

Making a Legal Record Under the Oregon Constitution or... “If You Don’t Raise It, You Lose It.”

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As litigators, much of our practice turns on motions challenging a statute or procedure and trying to ensure our clients receive a fair trial. These issues often have constitutional components.



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Further, many of our strongest constitutional arguments can be raised under the Oregon Constitution, which has been found to encompass broader protections than the federal constitution. As I have endeavored to raise these arguments in my practice, I have discovered that many state constitutional arguments have been missed. Frequently where one would expect case law to set out the contours of state constitutional rights, the court has not reached the issue because it was not separately addressed. The court has often noted that “counsel below did not raise the state constitutional issue or ask the court to engage in a separate analysis, thus we will assume that the federal analysis applies.”¹ Therefore, I thought it would be useful to address the framework for state constitutional analysis.

The following article will address (1) the importance of fully briefing state constitutional claims; (2) the methodology for raising Oregon constitutional issues; (3) the areas of the Oregon Constitution that have rich bodies of independent analysis; and, finally, (4) a specific example of an area ripe for argument, specifically corporate rights under article I,

section 12 of the Oregon Constitution.

Going back to the basics that we all learned in law school, the United States Constitution is simply the baseline for individ-

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ual rights. States are free to grant greater rights to their citizens than those already protected by the federal constitution. The Oregon Constitution grants a wealth of rights and protections that often go beyond what is offered by the United States Constitution. Although neither the Equal Protection Clause nor Due Process rights are expressly provided for in the Oregon Constitution, Oregon courts have found similar or even greater protections in other guarantees. However, the analysis is different from these federal counterparts.² Oregon courts have also developed nuanced case law regarding challenges made on vagueness and overbreadth grounds. While vagueness and overbreadth challenges are often based on First Amendment litigation in federal courts, Oregon courts have a well-developed body of case law addressing overbreadth that extends beyond freedom of expression.³

Under Oregon jurisprudence, our courts have been quick to state that the analysis of a federal constitutional provision should not be used as conclusive authority in interpreting a similar provision of the Oregon Constitution, and will be considered no more binding on the court than a well-reasoned law review article.⁴ However, there have also been cases where the appellate courts have concluded that there is no reason to apply a different analysis under the Oregon Constitution when well-established federal analysis exists, because it would only cause confusion.⁵ To be clear, this is separate from a situation where an Oregon court is asked to address a federal constitutional right. Under those circumstances, Oregon courts will look first to the U.S. Supreme Court.⁶

In 1981, the Oregon Supreme Court in *Sterling v. Cupp* explained the methodology for reviewing arguments that raise both state and federal constitutional claims.⁷ The court instructed that the reviewing court should first look to the state claims before reaching a federal constitutional claim because "the state does not deny

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any right claimed under the [F]ederal Constitution when the claim before the court in fact is fully met by state law."⁸ This was followed by *State v. Kennedy*, which expounded on the necessity of first addressing any questions of state law before ever turning to the Federal Constitution.⁹ In *Kennedy*, the court rejected the state's contention that it should not apply Oregon constitutional analysis to the issue because it was not properly briefed to the lower courts.¹⁰ While *Kennedy* endorsed a liberal standard for raising state constitutional claims, more recently the court has required a more detailed showing.¹¹ The court will decline to consider a party's state constitutional claim if "he has failed to brief or argue any independent state constitutional theory."¹²

With Oregon courts focusing on the need for litigators to raise and independently brief state constitutional claims with a consequence of "use it or lose it," the courts have provided guidance for interpreting state constitutional provisions. In interpreting state consti-

tutional provisions, the court will look at three things: (1) the text; (2) case law that construes the provision; and (3) the historical circumstances surrounding the adoption of the provision.¹³ The court's goal is to determine the founders' intent in adopting the constitutional provision, in a context that is unique to Oregon's constitutional history. As the court has noted in interpreting an Oregon constitutional provision, "[article I, section 26 of Oregon's Constitution] differs from its federal counterpart in text, context, judicial gloss, and historical underpinning."¹⁴

Using this analytical framework, litigators have argued for greater protections under various provisions of the Oregon Constitution than what is guaranteed by the Federal Constitution. One example can be found in article I, section 8 of the Oregon Constitution, which states: "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." In *State v. Stoneman*, the Oregon Supreme Court specifically commented on the breadth of our state's constitutional guarantee of free expression, as compared to the First Amendment right.¹⁵ The court flatly declined to follow the balancing approach used in First Amendment analysis, finding it contrary to the principles that have guided Oregon's jurisprudence.¹⁶ In this context, the Oregon Supreme Court has, time and again, provided a rigorous reminder that federal interpretation will not simply be grafted onto Oregon constitutional provisions.¹⁷

Oregon's right to free assembly under article I, section 26, the privileges and immunities clause under article I, section 20, and Oregon's right to public hearings under article I, section 10 all have been interpreted distinctly from their federal counterparts.¹⁸ For example, article I, section 26 of the Oregon Constitution provides the right for groups to freely assemble in

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order to achieve some political objective. In *Lahmann*, the court made a point to correct any misassumption that section 26 is coextensive with the right of “expressive association” in the First Amendment.¹⁹ The court noted, in contrast to the First Amendment, Oregon’s right to assemble stands in a section separate and distinct from the rights of free speech and free exercise of religion.²⁰ The court also noted the differences between the text and context within their respective bodies of authority as well as differences between their historical underpinnings. Similarly, under article I, section 20 of the Oregon Constitution, the court has endorsed exacting scrutiny on a broader selection of classes than what is protected by the Equal Protection clause.²¹ For example, under article I, section 20, Oregon courts have found unmarried homosexual couples to be not only a true class but a suspect class that is subject to particularly exacting scrutiny when determining if certain privileges and immunities have not been made available to the class.²² Also, the public hearings rights protected by article I, section 10 have proved to be far more expansive than what is protected by the Due Process Clause.²³ The Oregon Supreme Court has held that under the Oregon Constitution, holding open hearings is a right that belongs to the public. In *O’Leary*, the court acknowledged that the only exceptions from the constitutional command to hold all trials and hearings open to the public are those hearings that were traditionally closed in 1859.²⁴ Unlike the federal courts, Oregon courts will not engage in a balancing test with this unqualified command from our Constitution.²⁵

Sometimes these fruitful areas can be missed. For example, a question remains regarding whether Oregon’s constitutional protection against compelled self-incrimination should be extended to the corporate accused. With the corporate accused constantly subject to

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discovery demands, an issue exists regarding whether a corporation should be considered a “person” under article 1, section 12 and subject to protection from compelled self-incrimination. This question is particularly significant in light of the fact that other provisions of the Oregon Constitution have been found to apply to corporations.²⁶ Furthermore, the fact that the U.S. Supreme Court has construed the Fifth Amendment right against self-incrimination to apply only to natural persons, holding that corporations have no protection against compelled self-incrimination,²⁷ is no more binding an interpretation of our constitution than a well reasoned law review article.

The text of article I, section 12 states, “[n]o person shall be put in jeopardy twice for the same offence [sic], nor be compelled in any criminal prosecution to testify against himself.” Under the analysis spelled out in *Liberty Northwest Insurance Corp. v. Oregon Insurance Guarantee Ass’n*, the court would assume that the framers intended the text to carry the meaning ordinarily given

to the words it contains.²⁸ To determine the “ordinary” meaning of those words to the framers we turn to the historical context and definitions of those words from contemporaneous dictionaries from the mid-nineteenth and early twentieth century.²⁹ Dictionaries published near the time the Oregon Constitution went into effect in 1859 defined “persons” to include corporate entities and corporations.³⁰

Additionally, an examination of the historical context helps us ascertain the framers’ assumptions and intentions in their adoption of article I, section 12. Although there is no direct record of the Oregon framers’ intentions with respect to article I, section 12,³¹ a survey of case law near the time the original constitutional provisions were approved offers insight into the historical and political arena within which the framers were working. During the late 1800s and early 1900s, various cases spoke to the understanding that the privilege against self-incrimination was applicable to both natural and corporate entities.³² Finally, as stated above, Oregon courts have found numerous provisions of the Oregon Constitution to apply to corporations.³³ This is just one example of state constitutional law that has not been fully developed under an independent Oregon analysis.

By carefully analyzing any potential state constitutional issue using the methodology set forth by the Oregon Supreme Court,³⁴ and by keeping the analysis independent from the federal constitutional analysis, arguments can be made on behalf of our clients that may prevail even when a similar right would not have succeeded under the United States Constitution. Under the principle of “raise it or lose it,” a litigator’s particular attention to state constitutional rights may change the outcome of the case. □

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ENDNOTES

- 1 In an earlier article the author wrote on the constitutional rights of corporations, it was stated that article 1 section 12 did not apply to corporations. The statement was based on a federal constitutional analysis applied by the State Courts. Later, in representing a corporation served with interrogatories, the issue was freshly analyzed as a case of first impression under an Oregon constitutional analysis. Following that review it appears the earlier statement was in error. Perhaps this article is motivated by a desire to help others not make the same mistake.
 - 2 See *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 444–48 (Or. Ct. App. 1998) (analyzing suspect classes under Oregon’s privileges and immunities clause).
 - 3 For example, in *State v. Blocker*, 630 P.2d 824, 827 (Or. Ct. App. 1981) the Oregon Supreme Court found unconstitutionally overbroad a state law that prohibited the possession of billy clubs because it violated article I, section 27 of the Oregon Constitution.
 - 4 *State v. Soriano*, 684 P.2d 1220, 1222 (Or. Ct. App. 1984) (proclaiming that “a United States Supreme Court majority is no more binding in Oregon than is a United States Supreme Court minority, a decision of the Supreme Courts of Hawaii, California, or Georgia, or a well-reasoned law review article”).
 - 5 See *State v. Smith*, 725 P.2d 894, 906 (Or. 1986) (holding that the federal Miranda rule is sufficient under Oregon constitutional law, and noting that there is “no strong and compelling reason to overturn a long-standing precedent of this court in order to adopt a rule which we consider to be unnecessary and confusing under the present circumstances”).
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- 6 *Mears v. Marshall*, 909 P.2d 212, 213 (Or. 1996) (and if unresolved by the Supreme Court, then Oregon courts look to the appellate courts for persuasive authority, but will ultimately end up employing an independent analysis to reach their own conclusion).
 - 7 625 P.2d 123, 126 (Or. 1981).
 - 8 *Id.* at 126.
 - 9 666 P.2d 1316, 1319–21 (Or. 1983). The court declared that “a practice of deciding federal claims without attention to possibly decisive state issues can create an untenable position for this state’s system of discretionary Supreme Court review. It can also waste a good deal of time and effort of several courts and counsel and needlessly spur pronouncements by the United States Supreme Court on constitutional issues of national importance in a case to whose decision these may be irrelevant.” *Id.* at 1319 (referring to Justice Stevens’ concurring opinion in *Oregon v. Kennedy*, 456 U.S. 667, 681 n.1 (1982)).
 - 10 *Id.* at 1320–21. Later in *State v. Hitz*, the Oregon Supreme Court distinguished between raising an issue at trial (which is essential to preserving error), identifying a source as support (which is less essential) and making a particular argument (which was considered least essential). 766 P.2d 373, 375 (Or. 1988).
 - 11 Compare *Kennedy*, 666 P.2d at 1319–21, with *State v. Mendez*, 774 P.2d 1082, 1088 (Or. 1989) (declining to consider defendant’s state constitutional claim because it was not raised at trial, or adequately briefed or argued with independent state constitutional analysis). However, the court did address the federal claim, even though it was not raised at trial, because a case cited by defendant on appeal was decided on Sixth Amendment grounds. *Id.*
 - 12 *Mendez*, 774 P.2d at 1088; see also *State v. Riggs*, 923 P.2d 683, 684–85 (Or. Ct. App. 1996).
 - 13 *Liberty Nw. Ins. Corp. v. Or. Ins. Guar. Ass’n*, 136 P.3d 49, 54 (Or. Ct. App. 2006) (citing *Priest v. Pearce*, 840 P.2d 65, 66–67 (Or. 1992)); see also *Billings v. Gates*, 916 P.2d 291, 295 (Or. 1996) (citing *Priest*, 840 P.2d at 66–67).
 - 14 *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 121 P.3d 671, 677 (Or. Ct. App. 2005) (comparing article 1, section 26 to the right of “expressive association” under the First Amendment of the U.S. Constitution).
 - 15 920 P.2d 535, 538–39 (Or. 1996).
 - 16 *Id.* at 539.

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- 17 Oregon's unique article I, section 8 framework has been recently reaffirmed in *State v. Ciancanelli*, 121 P.3d 613 (Or. 2005).
- 18 *Lahmann*, 121 P.3d at 677; *In re Marriage of McGinley*, 19 P.3d 954, 958–961 (Or. Ct. App. 2001); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 444–48 (Or. Ct. App. 1998); *Oregonian Publ'g Co. v. O'Leary*, 736 P.2d 173, 175–78 (Or. 1987).
- 19 121 P.3d at 677.
- 20 *Id.*
- 21 *Tanner*, 971 P.2d at 446–47. Although the court admitted the jurisprudence defining and construing article I, section 20, is far from complete and coherent, certain rules can be drawn to guide litigators, and gaps in the jurisprudence leave room for further independent argument and analysis. *Id.* at 445.
- 22 *Id.* at 446–47.
- 23 Article I, section 10, which provides for public hearings, is more protective against closed proceedings than the federal constitution. See *O'Leary*, 736 P.2d at 175–78.
- 24 *Id.* at 177–78.
- 25 See *id.* at 178. In its conclusion, the court held that “even assuming that the witness has a secrecy interest, it cannot limit the unqualified command of section 10 that justice shall be administered openly. The government cannot avoid a constitutional command by ‘balancing’ it against another of its obligations.” *Id.*
- 26 See *Ackerley Commc'ns, Inc. v. Multnomah County*, 696 P.2d 1140, 1144 (Or. Ct. App. 1985) (recognizing that

The Court explained that the corporation “is a creature of the [S]tate,” with powers limited by the State.... As such, the State may, in the exercise of its right to oversee the corporation, demand the production of corporate records.

- corporations have free speech rights under article I, section 8); see also *McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co.*, 193 P.3d 9, 14–20 (Or. 2008) (recognizing that corporations have rights to civil jury trials under article I, section 17).
- 27 *Hale v. Henkel*, 201 U.S. 43, 74 (1906) (pronouncing that “there is a clear distinction . . . between an individual and a corporation, and . . . the latter has no right to refuse to submit its books and papers for an examination at the suit of the [S]tate.”). The Court explained that the corporation “is a creature of the [S]tate,” with powers limited by the State. *Id.* As such, the State may, in the exercise of its right to oversee the corporation, demand the production of corporate records. *Id.* at 75.
- 28 *Liberty Nw. Ins. Corp. v. Or. Ins. Guar. Ass'n*, 136 P.3d 49, 54 (Or. Ct. App.

- 2006) (citing *Ecumenical Ministries v. Or. State Lottery Comm'n*, 871 P.2d 106, 111 (Or. 1994)); see also *Kerr v. Bradbury*, 89 P.3d 1227, 1230 (Or. Ct. App. 2004).
- 29 *Liberty Nw. Ins. Corp.*, 136 P.2d at 55 (citing *Rico-Villalobos v. Giusto*, 118 P.3d 246, 251–52 (Or. 2005)).
- 30 *City of Keizer v. Lake Labish Water Control Dist.*, 60 P.3d 557, 563 (Or. Ct. App. 2002).
- 31 See Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 – Part I*, 37 *Williamette L. Rev.* 469, 519 (2001).
- 32 *Wertheim v. Cont'l Ry. & Trust Co.*, 15 F. 716, 728 (C.C.S.D.N.Y. 1883); *In re Knickerbocker Steamboat Co.*, 136 F. 956, 959 (S.D.N.Y. 1905); *S. Ry. v. Bush*, 26 So. 168, 174 (Ala. 1899); *State v. Strait*, 102 N.W. 913, 913–14 (Minn. 1905).
- 33 See *City of Keizer*, 60 P.3d 557, 563 (Or. Ct. App. 2002) (noting that article XI, section 4, provides that “[n]o person's property shall be taken by any corporation under authority of law, without compensation first being made”). After further examination of the text and history of that provision, the court concluded that “person” applies to artificial persons, including municipal corporations, noting: “authority strongly suggests that the framers would have understood the term ‘persons’...included...corporations.” *Id.* at 565. See also *Ackerley Commc'ns, Inc. v. Multnomah County*, 696 P.2d 1140 (Or. Ct. App. 1985); *McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co.*, 193 P.3d 9 (Or. 2008).
- 34 Originally set forth in *Priest v. Pearce*, 840 P.2d 65, 67 (Or. 1992).