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## Missing from Oregon's Takings Clause: The Right to a Jury Trial of Compensation in Eminent Domain Proceedings

Although it may be surprising to some, no federal constitutional right to a jury trial exists for eminent domain actions, since, prior to the adoption of the U.S. Constitution, these actions were not tried to a common law jury. Because Oregon's jury trial constitutional provisions largely mirror those in the U.S. Constitution, the Oregon Constitution provides no further protection in eminent domain proceedings than the Federal Constitution. Although a legislature may guarantee a jury trial by statute, this Comment aims to demonstrate that no such guarantee exists within Oregon's statutes. Thus, a judge could validly deny a litigant's request for a jury trial in an eminent domain proceeding.<sup>1</sup> While this issue has yet to be directly addressed in

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<sup>1</sup> Eminent domain proceedings often address numerous issues regarding the taking in addition to the amount of compensation that is due to the property owner. In Oregon, several of these issues have been clearly established as ones that must be decided by a jury. *E.g.*, *Hawkins v. City of La Grande*, 315 Or. 57, 72, 843 P.2d 400, 408 (1992) (“[W]hether there was substantial interference [by the government] to constitute a taking in fact becomes a jury question.”); *State v. Lundberg*, 312 Or. 568, 574-75, 825 P.2d 641, 645 (1992) (“The question of the highest and best use of a particular property . . . is to be decided by a jury.”); *Thornburg v. Port of Portland*, 233 Or. 178, 194-95, 200, 376 P.2d 100, 108, 110 (1962) (“Ordinarily, in a case of a continuing interference, whether it is substantial enough to constitute a taking will be for the jury to determine. . . . We cannot say, as a matter of law, that jet or rocket

an Oregon appellate opinion, Oregon's newly enacted landmark land use statute, Measure 37,<sup>2</sup> provides opportunities for trial and appellate judges to consider this issue in the near future. To cure any statutory ambiguity and to prevent unnecessary litigation, this Comment argues that the Oregon Constitution should be amended to guarantee the right to have a jury decide "just compensation" for a taking of private property in an eminent domain proceeding.

Part I of this Comment provides background law on the power of eminent domain and describes the constitutional limitations imposed upon this power by federal and state takings clauses. This Part also describes the reasoning of federal and state courts in determining that no constitutional guarantee to a jury trial exists in eminent domain actions. Part II addresses the problem facing an eminent domain litigant in Oregon whose request for a jury trial to determine the measure of compensation required for the taking is opposed. This Part examines Oregon's civil procedure rules and eminent domain statutes for a guarantee to a jury determination of compensation and concludes that the rules and statutes are ambiguous. Further, this Part also discusses steps that other states have taken to guarantee a right to have a jury determine the amount of compensation.

Finally, Part III looks ahead to the potential effect of this uncertainty on Oregon's eminent domain jurisprudence, focusing primarily on the differing preferences of the litigants regarding a jury trial and how Measure 37 may set the stage to debate this issue and resolve it. To arrive at a recommendation for how Oregon should proactively address this uncertainty, this Part will consider several available avenues and possible objections to those proposals.

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or some other kind of noise within 500 feet, or within some other number of feet, of private land might not in a particular case cause a taking for public use. The question in each case must be decided by an appropriate tribunal. Our present constitution places this duty upon the jury."); *City of Salem v. H.S.B.*, 75 Or. App. 556, 560, 707 P.2d 73, 76 (1985) ("Whether [adjacent] parcels have a unity of use . . . is a practical question to be decided by the jury. . . .") (internal quotation marks and citation omitted), *rev'd on other grounds*, 302 Or. 648, 733 P.2d 890 (1987). However, since the analysis in this Comment has no effect on these established jury issues, I will address only eminent domain proceedings where the sole issue is the measure of compensation.

<sup>2</sup> Measure 37, a ballot initiative passed by Oregon voters in 2004 and codified as ORS 197.352, requires governments to pay "just compensation" for any decrease in value to private property caused by most regulations. OR. REV. STAT. § 197.352(1) (2005).

I

BACKGROUND LAW

A. *The Power of Eminent Domain*

“Eminent domain” is the power inherent in a sovereign to take or authorize the taking of any property within its jurisdiction for public use or benefit.<sup>3</sup> The power of eminent domain allows a sovereign to appropriate private property without the consent of the owner and has been characterized as the most significant power of the sovereign, second only to the drafting of soldiers.<sup>4</sup> The U.S. Supreme Court has described the power of eminent domain in this way: “All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand.”<sup>5</sup>

The existence of this power has been rationalized on a conditional title theory, whereby the sovereign, when originally conveying title to all property, impliedly reserved the power to declare a title forfeit when it required the property for its own use.<sup>6</sup> However, the more commonly embraced explanation in the United States is that the power of eminent domain is necessary to prevent recalcitrant individuals from thwarting the government’s efforts to carry out public functions.<sup>7</sup>

Over a century ago, the Oregon Supreme Court confirmed that “[e]very owner of the land holds it subject to be taken for the public use whenever it is necessarily required for that [public] purpose.”<sup>8</sup> In *Kendall v. Post*, the court held that a road supervisor in Western Oregon, entrusted with the duty to maintain all public roads in his district, was authorized to enter upon any pri-

<sup>3</sup> Wm. Ronald Hulen, Comment, *Abusive Exercises of the Power of Eminent Domain—Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200, 200 & n.1 (1968). Only Congress and state legislatures act as the sovereign and have the inherent authority to exercise eminent domain, though they may delegate the power of eminent domain and have done so. The executive branch and municipal governments do not have the power to exercise eminent domain, unless delegated by the sovereign. *Id.* at 200-01.

<sup>4</sup> *Id.* at 200.

<sup>5</sup> *United States v. Lynah*, 188 U.S. 445, 465 (1903), *overruled in part on other grounds by United States v. Chicago*, 313 U.S. 543 (1941).

<sup>6</sup> Hulen, *supra* note 3, at 200.

<sup>7</sup> *Id.*

<sup>8</sup> *Kendall v. Post*, 8 Or. 141, 144 (1879), *available at* 1879 WL 1242, at \*3.

vate land adjoining a road to quarry rock needed to make necessary road repairs.<sup>9</sup> The property owner requested compensation for the rock that had been taken from his land and demanded an injunction to prevent the road supervisor from quarrying any more rock from his property.<sup>10</sup> Although the property owner demonstrated that the same kind of rock could be acquired from nearby land, the court determined that, because the property owner's land was the nearest and most convenient location, the road supervisor had not violated the owner's property rights by intruding upon and obtaining materials from his land.<sup>11</sup>

Although the power of eminent domain inheres in the power of the sovereign, based upon the law of necessity, the authority to exercise this power must be conferred by statute in Oregon.<sup>12</sup> For example, in Oregon, the legislature has authorized the Oregon State Highway Commission to exercise the power of eminent domain for the purpose of acquiring any private property necessary for highway drainage and drainage tunnels.<sup>13</sup> Furthermore, since the State of Oregon cannot construct all public improvements on its own, it may invest a private party with the power of eminent domain through statute.<sup>14</sup>

Once an entity has statutory authority, the procedures for taking private property pursuant to the power of eminent domain are also prescribed by statute.<sup>15</sup> This process is called "condemnation." When the sovereign or its delegee exercises the power of eminent domain and takes private property for a public use without reaching an agreement with the property owner on the value of the property being taken, it institutes a condemnation proceeding to determine the amount of just compensation.<sup>16</sup> Therefore, a condemnation proceeding is a civil case in which the

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<sup>9</sup> *Id.* at 144, 1879 WL 1242, at \*3.

<sup>10</sup> *Id.* at 144, 1879 WL 1242, at \*3.

<sup>11</sup> *Id.* at 144-45, 1879 WL 1242, at \*4.

<sup>12</sup> *Tomasek v. Or. State Highway Comm'n*, 196 Or. 120, 142, 248 P.2d 703, 713 (1952).

<sup>13</sup> OR. REV. STAT. § 366.340(2) (2005).

<sup>14</sup> See *City of Eugene v. Johnson*, 183 Or. 421, 426, 192 P.2d 251, 254 (1948) ("The right of eminent domain, which is an attribute of sovereignty, has been vested by legislative action in subdivisions of the state and in *private corporations devoted to uses in which the public has a right to share.*") (emphasis added).

<sup>15</sup> See generally OR. REV. STAT. §§ 35.205-.625 (2005) (known as the General Condemnation Procedure Act).

<sup>16</sup> See, e.g., *id.* § 35.245(1) ("If the condemner is unable to agree with or locate the owner of the property . . . , then an action to condemn property may be commenced in the circuit court of the county in which the property proposed to be condemned

sovereign or its delegate (the “condemner”)<sup>17</sup> files a “losing” lawsuit against the property owner (the “condemnee”). It is referred to as a “losing” suit since judgment is always entered in favor of the property owner and the condemner is always required to pay the compensation award.<sup>18</sup>

### B. Takings Clauses

Since the power of eminent domain allows a sovereign to infringe upon an individual’s property rights, takings clauses impose constitutional limitations on this power.<sup>19</sup> The Federal Takings Clause provides: “[N]or shall private property be taken for public use, without just compensation.”<sup>20</sup> This clause neither authorizes nor forbids acts of eminent domain; rather, it operates as a conditional limitation that permits the taking of private property for a public use, but only so long as the condemner pays just compensation.<sup>21</sup> For this reason, any statute, whether enacted by Congress or a state legislature, authorizing condemnation of private property for public use without providing for just compensation would violate the Federal Takings Clause.<sup>22</sup> Furthermore, if the sovereign exercises its power of eminent domain without bringing an action to condemn, the owner of the property taken may go to court and sue to recover its value.<sup>23</sup> To deny the property owner this right would deprive him of the con-

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... is located.”); *Cereghino v. State Highway Comm’n*, 230 Or. 439, 443-44, 370 P.2d 694, 696 (1962).

<sup>17</sup> See, e.g., § 35.215(1) (“‘Condemner’ means the state, any city, county, school district, municipal or public corporation, political subdivision or any instrumentality or any agency thereof or a private corporation that has the power to exercise the right of eminent domain.”). Although the ORS utilizes a spelling of “condemner” that varies from the more common “condemnor,” this Comment uses the ORS spelling for consistency with those statutes. See, e.g., BLACK’S LAW DICTIONARY 311 (8th ed. 2004) (noting “condemner” as an alternate spelling), 1 NICHOLS’ THE LAW OF EMINENT DOMAIN § 1.141[4] (3d ed. 1987) [hereinafter NICHOLS].

<sup>18</sup> See, e.g., *Cereghino*, 230 Or. at 444, 370 P.2d at 696.

<sup>19</sup> See, e.g., U.S. CONST. amend. V; OR. CONST. art. I, § 18.

<sup>20</sup> U.S. CONST. amend. V.

<sup>21</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>22</sup> See *id.*

<sup>23</sup> See, e.g., *Cereghino*, 230 Or. at 444, 370 P.2d at 696. Another example of when a government may have failed to institute a condemnation action, and the property owner must go to court to obtain compensation, is an “inverse condemnation.” Inverse condemnation occurs when governmental action falls short of acquisition of title in, or occupancy of, the property, but its effects are so complete as to deprive the owner of all or most of his interest in the property. In these cases, the property owner institutes an action against the government to obtain just compensation. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378-79 (1945).

stitutional protection afforded by the Takings Clause.<sup>24</sup>

For example, in *United States v. Armstrong*, shipbuilders who were parties to a contract with the U.S. government alleged that the government violated the Takings Clause when it transferred their liens without paying compensation.<sup>25</sup> Because these liens were compensable property interests within the meaning of the Takings Clause, and the transfer of the liens to the government destroyed all of the laborers' property rights under them, the U.S. Supreme Court held that compensation was due under the Takings Clause.<sup>26</sup> Thus, the Takings Clause bars the federal government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>27</sup>

The Federal Takings Clause has been incorporated by the Fourteenth Amendment of the U.S. Constitution to apply against the states as well as the federal government.<sup>28</sup> Therefore, the Federal Takings Clause applies to state condemnation actions regardless of any comparable provision in a state constitution.<sup>29</sup> Oregon's takings clause provides that "[p]rivate property shall not be taken for public use . . . without just compensation; nor except in the case of the state, without such compensation first assessed and tendered."<sup>30</sup> Like many other states, Oregon's eminent domain jurisprudence has largely adopted that of the U.S. Supreme Court because the language and meaning of the Oregon takings clause is nearly identical to its federal counterpart.<sup>31</sup>

<sup>24</sup> See, e.g., *Cereghino*, 230 Or. at 444-45, 370 P.2d at 696-97 (referring specifically to the Oregon takings clause but stating that it is "identical in language and meaning" to the Federal Takings Clause).

<sup>25</sup> *Armstrong*, 364 U.S. at 41-42.

<sup>26</sup> *Id.* at 49. Three dissenting justices disagreed with the majority's contention that the government had exercised its power of eminent domain, thereby subjecting it to the Fifth Amendment. See *id.* (Harlan, J., dissenting) (joining Justice Harlan's dissent were Justices Frankfurter and Clark).

<sup>27</sup> *Id.* (majority opinion).

<sup>28</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897)).

<sup>29</sup> See *id.*

<sup>30</sup> OR. CONST. art. I, § 18 (providing an exception that, when the condemner is the state, it may pay compensation after the taking). Oregon's takings clause has been amended twice: first in 1920 and subsequently in 1924. The primary purpose of these amendments was to further clarify the meaning of "public use." Since compensation is the focus of this Comment, the amendments to the takings clause to define and clarify a public use are not relevant to this Comment.

<sup>31</sup> See *supra* note 24.

C. *Eminent Domain Actions: An Exception to the Constitutional Right to a Jury Trial*

I. *U.S. Constitution*

Although a constitutional right to a jury trial exists in certain civil cases, an eminent domain action is not one of those cases.<sup>32</sup> The Seventh Amendment of the U.S. Constitution provides that “[i]n [s]uits at common law . . . the right of trial by jury shall be preserved.”<sup>33</sup> In these suits, issues that a jury would have heard at common law must be submitted to the jury to preserve this right.<sup>34</sup> Therefore, the Seventh Amendment merely preserves the right to a jury as the right existed at common law prior to the adoption of the amendment in 1791.<sup>35</sup> To determine whether the right to a jury trial was preserved, the court must determine whether the action had a common law antecedent.<sup>36</sup> Since “the jury’s role in estimating just compensation in condemnation proceedings was inconsistent and unclear at the time the Seventh Amendment was adopted,” the Court has consistently held that there is no constitutional right to a jury in these proceedings.<sup>37</sup> Furthermore, the Due Process Clause of the Fifth Amendment does not require a jury trial in civil cases where a jury was not employed at the time the Constitution was adopted.<sup>38</sup>

The U.S. Supreme Court considers it long-settled that the U.S. Constitution confers no right to a jury trial in eminent domain

<sup>32</sup> *E.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711 (1999); *see also* 1A NICHOLS, *supra* note 17, § 4.105[4] (“With regard to the claim that complainant is entitled to have his compensation assessed by a jury, it has so often been decided that this is not a constitutional requisite that it cannot be any longer regarded as an open question.”) (citation omitted).

<sup>33</sup> U.S. CONST. amend. VII.

<sup>34</sup> *City of Monterey*, 526 U.S. at 718.

<sup>35</sup> *See id.* at 708, 718.

<sup>36</sup> *Id.* at 708. Even if an action did not exist when the Seventh Amendment was adopted, the Amendment’s jury guarantee extends to statutory claims unknown to the common law so long as the claims can be said “to sound basically in tort, and seek legal relief.” *Id.* at 709 (internal quotation marks omitted). For this reason, claims brought under 42 U.S.C. § 1983 have been determined to be actions at law even though they were created by statute subsequent to the adoption of the U.S. Constitution, because they sound in tort and seek damages for a constitutional violation, which is a legal remedy. *Id.* at 709-10. Since eminent domain actions did exist, but were not tried before a common law jury, the right to a jury trial was never preserved. *See id.* at 718.

<sup>37</sup> *Id.* at 711 (citing *United States v. Reynolds*, 397 U.S. 14, 18 (1970) and *Bauman v. Ross*, 167 U.S. 548, 593 (1897)).

<sup>38</sup> *See id.*

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proceedings.<sup>39</sup> However, the Federal Rules of Civil Procedure (FRCP) provide the opportunity for a jury determination of compensation to litigants in a federal condemnation proceeding.<sup>40</sup> Since this Comment is concerned only with the exercise of the power of eminent domain by the State of Oregon and not the federal government, rights conferred by the FRCP are irrelevant to this analysis. In fact, the rules explicitly defer to a state's grant of a right to a jury trial for any particular issue in a condemnation proceeding.<sup>41</sup>

## 2. *Oregon Constitution*

Like the U.S. Constitution, the Oregon Constitution does not guarantee the right to a jury trial in eminent domain proceedings.<sup>42</sup> Although the Oregon Constitution ensures that the right to a jury trial "shall remain inviolate" in all civil cases<sup>43</sup> and that "[i]n actions at law, where the value in controversy shall exceed \$750, the right of trial by jury shall be preserved,"<sup>44</sup> Oregon courts have determined that neither of these provisions guarantee a jury trial in eminent domain proceedings.<sup>45</sup> Like the Seventh Amendment of the U.S. Constitution, these provisions

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<sup>39</sup> *Reynolds*, 397 U.S. at 18.

<sup>40</sup> FED. R. CIV. P. 71A(h) ("If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal *any party may have a trial by jury of the issue of just compensation* by filing a demand therefor . . . .") (emphasis added). In *United States v. Reynolds*, the condemnee claimed that additional land taken for construction of recreational facilities adjacent to a reservoir was not within the original scope of the project that required condemnation of his property. 397 U.S. at 19. This scope-of-the-project issue was submitted to the jury over contentions by the government that it was an issue for the judge and not the jury. *Id.* The Court concluded that this was an issue to be ruled on by the judge because FRCP 71A(h) clearly confines a jury's role in federal condemnation proceedings to determining the compensation award. *Id.* at 20. When a jury is afforded under FRCP 71A(h), the judge decides all issues other than compensation, providing the judge a broader role in condemnation proceedings than in conventional jury trials. *Id.*

<sup>41</sup> FED. R. CIV. P. 71A(k) ("The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.").

<sup>42</sup> See *Moore Mill & Lumber Co. v. Foster*, 216 Or. 204, 225-26, 336 P.2d 39, 49 (1959).

<sup>43</sup> OR. CONST. art. I, § 17.

<sup>44</sup> OR. CONST. art. VII, § 3.

<sup>45</sup> *Moore Mill*, 216 Or. at 225-26, 336 P.2d at 49.



preserve the right to a jury trial only in civil cases where a jury trial was customary when the Oregon Constitution was drafted in 1857.<sup>46</sup> The provisions in the Oregon Constitution guaranteeing a right to a jury trial entitle individuals only to a continuation of the old methods and do not create a right to a jury in proceedings in which a jury had never been employed at common law before the adoption of the Oregon Constitution.<sup>47</sup>

As early as 1879, the Oregon Supreme Court in *Kendall v. Post* determined that the Oregon Constitution does not guarantee a right to a jury trial in eminent domain actions, even to determine the measure of just compensation.<sup>48</sup> In that case, a road supervisor quarried rock from a property owner's yard to repair a road, trampling grass and a garden on the property in the process.<sup>49</sup> The court determined that the constitutional right-to-jury-trial provision requiring that "in all civil cases the right of trial by jury shall remain inviolate" does not apply to eminent domain actions.<sup>50</sup> Instead, the court determined that this provision applies as a "safeguard" to actions in "courts of justice," which eminent domain actions are not.<sup>51</sup> The court then quotes a prominent treatise author:

"The determination of the question, 'What is the *value of property* taken, or what is the *amount of damages* sustained by the taking?' is undeniably judicial in its nature and peculiarly adapted for decision of a jury under the direction of the court. Yet it has been held that the ordinary provision as to the right of trial by jury, in civil cases, has no relation to original assessments in such cases, and that in the absence of special provision in the organic law, giving the right to have a jury assess the damages, it is competent for the legislature to provide for assessments by any other just mode, and to conclude the owner, as to the amount, without giving him the right to be heard before a jury."<sup>52</sup>

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<sup>46</sup> *Id.* at 225.

<sup>47</sup> *Id.* Although the Oregon Supreme Court has determined that the right to a jury trial should be extended to "like cases" as well, there are civil cases in which there is no constitutional guarantee to a jury trial because they lack a common law antecedent. *Cornelison v. Seabold*, 254 Or. 401, 405, 460 P.2d 1009, 1010-11 (1969). Examples of actions with no common law antecedent include commitment for mental incapacity and determination of whether a relative is responsible for welfare payments once a family member has been incapacitated. *Id.* at 405, 460 P.2d at 1011.

<sup>48</sup> *Kendall v. Post*, 8 Or. 141, 146 (1879), available at 1879 WL 1242, at \*4.

<sup>49</sup> *Id.* at 143, 1879 WL 1242, at \*3.

<sup>50</sup> *Id.* at 146, 1879 WL 1242, at \*4.

<sup>51</sup> *Id.* at 146, 1879 WL 1242, at \*4.

<sup>52</sup> *Id.* at 146, 1879 WL 1242, at \*4 (citation omitted).

Relying upon this reasoning, the court determined that a law providing for an assessment of the property owner's damages to be determined by a county court and not by a jury was constitutional.<sup>53</sup>

Eighty years after *Kendall*, the Oregon Supreme Court continued to express the sentiment of the case, even quoting it. The seminal case in this area in Oregon is *Moore Mill & Lumber Co. v. Foster*, which concerned two consolidated condemnation actions for easements over pieces of property for a right of way to construct a logging road.<sup>54</sup> The court in *Moore Mill* claimed that it was satisfied that none of the right-to-jury-trial constitutional provisions apply to eminent domain proceedings.<sup>55</sup> Rather, the court confirmed that these provisions merely preserve the method of trial for the classes of cases in which it was employed prior to the adoption of the constitution, of which eminent domain is not one.<sup>56</sup>

## II

### THE PROBLEM

#### A. Litigating Condemnation Cases

The exercise of the power of eminent domain can result in a trial in several circumstances, including when the condemnee is dissatisfied with the compensation offered by the condemner.<sup>57</sup>

<sup>53</sup> *Id.* at 146, 1879 WL 1242, at \*4. A careful review of Oregon appellate court opinions regarding this issue turns up a case decided by the Oregon Supreme Court only two years after *Kendall*, *Oregonian Railway Co. v. Hill*, 9 Or. 377 (1881), available at 1881 WL 1398. Interestingly, the court deciding this case was of an entirely different makeup from that which decided *Kendall*. Although the opinion in *Hill* refers to assessment of damages by a jury, this case stands only for the principle that a trial to determine compensation is required to comply with the statute authorizing condemnation of private property by a private corporation. See *Oregonian Ry. Co.*, 9 Or. at 385-86, 1881 WL 1398, at \*6. Since the circuit court had issued a default judgment against the condemnee, the measure of damages was fixed by the value of the land given by the private corporation (condemner) in its answer, rather than being assessed by either a court or jury. *Id.* at 378-79, 1881 WL 1398, at \*2. Furthermore, regardless of this defect, the court concluded that the circuit court could not issue a judgment that conveyed the private property to the condemner without the condemner first compensating the property owner for the taking. *Id.* at 385, 1881 WL 1398, at \*6.

<sup>54</sup> 216 Or. 204, 208, 336 P.2d 39, 41 (1959).

<sup>55</sup> *Id.* at 228, 336 P.2d at 50.

<sup>56</sup> *Id.* at 225, 336 P.2d at 49.

<sup>57</sup> See 7 NICHOLS, *supra* note 17, § G1.05. First, the condemnee may believe that the taking was unjustified or improperly carried out, and may wish to challenge the methods employed by the condemner, or to challenge its authority to condemn.

Although the condemner must first negotiate with the condemnee, if the condemnee refuses to accept the condemner's offer of compensation, the condemner is actually the party that files the lawsuit to have the measure of "just compensation" determined in a judicial proceeding.<sup>58</sup> While there is no constitutional right to a jury trial, as discussed in Part I.C, is either party to an eminent domain action allowed to request one? Is a judge allowed to grant such a request? To answer these questions as they relate to condemnation proceedings in Oregon, one must be familiar with the relevant statutes, which are the subjects of analysis in the next section of this Comment. If both questions are answered in the affirmative, either the condemnee or the condemner is permitted to request a jury trial if that party believes that a jury will return a more favorable award of compensation than a judge.

The U.S. system of jury trial has been criticized for returning high damage awards or being too prone to display undue sympathy for aggrieved parties.<sup>59</sup> Thus, a condemnee's preference for a jury determination of compensation would not be surprising.

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However, since the focus of this Comment is on measuring compensation, these other items are not discussed. Several issues in eminent domain actions must be determined as a matter of law by the court. For example, in Oregon, public use and necessity are two issues that must be decided by the judge as a matter of law and should never be submitted to a jury for determination. *E.g.*, *Moore Mill & Lumber Co.*, 216 Or. at 227, 228, 336 P.2d at 49, 50 (stating that the court is "aware of no enactment which authorizes the jury to resolve the issue of necessity" and also that the court "deem[s] it firmly established that whether a proposed taking is for a public use is a question for the court and not for a jury, even in a jury trial" (quoting *Port of Umatilla v. Richmond*, 212 Or. 596, 612, 321 P.2d 338, 346 (1958))). However, other issues remain questions of fact, including the compensation owed to the property owner for the taking. Under both Oregon and federal law, the amount of damages in a civil case is typically an issue of fact to be determined by the jury. *See, e.g.*, *Lakin v. Senco Prods., Inc.*, 329 Or. 62, 73-74, 987 P.2d 463, 470, *clarified on reconsideration*, 329 Or. 369, 987 P.2d 476 (1999). However, Oregon's constitutional provisions guaranteeing a right to a jury trial only prohibit the legislature from abrogating the jury's assessment in civil cases in which the right to jury trial was customary in 1857. *Id.*

<sup>58</sup> *See, e.g.*, 7 NICHOLS, *supra* note 17, § G1.06, at G1-9-10; OR. REV. STAT. § 35.245(1), (2) (2005). There are three fora before which an eminent domain action could be tried: board of commissioners, judge sitting as fact finder in a bench trial, and jury. *See* 8A NICHOLS, *supra* note 17, § G23.04[4].

<sup>59</sup> *Hannan v. Good Samaritan Hosp.*, 4 Or. App. 178, 181, 471 P.2d 831, 832-33 (1970). These presumed tendencies of the jury result in one of two things: either undeserving claimants receive money to which they are not entitled, or claimants receive more money than what is warranted by their injuries. *See* 7 NICHOLS, *supra* note 17, § G3.05 (discussing the various prejudices and attitudes that jurors bring to condemnation proceedings).

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However, the condemner might also prefer a jury trial.<sup>60</sup> The Oregon Court of Appeals observed this trend in Oregon in a workers' compensation opinion:

[I]t is interesting to note that as a matter of common knowledge . . . for many years past a large number of automobile liability insurers defending personal injury claims have *demand[ed] their right to trial by jury*—even though many plaintiffs, on the advice of experienced counsel, have offered to waive jury and submit their claims to a trial judge sitting without a jury. *The same has been true of the Oregon State Highway Division which commonly insists on its right to trial by jury when it seeks to acquire property by means of condemnation proceedings.*<sup>61</sup>

Whatever the reasons condemnees and condemners would have for preferring a jury trial in eminent domain proceedings, and whether jury trials actually result in more favorable outcomes for one party or the other, is not the subject of this Comment. Nonetheless, it seems likely that some eminent domain litigants, whether the state or aggrieved property owners, will continue to request a jury determination of compensation even if that is the only issue to be resolved. It also seems likely that Oregon's popularly elected trial judges will continue to impanel juries to determine compensation in eminent domain proceedings so long as the requests go unchallenged by opposing parties and sufficient judicial resources exist. Nevertheless, potential parties to a condemnation action in Oregon should be concerned with whether this "business as usual" approach is grounded in statutory requirements or whether it would give way if challenged in the courts.

*B. No Right to Have a Jury Determine "Just Compensation"*

As discussed in Part I.C.2, Oregon's constitution contains no guarantee to a jury trial in an eminent domain proceeding. Thus, for a party to argue that a jury, and not a judge, must ascertain compensation in an eminent domain proceeding, some Oregon statute must require a jury determination of compensation.

*1. Procedural Rules*

Juries are referenced in several places throughout the Oregon Rules of Civil Procedure (ORCP). Several of these provisions

<sup>60</sup> See *Hannan*, 4 Or. App. at 181, 471 P.2d at 833.

<sup>61</sup> *Id.* at 181, 471 P.2d at 833 (emphasis added).

merely codify the constitutional provisions that preserve the common law right to a jury trial and do not expand the right beyond that;<sup>62</sup> others merely prescribe procedures for jury trials.<sup>63</sup> Two provisions are relevant to the inquiry of this Comment and require close examination. First, ORCP 51 C(2) provides that either the court or a party may move to deny a jury trial request if a constitutional or statutory right to a jury determination of those issues of fact does not exist.<sup>64</sup> Second, ORCP 51 D provides that, upon consent by all of the parties, an advisory jury may be impaneled even in the absence of a right to jury trial.<sup>65</sup> Neither of these provisions guarantees anything beyond the Oregon Constitution. Therefore, if one of the parties does not consent to an advisory jury, the trial judge can commence a bench trial even on the measure of just compensation, which is a question of fact.<sup>66</sup>

## 2. *Statutory Interpretation Analysis*

To interpret an Oregon statute, a court must follow a three-step analysis to discern the intent of the legislature.<sup>67</sup> In the first step, a court must examine the actual text of the statute, because

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<sup>62</sup> See, e.g., OR. R. CIV. P. 50 (“The right of trial by jury as declared by the Oregon Constitution or as given by a statute shall be preserved to the parties inviolate.”); OR. R. CIV. P. 51 C(1) (providing an exception for the trial of factual issues by a jury if “[t]he parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial without a jury”).

<sup>63</sup> See, e.g., OR. R. CIV. P. 56 (specifying when a twelve-person, as opposed to six-person, jury is called for in circuit court jury trials based upon the amount in controversy); OR. R. CIV. P. 57 (outlining the process by which a party may challenge compliance with juror-selection procedures and dictating the number and conduct of peremptory challenges); OR. R. CIV. P. 58 B (addressing the appropriate procedure for jury trials including sequestration of the jury and the process for utilizing alternate jurors); OR. R. CIV. P. 59 (regarding jury instructions and deliberations).

<sup>64</sup> OR. R. CIV. P. 51 C(2) (providing an exception for the trial of factual issues by the jury if “[t]he court, upon motion of a party or on its own initiative, finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or statutes of this state”).

<sup>65</sup> OR. R. CIV. P. 51 D (“In all actions not triable by right to a jury, the court, upon motion of a party or on its own initiative, may try an issue with an advisory jury or it may, with the consent of all parties, order a trial to a jury whose verdict shall have the same effect as if trial to a jury had been a matter of right.”).

<sup>66</sup> *State v. Lundberg*, 312 Or. 568, 574, 825 P.2d 641, 645 (1992).

<sup>67</sup> See *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 610-12, 859 P.2d 1143, 1145-47 (1993). In *Portland General Electric*, the Oregon Supreme Court analyzed a statute by looking at its text and context and determined that the intent of the legislature was clear. *Id.* at 614, 859 P.2d at 1148. Thus, the case only illustrates the court’s examination at the first step of analysis.

the statutory provision itself is the best evidence of the legislature's intent.<sup>68</sup> A court considers rules of statutory construction, including: (1) to attribute plain meaning to words of common usage, and (2) "not to insert what has been omitted, or to omit what has been inserted."<sup>69</sup>

Also in this first step, the context of the statutory provision is examined.<sup>70</sup> This includes other provisions within the same statute as well as other related statutes.<sup>71</sup> When doing so, a court again considers rules of statutory construction, including: (1) the "use of a term in one section and not in another section of the same statute indicates a purposeful omission," and (2) "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."<sup>72</sup> If the legislature's intent is clear after completing this first step, a court must stop its examination.<sup>73</sup> However, if the legislature's intent is unclear, a court must consider legislative history and maxims of statutory construction to resolve the uncertainty.<sup>74</sup>

### 3. *Overview of Oregon's Condemnation Statutes*

Statutes that apply to eminent domain proceedings appear in several places throughout Oregon's statutory code, Oregon Revised Statutes (ORS). The procedure for acquiring private property through the exercise of the power of eminent domain in Oregon is set forth in Oregon's General Condemnation Procedure Act,<sup>75</sup> codified in chapter 35. The Act provides that:

[I]f the board [condemning property] and the owner of such property cannot agree upon the price to be paid for the amount of or interest in the property required for such public use, and the damages for the taking thereof, the board may request the Attorney General to, and the Attorney General shall when so requested, commence and prosecute in any

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<sup>68</sup> *Id.* at 610, 859 P.2d at 1146.

<sup>69</sup> *Id.* at 611, 859 P.2d at 1146 (internal quotation marks omitted) (noting that this rule of statutory construction is required by law in Oregon under ORS 174.010).

<sup>70</sup> *Id.* at 611, 859 P.2d at 1146.

<sup>71</sup> *Id.* at 611, 859 P.2d at 1146.

<sup>72</sup> *Id.* at 611, 859 P.2d at 1146 (internal quotation marks omitted) (quoting OR. REV. STAT. § 174.010 (1991)).

<sup>73</sup> *Id.* at 611-12, 859 P.2d at 1146.

<sup>74</sup> *Id.* at 612, 859 P.2d at 1146.

<sup>75</sup> OR. REV. STAT. §§ 35.205-625 (2005). This Act applies to both "private condemners" (private corporations that have been granted the power to exercise eminent domain by the sovereign), as well as "public condemners" (condemners other than private condemners). *See id.* § 35.215(4), (6).

court of competent jurisdiction in the name of the State of Oregon any necessary or appropriate suit, action or proceeding for the condemnation of the amount of or interest in the property required for such purposes and for the assessment of the damages for the taking thereof.<sup>76</sup>

The Act also provides that, except for procedures in ORS chapter 368 involving county roads,<sup>77</sup> “any action for the condemnation of property under the power of eminent domain shall be conducted according to this chapter.”<sup>78</sup> Therefore, any guarantee of a jury determination of compensation in eminent domain proceedings must necessarily be found in one of these chapters to be valid.<sup>79</sup>

Five provisions of the General Condemnation Procedure Act contain references to juries, several of which are, admittedly, made in association with compensation:

1. “Unless the case is submitted by both sides to the *jury* without argument, the party who presents evidence first shall also open and close the argument to the *jury*”;<sup>80</sup>
2. “If motion is made by either party before the formation of the *jury*, the court shall order a view of the property in question; and, upon the return of the *jury*, the evidence of the parties may be heard and the verdict of the *jury* given”;<sup>81</sup>
3. “Upon the assessment of the compensation by the *jury*, the court shall give judgment appropriating the property in question to the condemner, conditioned upon the condemner’s paying into court the compensation assessed by the *jury*”;<sup>82</sup>
4. “If the defendant withdraws the compensation awarded by the court or *jury*, the defendant waives the right of appeal”;<sup>83</sup> and
5. “Upon the determination of the price for repurchase by the court or *jury*, the court shall give judgment vesting title to the property in the owner or the beneficiary, conditioned upon payment into court of the assessed price by the owner

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<sup>76</sup> *Id.* § 35.555.

<sup>77</sup> *See id.* §§ 368.001-990.

<sup>78</sup> *Id.* § 35.375.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.* § 35.305(1) (emphasis added) (referring to evidence and quantum of proof in eminent domain actions).

<sup>81</sup> *Id.* § 35.315 (emphasis added).

<sup>82</sup> *Id.* § 35.325 (emphasis added).

<sup>83</sup> *Id.* § 35.365 (emphasis added).

or beneficiary.”<sup>84</sup>

However, not all references to compensation within Oregon’s condemnation statutes are associated with juries. Although chapter 368 specifically guarantees that compensation be provided to property owners whose land is affected by construction or maintenance of roads, it does so without reference to the word “jury.”<sup>85</sup>

While the General Condemnation Procedure Act dictates that only provisions within that Act and chapter 368 include procedures for condemnation proceedings,<sup>86</sup> “jury” is also mentioned two times in chapter 276, a section of the code regarding condemnation of private property for the purpose of providing a public water supply:

1. “When it appears that the Oregon Department of Administrative Services has offered the defendant, before commencing the action, an amount equal to or greater than that assessed by the *jury*, the state shall recover its costs and disbursements from the defendant”;<sup>87</sup> and
2. “The reasonable rental value for such time shall be assessed by the *jury*, if the case is tried before a *jury*, otherwise by the court. . . . Such reasonable rental value shall be included in the general damages allowed by the court or *jury*.”<sup>88</sup>

Although proceedings under chapter 276 must conform procedurally to chapter 35,<sup>89</sup> the provisions of chapter 276 have not been specifically incorporated into the General Condemnation Procedure Act. Therefore, it is not clear that these provisions

<sup>84</sup> *Id.* § 35.400(3)(d)(A) (emphasis added) (referring to the procedure for judgment for repurchase).

<sup>85</sup> *See id.* § 368.211. In particular, chapter 368 provides that “[a] county governing body shall provide for compensation under this section to any person who has established a structure on real property if the structure encroaches on a road that is the subject of legalization proceedings.” *Id.* § 368.211(1).

<sup>86</sup> *Id.* § 35.375 (“Except for procedures provided in ORS chapter 368, any action for the condemnation of property under the power of eminent domain shall be conducted according to this chapter.”).

<sup>87</sup> *Id.* § 276.240(2) (emphasis added).

<sup>88</sup> *Id.* § 276.240(3) (emphasis added) (referring to the condemner’s possession of property during the pendency of condemnation proceedings).

<sup>89</sup> *Id.* § 276.240(1) (confirming that condemnation proceedings must conform to the procedures set forth in the General Condemnation Procedure Act by requiring that “[i]n any condemnation procedures under ORS 276.234 to 276.244, the practice, pleadings, forms and modes of procedure shall conform as near as may be applicable to the practice, pleading[s], forms and procedure prescribed for the appropriation of real property by private corporations in ORS chapter 35”).



have any weight at all in determining condemnation procedures, particularly procedures not involving public water works.

4. Interpretation of Oregon's Condemnation Statutes

Applying the statutory interpretation analysis discussed in Part II.B.2 to Oregon's condemnation statutes reveals an ambiguity regarding the role of a jury in eminent domain proceedings. First, the actual text of the condemnation statutes does not clearly express a legislative intent to guarantee a jury determination of compensation in eminent domain proceedings. This is evident when applying the "rules of construction of the statutory text that bear directly on how to read the text."<sup>90</sup> The rules described in *Portland General Electric Co. v. Bureau of Labor & Industries* (to attribute plain meaning to common words and "not to insert what has been omitted, or to omit what has been inserted")<sup>91</sup> are useful in analyzing the actual text of Oregon's condemnation statutes.

The five provisions in Oregon's General Condemnation Procedure Act that include references to juries use "the" as the article to "jury."<sup>92</sup> Relying upon plain meaning, the meaning of "the jury" seems different from "a jury." One interpretation is that the latter refers to any jury, or a jury generally, while the former refers to the specific jury impaneled for a particular condemnation proceeding. To illustrate, were ORS 35.325 to read "[u]pon the assessment of the compensation by a jury" rather than "[u]pon the assessment of the compensation by the jury,"<sup>93</sup> the plain meaning might be very different. Using the definite article "the" as the limiting adjective for "jury" points to a specific jury—most likely the jury that has been selected to hear a particular condemnation case. Had the legislature instead used "a," an

<sup>90</sup> *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 611, 859 P.2d 1143, 1146 (1993).

<sup>91</sup> *Id.* at 611, 859 P.2d at 1146 (quoting OR. REV. STAT. § 174.010 (1991)).

<sup>92</sup> In English grammar parlance, "the" and "a" are both "articles." "An article is a limiting adjective that precedes a noun or noun phrase and determines the noun's or phrase's use to indicate something definite (*the*) or indefinite (*a* or *an*)." THE CHICAGO MANUAL OF STYLE ¶ 5.69 (15th ed. 2003). As a definite article, "the" "points to a definite object that (1) is so well understood that it does not need description . . . ; (2) is a thing that is about to be described . . . ; or (3) is important . . ." *Id.* ¶ 5.70 (examples omitted). Conversely, as an indefinite article, "a" "points to nonspecific objects, things, or persons that are not distinguished from the other members of a class." *Id.* ¶ 5.71.

<sup>93</sup> § 35.325.

indefinite article, these references would point to a nonspecific jury and would appear to contemplate juries in every condemnation proceeding. However, one could also argue that the definite article “the” evinces nothing more than a presupposition by the legislature of the involvement of a jury in condemnation proceedings.

Two of the provisions clearly anticipate a finding of compensation by either the judge or the jury, thereby obfuscating this presumption of a jury. One provision determines that a defendant waives the right of appeal upon withdrawal of “the compensation awarded by the court or jury.”<sup>94</sup> Another provision provides that the court shall allow an owner to buy back the property “[u]pon determination of the price for repurchase by the court or jury.”<sup>95</sup> Since a court undertaking a statutory interpretation may not “omit what has been inserted,” the inclusion of “court or jury” instead of just “jury” in some of the provisions must be given considerable weight in discerning the intent of the legislature. Just as it seems that the legislature anticipated a determination of compensation by a jury, it also seems to have anticipated a determination of compensation by the judge as well.

Perhaps the clearest support for an interpretation that Oregon’s condemnation statutes guarantee a right to jury determination of compensation is ORS 35.325, which contains the following introductory clause, “[u]pon the assessment of the compensation by the jury.”<sup>96</sup> However, this precise provision was construed by the Oregon Supreme Court in *Moore Mill*.<sup>97</sup> In that case, the court was tasked with determining whether necessity was an issue that must be decided by the jury.<sup>98</sup> For this reason, the court identified every provision that discussed the jury and noted that all of them were associated with compensation.<sup>99</sup> The court concluded that this must mean that a jury, if there is a jury, only decides compensation and not necessity.<sup>100</sup> Upon review of ORS 35.100, the Oregon Supreme Court com-

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<sup>94</sup> *Id.* § 35.365.

<sup>95</sup> *Id.* § 35.400(3)(d)(A).

<sup>96</sup> *Id.* § 35.325.

<sup>97</sup> *Moore Mill & Lumber Co. v. Foster*, 216 Or. 204, 227, 336 P.2d 39, 49-50 (1959).

<sup>98</sup> *Id.* at 222, 336 P.2d at 47.

<sup>99</sup> *See id.* at 227-28, 336 P.2d at 49-50. Although the court uses the term “damages,” the context of the case makes clear that the court is discussing just compensation. *See id.* at 226-28, 336 P.2d at 49-50.

<sup>100</sup> *Id.* at 228, 336 P.2d at 50.

mented that it “*appears* to state the function which the jury serves” in condemnation proceedings.<sup>101</sup> Thus, even the Oregon Supreme Court in *Moore Mill* was unable to state definitively that a right to a jury trial for compensation was granted by the statutes. For these reasons, the actual text of Oregon’s condemnation statutes does not demonstrate a clear legislative intent to ensure that compensation must be determined by the jury.

Furthermore, the context of the condemnation statutes does not clearly express a legislative intent to guarantee a jury determination of compensation in eminent domain proceedings. This is evident when applying the “rules of construction that bear directly on the interpretation of the statutory provision in context.”<sup>102</sup> The rules described in *Portland General Electric* are useful in analyzing the context of Oregon’s condemnation statutes: (1) “that use of a term in one section and not in another section of the same statute indicates a purposeful omission,” and (2) “where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”<sup>103</sup>

First, upon examination of the context of these statutes, there is at least one purposeful omission that is relevant to the issue of guaranteeing a jury determination of compensation. Side-by-side in the same chapter as these provisions that reference the jury, ORS 35.235(4) provides an example of the legislature assigning an issue to either the court or the jury:

The question of the validity of the disputable presumptions [necessity of proposed use, necessity of the property for that proposed use, and that the proposed use is most compatible with the greatest public good and the least private injury], if raised, *shall be determined by the court* in a summary proceeding prior to trial.<sup>104</sup>

The legislature specifically stated that particular issues are only to be determined by the court. By contrast, none of the provisions that include references to juries contain similar language to that quoted above.<sup>105</sup> Although the legislature included references to “jury” in ORS 35.315, and “jury” and “compensation” in

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<sup>101</sup> *Id.* at 227, 336 P.2d at 50 (emphasis added).

<sup>102</sup> *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 611, 859 P.2d 1143, 1146 (1993).

<sup>103</sup> *Id.* at 611, 859 P.2d at 1146 (quoting OR. REV. STAT. § 174.010 (1991)) (internal quotation marks omitted).

<sup>104</sup> OR. REV. STAT. § 35.235(4) (2005) (emphasis added).

<sup>105</sup> *See id.* §§ 35.205-.625.

35.325 and 35.365, none of those sections state anything to the effect that compensation shall be determined by the jury.<sup>106</sup> On the other hand, the legislature explicitly assigned certain issues to the court but did not explicitly assign the determination of compensation to the court. This could be used as evidence to support an interpretation that compensation must be determined by a jury instead of a court. However, the specific assignments to the court include presumptions, whereas the amount of compensation is an issue of fact to be determined at trial, providing an explanation for the omission that does not import a specific intent.

The provisions in chapter 276 regarding condemnation procedures, while superfluous, largely follow this same analysis. Although this chapter provides that the rental value due for the property occupied during the pendency of the condemnation proceedings before compensation is determined and paid “shall be assessed by the jury,” this provision goes on to state that this is only in cases that are tried before a jury.<sup>107</sup> One of the rules of statutory construction is to give preference for an interpretation that would give an effect to all provisions. Therefore, since only chapters 35 and 368 dictate condemnation procedures, the preferred interpretation of the provisions in chapter 276 is that compensation of rental value should be determined by a jury only if there is a jury, rather than guaranteeing a right to a jury determination of compensation.

Admittedly, the Oregon legislature did seem to anticipate jury determinations of compensation, since it made provisions for how these jury trials are to proceed. Consequently, it is not obvious that the Oregon legislature intended *not* to guarantee a jury trial on the issue of compensation in eminent domain actions. However, the provisions referencing the jury in condemnation proceedings seem purely procedural in nature and only address what happens once a jury is actually impaneled, rather than actually guaranteeing a right to a jury determination of compensation.

If the legislative intent is unclear after examining the text and context of the statute, a court must turn next to legislative intent. If intent is still unclear after that, a court must resort to maxims of statutory construction. It is not the purpose of this Comment

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<sup>106</sup> See *id.* §§ 35.315, .325, .365.

<sup>107</sup> *Id.* § 276.240(3).

to conduct an analysis of the issue on this level of statutory interpretation. Rather, the purpose of this Comment is to demonstrate that the text of the statutes are ambiguous and that it would be preferable for the statutes to clearly state whether a right to have a jury determine the amount of compensation exists in an eminent domain proceeding. If the legislature or citizens of Oregon intend to guarantee a jury trial or preclude one, they should do so explicitly, rather than rely upon a court to review the legislative history of the statutes to discern the legislative intent. Not only would this ensure that courts “get it right,” but it would proactively address the uncertainty and serve as a preemptive strike against unnecessary litigation regarding this issue.

*B. Neighboring States' Responses: Washington and California*

Many state constitutions include an explicit guarantee to a jury determination of compensation in eminent domain proceedings,<sup>108</sup> obviating the need for a statutory analysis like the one in

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<sup>108</sup> *E.g.*, ARIZ. CONST. art. II, § 17 (“[C]ompensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record . . .”) (emphasis added); COLO. CONST. art. II, § 15 (“Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property . . .”); IOWA CONST. art. I, § 18 (“Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, *as soon as the damages shall be assessed by a jury*, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.”) (emphasis added); LA. CONST. art. I, § 4, cl. B (“In every expropriation, *a party has the right to trial by jury to determine compensation*, and the owner shall be compensated to the full extent of his loss.”) (emphasis added); MD. CONST. art. III, § 40 (“The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, *or awarded by a Jury*, being first paid or tendered to the party entitled to such compensation.”) (emphasis added); MO. CONST. art. I, § 26 (“Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders . . .”); N.D. CONST. art. I, § 16 (“Compensation shall be ascertained by a jury, unless a jury be waived.”); OHIO CONST. art. I, § 19 (providing that “such compensation shall be assessed by a jury”); OKLA. CONST. art. II, § 24 (providing that “compensation shall be ascertained by a board of commissioners of not less than three freeholders” but that “[t]he commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide”) (emphasis added); VA. CONST. art. I, § 11 (noting at the end of the constitutional provision containing the state’s takings clause “[t]hat in controversies respecting property . . . trial by jury is preferable to any other, and ought to be held sacred”); W. VA. CONST. art. III, § 9 (guaranteeing that “such compensation shall be ascertained by an impartial jury of twelve freeholders”). Some states only explicitly guarantee a jury determination of compensation when property is taken by a municipal or private corporation as opposed to the government itself. *E.g.*, ALA. CONST. art. XII, § 235 (providing that a jury determination of damages is guaranteed to all parties in appeals involving

the section above. Washington’s takings clause has guaranteed a jury determination of compensation since the Washington Constitution was adopted in 1889. Its framers appeared to establish an independent constitution that secured the same fundamental rights for Washingtonians that were enjoyed by other citizens of the Union at that time.<sup>109</sup> Because the U.S. Bill of Rights did not apply to the states when the Washington Constitutional Convention convened in 1889, it is unlikely that the framers contemplated that the Federal Constitution would affect the interpretation of Washington’s constitution in any significant way.<sup>110</sup> Consequently, the Washington Constitution contains an expansive takings clause that provides in relevant part: “No private property shall be taken or damaged for public or private use without just compensation having been first made . . . *which compensation shall be ascertained by a jury*, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.”<sup>111</sup> Clearly more expansive in scope than its federal counterpart, Washington’s takings clause provides greater protection to Washingtonians and prescribes in detail the process by which private property can be taken for public use.<sup>112</sup>

Another of Oregon’s next-door neighbors, California, has a similar provision. California’s first constitution, adopted in 1849, included a takings clause that mirrored the Federal Takings Clause.<sup>113</sup> Subsequently, the California Constitutional Conven-

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“[m]unicipal and other corporations and individuals invested with the privilege of taking property for public use”); ARK. CONST. art. XII, § 9 (providing that when property is taken for use by “any corporation” that compensation “shall be ascertained by a jury of twelve men”). However, most state constitutions, including Oregon’s, “merely provide that the right of trial by jury shall remain inviolate, or shall continue as theretofore practiced.” 1A NICHOLS, *supra* note 17, § 4.105[3]. These states’ takings clauses, like Oregon’s, merely guarantee the right to just compensation but do not explicitly guarantee an assessment of compensation by a jury. *Id.*

<sup>109</sup> Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 498 (1984).

<sup>110</sup> *Id.*

<sup>111</sup> WASH. CONST. art. I, § 16 (emphasis added).

<sup>112</sup> See generally Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000) (discussing the conflict between property rights and the police power in light of the U.S. and Washington Constitutions); Utter, *supra* note 109.

<sup>113</sup> See CAL. CONST. of 1849, art. I, § 8, available at [http://www.ss.ca.gov/archives/level3\\_const1849txt.html](http://www.ss.ca.gov/archives/level3_const1849txt.html) (“[N]or shall private property be taken for public use without just compensation.”).

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tion of 1879 amended the state's takings clause to include a clause requiring that a jury ascertain the measure of compensation.<sup>114</sup> The clause provides: "Private property may be taken or damaged for public use only when just compensation, *ascertained by a jury* unless waived, has first been paid to, or into court for, the owner."<sup>115</sup> The mere existence of this clear and unambiguous language demonstrates how states have provided further protection than that afforded by the Federal Takings Clause.

### III

#### LOOKING AHEAD

##### A. *Oregon's Changing Eminent Domain Landscape: Measure 37*

At this point, no reported decision by an Oregon appellate court has ever reviewed a trial judge's denial of a jury trial in a condemnation case to determine the measure of compensation.<sup>116</sup> However, Oregon's eminent domain landscape appears to be changing. In the 2004 general election, Oregon voters passed Measure 37.<sup>117</sup> The ballot measure, now codified as ORS

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<sup>114</sup> California's takings clause was article I, section 8 in 1849, but it is currently article I, section 19. Since California only introduced the popular initiative in 1911, the decision to amend the state's takings clause to include a jury trial guarantee was made by the delegates and not by the populace, *see* Pat Ooley, *An Overview of the History of Constitutional Provisions Dealing with State Governance*, in CAL. CONSTITUTION REVISION COMM'N, CONSTITUTION HISTORY IN PERSPECTIVE 3, 3 (1996), available at [http://www.library.ca.gov/CCRC/reports/html/hs\\_state\\_governance.html](http://www.library.ca.gov/CCRC/reports/html/hs_state_governance.html) (follow "History" hyperlink under "Commission Final Report" section). Subsequently, the Supreme Court of California declared that the state constitution required that compensation be "found and fixed by a jury" and that this had been followed in California courts "without deviation." *People v. Ricciardi*, 144 P.2d 799, 805 (Cal. 1943).

<sup>115</sup> CAL. CONST. art. I, § 19 (emphasis added).

<sup>116</sup> A Westlaw key search of "eminent domain," "proceedings to take property and assess compensation," "mode of assessment of compensation," and "trial by jury," yielded zero relevant results for Oregon. To recreate this search on Westlaw, begin by clicking on the "KeySearch" tab; select the "West Key Number System"; expand the topic-key number "Eminent Domain 148"; expand "Proceedings to take property and assess compensation"; expand "Mode of assessment of compensation"; then check the "Trial by jury" box and click "Search selected"; select the "State" radio button for jurisdiction and select "Oregon" from the drop-down menu; then click "Search." *See also* *Moore Mill & Lumber Co. v. Foster*, 216 Or. 204, 227, 336 P.2d 39, 50 (1959) (stating in dicta that "[w]e have seen that the assessment of damages *may be* a proper subject for jury determination if a statute so declares") (emphasis added).

<sup>117</sup> *MacPherson v. Dep't of Admin. Servs.*, 340 Or. 117, 121, 130 P.3d 308, 311 (2006); Or. Dep't of Land Conservation & Dev., DLCD Measure 37 Legal Informa-

197.352, amends Oregon’s land use laws to entitle a property owner to “just compensation” when a land use regulation, enacted subsequent to the owner’s acquisition of the property, restricts the property’s use and reduces its fair market value.<sup>118</sup> The government may choose to waive the regulation in lieu of providing compensation.<sup>119</sup>

As of April 12, 2007, 6680 claims have been filed under Measure 37,<sup>120</sup> and more than \$14,959,251 has been requested as total compensation for these claims.<sup>121</sup> As of November 2006, all valid claims have been “compensated” with a regulation waiver,<sup>122</sup> with the exception of a couple offered \$47,750 by the City of Prineville as compensation for not allowing them to build a three-bedroom house on their property.<sup>123</sup> As of the writing of this Comment, over one hundred Measure 37 cases naming the State of Oregon as a party were pending in Oregon’s circuit courts.<sup>124</sup> Since the deadline for claims against regulations enacted prior to December 2, 2004, has passed,<sup>125</sup> the current tra-

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tion, Information About the Election, [http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml#Information\\_About\\_the\\_Election](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Information_About_the_Election) (last visited Feb. 17, 2007) [hereinafter DLCD Legal Information]. The measure became effective thirty days after the election on December 2, 2004, but a county circuit court judge declared the law unconstitutional in October 2005. *MacPherson v. Dep’t of Admin. Servs.*, Civil No. 05C10444, (Cir. Ct. Marion County, Or., Oct. 14, 2005), available at <http://www.ojd.state.or.us/mar/documents/Measure37.pdf>. The Oregon Supreme Court granted direct review of the appeal, and, in an opinion issued on February 21, 2006, reversed the decision of the county circuit court judge and reinstated Measure 37. *MacPherson*, 340 Or. at 122, 130 P.3d at 312; Laura Oppenheimer, *It’s Settled: Measure 37 Lives*, OREGONIAN (Portland), Feb. 22, 2006, at A1. Measure 37 was again effective on March 13, 2006. See DLCD Legal Information, *supra*, at Supreme Court Reinstates Measure 37 (Mar. 9, 2006), [http://www.oregon.gov/LCD/MEASURE37/legal\\_information.shtml#Supreme\\_Court\\_Reinstates\\_Measure\\_37](http://www.oregon.gov/LCD/MEASURE37/legal_information.shtml#Supreme_Court_Reinstates_Measure_37) (providing March 13, 2006, as the date the circuit court entered its judgment on remand).

<sup>118</sup> OR. REV. STAT. § 197.352 (2005).

<sup>119</sup> *Id.* § 197.352(8).

<sup>120</sup> Or. Dep’t of Land Conservation & Dev., DLCD Measure 37 Summaries of Claims (Apr. 12, 2007), [http://www.oregon.gov/LCD/MEASURE37/summaries\\_of\\_claims.shtml](http://www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml).

<sup>121</sup> *Id.*

<sup>122</sup> E-mail from Michael Morrissey, Or. Dep’t of Land Conservation & Dev., to author (Nov. 19, 2006, 12:17 PST) (on file with author).

<sup>123</sup> Matthew Preusch, *Prineville Offers Measure 37 Pay*, OREGONIAN (Portland), Oct. 26, 2006, at A1.

<sup>124</sup> Or. Dep’t of Justice, Pending Measure 37 Litigation, [http://www.doj.state.or.us/hot\\_topics/measure37litigation.shtml](http://www.doj.state.or.us/hot_topics/measure37litigation.shtml) (last visited Feb. 17, 2007) (noting that “[t]he list does not include cases involving local governments where the state is not a party”).

<sup>125</sup> OR. REV. STAT. § 197.352(5) (2005) (providing that Measure 37 claimants



jectory will likely not continue.<sup>126</sup> However, given the volume of pending litigation, the amount of time the appellate process consumes, and any additional claims made regarding newly enacted land use regulations, it is likely that the Oregon judicial system will be dealing with issues presented by Measure 37 for some time to come.

The extensive amount of litigation caused by the passage of Measure 37 begs the question: Which procedures must be followed in a Measure 37 trial? More precisely, must a jury determine the amount of “just compensation” due to a Measure 37 claimant? Measure 37 is a statutory remedy and not a cause of action that was tried to a jury at common law prior to the adoption of the Oregon Constitution. Consequently, Measure 37 litigants possess no constitutional right to a jury trial. Thus, for Measure 37 litigants to possess a right to a jury trial, the right must be provided by statute. There are three possible sources for a statutory right to a jury trial in Measure 37 cases: (1) the text of Measure 37 itself, (2) the Oregon Rules of Civil Procedure (ORCP), and (3) Oregon’s condemnation statutes.

As for the first option, the text of Measure 37 does not specify how “just compensation” is to be determined.<sup>127</sup> Nor does the measure make any reference to the use of a jury.<sup>128</sup> Second, as discussed in Part II.B.1, the ORCP provide no guarantee to a jury trial beyond that contained in Oregon’s constitutional and statutory provisions.

Third, to determine whether a Measure 37 litigant possesses a right to a jury trial, it would be reasonable to analogize Measure

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must make “written demand” regarding such regulations within two years of Measure 37’s enactment). Although some parties argued that the litigation over Measure 37’s constitutionality tolled the statute’s two-year deadline for land use regulations enacted before December 2, 2004, Oregon’s governmental bodies appeared to treat December 4, 2006, as the deadline for claims against such regulations. League of Or. Cities & Ass’n of Or. Counties, *Joint Statement Concerning Measure 37 Claims Filed After December 4, 2006*, [http://www.oregon.gov/LCD/MEASURE37/docs/general/joint\\_m37\\_loc\\_aoc\\_dlcd\\_statement\\_112206.pdf](http://www.oregon.gov/LCD/MEASURE37/docs/general/joint_m37_loc_aoc_dlcd_statement_112206.pdf) (last visited Feb. 17, 2007).

<sup>126</sup> See Or. Dep’t of Land Conservation & Dev., *supra* note 120 (providing the following statistics: 6680 claims as of April 12, 2007; 3182 claims as of November 17, 2006; 2724 claims as of October 20, 2006; 2636 claims as of October 13, 2006; 2412 claims as of September 15, 2006; 2359 claims as of September 8, 2006; 2234 claims as of August 18, 2006; 2205 claims as of August 11, 2006; 1994 claims as of July 7, 2006; 1809 claims as of June 2, 2006; 1605 claims as of April 21, 2006).

<sup>127</sup> See § 197.352.

<sup>128</sup> See *id.*

37 cases to condemnation cases and rely upon Oregon's condemnation statutes. Measure 37 simply extends the meaning of inverse condemnation, which is defined as an uncompensated taking of private property for public use.<sup>129</sup> Prior to Measure 37, Oregon property owners did not have a claim of inverse condemnation unless the action took the entire value of the property.<sup>130</sup> However, Measure 37 entitles property owners to compensation for a decrease in value of property caused by a wide array of government regulations.<sup>131</sup> Furthermore, the use of the term "just compensation" in the text of the measure appears to implicitly invoke eminent domain jurisprudence. Nonetheless, asserting a right to a jury trial in a Measure 37 case based upon Oregon's condemnation statutes is fraught with difficulties. Even if a court accepts the analogy, it must analyze the condemnation statutes for a jury trial guarantee, and, as this Comment has argued, that search is likely to uncover ambiguities rather than a definitive guarantee.

Admittedly, statutory ambiguity would likely not persuade a trial judge to deny a request of a Measure 37 litigant to have a jury determine compensation.<sup>132</sup> As stated earlier, no evidence to date indicates that a trial judge has ever denied a request for a jury trial of compensation in a condemnation case despite the ambiguity of the statutes. This makes sense. Oregon's condemnation statutes are to be strictly construed because the exercise of the power of eminent domain is in "derogation of vested rights."<sup>133</sup> Additionally, many people are highly critical of any attempt to abrogate the right to trial by jury, considered "democracy's cornerstone," even in civil cases.<sup>134</sup> Even though special interest lobbies have attempted to erode the right to a jury trial, juries are still considered critical decisionmakers in civil cases for

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<sup>129</sup> *Vokoun v. City of Lake Oswego*, 189 Or. App. 499, 510, 76 P.3d 677, 684 (2003) ("An action for inverse condemnation is one for damages asserted against a governmental entity with the power of eminent domain that has taken private property for public use without initiating condemnation proceedings, that is, without paying just compensation."), *review denied*, 336 Or. 406 (2004).

<sup>130</sup> *See id.*

<sup>131</sup> *See* § 197.352.

<sup>132</sup> Since compensation is the sole focus of this Comment, this Comment does not explore the ways in which this argument can be extended to other issues within a Measure 37 case.

<sup>133</sup> *City of Portland v. Kamm*, 132 Or. 317, 320, 285 P. 236, 237 (1930).

<sup>134</sup> *See, e.g.*, Richard J. Vangelisti, *Trial by Jury: Democracy's Cornerstone*, OR. ST. B. BULL., Apr. 2005, available at <http://www.osbar.org/publications/bulletin/05apr/parting.html>.

a number of reasons.<sup>135</sup> The most important reason may be to maintain the balance of power between the people and their government, because the jury trial is an “important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign.”<sup>136</sup> Thus, in a “close case,” such as a jury’s role in determining compensation, a court would likely err on the side of allowing the jury trial.

Nonetheless, it is possible that courts’ predispositions toward juries might change given the impacts of Measure 37. Perhaps no litigant has challenged a judge’s decision to conduct a jury trial of compensation in an eminent domain proceeding. However, the ORCP provide an avenue for a litigant to challenge such a decision.<sup>137</sup> Given the popular support of Measure 37 when it was passed, it seems plausible that the governing body denying a waiver under Measure 37 might prefer to litigate the issue of just compensation before a judge rather than a jury. Thus, the judge would be forced to justify his or her decision to impanel a jury, rather than doing so merely as a matter of course.

Furthermore, although still a relatively small portion of the cases heard in Oregon’s trial courts,<sup>138</sup> Measure 37 cases are indeed increasing the amount of litigation in Oregon, which, in turn, increases the strain on judicial resources.<sup>139</sup> Since the conduct of a jury trial is more time-consuming than a bench trial, a trial judge preferring to resolve cases as quickly and efficiently as possible might deny a jury trial to achieve judicial efficiency.

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<sup>135</sup> *See id.*

<sup>136</sup> *Id.* (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)). Sovereign immunity is not an issue for several reasons. First of all, by their very nature condemnation proceedings are not suits against the sovereign, since it is the state or the state agency acting as condemner that is actually filing the lawsuit. Furthermore, the state is consenting to this suit. The state never asserts that it is immune from suit and is not required to provide compensation for the taking. Rather, the sovereign admits liability for the taking of the private property and merely seeks a determination of the just compensation required for the taking.

<sup>137</sup> *See* OR. R. CIV. P. 51 C(2) (providing that a jury trial may be denied to litigants if “[t]he court, upon motion of a party or on its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or the statutes of this state”).

<sup>138</sup> In 2003, 655,574 cases were filed in Oregon’s circuit courts, although that number declined to around 610,000 cases in 2004 and 2005. SEC’Y OF STATE, OREGON BLUE BOOK 2007–2008, at Cases Filed in Oregon Courts: 2000–2005, <http://bluebook.state.or.us/state/judicial/judicial28.htm>.

<sup>139</sup> As of January 1, 2007, 173 circuit judges were serving Oregon’s thirty-six counties. *Id.* at Oregon Circuit Courts, <http://bluebook.state.or.us/state/judicial/judicial06.htm>.

*B. Possible Solutions*

Decisions about property rights, a fundamental individual liberty that was addressed within the Bill of Rights, may be “too important to be trusted to trained men.”<sup>140</sup> The Oregon Supreme Court has even described property rights as “sacred.”<sup>141</sup> Indeed, Measure 37, passed by Oregon voters by a sixty-one percent majority, signifies the importance of property rights to Oregonians.<sup>142</sup> Therefore, broad consensus might exist in Oregon to cure the ambiguity addressed in this Comment if such an attempt were made. However, there would likely be differences of opinion on the mode for change.

*1. Constitutional Reinterpretation*

One option would be to argue for a reinterpretation of Oregon’s constitutional jurisprudence on eminent domain. If a common law jury antecedent for eminent domain proceedings could be established,<sup>143</sup> the Oregon Constitution would have preserved the jury trial right in those cases.<sup>144</sup> Not only would this require a case to actually come before the Oregon Supreme Court, the Court would be required to overrule numerous precedent cases,

<sup>140</sup> Fred A. Granata, *On Jury Duty: ‘Too Important to be Trusted to Trained Men,’* OR. ST. B. BULL., May 2002 (quoting Gilbert Keith (G.K.) Chesterton, an English journalist from the late nineteenth and early twentieth centuries), available at <http://www.osbar.org/publications/bulletin/02augsep/parting.html>.

<sup>141</sup> *Minto v. Salem Water, Light & Power Co.*, 120 Or. 202, 219-20, 250 P. 722, 728 (1926).

<sup>142</sup> See Or. Sec’y of State Election Div., General Election Official Results, Nov. 2, 2004, <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf>. In contrast, in its 2006 general election, Idaho voters resoundingly rejected Proposition 2, a statewide initiative similar to Measure 37, Idaho Sec’y of State, General Election Results (2006), [http://www.idsos.state.id.us/ELECT/RESULTS/2006/general/tot\\_stwd.htm](http://www.idsos.state.id.us/ELECT/RESULTS/2006/general/tot_stwd.htm) (providing election results with twenty-four percent of voters in favor of Proposition 2 and seventy-six percent opposed), which would have amended Idaho’s statutes to permit a condemnee to collect just compensation for a regulatory taking. Idaho Sec’y of State, Proposed Ballot Initiatives (2006), <http://www.idsos.state.id.us/elect/inits/06init08.htm>. On the same night, Washington voters rejected Initiative Measure 933, Wash. Sec’y of State, 2006 General Election Results, <http://vote.wa.gov/Elections/General/Measures.aspx> (providing results of forty-one percent of voters in favor and fifty-nine percent opposed), which would also have provided condemnees with the right to collect compensation when land use regulations reduce the value of private property. Wash. Sec’y of State, Initiative 933, <http://www.secstate.wa.gov/elections/initiatives/text/i933.pdf> (last visited Mar. 12, 2007).

<sup>143</sup> At common law, eminent domain actions were tried to some kind of a jury, but this has not been interpreted to be the same kind of jury as a common law jury. 1A NICHOLS, *supra* note 17, § 4.105[1].

<sup>144</sup> OR. CONST. art. I, § 17.

which would be neither effective nor feasible. There are no cases to indicate that Oregon appellate courts are willing to deviate from the historical interpretation denying a constitutional right to a jury trial in eminent domain proceedings.

## 2. *Legislative Amendment*

This Comment has argued that Oregon's condemnation statutes are ambiguous regarding whether a jury trial of compensation is guaranteed in an eminent domain proceeding. The Oregon legislature could decide whether a jury trial of compensation should be guaranteed and amend Oregon's condemnation statutes accordingly. There are several simple ways in which the legislature could cure the current ambiguity to guarantee a jury trial. First, the legislature could amend the General Condemnation Procedure Act to include "compensation" or "just compensation" in its definitions section and specify that "compensation shall be assessed by a jury unless waived." Such an inclusion would ensure that it applies to both parts of the Act, the part regarding corporations as condemners and the part regarding the state as condemner. Although perhaps less elegant, this specific clause could also be included elsewhere throughout the Act when addressing "compensation."

Alternately, the legislature could clearly deny an absolute right to a jury trial. In the definitions section of the General Condemnation Procedure Act, "compensation" could be defined to incorporate a mode of determination other than the jury, such as a board of commissioners. This was the issue in *Kendall v. Post*, where the Oregon Supreme Court upheld a statute that provided that compensation be determined by a means other than a jury.<sup>145</sup> Furthermore, the legislature could explicitly guarantee the right to a jury trial to one party but not the other were it to conclude that it only intended the aggrieved property owners to request a jury trial of compensation and not the condemner.

Because such a course of action would not require a reinterpretation of the Oregon Constitution or existing statutes, amending the statutes would avoid the pitfalls that a process of reinterpretation within the courts would invite.

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<sup>145</sup> 8 Or. 141, 146 (1879), available at 1879 WL 1242, at \*4 ("[I]t is competent for the legislature to provide for assessments by any other just mode . . . without giving him the right to be heard before a jury.") (internal quotation marks omitted).

### 3. *Constitutional Amendment*

The Oregon legislature might prefer to leave a potentially contentious issue to the Oregon voters. Oregon was the second state to approve a statewide initiative and popular referendum, and did so by a large margin in 1902.<sup>146</sup> The initiative and referendum enable Oregon voters to adopt laws and amend the state's constitution in popular elections. As a ballot-measure state, a concerned individual or group could propose a constitutional amendment directly to Oregon voters that would guarantee a jury trial of compensation in eminent domain proceedings. Alternately, the Oregon legislature could refer this constitutional amendment to the voters. This method, whether it be initiated by a member of the public or by the legislature, would likely be the most streamlined and effective way to address the issue. Simply inserting a clause within Oregon's takings clause stating that "compensation shall be determined by a jury unless waived" would likely cure the current ambiguity in the condemnation statutes. This clause would likely apply to Measure 37 and would prevent the need to amend the statute to include a jury trial guarantee. Furthermore, such a clause would provide the option of waiver for situations where all the litigants prefer a bench trial. Most importantly, this constitutional amendment would be a pre-

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<sup>146</sup> *The History of Initiative and Referendum in the United States*, I&R FACTSHEET (Initiative & Referendum Inst., Leesburg, Va.), at 1, 2, available at <http://www.iandr.institute.org/Quick%20Fact-Handouts.htm> (follow "Number Two: The History of the Initiative and Referendum Process?" hyperlink) (last visited Feb. 17, 2007). The initiative process enables citizens of a particular state to adopt laws and to amend the state's constitution. *What Is Initiative and Referendum?*, I&R FACTSHEET (Initiative & Referendum Inst., Leesburg, Va.), at 1, 1, <http://www.iandr.institute.org/Quick%20Fact-Handouts.htm> (follow "Number One: What is the Initiative and Referendum Process?" hyperlink) (last visited Feb. 17, 2007). Twenty-four states, including Oregon, have some form of initiative. *Id.* Oregon has a direct initiative, which means that laws or amendments proposed by the people are placed directly on the ballot for the people to accept or reject, without submitting the proposal to the legislature first. *Id.* at 2. Other states have an indirect initiative that requires the proposal first be submitted to the legislature before being submitted to the people to accept or reject. *Id.* The referendum process enables citizens to reject laws or amendments proposed by the state legislature. *Id.* at 1. Forty-nine states, including Oregon, have some form of referendum. *Id.* The popular referendum enables the people to refer, by collecting signatures on a petition, specific legislation that was enacted by their legislature for the people to either accept or reject. *Id.* The legislative referendum allows the legislature to submit legislation to the vote of the people. *Id.* Oregon employs both processes of referenda: popular and legislative. *Id.* at 2. For more on Oregon's initiative system, see Ben Hovland, Comment, *Championed by Progressives and William U'Ren: Can Oregon Give the Ballot Initiative to the People Again?*, 85 OR. L. REV. 275 (2006).

emptive strike. This option would ensure that no taxpayer dollars in the form of judicial resources are expended to decide this issue, only to incite a subsequent constitutional amendment that is a reaction to an unpopular court decision or legislative enactment.

#### CONCLUSION

An inconsistency exists between common practices in Oregon and the right to a jury trial in eminent domain proceedings. Juries are routinely impaneled to determine compensation in condemnation proceedings in Oregon, but this is not based upon any constitutional or statutory guarantee. Without a constitutional or statutory guarantee, a trial judge could deny a request for a jury trial of compensation, and be upheld on appeal. Washington and California, along with numerous other states, explicitly guarantee a jury determination of compensation in their state takings clauses. Oregon, on the other hand, seems to be operating on an assumption that compensation ought to be determined by a jury, but this assumption may not be able to withstand closer scrutiny.

This Comment should not be construed as an attack on current practice and jurisprudence in Oregon. Rather, the purpose of this Comment is to illuminate an opportunity for Oregon to align its constitutional and statutory provisions with the wishes of Oregonians. Without some action, litigation entailing substantial costs and consuming valuable resources will be required to clarify the uncertainty in this area of the law.

The Oregon legislature is in a position to revisit the condemnation statutes, discuss the actual intent of these statutes, and weigh the costs and benefits of possible alternatives. The legislature should consider whether it intends to guarantee a right to a jury determination of compensation in an eminent domain action. If it does, action must be taken. If it does not, action must also be taken. The current ambiguity of the statutory language on this particular issue serves neither determination.

It seems likely, however, that Oregon citizens might be highly motivated to act. Property owners litigating Measure 37 or other condemnation cases against the State of Oregon would likely be disillusioned to learn that they possess no right to have a jury decide how much their properties are worth. As this Comment illustrates, there are arguments that property owners could advance that have a shot at winning, even absent the clarifications

to eminent domain proceedings suggested by this Comment. However, with an amended takings clause, property owners would have a slam dunk.