

OREGON: ANY APPROPRIATE JUSTIFICATION

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Oregon provides little encouragement for pro-life or politically conservative citizens. Limitation on abortions are virtually non-existent. The “Death With Dignity Act” makes suicide lawful for terminally ill adults within certain constraints. It is “unprofessional conduct” for a pharmacist to “lecture a patient about the pharmacist’s moral or religious beliefs”—the pharmacist must simply provide prescribed medications or ensure that a prescription is filled. And the current governor, a former Oregon Supreme Court justice, supports the idea of an Oregon Supreme Court free to review any common-law rules and doctrines where justices find “any . . . appropriate justification.”

I. LIFE ISSUES

Oregon voters have made physician assisted suicide lawful. In Oregon, a fifteen year old can consent to an abortion without parental notification. Pharmacists’ licenses are at risk if they do not provide, or arrange for provision of, medications they find morally or ethically objectionable. The state routinely votes along Democrat Party lines. Pro-life activists see little, if any, evidence that legislative solutions will be available for their mission at any time in the foreseeable future.

Abortion

Although little Oregon case law and few Oregon statutes directly address abortion, and the legislative make-up does not provide much hope for a change in direction in the near future, Oregon law does provide potential for developing the rights of unborn children in a post-Roe world.

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In Oregon, minors may consent to medical and dental procedures. The age of consent to medical procedures is fifteen years of age.² Once fifteen, the minor may consent to hospital care, medical or surgical diagnosis or treatment by a physician licensed by the Board of Medical Examiners for the State or Oregon.³ Although consent of a minor's parent is not required after the minor reaches fifteen years of age, notice to the parent is allowed. A hospital or physician may advise the minor's parent of any treatment, or need for treatment without the consent of the minor.⁴ A hospital or physician choosing to notify a minor's parent is not liable for choosing to notify without consent.⁵

With abortion's few abortion-specific regulations regarding consent, it is worth noting that an argument can be made for supporting an age of consent of fourteen of age—and possibly younger. A minor fourteen years of age may obtain outpatient treatment for mental or emotional disorders without parental knowledge or consent.⁶ Providers identified by statute as those who can diagnose and treat mental or emotional disorders in an outpatient setting include physicians.⁷ A physician who decides that treatment for a pregnant fourteen year old of her mental or emotional disorder requires an abortion would have an arguable defense on the face of this statute if accused of violating the age of consent requirement in ORS 109.640. The first apparent problem for such a physician is not as strong as it would seem. The first apparent problem for such an argument would be that ORS 109.640 is the more specific statute, limiting provision of medical procedures without consent of the parent to minors who have reached the age of fifteen. However, ORS 109.640 begins with the following sentence: “Any physician . . . may provide birth control information *and services* to any person *without regard to the age of the person*.”⁸

In *Greenberg v. Myers*, it appeared that Oregon's Attorney General takes the position that the law requires that a minor be fifteen before being able to obtain an abortion without parental

² ORS 109.640.

³ Id. The same right of consent extends to dental treatment. A minor must be sixteen years old before having the right to consent to giving blood. ORS 109.670

⁴ ORS 109.650.

⁵ Id.

⁶ ORS 109.675(1).

⁷ Id.

⁸ ORS 109.640 (emphasis added).

consent.⁹ *Greenberg* is a ballot title case. Prior to an election, the Attorney General certified a ballot title for a measure that would have required medical providers to give 48-hour written notice to the parents of an unemancipated minor.¹⁰ In describing the result of a vote against the measure, the Attorney General intended to inform voters that that current state of Oregon law is to allow medical providers to provide abortions to minors fifteen years or older without parental consent¹¹; however, ORS 109.640 and ORS 109.675, taken together, provide an arguable position that, without a clearly stated, legislatively mandated age of consent for abortion, Oregon statutory law provides for abortion under the age of fifteen without consent of a parent.¹² The ability of an abortion provider to make this argument is strengthened by the fact that, despite occurring elsewhere in Chapter 109, the section of statutes regarding consent, “Rights of Minors,” contains no definitions.

Although there is no informed consent statute specifically applicable to an Oregon minor’s ability to obtain an abortion, general informed consent law does provide an avenue for protecting the rights of minors, or at least vindicating them if they are violated in the abortion context. Obtaining informed consent for medical procedures in Oregon requires a following a statutorily defined four-stop process.¹³ A physician must explain three matters and ask one question; each step is mandatory. First, the physician must explain the procedure or treatment to be undertaken.¹⁴ Second, the physician must explain that there may be alternative procedures or methods of treatment, if any.¹⁵ Third, the physician must explain that there are risks, if any, to

⁹ *Greenberg v. Myers*, 340 Or 65, 73 (2006).

¹⁰ *Id.* at 67.

¹¹ *Id.* at 73.

¹² In *Greenberg*, the Court stated twice that the age of consent for abortion is 15 years of age. *Greenberg* at 74 and 76. However, in neither situation was the impact of the “birth control . . . services” phrase being considered. And both times the Court stated that this law applied “unless some legal exception applies.” *Id.*

¹³ ORS 677.097 is the codification of Oregon’s standard of care for informed consent for medical procedures. *Macy v. Blatchford*, 330 Or 444, 453, 8 P3d 204 (2000) *citing Zacher v. Petty*, 312 Or 590, 593, 826 P2d 619 (1992). It is also considered by the Court to have “codified the essence of the *Getchell* [*v Mansfield*, 260 Or 174, 489 P2d 953 (1971)] decision.” *Wyant v. Myers*, 336 Or 128, 81 P3d 692 (2003) *citing Tiedemann v. Radiation Therapy Consultants*, 299 Or 238, 247, 701 P2d 440 (1985).

¹⁴ ORS 677.097 (1)(a).

¹⁵ ORS 677.097(1)(b).

the procedure or treatment.¹⁶ Fourth, the physician must ask the patient if the patient wants a more detailed explanation.¹⁷ When a patient does want a more detailed explanation, the physician is required to cover the first three steps, “disclos[ing] in substantial detail” the procedure, alternatives, and risks.¹⁸ The only way out of the “disclose in substantial detail” requirement is a finding by the physician that to do so would be materially detrimental to the plaintiff.¹⁹ Although this is a patient-friendly informed consent procedure, the last step is not as strong a force in the abortion arena as it might be. In making the determination that to “disclose in substantial detail” would be detrimental to the patient, the statute does not require the physician to consider the patient as the reference point—“[i]n determining that further explanation would be materially detrimental the physician . . . shall give due consideration to *the standards of practice of reasonable medical . . . practitioners in the same or a similar community* under the same or similar circumstances.”²⁰

Although not specific to abortion, one of Oregon’s leading medical malpractice cases should effectively strengthen informed consent law in a manner that protects some women considering abortion, especially minors. In a procedure unrelated to abortion or fetal life issues, a patient argued that her sexual relationship with the physician was relevant for the claim of failure to obtain informed consent because such a relationship supported the conclusion that the patient “lacked the state of mind the standard of care implies.”²¹ The Court went on to hold that “it is significant that [ORS 677.097] requires a physician to ‘explain’ something.”²² It is insufficient to merely mouth the words.²³ The physician must “provide an understanding . . . taki[ng] into account the mental state and capabilities of the [patient].”²⁴ Where a patient does not have the capacity to understand and use the information provided, for whatever reason, the

¹⁶ ORS 677.097(1)(c).

¹⁷ ORS 677.097(2).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Macy v. Blatchford*, 330 Or 444, 452, 8 P3d 204 (2000)/

²² *Id.* at 454.

²³ *Id.*

²⁴ *Id.*

patient has evidence to support a claim of failure to obtain informed consent.²⁵ Further strengthening an abortion-injured woman’s right to bring a medical malpractice case against an abortion provider is the standard that applies to the informed consent statute. Oregon courts have done away with the “objective test” of what a “reasonable patient” would have decided. The relevant evidence is what each specific plaintiff would have done if properly and fully informed.²⁶ Oregon factfinders can be asked to weigh the likelihood that a patient is motivated by “bitterness and disillusionment” against the evidence that the patient/plaintiff truly would have made a different decision.²⁷

In 1981, the Oregon Court of Appeals addressed the Oregon Department of Human Resources’ ability to restrict the number of abortions it would pay for with taxpayer dollars.²⁸ DHR had promulgated an administrative rule limiting state medical assistance for elective abortions to those necessary to protect “the life of the woman who would be endangered if the fetus were carried to term.”²⁹ Payment for one or two more elective abortions was available with state funds under certain conditions.³⁰ The Court of Appeals held that the rule was “invalid under Article I, section 20 of the Oregon Constitution.”³¹ The Oregon Supreme Court affirmed the Court of Appeals, but did not reach the constitutional issue.³² Following a substantial discussion regarding the influence over the rule that was wielded by the Oregon Legislature’s Emergency Board (following restriction of federal funding of abortion under the Hyde Amendment)³³, the Court held that the rule was invalid because the promulgating agency exceeded its statutory authority.³⁴

²⁵ Id.

²⁶ *Arena v. Gingrich*, 305 Or 1, 4, 748 P2d 547 (1988).

²⁷ Id. at 7.

²⁸ *Planned Parenthood Assoc’n v. Dept. of Human Resources of Oregon*, 63 Or App 41, 663-P2d 1247 (1981).

²⁹ Id. at 43.

³⁰ Id. at 43-44.

³¹ Id. at 62.

³² *Planned Parenthood Assoc. Inc. v. Dept. of Human Resources of Oregon*, 297 Or 562, 564, 687 P2d 785 (1984).

³³ Id at 566-570.

³⁴ Id. at 574.

Protection of the Unborn from Criminal Violence

An Oregon Court of Appeals case from 2000, an Oregon Supreme Court case from 1974, the vulnerability of *Roe*, and a change in the Oregon appellate courts have converged to offer a glimmer of hope for legal action on behalf of nonviable, unborn children.

In 2000, the Oregon Court of Appeals was asked to decide whether a 16-week-old unborn child is a “person” under Oregon’s wrongful death statute.³⁵ Plaintiff argued that Oregon Supreme Court precedent mandated that the use of the word “person” in Oregon’s wrongful death statute include a nonviable fetus. The Court of Appeals disagreed.³⁶ The Supreme Court declined the opportunity to review it.³⁷ Although no dissenting opinion was filed, both the majority and the concurrence agreed that it would be a simple question, answered against plaintiff, but for an Oregon Supreme Court case.

The Supreme Court case in question was *Libbee v. Permanente Clinic*.³⁸ There the Supreme Court held that an action for wrongful death can be maintained by a viable unborn child because Article I, § 10 of the Oregon Constitution protects the right to a “remedy by due course of law for injury done [to every man] in his person.”³⁹ *Roe v. Wade* had been decided the prior year.⁴⁰ The Oregon Court harmonized its decision with *Roe* by the United States Supreme Court’s recognition that a state may prohibit abortion “after a fetus has become ‘viable.’”⁴¹ The Oregon Court held that *Roe* did not conflict with the holding that the Oregon Constitution protected the right of a viable fetus to maintain a cause of action.⁴² Plaintiff then argued before the Court of Appeals that “as a matter of fundamental remedial fairness, the [wrongful death] statute should be construed to afford equivalent relief for the death of a nonviable fetus.”⁴³

³⁵ *Ladu v. Oregon Clinic P.C.*, 165 Or App 687, 689, 998 P2d 733 (2000).

³⁶ *Id.* at 693.

³⁷ 331 Or 244 (2000).

³⁸ 268 Or 258, 518 P2d 636 (1974).

³⁹ *Id.* at 261.

⁴⁰ *Roe v. Wade*, 410 US 113, 93 S Ct 705 (1973).

⁴¹ *Libbee* at 267.

⁴² *Id.*

⁴³ *Ladu* at 693.

Neither the majority nor the concurrence agreed with plaintiff, but for different reasons that may become relevant to legal efforts to protect the interests of unborn children. The majority in *Ladu* identified the *Libbee* Court’s confrontation with *Roe*.⁴⁴ Yet it avoided deciding the case in a way that addressed *Roe*’s role in *Libbee*. The *Ladu* majority decided the case by applying a post-*Libbee* statutory construction methodology.⁴⁵ Using this methodology, the majority looked solely at the wrongful death statute and declined to “extend *Libbee* beyond its explicit contours” because *Libbee* “expressly avoided” the question before the court.⁴⁶

The concurrence in *Ladu* also decided that a nonviable fetus did not have a right to maintain a cause of action under Oregon’s wrongful death statute, but did so because “[a] holding that Oregon’s wrongful death statute permits the personal representative of a nonviable fetus to bring suit for the death of the fetus would put that statute directly into conflict with a pregnant woman’s constitutional right to bring about the death of such a nonviable fetus.”⁴⁷ The concurrence wrote that *Libbee* is now part of the text and context of the wrongful death statute, and therefore the statute is “ambiguous as to whether the term ‘person’ encompasses a nonviable 16-week-old fetus for purposes” of Oregon’s *PGE* statutory construction methodology.⁴⁸ The author of the concurrence wrote that he “would choose the statutory construction that avoids [the obvious constitutional problem of the right to abortion identified in *Roe*], which clearly was a major consideration of the *Libbee* court when it chose to draw a distinction between viable and nonviable fetuses in reaching its conclusion that the full-term fetus at issue in that case had a cause of action.” The concurrence would not grant the right to maintain a cause of action to a nonviable fetus, but not because of the statute—it was the constitutional right identified in *Roe* that guided the concurrence. Then-Judge DeMuniz wrote the concurrence. He is now Chief Justice of the Oregon Supreme Court. If *Roe* falls, *Libbee*’s recognition that Article 1, § 10 of the Oregon Constitution grants a cause of action for injuries sustained *in utero* by a viable unborn child can go before the Court for extension to nonviable unborn children.

⁴⁴ Id. at 695.

⁴⁵ Id. at 690, 694, 696 citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993).

⁴⁶ Id at 696.

⁴⁷ Id. at 699.

⁴⁸ Id. at 698.

Assisted Suicide

Not only has it been impossible to enact significant legislation protecting life, Oregon voters also have the distinction of enacting “The Oregon Death With Dignity Act.” In 1994, Oregon ballots provided the opportunity to change Oregon law to allow physicians to administer lethal drugs to terminally ill adults.⁴⁹ It became law. Capable adult Oregon residents, determined by an attending physician and a consulting physician to be suffering from a terminal disease, who have voluntarily expressed a wish to die, may make a written request for medication that will end his or her life in a humane and dignified manner.⁵⁰ The law states that a person cannot qualify for the Death With Dignity provisions by age and disability *alone*.⁵¹ The statutes apply to persons with a terminal disease which is an incurable and irreversible disease that will produce death within six months.⁵² A repeal was attempted three years later by legislative submission of the issue to the voters⁵³, but it failed. Legal challenges in federal court failed. Since 1997, it has been legal in Oregon, within the statutorily prescribed circumstances, for physicians to dispense medication with the purpose and effect of destroying life.

Health Care Rights of Conscience

Oregon law protects the right of medical personnel to refuse to participate in abortion. A physician is not required to give advice related to, or participate in, an abortion.⁵⁴ The physician must first, though, have made an election not to give such advice or to participate in abortions.⁵⁵ This creates an odd result for a physician where an abortion is contra-indicated. The law protects his or her right to refuse to participate in the procedure, but only, it seems, when the physician has made an election to not participate in any abortion. The physician is also required to inform the patient that such an election has been made.⁵⁶

⁴⁹ *Kane v. Kulongoski*, 318 Or 593, 871 P2d 993 (1994).

⁵⁰ ORS 127.805(1).

⁵¹ ORS 127.805(2).

⁵² ORS 127.800(12)

⁵³ *Hamilton v. Myers*, 326 Or 44, 943 P2d 214 (1997).

⁵⁴ ORS 435.485 (1).

⁵⁵ *Id.*

⁵⁶ *Id.*

The same protections are available to hospital employee⁵⁷, members of a hospital medical staff⁵⁸, and hospitals themselves.⁵⁹ A hospital employee who wishes to forego participation in any abortion must, like a doctor, make an election and then notify the hospital of the election.⁶⁰ When a hospital refuses to admit a patient for the purpose of abortion, it must be done pursuant to the “adoption of a policy” and the hospital is required to notify the person seeking admission for the purpose of abortion of this policy.⁶¹ If the hospital has not adopted a policy of refusing to perform any abortion it is not placed in the same bind as a physician regarding performance of a contra-indicated abortion. Hospitals are given the additional protection for its provision of medical services for persons seeking admission for performance of an abortion of being able to admit such persons “in the same manner and subject to the same conditions as imposed on any other patient seeking admission to the hospital.”⁶² The statutory grant of authority to a hospital to refuse to provide abortions does not extend to any hospital operated by the state or political subdivision of the state.⁶³

The other statutes directly addressing “Termination of Pregnancy” in Title 36, Public Health and Safety, provide limited protection to a pregnant woman from a coerced abortion and call for reporting to Center for health Statistics. A pregnant woman cannot be penalized by loss of any privilege or immunity, nor can receipt of any public benefits, be conditioned upon consent to an abortion.⁶⁴ And, every abortion must be reported to the Center for Health Statistics within 30 days of performance.⁶⁵ If the person making the report knows of a follow up visit, that must be reported, as well as whether any complications were noted.⁶⁶ Names and identities of parents must be excluded from the report.⁶⁷

⁵⁷ ORS 435.485(2) .

⁵⁸ Id.

⁵⁹ ORS 435.475.

⁶⁰ ORS 435.485(2).

⁶¹ ORS 435.475(1).

⁶² ORS 435.475(2).

⁶³ ORS 435.475(3).

⁶⁴ ORS 435.435.

⁶⁵ ORS 435.496(1).

⁶⁶ ORS 435.496(2).

⁶⁷ ORS 435.496(3).

In 2005, the Oregon Board of Pharmacy adopted a Position Statement regarding dispensing medications in situations a pharmacist finds morally or ethically objectionable. Although language in the beginning of the Position Statement asserted that a pharmacist could not be forced under Oregon law to dispense every lawful prescription, it went on to stress the rights of patients to obtain prescribed drug therapies without “interference.”

Just as other health care professionals and practitioners in Oregon have a choice, so do pharmacists have a choice whether or not to participate in activities they find morally or ethically objectionable. Oregon pharmacists cannot however, interfere with a patient's lawfully and appropriately prescribed drug therapy or request for drugs and devices approved by the U.S. Food and Drug Administration (FDA) for restricted distribution by pharmacies. Pharmacists enter into relationships with patients in the daily course of normal pharmacy practice. Within these relationships pharmacists have a duty to provide professional pharmaceutical care in the patient's interest.⁶⁸

Although couched in language asserting a pharmacist’s right of conscience, the effect of the Position Statement is to force pharmacists to fill or ensure filling of prescriptions found to be morally or ethically objectionable. The board indicated what problems it was attempting to avoid, and they were not problems pharmacists face, they were problems a patient might face when a pharmacist objected on moral or ethical grounds to filling a prescription:

Interference with a patient’s right to receive timely, professional prescription services and information or drugs and devices approved by the U.S. FDA for restricted distribution by pharmacies may be considered unprofessional conduct and could result in disciplinary action by the Board. . . . For Example, the Board would consider it unprofessional conduct for a pharmacist to lecture a patient about the pharmacist’s moral or religious beliefs, to violate the patient’s privacy or to destroy, confiscate or otherwise tamper with the patient’s prescription.⁶⁹

The Position Statement provides an opt-out provision—but only when a pharmacist arranges for the moral or ethical drug therapy to be dispensed by another pharmacist on-site or directs the patient to another location at which the prescription can be filled.

⁶⁸ Published by the Oregon Board of Pharmacy and posted on-line at http://www.pharmacy.state.or.us/Pharmacy/Position_Statements.shtml (last visited Feb 5, 2008)

⁶⁹ Id. (emphasis added).

And the Board of Pharmacy has left no room to doubt that a pharmacist who does not comply with these procedures will put his license at risk. The “unprofessional conduct” language is lifted specifically from Oregon Administrative Rules governing the licensing of pharmacists. “Unprofessional conduct” is grounds for discipline, specifically suspension, revocation, or restriction of a pharmacist’s license.⁷⁰ No pharmacist has challenged the validity of this Position Statement yet.

Cloning and Destructive Embryo Research

There does not appear to be any existing statutory or case law directly relating to cloning. In 2007, the Oregon State House failed to pass HB 2801 which would have allocated funding for research to clone human embryos for the use of stem cells. It was to create a Human Stem-Cell Research Committee and a grant fund. The bill’s language referred to “somatic cell nuclear transfer” and did not use the words “human” or “cloning.”

In Oregon, traditional pro-life forces have made little legal or political headway. Voters may propose, vote on, and enact laws independently of the legislature.⁷¹ This “initiative process” is created and protected by the Oregon Constitution.⁷² Attempts to use this process to pass laws related to informed consent and parental notification have been unsuccessful.⁷³ Direct lawmaking by the legislature has not provided a better avenue.⁷⁴ Following a recent redistricting, it will be at least six to 8 years until the Oregon Senate is in Republican hands.⁷⁵ The House is in Democrat hands by a closer margin, 29-31 in 2007, which leaves open the possibility of an earlier change in leadership.⁷⁶ Even before the redistricting, Oregon was hostile to legislative enactments friendly to life. A bill for an informed consent law failed to pass both the house and the senate; a bill to take away tax funding for abortions failed; in 2003 a bill to

⁷⁰ OAR 855-019-0055(1)(a).

⁷¹ *Meyer v. Bradbury*, 205 Or App 297, 299 (2006) *citing* Oregon Const. Art. IV, Sec. 1(2)(a).

⁷² *Id.*

⁷³ In an unpublished interview, Gayle Atteberry, Executive Director, Oregon Right to Life stated that no significant legislation has been passed in Oregon “since *Roe v. Wade*.”

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

protect unborn victims of violence failed to pass the senate.⁷⁷ In 1999, parental notification passed the legislature, but the governor vetoed it.⁷⁸

In 2003, voters were asked to amend ORS 677.097 as it applied to abortions.⁷⁹ The measure put to the voters would have created a law requiring a 24 hour waiting period as well as dictating that a health care provider, and referring health care provider, provide certain information to a female seeking an abortion.⁸⁰ The required information included notice regarding medical assistance available for pregnancy and child care, medical risks of carrying the unborn child to term, and the probable gestational age of the child.⁸¹ Oregon voters refused to enact the measure. In 2005, Oregon voters had the opportunity, again through the initiative process, to mandate parental notification.⁸² The measure would have created a law requiring parental notification in writing 48 hours in advance of an abortion procedure to be performed on an unemancipated minor. The lawsuit also provided for civil liability for all damages suffered by the parent.⁸³ Oregon voters refused to enact the measure.

On most fronts, the value of life is subordinated to a belief that persons ought to be able to choose death—and with taxpayer money where other medical services are being provided. The groundwork is in place to ensure that medical professionals either provide services related to the loss of life or act to ensure the provision of such services. It may be a forerunner of things to come that the Oregon Board of Pharmacy supports a position statement that prohibits a pharmacist from “lecturing” patients about the pharmacist’s religious beliefs. Since the pharmacist has little or no guidance for determining what activity is encompassed by the prohibited “lecturing,” nor what is encompassed by “moral or religious beliefs,” it is safer for medical professionals to exit the dialogue around life issues—right at the time and place where life issues are no longer theoretical. Oregon citizens will lose the voice of those professionals confronting life issues on a daily and personal basis at the time when their counsel is most

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ *Meyer v. Bradbury*, 341 Ore. 288; 142 P.3d 1031.

⁸⁰ Id.

⁸¹ Id.

⁸² *Greenberg v. Myers*, 340 Or 65, 67 (2006).

⁸³ Id. at 81.

needed. The surprise is not the attack but the silence with which it has been accepted: even with an apparent attack on free speech rights, no challenge has been raised.

II. JUDICIAL RESTRAINT

Oregon has elected Democrats to statewide offices, including Governor, almost exclusively over the last 20 years. Since the practice has been for a Justice to retire before his or her term has expired, and for the Governor to appoint the new Justice, the Supreme Court has almost exclusively appointed by a Democrat governor. Moreover, because the majority of the general electorate is Democratic, it affects what types of initiatives are passed. There is also a strong libertarian tradition in Oregon and a long-standing battle between property rights and centralized land use planning.

The Oregon Supreme Court in most cases has a disciplined approach for interpretation whether it is a statute, an initiative, or the Constitution. This approach can be considered strict constructionist and based on original intent.

Oregon has not judicially recognized doctrines that are common elsewhere. For example, it has refused to loosen the mootness standard for judicial review, it has not created an action for tortious interference with inheritance, and it did not expand the unlawful trade practices act.

Oregon provides greater protection for campaign than provided by U.S. Supreme Court in *Buckley v. Valeo*.⁸⁴

Although *Buckley* determined that both expenditures and contributions were forms of expression under the First Amendment, it also concluded that contributions were less central to the core of First Amendment expression and, therefore, could be subject to governmental restriction through a balancing of interests. 424 US at 28-29.(fn9) Under Oregon's Article I, section 8, jurisprudence, however, there is no basis for distinguishing between closely related forms of expression in the way that the United States Supreme Court does, solely on the basis of the extent to which a particular form of speech is thought by a court to be more or less "central" to the purposes of Article I, section 8.⁸⁵

⁸⁴ 424 US 1, 96 S Ct 612, 46 L Ed 2d 659 (1976).

⁸⁵ *Vanatta v. Keisling*, 324 Or 514, 521, 931 P2d 770 (1997).

In our view, a contribution is protected *as an expression by the contributor*, not because the contribution eventually may be used by a candidate to express a particular message. The money may never be used to promote a form of expression by the candidate; instead, it may (for example) be used to pay campaign staff or to meet other needs not tied to a particular message. However, the contribution, in and of itself, is *the contributor's expression of support for the candidate or cause*---an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put.⁸⁶

In most cases, the Court follows a disciplined approach in its interpretations so that it does not impose a meaning that would not have been intended by the adopters of the Oregon Constitution, the legislators, or the people in the case of a ballot measure. For instance, in *Priest v. Pearce*, 314 Or. 411, 840 P2d 65 (1992), the Court interprets the Oregon Constitution, Article I, section 14, to determine whether it mandates bail on appeal of a criminal conviction. The Court addresses “three levels on which that constitutional provision must be addressed: its specific wording, the case law surrounding it, and the historical circumstances that led to its creation.” There is an extensive discussion of original intent, for instance Justice Fadeley explaining that “while the concerns of the Massachusetts colonial legislators are not self-evident, the Petition of Right and its aftermath were provoked in part by the king imprisoning persons, without charges, in an effort to force payment of "taxes" that parliament had refused to approve and levy.”

The Oregon Supreme Court clarified its framework for statutory interpretation in *Portland General Electric Co. v. Bureau of Labor & Industries*.⁸⁷

In interpreting a statute, the court's task is to discern the intent of the legislature. To do that, the court examines both the text and context of the statute. * * * In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. * * * When the court reaches legislative history, it considers it along with text and context to determine whether all of those together make the legislative intent clear. If the legislative intent is clear, then the court's inquiry into legislative intent and the meaning of the statute is at an end and the court interprets the

⁸⁶ Id. at 522.

⁸⁷ 317 Or. 606, 859 P2d 1143 (1993).

statute to have the meaning so determined. If, after consideration of text, context, and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.⁸⁸

When Oregon's Constitution has been amended through initiative petition, the Court's task is to discern the intent of the voters, not a legislature.⁸⁹

The Oregon Supreme Court has limited its ability to review and overrule cases and common-law rules. The Court explained three major ways to overcome established precedent in *Schiffer v. United Grocers, Inc.*⁹⁰, applying the three-factor test established in *G.L. v. Kaiser Foundation Hospitals, Inc.*⁹¹

[o]rdinarily this court reconsiders a nonstatutory rule or doctrine upon one of three premises: (1) that an earlier case was inadequately considered or wrong when it was decided; (2) that surrounding statutory law or regulations have altered some essential legal element assumed in the earlier case; or (3) that the earlier rule was grounded in and tailored to specific factual conditions, and that some essential factual assumptions of the rule have changed. Without some such premise, the court has no grounds to reverse a well-established rule besides judicial fashion or personal policy preference, which are not sufficient grounds for such a change.⁹²

In *Schiffer*, the Court abrogated a long-standing rule. The Court "allowed review to determine the continuing validity of the rule that the release of one joint and several obligor on a promissory note releases automatically the other joint and several obligors."⁹³ In announcing the end of the rule's validity, the Court added that the rule being announced would also apply to releases in tort.⁹⁴ In response to argument that such a change belonged to the legislature, the Court declared that "where we have competence to act, we should not hide from our

⁸⁸ Id. at 610-612 (citations omitted).

⁸⁹ *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 56, 11 P3d 228 (2000).

⁹⁰ 329 Or. 86, 859 P2d 1143 (1998).

⁹¹ 306 Or. 54, 757 2d 1347 (1988)

⁹² *Schiffer* at 100, quoting *G.L.* (citations omitted).

⁹³ Id. at 99.

⁹⁴ Id. at 88.

responsibilities with regard to judge-made law just because we share those responsibilities with the legislature.⁹⁵

In a concurring opinion, Justice Durham advocated for an “ancient doctrine” *stare decisis*—one that incorporated more opportunity for the Court to review precedent. He would open reconsideration of common-law rules and doctrines to review under a “any proper justification” standard, without limiting review to the three-factor test identified in *G.L.* and applied in *Schiffer*.

In my view, the ancient doctrine of *stare decisis* should govern the court's reconsideration of common-law rules and doctrines. That doctrine appropriately incorporates elements of both stability and flexibility in the judicial development of the common law. Applying that doctrine, this court should evaluate the continuing validity of a common-law rule by considering whether a proper justification supports a modification. Such a justification could include any of the criteria listed in *G.L.*, the manifest error criterion * * *, or any other appropriate justification. As *G.L.* correctly noted, “judicial fashion or personal policy preference * * * are not sufficient grounds for such a change.” If the court's evaluation of a common-law rule leads it to the conclusion that the rule deserves modification, it is the court's responsibility to say so.⁹⁶

Justice Durham noted that the approach used by the Court had begun in *G.L.*, without, in his reading, being a limitation to three-factor test for opportunities to review common-law rules and doctrines. However, following *G.L.*, the question remained whether the absence of the *G.L.* factors would preclude reconsideration. When the issue was addressed in *Keltner v. Washington County*,⁹⁷ the Court required the presence of at least one of the *G.L.* factors and refused to reconsider a common-law rule without them.⁹⁸ This opinion was joined by then-Justice, now-Governor, Theodore Kulongoski.⁹⁹ Justice Durham seems willing to try to keep his foot in the door for his “any proper justification” standard. In 2006, he briefly addressed the avenues to reconsideration and stated that “generally” Oregon courts look to the three factors set forth in

⁹⁵ Id. at 101.

⁹⁶ Id. at 104-105 (citations omitted) (emphasis added).

⁹⁷ 310 Or 499, 800 P2d 752 (1990).

⁹⁸ *Schiffer* at 103 (Durham, concurring) citing *Keltner* at 505-510.

⁹⁹ Id. at 105.

*G.L.*¹⁰⁰ And he cited to another restatement of the rule that predates the restriction of review announced in *Keltner*, omitting reference to *Keltner*.¹⁰¹

In *State v. Stoneman*,¹⁰² the Court interpreted a statute criminalizing the depiction of simulated representations of sexual explicit conduct with minors. The majority opinion interpreted the statute so as to preserve its validity. In his dissent, Justice Durham states:

Only by misconstruing the statute can the majority evade the restraint on expression that the statute embodies. The majority construes the phrase "actual or simulated" to mean "actual." As a result, the majority concludes that the statutory definition of "sexually explicit conduct" extends only to visual representations that involve "actual" abuse of children. I cannot imagine a more obvious instance of an appellate court failing to come to grips with the best evidence of the legislature's intention: the statute's words.¹⁰³

Justice Durham continues, asserting that the majority has violated the statute forbidding the Court from both inserting what the legislature omitted and omitting what the legislature inserted.¹⁰⁴

In *State v. Slovik*,¹⁰⁵ the Court used the *Stoneman* test to loosely interpret the text of a statute, providing some liberation from text if warranted in context.

The texts of those subparagraphs do not expressly limit the type of mixture or substance that will warrant an enhanced sentence; that is, they do not specifically limit the phrase "a mixture or substance" to marketable mixtures or substances. Although the text, viewed in isolation, supports the state's position, the court has explained that a statute's context may reveal a different focus from its text.¹⁰⁶

Joining that opinion was Judge Linder who has since become Justice Linder of the Oregon Supreme Court.¹⁰⁷

¹⁰⁰ *Juarez v. Windsor Rock Products, Inc.*, 341 Ore. 160; 144 P.3d 211 (2006).

¹⁰¹ *Id.*

¹⁰² 323 Or 536, 920 P2d 535 (1996).

¹⁰³ *Id.* at 554-555.

¹⁰⁴ *Id.* at 556, citing ORS 174.010.

¹⁰⁵ 188 Or. App. 263, 71 P.3d 159 (2002).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

In *State v. Rogers*, the Court considered the interplay between ORS 136.005, a statute authorizing either party in a criminal case to challenge the lawfulness of the selection of a jury panel on statutory or constitutional grounds, and ORS 10.215, which establishes the confidentiality of certain jury records:

Accordingly, we consider the specific wording of Article I, section 11, the historical circumstances that led to its creation, and the case law surrounding it. Our goal is "to understand the wording in the light of the way [the] wording would have been understood and used by those who created the provision," and to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise.¹⁰⁸

The Oregon Supreme Court has considered the scope of its judicial review power on several occasions. The judicial review function is vested in the courts by the Oregon Constitution in Article VII (Amended), Section 1.

One of the issues that the Oregon Supreme Court has considered is the mootness doctrine in the case *Yancy v. Shatzer*.¹⁰⁹ Unlike the U.S. Supreme Court and every other state, Oregon does not have the power of judicial review for moot cases that are "capable of repetition, yet evading review."

While the Oregon courts wrestled with the issue, the United States Supreme Court eventually changed its own course and recognized an exception to the federal mootness doctrine that allows for discretionary review of disputes "capable of repetition, yet evading review." Since that time, every state, except Oregon, has adopted that exception and has employed the exception from time to time in cases involving alleged harms of a short-term effect -- harms that are too ephemeral for courts to adjudicate before factual developments render the disputes involving those harms moot.¹¹⁰

Following discussion of the grant of judicial power, the Court concluded that in recognizing authority for deciding cases capable of repetition yet evading review, the Court had created a rule that exceeded a "circumscribed grant of power." Oregon appellate courts do not

¹⁰⁸ 330 Or. 282, 297, 4 P3d 1261 (2000) (citations omitted).

¹⁰⁹ 337 Or. 345, 97 P.3d 1161 (2004) (dissent by Balmer, joined by Riggs).

¹¹⁰ Id. (citations omitted).

have judicial power under the Oregon Constitution to decide moot cases that are capable of repetition, yet evading review.¹¹¹

Another issue that the Oregon Supreme Court wrestled with was whether the Court's judicial review function of initiative ballot titles under ORS 250.085(5) violated the doctrine of separation of powers. The Court exercised the authority to rewrite initiative ballot titles from 1995 to 1999, when the legislature enacted a new law such that the Court would remand the measures to the Attorney General, rather than rewriting the ballot titles. There were regular dissents to any rewriting of the ballot measure titles by several of the justices, namely Justices Riggs, Durham, and Van Hoomisen. For instance, in *Earls v. Myers*:

The unspoken premise on which this court's modification decision is based is that it does not violate the principle of separation of powers for this court to rewrite a certified ballot title. See *Rooney v. Kulongoski (Elections Division #13)*, 322 Or 15, 55, 902 P2d 1143 (1995) (Unis, J., dissenting) (arguing that judicial modification of ballot titles offends Article III, section 1, of the Oregon Constitution); *Sizemore v. Kulongoski*, 322 Or 229, 237, 905 P2d 1146 (1995) (Durham, J., concurring) (same). The court should revisit that premise.¹¹²

The dissenting justices explained that the success of ballot measures largely depended on the ballot title and by rewriting ballot titles the Court was improperly exercising a political function. Although this issue has been resolved, the controversy indicates that only at most 2 of the 7 justices joined in the dissent.

III. THE COURT

The Oregon Supreme Court has seven justices. Each justice serves a six year term. The justices are elected in statewide, non-partisan elections. The justices choose from among themselves one justice to serve a six year term as Chief Justice. Vacancies created by retirement, resignation, or death are filled by appointment by the Governor. A justice so appointed must later run for election.

¹¹¹ Id.

¹¹² 330 Or. 171, 178-179, 999 P2d 1134 (2000) (Van Hoomisen dissenting).

Biographical information of the current members of the Oregon Supreme Court

Member	Appointed by / Year	Term Expires	Miscellaneous
Chief Justice Paul J. De Muniz	Elected / 2000 Re-elected (as chief justice) / 2006	2012	<p>-Biographical information: B.S. (sociology), Portland State University, 1972; J.D., Willamette University College of Law, 1975; Served in the United States Air Force, 1966-70, including a tour in Vietnam during the Vietnam War, 1968-69; Was a deputy public defender for the state of Oregon, 1975-77; Special prosecutor in Douglas County, 1988; Practiced law in Salem with Garret, Seideman, Hemann, Robertson & De Muniz, P.C., where he handled complex criminal and civil trials and appeals, including 4 death penalty cases and 10 other murder cases, 1977-90; Served on the Oregon Court of Appeals, 1990-2000, where he was the Presiding Judge of Department One, 1997-2000;</p> <p>-Professional/social affiliations: Member, Oregon State Bar Association; Member, American Bar Association.</p> <p>-Articles: <i>A Practical Guide to Oregon Criminal Procedure and Practice</i>, Templeton Press, 2005; <i>Judicial Reform in Russia: Russia Looks to the Past to Create a New Adversarial System of Criminal Justice</i>, 11 Willamette Journal of International Law and Dispute Resolution 81 (2004) [translated to Russian]; <i>Eroding the Public's Confidence in Judicial Impartiality: First Amendment Federal Jurisprudence and Special Interest Financing of Judicial Campaigns</i>, 67 Albany Law Review 763 (2004); <i>Politicizing State Judicial Elections: A Threat to Judicial Independence</i>, 38 Willamette Law Review</p>

			367 (2002) [translated to Russian]; Two chapters in Joanne Moore's <i>Immigrants in Courts</i> , University of Washington Press (1999), a reference used by attorneys and judges throughout the United States.
Rives Kistler	Governor T. Kulongoski / 2003 Elected / 2004	2010	-Biographical information: Georgetown University Law Center, 1981; Served as law clerk for the Honorable Charles Clark, Chief Judge, United States Court of Appeals for the Fifth Circuit; Served as law clerk for the Honorable Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States; Private practice, litigation associate for Stoel Reeves LLP, 1983-1987; Assistant Attorney General, Oregon Department of Justice, 1987-1999; Adjunct professor, Lewis and Clark Law School; -Professional/social affiliations: Former member and vice-chair, Oregon Board of Bar Examiners; Former member, National Association of Attorneys General Working Groups on criminal law, federalism, and free speech; Chair, working group on free speech.
Martha Lee Walters	Governor T. Kulongoski / 2006	2009	-Biographical information: B.A., University of Michigan with distinction, 1972; J.D., University of Oregon School of Law, 1977; Practiced law in Eugene with Walters Romm Chanti & Dickens, P.C. and its predecessor firms, 1985-2006, serving as firm president, 1992-2006, and secretary, 2004-06; Practiced law in Eugene with Harrang, Swanson, Long & Wilkinson, P.C. and its predecessor firms, 1977-85; -Professional/social affiliations: President, National Conference of Commissioners on Uniform State Laws, 2007-present; member, Oregon State Bar; Past president, Lane County Bar. -Articles: "When the Only Way to Equal

			is to Acknowledge the Difference: <i>PGA Tour, Inc., v. Martin.</i> "
Virginia L. Linder	Elected/ 2007	2013	-Biographical information: B.A., Southern Oregon State College (now Southern Oregon University, 1975; J.D., Willamette University College of Law, 1980; Served on the Court of Appeals, 1997-2007; Assistant Attorney General in the Appellate Division, 1980-1983; Attorney-in-Charge of the Education Section, General Counsel Division, 1983-1984; Assistant Solicitor General, 1984-1986; Solicitor General, 1986–1997.
W. Michael Gillette	Governor V. Atiyeh / 1986 Elected / 1986 Re-elected / 1992 Re-elected / 1998 Re-elected / 2004	2010	-Biographical information: Bachelor's degree, Whitman College, 1963; Law degree, Harvard Law School, 1966; Served on the Court of Appeals, 1977-1986, and was a presiding judge, 1980-1986; Solicitor General of Oregon, 1973-1977; Chief Trial Counsel, Oregon Department of Justice, 1973; Chief Counsel, Consumer Protection Division, 1971-1973; Assistant Attorney General in Oregon and American Samoa, 1969-1971; Multnomah County Deputy District Attorney, 1967-1969. Private practice, Portland law firm of Rives and Rogers, 1966-1967; Instructor in constitutional and criminal law, Portland State University, 1971-1974.
Robert D. Durham	Governor B. Roberts / 1994 Elected / 1994 Re-elected / 2000 Re-elected / 2006	2012	-Biographical information: Bachelor's degree, Whittier College, 1969; Law degree, University of Santa Clara School of Law, 1972; LL.M. (judicial process), University of Virginia School of Law, 1998; Served on the Oregon Court of Appeals, 1991-1994; Practiced law in Eugene and Portland, 1974-1991, focusing primarily on labor law, civil rights, and appellate practice in state and federal courts; Law clerk, Oregon Supreme Court, 1972-1974;

			-Professional/social affiliations: President, Oregon Appellate Judges Association 1996- 1997; Served on the faculty of the National Judicial College, 1992; Served on the Oregon Rules of Appellate Procedure Committee, 1994-1998; Chair, the Governor's Commission on Administrative Hearings, 1989-1990.
Thomas A. Balmer	Governor <u>J. Kitzhaber</u> / 2001 Elected / 2002	2008	-Biographical information: Bachelor's degree, Oberlin College, 1974; Law degree, Chicago Law School, 1977; Associate, the Boston firm of Choate, Hall & Stewart, 1977-79; Trial Attorney, the Antitrust Division of the U.S. Department of Justice, 1979-80; Associate, Wald, Harkrader & Ross (Washington, D.C.), 1980-1982; Associate, the Portland firm of Ater Wynne LLP and its predecessor firm, Lindsay, Hart, Neil & Weigler, 1982-85; Deputy Attorney General of Oregon under Attorney General Theodore R. Kulongoski, 1993-97; Managing Partner, the Portland firm of Ater Wynne LLP and its predecessor firm, Lindsay, Hart, Neil & Weigler, 1998-2001; Partner, the Portland firm of Ater Wynne LLP and its predecessor firm, Lindsay, Hart, Neil & Weigler, 1985-93; 1997-2001.

IV. CONCLUSION

It is likely, if *Roe* is overturned, that Oregon as a state will safeguard the provision of abortion services. There is little available evidence to indicate that the legislature, statewide elected officials, or citizens involved through the initiative process will do anything other than strengthen the opportunities available to Oregonians to choose their own course without reflection on reasons to sustain and protect life—whether that of the unborn or the terminally ill. Restrictions such as those recently put on pharmacists to not “lecture” patients regarding a

pharmacist's moral or religious beliefs" indicate a direction where even dissent and debate will be silenced. No pharmacist has challenged this action, so the question is not so much whether public life in Oregon will continue to proceed on this path, it is simply a question of when and where.