OREGON

CONSTITUTIONAL LAW

NEWSLETTER

Published by the Oregon State Bar
Constitutional Law Section
August 2000 - No. 2

The "Separate Vote Rule" Since Armatta: A Lot of Heat, a Little Light

David Schuman[1]

More than two years have elapsed since the Oregon Supreme Court struck down Measure 40, the "Crime Victims' Bill of Rights," because it violated the "separate vote" rule of Article XVII, section 1 of the Oregon Constitution by making "two or more changes to the constitution that are substantive and that are not closely related." *Armatta v. Kitzhaber*, 327 Or 250, 277, 959 P2d 49 (1998). The most vocal critics of *Armatta* were the law enforcement and crime victims advocates who had sponsored Measure 40 in the first place. More muted and persistent criticism came from the coalition of initiative supporters from across the political spectrum who saw in *Armatta* not an attack on prosecutorial powers, but part of a larger attack on direct democracy itself. Conversely, those who had grown increasingly wary of the "initiative industry" welcomed *Armatta* as a giant first step in the right direction. In the intervening two years, *Armatta* has continued to generate much discussion and a significant amount of litigation, but so far it has not lived up to its advanced billing as a significant new direction in the judicial review of initiated constitutional amendments. It remains to be seen if it ever will.

To amend the Constitution by initiative, a petitioner must submit to the Secretary of State a "prospective petition" containing at least 25 qualified signatures. ORS 250.045. Before the Secretary can allow the measure to circulate for signature-gathering, however, the Secretary must review it for compliance with such formal constitutional requirements as the "single subject" rule, Article IV, section 1(2)(d); the "no revision" rule, Article XVII, section 2; and the "separate vote" rule, Article XVII, section 1. *Holmes v. Appling*, 237 Or 546, 554, 392 P2d 636 (1964); *OEA v. Roberts*, 301 Or 228, 230, 721 P2d 833 (1986); *State ex rel Fidanque v. Paulus*, 297 Or 711, 716-17, 688 P2d 1303 (1984): *Armatta v. Kitzhaber*, 327 Or 250.

In the election cycle since *Armatta*, the Secretary

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EDITOR'S NOTE

Greetings! We welcome contributions from section members and others interested in constitutional law. We are interested in your articles, potential articles, letters to the editor, or other commentary on matters of interest to the section. Please send them to: **Madelyn Wessel, 1221 SW 4th Ave, Rm. 430 Portland, Oregon 97204. Fax: (503) 823-3089. Email: mwessel@ci.portland.or.us.**

of State received 105 preliminary petitions for initiated constitutional amendments to appear on the November, 2000 ballot. After consulting the Attorney General, he concluded that eleven of them violated the "separate vote" rule. Three of the eleven *Armatta* rejects (Proposed Initiatives 21, 33 and 55) were nearly identical variations on a single theme: a sweeping attempt to amend the constitution so as to eliminate restrictions on the peoples' initiative and referendum powers. Two (P.I. 132, 135) were nearly identical proposed amendments guaranteeing the confidentiality of personal financial information and also guaranteeing that unions could deduct political contributions from members' dues; another (P.I. 142) was a mirror image of P.I. 132 and 135, also dealing with confidentiality and union dues, but prohibiting automatic deductions instead of safeguarding them. Two proposals (P.I. 31, 37) required voter approval for new taxes and prohibited government from disseminating information that might influence the outcome of the vote. Thus, although the Secretary of State rejected eleven petitions, when the overlapping measures are aggregated, the more accurate number of rejects was six. In addition to those already mentioned, he also rejected:

- P.I. 26, a proposal to require state government to contract out all of its functions (not excepting its legislative and judicial functions) if a contractor submitted a bid that would result in savings to the public.
- P.I. 28, which would have restricted political contributions by public employee unions and corporations with public contracts.
- P.I. 116, prohibiting judicial review or legislative amendment of voter-approved tax cuts.

Only one of these rejections, P.I. 55, was challenged in court. Marion County Circuit Court Judge Terry Leggert upheld the Secretary of State's decision to reject. It therefore seems safe to conclude that, contrary to widely-reported assertions in the press, neither the Secretary of State nor the Attorney General has seized on *Armatta* as a tool to inhibit the people's power to amend the constitution. Of the measures rejected, either the petitioners themselves were sufficiently in agreement with the official rejections that they did not challenge them in court, or, in the one instance where they did, the court agreed with the government.

Thus, if *Armatta* is going to have a significant impact in the near future, it will come from the judicial branch. The vehicles of this impact will not be angry petitioners' challenges to measures that the Secretary of State rejected, but aggrieved citizens' challenges to measures that he approved. Four such challenges have already occurred. Thus far, the trial courts have ratified the Secretary of State's approval in every case, sustaining approval of two measures (P.I.s 12 and 15) that would have replaced the tax system with a unitary "flat tax" or "gross receipts" tax, a measure that requires voter approval of new taxes and tax increases (P.I. 47, qualified as Measure 93), and a previously enacted measure (Measure 62, 1998) that constitutionalizes many reforms in election law and guarantees the right of public employees to make contributions through automatic payroll deductions.

The Court of Appeals, however, has been less deferential. In *Dale v. Keisling*, 167 Or App 394, 999 P2d 1229 (2000), and *Sager v. Keisling*, 167 Or App 405, 999 P2d 1235 (2000) – the first two separate-vote cases to reach the appellate courts since *Armatta* – the Court of Appeals applied an extremely rigorous test in holding that the Secretary of State had erred in approving the two sweeping tax-reform measures, P.I. 12 and 15. The court held that two proposed changes to the constitution can be combined in a single amendment only "if a vote in favor of one necessarily implies a vote in favor of the other." *Id.* at 411**.** Thus, if a measure would make two changes to the constitution, and some voter could prefer to enact one of them but not the other, the measure violates Article XVII, section 1. This rule would significantly affect current initiative practice. While it would not put any constitutional change beyond the reach of the initiative process, it would enact a radical disaggregation rule. The result would not necessarily be fewer proposed constitutional amendments, but shorter ones. As petitioners discovered that they could not combine elements unless they are linked to each other by necessary logical implication, they would be likely to submit each separate part by itself. Whether enforcement of such a rule would ultimately make initiated changes to the state constitution harder to accomplish or not is difficult to predict.

The longevity of the Court of Appeal's tough new test, however, is far from certain. The Secretary of State petitioned for Supreme Court review of *Dale* and *Sager*. But both cases involved proposed initiatives that did not raise enough signatures to qualify for the November 2000 ballot by the cut-off date of July 7. It seems likely that the Supreme Court will determine that the cases are therefore moot, and apply what it has referred to as the "best practice" when cases become moot while on review: remand with instructions to vacate. *First Commerce of America, Inc., v. Nimbus Center Associates*, 329 Or 199, 986 P2d 556 (1999). If that happens, then neither *Dale* nor *Sager* will have any precedential value, leaving the Secretary of State, petitioners, and would-be challengers where they are now: attempting to apply *Armatta* with only the phrase "closely related" for guidance.

That state of affairs, in turn, may not last. Another case in the appellate pipeline, *Swett v. Keisling*, has now been fully briefed in the Court of Appeals. That case is a post-enactment challenge to Measure 62; it will therefore not become moot while on review. Within the reasonably foreseeable future, and hopefully before the 2002 election cycle moves into high gear, the Supreme Court may use that case to elaborate on *Armatta* so that Oregonians can know its full impact.

Origins of a Judicial Misstatement

Charles F. Hinkle[2]

Sometimes a plain, unvarnished factual mistake creeps into a court opinion. In *Fossi v. Myers*, 271 Or 611, 614 n 1, 533 P2d 337 (1975), the Court seems to have thought that Justice Robert S. Bean, who served from 1890 to 1909, and Justice Henry J. Bean, who served from 1911 to 1941, were the same person. Gremlins abound, even in courthouses, and the mistake in *Fossi* was harmless.

Sometimes mistakes of law appear in court opinions, too, though many of the "mistakes" are simply the result of choices between competing legal principles that others - especially losing litigants - may disagree with. Many years ago the dean of the University of Oregon Law School wrote that the Oregon Supreme Court had made an "unfortunate" departure from "the orthodox law of libel," which would "clutter the law up further with anomalous distinctions which have no merit." C. Carpenter, *Defamation - Libel* Per Se - *Special Damages*, 7 Or L Rev 353 (1928). Maybe so; but decisions like the one criticized by Dean Carpenter are part of the development of the common law, and it may overstate the case to call them "mistakes." They represent policy decisions that common law courts are required to make in deciding ordinary tort and contract claims. (Can you say "Fazzolari"?)

But sometimes a court's statement of the law is also a plain, unvarnished mistake. One such misstatement appears in *Barcik v. Kubiaczyk*, 321 Or 174, 186, 895 P2d 765 (1995), where the Court stated that in an action brought under 42 USC 1983, "in which a party claims to have been deprived of a federal constitutional right under color of state law, *** the state does not deny any right claimed under the federal constitution if the claim before the court is fully resolved by state law."

That statement is mistaken, as a matter of both fact and law. It has appeared in a few other Oregon cases, but its first appearance came in *Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981). In that case, the Court stated that when an Oregon court is confronted with a claim that presents both state and federal issues, "[t]he proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim." *Id.*

So far so good; the U.S. Supreme Court has often said that federal courts should follow the same sequence of decision making. *Wolston v. Reader's Digest Ass'n*, 443 US 157, 160 n 2 (1979) ("dispositive issues of statutory and local law are to be treated before reaching constitutional issues"). Chief Justice Carson has referred to this approach as "tak[ing] the first door out," and it is a well established part of Oregon's jurisprudence. Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 Will L Rev 641, 643 (1983).

But the Court in *Sterling* did not stop with its statement about the "proper sequence" of considering state and federal claims. It went on to say that this method of adjudication "is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law." 290 Or at 614. (I'll refer to the words following "because" in that sentence as "the *Sterling* statement.")

The *Sterling* statement had its origins in criminal cases where the question was whether particular conduct by police officers or particular rulings by trial judges deprived a criminal defendant of the protections of the federal Bill of Rights. In cases where the arguably erroneous action was one of procedure only, the *Sterling* statement makes sense: the defendant has not been permanently deprived of liberty until a final judgment of conviction is entered, and if state law precludes the entry of such a judgment, then there is no federal constitutional deprivation.

But the statement makes no sense in cases (civil or criminal) where the state's conduct constituted a substantive violation of a federal constitutional right at the time it occurred. The Equal Protection Clause of the Fourteenth Amendment, for example, prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." If Oregon had a statute that read, "The State shall issue drivers licenses only to persons with blue eyes," and if the State's Driver and Motor Vehicles Services were to deny a brown-eyed person's application for a license because of the statute, the State would *then and there* violate that person's rights under the federal Equal Protection Clause.

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To be sure, denial of the license would also violate the brown-eyed person's rights to equal "privileges" under Article I, section 20, of the Oregon Constitution, and if she were to challenge the denial, her challenge could be, and no doubt would be, "fully met by state law," as the *Sterling* statement puts it. But that fact does not mean that the statute, while it was in effect, did not violate the federal Equal Protection Clause. It is simply not true to say, as the *Sterling* statement would have it, that availability of relief under state law meant that the brown-eyed person's federal rights were not violated when her license application was denied.

So how did the Oregon Supreme Court come to make the *Sterling* statement? The mistake appears to be the result of the fact that the Court overlooked the distinction between the two distinctly different ways that a state can violate the Due Process Clause of the Fourteenth Amendment. That clause prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law," and the U.S. Supreme Court has recognized essentially two ways in which a state can violate it: either by depriving a person of one of the *substantive* rights that are protected by the Clause, or by depriving a person of the minimal *procedural* safeguards required by the Clause.

With respect to the *procedural guarantees* of the Due Process Clause, the *Sterling* statement is correct. If a state's *procedures* leading to the deprivation of life, liberty or property are deficient under the Due Process Clause, the state may avoid a violation of the Clause by providing, as a matter of state law, a level of procedural protection that *does* satisfy the federal standard. In such cases, the state has provided all the process that is due under the federal constitution, and there is no violation of a federal right.

On the other hand, if the state has violated a *substantive* right protected by the Due Process Clause, that violation is complete upon its occurrence. Like the equal protection violation in the drivers license hypothetical set out above, a substantive violation of the Due Process Clause does not disappear merely because the state's action may also have violated state law, or merely because the aggrieved person may obtain complete redress for her injuries under state law.

Thus, if an Oregon public school teacher begins classes each morning with vocal public prayer and Bible readings, the teacher then and there violates the students' First Amendment rights. Those rights are guaranteed against state infringement by Due Process Clause of the Fourteenth Amendment, and at the moment when the prayer is uttered, the state (acting through its agent, the teacher) deprives the students of a right "secured by the Constitution" (to use the words of 42 USC 1983): namely, the right to be free from an establishment of religion.

To be sure, the state, acting through some other agent (the school board, for example, or the Superintendent of Public Instruction, or a court), may subsequently acknowledge the violation, and conclude that the prayer or Bible reading also violated state law, but the federal violation was nevertheless complete when it occurred.

Similarly, if a police officer shoots and kills a fleeing burglary suspect, when the use of deadly force is not necessary to prevent escape or injury to a bystander, the officer has then and there violated the suspect's *federal* right to be free from an unreasonable seizure. At that very moment, the state deprived the suspect of life "without due process of law." (These were essentially the facts in *Tennessee v. Garner*, 471 US 1 (1985).)

The officer's actions may also have violated a host of state statutory and constitutional provisions, but the violation of the suspect's federal rights was complete when the shot was fired and the suspect was killed. If a court later determines that the officer's actions violated state law and awards damages under state law to the suspect's next of kin for his wrongful death, relief for the federal violation might become duplicative and improper; but it is not true, factually or logically, to say that the state (acting in the only way it can act, through one of its agents) did not violate the suspect's Fourteenth Amendment rights at the moment the shot was fired.

But don't take my word for it. The question of whether there has been a violation of the federal constitution is a question of *federal* law, and the U.S. Supreme Court has made it clear that the *Sterling* statement is incorrect. When state actors deprive a person of one of the substantive rights protected by the Due Process Clause, "the [federal] constitutional violation *** is complete when the wrongful action is taken." *Zinermon v. Burch*, 494 US 113, 125 (1990).

Of course, the state actor's conduct may also have violated state law, and state law may provide a remedy for the wrong, but neither of those facts can alter the reality noted in *Zinermon*: to state it in *Sterling*-like terms, at the moment the wrongful action is taken, the state *does* deny a right claimed under the federal Constitution *even if* the claim before the court in fact is fully met by state law. That is why an aggrieved plaintiff may bring an action under 42 USC 1983 for violation of her federal constitutional rights "despite the fact" that the state action also "violated the State's Constitution or statutes, and despite the fact that there are common-law remedies for [the wrongful conduct]." *Zinermon*, 494 US at 124-25.

As noted above, the Court in *Sterling* stated that analysis of state law "is required" before a court reaches a federal constitutional issue. However, the federal constitution imposes no such requirement on

state courts; the U.S. Supreme Court has expressly held that it has jurisdiction to decide a federal question on review of a state court judgment, even if the state court bypassed possibly dispositive state law issues and moved directly to a litigant's federal claims. *Orr v. Orr*, 440 US 268, 276-77 (1975).

The Court in *Sterling* presumably recognized that its "proper sequence" of deciding state and federal claims is not required by the federal constitution, for the only support for its stated "requirement" is the "*Sterling* statement" quoted above, which the Court supported with a "*see, e.g.*" citation to *State ex rel Oregonian Pub. Co. v. Deiz*, 289 Or 277, 613 P2d 23 (1980), and *State v. Spada*, 286 Or 305, 309, 594 P2d 815 (1979), a "*cf.*" reference to *State v. Tourtillott*, 289 Or 845, 618 P2d 423 (1980), and a footnote listing of eleven other cases which it said contained "[r]ecent affirmations of the point." 290 Or at 614 and n 2.

The cited cases do not, in fact, support the *Sterling* statement. The majority opinion in *Oregonian* discussed two claims made by the newspaper: first, that the closure of a juvenile court proceeding violated an Oregon statute, and second, that the closure violated Article I, section 10, of the Oregon Constitution. The Court rejected the first claim and upheld the second. There is nothing in the majority opinion in *Oregonian* to suggest that the Court thought that closure of the courtroom did not also violate the federal constitution; the issue simply was not discussed. There was no need to discuss it, because the newspaper obtained all the relief that it sought on state law grounds.

The only reference to the federal issue in *Oregonian* appears in a footnote in Justice Linde's concurring opinion, where he noted that the Court had "repeatedly held that article I, section 8, applies before and independently of any issue under the first amendment." 289 Or at 287 n 1. True enough, but that is a far cry from saying that the State may not simultaneously violate *both* Article I, section 8, *and* the First Amendment by excluding the public from a court proceeding.

The other cases cited by the Court in *Sterling* were all criminal cases. In each of them, the question presented was whether various procedures in a criminal prosecution comply with the minimum standards established for criminal prosecutions by the Due Process Clause of the Fourteenth Amendment. And in each case, the Court examined the prior question of what procedures are required by state statute or constitution. It is necessary in such cases to make that inquiry, because "[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon*, 494 US at 125 (emphasis in original).

Unlike the situation in which the state has violated a substantive right (the right to be free from an establishment of religion, for example), a procedural due process violation "is not complete unless and until the State fails to provide due process." *Id*. at 126. If the State does provide the minimum procedural protections required by the Due Process Clause, then by definition it has not violated that Clause.

That is what the several criminal cases cited in *Sterling* stand for, and that is *all* that they stand for: when the issue is one of *procedure*, a State does not violate the Due Process Clause if the procedural requirements imposed by its own laws meet or exceed the standards established under the federal Clause. But with respect to a violation of a *substantive* federal right, the *Sterling* statement made sense only on the solipsistic assumption that the State of Oregon has not acted until the Supreme Court has spoken.

But as the Oregon Supreme Court has itself emphasized, *all* state actors have an obligation to carry out their duties in a manner consistent with the commands of the constitution (*Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 364, 723 P2d 298 (1986), and a public school teacher acts in the name of and under the authority of the State of Oregon no less than the justices of the Supreme Court do. When a public school teacher begins her classes with vocal sectarian prayer, the State (acting, again, in the only way it can act, through one of its agents) violates the federal Establishment Clause. That violation does not disappear simply because the state Supreme Court may later decide that she violated state law as well. Persons aggrieved by the violation may obtain complete relief under state law, and in that case there is no need for a court to decide a federal question, but that is far different from saying that the state did not violate federal law when the event occurred.

Perhaps by now you are thinking, "So what? The Court's confusion over the two Justice Baileys caused no harm, and the *Sterling* statement is likewise harmless, because the litigant has obtained full relief under state law. No harm, no foul." But in fact, there is a harm caused by the *Sterling* statement, because it has led the Oregon Supreme Court to deny attorney fees to prevailing plaintiffs who are clearly entitled to fees under federal law.

The Court's error is most vividly illustrated in *Oregon State Police Officers Assn. v. State of Oregon*, 308 Or 531, 783 P2d 7 (1989), *cert denied* 498 U.S. 810 (1990). The plaintiffs in that case challenged a statute that prohibited state police officers from participating in election campaigns. They contended that the statute violated Article I, sections 8 and 20, of the Oregon Constitution, and the free speech and equal protection guarantees of the U.S. Constitution. They sought a judgment declaring the statute

unconstitutional and awarding them attorney fees under 42 USC 1988.

On the merits, the plaintiffs won. The Oregon Supreme Court held that the statute violated Article I, section 8, and that it therefore "need not determine plaintiffs' claims under Article I, section 20, *** or under the [federal constitution]." 308 Or at 537. And with respect to the merits, the Court was correct: the statute could be invalidated only once, and if it could be invalidated on Ground A, there is obviously no reason to consider whether it might also be invalidated on Ground B, C, or D.

But the Court then went astray when it further held that it was not required to consider the validity of the plaintiffs' federal claims for purposes of deciding their attorney fee claim under 42 USC 1988. The question of whether attorney fees may be awarded under that federal statute is, of course, a question of *federal* law. Inexplicably, the Court did not examine any of the legislative history of 1988, or consider any U.S. Supreme Court interpretations of the statute. Instead, it simply recited the erroneous *Sterling* statement, and concluded that since the statute had been invalidated on state constitutional grounds, "the state did not deny [the plaintiffs] any federal constitutional rights." 308 Or at 538.

That statement is plainly wrong. The statute challenged in *Oregon State Police* had been in effect for 56 years. For 56 years, the State had been gagging the political speech of state police officers, in violation of the officers' First Amendment rights. The fact that the statute also violated Article I, section 8, does not change that fact. But even if the statute did not violate the First Amendment, the Oregon Supreme Court was required, as a matter of federal law, to decide whether or not it did. That is because the legislative history of 1988 made it abundantly clear that when a plaintiff joins a claim for violation of a federal constitutional right under 1983 "with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees." (This language from the report of the House Judiciary Committee is quoted in *Maher v. Gagne*, 448 US 122, 132 n 15 (1980).)

In other words, as stated by the Ninth Circuit, "When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under 1988." *Carreras v. City of Anaheim*, 768 F2d 1039, 1050 (9th Cir 1985).

The plaintiffs in *Oregon State Police* thus had a *federal* right to have their *federal* claim considered for purposes of determining whether they were entitled to an award of attorney fees under 1988. The Court's suggestion that the matter could only be addressed by the legislature (308 Or at 538 n 8) is as inexplicable as the holding itself; it is the responsibility of courts to construe and apply federal law in cases where it has jurisdiction (and there is no doubt that an Oregon court has jurisdiction to hear federal claims under 1988; *see Barcik*, 321 Or at 183). Perhaps even more inexplicable is the fact that just over a year before deciding *Oregon State Police*, the Court itself had recognized that "[n]either the Oregon legislature nor the Oregon courts can limit the rights that a plaintiff has in a federal claim, even when that federal claim is brought in state court." *Rogers v. Saylor*, 306 Or 267, 284, 760 P2d 232 (1988). That, of course, is exactly what the Court did in *Oregon State Police*, without so much as mentioning, let alone distinguishing, the *Rogers* case.

As a result of the decision in *Oregon State Police*, a lawyer for a civil rights plaintiff who has both state and federal claims arising out of the same set of facts may well commit malpractice if the lawyer files the action in state court. If the action is filed in federal court, a prevailing plaintiff will recover attorney fees (even if the court decides the case on state law grounds). But if the action is filed in state court, the plaintiff has forfeited any possibility of recovering fees under 1988. That makes no sense, and it is wrong as a matter of federal law.

Fortunately, in law as in everything else, nothing lasts forever, and the present Court has shown a commendable willingness to take a fresh look at even very old precedent, when it concludes that the precedent rests on shaky foundations. It has been five years since the last appearance of the *Sterling* statement in an Oregon Supreme Court opinion, and perhaps the Court is letting it die by neglect, just as it has allowed its adoption, in *Eugene Sand & Gravel v. City of Eugene*, 276 Or 1007, 1012-13, 588 P2d 338 (1977), of the federal Lemon test to questions arising under Article I, section 5, to die a well-deserved death by neglect. Let us hope we have seen the last of both of them. *Requiescat in pace.*

* * *

A Field Guide to 1999 Oregon Constitutional Law

Madelyn F. Wessel[3] *& Alan Phelps*[4]

I. INTRODUCTION

Welcome to the Field Guide of 1999 Oregon appellate constitutional decisions. We offer this year's analysis with the same caveat as we introduced last year's: This summary is only a beginning tool to assess some of the work of Oregon's two appellate courts in the last year.[5] Much of the work of Oregon's appellate courts is not included. We again analyze only Oregon appellate decisions focusing on the state constitution and have not included decisions based on the federal constitution. Obviously many significant decisions were decided by the courts as a matter of statutory construction or common law adjudication. Many interesting constitutional decisions are also issued by Oregon's trial courts, but these are hard to find through any centralized method. To address this gap, we would like to invite the state's trial and administrative judges to send copies of written opinions involving Oregon constitutional provisions to the newsletter Editor for inclusion in next year's Field Guide. Finally, powerful and interesting dissenting and concurring opinions are written each year in the Oregon Supreme Court and Court of Appeals. We may try tracking these opinions independently in the future.

We have maintained last year's restrictive decision to focus only on the decisions of the last calendar year, although this plainly artificial decision excludes important constitutional decisions rendered in the last few months. However, with the benefit of last year's Field Guide under our belts, we have compiled a cumulative Table 2 which allows the reader to examine constitutional decisions by constitutional provision covering both 1998 and 1999.

As with last year's survey, we omitted discussion of cases that merely mentioned the constitution but provided little substantive interpretation or analysis. The majority of the cases in this category were ballot title reviews.

We continue to hope that others will find value in our attempt to explore the rhythm of Oregon courts' work from year to year across the constitutional spectrum and at a level that can be practically accomplished in a reasonable amount of time. Please send a note to the Editor if format or focus changes would make this article more useful in the future.

II. CASE STATISTICS

Table #1 permits a quick look at which courts handled a specific constitutional provision during 1999. Of the 81 substantive interpretations of the state constitution, the Tax Court produced 7, the Supreme Court produced 12, and the Court of Appeals 62. The number of interpretations exceeds the number of cases included in the survey due to the fact that some cases involved more than one constitutional provision.

Table #2 attempts to categorize interpretations based on two indices. "Scope" is a general subjective measurement of the depth of analysis, from a quick cite to a lengthy discussion, while "jurisprudential tactic" is a description of the type of interpretation. Many cases obviously fall on borderlines between these inexact categories, and to reread all of the cases under a particular constitutional provision is to invite continuous fiddling with our classification decisions. Nevertheless, however imperfect, this table provides a quick and general overview of the types of interpretations the courts produced in the past two years and an easy way for those seeking the most in-depth analyses to find cases quickly.

For the record: we could not resist modifying last year's categories. As a result, in order to create a cumulative 1998-1999 Table 2, we quickly reclassified last year's opinions where criteria were altered.

To illustrate the possibilities presented by the 1998-1999 cumulative table: If you are interested in looking at all of the 1998 and 1999 cases decided under Article I, section 9, for example, you can find the information

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[5] A few Oregon Tax Court opinions interpreting or applying the state constitution have been included as well.

in Table 2. By examining the column labeled "Scope," you can use that table to find the three opinions that in our view, at least, produced a significant discussion. By looking under "Tactic," you can also find, for example, the four cases we thought involved a new or expanded interpretation of this constitutional provision.

Table 2 also reveals the frequency with which individual judges handled particular constitutional provisions in the last two years. We hope this particularly helps section members who are preparing for oral argument to identify recent opinions on pertinent constitutional sections which were authored by individual judges.

Of course as constitutional law section members know well, whether or not a particular court or particular judge issues an opinion under a provision of the state constitution has virtually everything to do with the pleadings and arguments of the litigants. Further, established canons of judicial review dictate that constitutional questions will be reached only if alternative grounds for resolving the dispute are inadequate. Thus, if application of a statute or administrative regulation resolves the case, the court will not proceed, as a general matter, to address a litigant's constitutional arguments as well. For all of these reasons and many more, the statistical data presented below cannot and should not form the basis of value judgments about the work of a court or of individual judges. The information is merely a speedy tool to find out which judges have spent time in the last two years working on specific provisions of the state constitution.

Guide To Table 2:

Scope or Depth of discussion:

1. Succinct or summary treatment of constitutional issue.
2. Substantive analysis of a moderate length.
3. Significant discussion and analysis.

Jurisprudential Tactic:

A. Same rule / Court merely applies what it determines to be previous precedent.
B. Rejection of prior rule / Court overrules previous precedent.
C. New rule / Court determines the issue is novel and develops a new interpretation.
D. Expansion of old rule / Court reinterprets existing rule to cover what it sees as a somewhat new situation.

Note this is a new category since last year although one which we have yet to assign to a particular case. Clearly change in constitutional doctrine typically tends to come more slowly and through evolutionary processes such as those described as C or D tactics. Nevertheless, we think there is value in pointing out the possibility of this relatively rare event.

TABLE 1 – 1999 Constitutional Decisions by Court

Section	Total interpretations	Supreme Court Interpretations	Court of Appeals Interpretations	Tax Court Interpretations
1.2	1		1	
1.8	3	1	2	
1.9	22	2	20	
1.1	2		2	
1.11	14	2	12	
1.12	3		3	
1.14	1	1		
1.16	8	1	6	1
1.17	2	1	1	
1.18	4		4	
1.2	3		3	
1.21	6	1	5	
3.1	2	1	1	
7.3	1	1		
9.1	1			1
9.1a	1	1		
11.2	1		1	
11.11	2			2
11.11b	3			3
11.12	1		1	

TABLE 2 1998 and 1999 Constitutional Decisions *1998 Cases

Art.	Sec.	Scope	Tactic	Name	Cite	Opinion By:
1	2	2	A	Newport Church of the Nazarene v. Hensley	161 Or. App. 12	De Muniz
1	8	2	A	Shook v. Ackert*	152 Or. App. 224	Haselton
1	8	2	D	Hanzo v. deParrie*	152 Or. App. 525	Haselton
1	8	1	A	Wayt v. Goff*	153 Or. App. 347	Armstrong
1	8	3	C	Oregon Newspaper Pub. v. Dept. of Corrections*	156 Or. App. 30	Edmonds
1	8	1	A	Wheeler v. Marathon Printing Inc*	157 Or. App. 290	Haselton
1	8	3	D	Media Art Co. v. City of Gates	158 Or. App. 336	Armstrong
1	8	2	A	State v. Fleming	159 Or. App. 565	Landau
1	8	3	D	Fidanque v. State ex rel. Oregon Gov't Standards and Practices Com'n*	328 Or. 1	Gillette
1	8	3	C	State v. Rangel	328 Or. 294	Van Hoomissen
1	9	1	D	State v. $113,871 in U.S. Currency*	152 Or. App. 770	Armstrong
1	9	1	C	State v. Edgell*	153 Or. App. 108	Leeson
1	9	1	A	State v. Caron*	153 Or. App. 507	Riggs
1	9	2	D	State v. Johnson*	153 Or. App. 535	Edmonds
1	9	1	A	State v. Meyers*	153 Or. App. 551	Landau
1	9	1	D	State v. Haney*	153 Or. App. 642	De Muniz
1	9	1	A	State v. Jangala*	154 Or. App 176	Armstrong
1	9	1	D	Walls v. Driver and Motor Vehicle Services*	154 Or. App. 101	Edmonds
1	9	1	A	State v. Finney*	154 Or. App. 166	Armstrong
1	9	1	D	State v. Powelson*	154 Or. App. 266	De Muniz
1	9	1	A	State v. Herrera-Sorrosa*	154 Or. App. 28	Haselton
1	9	2	C	State v. Baker*	154 Or. App. 358	Haselton
1	9	2	A	State v. Roe*	154 Or. App. 71	Edmonds
1	9	1	A	State v. McCoy*	155 Or. App. 610	Armstrong
1	9	1	A	State v. Myers*	156 Or. App. 561	Armstrong
1	9	3	C	State v. Kruchek*	156 Or. App. 617	Armstrong
1	9	2	A	State v. Bishop*	157 Or. App. 33	Warren
1	9	1	A	State v. Cruz-Aguirre	158 Or. App. 15	Edmonds
1	9	2	D	State v. Beylund	158 Or. App. 410	Edmonds
1	9	2	A	State v. Fuller	158 Or. App. 501	Wollheim
1	9	2	D	State v. Larson	159 Or. App. 34	Deits
1	9	2	A	State v. Rutherford	160 Or. App. 343	Armstrong
1	9	2	A	State v. Knox	160 Or. App. 668	De Muniz
1	9	3	A	State v. Cocke	161 Or. App. 179	Wollheim
1	9	2	A	State v. Rodal	161 Or. App. 232	Deits
1	9	2	A	State v. Rocha-Ramos	161 Or. App. 306	Edmonds
1	9	1	A	State v. Rutledge	162 Or. App. 301	Edmonds
1	9	1	A	State v. May	162 Or. App. 317	Armstrong
1	9	2	A	State v. Kauffman	162 Or. App. 402	Deits
1	9	1	A	State v. Arabzadeh	162 Or. App. 423	De Muniz
1	9	2	A	State v. Bingman	162 Or. App. 615	Wollheim
1	9	2	A	State v. Cook	163 Or. App. 24	Edmonds
1	9	2	D	In Re Reeves	163 Or. App. 497	Haselton
1	9	1	A	State v. Beckstead	164 Or App 538	Deits
1	9	2	A	State v. English	164 Or App 580	Landau

Art.	Sec.	Scope	Tactic	Name	Cite	Opinion By:
1	9	2	A	State v. Ray	164 Or. App. 145	Haselton
1	9	1	A	State v. Guzman	164 Or. App. 90	Edmonds
1	9	1	D	State v. Morton*	326 Or. 466	Gillette
1	9	1	A	State v. Boone*	327 Or. 307	Van Hoomissen
1	9	3	D	State v. Smith*	327 Or. 366	Gillette
1	9	1	D	State v. Toevs*	327 Or. 525	Carson
1	9	2	C	State v. Goodman	328 Or. 318	Riggs
1	9	1	A	Poddar v. Department of Revenue	328 Or. 552	Durham
1	10	1	A	State v. McQueen*	153 Or. App. 277	De Muniz
1	10	1	A	State v. Loynes*	154 Or. App. 1	Deits
1	10	2	A	State v. Rohlfing*	155 Or. App. 127	De Muniz
1	10	3	D	Oregon Newspaper Pub. v. Dept of Corrections*	156 Or. App. 30	Edmonds
1	10	2	A	State v. Kirsch	162 Or. App. 392	Deits
1	10	1	A	Piper v. Scott	164 Or. App. 1	Landau
1	11	2	D	State v. Kramer*	152 Or. App. 519	De Muniz
1	11	1	A	State v. $113,871 in U.S. Currency*	152 Or. App. 770	Armstrong
1	11	1	A	Walls v. Driver and Motor Vehicle Services*	154 Or. App. 101	Edmonds
1	11	1	A	Saroian v. State*	154 Or. App. 112	Edmonds
1	11	1	A	State v. Baldeagle*	154 Or. App. 234	Landau
1	11	3	A	State v. Amini*	154 Or. App. 589	De Muniz
1	11	2	A	State v. Dell*	156 Or. App. 184	Riggs
1	11	1	D	New v. Armenakis*	156 Or. App. 24	Edmonds
1	11	3	C	State v. Zinsli*	156 Or. App. 245	De Muniz
1	11	3	C	State v. Reese*	156 Or. App. 406	Warren
1	11	2	D	Martinez v. Baldwin*	157 Or. App. 280	De Muniz
1	11	1	A	State v. Decamp	158 Or. App. 238	Linder
1	11	2	C	State v. Vann	158 Or. App. 65	De Muniz
1	11	3	C	State v. Moore	159 Or. App. 144	De Muniz
1	11	2	C	Lovelace v. Zenon	159 Or. App. 158	De Muniz
1	11	1	A	Gorham v. Thompson	159 Or. App. 570	Landau
1	11	2	A	State v. Richardson	159 Or. App. 592	Haselton
1	11	1	A	State v. Massey	160 Or. App. 197	Landau
1	11	1	A	State v. Goss	161 Or. App. 243	Deits
1	11	2	A	State v. Lemon	162 Or. App. 640	Brewer
1	11	1	A	Aquino v. Baldwin	163 Or. App. 452	De Muniz
1	11	2	A	Jones v. Baldwin	163 Or. App. 507	Armstrong
1	11	2	A	State v. Dupree	164 Or. App. 413	Brewer
1	11	1	A	State v. McElligott*	326 Or. 547	Graber
1	11	3	C	State v. Baker	328 Or. 355	Gillette
1	11	1	A	State v. Barone*	328 Or. 68	Gillette
1	11	3	C	State v. Barone	329 Or. 210	Riggs
1	12	1	A	State v. Ostrom*	153 Or. App. 606	Wollheim
1	12	3	C	State v. Selness*	154 Or. App. 579	De Muniz
1	12	2	A	State v. Rohrs*	157 Or. App. 494	De Muniz
1	12	3	C	State v. James	159 Or. App. 502	De Muniz
1	12	2	A	State v. Hoehne	163 Or. App. 402	Brewer
1	12	1	A	Custer v. Baldwin	163 Or. App. 60	Haselton
1	12	1	A	In re Conduct of Wyllie*	326 Or. 622	Per curiam

Art.	Sec.	Scope	Tactic	Name	Cite	Opinion By:
1	12	1	D	State v. Meade*	327 Or. 335	Gillette
1	14	1	A	State v. Sutherland	329 Or. 359	Gillette
1	16	1	A	State v. Shoemaker*	155 Or. App. 416	Landau
1	16	1	A	State v. Gee*	156 Or. App. 241	De Muniz
1	16	3	D	State v. Ferman-Velasco*	157 Or. App. 415	Edmonds
1	16	1	A	State v. McGhee*	157 Or. App. 598	Per curiam
1	16	1	A	State v. Davilla*	157 Or. App. 639	Edmonds
1	16	2	A	State v. McLain	158 Or. App. 419	De Muniz
1	16	1	A	State v. Silverman	159 Or. App. 524	De Muniz
1	16	1	A	State v. Melillo	160 Or. App. 332	Edmonds
1	16	1	A	State v. Bowman	160 Or. App. 8	Edmonds
1	16	1	A	State v. Wilson	161 Or. App. 314	De Muniz
1	16	1	A	State v. Lavert	164 Or. App. 280	Edmonds
1	16	1	A	Ron Staley Enterprises v. Dep't of Revenue	1999 WL 1009120	Byers
1	16	2	C	State v. Sutherland	329 Or. 359	Gillette
1	17	1	A	Sanderson v. Allstate Ins Co.	163 Or. App. 58	Brewer
1	17	1	A	Foltz v. State Farm Mut. Auto. Ins. Co.*	326 Or. 294	Van Hoomissen
1	17	3	C	Lakin v. Senco Prods.	329 Or. 62	Van Hoomissen
1	18	1	A	State of Oregon by and through its Dept. of Trans. v. DuPree*	154 Or. App 181	Armstrong
1	18	2	A	Mark v. State Dept. of Fish and Wildlife	158 Or. App. 355	Warren
1	18	3	A	Kinross Copper Corp. v. State	160 Or. App. 513	Landau
1	18	1	A	State v. Hanson	162 Or. App. 38	Landau
1	18	2	A	State v. Hughes	162 Or. App. 414	Deits
1	20	1	A	Brummell v. Department of Revenue*	14 Or. Tax 303	Byers
1	20	1	A	Stranahan v. Fred Meyer, Inc.*	153 Or. App. 442	Riggs
1	20	1	A	Brown v. A-Dec Inc.*	154 Or. App. 244	Wollheim
1	20	1	D	Kmart v. Lloyd*	155 Or. App. 270	Edmonds
1	20	1	A	Southern Wasco County Ambulance Service, Inc. v. State by and through Howland*	156 Or. App. 543	Edmonds
1	20	3	C	Tanner v. Oregon Health Sciences University*	157 Or. App. 502	Landau
1	20	1	D	In re Marriage of Crocker*	157 Or. App. 651	Armstrong
1	20	1	D	Herson v. Driver and Motor Vehicle Services Branch DMV*	157 Or. App. 683	De Muniz
1	20	2	A	Lincoln Loan Co v. City of Portland	158 Or. App. 574	De Muniz
1	20	2	A	State v. Harris	159 Or. App. 553	Landau
1	20	2	A	Withers v. State	163 Or. App. 298	De Muniz
1	20	1	D	State v. Hayward*	327 Or. 397	Leeson
1	21	1	A	State v. Jackman*	155 Or. App. 358	De Muniz
1	21	3	C	State v. Matthews	159 Or. App. 580	Haselton
1	21	2	C	Advocates For Effective Regulation v. City of Eugene	160 Or. App. 292	Landau
1	21	2	A	State v. Metz	162 Or. App. 448	De Muniz
1	21	3	A	State v. Grimes	163 Or. App. 340	Landau
1	21	3	C	Doe v. State	164 Or. App. 543	De Muniz
1	21	2	A	State v. McDonnell	329 Or. 375	Durham
1	23	1	A	Wallis v. Baldwin*	152 Or. App. 295	Landau
1	32	1	A	Brummell v. Department of Revenue*	14 Or. Tax 303	Byers
1	42	1	A	State v. Lanig*	154 Or. App. 665	Landau

Art.	Sec.	Scope	Tactic	Name	Cite	Opinion By:
1	42	3	C	Armatta v. Kitzhaber*	327 Or. 250	Carson
3	1	3	C	State v. Jackman*	155 Or. App. 358	De Muniz
3	1	3	A	Seida v. City of Lincoln City	160 Or. App. 499	Landau
3	1	1	A	First Commerce of America Inc v. Nimbus Ctr. Assocs.	329 Or. 199	Leeson
4	1	1	D	Stranahan v. Fred Meyer Inc.*	153 Or. App. 442	Riggs
4	1	2	C	State v. Ferman-Velasco*	157 Or. App. 415	Edmonds
4	1	1	D	Lane v. Lane County*	327 Or. 161	Kulongoski
4	1	3	C	Armatta v. Kitzhaber*	327 Or. 250	Carson
4	20	2	C	State v. Fugate*	156 Or. App. 609	Landau
7	3	2	C	Parrott v. Carr Chevrolet Inc.*	156 Or. App. 257	De Muniz
7	3	2	A	State v. Metcalfe	328 Or. 309	Leeson
9	1	1	A	Irwin v. Oregon Dep't Of Revenue	1999 WL 615881	Byers
9	1a	2	A	Feves v. Kitzhaber	329 Or. 339	Gillette
11	2	1	A	Hunter v. Portland Metro Area Local Boundary Comm'n	160 Or. App. 508	Landau
11	11	1	A	Glenn v. City of Boardman*	14 Or. Tax 291	Byers
11	11	3	C	Glenn v. Morrow County Unified Recreation Dist.*	14 Or. Tax 344	Byers
11	11	2	A	Ash Org. v. City of Wilsonville*	14 Or. Tax 362	Byers
11	11	3	C	Taylor v. Clackamas Cnty Assessor	14 OTR 504	Byers
11	11b	1	A	Martin v. City of Tigard	14 OTR 517	Byers
11	11	3	C	Ellis v. Lorati	14 OTR 525	Byers
11	11b	2	A	Irwin v. Oregon Dep't Of Revenue	1999 WL 615881	Byers
11	11b	3	C	Shilo Inn Portland/ v. Multnomah County	1999 WL 615887	Byers
11	12	2	A	Douglas Elec v. Central Lincoln People's Util. Dist.	164 Or. App. 251	Brewer
17	1	3	C	Armatta v. Kitzhaber*	327 Or. 250	Carson

III. 1999 CASE SUMMARIES

A. Art. 1, §§ 2 & 3

- *Newport Church of the Nazarene v. Hensley*, 161 Or. App. 12, 983 P.2d 1072 (June 2, 1999); rev. allowed by *Newport Church of the Nazarene v. Hensley*, 329 Or 447, 994 P.2d 126 (1999).

"No law shall in any case whatever control the free exercise, and enjoyment of religious opinions …"

In ***Newport Church***, plaintiff challenged an award of unemployment compensation benefits to a former minister based on constitutional guarantees of religious freedom. The church argued that ORS 657.072(1)(a) and (1)(b) exclude from the benefit scheme services performed for a church and services performed by a minister of a church. However, two earlier cases, *Salem College* and *Rogue Valley*, declared that under the constitution, "Oregon must treat all religious organizations similarly whether or not they would qualify as churches[.]"[6] The state Employment Department initially responded to this opinion by promulgating a rule that broadened the exception to include ministers licensed by all "religious organizations." This interpretation, however, ran afoul of federal unemployment regulations in a way that threatened certain tax credits for Oregon employers. The Department subsequently promulgated a second rule that tacitly declared ORS 657.072(1)(b) unconstitutional. The Court of Appeals agreed with the Department's reasoning, holding that the same analysis that applied to (1)(a) in *Rogue Valley* and *Salem College* applied to (1)(b) as well – any definition of "minister" that drew a line between churches and other religious organizations violates the Oregon Constitution. Thus, the minister was covered under the statute.

B. Art. 1, § 8

- *Media Art Co. v. City of Gates*, 158 Or. App. 336, 974 P.2d 249 (Feb. 10 1999).

[6] *Rogue Valley*, 307 Or. at 497.

- *State v. Fleming*, 159 Or. App. 565, 979 P.2d 771 (April 14, 1999); *rev. denied* 329 Or. 358, 994 P.2d 124 (1999).
- *State v. Rangel*, 328 Or. 294, 977 P.2d 379 (Feb. 26, 1999.

"No law shall be passed restraining … free expression …"

In ***Media Art***, Petitioner sought review of a LUBA determination upholding the City of Gates' denial of a permit for an off-premises billboard. While the local zoning ordinance made no reference to signs or billboards, it included a catch-all clause allowing only uses "clearly accessory and subordinate" to listed uses. Applying *State v. Robertson*,[7] the Court of Appeals first rejected petitioner's argument that the ordinance was directed at the content of expression. The court also quickly rejected the idea that the ordinance sought to prevent a specific harm in a way that directly implicated expression. "On its face," the court said, "the ordinance does not address any specific harm that itself implicates expression -- as a land use regulation, it merely informs prospective builders and others what types of structures will be permitted in the light industrial zone."[8] Considering petitioner's "as applied" challenge, the court found that the city's "accessory and subordinate" language comported with the court's recent decision upholding the Oregon Motorist Information Act in *Outdoor Media Dimensions Inc. v. State of Oregon*,[9] where the court allowed a restriction on signs advertising off-premises activity because the statute did not base approval on content, subject, or viewpoint. Finally, the court rejected petitioner's argument that the "accessory and subordinate" language in a light industrial zone necessarily favored commercial speech over non-commercial speech since the statute itself made no distinction between the types of speech.[10]

The Court of Appeals in ***Fleming*** upheld a former statute outlawing the possession of child pornography. Defendants were charged with possessing a depiction of sexual conduct involving a child, in violation of former ORS 163.672 (1993), repealed by Or. Laws 1995, ch. 768, § 16. The court once again applied *Robertson* and its progeny, examining first whether the challenged statute targeted the substance of communication or merely opposed the harmful effects of communication. The State argued that *State v. Stoneman*,[11] which upheld a similar ordinance against commerce in child pornography (former ORS 163.680) dictated the result of this case as well. Defendants distinguished the two statutes based on an affirmative defense to former ORS 163.680 that allowed defendants to show the materials in question were not actually the result of sexual abuse of a child. However, the court found the language of both statutes constitutionally targeted the harmful effects of speech rather than the substance of speech. While the affirmative defense to former ORS 163.680 added further support to that position, the court found, the language was not necessary to the *Stoneman* holding, and the possession law therefore survives scrutiny without it. Left unclear in *Fleming* is whether the affirmative defense to former ORS 163.680 is implied in the language of former ORS 163.672 or if the state in fact can outlaw possession of materials that only appear to depict sexual conduct involving a child.

In ***Rangel***, the Supreme Court construed a stalking statute to fit within Art. 1, Sec. 8. Defendant argued that ORS 163.732 was unconstitutionally overbroad in banning, *inter alia*, communication that caused "alarm." The court agreed the "alarm" standard could reach protected expression. Examining the statute, the court concluded that the legislature must have intended "alarm" to require a threat, since "only a threat will be sufficient to 'cause apprehension or fear resulting from the perception of danger,' as ORS 163.730 requires."[12] The court noted that it previously examined the term "threat" in connection with a harassment statute and found the word "exclude[s] the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee."[13] The court also construed the alarm/threat language as requiring "intent" rather than mere "knowledge" as the text of the statute states.

C. Art. 1, § 9

- *State v. Rodal*, 161 Or. App. 232, 985 P.2d 863 (July 7, 1999).
- *State v. Beylund*, 158 Or. App. 410, 976 P.2d 1141 (Feb. 17, 1999).; *rev. denied*, 328 Or. 594, 987 P.2d 515 (1999).

[7] 293 Or. 402, 412, 649 P.2d 569 (1982).
[8] *Media Art*, 158 Or. App. at 341.
[9] 150 Or. App. 106, 945 P.2d 614 (1997), *rev. allowed* 326 Or. 627, 964 P.2d 1029 (1998).
[10] *See id*. at 343.
[11] 323 Or. 526 (1996).
[12] *Rangel*, 328 Or. at 303.
[13] *Id*. (quoting *State v. Moyle*, 299 Or. 691, 705 (1985)).

- *State v. Fuller*, 158 Or. App. 501, 976 P.2d 1137 (Feb. 17, 1999).
- *State v. Larson*, 159 Or. App. 34, 977 P.2d 1175 (March 17, 1999); *rev. denied*, 329 Or. 318, 994 P.2d 123 (1999).
- *State ex rel Juvenile Dep't. of Coos County v. Reeves*, 163 Or. App. 497, 988 P.2d 433 (Oct. 27, 1999).
- *State v. Guzman*, 164 Or. App. 90, 990 P.2d 370 (Nov. 10 1999).
- *Poddar v. Dep't. of Revenue*, 328 Or. 552, 983 P.2d 527 (May 27, 1999).
- *State v. Goodman*, 328 Or. 318, 975 P.2d 458 (Feb. 26, 1999).
- *State v. Cruz-Aguirre*, 158 Or. App. 15, 972 P.2d 1206 (Jan. 6, 1999).
- *State v. Rocha-Ramos*, 161 Or. App. 306, 985 P.2d 217 (July 7, 1999).
- *State v. Cook*, 163 Or. App. 24, 986 P.2d 1228 (Sept. 22 1999).
- *State v. Ray*, 164 Or. App. 145 (Nov. 10, 1999).
- *State v. Kauffman*, 162 Or. App. 402, 986 P.2d 696 (Sept. 15, 1999); *rev. denied*, __*Or.*__ 994 P.2d 132 (2000).
- *State v. Knox*, 160 Or. App. 668, 984 P.2d 294 (May 26, 1999); *rev. denied*, 329 Or. 527, 994 P.2d 128 (1999).
- *State v. Bingman*, 162 Or. App. 615, 986 P.2d 676 (Sept. 15, 1999).
- *State v. English*, 164 Or. App. 580, 994 P.2d 165 (Dec. 29, 1999).
- *State v. May*, 162 Or. App. 317, 986 P.2d 608 (Aug. 11, 1999); *rev. denied*, 330 Or. 375, --- P.2d --- (2000).
- *State v. Rutledge*, 162 Or. App. 301, 986 P.2d 99 (Aug. 11, 1999).
- *State v. Rutherford*, 160 Or. App. 343, 981 P.2d 386 (May 12, 1999); *rev. denied*, 329 Or. 447, 994 P.2d 126 (1999).
- *State v. Cocke*, 161 Or. App. 179, 984 P.2d 321 (June 23, 1999); *rev. allowed*, 329 Or. 650, 994 P.2d 132 (2000).
- *State v. Beckstead*, 164 Or. App. 538, 994 P.2d 174 (Dec. 29, 1999).
- *State v. Arabzadeh*, 162 Or. App. 423, 986 P.2d 736 (Sept. 15, 1999); *distinguished on other grounds*, *State v. Ray*, 164 Or. App. 145, 990 P.2d 365 (1999).

1. "No law shall violate the right of the people to be secure … against unreasonable search, or seizure …"

The familiar standard under Art. 1, § 9 holds that warrantless searches are per se unreasonable. However, the state may lawfully carry out warrantless searches or seizures if certain exceptions, such as consent, apply. To show consent for a search or seizure, the state must prove by a preponderance of the evidence that 1) consent was given voluntarily and 2) a person with actual authority gave the consent. The court looks at the "totality of the circumstances" in determining voluntariness.[14]

Questions under the first prong of this test often involve finding whether police officers used coercion while obtaining consent. In ***Rodal***, for example, the court found that officers informing the defendant that if he did not consent to a search they would detain him while obtaining a search warrant did not constitute coercion. Quoting previous rulings, the court said that a threat merely to do what the law allows is not constitutionally objectionable.[15]

The second prong of the consent test deals with third parties purporting to consent to searches of property they share with the defendant. The facts of ***Beylund*** involved a tenant who satisfied part of his "rent" by tending his landlord's marijuana crop in one of the property's outbuildings. While the court found no coercion by police who convinced the tenant to unlock the building's door, the landlord contended his tenant had no authority to allow officers into the building in the first place. Defendant based his argument on *State v. Will*,[16] which noted that police must determine whether a third party has the proper authority before they request that person's permission for entry. However, the court said that statements to this effect in *Will* must be read in conjunction with other decisions, such as *State v. Carsey*,[17] which make it clear that officers merely **should** determine whether a third party has authority before requesting consent. The court said that its decision in *Will* "does not stand for the proposition that the failure to make such an inquiry will **per se** abrogate a purported consent to search. The question of whether a person has actual authority at the time consent is given is ultimately a question of law."[18] In this situation, the court said, defendant assumed the risk his tenant would consent to searches when he gave the tenant a key to the building and allowed him to cultivate in exchange for living quarters.

As the Court of Appeals reiterated in ***Fuller***, however, access alone is not enough to authorize a third party to consent to police searches. In that case, a roommate allowed officers to search a nightstand drawer defendant usually kept locked. The court held

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[14] *See Beylund*, 158 Or. App. at 413-14.
[15] *See Rodal*, 161 Or. App. at 242.
[16] 131 Or. App. 498 (1994).
[17] 295 Or. 32 (1983).
[18] *Beylund*, 158 Or. App. at 417.

that the roommate's "**ability** to open and occasionally access the unlocked drawer, in the absence of any evidence of permission or acquiescence by defendant, does not, as a matter of law, support an inference that [she] was **actually authorized** to open or exercise control over the nightstand."[19]

While it is possible for a *defendant* to waive a prior illegal entry,[20] two 1999 cases hold that under no circumstances can a *third party* grant retroactive consent to an illegal search. In ***Larson***, the Court of Appeals found unconvincing a note written by the defendant's neighbor on the day before a suppression hearing attempting to grant police officers retroactive permission to enter the common area of an apartment complex.[21] In ***Reeves***, the same court rejected a retroactive consent argument advanced by the state based upon the fact that defendant's father did not tell police officers to leave after they had driven past a sign reading "No unauthorized entry."[22]

It is also unconstitutional for the state essentially to waive a person's consent for them. The Court of Appeals in ***Guzman*** reiterated that a "search condition" included in a probation sentence does not constitute a waiver of the probationer's Article I, § 9 rights. Before carrying out a search of a probationer's home, the court found, police must still obtain constitutionally valid consent or meet one of the constitutional exceptions.

Consent is not necessary if officers show up with a validly issued warrant. In ***Poddar***, a taxpayer alleging an assessment error objected to a requested inspection of his property, asserting a constitutional right to privacy. Relying on past precedent, the Supreme Court found that in such cases Art. 1, § 9 requires only that a search be reasonable and that a judicial officer rather than an executive officer determines whether adequate factual and legal grounds support the entry.[23] A Tax Court determination that an inspection is required satisfies the constitution, the court said.

In ***Goodman***, the Supreme Court found that facts derived from a law enforcement officer's training and expertise can contribute to the "factual nexus" necessary to determine the probable cause needed for a warrant. After videotaping the defendant entering and leaving a hidden, outdoor marijuana garden, police obtained a search warrant for his home and found various tools of the drug trade. Defendant argued the warrant, based on little more than one officer's testimony that evidence is usually found at the homes of persons seen tending such gardens, lacked probable cause. The Court of Appeals agreed, based on its decision in *State v. Evans*.[24] However, the Supreme Court flatly overruled this notion, citing three previous cases where an officer's knowledge was treated as a fact contributing to an affidavit's sufficiency. The court cautioned, however, that an officer's expertise must be connected to objective facts derived from other sources. In this case, for example, "the officer's expertise is used only to provide a criminal law nexus to a series of other, separately verified facts."[25]

2. Definitions and outcomes

Whether consent or some other standard must be met depends heavily on how a situation is defined. For example, the Court of Appeals in ***Cruz-Aguirre*** found no continuing "stop" under the constitution where a police officer handed a driver a citation during a routine traffic stop, told the driver "adios," and then, after a seven-second intermission, asked permission to search the car before the driver pulled away. The court noted that under the Supreme Court's decision in *State v. Holmes*[26] mere "conversations" involve no restraint of liberty and thus do not implicate Art. 1, § 9. Despite the short amount of time between what the court saw as the "end" of the traffic stop and the beginning of the conversation, the court said it found nothing in the description of the contact that would constitute a seizure.

The Court of Appeals identified a different situation in ***Rocha-Ramos***. There the defendant granted officers permission to enter his apartment, then said he wanted to go to the bathroom and began moving in that direction. One of the officers blocked his path and asked him to sit down, which he did. Citing *State v. Johnson*,[27] the court reasoned this was a "seizure" because it interfered with the defendant's freedom of movement.[28] While a seizure can be justified by a reasonable suspicion of criminal activity, the court said, it saw no "specific and articulable facts" giving rise to such a belief in this case. The state argued that the refusal to allow defendant to use the bathroom in his home was constitutionally insignificant, but the court disagreed.[29]

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[19] *Fuller*, 158 Or. App. at 507.
[20] *See State v. Weaver*, 319 Or. 212, 874 P.2d 1322 (1994).
[21] *See Larson*, 159 Or. App. at 42-43.
[22] *See Reeves*, 163 Or. App. at 506.
[23] *See Poddar*, 328 Or. at 536.
[24] 119 Or. App. 44 (1993).
[25] *Goodman*, 328 Or. at 328.
[26] 311 Or. 400 (1991).
[27] 105 Or. App. 587 (1991).
[28] *See Rocha-Ramos*, 161 Or. App. at 312.
[29] *See id*. at 312.

3. Abandonment

The state also need not obtain consent or a warrant to search items that suspects "abandon." The Court of Appeals encountered several opportunities in 1999 to expand the abandonment doctrine most recently set out by the Supreme Court in *State v. Morton*.[30] For example, the defendant in ***Cook*** repeatedly denied ownership of a bag and left it on the ground when the officers asked him to step over to them. Under the *Morton* standard, the Court of Appeals wrote, an item is abandoned when, based on a totality of the circumstances, a court finds a person "intended to forego exercising his possessory and privacy interests" in the item.[31] Distinguishing the facts in this case from those in *Morton*, the court found the police lawfully stopped defendant and investigated the bag free of coercion. The defendant not only disclaimed possessory interest in the bag, the court found, but asserted that it had been abandoned in a trash dumpster by someone else.[32]

The Court of Appeals held that the defendant in ***Ray*** abandoned his Art. 1, § 9 privacy interest in a bag by disclaiming ownership of it during a car search incident to a lawful traffic stop. Citing *Cook*, the court found no evidence of police coercion or illegal conduct, and said the defendant's fear that the police might search the bag was not itself "a ground on which to hold that his privacy or possessory interest in the [bag] was violated."[33]

The court in ***Kauffman*** agreed that, under *Morton*, a defendant who initially denied ownership of an item is entitled to challenge police seizure of it if, despite defendant's denials, there is no question that the item had recently been in defendant's possession. However, under these facts, the court found that the defendant actually did abandon a bag when he gave it to two passers-by and asked them to hide it in bushes on someone else's property. The court distinguished *Morton* based on the fact that the defendant relinquished control of the bag before police arrived, eliminating any possibility of coercion.[34]

In ***Knox,*** the Court of Appeals found admissible cocaine that defendant abandoned in a police car after being arrested. While the court agreed that defendant's arrest based on evidence obtained during an illegal search was unlawful, the court reasoned that the arrest was factually separate from the abandonment. The court quoted at length from *State v. Rodriguez*,[35] which held that evidence should be suppressed only where police exploited prior unlawful conduct. Here the court saw nothing more than a mere "causal connection" between the conduct and the abandonment. "[Defendant's] transportation to the police station during which his alleged deposit occurred was an event that intervened between the illegal search and seizure and the seizure at issue here ….a 'but for' analysis is inappropriate."[36] Though the court recognized defendant probably attempted to hide the cocaine in the police car to avoid it being found during a jailhouse search, the court considered the abandonment a product of his own volition and not a product of exploitation of the unlawful search by police. Whether the evidence would have been suppressed if discovered during booking apparently made no difference in the decision.

4. Exceptions for automobile and inventory searches

Automobiles figure prominently in search and seizure cases and exceptions to the constitutional rule. In ***Bingman***, the Court of Appeals reiterated the "automobile exception" to the warrant requirement: "[O]fficers may conduct a warrantless search of a vehicle provided '(1) that the automobile is mobile at the time it is stopped by police or other governmental authority, and (2) that probable cause exists for the search of the vehicle.'"[37] In this case, police noticed a small amount of marijuana before their search began along with a strong odor of additional marijuana. The court held that these facts together constitute the necessary probable cause and ruled admissible a large bag of marijuana.[38]

Automobiles are frequently subjected to "inventory searches" pursuant to impounding by authorities. Not every container that turns up in such a search may be opened.[39] However, the Court of Appeals reiterated in ***English*** that even an opaque container can be searched if it "announces" its contents. This case involved a small, red vial that, based on the experience of the investigating officer, appeared to be of a type commonly used to hold drugs. The court approved, relying primarily on *State v. Herbert*,[40] which said that some opaque

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[30] 326 Or. 466 (1998).
[31] Cook, 163 Or. App. at 32.
[32] *See id.* at 33-34.
[33] *Id*. at 153 (quoting *State v. Knox*, 160 Or. App. 668, 678 (1999)).
[34] *See Kauffman*, 162 Or. App. at 408.
[35] 317 Or. 27, 854 P.2d 399 (1993)
[36] *Knox*, 160 Or. App. at 678-79.
[37] *Bingman*, 162 Or. App. at 618 (quoting *State v. Brown*, 301 Or. 268, 274, 721 P.2d 1357 (1986)).
[38] *See id*. at 620.
[39] *See State v. Myers*, 156 Or. App. 561, 967 P.2d 887 (1998).
[40] 302 Or. 237, 729 P.2d 547 (1986).

containers may be so uniquely associated with the storage of controlled substances that they announce their contents. Balloons, tin foil bundles, and paper bundles are among the items the court said have been found to be associated with the drug trade. Whether or not a small vial conceivably could hold legal items makes no difference, the court said. The test under *Herbert* is whether in the experience of the officer it is reasonable to believe it is probable the container holds contraband.[41]

Outside the realm of vials, tin foil, and the like, the state may have more trouble attempting to admit inventory evidence discovered inside opaque containers. In ***May***, the Court of Appeals found that a cloth bundle containing drug paraphernalia qualified as an opaque closed container and could not be opened during an inventory search. Such a case, the court said, is indistinguishable from cases involving closed containers such as brown paper packets and folded tissues.[42]

The contours of one growing exception to the opaque container rule are difficult to pin down. Under *State v. Atkinson*[43] and *State v. Johnson*,[44] police officers can be authorized by statute to open during an inventory search any containers that "typically" hold valuables. In ***Rutledge***, the Court of Appeals found that these cases permitted an officer to open a small bag he called a coin purse. At trial, it was noted that the "coin purse" included a small "Norelco" label and in fact was no coin purse at all. Regardless of the actual nature of the container, the court held, the officer could reasonably believe the object in question was designed to hold valuables and therefore search it.[45]

5. Balancing privacy and plain sight

Police officers may generally observe objects and activities provided their vantage point does not impermissibly interfere with a citizen's privacy rights. Officers in ***Rodal*** used aerial surveillance to identify and photograph marijuana plants growing on defendant's property. The court found nothing intrusive about using the helicopter, given the lack of evidence that it flew lower than 600 feet.[46] Although the officer used a telephoto lens while snapping pictures, the court found that since he could identify the plants with his eyes alone this information was irrelevant to the case.[47] The court also found that observations of marijuana plants made by officers during their walk up the defendant's cement path to his front door also did not constitute a search without evidence of some intent on the part of the defendant to exclude others from his walkway.[48]

In ***Reeves*** the court found just that sort of an intent to exclude in a "No unauthorized entry" sign posted at the entrance to defendant's property. The court cited several cases holding that a sign by itself is enough to manifest an intent to keep the public out of property and rejected the state's contention that "unauthorized" visitors would be only those persons without legitimate business on the property. "[P]olice officers are no more 'authorized' than anyone else to invade property, absent the legal sanction of a warrant or some exigency."[49]

The Court of Appeals examined privacy rights in greater depth in ***Larson***, which involved police officers entering a "common area" behind an apartment building and smelling the odor of marijuana emanating from defendant's window. Citing previous holdings, the court noted that privacy rights under the Oregon Constitution are defined by an objective examination of whether the government's conduct would "significantly impair" an individual's privacy.[50] The commonly used test is whether a private person would "offend social and legal norms of behavior by engaging in the same kind of intrusion."[51] In this case, the court held that the officers violated defendant's privacy rights by walking around the building. Based on the physical layout of the apartments and the residents' use of the area, the court found that the area functioned as a kind of backyard, and "backyards are generally, by nature, more private than areas in the front of a house."[52] Even though the area was open to all tenants and perhaps their guests, the court said, it was not open to the public.[53]

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[41] *See English*, 164 Or. App. at 584.
[42] *See May*, 162 Or. App. at 322.
[43] 298 Or. 1 (1984).
[44] 153 Or. App. 535 (1998).
[45] *See Rutledge*, 162 Or. App. at 308.
[46] *See Rodal*, 161 Or. App. at 237.
[47] *See id*. at 236-37.
[48] *See id*. at 239 (citing *State v. Portrey*, 134 Or. App. 460, 465, 896 P.2d 7 (1995)).
[49] *Reeves*, 163 Or. App. at 504.
[50] *Larson*, 159 Or. App. at 39 (citing *State v. Dixson/Digby*, 307 Or. 195, 211, 766 P.2d 1015 (1988)).
[51] *Id*. (quoting *State v. Portrey*, 134 Or. App. 460, 464, 896 P.2d 7 (1995)).
[52] *Id*. at 41.
[53] *See id*.

6. Other § 9 holdings

Under *Winroth v. DMV*,[54] officers may conduct field sobriety tests without a warrant if they already have probable cause to believe a suspect motorist is intoxicated. The defendant in ***Rutherford*** argued that the officer who administered DUII tests in his case had no probable cause. The court agreed, based on the testimony of the officer that he did not come to the conclusion that the defendant was more likely than not intoxicated until after he conducted the tests.[55] Because probable cause includes both an objective and subjective component, the court suppressed the test evidence.

Officers in ***Cocke*** found illegal drug paraphernalia and firearms during a cursory search of a home pursuant to an arrest. The court ruled the search lawful under the circumstances, which included police concern regarding potentially dangerous suspects within the house. Cases interpreting the constitution, the court said, allow an officer to take reasonable steps to protect himself and others if the officer develops a "reasonable suspicion," based on "specific and articulable facts" that someone poses an immediate danger.[56] Such searches can include "areas of a home beyond the immediate reach of the arrestee," the court said, and are judged "in light of the circumstances as understood by the officers at the time."[57] The state urged the court to adopt the "protective sweep" doctrine announced by the United States Supreme Court in *Maryland v. Buie*,[58] but the court found that *Buie* would have the effect of making every protective sweep reasonable.[59] The court noted that "the Oregon Supreme Court has explicitly chosen to define reasonable searches incident to arrest by relying independently on the Oregon Constitution."[60]

Evidence obtained during a search pursuant to an illegal arrest must be suppressed. In ***Beckstead***, defendant was arrested for not paying restitution on a bad check. During a search pursuant to that arrest, drugs were found. As it turned out, however, the defendant had made arrangements to pay the money that same day. The Court of Appeals found that because the lower court's determination that defendant had not paid the money was not supported by oath or affirmation as required by § 9, the arrest warrant was invalid.[61]

In ***Arabzadeh***, police found defendant's gun during an automobile search following a traffic stop. While the Court of Appeals assumed for the purposes of the case that the police officer's extension of the stop was illegal, the court found that the car's driver voluntarily consented to the search and therefore the gun could not be suppressed under ORS 136.432.[62] As in *Knox*, the court noted that under *Rodriguez* unlawful police conduct renders a consent to search invalid only if the illegality overbears the free will of the person giving consent or if police exploit their prior unlawful conduct to obtain the consent.[63] The court found no evidence the driver's consent to search was anything but voluntary despite the officer's unlawful request.[64]

D. Art. 1, § 10

- *Piper v. Scott*, 164 Or. App. 1, 988 P.2d 919 (Nov. 3, 1999); *rev. denied*, 329 Or. 650, 994 P.2d 132 (2000).
- *State v. Kirsch*, 162 Or. App. 392, 987 P.2d 556 (Sept. 15, 1999).

1. "… every man shall have remedy by due course of law …"

Plaintiff in ***Piper***, injured in a car-steer collision in an open range area, complained prior state court holdings deprived him of a remedy against both livestock owners and the state in violation of Art. 1, Sec. 10. However, the Court of Appeals found that such a right of action never existed against livestock owners, and that the constitution "does not guarantee a remedy for a right that plaintiff never had."[65] Next, the court found that case law does not hold the state absolutely immune in such situations, which meant plaintiff was not completely deprived of a remedy.

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[54] 140 Or. App. 622, 915 P.2d 991 (1996)
[55] *See id*. at 346.
[56] *Cocke*, 161 Or. App. at 185 (quoting *State v. Bates*, 304 Or. 519, 524, 747 P.2d 991 (1987)).
[57] *Id*. at 190 (citing *Rickard***,** 150 Or. App. at 525-26).
[58] 494 U.S. 325 (1990).
[59] *See id*. at 184.
[60] *Id*. at 187-88.
[61] *See Beckstead*, 164 Or. App. at 542.
[62] ORS 136.142 provides that such evidence obtained in violation of a statutory provision cannot be suppressed unless exclusion is required by the federal or state constitutions.
[63] *See Arabzadeh*, 162 Or. App. at 427.
[64] *See id*. at 428.
[65] *Piper*, 164 Or. App. at 5 (quoting *Hale v. Port of Portland*, 308 Or. 508, 518, 783 P.2d 506 (1989)).

2. "… justice shall be administered … without delay ..."

In ***Kirsch***, defendant argued that a delay of more than eight years between his citation for DUII and his arraignment violated the speedy trial guarantee of Art. 1, § 10. Analyzing the facts under *State v. Coggin*,[66] the Court of Appeals examined the length of the delay, the reasons for the delay, and any resulting prejudice to the accused. Although *Coggin* noted that an 8 1/2 year delay is presumptively prejudicial, the Kirsch court cited *State v. Rohlfing*[67] for the proposition that a defendant's acquiescence in a long delay can rebut presumptive prejudice. Though the delay in this case was attributable in part to the state's negligence in failing to arrest the defendant during numerous traffic stops, the court saw "no indication that the state intentionally failed to arrest defendant in order to somehow prejudice him."[68] The court also found that the delay was extenuated by defendant's willful failure to attend the original trial date and his decision to remain silent for eight years. Therefore, the court said, "as with most speedy trial cases" this case turned on the question of prejudice.[69] Since defendant offered no evidence of actual prejudice, the court ruled against him.

E. Art. 1, § 11

- *State v. Dupree*, 164 Or. App. 413, 992 P.2d 472 (Dec. 15, 1999); *rev. denied*, 330 Or. 361, --- P.2d --- (2000).
- *State v. Barone*, 329 Or. 210, 986 P.2d 5 (July 29, 1999); *cert. denied*,120 S.Ct. 813 (2000).
- *State v. Vann*, 158 Or. App. 65, 973 P.2d 354 (Jan. 13, 1999).
- *State v. Lemon*, 162 Or. App. 640, 986 P.2d 705 (Sept. 15, 1999).
- *State v. Baker*, 328 Or. 355, 976 P.2d 1132 (April 1, 1999).
- *State v. Decamp*, 158 Or. App. 238, 973 P.2d 922 (Feb. 3, 1999).
- *State v. Goss*, 161 Or. App. 243, 984 P.2d 938 (July 7 1999).
- *Jones v. Baldwin*, 163 Or. App. 507, 990 P.2d 345 (Oct. 27, 1999).
- *Gorham v. Thompson*, 159 Or. App. 570, 978 P.2d 443 (April 14, 1999).
- *Aquino v. Baldwin*, 163 Or. App. 452, 992 P.2d 472 (Oct. 27, 1999).
- *Lovelace v. Zenon*, 159 Or. App. 158, 976 P.2d 575 (March 17, 1999); *rev. denied*, 329 Or. 589, 994 P.2d 130 (2000).
- *State v. Massey*, 160 Or. App. 197, 981 P.2d 352 (April 28, 1999).
- *State v. Richardson*, 159 Or. App. 592, 978 P.2d 435 (April 14, 1999); *rev. denied*, 329 Or. 479, 994 P.2d 127 (1999).
- *State v. Moore*, 159 Or. App. 144, 978 P.2d 395 (March 17, 1999); *rev. allowed*, 329 Or. 438, 994 P.2d 125 (1999).

1. Generally

The Court of Appeals in ***Dupree*** noted that under *State v. Amini*,[70] the rights afforded to citizens under Art. 1, § 11 of the state constitution matched the principles of "fundamental fairness underlying the federal right to due process." Responding to defendant's claims in this case, the court found no authority for the proposition that generally "outrageous governmental conduct" violates the guarantees of § 11 and found no such conduct on the facts presented.

2. "… the accused shall have the right to … an impartial jury."

The ***Barone*** court upheld defendant's murder conviction despite the trial court's initial failure to administer the juror oath. The Supreme Court found that without some evidence of impartiality, the omission of a juror oath until just before a second round of jury deliberations does not violate a defendant's rights under § 11. It was enough, the court said, that the trial judge asked jurors individually whether they had in fact tried the case according to the terms of the oath and then sent them back for another deliberation session where they were to set aside all previous deliberations.

In ***Vann***, the trial court mistakenly discharged the jury after receiving only 11 out of 12 juror polling slips. The court then attempted to rectify the error by recalling the "missing" juror weeks later to question her about her verdict. The Court of Appeals found no Oregon case law on point, but noted that in other jurisdictions a verdict is generally unalterable once the jury has been dispersed.[71] After discussing how this rule preserves the integrity of the jury process by ensuring verdicts are based on evidence developed at trial, the court adopted it.

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[66] 126 Or. App. 230 (1994).
[67] 155 Or. App. 127 (1998).
[68] *Kirsch*, 162 Or. App. at 399.
[69] *Id.* at 399.
[70] 154 Or. App. 589, *rev. allowed* 327 Or. 620 (1998).
[71] *See Vann*, 158 Or. App. at 73.

3. "… any accused person … may elect to waive trial by jury …"

The defendant in ***Lemon*** argued that her drug convictions were invalid because the trial court failed to obtain a written waiver of trial by jury before conducting a bench trial. Setting out the standard from previous holdings, the court found such a waiver must be in writing, voluntary, and knowing.[72] In this case, the state pointed to *State v. Naughten*,[73] in which the written court record served as the required "writing."[74] However, the Court of Appeals pointed out that in *Naughten*, the defendant was asked on the record about waiving the jury trial right. In the present case, the record reflected only that the trial court concluded the defendant waived that right. The court reversed and remanded for a new trial, concluding that it lacked a basis for evaluating whether a voluntary and knowing waiver had occurred.

In ***Baker***, the Supreme Court found ORS 136.001(1), which granted the state the right to insist on a jury trial in criminal prosecutions, unconstitutional under Art. 1, § 11. The court held that the wording of § 11 plainly states that a criminal *defendant* has the right to choose whether the trial is by jury or judge, and nothing in the case law or history surrounding § 11 contradicted that meaning.

4. "… the accused shall have the right … to be heard by himself and counsel …"

In ***DeCamp***, the Court of Appeals cited earlier precedent for the proposition that defendants have a constitutional right to be present during sentencing, which includes any sentence modification that is "substantive" rather than "administrative." In this case, a trial court's sua sponte increase in defendant's prison term was found to be plainly substantive.

The Court of Appeals in ***Goss*** found that while the right to consult privately with an attorney after a DUII arrest can be limited for security reasons or to conduct an accurate breath test, the state must show that the limitations in a particular case are justified. While the state failed to show valid justification in this case, the court saw no prejudice and ruled against the defendant's claim.

Jones is one of several 1999 cases that reiterated the standard for proving inadequate assistance of counsel under the Oregon Constitution. Citing *Stevens v. State of Oregon*,[75] the court wrote that a petitioner must prove that counsel "failed to do the things reasonably necessary to advance the petitioner's defense and that the petitioner suffered prejudice as a result."[76] In this case, the court found the trial court's answer to a jury question about the elements of the crime involved was ambiguous and potentially misleading. Finding for the defendant, the court ruled that "[r]elying on such instructions is more akin to entering a defendant's fate into a lottery system than to making a rational decision about trial strategy" and that the trial counsel's failure to object was prejudicial.[77]

Given the "prejudice" prong of the *Stevens* test, a court may be able to find inadequate lawyering but a constitutional verdict nonetheless. For example, the court in ***Gorham*** concluded after a fact-specific inquiry that any inadequacies by trial counsel did not affect the outcome of the case and found against the defendant.

Cases such as ***Aquino*** illustrate that even attorney decisions that may seem wrong in hindsight do not trigger an ineffective assistance claim. Again citing the *Stevens* standard, the Court of Appeals found that a decision to present an alibi defense by means other than calling a particular witness was a permissible tactical decision. However, the court found that a failure to seek a trial continuance to await new and possibly exculpatory evidence that counsel knew would arrive shortly was not a reasonable tactical choice and prejudiced the defendant.[78]

Lovelace shows that while what a lawyer must do to present an adequate defense is not always clear, failure to advance previously accepted constitutional arguments will not meet the standard even if those particular arguments have not before been applied to a particular new statute. The Court of Appeals cited *Krummacher v. Gierloff*,[79] for the proposition that counsel must "do those things reasonably necessary to diligently and conscientiously advance the defense."[80] Representation that fails to raise issues "fundamental" to a defense, the court said, will be found constitutionally inadequate.[81] In this case, the court determined that trial counsel failed to apply two of what it considered to be straightforward constitutional cases, and that this failure prejudiced the client. The dissent argued that application of the cases to a new statutory scheme was not so obvious,

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[72] *See Lemon*, 162 Or. App. at 642.
[73] 5 Or. App. 6, 480 P.2d 448 (1971).
[74] *See id*. at 643.
[75] 322 Or. 101, 108, 902 P.2d 1137 (1995)
[76] *Jones*, 163 Or. App. at 510.
[77] *Id*. at 512.
[78] *See Aquino*, 163 Or. App. at 461.
[79] 290 Or. 867, 874, 627 P.2d 458 (1981)
[80] *Lovelace*, 159 Or. App. at 161.
[81] *See id*. at 161 (citing *Haynes v. State*, 121 Or. App. 395 (1993).

which itself illustrates perfectly how reasonable minds can disagree on such matters.

Constitutional questions will also arise concerning a defendant's ability to waive representation. Citing past precedent, the Court of Appeals in ***Massey*** stated that the "preferred method" for assuring a criminal defendant understands the risks of self-representation is a colloquy on the record where the trial court explains the dangers involved.[82] In this case, there was no such evidence of any explanation by the court. The state argued that the court could infer the defendant knew the risks, since the defendant had worked as a paralegal, been involved in civil suits, and been represented by several lawyers in the current case. The *Massey* court found that that these facts by themselves said nothing about whether a defendant knows the risks of self-representation.

The importance of the colloquy was again emphasized in ***Richardson***. There the Court of Appeals quoted from *State v. Curran*,[83] that "[a]lthough no particular catechism is required, the court must provide some information about the dangers of self-representation." The court found no evidence of such a warning nor anything to suggest the defendant independently knew of the dangers.[84] Although the defendant failed to demonstrate whether representation would have made a difference in his case, the court pointed to the Supreme Court's decision in *State v. Cole*[85] for the proposition that it is simply impossible to know what the result might have been. Thus, the court rejected the state's "harmless error" argument.

5. "… the accused shall have the right … to meet the witnesses face to face…"

The Court of Appeals in ***Moore*** extended previous holdings regarding hearsay evidence to make clear that no hearsay evidence should be admitted until the declarant is found incompetent or unavailable. Thus, OEC 803(2)'s hearsay exception for excited utterances runs afoul of the constitution insofar as it allows admission of statements regardless of the declarant's availability.[86]

[82] *See Massey*, 160 Or. App. at 199 (citing *State v. Meyrick*, 313 Or. 125, 133, 831 P.2d 666 (1992)).
[83] 130 Or. App. 124 (1994).
[84] *See Richardson*, 159 Or. App. at 600-01.
[85] 135 Or. App. 643, 900 P.2d 517 (1995), reversed 323 Or. 30, 912 P.2d 907 (1996).
[86] *See Moore*, 159 Or. App. at 149.

F. Art. 1, § 12

- *Custer v. Baldwin*, 163 Or. App. 60, 986 P.2d 1203 (Sept. 22, 1999); *rev. denied*, 329 Or. 589, 994 P.2d 130 (2000).
- *State v. James*, 159 Or. App. 502, 978 P.2d 415 (April 14, 1999).
- *State v. Hoehne*, 163 Or. App. 402, 989 P.2d 469 (Oct. 13, 1999); *rev. denied*, 330 Or. 252, --- P.2d --- (2000).

1. "No person shall be put in jeopardy twice for the same offence …"

In ***Custer***, the court reiterated previous determinations that ORS 131.515, which provides that "[n]o person shall be separately prosecuted for two or more offenses based upon the same criminal episode," grants protections beyond the constitutional guarantees of Art. 1, § 12, which merely bars successive prosecutions for the same offense. Thus, a defendant arguing for the full protections of ORS 131.515 must show all the elements of that statute are met rather than simply advance a constitutional claim.[87]

In ***James***, defendant was arrested for a drug-related crime in a "Drug-free Zone" and issued a temporary exclusion order by the arresting officer. Defendant claimed this exclusion was "punishment" and any further punishment would put him in jeopardy twice for the same crime. While the trial court agreed, the Court of Appeals weighed the sanction according to factors developed by the U.S. Supreme Court in *Hudson v. United States*[88] and found exclusion to be a civil rather than criminal remedy that did not implicate double jeopardy under the state or federal constitutions.

2. "No person shall … be compelled in any criminal prosecution to testify against himself."

While the Court of Appeals in ***Hoehne*** did not find an involuntary confession, it reconfirmed previous holdings that incriminating statements by a defendant produced by a promise of leniency or immunity are inadmissible under § 12.[89] Miranda-like

[87] *See Custer*, 163 Or. App. at 65 (citing *State v. Lyons*, 161 Or. App. 355, 985 P.2d 204 (1999)).
[88] 522 U.S. 93 (1997)
[89] *See Hoehne*, 163 Or. App. at 472 (citing *State v. Aguilar*, 133 Or.App. 304, 307, 891 P.2d 668 (1995)).

warnings, the court said, whether enhanced or not, would fail to cure such an illegality.

G. Art. 1, § 14

- *State v. Sutherland*, 329 Or. 359, 987 P.2d 501 (Oct. 7, 1999) (*as corrected* Oct. 18, 1999)

"Offences, except murder, and treason, shall be bailable …"

In ***Sutherland***, the Supreme Court struck down ORS 135.240(4), which denied bail to anyone accused of a Measure 11 offense unless the trial judge found by clear and convincing evidence the defendant would not commit new crimes while on release. The court found the language of the statute directly inopposite of § 14, which provides that offenses other than murder and treason "shall be bailable."

H. Art. 1, § 16

- *State v. Bowman*, 160 Or. App. 8, 980 P.2d 164 (April 21, 1999).
- *State v. Melillo*, 160 Or. App. 332, 982 P.2d 12 (May 12, 1999); *rev. denied*, 329 Or. 438, 998 P.2d 126 (1999).
- *State v. Silverman*, 159 Or. App. 524, 977 P.2d 1186 (April 14, 1999); *rev. denied*, 329 Or. 527, 994 P.2d 129 (1999); petition for cert. filed, 69 USWL 3088 (2000).
- *State v. McLain*, 158 Or. App. 419, 974 P.2d 727 (Feb. 17, 1999); *superceded*, *State v. Haynes*, 168 Or. App. 565, 2000 WL 830504 (2000).
- *State v. Sutherland*, 329 Or. 359, 987 P.2d 501 (Oct. 7, 1999) (*as corrected* Oct. 18, 1999).
- *State v. Lavert*, 164 Or. App. 280, 991 P.2d 1067 (Dec. 8 1999).
- *State v. Wilson*, 161 Or. App. 314, 985 P.2d 840 (July 7, 1999); *rev. denied*, 330 Or. 71, 994 P.2d 133 (2000).
- *Ron Staley Enterprises v. Dep't. of Revenue*, 1999 WL 1009120 (Nov. 1, 1999).

"Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."

Most recent challenges under Art. 1, § 16 involve the mandatory sentence scheme set up by the voter-approved Measure 11. Typically, such appeals take one of two routes. Defendants may argue that their Measure 11 sentences are unconstitutionally cruel and unusual either on their face or as applied to specific situations; however, this tactic is unlikely to succeed given the tough standard articulated in *State v. Isom*,[90] which declares an unconstitutionally disproportionate sentence is one that "shocks the moral sense of all reasonable persons." Defendants may have more luck if they are able to argue their sentence is disproportionate to the offense because of the slipshod way Measure 11 meshes with the pre-existing sentencing scheme.

Bowman, *Melillo*, and *Silverman* illustrate the difficulty of the first route. In ***Bowman***, the Court of Appeals held that the 70-month sentence required by Measure 11 for a robbery in which knives were displayed does not violate the constitution despite the homeless defendant's clean prior record. The court simply cited a prior case in which a similar sentence was upheld in a similar crime.[91]

The defendant in ***Melillo*** argued against the state's appeal of his 38-month sentence for armed robbery, contending that the 90-month sentence imposed under Measure 11 would violate § 16. Defendant argued that the appropriate standard was not *Isom*'s "reasonable person" but the test in *State v. Thornton*,[92] which stated a sentence is unconstitutional when it "shock[s] the conscience of fair-minded [persons]." The court found no difference between the two standards and determined a 90-month sentence would be constitutional under either test considering the nature of defendant's crime.

In ***Silverman***, the defendant, convicted of sexually molesting two boys, asserted that "because several mental health professionals opined that his pedophilia is treatable and that he would not be able to receive treatment if he were imprisoned, a mandatory sentence of imprisonment would be cruel and unusual."[93] Reviewing the record, however, the court found a long history of sexual misconduct and prior treatment with evidently no effect. The court determined that, based on this information, the 70-month sentence would not shock the conscience of a reasonable person.[94]

McLain provides an example of the incongruities between Measure 11 and the pre-existing sentencing scheme. In that case, the Court of Appeals agreed with defendant that Measure 11's mandatory life imprisonment sentence for murder was unconstitutional because state statutes failed to

[90] 313 Or. 391, 837 P.2d 491 (1992).
[91] *See Bowman*, 160 Or. App. at 17.
[92] 244 Or. 104 (1966)
[93] *Silverman*, 159 Or. App. at 527.
[94] *Id*. at 532.

provide the Board of Parole with authority to parole individuals sentenced for murders committed after November 1989. As a result of the interplay between Measure 11 and the existing statutes, there was a harsher sentence for murder than for the more serious offense of aggravated murder. Citing previous cases, the court found that "a statutory scheme that provides a greater penalty for a lesser-included offense than for the greater offense violates Article I, § 16, of the Oregon Constitution."[95] The state and the dissent argued that the statute should be construed to maneuver around the constitutional deficiency. The majority agreed with that jurisprudential canon generally, but said that "[t]here comes a point, however, where we must draw the line."[96]

The court in ***Sutherland*** held that ORS 135.240(5)'s requirement of a $50,000 minimum bail for defendants accused of Measure 11 offenses does not facially violate § 16 either. The court read the language of § 16 that "excessive bail shall not be required" as "necessarily presuppos[ing]" a hearing at defendant's request. Therefore, the court stated, the statute's $50,000 requirement must be read as "the minimum amount that is to be imposed initially, on arrest," which could be reduced at a subsequent hearing if the defendant were able to demonstrate excessiveness as applied. Since there could be some cases in which a bail in this amount was not excessive, the statutory requirement was not facially unconstitutional.

In ***Lavert***, the court cited previous opinions stating that in reviewing a trial court's sentencing determination in "as applied" challenges to Measure 11, the record on appeal must be sufficient to allow the court to "step into the shoes" of the trial court and to view the same record that was before it.[97] In this case the state failed to support its argument with the relevant portions of the record and the appeal was dismissed.

In a non-Measure 11 case, the defendant in ***Wilson*** argued that his sentence under a dangerous offender statute was more harsh than that of others involved in the same crime. The court responded that § 16 "has never been interpreted to require that individuals who commit different crimes during the same criminal episode receive comparable sentences, regardless of the crimes involved, the nature of their participation in those crimes, and other relevant factors such as their criminal histories, their cooperation with authorities, and their violent propensities."[98]

Finally, the Tax Court in ***Staley Enterprises*** applied an apparently well-settled case holding that penalties for non-payment of tax do not violate the constitution. In this case, the court found that even a 100 percent penalty is constitutional.

I. Art. 1, § 17

- *Sanderson v. Allstate Ins. Co*., 164 Or. App. 58, 989 P.2d 486, (Nov. 3, 1999).
- *Lakin v. Senco Products*, 329 Or. 62, 987 P.2d 463 (July 15, 1999); *opin. clarified on other grounds*, 329 Or. 369, 987 P.2d 476 (1999).

"In all civil cases the right of Trial by Jury shall remain inviolate."

Two cases dealing with Art. 1, § 17 prove the strength of this section's relatively unambiguous terms. The court in ***Sanderson*** easily concluded based on earlier precedent that requiring arbitration between an insured and an underinsured motorist carrier under ORS 742.504(12) would violate the insured's right to trial by jury. The right to a jury trial, the court said, "is not subject to the unilateral discretion of the opposing party."[99]

The ***Lakin*** decision stands at the center of the current controversy surrounding Measure 81. In *Lakin*, the Supreme Court struck down ORS 18.560(1), which limited noneconomic damages in civil cases to $500,000 regardless of the jury's determination. In deciding whether the statute violated § 17, the court first discussed the meaning of "inviolate" as it was understood when the word was incorporated into the constitution. While the court found dictionary definitions ambiguous, early case law and historical sources held that juries were to determine all issues of fact. The amount of noneconomic damages is an issue of fact, the court concluded, and the legislative cap unconstitutionally interferes with that determination.[100] The court rejected the argument advanced by the corporate defendant that a legislative cap on damages is justified by longstanding judicial authority to ask

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[95] *McLain*, 158 Or. App. at 421 (citing *State v. Shumway*, 291 Or. 153, 630 P.2d 796 (1981); *Cannon v. Gladden*, 203 Or. 629, 281 P.2d 233 (1955)).

[96] *Id*. at 426. *But note* that the Court of Appeals' subsequent decision in *State v. Haynes*, 168 Or. App. 565, P.2d. (June, 2000) accepts that subsequent legislation removes the constitutional barrier identified in *McLain*.

[97] *See Lavert*, 164 Or. App. at 285.

[98] *Wilson*, 161 Or. App. at 324.

[99] *Sanderson*, 163 Or. App. at 64.

[100] *See id*. at 81.

plaintiffs to accept a remittitur of damages not supported by the evidence or face a new trial. "A statutory cap," the court said, "fundamentally is different from the doctrine of judicial remittitur."[101] The court found that "[l]imiting the effect of a jury's noneconomic damages verdict eviscerates "Trial by Jury" as it was understood in 1857 and, therefore, does not allow the common-law right of jury trial to remain 'inviolate.'"[102]

J. Art. 1, § 18

- *State v. Hughes*, 162 Or. App. 414, 986 P.2d 700 (Sept. 15, 1999).
- *State v. Hanson*, 162 Or. App. 38, 987 P.2d 538 (July 21, 1999); *rev. denied*, 330 Or. 252, --- P.2d --- (2000).
- *Kinross Copper Corp. v. State*, 160 Or. App. 513, 981 P.2d 833 (May 19, 1999); *rev. denied*, 330 Or. 71, 994 P.2d 133 (2000).
- *Mark v. State Dept. of Fish and Wildlife*, 158 Or. App. 355, 974 P.2d 716 (Feb. 17, 1999); r*ev. denied* 329 Or 479, 994 P.2d 127 (1999).

"Private property shall not be taken for public use … without just compensation."

The Court of Appeals in ***Hughes*** found that evidence related to contamination existing on a property on the date a condemnation action is filed is relevant to determining the fair market value for takings purposes even if the contamination is not discovered until after the initial filing of the condemnation action.[103] The court based this holding on settled case law that fair market value of any property taken by the state is determined based on all evidence that might fairly be brought forward during hypothetical negotiations between the owner and a prospective buyer.[104]

In ***Hanson***, the Court of Appeals cited previous precedent reaffirming that an easement is a property right under the constitution for which the state must compensate if taken. Under the facts of this case, the court said, a property owner who reserves an easement for access to a specific highway at a specific location is entitled to exactly that.

However, as the ***Kinross*** court found, it is important in a § 18 case to determine first whether a taking actually has occurred. The *Kinross* court pointed to the standard rule as articulated in *Boise Cascade Corp. v. Board of Forestry*,[105] that an inverse condemnation suit can be maintained only if a government agency has taken action that deprives the owner of "all economically viable use" of its property.[106] Secondly, "an owner cannot maintain an action for loss of a property right that it did not ever have."[107] In this case, the court found that plaintiff's claim was based on a mistaken idea that it possessed a right to dump mining waste into state waters.

The Court of Appeals also declined to find a taking in *Mark*. Plaintiffs in that case claimed that government acquiescence to public nudity in the Sauvie Island Wildlife Area detracted from the value of plaintiffs' nearby property. The court reiterated that Oregon case law emphasizes that a taking requires more than just some damage but "a deprivation of all feasible private uses of the property or of some specific right in the property."[108]

K. Art. 1, § 20

- *Withers v. State*,163 Or. App. 298, 987 P.2d 1247 (Oct. 13, 1999).
- *Lincoln Loan Co. v. City of Portland*, 158 Or. App. 574, 976 P.2d 60 (Feb. 24, 1999).
- *State v. Harris*, 159 Or. App. 553, 980 P.2d 1132 (April 14 1999); *rev. denied*, 330 Or. 252, --- P.2d --- (2000).

Equality of privileges and immunities

Groups claiming unconstitutionally disparate treatment under a state statute must show that they represent a "true class" defined not by the challenged regulation but on its own terms.[109] In ***Withers***, the Court of Appeals disagreed with the state's argument that inequalities in legislative funding for school districts did not affect a "true class" based on geographical distinctions.[110] The court found that simply because a student might theoretically move from a poorer school district to a wealthy district does not defeat the "true class" since "children do not **choose** to be born into families that reside in poorer school districts."[111] The court found against plaintiffs, however, citing its previous opinion in the case that it would be rational for the legislature to have

[101] *Lakin*, 329 Or. at 77.
[102] *Id*. at 79.
[103] *See Hughes*, 162 Or. App. at 419-20.
[104] *See id*. at 419.
[105] 325 Or. 185, 197-98, 935 P.2d 411 (1997).
[106] *Kinross*, 160 Or. App. at 518.
[107] *Id*. at 519.
[108] *Powers*, 158 Or. App. at 370.
[109] *See, e.g., Tanner v. OHSU*, 157 Or. App. 502, 519-20 (1998).
[110] *See Withers*, 163 Or. App. at 307.
[111] *Id*. at 308.

concluded that immediate school district fund shifting would have a deleterious effect on children.[112] ***Withers*** illustrates the difference between the heightened level of scrutiny Oregon courts will apply to Art. 1, 20 plaintiffs whose "true class" status is based on *ad hominem* personal characteristics and the highly deferential review afforded legislative decisions based on geographic or other less invidious distinctions.

Another key to proving a disparate treatment claim is showing that a plaintiff actually was singled out among similarly situated entities for special government treatment.[113] Thus, the court in ***Lincoln Loan*** found for the City of Portland when plaintiff property owner failed to show that city housing inspectors, whatever their motives, treated the plaintiff property owner differently from other property owners with recurring ordinance violations.[114]

The terms of Art. 1, §§ 20 and 21 also require that criminal statutes be "sufficiently explicit to inform those who are subject to it of what conduct is prohibited."[115] The court in ***Harris*** took up defendant's claims that ORICO contained unconstitutionally vague language. After noting that ORICO had already been found constitutional in *State v. Romig*,[116] the court examined specific phrases pointed out by the defendant and reaffirmed its *Romig* holding.

L. Art. 1, § 21

- *State v. McDonnell*, 329 Or. 375, 987 P.2d 486 (Oct. 7 1999) (Dec. 21, 1999).
- *State v. Grimes*, 163 Or. App. 340, 986 P.2d 1290 (Oct. 13, 1999).
- *State v. Metz*, 162 Or. App. 448, 986 P.2d 714 (Sept. 15, 1999); *rev. denied*, 330 Or. 331, --- P.2d --- (2000).
- *State v. Matthews*, 159 Or. App. 580, 978 P.2d 423 (April 14, 1999).
- *Doe v. State*, 164 Or. App. 543, 993 P.2d 822 (Dec. 29, 1999).
- *Advocates for Effective Regulation v. City of Eugene*, 160 Or. App. 292, 981 P.2d 368 (May 5, 1999).

1. "No ex-post facto law … shall ever be passed …."

Remands delayed sentencing of defendant in ***McDonnell*** for a 1984 murder conviction until after the legislature enacted a 1993 statute that included the punishment of life imprisonment without parole in addition to death and life with possibility of parole. Defendant argued that the new statute applied to him, and that he should be able to waive any ex post facto objection. The court held that under *State v. Isom*[117] courts must, subject to constitutional restrictions, "apply the sentence that the legislature intended."[118] The Supreme Court found, based on the language of ORS 163.150 (1993), that the legislature indeed meant the statute to apply in cases such as defendant's where a reviewing court found error in the sentencing proceeding and remanded the case back to the trial court.[119] The court also found that defendant could waive his right to constitutional ex post facto protection.[120]

Grimes dealt with the application of ORS 137.750, which compelled courts to announce in criminal cases whether administrative agencies would be allowed to later reduce the sentences of defendants. The statute was meant to ameliorate Measure 40, which commanded that no sentence be reduced by agencies unless the sentencing court had made such a pronouncement. Measure 40 was later found invalid in *Armatta v. Kitzhaber*.[121] The defendant in *Grimes* argued that his sentencing court's order pursuant to the statute that there would be no sentence reduction impermissibly imposed a greater punishment than that available before the enactment of ORS 137.750. After noting that the federal and state ex post facto doctrines have the same scope, the Court of Appeals found that the statute had the effect of "providing defendant with more protection, not less, than previously available,"[122] and therefore did not violate the ex post facto provision. Following U.S. Supreme Court reasoning, the *Grimes* court held that the fact Measure 40 was declared unconstitutional does not mean the statute actually changed the defendant's position for the worse. "[T]he statute still serves as a real-world 'operative fact' that warned the public of

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[112] *See id*. at 309.
[113] *See, e.g., Lincoln Loan Co*., 158 Or. App. at 586.
[114] *See id*. at 586.
[115] *Harris*, 159 Or. App. at 558 (quoting *State v. Plowman*, 314 Or. 157, 160-61, 838 P.2d 558 (1992)).
[116] 73 Or. App. 780, 700 P.2d 293 (1985).
[117] 313 Or. 391 (1992).
[118] *McDonnell*, 329 Or. App. at 492 (quoting *Isom*, 313 Or. at 395).
[119] *See id*. at 491.
[120] *See id*. at 495.
[121] 327 Or. 250, 959 P.2d 49 (1998).
[122] *Grimes*, 163 Or. App. at 347.

the state's intentions with respect to the crime at issue."[123]

The court in ***Metz*** reiterated that changes in evidentiary law after a crime is committed violate ex post facto requirements. Defendant argued against applying in his case the language of ORS 163.150 (1995), which makes so-called "victim impact" evidence relevant to a sentencing jury. Examining previous precedent in the area, the court determined the constitutional standard to be whether the law "impermissibly 'retrenches the rules of evidence' in a manner that affects defendant's substantive rights."[124] The court said it read the relevant case law to mean that a change in evidentiary law affecting the **way** something is proved but not the nature of **what** is proved does not retrench the rules of evidence.[125] This law, the court said, changed the nature of the proceeding by making aggravating evidence relevant along with mitigating evidence.[126] Thus, the statute as applied to defendant, violated Art. 1, § 21.

In ***Matthews***, the Court of Appeals held that ORS 181.599, retroactively compelling convicted sex offenders to register their addresses with police, does not constitute "punishment" and therefore does not support an ex post facto claim.[127] Citing previous case law, the court engaged in a two-step inquiry: First, it found the legislative purpose in the statute was not punitive but merely to "create a database of past sex offenders … to facilitate investigations of sex crimes."[128] Second, the court sought to determine whether the requirement is in practice so punitive as to negate the nonpunitive intention. Finding both Oregon and federal case law "somewhat unsettled,"[129] on the exact question, the court borrowed factors from U.S. Supreme Court double jeopardy decisions: "(1) Has the requirement been historically regarded as a punishment? (2) Does the requirement involve an affirmative disability or restraint? (3) Is the scope and rigor of the registration requirement excessive in relation to its purported nonpunitive purpose?"[130] Answering these questions in the negative, the court found the statute constitutional.

[123] *Id*. at 348 (citing 432 U.S. at 297-98).
[124] *Metz*, 162 Or. App. at 457 (quoting *Cookman*, 324 Or. at 28).
[125] Id.
[126] See id. at 461.
[127] *See Matthews*, 159 Or. App. at 582.
[128] *Id*. at 587.
[129] *Id*. at 588.
[130] *Id*. at 589.

2. "no law … impairing the obligation of contracts shall ever be passed."

Unnamed birth mothers in ***Doe*** challenged the controversial Measure 58, which allowed persons given up for adoption to acquire their unaltered birth certificates from the state. Among their arguments, plaintiffs claimed that the state was in effect a party to their adoption contracts and that the private entities involved acted as agents of the state. The birth mothers also contended that Oregon statutes enacted in 1983 recognizing a right to privacy for adoptees and parents were a material part of the adoption contracts. As a threshold matter, the Court of Appeals held adoption agreements constitute contracts for the purposes of Art. 1, § 21. The court then noted that state laws governing the privacy surrounding adoptions had been amended regularly over the years. A statutory contract, the court said, generally will not be found in legislation containing no commitment not to repeal or amend a statute.[131] Furthermore, the court held that no Oregon case has ever interpreted any section of the state constitution to confer a constitutional right for mothers to conceal their identities from their children or any kind of general privacy right.[132]

3. "… nor shall any law be passed, the taking effect of which shall be made to depend upon any authority …"

In ***Advocates for Effective Regulation***, the court quickly held that the constitutional rule against prospective delegation applies to municipal charters.[133] While the court found no prior cases directly on point, it pointed out that the relevant provision of Art. 1, § 21 applies to "laws," and municipal charters are the organic laws of municipalities.[134] Therefore, a section in the charter of Eugene which incorporated in its definition of "hazardous substances" federal regulations not yet enacted was held to be invalid.[135]

[131] *See Doe*, 164 Or. App. at 554.
[132] *See id*. at 562.
[133] *See Advocates for Effective Regulation*, 160 Or. App. at 313.
[134] *See id*. at 312 (citing *Harder et ux v. City of Springfield et al.*, 192 Or. 676, 683 (1951)).
[135] *See id*. at 313.

M. Art. 3, § 1

- *Seida v. City of Lincoln City*, 160 Or. App. 499, 982 P.2d 31 (May 19, 1999); *rev. denied*, 329 Or. 357, 994 P.2d 124 (1999).
- *First Commerce of America, Inc. v. Nimbus Ctr. Assocs.*, 329 Or. 199, 986 P.2d 556 (July 29, 1999).

"The powers of the Government shall be divided into three separate departments ..."

The Court of Appeals in ***Seida*** found that land use statutes in general are products of the state legislature, which has the constitutional authority to prescribe judicial remedies for violations of such statutes by cities.[136] Lincoln City contended that ORS 227.178(7) gave authority to the judiciary to perform an executive function in violation of Art. 3, § 1 by compelling the approval of certain discretionary city permits. The court rejected this argument, writing that the constitution does not contain a comprehensive description of city or county functions; nor does it say that all city and county functions are administrative. In fact, the court cited precedent for the proposition that land use permit decisions are actually quasi-judicial rather than administrative or executive.[137]

In ***First Commerce***, the Supreme Court noted in passing that if a case is rendered moot because of an event not reflected in the record, appellate courts have the power to consider evidence of the event.[138] This power, the court said, derives from the general duty to determine whether a justiciable controversy exists under both Art. 3, § 1 and Art. 7, § 1.[139]

N. Art. 7, 3

- *State v. Metcalfe*, 328 Or. 309, 974 P.2d 1189 (Feb. 26, 1999).

In ***Metcalfe***, the trial court granted defendant's post-verdict motion for acquittal and found him guilty of a lesser charge than the determination of the jury. On appeal by the state, defendant argued that if the Supreme Court reinstated the jury's verdict, he would be "found guilty of a greater offense than that for which he was convicted."[140] The court, however, agreed with the state that reinstating the jury verdict would not unconstitutionally disturb the jury's fact finding. Rather, in reinstating the verdict the court said it was simply finding that the trial court lacked authority to grant defendant's post-verdict motion.

O. Art. 9

- *Irwin v. Oregon Dep't. of Revenue*, 1999 WL 615881 (Or. Tax. July 21, 1999).
- *Feves v. Kitzhaber*, 329 Or. 339, 986 P.2d 1167 (Sept. 16, 1999).

1. § 1

In ***Irwin***, taxpayers claimed that the Western Oregon Privilege Tax and Eastern Oregon Privilege Tax violated Art. 9 because they do not apply uniformly to the entire state. The court dispatched this argument by citing *State ex rel. v. Malheur County Court*,[141] which holds a tax law must only be uniform throughout a tax district.[142]

2. § 1a

Plaintiffs in ***Feves*** challenged the Assembly's passage of an emergency clause to site a women's detention facility. Plaintiffs claimed it was an act of exemption in violation of Art. 9, § 1a, since the authorized condemnation power would necessarily exempt some land from taxation. However, the court said that the act did not *require* condemnation of any property. "Acknowledging the possibility of condemnation does not transform legislation into an act regulating exemption."[143]

P. Art. 11

- *Hunter v. Portland Metro. Area Local Boundary Comm'n*, 160 Or. App. 508, 981 P.2d 1276 (May 19, 1999).
- *Ellis v. Lorati*, 14 OTR 525 (Feb. 23, 1999).
- *Taylor v. Clackamas Co. Assessor*, 14 OTR 504 (Jan. 13, 1999), *order modified* 14 OTR 581 (June 3, 1999); *opinion withdrawn and judgment vacated*, 2000 WL 31987 (1/11/2000).
- *Irwin v. Oregon Dep't Of Revenue*, 1999 WL 615881 (Or. Tax. July 21, 1999).
- *Shilo Inn Portland/205 v. Multnomah County*, 1999 WL 615887 (Or. Tax July 20, 1999).
- *Martin v. City Of Tigard*, 14 OTR 517 (Feb. 17, 1999).

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[136] *See Seida*, 160 Or. App. at 506.
[137] *See id*. at 505.
[138] *See First Commerce*, 329 Or. at 206.
[139] *See id*. at 207.
[140] *Metcalfe*, 328 Or. at 317.
[141] 185 Or. 392, 203 P.2d 305 (1949).
[142] *See Irwin*, 1999 WL 615881 at *4.
[143] *Feves, 329 Or. at* 347.

- *Douglas Elec. Coop. & Int'l Paper Co. v. Central Lincoln People's Util. Dist.*, 164 Or. App. 251, 991 P.2d 1060 (Nov. 24, 1999).

1. § 2

Petitioner in ***Hunter*** argued annexation orders not approved by voters violated the home rule provisions of the constitution. However, the court noted that the Supreme Court held in *Mid-County Future Alternatives v. City of Portland*[144] that the legislature has the constitutional authority to annex property to cities.[145] In this case, the court found, state legislation created a local commission authorized to annex property according to statutory procedures.[146]

2. § 11

Taxpayers in ***Ellis*** contended that "real market value" as used in the recently adopted Art. 11, § 11(1) meant "fair market value" rather than the government's assessment for 1995. Based on the language of the amendment itself along with the history surrounding its adoption, the Tax Court found that the phrase must mean the 1995 assessed value.

In ***Taylor***, the Tax Court addressed whether property destroyed after 1995 should continue to be included in maximum assessment value calculations under § 11(1), which simply says that the MAV must not exceed the "real market value" of the property on July 1, 1995, reduced by 10 percent. Examining the ambiguous language of the section, the court found that the drafters meant for the lesser of the two referenced values - MAV or "real market value" - to be the basis of the tax. While real market value can fluctuate, the court said, MAV is tied to the 1995 value.[147] On reconsideration, the court also found that under § 11(1) the total assessed value of a property must be determined by separately figuring the assessed value of the improvements and the land.[148] **But note that this opinion was withdrawn and the judgment vacated**.

3. § 11b

In ***Irwin***, the court quickly found, based on prior case law, that the Western Oregon Forestland and Privilege Tax on the harvesting of timber is not a tax on property within the meaning of § 11b and thus is not subject to § 11b limitations. The court also cited earlier cases in upholding the tax under Art. 4, § 23, Art. 9, § 1, and Art. 1, § 32.

The taxpayer in ***Shilo*** contended that taxes categorized as school funds but used to pay urban renewal indebtedness were actually funds used for government operations other than schools under § 11b. The Tax Court found that while the drafters of § 11b must have contemplated that taxes would be used for their categorized purposes, the amendment itself provides "no mechanism for ascertaining or verifying the actual expenditure of taxes" but only for "categorization at the time of imposition."[149]

Taxpayers in ***Martin*** contended that the adoption by voters of § 11b changed how properties are determined to be specially benefited, how the cost of a local improvement is to be determined, and the way in which certain taxpayers are able to spread payments out over time. Citing the Supreme Court's decision in Ester v. City of Monmouth,[150] the Tax Court held that § 11b in fact changed none of these things.[151]

4. § 12

In ***Douglas***, the Court of Appeals examined whether § 12 grants utility districts the exclusive right to provide electricity within their boundaries. After parsing the text of the amendment and examining the history and case law surrounding it, the court rejected an argument by a district that the power of eminent domain granted to it by the constitution necessarily establishes a monopoly right as well.[152]

[144] 310 Or. 152, 163-64, 795 P.2d 541 (1990)
[145] *See Hunter*, 160 Or. App. at 510.
[146] *See id.* at 511.
[147] *See Taylor*, 14 OTR at 510-11.
[148] *See id.*, 14 OTR at 587.
[149] *Shilo*, 1999 WL 615887 at *4.
[150] 322 Or. 1, 903 P.2d 344 (1995).
[151] *See Martin*, 14 OTR at 524.
[152] *See Douglas, 164 Or. App.* at 10.

Casenote
Supreme Court Rejects Law On Violence Against Women

Katherine G. Georges[153]

On May 15, 2000, the United States Supreme Court threw out a key provision of the federal Violence Against Women Act of 1994, continuing the court's recent trend of expanding states' rights at the expense of the federal government.

In a 5-4 ruling, split along liberal and conservative lines, the court ruled that victims of rape and domestic violence cannot sue their attackers in federal court, ruling that states, not Congress, should provide women recourse against such violence.

In *Brzonkala v. Morrison*, 120 S.Ct. 1740 (2000), a former college student sued two football players who allegedly raped her in her dormitory room. The VAWA created a private cause of action allowing victims of gender-based violence to sue their attackers in federal court for lost earnings, medical expenses, and other damages.

The court struck down that provision, holding that Congress did not have the authority to adopt the federal civil remedy. In enacting the VAWA, Congress acted pursuant to its power under the Commerce Clause and § 5 of the Fourteenth Amendment, which permits Congress to enforce the guarantee that no State shall deprive any person of due process or equal protection. Neither of these powers, the court held, provided authority for the broad intrusion of Congress into the traditional powers of the states.

The court rejected the argument that Congress had authority under the Commerce Clause. The court repeated that the "economic nature of the regulated activity" is at the heart of any analysis of Congress's authority under the Commerce Clause. "Gender-motivated crimes of violence are not, in any sense of that phrase, economic activity." 120 S.Ct. at 1751.

To accept this reasoning "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption." If Congress may regulate gender-motivated violence because of its impact on interstate commerce, "it would be able to regulate murder or any other type of violence." Next, it could regulate family law and other areas traditionally left to the states, such as "marriage, divorce and child-rearing." 120 S.Ct. at 1752-53.

The court also rejected the argument that Congress had authority under the Fourteenth Amendment. That amendment prohibits discrimination by states or "state actors," not private conduct. 120 S.Ct. at 1745, 1755-59.

Plaintiff argued that the law was needed because states are not doing enough to protect rape victims, and because gender-based violence restricts women's choices in jobs and travel. The Clinton administration intervened to defend the law, and 36 states filed briefs supporting the law.

Four justices - Stevens, Souter, Ginsburg and Breyer - dissented. The dissenters said Congress had the authority to adopt the law on the grounds that violence against women has a substantial impact on interstate commerce. Justice Souter's dissent cited a "mountain of data" assembled by Congress showing the effects of violence against women on interstate commerce, and said gender-based violence in the 1990's was shown to operate in ways similar to racial discrimination in the 1960's.

This is the latest decision in the court's newly restrictive view of congressional power and the degree of deference owed Congress by federal courts. The case follows the Supreme Court's 1995 ruling in *United States v. Lopez*, that struck down the Gun-Free School Zones Act, a law that made it a federal crime to possess a gun within 1,000 feet of a school. 115 S.Ct. 1624 (1995). The court found that gun possession was not sufficiently linked to interstate commerce and that the law usurped state authority of such crimes. *See also Printz v. United States*, 117 S.Ct. 2365 (1997) (striking down provision in Brady Handgun Violence Prevention Act, requiring state law enforcement officers to conduct background checks on prospective handgun purchasers, as an unconstitutional obligation on state officer to execute federal laws.)

The court's focus on a Congress of limited powers parallels the court's other decisions this term which expand the states' sovereign immunity. The court has held that states are immune from suit under the Fair Labor Standards Act, Age Discrimination in Employment Act, and patent and trademark laws. In its next term the court will decide whether states can be sued under the Americans With Disabilities Act. For a good discussion of these cases, *see The Resurrection of Sovereign Immunity*, by Harry Auerbach, in the March 2000 Oregon Civil Rights Newsletter.

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