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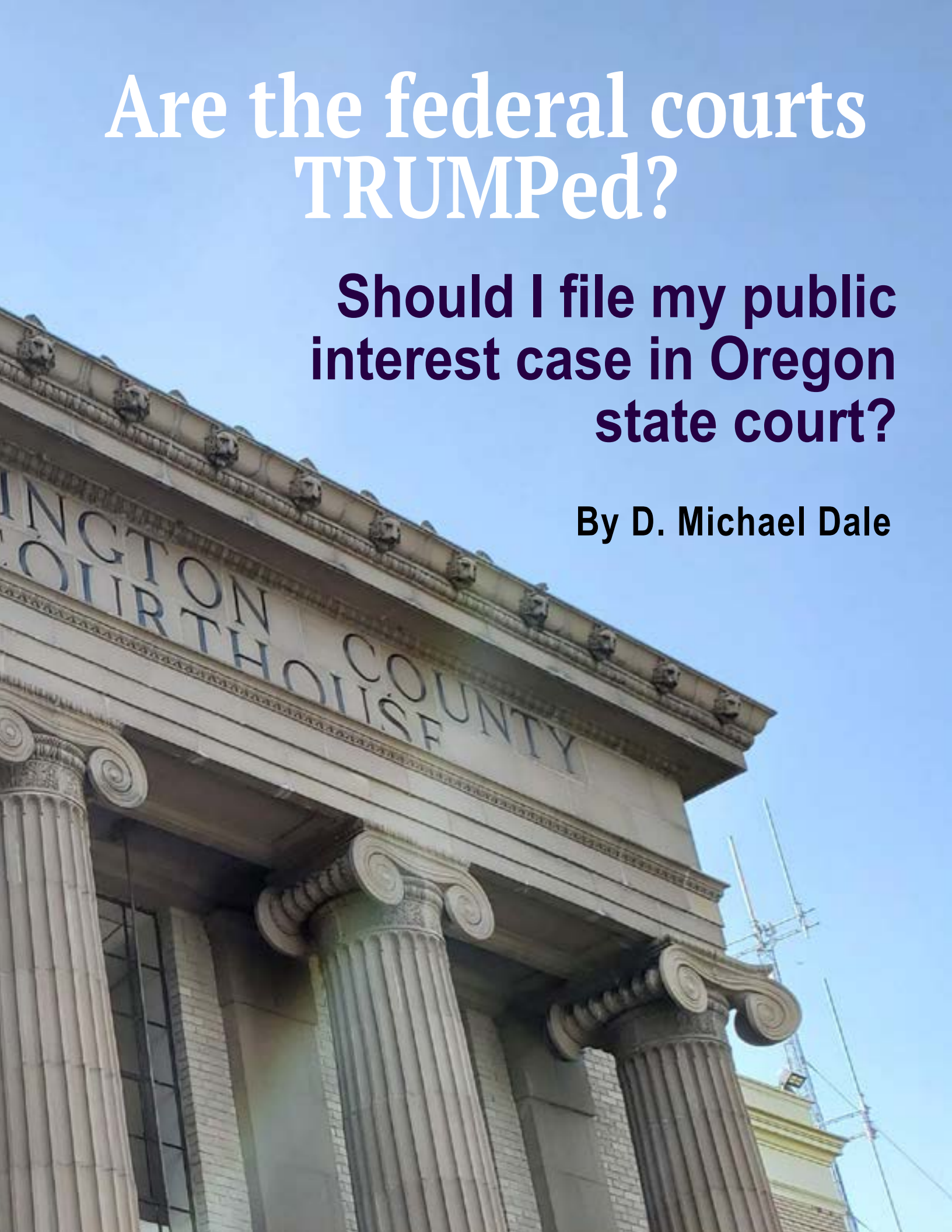
By D. Michael Dale



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The author is deeply indebted to Bonnie Allen-Sailer, Steven Goldberg, David Henretty, Lori Isley, Jack Landau, Cynthia Rice, Steve Walters, and Ira Zarov for their very helpful review and comment on drafts of this paper. I would also like to thank Nathaniel Belachew, Jami Ferraris, Nate Haberman, Sydney Harper, Juliana Minn, Sarah Osborn and Sadie Wolff for their valuable research contributions to this project. The generous financial support of the Oregon Law Foundation was critical to its completion.

Introduction

For nearly sixty years the paradigm among public interest lawyers has been to resort, after other forms of advocacy had been unsuccessful, to civil rights suits in federal district court and, if unsuccessful there, to appeal until one found success. While this strategy has had a relatively good run, its prospects may be waning due to changes in the federal judiciary.

As he left office, Donald Trump had filled 28 percent of seats on the federal bench, including 27 percent of active federal district court judges[1] and 30 percent of active appeals court judges, not to mention appointing three very conservative Supreme Court justices.[2] Trump's appointees are not only far more conservative than other presidents' picks but far less racially and ethnically diverse.[3] This lack of diversity may well adversely affect case outcomes in the significant number of public interest cases on which Trump appointees will sit.[4]

Recent decisions such as *National Federation of Independent Federation of Business v. OSHA*, 595 U. S. _____ (2022) (limiting OSHA's authority to require COVID protections); and *Cedar Point Nursery v. Hassid*, ____ U.S. __; 141 S.Ct. 2063, 210 L.Ed.2d 369 (2021) (requiring payment of compensation for access to farms by union organizers under California's Agricultural Labor Relations Act); do not portend well.

Of course, one hopes that the beneficial effects of judicial precedent, lifetime tenure and the collegiality of the existing judiciary will moderate the anticipated conservatism of this wave of new judges. The Biden Administration may be able to move quickly on filling vacancies,[5] and discussions of ways to reform the federal

1 Mejía, Elena and Thomson-DeVeaux , Amelia, "It Will Be Tough For Biden To Reverse Trump's Legacy Of A Whiter, More Conservative Judiciary," **Five Thirty-eight,** https://fivethirtyeight.com/ features/trump-made-the-federal-courts-whiter-and-more-conservative-and-that-will-be-tough-for-biden-to-reverse/ (Visited 1/25/2021).

2 *See* Wermiel, Stephen, *SCOTUS for law students: Justice William Brennan and Supreme Court avoidance,* SCOTUSblog (Nov. 21, 2018), https://www.scotusblog.com/2018/11/scotus-for-law-students-justice-william-brennan-and-supreme-court-avoidance/. "Even before Justice Brett Kavanaugh replaced Justice Anthony Kennedy this fall, some commentators were suggesting that liberals might want to avoid appealing cases to the increasingly conservative Supreme Court. . . .'If you are liberal,' wrote Ian Millhiser of the Center for American Progress in 2014, 'you should probably try to keep your case away from the justices.'" (visited 3/15/21)

3 Mejía, Elena and Thomson-DeVeaux, *supra*.

4 *See* Kastellec, Jonathan P., "Racial Diversity and Judicial Influence on Appellate Courts," **American Journal of Political Science**, https://scholar.princeton.edu/sites/default/files/kastellec_racial_diversity_final_0.pdf (Visited 1/25/2021).

5 As of January 1, 2022, Biden had filled 11 Court of Appeals judgeships and 29 district court positions. For historical comparative data see "Federal judges nominated by Joe Biden," BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Joe_Biden (last visited January 5, 2022).

judiciary are underway.[6] Still, it seems prudent to explore other ways of thinking about how to invoke judicial protection of the rights of our clients. In relatively progressive states like Oregon, reconsideration of the role state courts might play is timely.

The proposition of looking to state courts to assure protection of civil rights is not really a new idea. In the wake of the retreat of the federal courts from defending criminal defendants' rights as the Warren Court gave way to the Burger Court in the 1970s, Justice William J. Brennan, Jr., wrote a seminal appeal to state courts to step into the breach in defending liberty. *See* Brennan, William J., Jr., STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS, 90 Harv. L. Rev. 489 (January, 1977). Justice Brennan wrote:

> "But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed."

Id., at 490.

Even earlier academic writing concerning the important role of state constitutional law includes Linde, Hans A., "Without 'Due Process': Unconstitutional Law in Oregon," 49 Or. L. Rev. 123 (1970)[7]; Force, Robert, "State 'Bill of Rights': A Case of Neglect and the Need for a Renaissance," 3 Va. U. L. Rev. 125 (1969); Falk, Jerome B., "The State Constitution: A More than 'Adequate' Nonfederal Ground," 61 Cal. L. Rev. 273 (1973). During the approximate period in which Justice Brennan was writing, a number of state court jurists, including Justice Stanley Mosk of the California Supreme Court and Justice Hans Linde of the Oregon Supreme Court were writing opinions robustly interpreting state constitutional protections independently of federal constitutional doctrine.[8]

In relatively progressive states like Oregon, reconsideration of the role state courts might play is timely.

There are good reasons for state courts to assert leadership in the adjudication of civil rights. Historically, states were the original repositories and exponents of civil rights under law in the United States. Each of the original states had existing rights charters prior to the adoption of the federal bill of rights. Indeed, state constitutional protections served as the model for the federal bill of rights, and one of the objections to its adoption was that doing so might undermine robust enforcement of civil rights in the states.

Second, individual states can set their own rights regimes, and so long as states are at least as protective as required by federal law, they are free to do so. The federal constitution sets a floor under state protection of individual rights, but it does not set a ceiling. Part of the design of republican form of government was the idea that different states would experiment with different ways of enforcing the law which could then serve as models for others. In the constant ebb and flow of thinking among states and between states and the federal government about what rights we should enjoy, at times a particular state court may be ready to take leadership on a certain issue.

So long as the state court is interpreting

6 https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/ (last visited January 5, 2022).

7 "It is common for scholars to trace the origins of state constitutionalism to the 1976 Harvard Law Review article authored by the late Justice William Brennan. But the truth is that Justice Brennan stood on the shoulders of Hans Linde in calling for state courts to recognize the independent significance of their own constitutions as safeguards of the civil liberties of its citizens." Landau, Jack, "Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law," WILLAMETTE LAW REVIEW, 252-53 (3/13/2007) *citation omitted*.

8 *See, e.g. State v. Clark,* 291 Or. 231, 630 P.2d 810 (Or. 1981) (privileges and immunities); *State v. Robertson,* 293 Or. 402, 649 P.2d 569 (Or. 1982) (free expression); and S*alem College & Academy, Inc. v. Employment Div.*, 695 P.2d 25, 298 Or. 471 (Or. 1985) (religious freedom); Wermiel, *supra*.

its own law, and so long as its pronouncements do not fall beneath the floor set by the federal constitution, its opinions are beyond review by the federal courts. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940); accord, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *Powell v. Alabama*, 287 U.S. 45, 60 (1932). By deciding for itself what state law requires, a state court enables a flexibility in the law to adjust doctrine to meet local needs and conditions.

Finally, when it decides a case simply on state law grounds, a state supreme court achieves the judicial efficiency of ending the litigation without resort to resource-consuming trips back and forth to the federal courts.

This paper will discuss a few contemporary examples of state courts having favorably decided important, controversial public interest cases. It then will explore a series of practical considerations for advocates thinking of invoking the Oregon judiciary in public interest cases.

"State courts around the country have proven themselves quite able to take on highly contentious, politically controversial cases and to issue principled, progressive outcomes, even where federal courts may well have reached a less favorable result."

I. Examples of State Court Decisions in Public Interest Cases

State courts around the country have proven themselves quite able to take on highly contentious, politically controversial cases and to issue principled, progressive outcomes, even where federal courts may well have reached a less favorable result. A few examples affecting farm workers and other low wage workers may be illustrative:

A. *Rodriguez v. Dairy*: exclusion of farm and ranch workers from New Mexico workers' compensation law held to be unconstitutional.

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In *Rodriguez v. Dairy*, 2016 N.M.S.C. 29, 378 P.3d 13 (N.M. 2016), the issue before the court was whether the exclusion of farm and ranch workers from New Mexico's workers' compensation scheme violated the Equal Protection Clause of Article II, § 18 of the New Mexico Constitution.

In New Mexico, "In order to be legal," ostensibly discriminatory classifications in social and economic legislation "must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule" for the class that suffers the discrimination. *Burch v. Foy*, 1957–NMSC–017, ¶ 10, 62 N.M. 219, 308 P.2d 199." *Rodriguez*, 378 P.3d 17. The court in *Rodriguez* found the distinction in the statute between excluded farm and ranch workers and other agricultural workers (who were covered by the New Mexico workers' compensation statute) to be "nothing more than arbitrary discrimination" and therefore unconstitutional. *Id.*, 378 P.3d 18.

The court reached this conclusion under New Mexico's rational basis test for equal protection. *Id.*, 378 P.3d 24. Since the benefits conferred by the workers' compensation statute were not seen to be fundamental rights, and since farm

and ranch workers were not recognized to be in a sensitive or suspect class, the court found neither intermediate nor strict equal protection scrutiny to be appropriate. *Id.*

The court strongly intimated that the ultimate outcome may well have been different, had the claim been made under the federal equal protection clause. Criticizing the federal test, the *Rodriguez* court noted that a federal rational basis analysis can be subjective and requires opponents of a statute to negate every conceivable rationale for the discrimination, including arguments that have not even been made to the court.

> Our opinion in *Trujillo v. City of Albuquerque*, 125 N.M. 721, 965 P.2d 305 (N.M. 1998)] implicitly addressed Justice Stevens' concern in *[FCC v.] Beach Communications[,* Inc., 508 U.S. 307, 315 (1993)] that the federal test "sweeps too broadly, for it is difficult to imagine a legislative classification that could not be supported by a 'reasonably conceivable state of facts[,]'" as well as his statement that judicial review under this test is therefore "tantamount to no review at all." 508 U.S. at 323 n. 3, 113 S.Ct. 2096 (Stevens, J., concurring); *see also* Clark Neily, No Such Thing: Litigating Under the Rational Basis Test , 1 N.Y.U. J.L. & Liberty 898, 905–913 (2005) (arguing that the federal rational basis test invites dishonest and entirely speculative defenses of legislation; "[s]addl[es] ... plaintiffs with a technically unattainable burden of proof and requir[es] them to construct a trial court record sufficient to rebut arguments that have not even been made yet"; and is particularly subject to inconsistent, result-based interpretations).

Rodriguez, 378 P.3d 24-27.

It is most unlikely that the court would have used such a frail analysis, which it described as "toothless" and "a virtual rubber-stamp," *Id.*, 25 (citation omitted), to strike down the farm and ranch labor exclusion.

However, New Mexico recognizes a rational basis test for equal protection that is different from the federal rational basis test under the Fourteenth Amendment. 378 P.3d 24-25. *See Trujillo v. City of Albuquerque,* 125 N.M. 721, 965 P.2d 305. Rather than engaging in the very limited and subjective review available under federal law, the court sought to fulfill what it described as its "constitutional duty to protect discrete groups of New Mexicans from arbitrary discrimination by political majorities and powerful special interests." *Rodriguez*, 378 P.3d 25. The rational basis test adopted by *Trujillo* requires the challenger to

> "demonstrate that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record."

Id., 25 (citation omitted).

To overturn a statute under the New Mexico rational basis test:

> In practical terms, our rational basis standard requires the challenger to bring forward record evidence, legislative facts, judicially noticeable materials, case law, or legal argument to prove that the differential treatment of similarly situated classes is arbitrary, and thus not rationally related to the articulated legitimate government purposes.

Rodriguez, 378 P.3d 24-26 (citation omitted).

Applying this test to the issue at hand the court struck down the statutory exclusion.

B. Exclusion of dairy workers from overtime premium pay found to violate the Washington constitution's equal privileges or immunities clause.

In *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.,* 475 P.3d 164, 196 Wash.2d 506, 475 P.3d 164 (Wash. 2020), dairy workers challenged the Washington state statute that

excluded agricultural workers from overtime protection under Washington law. They alleged that RCW 49.46.130(2)(g) violated the privileges or immunities clause, article I, section 12 of the Washington State Constitution. That provision is often interpreted using precedents drawn from the Equal Protection Clause of the United States Constitution, but also has been recognized as having a broader meaning. Adopted in the wake of political favoritism common during the territorial period, the Washington clause has been held to bar favoritism of one class of persons over another with respect to fundamental rights of state citizenship. *See State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902). This aspect of the clause is "more protective," than the federal equal protection clause. *Martinez-Cuevas*, at 475 P.3d 164, 171, 196 Wash.2d 506, 518, 475 P.3d 171.

This "more protective" analysis begins with an inquiry as to "whether a challenged law grants a 'privilege' or 'immunity' for purposes of [the Washington] state constitution. If the answer is yes, then we ask whether there is a 'reasonable ground' for granting that privilege or immunity."

Plaintiff Dairy Workers in *Martinez-Cuevas*, Photo by Columbia Legal Services http://columbialegal.org/impact_litigations/martinez-cuevas-et-al-v-deruyter-brothers-dairy-inc-et-al/

Martinez-Cuevas, 196 Wash.2d at 519, 475 P.3d at 171 (citations omitted).

The *Martinez-Cuevas* Court found that, by virtue of Article II, section 35 of the Washington constitution, milkers have a fundamental state constitutional right to the enactment of legislation protecting their health and safety. *Id.*, 196 Wash.2d 520-21, 475 P.3d 172, 196 Wash.2d 521-73 (Article II, section 35 requires that "the legislature pass necessary laws for the protection of persons working in . . . employments dangerous to life or deleterious to health."). The court held that, since overtime protects the health and safety of affected workers, in adopting RCW 49.46.130(2)(g), the legislature granted a privilege or immunity to dairy employers by not affording this constitutional protection to dairy workers. *Id.* 196 Wash.2d at 522, 475 P.3d at 173. The court found that this satisfied the first prong of Washington's enhanced privileges and immunities analysis. *Id.*

As to whether the legislature had reasonable grounds to grant dairy farmers the privilege or immunity of not paying higher overtime wages to milkers, the court first noted that

> The article I, section 12 reasonable ground test is more exacting than rational basis review [under the federal constitution]. Under the reasonable ground test, a court will not hypothesize facts to justify a legislative distinction. Rather, the court will scrutinize the legislative distinction to determine whether it in fact serves the legislature's stated goal. Speculation may suffice under rational basis review, but article I, section 12's reasonable ground analysis does not allow it. If we are to uphold RCW 49.46.130(2)(g)'s overtime exemption, the provision must be justified in fact and theory.

Id., 196 Wash.2d at 523, 475 P.3d 173 (citations omitted).

Turning to an examination of the proffered justification for the dairy exemption and the legislative history, the court noted that "*DeRuyter* does not offer, and we have not found, any convincing legislative history that illustrates a reasonable ground for granting the challenged overtime pay exemption . . . the exemption in RCW 49.46.130(2)(g) is an impermissible grant of a privilege or immunity under article I, section 12 of Washington's constitution." *Id.*, 196 Wash.2d 524-25, 475 P.3d 174.

Again, it is unlikely that this exemption of milkers from overtime protection would have been overturned under a conventional federal equal protection test. Justice Gonzalez, in a concurring opinion, essentially applied such a test. *Id.*, 196 Wash.2d at 526. He found that disparate treatment of farm workers under the statute required at least an intermediate level of scrutiny, given the long history of racial considerations embedded in the exclusion of agricultural workers from federal labor protections. Finding no countervailing important government interest justifying this discrimination, Justice Gonzalez concluded that

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the statute denied equal protection and concurred in the judgment of the court on this basis. *Id.* 196 Wash.2d 526-33, 475 P.3d 174-78. However, his concurrence resting on traditional state equal protection analysis derived from federal law was only able to win the support of three other justices. 196 Wash.2d 533, 475 P.3d 178.

C. Oregon anti-immigrant measure overturned on state law grounds.

On November 4, 2008, Columbia County, Oregon, voters adopted Measure 5-190, a county-wide initiative that was based on an existing Arizona statute, the Legal Arizona Workers Act, Ariz. Rev. Stat. §§ 23-211 to 23-216. The Arizona statute had been challenged based on federal preemption and due process grounds in then-pending litigation that was ultimately resolved in *Chicanos Por La Causa, Inc. v. Napolitano,* 558 F.3d 856 (9th Cir. 2008, amended 2009). *Chicanos* upheld the Arizona statute, at least as to facial attack. The plaintiffs in *Chicanos* had moved for rehearing and rehearing *en banc* of the original panel decision of the Ninth Circuit, published at 544 F.3d 976. The panel ultimately denied these motions, making only small amendments to its decision, and upheld the Arizona statute. 558 F.3d at 860.

Opponents of the Columbia County measure sought to challenge the measure at a point in time after the original Ninth Circuit panel opinion in *Chicanos*, but while the request for rehearing *en banc* was still pending before the Court of Appeals. Parallel federal preemption and due process claims as had been made in *Chicanos* could have been raised with respect to the Columbia County measure, but, unless the *Chicanos* decision had first been overturned by an *en banc* review in the Ninth Circuit, a federal district court in Oregon ruling on these issues would have almost certainly felt bound to uphold the measure if contested on those same federal grounds, and a potential early adverse Oregon decision on those grounds threatened to prejudice the pending request for *en banc* review of *Chicanos* in the appellate court.

These considerations led plaintiffs to challenge the Columbia County ordinance in state court, on purely state law grounds.[9] Since no federal claims were pressed, the case could not be removed to federal court, and the case was not subject to the decision in the Ninth Circuit.

The Columbia County measure[10] prohibited an employer from intentionally or knowingly

9 *Abbot, et al v. Columbia County, et al*, Civ. No. 08-2922 (Or. Cir. Ct. for Columbia County, Sept.5, 2008).

10 For contents of this measure see Columbia County Measure 5-109, 2008 General election, *see also,* https://ballotpedia.org/Columbia_

employing any alien who did not have authorization to work in the United States. The measure required the county attorney to investigate whenever he or she received a complaint that an employer was employing an unauthorized alien, and, unless the complaint was frivolous, to bring an action against the employer in "an administrative hearing before the [B]oard of [C]ounty [C]ommissioners." Appeals were to be heard by the Justice Court.

The measure provided for sanctions for knowing violations of the prohibition against employing an unauthorized alien.[11] For a first violation during a three-year period, the Board or the Court was required to order the employer to terminate all unauthorized aliens, and for an employer who was a building contractor, assess a fine of $10,000. Contractor employers were also to be placed on probation for three years. In addition, if the employer failed to terminate all unauthorized aliens within three days, the Board or Justice Court was required to order "the appropriate agencies to suspend all licenses and building permits . . . held by the employer," and the "appropriate agencies" were required to suspend the licenses. When an employer committed a second violation during the period of probation, the court was required to order the appropriate agencies permanently to revoke all of the licenses necessary to operate the employer's business and permanently to deny the employer the right to obtain building permits in the future.

Fines collected under this regime were first to be applied to the cost of implementing the measure and all surplus was to be applied to law enforcement through the Columbia County Sheriff's Office. All county officials were required to enforce and uphold the measure, and all citizens were given the right to petition the Justice Court for appointment as a special county counsel to enforce the measure in the event any county official failed to enforce it. *Id.*

In *Abbot, et al v. Columbia County, et al,* Civ. No. 08-2922 (Or. Cir. Ct. for Columbia County, Sept.5, 2009), *supra*, n. 9, Columbia County residents and businesses sued in the local state Circuit Court to invalidate the ordinance. They argued that the ordinance:

1) conflicted with Oregon's land use planning system by disrupting the building permit system;

2) interfered with the Oregon Building Code by injecting new, local considerations into the standards for issuing permits;

3) usurped the authority of the Oregon Construction Contractors Board to regulate licenses of construction contractors;

4) interfered with state statutes concerning the lawful functions of the district attorney; definitions and penalties for official misconduct; and allocation of money collected in fines to the general fund;

5) exceeded county legislative power by interfering with state immigration enforcement policy, purporting to coerce employers outside the County's boundaries, impermissibly stripping the legislative powers of the County Board of Commissioners, imposing regulation on cities that had not authorized application within their jurisdictions, and by enlarging the statutory powers of the justice court;

6) the ordinance was unconstitutional under the state constitution in that it directed an unconstitutional taking of property and imposed penalties that are criminal in nature;

7) the measure was invalid because it dealt with more than one principal subject in violation of the Oregon Constitution;

8) it included unreasonable provisions and procedural errors; and

9) its valid and invalid parts were so entwined that the whole must be invalidated.

"the subject matter of the ordinance and initiative is without question controversial and the margin of the initiative's passage indicates that the community is indeed frustrated by the lack of Federal attention..."

The initiative had been the subject of great local controversy in the election, and this lawsuit

County_Measure_5-190_(2008) (visited February 17, 2022).

11 *Id.*

was highly visible and controversial when it was filed. Noting that "the subject matter of the ordinance and initiative is without question controversial and the margin of the initiative's passage indicates that the community is indeed frustrated by the lack of Federal attention," Circuit Court Judge Ted E. Grove nonetheless declared, on April 13, 2009, that the ordinance was illegal and unenforceable.[12]

Photo by Melissa Lyttle/Bloomberg
https://www.post-gazette.com/business/career-workplace/2021/07/30/Amazon-and-other-employers-must-pay-workers-for-time-in-security-screenings-Pa-Supreme-Court-says/stories/202107300073

D. Time spent by Amazon workers waiting for security checks found to be compensable time under Pennsylvania's wage and hour laws.

In *Integrity Staffing Solutions v. Busk,* 574 U.S. 27 (2014), the United States Supreme Court held that the time spent by Amazon warehouse workers in Nevada waiting for their employer to conduct security checks after the conclusion of their work shifts was not compensable time under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq*., because of provisions of the Portal to Portal Act, 29 U.S.C. §§ 251-262, excluding certain post-liminary activities from compensability under the Fair Labor Standards Act. Workers in a Pennsylvania class action sought wages for the same post-shift security checks.

Are there ways in which state court may offer advantages to the traditional federal forum? Are there offsetting disadvantages?

The issue of whether this time was compensable under Pennsylvania law, 43 P.S. §§ 333.101-333.115, was certified by the Sixth Circuit to the Pennsylvania Supreme Court. *Heimbach v. Amazon.Com, Inc.,* 942 F.3d 297 (6th 2019). The Pennsylvania court declined to follow *Busk* in interpreting its state law, writing that it was not bound by the United States Supreme Court's interpretation of the Fair Labor Standards Act. *In Re Amazon.com, Inc.,* 255 A.3d 191, 201 (Pa. 2021). Noting that when Pennsylvania adopted its minimum wage law in 1968, it did not adopt the language of the Portal to Portal Act, the Pennsylvania Supreme Court held that the time spent by workers undergoing mandatory security checks was work time under Pennsylvania law that the employer was obligated to pay. *Id*. at 204.

II. Opportunites and Considerations for Public Interest Litigants in Oregon State Court

Having suggested that state courts can provide a favorable forum for public interest cases, we next examine the factors one might consider in deciding to file such litigation in Oregon state courts. Are there ways in which state court may offer advantages to the traditional federal forum? Are there offsetting disadvantages?

A. A progressive and independent judiciary.

In Oregon, most judges have been appointed by relatively progressive governors since 1987, and one could argue, since 1959. Oregon judges are not insulated by life time appointment; they must run for reelection every six years.[13] Yet, in the main, it is relatively rare for incumbent judges to be challenged when they run for reelection, and even rarer for sitting judges to be defeated. In looking at 105 contested judicial elections conducted in Oregon since 2000, it appears that an incumbent was defeated by a challenger in only six cases.[14]

12 *Abbot, et al v. Columbia County, et al,* Civ. No. 08-2922 (Or. Cir. Ct. for Columbia County, April 13, 2009).

13 Article VII, section 1.

14 In thirty-two contested elections, the incumbent was re-elected. In thirty-eight of the elections, candidates were competing for a vacant

In a number of these six elections it seems as though the salient issue may have been more about dissatisfaction with the governor's original selection than concern over particular rulings by the incumbent. Three seemed to turn on criticism of the Governor's original appointment. In the 2014 election in Columbia County[15] and the 2018 election in Linn County,[16] the incumbent was a very recently appointed, inexperienced judge. This same factor may have been at play in the 2014 election in Jackson County, although there was some public criticism of a "botched" murder trial that may have played some role.[17]

Two other elections appear to have centered on criticism of the judge's conduct in office, but not on particular judicial decisions. The 2020 defeat of the incumbent in Jackson County was colored by an ethics complaint against the incumbent filed by a retired judge.[18] Somewhat similarly, in the 2020 defeat of the incumbent in Columbia County, her involvement in general workplace discord in the county, and an accusation of "gossip" were central issues. Although general "not tough enough on crime" allegations were publicly made, no specific cases or decisions are known to have been called out as being problematic.[19] Only the 2008 election in Washington County appears to have centered on unhappiness with particular rulings of the incumbent judge. In that election, the incumbent, a former criminal defense attorney, was criticized by a prosecutor challenging him for having dismissed four charges in a DUII case for lack of evidence. [20]

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In the Columbia County ballot measure case described above, the decision addressed the highly controversial hot button issue of employment of unauthorized workers in the construction industry. Judge Grove overturned a ballot measure that had only recently been passed by the voters by a wide margin. In spite of the controversial, public nature of the case, Judge Grove was reelected without opposition when he next faced the voters of rural Columbia County.

Thus, Oregon judges do not seem often to have been punished at the ballot box for their judicial decisions, at least in the past. [21]

While this, of course, does not guarantee that state judges in Oregon will be free in the future from political influence over their decision making, [22] it is reassuring that it does not seem that such political considerations have played much of a role in judicial elections in Oregon.

position.

15 https://pamplinmedia.com/scs/83-news/238984-105263-huge-money-edge-for-most-incumbents.

16 https://www.opb.org/news/article/kate-brown-judicial-appointees-lose-election/.

17 https://mailtribune.com/news/government-politics/incumbent-peterson-concedes-to-hoppe-in-judge-s-race.

18 https://kobi5.com/news/former-jackson-co-judge-files-complaint-against-existing-judge-125964/.

19 https://pamplinmedia.com/scs/83-news/484483-390059-judge-contenders-grant-clarke-respond-to-questions (Grant accused of misconduct, "gossip", with parole/probation officer).

20 https://pamplinmedia.com/component/cuntent/article?id=66306.

21 *See* Shepherd, Pete, "One Hundred Fifty Years of Electing Judges in Oregon," 87 OR.LAWREV. 907, 925-34 (2008), for a review of past history of the conduct of Oregon elections from 1934 to 2006. 'Most of the published statements [in the voters' pamphlets] of candidates and their supporters in the contested elections listed in Table 2 are fairly described as self-restrained, nonpartisan, and biographical. Most candidates and their supporters eschewed specific commentary on substantive issues already decided by, or likely to be pending before, the court.'

22 The three-way contested election to the Supreme Court of 2006 offers a sobering harbinger of what election of judges could look like in the future. *See* Shepherd, 87 OR.LAWREV. 930-34. 'Far from demonstrating that any of the candidates 'prostitute[d] the ermine to political ends,' the history of the 2006 campaign for the Oregon Supreme Court position instead demonstrates that even well-qualified and strongly independent candidates are trapped by their reliance on contributions from motivated contributors.' *Id.* 933-34. For other critique of electing appellate judges in Oregon, see Frohnmayer, David, "Election of State Appellate Judges: the Demise of Democratic Premises," 39:4 WILLAMETTE LAW REV. 1251 (Fall, 2003); DeMuniz, Paul J., "Judicial Selection in Oregon: Money, Politics, and the Initiative Process," 39:4 WILLAMETTE LAW REV. 1265 (Fall, 2003).

If a litigant in Oregon is assigned a judge that is perceived to be biased against the party, state law provides a procedure by which that judge can be replaced as a matter of course. An Oregon judge cannot sit on a case in which "any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge." O.R.S. § 14.250. This belief can be established by affidavit pursuant to O.R.S. § 14.260, and the judge with a perceived bias will be routinely replaced. Although judges can be disqualified in federal court, bias must be shown. 28 U.S.C. § 455(b)(1); *Liteky v. United States*, 510 U.S. 540 (1994).

B. The Extraordinary Influence of Hans Linde over Oregon Civil Rights Jurisprudence.

Hon. Hans A. Linde, Photo by University of Oregon https://law.uoregon.edu/memoriam-hans-linde

Both as a legal scholar and during his tenure as a Supreme Court Justice, Hans Linde exerted extraordinary influence over how Oregon thinks about its state law. [23] This abiding influence creates important opportunities for public interest litigants in Oregon's state courts.

1.The Independence and Primacy of the Oregon Constitution.

As noted above, Justice Linde was an early and prominent proponent of the idea that, not only does the Oregon constitution provide a basis of decision that is independent of federal jurisprudence, it is the primary source of authority. Like most other states, prior to Justice Linde's influence, Oregon had closely followed federal constitutional doctrine in interpreting its own bill of rights. Beginning in the late 1970s, under Linde's leadership, this changed drastically.

2. Avoiding Federal Review; "First Things First."

Linde was influential in establishing for Oregon Courts a methodology about how to approach mixed questions of state and federal law, particularly with respect to rights under the Oregon and United States Bills of Rights. In his seminal speech, "First Things First,"[24] Justice Linde laid out the theoretical underpinnings for this analysis. According to Linde, since the federal bill of rights only applies to the states by virtue of the Fourteenth Amendment, in order to reach a question of the violation of a federal civil right, an Oregon court must first determine whether Oregon law, including its constitutional law, deprives the plaintiff of due process or equal protection.

If Oregon's constitution would prohibit a particular act, there can be no federal violation under state law. As Linde put it:

> Whenever a person asserts a particular right, and a state court recognizes and protects that right under state law, then the state is not depriving the person of whatever federal claim he or she might otherwise assert. There is no federal question.

Id.,. at 383.

Shortly afterward, Linde wrote from the bench:

> Whenever a person asserts a particular right, and a state court recognizes and protects that right under state law, then the state is not depriving the person of whatever federal claim he or she might otherwise assert. There is no federal question.

23 Balmer, Thomas A. and Thomas, Katherine, "In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation," 76 ALBANY L REV, 2027, 2040, n. 75 (2012).

24 Hans A. Linde, "First Things First: Rediscovering the States' Bills of Rights," 9 U Balt L Rev 379 (1980).

Sterling v. Cupp, 625 P.2d 123, 290 Or. 611 (Or. 1981); *see also State v. Scharf,* 288 Or. 451, 453, 605 P.2d 690, 691 (Or. 1980) ("[A] court's responsibility is first to decide the effect of the state's own laws, because if the state provides what defendant claims, it does not deprive her of the due process commanded by the 14th amendment.") This implicitly means that the court must first decide whether state law, including the state constitution, provides protection before reaching the federal constitutional issue. If it does, according to Justice Linde, the court's work is done; there remains no federal question to decide.[25] While the Oregon Supreme Court no longer invariably follows this directive,[26] the principle is now thoroughly imbedded in Oregon law. [27]

This procedural practice offers a potential advantage to a litigant hoping to avoid review by a hostile United States Supreme Court. If the state court follows Justice Linde's admonition as to how mixed federal/state law cases should be adjudicated, and the plaintiff prevails as a matter of state law, the court's decision will rest upon "independent and adequate" state law grounds, and for that reason is not reviewable by the United States Supreme Court.[28] *Michigan v. Long,* 463 U.S. 1032, 1041–42 (1983).

3. "Privileges and Immunities" vs. "Equal Protection."

As noted in the New Mexico and Washington cases discussed above, many states view the privileges and immunities clauses of their state constitutions to be roughly the equivalent of the U.S. Constitution's Equal Protection Clause. Justice Linde pointed out that Oregon's Privileges and Immunities Clause actually predated the federal Equal Protection Clause, and was principally addressed to other concerns.

> Antedating the Civil War and the equal protection clause of the fourteenth amendment, its language reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups.

State v. Clark, 291 Or. at 236, 630 P.2d at 814 (Or. 1981).

"[A] court's responsibility is first to decide the effect of the state's own laws, because if the state provides what defendant claims, it does not deprive her of the due process commanded by the 14th amendment."

A consequence of this different origin is that the Privileges and Immunities Clause "may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs." *Id.,* 291 Or. at 237.

4. A Different View of Interest Balancing in Constitutional Rights Litigation.

In areas such as equal protection and free speech, balancing of interests between government and individuals is common, *e.g.*, government may impose classifications that discriminate against a class of individuals, if, but only if, it has a compelling interest in doing so.[29] Justice Linde, on the other hand took a much more absolutist view of constitutional rights.

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25 *Sterling* continues to be cited by Oregon courts regarding the order of deciding federal and state constitutional issues. See, *infra*, n. 27. As a matter of federal constitutional law, the proposition that there is no federal violation if the state provides a remedy is dubious. See *Zinermon v. Burch*, 494 U.S. 113 (1990). *See, also,* Landau, Jack, "'First Things First' and Oregon State Constitutional Analysis," 56.2 WILLAMETTE LAW REVIEW 63 (Spring 2020), where Justice Landau argues that, although Sterling is not required as a matter of federal law, there are, nonetheless, sound prudential reasons for the state courts to continue applying its order of analysis.

26 *See, e.g., State v. Link,* 367 Or. 625, 631, 482 P.3d 28, 37 (2021), where the court acknowledged that it now views the first-things-first rule as a prudential matter, not, apparently, as something that is required under *Sterling. See, also,* Landau, "'First Things First," *supra* at 77-85.

27 *Id.*, 75, and cases cited at n. 73.

28 OREGON CONSTITUTIONAL LAW, Oregon State Bar, 2013 edition, 1-6-7.

29 A very helpful exploration of balancing and other approaches to constitutional analysis in Oregon is offered in Balmer and Thomas, "In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation," 76 ALBANY L REV 2027 (2012).

> The Constitution directs governments how to act and how not to act. The Constitution does not say that a government may act contrary to those directives if judges believe that the government has good enough reasons to do so.

Hans A. Linde, "Who Must Know What, When, and How: The Systematic Incoherence of 'Interest' Scrutiny, PUBLIC VALUES IN CONSTITUTIONAL LAW 219, 219 (1993). As former Justice Landau writes:

> The sort of rationality review that has become so common in cases arising under the Equal Protection clause of the Fourteenth Amendment to the federal Constitution is a subject of special scorn from Linde. "The battery of adjectives that make up the conventional formula of attack on governmental action—'arbitrary', 'capricious,' 'discriminatory,' as well as 'reasonable,' and 'legitimate' and their opposites," he said derisively, "are the most cherished ammunition in the lawyer's verbal arsenal." They are, however, no more than "conclusory epithets," but at best "mere rhetorical surplusage." Worse, Linde explained, they are not constitutional terms. Constitutional guarantees of equal protection or equal privileges and immunities say nothing about legislation needing to be "reasonable," "rational," or the like. [30]

"The battery of adjectives that make up the conventional formula of attack on governmental action—'arbitrary', 'capricious,' 'discriminatory,' as well as 'reasonable,' and 'legitimate' and their opposites," he said derisively, "are the most cherished ammunition in the lawyer's verbal arsenal." They are, however, no more than "conclusory epithets," but at best "mere rhetorical surplusage."

Linde's disapproval of the use of balancing in constitutional interpretation was widely accepted by his colleagues on the Supreme Court.[31]

An example:

> The difficulty with this balance-of-interests argument is that it assumes that a court can and should attach values to the conflicting interests asserted, aggregate the resulting values and then compare the aggregates to arrive at a decision concerning the constitutionality of the statutes. A court, however, cannot divine the relative importance of interests absent reference to the constitution itself; it is in the constitution that competing interests are balanced. A court's proper function is not to balance interests but to determine what the specific provisions of the constitution require and to apply those requirements to the case before it.
>
> *Libertarian Party of Oregon v. Roberts,* 305 Or. 238, 246, 750 P.2d 1147, 1151 (Or. 1988). (Lent, J.)

As case law has developed in the intervening years, this strand of analysis still has force. However, the Oregon Supreme Court today doesn't always necessarily abide by Linde's view of interests balancing in constitutional litigation.

For example:

> It is now quite common for Oregon appellate court decisions applying Article I, section 20 [Oregon's privileges and immunities Clause] [32] to frame their analysis in

30 Landau, Jack, "Of Lessons Learned and Nearly Lost, the Linde Legacy and Oregon Constitutional Law," 43 WILLAMETTE LAW REVIEW 251, 254-55 (March 13, 2007), *citing* Linde, Hans, "Without 'Due Process,' 49 OR. L. REV. 125, 166-67 (1970).

31 Balmer and Thomas, 76 ALBANY L REV, 2048-49.

32 The scope, limitations and relevant case law under Article I, section 20 is discussed more fully below at 32-38.

terms of the very "rising scale of elements" that Linde has derided throughout his career. Courts now routinely frame Article I, section 20, challenges in terms of, first, slotting a classification as either "suspect" or not and, second, applying an appropriate level of scrutiny depending on the nature of the classification.[33]

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever . . ."

Certain constitutional provisions, to be sure, are written in terms that seem absolute, e.g., Article I, § 8: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever . . ." Such a provision lends itself readily to the Linde textual approach, eschewing balancing of interests.

On the other hand, other constitutional provisions call out for a balancing of interests. *See, e.g.,* Article 1, § 9, which prohibits only "unreasonable" searches and seizures. Determination of whether a particular government action was unreasonable under particular circumstances would seem inevitably to involve the court in a case-by-case analysis of the facts, circumstances and underlying interests at stake. While Linde criticized aspects of how balancing in such circumstances could lead courts astray,[34] even he noted that "[t]he Court need not settle on a single structure of formulas for judging all constitutional claims."[35]

Still, Justice Linde's legacy may offer arguments for a different approach to balancing of interests in constitutional interpretation.

5. Resort to International Human Rights Law as Persuasive Authority in Oregon Courts.

As the legal climate for civil rights cases began to harden during the 1980s, public interest lawyers began pressing international law arguments to the effect that universally shared principles of civilized nations as to human rights were binding on U.S. courts, or at the very least, were persuasive authority with respect to the interpretation of U.S. law.

In the United States Supreme Court, these arguments provoked strong disagreement. Compare *Thompson v. Oklahoma,* 487 U.S. 815 (1988) (Stevens, J., plurality opinion) (noting that the conclusion that it would "offend civilized standards of decency to execute a person who was less than 16 years old" was "consistent with the views expressed . . . by the leading members of the Western European community" with *Thompson*, (Scalia, J. dissenting) ("civilized standards of decency in other countries is totally inappropriate as a means of establishing the fundamental beliefs of this Nation." A domestic consensus in favor of execution ought to control "even if that position contradicts the uniform view of the rest of the world, . . . We must never forget that it is a Constitution for the United States of America that we are expounding.").

33 Landau, Jack, "Of Lessons Learned and Nearly Lost," *supra*, n. 24, at 264.

34 *See, e.g., State v. Tourtillott*, 289 Or. 845, 881-82, 618 P.2d 423, 441-42 (1980) (Linde, J., *dissenting*). "The easiest and most common fallacy in 'balancing' is to place on one side the entire, cumulated 'interest' represented by the state's policy and compare it with one individual's interest in freedom from the specific intrusion on the other side, as the majority does here. What balance is likely to be struck between the momentary inconvenience of one person stopped to answer a question and the protection of thousands of the public's deer? Yet it is plain that to 'balance' one person's rights with cumulated majoritarian interests in this fashion flies in the face of the premise of constitutionally guaranteed individual rights against the state. The semantic 'balance' looks different when it matches the freedom of thousands of citizens from being stopped and questioned by police officers against the chance that one or a few will admit to a hunting or fishing violation."

35 Hans A. Linde, "The Shell Game of "Interest" Scrutiny: Who Must Know What, When, and How?," 55 ALB. L. REV. 725, 735 (1992)

Although this disagreement in the Supreme Court continued for a number of years, the notion of using international human rights law as a source for interpreting U.S. law reached in zenith in cases like *Roper v. Simmons,* 543 U.S. 551 (2005) (finding that execution of juveniles is unconstitutional); *Lawrence v. Texas,* 539 U.S. 558 (2003) (due process bars criminal prosecution of same-sex sodomy); and *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of the intellectually disabled held to be cruel and unusual punishment). Each of these decisions relied upon international human rights law as an interpretive guide, over strenuous dissent from a split court. However, the exit of Justices Stevens and Kennedy from the court has left the use of international human rights law as an interpretive source without apparent advocates on the Supreme Court, and at least for the present, resort to international law principles in federal courts seems likely to be a dead letter.

On the other hand, Justice Linde laid the foundation for arguments invoking international law as an interpretive source for Oregon courts. In *Sterling v. Cupp,* 290 Or. 611, 624 P.2d 123 (1981), the court was called upon to decide whether the intimate bodily search of male prisoners by female guards violated the Oregon constitution. Linde consulted a number of sources, including international standards, to evaluate whether under prevailing societal standards such a search was unduly invasive or humiliating. *Id*. 290 Or. at 621, 624 P.2s at 131. "Indeed, the same principles have been a worldwide concern recognized by the United Nations and other multinational bodies." Id.621, 624 P.2d 131. An accompanying footnote discusses a variety of international law standards, including the Universal Declaration of Human Rights, Article 55 of the United Nations Charter, the International Covenant of Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and other international law sources. *Id*. at n.21.

Similarly, in *Humphers v. First Interstate Bank of Oregon,* 298 Or. 706, 696 P.2d 527 (Or. 1985), the Supreme Court considered whether a mother had a claim for damages against her former physician who, without her consent, revealed her identity to a daughter whom she had given up for adoption. In parsing this question, Justice Linde considered legal authorities from England, Scotland, Ireland and New Zealand. *Id*., 298 Or. 710-11, 696 P.2d 529.

Oregon's Constitution will be evaluated independently of federal interpretations of similar, or even identical, provisions. Depending on the issues involved in a particular case, this may present a litigant with both opportunities and challenges."

C. Unique Oregon constitutional rights.

Partly as a result of this Linde legacy, and partly because of differing textual content and historical origins, Oregon's constitution offers unique protection of civil rights. As explained above, the scope and meaning of protections under Oregon's Constitution will be evaluated independently of federal interpretations of similar, or even identical, provisions. Depending on the issues involved in a particular case, this may present a litigant with both opportunities and challenges.

1. Method of Interpreting Provisions of the Oregon Constitution

Until 1992, Oregon approached questions of constitutional interpretation on a somewhat ad hoc basis, without any specified framework for doing so.

> For a time, different provisions were interpreted differently, with no explanation for the distinctions. Some provisions were interpreted to mean the same thing as their federal constitutional counterparts. Other provisions were interpreted in an originalist fashion, so that, whatever the constitution meant when it was adopted, it continues to mean today. Still other provisions were interpreted more or less like statutes. And yet other provisions were construed without reference to any particular apparent set of interpretive principles.

Landau, Jack L., "An Introduction to Oregon Constitutional Interpretation," 55 WILLAMETTE L REV 261, 262 (2019).

In *Priest v. Pearce*, 314 Or. 411, 415–16, 840 P.2d 65 (1992), the Supreme Court outlined a methodology for approaching interpretation of a provision of the original state constitution that has been applied generally in subsequent cases. Courts are instructed to examine the language of the provision, consider the historical circumstances of its adoption, and review any prior case law interpreting the provision in order "to understand the wording in the light of the way that wording would have been understood and used by those who created the provision." *Vannatta v. Keisling,* 324 Or 514, 530, 931 P2d 770 (1997).

> The approach was formalized into a three-part method of analysis in *Priest v. Pearce*, 840 P.2d 65, 67 (Or. 1992), that requires examination of the 'specific wording' of a provision of the original constitution, 'the case law surrounding it and the historical circumstances that led to its creation' The goal of that analysis, the Oregon Supreme Court has explained, is 'to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it.' *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 237 (Or. 2000) (quoting *Jones v. Hoss*, 285 P. 205, 206 (Or. 1930)). A similar method of analysis is required for determining the legal significance of provisions adopted by initiative. *See generally Ecumenical Ministries of Oregon v. Oregon State Lottery Comm.,* 871 P.2d 106, 110-11 (Or. 1994).

Landau, "Of Lessons Learned," *supra*, at 261, n.64.

At first, the Supreme Court adhered closely to the strong original intent approach outlined in *Vannatta*. However, the Court's approach to this issue appears to be softening to account for modern realities.

> In more recent cases, the Oregon Supreme Court has relented somewhat from the rigid originalism of cases like *Priest* and *Smothers*. It still cites *Priest*, but it usually qualifies the citation with a comment that the purpose of the analysis is not to freeze the meaning of the constitution[36] in the mid-nineteenth century.

See, e.g., Couey v. Atkins, 357 Or 460, 490, 355 P.3d 866, 885 (2015)

36 Comment to author by Jack Landau, September 21, 2021. *See, e.g., State v. Savastano,* 354 Or. 64, 72, 309 P.3d 1083, 1089 (Or. 2013): ("In undertaking the inquiry outlined in *Priest*, our goal is to identify the historical principles embodied in the text of Article I, section 20, and to apply those principles faithfully to modern circumstances as they arise.")

> In conducting that examination, our purpose is not to freeze the meaning of the state constitution to the time of its adoption, but is instead 'to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances.'

State v. Davis, 350 Or. 440, 446, 256 P.3d 1075 (2011).

Much of the established case law interpreting the Oregon Constitution predates 1992, when *Priest* was decided, and, hence, did not employ the *Priest* interpretive methodology. This suggests instability in what has been accepted as settled Oregon constitutional doctrine. Indeed, the Oregon Supreme Court has invited litigants to challenge decisions that were decided without using the *Priest* methodology, and indicated its willingness to reconsider such precedents. In *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 331 Or 38 (Or. 2000), the court did just that, overruling its earlier decision in *Lloyd Corporation v. Whiffen,* 315 Or. 500, 849 P.2d 446 (1993) (which had found a right to gather petition signatures on large regional shopping centers over objection by the owner) on the basis that *Whiffen* failed to approach constitutional interpretation using the *Priest*-prescribed analytical methodology:

> Consistent with the foregoing, we remain willing to reconsider a previous ruling under the Oregon Constitution whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question. We will give particular attention to arguments that . . . demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question.

Stranahan v. Fred Meyer, Inc., 331 Or 3, 811 P.3d 228 (Or. 2000). *See also, State v. Savastano,* 354 Or. 64, 309 P.3d 1083 (Or. 2013).

Because Oregon constitutional law may be in some flux, a path may be open to challenge or modify adverse precedents...

Further, even when an earlier decision interpreting the Oregon Constitution was based upon the *Priest* methodology, the Supreme Court has been willing to overturn that precedent. In *Smothers v. Gresham Transfer, Inc.,* 332 Or. 83, 23 P.3d 333 (2001), the Supreme Court applied the *Priest* methodology to interpret the remedies provision of Article I, § 10.[37] It held that the remedies clause limited the ability of the legislature to eliminate a cause of action that was available at common law at the time the constitution was adopted. Only fifteen years later, while noting that "[w]e do not overrule our precedents lightly," the court nonetheless overruled the part of *Smothers* that limited the reach of the remedy guarantee to claims that existed in 1857. *Horton v. Oregon Health and Sciences University,* 359 Or. 168, 186, 376 P.3d 998, 1009 (Or. 2016).

Thus, resort to arguments under the Oregon Constitution may present both opportunities and challenges. Because Oregon constitutional law may be in some flux, a path may be open to challenge or modify adverse precedents.[38] However, reliance on favorable precedent may be less than certain. In any event, it will be important to address the original intent methodology that the Court embraced in *Priest*.[39]

37 This provision is discussed more fully below.

38 For a discussion of the factors the Supreme Court may use to consider overruling a prior decision, *see Couey v. Atkins*, 357 Or 460, 485-86; 355 P.3d 866, 882 (Or. 2015); *Horton v. Oregon Health and Sciences University,* 359 Or. 168, 186-88, 376 P.3d 998, 1009-10.

39 For an excellent guide to how the Supreme Court reviews constitutional interpretation, *see* Landau, Jack L., "An Introduction to Oregon

2. Comparison of the First Amendment Free Speech Clause and Article I, section 8 of the Oregon Constitution

Perhaps the most well-known Oregon departure from federal constitutional doctrine involves the differences in holdings under the First Amendment and Article I, section 8 of the Oregon Constitution. In *State v. Robertson,* Oregon's free expression guarantee was given a very broad construction. 293 Or. 402, 649 P.2d 569 (1982). Under *Robertson*, the state may not regulate any form of expression based upon the content of the expression unless it can be established that the framers would not have understood that Article I, section 8, would have applied because of "historical exceptions" recognized at common law, such as perjury. *Id.* at 412. *Robertson* predates *Priest*, and was not subjected to its method of constitutional interpretive analysis. However, in *State v. Ciancanelli,* the Oregon Supreme Court re-examined *Robertson* using the *Priest* methodology, but nonetheless reaffirmed the decision. 339 Or. 282, 315, 121 P.3d 613, 631 (2005). Although the court conceded that most historical sources suggest a more limited historical understanding of the free expression guarantee than was adopted by *Robertson*, *Id.* at, 339 Or.229–303, 121 P3d 622-24, there was enough evidence of a broader understanding to cause the court to let the *Robertson* precedent stand, *id.*, 339 Or. at 314–15, 121 P.3d at 631, leaving Oregon with perhaps the broadest protection of free expression in the United States.

The nature of that protection depends upon the type of the governmental action restricting expression that is being challenged. Oregon recognizes three categories of laws, which are summarized in *State v. Plowman*, 314 Or. 157, 164, 838 P.2d 558, 562 (1992). If the government action, by its terms, prohibits the specific content of speech itself, it violates Article I, section 8 unless it can be established that the framers would not have understood that constitutional protection would have applied because of "historical exceptions" recognized at common law. *Id.* Where government forbids a particular harm, but seeks to avoid that harm by regulating speech, either expressly, or "obviously," the government action is subjected to overbreadth analysis, i.e., could the prohibition be narrowed in a way which would not burden speech. *Id.* 838 P.2d at 562-63. Finally, where the government forbids causing a particular harm, but does not, by its terms, implicate speech, the prohibition can only be attacked as applied. *Id.* In that case, the issue is whether the government prohibition "did, in fact, reach privileged communication," and enforcement of the law against a particular defendant "impermissibly burden[ed] his [or her] right of free speech." *City of Eugene v. Miller,* 318 Or. 480, 490, 871 P.2d 454, 460 (1994).

3. Comparison of the First Amendment's right of assembly provision and Article I, section 26

Article I, section 26 of the Oregon Constitution provides: "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances [sic]." This provision is interpreted by Oregon courts independently from the First Amendment's right of assembly provision. *Lahmann v. Grand Aerie of Fraternal Ord. of Eagles*, 202 Or. App. 123,

127, 121 P.3d 671, 677 (2005). It protects the right to assemble as part of the political process; it does not afford protection to social gatherings that lack a political purpose. *Id.*, 202 Or. App. 142-43, 121 P.3d at 678-82. Although the language of the section refers to passing laws, the provision applies to other actions by government impinging upon the protected rights as well. See generally, *State v. Babson*, 355 Or. 383, 326 P.3d 559 (2014). Courts analyze Article I, section 26 "subject to the same analytical framework" as Article I, section 8. *State v. Illig-Renn*, 341 Or. 228, 232, 142 P.3d 62, 68 (2006).

4. Comparison of the First Amendment Religion Clauses & the Oregon Constitution

In contrast to the First Amendment's two provisions respecting religion, the Oregon Constitution contains seven sections relating to religious liberty. Six of them are found in Article I. Sections 2 and 3 of that article are 'free exercise' clauses, section 4 is a prohibition on religious tests for office, section 5 prohibits governmental financial support of religious institutions, section 6 relates to religious qualifications for witnesses and jurors, and section 7 relates to conscientious scruples in making an oath or affirmation. The seventh section, relating to conscientious objection to bearing arms, appears as section 2 of Article X. OREGON CONSTITUTIONAL LAW, at 2-3, Oregon State Bar (2013 ed.) Oregon Constitutional Law (2013 ed.)

The free exercise provisions of the Oregon Constitution, Article I, sections 2 and 3, were at first interpreted following federal First Amendment analysis. *See, e.g., City of Portland v. Thorton,* 174 Or. 508, 149 P.2d 972 (1944). However, in *Cooper v. Eugene Sch. Dist. No. 4J,* the Court disapproved the practice of equating the protections of Article I, sections 2 and 3 with the First Amendment. 301 Or. 358, 369, 723 P.2d 298 (1986). Later opinions explained that the protections demand separate analysis since they "are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference." *Meltebeke v. Bureau of Labor & Industries*, 322 Or. 132, 146, 903 P.2d 351 (1995). A key tenet in the ensuing case law under these provisions is that the state may not give preference for one religion over another or over non-belief. *See Newport Church of Nazarene v. Hensley*, 335 Or. 1, 56 P.3d 386 (2002); *Meltebeke*, 322 Or. at 147. Neutral laws that are not aimed at religion can be constitutional, even if they have the effect of burdening religious practice. *See, e.g., Smith v. Employment Div., Dept. of Human Res.,* 301 Or. 209, 721 P.2d 445 (1986), vacated on other grounds sub nom., *Employment Div., Dept. of Human Res. of State of Or. v. Smith,* 485 U.S. 660, (1988).

5. Search and Seizure Provisions

Historically the decisions of the Oregon Supreme Court interpreting Article I, section 9, protecting citizens from unreasonable search and seizure, generally followed federal jurisprudence under the Fourth Amendment.[40] But in *State v. Caraher,* the Oregon Supreme Court declared its independence from federal Fourth Amendment interpretations. 293 Or. 741, 653 P.2d 942 (1982).

> [W]e remain free . . . to interpret our own constitutional provision regarding search and seizure and to impose higher standards on searches and seizures under our own constitution than are required by the federal constitution. This is part of a state court's duty of independent constitutional analysis. That a state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional standards is beyond question.

Id. 293 Or. at 750–51, 653 P.2d 946-47 citations omitted.

40 Landau, Jack L., "The Search for the Meaning of Oregon's Search and Seizure Clause, " 87 OR L REV 819 (2008).

Yet, even after *Caraher* most Oregon decisions continue to follow federal Fourth Amendment doctrine, and the Court almost never engages in a *Priest*-type review of text, history and case law to find the original intent of Article I, section 9. [41]

This is not to say that Article I, section 9 does not sometimes offer greater protection than the Fourth Amendment. For example, in *State v. Lien,* the court held that the police can't search garbage left in a bin at the curb without a warrant. 364 Or 750, 441 P.3d 185 (Or. 2019); contrast *California v. Greenwood,* 486 U.S. 35 (1988) (search permissible). In *State v. Arreola-Botello,* the court held that during a traffic stop police may only question with respect to the reasons for the stop and can't diverge into other matters without reasonable suspicion that an individual has committed a criminal offense. 365 Or 695, 451 P.3d 939 (2019). Compare, *Arizona v. Johnson*, 555 U.S. 323 (2009) (unrelated questioning permissible "so long as those inquiries do not measurably extend the duration of the stop.").

Likewise, the Oregon Constitution has been held to extend privacy protection to the boundary of fenced, posted property beyond the curtilage. *State v. Dixson*, 307 Or 195, 211–12, 766 P2d 1015 (1988); compare *Hester v. United States*, 265 U.S. 57 (1924) (holding federal Fourth Amendment privacy protections do not extend past the curtilage, even where a "no trespassing" sign is posted). And while federal courts exclude wrongfully seized evidence in order to deter police misconduct, *Weeks v. United States*, 232 U.S. 383 (1914), in Oregon, exclusion of such evidence is based upon the right of the public to be free from unreasonable search and seizure. *State v. Tanner,* 304 Or. 312, 315, 745 P.2d 757, 758 (1987); *State v. Smith,* 327 Or. 366, 963 P.2d 642 (1998).

[W]e remain free . . . to interpret our own constitutional provision regarding search and seizure and to impose higher standards on searches and seizures under our own constitution than are required by the federal constitution. This is part of a state court's duty of independent constitutional analysis.

6. Comparison of compulsory process provisions of the Sixth Amendment and Article I, section 11

The state constitution's compulsory process provision, Article I, section 11, has been held to be interpreted the same as the federal Sixth Amendment clause. *State v. Mai,* 294 Or 269, 272, 656 P2d 315 (1982). This holding has not been re-examined using the methodology set out in *Priest v. Pearce, supra*.

7. Comparison of limitations on forms of punishment

In contrast to the Eighth Amendment's simple prohibition of cruel and unusual punishments, the Oregon Bill of Rights includes five additional related provisions that have no federal parallel. These include a guarantee that "Laws for the punishment of crime are to be founded on the principles of protection of society, personal responsibility, accountability for one's actions and reformation. Or. Const. Ar. I section 15. Excessive bail is not to be required, nor excessive fines imposed. Cruel and unusual punishments

41 Landau, "The Search for the Meaning," *supra* at 853, 859 (2008). *But see State v. Carter,* 342 Or. 39, 147 P.3d 1151 (2006).

are not to be inflicted, but all penalties are to be proportioned to the offense. Or. Const. Art. I, section 16. No person arrested, or confined in jail, is to be treated with unnecessary rigor. Or. Const. Art. I, section 13. *Sterling v. Cupp,* 290 Or. 611, 625 P.2d 123 (Or. 1981).

Imaginative advocacy under these provisions might well cause the courts to expand protection of participants in the criminal justice system beyond the limits of the Eighth Amendment.

8. Comparison of the Remedies Clause of Article I, section 10 and the Due Process Clause of the Fourteenth Amendment

As is discussed above, one of the important contributions of Justice Hans Linde to Oregon constitutional jurisprudence was his insistence upon the independent interpretation of Article I, Section 10 of the Oregon Constitution. It states: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, *and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.*" The italicized language is commonly referred to as the "Remedies Clause."

Oregon case law under this provision is a bit of a jumble. Early cases characterized the remedies clause as being equivalent to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[42] However, in *Cole v. State By & Through Oregon Dept. of Revenue,* 294 Or. 188, 191, 655 P.2d 171 (1982); the Supreme Court held that the Remedies Clause is not a due process clause, having a distinct history and purpose from the federal due process clause.

More recently, *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001); held that Article I, section 10, limits the ability of the legislature to abolish or severely undermine any cause of action that existed at common law at the time the constitution was adopted in 1857. *Smothers*' holding tying the Remedies Clause protection to pre-existing common law causes of action was subsequently overruled by *Horton v. OHSU,* 359 Or. 168, 187-88, 376 P.3d 998 (2016).

> As our early cases recognized, common-law causes of action and remedies provide a baseline for measuring the extent to which subsequent legislation conforms to the basic principles of the remedy clause—ensuring the availability of a remedy for persons injured in their person, property, and reputation. As our early cases also recognized, however, the common law is not inflexible but changes to meet the changing needs of the state. For that reason, *Smothers* clearly erred in holding that the remedy clause locks courts and the legislature into a static conception of the common law as it existed in 1857.

Horton, 359 Or. at 218-19, 376 P.3d at 1027.

Plaintiff in *Horton* had argued that the Remedies Clause does not impose any limits on the legislature's ability to modify, or even eliminate causes of action or modify the remedies available to litigants. *Id.*, 359 Or. at 173, 376 P.3d at 1003. Under this view, the Remedies Clause would be seen to guarantee only that a plaintiff have open and equal access to the courts to recover whatever remedies the law allowed at that point in time. This would have required the Supreme Court to overrule not only *Smothers* but a score of other existing precedents that had restricted the ability of the legislature to pass laws that limited or reduced previously available remedies.

The *Horton* court agreed that the legislature could alter or even eliminate remedies under some circumstances, 359 Or. at 193-94, 376 P.3d at 1013-14; but declined to overturn case law that had held that the Clause imposed limits on the legislature's ability to do so. 359 Or. at 218, 376 P.3d at 1027. The court drew a number of conclusions from the prior line of cases holding that the remedies clause limits the legislative authority. 359 Or. at 218-20, 376 P.3d 1027-28.

42 OR. CONSTITUTIONAL LAW, *supra*, at 5-7

The common law does provide a base line against which to judge legislative enactments constraining remedies for injury to a plaintiff's person, property or reputation; but the common law is not immutable, and legislation may adjust its rights and remedies to meet contemporary circumstance.

The Court described three classes of cases:

1) Where the legislation has not altered the duty owed to the plaintiff, but completely denies a remedy or only provides an insubstantial one, the legislation is invalid. *Id*. at 219.

2) The reasons underpinning legislative action can matter in determining whether the legislation is permissible under the remedies clause. In particular, a legislative *quid pro quo*, enhancing available remedies for some, while constricting remedies of others may justify the legislative enactment. *Id*.

3) The legislature may modify common-law duties and eliminate common-law causes of action because of changed social conditions. Then, the constitutionality of the legislation will depend on "the reason for the legislative change measured against the extent to which the legislature has departed from the common law." *Id*.

As the court recognized, this leaves the matter without a clear formula for decision. *Id*. at 220; *see also Busch v. McInnis Waste Sys., Inc.,* 366 Or. 628, 636, 468 P.3d 419, 424 (2020). It would seem that a case-by-case analysis will be required. Nonetheless, the Remedies Clause may provide protection against legislative curtailment of pre-existing remedies. *Busch, supra*.

9. Distinction between Article I, section 20, the Equal Privileges and Immunities Clause of the Oregon Constitution and the Equal Protection Clause of the U.S. Constitution

Article I, section 20, the Equal Privileges and Immunities Clause of the Oregon Constitution, perhaps provides the most opportunity for additional development in litigation. Justice Linde pointed out that the clause has been part of the Oregon Bill of Rights since the original constitution was adopted in 1859. Although it has sometimes been considered to be equivalent to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, it predated the post-civil war amendments and uses different language, reflecting the "early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups." *State v. Clark,* 291 Or. at 236, 630 P.2d at 814.

The Reconstruction Congress, which adopted the fourteenth amendment in 1868, was concerned with discrimination against disfavored groups or individuals, specifically, former slaves. *State v. Bunting,* 71 Or. 259, 263, 139 P. 731 (1914). When article I, section 20, was adopted as a part of the Oregon Constitution nine years earlier, in 1859, the concern of its drafters was with favoritism and the granting of special privileges for a select few. *Hewitt v. SAIF*, 294 Or. 33, 42, 653 P.2d 970, 975 (1982) (citations omitted). Accordingly, it must be interpreted according to its own terms independently of the Fourteenth Amendment. As with much else in Oregon constitutional law, the case law under Article I, section 20 is evolving. *Tanner v. OSHU*, 157 Or. App. 502, 520, 971 P.2d 435, 445 (1998) (noting case law in this area is "a work in progress" rather than "completed, coherent jurisprudence.").

What Actions are Regulated?

Article I, section 20 regulates the actions of public bodies, not private citizens:

> Article I, section 20, by its terms, does not constrain the conduct of wholly private entities. It prohibits the passage of laws granting citizens or classes of citizens privileges or immunities on unequal terms. . . . But in all cases, those constrained by that section of the constitution are government entities of one sort or another.

Tanner, 157 Or. App. at 519, 971 P.2d at 445.

Although, by its terms, the provision specifically addresses legislative action, Article I, section 20 also applies to actions of the other branches of government. *Savastano*, 354 Or. at 91, 309 P.3d at 1099. ("[T]he same limitations that apply to the legislature in enacting laws apply to other government entities."). *Id*. 354 Or. at 80, 309 P.3d at 1093.

"Privileges and immunities" refers to rights that are granted or created by the state. *Kramer v. City of Lake Oswego,* 365 Or. 422, 452, 446 P.3d 1, 20 (2019). The clause is not implicated in a situation in which some are treated differently than others on a basis that does not arise from state action. So where one class of citizens who own lake front property were able to access Oswego Lake because of their property rights, but members of the general public who do not own lake front property could not, there was no violation of the Privileges and Immunities Clause when the City of Lake Oswego passed an ordinance forbidding anyone, resident or not, from entering the lake from adjoining public land. Id. In *Kramer*, the court rejected plaintiffs' argument that Article I, section 20, is violated when "the side-effect of a seemingly non-discriminatory enactment is to create an impermissible privileged class." *Id*. "Privileges and immunities" encompass more than solely economic benefits, but "also apply to noneconomic privileges or immunities conferred by the government." *Savastano*, 354 Or. at 92, 309 P.3d at 1099.

Who is protected?

Article I, section 20, protects citizens of the State. *Alsos v. Kendall*, 111 Or. 359, 366, 227 P. 286 (1924). Cities and instrumentalities of the state are not citizens for purposes of the Article . *Hale v. Port of Portland,* 308 Or. 508, 524, 783 P.2d 506 (1989), abrogated on other grounds, *Smothers v. Gresham Transfer, Inc.,* 332 Or. 83, 23 P.3d 333 (2001). Despite the specific language of the clause referring to "citizens," in *dicta*, Oregon Courts have written that classes defined by alienage are suspect. *Hewitt*, 294 Or. at 46, 653 P.2d at 977-78; *see also Tanner*, 157 Or. App. at 522–524; 971 P.2d at 446, (1998). Whether a corporation is a citizen protected by Article I, section 20, is unsettled. *See Advanced Drainage Sys., Inc. v. City of Portland,* 214 Or. App. 534, 538–39, 166 P.3d 580 (2007).

Article I, section 20, may be invoked to challenge differential treatment of an individual without regard to class characteristics, *Savastano*, 354 Or. 64, 309 P.3d 1083; *Altschul v. State,* 72 Or. 591, 144 P. 124 (1914); or by an individual who is part of a class that is adversely affected as a class. *State v. Clark*, 291 Or. at 237.

Applicable standards

As to individuals, Article I, section 20, "require[s] government to treat similarly situated people the same." *Id*. at., 354 Or. 96, 309 P.3d 1102.

> To bring an individual-based claim under Article I, section 20, a defendant must initially show that the government 'in fact denied defendant individually * * * [an] equal privilege * * * with other citizens of the state similarly situated.' [*State v.] Clark*, 291 Or. at 243, 630 P.2d 810. An agency or official's decision will comply with Article I, section 20, 'as long as no discriminatory practice or illegitimate motive is shown and the use of discretion has a defensible explanation' in the individual case. *Id*. at 246, 630 P.2d 810. An executive official's decision will be 'defensible' when there is a rational explanation for the differential treatment that is reasonably related to the official's task or to the person's individual situation. *See id*. at 239, 246, 630 P.2d 810.

Savastano, 354 Or. 96, 309 P.3d 1102.

Whether a statute that affects classes of persons differently violates Article I, §20, depends in part on the nature of the class that is adversely affected. "[O]nly laws that disparately treat a 'true class' may violate that section of the constitution." *Tanner*, 157 Or App at 520 (citing *State ex rel Huddleston v. Sawyer*, 324 Or. 597,

610, 932 P.2d at 1145 (1997)). A "true class" is a class that is defined by characteristics that exist independently of the statute being challenged. *Tanner*, 157 Or. App. at 520, 971 P.2d at 445. If the only significance of a class definition derives from the statute, itself, it is a "non-true class." *Id.* at 521. Classes that are based on gender, ethnic background, legitimacy, past or present residency, and military service, are examples of true classes. *See id.* 157 Or App at 521, at 971 P.2d 446.

A further refinement in the treatment of classes concerns classes that are deemed to be "suspect." If the class is defined by "immutable characteristic of the persons within it," or if the class has been "the subject of adverse social or political stereotyping or prejudice," then it is a suspect true class. *Id.* 157 Or. App. at 522–23, 971 P.2d at 446; see also *Hewitt*, 294 Or. 33, 653 P.2d 970. In addition to gender, such classes as alienage, *Greist v. Phillips,* 322 Or. 281, 300, 906 P.2d 789 (1995) (race, sex and alienage are 'inherently suspect' classes), and religious affiliation, *State v. Buchholz,* 309 Or. 442, 446, 788 P.2d 998 (1990) (race and religion are 'impermissible criteria' of classification); *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or. 471, 695 P.2d 25 (1985) (religious affiliation an impermissible classification), also are suspect classes.

Nor is it necessary for a class to be defined by "immutable" characteristics in order to be defined as "suspect."

> Although the court in *Hewitt* referred to 'immutable' characteristics as being sufficient for defining a suspect class under Article I, section 20, subsequent cases make clear that immutability--in the sense of inability to alter or change--is not necessary. . . . Both alienage and religious affiliation may be changed almost at will. For that matter, given modern medical technology, so also may gender. We therefore understand from the cases that the focus of suspect class definition is not necessarily the immutability of the common, class defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.

Tanner, 157 Or. App. at 522–23, 971 P.2d at 446 (emphasis added).

We therefore understand from the cases that the focus of suspect class definition is not necessarily the immutability of the common, class defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.

Gender, race, ethnicity, alienage and religious affiliation are examples of suspect true classes. *Id.*. Laws that burden or benefit suspect true classes are only constitutional if the difference in treatment "can be justified by genuine differences between the class and those to whom privileges or immunities are made available." *Shineovich & Kemp*, 229 Or. App. 670, 682, 214 P.3d 29 (2009).

> If a law or government action fails to offer privileges and immunities to members of [a suspect] class on equal terms, the law or action is inherently suspect and, as the court made clear in Hewitt, may be upheld only if the failure to make the privileges or immunities available to that class can be justified by genuine differences between the disparately treated class and those to whom the privileges and immunities are granted.

Tanner, 157 Or. App. at 523, 971 P.2d at 446.

The use by Oregon courts of terms similar to those used by the United States Supreme Court in its 14th Amendment equal protection cases can be a bit misleading. Oregon has never adopted the three levels of scrutiny applied in federal equal protection jurisprudence, *Kramer v. City of Lake Oswego,* 365 Or. 455, 446 P.3d 22, and has specifically rejected application of "heightened" scrutiny for discrimination based on sex. Id.; see also., 365 Or. 455, 446 P.3d 22; *Hewitt*, 294 Or. at 41, 653 P.2d 970. Sex discrimination is analyzed in the same manner as race-based discrimination. *Kramer*, 365 Or. at 456-57. Further, aside from discrimination based upon the physical characteristics of the members of the class, Oregon has not recognized a different level scrutiny for disparate treatment of a "suspect" class. *Id*. at 456.

If a true class is not "suspect," it is classified as a non-suspect true class. Examples of non-suspect true classes identified by the courts include geographic residency, *Tanner*, 157 Or. App. at 523; 971 P.2d at 447, cf. *Kramer*, 365 Or. at 453-62; 446 P.3d 1, 21-26, the class of divorced parents with schoolchildren, *In re Marriage of McGinley*, 172 Or App 717, 724, 19 P3d 954 (2001); and classes based on marital status, *Haldeman v. Dep't of Revenue,* TC 4837, 2010 WL 3655956 at *4–5 (Or TC Sept 21, 2010). Article I, section 20, does not restrict the legislature from benefitting or burdening a non-suspect true class, provided that it has a reasonable basis for doing so.

> Disparate treatment of [non-suspect true] classes may be justified on a 'rational basis' examination, *Seto v. Tri-County Metro. Transportation Dist.,* 311 Or. 456, 814 P.2d 1060 (1991), although the case law on that point is not entirely consistent. Compare [*Hale v. Port of Portland*], 308 Or. [508, 783 P.2d 506 (1989)] at 524 (rational basis examination common to Equal Protection Clause cases 'has been superseded by our more recent [Article I, section 20] decisions') with *State v. Tucker,* 315 Or. 321, 338, 845 P.2d 904 (1993) (Article I, section 20, challenge to death penalty statute rejected because the statute 'established clear, rational and definitive criteria').

Tanner, 157 Or. App. at 523, 971 P.2d at 447; *see also, Kramer,* 365 Or. at 456-58, 446 P.3d 22-23.

Aside from classifications made on the basis of historical discrimination against a publicly recognized class or immutable physical characteristics, disparate treatment by government of particular classes will be sustained if there is "a reasonable relationship between the classification and the legitimate legislative purpose that it serves." *Id.*, 365 Or. at 459, 446 P.3d 24. If the court finds such a rational basis, the fact that a different classification might better meet the governmental objective is irrelevant. "As we have explained, if a classification bears 'some rational relationship to a legitimate state interest[,]' then it is "immaterial that available alternatives may be better suited to carry out the rationale[.]" *Id.*, 365 Or. at 461, 446 P.3d 25, (citing *School District No. 12 v. Wasco County,* 270 Or. 622, 629, 529 P.2d 386 (1974).

In *In re Oberg,* 21 Or. 406, 28 P. 130 (1891); the Oregon Supreme Court ruled that Article I, section 20, does not bar the legislature from enacting laws that benefit a particular class of citizens if other members of the community may bring themselves into that class. The fact that anyone is free to bring him- or herself into a particular class typically indicates that the class is a non-true class for purposes of Article I, § 20. *Wilson v. Dep't. of Revenue,* 302 Or. 128, 132, 727 P2.d 614 (1986).

D. Opportunity to recover attorneys' fees for common law claims involving unlawful discrimination or a common benefit.

Another factor to consider in bringing civil rights cases in Oregon courts has to do with differences in the availability of court-awarded attorneys' fees. ORS 20.107 authorizes prevailing

plaintiffs[43] to collect attorneys' fees and expert witness fees in discrimination cases. "Unlawful discrimination" is very broadly defined to include many, if not all, contemplated types of class-based discrimination. It covers claims of discrimination "based upon personal characteristics including, but not limited to, race, religion, sex, sexual orientation, sexual identity, national origin, alienage, marital status or age." ORS 20.107(4).

This statute has been construed to include common law, as well as statutory claims, so long as the claim is, "based on" or "in connection with" a claim of unlawful discrimination. K*emp v. Masterbrand Cabinets,* 257 Or. App. 530, 541, 307 P.3d 491, 497 (2013) (holding the statute applied to fees incurred in prosecuting a common law wrongful discharge claim based upon pregnancy/ sex discrimination).

Oregon does not have a precise analogue to 42 U.S.C. § 1988, providing for attorneys' fees for the prevailing party in civil rights litigation (even though ORS 20.107 as it was first proposed in the legislature would have provided such a remedy, see 1985 SB 494 as it was introduced, Oregon State Archives). Notwithstanding, for those cases where ORS 20.107 may not apply, Oregon courts have the inherent power to award prevailing party attorneys' fees, even in the absence of statutory or contractual fee-shifting authority for certain classes of cases in equity, including those enforcing important constitutional rights. *Gilbert v. Hoisting & Port. Engrs.,* 237 Or. 130, 384 P.2d 136 (1963); *see also Deras v. Myers,* 272 Or. 47, 66, 535 P.2d 541 (1975). In order to receive fees under the inherent equitable authority of the court, a party must meet the following three prerequisites for a fee award under that inherent equitable authority: (1) the proceeding must be one in equity, (2) the party requesting fees must have been the prevailing party, and (3) the party requesting fees must have been seeking to vindicate a right that applies to others as well as the party itself, without an overriding personal pecuniary interest. *Armatta v. Kitzhaber* , 327 Or. 250, 287, 959 P.2d 49 (1998).

After these criteria are satisfied, Oregon recognizes three classes of cases in which fees may be available in the discretion of the court: 1) where a party vindicates an important constitutional right applying to all residents of the state, without personal gain to the party, *Deras*, 272 Or. at 66, 535 P.2d 550; 2) where a party creates, discovers, increases, or preserves a common fund of money to which others also have a claim, *Strunk v. PERB,* 341 Or. 175, 181, 139 P.3d 956 (2006); and 3) where a party's litigation confers "substantial benefit" on others, even if neither constitutional nor financial. *Krause v. Mason*, 272 Or. 351, 358–59, 537 P.2d 105 (1975).

Ordinarily, even a constitutional claim that does not fall into the first category will be seen to confer a substantial benefit. *De Young v. Brown,* 368 Or. 64, 72, 73, 486 P.3d 740, 745 (2021). Sometimes a claim based upon enforcement of a statute may confer a substantial benefit. *De Young v. Brown*, 300 Or. App. 530, 539, 451 P.3d 651 (2019). This is particularly likely if the statute concerns the right to vote. *De Young*, 368 Or. at 73–74, 486 P.3d at 745-746.

In determining whether the benefit conferred is sufficiently substantial to justify a fee award, it doesn't matter that the number of persons benefitted is few, or that the individual benefit is small. What matters is "the extent to which the constitutional issue resolved is a matter of primary concern to the public at large." *Id*. at., 368 Or. 76, 486 P.3d at 747.

It is important to note that the purpose of awarding fees under the equitable power of the court.

> Unlike statutory or contractual attorney fees awards, the purpose of awarding equitable attorney fees is not to punish a wrongdoer or to make a plaintiff whole. *Crandon [Capital Partners v. Shelk*], 342 Or. [555,] at 566, 157 P.3d 176 [(2007)]. Cf. *Mattiza v. Foster,* 311 Or. 1, 4, 803 P.2d 723 (1990) (describing the legislative history of ORS 20.105(1) 'allowing for the award of attorney fees based on the misconduct of the opposing party or attorney'). Rather, the purpose of equitable fees is to recognize that, when a plaintiff has vindicated the rights of others in a

43 A court may also award fees to a prevailing defendant, but only if the court determines that the plaintiff had no "objectively reasonable basis" for asserting the claim(s) or for appealing an adverse decision of a lower court/agency. Cf., *Dobie v. Liberty Homes, Inc.,* 53 Or.App. 366, 632 P.2d 449 (Or. App. 1981)

> significant way, equity may require that the costs of that litigation be borne not just by the plaintiff, but also by others who have benefitted. See Crandon, 342 Or. at 565, 157 P.3d 176 (holding that the court may award attorney fees 'when it would be inequitable for that party to bear all the costs of the litigation').

De Young, 368 Or. at 72, 486 P.3d at 744-745.

E. Court Annexed Arbitration

Any civil case in Oregon state court in which the only claim for relief is to money damages that do not exceed $50,000 will be referred to mandatory arbitration even if all parties do not wish to arbitrate. However, if a plaintiff does not wish to arbitrate, mandatory arbitration can be avoided by pleading more than $50,000 in damages or asking for injunctive relief (assuming that there is a good faith basis to do so). Costs of arbitration can be waived or deferred by the court. ORS 36.420. Mandatory arbitration in state court may in some cases be an advantage for a civil rights litigant; in other circumstances it may impose obstacles to arriving at a final favorable judgment.

The advantages of arbitration can include truncated discovery; the arbitrator is instructed to "balance the benefits of discovery against the burdens and expenses" and "shall consider the nature and complexity of the case, the amount of controversy, and the possibility of unfair surprise that may result if discovery is restricted." UTCR 13.140. Under UTCR 13.190, some documents, such as doctors' reports, bills and estimates, police reports and written sworn statements, can be admitted into evidence without having to call a witness. Of course, those provisions may significantly lower the costs of bringing a claim. If either party is not satisfied with the arbitrator's decision the party can ask for a trial de novo before a judge or jury. ORS 36.425(2). This can either represent a welcome second chance to prevail, or can require that the case be retried after success before the arbitrator.

F. Jury Rules

Oregon's rules regarding juries in civil cases may lower the plaintiffs' burden of winning a jury verdict.

Art. I, § 17 of Oregon's constitution guarantees the right of trial by jury in civil cases. While most juries consist of 12 persons, in cases where the amount in controversy is less than $10,000, only a six-person jury is seated. ORCP 56B. In Oregon state courts jury verdicts in civil cases do not have to be unanimous. The constitution also contains what is known as the "three-fourths rule," whereby verdicts "may" be rendered by "three-fourths of the jury." *Id.* Art. VII § 5; see also ORCP 59G(2). This is understood as requiring only nine of twelve jurors to return a verdict, or if a jury consists of six jurors, then five of those six. Amendments to ORCP 59 promulgated by Council on Court Procedures 1980 to 2016, online, (http://counciloncourtprocedures.org/Content/Legislative_History_of_Rules/ORCP_59_promulgations_all_years.pdf last

accessed: April 19, 2021).

The potential jury pool may also affect the decision as to whether to use federal or state court. State juries are drawn from the residents of the county in which the court sits. See ORS 10.030(2)(b). On the other hand, federal juries are randomly drawn from the various counties served by the particular court. See https://ord.uscourts.gov/index.php/jurors (last visited April 8, 2022). This means that it may be possible to more precisely target the demographic composition of the likely jury pool in state court than in federal court. Depending on the type of case and the location of the possible courts this may work to the advantage or disadvantage of the plaintiff to be in state court in a particular case.

Oregon state courts also offer a streamlined jury procedure that, in appropriate cases, may offer considerable savings in cost and time. UTCR 5.150. All parties and the court must agree in order for a civil case to be designated for streamlined jury treatment. UTCR 5.150(1)(a). Such designation allows parties to avoid mandatory arbitration and proceed directly to trial. UTCR 5.150(2)(a). The parties exchange evidence and information about witnesses within 30 days of designation, and may, by agreement, control the manner of presentation of evidence and witnesses. UTCR 5.150(3). The case will be set for trial within 180 days of designation. UTCR 5.150(2)(b).

G. Access to Court-Provided, Certified Language Interpreters

In representing litigants or presenting witnesses who do not speak English well enough to be able to testify and otherwise participate in court proceedings, or who need language assistance by virtue of a disability, litigating in state courts in Oregon may present some distinct advantages. While the right of access to qualified interpreters in federal court is somewhat murky and beyond the scope of this paper, Oregon has established clear public policy in regard to access to court interpreters:

> **Policy.** (1) It is declared to be the policy of this state to secure the constitutional rights and other rights of persons who are unable to readily understand or communicate in the English language because of a non-English-speaking cultural background or a disability, and who as a result cannot be fully protected in administrative and court proceedings unless qualified interpreters are available to provide assistance.

ORS 45.273.

Oregon has established a system for certification of qualified interpreters, ORS 45.291, and in a civil proceeding, the court will appoint a qualified interpreter to assist parties or witnesses who require assistance at no cost to the non-English speaker. ORS 45.275.

Note that the interpreter need not necessarily be certified to be "qualified." Although a certified interpreter ordinarily will be deemed to be qualified, "qualified interpreter" is defined by statute:

> "**Qualified interpreter**" means a person who is readily able to communicate with the non-English-speaking person and who can orally transfer the meaning of statements to and from English and the language spoken by the non-English-speaking person. A qualified interpreter must be able to interpret in a manner that conserves the meaning, tone, level, style and register of the original statement, without additions or omissions. "Qualified interpreter" does not include any person who is unable to interpret the dialect, slang or specialized vocabulary used by the party, victim or witness.

ORS 45.275(8)(c).

A highly educated, academically trained interpreter will be more likely to be able to pass the state's certification examination than a person from the same social, cultural and ethnic background as the party or witness, yet may be far less able to communicate effectively. The statute takes this into account, first, by not requiring certification in each circumstance, and second, by allowing the party needing assistance to use a

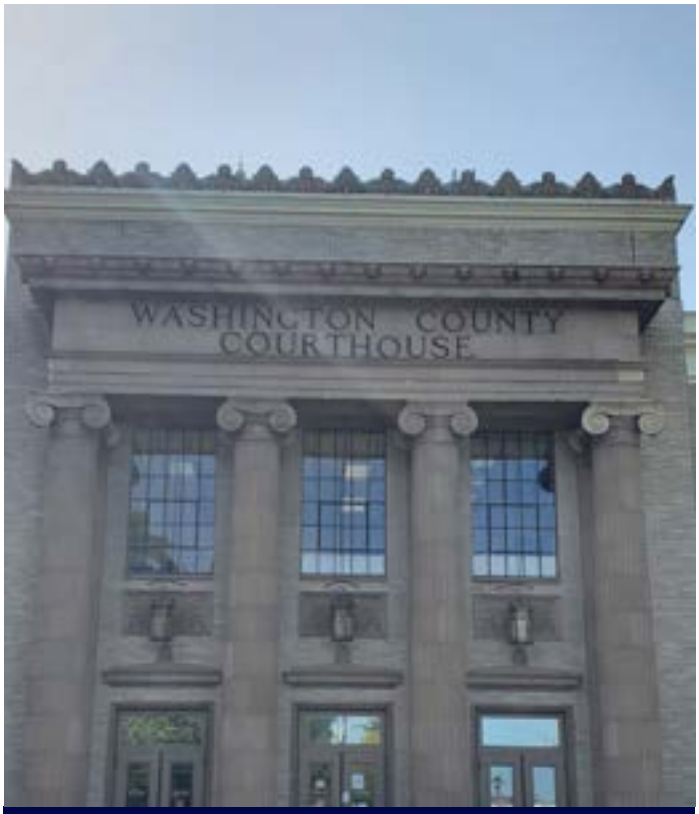
more appropriate interpreter of the party's choice. See ORS 45.275(4). A party seeking to use an alternative interpreter must be prepared to show that the substitute is qualified, ORS 45.275(7), and can be required to pay any additional costs entailed. ORS 45.275(4). Reasonable costs incurred to secure an interpreter are recoverable as costs under ORCP 68.

H. State courts are courts of general jurisdiction; federal courts have limited jurisdiction.

Because federal courts under Article III are courts of limited jurisdiction, a key aspect of any federal civil rights litigation necessarily involves establishing and defending the right to assert an action in the federal forum. This often consumes considerable time and resources. Past efforts to deny civil rights litigants a remedy have focused in significant degree on constricting access to the federal courts. If the federal courts are about to begin a sharp turn away from enforcement of civil rights, one would expect that a key locus of that shift would be conflict over federal jurisdiction. Federal court litigants must likely anticipate even greater consumption of litigation resources simply on staying in court.

On the other hand, nearly all state courts are courts of general jurisdiction, in which those battles are far less likely.

A similar issue is the question of "justiciability." This is a frequent issue in federal court cases, with issues of mootness, ripeness, standing or exhaustion often consuming significant time and resources, and in a significant number of cases, precluding the court from granting affirmative substantive relief. This largely arises due to Article III's "case or controversy" provision. Until 2015, Oregon courts largely followed federal justiciability doctrine. However, in *Couey v. Atkins,* 357 Or. 460, 355 P.3d 866, the Oregon Supreme Court reversed course, holding that federal justiciability doctrine does not apply to state courts. These concepts are a matter of state constitutional law. Since the Oregon Constitution does not contain a "case or controversy" limitation, there is nothing that requires particular justiciability restrictions, though the state courts may wish to impose them prudentially.



Conclusion

The point of this paper is not that civil rights plaintiffs should now abandon actions in federal court. We haven't reached that point in most jurisdictions, and it may never come to that. Of course, public interest lawyers should continue to consider the options open to their clients in the federal court system. A state or federal forum may be more appropriate, depending on the nature of the case, legal issues, possible venues and likely judge and jury pool. To the extent that options in federal court may be closing we should simply be aware of other possibilities, and hopefully this paper is helpful in laying out some of the considerations involved in exploring litigation in state courts in progressive states like Oregon.