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 pri

> 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]

> 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

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sense because, as a matter of preservation law, parties generally are not obligated to assert in the trial court that decisions of the Oregon

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]

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 statementsand thsu.1(TJ0.00)3nlys(y r)48

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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 ne

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

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

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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]

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

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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 *GrifC*

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

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]

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

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

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 legisl

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 never02[(T1.52 414.2429 470.641Asking ne5(e)-2.)8.3(5)7.6 pre0.641Aci7.9(t)-