EAST OREGONIAN
OPINION

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TUESDAY, MAY 19, 2020 | *Founded October 16, 1875* | A4

OUR VIEW

No time to waste

There is a growing probability that Gov. Kate Brown will call a special session of the Oregon Legislature within the next few weeks to deal with expected budget shortfalls created by the COVID-19 virus outbreak.

Brown should call the special session and shouldn't wait very long to do so.

That's because the state is beginning to stagger after weeks of closed businesses and high unemployment. Already, Brown has asked state agencies to create a plan to slash their budgets by 17%. We will all find out more May 20 when the latest report from the Office of Economic Analysis is revealed, but not even the most optimistic pundit should expect anything other than very bad news.

Oregon faces another challenge — the state constitution demands a balanced budget.

Unlike the federal government, Oregon can't put everything on a virtual credit card and let the future take care of itself.

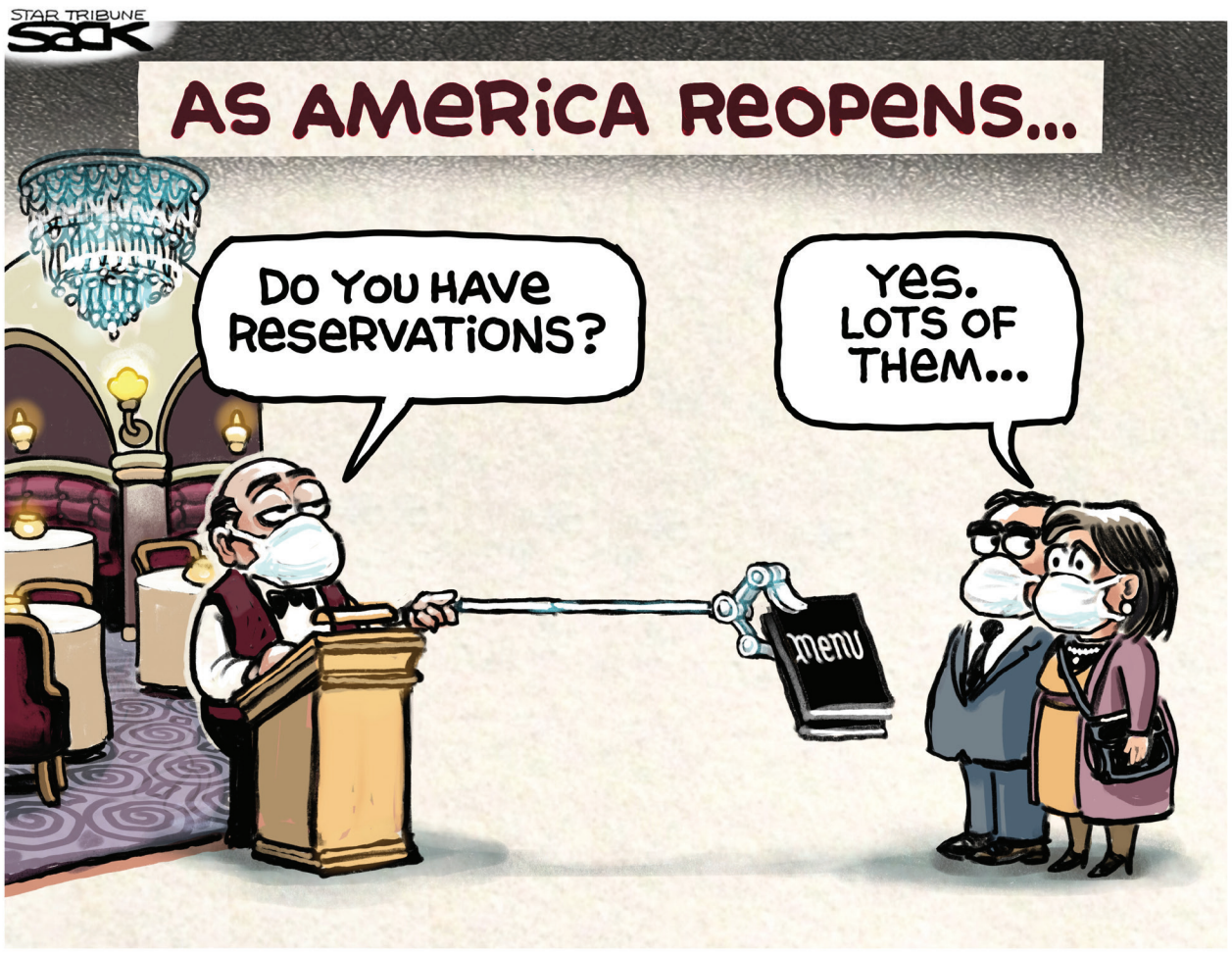
That creates steep challenges for lawmakers and their jobs during the special session will be crucial. What simply cannot happen is a divergence away from the budget woes and how to deal with COVID-19 into yet another series of legislative battles over issues tied to party dogma.

We don't have the time now to watch the special session descend into chaos because a group of lawmakers suddenly decide to resurrect some flashpoint issue from the past. The only goal must be to face the budget shortfall and balance the budget, and then get back to dealing with the virus outbreak.

Anything less will be a betrayal of voters. Party leaders and the governor need to meet before the special session and craft an agreement that narrowly defines what the special session will tackle. That agreement must be clear and precise and include provisions that there will be no deviation from the pressing matter — the state budget — at hand. Oregon lawmakers no longer have the privilege of wasting away days on the legislative time clock fighting over pie-in-the-sky, New Age political initiatives. Lawmakers can do that later. Policy issues that are not related to the state budget and the COVID-19 outbreak should be jettisoned.

As is always the case, elected leaders from both parties will have an opportunity to do some good work if a special session is called. They will be presented with an opportunity to face a serious set of problems, work on them together and solve them.

Wasting time in any other fashion is simply that — wasting time. Time the state does not have.



The debate over constitutional originalism just got ugly

CASS SUNSTEIN
OTHER VIEWS

Are most members of the Supreme Court violating their oath of office?

Might Chief Justice John Roberts and Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan be committing impeachable offenses?

Did some of history's most celebrated justices — Oliver Wendell Holmes, Louis Brandeis, Robert Jackson, Earl Warren, Thurgood Marshall, William Rehnquist and Sandra Day O'Connor — also act inconsistently with their oath of office?

Some prominent law professors at distinguished institutions are making precisely that argument. It's unpleasant stuff, the academic equivalent of "lock her up!" But like that howl of rage, the new argument is resonating in influential circles. Before long, it will probably enter into public debates.

To understand what's afoot, we need to explore a much-disputed question: How should the Supreme Court interpret the U.S. Constitution?

Many justices think that the founding document contains what Justice Felix Frankfurter called "majestic generalities," phrases like freedom of speech, equal protection, unreasonable searches and seizures, due process of law.

In their view, the text of the Constitution is binding, but its meaning is not frozen in time. Sex discrimination might violate the Constitution now, even if it was constitutional in 1791 (when the Bill of Rights was ratified) or in 1868 (when the 14th Amendment was ratified). Racial segregation might be unconstitutional now even if those who ratified the equal protection clause had no problem with it.

By contrast, some justices, including Clarence Thomas and the late Antonin Scalia, are "originalists." They believe that the Constitution must be interpreted to fit with its "original public meaning" — that is, the meaning that members of the public would have given to it at the time of ratification.

The debates between originalists and their adversaries have become sophisticated and elaborate.

Both sides deserve respect and a civilized hearing. Recently, however, things have taken a new turn. Some originalists are arguing that judges who disagree with them are violating their oath of office.

It's a serious charge. It's also unfounded.

Here's what the Constitution has to say:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

Originalists who think that their preferred approach is mandatory point to two words: "this Constitution." If judges do not follow the original public meaning, their argument goes, they are supporting no constitution, or some other constitution, rather than "this" one.

But that doesn't follow at all. The Constitution does not tell judges to be originalists. It does not contain a provision saying, "The meaning of this Constitution shall be settled by reference to the original understanding."

To buttress the argument, those who believe that the oath of office requires originalism contend that in the late 18th century, most people believed in originalism. In their account, it constituted the "interpretive convention" at the time.

As a matter of history, it's far from clear that's the case; it was not the conventional view in 1800, or 1810, or 1820 that justices who did not practice originalism were violating their oath of office. But suppose that originalists are right to say that in the founding period, most people accepted originalism. Would we then conclude that the oath of office requires judges to be originalists?

No. You cannot say that the original understanding is binding because the original understanding was that the original understanding is binding. That would be circular; it would assume the conclusion.

Everyone should agree that the text of the Constitution is binding. It is "this Constitution." Some originalists act as if the text of the Constitution and the original understanding of that text are the same thing. They aren't. The equal protection clause is part of the Constitution. The original understanding of the clause is not.

Like any theory of interpretation, originalism has to be defended on its merits, as the best theory of interpretation — maybe because it limits the discretion of unelected judges, maybe because it preserves the separation of powers, maybe because it promotes clarity and predictability.

But even if the arguments for originalism are convincing, it doesn't follow that judges who reject them are violating their oath of office. It doesn't follow that Holmes and Brandeis, or Roberts and Kagan, are refusing "to support this Constitution."

Because originalism is wildly inconsistent with current constitutional law, you might be inclined to say that it is the originalist judges like Thomas who are violating their oath of office. That's more plausible than accusing judges who reject originalism of doing that — but still, it's wrong and ugly and a horrible thing to say.

There's a larger point here. We live in an era in which political disagreements are increasingly turned into accusations of disloyalty, of heresy, of criminality. It's reasonable to argue about constitutional method and to contend that originalism is terrific or terrible. But it's not reasonable — in fact it is shameful — to allege that justices who embrace it or reject it are violating their oath of office.

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Cass Sunstein is a columnist for Bloomberg and the Robert Walmsley University Professor at Harvard Law School.

YOUR VIEWS

Criticism of president doesn't have to be uncivil

President Trump is an odd person and extremely egocentric. I'll grant to anyone that he has those characteristics. But calling him a sociopath projects incivility that is unwarranted and adds to the rancor that we see too much in current political discussion.

We certainly have political differences in our community, and nation, but I believe our manner and style of disagreement should be cordial and we should all work toward that.

Maybe perspective would help. I recently finished reading another book about the Civil War, my favorite topic. Although the history is fascinating, it was a good reminder that there was at least one time in our past that conditions were far worse than today. In 1856, a southern Democrat representative, Preston Brooks, attacked a northern Republican senator, Charles Sumner, on the Senate floor, beating him horribly and only quitting when his cane finally broke. Events soon get worse than that. Within five years, Americans were at war with each other, killing as many as have died in all other wars combined. It was the saddest period in America's history. During that time, many vilified President Lincoln, referring to him as an ape or other nasty things, insulting him and criticizing him in many ways. Today, however, we recognize Lincoln as one of the greatest presidents who persevered in preserving our nation.

How President Trump will be remembered in history remains to be seen but, in the meantime, I encourage everyone to be more considerate. We may have our political differences but we're all in this together. We should learn from our past in how we treat each other and the president.

James Carnahan
Baker City