

OREGON'S CONSTITUTIONAL RENAISSANCE: FEDERALISM REVISITED

John H. Buttler*

INTRODUCTION

The paths of Oregon's state constitutional development are as diverse as the provisions that have been subject to interpretation and application. Oregon courts early recognized their obligation to interpret the state constitution independently of the federal constitution in order to provide the protection its authors intended. The Oregon Constitution may afford more protection of individual rights and liberties than does the federal constitution, or it may afford less. In either case it is state policy, not federal, that the constitution represents.¹ Until recently, however, Oregon courts frequently side-stepped their independent obligation in favor of the perceived convenience of uniform application of similar state and federal constitutional provisions. They even found similarities that were not apparent. As a result, Oregon courts adopted existing federal analyses and precedents, following every refinement or modification the federal courts made.²

Deference to the federal analysis was most frequent when the language of the Oregon provision was similar to its federal counterpart and the federal law was well developed.³ It also occurred, however, when the federal and state provisions differed significantly.⁴ On the other hand, the Oregon Supreme Court at times relied on state law when it was available, even in view of an extensive body of federal law.⁵ In short, there is no apparent pattern in the earlier cases, other than that dictated by the parties' arguments and the court's reaction to the facts of the particular case, as to when the

* Judge, Oregon Court of Appeals. L.L.B., Columbia University, 1950; B.A., Dartmouth College, 1947. The author gratefully acknowledges the research and other assistance of Francine S. Shetterly and Robert D. Bulkley, Jr., staff attorneys, in the preparation of this article.

1. Of course, if the state constitution affords less protection, the federal Constitution controls. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *City of Portland v. Thornton*, 174 Or. 508, 511, 149 P.2d 972, 973-74, *cert. denied*, 323 U.S. 770 (1944); *State v. Laundry*, 103 Or. 443, 494, 204 P. 958, 963 (1922).

2. See, e.g., *State v. Florance*, 270 Or. 169, 182, 527 P.2d 1202, 1209 (1974).

3. *Id.*

4. See *Eugene Sand & Gravel v. City of Eugene*, 276 Or. 1007, 1012, 558 P.2d 338, 342 (1976), *cert. denied*, 434 U.S. 876 (1977).

5. See *State v. Krogness*, 238 Or. 135, 388 P.2d 120, *cert. denied*, 377 U.S. 992 (1964).

court would analyze the state constitution independently and when it would simply accept the federal analysis under the state constitution.

That situation has changed. Oregon appellate courts now uniformly decide state constitutional questions, if raised, before federal ones. Usually they examine state constitutional provisions independently of cases decided under the federal counterpart, although analysis used by the federal courts has been sufficiently persuasive, on occasion, to be adopted in Oregon. Even when the Oregon courts do that, they do not adopt that federal elaborations or modifications are not adopted automatically. The result is a growing body of constitutional law with its own premises and direction. One reason for the change, undoubtedly, is the intellectual leanings of members of the state's highest court⁶ and another is a perceived weakening of the federal protection of individual rights under recent United States Supreme Court decisions. The primary impetus for the recent revival of Oregon constitutional law, however, is the recognition that the state constitution is historically and analytically separate from the federal and that state judges alone are charged with its application. That recognition appears to encompass a silent awareness that that is the way the federal system is supposed to work, an awareness that has been sublimated during most of the last fifty years.

Whatever the reason, the growth in state constitutional analysis in Oregon surpasses that which occurred in the past, both in quantity and in analytical rigor. At times, state constitutional provisions have been held to be more protective than their federal counterparts;⁷ at times they have been held to be less protective.⁸ In almost all cases, the Oregon courts have sought the meaning of those provisions primarily in Oregon sources.

The survey which follows illustrates the development of Oregon constitutional law in the substantive areas that have received the most attention.⁹ It also reveals important similarities in the

6. See, e.g., Carson, "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 19 WILLAMETTE L. REV. 641 (1983); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

7. See, e.g., *State v. Caraher*, 293 Or. 741, 653 P.2d 942 (1982).

8. See, e.g., *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 445 (1986), cert. granted, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987).

9. This article focuses on developments under Oregon's Bill of Rights, especially free-

method of analyzing the various constitutional provisions.

I. FREEDOM OF RELIGION

The religion clauses of the Oregon Constitution, article I, sections two through five,¹⁰ are the most recent provisions separated from federal precedent. Although these clauses are different in language and origin from their first amendment counterparts, early cases interpreted them to be coextensive with it. The Oregon Supreme Court nominally did not consider the federal analysis conclusive, but in fact adopted it.¹¹

The first case to rely solely on the Oregon Constitution to decide a question involving religious freedom was *Dickman v. School District*.¹² In that case, the court held that a school district violated article I, section 5, when it supplied free textbooks to a parochial school. The United States Supreme Court had previously

dom of religion, article I, §§ 2-7; freedom of expression, article I, § 8; search and seizure, article I, § 9; the right against compulsory self incrimination, article I, § 12; double jeopardy, article I, § 12; and equal privileges and immunities, article I, § 20. Other substantive areas have also undergone significant development in the last decade: *State v. Hart*, 299 Or. 128, 699 P.2d 1113 (1985) (defendant not entitled to a criminal jury trial under article I, § 11 of the Oregon Constitution on the issue of restitution); *State ex rel Dwyer v. Dwyer*, 299 Or. 108, 698 P.2d 957 (1985) (no constitutional right to jury trial in criminal contempt proceeding); *State v. Mende*, 304 Or. 18, 741 P.2d 496 (1987) (right to speedy trial, article I, § 10); *State v. Campbell*, 299 Or. 633, 705 P.2d 694 (1985) (right to confrontation, article I, § 11); *State v. Sparklin*, 296 Or. 85, 672 P.2d 1182 (1983) (right to be heard by counsel, article I, § 11); *Oregonian Pub. Co. v. O'Leary*, 303 Or. 297, 736 P.2d 173 (1987) (right of the public to attend all judicial proceedings, article I, § 10); *State v. Wagner*, 305 Or. 115, ___ P.2d ___ (1988) (Oregon's death penalty statute upheld).

10. The religion clauses of the Oregon Constitution provide:

Section 2. . . . All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

Section 3. . . . No law shall in any case whatever control the free exercise, and enjoyment of religious [*sic*] opinions, or interfere with the rights of conscience.

Section 4. . . . No religious test shall be required as a qualification for any office of trust or profit.

Section 5. . . . No money shall be drawn from the Treasury for the benefit of any religious [*sic*], or theological institution, nor shall any money be appropriated for the payment of any religious [*sic*] services in either house of the Legislative Assembly.

OR. CONST. art. I, §§ 2-5.

11. See *City of Portland v. Thornton*, 174 Or. 508, 511, 149 P.2d 972, 973-74, *cert. denied*, 323 U.S. 770 (1944) (relying on federal law to uphold an ordinance prohibiting children from selling religious periodicals over a challenge based on article I, § 2); See also *Milwaukee Co. of Jehovah's Witnesses v. Mullen*, 214 Or. 281, 330 P.2d 5 (1958), *cert. denied*, 359 U.S. 436 (1959); *Baer v. City of Bend*, 206 Or. 221, 292 P.2d 134 (1956).

12. 232 Or. 238, 366 P.2d 533, *cert. denied*, 371 U.S. 823 (1962).

held that it was not a violation of the first amendment for a school district to bus parochial school children to school, because that action aided the students, not the school.¹³ The Oregon court, in *Dickman*, held that the proscription in the Oregon Constitution against aid to religious institutions was more restrictive than the interpretation of the first amendment which was then current. The court held that article I, section 5 of the Oregon Constitution prohibits a school district from conferring a benefit on a school or a religious institution, even if the action also benefits the students.¹⁴

*Dickman*¹⁵ did not clearly establish the primacy of the state constitution. Two subsequent cases involving the same large Roman cross in a public park in Eugene sent out conflicting signals. In *Lowe v. City of Eugene*,¹⁶ the court, in its final opinion on rehearing, held that the cross should be removed. It mixed federal and state constitutional concepts and held that, although the state constitution has no explicit establishment or credal preference clause, "it is obvious that the founders of this state did not intend to permit the state to sponsor any particular religion."¹⁷ In *Eugene Sand & Gravel v. City of Eugene*,¹⁸ the court purported to find "changed circumstances,"¹⁹ and expressly held that federal establishment clause analysis applies under the "similar provisions" of the Oregon Constitution.²⁰ The court made no effort to show that the provisions were in fact so similar as to require an identical construction.²¹ The court then applied the federal analysis to permit the cross to remain.²²

In *Salem College & Academy, Inc. v. Employment Division*,²³ the Oregon Supreme Court finally held unequivocally that it was

13. *Everson v. Board of Educ.*, 330 U.S. 1 (1946).

14. *Dickman*, 232 Or. at 245-55, 366 P.2d at 537-42. See also, *Fisher v. Clackamas County School*, 12 Bennett, 13 Or. App. 56, 507 P.2d 839 (1973). The United States Supreme Court later reached the opposite conclusion under the first amendment. *Board of Educ. v. Allen*, 392 U.S. 236 (1968). That decision does not affect the continuing validity of *Dickman* under article I, § 5.

15. 232 Or. 238, 366 P.2d 533.

16. 254 Or. 518, 463 P.2d 360 (1969), *cert. denied*, 397 U.S. 1042, *reh'g denied*, 398 U.S. 944 (1970).

17. *Id.* at 547, 463 P.2d at 364.

18. 276 Or. 1007, 558 P.2d 338 (1976), *cert. denied*, 434 U.S. 876 (1977).

19. *Id.* at 1016-17, 558 P.2d at 344.

20. *Id.* at 1012-13, 558 P.2d at 342.

21. *Id.*

22. *Id.* at 1020-23, 558 P.2d at 346-48.

23. 298 Or. 471, 695 P.2d 25 (1985).

obliged to decide a "free exercise" question under article I, section 2, of the Oregon Constitution before considering a first amendment claim.²⁴ It adopted a test of governmental neutrality; if the challenged action—in this case an exemption from unemployment taxes for churches—is based on principles which apply equally to religious and non-religious organizations, there is no constitutional violation.²⁵ The court held that the tax was neutral, because the tax focused solely on the economic and social aspects of employment and the burdens associated with payment were not related to religion.²⁶

The court expanded on this analysis in *Smith v. Employment Division*,²⁷ and *Black v. Employment Division*.²⁸ In those cases the employees, who worked for a drug counselling agency were discharged for ingesting peyote, while they were off duty, as part of a Native American religious ceremony.²⁹ The employer's rules strictly prohibited the use of any illegal drugs by drug counsellors. Oregon's unemployment compensation law disqualifies workers who have been discharged for misconduct. The Employment Division held that the employees' actions constituted misconduct and denied benefits.³⁰

The employees contended that the disqualification was a burden on their right to worship as they saw fit under article I, sections 2 and 3 and the first amendment.³¹ The court held that the disqualification did not penalize misconduct which has a religious motive differently from other misconduct.³² The agency's rule defining misconduct was, therefore, religiously neutral. If there was any interference with the employees' right to worship, it resulted from the employer's actions, not from the state's. Thus, the disqualification did not violate the state constitution.³³

The court held in both *Smith* and *Black*, however, that the state's action in denying benefits violated the first amendment, because the disqualification from benefits was a significant burden on

24. *Id.* at 484, 695 P.2d at 34.

25. *Id.* at 489, 695 P.2d at 37.

26. *Id.* at 486-87, 695 P.2d at 35.

27. 301 Or. 209, 721 P.2d 445 (1986), *cert. granted*, 107 S.Ct. 1368 (1987).

28. 301 Or. 221, 721 P.2d 451 (1986), *cert. granted*, 107 S.Ct. 1368 (1987).

29. 301 Or. at 211, 721 P.2d at 445; 301 Or. at 223, 721 P.2d at 452.

30. 301 Or. at 212, 721 P.2d at 446; 301 Or. at 222, 721 P.2d at 452.

31. 301 Or. at 212-13, 721 P.2d at 447; 301 Or. at 225, 721 P.2d at 453.

32. 301 Or. at 214, 721 P.2d at 448; 301 Or. at 224-25, 721 P.2d at 453.

33. 301 Or. at 215, 721 P.2d at 449; 301 Or. at 225, 721 P.2d at 448-49.

the employees' exercise of religious freedom.³⁴ Relying on *Sherbert v. Verner*,³⁵ and *Thomas v. Review Board of the Indiana Employment Security Division*,³⁶ the court held that the state's financial interest in refusing to award benefits was not "compelling" when weighed against the employees' free exercise rights.³⁷ Assuming that the United States Supreme Court affirms the decision, it is an example of the federal constitution's protection being greater than the state's and therefore controlling.

In *Cooper v. Eugene School District*,³⁸ the court faced a conflict between a teacher's right to wear religious dress and the state's obligation to provide a religiously neutral education. A state statute expressly prohibits a teacher from wearing religious dress at work.³⁹ That statute is not religiously neutral, as were the statutes in *Salem College & Academy*,⁴⁰ *Smith*⁴¹ and *Black*.⁴² The court stated that the issue in *Cooper* was whether the statute infringes on the right to worship guaranteed in article I, sections 2 and 3.⁴³ The court identified a competing state constitutional interest in educational neutrality, similar to the federal establishment clause, in those sections and in the state's constitutional obligation to provide a uniform and general system of common schools.⁴⁴ Article VIII, section 3. Religious neutrality in itself furthers religious freedom; the choices involved in balancing a teacher's right to wear religious dress against the competing state interest in educational neutrality are matters of policy for the legislature, not the courts, to determine.⁴⁵ It concluded that a statute restricting a teacher's dress, if limited to actual incompatibility with the teaching function, does not violate state constitutional freedoms.⁴⁶

34. 301 Or. at 218, 721 P.2d at 450; 301 Or. at 225, 721 P.2d at 453.

35. 374 U.S. 398 (1963).

36. 450 U.S. 707 (1981).

37. 301 Or. at 218-19, 721 P.2d at 450.

38. 301 Or. 358, 723 P.2d 298 (1986).

39. OR. REV. STAT. § 342.650 (1985).

40. See *supra* notes 23-26 and accompanying text.

41. See *supra* notes 27-37 and accompanying text.

42. See *supra* notes 28-37 and accompanying text.

43. *Cooper*, 301 Or. at 369-76, 723 P.2d at 306-08.

44. *Id.* at 373-75, 723 P.2d at 308-09.

45. *Id.* at 373, 723 P.2d at 308.

46. *Id.* at 381-82, 723 P.2d at 313.

II. FREEDOM OF EXPRESSION

Several of the cases discussed in the previous section concerning religious rights implicitly relied on the court's understanding of the original intent of the authors of the Oregon Constitution as the appropriate beginning of the analysis. In a number of cases under article I, section 8,⁴⁷ the free expression provision, the Oregon Supreme Court has made explicit its understanding of the original intent as the foundation of Oregon free expression law. In so doing, it has shown that original intent sometimes leads to significant expansions of individual freedoms.

In its earlier cases,⁴⁸ the Oregon Supreme Court purported to base its decisions on the Oregon Constitution but actually applied the federal first amendment obscenity analysis. In so doing, it ignored the specific language of article I, section 8, which is broader in some respects than the first amendment. In *Deras v. Myers*,⁴⁹ the court held unconstitutional a statute limiting the amount of money that could be spent to support or oppose a candidate for public office.⁵⁰ It relied on the state constitution but did not develop an independent analysis of it.

The first case to treat article I, section 8 on its own terms was *Wheeler v. Green*.⁵¹ There, the court reviewed the relationship between the free expression guarantee of article I, section 8, the abuse of the right, and the article I, section 10 guarantee, of "remedy by due course of law for injury . . . in . . . person, property, or reputation."⁵² The court concluded that the constitution protected the right to actual damages for defamation but prohibited punitive damages.⁵³ The court also pointed out that the Oregon Constitution does not mention separately a "freedom of the press" and has held that article I, section 8 does not provide the media with more

47. Article I, § 8 of the Oregon Constitution provides: "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, but every person shall be responsible for the abuse of this right." OR. CONST. art. I, § 8.

48. See, e.g., *State v. Jackson*, 224 Or. 337, 356 P.2d 495 (1960); *State v. Childs*, 252 Or. 91, 447 P.2d 304 (1968), cert. denied, 394 U.S. 931 (1969), *habeas corpus granted*, 300 F. Supp. 649 (1969), rev'd, 431 F.2d 272 (1970), rev'd per curiam, 401 U.S. 1006 (1971).

49. 272 Or. 47, 535 P.2d 541 (1975).

50. *Id.* at 67, 535 P.2d at 551.

51. 286 Or. 99, 593 P.2d 777 (1979).

52. *Id.* at 118, 593 P.2d at 788.

53. *Id.* at 119, 593 P.2d at 788-89.

protection from defamation than it provides other citizens.⁵⁴ In essence, the court refused to adopt the "public figure" analysis that is applicable under the first amendment of the United States Constitution.⁵⁵

Aside from *Wheeler v. Green*, current article I, section 8, law begins with *State v. Spencer*.⁵⁶ In *Spencer*, the court considered a disorderly conduct statute prohibiting abusive or obscene language and obscene gestures.⁵⁷ The court emphasized that article I, section 8, "prohibits the legislature from enacting laws restraining the free expression of opinion or restricting the right to speak freely on any subject whatever."⁵⁸ A law may not, on its face, restrict expression that is within the protection of the constitutional provision.⁵⁹

*State v. Robertson*⁶⁰ expanded *Spencer* and established current article I, section 8, analysis. The court addressed the constitutionality of a criminal statute prohibiting compelling or inducing another person to do an act that that person has a right to refrain from doing, by causing fear of disclosure of discreditable information about the person.⁶¹ The court first distinguished between laws that, on their face, forbid particular kinds of communication, and those that are directed at prohibiting the achievement of a particular effect through the use of communications.⁶² If a statute on its face forbids communication, it is unconstitutional unless it falls within an historical exception to the constitutional protection.⁶³ Such an exception must have been well established when the first American guarantees of freedom of expression were adopted, and those guarantees must not have been intended to reach the exception, either then or in 1859, when the Oregon Constitution was adopted.⁶⁴ The court listed examples of historical exceptions: "per-

54. *Id.* at 117-18, 593 P.2d at 788.

55. *Id.* at 115, 593 P.2d at 787. See also *Bank of Oregon v. Independent News, Inc.*, 298 Or. 434, 693 P.2d 35, cert. denied, 474 U.S. 826 (1985).

56. 289 Or. 225, 611 P.2d 1147 (1980).

57. *Id.* at 227, 661 P.2d at 1147.

58. *Id.* at 228, 661 P.2d at 1148 (emphasis added).

59. *Id.* at 228-29, 661 P.2d at 1148.

60. 293 Or. 402, 649 P.2d 569 (1982).

61. *Id.* at 404, 649 P.2d at 571.

62. *Id.* at 412-18, 649 P.2d at 576-79.

63. *Id.* at 412, 649 P.2d at 576.

64. *Id.* By its reference to the first American guarantees of free expression rather than to the first amendment, the court recognized that state constitutions protected individual rights years before the adoption of the federal Bill of Rights.

jury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants."⁶⁵

If the statute does not prohibit communication outright but rather attempts to avoid a forbidden effect, the statute is not necessarily constitutional. The statute may penalize communicative methods of attaining the effects. If it does, and if those communications do not fall within a historical exception to article I, section 8, the question becomes whether the statute is impermissibly vague or is so broad that it may reach protected communication. If it is either, it is unconstitutional. In *Robertson*, the court held that the challenged statute was unconstitutional because it focused on protecting the victim from hearing threats rather than on preventing the commission of the compelled act, which the statute did not require to be unlawful.⁶⁶

A number of cases since *Robertson* have discussed both the expression/effect distinction and the nature of historical exceptions. It is clear that a historical exception requires not only that the expression have been criminal before 1859, but also that those who wrote the constitution intended to exclude it from the protection of article I, section 8.⁶⁷

The most important post-*Robertson* case is *State v. Henry*.⁶⁸ In *Henry*, the Supreme Court, applying the *Robertson* analysis, held that obscenity is not an historical exception to the protection afforded by article I, section 8, and that any statute that attempted to prohibit or to regulate adult-oriented obscenity would be unconstitutional.⁶⁹ The court questioned *State v. Jackson's* soundness⁷⁰ and rejected the federal test for obscenity set out in *Miller v. California*.⁷¹ The court emphasized that article I, section 8, protects all forms of speech on any subject whatsoever.⁷² After tracing the historical development of obscenity legislation, the court pointed out that the only pre-1859 Oregon statute on the

65. *Id.* at 412, 649 P.2d at 576.

66. *Id.* at 433, 649 P.2d at 588.

67. See *State v. Moyle*, 299 Or. 691, 696, 705 P.2d 740, 744 (1985); *State v. Garcias*, 296 Or. 688, 695, 679 P.2d 1354, 1357 (1984); *State v. Grimes*, 85 Or. App. 159, ___, 735 P.2d 1277, 1278, *appeal denied*, 304 Or. 56, 742 P.2d 1187 (1987); *State v. Harrington*, 67 Or. App. 608, ___, 680 P.2d 666, 668, *appeal denied*, 297 Or. 547, 685 P.2d 998 (1984).

68. 302 Or. 510, 732 P.2d 9 (1987).

69. *Id.* at 525, 732 P.2d at 17.

70. *Id.* at 523, 732 P.2d at 16.

71. *Id.* at 525, 732 P.2d at 17 (rejecting *Miller v. California*, 413 U.S. 15 (1973)).

72. *Id.* at 525, 732 P.2d at 17.

subject was solely designed to protect minors. The court concluded that:

Obscene speech, writing or equivalent forms of communication are "speech" nonetheless. We emphasize that the prime reason that "obscene" expression cannot be restricted is that it is speech that does not fall within any historical exception to the plain wording of the Oregon Constitution that "no law shall be passed restraining the expression of [speech] freely on any subject whatsoever."⁷³

III. SEARCH AND SEIZURE

The area that has provoked the greatest number of decisions under the Oregon Constitution is article I, section 9, relating to search and seizure.⁷⁴ Oregon search and seizure cases first arose in significant numbers during the prohibition era. At that time and in the years following, the Oregon courts, while frequently adopting the federal analysis, acted strictly under the state constitution.⁷⁵ However, soon after the United States Supreme Court handed down *Mapp v. Ohio*,⁷⁶ and *Ker v. California*,⁷⁷ the Oregon Supreme Court began to waiver in its consistency in deciding cases on

73. *Id.* at 525, 732 P.2d at 17. The court, however, included a *caveat*:

We do not hold that this form of expression like others, may not be regulated in the interests of unwilling viewers, captive audiences, minors and beleaguered neighbors. No such issue is before us. But it may not be punished in the interest of a uniform vision on how human sexuality should be regarded or portrayed. We also do not rule out regulation, enforced by criminal prosecution, directed against conduct of producers or participants in the production of sexually explicit material, nor reasonable time, place and manner regulations of the nuisance aspect of such material or laws to protect the unwilling viewer or children.

Id. at 525, 732 P.2d at 18 (citations omitted).

74. Article I, § 9, provides:

No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

OR. CONST. art. I, § 9.

75. *See State v. Elkins*, 245 Or. 279, 422 P.2d 250 (1966); *State v. Krogness*, 238 Or. 135, 388 P.2d 120 (1963), *cert. denied*, 377 U.S. 992 (1964); *State v. Chin*, 231 Or. 259, 373 P.2d 392 (1962); *State v. Lee*, 120 Or. 643, 253 P. 533 (1927); *State v. McDaniel*, 115 Or. 187, 231 P. 965, *aff'd on rehearing*, 237 P. 373 (1925); *State v. Laundry*, 103 Or. 443, 495-97, 204 P. 958, *reh'g denied*, 103 Or. 443, 206 P. 290 (1922).

76. 367 U.S. 643 (1961).

77. 374 U.S. 23 (1963).

state constitutional grounds.⁷⁸

In *State v. Florance*,⁷⁹ the Oregon Supreme Court explicitly adopted the federal construction of the fourth amendment as appropriate under article I, section 9, of the Oregon Constitution.⁸⁰ The court treated uniformity of decision as its primary goal.⁸¹ It continued this abdication of its state constitutional role until 1982.⁸² In that year in *State v. Caraher*,⁸³ the court changed course, and emphasized the independent nature of the Oregon Constitution.⁸⁴ It relied on pre-*Florance* cases to decide the issue before it and emphasized that, even when the court gives Oregon law an interpretation corresponding to a federal opinion, the court's decision remains Oregon law, notwithstanding subsequent changes in the federal doctrine.⁸⁵

Caraher began a rethinking of Oregon search and seizure law which is still in process with both appellate courts playing important roles in its development. An interesting example is a sequence of cases which began with *State v. Lowry*.⁸⁶ In *Lowry*, the defendant was arrested for driving under the influence of intoxicants. A search incident to his arrest led to the discovery of a transparent pill bottle, which was seized; a warrantless testing of the bottle's contents showed that it contained cocaine.⁸⁷ The majority characterized the testing of the bottle's contents as a search and analyzed its constitutionality separately from that of the seizure of the bottle. It held that, even if the seizure of the bottle was justified because the nature of its contents was apparent, the police could hold it only for the least amount of time necessary to obtain a warrant for testing the contents.⁸⁸ Because they tested the contents without first obtaining a warrant, the court ordered the evidence of the test suppressed.⁸⁹

78. See *State v. O'Neal*, 251 Or. 163, 444 P.2d 951 (1968); *State v. McCoy*, 249 Or. 160, 172, 437 P.2d 734 (1968).

79. 270 Or. 169, 527 P.2d 1202 (1974).

80. *Id.* at 182, 527 P.2d at 1208.

81. *Id.* at 183-84, 527 P.2d at 1209.

82. See, e.g., *State v. Flores*, 280 Or. 273, 570 P.2d 965 (1977); *State v. Nettles*, 287 Or. 131, 597 P.2d 1243 (1979).

83. 293 Or. 741, 653 P.2d 942 (1982).

84. *Id.* at 748, 653 P.2d at 946.

85. *Id.* at 749, 756-57, 653 P.2d at 946, 951.

86. 295 Or. 337, 667 P.2d 996 (1983).

87. *Id.* at 339, 667 P.2d at 997.

88. *Id.* at 348, 667 P.2d at 1003.

89. *Id.* at 339, 667 P.2d at 997.

In *State v. Flores*,⁹⁰ the Oregon Court of Appeals criticized *State v. Lowry*, apparently attempting to persuade the Oregon Supreme Court to modify, or at least clarify, *Lowry*. However, the precise *Lowry* question was not involved in *Flores*, so there was no occasion for the Oregon Supreme Court to grant review, and it did not. Then in *State v. Westlund*,⁹¹ the Oregon Court of Appeals modified its criticism of *Lowry*. The court suggested a different reasoning based on earlier Oregon cases employing a trespass analysis to facts essentially identical to those of *Lowry*. In *Westlund*, the court of appeals was concerned again with the warrantless seizure of a vial that contained cocaine.⁹² It pointed out that the vial was a constitutionally protected "effect" and that an unjustified interference with it was a trespass.⁹³ Although the warrantless seizure might be justified under the search incident to arrest exception to the warrant requirement, opening the vial and testing its contents was an additional trespass for which there was no exception. Therefore, it violated the constitution.⁹⁴

The Oregon Supreme Court took the hint and granted review in four related cases,⁹⁵ of which *State v. Owens*,⁹⁶ was treated as the lead opinion. Relying on *State v. Caraher*,⁹⁷ it held that a search for evidence of the crime for which the person was arrested, when such evidence reasonably could be concealed on the arrestee's person or in the belongings in his or her immediate possession at the time of the arrest, is not limited by a "container rule."⁹⁸ The court emphasized its statements in *Caraher* and *Lowry* "that a search incident to arrest must also be reasonable in light of all the circumstances and that such search does not justify an 'exploratory seizure' of 'everything in [the arrestee's] immediate possession and control'"⁹⁹ It noted that an arrestee has both a property interest and a privacy interest in the property. A seizure interferes with the property interest; a search of the contents interferes with

90. 68 Or. App. 617, 685 P.2d 999, *appeal denied*, 298 Or. 151, 690 P.2d 506 (1984).

91. 75 Or. App. 43, 705 P.2d 208 (1985), *aff'd in part and rev'd in part*, 302 Or. 225, 729 P.2d 541 (1986).

92. 75 Or. App. at ___, 705 P.2d at 210.

93. *Id.* at ___, 705 P.2d at 212.

94. *Id.* at ___, 705 P.2d at 213.

95. See cases cited *infra* note 102.

96. 302 Or. 196, 729 P.2d 524 (1986).

97. 293 Or. 741, 653 P.2d 942 (1982). See *supra* text accompanying notes 83-85.

98. *Owens*, 302 Or. at 201, 729 P.2d at 527 (1986).

99. *Id.* at 204, 729 P.2d at 529 (quoting *State v. Lowry*, 295 Or. 337, 348, 667 P.2d 996, 1003 (1983)).

the privacy interest.¹⁰⁰ However, it modified *Lowry* and held that, when there is probable cause to believe that a lawfully seized transparent container contains contraband, testing its contents is no search, because there is no cognizable privacy interest in a container that "announces its contents."¹⁰¹ Therefore, no warrant is required for the opening, seizure and confirmatory testing of the contents.¹⁰²

In several other respects, Oregon search and seizure law is moving in directions different from the federal law. In *State v. Davis*,¹⁰³ the Oregon Supreme Court rejected the federal rationale for excluding illegally seized evidence of deterring illegal police activity.¹⁰⁴ Rather, the Oregon Supreme Court emphasized that the purpose of the exclusionary rule is to make the constitutional guarantees effective. When the police violate a rule which protects the privacy and freedom of individuals against unauthorized or illegal searches and seizures, the rule is nevertheless given effect by denying the state the use of the evidence secured in violation of the rule.¹⁰⁵ The result is to restore the parties to their position as if the state's officers had remained within the limits of their authority.¹⁰⁶

In *State v. Brown*,¹⁰⁷ and *State v. Bennett*,¹⁰⁸ the Oregon Supreme Court rejected a court of appeals ruling in *State v. Kirsch*,¹⁰⁹ and adopted an "automobile exception" to the Oregon Constitution's warrant requirement. It held that the police may search an automobile, which is mobile, when stopped, if there is probable cause to believe that it contains fruits of a crime.¹¹⁰ The

100. 302 Or. at 206, 729 P.2d at 530.

101. *Id.*

102. *Id.* The other three cases decided with *Owens*, are: *State v. Westlund*, 302 Or. 225, 729 P.2d 541 (1986); *State v. Forseth*, 302 Or. 233, 729 P.2d 545 (1986); *State v. Herbert*, 302 Or. 237, 729 P.2d 547 (1986). A majority of the Oregon Court of Appeals has synthesized those cases to mean that, if there is probable cause to seize a container, regardless of whether it is transparent or otherwise announces its contents, its contents may be tested without a warrant. *State v. McCrory*, 84 Or. App. 390, 734 P.2d 359 (1987). *But see McCrory*, 84 Or. App. at 394, 734 P.2d at 362 (Buttler, J., concurring).

103. 295 Or. 227, 666 P.2d 802 (1983). *See also State v. Tanner*, 304 Or. 312, 745 P.2d 757 (1987) (one who has entrusted an effect to another has a right under the Oregon Constitution against an unlawful search that discovers that effect).

104. *Id.* at 235, 666 P.2d at 807.

105. *Id.*

106. *Id.* at 237, 666 P.2d at 809.

107. 301 Or. 268, 721 P.2d 1357 (1986).

108. 301 Or. 299, 721 P.2d 1375 (1986).

109. 69 Or. App. 418, 686 P.2d 446, *appeal denied*, 298 Or. 151, 690 P.2d 506 (1984).

110. *Brown*, 301 Or. at 277, 721 P.2d at 1362.

court reasoned that mobility creates "*per se* exigency."¹¹¹ Accordingly, the search for the object may extend to all compartments of the automobile, including closed containers within a trunk.¹¹² This mobility requirement may be stricter than the federal automobile exception.¹¹³

In *State v. Atkinson*,¹¹⁴ the Oregon Supreme Court established the requirements under the Oregon Constitution for the inventory of lawfully impounded vehicles in noncriminal and non-emergency situations. The test adopted appears to be more stringent than that approved in *South Dakota v. Opperman*.¹¹⁵ Among other requirements, the inventory must be conducted pursuant to a "properly authorized administrative program," systematically administered so that the inventory involves no exercise of discretion by the officer taking the inventory.¹¹⁶ It must be limited in intensity and scope.¹¹⁷

IV. SELF-INCRIMINATION

Oregon courts have extensively analyzed the state and federal prohibition against compulsory self-incrimination. Early opinions are not consistent in their application of article I, section 12 of the Oregon Constitution.¹¹⁸ For example, some base their holdings exclusively on the federal Constitution.¹¹⁹ Other opinions focus exclusively on the state constitution.¹²⁰

Whatever the basis for the analysis, Oregon courts have long held that, under article I, section 12, a defendant's confession cannot be used against him in a criminal prosecution unless it is voluntarily made,¹²¹ without inducement through fear or promises, di-

111. *Id.*

112. *Id.* at 277, 721 P.2d at 1362. The scope of the search, however, must be reasonable in light of the object searched for. *Id.* at 279, 721 P.2d at 1363.

113. *Id.* at 276, 721 P.2d at 1362; *State v. Kock*, 302 Or. 29, 725 P.2d 1285 (1986). See *United States v. Ross*, 456 U.S. 798 (1982); *Carroll v. United States*, 267 U.S. 132 (1925).

114. 298 Or. 1, 688 P.2d 832 (1985).

115. 428 U.S. 364 (1976).

116. *Atkinson*, 298 Or. at 10, 688 P.2d at 837.

117. *Id.*

118. OR. CONST. art. I, § 12. ("No person shall be put in jeopardy twice for the same offense, nor be compelled in any criminal prosecution to testify against himself.").

119. *State v. Gullings*, 244 Or. 173, 416 P.2d 311 (1966).

120. See *State v. Griffin*, 242 Or. 284, 409 P.2d 326 (1965); *State v. Wederski*, 230 Or. 57, 368 P.2d 393 (1962); *State v. Nelson*, 162 Or. 430, 92 P.2d 182 (1939).

121. *State v. Andrews*, 34 Or. 388, 58 P. 765 (1899).

rect or implied.¹²² A majority of the Oregon Supreme Court has yet to decide, however, what, if any, warnings or advice police must give a suspect before interrogation. Some cases appear to provide greater rights to warnings than the federal constitution presently requires, while some appear to provide less. In *State v. Mains*,¹²³ the court established warning requirements before a court-ordered psychiatric examination of a person in custody. In *State v. Sparklin*,¹²⁴ the court held that, except for the circumstances of *Mains*, a suspect in full custody is not entitled to more detailed warnings under the Oregon Constitution than *Miranda* requires before police questioning.¹²⁵ It suggested that it might reach a different result if the federal requirements change.¹²⁶ Finally, in *State v. Smith*,¹²⁷ a plurality of the court backed away from *Sparklin* and held that there is no requirement under article I, section 12, to advise a person in custody of any rights, but the state does have the burden in all situations to establish that a confession was voluntary.¹²⁸

The Oregon court has accepted a federal rule when it believes that that rule is appropriate in Oregon. In *State v. Kell*,¹²⁹ it adopted the rationale of *Edwards v. Arizona*,¹³⁰ concerning interrogation after a request for an attorney, under article I, sections 11 and 12.¹³¹ However, it stated expressly that it was not implying that "all future elaborations or changes of the analysis by the United States Supreme Court also will apply to a claim under Oregon law."¹³²

In *State v. Soriano*,¹³³ after discussing the relevant state and federal cases, the Oregon Court of Appeals declined to adopt the federal rule that a grant of "use and derivative use" immunity is

122. *State v. Mendacino*, 288 Or. 231, 235, 603 P.2d 1376, 1379 (1979).

123. 295 Or. 640, 669 P.2d 1112 (1983).

124. 296 Or. 85, 672 P.2d 1182 (1983).

125. *Id.* at 89, 672 P.2d at 1184.

126. *Id.*

127. 301 Or. 681, 725 P.2d 894 (1987).

128. *Id.* at 700, 725 P.2d at 906.

129. 303 Or. 89, 734 P.2d 334 (1987).

130. 451 U.S. 477 (1981).

131. The *Kell* Court accepted the rationale of *Edwards v. Arizona* explained in: *Oregon v. Bradshaw*, 426 U.S. 1039 (1983); *Smith v. Illinois*, 469 U.S. 91 (1984); *Oregon v. Elstad*, 470 U.S. 298 (1985); and *Connecticut v. Barrett*, 107 S.Ct. 828 (1987). 303 Or. at 96-101, 734 P.2d at 337-39.

132. 303 Or. at 100, 734 P.2d at 339.

133. 68 Or. App. 642, 684 P.2d 1220, *opinion adopted*, 298 Or. 392, 693 P.2d 26 (1984).

sufficient to replace the right against self-incrimination and to justify compelling a person to testify.¹³⁴ It held, instead, that the Oregon Constitution requires a grant of "transactional immunity," which protects the person from prosecution for any crimes disclosed in the immunized testimony, before the court may compel testimony.¹³⁵

V. DOUBLE JEOPARDY

The earliest Oregon cases involving double jeopardy were decided under article I, section 12 of the Oregon Constitution only.¹³⁶ Later cases were nominally decided under both the state and federal constitutions, but there was no attempt to analyze each separately.¹³⁷ The cases which are now controlling, however, were decided solely under the state constitution.

In *State v. Brown*,¹³⁸ the court considered whether successive prosecutions for separate offenses arising out of the same act or transaction violated the guarantee against double jeopardy. The court held that, under the Oregon Constitution:

a second prosecution is for the 'same offense' and is prohibited if (1) the charges arise out of the same act or transaction, and (2) the charges could have been tried in the same court, and (3) the prosecutor knew or reasonably should have known of the facts relevant to the second charge at the time of the original prosecution.¹³⁹

In *State v. Kennedy*,¹⁴⁰ the Oregon Supreme Court decided under what circumstances a defendant may be retried when the state is responsible for the initial mistrial. It declined to adopt the federal standard, which requires that the prosecutor intentionally provoke the defendant into moving for a mistrial.¹⁴¹ The court held, instead, that the defendant's right not to be tried twice for

134. 68 Or. App. at ___, 684 P.2d at 1232.

135. *Id.* at ___, 693 P.2d at 1232.

136. See *State v. McCormick*, 8 Or. 236 (1880); *State v. Steeves*, 29 Or. 85, 43 P. 947 (1896).

137. See *Bailleaux v. Gladden*, 230 Or. 606, 370 P.2d 722, *cert. denied*, 371 U.S. 848 (1962); *State v. Bowling*, 1 Or. App. 103, 459 P.2d 454 (1969).

138. 262 Or. 442, 497 P.2d 1191 (1972).

139. *Id.* at 458, 497 P.2d at 1198.

140. 295 Or. 260, 666 P.2d 1316 (1983).

141. 295 Or. at 273-74, 666 P.2d at 1324-25. The federal standard is set out in *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982).

the same offense is implicated when a court official consciously chooses to engage in misconduct that is so prejudicial that it cannot be cured by means short of mistrial. In such a case, the official must know that the conduct is improper and either be indifferent to or intend to cause a mistrial or reversal.¹⁴² The case also demonstrates why state constitutional questions should be decided before federal questions. The Oregon Court of Appeals' initial decision was based on the federal constitution and was reversed by the United States Supreme Court,¹⁴³ on remand, the case was decided under the Oregon Constitution "two and one-half years and hundreds of pages of briefs after it might have been decided in the Oregon courts."¹⁴⁴

VI. EQUAL PRIVILEGES AND IMMUNITIES

Oregon's equal privileges and immunities clause¹⁴⁵ prohibits the *granting* of special privileges or immunities to a particular class of persons or a particular person.¹⁴⁶ In contrast, the federal equal protection clause prohibits the *denial* of equal protection.¹⁴⁷ The difference in focus was recognized early by the Oregon Supreme Court in *State v. Savage*;¹⁴⁸ however, the two clauses are still regarded as the equivalent of each other in many respects, and the federal cases are often influential.¹⁴⁹ In *Olson v. State*,¹⁵⁰ the court rejected the federal approach of categorizing interests as "fundamental" or nonfundamental. It opted instead for a balancing approach, weighing the detriment to the individual of withholding a privilege against the state's justification for doing so.¹⁵¹

In the area of class discrimination the Oregon Supreme Court rejected the federal analysis requiring different levels of scrutiny for different categories of classes. It held that a classification is un-

142. 295 Or. at 274, 666 P.2d at 1324-25.

143. 49 Or. App. 415, 619 P.2d 948 (1980), *appeal denied*, 290 Or. 551 (1981), *rev'd and remanded*, 456 U.S. 667 (1982).

144. *Kennedy*, 294 Or. at 265, 666 P.2d at 1320 (footnote omitted).

145. This provision states that: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

146. *Id.*

147. U.S. CONST. amend. XIV, § 1.

148. 96 Or. 53, 59, 184 P. 567, 569 (1919).

149. *See City of Klamath Falls v. Winters*, 289 Or. 757, 619 P.2d 217 (1980), *appeal dismissed*, 451 U.S. 964 (1981).

150. 276 Or. 9, 554 P.2d 139 (1976).

151. *Id.* at 20, 554 P.2d at 145.

constitutional if it focuses on immutable personal characteristics, such as sex, and reflects "invidious" social or political premises, such as assumptions about sex roles.¹⁵² For a collection of individuals to constitute a class subject to equal privileges analysis, the characteristics of the individuals must exist independently of the scheme set up by the challenged statute.¹⁵³ Another aspect of equal privileges analysis is that, when the legislature has given a government official the discretion to make a choice of "privileges" for individuals who are similarly situated, there must be consistent standards and a coherent, systematic policy to guide the official in that decision.¹⁵⁴

CONCLUSION

Although it is difficult to predict where Oregon's recent focus on the state constitution will lead, it is certain that the practice of deciding state questions first is firmly established. What is uncertain is whether that independent analysis of the state constitution will always produce significant variations from the federal courts' analysis and interpretation of the federal constitution. It is probable that that will depend, somewhat ironically, on the direction federal law takes and, to some extent, on the makeup of Oregon's appellate courts. What is clear is that Oregon's appellate courts think in terms of the state rather than the federal constitution, and use federal cases only to the extent that the state courts consider them persuasive.

While the Oregon Supreme Court is wending its way toward the final word on what the Oregon Constitution means, the Oregon Court of Appeals, which has the initial burden of analyzing the state's constitution, is laying the groundwork for the high court, applying its analysis independent of that of the United States Supreme Court.¹⁵⁵ Whatever the ultimate outcome of these recent ap-

152. *Hewitt v. State Accident Ins. Fund. Corp.*, 294 Or. 33, 653 P.2d 970 (1982).

153. *See State ex rel. Adult & Family Serv. Div. v. Bradley*, 295 Or. 216, 666 P.2d 249 (1983); *State v. Clark*, 291 Or. 231, 630 P.2d 810, *cert. denied*, 454 U.S. 1084 (1981).

154. *See City of Salem v. Bruner*, 299 Or. 262, 702 P.2d 70 (1985); *State v. Freeland*, 295 Or. 367, 667 P.2d 509 (1983); *State v. Edmunson*, 291 Or. 251, 630 P.2d 822 (1981); *State v. Clark*, 291 Or. 231, 630 P.2d 810, *cert. denied*, 454 U.S. 1084 (1981); *State v. Reynolds*, 289 Or. 533, 614 P.2d 1158 (1980); *see also Anderson v. Peden*, 284 Or. 313, 587 P.2d 59 (1978).

155. For some of the most recent examples see *State v. Dixon*, 87 Or. App. 1, 740 P.2d 1224 (1987) *appeal granted*, 304 Or. 437, ___ P.2d ___ (1988) (so-called "open fields" protected from warrantless searches and seizures); *State v. Simons*, 86 Or. App. 34, 738 P.2d

pellate cases,¹⁵⁶ Oregonians can be assured that their state constitutional rights will be scrutinized for what they are—protections that Oregonians created for Oregonians, not faint reflections of federal law.

590 (1987) (a defendant charged with possession of a controlled substance need not assert an interest in the thing he is charged with possessing before he has "standing" to move its suppression); *State v. Campbell*, 87 Or. App. 415, 742 P.2d 683 (1987), *appeal granted*, 305 Or. 21, 742 P.2d 683 (1987) (attaching and monitoring an electronic beeper on defendant's car without probable cause is a seizure of the car in violation of article I, § 9 of the Oregon Constitution).

156. See cases cited *supra* note 155.

