Date: 28 January 2025
To: House Committee on Commerce and Consumer Protection
From: Joshua R. Hall, Board of Directors – Public Banking Institute
Re: Support for Public Finance Taskforce

Dear Chair Sosa, Vice Chairs Chaichi & Osborne, and Honorable Members of the Committee,

I write to you in order to head off a precarious argument against public financial institutions in Oregon. Inevitably, you will be told that such entities are prohibited by the Oregon Constitution. This is, however, not true.

In our 2023 article, *Public Banking and the Oregon Constitution*, my co-authors and I confronted the persistent misconception that Article XI, Section 1 of the Oregon Constitution prohibits the establishment of a public bank.

Our research showed that this provision, while grammatically convoluted and especially confusing to modern readers, narrowly prohibits the establishment or operation of "banks of issue" only. These are institutions that create and circulate their own paper currency. Oregon's Constitution does not bar all forms of banking from the state.

Drawing from Oregon Supreme Court precedent, textual analysis, and the historical context of the Constitution's adoption, we concluded that the Oregon Legislature is constitutionally permitted to charter novel financial institutions, such as a public bank.

We also addressed the political and legal barriers to public banking in Oregon, advocating for a clearer understanding of the constitutional text to advance public finance and banking initiatives. Ultimately, our work underscored the *debates over the merits of public banks remain a question for the legislature*, as they always have been, rather than being precluded in advance by a meritless constitutional argument.

I urge you to use our research as a tool to understand the constitutional issue that you will be presented with. Public financial institutions are not prohibited by the Oregon Constitution, and fear of this should not stand in the way of the Legislative Assembly exploring innovative financial institutions as a means to better our state.

Joshua R. Hall, J.D., Ph.D.
Board of Directors – Public Banking Institute

J.R. Hall, K. Johnson, & G. Ricciardi, *Public Banking and the Oregon Constitution*, 59 Willamette Law Review 413 (2023).

PUBLIC BANKING AND THE OREGON CONSTITUTION

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I. INTRODUCTION

While national support for public banking is growing,[1] advocacy efforts in Oregon have been hindered by the persistent legal misconception that article XI, section 1 of the Oregon Constitution[2] prohibits

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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. *See* CAL. PUB. BANKING ALL., https://californiapublicbankingalliance.org/ [https://perma.cc/WCH6-33KZ]; MASS. PUB. BANKING, https://masspublicbanking.org/ [https://perma.cc/JW4U-CEVC]; Press Release, Gov. Murphy Signs Exec. Ord. Creating Pub. Bank Implementation Bd. (Nov. 12, 2019). 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. H.R. 8721, 116th Cong., 2d Sess. (2020). This bill was reintroduced in December 2023. H.R. 6675, 118th Cong. (2023–24). 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 underserved communities. *See, e.g.*, *Legislation by State – Oregon*, PUB. BANKING INST., https://publicbankinginstitute.org/legislation-by-state/#OR [https://perma.cc/5CT4-V998] (last visited Jan. 24, 2024).

2. Article XI, section 1 of the Oregon Constitution provides,

> 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.—

the state legislature from establishing a public bank. The research presented in this article indicates that the Oregon Constitution does not prohibit the chartering or operation of a public bank. Following the Oregon Supreme Court's methodology, we analyze three aspects of the provision to understand how it operates. We have reached two broad conclusions. First, although the grammatical construction of article XI, section 1 is convoluted, its sole purpose is to prohibit the establishment and operation in Oregon of banks that issue their own paper money (historically referred to as "banks of issue"). In fact, the drafters of the constitution debated fully prohibiting all banking institutions from the state—despite the fact that "Wells, Fargo & Co." (then-established in Portland) issued certificates of deposit—yet that proposal seems to have died on the vine.[3] One of the delegates even went as far as stating it would be futile and against the United States Constitution to attempt to keep banks out of the state.[4] Second, article XI, section 1 does not distinguish between publicly and privately owned banks. Indeed, it does not mention "public" banks at all.[5]

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 then subjecting it to judicial scrutiny. Of course, the Oregon Supreme Court does not issue advisory opinions, so it would only provide a contemporary ruling on the constitutionality of a state-chartered public bank if such legislation was passed and then challenged in court.[6]

OR. CONST. art. XI, § 1.

3. THE OREGON CONSTITUTION 277 (Charles Henry Carey ed., Or. Hist. Soc'y 1926).

4. *Id.*

5. The title of article XI, section 1, "Prohibition of state banks," may lead some to conclude that the provision was designed to prevent the establishment of public banks. OR. CONST. art. XI § 1. However, this title was added informally, long after ratification of the official text, and thus does not relate to the meaning of the provision or intention of the drafters and is not constitutionally relevant. *See* OR. CONST. of 1857, art. IX § 1 (available at https://digital.osl.state.or.us/islandora/object/osl%3A399219 [https://perma.cc/Z44Q-VM36]).

6. Although the Oregon Supreme Court does not issue advisory opinions, the Oregon Constitution lacks a "cases and controversies" clause, which means that the court could do so if it did not adopt this aspect of federal justiciability doctrine. *See* Couey v. Atkins, 355 P.3d 866 (Or. 2015); Hon. Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 RUTGERS U. L. REV. 1309, 1327–28 (2017).

This article is divided into four sections. First, we address the question of how advocacy efforts for public banks have proceeded in Oregon. Second, we address the plain meaning of the text of article XI, section 1. Third, we address the case law surrounding this constitutional provision. Fourth, we look at the broader historical context of article XI, section 1 both in the state and in the nation. Our conclusion can be summarized succinctly: under the Oregon Supreme Court's current constitutional interpretative methodology, a state-chartered public bank is permissible under the Oregon Constitution.

II. ADVOCACY EFFORTS AND OUR APPROACH

Oregon residents have been interested in the power of a state public bank for nearly a century, if not longer. In 1936, a State Bank Bill measure "[f]or an act providing for the creation and operation of a bank to be owned and operated by the state of Oregon" was put forth to voters.[7] The measure was designed to establish a bank owned and operated by the State of Oregon to serve as the fiscal agent for all state and public entities including counties, cities, and the like.[8] The proposed bank would also have authority to issue loans—not only to the state and municipal bodies—but also to individuals, nonprofits, and for-profit corporations.[9] Organizations such as the Oregon State Grange and the Oregon State Federation of Labor supported the initiative, and it was opposed by the Taxpayers Protective Association.[10] Proponents argued that it was absurd for public bodies to put their public funds in private banks, "where they re-ceive little or no interest for deposits and then . . . pay[] a high rate of interest for funds when they need money[.]"[11]

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7. OR. SEC'Y. OF STATE, STATE OF OR. OFF. VOTERS' PAMPHLET FOR THE REGULAR GEN. ELECTION 39 (1936).

8. *Id.* at 41. The complete text of the ballot measure was:

> State Bank Bill—Purpose: Creating the state owned and operated "Bank of Oregon" with the governor, secretary of state, state treasurer, attorney-general and labor commission as board of directors, which shall appoint manager; to do a general banking business; be exclusive state fiscal agent, and depository all moneys of the state, counties, cities, districts, political subdivisions, legal receivers, trustees, administrators, executors and officials; fix its interest rates paid and received; have county agent banks; all deposits guaranteed; may de-posit funds in any Oregon bank which gives same security as state depositories; officials so depositing and their sureties exempted from liability for such deposits.

9. *Id.* at 40.

10. *Id.* at 42–43.

11. *Id.* at 42.

The ballot measure failed by a vote of 82,869 in favor versus 250,777 opposed.[12]

In 2009, grassroots efforts for a public bank, led by the Working Families Party, gained traction.[13] 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, called the Bank of the State of Oregon. The bill did not advance through the Senate Committee on Finance and Revenue by adjournment in January 2021, killing it for the session. The concept was not revisited by the committee in the 2022 regular session.[14]

Others have attempted to promote public banking in Oregon by seeking a constitutional amendment to explicitly authorize a public bank, such as House Joint Resolution 205 (HJR 205).[15] During the 2022 legislative session, elected officials presented HJR 205, which would add a new section to article 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."[16] The additional provision would not be "a vote *for* a public bank" as much as it would "*allow the public to consider* a public bank" as well as remove any lingering ambiguity in the original language of the constitution's article.[17] Although the amendment was drafted with the intent to update 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.[18]

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12. *Initiative, Referendum and Recall, Introduction and Measure Listings 1902–2020*, OR. BLUE BOOK ALMANAC & FACT BOOK 10, https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf [https://perma.cc/3B2M-2T4X].

13. Barbara Dudley, *In Oregon, a Grassroots Campaign for a State Bank*, THE NATION (June 8, 2011), https://www.thenation.com/article/archive/oregon-grassroots-campaign-state-bank/ [https://perma.cc/SCV5-PCQR].

14. *Id.*; *see also Senate Committee on Finance and Revenue*, OR. LEGIS. INFO., (https://olis.oregonlegislature.gov/liz/2022R1/Committees/SFR/AssignedMeasures) [https://perma.cc/NTY5-AU4R] (last visited Nov. 10, 2023).

15. HJR 205, 2022 Leg., Reg. Sess. (Or. 2022).

16. *Id.*

17. *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*] (testimony of Rohan Grey).

18. *Hearing on HJR 205.*

In 2023, the Oregon Legislature successfully passed a bill to establish a public banking task force.[19] Despite having expressed support for studying a public bank, Governor Tina Kotek ultimately vetoed the bill, citing logistical challenges for the department charged with staffing the taskforce.[20]

Presently, there are three courses of action that Oregon public banking advocates can take to address lingering political anxiety regarding the constitutionality of establishing a state bank. First, they can attempt, again, to pass a ballot initiative amending the Oregon Constitution to grant the legislature explicit authority to establish a public bank. However, given the current state of the Oregon public banking movement's resources, 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 more politically difficult, by reinforcing the incorrect perception that the existing constitutional language must be amended before authorizing legislation could be safely passed.[21]

Second, public banking advocates can bring a lawsuit challenging the constitutionality of state-chartered private commercial banks, with the goal of producing a judicial opinion reaffirming existing case law on the subject.[22] Such a lawsuit would almost certainly be dismissed, but the court would not necessarily create clarity on the meaning of

19. Jamie Goldberg, *Gov. Tina Kotek vetoes plans to study decriminalizing sex work, creating state bank*, THE OREGONIAN (Aug. 4, 2023, 5:01 PM), https://www.oregonlive.com/politics/2023/08/gov-tina-kotek-vetoes-plans-to-study-decriminalizing-sex-work-creating-state-bank.html [https://perma.cc/866T-GV5E].

20. *Id.*

21. *See Hearing on HJR 205*, *supra* note 17 (testimony of Rohan Grey) (addressing concerns of a failed amendment or referendum).

22. *See* State ex rel. Caples v. Hibernian Sav. and Loan Ass'n, 8 Or. 396 (1880) (holding that the state legislature has the constitutional authority to charter banks of whatever kind, except, per art. XI § 1, banks that issue paper currency). Even if a plaintiff raised a meritorious claim against banking within Oregon, in order to overrule *Hibernian*, the argument would need to meet a high burden under the stare decisis doctrine. It is not enough to raise questions about the existing precedent—a successful challenge must show the existing interpretation was "clearly incorrect—that is, it finds no support in the text or the history of the relevant constitutional provision." Couey v. Atkins, 355 P.3d 866, 882 (Or. 2015).

article XI, section 1.[23] Moreover, litigation could take years, hindering broader advocacy efforts in the meantime and causing problems for existing state banks.[24] Thus, while this option is more feasible and less costly than a ballot initiative, it is still uncertain and practically unattractive.

The third course of action is to demonstrate that the plain language and historical context of article XI, section 1, as well as judicial precedent, overwhelmingly support the constitutionality of establishing a public bank. This article explores the 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, housed at Willamette University College of Law.

To approach the question of whether the language and context of the Oregon Constitution's banking provision indicate a wholesale prohibition on state banks, we have adopted the state supreme court's current methodology for answering questions of constitutional law. In *Priest v. Pearce*, the court described a way of looking at constitutional issues that has held sway for most questions of constitutional law since 1992.[25] In its own words, the court believes that there are "three levels on which [a] constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation."[26] The remainder of this article adopts this framework to establish the original meaning of article XI, section 1 of the Oregon Constitution, and to answer the question of whether it

23. 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.

24. 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.

25. 840 P.2d 65 (Or. 1992). There are some exceptions to the dominance of *Priest*, but these other tests are applicable only in specific circumstances. The two most prominent deviant lines of cases are about regulation of speech (State v. Robertson, 649 P.2d 569 (Or. 1982)) and Oregon's right to bear arms (*e.g.*, State v. Kessler, 614 P.2d 94 (Or. 1980); State v. Delgado, 692 P.2d 610 (Or. 1984); Or. State Shooting Ass'n v. Multnomah Cnty., 858 P.2d 1315 (Or. Ct. App. 1993)).

26. *Priest*, 840 P.2d at 67.

prohibits all state-chartered banks or if it is actually a much more specific, tailored prohibition.[27]

III. THE PLAIN LANGUAGE OF ARTICLE XI, SECTION 1 DOES NOT PROHIBIT THE ESTABLISHMENT OF A PUBLIC BANK

The full text of article XI, section 1 reads as follows:

> 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 institution [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.[28]

The first issue to be addressed when resolving constitutional meaning under the *Priest* paradigm is whether a plain language reading of the provision provides a clear and unambiguous meaning. A "plain" reading of this provision is difficult to parse from a quick blush, but a close reading of the text and its context indicates that a public bank is not prohibited.

As an initial matter, article XI, section 1 does not reference "public" banks nor include the term "public" whatsoever.[29] There is a single reference to "state banks" in the title header: "Prohibition of state banks."[30] However, this title is not part of the original Oregon Constitution,[31] and thus is not legally significant.[32] It was only added by

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27. It is worth noting, though, that the court has clarified the *Priest* paradigm is not meant 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." State v. Mills, 312 P.3d 515, 518 (Or. 2013).

28. OR. CONST. art. XI § 1.

29. *Id.*

30. *Id.*

31. OR. CONST. of 1857, art. IX § 1.

32. While some courts can—and will—give weight to the title of a legal provision like a statute (*e.g.*, Yates v. U.S., 574 U.S. 528, 539–40 (2015)), the Oregon Legislative Assembly has made clear that it does not think the state's courts should look to these. *See* OR. REV. STAT. § 174.540 (2013) (stating that title heads and other headings do not constitute part of the law); *cf.* State ex rel. Penn v. Norblad, 918 P.2d 426, 428 (Or. 1996). Although ORS 174.540 only applies

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 voters in 1859.[33] Instead, the framers initially placed article XI, section 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.[34] Because it was a later addition, the title should not be included in a plain text reading of this constitutional provision.

Another feature of the provision that demands a closer look is the semicolon between "whatever" and "nor." Some have argued that this semicolon creates two independent clauses, and therefore two distinct prohibitions.[35] However, the semicolon was a clerical mistake, not actually in the text as drafted by the constitutional convention, and should not be given any interpretive weight.[36] Further, even if read as a legitimate part of article XI, section 1, the semicolon cannot be interpreted according to common twenty-first century usage. Instead, as the court has held about words and phrases, the language used in a constitutional provision should "be considered in the sense most obvious to the common understanding of the people at the time of its adoption."[37] This methodology logically must extend to punctuation used to give words meaning. Thus, if the court were to give any weight to the semicolon, it would do so by interpreting it as it would have been understood by

to statutes, it is instructive of how the courts could, and should, for reasons similar to those explained in this article, disregard the title of article XI, section 1.

33. OR. CONST. of 1857, art. IX § 1; *Constitution*, OR. 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, S. Doc. No. 581, at 5–226 (2d Sess. 1910).

34. Article XI, section 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, for example, to the liability of corporate stockholders, limitations on the authority of municipal corporations, and restrictions on the public acquisition of corporate stock.

35. State ex rel. Caples v. Hibernian Sav. and Loan Ass'n, 8 Or. 396, 399–400 (1880).

36. *Id.* at 401.

37. Jones v. Hoss, 285 P. 205, 206 (Or. 1930). For example, the Court has looked to nineteenth century commentaries and dictionaries to understand the phrase "common schools" in article VIII, section 3 of the Oregon Constitution. Pendleton Sch. Dist. 16R v. State, 200 P.3d 133, 143 (Or. 2009) (citing *Jones* as the source of its interpretive approach).

voters[38] at the time of drafting and ratification in 1857–59.[39] Linguistic evidence suggests that Oregon voters in 1859 would have likely read the semicolon in the published version of article XI, section 1 as linking two dependent clauses, not creating two completely separate provisions.[40]

The semicolon as a grammatical device has a complicated past. Originating in fifteenth century Italian academic writing, its modern usage to separate two independent clauses only solidified in the 1880s.[41] In the 1850s—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 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."[42] Examples from the journal of the Oregon

38. We feel it is important to acknowledge, due to structural oppression and overt racism by drafters of the constitution, "voters" at the time of constitutional ratification in 1859 comprised a very small percentage of people actually living in Oregon. In fact, at the time, art. II constrained voting to white males twenty-one years and older; expressly denied suffrage to mentally disabled people and certain people of color; and made no acknowledgment of the existence of Indigenous people. OR. CONST. of 1857 art. II §§ 2, 3, 6,

39. Priest v. Pearce, 840 P.2d 65, 69 (Or. 1992) (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.").

40. Voter intent may or may not matter to the court. *Cf.* Hon. Jack L. Landau, *An Introduction to Oregon Constitutional Interpretation*, 55 WILLAMETTE L. REV. 261, 293–95 (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 I (Articles I & II)*, 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."). Before the advent of the *Priest* paradigm, the Oregon Supreme Court did give some credence to the intent of those who voted to adopt the Constitution. Jones v. Hoss, 285 P. 205, 206 (Or. 1930) ("In construing a constitutional provision we seek to ascertain and give effect to the intent of the framers and of the people who adopted it.").

41. *See* Cecelia Watson, *Points of Contention: Rethinking the Past, Present, and Future of Punctuation*, 38 CRITICAL INQUIRY 649, 659 (2012).

42. GOOLD BROWN, THE GRAMMAR OF ENGLISH GRAMMARS 787 (10th ed. 1882) (New York, William Wood & Co., 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

constitutional convention provide further evidence for this type of 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."[43] 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 the proposed language of article XI, section 1 in 1857, it would instead have signaled an intimately related dependent clause following an independent clause. Consequently, it would have been read like a modern comma.

Once divorced from its anachronistic and misleading modern title, and having resolved that the semicolon either carries no interpretive weight or should be read as a modern comma, a plain reading of article XI, section 1 indicates that it contains one prohibition which bars specific activities ("making, issuing, or putting in circulation, any bill . . . to circulate as money") from being conducted by "any bank, banking company, or monied [sic] institution whatever" chartered by the Oregon Legislature, or otherwise allowed to exist in Oregon.[44]

The term "whatever" may also give a reader pause. Applying the last antecedent rule, the word "whatever" modifies only "monied [sic] institution"—"whatever" does not constrain or modify the "Legislative Assembly's power to establish, or incorporate."[45] Essentially, the list "any bank, or banking company, or monied [sic] institution whatever," broadly encompasses institutions which carry out banking and money functions. This list of institution types is further modified by the latter half of the provision, which concerns the nature and extent of

essentially as a comma in modern English composition. Many further examples of the same usage can be found in *id.* at 1030–31.

43. CAREY, *supra* note 3, at 230.

44. OR. CONST. art. XI § 1.

45. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, *Statutory Interpretation: Theories, Tools, and Trends* 29–30 (Mar. 10, 2023).

prohibited ("privileged") activity. As detailed below, the prohibited activity is narrowly limited to the issuance of paper instruments designed to circulate as money, not banking operations in general. Just as the first half of the provision contains a catch-all list for bank-like institutions, the latter half contains a catch-all list for paper-money-like instruments ("any bill, check, certificate, prommisory [sic] note, or other paper, or the paper of any bank company, or person").[46]

Thus, when the beginning and end of the provision are read together, the text prohibits the legislature from creating any bank or bank-like institution that makes or circulates any paper-money-like instrument.[47] The clause in the middle ("nor shall any bank company, or institution [sic] exist in the State") also prohibits such institutions from existing in Oregon at all, even if they were established or chartered elsewhere.[48]

IV. THE OREGON SUPREME COURT'S PREVAILING AND LONG-SETTLED INTERPRETATION OF ARTICLE XI, SECTION 1 SUPPORTS THE CONSTITUTIONALITY OF ESTABLISHING A PUBLIC BANK

In the second prong of the *Priest* paradigm, Oregon courts must look to the case law surrounding a constitutional provision.[49] 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 article XI, section 1 in *Hibernian Savings*, decided just over twenty years after the Oregon Constitution was ratified.[50] Notably, the four justices of the Oregon Supreme Court who heard the case all had served as delegates to the constitutional convention in 1857.[51]

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46. OR. CONST. art. XI § 1.

47. Banks or institutions which create or print and circulate their own money are often referred to as banks of issue.

48. Some may argue that this interpretation renders some of the provision surplusage–it seems that the drafters really wanted to use many words to guard against the perceived dangers of paper money. *See infra* Section V.

49. Priest v. Pearce, 840 P.2d 65, 67 (Or. 1992).

50. State ex rel. Caples v. Hibernian Sav. and Loan Ass'n, 8 Or. 396 (1880).

51. Ralph James Mooney & Raymond H. Warns, Jr., *Governing a New State: Public Law Decisions by the Early Oregon Supreme Court*, 6 L. & HIST. REV. 25, 49–50 (1988).

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."[52] At issue was whether the bank, which had been chartered under the general business chartering powers of the Oregon Constitution,[53] violated article XI, section 1's apparent prohibition on the Legislative Assembly "establish[ing], or incorporat[ing] any bank or banking company . . . whatever."[54]

In a unanimous 4–0 decision, the court held that article XI, section 1 did not prohibit the state from chartering banks or allowing them to operate in Oregon generally. In reaching this conclusion, it observed that article XI, section 1 contains two parts, linked by a semicolon after the word "whatever."[55] 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 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,[56] and thus not entitled to constitutional weight.[57] 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

52. *Hibernian Sav.*, 8 Or. 396 at 397.

53. OR. CONST. art. XI § 2 ("Corporations may be formed under general laws . . .").

54. *Hibernian Sav.*, 8 Or. 396 at 401 (discussing *id.* § 1).

55. *Id.*

56. 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. OR. CONST. of 1857, art. XI § 1; *Constitution*, THE OR. STATESMAN, Sept. 29, 1857, at 1.

57. State ex rel. Caples v. Hibernian Sav. and Loan Ass'n, 8 Or. 396 401 (1880) ("[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.").

money").[58] On that basis, the court concluded that article XI, section 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 full stop.[59]

Interpreting article XI, section 1 as a general prohibition on the establishment of state—and thus public—banks would directly contradict the core holding of *Hibernian Savings*: that this provision 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 article XI, section 1, in which 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*"[60]—was elevated to the status of a standalone general prohibitory rule on bank chartering and incorporation. Such a drastic reversal of longstanding precedent is highly unlikely and would be economically and legally disruptive.[61]

The Oregon Supreme Court employs a well-established deference to stare decisis and is reluctant to overrule "fully considered prior cases" without strong reason.[62] This deference is not absolute; rather, the court considers whether the previous court applied "its usual interpretative methodology" in the challenged decision.[63] In doing so, the court has noted that there is "no fixed list of factors" guiding the court's

58. *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.").

59. 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).

60. OR. CONST. art. XI §1 (emphasis added).

61. Parties rely on law announced by the Supreme Court of Oregon to structure their transactions, thus, "this court should not upend those expectations without sufficient reason." Farmers Ins. Co. of Or. v. Mowry, 261 P.3d 1, 9 (Or. 2011).

62. *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.").

63. State v. McCarthy, 501 P.3d 478, 488 (Or. 2021).

determination.[64] Instead, its approach "requires . . . an exercise of judgment that takes all appropriate factors into consideration."[65]

The court's current methodological approach to constitutional interpretation was first laid out in *Priest*.[66] As noted in the introduction above, 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."[67] This approach was only formally adopted in 1992; thus, it is conceivable that a modern court could revisit *Hibernian Savings* on the grounds that it does not meet modern standards of constitutional interpretation.[68] While it is possible for the contemporary court to find fault with the constitutional interpretation in *Hibernian Savings*, that is unlikely, given the fact that *Hibernian Savings* incorporates extensive analysis consistent with the three prongs of the *Priest* approach.[69] 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 modern standards of constitutional interpretation, and thus worthy of ongoing deference under stare decisis.[70]

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64. *Id.*; *see also* Horton v. Or. Health & Sci. Univ., 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" and "the age of the decisions and the extent to which the issues have been fully litigated can matter.").

65. *Horton*, 376 P.3d at 1010.

66. Priest v. Pearce, 840 P.2d 65, 65 (Or. 1992).

67. *Id.* at 67.

68. When considering whether to apply the doctrine of stare decisis, the "age of [a] decision[] and the extent to which a decision has been fully litigated can matter." *Horton*, 376 P.3d at 1010; *see also* Farmers Ins. Co. of Or. v. Mowry, 261 P.3d 1 (Or. 2011) (declining to review a relatively recent decision where the issue had been fully litigated). In 2013, the court in *Mills* overruled and replaced its prevailing interpretation of article I, section 11 of the Oregon Constitution which outlines the rights of those accused in criminal prosecutions. State v. Mills, 312 P.3d 515. 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.

69. The *Hibernian Savings* decision includes thorough analysis of the text itself, including the disputed semi-colon, and the historical context of the drafting and ratification of art. IX, § 1. There is no other relevant case law that would apply to the second prong of the *Priest* analysis.

70. *Cf.* State v. Ciancanelli, 121 P.3d 613, 617 (Or. 2005).

Another important consideration is the court's reluctance to overrule precedent when doing so would create economic or legal disruption and uncertainty.[71] As it currently stands, *Hibernian Savings* has been well-settled law for 140 years, during which time the Oregon 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 nonprofit corporations and member-cooperatives.[72] If the court were to overrule it and read into article XI, section 1 a new, general legislative prohibition on the establishment or operation 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 Oregon law more than rendering unconstitutional the entirety of the state's bank chartering and regulatory framework.[73] Moreover, doing so could seriously destabilize or irreparably harm the Oregon banking services industry, and through it, public welfare more generally.

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71. *See, e.g.*, Farmers Ins. Co. of Or. 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 v. Or. Health & Sci. Univ., 376 P.3d 998, 1010 (Or. 2016) (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.").

72. There are currently thirty-nine FDIC-insured banks operating within Oregon. *BankFind Suite*, FED. DEPOSIT INS. CORP., https://banks.data.fdic.gov/bankfind-suite/bankfind?activeStatus=1&branchOffices=true&pageNumber=1&resultLimit=25&stalp=OR [https://perma.cc/JV4B-MMC5] (Nov. 11, 2023). There are three chartered trust companies, *Oregon State Chartered Trust Companies*, DIV. FIN. RES., https://dfr.oregon.gov/business/licensing/financial/Documents/oregon-chartered-trust-companies.pdf [https://perma.cc/YCK5-UHFQ] (Feb. 22, 2023), and at least twenty credit unions. *Oregon state-chartered credit union directory*, DIV. FIN. RES., https://dfr.oregon.gov/financial/manage/pages/state-chartered-credit-unions.aspx (last visited Nov. 12, 2023).

73. *Ciancanelli*, 121 P.3d at 618.

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 article XI, section 1 established by *Hibernian Savings*—in which the legislature has the general power to charter banks of any kind, provided, per article XI, section 1, that they do not issue paper money—and leave the policy debate over the merits of "public" versus "private" banking to the elected representatives in the legislative and executive branches, where it belongs.

V. THE HISTORICAL CONTEXT OF ARTICLE XI, SECTION 1 SUPPORTS THE CONSTITUTIONALITY OF A PUBLIC BANK

The third and final prong of the *Priest* test involves looking at the historical context of a constitutional provision. The Oregon Supreme Court has looked to different types of history since the advent of the modern methodology. For instance, in *Smothers*, the court looked, primarily to legal history dating back to Edward Coke's 1642 commentary on the Magna Carta, and moved on to Indiana's 1851 constitution.[74] The court also looked at the scant evidence from the Oregon constitutional convention in *Smothers*, including the professional background of the delegates.[75] Looking at similar constitutional provisions in other states is a common theme in the court's historical research.[76] This is a logical approach, given that the Oregon constitutional convention was not recorded minute-by-minute, and what little we have left was only reported in newspapers, while other states have more thoroughly documented constitutional conventions.[77] Ultimately, what seems to be the objective of the court is to determine what the framers of the Oregon Constitution intended its provisions to do, and what the ratifying voters would have understood.[78] In the spirit of the Oregon Supreme Court's broad historical approach across its opinions, we have adopted a similar one which looks at evidence from the constitutional convention and the wider history of banking regulation in the middle of the nineteenth century.[79]

74. Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 340–43, 346–47 (Or. 2001).

75. *Id.* at 350–51.

76. *E.g.*, State v. Davis, 256 P.3d 1075 (Or. 2011); State v. Mills, 312 P.3d 515 (Or. 2013).

77. *See Davis*, 256 P.3d at 1079.

78. *Cf.* Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1007–08 (Or. 2016).

79. We do not want to imply that Oregon's approach to constitutional analysis is unique among the states. Indeed, this type of originalism—if that is the right word—is common throughout state courts' doctrines. Jeremy M. Christiansen, *Originalism: The Primary Canon of*

Regarding article XI, section 1 and whether it would prevent the Legislative Assembly from establishing a public bank, there is both a wealth and a dearth of contextual evidence. The wealth comes from the many scraps of information we hear about the provision's movement through the constitutional convention and the historical context of banks—especially banks of issue—in the mid-eighteenth century. The dearth comes from a lack of comprehensive information on how the voting public understood article XI, section 1. However, from what evidence does exist, even the intent of the voters was arguably to only prohibit banks of issue.

Looking to the constitutional convention, we start with the words of its delegates themselves. The original proposed text of article XI, section 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, prommisory [sic] note, or other paper, or the paper of any bank company, or person, to circulate as money.[80]

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.[81] 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."[82] This establishes early public knowledge of the narrowly intended scope of the provision.

State Constitutional Interpretation, 15 GEO. J. L. & PUB. POL'Y 341 (2017); Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169 (2022).

80. State ex rel. Caples v. Hibernian Sav. and Loan Ass'n, 8 Or. 396, 400–01 (1880).

81. This may be supported by a notice in the *Oregon Weekly Times* 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." *Constitutional Convention*, OR. WEEKLY TIMES, Aug. 24, 1857, at 1.

82. CAREY, *supra* note 3, at 230.

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,[83] the chief justice of the Supreme Court of the Oregon Territory, and a delegate from Marion County.[84] We have been unable to find (and it is unlikely the constitutional convention documented) Williams's purpose for adding these words. Though it is worth noting that there was a lot of debate regarding dangers of corporations generally, and banks of issue more specifically—there seems to have been a lot of tinkering with the wording of article XI, which may have been, in part, to garner political compromise.[85] 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.[86] 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 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.[87] Chief Justice Kelly noted in the decision that he personally did not recall the delegates approving a ban on state-

83. *Id.* at 274.

84. William L. Lang, *George H. Williams (1823–1910)*, OR. ENCYCLOPEDIA, https://www.oregonencyclopedia.org/articles/williams-george/ [https://perma.cc/CY22-2QNH] (Nov. 6, 2023).

85. CAREY, *supra* note 3 at 147, 158, 230, 239, 246–47, 259, 274–77.

86. *Id.* at 275–78.

87. 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. PHARISEE AMONG THE PHILISTINES: THE DIARY OF JUDGE MATTHEW P. DEADY, 1871–1892, at 300 (Malcom Clark, Jr. ed., Or. Hist. Soc'y 1975). *See also* Ralph James Mooney, *Remembering 1857*, 87 OR. L. REV. 731, 769 n.140 (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.").

chartered banks in general, only banks of issue.[88] 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.[89]

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 collective 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.[90]

Although there were some public voices during the constitutional ratification period (1857–59) asserting that article XI, section 1 prohibited the establishment of any and all banks,[91] broader historical evidence suggests the majority of Oregon voters in 1859[92] understood the provision as establishing a narrow prohibition on banks issuing paper currency.

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88. State ex rel. Caples v. Hibernian Sav. and Loan Ass'n, 8 Or. 396, 400 (1880).

89. CAREY, *supra* note 3, at 274. It is not clear how the current Oregon Supreme Court would handle evidence of a single legislator's impression of a statute, let alone a constitutional provision. *Cf.* State v. Gaines, 206 P.3d 1042, 1050 (Or. 2009) ("The formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law[.]").

90. *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).

91. *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 The Constitution—Its Provisions,* OR. WEEKLY TIMES, Oct. 17, 1857, at 1 (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.

92. At that time, voting eligibility 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. *See generally* BRADLEY J. NICHOLSON, A SENSE OF THE OREGON CONSTITUTION 6 (2015).

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.[93] This has been interpreted as a measure to prevent bank notes issued in the state from circulating as currency; these larger denominations were not practical for day-to-day use.[94] Additionally, the legislature restricted banks in their charters to "the business of exchange, discount and deposit."[95] The state could not pledge to guarantee bank debts.[96] 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.[97] When Iowa adopted its state constitution in 1846 upon entry to the Union, banks of issue were specifically prohibited.[98]

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.[99] Price was an ardent

93. FL. CONST. art. XIII § 8.

94. Stephanie D. Moussalli, *Florida's Frontier Constitution: The Statehood, Banking & Slavery Controversies*, 74 FLA. HIST. Q. 423, 428 (1996).

95. FL. CONST. art. XIII § 5. Further requirements included that banks shall have no less than $100,000 in specie when chartered, *id.* § 6, and all liabilities were payable in specie, *id.* § 7.

96. Moussalli, *supra* note 94.

97. THE STATUTE LAWS OF THE TERRITORY OF IOWA, at 67–68 (Hist. Dep't of Iowa 1900). This is important evidence, as an editorial from the *Oregon Weekly Times* claimed OR. CONST. art. XI § 1 was "word for word the same as in . . . Iowa." Editorial, OR. WEEKLY TIMES, Oct. 17, 1857, at 2. This probably referred to the original Iowa Constitution which prohibited the state from incorporating banks of issue. IOWA CONST. art. 9 § 1. The editorial is likely not referring to the revised Iowa constitution of 1857, which contained complex regulations on state banks. *See* IOWA CONST. art. VIII §§ 4–11.

98. IOWA CONST. of 1846, art. IX. 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).

99. 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).

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."[100] 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 California convention delegate Charles Botts believed that bankers who issued paper currency were "the sharpest and cunningest 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."[101] The gist of his argument was not that banks were all inherently bad, but those that 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.[102]

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.[103] Indeed, the original language of article XI, section 1 of the Oregon Constitution is worded nearly identically to the original language of article XI, section 1 of the Indiana Constitution.[104]

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100. *Id.*

101. *Id.* at 125.

102. *See generally* Bayrd Still, *California's First Constitution: A Reflection of the Political Philosophy of the Frontier*, 4 PAC. HIST. REV. 221, 229–31 (1935).

103. W. C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200 (1925–26). Palmer's figure is likely not exact but representative.

104. *Compare* OR. CONST. art. XI § 1

> (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 institution [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),

with IND. CONST. art. XI § 1

> (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).

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 article XI, section 1 was understood generally to prohibit only banks that issue paper currency.

Debates over paper currency had a long history in the United States by the time of Oregon's constitutional convention. In post-revolution America, there was considerable consternation about the potential and liability of paper currency.[105] Even then, banks undoubtedly played an important role in the development of the American economy, especially as settler colonialism pushed westward.[106] Paper currency that was not redeemable for specie became a major policy issue during the Civil War.[107] The fears of common folk can be summed up in a letter from someone experiencing the problems of multifaceted paper currency in 1840:

> Started from Virginia with Virginia money—reached the Ohio River—exchanged $20 Virginia note for shin-plasters and a $3 note of the Bank of West Union—paid away the $3 note for a breakfast—reached Tennessee—received a $100 Tennessee note—went back to Kentucky—forced there to exchange the Tennessee note for $88 of Kentucky money—started home with Kentucky money. In Virginia and Maryland compelled, in order to get along, to deposit five times the amount due, and several times detained to be shaved at an enormous per cent. At Maysville wanted Virginia money—couldn't get it. At Wheeling exchanged $50 note, Kentucky money, for notes of the North Western Bank of Virginia—reached Fredericktown—there neither Virginia nor Kentucky money current—paid a $5 Wheeling note for breakfast and dinner; received in change two one dollar notes of some Pennsylvania bank, one dollar Baltimore and

105. GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 189–213 (2017). There was even debate over whether Congress should be able to limit the states' prerogative to allow paper money. *Id.* at 210 ("when Congress's Grand Committee . . . made its extensive Confederation reform proposals in August 1786, no change in state powers over paper money or debt relief was proposed.").

106. Donald R. Adams, Jr., *The Role of Banks in the Economic Development of the Old Northwest*, *in* ESSAYS IN NINETEENTH CENTURY ECONOMIC HISTORY: THE OLD NORTHWEST 208 (David C. Klingaman & Richard K. Vedder, eds., 1975).

107. LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 25–30 (2015).

> Ohio Rail Road, and balance in Good Intent shin-plasters; one hundred yards from the tavern door all the notes refused except the Baltimore and Ohio Rail Road—reached Harpers Ferry—notes of North Western Bank in worse repute there than in Maryland—deposited $10 in hands of agent—in this way reached Winchester—detained there two days in getting shaved—Kentucky money at 12 per cent., and North Western Bank at 10.[108]

This excerpt is an example of the problem that currency did not carry its value outside of its locale. There were a number of reasons for this. For instance, there was no guarantee that a paper dollar issued by a bank in Kentucky would be honored for a dollar in specie from a bank in New York. More than 7,000 individual bank monies existed.[109] The federal government did not begin issuing paper money until 1861, and even then, variation in both state and federal banknotes continued for decades.[110] The massive volatility of paper money persisted, in part, because the Federal Reserve was not established to backstop the banking system until 1913, and FDIC insurance to protect bank deposits was not established until 1933.[111]

Beyond this evidence, though, there is the possibility that the framers of the Oregon Constitution and the voters who ratified it would have understood the word "bank" to mean—in a legal setting—an institution which circulated paper money. In 1839, prominent attorney and future secretary of state Daniel Webster was arguing a case before the United States Supreme Court about banking. One of his objectives was to define what a "bank" was as this seemed to be unclear. Asking the question "what is banking," he argued to the Court:

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108. William H. Dillistin, *Bank Note Reporters and Counterfeit Detectors 1826–1866: With a Discourse on Wildcat Banks and Wildcat Bank Notes*, 114 NUMIASTIC NOTES & MONOGRAPHS 1, 44–45 (1949) (citing a letter from William Lowndes Yancey to John C. Calhoun, in which the former describes the experience of a third-party traveler).

109. *History of United States Currency*, NAT'L CREDIT UNION ASSOC., https://mycreditunion.gov/financial-resources/history-united-states-currency [https://perma.cc/DVK8-2S7N] (last visited Jan. 24, 2024).

110. *Id.*

111. David C. Wheelock, *Overview: The History of the Federal Reserve*, FED. RSRV. HIST. (Sept. 13, 2021), https://www.federalreservehistory.org/essays/federal-reserve-history [https://perma.cc/59E9-F24K]; FED. DEPOSIT INS. CORP., THE FIRST FIFTY YEARS: A HISTORY OF THE FDIC 1933–1983, at 3–5 (1984).

> And when the learned counsel on the other side speak of banking, what do they mean by it? A bank deals in exchanges; and it buys or builds houses, also; so do individuals. If there be any thing peculiar in these acts by a bank, it must be not in the nature of the acts individually, but in the aggregate of the whole. What constitutes banking, must be something peculiar. There are various acts of legislation, by different states in this country, for granting or preventing the exercise of banking privileges. But has any law ever been passed to authorize or to prevent the buying by an individual of a bill of exchange? No one has ever heard of such a thing. The laws to restrain banking have all been directed to one end: that is, to repress the unauthorized circulation of paper money. There are various other functions performed by banks; but, in discharging all these, they only do what unincorporated individuals do.
>
> What is that, then, without which any institution is not a bank, and with which it is a bank? It is a power to issue promissory notes with a view to their circulation as money.[112]

By Webster's logic, then, the prohibition in article XI, section 1 was assuredly only leveled at banks of issue.

Those words, of course, were the opinion of one man. However, they were persuasive. Throughout the nineteenth century, state courts were siding with Webster's definition of banking as the legal definition of the term. Referencing the California Constitution created by delegates like Rodman Price mentioned above, that state's highest court held in 1877 that "deposit and loan associations may be formed which do not issue paper to circulate as money; and such are not *banks* within the prohibition of the Constitution, although they may be called *banks*."[113] Websters' views were quoted by the California court. This opinion of what constituted "banking" was current in state supreme courts through the later part of the nineteenth century.[114]

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112. Bank of Augusta v. Earle, 38 U.S. 519, 563–64 (1839).

113. Bank of Sonoma Cnty. v. Fair Banks, 52 Cal. 196, 198 (1877).

114. Dearborn v. Nw. Sav. Bank, 42 Ohio St. 617 (Ohio 1885) (citing numerous contemporary and earlier cases). This also seems to be how Oregon as an abstract entity handled banking in the period immediately after the convention, in which entities that operated as "savings and loan" institutions were allowed to function without legal or legislative interdiction. *See* Burrell, *supra* note 59, at 41–91, 105.

It is quite possible that the framers of the Oregon Constitution—who were attorneys—understood this definition of "bank" and intended article XI, section 1 to follow it. This evidence should also be persuasive to the Oregon Supreme Court based on earlier decisions regarding other constitutional provisions. For instance, the *Smothers* court relied on the legal understanding of tort remedies. In this case, the court relied on an analysis of the legal history in the centuries leading up to ratification of the Oregon Constitution.[115] Its holding turned on how law-aware persons of the time understood the meaning of the constitution's right to a remedy.[116] The court did so even in the absence of direct evidence that delegates to the constitutional convention shared the understanding developed through the court's legal historical research.[117] If the Oregon Supreme Court analyzed article XI, section 1 as it did the remedies clause in *Smothers*, it would likely come to the conclusion that the former was meant only to prohibit banks of issue.

Even if the court deviated from its previous use of legal history, it has held that evidence of parallel policy debates in other states is not only helpful in providing contextual clues to the Oregon constitutional drafters' intent, but is also constitutionally significant on its own terms.[118] 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 article XI, section 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.

VI. CONCLUSION

The Oregon Supreme Court correctly determined in *Hibernian Savings* that article XI, section 1 does not prohibit the state from chartering banks, and instead only prohibits the state from chartering banks of issue (banks that issue and circulate paper money).[119] *Hibernian*

115. Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 338 (Or. 2001).

116. *Id.* at 351.

117. *Id.*

118. Priest v. Pearce, 840 P.2d 65, 68–69 (Or. 1992) (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").

119. State ex rel. Caples v. Hibernian Sav. and Loan Ass'n, 8 Or. 396 (1880).

Savings is not simply good law; its findings are consistent with a close analysis of the text of the provision and the broader historical context of the constitutional drafting and ratification processes. 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 not issue paper money. A similar conclusion was reached by Oregon's Legislative Counsel.[120]

Notably, if the Oregon 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 article XI, section 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 article XI, section 1 of the Oregon Constitution.

120. *See* Letter from Aurora Moses, Staff Attorney for Dexter Johnson, Or. Legis. Counsel, to Rep. Pam Marsh, Or. Legis. (Sept. 5, 2018) (on file with author) (discussing the constitutionality of authorizing cannabis-focused limited charter banks and credit unions). Aurora Moses, unpublished legislative counsel opinion, September 5, 2018.