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The Uncertain Legacy of *Kellas v. Dept. of Corrections*

By Gregory Chaimov

It is moot whether there be divinities.

Allen Tate

The principle of separation of powers deters one branch of government from "mount[ing] the bully pulpit in order to lecture another branch of government about how to do its job." *United States v. Mussari*, 168 F 3rd 1141 (1999) (Kozinski, J., dissenting).

The Oregon Supreme Court calls itself the "final arbiter of the Oregon Constitution"—*State v. Hancock*, 317 Or 5, 26 (1993) (Unis, J., dissenting)—a role that denies the Legislative Assembly the authority to set the scope of the court's constitutional power. *Ortwein v. Schwab,* 262 Or 375, 385 (1972), *aff'd,* 410 US 656 (1973) ("We look upon the doctrine of inherent judicial power as the source of power to do those things necessary to perform the judicial function for which the legislative branch has not provided, and, in rare instances, to act contrary to the dictates of the legislative branch"); *State v. Whited*, 239 Or 149, 153 (1964) ("All legislation *** must pass the judicial test").

Or does it?

Kellas v. Dept. of Corrections, 341 Or 471 (2006), seems to have invited the Legislative Assembly to empower courts to render advisory opinions—opinions that the Supreme Court has said the *constitution* does not permit. *E.g., Brown v. Oregon State Bar,* 293 Or 446, 449 (1982) ("in the absence of constitutional authority, the court cannot render advisory opinions"). Whether *Kellas* really extended that invitation should be answered soon, because the Legislative Assembly has accepted the invitation, passing a new law, House Bill 2324, that authorizes courts to decide cases that previously had been considered moot.

Until recently, one might have thought that standing to sue and a justiciable controversy (the flip-side of mootness) were bedrock constitutional floors below which the Legislative Assembly could not tell the courts to go. In *Eckles v. State*, 306 Or 380, 386 (1988), the Supreme Court said that, in the absence of a "governing statute," a plaintiff still had to show an injury "in some special sense that goes beyond the injury the plaintiff would expect as a member of the general public." Likewise, in *Yancy v. Shatzer,* 337 Or 345, (2004), the Supreme Court said that the *constitution* limited application of "judicial power *** to the resolution of justiciable controversies," precluding challenges to actions that later stopped, even if those actions were capable of short-term repetitions that evaded review. *See* 337 Or at 363 (Balmer, J., specially concurring to argue for review of actions that "are capable of repetition and yet evade review because they become moot at some point in the proceedings").

The Court of Appeals certainly thought that the Supreme Court had said that the Legislative Assembly could not require courts to decide cases for plaintiffs whose interests in the outcomes did not rise above the constitutional floor. In *Utsey v. Coos County*, 176 Or App 524, 560 (2001) (en banc), the court ruled that "the legislature cannot simply declare that the elements of ripeness, mootness, and adversity have been satisfied."[1]

Then along came *Kellas*.

Scott Kellas had sought judicial review of Department of Corrections' rules under ORS 183.400—rules that applied not to Scott Kellas but to his son, Brian, who, unlike Scott, was in the custody of the Department. In the past, parents who had sought to assert family rights had not fared well. *See, e.g., Eacret v. Holmes*, 215 Or. 121 (1958) (parents of murdered child lacked standing to challenge commutation of murderer's sentence). The Court of Appeals followed in that line, dismissing the petition because invalidating the rules would have no practical effect on the father. 190 Or App 331 (2003).

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On review, the Supreme Court started its analysis by noting that, in ORS 183.400, the Legislative Assembly had granted anyone the right to challenge any rule: "[t]he validity of *any rule* may be determined upon a petition by *any person* to the Court of Appeals[.]" (Emphasis added.) By law, the Legislative Assembly had granted a right to sue with no "qualification for standing." 341 Or at 477.

The question then became whether the Legislative Assembly had the power to require the courts to review rules when the rules would have no practical effect on the petitioner—in other words, an advisory opinion. To answer the question, the Supreme Court made the following observations:

1. The lawmaking authority of Oregon's legislature under the Oregon Constitution is plenary, subject only to limits that arise either from the Oregon Constitution or from a source of supreme federal law[,]." 341 Or at 478; and

2. The Oregon Constitution contains no "cases" or "controversies" provision. 341 Or at 478.

The Legislative Assembly was, therefore, free to grant a right to sue to a person even though the outcome of the case would have no "practical effects" on the person. 341 Or at 486.

Of principal interest on the issue of mootness are the following lines:

[T]he "constitutional grant of judicial power did not include the power to decide cases that had become moot at some stage of the proceedings." That holding does not resolve the issue presented in this case, however. Here, the question is whether the legislature has the authority to empower any citizen to act as a private attorney general to enforce public rights. 341 Or at 480 (quoting *Yancy*, 337 Or at 362).

Do these lines mean that, unlike standing, mootness remains part of the constitutional justiciability floor? Or, do these lines mean that, as with standing, so long as the Legislative Assembly is empowering the enforcement of public rights, the Legislative Assembly can do away with a justiciable controversy, too?

In response to Kellas and Yancy, the Legislative Assembly passed House Bill 2324, which reads:

In any action in which a party alleges that an act, policy or practice of a public body, as defined in ORS 174.109, or of any officer, employee or agent of a public body, as defined in ORS 174.109, is unconstitutional or is otherwise contrary to law, the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party if the court determines that:

(1) The party had standing to commence the action;

(2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect; and

(3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future.

The bill, if signed by the Governor, will become law January 1, 2008, and not long after that, we should find out whether the courts will decide cases like *Yancy* (city's exclusion order expired before plaintiff could complete challenge) and *Edmunson v. Dept. of Ins. and Finance*, 314 Or 291, 838 P2d 589 (1992) (rules superseded before petitioner could complete challenge). Stay tuned.

Endnotes

1 A reader of appellate court opinions may note some tension between the judges who read and those who write the Supreme Court's opinions. *See, e.g., State v. Ramirez*, 207 Or App 1, 4 (2007) ("Our decision reflects the best attempt of the members of this court to understand the fair import of those decisions and to apply them in light of what we understand to be other applicable law. If we have erred, it is not for want of earnest effort or for lack of regard for the authority of the court.") In *Kellas* itself, 341 Or at 485, the Supreme Court "acknowledge[d] that three recent decisions from this court may have caused some confusion in the application of statutes conferring standing on persons who do not assert a personal interest in the outcome.

Letter from the Chair

By Les Swanson

Just recently the Constitutional Law Section distributed a description of the Section to newly admitted members of the Oregon State Bar. I will reprint it here, with some additions:

"The Constitutional Law Section is involved with issues, education, legislation, and litigation concerning the Oregon and U.S. Constitutions and related subjects. Our activities include the following:

1) We sponsor an annual CLE on constitutional issues with outstanding speakers from Oregon and the nation. For the last several years, Erwin Chemerinsky, Professor of Constitutional Law, Supreme Court advocate, and a leading national scholar has participated and given a review of the significant cases in the most recent U.S. Supreme Court term.

2) We sponsor the orconlaw blog at Typepad.com where current constitutional and related issues are discussed, information is posted, and comments are invited.

3) We issue one or two newsletters each year, electronically, with analysis and summaries of recent Oregon constitutional law cases, book review, news articles, etc.

4) We have a sesquicentennial committee working on preparing television and dvd programming for public television and for educational uses on the Oregon Constitution, its founding, its evolution, and its most significant sections. So far, we have $10,000 in grants to assist this project.

5) We have a legislative committee that tracks significant legislation involving Oregon constitutional issues.

6) We have an amicus committee (in the formations stages) that will track significant constitutional litigation in Oregon and assist in various ways to see that important issues are adequately addressed.

This year's CLE will be held on November 30 at the Portland Convention Center.

Professor Erwin Chemerinsky (Duke Constitutional Law Professor and advocate in the Supreme Court) will review with us the key cases from last year's Supreme Court docket. Their will be an emphasis on the role of history in the making and development and interpretation of the Oregon Constitution. Professor of history at Portland State University, David Johnson, will speak as will distinguished members of the bench and of the bar in Oregon. Look for the announcement and be sure to come.

We are looking for a blog master or several blog masters to manage the orconlaw blog at typepad.com. The blog has been running for about two years now and it has had its interesting days, but it needs more constant attention from a few members of our section to make it interesting for all of us over the long haul. Please send me an email at lesswanson@comcast.net if you are interested in becoming more active in our blog activities. The blog is centered around constitutional law, but legal theory, ethics, history, Oregon history, sociology, psychology, political science, literature and other areas of interest are all relevant to constitutional law and interpretation.

We hope that you enjoy this newsletter and I invite your comments as to what you would like to see more of or less of in our newsletters. Also, be sure to email me if you are interested in contributing to the next newsletter that should come out no later than six months from now.

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The 2006-2007 Grant High School Constitution Team – Third In The Nation

By Henry Breithaupt

In mid-September of 2006, 36 students, 10 coaches and a teacher assembled at Grant High School to begin the process of studying the federal constitution, its philosophical and historical antecedents and its application and construction throughout the last 220 years. The students followed in the footsteps of teams from Grant that had finished in the top ten teams in the national competition for the last three years. They also faced what they knew would be stiff competition from the teams organized by Lincoln High School and Lake Oswego High School.

Teams divide themselves into six units, each unit being responsible for studying and writing a "direct " presentation on three questions – each of which is related to the theme for the unit; Unit One covers the historical and philosophical background of the constitution, Unit Two covers the Convention, and so forth. The "directs" , being four minutes in length, are interesting, but the fur flies when the students must field six minutes of unrehearsed questions from a panel of judges. This format is used at the Congressional District level, the state level and the national level.

At the state competition the Grant team prevailed by a very thin margin – proving the observation many have made to the effect that it is harder to "get out of Oregon" than it is to finish in the top ten nationally. The state representative, this year Grant, competes in Washington D.C. at the end of April with teams from each state and the District of Columbia. Over the first two days of competition, fifty-one teams are winnowed to ten. Those ten teams compete on the final day on Capitol Hill – this year in hearing rooms in the Rayburn House Office Building. On this day the questioning, from academics in relevant fields, state court judges and educators, becomes even more intense and probing – and it extends for eleven minutes. This year the team from Colorado finished first, the team from California finished second and the team from Oregon finished third. All other teams in the top ten are considered to finish fourth.

I interviewed six students from the team from Grant to give our membership a sense of what some high school age kids with an interest in constitutional law have been thinking and doing. To a question about why they participated in the program, some indicated they wanted this as a start to a potential career in the law, some admitted to succumbing to peer pressure or the recommendations of students from teams of the past. Some had been inspired by other classes they had taken.

Asked whether prior to this activity they had read the federal constitution or a Supreme Court case, most admitted that they had not read either source of constitutional principles prior to this class but now had remedied that deficiency. Of particular interest to many of you will be the fact that most of those interviewed knew Oregon had its own constitution, although no student had read the document. The knowledge of the existence of our own constitution came from the process of discussing with parents or others issues on which those people had recently been asked to vote. On a final substantive question, all of those interviewed strongly agreed with the proposition that judicial review is valid – an answer I am sure was unaffected by the fact that I had just agreed to by them each a gelato dessert.

The process and competition is not all books and cases. On the visit to Washington itself, the students were interested that the place really did exist – with real and impressive buildings and earnest looking people scurrying around doing the work of the government. A visit to the National Archives gave all a thrill as they say the actual documents to which they had all paid so much attention over seven months. As one of the coaches on the team, I will tell you that it is a thrill to see the eyes of the students when they look at the Constitution, the Bill of Rights or one of the editions of Magna Carta. There is hope for the future. There is also a thrill for these students to see others from all fifty states and the clusters of other Americans and foreign visitors who still marvel at so much of what Washington has to offer to the eyes.

All of the students interviewed hoped that more schools would enter the competition, even though only one from each state wins the right to work for an extra four months – with two or three meetings a week - to prepare for nationals. Finally, although some students have a definite interest in a career in the law, some do not . All, however, have an interest in work that involves public policy and believe that this intense educational

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Book Review

by Les Swanson

Robert Summers, Emeritus Professor of Law at Cornell University, has now completed his book, *Form and Function in a Legal System: a General Study,* Cambridge University Press, 2006. Summers was a law professor at the University of Oregon School of Law in the 1960s as was Summers' teacher at the Harvard Law School, Lon Fuller, who taught at Oregon for several years in the early 1930's. The inside flap of the jacket cover of Summers' book summarizes in three questions the issues that he is addressing:

1) What are the defining and organizing forms of legal institutions, legal rules, interpretive methodologies, and other legal phenomena?

2) How does frontal and systematic focus on these forms advance understanding of such phenomena?

3) What credit should the functions of forms have when such phenomena serve policy and related purposes, rule of law values, and fundamental political values, such as democracy, liberty, and justice?

Questions 2 and 3 assume that the answer to question 1 is positive. Because the word "form" figures so prominently in the three questions, our first question as readers is likely to be: "What does Summers mean when he refers to "the defining and organizing forms" of legal phenomena? He answers the question on page 5 where he writes that he is introducing a "form-oriented mode of analysis as the main method for elucidating the nature of functional units and of the legal system as a whole." He then tells us that "[t]his overall form is defined here as the purposive systematic arrangement of the unit as a whole – its 'organizational essence' and is to be further analyzed in terms of its constituent features, and their inter-relations."

Summers in his book proceeds to apply his theory of form and function to legal units like, rules, legal methodologies (e.g., statutory interpretation), contracts, legal institutions (legislature, executive, judiciary), etc. Here are three important points that Summers makes about his "form-oriented" approach to understanding law:

1) The form oriented approach should be primary and a rule-oriented analysis secondary. (This pits Summers against H.L.A. Hart, Joseph Raz, and other legal positivists who argue that law is best understood as being made up of rules, both primary and secondary rules.)

2) The purposive rationales for an overall form must be formulated before, and are logically prior to, the formulation of any rules purporting to prescribe such form. This places purpose front and center in Summers' theory.

3) The formal features of a functional legal unit make "imprints" on each other and on components of content in a rule. Functional legal units, of which rules are one type of unit, "simply cannot be adequately understood without intensive focus on their forms, formal features, specifications of material and other components, and the effect and <u>imprints</u> of form on other formal features and on material components." Pages 7-8. (emphasis added)

The logical priority of purposes over rules (point 2 above) is a central point of Summers' theory. In his view, we cannot logically draft a rule that derives from a form for a valid contract (the voluntary exchange of promises between two or more persons, for consideration, etc.) unless we know the purposes for the overall form that is being prescribed. But, how much do we need to know about purposes if we know the kinds of situations in which contracts are used and something about the pitfalls that occur when contracts lack certain central or supplementary features?

And, what if a libertarian decides that the central purpose of the overall form of a bilateral contract is to highlight the ideal of people acting voluntarily such that in addition to the usual functions that contracts fulfill for us all bilateral contracts will also serve as a beacon for an exaggerated, libertarian, human freedom in the world? If we must logically front-load the forms that we use in the law with purposes, then aren't we loading up the forms that we use, for example for bilateral contracts, with values that some may prefer (like a robust form of libertarian freedom) where that emphasis on freedom then determines the kinds of legal rules that we draft to govern the use of bilateral contracts?

But, if that is the case, Summers' arguments in the book that good form creates good values in both the legal system and in the broader society are suspect, since those values, in the form of purposes, are being front-loaded into forms before the forms are put to work in shap-

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ing rules of law. If Summers is to avoid making circular arguments about the connection between overall forms and certain normative values and how these forms lead to rules, methodologies and institutions that exemplify norms of the rule of law and of a good political society, then he has to give the reader persuasive arguments as to why the values that are front-loaded into the overall forms are either directly or indirectly the right values. I question that he has adequately done this.

For example, Summers claims that fundamental purposes of the form for a valid bilateral contract are: 1) realization of free private choice; 2) individual autonomy; 3) promise-keeping integrity; and 4) free market exchange. P. 216. He then claims that without the overall form of the bilateral contract parties who enter into such contracts "…would realize far less free choice and private autonomy, and there would be many fewer occasions to vindicate the integrity of promise-keeping as well." P. 222. Summers further claims that as a result of common usage of the overall form for the bilateral contract, there is a facilitation of free market exchange and economic efficiency. P. 224. We can see that where the value of freedom is heavily front-loaded into the purposes for the overall form of the bilateral contract the participants in bilateral contracts are likely to experience that sense of freedom and that the results of many bilateral contracts will be the likely promotion of free trade.

Obviously, how we formulate the purposes for the overall form of the bilateral contract, under Summers' theory, will be a crucial factor regarding the results to the participants and to the larger society. What if the political value of equality is given similar weight to the political of freedom as one of the purposes for the overall form of the bilateral contract? Then, perhaps, we end up with some rules that are influenced by the purposive overall form of the bilateral contract that give an ordinary citizen consumer who has entered into a bilateral contract with the Wells Fargo bank for a home loan and trust deed some "evening up" advantages when it comes to interpreting ambiguities in the contract language. Clearly, in Summers' theory of form and function the battle over the purposes for the overall forms that will influence the legal rules to be adopted is where the action lies. And, fundamentally, it will be front-loaded values that will determine the legal phenomena that end up on society's back loading dock.

Too much focus on form instead of on the functions that contracts must perform in western, generally capitalistic, societies, will overemphasize form and underemphasize function. This is why the title of Summers' book refers to Form and Function. He recognizes that there needs to be attention paid to the interactions between the two, and that trouble occurs when one or the other is ignored.

But, there is a more serious problem than whether form and function get out of balance. It is the problem of whether there are such things as "forms" as Summers describes them. If he is arguing that we generally like to have some idea of what it is that we want to accomplish before we set about doing it, develop some criteria, methods and tools, then set about doing it, and often revise our goals and criteria, methods and tools as we go along, we can readily accept this as part of human activities. But, his thesis is not just that we generally plan before we act, and that it is a good thing that we do. His thesis places purpose first, then form, then rules, in that order of logical priority in the law.

Formalists normally emphasize the significance of rules in a legal system and claim that disputed questions of law must be settled by the rules of law in the formal way in which legal precedents are followed to their conclusions. Instrumentalists normally emphasize the purpose or purposes of a law and are willing to have the purpose(s) of a rule of law determine the right answer to a disputed legal question where the rule of law is poorly drafted, is confusing, incomplete, ambiguous, etc.

Summers emphasis on form and function is interesting because he takes two aspects of law – its formal rules and its purposes – and attempts to combine them into one comprehensive and non-contradictory theory. Traditionally, either legal rules or purposes trump the other. For the instrumentalist, purposes can and often do trump rules. For the formalist, rules can and often do trump purposes. It is difficult to see how one can have it both ways. But, Summers' theory attempts to have it both ways.

Perhaps Summers is right. How can we rationally enact a rule that requires a certain form for a valid bi-lateral contract without knowing something about what the purposes of contracts are? In fact, the very idea of function seems to imply or at least infer that functions fulfill purposes. Purposes are reasons for humans doing or not doing something. They may not be good reasons, but they are reasons nonetheless. But, Summers' claim isn't that we act irrationally if we use a rule to prescribe a

form of contract without first formulating the purposive rationales for that form; his claim is a much stronger one, that we cannot logically do so.

His claim is that without considering the purposes that serve as reasons for the form of a valid bi-lateral contract we cannot logically enact that form into law by a rule of law. Surely he is wrong about this. Legislative acts occur daily where a rule of law is passed that requires a certain form for a contract, an administrative rule, damages in a tort action etc., and the legislature, especially individual legislators, have not formulated the purposive rationales for the form being prescribed. They may not have taken enough time; they may not understand the issues; they may not care about this particular issue; but, nonetheless, the legislation is passed, the rule goes into effect, and it is valid law. Such a law may be stupid; it may be irrational; it may be wrong, it may be psychologically odd, but it is not contrary to logic unless one believes that consideration of purpose must always precede enactment of a rule of law.

Many human actions have no purpose. Many actions are not even conscious actions. "Why did you do it?" "I don't know; I just did it." Many rules of law have been passed where there has been no formulation of purposive rationales. Maybe there were some desires at work – "We just wanted to show the opposition that we had the power to do it" – but, fulfilling a selfish desire, or exercising power to gain more power, would not normally be considered to be "formulating purposive rationales." I agree with Summers that it is generally desirable that we formulate purposive rationales before deciding on a form for a valid contract; but I disagree that it is logically required. But, who cares? What difference does it make whether it is desirable or logically required?

The difference is that some believe that the validity of a law should depend only on whether there is a valid rule of recognition that confers validity on the rule. These people are legal positivists. Others believe, or have believed, that a law can be invalid because it is unjust, contrary to religious law, irrational, or because it enacts a form of contract without any formulation of the purposive rationales for that form of contract. I am not saying that Summers believes this. But, I am saying that Summers' theory and his argument on logically priority could lead one to conclude that a statute enacting the form for a valid contract would be invalid if it could be shown that the legislators did not formulate sufficient purposive rationales for the overall form of a valid contract before enacting the legislation.

Generally, we don't want decisions about the validity of the law to devolve into arguments over purposes because then people will begin to believe that purpose is more important than the actual enacted law. For example, people may then believe that because a law permitting certain types of abortion wasn't preceded by a careful formulation of the purposive rationales for the overall form of the permission given, the law is invalid. Or, because many people believe that sex between persons of the same gender is immoral, if it can be shown that there are no purposive rationales for an overall form of rule that would permit it, any legal rule that does permit it is invalid.

Perhaps, none of what Summers has to say about form and function and purpose would lead to any of the above scenarios. Still, it remains true, that the legal positivist's belief (H.L.A. Hart's, for example) in the need for the separation of law from morals is motivated in large part by historical examples and current efforts of people to tie the validity of law to its moral rectitude or the lack thereof. The attitude that legal validity hinges on moral rightness leads people to enact their moral beliefs into law so that the law will be valid for them and it leads people to claim that laws with which they strongly disagree are invalid because the laws violate higher moral laws.

We will understand Summers' claims better if we consider an example, one that he uses in his book (the example comes from H.L.A. Hart's book, *The Concept of Law, 1961*). The example involves statutory interpretation of a statute that reads: "No vehicles may be taken into the park." But, first we need to consider what Summers says about statutory interpretation. He tells us that legal methodologies are a special type of functional legal unit, page 241, and then he introduces an interpretative methodology for statutory interpretation as an example of a legal methodology.

For Summers, the constituent features of the overall form of a duly designed methodology for interpreting statutes are: 1) A primary criterion of faithfulness to the form and content of a statute being interpreted: "for example, conformity to standard ordinary, technical, or special meanings of the statutory words in light of purpose and context." 2) Recognized types of interpretive arguments that implement the foregoing primary criterion. 3) Principles prioritizing such arguments.

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May a person ride her horse into the park without violating the prohibition against vehicles in the park? Is a horse a vehicle? A standard dictionary tells us that a vehicle is "any means of carriage with wheels, runners or the like." Page 260. If the plain meaning of the text is the first criterion in the methodology, then we will decide that horses are permitted in the park and that there is no prohibition on riding a horse in the park.

However, if our primary or first criterion for interpreting statutes is to determine the "ultimate purpose" of the statute, and if the legislature placed a preamble to the statute stating that the statute's purpose is to make the pedestrian pathways and grounds of the park safe for all park users, then a horse could be declared the equivalent of a vehicle in light of the purpose of the statute and because "ultimate purpose" is the primary criterion for interpreting statutes, riding the horse in the park would be prohibited. But, if the primary criterion in the methodology for interpreting statutes is legislative history, and if all the debates leading to the passage of the statute show that only motorized transportation were mentioned, then a horse should be permitted in the park.

This example of Summers demonstrates that how we define and prioritize the criteria for interpreting statutes will effect the decisions we make. But is there any indication that "overall form" has anything to do with it, other than the preparation and use of a prioritized set of criteria to consider in making our decisions? Is this all that Summers means by "overall form?" Is "overall form" just another term for carefully considering what we are doing, selecting our criteria and methodologies, and prioritizing the criteria we use to make decisions? I don't believe so, and because I think that Summers means more than this, some real difficulties arise.

First, purpose is central to Summers' theory. It is logically prior to everything else in understanding legal phenomena. It is the first word used in his definition of form: "The purposive systematic arrangement of the unit as a whole – its 'organizational essence….'" Page 5. Second, for Summers "the 'imprints' of constituent formal features on each other and on components of contents in a rule, must be a central focus." Page 7.

In footnote 12 on page 7, Summers writes that "the word 'imprint' may, to some, not seen strong enough here to do justice to the effects of well-designed form on material or other components of content. However, an imprint can be 'deep' and 'indelible'…Jhering used a different metaphor…the 'most sharply etched characteristic of law." Jhering also said that "form is to the identity of such a unit as the 'mark of the mint is to coinage.'" page 13.

Summers acknowledges his former teachers Lon Fuller and H.L.A. Hart as inspirations for his book, but the major inspiration for Summers is the German legal theorist, Rudolf von Jhering, who lived and wrote in the nineteenth century. He is sometimes referred to as the father of sociological jurisprudence. For Jhering, when individual interests conflicted with societal interests, he assigned greater weight to societal interests. His major work was *Der Zweck im Recht* (Purpose in Law) or, as published in English in a translation from the German by Isaac Husik, *Law as a Means to an End.*

Jhering took Bentham's utilitarian calculus and reframed it in terms of the accomplishment of a social purpose as the final end rather than the aggregation of the pain and suffering of individuals. Like Summers, Jhering was not degree trained as a philosopher, but Jhering described himself as a law professor and naturalist with a philosophical bent. He believed that he could usefully engage in the philosophy of law by having "the necessary knowledge of the subject (law), scientific earnestness, and an eye for the universal." Page iv of the Preface to *Law as a Means to an End.*

For Jhering, purpose is the creator of the entire law. "The man who acts does so, not because of anything, but in order to obtain something. This purpose is as indispensable for the will as cause (Newtonian cause) is for the stone (to fall)." Page 2 *Law as a Means to an End.* For Jhering, only purpose moves the Will and it is only purpose that motivates men to achieve social good. Hence, purpose is the creator of the entire law.

Jhering was an inspirational figure for the American legal realists in the early twentieth century. Brian Tamanaha in his book, *Law as a Means to an End: Threat to the Rule of Law,* Cambridge University Press, 2006, took the title of his book from Jhering and cites Jhering and Dewey as significant critics of the then prevailing formalist views of the law. Tamanaha describes formalist thinking in this way:

"Philosophy, ethics, economics, and the social sciences emphasized internal coherence, logic, abstraction, typology and categorization, unchanging laws or immanent patterns, and order, often to the neglect of close attention to reality." Page 49, *Law as a Means to an End*.

Formalist thinking in its most exaggerated sense understands the law as a set of principles or rules found in case law and statutory or constitutional law and from which other legal principles and finally decisions can be deduced. The stereotype of formalism is mechanical jurisprudence – rules and principles and deductions from them. In its strongest, deductive characterization, formalistic legal conclusions can only be derived from valid, recognized legal sources by the logical process of deduction.

U.S. Supreme Court Justice, Antonin Scalia, is an example of a current formalist with his emphasis on the original meanings of the language of the U.S. Constitution and a doctrine of restraint upon interpretations of the Constitution that go beyond those understood original meanings. Summers is a formalist of a very different cast than Scalia. Summers' formalism has a strong instrumental influence. This is not surprising because both Lon Fuller and Rudolph von Jhering were strongly instrumental as well as formalistic in their legal philosophies.

Instrumentalism, pragmatism, and functionalism are all closely related. American philosophy and American legal philosophy in particular, are strongly influenced by them. Functionalism is primarily concerned with how ideas and concepts function in relation to action in the world. Justice for a functionalist will have much more to do with how people act in relation to their use of the concept "justice" than with its meaning derived from its relationships with other concepts or people's attitudes about justice, or what people say about justice.

Summers, too, is concerned with how legal units function and he believes that when they function well it reflects back favorably on the purposive overall forms that were used to construct those legal units in the first place. The title of his book is no accident: *Form and Function in a Legal System: a General Study.*

Throughout all theory, however, including theory in philosophy and in law, there is inherent tension between form and function. In ethics, form often consists of principles, sometimes prioritized, and considered to be presumptively valid, or sometimes, universally true. Ethical functionalism, usually referred to as instrumentalism, is much more concerned with actions in the world and their results than it is with loyalty to a set of principles.

The formalist claims that his account of the structure of the world, whether it is about the physical world, social structures, ethics, or law, will consist of certain propositions, statements, principles or "forms" that represent or aim at the truth about such things. In its circular form, formalism consists of truth-oriented forms that when faithfully applied will yield epistemic or normative truths. When Summers writes about contracts, and the form of a bilateral contract, there is a strong emphasis on free choice and autonomy, on promise keeping integrity, economic exchange, and efficiency.

It is no surprise, then, that values front-loaded by Summers into the formal processes for producing bi-lateral contracts then show up in the results that Summers claims bi-lateral contracts produce in western, capitalistic societies. Summers writes, "As Jhering would have said, form is the "innermost essence" of contracts…." P. 215. Without studying form "…contracts could not be adequately understood as instruments of free choice, autonomy, promise keeping integrity, economic exchange, and efficiency, all of which are purposes realizable either through the very processes of creating and performing contracts, or through the outcomes of these processes, or both." p. 215.

Summers has one foot in the formalist canoe and the other in the functionalist row-boat. The central question about his book is whether he manages to combine the two into one water-worthy vessel or whether he is still straddling the two when he pens his last line. Brian Bix, Professor of Law and Philosophy at the University of Minnesota, reviewed Summers' book in the March, 2007 issue of Ratio Juris, vol. 20, No.1 (pp 45-55). Bix concludes that Summers' position is more strongly on the side of functionalism (or legal realism) than on the side of formalism.

Bix notes that "Summers' discussion of form emphasizes the way that form helps to achieve results. While the focus is on form, the underlying theme and motivation is one central to the (legal) realists: That law serves human purposes, and should be evaluated based on how successful it is at serving those purposes." Bix at p. 46.

I agree with Bix about Summers' emphasis on human purposes and the emphasis on successful serving of those purposes. The driving power of form in Summers' book comes from human purposes. As quoted above, Summers has written: "This overall form (of a functional legal unit) is defined here as the purposive systematic arrangement of the unit as a whole – its 'organizational essence' and is

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to be further analyzed in term of its constituent features, and their inter-relations." P. 5. (emphasis added)

Summers loads purpose into form and makes it logically prior to using form to construct rules of law, so we should expect that the success or failure of the application of the rules will be dependent on whether the results of their applications serve the human purposes that were front-loaded into the overall form used to create the rules. This is very much a circular affair.

Summers claims that "due form in rules" can serve general values of the rule of law and the realization of "democracy, justice, freedom, security, rationality, and other fundamental political values." P. 136. He believes that the due form of rules have not "received their due" even though rules themselves are the "workhorse precepts of legal systems." But, how well do rules adhering to form serve fundamental political values that Summers does not mention, like equality, trust and caring? Values like equality, trust, and caring will not be well served unless they are acknowledged up front as important purposes for the overall forms of legal phenomena. The battle over forms is clearly the battle over the purposes thought to be important for the forms, and the winner of that battle over purposes will determine much of the content of the law.

In constitutional law an example of forms would be the judge-made rule of applying strict scrutiny in equal protection law under the Fifth and Fourteenth Amendments. Legislation concerning a fundamental constitutional interest such as race will receive strict scrutiny; gender receives only intermediate scrutiny; and education is not considered to be a fundamental interest. These levels of scrutiny are legal forms under Summers' theory and it is obvious that the real battle is over the purposes or interests that are considered to be fundamental (for example, race), quasi-fundamental (for example, gender), or non-fundamental (for example, education). The constitutional purposes or interests that are labeled as fundamental will be crucial to the results produced by the "forms" used in applying Fifth and Fourteenth Amendment equal protection law.

Summers claims that the overall form of most legal rules and of bi-lateral contracts consist of seven distinctive features:

1) Prescriptiveness (prohibited, permitted, or required)

2) Completeness (all of its parts or elements)

3) Definiteness (fixity and specificity)

4) Generality (if not general, it is only an order)

5) Structure (relations between its parts and the whole of the rule)

6) Encapsulation (authoritative source and manner of forming the rule)

7) Expressional (how and where the rule is expressed)

In a conversation with Summers about his book, he was most excited about discoveries like the one about rules – that there are seven constituent features of most all legal rules. If, as Summers claims, form makes its "imprints" on constituent formal features of rules and on the components and contents of a rule, is this "overall form" feature something that is inherent or naturally or metaphysically present in good legal rules?

Is the law a unique discipline with its own forms and rules and institutions that when done well in a western, democratic society is differently structured, differently studied, and differently understood than are other disciplines or institutions like medicine, sociology, economics, hospitals, social-service networks, religious law, or Wall Street? Is learning to think like a lawyer different from learning to think well? Is law just another human, institutional creation that involves structure, operational units, practitioners, subject matter, and outcomes, or is it unique with its own forms?

The way that Summers writes about forms leads me to believe that he believes that there is something quite unique, perhaps extraordinary, about a system of law. His emphasis on forms, "imprints", and the "organizational essence" of the "overall form" of a functional legal unit and of a system of law seems to exclude these same features from being properly applied to non-legal systems of rules, institutions, or methodologies.

I question whether Summers' theory of form and function would apply much differently to kitchen rules, kitchen units, and kitchen functions in an organization of the family kitchen than it does to legal rules, legal units, and legal functions in the organization of a system of law. Imagine a large family that decided to have a set of rules and governing committees for making rules for the kitchen units of the microwave, the toaster, the oven, the stove, the refrigerator, the dishwasher, the storage units, and family meals at the kitchen table.

Imagine that in addition to the rules, there would be governing committees for making rules, executing them, and enforcing them. There would be buyers, storage persons, and cookers. And, of course, there would be meeting times and places for the committees, pencils and paper for them to record their work, etc. We hope, of course, that no large family would go to such lengths to organize their kitchen; but, why wouldn't an elaborate organizational effort for the kitchen include all of the elements that Summers applies in his "form oriented" approach to a system of law?

The legal philosopher, Joseph Raz, argues that "the core of logic is not domain specific, nor could it be…For the most part we use one and the same language in all domains" (law, physics, accounting, medicine, religion, morality, etc.). Raz, Reasoning with Rules, P. 1, an unpublished manuscript in process, available on the internet at SSRN. However, Raz also argues that "inductive reasoning" may vary from domain to domain, and he claims that legal rules have three central features: 1) Content independence; 2) Opaqueness; and 3) A normative gap. Raz's understanding of the three central features of rules is quite different from Summers' claim that the overall form of rules gives them seven constituent features.

Raz uses a simple example to illustrate what he argues are the three central features of legal rules. Raz considers a private club with a rule that members are entitled to bring no more than three guests to any social function of the club. This rule is binding on club members not because it is desirable that club members bring guests or that they bring only a small number of guests. It is desirable because the club committee on rules formulated this rule and it is good for the stability and predictability of club conduct that rules of governance made by them are binding.

The rule is content-independent because its validity does not turn on the desirability of the acts for which the rule is a reason. Its validity turns on the club having designated the rules committee as the source of all rules governing the club. The rule is opaque because it fails to show what is good about the action for which the rule is a reason. And the rule has a normative gap because there is a gap between the value of having the rule and the normative force of the rule (what it prohibits or allows).

Contrast Raz's approach with Summers' concept of "overall form" and his seven constituent features of legal rules. For Raz, validity turns on the club having designated the rules committee as the source of all rules governing the club. For Summers, the quality of the legal rule (and at least sometimes its validity) will depend on how well the seven constituent features are "imprinted" on a particular rule.

And, for Summers, the purpose(s) of the rule will figure prominently in determining how well the seven constituent features are developed in the overall form of the rule. Purpose, remember, was the key for Rudolph von Jhering in understanding legal rules, and Jhering was a strong inspiration for Summers in the development of his form and function legal theory. For Raz, purpose takes a backseat in understanding legal rules. The most prominent feature of a legal rule for Raz is its validity. As H.L.A. Hart maintained, a primary legal rule either is valid because of a secondary legal rule of recognition, or it is invalid.

In the case of the club, the club members in its charter, or by an agreed upon majority vote, designated the rules committee as the source of all valid club rules. So, when a club member has three siblings and two parents in town from Norway and wants to bring them to the club's Sunday barbecue and sing-a-long, she can't do it, even though it's a damp summer evening and the turnout is expected to be low. The rule doesn't permit it and the rule is valid. If the rule is unfair, then members need to lobby the rules committee to modify the rule.

If Summers' seven constituent features of legal rules had been fully imprinted on the rule by the rules committee, then perhaps a better rule could have been formulated. Still, whatever the rule, it is most likely to define some limits, and when a fact situation surpasses those limits the rule will be applied and may prevent, for example, more than three guests being brought by a member to a social function.

Summers would claim, however, that when the purpose or purposes of the rule are fully considered in the formulation of the rule and when the seven constituent features of rules are fulfilled in light of the purpose or purposes of the rule, then better rules will result. And, those better rules will both further the values of a legal system, for example, fair notice, stability, and certainty, and will further the broader values of democracy, justice, freedom, security, rationality and other fundamental political principles.

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Lon Fuller, Summers' professor at Harvard, was a leading academic figure in the legal process movement in American law that developed post WW II. This movement, and Fuller, viewed law as imbued with social purposes. For Fuller, purposes in the law are the means to the end of legislation, executive actions, and judicial decisions. For Fuller, legal principles reflect common social aims, and judges develop these principles "…in the enterprise of articulating the implications of shared purposes. The gradual development of these principles by judges is the process of 'the law' 'working itself pure.'" Fuller, as quoted by Brian Tamanaha, *Law as a Means to an End: Threat to the Rule of Law,* Cambridge University Press, 2006, pp. 102,103,107. In short, Fuller claimed that the constituent and socially purposive forms of legal process produce better substantive results in the law, and lead to better substantive principles of law.

Raz's positivist views separate considerations of law from considerations of morality. A strong reason for this separation is that it prevents people, officials, judges and practitioners from claiming that a legal rule is invalid, and not really law, because it transgresses some higher moral principle(s) such as religious precepts, Fuller's internal "morality of the law" principles, or, perhaps Summers' form-oriented purposive approach and his seven constituent features of legal rules.

The legal positivist can be a strong moralist, but for the legal positivist moral arguments are better used to change the rules of law in the legislature; they are not the arguments that a court should normally accept in invalidating a rule of law in court. For the legal positivist, arguments about the validity of laws are generally limited to arguments about what H.L.A. Hart called secondary rules of recognition – for example, did the club fully vest its rule-making authority in the rules committee, or did it reserve a right to consider appeals made directly to the club membership?

In addition to legal positivism, Summers' "form oriented" approach to law is in competition with legal realism. Legal realism emphasizes everyday cause and effect relationships as leading to legislation, executive actions, and the resolutions of legal disputes. Human desires are what drive the law; not forms. Human desires are what end up shaping the law and determining the outcome of legal disputes. What people want, how many people want it, which groups are the stronger, and who is making the decision under what circumstances, will determine the outcome of most legislative efforts and court decisions. In my view, Summers theory competes more strongly against legal realism than it does against legal positivism.

Summers has been leading up to the publication of his book on form and function for more than fifteen years, and perhaps for the life of his teaching career. He has written many articles, chapters, and books where he has partially developed the ideas that he has now put together in this one volume treatise. His is an impressive range of work on contracts, the uniform commercial code, legal methodologies, legal rules, and legal theory.

The book is for serious reading; it is not an easy read, although it is well written and follows a rational chronology. As Brian Bix wrote in his review of the book, supra at p. 12, Summers has been out there, mostly alone, developing and defending his form-oriented approach to understanding law. He deserves a larger audience because understanding what Summers is saying gives a reader a much greater understanding of how the law sometimes works, and a theory of how we might be able to make it work even better. I think that Summers is describing law as he would like it to be more than he is describing law is it is. Even if his theory is equally applicable to an imagined system of purposeful organization for the family kitchen as it is for a system of law, it is very useful to thinking through how we formulate legal rules, understand bilateral contracts, develop legal methodologies and theorize a system of law.

Summers' form-oriented theory has merits that surpass the limits of legal realism in its baser forms and he offers a much richer picture of the law than does Ronald Dworkin in his theory of legal interpretivism. I do not think, however, that his form and function theory is a strong challenge to the work of the legal positivists, H.L.A. Hart, Joseph Raz, John Gardner, Jules Coleman and the many other scholars who have been working in recent years in the positivist tradition.

There is a metaphysical air about Summers' theory. Its references to "organizational essence", to "purposive systematic arrangements", and to forms, remind me of Plato's theory of forms and nineteenth German philosophers' emphases on "essences", "purposes" and "spirit."

There are good reasons to be concerned about theories that emphasize imagined forms of goodness and perfection and rightness in the law because they often substi-

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ECL Case Summaries

By David Leith and Erin C. Lagesen

***State v. Howard/Dawson*, 342 Or 635 (April 26, 2007) (Kistler, J.).**

Question Presented: "Whether Article I, section 9, of the Oregon Constitution prohibits the police from engaging in a warrantless search of garbage that a sanitation company had picked up in the regular course of business and turned over to the police?"

The Unanimous Answer: No.

In this case, the police became aware that one of the defendants had purchased one of the chemicals used to make methamphetamine multiple times. Based on that information, the police asked defendants' garbage company if it would let them have defendants' garbage after the company picked it up from defendants' house. The company agreed to do so, and gave police defendants' garbage on two occasions, after picking it up from defendants' house in the regular course of business. That garbage revealed information that on which the police relied to obtain a search warrant for defendants' house; the ensuing search of the defendants' house revealed additional evidence of drug manufacturing and use. Before trial, defendants sought to suppress that evidence, as well as the evidence obtained from their garbage, on the ground that the inspection of their garbage violated their rights under Article I, section 9.

On review, the Supreme Court held that Article I, section 9, does not prohibit the police from searching garbage that they have obtained from a sanitation company that picked up the garbage in the regular course of business, absent some showing of circumstances demonstrating that the defendants retained some interest – contractual or otherwise -- in their garbage after the sanitation company had picked it up. The court reasoned that the inspection of the garbage did not amount to a "seizure" under Article I, section 9, because the defendants had relinquished any possessory or ownership interest in the garbage. The court further reasoned that the garbage inspection did not constitute a "search" of the defendants because they had no privacy interest in their garbage, after they had turned it over to the garbage company "without restriction." The court noted that the extent of the defendants' retained privacy interest in the garbage was controlled by "the legal relationship between defendants and the sanitation company," leaving open the possibility that Article I, section 9, would prohibit a search of garbage under similar circumstances, if the relationship between the defendant and his or her garbage company was structured differently than the one at issue in this case.

***Carey v. Lincoln Loan Co.*, 342 Or 530 (April 12, 2007) (Balmer, J.).**

Question Presented: Is the Oregon Court of Appeals a lawfully constituted court?

The unanimous answer: Yes.

In this case, the defendant won a case at trial. The Court of Appeals reversed. Not willing to accept defeat, the defendant took the position that the Court of Appeals' reversal was a nullity because, according to the defendant, the Court of Appeals was a nullity. The defendant argued that Amended Article VII, which authorizes the legislature to create courts, was adopted in contravention of the separate vote requirement of Article XVII, section 1, in violation of the "canvas and proclamation" requirements of Article XVII, section 1, and in violation of the "full text" requirement of Article IV, section 1. The defendant further reasoned that, as a result, the legislature was not authorized to create the Court of Appeals.

The Supreme Court rejected that argument, declining to analyze whether the submission of Amended Article VII to the people in 1910 contravened any constitutional procedural requirements. Instead, the court observed that Amended Article VII had been amended by the people multiple times after its initial approval in 1910. It then held that those subsequent amendments implicitly validated Amended Article VII, even if it had been defective: "Irregularities in the people's adoption of constitutional amendments may be cured by subsequent constitutional amendments that the people enact that implicitly validate the earlier, defective amendment."

The court did not explain how many such subsequent amendments would be required to validate a measure that was submitted to the people in contravention of constitutionally-mandated procedures. Additionally, the court did not address what effect, if any, alleged procedural irregularities in the adoption of the subsequent amendments would have on the analysis. Finally, the

court did not explain why, if voters are permitted to "cure" procedurally invalid measures through subsequent amendments (measures that the court held were "void ab initio" in *Armatta v. Kitzhaber*, 327 Or 250 (1997)), the initial election approving the procedurally-irregular measure is legally insufficient to cure the irregularities. The court simply distinguished *Armatta* and other like cases by observing that those procedural challenges were filed "relatively soon" after the challenged measures had been passed, and before the voters had amended those measure, and before the legislature passed statutes authorized by them. Thus, it appears that the court may have retreated from its statement in *Armatta* that procedurally irregular measures are "*void ab initio*," in favor of a rule that such measures are *voidable*, provided action is taken to void them before the legislature and the people rely on them.

***Corey v. DLCD*, 210 Or. App. 541, *adhered to on recon.*, 212 Or. App. 536 (2007)**

This opinion explores one dimension of the interplay between Measure 37, the Administrative Procedures Act, and the Due Process Clause of the federal constitution. The petitioners applied to the Department of Land Conservation and Development (DLCD) under Measure 37 for either compensation or a waiver of certain land-use regulations. DLCD concluded that the regulations in question had reduced the value of the petitioners' property rights. In lieu of payment, DLCD waived the regulations, in part, to simulate the regulations in effect when the petitioners purchased the property.

The petitioners disagreed that DLCD's waiver was adequate to fully restore their rights. They filed petitions for judicial review of DLCD's waiver in both the circuit court and the Court of Appeals. Which court the petition properly should be filed in depended on whether it challenged an order in a contested case. An order in a contested case is an order that arises from a proceeding that should have followed contested case procedures, as directed by ORS 183.310(2)(a). Such procedures are required *inter alia* whenever the Due Process Clause requires a hearing at which specific parties have a right to be heard before the decision can be taken. ORS 183.310(2)(a)(A). The Court of Appeals quickly narrowed the issue to whether the order should have fo llowed contested-case procedures on that ground.

The Court of Appeals looked first to United States Supreme Court precedent, fashioning a cogent argument under *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) that an applicant for a government benefit enjoys no protected property interest in the benefit under the Due Process Clause. While *Goldberg v. Kelly*, 397 U.S. 254 (1970) recognized a protected property interest in the continuation of an existing benefit, *Sullivan* refused to extend that protection to an application for a new benefit. *Sullivan*, 526 U.S. at 60-61.

If "writing on a clean slate," the Court of Appeals said, it might well find under *Sullivan* that the Measure 37 petition gave rise to no protected property interest. The court, however, concluded that the Oregon Supreme Court in *Koskela v. Willamette Industries*, 331 Or. 362 (2000) already had interpreted *Sullivan* differently. In *Koskela*, the Oregon Supreme Court held that a workers' compensation applicant had a protected property interest in the proper extent of his benefits from the time at which he was determined to be eligible for such benefits. The Court of Appeals held that a Measure 37 claimant who has been granted a partial waiver similarly has established a protected property interest in the extent of that benefit.

The Court of Appeals held, therefore, that the Due Process Clause did entitle the petitioners to a hearing, so the order was in a contested case, and so the Court of Appeals properly had jurisdiction of the petition for judicial review. DLCD's petition for Oregon Supreme Court review is pending.

Subsequently, in *Emmel v. DLCD*, ___ Or. ___ (July 5, 2007), the Court of Appeals distinguished *Corey* and held that judicial review of DLCD's Measure 47 order in that case should be in the circuit court. The Court of Appeals reiterated that a property interest attaches under the Due Process Clause, triggering contested-case procedures, only after entitlement to some benefit is established. Because the *Emmel* petitioners' claim was denied, no Due Process rights attached.

***Meyer v. Bradbury*, 341 Or. 288 (2006)**

This case presented a challenge to Measure 46 (2006) under the separate-vote requirement, Article XVII, §1, of the Oregon Constitution. As construed in *Armatta v. Kitzhaber*, 327 Or. 250 (1998), that provision disquali-

fies any proposed constitutional amendment that makes more than one substantive change to the constitution, unless the changes all are closely related.

Measure 46 proposed an amendment to authorize legislative limits on campaign contributions and expenditures (CC&Es), thereby changing the Oregon Constitution's free speech protections under Article I, section 8. *See Vannatta v. Keisling*, 324 Or. 514 (1997) (holding such limits unconstitutional). Under the proposal, CC&E limits could be adopted either by a majority of electors on an initiative petition or by a three-fourths supermajority in both houses of the legislature. That constituted a change to Article IV, § 25, which otherwise generally requires only a majority vote of both houses to pass legislation. The lower court had held that the latter change shifted the constitutional allocation of the legislative power away from the legislature and to the people in a way that was not closely related to the change to free-speech rights under Article I, § 8.

The Supreme Court, however, found that the changes were closely related. Because regulation of campaign contributions and expenditures was beyond the existing legislative power altogether, the qualified grant of such power to the legislature could not be viewed as shifting power away from that body. Moreover, the court found fault with the entire concept of a "balance" between the unitary legislative power as exercised by the people and as exercised by the legislature.

Ultimately, the Supreme Court held that the challenged measure merely created, and simultaneously qualified, the legislative power to adopt CC&E limits. As such, the changes were closely related, and so did not violate the separate-vote requirement.

Constitution Team…

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By Henry Breithaupt

experience will prepare them for citizenship and its responsibilities

All of those involved in the Grant High program wish to extend a special thanks to those members of the Constitution Law Section, and the bar generally, who volunteered their time to help coach the kids, be judges at moot performances and otherwise encourage this activity. Civic virtue lives on.

Book Review

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By Les Swanson

tute illusions and allurements for difficult decision-making involving inherently conflicting principles and messy concrete realities. Summers' theory of form and function takes formalism to firmer ground because it attempts to combine formalism strongly with functionalism and its empirical foundations. However, the serious question remains as to whether theoretical constructs (form or rules) and consistently good outcomes can be successfully combined in a coherent manner in the same theory, or whether old-fashioned human judgment will always have to bridge the gap between these two components that are in permanent tension with one another.

Les Swanson, August 31, 2007

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