

OREGON

# CONSTITUTIONAL LAW

NEWSLETTER

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## A Note From the Chair

*Charles F. Hinkle<sup>1</sup>*

Welcome to the first edition of the newsletter of the OSB Constitutional Law section. Elsewhere in this issue you will find articles on various substantive aspects of this field of law, but I want to use this forum to talk about a different issue that has become an increasing focus of attention in our state: the judicial selection process.

You may have heard that some folks in our state are unhappy with one or more of the recent appellate decisions construing the Oregon Constitution. What's new? Most lawyers have stories about judges who misunderstood the law or the facts and reached the wrong result, and sometimes they aren't shy about expressing their discontent. Under our constitutional system, judges aren't immune from the most strident criticism; if you are tempted to call a judge "ignorant," "dishonest," "ill-tempered," a "bully," a "buffoon," a "sub-standard human," or a "right-wing fanatic," your comments, at least according to the Ninth Circuit, are constitutionally protected. *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

Judges, too, have stories about mistaken decisions. Sometimes the stories are about themselves; the famous *mea culpa* of a California appellate judge acknowledged that "having taken all conceivable sides on the issue, I must certainly at some point have been right. Unfortunately, it too obviously follows that at some point I must also have been wrong." *People v. Webb*, 230 Cal. Rptr. 755, 763 (Cal. App. 1986) (Sims, J., concurring). More often, of course, judges (like the rest of us) are able to discern the mistakes of others more readily than their own; consider Justice Scalia's

light-hearted criticism of the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992): it was, he said, "outrageous," "inexplicable," "hopelessly unworkable," "flatly wrong," "dangerous," "rootless," "contrived," "Orwellian," and "Nietzchean" -- all in all, "more than one should have to bear." *Id.* at 981-999.

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### PLEASE ATTEND

**Constitutional Law Section Annual Meeting, Seaside  
Friday, September 17, 1999 – 3:30 – 5:00 p.m.**

**Featuring Chief Justice Carson on the "State of the  
Judiciary"**

### EDITOR'S NOTE

Greetings! Like every other Bar publication, we welcome contributions from section members. Although this first edition focuses on state constitutional law issues, we plan on looking at United States Supreme Court decisions on important constitutional topics as well. Let us know what issues you think we should address and what you think about this inaugural edition. 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:

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Rhetorical hyperbole of that nature may be annoying, but whether it comes from a lawyer, litigant, or judge, it is generally harmless. It often says a great deal more about the speaker than it does about the object of the speaker's wrath, and it poses no threat to the integrity or independence of the judicial system.

And as unhappy as Justice Scalia may have been with the *Planned Parenthood* decision, his discontent did not lead him to suggest that the method of selecting Supreme Court justices should be changed. Most judges and lawyers know that the best response to a mistaken opinion is, in the words of the old ballad, to lie back and bleed awhile and then to rise and fight again. A court may be slow to see the light (in July 1999, the Oregon Supreme Court overruled a decision that it had made in 1880), but as Justice Frankfurter famously remarked, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

Probably no one would disagree with the proposition that scrutiny of a judge's opinions by lawyers, litigants, other judges, and the public at large is a good and healthy thing. But when criticism of the judiciary goes beyond the expression of dismay over a "wrong" decision, and becomes an effort to inject political considerations into the judicial decision-making process, alarm bells should go off, because freedom from political pressure is absolutely essential to a fair and just judicial system.

Shortly after the Oregon legislature adjourned this summer, the newsletter of the OSB Public Affairs committee referred to "a lack of political support for judicial institutions" and commented that there is a sentiment among some legislators that "the Judicial Branch needs to be reined in or punished." Unfortunately, some of the proposals that have been made in recent years to change the way judges are selected in our state seem to be a product of that kind of hostility.

These proposals are a dramatic overreaction to a phenomenon that has always been and will always be with us: The fact that judges sometimes decide cases in ways that we don't like. The proposals reflect a misunderstanding of the importance of a judiciary that can carry out its task of judicial review free from political pressure. They are aimed not at the mistakes of an individual judge (mistakes that are inevitable unless and until the judicial craft attains a level of perfection denied to every other realm of human activity), but at the institution of the judiciary itself. These attacks on the judiciary are far more troublesome than any attack on an individual judge.

What is remarkable about the recent efforts to amend the judicial selection process in our state is that they make no pretense of attempting to ensure the

selection of more competent judges. It is not an effort to bring about "better" judicial decisions that motivates the "reformers." They are motivated by political considerations, pure and simple. The attitude among some critics of the present system of selecting judges seems to be, "If judges are issuing opinions that diverge from our own political or economic or jurisprudential preferences, why, let's change the system for picking the judges. Some other system will surely produce judges whose opinions are more to our liking."

Of course, the empirical evidence is to the contrary. Whether judges are selected by popular vote, or by selection from a slate nominated by a "neutral" commission, or selected as a matter of pure political patronage, each one of them will issue a decision from time to time that will disappoint somebody, somewhere. We should not want to have it any other way, for Judge Learned Hand's comment is surely one that most of us would agree with: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. Hand, *THE BILL OF RIGHTS* 73 (1958).

Few would contend that injecting the legislature into the judicial selection process will improve the caliber of the judiciary in Oregon. The only sure result of such a change in the process would be to increase the political pressure on judges, and persons who aspire to be judges, to conform their conduct to a public opinion. And that would be unfortunate to say the least. Other nations are quite familiar with judicial systems that are subject to the manipulation of the executive and legislative powers, but our system has been built upon a different theory. "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). And therefore, as Mark Twain put it, judges should not read the Constitution through the blurred and distorting lenses of political spectacles.

Our constitutions, state and federal alike, placed the judicial power in a branch of government separate from the executive and the legislative powers in order to ensure that litigants would have their claims decided by judges who are free from the risk of legislative or executive pressure. In 1802, John Rutledge expressed the view on the floor of the House of Representatives that government may be conducted with all manner of mischief, "but, so long as we may have an independent Judiciary, the great interests of the people will be safe." 11 ANNALS OF CONG. 739-40 (1802).

Disgruntlement with particular appellate decisions is not a legitimate reason for seeking to change the judicial selection process, especially when the decisions under attack are the product of a neutral and

consistent method of constitutional interpretation. Oregon's appellate courts in recent years have been quite faithful (with one or two exceptions) in applying a consistent mode of analysis of the provisions of the Oregon constitution. It is a mode of analysis that examines the specific wording of the constitutional provision, the case law surrounding it, and the historical circumstances that led to its creation. The great virtue of this mode of analysis is its neutrality: it does not start from any judge-made canon of construction about "preferred" rights or "core" values, or from any assumption about the meaning of a constitutional text. Oregon courts ask, instead: What does this provision mean? The Oregon Supreme Court has instructed that the proper way to determine that meaning is to examine the text of the provision and the historical circumstances that led to its enactment, while paying attention, too, to prior court interpretations of the provision (on the sensible theory that wisdom is not the exclusive possession of today's court).

This method of analysis doesn't favor plaintiffs or defendants, it doesn't favor the State or the criminally accused, it doesn't favor the political left or the political right. "Winners" and "losers" in state constitutional cases over the past few years have included litigants from both sides of nearly every contending faction in the litigation universe. That is a pretty good indication that the method of analysis is a fair and reasonable one. When judges diligently strive to determine the meaning of a constitutional provision, when they apply neutral principles of interpretation in doing so, it is wrong to fault them for the results they achieve, even though reasonable persons might draw different conclusions based on the meaning of particular words or on the available evidence of the intent of the framers.

Efforts to change the judicial selection process did not prevail in the 1999 legislature, but the issue is not dead. SJR 7 originally provided for Senate confirmation of judicial appointments; it was later amended to provide for a judicial nominating commission. Neither version was approved. Instead, SJR 7, as it was adopted, directs the Interim Judiciary Committees of the House and Senate to "conduct a joint study of proposals for constitutional changes designed to increase legislative participation in the appointment of judges to fill vacancies in judicial offices."

The Interim Judiciary Committees have scheduled a hearing on SJR 7 during the OSB annual meeting in Seaside. The hearing will be from 2:30 to 4:30 p.m. on Thursday, September 16. I urge you to attend this hearing and express your views. The issue is too important to be left to the cranks on the fringes; the cranks in the middle need to be heard, too.

I also urge you to attend the Friday CLE session sponsored by the Constitutional Law section. Chief Justice Carson has agreed to speak regarding "The State of the Judiciary" and the proposals to change the judicial selection process and Deputy Attorney General David Schuman and Professor Lisa Kloppenberg will give a round-up of significant constitutional law decisions from the past year. You can expect to hear some analysis and debate concerning the important federalism cases decided by the U.S. Supreme Court in June. We will close the session with a brief business meeting, at which section officers for the next year will be elected. I hope to see you there.

## Oregon's Attempt at Constitutional Revision

*David Schuman*<sup>2</sup>

In one sense, Oregon's state constitution is among the oldest in the nation. Unlike other states, Oregon has never had an intentional, wholesale revision of its original charter; today's document is technically the same one that 60 Oregonians in convention composed in the summer of 1857 and the voters ratified in 1859. In another sense, however, the current Constitution would be unrecognizable to the generation that drafted and voted for the original. Because it can be so easily amended piecemeal by legislative referral or voter initiative, the document has more than doubled in size since 1859. The original Constitution had 187 sections in 18 articles; 77 of those sections have since been either changed or repealed, and another 134 sections have been added.<sup>3</sup>

Taken as a whole, these changes transform a tightly written, logically organized foundational charter into a wordy, cluttered collection of provisions, many of which are obsolete, ambiguous, mutually incompatible, or more appropriately enacted as statutes. In response to this ongoing development, one member of the recently completed 70th Legislative Session introduced a measure calling for the creation of a Commission to study constitutional revision. This bill<sup>4</sup> died a quiet death, and it is not a death many will mourn: Today's political climate is not conducive to constitution-making. That task should be a labor to find and articulate foundational shared beliefs about what

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<sup>3</sup>*More than 150 sections have been added over the years; of these, 134 remain part of the document.*

<sup>4</sup>*HB2778*

constitutes a polity, not a bitter negotiating session among factions with pre-existing social and political agendas. But the bill did raise a legitimate question: What, if anything, should be done to create a modern, streamlined, lean Oregon Constitution – a document for the twenty-first century? To begin answering this question, we might want to recall this state's only other experiment in constitutional revision.

In the years immediately after World War II, several key Oregonians (including future U.S. Senators Mark Hatfield and Richard Neuberger) recognized that the process of piecemeal change had resulted in an Oregon Constitution needing wholesale revision. Along with Esther Lewis of the Oregon League of Women Voters, they began a persistent campaign for constitutional reform.<sup>5</sup>

This campaign achieved several preliminary victories: In 1953, a statute creating an official committee to study constitutional revision; in 1959 and 1960, a constitutional amendment permitting complete revision without a convention; and finally in 1961, Senate Joint Resolution 20, creating a Commission for Constitutional Revision to report "findings and recommendations" to the 1963 session.

That Commission consisted of 17 members, 13 appointed by the legislature, two by the Governor and two by the Chief Justice of the Supreme Court. Ultimately the Commission contained "four state representatives, three state senators, two supreme court associate justices, a circuit judge, two ex-governors, [two] newspaper publishers, a businessman with long political experience, a professor of law and a housewife long active in constitutional revision study for the Oregon League of Women Voters."<sup>6</sup> The members were divided into committees, which held a total of 39 meetings around the state to take testimony and formulate recommendations. The plenary Commission met on 21 occasions for over 80 hours of discussion.<sup>7</sup>

These discussions focussed on several divisive issues. The most basic involved the scope of the revision itself. One faction urged mere housekeeping, on the theory that each substantive change would alienate a group of voters who, when added together,

would defeat any proposal the Commission might formulate. The other faction noted that the legislature which created the Commission seemed to mandate complete substantive revision, which was, in any event, necessary in order to replace the old charter with one designed for the twenty-first century. The latter faction prevailed.<sup>8</sup>

Other disagreements concerned the judicial selection process, the necessity or wisdom of a "substantive due process" clause in the Bill of Rights, and the rules of legislative apportionment.<sup>9</sup> Overcoming these disputes, the Commission completed its work and recommended a revised Constitution to the voters and the members of the 1963 legislature.<sup>10</sup>

The new Constitution, approximately half the length of the old one,<sup>11</sup> contained a mixture of traditional and innovative provisions. It preserved a three-branch government with separated powers, checks and balances, and the other familiar components of American constitutionalism. The Executive branch proposed by the Commission made the Governor the only state-wide elected official, in order to provide a "clear line of authority"; instead of having to struggle for coordinated policy with an independently elected (and thus arguably co-equal and possibly adversarial) Attorney General, Secretary of State, or Treasurer, the Governor would preside over a cabinet of appointed administrators.<sup>12</sup> The proposed new legislature would remain bi-cameral, but meet annually instead of biannually. Judges under the Commission's recommendation would be appointed by the governor and stand for approval or rejection after holding office for two years. If approved at that election, the judges would serve six-year terms before having to stand for approval again.<sup>13</sup>

The proposed Constitution also imposed some constraints on popular democracy by increasing the number of signatures needed to qualify a measure for the ballot.<sup>14</sup> And after a fierce debate, the Commission recommended that the Bill of Rights include an explicit "substantive due process" clause, requiring legislation to pass judicial scrutiny for "reasonableness." Proponents believed this clause would protect economic initiative and individualism from overreaching government regulation; opponents, led by Constitutional Law Professor (and later Justice of

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<sup>5</sup> See Forest W. Amsden, *The Constitutional Revision Commission and its Job*, in OREGON CONSTITUTIONAL REVISION (1963) (unpublished collection, University of Oregon Law School Library); Alfred T. Goodwin, *The Commission for Constitutional Revision*, 67 Or. L.R. 1,2 (1988).

<sup>6</sup> Amsden, *supra* at 3.

<sup>7</sup> See The Commission for Constitutional Revision, *A New Constitution for Oregon: A Report to the Governor and the 52nd Legislative Assembly*, December 15, 1962, reprinted in 67 Or. L.R. 127, 181 (1988) (hereafter *A New Constitution*).

<sup>8</sup> See Amsden, *supra*, at 5; Goodwin, *supra*, at 6.

<sup>9</sup> See Goodwin, *supra*, at 8-9.

<sup>10</sup> See *A New Constitution* at 130.

<sup>11</sup> The recommended Constitution was 9,644 words long, to replace one with 21,982 words. See *id.* at 175 n. 8.

<sup>12</sup> See *id.* at 182.

<sup>13</sup> See *id.* at 192.

<sup>14</sup> See *id.* at 205.

the Oregon Supreme Court) Hans Linde, tried in vain to remind the Commissioners that "substantive due process" invited judges to sit as super-legislators, and had been thoroughly and explicitly discredited under the Federal Constitution for decades.<sup>15</sup>

Innovative provisions included a new office, Controller, with power to audit and generally oversee all Executive Branch functions. The Commissioners believed that separation of the executive from the control function within the state bureaucracy would promote efficiency.<sup>16</sup> Further, the revised Constitution called for establishment of a permanent "State Law Commission" to advise the legislature regarding law reform.<sup>17</sup>

However, the innovation that caused the most controversy involved a complex and soon-to-be anachronistic issue. Due to population shift from rural to urban districts, Oregon, like many other states, suffered from serious malapportionment. Because the state had not been reapportioned, sparsely populated districts in southern and eastern Oregon were overrepresented in the legislature; they might have one representative for every 100 voters, while in Portland the ratio would be 1000-to-one, thus diluting the political power of Portland residents by a factor of 10. To remedy that situation at least partially, the Commission proposed that the legislature appoint a bipartisan, non-political committee to reapportion the state, operating under a "two-to-one" upper limit: the largest constituency would have to be no more than twice the size of the smallest, so that "no representative or senator should be required to represent more than twice as many people as any colleague."<sup>18</sup> Because the 1963 legislature reflected precisely the abuse that the new constitution aimed to cure, it was a hard sell. Reapportionment became the dispositive issue of the revision debate; despite the fact that it was only a minor part of the proposed new constitution, many legislators decided to vote for or against approval based on that single point. Ultimately, revision supporters did manage to persuade exactly the required two-thirds in the house, but failed by a single vote in the senate. Thus, the two-decade campaign supported at one time or another by almost the entire Oregon political establishment – a campaign for reform no one denied was necessary – floundered and failed, by a single vote, over an issue that the United States Supreme Court rendered moot within a year. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held that each member of a state legislature must represent approximately the same number of voters ("one

person, one vote"), thereby requiring of Oregon a legislative reapportionment much more radical than the one over which the revised constitution faltered and fell.

Not easily defeated, some of the Commissioners reconstituted themselves as a Citizens' Committee for Constitutional Revision and attempted to submit the defeated constitution as an initiative. However, the Secretary of State, acting on the advice of Attorney General Robert Thornton, refused to certify the measure for the ballot, citing Article XVII of the Oregon Constitution for the proposition that constitutional revision could lawfully occur only by separate plebiscites on each new provision, constitutional convention, or referendum by two-thirds of both houses – not by simple initiative. The Oregon Supreme Court, in a subsequent mandamus action, agreed with the Secretary of State,<sup>19</sup> and the proposed revision never reached the ballot. The movement never regained momentum after these defeats.

## Legislative Referrals of Constitutional Measures

*Kelly Clark<sup>20</sup> & Ross Day<sup>21</sup>*

Now that the 1999 Legislature has closed up shop it is time to take a constitutional inventory. Most notable are the referrals the Legislature passed - a record 21 referrals to the voters. Nineteen of the 21 referrals amend the Oregon Constitution in one way or another. Some of the amendments are in response to recent Oregon Supreme Court decisions, others are in response to local issues, and still others are in response to broader statewide concerns.

This report presents a short overview of the referrals, when they will appear on the ballot and what they purport to accomplish.

### “CRIME VICTIMS RIGHTS” REFERRALS

Over one-third of the referrals sent to the voters by the Legislature (7 of the 19) seek to reinstate the provisions of the Crime Victims Rights amendments (1996 Ballot Measure 40) which were invalidated by the Oregon Supreme Court on what some consider to be technical grounds. The referrals (House Joint Resolutions 87, 88, 89, 90, 92, 93, & 94) will all appear on the November, 1999 ballot.

<sup>15</sup> See *id.* at 225-27.

<sup>16</sup> See *id.* at 186.

<sup>17</sup> See *id.* at 195.

<sup>18</sup> See *id.* at 188.

<sup>19</sup> *Holmes v. Appling*, 237 Or. 546, 392 P.2d 636 (1964).

<sup>20</sup> *Partner, O'Donnell & Clark*

<sup>21</sup> *Willamette University College of Law*'2000

House Joint Resolution 87 - This is the initial "crime victims rights" measure. It delineates the rights afforded to victims of crime and in juvenile court delinquency proceedings. Among these rights are: the right to be present at the proceedings and to be heard at the sentencing, the right to obtain information about the sentence or other information about the criminal defendant, the right to refuse interview, deposition or other discovery request from the defendant subject to constitutional limitations, the right to restitution, the right to a transcript of any court proceeding, the right to be involved in plea agreements and the right to be informed of the above mentioned rights as soon as possible.

House Joint Resolution 88 - This resolution grants the state, through the prosecuting attorney, the right to demand a jury trial.

House Joint Resolution 89 - This resolution prohibits individuals convicted of a felony within 15 years or a misdemeanor involving dishonesty or violence within 5 years from serving on a jury.

House Joint Resolution 90 - HJR 90 prohibits the pre-trial release of criminal defendants in cases involving violent crimes. In cases involving less violent crimes HJR 90 requires the court to consider the safety of the victim before setting bail or releasing the defendant.

House Joint Resolution 92 - HJR 92 requires only 11 members of a 12 member jury panel to render a verdict of guilty in an aggravated murder case.

House Joint Resolution 93 - This resolution compels a person to testify regarding a criminal offense that person may have committed.

House Joint Resolution 94 - This referral reserves the authority to change or otherwise reduce a term of imprisonment to Judges or the Governor and takes it away from the legislature. This resolution applies to all criminal offenses committed on or after HJR 94 goes into effect.

### **CAPS ON NON-ECONOMIC DAMAGES**

In mid-July the Oregon Supreme Court ruled that statutory caps on non-economic damages violated the Oregon Constitution's guarantee to a jury trial. *Lakin v. Senco Products, Inc.*, 329 Or. 62, \_\_\_ P.2d \_\_\_ (1999). In response to the Court's decision, the Legislature passed House Joint Resolution 2. HJR 2 grants to the Legislature the authority to place caps on damages in civil actions. This resolution reaches farther than the Court's decision in that it gives the Legislature the right to place caps on all damage awards, not just non-economic damages. HJR 2 is scheduled to appear on the May, 2000 ballot. Existing legislation reinstates statutory caps on non-economic damages if HJR 2 is

passed by the voters. HJR 2 is expected to be on the May, 2000 ballot.

### **REFERRALS REGARDING LOCAL ISSUES**

The Legislature referred to the people a measure which modifies the manner in which counties may be formed. Currently the Oregon Constitution only allows for the creation of new counties if the county is 400 square miles in size and has a population of more than 100,000. The referral (House Joint Resolution 28) would change the language to require either 400 square miles or 100,000 people in order to form a new county. This measure is expected to be on the November, 2000 ballot.

### **STATEWIDE ISSUES ON THE BALLOT**

Six of the 21 referrals on the ballot address other diverse statewide issues. The issues range from an expansion of the state veteran's home loan program to changes in the state inmate labor program.

Most significant in this list of referrals is House Joint Resolution 17 which would place the state's "Kicker" law into the Oregon Constitution. This is significant because it would require the state to return the monies (when the State collects more than 102% of projected revenues) as opposed to allowing the Legislature to vote each session to override the kicker law. As the "Kicker" law now stands, the Legislature can choose to keep the "Kicker" money anytime it sees fit. House Joint Resolution 17 would take this option away. This measure is expected to be on the November, 2000 ballot.

In response to the recent siting of adult bookstores in Portland, Medford and elsewhere, the Legislature sent to the voters House Joint Resolution 52. This resolution allows local jurisdictions to zone adult businesses. Currently local jurisdictions are unable to zone such businesses because of the Oregon Constitution's strong free speech protections. House Joint Resolution 52 would carve a niche out of Article I, Section 8 to allow a restriction on this type of speech. This measure is expected to be on the November, 2000 ballot.

The Legislature also sent two referrals to the people dealing with the gasoline tax issue. First, Senate Joint Resolution 44 sets out in detail what gasoline tax revenues may be used for. The intention of this measure is to ensure gasoline tax revenues are spent on roads and not administration. Second, the Legislature referred a measure (Senate Joint Resolution 11) allowing gasoline tax revenues to be spent on state and local police. This measure is expected to be on the November, 1999 ballot.

Finally, after referring to the voters 21 measures with a wide range of topics, the Legislature referred to the people House Joint Resolution 21. Ironically -- in light of the 21 measures the Legislature referred out -- HJR 21 increases the number of signatures required in order for a constitutional initiative to be placed upon the ballot, making it more difficult for citizens to place constitutional changes on the ballot. Apparently, the Legislature is trying to eliminate its competition.

## Opinion & Commentary: New Oregon's Amendomania

Hans A. Linde<sup>22</sup>

The Oregon Constitution no longer gets much respect. Soon it may not deserve much.

The constitution long was regarded as an enduring charter of government and of guaranteed rights. Even after the early 20th-century innovations opened the door to amendments on initiative petitions, their sponsors respected the difference. They used laws to enact policies to meet changing priorities and, with few exceptions, reserved amendments for changing the institutions of government.

The past decade has seen a stream of initiatives to cement social policies into the constitution. Many have failed, some costly ones have succeeded. The attempts likely will continue as long as sponsors can secure that goal with only a simple majority of those voting.

More recently, however, legislators themselves have joined in the amendment craze. The 1999 Legislative Assembly referred 19 constitutional amendments to the voters and considered many more. A number of these reduced guarantees of the Bill of Rights that date from Oregon's 1859 Constitution. How does the legislature approach changing the constitution? *Not* "carefully, very carefully."

### **"IS THIS AMENDMENT REALLY NECESSARY?"**

We do not expect sponsors of initiatives to conduct studies and hearings with expert witnesses before drafting their proposals and starting to collect signatures. But that should not be too much to expect of legislators before changing the constitution. Most legislators, after all, have little prior knowledge of the existing constitutional law, nor of alternative legal ways of pursuing their goal. Yet there is little patience

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<sup>22</sup>Distinguished Professor, Willamette University College of Law; Associate Justice, Oregon Supreme Court 1977-1990

to stop long enough to find out, possibly because many members do not expect to return for another session. This puts a heavy burden on the few lawyer legislators to slow or redirect the thrust of demands for programmatic amendments that may be unnecessary, or at least premature.

*It is unnecessary* to amend Oregon's Bill of Rights in order to protect neighborhoods against sex-related businesses at locations where they threaten to have adverse effects. The legal issue is largely procedural, within the reach of ordinary state or local legislation. An old-fashioned respect for the constitution would resist needless tampering with Oregon's Article I, section 8, the guarantee of free expression, and thereby jeopardizing other ways in which it protects Oregon's press and other media.

*It is unnecessary* to amend the constitution for the legislature to authorize sobriety checks in order to stop an intoxicated driver from continuing to drive. The constitutional issue arises only if the warrantless stop leads to criminal prosecution for the same conduct that there was no grounds to suspect.

*It is premature* to amend the constitution when a court below the Oregon Supreme Court cites the constitution for a result with which legislators or their constituents disagree. The Supreme Court might decide the issue differently. The court had no opportunity to consider "domestic partner" benefits.

Even a Supreme Court decision needs careful scrutiny for another means to achieve the legislature's goal before reaching for a constitutional amendment. When the court recently held that a post-verdict cap on jury awards of non-economic damages contradicted the constitutional status of jury trials, the legislature might have studied whether a different law would pass muster, as had the workers compensation law and the retraction statute limiting some libel recoveries to economic loss. Instead, legislators rushed to a proposed amendment simply to validate the reduction of jury verdicts, surely not an easy sale to the voters.

For 140 years Oregon has investigated and prosecuted crime according to its original procedural guarantees, weakened only recently by a few initiated amendments. It is doubtful that the legislature on its own would have proposed major changes such as denying bail or narrowing the jury of one's peers without a serious study of their actual necessity and social impact. Some legislators are swayed, or intimidated, by the political argument that voters accepted these and other changes when initiative sponsors wrapped extensive reductions of everyone's constitutional protections in a single package deceptively labeled "VICTIMS' Rights," though laws can and do provide actual rights for crime victims without the constitutional symbolism. But when the legislature submits constitutional amendments, the

amendments are the legislators' proposals. The legislators are responsible for them, not the original proponents. Yet, without time for study and explanations, most legislators, like their constituents and the media, know little of the historic rights that they propose to sacrifice.

### TAKING TIME

Members of the Constitutional Law Section, like other lawyers, doubtless differ about the goals or the substance of many proposed amendments. They should agree, however, on the importance of a rational and informed process for deciding whether and how to amend Oregon's constitution. Unlike a faulty statute, a faulty constitutional text provision is hard to correct, as the recent time-consuming and expensive struggle to correct an initiated tax limitation showed.

A careful amendment process is hardly possible in the midst of a legislative session. The available time may suffice for policies such as bond measures that require amending the constitution's fiscal directives. It does not suffice for committee members, while also participating in the rest of the session's agenda, to study constitutional clauses with a long history and extensive judicial consideration, and thereafter to explain these to their equally busy fellow legislators.

Legislators should recognize that after a session begins, they lack the opportunity and time to obtain the kind of explanation and analysis that a constitutional amendment demands. Persons who could offer that kind of help will not be given time to prepare and present it with any expectation that legislators will have time to study or to discuss the information they provide. During a session, committee members may well listen courteously to an amendment's proponents and opponents, but in the end legislators most likely will vote for what they or their constituents consider a desirable goal, whether or not it actually calls for a constitutional amendment. Only interim committees that request written and oral submissions, question witnesses, and make written reports available well in advance of a legislative session can provide a more informed process, as well as time for public attention to proposed constitutional changes, before legislators vote to send them to the voters.

A constitution deserves more respect than the present headlong rush to amend it whenever it places some substantive or procedural restraint in the path to a particular goal. Proponents of amendments for narrow purposes should recognize that when the Bill of Rights is given no more respect than simple legislation, the precedent is set to override guarantees that they care about. That applies equally to political liberals and conservatives. A press, like *The Oregonian*, that would ignore the constitutional difference between

salacious publications and "sex toys," may find it hard to insist that its own privileges and immunities must remain untouched. The same is true with the Oregon Constitution's independent protections for private property, contracts, tax uniformity, or the right to bear arms.

### WHAT TO DO

Members of the Constitutional Law Section should work to have the legislature's judiciary committees adopt a simple principle: Legislative proposals that would affect Oregon's Bill of Rights should be referred for study during one interim between sessions before an amendment is submitted to the voters. Legislators should adopt this as standard operating procedure, not selectively depending on the politics of individual proposals.

The object of the principle should be to preserve the Bill of Rights from needless amendments, regardless where its proponents come down on any single amendment. The principle is procedural, not political. Moreover, it is not new or unusual to require constitutional amendments to go through two legislative sessions. That was the rule in Oregon's original constitution until 1906. My modest proposal does not require double legislative passage of an amendment, only a serious study and report in advance of the session that votes on it; and it is limited to amendments that affect the Bill of Rights. It does not cover initiative amendments, which are a separate problem. The principle should appeal to reasonable legislators and voters, regardless of party. The Constitutional Law Section should help to achieve it.

## A Field Guide to 1998 Oregon Constitutional Law

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**I. INTRODUCTION**

We offer this analysis of 1998 Oregon appellate decisions with the humble certainty that it constitutes only a beginning tool to assess some of the work of Oregon’s two appellate courts in the last year. <sup>25</sup>For starters, we analyzed only Oregon appellate decisions focusing on the state constitution.<sup>26</sup> Obviously, the Oregon Supreme Court and Court of Appeals decide many significant cases as a matter of statutory construction, common law adjudication, or on the basis of the federal constitution. Further, many interesting constitutional decisions are issued by Oregon’s trial courts, but these are hard to find through any centralized method. Finally, under the adage that “you have to begin someplace,” we looked only at 1998 decisions. This decision is plainly artificial and leaves out important decisions, such as the Court of Appeals ruling in *Outdoor Media Dimensions* (1997) (now under review by the Oregon Supreme Court), which are a very important part of the current constitutional landscape.

Given all these caveats, why the “Field Guide”? Quite simply, we believe there is value in exploring the rhythm of the 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. Oregon has one of the nation’s more active and independent state constitutional traditions. Considerable scholarly attention has been paid to the originality of the work of Hans Linde and to the Supreme Court’s interpretation of specific provisions, such as Article I, section 8. This review builds a necessarily more superficial but also more encompassing base that might allow a cumulative look, from year to year, at the sweep and technique of

<sup>25</sup> A few Oregon Tax Court opinions interpreting or applying the state constitution have been included as well.

<sup>26</sup> Federal cases interpreting the Oregon Constitution generally represent only persuasive authority and were not included in this survey, which focuses on the work of state courts. However, it is important to note that the Ninth Circuit in *Vannatta v. Keisling*, 151 F.3d 1215 (1998) found Art. II, § 22 (restricting campaign contributions by out-of-state donors) unconstitutional under the First Amendment.

Oregon courts’ treatment of the state constitution as a whole. We hope this will prove useful to practitioners as a research tool. We also hope that our work might spawn in these pages a more focused consideration of specific provisions and the constitutional methodology of Oregon courts.

We gathered information by constitutional provision, by court, by judge, by scope, and by what we call “jurisprudential tactic.” Someone interested in looking at all of the 1998 cases decided under Article I, section 9, for example, can find the information in Table #2. By examining the column labeled “Scope,” you can use that table to find the two opinions that in our view, at least, produced a significant discussion. By looking under “Tactic,” you can also check to see which of the cases involved a new or expanded interpretation of the constitution, or imported reasoning from outside the State, versus application of existing theory. In addition, Table #2 reveals the frequency with which individual judges handled particular constitutional provisions last year. Table #1 permits a quick sweep of all the courts which handled a specific provision during 1998.

For the purposes of this article, cases that merely mentioned the constitution but provided no substantive interpretation were winnowed out. Ballot title reviews made up the bulk of these cases, along with numerous cases that simply cited *State ex. rel. Huddleston v. Sawyer*<sup>27</sup> for the proposition that Measure 11 has survived all constitutional challenges.<sup>28</sup>

**II. CASE STATISTICS**

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 nothing to do with the court or the judge and 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 recent time

<sup>27</sup> 324 Or. 597 (1997).

<sup>28</sup> See, e.g., *State v. Mills* 153 Or. App. 611, 958 P.2d 896 (1998).

working within specific provisions of the state constitution.

In the 72 cases which substantively discussed the state constitution, four were decided by the Tax Court, 55 by the Court of Appeals and 13 by the Supreme Court. Table #1 provides a listing of how many times a court interpreted a specific section. Because a given case may interpret multiple constitutional sections, the total number of interpretations is greater than the total number of cases.

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. Below the categories are described and assigned to each of the cases, sorted by the constitutional section which they interpret. Many cases would obviously fall on borderlines between these inexact categories, but this table provides a quick and general overview of the types of interpretations the courts produced this past year.

**Scope or depth of discussion:**

1. Mentions or applies previous interpretation with **little or no explanation** as to whether that interpretation is right or why.
2. Applies previous interpretation, overrules previous interpretation or creates new interpretation on de novo question with **some discussion**.
3. Applies previous interpretation, overrules previous interpretation or creates new interpretation on de novo question with **significant discussion**.

**Jurisprudential Tactic:**

- A. Court cites a previous interpretation as directly applicable to this factual situation.
- B. Court cites a previous interpretation and applies it to what it says is a slightly new factual situation in a way that expands the original interpretation.
- C. Court develops new interpretation because substantially different factual situation or inadequate existing constitutional analysis compels de novo holding.
- D. Court examines statute to find whether it is constitutional.
- E. Court adopts reasoning from a source outside the state to explain constitutional provision.

TABLE 1.

Section	Total interpretations	Interpretations by the Supreme Court	Interpretations by the Court of Appeals	Interpretations by the Tax Court
1.8	6	1	5	0
1.9	21	5	16	0
1.10	4	0	4	0
1.11	13	2	11	0
1.12	5	2	3	0
1.16	5	0	5	0
1.17	1	1	0	0
1.18	1	0	1	0
1.20	9	1	7	1
1.21	1	0	1	0
1.23	1	0	1	0
1.32	1	0	0	1
1.42	2	1	1	0
3.1	1	0	1	0
4.1	4	2	2	0
4.20	1	0	1	0
7.3	1	0	1	0
11.11	3	0	0	3
17.1	1	1	0	0

TABLE 2.

Art.	Sec.	Scope	Tactic	Name	Oregon cite	Majority author
1	8	2	D	Shook v. Ackert	152 Or. App. 224	Haselton
1	8	2	B	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. Department of Corrections	156 Or. App. 30	Edmonds
1	8	1	A	Wheeler v. Marathon Printing Inc	157 Or. App. 290	Haselton
1	8	3	B	Fidanque v. State ex rel. Oregon Gov't Standards and Practices Com'n	328 Or. 1	Gillette
1	9	1	B	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	B	State v. Johnson	153 Or. App. 535	Edmonds
1	9	1	A	State v. Meyers	153 Or. App. 551	Landau
1	9	1	B	State v. Haney	153 Or. App. 642	De Muniz
1	9	1	A	State v. Jangala	154 Or. App. 176	Armstrong
1	9	1	B	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	B	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	B	State v. Morton	326 Or. 466	Gillette
1	9	1	A	State v. Boone	327 Or. 307	Van Hoomissen
1	9	3	B	State v. Smith	327 Or. 366	Gillette
1	9	1	B	State v. Toevs	327 Or. 525	Carson
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. Rohlffing	155 Or. App. 127	De Muniz
1	10	3	B	Oregon Newspaper Pub. v. Department of Corrections	156 Or. App. 30	Edmonds
1	11	2	B	State v. Kramer	152 Or. App. 519	De Muniz
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	B	New v. Armenakis	156 Or. App. 24	Edmonds
1	11	3	E	State v. Zinsli	156 Or. App. 245	De Muniz
1	11	3	C	State v. Reese	156 Or. App. 406	Warren
1	11	2	B	Martinez v. Baldwin	157 Or. App. 280	De Muniz
1	11	1	A	State v. McElligott	326 Or. 547	Graber
1	11	1	A	State v. Barone	328 Or. 68	Gillette
1	11	1	A	Walls v. Driver and Motor Vehicle Services	154 Or. App. 101	Edmonds
1	11	1	A	State v. \$113,871 in U.S. Currency	152 Or. App. 770	Armstrong
1	12	1	A	State v. Ostrom	153 Or. App. 606	Wollheim
1	12	3	E	State v. Selness	154 Or. App. 579	De Muniz
1	12	2	A	State v. Rohrs	157 Or. App. 494	De Muniz

1	12	1	A	In re Conduct of Wyllie	326 Or. 622	Per curiam
1	12	1	B	State v. Meade	327 Or. 335	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	B	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	17	1	D	Foltz v. State Farm Mut. Auto. Ins. Co.	326 Or. 294	Van Hoomissen
1	18	1	A	State of Oregon by and through its Department of Trans. v. DuPree	154 Or. App 181	Armstrong
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	B	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	B	In re Marriage of Crocker	157 Or. App. 651	Armstrong
1	20	1	B	Herson v. Driver and Motor Vehicle Services Branch (DMV)	157 Or. App. 683	De Muniz
1	20	1	B	State v. Hayward	327 Or. 397	Leeson
1	21	1	D	State v. Jackman	155 Or. App. 358	De Muniz
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	3	D	Armatta v. Kitzhaber	327 Or. 250	Carson
1	42	1	A	State v. Lanig	154 Or. App. 665	Landau
3	1	3	C	State v. Jackman	155 Or. App. 358	De Muniz
4	1	1	B	Stranahan v. Fred Meyer Inc.	153 Or. App. 442	Riggs
4	1	1	B	Lane v. Lane County	327 Or. 161	Kulongoski
4	1	3	C	Armatta v. Kitzhaber	327 Or. 250	Carson
4	1	2	C	State v. Ferman-Velasco	157 Or. App. 415	Edmonds
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
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	D	Ash Org. v. City of Wilsonville	14 Or. Tax 362	Byers
17	1	3	C	Armatta v. Kitzhaber	327 Or. 250	Carson

### III. ART. I § 8

- *Fidanque v. State ex rel. Oregon Gov't Standards and Practices Com'n*, 328 Or. 1, 969 P.2d 376 (Nov. 27, 1998); rev'd Or. Sup Ct 7/22/99.
- *Oregon Newspaper Pub. v. Dep't. of Corrections*, 156 Or. App. 30, 966 P.2d 819 (Sep. 9, 1998).
- *Wheeler v. Marathon Printing Inc.*, 157 Or. App. 290, 974 P.2d 207 (Nov. 25, 1998).
- *Shook v. Ackert*, 152 Or. App. 224, 952 P.2d 1044 (Jan. 21, 1998).
- *Hanzo v. deParrie*, 152 Or. App. 525, 953 P.2d 1130 (Feb. 18, 1998).
- *Wayt v. Goff*, 153 Or. App. 347, 956 P.2d 1063 (Apr. 1, 1998).
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#### A. No law shall be passed restraining ... free expression ...”

The Supreme Court in *Fidanque* examined a registration fee for lobbyists that funded a commission dealing with lobbyists as well as other professionals and found it unconstitutional. “[T]he mere fact that a profession is associated with a certain kind of expression does not transform every statute that regulates that profession into an attack on expression,” the court said.<sup>29</sup> However, at some point attacking a profession does become an attack on expression, and this fee goes beyond that line.<sup>30</sup>

In *Oregon Newspaper*, the Court of Appeals ruled that the state constitution does not guarantee a right of the public or the press to view execution procedures.<sup>31</sup> The court drew upon history and its own interpretation of Art. I § 8 to find that it provides no special rights in regard to trial or adjudication access – Art I § 10 specifically provides the right of access to criminal trials, and no such rights should be read into § 8.<sup>32</sup> A United States Supreme Court case holding that the First Amendment guarantees access to trials has no applicability in Oregon, the court said, because the state constitution includes a provision dealing with trial access - no need to bring in the free expression clause.

In addition, the *Oregon Newspaper* court found that administrative rules mandating that execution witnesses, including members of the media, refrain from identifying the prison personnel connected with the carrying out of a death sentence are constitutional under Art. I § 8. Usually, a free speech prior restraint is constitutional only when it falls within a historical

<sup>29</sup> *Fidanque*, 328 Or. at 7.

<sup>30</sup> *See id.* at 9.

<sup>31</sup> The Oregon Supreme Court overruled this decision on July 22, 1999, finding the contested nondisclosure rules invalid on statutory grounds.

<sup>32</sup> *See Oregon Newspaper*, 156 Or. App. at 41.

exception, the court said. However, this restraint is on expression of one who undertakes to exercise official responsibility that carries with it an obligation of confidentiality.<sup>33</sup> The proper inquiry is whether the purposes for the rules have a reasonable nexus to the restraint they impose on free expression. These rules are required for the safety of the prison staff.<sup>34</sup>

In *Wheeler*, the court found that precedent denied the awarding of punitive damages for expressive conduct. However, the court found the conduct in question, keying a car and throwing a brick through a window, to be nonexpressive in this context and even criminal. Therefore, punitive damages were allowed. Cases regarding stalking statutes

#### B. Cases regarding stalking statutes.

In *Hanzo*, the Court of Appeals set out guidelines for deciding when stalking protective orders (SPOs) issued under ORS § 30.866 are constitutional. After an abortion provider sought an SPO the Court of Appeals reversed a lower court and denied the order on the grounds that petitioner failed to prove the required threatening conduct. Based on previous decisions in *State v. Rangel*<sup>35</sup> (criminal stalking) and *Delgado v. Souders*<sup>36</sup> (civil SPOs), the court decides that the civil stalking statute ORS § 30.866, even though it potentially restricts expression, does not violate the constitution if it meets the requisites set out in *Rangel*: “The underlying expression must represent ‘a threat or something that does not differ meaningfully from one’; the complainant must actually experience ‘fear or apprehension of a danger to personal safety’; and that alarm must be objectively reasonable.”<sup>37</sup> A constitutional “threat,” the court said, requires unambiguous communication of the stalker's determination to cause harm. The contacts in question here did not meet that standard.<sup>38</sup>

The Oregon criminal stalking statute ORS § 163.738 was held constitutional in *Shook* because a stalking order issued by a court under the statute need not necessarily violate Art. 1, § 9. The court said an order may be subject to an “as applied” challenge, but the statute was not facially unconstitutional.<sup>39</sup> Similarly, the court in *Wayt* summarily rejected argument that ORS 163.738 was overbroad based on previous holdings.

<sup>33</sup> *See id.* at 49.

<sup>34</sup> *See id.* at 50

<sup>35</sup> 146 Or. App. 571 (1997).

<sup>36</sup> 146 Or. App. 580 (1997).

<sup>37</sup> *Hanzo*, 152 Or. App. at 542 (citing *Rangel*, 146 Or. App. at 577-78).

<sup>38</sup> *See id.* at 544.

<sup>39</sup> *See Shook*, 152 Or. App. at 230.

#### IV. ART. I § 9

- *State v. Smith*, 327 Or. 366, 963 P.2d 642 (Jul. 24, 1998).
- *State v. Kruchek*, 156 Or. App. 617,969 P.2d 386 (Oct. 28, 1998).
- *State v. Bishop*, 157 Or. App. 33, 967 P.2d 1241 (Nov. 4, 1998).
- *State v. Johnson*, 153 Or. App. 535, 958 P.2d 887 (Apr. 22, 1998).
- *State v. Baker*, 154 Or. App. 358, 961 P.2d 913 (Jun. 10, 1998).
- *State v. Roe*, 154 Or. App. 71, 961 P.2d 228 (May 27, 1998).
- *State v. Edgell*, 153 Or. App. 108, 956 P.2d 988 (Mar. 18, 1998).
- *State v. \$113,871*, 152 Or. App. 770, 954 P.2d 218 (Feb. 25, 1998).
- *State v. Boone*, 327 Or. 307, 959 P.2d 76 (Jul. 2, 1998).
- *State v. Caron*, 153 Or. App. 507, 958 P.2d 845 (Apr. 22, 1998).
- *State v. Finney*, 154 Or. App. 166, 961 P.2d 256 (May 27, 1998).
- *State v. Haney*, 153 Or. App. 642, 958 P.2d 192 (Apr. 29, 1998).
- *State v. Jangala*, 154 Or. App. 176, 961 P.2d 246.
- *State v. McCoy*, 155 Or. App. 610, 964 P.2d 309 (Sep. 2, 1998).
- *State v. Meyers*, 153 Or. App. 551, 958 P.2d 187 (Apr. 22, 1998).
- *State v. Morton*, 326 Or. 466, 953 P.2d 374 (Mar. 5, 1998).
- *State v. Powelson*, 154 Or. App. 266, 961 P.2d 869 (Jun. 10, 1998).
- *Walls v. Driver and Motor Vehicle Services*, 154 Or. App. 101, 960 P.2d 888 (May 27, 1998).
- *State v. Herrera-Sorrosa*, 154 Or. App. 28, 959 P.2d 619 (May 20, 1998).
- *State v. Myers*, 156 Or. App. 561, 967 P.2d 887 (Oct. 21, 1998).
- *State v. Toevs*, 327 Or. 525, 964 P.2d 1007 (Sep. 24, 1998).

##### A. What constitutes a “search”

In *Haney*, the court said that a police officer who patted down a bookbag after discovering it was “heavy” and then found a gun conducted an illegal search. “[W]hen additional activity beyond that available to an ordinary observer is required to obtain information, a ‘search’ under Article I, section 9, has occurred.”<sup>40</sup>

<sup>40</sup> *Haney*, 153 Or. App. at 646.

However, the actual rule is not so simple. In *Smith*, the Supreme Court held that the use of a specially trained drug-sniffing dog (presumably something the “ordinary observer” lacks) to find narcotics was not a “search.” The decision overruled a previous Court of Appeals determination in *State v. Juarez-Godinez*<sup>41</sup> and set out an expanded test for judging whether the use of extra-sensory technology constitutes a “search.” The Supreme Court agreed that unconstitutional searches into such private space need not be traditional trespasses - they can be technological in nature.<sup>42</sup> The court clarified that the applicability of Art. I § 9 does not turn “on whether the evidence can be perceived directly by unenhanced human senses.”<sup>43</sup> Rather, protected privacy interests “commonly are circumscribed by the space in which they exist, and, more particularly, by the barriers to public entry (physical and sensory) that define that private space.”<sup>44</sup>

In distinguishing which technological techniques are permissible, the court attempted to formulate a distinction based on the invasiveness of particular procedures. The court approvingly mentions a case that upheld police use of a telephoto lens to photograph into a house from across a street where the activity photographed was visible from the sidewalk<sup>45</sup> and other cases where police detect with or without technological enhancements what ordinary human powers of perception could detect from some lawful vantage point. However, the court implies that use of high-powered telescopes, parabolic sound gathering devices, and infrared cameras generally would be invasive. Drug-sniffing dogs distinguish themselves from such devices, the court said, in that the molecules dog noses detect only *inferentially* emanate from the private enclosure being searched.<sup>46</sup> Thus, based apparently on the relative predictability of photon motion v. wafting smell trajectories, the police officer with a drug-sniffing dog does not invade one’s privacy to the same extent as an officer with a telescope.

##### B. Warrantless searches – exceptions to the rule

Some activities that do constitute searches nonetheless require no warrant. Many such cases focus on exceptions to the rule dealing with police officer safety. For example, the court in *Roe* ruled that an officer who pulled over car in isolated area after driver refused to take other opportunities to pull over, smelled alcohol and saw a box of ammunition and other hunting equipment within the driver’s reach could

<sup>41</sup> 135 Or. App 591(1995).

<sup>42</sup> *See id.* at 373.

<sup>43</sup> *Id.* at 371.

<sup>44</sup> *See id.* at 373.

<sup>45</sup> *State v. Louis*, 296 Or. 57 (1983).

<sup>46</sup> *See id.* at 374.

lawfully ask whether the driver was armed, and when the question was answered affirmatively, search out the weapon. The officer's fear for his safety in such a situation is reasonable, the court said. However, the court in *Haney* once again made clear that precedent requires more than a "generalized caution" to make such a search reasonable. No such specific, articulable facts that the defendant posed a threat were found by the *Haney* court.

The obvious nature of some evidence leads to another common exception. The court in *Kruchek* wrote that while it has been established that police can open a transparent container when it appears to contain a controlled substance, that case law does not support officers opening without a search warrant opaque containers that smell of marijuana. Such a search violates Article I § 9, the court said, because the opaque container might hold items other than contraband in which the owner has a privacy interest. For such a warrantless search to be valid under Art. I § 9, it must be clear that the container holds nothing other than contraband.<sup>47</sup>

Several 1998 decisions dealt with the inventory search exception, which is implicated when police find evidence of a crime while conducting an inventory of a defendant's possessions pursuant to detention. For instance, in *Boone* the court upheld a local ordinance mandating an inventory be done on all cars about to be impounded. Relying on *State v. Atkinson*,<sup>48</sup> the court held that a properly authorized inventory involving no discretion by officers violated no constitutional guarantees. In *Myers*, however, the court reaffirmed the idea that even during a lawful inventory search police cannot open opaque containers except for purses, wallets, and other containers designed to carry small valuables such as money. The officers in *Myers* performed an inventory according to policy after placing the defendant in detox and found cocaine in a small paper wrapper. The court ruled the evidence was correctly suppressed because "although the packet could have contained something valuable, it was not designed to carry money or small valuables."<sup>49</sup> Thus the inventory became a warrantless search.

However, *Johnson* adds an important wrinkle to inventory cases. In that case, police inventorying a detained suspect's items opened a briefcase apparently belonging to him and removed a coin purse in which they found narcotics. The court upheld the opening of the briefcase, citing previous cases the majority characterized as permitting the opening of closed containers like wallets and purses that "typically" hold

valuables.<sup>50</sup> The *Johnson* dissent argued that briefcases are designed to hold papers and books rather than valuables, but the majority countered that a briefcases are distinguishable from items like "a matchbox, a steamer trunk and a fishing tackle box" in that they could hold "money, credit cards, valuable papers, a lap top computer or a calculator."

### C. Consent search

A warrant is not necessary for searches to which citizens consent. However, as the case law makes clear, such consent must be freely given by someone with the authority to provide it.

In *Edgell*, the court found that an automobile driver did not have actual authority to consent to a police search of a passenger's belongings inside the vehicle. The state argued that the passenger defendant's silence in the face of the driver's consent equated to consent, but the court ruled that its decision in *State v. Will*,<sup>51</sup> demands actual authority to consent in third-party consent cases. Since the driver did not have actual authority in this case, defendant's silence did not matter.

Consent can be given to a search even when an officer stops someone unlawfully. In *Herrera-Sorroso*, the court ruled that where a police officer does not exploit an unlawful stop to gain consent to a search, items obtained as a result of the consent search need not be suppressed under Art. 1 § 9.<sup>52</sup> Similarly, the court in *\$113,871* ruled that while the police officer in that case unlawfully expanded the scope of his inquiry during a routine traffic stop, he did not act in a particularly intimidating manner that would impair claimant's free will. Therefore, the consent claimant gave the officer to search the bags in his trunk was constitutionally valid.<sup>53</sup>

However, there seems to be a fine line between freely given consent and intimidation. In *Finney*, the court re-iterated previous case holdings that requiring a sobriety test is a "search" and that "[s]imply acquiescing in an officer's exercise of authority does not constitute consent."<sup>54</sup> In *Powelson*, defendant's consent to a warrantless police search of his home was found "tainted" by the threat of detention. In that case, the police told defendant that he did not have to

<sup>47</sup> The Oregon Supreme Court has accepted this case for review.

<sup>48</sup> 298 Or. 1, 688 P.2d 832 (1984).

<sup>49</sup> *Myers*, 156 Or. App. at 564.

<sup>50</sup> *Johnson*, 153 Or. App. at 540 (citing *State v. Mundt/Fincher*, 98 Or. App. 407 (1989), which actually referred to items "uniquely designed" to hold valuables).

<sup>51</sup> 131 Or.App. 498, 504, 885 P.2d 715 (1994)

<sup>52</sup> See *Herrera-Sorroso*, 154 Or. App. at 35 (citing *State v. Austin*, 145 Or. App. 217, 222, 929 P.2d 1022 (1996)).

<sup>53</sup> See *id.* at 777

<sup>54</sup> *Finney*, 154 Or. App. at 171.

consent to the search, but if he did not he would be placed in a holding cell or watched in his home by an officer until a warrant was issued.<sup>55</sup> The court based this finding on the recent definition of “seizure” from *State v. Juarez-Godinex*,<sup>56</sup> which held a person has been seized if he has a reasonable subjective and objective belief he has been seized.

Finally, in *Walls* the court ruled that the constitutional standard for consent searches is the same in administrative proceedings such as driver’s license suspensions as in criminal proceedings. a defendant consented to take field sobriety tests because the record contained no evidence of express or implied coercion, unlike a prior case where defendant testified to feeling like he had no choice.<sup>57</sup>

#### D. “Conversations” and “stops”

As the court pointed out in *Caron*, not all encounters between police officers and the public are “stops” that implicate Art. I § 9. Unlike an actual “stop,” a mere “conversation” requires no reasonable suspicion of wrongdoing. The *Caron* court used the test from *State v. Holmes*<sup>58</sup> to determine that there was no objective belief of restricted liberty where officer simply questioned defendant about what he was doing and asked if he could perform a search. Along the same lines, the court in *Baker* ruled that an officer who asked a suspect if the suspect found any good crack in a notorious drug house, without more, did not perform a “stop” but instead struck up a “mere conversation.”

As the court in *Toevs* explained, distinguishing between stops and conversations requires “fact-specific inquiry into the totality of the circumstances.”<sup>59</sup> In that case, the court found that even officers who tell someone they are free to go effect a stop if they immediately follow that statement with repeated questions about drugs and requests to conduct a search.

#### E. What constitutes “seizure”

In general, seizure means to interfere with someone’s possessory interest rather than mere privacy interest. For example, the court in *Smith* held that police officers who padlocked a storage unit shut while waiting for a warrant to search it nonetheless seized the contents because the lock significantly interfered with the defendant’s possessory interests.<sup>60</sup> However, the *Smith* court allowed the evidence in anyway because

the unlawful locking contributed nothing to the eventual uncovering of the evidence. The court said that its decision in *State v. Sargent*,<sup>61</sup> should be seen as “tacitly rejecting” *State v. Hansen*<sup>62</sup> to the extent that Hansen “holds that unlawful seizure of property necessarily triggers suppression of any evidence contained therein, whether or not the police subsequently obtain lawful authority to search that property.”<sup>63</sup> In this case “[t]he padlock, though unlawful, was irrelevant” because no one “attempted to gain access to the unit to remove the evidence before the search warrant was executed.”<sup>64</sup>

Police need no warrant to seize or search something that apparently belongs to no one, a fact that can potentially create problems for defendants who “drop” evidence. In *Morton*, a defendant dropped a container holding drugs just before his arrest and denied ownership over it. However, the Supreme Court ruled that a suspect who obviously possessed an item retains the ability to challenge the seizure under Art. I, § 9.<sup>65</sup> The *Morton* court did say, however, that the right to move to suppress evidence from a potentially unlawful search would be lost if “the facts showed that the defendant had abandoned the container before the police seized it.”<sup>66</sup> In *Morton*, apparently, the defendant held on to the item just long enough.

In *Johnson*, defendant arrested on an outstanding warrant denied ownership of a briefcase found on a bicycle near where he was standing, but during the subsequent inventory search admitted it was his. The trial court ruled that either defendant’s previous denial or the inevitable discovery during inventory defeated any motion to suppress evidence found in the briefcase at the scene of the arrest. In a footnote, the Court of Appeals cited *Morton* as holding that “the right to assert a personal interest can be lost if the facts show that a defendant abandoned the interest in the seized object before the officer seized it.”<sup>67</sup> It is not clear, however, whether or exactly why the Court of Appeals believed the briefcase situation to be different from the facts of *Morton*, since in both cases the defendants obviously possessed the items in question despite their denials. The *Johnson* court instead focused on the inevitable discovery argument and found the inventory rendered the first search harmless.

<sup>55</sup> *Powelson*, 154 Or. App. at 274-75.

<sup>56</sup> 326 Or. 1, 942 P.2d 772 (1997)

<sup>57</sup> See *Walls*, 154 Or. App. at 107 (distinguishing the present case from *State v. Lowe*, 144 Or. App. 313 (1996)).

<sup>58</sup> 311 Or. 400, 406-07, 813 P.2d 28 (1991).

<sup>59</sup> *Toevs*, 327 Or. at 535.

<sup>60</sup> See *Smith*, 327 Or. at 376.

<sup>61</sup> 323 Or. 455 (1996).

<sup>62</sup> 295 Or. 78 (1983).

<sup>63</sup> *Id.* at 379.

<sup>64</sup> *Id.* at 380.

<sup>65</sup> See *Morton*, 326 Or. at 470.

<sup>66</sup> *Id.* (citing *State v. MacDonald*, 105 Or. App. 102 (1990)).

<sup>67</sup> *Id.* at 538 n.1.

## F. Probable cause

As the *McCoy* court repeated, officers can perform a search incident to an arrest if they have probable cause to believe a second crime has been committed.<sup>68</sup> Probable cause requires a “substantial objective basis” for reasonably believing that “more likely than not” an offense has been committed, the court said.<sup>69</sup> The court cites additional cases for the proposition that probable cause is determined by a totality of the circumstances test that includes the prior experience of the officer. Based on this precedent, *McCoy* held that an officer lawfully searched the coat a suspect was suspiciously trying to give away. Officer experience also played a role in *Jangala*, which allowed officers to bust a suspected teenage keg party without waiting for a warrant because they feared time would allow the alcohol and individuals responsible to disappear.

In *Bishop*, the court ruled that a defendant's brief hesitation or stumble while providing his address to a police officer during a traffic stop did not constitute probable cause for the crime of knowingly giving false information to an officer. The officers also were not justified in arresting the defendant because he could not produce a valid drivers' license - the court said the officers could only detain the defendant for as much time as was reasonably necessary to determine his identity, a determination the court said was made on the scene.

In *Meyers*, the court decided that SB 936, which provided that courts could not exclude evidence if allowed under the federal Constitution, did not apply because the trial proceedings were concluded before the statute took effect.<sup>70</sup> It is not clear whether the result would have been different had SB 936 applied. Without SB 936, the court found the officer here lacked reasonable suspicion of prostitution to expand the scope of a traffic stop and lock defendant in the squad car while he questioned defendant's companion.<sup>71</sup>

## V. ART. I § 10

- *Oregon Newspaper Pub v. Dept. of Corrections*, 156 Or. App. 30, 966 P.2d 819 (Sep 09, 1998); rev'd Or. Sup Ct 7/22/99.
- *State v. Loynes*, 154 Or. App. 1, 960 P.2d 388 (Or.App., May 20, 1998).

<sup>68</sup> See *McCoy*, 155 Or. App. at 614-15 (citing *State v. Askay*, 96 Or. App. 563, 566-67 (1989)).

<sup>69</sup> *Id.* at 615 (citing *State v. Owens*, 302 Or. 196, 204 (1986)).

<sup>70</sup> See *Meyers*, 153 Or. App. at 560.

<sup>71</sup> See *id.* at 556.

- *State v. McQueen*, 153 Or. App. 277, 956 P.2d 1046 (Or.App., Apr 01, 1998).
- *State v. Rohlfing*, 155 Or. App. 127, 963 P.2d 87 (Or.App., Jul 15, 1998).

### A. “[J]ustice shall be administered ... without delay.”

*State v. Mende*<sup>72</sup> set forth the factors to be considered in evaluating a speedy trial claim under Art. I, § 10: (1) the length of delay; (2) the reasons for the delay; and (3) the resulting prejudice to the accused.<sup>73</sup> A lengthy delay triggers evaluation of the second two factors, of which prejudice is usually pivotal.<sup>74</sup> The decisions mentioning defendants' speedy trial rights in 1998 concerned delays of 19 months (*Loynes*), 46 months (*McQueen*), and 8 years (*Rohlfing*). While the Court of Appeals found that all of these time periods were enough to trigger investigation into the second and third factors, only the 8-year delay was found to be of constitutional magnitude.

The court examined defendants' claims of prejudice in *Loynes* and *McQueen* and found only what it called “speculation.” Each case involved witnesses the defendants said were no longer available, but the court noted that defendants have the burden of proving prejudice and neither witness was actually shown to be unavailable. In addition, the court said neither defendant presented evidence their missing witnesses would have testified in their favor.

In *Rohlfing*, however, the court found the eight-year wait, combined with the fact that defendant was unaware of his indictment and thus did not contribute to the delay, was “presumptively prejudicial.” The court quoted *Mende* in saying that delay at some point becomes so excessive that it requires dismissal, along with *Doggett v. U.S.*,<sup>75</sup> which held a delay of 8 ½ years too long.

### B. “[J]ustice shall be administered ... openly.”

The Court of Appeals held in *Oregon Newspaper* that journalists have no constitutional right to witness executions. The court cited previous opinions ruling that Art. I § 10 applies only to “adjudications.”<sup>76</sup> Executions do not determine a legal right, the court said, and thus are not adjudications. The court also reasoned that executions are not a function of the judicial branch but are carried out by the executive branch.<sup>77</sup>

<sup>72</sup> 304 Or. 18, 741 P.2d 496 (1987).

<sup>73</sup> See *id.* at 21.

<sup>74</sup> See *id.*

<sup>75</sup> 505 U.S. 647 (1992).

<sup>76</sup> *Oregon Newspaper*, 156 Or. App. at 34; but see n. 31 *supra*.

<sup>77</sup> See *id.* at 36-37.

## VI. ART. I § 11

- *State v. \$113,871*, 152 Or. App. 770, 954 P.2d 218 (Feb. 25, 1998).
- *Martinez v. Baldwin*, 157 Or. App. 280, 972 P.2d 367 (Nov 25, 1998).
- *State v. Kramer*, 152 Or. App. 519, 954 P.2d 855 (Feb 18, 1998).
- *State v. Dell*, 156 Or. App. 184, 967 P.2d 507 (Sep 30, 1998).
- *New v. Armenakis*, 156 Or. App. 24, 964 P.2d 1101 (Sep 09, 1998).
- *Saroian v. State*, 154 Or. App. 112, 961 P.2d 252 (May 27, 1998).
- *State v. Reese*, 156 Or. App. 406, 967 P.2d 514 (Oct 07, 1998).
- *State v. Zinsli*, 156 Or. App. 245, 966 P.2d 1200 (Sep 30, 1998).
- *State v. Amini*, 154 Or. App. 589, 963 P.2d 65 (Jun 24, 1998).
- *State v. Baldeagle*, 154 Or. App. 234, 961 P.2d 264 (Jun 03, 1998).
- *State v. Barone*, 328 Or. 68, 969 P.2d 1013 (Dec 10, 1998).
- *State v. McElligott*, 326 Or. 547, 956 P.2d 179 (Mar 26, 1998).

### A. Generally

In *\$113,871*, the court held that the Oregon Forfeiture Act is constitutional, as forfeiture proceedings are not criminal proceedings and thus do not implicate due process requirements of Art I. § 11.<sup>78</sup>

### B. "... to be heard by himself and counsel"

The petitioner in *Baldwin* argued that he received constitutionally ineffective assistance of counsel when his attorney failed to call the petitioner's mother as a witness. The attorney testified that he feared impeachment evidence regarding the mother would damage more than help the case. The court cited previous decisions mandating deference for attorney decisions made during the heat of trial and found petitioner's Art. I, § 11 rights were not violated.

Even if an attorney is found to have failed in his or her professional duty, the court in *Armenakis* makes clear that a violation of the right to adequate assistance of counsel requires that defendant was prejudiced by the omission. In this case, the court assumed *arguendo* a lapse of duty but found no prejudice and thus no reason to overturn the conviction.

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<sup>78</sup> See *\$113,871*, 152 Or. App. at 773 (citing *State v. Curran*, 291 Or. 119 (1981)).

The Court of Appeals in *Saroian* held that the defendant made out a prima facie ineffective assistance claim where uncontroverted affidavits indicate the trial court defense attorney failed to procure the testimony of a material exculpatory witness, resulting in a guilty plea. The court ruled there was nothing in the record to support the state's claim that the defendant was untruthful in stating she would have gone to trial had the witness been available.

In *Kramer*, the Court of Appeals found that cases such as *State v. Meyrick*<sup>79</sup> set forth an obligation for trial courts to make sure defendants understand the dangers of proceeding pro se. The defendant in *Kramer* agreed in court that he understood his right to have a lawyer, had money to hire a lawyer, but preferred to represent himself. However, the court said, nothing in the record indicated the defendant understood the potential pitfalls of his decision, and a new trial was ordered.

Although the constitution grants defendants the right to be heard, the court in *Dell* held that the guarantee is not absolute. *Dell* involved a defendant who argued that she had a right to testify in her DUI proceeding and that the trial court's directing her to be silent during the state's case, closing arguments, and jury instructions was unconstitutional. The court cites *State v. Stevens*<sup>80</sup> for the proposition that Art. I, § 11 gives defendants no right to act as co-counsel and no right to speak during those phases of the proceeding. Defendant also argued that the court erred in failing to call her to testify on her own behalf, but the Court of Appeals held that, while defendant does have a right to testify, whether or not she actually does is a question to be decided by defendant and her attorney. Complaints about defendant's attorney in this regard are for an ineffective assistance of counsel claim which cannot be raised on direct appeal.

In *Walls*, the court noted that Art. I, § 11 does not apply to administrative proceedings such as driver's license suspension actions.<sup>81</sup>

### C. "... an impartial jury"

In *Amini*, the Court of Appeals ruled that "consequences instructions," in any form, violate a defendant's right to an impartial jury.<sup>82</sup> The trial court in this case gave the jury, over defendant's objection, a "consequences instruction" required by statute in cases where an "guilty except for insanity" defense is used. The instruction informed the jury that the defendant

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<sup>79</sup> 313 Or. 125, 132, 831 P.2d 666 (1992).

<sup>80</sup> 311 Or. 119 (1991).

<sup>81</sup> *Walls* at 108 n.4 (citing *Gildroy v. MVD*, 315 Or. 617 (1993)).

<sup>82</sup> This case has been accepted for review by the Oregon Supreme Court, 327 Or. 620 (1998).

could be released under certain circumstances if he was found “guilty except for insanity.” The court notes that in Oregon and the federal system juries are not to consider punishments in determining guilt or innocence because it might lead to unfairness. In *State v. Wall*,<sup>83</sup> the court said, it was held that a trial court erred by allowing an expert witness to testify whether the defendant would be released if his mental defect defense succeeded. The court notes that some states allow consequences instructions if the defendant requests it, but none allow such an instruction when the defendant objects. Even a consequences instruction like this one, the court said, apparently designed to let juries know that finding the defendant insane would not set him free, could bias the jury against the defendant. Therefore, the court elected to follow the reasoning of *Wall* and finds the instruction violated defendant's constitutional rights.

The defendant in *Baldeagle* contended that a juror's exposure to outside information violated defendant's right to an impartial jury. However, the court found the situation distinguishable from previous cases in that the misconduct did not prejudice the jury.

In *Barone*, defendant argued that he was forced to use peremptory challenges to remove jurors that ought to have been removed for cause. The Supreme Court ruled that it does not matter under Art. I, § 11 that defendant is forced to use his peremptory challenges to achieve an impartial jury. The only question is whether the jury that finally tries the case is impartial – defendant has no right to exclusive control over composition of jury.<sup>84</sup>

The Supreme Court in *McElligott* held, citing earlier precedent, that juveniles are not entitled to a jury trial under the state constitution because a juvenile court proceeding is not a “criminal prosecution.”

#### D. “... to meet the witnesses face to face”

In *Zinsli*, the court explicitly extended for the first time the reasoning of the United States Supreme Court to the analysis of a defendant's right to effective cross-examination under Art 1 § 11. After state lost videotape of defendant's performance on DUI tests, defendant argued that he could not effectively cross-examine the arresting officer who based his testimony on a previous viewing of the tape. The court concluded that even though defendant's cross might not be effective in the way he wished, defendant still had the constitutionally required “opportunity for effective cross-examination” because the scope of his cross of the officer was not restricted. Because the officer was

available for cross, defendant's confrontation rights also were not violated.<sup>85</sup>

#### E. “[A] verdict of guilty of first degree murder ... shall be found only by a unanimous verdict”

The court in *Reese* examined de novo whether a “guilty except for insanity” verdict in a murder case must be by a unanimous jury. The court ruled that Art. I, § 11 does not answer the question, as it mentions only “guilty of first degree murder” and not “guilty except for insanity.” However, the court said that former ORS § 136.450 (since amended by Or. Laws 1997, ch. 313, § 25) was applicable. ORS § 136.450 provides that “‘the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors except in a verdict for murder which shall be unanimous.’ Thus, if a determination of guilt of murder or aggravated murder except for insanity is a ‘verdict,’ it must be reached by a unanimous jury. We hold that it is.”<sup>86</sup>

### VII. ART. I § 12

- *In re Conduct of Wyllie*, 326 Or. 622, 956 P.2d 951 (Mar. 31, 1998).
- *State v. Meade*, 327 Or. 335, 963 P.2d 656 (Jul. 24, 1998).
- *State v. Rohrs* 157 Or. App. 494, 970 P.2d 262 (Dec. 9, 1998).
- *State v. Ostrom*, 153 Or. App. 606, 958 P.2d 848 (Apr. 22, 1998).
- *State v. Selness*, 154 Or. App. 579, 962 P.2d 739 (Jun. 24, 1998).

#### A. “No person shall ... be compelled ... to testify against himself.”

In *Wyllie*, the court re-affirmed that the right against self-incrimination attaches only in criminal prosecutions, and ruled that the self-incrimination clause is no bar to particular non-criminal disciplinary actions against a lawyer.

Even in criminal prosecutions, nontestimonial “statements” made by defendants can be used against them. However, this right must be made clear to suspects. In *Rohrs*, an officer told a suspected drunk driver that refusal to perform roadside sobriety tests could be used against him in court. The Court of Appeals dismissed the charges because it considered the officer's statement misleading. The driver received no explanation that only the refusal to do certain nontestimonial tests could actually be used against him.

<sup>83</sup> 78 Or. App. 81 (1986).

<sup>84</sup> See *Barone*, 328 Or. at 72.

<sup>85</sup> See *Zinsli*, 156 Or. App. at 251.

<sup>86</sup> *Reese*, 156 Or. App. at 409.

The court in *Meade* faced the de novo question of whether a suspect who initiates conversation with police after equivocally invoking his right to counsel waives the right to have an attorney present. The majority said that the question was not difficult to answer since “a suspect’s own actions may ... eliminate any need for clarification by the officers.” The court concluded that once a defendant “assert[s] control over the conversation” officers have “no obligation to inquire further.”<sup>87</sup>

The language seems to extend additional leeway to police in custodial interrogations. All of the justices agreed that it is possible for a suspect to eliminate the need for police clarification of his attorney request, but the dissenting Justice Durham argued the facts of the case did not present such a situation. The defendant in *Meade* indicated to officers that “if he needed an attorney, he wanted one,” but then leaned forward, “put his hands up as if to stop the detectives from speaking” and said he wanted to say a few things.<sup>88</sup> However, his subsequent statements did not directly relate to the merits of the case, and the officers then passed up an opportunity to clarify defendant’s remarks about an attorney before proceeding into further questioning. The dissent viewed the majority as attempting to shoehorn the re-initiation doctrine of *Edwards v. Arizona*<sup>89</sup> into ongoing interrogations, which could lead police to ignore equivocal requests and simply wait for the suspect to continue speaking.<sup>90</sup>

**B. “No person shall be put in jeopardy twice for the same offence.”**

The courts opened no new avenues for double jeopardy claims in 1998. In *Ostrom*, defendant convicted on multiple, non-consolidated charges stemming from a single DUI episode argued that the prosecutions subjected him to double jeopardy. The court responded that “[w]hile it is true that the traffic citations in this case were not formally consolidated, this distinction does not result in a different outcome” than previous cases dealing with consolidated charges.<sup>91</sup>

*Selness* made clear for the first time that defendants must at least contest a civil forfeiture action before attempting to use it as the basis of a double jeopardy claim. The *Selness* court did not hold that such a civil action would necessarily constitute the required criminal penalty, but instead focused on the

<sup>87</sup> *Id.* at 341.

<sup>88</sup> *Meade*, 327 Or. at 337.

<sup>89</sup> 451 U.S. 477 (1981).

<sup>90</sup> Justice Durham also notes that *Meade* may not have full precedential weight because only three justices in a four-justice quorum signed on to the majority opinion.

<sup>91</sup> *Ostrom*, 153 Or. App. at 610.

defendants’ lack of standing. “By not participating in the civil forfeiture proceedings, defendants have lost their opportunity to present evidence of the punitive nature of those proceedings.”<sup>92</sup> To hold otherwise, the court said in quoting an Arizona case, would be to let criminals decide their punishment - giving up possessions now could eliminate the chance of jail later.<sup>93</sup>

**VIII. ART. I § 16**

- *State v. Ferman-Velasco*, 157 Or. App. 415, 971 P.2d 897 (Dec. 9, 1998).
- *State v. McGhee*, 157 Or. App. 598, 971 P.2d 913 (Dec. 9, 1998).
- *State v. Davilla*, 157 Or. App. 639, 972 P.2d 902 (Dec. 16, 1998).
- *State v. Shoemaker*, 155 Or. App. 416, 965 P.2d 418 (Aug. 5, 1998).
- *State v. Gee*, 156 Or. App. 241, 965 P.2d 462 (Sep. 30, 1998).

**A. “Cruel and unusual punishments shall not be inflicted”**

The standard for determining whether a punishment is cruel and unusual under Art. 1, § 16 was set down in the earlier case of *State v. Isom*.<sup>94</sup> An unconstitutional punishment is one “so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper.”<sup>95</sup>

In *Shoemaker*, a defendant who brandished a knife during an armed robbery and received the mandatory minimum 70-month sentence under Measure 11 unsuccessfully argued his punishment was “cruel & unusual.” The state focused on *Isom*’s “moral sense of all reasonable persons” standard and argued that punishments adopted by the voters (or legislators elected by voters) must not, by definition, shock reasonable persons. The court upheld the sentence, citing *Isom* as well as a case where an identical sentence for the same crime was found constitutional. However, the *Shoemaker* court expressly noted that it did not adopt the state’s interpretation of Art. 1, § 16.

A month later in *Gee*, the Court of Appeals affirmed a writ of mandamus ordering a trial court to impose the Measure 11-specified 90-month sentence for armed robbery. Again citing *Isom*, the court found that such a sentence did not shock the conscience of reasonable people on the facts presented. Even if

<sup>92</sup> *Selness*, 154 Or. App. at 587.

<sup>93</sup> The Oregon Supreme Court has accepted *Selness* for review.

<sup>94</sup> 313 Or. 391, 837 P.2d 492 (1992).

<sup>95</sup> *Id.* at 401.

defendant's criminal behavior was caused by drug abuse and resultant mental problems, as the defense argued, the court said that there was no evidence the defendant lacked the required culpable state of mind for the offense.

**B. “[A]ll penalties shall be proportioned to the offense.”**

*Davilla* once again affirmed the logical reasoning that the proportionality clause of the state constitution means that a crime designated as less serious than another crime cannot garner a harsher sentence. In this case, for instance, the court cited a previous opinion holding that a defendant cannot receive a more severe sentence for murder than he would for aggravated murder.

*Ferman-Velasco* dealt with this familiar notion under the dictates of the voter-approved Measure 11 sentencing scheme. Defendant argued that mandatory sentences under ORS 137.700, a codification of Measure 11 for certain “Class B” felonies such as first-degree sexual abuse were unconstitutional because they exceeded the existing sentencing guidelines for certain other “Class A” felonies such as first-degree arson. The court held that the people or the legislature can constitutionally promulgate different punishments for these unrelated offenses.<sup>96</sup> “[S]o long as there is a rational basis for the people ... to conclude that first-degree sexual abuse and second-degree rape deserve greater penalties than felonies such as ... first-degree arson, the requirement of § 16 is met.”<sup>97</sup> The court concluded that there was such a rational basis since sexual abuse and second-degree rape, although known as “Class B” felonies, were also “person” crimes unlike arson, which is a “property” crime.

The *Ferman-Valasco* dissent pointed out that the legislature has expressly determined the relative seriousness of these crimes, and Measure 11 imposes far greater sentences for some felonies the state has determined to be equally serious. On its face, the dissent wrote, this violates the proportionality requirement.<sup>98</sup> The majority found, however, that the people have re-vamped the legislature’s determinations about the levels of seriousness as is their prerogative. The dissent countered that Measure 11 dealt only with the crimes it covered, not on those crimes’ relationship to other crimes it does not cover.

*McGhee*, decided with *Ferman-Valasco*, merely cites the main holding of the principle case.

<sup>96</sup> See *Ferman-Velasco*, 157 Or. App. at 422-23.

<sup>97</sup> *Id.*

<sup>98</sup> See *id.* at 425.

**IX. ART. I § 20**

- *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502, 971 P.2d 435 (Dec. 9, 1998).
- *State v. Hayward*, 327 Or. 397 963 P.2d 667 (Jul. 24, 1998).
- *Stranahan v. Fred Meyer, Inc.* 153 Or. App. 442, 958 P.2d 854 (Apr. 22, 1998).
- *Brown v. A-Dec Inc.*, 154 Or. App. 244, 961 P.2d 280 (Jun. 3, 1998).
- *Herson v. Driver and Motor Vehicle Services Branch (DMV)*, 157 Or. App. 683, 971 P.2d 492 (Dec. 23, 1998).
- *In re Marriage of Crocker*, 157 Or. App. 651, 971 P.2d 469 (Dec. 16, 1998).
- *Kmart v. Lloyd*, 155 Or. App. 270, 963 P.2d 734 (Jul. 22, 1998).
- *Brummell v. Department of Revenue*, 14 Or. Tax 303 (Apr. 17, 1998).
- *Southern Wasco Cty. Ambulance Serv., Inc. v. State By and Through Howland*, 156 Or. App. 543, 968 P.2d 848 (Oct. 21, 1998).

Decisions in 1998, such as *Southern Wasco County Ambulance*, reiterated support for using the “true class” analysis for Art. 1 § 20 questions. A “true class,” courts said, is one defined not by the challenged action but on its own terms.<sup>99</sup>

However, the *Southern Wasco* court pointed out, even if plaintiffs are members of a true class, their claims can fail if the challenged statute has a rational basis. Two 1998 cases denied relief on this basis. In *Kmart*, the court found that the legislature identified a rational basis for ORS § 656.262(1), which claimant argued gave employers in Worker's Comp cases an exception to claim preclusion. The court in *Crocker* found divorced fathers living away from their children represent a “true class” as opposed to, for instance, unmarried parents living apart.<sup>100</sup> However, the court said, a statute mandating divorced fathers help pay for the children’s post-secondary education has a rational purpose because married people living together can be counted upon to make reasonable decisions about sharing child support whereas parents not living together often are acrimonious.<sup>101</sup>

The Supreme Court reached a similar result in *Hayward*, where the defendant in argued that the local district attorney office lacked a systematic, non-arbitrary policy for plea negotiations in capital cases. The court agreed that “standardless or irrational” plea

<sup>99</sup> See, e.g., *Tanner*, 157 Or. App. at 519-20.

<sup>100</sup> See *Crocker*, 157 Or. App. at 660.

<sup>101</sup> See *id.* at 661. The Oregon Supreme Court has accepted the case for review, 328 Or. 418 (1999).

bargain decisions indeed violate Art. I § 20.<sup>102</sup> However, a hearing established that the district attorney made decisions based mostly on the strength of individual cases and the guidelines set out in ORS § 163.095, a method the court found constitutional. The *Hayward* court also refused to re-examine *State v. Cunningham*,<sup>103</sup> which allowed the state not to disclose on a statewide basis statistics regarding the number of aggravated murder cases where the defendant was eligible for the death penalty so the court could conduct a proportionality review.

To win any sort of relief it must also be shown that the true class is treated differently from other classes. The court in *Herson* made this point clear by writing that "[t]o prove a violation of the [Privileges and Immunities] [c]lause, a defendant must first show that he was denied a privilege or immunity."<sup>104</sup> In *Brown*, the claimant contended that the "the treatment of a condition brought on by aging as a preexisting condition for purposes of the Workers' Compensation Law is a violation of Article I, section 20."<sup>105</sup> The court responded that even if workers with age-related, pre-existing conditions are a class, the claimant presented insufficient evidence that the group is treated unlike workers with other pre-existing conditions.

Whether a group receives different treatment can depend on the way one sees the situation. In *Stranahan*, Fred Meyer argued that because smaller Safeway stores had been able to prohibit initiative supporters, large Fred Meyer shopping centers were being treated unequally. The court pointed out that the difference is not in the ownership of property but the nature and size of the store.<sup>106</sup> In *Brummell*, plaintiffs asserted that using certain tax valuation methods for multi-family properties gave owners of such properties privileges not available to owners of other types of properties. The court said that different rates of increase among different types of properties were not necessarily a function of the assessment method and could simply be market forces. Whatever method of valuation is used, the court said, the evidence showed rates are based on the same ultimate standard: market value.<sup>107</sup>

Not every group claiming disparate treatment failed. In *Tanner*, the Court of Appeals found that public institutions could not deny benefits to domestic partners of homosexual employees. The *Tanner* court first addressed a point not raised by the parties, namely whether Art I § 20 came into play at all since the

<sup>102</sup> See *Hayward*, 327 Or. at 404.

<sup>103</sup> 320 Or. 47 (1994).

<sup>104</sup> *Id.* at 685 (quoting *State v. Scott*, 96 Or. App. 451, 455, 773 P.2d 394 (1989)).

<sup>105</sup> *Brown*, 154 Or. App. at 248.

<sup>106</sup> See *Stranahan*, 153 Or. App. at 458.

<sup>107</sup> See *Brummell*, 14 Or. Tax at 311.

Legislature had declared that OHSU was no longer a "state agency." The court concluded that Art I § 20 did apply because OHSU was still statutorily defined as a "governmental entity performing governmental functions and exercising governmental powers." As such, it is still subject to the prohibitions of Art. I § 20.<sup>108</sup>

The court next said that homosexuals represented not only a "true" class but a "suspect" class as well. Suspect classes are a subgroup of true classes that receive a "more demanding level of scrutiny."<sup>109</sup> Suspect classes are usually defined by "immutable" characteristics reflecting social prejudices.<sup>110</sup> However, immutability is not necessary.<sup>111</sup> Based on this precedent, the court found homosexuals to be a true, suspect class under Art I § 20, similar to those who experience stereotyping and prejudice based on race or religion.<sup>112</sup> The court then said that the denial of benefits for domestic partners could not be justified by "genuine differences between the class and those to whom the privileges and immunities are made available," indeed, "[T]he parties have suggested no such justification, and we can envision none."<sup>113</sup>

Lastly, the *Tanner* court said it was not persuaded by the defense argument that discrimination against homosexuals is merely an unintended side effect of policy denying benefits to unmarried people. Art. I § 20, the court said, goes beyond prohibiting only intentional discrimination.<sup>114</sup> Intentional or not, OHSU's actions unconstitutionally discriminated against homosexuals, a suspect class, in denying certain privileges on equal terms.<sup>115</sup>

## X. Other Art. I cases

- *Foltz v. State Farm Mut. Auto. Ins. Co.* 326 Or. 294, 952 P.2d 1012 (Jan. 23, 1998).
- *Oregon Department of Trans. v. DuPree*, 154 Or. App. 181, 961 P.2d 232.
- *State v. Jackman*, 155 Or. App. 358, 963 P.2d 170 (Aug. 5, 1998).
- *Wallis v. Baldwin*, 152 Or. App. 295, 954 P.2d 192 (Feb. 4, 1998).
- *Brummell v. Department of Revenue*, 14 Or. Tax 303 (Apr. 17, 1998).

<sup>108</sup> See *Tanner*, 157 Or. App. at 519-20.

<sup>109</sup> *Id.* at 521-22.

<sup>110</sup> *Id.* at 522.

<sup>111</sup> See *id.* at 522-23.

<sup>112</sup> *Id.* at 524

<sup>113</sup> *Id.* at 524.

<sup>114</sup> *Id.* at 524 (citing *Zockert v. Fanning*, 310 Or. 514 (1990)).

<sup>115</sup> See *id.* at 525.

- *State v. Lanig*, 154 Or. App. 665, 963 P.2d 58 (Jun. 24, 1998).

**A. “In all civil cases the right of Trial by Jury shall remain inviolate.”**

In *Foltz*, the Supreme Court held that because ORS § 742.522(1) made mandatory arbitration under ORS § 742.520(6) binding on parties, “that statute takes away something that Article I, section 17, guarantees plaintiff, i.e., a jury trial.”<sup>116</sup> The court also held that ORS § 742.520(6), standing alone, did not violate the constitution because the mandatory arbitration procedure could presumably be appealed to a jury trial.<sup>117</sup>

**B. “[P]roperty shall not be taken ... without just compensation.”**

In *DuPree*, the Court of Appeals held that there is no constitutional taking when the state removes one of two highway access points to a plaintiff’s business, since landowner access to highways abutting their property “is subject to the state’s authority to control and regulate the use of the highway.”<sup>118</sup>

**C. “No ex post facto law ... shall ever be passed.”**

In *Jackman*, the trial court imposed a sentence upon defendant less than the Measure 11 mandatory minimum. The state sought review in the Court of Appeals under Measure 11, which defendant argued violated ex post facto clause by denying him a defense available at trial. The court disagreed, holding that Measure 11 merely changed the procedure for “correcting certain sentencing errors” since the Supreme Court could always have altered the sentence via a writ of mandamus.<sup>119</sup>

**D. “The privilege of ... habeas corpus shall not be suspended”**

The defendant in *Wallis*, convicted in 1987, filed a petition for post-conviction relief in 1995, long after the 1-year limitation imposed by state statute. Defendant argued the limitation was unconstitutionally short and deprived him of habeas corpus relief. The court, however, concluded the limitation was reasonable based on an earlier case upholding a 120-day limit.

<sup>116</sup> *Foltz*, 326 Or. at 301.

<sup>117</sup> *See id.* at 303.

<sup>118</sup> *DuPree*, 154 Or. App. at 184 (citing *Curran v. ODOT*, 151 Or. App. 781, 784 (1997))

<sup>119</sup> *Jackman*, 155 Or. App. at 361.

**E. “[A]ll taxation shall be uniform”**

While the constitution requires property to be assessed at its market value, the court in *Brummell* held that it does not require the same valuation method be used for all properties. Such a system would not reflect the realities of the market, the court said.<sup>120</sup> As long as the various methods lead to “relative uniformity,” the constitution is satisfied.<sup>121</sup>

**F. A moot interpretation**

In *Lanig* the court ruled that the soon-to-be-struck-down Measure 40 (Art. I, § 42) applied to cases pending at the time it was enacted. The court first determined that constitutional text is interpreted according to the same methodology used for finding the intended meaning of statutes.<sup>122</sup> The absence of a retroactivity clause in Measure 40, the court said, “strongly suggests that the measure was not intended to apply to cases pending upon enactment.”<sup>123</sup>

**XI. Art. III**

- *State v. Jackman*, 155 Or. App. 358, 963 P.2d 170 (Aug. 5, 1998).

**A. “The powers of the Government shall be divided”**

*Jackman* upheld yet another aspect of Measure 11, this time against a charge that the scheme violated the separation of powers clause. When the trial court in *Jackman* sentenced Defendant to less than the new mandatory minimum, the state sought review as per the statute from the Court of Appeals. Defendant argued the review violated the separation of powers clause by retroactively conferring new jurisdiction to the court. The court held that previous cases on which defendant relied concerned the legislature attempting to make appealable decisions that were not appealable when they were rendered. In contrast, the court said, Measure 11 simply altered the way in which an order was appealed but did not usurp judicial power. *Jackman* concerns “reviewability” rather than “appealability,” the court said.

<sup>120</sup> *Brummell*, 14 Or. Tax at 308.

<sup>121</sup> *Id.* (citing *Appeal of Kliks*, 158 Or. 669 (1938)).

<sup>122</sup> *See Lanig*, 154 Or. App. at 670 (citing *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 61-12 (1993)).

<sup>123</sup> *Id.* at 671 (citing several previous cases dealing with statutes)

## XII. ART. IV

- *Armatta v. Kitzhaber*, 327 Or. 250
- *Stranahan v. Fred Meyer Inc.*, 153 Or. App. 442, 958 P.2d 854 (Apr 22, 1998)
- *Lane v. Lane County*, 327 Or. 161, 957 P.2d 1217 (May 29, 1998)
- *State v. Fugate*, 156 Or. App. 609, 969 P.2d 395 (Oct 28, 1998)
- *State v. Ferman-Velasco*, 157 Or. App. 415, 971 P.2d 897 (Dec 09, 1998)

*Ferman-Velasco* showed once again that the initiative power enjoyed by Oregon voters is broad. As part of its larger holding in the case, the *Ferman-Velasco* court noted that the citizens have the power through Art. IV, § 1(2) to make determinations about what punishments should be imposed for particular crimes.

The people also enjoy a certain freedom to gather signatures for proposed initiatives that in some cases override the interests of property owners. In *Stranahan*, the Court of Appeals upheld the notion that large shopping centers, the “modern-day equivalent of town squares,”<sup>124</sup> cannot detain signature gatherers as though they were criminal trespassers. While the majority acknowledged that “it is not easy to discern a unifying theme from the case law,”<sup>125</sup> the court compared the Fred Meyer shopping center in question and found it sufficiently resembled “large shopping centers such as the Lloyd Center.”<sup>126</sup> Factors to consider, the court said, included the size/configuration of the center, relationship to other biz in the area, whether public facilities like sidewalks, streets, public transit share the space.<sup>127</sup>

*Armatta* discussed a number of constitutional sections dealing with the initiative power. The Supreme Court decided the case mainly based on Art. 17 § 1 grounds (the “separate vote” requirement), but the court also noted that Art. 4 § 1 prohibits measures that embrace more than one subject (the “single subject” requirement). The single subject requirement, the court found, “focuses upon the content of the proposed amendment, by requiring that it embrace only one subject and matters properly connected therewith.”<sup>128</sup> Art. 4 § 1, unlike Art. 17 § 1, the court

<sup>124</sup> *Stranahan*, 153 Or. App. at 452-53.

<sup>125</sup> *Id.* at 455 n.10.

<sup>126</sup> I. at 452 (citing *Lloyd Corp v. Whiffen*, 315 Or. 500 (1993)).

<sup>127</sup> The Oregon Supreme Court has accepted *Stranahan* for review (328 Or. 115 (1998)).

<sup>128</sup> *Armatta*, 327 Or. at 274.

said, applies to both laws and amendments proposed by the people.

The Court of Appeals in *Fugate* affirmed that *Armatta* added nothing new to the meaning of Art. 4. Defendant in *Fugate* challenged SB 936 (relating to the admission of evidence) on single-subject grounds, but the court said that the scrutiny applied by *Armatta* to constitutional amendments under Art. 17 means nothing to mere legislation. It does not follow, the court said, that because a “a given enactment might not survive scrutiny under Art. XVII, section 1, it would not survive scrutiny under Art. IV, section 20.”<sup>129</sup>

In *Lane*, the court reaffirmed that the language of Art. 4 § 1 also limits initiatives to legislative rather than administrative actions. *Lane* concerned a proposed initiative to reduce the salary of a transit district's general manager. The court held that the action would be administrative because, as with the road renaming in *Foster v. Clark*,<sup>130</sup> this initiative would perform an administrative task under an already-existing legal framework. Initiatives, the court said, must change or add to the legal framework, not alter decisions made under that framework.

## XIII. ART VII

- *Parrott v. Carr Chevrolet Inc.*, 156 Or. App. 257, 965 P.2d 440 (Sep 30, 1998).

*Parrott* cited the 95-year-old case of *Adcock v. Oregon R.R.*<sup>131</sup> to find that the remedy of remittitur is in fact available to Oregon courts.<sup>132</sup>

## XIV. ART XI

- *Glenn v. City of Boardman*, 14 Or. Tax 291 (Apr. 10, 1998).
- *Glenn v. Morrow County Unified Recreation Dist.*, 14 Or. Tax 344 (Jul. 17, 1998).
- *Ash Org. v. City of Wilsonville*, 14 Or. Tax 362 (Aug. 31, 1998).

In an attempt to continue school extra-curricular activities threatened by the reduction in property tax revenues enforced by the new Art. 11 § 11, the county in *Glenn v. Morrow County* created a “recreation district,” which levied property taxes to support the school activities as well as some community recreation

<sup>129</sup> *Fugate*, 156 Or. App. at 613. The case has been accepted for review by the Oregon Supreme Court, 328 Or. 275 (1999).

<sup>130</sup> 309 Or. 464 (1990).

<sup>131</sup> 45 Or. 173 (1904).

<sup>132</sup> The Oregon Supreme Court has accepted this case for review, 328 Or. 418 (1999).

activities. The Tax Court found the scheme constitutionally viable even though the plain purpose of the recreational district was to circumvent the new tax limitations. The text of § 11(b) “effectively works against itself,” the court found, “by focusing on the unit levying the tax instead of the actual expenditures made by that unit.”<sup>133</sup> Because the district did not fund educational services exclusively, the court said, it need not be categorized as funding the public education system and thus exists outside the severe tax limitations.

The same petitioner sought to enforce § 11 once again in *Glenn v. City of Boardman*, which held that annexation increases a city’s tax base as a matter of law. Petitioner had argued that a loophole created by the relationship between ORS § 308.225 and Art. XI, § 11(4) of the constitution meant the tax base could never increase on account of an annexation occurring during a specific time. The court held that Glenn confused the concepts of tax base and tax levy, and that the city could increase its levy up to the § 11-limited, annexation-increased tax base.

The plaintiff in *Ash Organization* also alleged a violation of § 11 by claiming that the city instituted a new road fee without the required voter approval to make up for lost property tax revenue. The tax court, after examining the evidence, found no proof that the reduction in property taxes under Measure 47 or 50 affected the city’s roads budget. The new fee was unrelated to any property tax reduction, the court found, and thus no unconstitutional “shifting” had occurred.

## XV. ART. XVII

- *Armatta v. Kitzhaber*, 327 Or. 250, 959 P.2d 49 (Jun. 25, 1998).

*Armatta* declared Measure 40, enacted as Art. I § 42, unconstitutional on the ground that it violated the “separate vote” requirement of Art. 17 § 1. Art IV § 1, by comparison, prohibits a measure to embrace more than one subject (the “separate subject” requirement), and Art. XVII, § 2 prohibits a measure that revises rather than amends the constitution.

The court examined the history, text, and case law surrounding Art. IV § 1 and Art. XVII § 1 and found little clarifying detail other than the broad notion that Art. XVII § 1 focuses “both on the proposed change ... as well as the procedural form” while Art. IV, § 1 “focuses upon the content of the proposed amendment, by requiring that it embrace only one subject and matters properly connected therewith.”<sup>134</sup> Art. XVII §

<sup>133</sup> *Glenn*, 14 Or. Tax at 354.

<sup>134</sup> *Armatta*, 327 Or. at 274.

1, the court said, applies only to constitutional amendments rather than amendments and legislation as with Art. IV, § 1. Therefore, the court decides, the fact that Art. XVII, § 1 imposes a narrower restriction “should come as no surprise.”<sup>135</sup>

The test under Art. XVII, the court held, requires examining whether the measure makes two or more changes that are substantive but not closely related. The court concluded after looking at the provisions of Measure 40 that the amendment actually affected at least six separate, individual rights.<sup>136</sup> These substantive changes, the court said, might all implicate constitutional rights relating to criminal prosecutions, but they were not closely related. Establishing a significant new analytical framework applicable to this type of ballot measure challenge, the court concludes that the measure is invalid in its entirety, despite a severability provision.



<sup>135</sup> *Id.* at 276.

<sup>136</sup> *See id.* at 283.