Memorandum

TO: The Oregon Public Banking Alliance

FROM: The Oregon Public Banking Legal Working Group

DATE: August 10, 2022

RE: Art. XI § 1 of the Oregon Constitution does not prohibit the state legislature from establishing a public bank.

Introduction

While there is growing national political support for public banking,[1] local advocacy efforts in Oregon have been hindered by the persistent legal misconception that Art. XI § 1 of the Oregon Constitution prohibits the state legislature from establishing a public bank. As explained in detail below, this concern is misplaced for two main reasons. First, although the grammatical construction of Art. XI § 1 is convoluted, its sole purpose is to prohibit the establishment and operation in Oregon of banks that issue paper money (historically referred to as "banks of issue"). This prohibition was motivated by the original drafters' fear of, and hostility toward, the paper-money-issuing "wildcat banks" that dominated other states prior to the passage of the National Banking Acts of 1863 and 1864 (the Oregon Constitution was drafted in 1857 and

[1] Communities across the United States are increasingly turning to public banking to address perennial social problems. Over the past few years, elected officials in states such as California, Massachusetts, and New Jersey have taken legislative steps toward establishing public banks that will offer credit and payments services to underserved communities, fund public projects with fairly priced loans, and manage public money without paying exorbitant fees to private banking intermediaries. At the federal level, members of Congress introduced the Public Banking Act of 2020 to help state and local governments establish public banks and harmonize such efforts with federal banking regulations. In Oregon, a growing coalition of lawmakers, activists, community organizations, and industry representatives are looking to public banking to expand financial inclusion, foster racial equity, support local businesses, and bolster investment in under-served communities.

ratified in 1859).[2] The Oregon Supreme Court affirmed this interpretation over 140 years ago in *State ex rel. Caples v. Hibernian Savings & Loan Ass'n* (1880), which remains good law today.

Second, Art. XI § 1 does not distinguish between publicly and privately owned banks. Indeed, it does not mention "public" banks at all. The closest term is "state banks," and the only place it appears in relation to Art. XI § 1 is its title, "Prohibition of state banks." However, this title was added informally, long after ratification of the official text, and thus is not constitutionally significant. Moreover, even if Art. XI § 1 were interpreted to prohibit the chartering of all "state banks," not merely those that issue paper money, the only plausible definition of "state banks" in this context includes state-chartered *private commercial* banks as well state-chartered *public* banks. Therefore, if the Oregon Supreme Court were to hold that it was unconstitutional for the Oregon Legislature to create a public bank, it would also have to hold unconstitutional the creation and the ongoing existence of the many private commercial banks in Oregon today.

Efforts to update the language of the constitution have been pursued by state legislators through proposals such as House Joint Resolution 205 (HJR 205), which proposed to amend the constitutional provision to facilitate state chartered public banking in Oregon.[3] During the 2022 Legislative session, elected officials presented the resolution that would add a second section to Art. XI, stating "[n]othing in this section prohibits the establishment in this state of a bank that is owned or operated by the State of Oregon."[4] The additional provision would not be "a vote for a

---

[2] On "wildcat banks" and their context in constitution-making in the emerging West, *see* Silvanna R. Siddali, Frontier Democracy: Constitutional Conventions in the Old Northwest 347-77 (Cambridge University Press, 2015). Until the centralization of US currency production in the Federal Reserve, state-chartered banks issued paper currency. Often, these notes were not backed up by specie, gold and silver coinage, which was technically the basis of their value. Because of this, the value of particular notes was not always that printed on their face, and trading in paper money was risky. Numerous economic downturns throughout 19th century America were blamed on—and likely caused by—paper currency with no foundation in specie.
[3] *Proposing amend. to Oregon Const. relating to banks: Hearing on HJR 205 Before the H. Comm. on Rules*, 2022 Leg., 81st Leg. Assembly (Or. 2022)[hereinafter Hearing on HJR 205])
[4] HJR 205, 2022 Leg., Reg. Sess. (Or. 2022).

public bank" as much as it would "allow the public to consider a public bank" as well as repair the initial ambiguity to the original language of the Constitution's article.[5] Although the amendment was drafted with the intent of updating the language to reflect modern banking practices in Oregon, it nevertheless raised objections among the session's lawmakers, tempering enthusiasm and support for public banking more broadly.[6]

Without any amendments to the state constitution, in 2021 State Senator Jeff Golden of District 3 proposed and failed to pass Senate Bill 339 (SB 339), which related to the establishment of a public bank, titled the Bank of the State of Oregon. The bill was left indefinitely in the Senate Committee on Finance and Revenue upon adjournment in January 2021, killing it for the session. The concept was not revisited by the committee in the 2022 regular session.[7]

Presently, public banking advocates face a Catch-22: the passage of public banking legislation is being held up by constitutional concerns that cannot be definitively resolved without passing public banking legislation (and subjecting it to judicial scrutiny). The Oregon Supreme Court's inability to issue an advisory opinion is partially to blame. However, these concerns also ignore Legislative Counsel opining in 2018 that they "believe the Legislative Assembly could also establish or incorporate a public bank—that is, a state or local bank—under *Hibernian*."[8]

Presently, there are three courses of action that the Oregon public banking movement can take to address this Catch-22. First, it can attempt, again, to pass a ballot initiative amending the Oregon Constitution to grant the legislature explicit authority to establish a public bank. Given

---

[5] Hearing on HJR 205, supra note 3 (testimony of Rohan Grey).
[6] *Id.*
[7] *Id*; Senate Committee on Finance and Revenue, Or. State Leg.: Or. Legis. Info. (https://olis.oregonlegislature.gov/liz/2022R1/Committees/SFR/AssignedMeasures) (last visited March 30, 2022).
[8] Aurora Moses, unpublished legislative counsel opinion, September 5, 2018.

the current state of the Oregon public banking movement's resources, however, such a campaign is economically unfeasible. Moreover, there is no guarantee that another push for a ballot initiative will be more successful than the previous attempts in 2021 or 1936. In addition, if such an initiative were voted down, it would make future attempts to establish a public bank much more politically difficult, by reinforcing the incorrect perception that the existing constitutional language must be amended before authorizing legislation could be safely passed.[9]

Second, the public banking movement can bring a lawsuit challenging the constitutionality of state-chartered private commercial banks, with the goal of producing a judicial opinion reaffirming the basic holding from *Hibernian Savings* (i.e. that the state legislature has the constitutional authority to charter banks of whatever kind, except, per Art. XI § 1, banks that issue paper currency). Such a lawsuit would almost certainly be dismissed but not necessarily on the specific grounds that would produce judicial clarity on the meaning of Art. XI § 1.[10] Moreover, litigation could take years, hindering broader advocacy efforts in the meantime and causing problems for existing state banks.[11] Thus, while this option is more feasible and less costly than a ballot initiative, it is still uncertain and practically unattractive.

The third and final course of action is to demonstrate that the plain language and historical context of Art. XI § 1, as well as judicial precedent, overwhelmingly support the constitutionality of establishing a public bank. This memo takes this third approach. It builds on prior legal analysis produced by the Oregon Public Banking Alliance, and incorporates original historical research conducted by members of the Oregon Public Banking Legal Working Group,

---

[9] Addressed in the testimony of Rohan Grey on HJR 205 (Or. Legis. Assemb. 2022).

[10] Instead, for example, the trial court could dismiss or resolve the case on other narrow procedural or precedential grounds. Alternatively, the Oregon Supreme Court could refuse to hear the case on appeal, or simply affirm the lower court's ruling without adopting or validating its constitutional analysis.

[11] It is improbable that years of pending litigation on this issue would have no effect on the economic situation of large state banks like Umpqua

housed at Willamette University College of Law.[12] The purpose of this memo is to inform and empower lawmakers, activists, community organizations, and industry leaders to support a public bank with full confidence in its constitutionality.

I. The plain language of Article XI § 1 does not prohibit public banks

The plain language of Article XI § 1 does not prohibit the establishment of a public bank. Art. XI § 1 does not reference "public" banks whatsoever. The only reference to "state banks" is in the title, "Prohibition of state banks." However, this title is not part of the original Oregon Constitution, and thus is not analytically significant. This title has no legal status. It was only added by publishers in the mid-twentieth century, and did not appear in the official text that was proposed by the framers in 1857 and ratified by the public in 1859.[13] Instead, the framers initially placed Art. XI § 1 directly under the heading "Corporations and Internal Improvements," indicating that it was intended to apply equally to *all incorporated* (or otherwise chartered) *entities*, regardless of their ownership and governance structure.[14]

Once divorced from its anachronistic and misleading modern title, a plain reading of Art. XI § 1 indicates that its function is to prohibit specific activity from being conducted by *any bank, banking company, or monied institution formed by the Oregon legislature, or otherwise allowed to exist in Oregon*, regardless of whether such entity is "publicly" or "privately" owned:

> "The Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company, or monied [sic] institution whatever; nor shall any bank company, or instition [sic] exist in the State, with the privilege of …"[15]

[12] https://www.orpublicbank.org/

[13] *Constitution for the State of Oregon* article XI, § 1 (1857); *The Oregon Statesman*, Sept. 29, 1857, at 1. More generally, there is no evidence that the term "state bank" was ever intended to refer exclusively to "state-owned" or "public" banks in this context. *See, e.g.*, Davis R. Dewey, State Banking Before the Civil War (1910).

[14] Art. XI § 2, which follows this provision, establishes the Legislative Assembly's power to form corporations "under general laws." Or. Const. Art. XI § 2. Other provisions included in this article pertain, e.g., to the liability of corporate stockholders, limitations on the authority of municipal corporations, and restrictions on the public acquisition of corporate stock.

[15] Or. Const. Art. XI § 1.

The latter half of the provision concerns the nature and extent of this prohibited ("privileged") activity, which as detailed below, is narrowly limited to the issuance of paper instruments designed to circulate as money, not banking operations in general.

II. The Oregon Supreme Court's prevailing and long-settled interpretation of Art. XI § 1 supports the constitutionality of establishing a public bank

The Oregon Supreme Court has not directly considered the constitutionality of a state-chartered public bank. However, it opined at length on the meaning and original intent of Art. XI § 1 in *State ex rel. Caples v. Hibernian Savings and Loan Ass'n*, 8 Or. 396 (1880), decided just over twenty years after the Oregon Constitution was ratified. The four justices of the Oregon Supreme Court who heard the case all previously served as delegates to the constitutional convention in 1857.[16]

Hibernian Savings concerned the constitutionality of Hibernian Savings and Loan Association, a state-chartered private commercial bank. In late 1879, the Multnomah County district attorney brought a complaint, alleging that Hibernian had "received deposits, made loans, and transacted a banking business, and by so doing ha[d] exercised franchises and privileges not conferred upon it by law, and not permitted by the Constitution of said State of Oregon." At issue was whether the bank, which had been chartered under the general business chartering powers of the Oregon Constitution,[17] violated Art. XI § 1's apparent prohibition on the Legislative Assembly "establish[ing], or incorporat[ing] any bank or banking company…whatever."

In a unanimous 4-0 decision, the Court held that Art. XI § 1 did not prohibit the state from chartering banks or allowing them to operate in Oregon in general. In reaching this conclusion, it observed that Article XI § 1 contains two parts, linked by a semicolon after the

[16] Ralph James Mooney and Raymond H. Warns, Jr., *Governing a New State: Public Law Decisions by the Early Oregon Supreme Court*, 6 Law & Hist. Rev. 25, 49-50 (1988).
[17] Or. Const., Art. XI § 2 ("Corporations may be formed under general laws…").

word "whatever". Depending on how one interpreted the semicolon, the provision could be read as either containing one single prohibition with two dependent clauses, or two independent prohibitions:

> *The Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company, or monied [sic] institution whatever***;** *nor shall any bank company, or instition [sic] exist in the State, with the privilege of making, issuing, or putting in circulation, any bill, check, certificate, promissory [sic] note, or other paper, or the paper of any bank company, or person, to circulate as money.*[18]

Article XI Section 1

COURT'S UNANIMOUS INTERPRETATION AS SINGLE RESTRICTION	INCORRECT INTERPRETATION AS SEPARATE RESTRICTIONS (CAPLES)
The Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company, or monied [sic] institution whatever, nor shall any bank company, or instition [sic] exist in the State, *with the privilege of making, issuing, or putting in circulation, any bill, check, certificate, promissory [sic] note, or other paper, or the paper of any bank company, or person, to circulate as money.*	(a) The Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company, or monied [sic] institution whatever; (b) nor shall any bank company, or instition [sic] exist in the State, with the privilege of making, issuing, or putting in circulation, any bill, check, certificate, promissory [sic] note, or other paper, or the paper of any bank company, or person, to circulate as money.

[18] Or. Const., Art. XI § 1.

The Court adopted the former interpretation. It found that the semicolon that appeared in the published version of the Oregon Constitution presented to voters for ratification was a clerical error, not included in the original version drafted by the convention delegates,[19] and thus not entitled to constitutional weight.[20] It instead held that the first, pre-semicolon clause ("*The Legislative Assembly shall not have the power to establish…any …bank …institution whatever")* was intended as a partial qualifier for the second clause ("*...with the privilege of making, issuing, or putting in circulation, any …paper… to circulate as money*").[21] On that basis, the Court concluded that Art. XI § 1, properly read as a single, run-on sentence, only prohibited the establishment and ongoing existence of banks and monied institutions in Oregon *that circulated bank-issued paper currency*, not banks more generally.[22]

II(a). *Hibernian Savings* remains good law and is unlikely to be disturbed

Interpreting Art. XI § 1 as a general prohibition on the establishment of state (public) banks would directly contradict the core holding of *Hibernian Savings*, that Art. XI § 1 narrowly prohibits banks of issue. The current Court would effectively need to vacate *Hibernian Savings* and replace it with an entirely novel textual and historical interpretation of Art. XI § 1, in which

---

[19] The person responsible for this insertion was probably Asahel Bush II, the *de facto* leader of the Oregon Democratic Party, and an ardent opponent of commercial banks (as was his party at the time). He published the official version of the Constitution and a version of it in his *Oregon Statesman* newspaper, both of which included the semicolon. *Constitution for the State of Oregon* article XI, § 1 (1857); *The Oregon Statesman*, Sept. 29, 1857, at 1.

[20] *Hibernian Savings*, 8 Or. at 401 ("[T]he semicolon, placed immediately after the word 'whatever' in the printed Constitution, was a clerical mistake, and…was not entitled to have the force and effect claimed for it by the respondent.").

[21] *Id.* ("The section, as engrossed, is without any punctuation whatever. We are, therefore, well satisfied that the convention did not intend to separate that part of the section which preceded the amendment from the context which followed the amendment.").

[22] The Court's decision is also consistent with the historical reality that, prior to *Hibernian Savings*, the State of Oregon clearly tolerated the existence of banking endeavors and partnerships (neither of which required incorporation) that did not issue paper currency. Between 1859 and 1879, there were at least thirteen unincorporated banks that operated in Oregon, none of which resembled the "wildcat banks" that had wreaked havoc in other parts of the country. *Cf.* Orin Kay Burrell, *Gold in the Woodpile: An Informal History of Banking in Oregon* 41-109 (1967).

the first clause prior to the semicolon—*"The Legislative Assembly shall not have the power to establish, or incorporate* ***any bank or banking company, or monied institution whatever"*** (emphasis added)—was elevated to the status of a standalone general prohibitory rule on general bank chartering and incorporation. Such a drastic reversal of longstanding precedent is highly unlikely, and would be economically and legally disruptive.

The Oregon Supreme Court has a well-established deference to *stare decisis* and is reluctant to overrule "fully considered prior cases" without strong reason.[23] This deference is not absolute; rather, the Court considers whether the previous Court applied "its usual interpretative methodology" in the challenged decision.[24] In doing so, the Court has noted that there is "no fixed list of factors" guiding the Court's determination.[25] Instead, its approach "requires … an exercise of judgment that takes all appropriate factors into consideration."[26]

The Court's current methodological approach to constitutional interpretation was first laid out in *Priest v. Pearce* (1992).[27] Under the *Priest* approach, the Court evaluates constitutional claims in three ways: "[the provision's] specific wording, the case law surrounding it, and the historical circumstances that led to its creation."[28] In doing so, the Court's purpose is not to "fossilize the meaning of the state constitution so that it signifies no more than what it would have been understood to signify when adopted in the mid-nineteenth century."[29] Instead, it aims

---

[23] *E.g., State v. Ciancanelli*, 121 P.3d 613, 617 (Or. 2005) ("A decent respect for the principle of *stare decisis* dictates that this court should assume that its fully considered prior cases are correctly decided.").
[24] *State v. McCarthy*, 501 P.3d 478, 488 (2021).
[25] *Id.*; *see also Horton v. Oregon Health and Science University*, 376 P.3d 998, 1010 (Or. 2016) ("The answer to the question whether a case should be overruled cannot be reduced to the mechanical application of a formula…[T]he age of the decisions and the extent to which the issues have been fully litigated can matter").
[26] *Horton*, 376 P.3d at 110.
[27] 314 Or. 411, 840 P.2d 65 (1992).
[28] *Id*. at 415-16.
[29] *State v. Mills*, 312 P.3d 515, 518 (Or. 2013).

to "determine the meaning of the constitutional wording, informed by general principles that the framers would have understood were being advanced by the adoption of the constitution."[30]

This approach was only formally adopted in 1992; thus, it is conceivable that a modern Court could revisit and overturn *Hibernian Savings* on the grounds that it does not meet modern standards of constitutional interpretation.[31] Such an outcome is highly unlikely, however, as the *Hibernian Savings* decision includes extensive discussion and analysis of the specific wording of the text (notably the controversial semicolon), as well as evidence pertaining to the historical context and intent of the drafters, consistent with the *Priest* approach.[32] Consequently, even if the Court were to revisit *Hibernian Savings*, it would likely conclude that the original opinion had been properly considered in accordance with prevailing contemporary standards of constitutional interpretation, and thus worthy of ongoing deference under *stare decisis*.[33]

Another important consideration is the Court's reluctance to overrule precedent when doing so would create economic or legal disruption and uncertainty.[34] As it currently stands, *Hibernian Savings* has been well-settled law for 140 years, during which time the Oregon

---

[30] *Id.*

[31] When considering whether to apply the doctrine of *stare decisis*, the "age of [a] decisio[n] and the extent to which a decision has been fully litigated can matter." *Horton*, 376 P.3d at 1010; *see also Farmers Ins. Co. v. Mowry*, 350 Or. 686 (2011) (declining to review relatively recent decision where issue had been fully litigated). In 2013, the Court in *State v. Mills* (312 P.3d 515 (Or.)) overruled and replaced its prevailing interpretation of Article I § 11 of the Oregon Constitution which outlines the rights of those accused in criminal prosecutions. Earlier cases, such as *State v. Casey* (213 P. 771 (Or. 1923)), held that the state had to prove venue as a material allegation. The *Mills* Court found that although *Casey* had been considered settled law for almost a century, the original opinion contained "no explanation or analysis," and instead "consisted [only] of a quotation from Article I, section 11, [of the Oregon Constitution] followed by a single sentence summarizing what otherwise would appear to be the common-law rule requiring proof of venue to establish jurisdiction." *Mills*, 312 P.3d at 525. Consequently, even though *Casey* had been reaffirmed and relied upon in numerous subsequent cases, "in no case [had the Court] examined the issue in accordance with the interpretive analysis that *Priest* requires." *Id*. at 527.

[32] There is no other case law on this issue to fulfill the "second" avenue of analysis under *Priest*.

[33] *Cf. State v. Ciancanelli*, 121 P.3d at 617.

[34] See, *e.g.*, *Farmers Ins. Co. v. Mowry*, 261 P.3d 1, 8 (Or. 2011) ("Stability and predictability are important values in the law; individuals and institutions act in reliance on this court's decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness."); Horton, 376 P.3d at 1010 (citing Mowry, 261 P.3d at 9) (The extent to which others have "rel[ied] on [established judicial doctrine] to structure their transactions" is a "significant consideration" when revisiting prior case law); *Ciancanelli*, 121 P.3d at 618 (To overturn an established rule, the Court must be persuaded that, "when the passage of time and the precedential use of the challenged rule is factored in, [doing so] will not unduly cloud or complicate the law").

Legislature has established, and allowed to operate, dozens of banks, money transmitters, and other "monied" institutions with a range of ownership structures, ranging from publicly traded companies to non-profit corporations and member-cooperatives.[35] If the Court were to overrule it and read into Art. XI § 1 a new, general legislative prohibition on the establishment of any "banks, bank companies, or monied institutions…whatever," it would have far-reaching implications beyond the narrow question of the constitutionality of a public bank. Indeed, it would bring into question the constitutionality of any and all existing state-chartered private commercial banks operating in Oregon, including those chartered in other states and by the federal government.

There are few actions that would "cloud or complicate" existing Oregonian law more than rendering unconstitutional the entirety of the state's bank chartering and regulatory framework.[36] Moreover, doing so could seriously destabilize or irreparably harm the Oregon banking services industry, and through it, public welfare more generally.

Hence, if legislation establishing a public bank were challenged on constitutional grounds, the Supreme Court would be strongly inclined to uphold the status quo interpretation of Art. XI § 1 established by *Hibernian Savings*—in which the legislature has the general power to charter banks of any kind, provided, per Art. XI § 1, that they do not issue paper money—and leave the policy debate over the merits of public banking to the elected representatives in the legislative and executive branches, where it belongs.

III. The original intent and broader political context of Art. XI § 1 support the constitutionality of a public bank

III(a). The constitutional drafters clearly intended Art. XI § 1 to prohibit only banks of issue

[35] Original historical research by the Oregon Public Banking Legal Working Group further supports the Court's decision (*cf.* § v(a) below).
[36] *See Mowry*, 261 P.3d at 8.

The original proposed text of Art. XI § 1 did not include the clause “nor shall any bank company, or institition [sic] exist in the state” that follows “whatever” in the final version. Instead, it read:

> *The Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company, or monied [sic] institution whatever, with the privilege of making, issuing, or putting in circulation, any bill, check, certificate, promissory [sic] note, or other paper, or the paper of any bank company, or person, to circulate as money.*[37]

The meaning of this original wording is obvious and straightforward: a prohibition only on banks of issue (i.e. banks that issue paper money) within Oregon.[38] In fact, the passage of this version of the article from committee to the convention floor was reported by the Oregonian to prohibit “the legislature from establishing any bank or banking corporation to put paper money in circulation.”[39] This establishes early public knowledge of the narrowly intended scope of the provision.

The clause after “whatever” which reads “nor shall any bank, company, or institition [sic] exist in this state” was first proposed during the convention debate by George Williams, the chief justice of the Supreme Court of the Oregon Territory, and a delegate from Marion County.[40] The “Williams Amendment” was adopted on September 4, 1857, and, together with the original proposed text, constituted the final version of the article approved by the general assembly of the convention. However, at this point, there was still no semicolon after “whatever”. Instead, the article remained a single run-on sentence, intended to refer to a single subject: the prohibition of

---

[37] *Hibernian Savings*, 8 Or. at 400-1.
[38] This may be supported by a notice in the *Oregon Weekly Times* (Sept. 5th, 1857, at 1) that announced a committee of finance was to “submit a plan to the convention for the prohibition of the circulation of paper currency in the future State of Oregon.”
[39] Carey, *supra* note 9, at 230.
[40] https://sos.oregon.gov/archives/exhibits/constitution/Pages/during-about-williams.aspx

banks of issue, regardless of whatever institutional form such entity may take or where they were originally incorporated.

Further evidence illustrating that the drafters at the convention intended only to prohibit banks of issue was provided to the Court during *Hibernian Savings*. Matthew Deady, the president of the convention and former Oregon territorial justice, presented then-Chief Justice of the Oregon Supreme Court, James K. Kelly, with original documentation that showed the semicolon was a post-convention addition, not part of the original text.[41] Chief Justice Kelly noted in the decision that he personally did not recall the delegates approving a ban on state-chartered banks in general, only banks of issue.[42] This is especially important, as the journal of the 1857 convention records that Kelly voted "yea" to adopt the Williams Amendment, and thus presumably understood its purpose.[43]

The participation of both Deady and Kelly in the convention—and their subsequent contributions to the *Hibernian Savings* decision—would likely be persuasive to the Court in its determination of the intent of the original drafters. Indeed, the Oregon Supreme Court has previously found the testimony of convention delegates persuasive when ascertaining the intent of the drafters with respect to other constitutional provisions.[44]

---

[41] These included Deady's personal diary, in which he had written - while a convention delegate - that he understood Art. XI § 1 to prohibit Banks of Issue. Malcolm Clark, Pharisee Among the Philistines: The Diary of Judge Matthew P. Deady, 1871-1892, at 300 (1975). *See also* Ralph James Mooney, *Remembering 1857*, 87 Or. Law Rev. 731, 769 (2008) ("Justice Kelly consulted Matthew Deady, by then Oregon's federal district judge, and together they concluded (with the help of files Deady had retained from the convention) that the semicolon was a 'clerical mistake'; the delegates had intended merely to ban banks that issued circulating currency of any sort").
[42] *Hibernian Savings*, 8 Or. at 400.
[43] Carey, *supra* note 9, at 274.
[44] *See, e.g.*, *Jory v. Martin*, 56 P.2d 1093, 1098 (Or. 1936) (concerning the legislature's constitutional power to increase salaries of government officials).

III(b). Even with the erroneous semicolon, Oregon voters would have understood Article XI § 1 to narrowly prohibit bank-issued paper money

As mentioned above, the Court's finding in *Hibernian Savings* relied in part on the factual determination that the semicolon between "whatever" and "nor"' was a clerical error, added by the publisher prior to ratification in 1859 and not included in the original 1857 text, and thus not entitled to constitutional weight. There is no reason for the Court today to disturb or question this finding.[45]

That said, the existence of a grammatical discrepancy between the version of the Constitution drafted by the official delegates and the version presented to voters complicates attempts to establish a definitive historical understanding of the intent of Art. XI § 1 at the time of its ratification. However, the constitutional stakes of this discrepancy are low, as linguistic evidence suggests that Oregon voters in 1859 would have likely read the semicolon in the published version of Art. XI § 1 as linking two dependent clauses, not creating two completely separate provisions, just like the Court ultimately did in *Hibernian Savings*.[46]

When interpreting an unclear word, the Court has held that the language used should "be considered in the sense most obvious to the common understanding of the people at the time of its adoption."[47] This methodology extends to punctuation used to give words meaning. Thus, if

---

[45] It is extremely unlikely that the Court would take this route, and even if it did so, the Court would face strong pressure to find the creation of a public bank constitutional in order to avoid interpreting Article XI § 1 in such a way as would effectively prohibit the chartering of any and all banks in Oregon, per the analysis in Section II, supra.

[46] Voter intent may or may not be considered by the Court. *Cf.* Hon. Jack L. Landau, *An Introduction to Oregon Constitutional Interpretation*, 55 Willamette L. Rev. 261, 293-5 (2019). The latter context is typically reserved for amendments adopted through the initiative process. *Id*. at 309-13. However, there have been suggestions in the literature that voter intent matters when interpreting the 1857 constitution. *E.g.*, *Id*. at 287-93; Claudia Burton & Andrew Grade, *Legislative History of the Oregon Constitution of 1857 - Part 1*, 37 Willamette L. Rev. 469, 474 (2001) ("Arguably, the intent of the delegates is of relatively little importance; it is the text of the constitution, as it was presented to the voters in November 1857 that is determinative.").

[47] *E.g.*, *Jones v. Hoss*, 285 P.2d 205, 206 (Or. 1930).

the Court were to revisit its findings in *Hibernian Savings*, it would do so by interpreting the semicolon as it would have been understood by voters at the time of ratification in 1859.[48]

The semicolon as a grammatical device has a complicated past. Originating in 15th century Italian academic writing, its modern usage to separate two independent clauses only solidified in the 1880s.[49] In the 1850's—when the Oregon Constitution was drafted and ratified—its usage was different. A leading meta-collection of grammar manuals that was originally published in 1851 describes the semicolon as punctuation used to "to separate those parts of a compound sentence, which are neither so closely connected as those which are distinguished by the comma, nor so little dependent as those which require the colon."[50] Examples from the journal of the constitutional convention provide further evidence for this usage. For instance, sentences like the following are common: "Mr. Packwood moved to amend section 3, first line, by striking out the words 'of the state'; which was disagreed to," and "Mr. Grover moved that the resolution providing for the printing of the journal, and proceedings of the convention be taken from the table; which was decided in the affirmative."[51] In both of these sentences, semicolons are used like a comma would be in modern writing, separating an independent clause from a dependent clause.

Whereas a semicolon today signals two separate but related independent clauses, for an Oregon voter presented with one in proposed language for Constitutional ratification in 1857, it

[48] *Priest*, 314 Or. at 419 (In this case, the plaintiff lost their appeal because "neither the specific history of the Oregon Constitutional provision nor the more general history of the parallel provisions found in many other state constitutions supports [their] position here").

[49] *See* Cecelia Watson, *Points of Contention: Rethinking the Past, Present, and Future of Punctuation*, 38.3 Critical Inquiry 649, 659 (2012).

[50] Goold Brown, The Grammar of English Grammars 787 (William Wood & Co., 10th ed. 1880) (1851). A stereotypical sentence using a semicolon from this work reads: "Of the different kinds of verse, or 'the structure of Poetical Composition,' some of the old prosodists took little or not notice; because they thought it their chief business, to treat of syllables, and determine the orthoëpy of words." *Id*. at 771. Here, the semicolon operates essentially as a comma in modern English composition. Many further examples of the same usage can be found in *Id*. at 1030-31.

[51] Charles Henry Carey, The Oregon Constitution 230 (Oregon Historical Society, 1926).

would instead have typically signaled an intimately related dependent clause following an independent clause, and consequently been read like a modern comma. Consequently, even if the Court today insisted on placing greater weight on the inclusion of the semicolon in the version of Art. XI § 1 presented to the voters for ratification, it would likely still end up at the same interpretative result overall as the prior Court did in *Hibernian Savings* (i.e. that the provision singularly prohibits banks of issue, not banks in general).

IV(c). The national political debate at the time of ratification of the Oregon Constitution was primarily concerned with prohibiting bank-issued paper money.

Although there were some public voices during the constitutional ratification period (1857-1859) asserting that Art. XI § 1 prohibited the establishment of any and all banks,[52] historical evidence suggests the majority of Oregon voters in 1859[53] understood the provision as establishing a narrow prohibition on banks issuing paper currency.

At the time, American voters across the continent were keenly aware of the perceived harms of paper money issued by state-chartered banks, as well as policy efforts to regulate it out of existence in the frontier states. For instance, during Florida's 1838 constitutional convention, a provision was adopted that prohibited banks from issuing notes (i.e. paper money) in denominations less than five dollars, and gave the legislature power to increase this to twenty dollars.[54] This has been interpreted as a measure to prevent bank notes issued in the state from

[52] *See*, *e.g.,* Squib, *Constitution–Yes, or No?*, Or. Argus, Nov. 7, 1857, at 1 (claiming that one argument against the constitution is that banks are prohibited); *but see Oregon Weekly Times*, Oct. 17, 1857, at 2 (claiming that Art. XI § 1 "prohibit[s] rags and shinplasters from being milled here for issue as money, and it does nothing more"); *contra* Claudia Burton, *Legislative History of the Oregon Constitution of 1857 - Part III (Mostly Miscellaneous: Articles VIII-XVIII)*, 40 Willamette L. Rev. 225, at 299 (2004) (arguing that both articles argued for a general prohibition on banks). Notwithstanding these discrepancies, as discussed *supra*, the general presumption at this time was that the power to charter banks primarily concerned private commercial banks, not public banks.

[53] At that time, eligibility to vote in both Oregon and the broader United States was almost exclusively restricted to adult white men, with additional property or taxation requirements in many jurisdictions. In addition, delegates to the Oregon constitutional convention were all white males, and generally wealthy. They were mostly farmers (33), but their number also included lawyers (8), miners (5), journalists (2), and a civil engineer. In general, see Bradley J. Nicholson, *A Sense of the Oregon Constitution* 6 (2015).

[54] Fl. Const. Art. XIII § 8.

circulating as currency; these larger denominations were not practical for day-to-day use.[55] Additionally, the legislature had to restrict banks in their charters to "the business of exchange, discount and deposit."[56] The state could not pledge to guarantee bank debts.[57] In the laws of the Iowa Territory of 1839, it was illegal to participate in any institution that issued notes or bank bills—i.e. paper currency—unless expressly authorized by law.[58] When Iowa adopted its state constitution in 1846 upon entry to the Union, banks of issue were specifically prohibited.[59]

Anti-paper money sentiment was also high during the 1849 California constitutional convention. This was most strongly expressed by delegate Rodman M. Price, who said during a speech that nothing "has more importance or influence upon the future well-being of the State of California than" the question of banking.[60] Price was an ardent opponent of banks and opposed chartering them in California. However, a careful reading of his thoughts helps illuminate what "anti-banking" really meant in this era.

Price thought that the creation of a constitution for California was the "time and place to cut off the head of this monster serpent, paper money."[61] This was the focus of his anti-banking rhetoric. It was not the idea of a financial house that could facilitate the movement of capital; rather, it was an institution with a very specific function: the issuance of paper currency. Fellow

---

[55] Stephanie D. Moussalli, *Florida's Frontier Constitution: The Statehood, Banking & Slavery Controversies*, 74.4 The Florida Historical Quarterly 423, 428 (1996).
[56] Fl. Const. Art. XIII § 5. Further requirements included that banks shall have no less than one hundred thousand dollars in specie when chartered (*Id*. § 6) and all liabilities were payable in specie (*Id*. § 7).
[57] Moussalli, *supra* note 51.
[58] The Statute Laws of the Territory of Iowa, at 67-8 (1900). This is important evidence as the editorial from the *Oregon Weekly Times* mentioned above (*supra* note 51) claimed that Art. XI § 1 in Oregon was similar to an Iowa provision. The original constitution of Iowa prohibited the state from incorporating banks of issue (Art. 9 § 1). The latter must have been the provision to which they referred, as the revised Iowa constitution of 1857 contained complex regulations on banking, including the specific provision of a state bank if so desired (*see* Art. VIII §§ 4-11).
[59] Text preserved here at 205. Interestingly, only nine years later in 1855, a new constitutional convention was called largely to get rid of this provision because the state had been flooded with paper currency from outside its borders with no way of creating a system to regulate it through Iowa-chartered banks because of this article. See Frank E. Horack, Constitutional Amendments in the Commonwealth of Iowa 15-16 (1899).
[60] John Ross Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849, at 113 (1850).
[61] *Id*.

California convention delegate Charles Botts believed that bankers who issued paper currency were "the sharpest and cunning of men" whose banks of issue "can creep through an auger hole; they can get into this country through the smallest place you ever saw in your life."[62] The gist of his argument was not that banks were all inherently bad, but those which issued paper currency not backed up one-to-one with gold specie were the true "serpent." This seems to have been a common feeling at the California convention.[63]

Of all other states' constitutions in this era, the 1851 Indiana Constitution is especially informative in ascertaining the original intent of the 1859 Oregon Constitution. Approximately 103 of the 186 provisions in the Oregon Constitution were taken directly from it or significantly inspired by it.[64] Indeed, the original language of Art. XI § 1 of the Oregon Constitution is worded nearly identically to Art. XI § 1 of the Indiana Constitution.

Comparison of Indiana & Oregon Articles XI

INDIANA'S 1851 CONSTITUTION	OREGON'S 1859 CONSTITUTION
The General Assembly shall not have power to establish, or incorporate, any bank or banking company, or moneyed institution, for the purpose of issuing bills of credit, or bills payable to order or bearer, except under the conditions prescribed in this Constitution.	The Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company, or monied [sic] institution whatever; nor shall any bank company, or instition [sic] exist in the State, with the privilege of making, issuing, or putting in circulation, any bill, check, certificate, prommisory [sic] note, or other paper, or the paper of any bank company, or person, to circulate as money.

[62] *Id*. at 125.
[63] See generally Bayrd Still, *California's First Constitution: A Reflection of the Political Philosophy of the Frontier*, 4.3 Pacific Historical Review 221, 229-31 (1935).
[64] W. C. Palmer, *The Sources of the Oregon Constitution*, 5 Or. L. Rev. 200 (1925-1926). Palmer's figure is likely not exact but representative.

Given how much the Indiana Constitution influenced the delegates to the 1857 convention, how similarly the two articles are worded, and the fact that the Indiana article only prohibits banks of issue, this contextual evidence strongly supports the conclusion that Oregon's Art. XI § 1 was understood generally to prohibit only banks that issue paper currency.

The Court has held that evidence of parallel policy debates in adjacent states is not only helpful in providing contextual clues to the Oregon constitutional drafters' intent, but also constitutionally significant on its own terms.[65] When taken together, the combined weight of the drafters' clear intent, the Oregon voting public's likely understanding of the provisional language, and the broader American political context all support the finding that Art. XI § 1 was intended only to prohibit the establishment of banks that issue paper currency, not all banks, regardless of whether or not the semicolon is interpreted as a constitutionally significant part of the provision.

<u>Conclusion</u>

The Oregon Supreme Court correctly determined in *Hibernian Savings* that Art. XI § 1 does not prohibit the state from chartering banks, and instead only prohibits the state from chartering banks of issue. *Hibernian Savings* is not only good law, its findings are consistent with a close analysis of the text of the provision and the broader historical context of the 1857/1859 constitutional drafting and ratification process. Thus, if the Court was asked to rule on the constitutionality of public banking legislation, it is overwhelmingly likely that it would reaffirm its finding in *Hibernian Savings* and declare the bank constitutional, provided it does

[65] *Priest*, 480 P.2d at 418-19 (considering both "the specific history of the Oregon constitutional provision" and "the more general history of the parallel provisions found in many other state constitutions").

not issue paper money. This is similar to the conclusion reached by Oregon's Legislative Counsel.[66]

More importantly, if the Supreme Court were to ignore over a century of *stare decisis*, and seek to overturn *Hibernian Savings* in order to find a public bank unconstitutional, there would be no textually coherent way to do so without finding the entire Oregon private commercial banking sector unconstitutional at the same time, as the plain language and historical context of Art. XI § 1 makes no distinction between state chartered banks owned by public or private actors. Adopting such an extreme interpretation would bring the Court's authority and legitimacy into question, in addition to being unquestionably legally destabilizing and economically disruptive. Hence, it is highly likely that the Court would find legislation authorizing the chartering of a state bank constitutional under Art. XI § 1 of the Oregon Constitution.

[66] Aurora Moses, unpublished legislative counsel opinion, September 5, 2018.