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CONSTITUTIONAL LAW

NEWSLETTER

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A Note from the Chair

Katherine G. Georges[1]

Welcome to the third edition of the newsletter of the OSB Constitutional Law Section. We are changing the format of our newsletter this year in two respects. First, we are going to publish fewer articles on a more frequent basis. Second, we have started an on-line component to the newsletter. You can now access the current newsletter, and all prior newsletters back to 1999, on our website (www.osbar.org/5member/sections/constitutional.html).

Let us know what issues you would like to see us address and what you think about this issue. If we receive responses to, or comments on, the articles in this issue, we will print them in the next newsletter. We are interested in your articles, potential articles, letters to the editor or other commentary on matters of interest to members in this section. Please send them to the editor, Charles F. Hinkle (cfhinkle@stoel.com) or to me (kate.georges@doj.or.us).

This year, with some dissent, the Executive Committee of the Section voted to take the position that the Oregon appellate courts should have the discretionary authority to review and decide moot cases that are capable of repetition, yet evade review. The Section has sought and received permission from the Oregon State Bar to seek to participate as amicus curiae in a case before the Oregon Supreme Court where this issue may arise. Let us know your views and how this issue impacts your practice.

In 2002, the Section sponsored a fall CLE program, with national and Oregon speakers, including National ACLU President Nadine Strosser and Professor Jesse Choper, addressing cases during the 2001-2002 term of the United States Supreme Court, such as vouchers for education and civil liberties in times of national crisis. Speakers also addressed the role of the press in covering Oregon law and whether Oregon needs to have a new state constitution. The Section is planning another full day CLE in 2004.

Finally, in 2003, the Section will sponsor a CLE session in connection with the Oregon State Bar's Annual Meeting, September 18-20, 2003, at Seaside, Oregon. The Section's CLE will be on Thursday, September 18th from 3:30 - 5:30 p.m. Topics will include a review of important cases in the 2002-2003 term of the United States Supreme Court and the constitutional implications of the Patriot Act and other post 9-11 enactments. We hope to see you there.

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IN THIS ISSUE

PLEASE ATTEND

The Section is sponsoring a CLE session *(2 MCLE credits)* on Thursday, September 18 from 3:30 to 5:30 p.m. at the OSB Annual Meeting in Seaside, OR:

Current Developments in Constitutional Law:
Another Blockbuster Supreme Court Term and the New Anti-Terrorism

More information about events at the OSB Annual Meeting is available online at: **www.osbar.org** Registration packets will be mailed to all bar members in July and can also be found in the July issue of the *Bulletin*. For registration call: (503) 684-7413 or toll-free in Oregon: (800) 452-8260, ext. 413.

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:
Charles Hinkle (cfhinkle@stoel.com) or
Katherine Georges (kate.georges@doj.state.or.us)

Oregon Constitutional Law Survey – 2002

Charles F. Hinkle

The most significant decisions of the Oregon Supreme Court and Court of Appeals construing the Oregon Constitution during calendar year 2002 are set out below. Except for four decisions that may be of interest to constitutional law practitioners in general, this summary does not include decisions relating to the procedural constitutional rights of criminal defendants. The following summary is arranged under nine categories:

1. The Religion Clauses (Art. I, §§ 2, 3, and 5)
2. Free Speech (Art. I, § 8)
3. The Remedy Clause (Art. I, § 10)
4. Equal Privileges and Immunities (Art. I, § 20)
5. Jury Trial (Art. I, § 17; Art. VII (Amended), §1)
6. Takings (Art. I, § 18; Art. XI, § 4)
7. Separation of Powers (Art. III, § 1; Art. VII (Amended), §1)
8. Procedural Requirements for Amending the Constitution (Art. XVII, §1)
9. Criminal law issues (stalking; public trial; photo radar; drug testing)

1. The Religion Clauses: Art. I, §§ 2, 3, and 5

1.1 Newport Church of Nazarene v. Hensley, 335 Or 1, 56 P3d 386 (2002). ORS 657.505 requires most employers to make payments into the state Unemployment Compensation Trust Fund. ORS 657.072(1)(b) exempts from unemployment coverage "duly ordained, commissioned or licensed minister[s] of * * * church[es]," but it does not exempt other religious leaders not ordained by churches. Because of concerns over the constitutionality of that exemption, the Employment Department promulgated a rule "that superseded the ministerial exemption under ORS 657.072(1)(b) and brought all ministers, regardless of affiliation, within mandatory unemployment compensation coverage." 335 Or at 8.

A youth minister at a Newport church sought unemployment benefits after being discharged from his position. The Employment Appeals Board allowed the award, the church challenged it, and the Court of Appeals and Supreme Court both affirmed. The Supreme Court reaffirmed its holdings in *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or 471, 695 P2d 25 (1985), and *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d 588 (1989), that "'Oregon must treat all religious organizations similarly ***.'" 335 Or at 10, quoting *Salem College*, 298 Or at 497. The Court rested its holding both on the religious liberty clauses (Art. I, §§ 2 and 3) and on the guarantee of equal privileges and immunities in Article I, section 20: "In sum, the case law demonstrates that, under Article I, sections 2, 3, and 20, of the Oregon Constitution it is impermissible for a statute to draw a distinction between churches and nonchurch religious organizations." 335 Or at 10. By drawing a distinction between ministers of churches and religious leaders not ordained by churches, ORS 657.072(1)(b) violated that constitutional command.

1.2 Powell v. Bunn, 185 Or App 334, 59 P3d 559 (2002), *petition for review pending* (2003). A public school district permitted the Boy Scouts to use school property and the assistance of staff members, during a period of mandatory attendance by first grade students, to solicit students to join. After the presentation to the students, one student learned that he would not be permitted to join the Scouts because he is an atheist. The student and his mother brought companion administrative and judicial proceedings, contending that the district's actions in assisting the Boy Scouts violated Article I, sections 2, 3, and 5. Both the Superintendent of Public Instruction and the trial court rejected their claims, and the Court of Appeals affirmed

In *Powell*, the Court of Appeals concluded that it was bound by *Eugene Sand & Gravel v. City of Eugene*, 276 Or 1007, 558 P2d 338 (1976), cert den, 434 US 876 (1977), in which the Supreme Court held that the federal *"Lemon"* test for evaluating challenges to governmental actions under the Establishment Clause of the First Amendment (*Lemon v. Kurtzman*, 403 US 602, 91 S Ct 2105, 29 LEd2d 745 (1971)) was applicable not only to Article I, section 5, but also to Article I, sections 2 and 3.

Applying the *Lemon* test, the Court of Appeals held that the District's assistance to the Scouts had a secular purpose and a primary effect that neither advances nor inhibits religion, and that it avoided excessive government entanglement with religion. The student and his mother have asked the Supreme Court to review the decision. They are urging the Court to hold that the methodology set out in *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) applies to the religion clauses, and to overrule the holding in *Eugene Sand & Gravel* that Oregon's constitutional guarantees of religious liberty are to be evaluated according to the federal *Lemon* test. On the merits, they contend that an independent analysis of Oregon's religion clauses leads to the conclusion that the Oregon Constitution creates a stricter separation of church and state than the federal constitution, and that the District's actions violate that principle.

2.Free Speech: Art. I, § 8

In two important en banc decisions in 2002, the Court of Appeals overruled two of its prior free speech cases and issued majority opinions that criticized the Supreme Court's methodology and result in the two seminal free speech cases of the modern era, *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), and *State v. Henry*, 302 Or 510, 732 P2d 9 (1987).

2.1 State v. Ciancanelli, 181 Or App 1, 45 P3d 451, *rev allowed*, 335 Or 90, 58 P3d 821 (2002). In this 7-3 decision, the Court of Appeals (to borrow that Court's own subsequent description of the case) "considered whether a statute that prohibits persons from presenting 'a live public show in which the participants engage in * * * sexual conduct' violates Article I, section 8. *** Because that statute was directed at 'live public show[s],' we assumed that it was written in terms directed at expression. *** We held, however, that the statute did not violate Article I, section 8, because it was wholly contained within a well-established historical exception. *** In reaching that conclusion, we explained that 'eighteenth- and nineteenth-century statutes and case law reflect the widespread--if not universal--regulation of public exposure of the genitals.'" *City of Nyssa v. Dufloth/Smith*, 184 Or App 631, 637, 57 P3d 161 (2002), review allowed 335 Or 266 (2003).

The majority in *Ciancanelli* did not cite a single court decision prior to 1857 in which performers in a theater were prosecuted for violating any kind of obscenity or public indecency law, but it nevertheless held that ORS 167.062, which makes it a crime to promote unlawful sexual conduct in a public show, "is wholly contained within a well-established historical exception [to Article I, section 8]." 181 Or App at 19. In reaching that conclusion, the Court overruled *State v. House*, 66 Or App 953, 676 P2d 892, *on recon* 68 Or App 360, 681 P2d 173 (1984), *aff'd on other grounds* 299 Or 78, 698 P2d 951 (1985), holding that *House*, which the Court had decided by an 8-1 *en banc* vote, "is plainly wrong." 181 Or App at 22.

2.2 City of Nyssa v. Dufloth/Smith, 184 Or App 631, 57 P3d 161 (2002), *review allowed* 335 Or 266 (2003). In this 7-3 decision, the Court of Appeals extended *Ciancanelli* to nude dancing, holding that it, too, is not protected by Article I, section 8. The Court overruled its prior decision to the contrary, *Sekne v. City of Portland*, 81 Or App 630, 726 P2d 959 (1986), *rev den* 302 Or 615 (1987).

2.3 City of Eugene v. Lincoln, 183 Or App 36, 50 P3d 1253 (2002). After refusing to obey an order to leave the county fairgrounds where she was protesting the treatment of circus animals, the defendant was convicted of violating Eugene's criminal trespass ordinance. The Court of Appeals reversed, holding that both offensive speech and "fighting words" are protected by Article I, section 8. Since the order to leave was based solely on the content of her speech, it was not lawful, and it could not be made the basis of a trespass conviction.

2.4 Leppanen v. Lane Transit District, 181 Or App 136, 45 P3d 501 (2002). The plaintiff challenged a transit district ordinance that prohibited solicitation of signatures in the vicinity of a bus boarding area at a transit station. The Court held that the ordinance was aimed at the content of speech, not its effects, and therefore violated Article I, section 8.

3. The Remedy Clause: Art. I, § 10

Article I, section 10, provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." Under this section, "the legislature may abolish a 'remedy' that existed at common law only if the legislature simultaneously provides a constitutionally adequate substitute remedy.'" *Jensen v. Whitlow*, 334 Or 412, 418, 51 P3d 599 (2002) (emphasis in original), *quoting Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001).

3.1 Jensen v. Whitlow, 334 Or 412, 51 P3d 599 (2002). The Tort Claims Act makes public bodies liable for the torts of its agents who are acting within the scope of their duties, and it eliminates tort actions against those agents individually. The Act also imposes a "cap" of $100,000 on a plaintiff's recovery against a public body. ORS 30.265(1), 30.270(1)(b). In a tort action involving allegations of negligence against the Children's Services Division (now the Department of Human Services), the U.S. District Court certified several questions to the Supreme Court. As restated by the Supreme Court, the first question was whether ORS 30.265(1) "on its face, provides a constitutionally adequate substitute remedy for the claim plaintiffs once had against individual employees of a public body." 334 Or at 420. The Court concluded that it did, because a jury might return a verdict under the damage cap set out in the statute, and therefore the plaintiffs' remedy would not be impaired. *Id.* at 421. The Court expressly declined to decide whether the Act would violate the remedy clause in a case in which a jury returned a verdict higher than the damage cap.

3.2 DeMendoza v. Huffman, 334 Or 425, 51 P3d 1232 (2002). "Since 1987, Oregon statutes have directed that a portion of any punitive damage award be paid into a state fund for victims of crime." *Id.* at 429. ORS 18.540(1)(b) currently provides that sixty percent of every punitive damage award must be paid to that fund. The Court rejected a contention that this requirement violates the "remedy" clause of Article I, section 10. It concluded that punitive damages are not part of the remedy guaranteed by that section, because they are "a means of vindicating society's interest in punishing and deterring especially egregious conduct, rather than as 'a means for seeking redress for injury' to person, property or reputation." 334 Or at 446.

3.3 Storm v. McClung, 334 Or 210, 47 P3d 476 (2002). This was a wrongful death action against a city on behalf of the daughters of a volunteer killed while working in a beautification project. Plaintiffs' claims were based solely on the Tort Claims Act. The Court held that because the wrongful death claim was a statutory one, the legislature could limit that action as it chose, and therefore the statute that immunized public bodies from liability for claims based on injuries to a person, such as volunteer, who are covered by the workers' compensation law, did not violate

the remedy clause. The Court overruled *Neher v. Chartier*, 319 Or 417, 879 P2d 156 (1994), to the extent that that case had held that the legislature could not limit a statutory (as opposed to a common law) wrongful death action.

3.4 Stone v. Finnerty, 182 Or App 452, 50 P3d 1179, modified, 184 Or App 111, 55 P3d 531 (2002), *rev den* 335 Or 422 (2003). Plaintiff was detained, handcuffed, and allegedly injured when public agencies executed a search warrant to search a building where plaintiff was working. The Court of Appeals held that his battery claim against the public agencies was barred by the exclusive remedy provisions of the workers compensation law, and that his remedy under that law was adequate, so that there was no violation of his rights under the "remedy" guarantee of Article I, section 10, as applied in *Smothers v. Gresham Transfer*, Inc. 332 Or 83, 23 P3d 333 (2001).

4. Equal privileges and immunities: Art. I, § 20

4.1 Jensen v. Whitlow, 334 Or 412, 51 P3d 599 (2002), described in 3.1, above. The Supreme Court held that the Tort Claims Act does not violate the "equal privileges and immunities" guarantee of Article I, section 20. "Because 30.265(1) does not distinguish based on any immutable characteristic, it satisfies Article I, section 20, if the legislature had a rational basis for distinguishing between the classes involved." Id. at 424. The Court concluded that the Act "satisfies that rational-basis test," because the legislature could reasonably have concluded that providing workers with immunity "will assist public bodies in recruiting qualified persons to work in public service." Id.

4.2 Adams v. PERB, 180 Or App 59, 71, 42 P3d 911 (2002). The Court held that the legislature's decision to treat police officers and firefighters differently from other public employees for purposes of PERS is "rational" for purposes of Article I, section 20. The classification does "not result from animus, bias, or stereotype," and is therefore subject to "rational" basis review.

5. Jury Trial: Art. I, § 17 and Art. VII (Amended), § 1

5.1 Jensen v. Whitlow, 334 Or 412, 51 P3d 599 (2002), described in ¶ 3.1, above. The Supreme Court held that in eliminating plaintiff's right to bring her claim against individual public employees, the Tort Claims Act does not violate a plaintiff's right to a jury trial, under Article I, section 17. That section "is not a source of law that creates or retains a substantive claim or a theory of recovery in favor of any party." Id. at 422. "Plaintiff has no 'civil action' against the individual defendants. It follows that there is no claim to which a right to a jury trial can attach." *Id.*

5.2 DeMendoza v. Huffman, 334 Or 425, 51 P3d 1232 (2002). As noted above in ¶ 3.2, this case involved a challenge to the requirement in ORS 18.540(1)(b) that sixty percent of every punitive damage award must be paid to the state's Criminal Injuries Compensation Account. The plaintiff contended that the statute violated plaintiff's rights to a jury trial guaranteed by Article I, section 17, and Article VII (Amended), section 3. With respect to the former, the Court reiterated its holding in J*ensen v. Whitlow* (see ¶ 5.1, above) that this section does not create any substantive rights, but simply guarantees a jury trial in civil actions for which the common law provided a jury trial in 1857. There is no independent constitutional right to punitive damages, the Court held, and therefore "the legislature's allocation of a portion of the punitive damages award to the state does not implicate Article I, section 17." 334 Or at 447.

As for the provision in Article VII (Amended), section 3, that "no fact tried by a jury shall be otherwise re-examined in any court of this state," the Court concluded that the legislature's decision that a portion of all punitive damage awards should be paid to the State does not interfere with the jury's assessment of such damages. The statute does not require a court to "re-examine" any factual determination that the jury might have made; rather, it deals only with the distribution of an award that the jury has made, and therefore the allocation of a portion of the award to the State does not violate Article VII (Amended), section 3. 334 Or at 447-48.

6. Takings: Art. I, § 18; Art. XI, § 4

6.1 DeMendoza v. Huffman, 334 Or 425, 51 P3d 1232 (2002). The Court held that the statutory requirement that a portion of every punitive damage award be paid to the state did not constitute a taking of private property without just compensation, because a plaintiff has no vested property right in a punitive damage award. Juries have complete discretion not to award punitive damages, and therefore plaintiffs have only "at most, an expectation of such an award." 334 Or at 449. For the same reason, the statute does not impose a "tax" on a plaintiff: the punitive damage award was not the plaintiff's "property" at the time the State takes its portion of it.

6.2 City of Keizer v. Lake Labish Water Control Dist., 185 Or App 425, 60 P3d 557 (2002). The city sued the water district for inverse condemnation, alleging that the district flooded city property, causing damage to a city-owned park and bridge. The city contended that it could bring its action under Article I, section 18 ("Private property shall not be taken for public use * * * without just compensation") and Article XI, section 4 ("No person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law"). The Court of Appeals concluded that the city park and bridge did not constitute "private property" for purposes of section 18, but that the city was a "person" for purposes of Article XI, sec-

tion 4. A judgment dismissing the city's claim was therefore reversed.

7. Separation of Powers: Art. III, § 1; Art. VII (Amended), § 1

7.1 2606 Building v. MICA OR I Inc., 334 Or 175, 47 P3d 12 (2002). This case is primarily concerned with landlord and tenant law, but it acknowledges the limits that the separation of powers principle places on the judiciary's ability to interfere with legislative judgments: "A party to a lease may raise equitable defenses in response to contractual lease forfeiture claims, but not in response to statutory lease forfeiture claims. *** [A] court of equity may not defeat the legislative will, even though it might be harsh and severe in its character." *Id.* at 182 (internal quotation marks and citation omitted).

7.2 DeMendoza v. Huffman, 334 Or 425, 51 P3d 1232 (2002). The Court held that requirement that a portion of all punitive damage awards be paid to the State does not violate separation of powers principles, set out in Article III, section 1 (dividing the powers of government into three departments), and in Article VII (Amended), section 1 (conferring the judicial power on the courts). The allocation of punitive damages by the legislature did not interfere with a judicial function; the statute merely "established reasonable guidelines for the courts to follow in the exercise of their duties." 334 Or at 454.

8. Procedural Requirements for Amending the Constitution: Art. XVII, § 1

The Supreme Court decided three cases in 2002 under the "separate vote" requirement of Article XVII, section 1, which provides: "When two or more amendments [to the Oregon Constitution] shall besubmitted * * * to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."

8.1 Lehman v. Bradbury, 333 Or 231, 37 P3d 989 (2002). Ballot Measure 3 (1992) established term limits for members of the legislature, modified the term limits for governor and other executive offices, and purported to establish term limits for members of Congress. The Court held that "Changes in the term limits for state executive officers and the creation of such limits for state legislators and for members of Congress are at least two substantive changes to the constitution" and that these changes are not "closely related." They were thus two separate amendments that were required to be submitted to the voters separately. The Court also decided two ancillary issues: first, it held that Article IV, section 1 (4)(d), which provides that an initiative or referendum measure becomes effective 30 days after the election in which it was approved, does not bar "separate vote" challenges brought after that 30-day period; and second, it rejected the holding of the Court of Appeals that a measure violates the "separate vote" requirement "if a vote in favor of one amendment does not necessarily imply a vote in favor of another." *Dale v. Keisling*, 167 Or App 394, 401, 999 P2d 1229, *review dismissed on mootness grounds, Dale v. Bradbury*, 330 Or 567, 10 P3d 944 (2000).

8.2. Swett v. Bradbury, 333 Or 597, 43 P3d 1094 (2002). Among other things, Ballot Measure 62 (1998) required disclosure by recipients of significant political contributions from one contributor and it required that persons gathering signatures on an initiative or referendum petition be registered to vote in Oregon. The Court held that these provisions were not "closely related." The Court also held that it is proper to bring "separate vote" challenges under the Declaratory Judgment Act, ORS 28.010 (thereby rejecting the State's contention that such actions must be brought under ORS 250.044).

8.3. League of Oregon Cities v. State of Oregon, 334 Or 645, 56 P3d 892 (2002). Ballot Measure 7 (2000) sought to amend the Constitution to require governments to compensate private landowners for the cost of certain regulations that reduce the value of their property, but it excluded regulations "prohibiting the use of a property for the purpose of selling pornography." It was undisputed that the measure made substantive changes to Article I, section 18 (the guarantee of "just compensation" for public taking of private property), so the question before the Court was whether the measure also amended a different section of the constitution in a manner that was not "closely related" to the amendment to Article I, section 18. The Court concluded that because the measure conferred a benefit to some property owners, but specifically excluded owners of other property from that benefit solely because they sold a type of expressive material that is protected by the free expression guarantees of Article I, section 8, the measure would also amend the latter section. The two changes, the Court held, were not "closely related."

9. Criminal Law Issues

9.1 The Stalking Case. In *Delgado v. Souders*, 334 Or 122, 46 P3d 729 (2002), the Court considered constitutional challenges to ORS 30.866, which authorizes a court in a civil action to enter a "stalking protective order" in certain specified circumstances. The defendant challenged the SPO entered against him on several constitutional grounds. First, he contended that the statute violated his right to a jury trial under Article I, section 11, which guarantees jury trials "in all criminal prosecutions." The Court noted that before statehood, Oregon statutes "provided for proceedings to prevent the commission of crimes." *Id.* at 140. There was no right to a jury trial in those proceedings, so the Court concluded, by analogy, that "the procedures *** for obtaining an SPO fall within a historical exception to Article I, section 11, and, therefore, cannot be characterized as a

'criminal prosecution[]' within the meaning of that provision." *Id.* at 141.

The defendant also contended that the statute was unconstitutionally vague, under the prohibition on "ex post facto" laws in Article I, section 21, and under the equal privileges and immunities guarantee of Article I, section 20, which the Court had previously construed to require that government decisions "'be made by permissible criteria and consistently applied.'" *Id.* at 145, quoting City of *Salem v. Bruner*, 299 Or 262, 268-69, 702 P2d 70 (1985). The Court rejected the "ex post facto" challenge, on the ground that that clause applies only to a law "that carries a sanction that is criminal, as opposed to civil, in nature," 334 Or at 144, and an SPO "cannot be considered a punishment that is criminal in nature ***." *Id.* at 145. It rejected the "equal privileges and immunities" challenge on the ground that "his vagueness challenge is not grounded in the protection that that constitutional provision affords." *Id.* at 147.

9.2 Right to Public Trial. Article I, section 11, guarantees persons charged with crimes the right to a public trial. The right is personal to the defendant and is intended to ensure public scrutiny of the criminal process. *State v. Jackson*, 178 Or App 233, 36 P3d 500 (2001). In *State v. Cavan*, 185 Or App 367, 59 P3d 553 (2002), the Court rejected a claim that holding a trial in the Snake River Correctional Institution violated the right to a public trial. The Court stated that since members of the public can sit outside the courtroom and view the proceedings through several large windows and can hear the proceedings over loudspeakers, "the public had full audio and visual access to the courtroom during defendant's trial, and the jury could see the members of the public. In the ordinary understanding of the term, defendant's trial was public." The defendant also argued that he was denied a fair trial in violation of Article I, section 11, and the Court rejected that argument on the ground that Article I, section 11, "guarantees the right to an impartial jury. It does not guarantee the right to a fair trial."

9.3 Photo Radar. In *State v. Dahl*, 185 Or App 149, 57 P3d 965 (2002), review allowed 335 Or 422 (2003), the Court held that constitutional procedural guarantees relating to criminal law do not apply to photo radar citations.

9.4 Search and Seizure. In *Weber v. Oakridge School Dist. 76*, 184 Or App 415, 56 P3d 504 (2002), *rev den* 335 Or 422 (2003), the Court held that the random urinalysis component of school district's drug testing policy for student-athletes involved a "search" within the meaning of Article I, section 9, but it was "reasonable," on the facts of the case, and therefore the student plaintiff's rights under that section were not violated.

Armatta Update: Developments in "Separate-Vote" Law

Hon. David Schuman
Judge, Oregon Court of Appeals

Some of the most important words in the Oregon Constitution can be found not in the Bill of Rights or in any of the articles setting out the functions of the three branches of government, but in Article XVII, section 1, a once-obscure procedural provision located near the end of the document in the article entitled "Amendments and Revisions." The words are these: "When two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."

In *Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998), the Supreme Court resurrected this "separate-vote" requirement and held that Measure 40, the "crime victims' rights" initiative, did not meet it. Since that time, the rule has served as the vehicle for invalidation of initiatives creating term limits, *Lehman v. Bradbury*, 333 Or 231, 37 P3d 989 (2002); imposing election reform, *Swett v. Bradbury*, 333 Or 597, 43 P3d 1094 (2002); and expanding property rights, *League of Oregon Cities v. State of Oregon*, 334 Or 645, 56 P3d 892 (2002). Another measure altering the law of civil forfeiture is under advisement at the Court of Appeals. *Lincoln Interagency Narcotics Team v. Kitzhaber, CA 115401*. Some observers regard this new development as a much-needed and long-overdue brake on money-driven special interest constitutional amendomania; others see it as unprincipled, result-driven judicial activism favoring the policy preferences of an elite few over the will of the voters. In any event, the separate-vote rule has become an important feature in Oregon's legal landscape. Despite this fact, the jurisprudence surrounding it is still unformed--a work in progress. The following summary of appellate court cases might provide some guidance as to what the rule means and how to formulate legal analyses under it.

***Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998).**

In sustaining a challenge to Measure 40, the "crime victims' rights" initiative passed by the voters in 1996, the court began the modern development of separate-vote jurisprudence. The case teaches, generally, that the separate-vote rule, unlike the single-subject rule, imposes a serious limitation on initiative constitutional amendments; it is a "safeguard that is fundamental to the concept of a constitution," and not to be construed liberally. *Id.* at 276 More specifically--and this is the core of separate-vote analysis--the provision prohibits any initiative that would "make two

or more changes to the constitution that are substantive and that are not closely related." *Id.* at 277. Having announced the rule, the court then determines that at least some of the changes wrought by Measure 40 were substantive and not closely related:

> "[T]he right of all people to be free from unreasonable searches and seizures under Article I, section 9, has virtually nothing to do with the right of the criminally accused to have a unanimous verdict rendered in a murder case under Article I, section 11. The two provisions involve separate constitutional rights granted to different groups of persons. Similarly, the right of the criminally accused to bail by sufficient sureties under Article I, section 14, bears no relation to legislation concerning the qualification of jurors in criminal cases under Article VII (Amended), section 5(1)(a)."
>
> *Id.* at 283-84.

Thus, *Armatta* announces a two-part inquiry to determine if a proposed constitutional amendment was enacted in accordance with the separate-vote rule: Does the proposed initiative make two or more substantive changes to the constitution? Are those changes closely related to each other? Regarding the "changes," *Armatta* seems to distinguish between changed provisions in the existing constitution (the changed provisions) and parts of the proposed initiative itself (the provisions that change, or the changing provisions) and to hold that both types of changes are relevant in a separate-vote analysis:

> "[I]n addition to speaking to the form of submission, the separate-vote requirement addresses the extent to which a proposed amendment would *modify* the existing constitution. That is significantly different from the wording of the single-subject requirement, which focuses in isolation only upon the text of a proposed amendment in requiring that it embrace a single subject."

Id. at 276 (emphasis in original). Regarding how to determine whether changes, once identified, are "closely related" to each other, the opinion provides guidance only by the examples it uses in striking down Measure 40. The case teaches that, at the least, provisions that address different rights held by different groups of people are not closely related. Other rules or principles are not presented.

Dale v. Keisling, 167 Or App 394, 999 P2d 1229 (2000) and *Sager v. Keisling*, 167 Or App 405, 999 P2d 1235 (2000).

These two cases deal with challenges to measures that would have imposed radical changes on Oregon's tax structure. They present the first opportunity for challengers of initiative constitutional amendments to apply the teaching of *Armatta*. The Department of Justice, representing the Secretary of State, argued that two measures are "closely related" if they are so logically interrelated as to present one specific, discrete, cohesive policy choice. The Court of Appeals rejected that formulation and held that two provisions were "closely related" only if a vote in favor of one "necessarily implied" a vote in favor of the other. *Dale*, 167 Or App at 403-404; *Sager*, 167 Or App at 411. The Supreme Court had no opportunity to review that holding, however, because the cases became moot when the initiatives they dealt with did not qualify for the ballot.

Hartung v. Bradbury, 332 Or 570, 33 P3d 972 (2001).

Petitioners challenged the Secretary of State's proposed reapportionment plan, arguing that the plan was formulated under an unlawful 1986 constitutional amendment to Article IV, section 6. That amendment, petitioners contended, violated several constitutional provisions including the separate-vote rule. The court rejects the separate-vote challenge in a single paragraph. Noting that in a pre-*Armatta* case, *Baum v. Newby*, 200 Or 576, 267 P2d 220 (1954), the court had sustained an earlier, more diffuse and radical, reapportionment plan against a separate-vote challenge, the court in Hartung simply concludes: "In light of this court's conclusion in Baum that the more extensive 1952 amendments passed muster under Article XVII, section 1, we conclude that the more limited 1986 amendment necessarily withstands petitioners' challenge." *Id.* at 579. In a footnote, id. at 579 n.5, the court insists that *Armatta* did not overrule Baum, although many observers--not merely the petitioners--find the two cases extremely difficult to reconcile.

Lehman v. Bradbury, 333 Or 231, 37 P3d 989 (2002).

The Supreme Court first significantly expanded on the *Armatta* analysis in *Lehman v. Bradbury*, striking down Measure 3, the 1999 amendment imposing term limits on many state and federal offices. The case holds that the provisions involving state offices, although closely related to each other, are not closely related to the provisions involving federal offices. Noting (rather archly, it seems) that "defendant apparently believes that *Armatta* needs clarification," id. at 242, the court rejects both the Department of Justice's "single, discrete, coherent policy choice" argument and the Court of Appeals' "necessary implication" test, the former because it was "too restrictive" and the latter because it would permit separate-vote cases to "degenerate into an endless war of adjectives and adverbs, each battle of which would involve further efforts to explain and elaborate on whichever set of adjectives and adverbs had been used in

the next preceding case." *Id.* 241-42. The court does not explain how one set of adjectives and adverbs ("closely related") is any less susceptible to degeneration into war than another ("single," etc.), nor does it offer any more satisfactory "test."

It does, however, set out a method of analysis. Once again the court notes the difference between *changed parts of the constitution* ("the constitutional provisions that the measure affects") on the one hand and *parts of the initiative that impose changes on the constitution* ("the constitutional changes themselves") on the other, id. at 246, and pointed out that the analysis had to consider both. *Id.* at 245-46. The first step focuses on the changed provisions. *Id.* at 246. If they are not "related" at all, then it is "likely that changes to those provisions will offend the separate-vote requirement." *Id.* That outcome, however, is only "likely" and not absolute; it is but "one indication that the proposed amendment" might be constitutionally infirm, because "although it is difficult to make *related* changes to *unrelated* constitutional provisions," it is not impossible. *Id.* (emphasis in original).

After examining the changed provisions, the court proceeds to

> "consider the constitutional changes themselves. That is, assuming that the constitutional provisions affected by the measure are related, we must determine whether the changes made to those related constitutional provisions are closely related. If they are closely related, the measure under consideration survives scrutiny under Article XVII, section 1. If they are not, it does not."

Id. This analytical method, then, begins with examination of the changed provisions within the constitution and, if they are related, proceeds to the second step to determine if the provisions of the measure are closely related. The answer to that inquiry is dispositive. In describing this method, the court does not explicitly state what happens if the changed provisions are unrelated.

The court begins its application of the stated method by examining all of the parts in the constitution that are changed by section 19 of Measure 3. All of those parts deal with state offices. The court concludes that because they all set out similar disqualifications for state offices, the framers must have considered all state office-holders "to be parts of a larger category, namely, persons holding elected office in the political branches of state government." *Id.* at 248. Because section 19 of Measure 3 dealing with state offices imposed "an additional disqualifying factor respecting state elective offices * * * it follows, we think, that the constitutional provisions affected by section 19 are related." *Id.*

At that point, instead of finishing the first step of the analysis by asking whether the sections changed by section 19 are closely related to the sections changed by section 20, dealing with federal office holders, the court turns instead to the second step—probably because no existing provision in the constitution deals explicitly with qualifications for federal office.[1] Focusing on the relationship between sections 19 and 20, then, the court concludes that they are not closely related: "[T]he specific addition made by section 20, affecting eligibility for federal public office, had little or nothing to do with term limits for the Oregon State Treasurer, for example, as those limits were established in section 19." *Id.* at 250.

Lehman, then, establishes a process for analyzing a separate-vote issue: Begin by examining the provisions of the existing constitution that are changed by the proposed measure, including those that are changed by addition. If those existing provisions are related, proceed to an examination of the particular parts of the proposed measure, and determine if they are closely related. If they are, the measure does not violate the separate-vote rule. If they are not, it does. If the existing provisions are not related, then the measure probably violates the separate-vote rule. *Lehman* does not disclose what occurs in that situation.

While *Lehman* significantly elaborates on the method of analysis under Article XVII, section 1, it does not announce any rule or guidelines for determining what "closely related" means. It does suggest that existing provisions of the constitution are closely related if the framers regarded them as such.

***Swett v. Bradbury*, 333 Or 597, 43 P2d 1094 (2002)**

Swett v. Bradbury is a successful challenge to Measure 62 (1998), which would have, among other things, required disclosure of large contributions, thereby changing Article II by adding another qualification for office (that is, one cannot hold office without making the required disclosure), and also limited the people's power to propose initiatives under Article IV by adding a residence requirement for signature-gatherers. To the consternation of constitutional commentators who are fond of flow charts--careful readers (and my former students) will know *to whom I am referring*—the court summarizes the analytical method it announced in *Lehman* and then states: "The foregoing statement from *Lehman* was descriptive, not prescriptive. That is, it is equally valid analytically to start the inquiry by

[1] Technically speaking, almost any new addition to the constitutin changes it. A provision imposing term limits on federal office holders, for example, changes the legislature's otherwise plenary power to enact laws, Or. Con. art IV, § 1, by specifying one kind of law it cannot enact, that is, a law permitting federal office holders to serve without limits.

focusing on the changes themselves." *Swett*, 333 Or at 607. Turning then to "the changes that Measure 62 makes to the constitution, regardless of the relationship between the affected constitutional provisions," *id.* at 608, the court concludes without extended discussion that section 1 of the measure, which imposed a disclosure requirement on recipients of political contributions, was not closely related to section 3, which imposed the residence requirement on signature-gatherers. *Id.* at 609. The court reiterates that provisions dealing with the same subject (election reform), and therefore meeting the requirement of the single subject rule, do not necessarily meet the more stringent requirement of the separate-vote rule. *Id.*

***League of Oregon Cities v. State of Oregon*, 334 Or 645, 56 P3d 892 (2002).**

Measure 7, approved by the voters in 2000, expanded the guarantee in Article I, section 18 ("Private property shall not be taken for public use . . . without just compensation") by requiring full compensation for the financial impact of all government regulations--with certain exceptions. One of these exceptions proved fatal; the court holds that the provisions of Measure 7 expanding property rights under section 18 are not closely related to the provision that created an exception for regulations imposed on property dedicated to certain forms of expression. That provision changed the free speech guarantee in Article I, section 8.

As this description indicates, the opinion focuses not on the changed provisions of the constitution, but on the constitution-changing provisions within Measure 7. To reach its decision, the court returns to the sequence of inquiries outlined in *Lehman. League of Oregon Cities*, 334 Or at 674. "Following that approach," the court begins by asking whether "two existing constitutional provisions affected by Measure 7," that is, the Takings Clause of section 18 and the free expression guarantee of section 8, are related, and quickly concludes that they are not: "[T]hose provisions bear no relation to each other." *Id.* The court therefore confronts the question that *Lehman* did not present: what happens if the changed provisions are unrelated? *Lehman* announces that this lack of relationship indicates *probable* constitutional infirmity, but leaves open the possibility that unrelated constitutional provisions could be treated by a measure containing only parts that are closely related. *Lehman*, 333 Or at 246.

Apparently, the next step in this situation is to proceed as though the changed provisions were related, that is, to move on to an examination of the different provisions within the measure. That is what the *League of Oregon Cities* opinion does. Immediately after announcing that the changed provisions of the constitution are not related, the court proceeds: "Turning to the constitutional changes themselves, we conclude that the change . . . to Article I, section 18 . . . is not closely related to the change that it makes to Article I, section 8[.]" *Id.* at 675. That is so because the provisions dealing generally with compensation for so-called regulatory takings "generally *expands* the rights of property owners," while the section allowing regulation insofar as it affects pornography and nude dancing "operates to *limit* the rights of certain property owners. *Id.* (emphasis in original).

Interestingly, *League of Oregon Cities* asserts that the *Lehman* analysis still governs the adjudication of separate-vote issues, and at the same time demonstrates that the first part of that two-part analysis is unnecessary. In *Lehman* we learn that if the changed parts of the constitution are related to each other, then we must proceed to an examination of the constitution-changing parts within the measure to determine if they, too, are closely related. *League of Oregon Cities* teaches that if the changed parts are wholly *un*related to each other, then . . . we still proceed to an examination of the constitution-changing parts within the measure. The result of the first inquiry is irrelevant, because no matter what it is, the analysis must move ahead to the second inquiry, the answer to which is dispositive.

Further, the existing cases still provide no gauge for measuring the closeness of relation between different provisions. Perhaps this is as it should be--that is, a case-by-case determination requiring careful and sensitive evaluation of each proposed measure on its own terms, instead of rote application of some magic rule.

The Court of Appeals Wrestles with Constitutional Methodology

Charles F. Hinkle

Several Court of Appeals decisions in 2002 raised interesting questions about the methodology that Oregon courts are to follow in construing provisions of the Oregon Constitution.

1. Does Oregon *really* require "first things first"? In *Freedom Socialist Party v. Bradbury*, 182 Or App 217, 48 P3d 199 (2002), the Court considered a challenge to the Secretary of State's ruling, under ORS 248.010, that the plaintiff could not register as a political party in Oregon using the word "socialist," because a different party had previously registered using that word. The Court of Appeals held that the statute violated the First Amendment rights of citizens to associate, to form political parties, and to vote effectively, and thus was facially unconstitutional. The Court expressly declined to consider whether the statute violated Article I, section 8, for the reason that the "plaintiffs do not assert that Article I, section 8, provides an alter-

native basis for affirming the trial court's judgment ***." 182 Or App at 221 n 2.

In a concurring opinion, Judge Landau pointed out that the Supreme Court has stated that "'an Oregon court should not readily let parties, simply by their choice of issues, force the court into a position to decide that the state's government has fallen below a nationwide constitutional standard,' when the matter could be decided by application of state law." 182 Or App at 230 (Landau, J., concurring), quoting *State v. Kennedy*, 295 Or 260, 266-67, 666 P2d 1316 (1983).

Indeed, the Supreme Court has been very critical of the Court of Appeals for doing what the majority did in Freedom Socialist Party: namely, decide a case on federal constitutional grounds without first examining the state constitution. In *Salem College & Academy, Inc. v. Employment Division*, 61 Or App 616, 659 P2d 415 (1983), *rev'd* 298 Or 471, 484, 695 P2d 25 (1985), the Court of Appeals held that application of a certain statute "violates the Establishment Clause of the First Amendment," 61 Or App at 618, and that "[i]n view of our conclusion with respect to the federal constitution, we need not, and do not, consider the Oregon Constitution." *Id.* n 1. The Supreme Court bluntly expressed its disapproval: "That approach departed from the judicial responsibility to determine the state's own law before deciding whether the state falls short of federal constitutional standards." *Salem College*, 298 Or at 484.

That disapproval would seem to apply not only to the approach taken in Freedom Socialist Party, but also to the suggestion once made by then-Judge Riggs, that the "first-things-first" rule of *State v. Kennedy* does not invariably require an Oregon court to decide a case on state constitutional grounds, if there is a clearly dispositive *non-analogous* federal constitutional ground of decision. *State v. Rudder/Webb*, 137 Or App 43, 53, 903 P2d 393 (1995) (Riggs, P.J., concurring), *rev'd in part on other grounds sub nom State v. Webb*, 324 Or 380, 927 P2d 79 (1996). Even if the federal constitutional ground of decision is not analogous to the state claim, an Oregon court still has a "judicial responsibility," according to *Kennedy*, to determine the state's own law first.

2. When Does *Priest v. Pearce* Apply? In *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), the Supreme Court stated, with respect to Article I, section 14, that "[t]here are three levels on which that constitutional provision *must* be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation." (Emphasis added.) The Court has subsequently applied that methodology in construing at least 12 other provisions of the Constitution (listed in ¶ 2.4, below). However, the Court has subsequently stated that the *Priest v. Pearce* methodology is to be applied only to a provision of the original Constitution. When construing a provision added to the Constitution by later initiative or legislative referral, a court is to apply the slightly different methodology described in *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994). *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 56-57, 11 P3d 228 (2000),

In four cases in 2002, the Court of Appeals held that it could not, or would not, apply the *Priest v. Pearce* methodology in construing five different sections of the original Constitution: Article I, sections 2, 3, 5, 8, and 9. (The holdings of these cases on the merits are described in the survey of 2002 constitutional law decisions, elsewhere in this newsletter.)

2.1 Leppanen v. Lane Transit District, 181 Or App 136, 45 P3d 501 (2002); **State v. Ciancanelli**, 181 Or App 1, 45 P3d 451, *rev allowed*, 335 Or 90, 58 P3d 821 (2002). In Leppanen, the Court stated that "[a]lthough the Supreme Court has suggested that because it is part of the original constitution, a different, more originalist interpretive approach applies to Article I, section 8, the fact remains that the court has yet to overrule *Robertson*," and that it would therefore continue to apply the *Robertson* methodology rather than that set out in *Priest v. Pearce*. 181 Or App at 142.

The Court of Appeals elaborated on that theme in *Ciancanelli*. In that case, the Court stated that although the Supreme Court "held," in *Stranahan v. Fred Meyer, Inc*., 331 Or at 66 n 19, that the *Priest v. Pearce* methodology "applies to Article I, section 8," it nevertheless "conclude[d] that Robertson still controls our disposition of cases arising under Article I, section 8." *Ciancanelli*, 181 Or App at 7. It stated that the mode of analysis for Article I, section 8, in Robertson is "somewhat different" from the methodology prescribed in *Priest v. Pearce, id.*, and that the Supreme Court "did not explain in *Robertson* what it meant by a 'well-established' historical exception." *Id.* at 8 n 2.

And as for *State v. Henry*, 302 Or 510, 732 P2d 9 (1987), the Court of Appeals seems to have felt bound by some parts of the opinion in that case, but not by others. Thus, the Court stated that "some general historical observations" made in *Henry* "are tough to square with the historical evidence," and that since the "court's comments in *Henry* about rugged and robust pioneer forebears" were not necessary to the court's decision, "we are not bound by them." 181 Or App at 23-24 n 21. On the other hand, the Court found "no support" for a contention that other parts of "the extensive historical analysis in *Henry* amounts to entirely unnecessary dictum." *Id.* at 27.

2.2 Powell v. Bunn, 185 Or App 334, 59 P3d 559 (2002), *petition for review pending* (2003). In deciding a case under the religion clauses of Article I, sections 2, 3, and 5, the Court was confronted with the impossibility of fol-

lowing two contradictory precedents: (a) the directly controlling precedent of *Eugene Sand & Gravel v. City of Eugene*, 276 Or 1007, 558 P2d 338 (1976), *cert den*, 434 US 876 (1977), where the Court, without analysis, held that the federal *"Lemon"* test for evaluating challenges to governmental actions under the Establishment Clause of the First Amendment (*Lemon v. Kurtzman*, 403 US 602, 91 S Ct 2105, 29 LEd2d 745 (1971)) was applicable not only to Article I, section 5, but also to Article I, sections 2 and 3, and (b) the apparently equally mandatory statement in *Priest v. Pearce* (and repeated in *Armatta v. Kitzhaber*, 327 Or 250, 256, 959 P2d 49 (1998) and *Neher v. Chartier*, 319 Or 417, 422, 879 P2d 156 (1994), *overruled in part on other grounds, Storm v. McClung*, 334 Or 210, 47 P3d 476 (2002)) that a court "must" follow the methodology set out there in construing a constitutional provision. The Court of Appeals opted to follow the former, which is the path required by the U.S. Supreme Court. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 US 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

2.3 Weber v. Oakridge School Dist. 76, 184 Or App 415, 56 P3d 504 (2002), *rev den* 335 Or 422 (2003). In this "search and seizure" case, the Court of Appeals stated that "so far as we can tell, the [Supreme] court has not applied that interpretive method [set out in *Priest v. Pearce*] to Article I, section 9. In addition, although both plaintiffs and the district advance arguments supposedly based on their understandings of the framers' intentions, neither offers anything significant in the way of historical evidence in support of those understandings. Particularly in light of the fact that a more historically oriented interpretive approach has at least the potential to lead to conflicts with well-established rules of law, we are not inclined to attempt to undertake on our own an effort to determine the framers' intentions with respect to the issues in this case." *Id.* at 429 (footnote omitted).

2.4. The Supreme Court's Application of Priest v. Pearce. The Supreme Court has applied the *Priest v. Pearce* methodology in interpreting at least 13 sections of the Oregon Constitution:

Article I, section 10: *DeMendoza v. Huffman*, 334 Or 425, 51 P3d 1232 (2002); *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001); *State v. Harberts*, 331 Or 72, 11 P3d 641 (2000); *Bryant v. Thompson*, 324 Or 141, 922 P2d 1219 (1996); *Neher v. Chartier*, 319 Or 417, 879 P2d 156 (1994).

Article I, section 11: *State v. Durbin*, 335 Or 183, 63 P3d 576 (2003); *State v. Moore*, 334 Or 328, 49 P3d 785 (2002); *State v. Amini*, 331 Or 384, 15 P3d 541 (2000); *State v. Rogers*, 330 Or. 282, 4 P.3d 1261 (2000); *State v. Baker*, 328 Or 355, 976 P2d 1132 (1999).

Article I, section 12: *State v. Selness*, 334 Or 515, 526, 54 P3d 1025 (2002).

Article I, section 14: *State v. Sutherland*, 329 Or 359, 987 P2d 501 (1999); *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992).

Article I, section 16: *Billings v. Gates*, 323 Or 167, 916 P2d 291 (1996); *Oberg v. Honda Motor Co., Ltd.*, 316 Or 263, 851 P2d 1084 (1993).

Article I, section 17: *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999).

Article I, section 21: *State v. Fugate*, 332 Or 195, 210, 26 P3d 802 (2001); *State v. Cookman*, 324 Or 19, 920 P2d 1086 (1996).

Article II, section 8: *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997).

Article IV, section 1(2)(d): *State ex rel. Caleb v. Beesley*, 326 Or 83, 949 P2d 724 (1997).

Article IV, section 20: *State ex rel. Caleb v. Beesley*, 326 Or 83, 949 P2d 724 (1997); *McIntire v. Forbes*, 322 Or 426, 909 P2d 846 (1996).

Article VII (Amended), section 3: *Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995).

Article VII (Amended), section 5(2): *State v. Conger*, 319 Or 484, 878 P2d 1089 (1994).

Article XVII, section 1: *Armatta v. Kitzhaber*, 327 Or 250, 256, 959 P2d 49 (1998).

In addition, the Court has stated that the *Priest v. Pearce* methodology applies to Article I, section 8. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 66 n 19, 11 P3d 228 (2000). That statement is *dictum*, since the Court did not have occasion to analyze Article I, section 8, in that case, but the Court of Appeals has described the statement as a holding. (See the discussion of *Ciancanelli* in ¶ 2.1, above.)

Board of Governors to Review Section's Draft Brief

The Executive Committee of the Constitutional Law Section has adopted a resolution that calls for the Oregon State Bar to submit an amicus brief in the Oregon appellate courts that would advance the following policy: "A court may decide a moot case that presents a question of law that is capable of repetition yet evading review."

The Section's Executive Committee believes that there are substantial legal and jurisprudential reasons for the policy that they seek to promote, including uniformity among jurisdictions, a strong and independent judiciary, judicial efficiency, and the provision of guidance to the people and the government on important recurring issues of law.

The Board of Governors' Policy and Governance Committee considered the Section's request and circulated the proposed policy to all of the other Sections of the Bar for comment. The proposal received no comment from most Sections, and a favorable response from all but one section that did respond. The Committee then recommended the policy to the Board of Governors, which adopted the policy in its April 2003 meeting, subject to the Board of Governors' right to approve the brief and the case it would be filed in.

The Section's Executive Committee is currently reviewing a draft brief, which will be submitted for Board of Governors approval at its June 2003 or August 2003 meeting. Once a brief is approved by the Board of Governors, then the Section's Executive Committee will recommend a proper case to the Board for its approval.

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The Constitutional Law Section sponsors CLE session at the OSB Annual Meeting

The OSB Annual Meeting is scheduled for September 18-20, 2003, in Seaside, Oregon, and the Section's CLE will be held on Thursday, September 18th from 3:30 - 5:30 p.m.

Current Developments in Constitutional Law:
Another Blockbuster Supreme Court Term and the New Anti-Terrorism

2 MCLE Credits

This program will consist of two panels: The first panel will review the important constitutional cases on affirmative action, sexual orientation discrimination, corporate free speech, cross burning, and self-incrimination decided by the US Supreme Court in the 2002-03 term. The second panel will focus on constitutional implications of anti-terrorism legislation and official anti-terrorism measures.

Following the CLE activities on Thursday, the Bar will host a **Bonfire and Blues Party** on the beach from 6:30 - 9:30 p.m. Enjoy steamer claims and microbrews or hot cocoa around a bonfire, while listening to *The Hudson Rocket Band*, a Portland area blues group. Tickets will be $30/person from the Bar.

More information about events at the OSB Annual Meeting is available online at: www.osbar.org

Registration packets will be mailed to all bar members in July and can also be found in the July issue of the *Bulletin*. For registration call: (503) 684-7413 or toll-free in Oregon: (800) 452-8260, ext. 413.