HALPERIN V. PITTS AND THE PROSPECTIVE APPLICATION OF NEW OREGON SUPREME COURT RULINGS

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I. INTRODUCTION

Sometimes the Oregon Supreme Court overrules itself. When that happens, the party who opposed the overruling sometimes argues that the court should apply the change in the law prospectively. Prospective application of a new legal rule means the rule is applied only to future cases, rather than retroactively to the case at hand, other cases still pending, or those already finally decided. This argument most frequently arises when the issue in dispute is one of court procedure and the losing party claims to have relied on the court's prior precedent in the manner that the party litigated the present case, such that it would be unfair to that party to apply to it the court's new rule. In the face of such claims, and also in a broader range of

contexts, the Oregon Supreme Court has long indicated a preference for applying new rules prospectively only. In *Halperin v. Pitts*, however, the court cast doubt on that practice.[1] This article examines the foundations of the court's reasoning in *Halperin*, as well as the court's traditional practice beforehand, to suggest that *Halperin* was wrongly decided.[2]

Part II of this article describes the prospectivity principle in general. Part III describes the principle's roots in Oregon, with a focus on civil cases. Then, Part IV discusses *Halperin* and critiques each of the two rationales cited by the court to reject prospective-only application of the new legal rule that the court announced in that case. Part V expresses the hope that this article will help future litigants persuade the Oregon Supreme Court to revisit *Halperin*.

II. THE PROSPECTIVITY PRINCIPLE IN GENERAL

The prospectivity principle holds that a new legal rule, generally resulting from a court decision overruling a prior decision of the court, should be applied only in future cases. By contrast, the retroactivity principle applies the new rule both to future cases and to the parties to the rule-announcing decision; the retroactivity principle also usually applies the new rule to all other cases pending in the trial courts and on appeal at the time of the decision, and sometimes to cases in which final judgment has already been entered. The key difference between the two principles is their attitude toward the old rule of law espoused by the overruled decision: The retroactivity principle treats the prior decision as "being erased by the later overruling decision," such that it can have no effect going forward, while the prospectivity principle considers the prior decision "as an existing juridical fact" which must be recognized as valid with regard to events transpiring from the time that it was rendered until the date of its overruling.[3] As one authority has explained:

> Under the classical view that the courts merely discovered and announced existing law, which they had no hand in creating, no issue of restricting the rule of an overruling case to prospective operation could be presented, since the act of overruling was a

1. Halperin v. Pitts, 287 P.3d 1069, 1077 (Or. 2012).

2. The author of this article represented the plaintiffs in *Halperin* in the Oregon Supreme Court. Except as noted below, the arguments made here were not presented to the court.

3. Linkletter v. Walker, 381 U.S. 618, 624 (1965).

> confession that the earlier rule had been erroneous and should never have been applied at all; but the modern decisions, taking a more pragmatic view of the judicial function, have recognized the power of a court to hold that an overruling decision is operative prospectively only . . . .[4]

Historically, the retroactivity principle prevailed; the prospectivity principle did not appear until the mid-19th century.[5] In 1848, for example, the Ohio Supreme Court held in *Bingham v. Miller* that the legislature lacked the constitutional power to grant divorces.[6] The legislature had been granting such divorces for over forty years, however, and the court was concerned about the effect its new rule would have on the children of the couples who previously had been legislatively divorced, whom the new rule would "bastardize."[7] "On account of [those] children," the court felt "constrained to content [itself] with simply declaring" its new rule, confident that its decision would be "enough to vindicate the constitution."[8] The United States Supreme Court later characterized *Bingham* as holding that "although legislative divorces were illegal and void, those previously granted were immunized by a prospective application of the rule of the case."[9]

Similarly, in 1863, the United States Supreme Court upheld the validity of Iowa municipal bonds which had been issued during a period when the Iowa Supreme Court held that such bonds could be issued, even though the Iowa Supreme Court later held that there was never any authority to issue such bonds.[10] The Court explained:

> However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or

4. S. R. Shapiro, Annotation, *Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R. 3d 1371, 1377–78 (1966) (footnotes omitted).

5. *Linkletter*, 381 U.S. at 623–24.

6. Bingham v. Miller, 17 Ohio 445, 448 (1848).

7. *Id.*

8. *Id.* at 448–49

9. *Linkletter*, 381 U.S. at 624.

10. Gelpcke v. Dubuque, 68 U.S. 175, 206 (1863).

decision of its courts altering the construction of the law."

> The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.[11]

In the decades that followed, the prospectivity principle became an established part of American law. By 1966, one authority was able to say that "most courts now treat the question of how an overruling decision should operate as one of judicial policy rather than of judicial power . . . ."[12]

The prospectivity principle has been justified on a number of grounds. The primary ground is people's reliance on the old rule of law which becomes overruled. The principle "prevent[s] such persons from being subjected to unfairness or undue hardship" through the changing of the rules midgame.[13] The reliance factor has been cited particularly frequently in cases involving vested contract and property rights.[14]

In deciding whether to apply an overruling decision prospectively or retroactively, courts also often consider their ability to effectuate the purpose of the new rule without retroactive application of it, as well as the burden that retroactive application of the new rule would impose upon society, and the judicial system in particular.[15] These factors are also frequently considered by courts that, having chosen to apply a new rule retroactively, must further choose just how retroactively to apply it: only to the parties in the case at hand, or also to all pending cases, or also to cases with final judgments.[16]

11. *Id.* (quoting Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. 416, 432 (1854)).
12. Shapiro, *supra* note 4 at 1378 (footnote omitted).
13. *Id.* at 1386.
14. *Id.* at 1388–89.
15. *Id.* at 1390–91.
16. *Id.* at 1386–91.

III. THE PROSPECTIVITY PRINCIPLE IN OREGON

A. Early Cases Recognizing the Principle

The Oregon Supreme Court has long recognized the validity of the prospectivity principle. Although in its early cases the court often declined to apply the principle to the case at hand, it never questioned its ability to apply the principle where appropriate. In later cases, the court has routinely applied the principle in a wide variety of contexts. Because the deep roots the principle has in Oregon law are critical to an examination of the court's recent decision in *Halperin*, the discussion below is comprehensive.

The first mention of the prospectivity principal in Oregon appears to be in Justice Kelly's 1936 dissent in *Jory v. Martin*.[17] In that case, the majority upheld statutory salaries for three government officials that exceeded the salaries provided for in the state constitution.[18] Justice Kelly urged the court to hold the salaries unconstitutional and to apply that holding retroactively because, although doing so would affect the three officials, it would "involve[] no confusion to the public, no disarray of numerous and diverse interests, no far spread ruin."[19] Justice Kelly distinguished *Bingham*, the Ohio legislative divorce case, as one which did involve those problems.[20]

The prospectivity principle was again mentioned in dissent in 1942 in *National Surety Corp. v. Smith*.[21] In that case, the majority declined to overrule a prior decision concerning the statutory validity of tax foreclosure deeds.[22] Justice Rossman urged the court to overrule the decision, yet he worried that previously "adjudicated titles to parcels of real property" "should not be disturbed."[23] How to avoid that disturbance? Justice Rossman pointed to "[t]he principle of law which is applicable to the situation before us":

> The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its

17. Jory v. Martin, 56 P.2d 1093, 1110 (Or. 1936) (Kelly, J., dissenting).
18. *Id.* at 1103–04 (majority opinion).
19. *Id.* at 1111 (Kelly, J., dissenting).
20. *Id.*
21. Nat'l Sur. Corp. v. Smith, 123 P.2d 203, 210 (Or. 1942) (Rossman, J., concurring).
22. *Id.* (majority opinion).
23. *Id.* at 222 (concurring opinion).

> operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision.[24]

Justice Rossman cited 21 C.J.S. (Courts) § 194(b), p 329 (1940), to the same effect and quoted the same authority at section 194(a):

> A court of final decision may expressly define and declare the effect of a decision overruling a former decision, as to whether or not it shall be retroactive, or operate prospectively only, and may, by a saving clause in the overruling decision, preserve all rights accrued under the previous decision.[25]

In light of those authorities, Justice Rossman noted that "we need not be disturbed lest anything we now hold will impair any title which is based upon previous interpretations of the act under consideration."[26]

In 1945, in *Linn County v. Rozelle*, the prospectivity principle gained the acceptance of the entire court.[27] *Rozelle* was another tax foreclosure deed case, with the defendants attacking the validity of a deed on the basis of two prior Oregon Supreme Court decisions.[28] The court, however, overruled those decisions as inconsistent with the statutory scheme.[29] The court then recognized that "a court of final review has the power to limit the effect of an overruling decision so that it will operate prospectively only" and that "[a]n overruling decision cannot operate retrospectively so as to impair the obligations of contracts entered into, or injuriously affect vested rights acquired, in reliance on the overruled decision."[30] Having recognized the

24. *Id.* at 222–23 (quoting 14 AM. JUR. *Courts* § 130 (1938)).
25. *Id.*
26. *Id.* at 223.
27. Linn Cnty. v. Rozelle, 162 P.2d 150 (Or. 1945).
28. *Id.* at 165.
29. *Id.* at 165–66.
30. *Id.* at 165 (citing the same three authorities cited by Justice Rossman in *Nat'l Sur. Corp.*).

validity of the prospectivity principle, the court nonetheless declined to apply it.[31] The court did not explain its rationale in that regard, but it is significant that the defendants in *Rozelle* do not appear to have relied on the rule espoused by the overruled decisions, and they had no vested property or contract rights under it. By contrast, application of the old rule in *Rozelle* would have upset the plaintiff's vested right to the real property at issue. In other words, the court appears to have concluded that the conditions for application of the prospectivity principle were not present in *Rozelle*.

The court again recognized the prospectivity principle without applying it in 1961 in *James A.C. Tait & Co. v. D. Diamond Corp*.[32] In that case, the court declined to overrule certain prior decisions, in part because "an untold number of surety contracts have been entered into in reliance upon the unequivocal holdings of this court.[33] We must assume that to now repudiate the rule, except on a prospective basis, would result in substantial damage to persons who have relied thereon."[34]

In *Hungerford v. Portland Sanitarium & Benevolent Ass'n*, the court in 1963 abolished the charitable immunity exception from tort liability and applied that abolition to the parties to the case.[35] Justice Rossman dissented, noting that the court's "holding is retrospective as well as prospective" and would thus have an even more deleterious effect on charities.[36] *Hungerford* appears to be a case where the court concluded that the purpose of the court's new rule (giving victims of torts committed by charities a right to redress) was best served by retroactive (broader) application of that rule.

In *American Reciprocal Insurers v. Bessonette*, the court in 1965 again recognized the applicability of the prospectivity principle, even though it again chose to apply its new rule retroactively.[37] *Bessonette* was tried before the Oregon Supreme Court issued a decision in

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31. *Id.*

32. James A.C. Tait & Co. v. D. Diamond Corp., 365 P.2d 883 (Or. 1961).

33. *Id.* at 884.

34. *Id.*

35. Hungerford v. Portland Sanitarium & Benevolent Ass'n, 384 P.2d 1009, 1010–11 (Or. 1963).

36. *Id.* at 1013 (Rossman, J., dissenting); *see also* Wicklander v. Salem Memorial Hosp., 385 P.2d 617 (Or. 1963) (applying new rule of *Hungerford* to case on direct review); Joseph v. Lowery, 495 P.2d 273, 276–77 (Or. 1972) (recognizing that new rule of *Hungerford* applied "retroactively").

37. Am. Reciprocal Ins. v. Bessonette, 405 P.2d 529 (Or. 1965).

another case that overruled prior decisions concerning tort liability. The defendants in *Bessonette* argued that they would have tried their case differently, and they would not have waived their jury trial right, if they had known the prior decisions would be overruled; they therefore asked the court to apply the overruling decision prospectively only (at least as to them; the court had already applied the overruling decision to the parties to that decision).[38] The court, however, thought the overruling decision "made no difference" to the manner in which the defendants had tried their case, and that they should not get a new fact-finder simply because their jury-waiver strategy backfired.[39] Accordingly, the court applied the overruling decision to the defendants in *Bessonette*.

B. Later Cases Applying the Principle

In 1967, in *Hawes v. Taylor*, the court for the first time declined to apply a new rule retroactively. In the trial court, both parties moved for a directed verdict.[40] In accordance with the then-applicable rule, which held that such a motion constituted a waiver of the right to trial by jury, the trial judge assumed the role of fact-finder. The plaintiff prevailed, and the defendant appealed, arguing that she had not waived her right to a jury trial. Although, after the trial of the *Hawes* case, the court in another case had disavowed its old waiver rule, the court nonetheless declined to apply the new rule to the defendant in *Hawes*, noting that she had not objected to having the trial judge serve as fact-finder.[41] The court stated: "We did not intend the rule in [the overruling decision] should be applicable to prior cases in which there was no request to submit the issues of fact to the jury."[42] While *Hawes* can be read as merely a case about preservation of error, the Oregon Supreme Court has twice cited it as support for application of the prospectivity principle.[43] That makes

38. *Id.* at 531.

39. *Id.*

40. Hawes v. Taylor, 423 P.2d 775 (Or. 1967).

41. *Id.* at 776.

42. *Id. Cf.* Godell v. Johnson, 418 P.2d 505, 508 (Or. 1966) (the overruling decision; there, the defendant objected to the loss of a jury, and the court applied the new rule to the case at hand, reasoning that "[t]he submission of the case to the jury . . . might well disappoint plaintiff, but he lost nothing he deserved to retain. Any disadvantage he may suffer as a result of submitting the case to the jury must be weighed against the unfairness and injustice in depriving defendant of a jury trial when he did not voluntarily waive it.").

43. *See* Holder v. Petty, 514 P.2d 1105, 1107 (Or. 1973); Falk v. Amsberry, 626 P.2d 362, 367 (Or. 1981).

sense because, as a matter of preservation law, parties generally are not obligated to assert in the trial court that decisions of the Oregon Supreme Court were wrongly decided; trial courts "are bound to follow" Oregon Supreme Court decisions anyway.[44]

The court again applied the prospectivity principle in 1967 in *Harvey Aluminum v. School District No. 9*.[45] In that case, the trial court fixed the boundaries of a school district because, even though that task was ostensibly committed to a certain government board, the board had not fixed the boundary and it potentially lacked authority to do so.[46] On appeal, the Oregon Supreme Court redrew the district boundary. While the case was pending on appeal, however, certain taxes had been collected based upon the trial court's boundary.[47] The question arose as to the propriety of those taxes after the court redrew the boundary. The court chose not to disturb the taxes. In part, the court relied upon a statute which stated that boundary changes should be disregarded if made after a certain deadline, which deadline had passed by the time the court redrew the boundary.[48] The court further explained, however:

> It has been repeatedly held that the reversal of a lower court decree nullifies the decree and leaves the case standing as if no decree had been entered. However, there is nothing inevitable about this conclusion and if a salutary purpose is served by giving effect to an erroneous lower court decree pending an appeal from it, there is no reason for not giving temporary effect to the decree.
>
> We have previously recognized that "a court of final review has the power to limit the effect of an overruling decision so that it will operate prospectively only." If we have the power to limit our decisions so that they do not affect action taken in reliance upon one of our previous decisions, we also have the power to limit our decisions so as not to affect action taken in reliance upon a decree of the trial court from which an appeal has been taken.[49]

44. *See, e.g.*, Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 233 n.6 (Or. 2000) (illustrating proposition).

45. Harvey Aluminum v. Sch. Dist. No. 9, 433 P.2d 247 (Or. 1967).

46. *Id.* at 248–50.

47. *Id.*

48. *Id.* at 250.

49. *Id.* at 249 (quoting Linn Cnty. v. Rozelle, 162 P.2d 150, 165 (Or. 1945)).

In *Smith v. Cooper*, the court in 1970 overruled a prior decision regarding the type of motion a defendant should file in order to raise the defense of immunity.[50] The court went on to "give prospective application" to its new rule, noting that the defendants had "probably" filed the motion they did based on the overruled decision.[51]

In 1973, in *Holder v. Petty*, the Oregon Supreme Court noted that in a recent case it had overruled a line of precedents regarding the pleading of damages in personal injury cases to permit less specific allegations than those that previously had been required.[52] At issue in *Holder* was the sufficiency of the plaintiff's complaint, which had been filed before the overruling decision was announced. The court declined to decide whether the *Holder* complaint satisfied the court's new standard. Instead, citing *Harvey Aluminum*, *Hawes*, *Rozelle*, and 10 A.L.R.3d 1371 (1966), the court held that "because the rule as adopted in [the overruling decision] changed a previously established rule of pleading in personal injury cases, it would be unfair to the parties in cases tried prior to [the overruling decision] to give that rule retroactive effect, and we therefore decline to do so."[53]

In 1975, in *Dean v. Exotic Veneers, Inc.*, the court overruled prior decisions and adopted a broader definition of "claim" for purposes of claim preclusion (res judicata).[54] The court then stated: "Since, however, we are unable to determine whether or not plaintiff relied upon the then state of Oregon law (the dictum in [one case] and the holding in [another case]), the change in the law will be applied only prospectively."[55]

Falk v. Amsberry, decided in 1981, concerned whether defendants in bench trials need to test the sufficiency of the plaintiff's evidence by motion in the trial court in order to preserve that issue for appeal.[56] The Oregon Supreme Court had indicated in dictum in a recent case that it might impose such a requirement in the future, even

50. Smith v. Cooper, 475 P.2d 78 (Or. 1970).

51. *Id.* at 80.

52. Holder v. Petty, 514 P.2d 1105, 1107 (Or. 1973).

53. *Id.*

54. Dean v. Exotic Veneers, Inc., 531 P.2d 266, 272 (Or. 1975).

55. *Id. See also* Del Monte Meat Co. v. Hurt, 561 P.2d 627, 629 (Or. 1977) (holding the same with respect to prospectivity); Colhouer v. Union Pac. R.R. Co., 551 P.2d 1291, 1293 (Or. 1976) ("In *Dean's* fact situation, this court decided to apply the doctrine of res judicata only prospectively because in finding that res judicata would normally apply, the court overruled an earlier Oregon case which the plaintiff in *Dean* might reasonably have relied on in choosing to bring the subsequent action.").

56. Falk v. Amsberry, 626 P.2d 362, 365 (Or. 1981).

though the then-prevailing practice did not require such a motion.[57] The court of appeals subsequently adopted that dictum as a holding in one of its cases.[58] Between those two events, the *Falk* case was tried, and the relevant motion was not filed. The court of appeals therefore held that the issue was unpreserved.[59] The Oregon Supreme Court reversed. First, the court adopted its prior dictum as law, as the court of appeals had done.[60] The Oregon Supreme Court then decided to apply its new rule prospectively only:

> A reading of [the earlier Oregon Supreme Court dictum] would have indicated to litigants at the time this case was tried that they need not make any special motions testing the sufficiency of plaintiffs' evidence in cases tried to the court in order to raise the insufficiency of the evidence on appeal although the probability of future change was certainly signalled by our dictum. In contrast, the [court of appeals] case established a definite procedure for litigants to follow, which had not yet been imposed by any Oregon appellate court at the time of trial. Under these circumstances, it was error for the court of appeals to apply the new procedural requirement to this case tried prior to its adoption.
>
> Ordinarily, we do not apply a new procedural requirement to cases tried prior to its adoption to the detriment of litigants who have justifiably relied on the overruled precedent. . . . [The court then discussed *Dean* and *Holder* and cited *Hawes*.]
>
> The cases discussed above indicate our reluctance to prejudice litigants by applying new pleading or trial practice requirements to cases tried before the announcement of these requirements.[61]

In *Peterson v. Temple*, the court in 1996 again confronted the definition of a claim for claim preclusion purposes, this time in a specific context where a prior precedent conflicted with the definition adopted in *Dean*.[62] The court overruled that precedent, as well as a court of appeals decision that had tried to reconcile the prior

57. *Id.* at 364.

58. *Id.*

59. *Id.* at 366.

60. *Id.*

61. *Id.* at 366–67. *See also* Illingworth v. Bushong, 688 P.2d 379, 382 n.3 (Or. 1984) (showing the same reluctance to apply new requirements retroactively).

62. Peterson v. Temple, 918 P.2d 413 (Or. 1996).

precedent with *Dean*.[63] On the question of prospectivity, the court cited an amicus brief by the Professional Liability Fund which warned that retroactive application of the new rule "likely will result in malpractice claims against lawyers" who had relied on the prior precedent and court of appeals opinion.[64] The court then held that such reliance "was reasonable" and that, therefore, "an inequitable result will occur if we apply retroactively to this case the new rule that we state in this opinion."[65] Accordingly, the court applied its new rule prospectively only.[66]

In *Kambury v. DaimlerChrysler Corp.*, the court held that a two-year statute of limitations applied to the plaintiff's claim, rather than a three-year statute.[67] The plaintiff asked the court to apply that rule prospectively only, asserting that he "reasonably relied on statements in [the] court's prior case law supporting a three-year limitations period and that applying a new rule would work an inequitable result."[68] The court declined that request, noting that, unlike in *Peterson v. Temple*, "this court had made no definitive statements that the three-year . . . limitation period trumped the two-year limitation period," and that "[p]laintiff could not reasonably rely on this court's silence."[69]

In *Schlimgen v. May Trucking Co.*, the trial court gave a jury instruction that encouraged the jury to return a verdict instead of deadlocking.[70] The instruction was not identical to the narrow instruction on that subject that the Oregon Supreme Court had then recently approved for criminal cases. In *Schlimgen*, the court extended the rationale of its recent decision to civil cases such that, if the new rule applied to *Schlimgen*, then reversal would be required.[71] But the court did not apply its new rule to the parties in *Schlimgen*. Instead, citing *Falk* and *Temple*, the court held that it was making "'new' law" and "it would not be equitable to apply the rule to this case."[72] The new rule was applied prospectively only. That was in

63. *Id.* at 414–18.
64. *Id.* at 418.
65. *Id.* at 419.
66. *Id.*
67. Kambury v. DaimlerChrysler Corp., 50 P.3d 1163, 1164 (Or. 2002).
68. *Id.* at 1166.
69. *Id.* at 1166–67.
70. Schlimgen v. May Trucking Co., 61 P.3d 923, 924 (Or. 2003).
71. *Id.* at 927–28.
72. *Id.* at 928.

2003.

C. Summary of Oregon Cases

As the foregoing discussion shows, the prospectivity principle runs deep in Oregon law, having been recognized for nearly eighty years and applied for nearly fifty years. The Oregon Supreme Court has applied the prospectivity principle not only in cases in which a new rule was announced,[73] but also in cases involving a new rule that was announced in a separate case even though the separate case applied the rule to the parties to that case.[74] The court has applied the principle in circumstances as varied as trial procedure[75] and school district boundaries,[76] and the court has recognized the principle in the contexts of tax foreclosure deeds[77] and surety contracts.[78]

In line with prevailing authority, the Oregon Supreme Court has frequently premised application of the principle on reliance, fairness, equity, and justice concerns. Where those concerns favor prospective-only application of a new rule, the court has required as much. Indeed, the court in *Falk* held that "it was error" to apply a new rule retroactively where those concerns prevailed.[79] In determining whether to apply a new rule retroactively, the court has considered the impact that such application would have on the judicial system, as well as society in general. Thus, in *Temple* the court noted concerns about legal malpractice claims,[80] in *National Surety Corp.* Justice Rossman worried about the stability of land titles,[81] and in *Hungerford* Justice Rossman worried about the impact that retroactive abrogation of charitable immunity from tort liability would have on charities.[82] The court has also considered the fairness of retroactive application of a new rule to the party opposing such application, as in *Godell*,[83] and likely in *Rozelle*[84] also.

73. Peterson v. Temple, 918 P.2d 413 (Or. 1996).

74. Holder v. Petty, 514 P.2d 1105 (Or. 1973).

75. Hawes v. Taylor, 423 P.2d 775 (Or. 1967).

76. Harvey Aluminum v. Sch. Dist. No. 9, 433 P.2d 247 (Or. 1967).

77. Linn Cnty. v. Rozelle, 162 P.2d 150 (Or. 1945).

78. James A.C. Tait & Co. v. D. Diamond Corp., 365 P.2d 883 (Or. 1961).

79. Falk v. Amsberry, 626 P.2d 362, 366–67 (Or. 1981).

80. Peterson v. Temple, 918 P.2d 413, 418 (Or. 1996).

81. Nat'l Sur. Corp. v. Smith, 123 P.2d 203, 223 (Or. 1942) (Rossman, J., concurring).

82. Hungerford v. Portland Sanitarium & Benevolent Ass'n, 384 P.2d 1009, 1013 (Or. 1963) (Rossman, J., dissenting).

83. Godell v. Johnson, 418 P.2d 505, 508 (Or. 1966).

Reliance, however, has been the most important factor in the court's decisions. Notably, the court has not required actual reliance on an old rule in order for a new rule to be applied prospectively. The court instead has applied the prospectivity principle when a party's reliance was only probable[85] and when the court was "unable to determine whether or not [the party] relied upon" the old rule.[86] That said, a party's reliance must be reasonable or justified, as the court noted in *Harvey Aluminum*,[87] *Falk*,[88] and *Temple*.[89] Thus, while the court has approved of reliance on Oregon Supreme Court dictum,[90] a trial court ruling,[91] and even a prevailing mode of practice in the face of clear Oregon Supreme Court dictum indicating that the practice is likely erroneous,[92] a party must be able to point to something more than the lack of precedent on an issue;[93] that is, there must be a "new" rule announced in the case at hand.[94] Not only must a party's reliance be reasonable, there also must be unfairness in applying the new rule to the case at hand. Accordingly, retroactive application of a new rule is not permissible if it would impair contract or other vested rights.[95] By contrast, retroactive application is permissible if it would "ma[k]e no difference" to the manner in which the parties previously conducted their affairs[96] or if a party would "los[e] nothing he deserved to retain."[97]

The Oregon Supreme Court's criminal jurisprudence has generally run parallel to its civil jurisprudence with respect to the prospectivity principle, even though the two lines of cases have never cited each other. For example, in *State v. Fair*, the court in 1972 applied a new rule of state constitutional criminal procedure

84. Linn Cnty. v. Rozelle, 162 P.2d 150 (Or. 1945).

85. Smith v. Cooper, 475 P.2d 78, 80 (Or. 1970).

86. Dean v. Exotic Veneers, Inc., 531 P.2d 266, 272 (Or. 1975).

87. Harvey Aluminum v. Sch. Dist. No. 9, 433 P.2d 247, 249–50 (Or. 1967).

88. Falk v. Amsberry, 626 P.2d 362, 366 (Or. 1981).

89. Peterson v. Temple, 918 P.2d 413, 413 (Or. 1996).

90. *Dean*, 531 P.2d at 272.

91. *Harvey Aluminum*, 433 P.2d 247.

92. *Falk*, 626 P.2d at 367.

93. Kambury v. DaimlerChrysler Corp., 50 P.3d 1163, 1166–67 (Or. 2002).

94. Schlimgen v. May Trucking Co., 61 P.3d 923, 928 (Or. 2003).

95. Linn Cnty. v. Rozelle, 162 P.2d 150, 165 (Or. 1945); James A.C. Tait & Co. v. D. Diamond Corp., 365 P.2d 883, 884 (Or. 1961).

96. Am. Reciprocal Insurers v. Bessonette, 405 P.2d 529, 531 (Or. 1965).

97. Godell v. Johnson, 418 P.2d 505, 508 (Or. 1966).

prospectively only.[98] In so doing, the court explained:

> We may draw two conclusions from our recent decisions on retroactivity. First, we are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires. Secondly, we have tended to restrict the retroactive application of newly-announced rights, giving them only the application which the Supreme Court has adopted as a minimum. In the present case since we are dealing with a new principle of law which rests entirely on our own Constitution the determination of retroactivity or prospectivity is for us alone. The decisions of the United States Supreme Court are not binding on us, but we may look to those cases for guidance.[99]

The court then adopted the criteria then employed by the United States Supreme Court "in deciding questions of retroactivity": "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[100]

The Oregon Supreme Court's cases analyzing when to apply a new judicial decision prospectively stand in contrast to the court's cases analyzing when a new statute will be deemed to apply prospectively. Whereas the prospectivity principle is an exception to the general rule that a judicial decision applies retroactively, the court "assume[s] that the legislature intends its amendments to existing legislation to apply prospectively unless the legislature signals an intention to apply an amendment retrospectively."[101] In particular, the court "ordinarily [has] decline[d] to construe a legislative amendment to have a retrospective effect if to do so would 'impair existing rights, create new obligations or impose additional duties

98. State v. Fair, 502 P.2d 1150, 1153 (Or. 1972).

99. *Id.* at 1152.

100. *Id.* (quoting Stovall v. Denno, 388 U.S. 293, 297 (1967)). *See also* Linkletter v. Walker, 381 U.S. 618, 636 (1965) (setting out those principles in United States Supreme Court jurisprudence); Moen v. Peterson, 824 P.2d 404, 407 (Or. 1991) (holding that "no question of retroactivity arises" if the holding in a prior case "did not announce a new rule, but simply applied the general rule announced in" an even earlier case).

101. Black v. Arizala, 95 P.2d 1109, 1119 (Or. 2004).

with respect to past transactions.'"[102]

IV. CRITIQUE OF *HALPERIN V. PITTS*

A. *Summary of the Court's Decision*

Halperin v. Pitts was decided in 2012.[103] *Halperin* concerned Or. Rev. Stat. § 20.080, which provides for attorney fees to parties who bring small-value tort claims, so long as certain conditions are met. Subsection (1) of the statute sets forth the conditions plaintiffs must meet, while subsection (2) sets forth the conditions counterclaiming defendants must meet. In the 1990 case of *Bennett v. Minson*, the court stated that one of the requirements of subsection (1)—the giving of notice to the adverse party before filing a claim—also applied to subsection (2).[104] The defendants in *Halperin* did not comply with that requirement, and the court of appeals held that they therefore could not recover attorney fees on their trespass counterclaim.[105] On review, the Oregon Supreme Court reversed.[106] The court characterized its statement in *Bennett* as dictum and disavowed it.[107]

Prepared for that possibility, the plaintiffs in *Halperin* argued that the court should apply the new rule prospectively only, noting that the change in the law increased their liability from nominal damages alone to those damages plus attorney fees for years of litigation.[108] The plaintiffs noted that their prior settlement strategy was totally undermined by the new rule.[109] As the plaintiffs argued:

> [E]ven if this court were inclined to overrule or otherwise reject *Bennett*, this court should apply any such change in the law prospectively only, given the reliance plaintiffs here have put on *Bennett* throughout the litigation of this case. *See Schlimgen v. May Trucking Co.*, 61 P.3d 923, 928 (Or. 2003) ("This court has

102. ZRZ Realty Co. v. Benefit Fire & Cas. Ins. Co., 266 P.3d 61, 63 (Or. 2011) (quoting *Black*, 95 P.2d at 1120). *See also* Hall v. N.W. Outward Bound Sch., Inc., 572 P.2d 1007, 1009–10 (Or. 1977) (discussing constitutional limitations on retroactive application of new statutes); Jones v. Douglas County, 270 P.3d 264, 276–77 (Or. Ct. App. 2011) (same).

103. Halperin v. Pitts, 287 P.3d 1069 (Or. 2012).

104. Bennett v. Minson, 787 P.2d 481, 484 (Or. 1990).

105. *Halperin*, 287 P.3d at 1071.

106. *Id.* at 1076.

107. *Id.*

108. *Id.* at 1071.

109. Brief for Respondent at 18–19, Halperin v. Pitts, 287 P.3d 1069 (Or. 2012) (No. S059505), 2011 WL 7074327.

> been 'reluctan[t] to prejudice litigants by applying new . . . trial practice requirements to cases tried before the announcement of [those] requirements.") (quoting *Falk v. Amsberry*, 626 P.2d 362, 367 (Or. 1981)); *Peterson v. Temple*, 918 P.2d 413, 418 (Or. 1996) (recognizing that, when litigants rely on prior precedents of this court, "it would be unfair to apply a newly announced rule, contrary to those precedents," to those litigants).[110]

The defendants in *Halperin* did not challenge the plaintiffs' argument in that regard, and the issue went unchallenged at oral argument as well.

The Oregon Supreme Court was not convinced, however. As it explained in its opinion:

> The cases on which plaintiffs rely . . . pertain to this court's decision whether to give only prospective effect to *a rule of its own making.* None concerns whether this court has discretion to give such limited effect to its interpretation of a legislative enactment. We are not persuaded that we have, or should exercise, discretion to apply our decision in this case prospectively only.[111]

In a footnote after the word "enactment," the court expanded its rationale.

> The exercise of judicial discretion to apply interpretations of statutes only prospectively may raise significant constitutional issues concerning justiciability, equal treatment, and separation of powers. See, e.g., Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (prohibiting selectively prospective application of federal law decisions because the courts lack "constitutional authority . . . to disregard current law or to treat similarly situated litigants differently") (citation and internal quotation marks omitted); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537 (1991) ("selective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same"); see also Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (rejecting selective application of newly announced constitutional principle because "the integrity of judicial review requires that we apply that rule to

110. *Id.* at 29.

111. *Halperin*, 287 P.3d at 1077 (footnote omitted).

all similar cases pending on direct review").[112]

No petition for reconsideration was filed in *Halperin*.

The court in *Halperin* thus denied prospective application of its new rule for two reasons. First, the court believed that, even if it had the authority to apply new common law rules prospectively only, it lacked such authority with regard to new interpretations of state statutes.[113] Second, the court appears to have believed that the prospectivity principle is unconstitutional whether applied to common law or statutory rules.[114] Both beliefs are incorrect, as explained below.

B. Prospective Application of New Statutory Interpretations

It is true that the three cases cited by the plaintiffs in *Halperin* involved new common law rules adopted by the court, not new statutory interpretations. But the Oregon Supreme Court had never before limited the prospectivity principle to common law rules. Rather, the court had previously indicated that the principle applies also to matters of statutory and constitutional interpretation.[115]

Even outside Oregon, generally "neither courts nor commentators have regarded the source of the law at issue as of much consequence to the temporal effect of a judgment."[116] If anything, courts "have held that overruling decisions involving constitutional or statutory construction, in particular, are suited for the denial of retroactive application."[117] As one recent authority noted: "A decision that overrules the judicial interpretation of a statute generally has only prospective effect equal to the effect ordinarily inherent in a

112. *Id.* at n.4.

113. *Id.* at 1077.

114. *Id.*

115. *See* Harvey Aluminum v. Sch. Dist. No. 9, 433 P.2d 247, 250 (Or. 1967) (applying principle to fixing of school district boundaries, which the court described as "a legislative function"); Linn Cnty. v. Rozelle, 162 P.2d 150, 165 (Or. 1945) (citing principle in context of case overruling prior interpretation of statutory scheme); State v. Fair, 502 P.2d 1150, 1153 (Or. 1972) (applying principle in context of case announcing new interpretation of state constitution); Nat'l Sur. Corp. v. Smith, 123 P.2d 203, 222–23 (Or. 1942) (Rossman, J., concurring) (recognizing validity of principle in context of statutory and constitutional cases).

116. Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. 37, 65 (2014).

117. Shapiro, *supra* note 4, at 1389. *See also* Kay, *supra* note 116, at 65–66 (noting that "some observers have noted that prospective rulings have been more common in the case of new statutory interpretations than in the case of new common law rules").

legislative change of a statutory rule . . . ."[118] Similarly, it was said over a century ago that: "A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of these rights. To divest them by a change of construction is to legislate retroactively."[119] While the Oregon Supreme Court no longer adheres to the view expressed in the first clause of that quote,[120] the wisdom of the rest of the quote remains vital.

In 1932, the United States Supreme Court upheld the constitutionality of applying changes in statutory interpretation prospectively only. In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, the Montana Supreme Court overruled its prior interpretation of a state statutory scheme and then refused to apply the change to the case at hand, instead applying the change prospectively only.[121] The party who achieved the change but did not enjoy its benefits appealed to the United States Supreme Court, arguing that application of the prospectivity principle violated the federal constitution.[122] The Court disagreed:

> We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly, that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted. On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. The alternative is the same whether the subject of the new decision is common law or statute. The choice for any state may be determined by the juristic philosophy of the judges of her

118. 20 AM. JUR. 2d *Courts* § 153 (2008).

119. J. G. SUTHERLAND & JOHN LEWIS, STATUTES & STATUTORY CONSTRUCTION 906 (2d ed. 1904).

120. Farmers Ins. Co. v. Mowry, 261 P.3d 1, 6 (Or. 2011)

121. Great N. Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).

122. *Id.* at 363–64.

courts, their conceptions of law, its origin and nature.[123]

Great Northern was cited and discussed in 10 A.L.R.3d 1371 (1966), which, in turn, was cited approvingly by the Oregon Supreme Court in *Holder*.[124]

In short, there is ample authority for the proposition that the Oregon Supreme Court "has discretion to give [prospective] effect to its interpretation of a legislative enactment."[125]

C. Constitutionality of the Prospectivity Principle in Federal Court

The question remains whether the prospectivity principle is constitutional, which is the concern that prompted the *Halperin* court's footnote. As mentioned above, the United States Supreme Court in *Great Northern* in 1932 affirmed the constitutionality of the prospectivity principle, a principle that it had applied as far back as 1863. In 1965, the Court in *Linkletter v. Walker* adopted a three-factor test for determining when a new rule of criminal law should apply prospectively or retroactively.[126] In 1971, the Court in *Chevron Oil Co. v. Huson* applied the same test to civil cases.[127] As noted above, that test is similar to the one employed by the Oregon Supreme Court.

Despite those consistent holdings, several United States Supreme Court justices disapproved of the three-factor test, or at least its application to new rules on a case-by-case basis (known as selective prospectivity).[128] In a series of highly fractured decisions in the late 1980s and early 1990s, the Court largely abandoned that test.

In 1987, in *Griffith v. Kentucky*, the Court held that new rules of criminal law always apply retroactively to the rule-announcing decision and all cases then pending in trial courts or on direct review.[129] The Court reasoned that any other course would "violate[] basic norms of constitutional adjudication": the justiciability norm that the Court decide only "cases" and "controversies"; the separation of powers norm that prospective application of new rules sounds more

123. *Id.* at 364–66 (emphasis added) (citations and footnotes omitted).

124. Holder v. Petty, 514 P.2d 1105, 1107 (Or. 1973).

125. Halperin v. Pitts, 287 P.3d 1069, 1077 (Or. 2012).

126. Linkletter v. Walker, 381 U.S. 618, 636 (1965).

127. Chevron Oil Co. v. Huson, 404 U.S. 97, 106–07 (1971).

128. *See* United States v. Johnson, 457 U.S. 537, 545–46 & n.9 (1982) (so noting).

129. Griffith v. Kentucky, 479 U.S. 314, 316 (1987).

in legislation than adjudication; and the equal treatment norm that "similarly situated defendants" should be treated "the same."[130] Regarding equal treatment, the Court was concerned that, if it applied a new rule to the parties to the rule-announcing decision, then it would be unfair not to apply that rule to parties to other cases then pending.[131] That concern implicated only selective prospectivity, not pure prospectivity (when a new rule is not even applied to the parties to the rule-announcing decision). Nonetheless, lower courts have understood *Griffith* to prohibit both selective and pure prospectivity in the criminal context.[132]

Two years after *Griffith*, the Court held in *Teague v. Lane*, that new rules of criminal law never apply to cases in which final judgments have been rendered, *i.e.*, collateral attacks (habeas corpus cases), unless the new rule places certain conduct beyond the legislative power to proscribe or unless it is a watershed rule of criminal procedure.[133] As support for that holding, the Court cited the importance—to society and the judicial system—of finality in the context of criminal convictions.[134] Together, *Griffith* and *Teague* overruled *Linkletter* and imposed a one-size-fits-all approach to the question of whether a new rule of criminal law should be applied prospectively or retroactively and how much. Answer: Always retroactively, always to the case at hand and other pending cases, but almost never to cases already finally decided.

The Court then turned to the civil context. In 1990, in *American Trucking Ass'ns, Inc. v. Smith*, four justices wrote that there were important distinctions between civil and criminal cases, such that the three-factor test of *Chevron Oil* should continue to apply despite *Griffith*.[135] Four justices dissented, expressing the view that the rule of *Griffith* should apply in the civil context as well, *i.e.*, that new rules of civil law should always apply retroactively to all cases then pending.[136] The dissent also asserted, based on reasoning similar to

130. *Id.* at 322–24.

131. *Id.* at 327.

132. *See, e.g.*, Glazner v. Glazner, 347 F.3d 1212, 1217 (11th Cir. 2003) (en banc) ("[F]or newly announced rules governing criminal prosecutions, the Supreme Court has completely rejected both pure prospectivity . . . and modified prospectivity . . . .").

133. Teague v. Lane, 489 U.S. 288, 310–11 (1989).

134. *Id.* at 309.

135. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 199–200 (1990) (plurality opinion).

136. *Id.* at 212–24 (Stevens, J., dissenting).

that of *Teague*, that new rules of civil law should never apply to cases in which final judgments have been rendered (based on *res judicata*) or for which the statute of limitations has run.[137] Justice Scalia "share[d]" the dissent's "perception that prospective decision-making is incompatible with the judicial role," but he concurred on other grounds.[138]

The Court returned to the issue one year later in *James B. Beam Distilling Co. v. Georgia*, and got a similarly fractured result.[139] Three justices wrote that *Chevron Oil* should be overruled based on the same rationale as *Griffith*.[140] Justices Souter and Stevens reserved the question of pure prospectivity, but held that, if the Court applies a new rule to the parties to the case, then that rule must be applied to all cases then pending, even if it is not applied to cases already finally decided or beyond the statute of limitations.[141] Justice White agreed with those two justices, except he expressed the view that pure prospectivity is permissible and *Chevron Oil* should continue to guide that analysis.[142] The remaining three justices argued that *Chevron Oil* should not be overruled as to either pure or selective prospectivity.[143]

In 1993, in *Harper v. Va. Dep't of Taxation*, the Court finally brought some clarity to its civil cases regarding prospectivity by adopting the holding of Justice Souter's opinion in *Beam*, which was the narrowest ground for the judgment in *Beam*.[144] The Court further stated, based on that opinion, that even if pure prospectivity is permissible, the choice whether or not to apply a new rule in the rule-announcing decision cannot be based on "the equities of the particular case," such as whether a party actually relied on the old rule or would be prejudiced by application of the new rule.[145] Rather, the Court limited the *Chevron Oil* inquiry to a "generalized inquiry" into "equitable and reliance interests."[146] Four justices disagreed in *Harper*, continuing to adhere to a broad view of prospectivity.[147]

137. *Id.* at 214.
138. *Id.* at 201 (Scalia, J., concurring).
139. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991).
140. *Id.* at 548–49 (Scalia, J., concurring).
141. *Id.* at 540 (plurality opinion).
142. *Id.* at 544–46 (White, J., concurring).
143. *Id.* at 552 (O'Connor, J., dissenting).
144. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 96–97 (1993).
145. *Id.* at 95 n.9.
146. *James B. Beam Distilling Co.*, 501 U.S. at 543.
147. *Harper*, 509 U.S. at 110 (Kennedy, J., concurring); *id.* at 113 (O'Connor, J.,

The decisions in *Griffith* and its progeny had a significant effect in Oregon. In *Page v. Palmateer*, the Oregon Supreme Court held, based on *Teague* and *American Trucking*, that it could not apply on collateral review a new rule of federal law announced by the United States Supreme Court, unless that Court had held that the rule applied to cases on collateral review (such as *Page*, a post-conviction proceeding).[148] Accordingly, the Oregon Supreme Court partly disavowed its 1972 statement in *Fair* that "we are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires."[149]

Page, however, was incorrect in that regard, as the United States Supreme Court later made clear in *Danforth v. Minnesota*.[150] There, the Court wrote that *Page*'s reliance on *American Trucking* was "misplaced, and its decision to change course [from *Fair*] was misguided."[151] The Court explained that none of the *Griffith* line of cases "places a limit on state authority to provide remedies for federal constitutional violations"; rather, while states must give new federal rules at least as much retroactive effect as the Court does, states are free to give those rules greater retroactive effect as well.[152]

D. Constitutionality of the Prospectivity Principle in Oregon

In *Halperin*, the Oregon Supreme Court cited *Griffith*, *Beam*, and *Harper* for the proposition that "[t]he exercise of judicial discretion to apply interpretations of statutes only prospectively may raise significant constitutional issues concerning justiciability, equal treatment, and separation of powers."[153] It is true that those cases noted those issues (albeit not with specific regard to statutory interpretation). Yet there are substantial additional considerations that the court in *Halperin* did not take into account.

First, while the *Griffith* line of cases limited the circumstances

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dissenting).

148. Page v. Palmateer, 84 P.3d 133, 137 (Or. 2004) ("Oregon courts are *not* free to apply pronouncements of *federal* constitutional law to a broader range of cases than federal law requires.") (empahsis added).

149. *Id.* at 136 (quoting State v. Fair, 502 P.2d 1150, 1152 (Or. 1972)).

150. Danforth v. Minnesota, 552 U.S. 264, 276–77 (2008).

151. *Id.* at 277 n.14.

152. *Id.* at 287–88.

153. Halperin v. Pitts, 287 P.3d 1069, 1077 n.4. (Or. 2012).

under which a federal court can apply the prospectivity principle, based on federal constitutional considerations, the Court has never held that it is unconstitutional for a federal court announcing a new rule of civil law to apply that rule purely prospectively, *i.e.*, not even to the parties to the rule-announcing decision.[154] *Halperin* recognized as much, noting that *Griffith*, *Beam*, and *Harper* involved only the issue of "selective prospectivity," not pure prospectivity.[155]

Second, the limits that the Court has placed on the prospectivity principle apply only for federal courts and federal rules of law. State courts can give federal rules greater retroactive effect than federal law requires, per *Danforth*, and state courts remain free under *Great Northern* to apply new state rules of law prospectively or retroactively however they see fit.[156] As one state court recently explained:

> When announcing a new common-law rule, a new interpretation of a State statute, or a new rule in the exercise of our superintendence power, there is no constitutional requirement that the new rule or new interpretation be applied retroactively, and we are therefore free to determine whether it should be applied only prospectively.[157]

Indeed, as Justice Harlan, who inspired the *Griffith* line of cases, once noted, "*state* courts may be *compelled* in some situations by particular provisions of *the Federal Constitution* to apply certain rules prospectively only."[158]

Third, consistent with the foregoing authorities, the Oregon Supreme Court recognized and applied the prospectivity principle

154. *See* Nunez-Reyes v. Holder, 646 F.3d 684, 690–92 (9th Cir. 2011) (en banc) (recognizing and applying a new civil rule prospectively only).

155. *Halperin*, 287 P.3d at 1077 n.4.

156. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100 (1993) (citing *Great Northern* as supporting "[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law"); DiCenzo v. A Best Prods. Co., 897 N.E.2d 132, 155–56 (Ohio 2008) (noting continued vitality of prospectivity principle in state courts and applying the principle).

157. Commonwealth v. Dagley, 816 N.E.2d 527, 533 n.10 (Mass. 2004). *See also* Galiastro v. MERS, 4 N.E.3d 270 (Mass. 2014) (applying *Dagley* in the context of a new interpretation of a mortgage statute); Kay, *supra* note 116, at 50 n.83 (citing recent state court decisions applying the prospectivity principle).

158. Mackey v. United States, 401 U.S. 667, 698 (1971) (Harlan, J., concurring) (citing Gelpcke v. Dubuque, 68 U.S. 175 (1863), for that proposition) (emphasis in original) (quoted in American Trucking Ass'ns Inc. v. Smith, 496 U.S. 167, 223 n.12 (1990) (Stevens, J., dissenting)).

multiple times after *Harper* and before *Halperin*. In 1996, three years after *Harper* was decided, the Oregon Supreme Court applied a new rule of Oregon civil law prospectively only.[159] The court did the same thing in 2003 in *Schlimgen*.[160] In 2002, in *Kambury*, the court declined to apply a "new" rule prospectively only, not because it lacked authority to do so, but because it felt the rule it announced in that case was not actually new.[161] Even in *Page*, decided in 2004, where the court errantly held that it lacked authority to apply new rules of federal law more retroactively than federal law requires, the court recognized that "it was free to determine the degree to which a new rule of Oregon constitutional law should be applied retroactively."[162] In short, there is ample authority for the continuing vitality of the prospectivity principle in Oregon, despite the *Griffith* line of cases.

Perhaps the court in *Halperin* did not mean to say that it *could not* apply the prospectivity principle after *Griffith*. Perhaps the court meant merely that it *would not* do so because it agreed with *Griffith* that the principle runs afoul of constitutional norms. But the federal constitutional norms that animated *Griffith* and its progeny do not condemn Oregon's continued application of the prospectivity principle. The Court identified three such norms: equal treatment, justiciability, and separation of powers.[163]

With regard to equal treatment, the Court in *Beam* required a "generalized inquiry" into "equitable and reliance interests," rather than an inquiry based on actual reliance or "the equities of a particular case."[164] Oregon precedent already applies that inquiry, as illustrated by *Dean*, where the court applied a new rule prospectively without regard to any party's actual reliance on the old rule.[165] Oregon precedent merely requires that the losing party "might reasonably have relied" on the old rule,[166] an objective and generalized inquiry

159. Peterson v. Temple, 918 P.2d 413, 419 (Or. 1996).

160. Schlimgen v. May Trucking Co., 61 P.3d 923, 928 (Or. 2003).

161. Kambury v. DaimlerChrysler Corp., 50 P.3d 1163, 1166–67 (Or. 2002).

162. Page v. Palmateer, 84 P.3d 133, 138 (Or. 2004). *See also id.* at 136–37 & n.1 (recognizing that *Fair* sets forth the test for determining "whether to apply state law retroactively" and that "Oregon courts are free to apply pronouncements of *Oregon* constitutional law that have a federal equivalent to a broader range of cases than the federal constitution requires . . . .") (emphasis in original).

163. Halperin v. Pitts, 287 P.3d 1069, 1077 n.4. (Or. 2012).

164. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543 (1991).

165. Dean v. Exotic Veneers, Inc., 531 P.2d 266, 272 (Or. 1975).

166. Colhouer v. Union Pac. R.R. Co., 551 P.2d 1291, 1293 (Or. 1976).

that comports with *Beam*.

In addition, the equal treatment concern does not arise when a new rule is applied purely prospectively, *i.e.*, not even to the parties to the rule-announcing decision, because then *neither* those parties *nor* the parties to any other pending or previously adjudicated case will enjoy the benefit of the new rule. All parties are treated alike. While the Oregon Supreme Court has in the past applied the prospectivity principle both purely[167] and selectively,[168] the court could, if it felt constitutionally compelled to do so, abandon selective prospectivity and thereby satisfy the concern, as the federal courts have done.

Yet the court ought not feel so compelled. In citing equal treatment as a concern, the United States Supreme Court has never held that selective prospectivity actually violates the Equal Protection Clause of the Fourteenth Amendment or its Fifth Amendment counterpart (federal due process). Moreover, as Justice O'Connor has explained, a party who has not argued against retroactive application of a new rule is not similarly situated to a party who has, regardless when those parties' cases are decided.[169]

Nor do the justiciability concerns mentioned by the Court require Oregon to abandon the prospectivity principle. The *Griffith* line of cases relied on the "cases" or "controversies" provision of Article III of the federal constitution. Yet the Oregon Supreme Court has held:

> The Oregon Constitution contains no "cases" or "controversies" provision. Moreover, the United States Supreme Court has determined that "the constraints of Article III do not apply to state courts . . . ." For that reason, we cannot import federal law regarding justiciability into our analysis of the Oregon Constitution and rely on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government."[170]

In *Kellas v. Department of Corrections*, the court upheld the validity

167. Peterson v. Temple, 918 P.2d 413 (Or. 1996).

168. Holder v. Petty, 514 P.2d 1105 (Or. 1973).

169. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 121–22 (1993) (O'Connor, J., dissenting). *See also* American Trucking Ass'ns Inc. v. Smith, 496 U.S. 167, 198–99 (1990) (plurality opinion) (noting other reasons why the "equal treatment" concern ought not to be a concern).

170. Kellas v. Dep't of Corr., 145 P.3d 139, 143 (Or. 2006) (quoting Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989)).

of a state statute that authorized "any citizen to initiate a judicial action to enforce matters of public interest" against a challenge that the statute violated the justiciability requirement of the Oregon Constitution because it did not require parties to have a private interest in the outcome.[171] Thus, even if one were to characterize a purely prospective judicial decision as an action to enforce the "public interest" rather than a private interest of the parties, the court's authority to announce such a decision would not violate the justiciability requirement of the Oregon Constitution under *Kellas*.[172] It is true that in Oregon the judicial power is "limited to the adjudication of an existing controversy," such that moot cases cannot be decided,[173] but the existence of such a controversy will always exist where the parties continue to dispute (or will be divergently affected by) whether a new rule of law will apply to their case.

The final concern mentioned in the *Griffith* line of cases is separation of powers. The concern is that, by announcing a new rule with prospective-only application, a court assumes the legislative role of saying what the law shall be, rather than the judicial role of saying what the law is.[174] To the degree that this concern is based on the federal constitution, it cannot condemn state application of the prospectivity principle, because "the separation-of-powers principles that the Constitution imposes upon the Federal Government do not apply against the States."[175] Nor does the Oregon Constitution condemn the principle. The Oregon Supreme Court has explained:

> [A] separation of powers analysis under the Oregon Constitution involves two inquiries: (1) whether one department of government has "unduly burdened" the actions of another department where the constitution has committed the responsibility for the governmental activity in question to that latter department; and (2) whether one department has performed functions that the constitution commits to another department.[176]

171. *Id.* at 146.

172. *See id.* at 143 (holding that that requirement contains no criterion that "a judicial decision will affect [a party] in a practical way").

173. Yancy v. Shatzer, 97 P.3d 1161, 1170–71 (Or. 2004).

174. Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987).

175. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 719 (2010) (plurality opinion).

176. Macpherson v. DAS, 130 P.3d 308, 318 (Or. 2006).

Does the prospectivity principle "unduly burden" the legislature's ability to pass laws? Certainly not where a court decision interprets the constitution, as that responsibility is not committed to the legislature, but to the courts.[177] The same goes for statutory interpretation and development of the common law, as the legislature can always override a court decision by passing new legislation.[178]

Nor does a court perform a legislative function by applying the prospectivity principle. It is true that "to declare what the law is or has been is a judicial power; to declare what the law shall be is legislative."[179] Yet a court decision which announces a new rule of law to be applied prospectively only does not simply "declare what the law shall be." The court declares what the law *is* but declines to apply that law to the parties at hand (or parties to other pending or final cases) for equitable reasons that are familiar features of the law. The decision whether to apply a new rule prospectively or retroactively is part of the stare decisis analysis that the court undertakes when deciding whether to overrule a prior decision in the first place.[180] And even if the prospectivity principle creates some overlap between legislative and judicial functions, that overlap is permissible. "Because the roles of governmental actors frequently overlap, th[e Oregon Supreme C]ourt has held that the separation of powers doctrine does not require an 'absolute separation between the departments of government.'"[181] Thus, the court has upheld the legislature's ability to revive claims previously dismissed as untimely by enacting a longer, retroactive statute of limitations.[182] If the legislature can legislate retroactively without violating separation of powers, then the court can adjudicate prospectively without violating

177. *See* Cooper v. Eugene Sch. Dist., 723 P.2d 298, 303 n.7 (Or. 1986) (recognizing courts "have the last word in interpreting the constitution").

178. *See* U.S. Nat'l Bank v. Boge, 814 P.2d 1082, 1086 (Or. 1991) (recognizing legislature is "free to displace the common law"); Gorham v. Swanson, 453 P.2d 670, 673 (Or. 1969) ("If we misinterpreted the statute the legislature . . . may in the future amend the statute to reject our interpretation and clarify its purpose.").

179. McFadden v. Dryvit Sys., Inc., 112 P.3d 1191, 1197 (Or. 2005) (quoting Macartney v. Shipherd, 117 P. 814, 817 (Or. 1911)).

180. *See* American Trucking Ass'ns Inc. v. Smith, 496 U.S. 167, 197–99 (1990) (plurality opinion) ("[P]rospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding," by avoiding hardship to those who relied on the old law).

181. *Macpherson*, 130 P.3d at 318 (quoting Rooney v. Kulongoski, 902 P.2d 1143, 1151 (Or. 1995)).

182. *McFadden*, 112 P.3d at 1198.

separation of powers.

For the reasons stated above, none of the constitutional concerns that animated the *Griffith* line of cases condemns Oregon's continued application of the prospectivity principle.

V. CONCLUSION

The Oregon Supreme Court in *Halperin* declined to apply the new rule of law it announced in that case prospectively only, for two reasons. As explained above, both of those reasons were incorrect. Under the court's prior precedent, the court should have applied the prospectivity principle. Although the plaintiffs in *Halperin* did not cite cases involving statutory interpretation, they did cite cases concerning trial practice, which is what *Halperin* also concerned. In addition, the plaintiffs in *Halperin* reasonably relied on the court's prior dictum in *Bennett*, a factor which the court previously had held compelled application of the prospectivity principle.[183] Finally, the plaintiffs in *Halperin* were not asking for selective prospectivity; they were asking for pure prospectivity,[184] which the United States Supreme Court has never rejected in the civil context, and which state courts remain free to apply in both civil and criminal cases.

I hope that this article will help future litigants to persuade the Oregon Supreme Court to revisit *Halperin*. Not only is application of the prospectivity principle in Oregon permissible; it sometimes is constitutionally required. The principle applies in common law cases, as well as in cases involving statutory and constitutional interpretation. The court should not abandon its lengthy and (until *Halperin*) consistent recognition of the principle based on either constitutional or prudential grounds.

183. *See* Dean v. Exotic Veneers, Inc., 531 P.2d 266, 272 (Or. 1975) (applying principle where party might reasonably have relied on dictum in prior Oregon Supreme Court decision); Falk v. Amsberry, 626 P.2d 362, 366 (Or. 1981) (holding that "it was error for the court of appeals to apply the new procedural requirement to this case tried prior to its adoption").

184. Halperin v. Pitts, 287 P.3d 1069, 1077 (Or. 2012).