationship between the state and federal constitutional claims. The federal source of all "due process" and "equal protection" attacks on state regulation is the fourteenth amendment's command that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Whether this command has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment.

The point is obvious when a conclusion such as "Regulation X denies defendant's rights under the fourteenth amendment and the corresponding sections of Oregon constitution article I" is broken down into its component parts. When a judgment holds with the defendant that the regulation is invalid under the state constitution, it cannot move on to a second proposition invalidating the state's action under the federal Constitution. By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it. While

[21] 86 Or. Adv. Sh. 1287, 1288, 444 P.2d 554, 555 (1968). The court also relied on the search and seizure provisions of OR. CONST. art. I, § 9 and the federal fourth amendment to strike down Portland's ordinance against being abroad at night with an apparent unlawful purpose, which had survived a previous attack in *City of Portland v. Goodwin*, 187 Or. 409, 210 P.2d 577 (1949). No criticism is intended of this tightening of constitutional standards for "vagrancy-type" legislation, but only of the erroneous reference to a "due process clause" in the Oregon constitution.

[22] *See* notes 45-46 *infra* and Linde *supra* note 1 at 152-158.

a defendant may have both a state and a federal constitutional claim to present, legally these are not cumulative but alternative: "If this official action is not forbidden by the state constitution, as I claim it is, then the state denies me a federal right." When the Oregon Supreme Court held in 1961 that the distribution of textbooks to parochial schools was forbidden by Oregon's article I, section 5, it would have been contradictory to go on to hold that Oregon supported religion in violation of the federal establishment clause.[23] Similarly, if Portland's "after-hours" ordinance or the gasoline-storage regulation in Burns is held to violate some provision of the Oregon constitution, then Oregon is not depriving Mr. James or Mr. Leathers of liberty or property and they have no further fourteenth amendment claim to be decided. That claim becomes not merely surplusage, it has in fact been satisfied. Conversely, when an Oregon court holds that Oregon has denied someone due process or equal protection in violation of the federal amendment, it in effect assumes that nothing within Oregon's own law stood in the way of the challenged action.

It should be clear that the point is not merely pedantic. When a decision rests on an independent ground of state law along with the federal constitutional claim, the latter is not reviewable on certiorari in the United States Supreme Court.[24] And in a subsequent litigation of some comparable cases in the federal courts, a federal judge will be bound

[23] *Dickman v. School Dist. No. 62C*, 232 Or. 238, 245-246, 366 P.2d 533, 537 (1961) held: "We have concluded that the expenditure authorized by ORS 337.150 is within the proscription of Article I, § 5 of the Oregon Constitution. It is unnecessary, therefore, to consider plaintiff's contention that the statute violates also the First or Fourteenth Amendments to the United States Constitution." For the same reason, the *Dickman* holding is not superseded by the United States Supreme Court's subsequent first amendment holding in *Board of Education v. Allen*, 392 U.S. 236 (1968).

Oregon cases commonly ignore or reverse this simple logic when they add a state constitutional right as an afterthought to the federal right. In an important recent decision, the Oregon Supreme Court projected the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963) to extend a 14th amendment right to appointed counsel in petty offenses. It then added in a final paragraph: "Although we could rest our decision solely on the Constitution of the United States, we prefer to rely also on Article I, Section 11, of our Oregon Constitution..." Stevenson v. Holtzman, 89 Or. Adv. Sh. 27, 36, 458 P.2d 414, 419 (1969). Yet if Oregon's article I, section 11 would free a man convicted without counsel in municipal court, then Oregon is not depriving that man of liberty without due process of law under the federal 14th amendment; and the relevant examination of federal law is not how far the United States Supreme Court would extend the rule of *Gideon* to the states, but only how it interprets the analogous 6th amendment in federal prosecutions.

[24] *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 131 *et seq.*, (4th ed.) 1969); C. WRIGHT, FEDERAL COURTS 425-426 (1963). See *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965), dismissing a writ of certiorari as improvidently granted when the Indiana supreme court had invalidated an airport zoning ordinance under Indiana's "just compensation" provision (the model for Oregon's art. I, § 18) as well as the fourteenth amendment.

to follow the state court's holding on the cited state constitutional premise, not on the supposedly "identical" federal premise.[25]

Judicial review of official action under the state constitution thus is logically prior to review of the effect of the state's total action (including rejection of the state constitutional claim) under the fourteenth amendment. *Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection.*

III. OREGON'S CONSTITUTIONAL GUARANTEES

Before examining judicial review of regulatory legislation under "due process," this article must accordingly detour through a preliminary exploration of the arsenal against such laws that may be offered by the Oregon constitution. The fact that state constitutional claims must be disposed of before reaching fourteenth amendment claims does not, of course, mean that a clause of the state's bill of rights may not have the same content as a federal clause. We turn, therefore, to a comparison between the fourteenth amendment and the provisions of Oregon's article I that are routinely invoked as its equivalents. Anyone interested only in fourteenth amendment "due process" analysis may skip the detour and move directly to Part IV of this article.

Treating Oregon's constitutional guarantees as equivalents to federal constitutional law is easiest when they are referred to as equivalents without being identified. But even when Oregon provisions are conscientiously cited by number, their texts are rarely quoted in briefs or opinions. These texts deserve examination, however, since they state the law which alone can furnish judicial review in Oregon with sources independent of the holdings of the United States Supreme Court. As illustrated in the recent cases under discussion, these sources consist of article I, sections 10, 18, 20, 21, 1, and 33. To alert readers in advance to what is at stake, the central and essential fact in this examination is not what is found in these sections, but what is not there. *Oregon has no "due process" clause.* It also does not guarantee "the equal protection of the laws." An advocate or a court who invokes "due process" or "equal protection" has footing only in the federal fourteenth amendment and must seek support in authoritative interpretations of that amendment. To dispose of the relevant state constitutional claims prior and additional to what may be found in authoritative fourteenth amendment cases requires them to give explicit attention to some other concepts than "due process" and "equal protection."

[25] Reed v. Rhay, 323 F.2d 498 (9th Cir. 1963); Barnett v. Gladden, 246 F.Supp. 250 (D. Or. 1965).

Article I, section 10. The section of Oregon's article I most often confused with a "due process" clause, section 10, reads:

> No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

If a cursory glance suggests at first that the final clause of this section is merely a "due process" clause in slightly different words, a reading with professional attention shows that this superficial resemblance arises only from the three words "due," "law," and "property." But these words appear in a very different sentence from a "due process" clause.

Section 10 as a whole is plainly concerned with the administration of justice. The guarantee of its last clause is directed against the denial of a legal remedy to one who has a claim, arising from "injury done him in his person, property, or reputation," that has its legal source outside this section itself. For such a recognized legal injury, "every man shall have remedy by due course of law."

This is plaintiff's talk, not a defense against laws imposing irksome obligations. Compare the interests protected: "person, property, or reputation," contrasted with the typical proscription of a "due process" clause against official deprivations of "life, liberty, or property." Laws that require one to wear a helmet when riding a motorcycle, or to have a lawful purpose for being on the streets at night, certainly impair one's liberty, with or without due process of law, but it is farfetched to argue that they impair one's remedy for injury to his person, property, or reputation.

The kind of constitutional claim properly arguable under those words of section 10 is illustrated in *Holden v. Pioneer Broadcasting Co.*,[26] which sustained a 1955 statute making recovery of general damages for publishing or broadcasting unintentional defamatory statements contingent upon the defendant's refusal to retract the statement.[27] The interpretation of section 10 in such a context has its own difficulties, as the opinions in this 4-3 decision show. On the one hand, one doubts that by the words "remedy by due course of law," Oregon's constitution meant to freeze tort law as it stood either in 1859, or when this guarantee first entered state constitutions almost 200 years ago. On the other hand, courts have assumed the provision to intend more than a procedural guarantee that the "due course of law" will be open to "every man" who is entitled to a remedy under the substantive law, whatever that might be at any time. Perhaps it is too late for that simpler reading. In *Holden*, the Oregon court debated the constitutionality of the sub-

[26] 228 Or. 405, 365 P.2d 845 (1961).
[27] Or. Laws 1955, ch. 365; OR. REV. STAT. §§ 30.155-.175 (1969).

stantive law in terms of whether the legislature could make retraction a substitute "remedy" for general damages. Another analysis might have been that, when a defamation had been retracted in the statutory manner, the plaintiff had suffered no legal "injury" cognizable by general damages under the law of Oregon. But whatever the right answer, here at least article I, section 10 was the right question.[28] Other situations in which the "remedy for injuries" clause was the right question include attacks on the workmen's compensation law,[29] on the automobile guest statute,[30] or on sovereign tort immunity,[31] all of which proved equally fruitless. All these situations have in common injuries to interests typically recognized in tort—injuries to persons, property, or reputation—for which section 10 is claimed only to assure some legal remedy. They are a far cry from recasting that section into the constitutional embodiment of a broad philosophical decision to delimit governmental power to regulate private affairs. The short answer to attributing any such purpose to section 10 is that its words would be a strange way to express that purpose.

But the meaning of this choice of text is not a matter of mere speculation. Article I, section 10 entered Oregon's constitution from the Indiana constitution of 1851.[32] It may be traced back through the history of westward expansion, including Ohio's constitutions of 1802 and 1851[33] to progenitors in the earliest state constitutions. And here we find that the difference between a "remedies" clause and a due process clause antedates the United States Constitution and its Bill of Rights. The predecessors of the state "due process" clauses were guarantees against official deprivations except "by the law of the land" and were independent of the guarantee of legal remedies for private wrongs. The 1776 Delaware Declaration of Rights referred to the "law of the land" only in its provision for civil remedies:

> That every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land, and

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[28] Another question arose under OR. CONST. art. 1, § 8, where freedom of expression carries the qualification, "but every person shall be responsible for the abuse of this right."

[29] Evanhoff v. S.I.A.C., 78 Or. 503, 154 P. 106 (1915).

[30] Perozzi v. Ganiere, 149 Or. 330, 40 P.2d 1009 (1935); Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893 (1928). These two opinions are worth rereading for their struggle with the problem of the legislature's authority to alter the received common law, 149 Or. at 345-346, 40 P.2d at 1015, and especially to see the effects of confusing article I, § 10, with "due process" analysis, *id.* at 333, 341, 350, 40 P.2d at 1010, 1013, 1016.

[31] Federal Land Bank v. Schermerhorn, 155 Or. 533, 64 P.2d 1337 (1937); Clark v. Coos Co., 82 Or. 402, 161 P. 702 (1916).

[32] Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 201 (1926).

[33] OHIO CONST. art. I, § 7 (1802); OHIO CONST. art. I, § 16 (1969).

ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land.[34]

The Declaration referred to the protection of "life, liberty and property"—protection by government, not against government—only as a basis for obligatory taxes and personal service to the state when compelled by a man's legal representatives.[35]

Other states during and immediately following the year of independence adopted similar provisions; but, unlike Delaware, they also adopted different clauses proscribing lawless official action against individuals. It is common understanding that clauses of the latter "law of the land" type evolved from chapter 39 of the Magna Carta. Maryland's and North Carolina's constitutions of 1776 repeated it virtually verbatim:

That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by judgment of his peers, or by the law of the land.[36]

Virginia and Pennsylvania understood this guarantee in its procedural sense and incorporated it among their constitutional provisions for criminal proceedings.[37] But the guarantee of legal remedies for private injuries was something else, directed at a different kind of royal abuse. It springs from Magna Carta's chapter 40: "To no one will we sell, to no one will we deny, or delay right or justice."[38] The two types of guarantees were not confused with each other when the early constitutions were drafted. Other states also adopted them both[39] and most state constitutions today contain both a "remedies" clause and a "due process" or "law of the land" clause.[40] But Oregon's does not. Article I, section 10, is *not* a due process clause.

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[34] DEL. DECL. OF RIGHTS § 12 (1776), *quoted in* R. PERRY, SOURCES OF OUR LIBERTY 339 (1959) [hereinafter cited as PERRY]. The words "by any other person" in this version demonstrate the object of clauses like this to secure legal remedies between parties.

[35] DEL. DECL. OF RIGHTS § 10 (1776).

[36] MD. DECL. OF RIGHTS § XXI (1776), *quoted in* PERRY at 348; N. CAR. DECL. OF RIGHTS § XII (1776), PERRY at 355. The North Carolina text omitted "judgment of his peers."

[37] VA. BILL OF RIGHTS § 8 (1776), *quoted in* PERRY at 312; PA. DECL. OF RIGHTS § IX (1776), *quoted in* PERRY at 330.

[38] *Quoted in* PERRY at 17. To demonstrate the difference another way, in adding the Bill of Rights to the United States Constitution in 1789 it made sense to secure that the new government would exercise its untried powers over life, liberty, and property by due process of law, U. S. CONST. amend. V. But it would have made no sense to "limit" this government by a demand that it afford every man "remedy in due course of law for injury done him in his person, property or reputation"—matters of common law that were not among the powers delegated to Congress.

[39] MASS. DECL. OF RIGHTS §§ XI, XII (1780), PERRY at 376; NEW HAMP. CONST. art. I, §§ XIV, XV (1784), PERRY at 384.

[40] *See* A. E. HOWARD, THE ROAD FROM RUNNYMEDE, 479-481, 485, appendices

Article I, section 18. Once it is recognized that "due process" is not common law but a particular kind of provision that some state constitutions might adopt while others might not, and that Oregon in 1859 did not,[41] the remainder of this preliminary detour through Oregon's article I in search of sources of judicial review equivalent to the fourteenth amendment can be much briefer.

The customary promise to pay a man for property taken for public use, for instance, is an unlikely candidate for expansion into a "substantive due process" clause. Section 18 reads:

> Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered...

This constitutional obligation to repay for property taken has its own long history of legal difficulty: what is property; what is a taking; what is just compensation; is "public use" a judicially enforceable limitation on governmental purposes in acquiring land? This is not the place to retrace the battle lines at the borders between "taking" and regulation or trespass or temporary use.[42] Whatever can be made of it at these

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N & O (1968). Professor Howard traces the shift from "law of the land" to "due process" in state constitutions adopted after the latter phrasing was used in the fifth amendment of the United States Constitution. He writes: "Later, after the War between the States, when state constitutions were revised or newly adopted, the guarantee of 'due process of law' was typically stated so as not to be limited (unlike chapter 39 of Magna Carta or the provisions of the early state constitutions) to criminal proceedings... To take the concept of due process of law out of its criminal context was an open invitation, which the state and federal courts accepted, to create a body of 'substantive' due process of law as a limit on the powers of legislatures, for example, in the regulation of property rights." *Id.* at 212. Howard also explains the origins of the "remedies" clauses in Magna Carta ch. 40, but he slips up in stating that only New Jersey has no "due process" clause; his appendix O correctly lists Oregon (1859), its predecessors Ohio and Indiana (1851) and Kansas (1861) as having only a "remedies" clause. These constitutions offered the courts no such invitation, open or disguised.

[41] One could not even infer adoption by the fiction of attributing to the 1857 constitution-makers an intent to carry into art. I, § 10 a confusion with "due process" and substantive limitations on government that might have been brought into it by Indiana judges. That development of judicial review did not occur until later, see Part V *infra.*

[42] The classic example is the disagreement between Justices Holmes, for the Court, and Brandeis, dissenting, in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). For recent Oregon analyses under art. I, sec. 18, *see Oregon City Investment Co. v. Schrunk,* 242 Or. 63, 408 P.2d 89 (1965); *Thornburg v. Port of Portland,* 233 Or. 178, 376 P.2d 100 (1963); *Cereghino v. State Highway Comm'n,* 230 Or. 439, 370 P.2d 694 (1962). Recent United States Supreme Court decisions under the 5th amendment are *Nat'l Board of YMCA v. United States,* 395 U.S. 85, (1969) (riot damage to private buildings temporarily occupied by government troops); *United States v. Rands,* 389 U.S. 121 (1967) (navigation value of potential port site at John Day Dam).

The Oregon Supreme Court has held that the policy choices involved in taking property for public use are unreviewable political or legislative questions, and even when made by a grantee of the state's eminent domain power these choices

borderlines of analysis, section 18 is not a substitute for a due process clause. It appears independently along with such clauses in the federal fifth amendment[43] as well as in the state constitutions. And its clear import is that under the circumstances within its reach, a private owner may have a claim that the government must pay him for the impact of its action, not that the action is "void."

It would have been absurd to cite section 18 against the motorcycle-helmet requirement or against Portland's after-hours ordinance; it was hardly less so to try it in a protest against city water rates.[44] Section 18 does not purport to offer any protection to "liberty" or to any constitutional rights or privileges other than "private property" and services, and then the protection is compensation. One who would use this section against the regulation of the size of his gasoline trucks or service station tanks must search for support—no doubt vainly—in cases finding compensable takings of property, not those striking down "unreasonable" laws. The question whether there has been a compensable taking may sometimes depend on facts, but it should not depend on a trial of whether the government did or did not have good reason for it; government may take for the slightest reason if it pays, and it must pay if it takes for the best of reasons.

Article I, section 20. Even this section, generally recognized to concern the unequal application of otherwise valid policies, is sometimes cited in the search for a state "due process clause."[45] Section 20 reads:

> 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.

The section has most often been treated as equivalent to the equal

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may not be reviewed except for fraud, bad faith, or abuse of discretion. City of Portland v. Swanson, 89 Or. Adv. Sh. 521, 459 P.2d 879 (1969), *quoting* City of Eugene v. Johnson, 183 Or. 421, 192 P.2d 251 (1948).

[43] "No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[44] Kliks v. Dallas City, 216 Or. 160, 335, P.2d 366 (1959); *see* Linde, *supra* note 1 at 152-157.

[45] For instance: "The right to pursue a legitimate trade, occupation or business is a natural, essential, and inalienable right, and is protected by our constitution. Constitution of Oregon, Art. I, § 20... We are convinced that the Fair Trade Act as it applies to nonsigners constitutes an unnecessary and unreasonable interference with an individual's constitutional right of contract and property in violation of Art. I, § 20, of the Oregon Constitution, and of the due process clause of the federal constitution." General Electric Co. v. Wahle, 207 Or. 302, 319, 326, 296 P.2d 635, 643, 647 (1959). Could the court have *looked* at art. I, § 20? Three justices concurred solely on the ground that binding nonsigners to a privately set price delegated legislative power to private parties in violation of art. I, § 21 and other provisions. The court was invited, but declined, to follow this use of art. I, § 20 as a "due process" clause in a bakery's attack on bread-size regulations. Brief for Respondent at 5, State v. Hudson House, Inc., 231 Or. 164, 171, 371 P.2d 675, 679 (1962).

protection clause of the fourteenth amendment.[46] That is not entirely accurate. Section 20 proscribes singling out some for special favors, while the equal protection clause forbids a state to "deny to any person within its jurisdiction the equal protection of the laws." The Oregon Supreme Court recognized this when it wrote that "[t]he provisions of the state Constitution are the antithesis of the fourteenth amendment in that they prevent the enlargement of the rights of some in discrimination against the rights of others, while the fourteenth amendment prevents the curtailment of rights . . . "[47] It saw the difference in the texts merely as stating one or the other side of a single equation: a plus for one equals a minus for all others, and vice versa.[48] Once the two legal premises are thus brought to a common denominator, everything can be happily reduced to the magic formula of "reasonable classification," for the verbal logic of equality, as of mathematical equations, is entirely tautological.

But the difference in the two constitutional texts is not happenstance. They were placed in different constitutions at different times by different men to enact different historic concerns into constitutional policy. When Oregon in 1859 took article I, section 20 from Indiana's constitution of 1851,[49] the equal protection clause had not yet been thought of. If section 20 had antecedents in the early state constitutions, these were provisions "that no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."[50] The concern was first with royal, later with legislative, favoritism. Equality *for* the disfavored minority rather than *against* a favored minority became the concern of

[46] *See, e.g.*, Jehovah's Witnesses v. Mullen, 214 Or. 281, 297, 330 P.2d 5, 13 (1958); Phillips v. City of Bend, 192 Or. 143, 153, 234 P.2d 572, 576 (1951), *relying on* State v. Savage, 96 Or. 53, 59, 184 P. 567, 189 P. 427 (1920).

[47] State v. Savage, *supra* note 46.

[48] "The general principle seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of equal protection of the laws to those subject to the burden and a grant of immunity to those not subject to it."State v. Savage, *supra* note 46 at 59, 184 P. at 569. Quoting this precedent later for the proposition that art. I, sec. 20 and the equal protection clause mean the same, the court wrote: "These provisions are most frequently invoked in cases where it is claimed that in subjecting persons to more or less burdensome regulations the legislature has omitted other persons who, in reason and fairness, should be included. But, of course, it is equally obnoxious to their guaranties to bring within the operation of a law persons to whom, in reason and fairness, it ought not to be applied." Savage v. Martin, 161 Or. 660, 693, 91 P.2d 273, 286-287 (1939). But it is difficult to find a claim for exclusion from an otherwise valid law within the terms of art. I, § 20. The section does not enact "reason and fairness" in general, it proscribes grants of special "privileges, or immunities."

[49] *See* note 32 *supra*.

[50] VA. BILL OF RIGHTS § 4 (1776), *quoted in* PERRY, *supra* note 30 at 311; N.C. DECL. OF RIGHTS § III (1776), PERRY at 355.

equal protection clauses after the Civil War. The different provenance of the two kinds of provisions is patent when a state constitution has both.[51]

Of course, application of Oregon's article I, section 20 and the federal equal protection clause will often produce the same result. Their words and policies have a substantial overlapping coverage.[52] Yet not only the premise, but also the conclusion, that these two provisions have the same legal effect is not precisely true. The guarantee of article I, section 20, runs in favor of "citizens." The Oregon Supreme Court has expressed doubts whether this includes corporations[53] or nonresidents.[54] Both are, of course, entitled to the benefits of the federal equal protection clause.

Article I, section 20, has its uses. One could, for example, reasonably expect it to be tried against licensing or certification laws that create a monopoly or restrict access to a business, an occupation, or a public service, or that grant exemptions from taxation or other burdens, and it has been so tried.[55] But since the essence of a section 20 claim is that others have been granted a special advantage, it must always involve a comparison, not a direct attack on the validity of the law even if it applied equally to all. The victor in this (or an equal protection) claim may force the government to extend its policy to others—which may, of course, meet his needs if the compaint is in fact one of competitive disadvantage—yet not force the government entirely to abandon its substantive policy apart from the questioned classification. Counsel in *Leathers* rightly treated section 20 as a separate claim of favoritism by

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[51] CONN. CONST. art. I, §§ 1, 20 (1967). Some that had gone up to the Civil War without any "exclusive privileges" clause thereafter added an "equal protection" clause; *e.g.*, South Carolina's Reconstruction constitution of 1868, art. I, § 5, which copied the federal fourteenth amendment; New York's 1938 constitution, art. I, § 11.

[52] *E.g., Morey v. Doud*, 354 U.S. 457 (1957), in which the United States Supreme Court held unenforceable an Illinois law regulating the sale of money orders that exempted the American Express Co. by name, shows the use of the equal protection clause against a grant of a special privilege or immunity.

[53] *State v. James*, 189 Or. 268, 275, 219 P.2d 756, 759 (1950) states that "[i]t has been held by this court that a corporation is not a citizen within the meaning of such constitutional provisions. See *Corporation of Sisters of Mercy v. Lane County*, 123 Or. 144, 261 P. 694, and the cases cited therein." That 1927 opinion only raised the question before discussing an alternate ground of decision and cites no cases on this point. *See also* Nilsen v. Davidson Industries, Inc., 226 Or. 164, 169-171, 360 P.2d 307, 309-310 (1961).

[54] *Berry v. Tax Commission*, 241 Or. 580, 397 P.2d 780, 399 P.2d 164 (1965) first cited *Alsos v. Kendall*, 111 Or. 359, 227 P. 286 (1924) for the proposition that section 20 does not purport to deal with the rights of nonresidents, but on rehearing withdrew this statement as dictum. *Compare* Mendiola v. Graham, 139 Or. 592, 610, 10 P.2d 911 (1932).

[55] Many such cases are collected in the annotations to OR. CONST. art. I, § 20, in the OREGON REVISED STATUTES.

the city of Burns in allowing deliveries by large tank trucks to bulk storage plants serving plaintiff's competitors, but not to plaintiff's own service station tanks. The court, of course, could and did find the two kinds of deliveries sufficiently dissimilar to allow different treatment.[56]

Such an argument about favoritism is different from the attempted attack on bread-size controls in *State v. Hudson House, Inc.*, on the ground that "business is a property right" protected by article I, section 20 and that "regulation, in order to be valid, may not be arbitrary and must meet certain tests of necessity and reasonableness."[57] It is an even further departure from this section's guarantee against favoritism to try a section 20 claim against a law requiring motorcyclists to wear safety helmets. If the constitutional command to grant privileges or immunities equally to all citizens "upon the same terms" called merely for a logical manipulation of verbal categories, it would be meaningless. The search is always for the *relevant* terms, the meaningful categories. Logically Mr. Leathers, on the one hand, was free "upon the same terms" to deliver fuel from his large trailer if he build himself a bulk storage plant. On the other hand, Mr. Fetterly's hopeless argument that the class of motorcyclists is denied equal privileges with the class of, say, auto drivers or bicyclists can be brought into purely verbal plausibility by moving to a higher level of abstraction: *e.g.*, unequal treatment of citizens within the class of all those who endanger themselves or possibly others, including, for instance, skiers, boaters, or skydivers. Yet a litigant cannot, merely by such a phrasing of the relevant class, impel a court to test constitutional equality of policy at that conceptual level, or to preclude lawmakers from dealing piecemeal with one part of one specific version of that general problem at a time.

To end this brief reminder of the dilemma inherent in "classification" analysis, I refer to my previous discussion of its uses by the contemporary Oregon court.[58] For present purposes, however, one conclusion is essential: The burden of a claim citing article I, section 20 (as also the equal protection clause) is always and only the denial of an advantage enjoyed by a specified class of others under legally indistinguishable circumstances; it is not a source for due-process-type judicial review of the substance of governmental policy apart from the asserted discrimination.

Other sections of Article I. Section 21 contains the state constitution's proscription of ex post facto laws, laws impairing the obligation of contracts, and delegation of lawmaking authority outside the con-

[56] 87 Or. Adv. Sh. 125, 139-140, 444 P.2d 1010, 1016-1017 (1968).
[57] *See* note 45 *supra*.
[58] Linde, *supra* note 1 at 152-158.

stitution.[59] It is included in this list of possible sources for substantive judicial review of regulatory laws only because it is sometimes cited as such. In *Leathers*, for instance, plaintiff coupled article I, section 21 with sections 10 and 18 and the federal fourteenth amendment in his "due process" attack on the Burns fuel storage and delivery ordinances, without further explanation of its relevance.[60] The contract clause of the United States Constitution was once the only vehicle available for federal judicial protection of property against state legislation before the fourteenth amendment, but one would not expect a revival of that buried tradition by misapplication of section 21 today. The clause of section 21 that confines the authority to make a law effective within the constitution adds nothing to conventional delegation doctrine when the delegation is to officials in the executive branch or local governmental agencies, but it places limits on accepting *in futuro* the policies of private parties or federal agencies.[61] The constitutional interest it protects is the democratic interest in the politically responsible allocation of power to turn policy into law; it has nothing to do with review of the substance of the law.

There remain sections 1 and 33. Section 1, which the draftsman began with "we declare" means just that; it is a declaration of the ideological premises of the "social compact," which might possibly be drawn upon in giving historic meaning to other provisions of the constitution, but which does not furnish an independent source for judicial invalidation of legislative authority.[62]

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[59] "No *ex post facto* law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution..." OR. CONST. art. I, § 21.

[60] *See* note 7 *supra*.

[61] Compare the rejection of a section 21 claim against the delegation to the State Department of Agriculture in *Hudson House, supra* note 45 at 181-183, with its success against legislation telling the same department to follow federal livestock regulations, *Seale v. McKennon*, 215 Or. 562, 336 P.2d 340 (1959), and against prospective adoption of safety standards prepared by the American Standards Association and by the federal Bureau of Standards, *Hillman v. Northern Wasco County PUD*, 213 Or. 264, 276-286, 323 P.2d 664, 671-675 (1958). The older Oregon cases that illustrate the use of section 21 against lending the state's power to professional or business self-regulation are *Van Winkle v. Fred Meyer, Inc.*, 151 Or. 455, 49 P.2d 1140 (1935); *LaForge v. Ellis*, 175 Or. 545, 154 P.2d 844 (1945). *See also* General Electric Co. v. Wahle, *supra* note 45.

[62] "We declare that all men, when they form a social compact, are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper." OR. CONST. art. I, § 1. The Oregon Supreme Court has declined to hold laws unconstitutional under this section, only adding a reference to its declaration of equality in holdings under section 20. Priester v. Thrall, 229 Or. 184, 349 P.2d 866, 365 P.2d 1050 (1961); Namba v. McCourt, 185 Or. 579, 611, 204 P.2d 569, 582 (1949). *See also* Scales v. Spencer, 246 Or. 111, 424 P.2d 242 (1967).

Section 33 provides that "this enumeration of rights and privileges shall not be construed to impair or deny others retained by the people." This section might furnish an Oregon text for those who are enamored with Justice Goldberg's concurring opinion in *Griswold v. Connecticut*.[63] This approach was tried without success against the motorcycle-helmet law.[64] The mere reference to unenumerated "rights and privileges" offers no criteria for principled analysis; judicial review under this section would be trapped in rhetorical rubrics about rights deemed "fundamental" or "essential" (sometimes historically, sometimes currently, to fit the case) though apparently not so fundamental or essential as to have been expressed in the Bill of Rights. As an attempted precaution against the constitutional draftsman's lack of omniscience, clauses like section 33 are ill-suited to judicial enforcement; the cure might be worse than the disease. In any case, it is probably too late now to seize upon section 33 to supply the missing legal basis for judicial elaborations of a common law of unconstitutionality. The section is repealed in the revised constitution submitted to the voters by the 1969 Legislature.[65]

Oregon has no due process clause. The end of this detour through article I leaves us with no constitutional command to our elected officials not to act unreasonably, no such requirement with which courts may (reluctantly and with all due deference to the judgment of the coordinate legislative branch, etc.) hold a law to be irreconcilably inconsistent.

Article I plainly enough lists many things the state may not do. Among them, those relevant to our present inquiry prove, upon examination, to be directed at the historic evils of denial of remedial justice for private claims, demanding private property or service for public use without payment, and favoritism in granting privileges or immunities. Each of them represents a decision to give constitutional force to a distinct and identifiable policy, to a specific constitutional value which litigants may invoke against challenged governmental action. Each of

[63] 381 U.S. 479, 486 (1965). Unlike that experiment with the federal ninth and fourteenth amendments, section 33 involves no doubt against which government the provision runs. *See* Part V *infra*.

[64] State v. Fetterly, 88 Or. Adv. Sh. 753, 754, 456 P.2d 996, 997 (1969) and Brief for Appellant at 6, 11-13. It had also been tried unsuccessfully twenty years ago against the Portland after-hours ordinance invalidated in *City of Portland v. James, supra* note 21. Earlier the court had rejected a section 33 claim against a primary election law, *Ladd v. Holmes*, 40 Or. 167, 66 P. 714 (1901), and also had suggested that the section might mean that "this enumeration" in article I should not exclude others reserved elsewhere in the constitution, *Ex parte Kerby*, 103 Or. 612, 203 P. 279 (1922). Section 33 seems to have been cited only once in protection of "inherent rights" of property against a zoning ordinance, in an opinion that does not invite emulation. Archbishop of Oregon v. Baker, 140 Or. 600, 15 P.2d 391 (1932).

[65] Article I in S. J. Res. 23 (1969).

them continues to be adaptable to modern versions of those specific historic concerns. But none of them is a due process clause. Judicial references to due process, or a due process clause, under the Oregon constitution simply lack an antecedent. Whatever may or may not legitimately be made of such a clause, as we shall next examine, Oregon's constitution and its predecessors never adopted it. Article I contains nothing precisely analogous to the federal fourteenth amendment. This is not surprising, since that amendment was drafted ten years after the Oregon constitution. When Oregon lawyers and judges invoke due process or equal protection, they are in the area of federal law.[66]

The guarantees that do exist in article I not only deserve independent attention; in strict logic they must always be exhausted, by necessary inference if not expressly, before a true fourteenth amendment issue is properly reached, as explained above. But if a state court undertakes to evolve an independent jurisprudence under the state constitution, it must give as much attention and respect to the different constitutional sources, and to striving for some continuity and consistency in their use, as we ask of United States Supreme Court justices in their respective constitutional views, even when they differ among themselves. This will not be accomplished by searching ad hoc for some plausible premise in the state constitution only when federal precedents will not support the desired result, nor by collecting citations from other state courts deciding "constitutional law," without identifying or analyzing their constitutional authority, if any. Rather, it requires serious analysis in briefs and opinions of each constitutional provision relied on, supported by respectable authority for the federal claim under the United States Constitution, and with a theory for the cited article I provision that has a basis in its text and history and a viable future beyond the needs of the immediate case.

It is possible, of course, that after such an analysis some constitutional attacks on annoying governmental regulations will not be made at all.

IV. THE QUEST FOR THE CHIMERA: "POLICE POWER"

Emerging empty-handed from this search through Oregon's unmapped article I for the mythical state premise of "substantive due process," we should now be ready to turn to the real due process clause,

[66] Other sections of article I, of course, do parallel guarantees found in U.S. CONST. amendments I-VIII, for instance those concerning freedom of speech and religion or criminal procedure, and Oregon is free to interpret them to have the same or a different meaning. *See, e.g.*, the 4-3 decision in *State v. Jackson*, 224 Or. 337, 356 P.2d 495 (1960). Since the 14th amendment now does not permit states to fall below the standards of the federal Bill of Rights in almost all these areas, only the possibility of a more libertarian reading of the state's own provisions is relevant.

section 1 of the federal fourteenth amendment. Legally and logically, that clause is indeed the next, and the decisive, item on the agenda. If a regulatory state law is not invalid under the state constitution, a court can set it aside only by an application of the limits placed on states by the federal Constitution; so the next question would appear to be the meaning and uses of those limits. Unfortunately, however, our approach to this question is trapped by another verbal hazard: the conventional rhetoric of "police power."

The recent Oregon decisions examined here, *Leathers v. City of Burns*,[67] *State v. Fetterly*,[68] and also *State v. Hudson House, Inc.*,[69] all illustrate this verbal substitution of "police power" terminology for the actual terms of constitutional law. The straightforward way to find out whether a law is prohibited by a federal constitutional provision, one would think, is to ask what that provision forbids. "Police power" terminology, instead, translates the question of a federal prohibition into a question of state power to pass such a law. As so translated, the inquiry is doomed from the start. The legal issue is always the meaning of a constitutional limitation, not the extent of the state's power. But is this distinction just another logic-chopping bit of pedantry about two sides of the same coin, a purist preoccupation with style?

"Police power" terminology is deeply imbedded in the Oregon cases, and it is a source of genuine confusion that goes beyond mere style. It ought to be completely abandoned, shunned in opinions, proscribed from briefs, and blue-penciled whenever it threatens to creep into sight.

No constitution, state or federal, grants Oregon or any other state a "police power." There simply is no such thing. What Oregon has, as a state, is plenary power to make and administer law, by means of constitutional institutions and subject to constitutional limitations. A state constitution distributes power, it does not create it. Article IV of the Oregon constitution states that "the legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly . . . "[70] But where in any constitution is the state granted a "police power?" Or power to define property rights? Or family relationships? Or commercial transactions? Or to define and punish crimes? Or to levy taxes? Or to build roads?

These and all other possible objectives of law are simply part of

[67] *See* note 4 *supra*. [68] *See* note 5 *supra*. [69] *See* note 45 *supra*.

[70] OR. CONST. art. IV, § 1. In 1886 the Oregon Supreme Court wrote that, subject to constitutional limitations, the people "have invested the legislative assembly with [legislative] power to the fullest extent, except so far as they expressly inhibited its exercise . . . The question in such cases is not as to the extent of the power that has been delegated by the people to the legislative assembly, but as to the limitations they have imposed upon that body." David v. Portland Water Comm'n, 14 Or. 98, 109-110, 12 P. 174, 178 (1886).

"the legislative power of the state" that in turn is allocated by article IV. The state has that legislative power, not because of any grant, but because it is a state. It would have made as much sense to list and describe the powers of a state in its constitution as it would to list and describe the powers of England. In fact, as in the case of England, a state would have the same legislative power without any written constitution at all.[71] One does not look for a "power" to explain why Parliament may legislate the size of bread loaves, or a helmet requirement for motorcyclists, or a probate code—nor why Oregon may do so. If some parliamentary laws would be invalid in Oregon, it is because of American constitutional limitations, not for lack of legislative power. To call a law a "police" regulation if its objective concerns public health or safety or morals or welfare does not mean that it may be enacted *because* it has such an objective, but only that laws passed for such objectives are so described.

The temptation to discuss the validity of laws in terms of legislative power is understandable because the United States Constitution lists the separate powers granted to the federal government. For generations, students, lawyers, and judges have learned that a statute passed by Congress might exceed the powers granted it by the Constitution. If the power of Congress under article I, section 8, "to regulate commerce among the states" did not extend to prohibiting the shipment of goods made by child labor, a statute prohibiting such a shipment would be void for lack of power.[72] If Congress thereafter sought to discourage child labor by an elaborately designed excise on the profits from its use, this might be held to go beyond the power granted by the same section "to lay and collect taxes."[73] In these and other challenges to federal statutes, the terms of a grant of authority required interpretation and definition; once the act was found to exceed that grant, no question of transgressing a constitutional prohibition need be reached. Even in modern times, Congress debated at length whether it should enact Title II of the Civil Rights Act of 1964,[74] under its power to regulate commerce or its power to enforce the fourteenth amendment, and shaped the text of the act accordingly. Despite the vast reach of the federal taxing,

[71] There is no reason why a state could not, like the United Kingdom, govern itself under a historical accretion of laws forming an "unwritten" constitution rather than under a formal state constitution. In fact, Connecticut did not adopt its first constitution until 1818 and Rhode Island not until 1843. *See* Legislative Drafting Research Fund of Columbia University, CONSTITUTIONS OF THE UNITED STATES, notes preceding constitutions of Connecticut and Rhode Island. Their legislative power as states was not for that reason different from that of other states.

[72] Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled in* United States v. Darby, 312 U.S. 100 (1941).

[73] Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

[74] 78 Stat. 241, 42 U.S.C. § 2000a et. seq. (1964).

spending, commerce, and other powers today, it remains true that these do not add up to a plenary lawmaking authority, and Congress may still be found to have legislated beyond the "necessary and proper" execution of its constitutional powers.[75]

No comparable need to interpret and define the legislative power arises in a challenge to a state statute. There is no grant of power to interpret. *"Police power" is not a constitutional term. There can be no such thing as a state law "exceeding the police power."*

"Plenary power in the legislature, for all purposes of civil government, is the rule, and a prohibition to exercise a particular power is an exception. It, therefore, is competent for the legislature to enact any law not forbidden by the constitution or delegated to the federal government or prohibited by the constitution of the United States." The words are not mine but those of the Oregon Supreme Court.[76] The court called this point "elementary" sixty years ago, and reiterated it as recently as 1960.[77] Yet two years later, to sustain the bread-size regulation in *State v. Hudson House, Inc.*, the court thought it necessary to explain that "the prevention of fraud, deceit, cheating and imposition is within the ambit of the sovereign's police power. It is a power which may be exercised to protect not only the intelligent and the prudent, but also the ignorant and rash."[78] The confusion caused by such discussions of constitutional limitations in terms of "power" is shown in the motorcycle-helmet case, *State v. Fetterly*.[79] Appellant clearly thought that he was presenting two different issues when he argued, first, that the law exceeded the "police power of the State of Oregon," and second, that it invaded his contitutionally guaranteed rights.[80] After listing the constitutional limitations cited by appellant, the supreme court's opinion reads entirely in the terminology of legislative power, concluding: "We hold that the statute was within the police power of the state and *therefore* constitutional."[81]

The Oregon Supreme Court did not invent "police power" terminology; it repeats it from old decisions of the Supreme Court of the United States, from opinions whose style and theoretical approach were

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[75] See *Reid v. Covert*, 354 U.S. 1 (1957), *Kinsella v. Singleton*, 361 U.S. 234 (1960), holding that provisions for court-martialing civilians exceeded the power granted in U. S. CONST. art. 1, § 8, cl. 14.

[76] Jory v. Martin, 153 Or. 278, 285, 56 P.2d 1093, 1095 (1936). The court continued to quote numerous precedents and Cooley's CONSTITUTIONAL LIMITATIONS, *id.* at 286-87, 56 P.2d at 1096. This language was recently reaffirmed in *Wright v. Blue Mt. Hospital Dist.*, 214 Or. 141, 328 P.2d 314 (1958).

[77] State v. Cochran, 55 Or. 157, 179, 105 P. 884, 887 (1909); State *ex rel.* Chapman v. Appling, 220 Or. 41, 47, 348 P.2d 759, 762 (1960).

[78] 231 Or. 164, 174, 371 P.2d 675, 686 (1962).

[79] *See* note 5 *supra.*

[80] Brief for Appellant at 4-6, 11, State v. Fetterly, *supra* note 5.

[81] *See* note 10 *supra* (emphasis supplied).

abandoned more than a generation ago.[82] Even then, the term "police power" was used only as a *name* for the entire residue of general regulatory state power that did not transgress a constitutional limit, not as describing a *source* of state power. Thus it can never serve as a premise of constitutional reasoning. The premise to be analyzed is always the constitutional limitation; once this has been done, the result can be described just as well without any reference to "police power" as with it.

Modern decisions occasionally categorize a particular law by the label "police power" in order to distinguish a constitutional clause that is phrased in different terms. For instance, the grant of power to Congress to regulate interstate commerce is sometimes said not to displace all state "police power" affecting such commerce, as the United States Supreme Court reiterated in sustaining enforcement of a local smoke abatement ordinance against interstate steamships.[83] On the other hand, the commerce clause does invalidate much other legislation that, as far as the fourteenth amendment goes, is unquestionably within the same "police power."[84] Obviously no question of the "power" to pass a smoke abatement ordinance or other such legislation decides these cases, but rather the scope of immunity given interstate business by the commerce clause.

The 1963 decision of the Oregon Supreme Court in *Sproul v. State Tax Commission*[85] is another illustration of the same technique. A levy of one cent per acre on certain forest lands, under a statutory scheme to provide fire protection, was attacked as violating Oregon's constitutional requirement of uniform taxation.[86] The majority found

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[82] Thus the *Fetterly* opinion in 1969 states its opening premise in the form of a 1928 quotation: " * * * The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare * * * " 88 Or. Adv. Sh. 753, 754, 456 P.2d 996 (1969).

[83] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960). This terminology for describing the elusive allocation of state and federal responsibilities has historic roots. A motion to phrase the principle of federal power restrictively "[t]o make laws binding on the people of the United States in all cases which may concern the common interests of the Union: *but not to interfere with the government of the individual States in any matters of internal police...*" was debated and defeated in the Convention. II FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 21, 25-21 (1911) (emphasis supplied).

[84] *See, e.g.*, Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964).

[85] 234 Or. 579, 383 P.2d 754 (1963).

[86] OR. REV. STAT. ch. 477; OR. CONST. art. I, § 32: "No tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

OR. CONST. art. IX, § 1: "The Legislative Assembly shall, and the people through the initiative may, provide by law uniform rules of assessment and taxation. All taxes shall be levied and collected under general laws operating uniformly throughout the State."

the requirement inapplicable on the ground that the levy was not a tax: "We hold that the levy is not an exercise of the state's taxing power. We conclude that such a levy is an exercise of the state's police power."[87] In a concurring opinion, Justice Sloan rejected this effort to ascribe a financial exaction to different kinds of "powers" and relied instead on holding the assessed timberland to be a permissible classification for tax purposes.[88] Here again, whichever theory is chosen, the constitutional question involves solely the interpretation of a limitation. The constitutional phrases are "tax" and "uniform" and "class of subjects" and "equal." The court might decide that the levy was not a "tax" as that word is intended in the limitation, or that the "tax" was sufficiently "uniform" and "equal" for the purpose of a permissible "class of subjects." Nothing is gained for the first theory by describing something that is not a "tax" to rest on something else called the "police power." The same is true whatever the terms of the constitutional prohibition are; if, for instance, the court rejects a claim for "just compensation" because it finds no "taking" of "private property," it adds nothing to describe the challenged action as an exercise of the "police power."

In a much quoted opinion, cited recently by the Oregon Supreme Court, Mr. Justice Holmes wrote:

> [W]hen legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation; the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.[89]

The carefully knotted strands of argument in opinions and briefs composed in pursuit of the state's "police power" can succeed only in netting the reddest red herring in all constitutional law.

Reviewing the actions of local government. If it were otherwise, and the "police power" were a kind of power granted by a constitution, its

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[87] 234 Or. at 581, 383 P.2d at 755.

[88] *Id.* at 603, 383 P.2d at 765.

[89] *Tyson & Brother v. Banton*, 273 U.S. 418, 445-446 (1927)—one of Justice Holmes's dissents from that era's "substantive due process" which has since been consistently followed by the United States Supreme Court—cited in *Oregon Investment Co. v. Schrunk*, 242 Or. 63, 73, 408 P.2d 89, 93 (1965). The majority holding in *Tyson & Brother v. Banton* was overruled without even hearing argument in *Gold v. DiCarlo*, 380 U.S. 520 (1965), *affirming* 235 F. Supp. 817 (1964).

scope could and would have to be defined in litigation before reaching any issue of a constitutional prohibition. Oregon's legislative power, for instance, would have been so delimited by virtue of its 1859 constitution even prior to the enactment of the fourteenth amendment in 1868; and a failure of "police power" would be a state ground of decision without ever reaching a federal issue.

That is not constitutional law. The burden of the preceding pages has been that it is illusory to litigate constitutionality of a state law by delimiting a state's legislative power, because constitutions do not grant or define such a power. There is nothing to analyze except the constitutional prohibition: for our present purpose, the federal due process clause. Unfortunately, however, it is now necessary to introduce another complication when the challenge is to the action of a local rather than the state government. For while state legislative power is plenary, the powers of local government are not. They are granted either by a statute or by the home-rule provisions of the state constitution, and they are further defined in the charter of the particular unit of government. Consequently an inquiry into the validity of local government action not only can but must involve a determination of that government's legal authority, if not explicitly then nevertheless by unspoken implication. If a court holds, for instance, that a city's film censorship ordinance violates a theater owner's freedom of expression, that holding presumably implies that no defect of municipal power prior to this unconstitutional restraint stood in the way.[90] Thus, insofar as both may involve the scope of delegated power, judicial review of local action can be more analogous to review of federal action than to review of state laws, which does not.

In many attacks on local action, as on federal action, no real question whether the action falls within the delegated authority can be raised, and the litigation turns on the application of a constitutional limitation. Nevertheless, it is important to recognize that the state courts do have the obligation to interpret what a local government has done and its authority to do so before reaching the claimed limitation, just as the federal courts do in scrutinizing federal action.[91] This may similarly

[90] In *City of Portland v. Welch*, 229 Or. 308, 364 P.2d 1009, 367 P.2d 403 (1961), the supreme court held a censorship ordinance unconstitutional on rehearing only after being reminded that its earlier effort to avoid the constitutional issue by interpretation was beyond its statutory jurisdiction. In the circuit court, however, the issue of charter power would be implicit in the case, whether or not it was raised, before reaching the constitutional issue.

[91] In suits challenging the constitutionality of federal personnel security programs, for instance, the Supreme Court first reviewed whether the discharges complied with departmental rules, whether the rules followed the basic executive order, and whether the order was authorized by Congress. By sustaining the petitioners' claims upon an analysis of these nonconstitutional sources, the Court never actually held a discharge to be legally authorized but in violation of the

require a three-step analysis, for instance: whether the local action complied with the ordinance, whether the ordinance was in accordance with a charter provision, and whether the charter provision so interpreted would be within the authority granted by statute or the constitutional home-rule provisions.

The rhetoric of "police power" is especially prevalent in decisions reviewing local regulations, and it blurs this essential distinction between state-granted authority and the federal constitutional restraints. In rejecting a challenge to the fluoridation of a municipal water system, the Oregon Supreme Court's opinion begins:

> The legislation in question was adopted by the city in the exercise of its police power granted by a provision of its charter which authorizes it "to make ordinances, by-laws, and regulations * * * not repugnant to the laws of the state of Oregon or of the United States, that shall be deemed necessary to secure the peace, health and general welfare of the city and its inhabitants." Charter of the city of Bend, ch. VII, art. B, § 1. These powers the municipality derives from the state, and "According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Jacobson v.* Massachusetts, 197 U.S. 11, 25, 49 L. Ed. 643, 25 S. Ct. 358.[92]

The quotation contains both a statement about the "police power" of the city of Bend, which is an interpretation of its charter, and the "police power" of the state, which is not an interpretation of any power but a conclusion that fluoridation is not prohibited by the constitution; but it is doubtful if any reader is likely to recognize the difference between the two statements. As the rest of the opinion shows, the litigation really concerned only a claim of religious liberty against fluoridation, and the court held it baseless. But if the court had believed that this constitutional claim had real substance, whether under the federal first and fourteenth amendments or under Oregon's article I, the opinion should not so readily assume that Bend's charter power to "make ordinances, by-laws, and regulations . . . to secure the peace, health and general welfare" necessarily extended to fluoridating its water. The authority granted to the city and the state's residue of power left by the fourteenth amendment need not be coterminous, as the court's use of "police power" to describe both in the quoted paragraph would suggest. The quoted terms of the charter grant do not in fact use the words "police power" but words that are far more confined than the total range of state laws permissible within the fourteenth amendment. Since "police power" is not a term of the city charter or state law, nor of constitutional law, the opinion would have been clearer without it.[93]

Constitution. Vitarelli v. Seaton, 359 U.S. 535 (1959); Greene v. McElroy, 360 U.S. 474 (1959).

[92] Baer v. City of Bend, 206 Or. 221, 224-225, 292 P.2d 134, 135-136 (1956).

[93] Again, as in the case of *City of Portland v. James, supra* note 21, I do not

Nowhere is the risk that the phrase "police power" will confuse legal authority and constitutional limitations more commonplace than in the review of zoning and other land-use controls. One of three such decisions of the Oregon Supreme Court in 1965, *Oregon City v. Hartke*,[94] sustained the power of a city to zone for aesthetic purposes. It is an excellent decision, and unquestionably sound fourteenth-amendment law, reached in the face of a good deal of antediluvian due-process lore in other states. Unfortunately, after clearing away the preliminary legal issues, the opinion explains its contrary view of the constitutional question in the familiar terminology:

> The change [in attitude toward aesthetic zoning] may be ascribed more directly to the judicial expansion of the police power to include within the concept of "general welfare" the enhancement of the citizen's cultural life. The broadening of the police power in this respect follows the expansion of the police power in other areas of regulation...

The court then concluded: "We hold that it is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion."[95] The first quotation, although judges do not really grant, expand, or broaden the "police power," describes the modern withdrawal of "substantive due process" barriers against legislative objectives. But this absence of constitutional prohibitions alone does not establish the city's "power." The legal authority of any given city does not derive from the fourteenth amendment; often it is something less than the Constitution would allow. Oregon City, in fact, enacted its zoning ordinance under the specific statutory authority cited in the opinion, and the quoted conclusion is really an interpretation of that statute rather than of some general municipal "police power."[96]

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disagree with the decision. Bend's city charter did extend its authority to pursue public health to the limits set by state and federal law, and fluoridation did not exceed those limits. I criticize only the misleading introduction of "police power" as a substitute for the terms either of the authority or of the limitation.

In the rare case when a government's grant of authority expressly refers to "police regulations," analysis in those terms is, of course, called for. *See, e.g.*, municipal powers under WASH. CONST. art. I, § 11, reviewed in *Petstel, Inc. v. County of King*,— Wash.2d.—, 459 P.2d 937 (1969). It remains important not to confuse interpretation of such a grant with the different question of fourteeenth amendment limitations.

[94] 240 Or. 35, 400 P.2d 255 (1965).

[95] *Id.* at 47, 49, 400 P.2d at 261, 263.

[96] OR. REV. STAT. §§ 227.220-.230 (1959), *cited in* 240 Or. at 39, 400 P.2d at 258. The statutory standards are "the public interest, health, comfort, convenience, preservation of the public peace, safety, morals, order and the public welfare." It is a sound conclusion that they extend to protecting the community's aesthetic stake in its environment, but that does not make this zoning statute the equivalent of some general power to legislate to the full limits of the federal fourteenth amendment.

Another recent, leading case on zoning in Oregon, *Jehovah's Witnesses v. Mullen*, 214 Or. 281, 330 P.2d 5 (1958), also begins with an analysis of the zoning

Smith v. County of Washington,[97] the second decision, did not mention either "police power" or constitutional limitations in setting aside a change in zoning granted by the county commissioners and opposed by plaintiffs. Despite some references to the "rights of residential property owners" and the judicial "duty to grant relief at the suit of a party aggrieved by arbitrary or capricious changes in neighborhood zoning," *Smith* is a case of statutory interpretation, not of constitutional law.[98] Its chief difficulty is whether to treat the action of a politically elected local government administering a state statute with the deference due legislation or only administrative rulemaking; the opinion calls the zoning amendment a "legislative act" yet reviews it like an administrative rule. The validity of "spot zoning" will reach constitutional dimensions only when some home-rule county like Washington decides to base its own zoning ordinance directly on its constitutional home-rule powers[99] rather than following the statutory scheme offered it by the legislature. The third 1965 decision, *Oregon Investment Co. v. Schrunk*,[100] used "police power" phrasing to explain why a city may deny an abutting landowner his "property right" of access to the street without paying him compensation, a claim which the court apparently hinges on the "reasonableness" of the city's action for purposes of article I, section 18 of the Oregon constitution though not necessarily the federal fourteenth amendment.

The special risk in judicial review of local action is that the terminology of "police power," "public welfare," "reasonableness," etc., sounds like constitutional law even when the case decides no constitutional issue, and that these terms will be read, headnoted, digested, and

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ordinance but soon commingles interpretation with the rhetoric of judicial review: "... [I]t is not the function of this court to reappraise the minimum requirements for public welfare as declared by Section 3 of the ordinance before us. Notwithstanding that a zoning ordinance is truly an instrument designed in the public welfare, and thus superior to private property rights, it must also be reasonable, and not arbitrary in reach or administration, and must confer on the public a benefit commensurate with its burden on private property (citations omitted).

"As an exercise of the police power, the courts will review such zoning ordinance to determine whether they are a proper employment of that power, *i.e.*, whether they are reasonable or arbitrary and have a substantial relation to the public health, comfort, morals, or welfare..." *Id.* at 307, 330 P.2d at 17. As in *Baer v. City of Bend, supra* note 92, the constitutional crux of the litigation involved the religion clauses (denial of a special building permit for a church in a residential zone), not general "due process" limits on the "police power."

[97] 241 Or. 380, 406 P.2d 545 (1965).

[98] "Arbitrary, or 'spot,' zoning to accommodate the desires of a particular landowner is not only contrary to good zoning practice, but violates the rights of neighboring landowners and is contrary to the intent of the enabling legislation which contemplates planned zoning based upon the welfare of an entire neighborhood." *Id.* at 384, 406 P.2d at 547. *See* OR. REV. STAT. §§ 215.050 and 215.110 (1969).

[99] OR. CONST. art. VI, § 10.

[100] 242 Or. 63, 69, 408 P.2d 89, 92 (1965).

cited in briefs as propositions of general validity beyond the actual legal texts governing the particular decision. The law of zoning, as of other regulatory action of local governments, is not common law; it is legislated by the political acts of particular communities and embodied in statutes, charters, and ordinances. Any one state or local government may not have legislated authority that extends to making zoning changes for small plots, but then again it might; the answer must be sought in what law that community adopted, not in annotations of how "courts generally view spot zoning."[101] There may be comfort in reviewing the holdings from other states on the powers of their local governments, but a contrary result in Oregon requires little explanation unless a genuine holding on federal constitutional law is involved. Indeed, one might reasonably expect that results could legally differ from one city or county to the next. Oregon's state and local governments are entitled to the benefits and burdens of the texts they adopt to govern themselves. These texts, and not a "police power," are the sources of authority whose various terms and scope can be an issue in judicial review before reaching a constitutional limitation.[102]

This brings us back to the 1968 decision that begins this survey of judicial review, the gasoline-storage case, *Leathers v. City of Burns*.[103] Plaintiff's complaint did in fact contain an allegation that the ordinances were "an excessive and unlawful exercise of the powers delegated to defendant City of Burns by its charter and by the Legislature of the State of Oregon."[104] The point was important; if correct, it would obviate any question whether the State of Oregon, through one of its cities, had done something that the federal Constitution forbids. But the point is never heard or seen again. Neither the city charter nor any state legislation is cited or examined by the parties or by the courts. The supreme court's description of the complaint of constitutional violations does not even notice the assertion of a nonconstitutional lack of city authority, and the opinion moves directly into due process analysis with the conventional statement: "The ordinance was enacted in the exercise of the city's police power, ostensibly to protect the public safety."[105] But what is analyzed in a due-process case is the restraint which the federal fourteenth amendment imposes on Oregon and all its works, not any "police power" of the city of Burns.

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[101] Smith v. County of Washington, 241 Or. 380, 384, 406 P.2d 545, 547 (1965).

[102] *Cf. Haugen v. Gleason*, 226 Or. 99, 359 P.2d 108 (1961), another land-use control case which avoided reaching the constitutionality of Multnomah County's subdivision fees for park acquisition by a careful reading of the underlying statute. Analytically, such an opinion does not decide whether a home-rule county, say Washington or Lane, could levy such a fee.

[103] *See* note 4 *supra*.

[104] Brief for Appellant at 10, 18, Leathers v. City of Burns, *supra* note 4.

[105] 87 Or. Adv. Sh. at 125, 136, 444 P.2d at 1015.

Review sans "police power." So where are the constitutional premises of judicial review in Oregon? Another wild goose has been chased across the horizon, and we are back where we started.

When a government action is challenged because it does not follow a regulation or an ordinance, or because the regulation or ordinance is unauthorized by a charter or a statute, the issue may be one of "power," but it is not a constitutional issue unless the power is granted or defined in the state constitution—for instance "home rule." "Police power" is not a power, and it is not constitutional law. The questions of legal authority for the challenged action should be carefully briefed and examined before reaching the ultimate question whether the law has authorized something that violates a constitutional limitation.

Sometimes it is possible to construe the granted authority narrowly to avoid constitutional doubt when the law in question is directed to a relatively confined object and could be readily amended to overcome the court's construction, if desired. For instance, if the legislation appears to authorize spot zoning or subdivision fees for park purposes, the constitutional question can be postponed until the Legislature clearly says so.[106] In another constitutional law case of 1969, the circuit court painstakingly determined that the Eugene City Charter did not authorize the city to accept a donated religious monument in a public park, thus avoiding a first amendment issue, though to no avail.[107]

On the other hand, there are times when authority to make law is granted to politically responsible bodies in broad terms that would be

[106] Smith v. County of Washington, *supra* note 97; Haugen v. Gleason, *supra* note 102.

[107] Lowe v. City of Eugene, 87 Or. Adv. Sh. 1059, 451 P.2d 117 (1969). The supreme court, in Oregon's most snarled constitutional litigation of recent years, did not expressly disagree with Judge Fort's charter interpretation. It used an incomprehensible pleading point (that the "issue of city authority which defendants sought to raise in an affirmative answer was stricken by the court on plaintiffs' motion") to stretch beyond the nonconstitutional question and reach a first amendment issue on which it could initially form no majority view except to reverse the judgment. On rehearing, with a permanent member of the court replacing a justice pro tem, the court reinstated the judgment on the conclusion of the former dissenting opinion that the cross constituted a forbidden establishment of religion. 89 Or. Adv. Sh. 323, 459 P.2d 222 (1969). When this drew *another* petition for rehearing from private defendants, now on the losing side, the court wrote a third opinion elaborating the grounds for finding violation of the separation of church and state under OR. CONST.. art. I, 89 Or. Adv. Sh. 909, 463 P.2d 360.

For purposes of the present discussion of judicial review, it is regrettable that the court failed to elucidate its elimination of the nonconstitutional ground of decision. The law applicable to a case is not normally a matter to be pleaded, and the stricken allegation was apparently surplusage. Surely parties are not free to obtain a constitutional opinion from the court if they merely take care that the issues are "drawn solely on constitutional grounds in [the] pleadings." 87 Or. Adv. Sh. at 1062, 451 P.2d at 120. To the contrary, the meaning and applicability of a law is always an inescapable premise in a decision whether its application is constitutional.

hard to amend, and when a narrowing construction of that authority may be too high a price to pay to avoid holding a particular act unconstitutional. These are the choices of policy and craftsmanship in judicial review which counsel can help present to the court, if the premises of judicial review are kept clear and precise.

But when decision of a "due process" attack on a regulatory policy becomes unavoidable, that decision will be an application of section I of the fourteenth amendment of the Constitution of the United States. To this we can finally turn.

V. FOURTEENTH AMENDMENT REVIEW OF STATE REGULATION

When an attack on the constitutionality of a state's regulatory policy identifies the constitutional clause or clauses that are asserted to invalidate the policy, the task of analysis is not ended, but at least it can begin. The particular clause cited presents certain criteria for a finding that a regulation is unconstitutional. It must be shown that these criteria are met. This may or may not involve questions of fact; as in any lawsuit, there is no reason to proceed to an inquiry into facts in constitutional litigation until the pleadings establish whether the outcome depends upon any disputed facts, and if so, which facts. In short, a claim that a regulation is constitutionally invalid requires a theory of the case. A mere assertion of unconstitutionality should not move the process of judicial review very far.

If the claim is that a regulation "deprives [the claimant] of liberty, or property, without due process of law," it is a claim under the fourteenth amendment. The two chief exhibits in the present article, the *Leathers* and *Fetterly* decisions, illustrate polar opposites in "substantive due process" litigation. *Leathers* reviewed the validity of the gasoline storage and delivery ordinances upon an elaborate record of factual evidence presented by expert witnesses in the circuit court for Harney County. In *Fetterly*, no evidence of any kind was presented; the defendant stipulated that he rode a motorcycle without the required protective helmet, and insofar as the court's evaluation of the legitimacy of that requirement depended on facts, the court presumably took judicial notice of them. The same was true in the review of the "balloon loaf" regulation in *Hudson House*, which was decided on defendant's demurrer to its enforcement.

Is one of these approaches right and the other wrong? How much must a court know about the delivery and storage of gasoline, the hazards of riding motorcycles, or the bread-buying habits of housewives, to decide whether these regulations violated the fourteenth amendment? And what factual or nonfactual considerations would

meet that question with respect to the aesthetic zoning against automobile wrecking yards in *Oregon City v. Hartke*?[108] The answer requires a clear theory of what federal due process is about, and in particular, what substantive limits the fourteenth amendment imposes on state regulatory policies.

First and fundamentally, if judicial review under "due process" is to be an application of law at all, it requires recognition that the fourteenth amendment is indeed *federal* law, and that its application contrary to how it would be applied by the Supreme Court of the United States is legal error. More pedantry? Perhaps, but necessary; there is a misunderstanding, rarely articulated but often put into practice, that the due process clause enacts a general requirement of fairness and reasonableness to be freely and independently developed by state as well as federal courts.

The Oregon Supreme Court has written in a modern decision:

> Although this court's *application* of the standard of due process in a particular case may be at variance with that of the Supreme Court of the United States, the *standard itself* is the same.[109]

What does this mean? The state courts are not so many juries diversely applying a common standard of, say, negligence, though substantive due process litigation in the states often resembles this common-law analogy. When a state court's application of the fourteenth amendment in a particular case is at variance with that of the Supreme Court and review is granted, the state court is going to find itself reversed no matter how much it protests that it has applied the same *standard*. And once the state court recognizes how the Supreme Court would decide the particular case, it can hardly trade on the likelihood that certiorari will be denied to justify a contrary application of the "standard itself."

That "due process" states a broad and quite vague standard does not alter the fact that it is federal law, to be followed by state courts.[110] They often must search the decisions of the United States Supreme Court for the correct application of vague standards, and sometimes of no standard at all.[111] The search may, of course, leave in doubt how the United States Supreme Court would decide a genuinely novel question, and the state court's application of the due process clause then

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[108] *See* note 94 *supra*.

[109] Brooks v. Gladden, 226 Or. 191, 200, 358 P.2d 1055, 1060 (1961) (italics in original).

[110] "This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

[111] *See, e.g., Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), establishing federal labor contract law under the purely jurisdictional § 301(a) of the Taft-Hartley Act.

becomes an exercise in creative prophecy.[112] What matters for our immediate purpose is that the tea leaves and entrails to be searched are the modern precedents and majority opinions of the Supreme Court. *The relevant citations in due process litigation are* (1) *decisions of the United States Supreme Court (after scrutiny of their continuing vitality), and* (2) *those of other courts carefully based on the application of such Supreme Court decisions*: but *not* (3) digest summaries or homemade collections of state cases chosen for the factual similarity of the circumstances being reviewed. And the prophecy drawn from the authoritative Supreme Court precedents must be a sincere attempt to divine their significance for the pending case.[113] That significance, in due process attacks on state regulations, will often be that a challenge to the substance of the regulatory policy finds no support in the due process clause alone, unaided by other constitutional clauses.

This conclusion about due process requires a quick review of its evolution, by no means original but familiar from the constitutional law casebooks.

A capsule history. During the sixty years before the Civil War, the "due process" of federal law guaranteed by the fifth amendment was rarely invoked, and then only in challenge to the *process* of law enforcement.[114]. It seems reasonable that, like its acknowledged ancestor, the "law of the land" clause, "due process" enshrined the protection of life, liberty, and property against the enforcement of merely executive (formerly royal) policy, not against that of the people's representatives; though even they could not make just any process "due." It was the *Dred Scott* case that turned the clause into a protection of the property in slaves against the congressional "Missouri Compromise" which excluded slavery from parts of the federal territory.[115] During the first eighty years of the Constitution, federal limits on state regulation had

[112] The Oregon Supreme Court recently held that, for purposes of postconviction review, a defendant had been denied due process when his privately retained counsel failed to file a timely notice of appeal. Shipman v. Gladden, 88 Or. Adv. Sh. 321, 453 P.2d 921 (1969). Insofar as the result is deduced from the right to the effective assistance of counsel, it might have been more directly rested on OR. CONST. art. I, § 11 than on the fourteenth amendment.

[113] There is a contemporary heresy that, since constitutional precedents are always subject to reconsideration, litigants and lower courts should do what they think right and make the Supreme Court grant certiorari if it cares to reaffirm its view. This sophistry is highly popular as a justification for civil disobedience, and thoroughly despised as a justification of continuing racial segregation or prayers in the public schools. I doubt that it would be very popular with the Oregon Supreme Court if put into practice by Oregon's circuit courts and the court of appeals.

[114] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[115] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

to be found in article I, section 10 or in a determination of what powers granted the federal government excluded concurrent state action; protection of business interests was built on the lawyers' expansion of the contract clause.

The fourteenth amendment originated in the post-Civil War Reconstruction Congress as a constitutional underpinning to the Civil Rights Act of 1866, vetoed by President Andrew Johnson as exceeding the congressional power to enforce the anti-slavery thirteenth amendment. As an instrument intended for the political reconstruction of the union by the victors, the fourteenth amendment contains much more than the opening clauses that define citizenship and command states to respect its privileges and immunities, and accord all persons due process and equal protection of the laws. The substantive concerns that led to these clauses of section 1, as of the Civil Rights acts, were the kinds of disqualifications, disabilities, and discriminations that the states were imposing on the former slaves. While the guarantees of course protect all persons, it is plain that they would not have been enacted as a constitutional amendment to furnish federal relief for the ordinary citizen's dissatisfaction with the unreasonable policies of his own state legislature or state courts.[116]

The claims of such citizens, though perhaps incidental beneficiaries of the fourteenth amendment, were however the first to be brought to the Supreme Court. Four years after the amendment was ratified, the butchers of New Orleans argued that in forcing them to slaughter cattle only at a state-chartered facility the state of Louisiana had transgressed each of the prohibitions of section 1 as well as the thirteenth amendment. It is pertinent that debate in the *Slaughterhouse Cases*[117] raged almost wholly around the privileges and immunities clause, four justices accepting the argument that the pursuit of the common, lawful

[116] When an indignant victim of municipal street-building practices in 1833, much like the complainant in *Oregon City Investment Co. v. Schrunk, supra* note 42, appealed to the United States Supreme Court for just compensation under the 5th amendment, Chief Justice Marshall explained why the federal Bill of Rights of 1789 could not reasonably be read to have been directed against the states themselves: "The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible languege." Barron v. Baltimore, 60 U.S. (7 Pet.) 243, 249 (1833).

[117] 83 U.S. (16 Wall.) 36 (1872).

callings, free from legal restraint on behalf of favored monopolies, was one of the privileges and immunities peculiar to American citizenship. In rejecting this view, the Supreme Court recited at length the familiar historical background and the obvious objectives of the amendments.[118] The argument that Louisiana had deprived the butchers of property without due process was briefly dismissed as a mere makeweight, baseless under the familiar understanding of that concept.[119]

In the post-Reconstruction atmosphere, however, there was more pressure for fourteenth amendment protection of business against state laws than of the former slaves. In a much quoted passage written six years after his *Slaughterhouse* opinion, Justice Miller complained:

> It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the text of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."[120]

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[118] Justice Miller's review of the racist practices that the amendment was designed to forbid ends: "We do not say that no one else but the negro can share in this protection... [If] other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy..." *Id.* at 72.

[119] "We are not without judicial interpretation... of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." *Id.* at 80-81.

[120] Davidson v. New Orleans, 96 U.S. 97, 103-104 (1878). That opinion also distinguished the function of the "law of the land" antecedents, to limit the executive prerogative, from that of the 14th amendment in a federal system: "[The feudal barons] meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those Barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of

Within another decade, the "strange misconception" became the doctrine of a majority of the Supreme Court. The notion that courts were obliged by fourteenth amendment due process to examine whether state legislation was a "reasonable" exercise of the state's "police powers" for protection of "the public health, the public morals, or the public safety," which still haunts the style of constitutional litigation in the states, first entered the Court's opinions twenty years after adoption of the Civil War amendments[121] and reached its high-water marks in the years just before and after the first World War. But since the great reexamination of our constitutional premises in the 1930s, for thirty years now, the Supreme Court has been trying to tell us that this doctrine is not constitutional law. Since it is not, what is?

Holdings and explanations. Courts and counsel contemplating a "due process" attack on the substance of a regulatory law must decide whether to look for the answer to this question in the modern decisions of the United States Supreme Court, or in the terminology sometimes accompanying those decisions.

Nothing in contemporary constitutional law could be more unambiguous than the record of modern Supreme Court decisions rejecting claims that a state regulatory policy denies "due process" directly under the fourteenth amendment itself, without reference to a value found in another amendment such as the first, fourth, or fifth. Since *Nebbia v. New York*,[122] thirty-five years ago, no decision lends any encouragement to the view that the due process clause may be used in this manner. If the "substantive due process" claim is raised in a petition for certiorari from a state court decision sustaining a state law, certiorari is denied. If such a decision comes within the jurisdiction of the Supreme Court on appeal and is not so insubstantial as to be dismissed, it is affirmed. If a lower federal court is so intrepid or obtuse as to invalidate a state law on "substantive due process" grounds, it is reversed. Those are the holdings.

It is not for nothing that briefs and lower court opinions adverse to a challenged regulation invariably rely on Supreme Court citations older than 1933, while the Supreme Court's own opinions invariably cite the same lengthening chain of post-*Nebbia* decisions monotonously

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grace 1866, there is placed in the Constitution of the United States a declaration that 'No State shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation." *Id.* at 102.

[121] Mugler v. Kansas, 123 U.S. 623 (1887).

[122] 291 U.S. 502 (1934). One final "substantive due process" holding, *Thompson v. Consolidated Gas Util. Co.*, 300 U.S. 55 (1937), found a natural gas proration scheme to be a taking of property for the private gain of another.

rejecting these challenges.[123] In part, this almost schizophrenic divergence of perception of the governing precedents in "substantive due process" litigation may no doubt be attributed to cultural lag. But in part it reflects the reluctance of state judges, and naturally of litigants, to abandon the comfortable old assumptions about judicial relief from unreasonable regulation, even when its one-time premises have shrunk into an episodic aberration of the distant past. When the United States Supreme Court reiterates that

> [t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought... We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, "For protection against abuses by legislatures the people must resort to the polls, not to the courts,"[124]

a profession that has been used to resorting to the courts, or to serve on them, is not lightly persuaded. And one reason for the survival of what Justice Miller called the "strange misconception" is to be found in the Supreme Court's explanations of its modern due-process holdings.

The import of the holdings themselves is, I repeat, unmistakable. But the explanations sometimes proceed on two fronts simultaneously. The "true" explanation, in the realist's sense—the operative doctrine—is the one communicated in the paragraph just quoted. Fourteenth amendment due process is not to be used to strike down regulatory laws. That is the message, as it has been for a generation. Any lower court holdings to the contrary are misapplications of federal law. Sometimes, however, the opinions also proceed on another front, to explain the validity of the challenged statutes by an analysis, not of the meaning of the fourteenth amendment, but of the possible reasons justifying the state's policy. Such examinations of the regulatory policies under due process attack may be mere makeweights, or they may be designed as object lessons to show the wide range of arguably "unjust" legislation that must nevertheless be enforced; but they tend also to keep alive the impression that "due process" *might* strike down regulatory laws if, upon such examination, the abuse by the legislature is unreasonable enough.

The presence of both explanations in the Supreme Court decisions *sustaining* state regulations occasionally misleads even lower federal courts into accepting due process arguments *against* such regulations. In the 1955 case from which the above quotation is taken, a three-judge

[123] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Olsen v. Nebraska, 313 U.S. 236 (1941); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963).

[124] Williamson v. Lee Optical Co., 348 U.S. at 488.

district court took evidence and made an extensive analysis of the operation of an Oklahoma statutory scheme that regulated the sale of eyeglasses to the advantage of opthalmologists and optometrists in private professional practice and adversely to opticians and to those employed by or using space in business establishments. It concluded that some of these prohibitions imposed on the latter groups had no "real and substantial relation" to any consideration of the public health and welfare and were unconstitutional.[125] Naturally the Supreme Court reversed. But besides telling the judges that the fourteenth amendment does not make such questions any of their business, the opinion goes on to speculate on the kind of reasons that might justify a legislature in making the regulations.[126] And decisions sometimes display concern with the factual balance of public necessity and private loss when the regulation of tangible property arguably approaches a "taking" of the property within the reach of the "just compensation" clause rather than only the unaided due process clause.[127]

In 1963, on the other hand, when another district court had held that Kansas could not prohibit the "lawful business" of debt adjustment,[128] the Supreme Court reversed in an opinion that studiously avoided any discussion of the nature of the business or the conditions that might lead a state to prohibit it. The decision is grounded explicitly on the premise that the due process clause does not call for such an inquiry by courts.[129] The point is sharpened by the fact that Justice Harlan alone concurred in the judgment "on the ground that this state measure bears

[125] Lee Optical of Oklahoma v. Williamson, 120 F. Supp. 128 (W.D. Okla. 1954). The district court relied on the same 1928 quotation from *Liggett Co. v. Baldridge* still relied on fifteen years later by the Oregon Supreme Court in *Fetterly*, quoted at note 82 *supra*. Neither court acknowledged the repudiation of *Liggett's* usage of "unreasonable" and "arbitrary" in *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949).

[126] Williamson v. Lee Optical Co., 348 U.S. 483 (1955). "The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses." *Id.* at 487.

"It certainly might be easy for an optometrist with space in a retail store to be merely a front for the retail establishment... Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds." *Id.* at 491.

[127] *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) held that on the record made below the plaintiff had not met the burden of showing that a prohibition of further excavation on this gravel pit was "unreasonable" as a "police regulation." Justice Clark's opinion is a more than usually confused compendium of quotations drawn indiscriminately from cases examining state regulations under the commerce clause, or as "takings," or under the unaided due process clause; it should not in turn be quoted without an examination of the sources and context of those quotations.

[128] Skrupa v. Sanborn, 210 F.Supp. 200 (D.Kan. 1961).

[129] Ferguson v. Skrupa, 372 U.S. 726 (1963).

a rational relation to a constitutionally permissible objective."[130] In 1968, even Justice Harlan joined an opinion by Justice Black dismissing without factual consideration a lower court's conclusion that a state "full-crew" law was "unreasonable and oppressive" and therefore a violation of due process.[131]

Most federal courts know that only Supreme Court decisions are authoritative on the meaning of the federal due process clause, and that government need no longer explain to judges why or how a regulation of a business activity is required by the public interest. Thus the Ninth Circuit Court of Appeals recently dismissed citation of Oregon's *Hertz Corporation v. Heltzel*[132] with the comment:

> In the face of this doctrinal change of position by the Supreme Court, the fact that certain state courts still adhere to Chief Justice Waite's "affected with a public interest" dictum... is without significance in federal adjudication.[133]

Of course, the proper application of federal law, including federal constitutional law, cannot be different because the adjudication happens to be in a state court. But federal courts as well as state courts may wonder if the due process clause still calls for a judicial inquiry whether a law "has a reasonable relation to a legitimate legislative purpose and is not arbitrary, capricious or discriminatory."[134] In the face of the unbroken modern history of Supreme Court holdings rejecting challenges to regulatory laws under that formula, does a claim of unconstitutionality stated under the formula call for an examination of the facts at all, and if yes, what facts?

The calculus of rationality. The battery of adjectives that together make up the conventional formula of attack on governmental action—"arbitrary," "capricious," "discriminatory," as well as "reasonable" and "legitimate" and their opposites—are the most cherished ammunition in the lawyer's verbal arsenal. Elimination of these conclusory epithets from the dialogue of judicial review, recognizing that they are meaningless apart from specifications couched in more concrete terms,

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[130] *Id.* at 733.

[131] "Insofar as these arguments seek to present an independent basis for invalidating the laws, apart from any effect on interstate commerce, we think, with all due deference to appellees and District Court, that these contentions require no further consideration." [Citing Ferguson v. Skrupa, Williamson v. Lee Optical Co., Olsen v. Nebraska, West Coast Hotel Co. v. Parrish, Nebbia v. New York, *supra* notes 122, 123.] Brotherhood of Loc. Fire. & Eng. v. Chicago, R.I. & P.R. Co. 393 U.S. 129 (1968), *reversing* Chicago, R.I. & P.R. Co. v. Hardin, 274 F. Supp. 294 (D.C. W.D.ARK. 1967). And see *Gold v. DiCarlo*, overruling *Tyson & Brother v. Banton, supra* note 89, without even hearing argument.

[132] *See* note 2 *supra.*

[133] Boylan v. United States, 310 F.2d 493, 498 (1962).

[134] *Id., relying on* Virginian Ry. Co. v. System Federation No. 49, 300 U.S. 515 (1937).

might leave all participants temporarily speechless. Yet they are, of course, only epithets. As in the case of other such comfortable terms, for instance "police power," they may at best be mere rhetorical surplusage when summarizing a claim meaningfully stated in other terms; but too often the epithets alone are submitted in lieu of any such meaningful analysis. They deserve a brief examination.

First, it is apparent that adjectives such as "arbitrary," "reasonable," and "legitimate" are conclusory; *i.e.*, they are used only as synonyms for the legal conclusion they articulate. One finds it difficult to imagine a judicial opinion that would state: "The government's action is not a reasonable means to a legitimate end. It is quite arbitrary. It is, however, not unconstitutional." Such a dictum, in a decision sustaining the governmental action, would sound perverse, or be understood as a deliberate judicial slap at the government's policy. When a court believes itself precluded from setting aside "arbitrary" action, this conclusion is likely to be phrased in terms of procedural "nonreviewability" that never reach a substantive characterization of the challenged action.

Second, however, there is no general constitutional obligation on government to behave "reasonably," or to avoid "arbitrary" action. If this sentence seems striking, that only illustrates the point of the preceding paragraph. Yet it is accurate. "Arbitrary" and "capricious" are not constitutional terms. When the Constitution makes "reasonableness" or other degrees of judgment into constitutional criteria, it says so.[135] Apart from such deliberately stated criteria, the Constitution is blessedly free of the programmatic preaching and pious instructions to government that characterize the later continental tradition of written constitutions. Governments had acted with human frailty before the Constitution was written and could be expected to do so in the future. Hope lay in the divided and representative structure of authority and in specific constitutional prohibitions. Short of a violation of such a specific prohibition, however, government is not commanded to act "reasonably," nor judges to keep it so.

The point is not merely doctrinaire; it can be illustrated by many examples. If by "arbitrary" we mean the widest sort of political discretion that is not subject to a legal obligation of reasonableness, then arbitrary governmental action within constitutional authority can range from the most awesome to the most trivial. The most often cited area is the President's power as commander-in-chief and his (and a governor's) authority over appointments. President Truman could decide arbitrarily whether or not to use the atomic bomb on Hiroshima, or to

[135] "Unreasonable searches and seizures," fourth amendment; "necessary and proper," art. I, § 8; "absolutely necessary," art. I, § 10; "needful Rules and Regulations," art. IV, § 3; "excessive bail" and "cruel and unusual punishments," eighth amendment.

replace one Attorney General with another. Governor Holmes could arbitrarily commute all death sentences; another governor could arbitrarily commute one out of many. The constraints are political, not legal.[136] But many more examples can be found in the government's managerial decisions in the public sector. Government may arbitrarily decide to provide or not to provide a program of medical insurance, or minimum income maintenance, or urban renewal, or what the pay scale of its military and civilian personnel should be. Government is free to develop another public park or not to develop another public park. The voters of Oregon may capriciously decide to authorize a sales tax or not, to accept a school budget for a new school or to reject it. The school may be arbitrarily named for Martin Luther King or for the town's favorite football coach. Government may arbitrarily decide to provide gas and electricity, or transportation, or radio and television broadcasts, by public entities or to let such services be provided by private business. "Reasonableness" is no criterion for the legality of such governmental action.

If these illustrations do not seem to fit the lawyer's sense of whether government may be "arbitrary," it is not because the decisions are not important. Governmental decisions in the public sector are today far more important to more people than conventional regulatory decisions. The economy is shaped by taxes and federal monetary controls. The impact of a highway program facilitating road traffic rather than mass transit has probably changed American life more than any other peacetime governmental decision. Nor is it that such decisions are not "arbitrary"—most are, in fact, made in a totally discretionary fashion by those procedures that are appropriate to the political rather than the administrative process. Rather, these examples show that *the Constitution does not deny government the exercise of arbitrary discretion as such; it prohibits depriving a person of life, liberty, or property without due process of law.*[137]

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[136] Eacret v. Holmes, 215 Or. 121, 333 P.2d 741 (1958); *discussed in* Linde, *supra* note 1.

[137] To forestall misunderstanding: Of course government management of public programs is not immune from the specific constitutional guarantees, quite the contrary. *See* Linde, *Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4 (1964), 40 WASH. L. REV. 10 (1965). But governmental decisions such as those in the text need not, apart from statutory requirements, be "reasonable" in substance or reasonably reached. "Discriminatory" is a word of a different color. As a conclusory epithet it claims denial of equal treatment contrary to the equal protection clause or the fifth amendment or Oregon's art. I, § 20; *see* notes 45-58 and accompanying text *supra*. Since any law inescapably distinguishes one thing from another, "discrimination" (when not unconstitutional *per se*, as for instance against interstate commerce) must be further stigmatized as "invidious." *See, e.g.*, Ferguson v. Skrupa, *supra* note 129; Shapiro v. Thompson 394 U.S. 618 (1969). As the latter decision (invalidating requirements of extended residence before eligibility for public welfare) shows, "discrimination" analysis may force alloca-

What, if anything, can be made then of an allegation that a particular legislative action is "arbitrary" or "capricious"? Can the mere "unreasonableness" of legislative action be a denial of due process under the fourteenth amendment?[138] That, in essence, is the assertion when regulations like the motorcycle helmet law in *Fetterly* or the gasoline delivery and storage ordinances in *Leathers v. City of Burns* are attacked on "due process" grounds. And more stands in the way of judicial review on those grounds than the consistently contrary modern holdings of the United States Supreme Court which have made fourteenth amendment due process unavailable as a premise for challenging the reasonableness of state laws. Even if a state court, unlike Oregon's, has an independent state constitutional premise available, judicial review of the "reasonableness" of legislative policy will not stand analysis.

What does it mean that a political lawmaker has acted "unreasonably"? If a policy is to be subjected to rational analysis, it involves at least four major judgments. One is the identification of a desired objective, a goal. A second is a set of assumptions about the existing situation, a diagnosis. Third is an instrumental hypothesis, the judgment that the proposed action (perhaps one among several alternatives) will influence the existing situation in the direction of the desired goal. And fourth is the ratio of costs to benefits, the judgment that the goal deserves the means, that the game is worth the candle, that the importance of the objective and the probable efficacy of the means chosen justify the burdens that the policy imposes.

Of these four components of policy, the second and third are judgments about facts. The first and fourth are clearly value judgments. Together, the four rationalize the substance of a policy as a means to an end. But there is a fifth determinant of policy, external to that equation yet indispensable to action: the political judgment that determines how far one of several possible means can be used at a given time to approximate how closely to what version of a desired objective, assuming that this objective is going to have a chance in the competition for political consideration in the first place. Which of these five judgments may a court examine for lack of rationality?

I do not mean that policy is actually made by the separate consideration of these issues. Not only will they not appear as distinct judgments

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tion of resources within a public program if the program is to be carried out at all, a point previously developed in school desegregation cases and in criminal procedure. It remains to be seen how far current atempts with more extreme "equality" analysis will succeed in imposing affirmative constitutional obligations on governments to initiate and maintain compensatory benefits for disadvantaged persons.

[138] This question must be distinguished from the use of such epithets as statutory standards for judicial review in administrative law, *e.g.*, the federal Administrative Procedure Act, § 10(e), 5 U.S.C. § 706 (Supp. IV, 1965-1968), where courts must interpret them as a legislative directive in reviewing agency action.

in retrospect, but there may have been no majority consensus on the whole chain. First, the goal: Most policy objectives are the goal of some discrete minority in society—optometrists, trout fishermen, insurance companies, adoption agencies, campers, blacks, lawyers, oil distributors. The goal may or may not be controversial. So (second) may assertions about the existing situation with respect to the problem —or again, these assertions may be unchallenged because they interest only the proponents of the policy. Third, the means: Some lawmakers who favor the goal may argue strenuously that the proposed action will not achieve it—then vote for the proposal as second best to their own preferred solution. Others may support the policy precisely because they think its effects will be different from the sponsors' hopes. Even futile government policies have or develop incidental beneficiaries; what to some is a means to an end is an end in itself to others. The "public interest" will be argued by those who have a private interest to do so. If the constitutional "rationality" of governmental action were impaired when the safety of motorcyclists is argued by helmet manufacturers, when newspaper publishers support billboard control, when railroads argue that highways are overcrowded with oversized trucks,[139] or when independent pharmacists or optometrists warn of dangers to public health from advertising or from the location of opticians in drug stores,[140] not much policy could be constitutionally enacted.

If "rationality" is taken to refer to mental processes, then a court can hardly adjudge that any given participant in the lawmaking process, or indeed each participant, has not played his role rationally. These participants are not individually omniscient or omnipotent. In a legislature, each operates in a setting of extreme decentralization in the initiation, investigation, and consideration of a thousand proposed policies which forms the context of the fifth, political, judgment mentioned above. He must choose his priorities and devote his energies to them. Is he irrational if he tailors a proposal to appeal to support from some and to minimize opposition from others? If he accepts the judgment of another committee on a policy he knows nothing about in order to earn similar deference to his own? If he trusts an outside interest group to have made its own diagnosis and means-ends analysis of a problem and confines himself to the value judgments of weighing the policy's goals and costs? A legislator who does these things can hardly be held to perform less rationally within his discipline than a judge does in

[139] Bradley v. Public Utilities Commission, 289 U.S. 92 (1933); compare the "Sanders doctrine" in administrative law, allowing a competitor standing to argue the public interest under the Federal Communications Act though it does not protect his own interest. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[140] Williamson v. Lee Optical Co., *supra* note 123; Oregon Newspaper Publishers Ass'n v. Peterson, 244 Or. 116, 415 P.2d 21 (1966).

his. But to hold the result of the legislative process as a whole to a standard of rationality higher than that of the separate participants—as if the four substantive components of the policy equation had been established seriatim by a single mind—is either to misunderstand that process or to deny its constitutional legitimacy. The claim for collective lawmaking by elected lawmakers is not that it is more rational than lawmaking by a unitary institution—its products are often less logical than those of a single mind—but that it is more democratic.

What is true of legislatures applies no less to other forms of non-delegated lawmaking. Direct lawmaking by popular initiative is one of Oregon's proudest inventions. What calculus of rationality can a court demand of an electorate that is confronted by a petition to be signed, or a ballot item to be voted for or against, on a take-it-or-leave-it basis? If rational processes of diagnosis and instrumental analysis by the lawmaker were a requirement of due process, the cherished shibboleth of direct popular legislation could hardly survive. And the elected lawmakers of hundreds of local governments struggle along about as rationally as can be asked without any resources for forming independent judgments about the factual and technical assumptions involved in regulatory policies that they may adopt. Does a city council act irrationally when it adopts the technical provisions of a voluminous building code on faith, relying on the competence and reputation of the organization that drafted it or on its widespread use elsewhere?

Actually, the inherited terminology that sees in "arbitrary" or "unreasonable" regulatory policies a denial of due process is not addressed to rationality in the sense I have described—the rationality of the actors under the conditions in which legislative action is taken. This conception of substantive judicial review does not challenge the rationality of lawmakers. Though purporting to enforce a constitutionally due *process*, it in fact does not judge the process but rather ignores it and denies its realities. Instead, it claims judicial responsibility for subjecting the end product of the legislative process to an independent examination for reasonableness in the other sense mentioned before—an ex post facto examination of the enactment for "rationality" as if the four substantive components of policy had been weighed and computed by a single mind. The rational legislator in this view of substantive due process is as much a fictitious construct as the "reasonable man" in private law. To invoke a criterion of rationality in this sense inescapably means substitution of judicial for legislative judgment, despite all conventional disclaimers.

Value or fact? If there is to be substitution of judgment, these conventional disclaimers are designed as much to obscure as to aid analysis. Assume that the challenged policy is to be examined to determine

whether a rational lawmaker could have selected it as a means to get from a present condition to a permissible goal, considering the concomitant burden imposed on the protesting litigant. In our four components of this policy, it would seem at first blush that those most clearly entrusted to political decision are the two value judgments: The desirability of the policy goal, and the relative value of that goal and the accompanying social costs. As recited in *Leathers v. City of Burns*, "it is no part of the court's function to inquire whether the legislation is wise or unwise."[141] The charge that the legislation is not only unwise but lacks a rational relation to its object seems more relevant to the factual premises of policy—that the policy will get us to our goal from where we are.

If the much-recited "presumption of constitutionality" makes any sense at all, it is here. Constitutionality is a legal conclusion, not a fact to be "presumed" until overcome by evidence. The term "presumption of constitutionality" might best be discarded; but if it must be retained, it implies that insofar as the constitutionality of the legislative judgment depends upon a state of facts, those facts are presumed to exist until shown otherwise.[142] But when does constitutionality (against a charge of lacking "rationality") depend on facts, and how may they be shown to be otherwise? Those were the questions in the *Leathers* litigation.

In *Leathers*, the circuit court for Harney County presided over an impressive hearing of experts testifying to the relationship of the size of gasoline storage tanks and delivery trucks to the danger of accidental fire and the capacity of Burns' volunteer firemen to cope with it. On the basis of the record made at this hearing, the Oregon Supreme Court reviewed at length the topography of the city's business district, its drainage system, its traffic pattern, the characteristics of tank trucks and of gasoline fires, the statistics of accidents-per-gallon of large and small trucks, and similar evidence. After sustaining the size limitation on trucks in Ordinance No. 350 as rationally related to risk of accidents, the court held unconstitutional Ordinance No. 349, the limitation on station tanks, on the ground that "the evidence compels the conclusion that there is no greater danger of fire from gasoline stored in a tank of

[141] 87 Or. Adv. Sh. at 136, 444 P.2d at 1015.

[142] State v. Hudson House, Inc., 231 Or. at 171, 371 P.2d at 679, and cases cited. The Oregon Supreme Court, like others, also mixes the terminology of "presumption" with the rule that laws are to be given a constitutional interpretation if possible (the legislature is "presumed" to have intended this, but the legal issue of statutory construction is not subject to evidentiary proof to overcome the "presumption") and with the rule that the challenger has the burden of explaining his constitutional attack, not the government the burden of showing the constitutionality of its action. *See* many citations collected in NEW OREGON DIGEST, *Constitutional Law*, § 48; *but compare* Minielly v. State, 242 Or. 490, 411 P.2d 69 (1966). These uses of the "presumption of constitutionality" should be abandoned, and the presumption confined to the factual meaning stated in the text.

10,000 gallons capacity than in a tank of 3,000 capacity, and that there is no connection between the public safety and this underground storage ordinance."[143] But there are serious logical and practical obstacles to trying the "rationality" of a regulation as a matter of evidentiary proof in this manner. For the logical implications of this conception of judicial review are to eliminate the relevance of all precedents and to make the constitutionality of a law depend on the fortuitous circumstances of time, place, and the relative resources and energy of the parties at the moment of litigation.

Thus in *Leathers*, the witnesses appearing as experts against the ordinances included a battalion chief of the Los Angeles fire department, a consulting fire protection engineer from Palo Alto and another from Washington, D.C., and the executive secretary of a committee of the American Petroleum Institute from Chicago. That is an impressive array of talent to bring to Harney County—and for what? To prove that under the particular circumstances prevailing at a specific location in an eastern Oregon town of 4,100 people in 1968, it is unconstitutionally irrational not to let one gas station operator install a 10,000 gallon underground tank? One may wonder whether other gasoline companies and members of the American Petroleum Institute did not and do not contemplate attaching a wider legal significance to the decision in the Burns litigation. Yet on its own stated premises, that is all the decision can hold. No city attorney can evaluate, and no trial court can adjudicate, the validity of any gasoline storage regulation by relying on *Leathers v. City of Burns*. An ordinance that is unconstitutional in Burns may be constitutional in Baker. The Burns ordinance may itself have been entirely "rational" and hence constitutional when it was enacted in 1949, become "unreasonable" and hence unconstitutional with a change in gasoline tank technology or a change in municipal fire-fighting capacity, and may become "reasonable" again with a change in the chemistry of automobile fuels or with the installation of a different city sewer system. (Due process theory has not yet been extended to find a denial of the due *process* of law in the lawmakers' failure to agree upon repeal or amendment of a once valid statute.) Moreover, the evidence that "proves" a regulation to be unreasonable, hence unconstitutional, as a city ordinance might not relieve the complainant from the identical regulation if it were a state statute, because

[143] The court concluded that the amount of leakage from an underground tank which is refilled periodically would be a function of the size of the hole and its level on the tank, irrespective of the size of the tank. Leathers v. City of Burns, 87 Or. Adv. Sh. at 141-142, 444 P.2d at 1018. This conclusion, on which the constitutionality of the ordinance is held to turn, assumes a slow leak rather than a major break or split, which of course could spill more gasoline from a larger tank.

the regulation might perhaps contribute to public safety under the different circumstances prevailing in some other location.

That is the logic of *Leathers v. City of Burns*, if its premise is taken literally that the validity of a regulation depends on a trial of its "factual" reasonableness at the time and place. But it is fair to predict that lawyers and judges will not so confine it. The decision will be thought to establish that in Oregon regulations of tank-truck size are constitutional and regulations limiting underground gasoline tanks are unconstitutional and need not be obeyed, even without importing opposing teams of engineers to litigate the facts. In *Leathers* itself, the Oregon Supreme Court apologetically explains its regret at being unable to follow decisions of other state courts invalidating gasoline delivery ordinances similar to Burns' No. 350—a matter which calls for neither explanation nor regret if validity depends on trial evidence of the particular local circumstances.

All this shows why the constitutionality of a regulation should not be litigated in a trial designed to prove by evidence merely that the regulation will not work, or that it will do more harm than good. Luckily, nothing in the due process clause of the fourteenth amendment requires or even authorizes that kind of trial of constitutionality. There are indeed many areas of constitutional law in which judicial review requires an assessment of facts. The logical and practical problems of making this assessment in the framework of litigation have received searching attention in studies that deserve examination by anyone undertaking such litigation.[144] But the modern decisions of the United States Supreme Court that call for judicial examination of the factual basis of legislative policy have not concerned a mere attack on the rationality of the means-ends hypothesis—whether the chosen means will in fact lead toward the chosen goal. Laws are not unconstitutional merely because they are shown to be useless. Rather, these decisions concern the necessity to measure the challenged policy against a constitutional criterion found elsewhere in the Constitution than in the due process clause itself. It is a crucial difference.

For instance, a trial much like that in *Leathers*, on a far larger scale, was held in an Arizona superior court to make a record on which to demonstrate that the Arizona train-length law placed an unconstitutional

[144] Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75 (1960), and see an earlier *Note: Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692 (1948), and Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924). The problem of rational judicial assessment of the needs of *procedural* due process is analyzed in Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L. J. 319, 346-363 (1957).

burden on interstate commerce.[145] Once the Supreme Court, following the lead of Justice Stone, had held a realistic balancing of state and national interests to be the constitutional test of state laws challenged under the commerce clause, some method of placing the relevant facts before the court became a necessity. But no similar trial would have been needed to dispose of a challenge to the train-length law under the due process clause. Similarly, congressional power to adopt a federal law may depend upon a state of facts, for example that items, the possession of which is made a federal crime, have been obtained in interstate or foreign commerce. When Congress seeks to provide this essential constitutional link by the bootstrap of a statutory presumption, the presumption will be scrutinized for empirical rationality.[146] Again, legislative findings cannot conclusively establish the permanent existence of facts relevant to a first amendment issue, for instance the existence of a "world Communist movement" directing domestic "Communist-action organizations" to establish Communist dictatorships by treachery, terror, etc.[147] Whether a governmental interference with private property has reached the point of "taking" it for public purposes may depend on the assessment of factual evidence presented in a trial.[148] Other examples of such factual assessment for constitutional purposes can easily be multiplied, particularly in the expanding use of the equal protection clause.[149]

What distinguishes all these examples from "substantive due process" review is that the "reasonableness" of the laws in question is being tested in relation to some requirement found elsewhere in the Constitution, not as a requirement of its own force. The facts are examined to permit the court to review the governmental value judgment against that other constitutional requirement. Could the government reasonably conclude that discrimination in restaurants affects the sale of food in interstate commerce?[150]—that symbolic black armbands

[145] Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). The state trial judge heard evidence over a period of five and one-half months and adopted findings of fact submitted by the railroad that covered 148 printed pages.

[146] Tot v. United States, 319 U.S. 463 (1943). The judicial examination of such presumptions in criminal statutes was recently reviewed and illustrated in great depth by Mr. Justice Harlan in *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532 (1969), and compare Mr. Justice Black's concurring opinion, 89 S. Ct. at 1558.

[147] Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 110-114 (1961); *see* Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532 at 1549, n. 68.

[148] Goldblatt v. Hempstead, *supra* note 127: "How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question. 369 U.S. at 594."

[149] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (Part IV of the opinion), rejecting the reasons offered by the states to justify the classification of welfare recipients by a one-year minimum term of residence.

[150] Katzenbach v. McClung, 379 U.S. 294 (1964).

worn by students endangered order in public schools?[151]—that occupying a private building with troops would protect it rather than subject it to greater riot damage?[152] In such cases, the *legitimacy* either of the government's goals or of its means under some constitutional criterion has been challenged and is being defended, and the attack or the defense may depend on a factual showing of harm and of reasonableness.

In short, there is no basis for judicial review of the factual components of policy—the utility of the means toward the end—divorced from constitutional evaluation of the goals of the policy; the familiar rubric "rationally adapted to a permissible end" applies only in cases when it matters constitutionally what the government's objective is. This should not be surprising, as can be illustrated by the *Leathers* case itself. A trial to determine whether small gasoline tanks and trucks are safer than large ones makes sense only if safety is the sole legitimate grounds for limiting the size of such tanks and trucks. In the case of the Burns ordinances, safety apparently was the original objective. But suppose safety had not been the objective in 1949, or suppose that since that time any modification or repeal of the ordinances had been resisted by local service station operators and wholesalers with a stake in maintaining the existing system of gasoline distribution against the competition of new stations with larger storage tanks, supplied by big tank trucks directly from metropolitan bulk plants. If the elected government accepts their objectives as public policy, maintenance of the size limitations on tanks and trucks could hardly be attacked as an irrational means to that end. There would be no factual issue to try, and all the petroleum safety experts could stay at home—except for the unexplained assumption that maintaining the restrictions for such a reason of local protectionism, unrelated to safety, would be unconstitutional.

Such an assumption was probably held not only by court and counsel on both sides but by the Burns city council. But why? No one said why, or even asked. The litigation simply assumed a premise of limited "police power" objectives which, as discussed in Part IV of this article, has no basis in the Oregon constitution or in the fourteenth amendment. A state may not pursue restrictionist policies to the disadvantage of interstate or foreign commerce or to the citizens of other states,[153] but it is not bound to an internal policy of unrestricted business activity, limited only by the needs of public health or safety. If the Oregon Legislature were openly to enact that "in order to provide the maximum opportunity for small individual enterprise" service stations were to be licensed and restricted in size and volume of sales, gasoline buyers

[151] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).
[152] Nat'l Board of YMCA v. United States, 395 U.S. 85 (1969).
[153] U.S. CONST. art. I, § 8; art. I, § 10; art. IV.

and city planners as well as volume sellers might have cause for bitter complaint, but they could not easily find a premise for a constitutional attack.[154] Despite the Oregon Supreme Court's reference to the newer fourteenth amendment decisions, the unexplained assumption in *Leathers* remains that which was explicit in *Hertz Corporation v. Heltzel*[155] ten years ago. Only because the legitimacy of the *goal* of the policy was thought to be constitutionally limited was there any reason to examine the utility of the means. While such misgivings seem not to have had any constitutional grounds in *Leathers*, the case nevertheless illustrates the point:

An assertion that a policy is substantively "arbitrary," "capricious," or "unreasonable," does not state a claim under fourteenth amendment due process by itself. Such an assertion offers no basis for judicial inquiry unless it also can be and is asserted that the policy, if not legitimized as a means to some permitted end, would transgress some specified constitutional criterion outside the due process clause.

The legitimacy of goals. Thus the due process calculus does not call for judicial review of the empirical rationality of policy-review of the factual elements of the policy—outside a context of some other constitutional limit on policy, some provision claimed to limit the legitimacy of its possible *value* premises. And except where confined by express constitutional criteria, these values both of ends and of means are presumably the essence of social choice expressed through political institutions. But the contrary assumption of only limited governmental objectives is again explicit in *State v. Fetterly*.[156]

As mentioned before, no factual record was made in *Fetterly* to show the invalidity of the motorcycle-helmet law. If the objective of the policy was to contribute to the safety of motorcyclists, the rationality of the means chosen could hardly be called into question. But the attack was squarely on the legitimacy of that objective as a *goal* of legislative policy, and the defense was to claim reasonableness of the helmet law

[154] Besides the decisions cited *supra*, note 123, *see, e.g., Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937) (state license tax on chain stores, at rates increasing by number of stores in the chain). Presumably, a state may prefer the supposed social advantages of "Momma-Poppa" stores to the consumer benefits of mass merchandising. Similarly, if Oklahoma had said that it gave independent optometrists a monopoly on fitting eyeglass frames in order to assure their financial ability to render their other professional services at prices people could afford, there should be no need to demonstrate any health risks from having frames fitted by opticians or in drug stores, *see Williamson v. Lee Optical Co.*, *supra* note 123, as far as the due process clause is concerned. By contrast, however, such restrictionist economic devices even for "health" or "welfare" goals will not survive if their impact is susceptible to a commerce clause attack. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

[155] Hertz Corp. v. Heltzel, *supra* note 2.

[156] State v. Fetterly, *supra* note 5.

as a means for the protection of others than the motorcyclists themselves. Its utility for the latter purpose was disputed between the parties by mere assertions and was made the basis of the court's decision on the strength of what appears to be judicial notice.

Since the court need not itself find that protective headgear can reduce the danger of serious motorcycle accidents and contribute to the safety of other travelers, but only that the Legislature might rationally think so, this decision is easy even without factual evidence. What seems surprising, but for the fact that it *is* so easy, is that the many courts which have decided on the validity of helmet laws have thought it necessary to rely on this reasoning. For what constitutional prohibition forbids a legislature to prescribe safety equipment for the protection of the user himself?

The arguments in these cases have been wholly rhetorical and ideological, protesting the invasion of the individual's freedom to risk injury to himself. They have the appeal of all libertarian arguments, as did the claim of "freedom of contract" sixty years ago, and perhaps they should be persuasive to lawmakers. But *constitutional* arguments must find their premise in a provision of the constitution. We have seen in Part III that the Oregon constitution offers none. Does the due process clause?

That the law deprives motorcyclists of "liberty" is beyond doubt. Every regulation restricts the liberty of those bound to obey it. But how is it without "due process of law"? Not by being "arbitrary," "capricious," or "irrational," for it is agreed that helmets are a perfectly rational means to protect their wearers. Yet to argue that protection of motorcyclists by this means restricts their liberty *without due process* because it restricts their liberty is patently circular.

The core of the dispute is a deep and ancient issue of philosophy. Appellants in cases like *Fetterly* seek to sharpen it by extending it to hypothetical restraints on the right to ski, to swim, to climb mountains, to smoke cigarettes. The question is more rhetorically compelling than legally difficult. Governments do in fact close dangerous trails to skiers, prohibit swimming in hazardous waters, oblige welders to wear goggles, and require prescriptions for dangerous drugs. Any such safety measure can be rationalized as furthering a social interest beyond the protection of the individual bound by it. Rescue parties might have to risk their lives for the swimmer or mountain climber; the sky diver might strike someone on the ground; the disabled worker drains unemployment and workmen's compensation funds and is lost to the labor force; widows and orphans are a welfare burden; it costs time and money for highway crews to scrub motorcyclists' blood off the pavement. It is easy, and it may even be wise, indefinitely to postpone the ultimate question of

legitimate protective objectives by such intellectual games.[157] But is it constitutionally necessary?

Advocates of the new "natural rights" revival rely, as in *Fetterly*, largely on Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,[158] in which the Supreme Court reversed the conviction of a physician as an accessory to the unlawful use of contraceptive devices by a married couple on the ground that enforcement of the prohibition against the users themselves would invade their constitutionally protected privacy. How ever one judges the merits of the separate debate between Justices Goldberg and Black over the utility of the ninth amendment as evidence of unenumerated "fundamental" rights, the opinion for the Court was careful to find its premises for this privacy in the "penumbra" of named provisions of the Bill of Rights.[159] As far as it goes, *Griswold* even leaves open whether its premise would reach beyond marital privacy in the *use* of contraceptives to any general right to obtain them, *e.g.*, invalidate a law against their manufacture, dis-

[157] In the latest of the helmet-law cases, *State v. Laitinen*,—Wash. 2d.—, 459 P.2d 789 (1969), two dissenting justices of the Washington Supreme Court wrote: "The majority have been most ingenuous and ingenious in their efforts to find some nexus between the legislation here in question and the public health, safety and welfare. The reasoning adopted by the majority would with equal force support legislation requiring a pedestrian to don such a helmet... or even prohibit a pedestrian from crossing a street or road save at controlled intersections." 459 P.2d at 792. In the light of familiar jaywalking and freeway regulations, one can only assume that the last sentence was added with tongue in cheek.

[158] 381 U.S. 479 (1965).

[159] The majority opinion found the souces of a "zone of privacy" in the first, third, fourth, and fifth amendments. In this listing, the only reference to the ninth amendment is the bare quotation: "The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others restrained by the people'." The Court's restatement of its established denial of "substantive due process" outside the Bill of Rights is reaffirmed by explaining the old freedom-of-education cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as emanations of first amendment values, comparable to the also inexplicit first amendment right of association, 381 U.S. at 482-84. Thus *Bates v. Little Rock*, 361 U.S. 516 (1960), quoted in the *Fetterly* opinion at 88 Or. Adv. Sh. at 755, 456 P.2d at 997, involved only a conventional first amendment problem (demand for NAACP membership lists held unwarranted by municipal tax purposes).

Justice Goldberg's wish to rely on the ninth amendment faced the difficulty that the amendment's draftsman, James Madison, meant it to quiet fears that the Bill of Rights might otherwise be misconstrued as increasing by implication the *powers* of the federal government, a government of enumerated powers, 381 U.S. at 489, a purpose which complicates citing it as a limitation on the states through the fourteenth amendment. *Compare* OR. CONST. art. I, § 33, *supra* note 63. To answer the dissenters' criticism on this point, Justice Goldberg claimed that the ninth amendment was not the constitutional *source* but rather evidence of an intent to recognize the *existence* of "fundamental" rights—a theory of judicially cognizable "rights" outside the Constitution not accepted by the majority.

That the Court did not simply fall back on a "substantive due process" examination of the policy justification of the Connecticut statute is pointed up by the separate opinions of Harlan and White, JJ., who would do so.

tribution, or possession. The more enthusiastic readers of the concurring opinion, however, are ready to push well beyond this in constitutional attacks on such contemporary targets as laws against marijuana and against abortion. A constitutional withdrawal of these matters as legitimate objects of public concern will be harder to find in the penumbras of the first eight amendments.

Most prohibitions in American constitutions restrict the means of policy, not its ends. Some values are indeed constitutionally prohibited as goals of public policy. The promotion of a religiously committed society is one.[160] A society of inequality by race or by titles of nobility is another. Unlike these, no provision expressly proscribes a society that values the lives and health of its members and seeks to protect them against even self-inflicted harm. To hold that such objectives of public policy are impermissible would place an ironic twist on modern welfare legislation and on the Constitution under which it has been enacted. For it would mean that the impetus and object of all legislation must appear selfish, not as a matter of a naïve cynicism about politics, but because the Constitution required it. Must the harm to be prevented by prohibiting the sale of impure food and drugs even beyond a risk of fraud, by prohibiting lotteries, by minimum standards in housing codes, by obligatory safety standards, always be explained as harm to others than the person directly protected? Under such a theory, the Constitution would demand the pretense that long, thankless battles fought from some of the most generous motives in modern politics really meant to serve the self-interest of the taxpayers or other third-party beneficiaries. It would take us back sixty years to the days when the humane impulse behind Oregon's pathbreaking law limiting laundresses to a ten-hour day had to be rationalized on the ground that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest"—unlike that of bakers, whose procreative virility was presumably not sufficiently affected by exceeding a 60-hour work week to justify restricting their personal freedom to do so.[161]

That theory conceived of society as a market and applied to it a rigorous philosophy of individualism and personal autonomy. The philosophy that the law should leave people alone unless their conduct harms others has, and one may hope will continue to have, much appeal.

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[160] Nor may government use religion as a means to a secular end. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963).

[161] Muller v. Oregon, 208 U.S. 412 (1908); Lichner v. New York, 198 U.S. 45 (1905). Actually, even *Lochner*, the horrible Exhibit A of the discredited substantive due process theory, conceded that danger to the health of the bakers themselves, if shown, would justify the maximum-hour regulation, as in *Holden v. Hardy*, 169 U.S. 366 (1897).

Applied to noneconomic issues, it is enjoying a dramatic revival among the young. It may be about to find expression in a new wave of legislative reforms in the criminal law and elsewhere. But there is also another view of society, less atomistic, that would not confine the actions of political man to pursuing the self-interest of economic man by other means. It would hold that we need not be indifferent to the fate of others —that "no man is an island," in Donne's famous words, for "any man's death diminishes me, because I am involved in mankind"—a philosophy with roots as ancient and honorable as radical individualism.

There can be no single choice between these views of legitimate social goals. The balance must be struck for each act of legislation, and we may divide bitterly over the legislative choice. The same generation that saw an intolerable invasion of personal freedom in a prohibition against yellow-dog contracts[162] also imposed prohibition against alcoholic beverages. My present point is only that it *is* a legislative choice. We may value personal autonomy and fear well-meant paternalism—a preference particularly likely among people who become lawyers. But, as the Supreme Court keeps reiterating, no provision of the Constitution imposes the choice of social philosophy upon us. And if the Constitution does not, then judges need not, as in the motorcycle-helmet cases, reexamine its legitimacy as a matter of constitutional law.

VI. SUMMARY AND CONCLUSION

The purpose of this lengthy survey has not been to exhaust the premises of judicial review in Oregon in order to exhaust the reader. Its practical object is to offer a systematic analysis of the constitutional law applicable to substantive attacks on otherwise binding regulations[163] as a guide to the litigation of such claims.

Because the conclusions found in the preceding pages differ in important respects from familiar assumptions and habits deeply ingrained in current practice, they have been given the foregoing detailed presentation and documentation. But they may be readily summarized.

(1) Governmental action is not "unconstitutional" unless it transgresses a provision of the state or the federal constitution. The provision relied on should always be identified and quoted by counsel in presenting and by judges in adjudicating any constitutional claim.

In practice, when confronted with a claim that governmental action is unconstitutional (or a claim that appears to intend such an assertion, for instance that a law is "arbitrary," or "unreasonable," or "unjusti-

[162] Coppage v. Kansas, 236 U.S. 1 (1915).

[163] Excluding, as stated at the outset, attacks under the federal commerce clause and the first amendment and its Oregon parallels, and other specific federal limitations antedating the fourteenth amendment, as well as procedural objections.

fied," or "not a valid exercise of police power"), opposing counsel may and should insist on specification and quotation of the constitutional provision invoked, and if not raised by the parties the court should require it on its own motion before proceeding to any further consideration of the constitutional claim.

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

A state court should not lightly assume that the state government has chosen a policy forbidden it by the state constitution, any more than the federal courts assume that Congress intended a policy in violation of the federal Constitution, if an alternative interpretation or application of the policy will avoid such a constitutional holding. But where a state law unavoidably faces a serious claim of constitutional right, the basis for that claim in the state constitution should be examined first, before any issue under the federal fourteenth amendment. To begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state's constitution are ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state. That is in fact true with respect to the commerce clause and article IV and other guarantees of the greater federal system against local parochialism, and it is often true of the Reconstruction amendments with respect to their own direct provisions on citizenship, involuntary servitude, racial discrimination, voting, and the like. But insofar as the federal fourteenth amendment is invoked to apply the federal Bill of Rights against state action, particularly in the fields of freedom of ideas, criminal procedure, and compensation for the taking of property, there is no reason to accept such an assumption that the values enshrined in a state's constitution, in, say, 1859, must today fall short of those in the federal Bill of Rights of 1789. And to add a reference to the corresponding state provision as an afterthought to a holding under the federal guarantee is worse than merely backwards: A holding that a state constitutional provision protects the asserted claim in fact destroys the premise for a holding that the state is denying what the federal Constitution would assure.

(3) To dispose of state constitutional questions before reaching claims under the federal fourteenth amendment obliges counsel and court to give independent professional attention to the text, history, and function of state constitutional provisions, as is sometimes found in cases from a generation when constitutions like Oregon's were still recent and there were fewer federal premises available to litigants.

The obligation to dispose of questions of state law, including constitutional law, before holding the state in violation of a federal command

applies in strict logic when the case originates in federal court just as in a state court, except insofar as the federal court is bound by a state decision on state law. Where a favorable disposition under the state constitution is available, a claim of unconstitutionality in federal court should not vault past the state constitution to the federal issue any more than in a state court.

(4) The customary assumption that the guarantees in the state constitution intend to protect the same interests against the same abuses as those in the federal Constitution, only phrased somewhat differently, is too facile, and statements to this effect in Oregon opinions deserve reexamination. Some provisions of Oregon's article I do have a precise federal parallel, others do not. Even with respect to those that are textually, historically, and functionally analogous to federal provisions, the state court is in no way obliged to follow the analysis of the United States Supreme Court.[164]

(5) Substantive attacks on the validity of regulatory laws in Oregon cannot claim a denial of "due process" outside the governing precedents of the United States Supreme Court under the federal fourteenth amendment. The Oregon constitution does not contain a due process clause.

(6) Article I, section 10, is a guarantee of legal remedies for certain categories of injuries recognized as such under some body of substantive law. It does not state a limitation on the power of government to regulate private conduct.

(7) Article I, section 18 is a conventional "just compensation" clause. It may, of course, be interpreted independently and more generously than the federal fifth and fourteenth amendments,[165] but its protection for private property extends only to exacting payment when government action rises to the point of taking the property for public use, not to invalidating the government's action. This section is of no use against regulation of bread pans, gasoline tanks, motorcycle helmets, and the like.

(8) Article I, section 20 is a substantive limitation on regulatory and other policies which overlaps but is not identical in concept or purpose with the federal equal protection clause. The essence of claims under either of these clauses is unlawful discrimination; they therefore require a showing based on a *comparison* rather than a mere frontal attack on the regulation. Article I, section 20 is not a source for judicial

[164] *See, e.g.*, Dickman v. School Dist. No. 62C, *supra* note 23 (textbooks for parochial school children); State v. Jackson, 224 Or. 337, 356 P.2d 495 (1960); State v. Childs, 87 Or. Adv. Sh. 495, 447 P.2d 304 (1968) (O'Connell, J., dissenting on application of art. I, § 8, to "obscenity" in both Jackson and Childs.)

[165] *Cf.* Jankovich v. Indiana Toll Road Comm'n, *supra* note 24.

review of the substance of governmental policy apart from the asserted discrimination.

(9) No state law can be attacked as lacking support in "police power." There is no constitutional source of "police power" or any other category of state power. State legislative power is plenary subject to constitutional limitations. An attack on the validity of a state law phrased as a claim that it exceeds "police power" should be dismissed unless and until it is restated in terms of a specific constitutional limitation said to have been violated. Courts would facilitate their own task with cases presented to them if they would rigorously blue-pencil any reference to "police power" from their opinions.

(10) Although state laws cannot be invalidated for lack of authority but only for exceeding a state or federal limitation, the actions of local government may be attacked on both grounds. The authority of a local agency to take the challenged action should be briefed and examined on the basis of the specific charter, statute, or home-rule provision granting that authority, rather than under any general case law, before reaching the claimed transgression of a constitutional limitation.

(11) Apart from claims for just compensation, neither the state nor the federal Constitution offers any substantive basis to attack a regulation on the sole ground that it needlessly or unjustifiably interferes with a business, the economic use of property, or noneconomic personal activities outside the range of the first and fourth amendments and their "penumbras."[166] The most promising grounds for substantive review of state or local regulatory laws are (1) displacement or preemption by a federal regulation; (2) discrimination against or interference with interstate or foreign commerce; (3) discrimination against nonresident citizens; (4) discrimination between otherwise similar groups or persons on the basis of race, religion, nationality, political affiliation, sex, poverty, or length of residence. These and possibly other classifications are inherently impermissible or highly suspect unless clearly justified by the legitimate objectives of the law in question.

A different argument attacks statutory classifications that are otherwise constitutionally indifferent on the sole ground that they are not rationally related to the objective of the law, for instance the distinction between gasoline deliveries to wholesale and retail storage tanks in *Leathers v. City of Burns*, or the partial coverage of a county building code in *Warren v. Marion County*.[167] This line of argument, which may find some support under Oregon's article I, section 20 though vir-

[166] Griswold v. Connecticut, *supra* note 158. Corresponding sources of protection for expression, religion, and privacy against official intrusion are found in OR. CONST. art. I, §§ 1-9.

[167] 222 Or. 307, 326-327, 353 P.2d 257, 266, 267 (1960).

tually none in United States Supreme Court decisions under the equal protection clause, must be handled with great restraint to avoid substituting the judicial for the legislative judgment on the reasons that led to the regulatory classification in the first place. As already stated, an argument that seeks to ground invalidity on any of the above forms of discrimination requires a comparative attack on the coverage of the regulation rather than directly on its substantive policy.

(12) In Oregon, a claimed deprivation of liberty or property "without due process of law" states a claim only under the federal fourteenth amendment. The applicable law is exclusively federal law to be found in modern decisions of the United States Supreme Court and in any decisions of other courts faithfully based on modern Supreme Court precedents. Oregon courts are as bound to follow this federal law as are lower federal courts.

In practice, courts and opposing counsel should scrutinize any "due process" citation earlier than volume 300 of the United States Reports with extreme skepticism. If the cited case states a restrictive standard of "police power" or "substantive due process" it will almost certainly not withstand Shepardizing.[168] General propositions about the validity of state or local regulations drawn from digests or collections of state cases serve no purpose in a brief or memorandum of law and should be met by a judicial request for citation and analysis of the modern federal precedents mentioned above.

An examination of these governing precedents will establish that the due process clause of the fourteenth amendment does not of its own force invalidate the substance of any state regulatory policy, but only insofar as it serves to apply against state action a limitation found elsewhere in the federal constitution. It is unthinkable, for example, that the United States Supreme Court would hold the Burns ordinance limiting the size of gasoline storage tanks to be a violation of fourteenth amendment due process.

(13) An allegation that a law is "arbitrary" or "unreasonable" does not by itself state a constitutional claim. A court, on its own motion or that of opposing counsel, should require specification whether the allegation means to assert (a) that the law was adopted, or is enforced by, a *procedure* which falls short of federal due process or of some state constitutional requirement; or (b) that the law substantively circumvents some constitutionally specified limit on the permissible ends or the permissible means allowed that government.

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[168] An old decision sustaining a state law may of course remain good authority on analogous facts even if it phrased that holding in unnecessarily restrictive doctrine, *e.g., Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935), followed in *State v. Hudson House, Inc., supra* note 45.

Only if some provision of the state or the federal Constitution outside the due process clause itself is cited as limiting the permissible legislative objective can there be grounds for a due process claim that the law is not a rational means to a permitted end. Without such a showing, the mere claim that a regulation is "arbitrary" or "unreasonable" is insufficient to move a court into any empirical inquiry into the facts. Thus in *Leathers v. City of Burns*, the plaintiff's allegation of discrimination in favor of bulk plants might have called for a factual inquiry, but not the paragraph alleging denial of due process which was in fact tried at length.[169] Clearly the distinction makes a substantial difference to the issues and the facts to be established.

(14) The fourteenth amendment does not impose upon states a requirement of showing that private conduct, to be regulated, must be shown to have harmful consequences to others, nor that the regulation will serve a useful public purpose.

To return to the beginning of this article, the legal premises of judicial review here summarized differ materially from judicial review in practice in state courts. If some of the foregoing propositions, once stated, seem too elementary to deserve statement, they are nevertheless often ignored in practice. To the extent that others may in summary appear didactic or doctrinaire, I hope that they have been adequately supported in the body of the article. As stated at the outset, the constitutional decisions of the Oregon Supreme Court during the past decade have on the whole been unexceptionable, when one allows for differences of view on the merits of debatable issues. The courts' performance, particularly in the contemporary areas of due process, is among the best in state courts. All that remains is to develop greater clarity of analysis in opinions deciding atacks on regulatory laws for the guidance of trial courts and of counsel in planning constitutional challenges and predicting their chances of success.

The overall conclusion, of course, is that litigation of the "reasonableness" of regulatory policies, in the manner pursued in the bread pan, gasoline delivery, aesthetic zoning, and motorcycle-helmet cases, lacks any premise in constitutional law under either the Oregon constitution or the federal due process clause. Counsel for parties wishing to resist a state or local regulation should devote their research and analysis to other grounds. Despite occasional dicta in opinions of the Oregon Supreme Court, this conclusion is no novelty. Three of Oregon's judges most concerned with constitutional review of governmental regulation were members of the Commission for Constitutional Revision when that commission discussed the present lack of any constitutional basis for

[169] The allegations are quoted *supra* note 7.

such substantive review.[170] The debate over the desirability of reverting to "substantive due process" in the revision of the Oregon constitution is fully set forth in the Commission's report.[171] Without "due process" in the state constitution, invalidating a regulatory policy for lack of due process is unconstitutional law in Oregon.

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[170] Justice Kenneth J. O'Connell was vice-chairman of the Commission. Justice Alfred T. Goodwin, then on the Oregon Supreme Court, now sits on the United States District Court. Judge Herbert M. Schwab is now Chief Judge of the Oregon Court of Appeals.

[171] COMMISSION FOR CONSTITUTIONAL REVISION, A NEW CONSTITUTION FOR OREGON 45, 59 (1962).