



## Preemption in Action in Oregon

What follows comprises as a comprehensive resource highlighting select provisions of Oregon law—spanning constitutional articles, statutes, and administrative rules—that have been rendered partially or fully unenforceable under the U.S. Constitution's Supremacy Clause. Generally, it illustrates how federal laws, court decisions, and regulations can override state authority in areas where national uniformity is deemed essential, such as civil rights, interstate commerce, public health, safety standards, and consumer protections. By detailing the original state text, enactment history, preempting federal authority, judicial applications, and practical impacts, the list educates on the dynamics of federalism, showing how state laws may persist "on the books" despite losing legal force, often awaiting formal repeal or amendment.

Specifically, this is a partial compilation of Oregon laws preempted by federal mandates, focusing on notable examples from the state's constitution (e.g., marriage definitions, jury verdicts, voting requirements), statutes (e.g., health insurance benefits, consumer protections, tobacco advertising), and administrative rules (e.g., railroad safety, hazardous materials transport, natural gas pipelines). It is not exhaustive but emphasizes long-standing provisions that remain codified yet inoperative in key respects, with timelines indicating years since unenforceability began. Users should consult legal professionals for current applications, as preemption analyses can evolve with new federal developments.

### Oregon Constitutional Provisions Unenforceable Due to Federal Preemption

#### **Article XV, Section 5a — Marriage Definition (11 years since it became unenforceable)**

**Issue:** Whether **Article XV, § 5a** of the **Oregon Constitution** may be enforced after federal recognition of same-sex marriage.

#### **Oregon constitutional text:**

**"Section 5a. Policy regarding marriage.** It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."



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## **Oregon enactment:**

**Article XV, § 5a** was adopted by initiative (**Measure 36**) at the **November 2, 2004** general election.

## **Federal law rendering it unenforceable:**

**Obergefell v. Hodges, 576 U.S. 644 (2015).**

## **Federal rule:**

The **Fourteenth Amendment** guarantees same-sex couples a fundamental right to marry and requires states to license and recognize same-sex marriages on equal terms as opposite-sex marriages.

## **Application of federal law and cases:**

In **Obergefell v. Hodges, 576 U.S. 644 (2015)**, the **U.S. Supreme Court** held that state laws limiting marriage to opposite-sex couples violate the **Due Process and Equal Protection Clauses** of the **Fourteenth Amendment**. The Court expressly invalidated state constitutional amendments and statutes that denied marriage recognition to same-sex couples. Because **Article XV, § 5a** declares that only marriages between one man and one woman may be legally recognized, it directly conflicts with **Obergefell**'s holding. Under the **Supremacy Clause**, Oregon officials are constitutionally prohibited from enforcing **§ 5a** notwithstanding its continued presence in the **Oregon Constitution**.

## **Practical effect:**

**Article XV, § 5a** has been unenforceable since **2015**. Oregon officials may not deny marriage licenses or refuse recognition based on the sex of the spouses, notwithstanding the continued presence of **§ 5a** in the **Oregon Constitution**. The provision remains on the books solely because it has not been repealed by constitutional amendment.

## **Article I, Section 11 — Non-Unanimous Criminal Jury Verdicts (6 years since it became unenforceable)**

**Issue:** Whether Oregon may constitutionally convict defendants of felonies based on non-unanimous jury verdicts authorized by **Article I, § 11**.



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#### **Oregon constitutional text (relevant excerpt):**

**“Section 11. Rights of Accused in Criminal Prosecution.** In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury ...; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; ...”

#### **Oregon enactment:**

The non-unanimous verdict clause was added by constitutional amendment adopted **May 18, 1934**.

#### **Federal law rendering it unenforceable:**

**Ramos v. Louisiana, 590 U.S. \_\_ (2020).**

#### **Federal rule:**

The **Sixth Amendment**, incorporated against the states through the **Fourteenth Amendment**, requires jury unanimity to convict in serious criminal cases.

#### **Application of federal law and cases:**

In **Ramos v. Louisiana, 590 U.S. \_\_ (2020)**, the U.S. Supreme Court held that the **Sixth Amendment** right to a jury trial includes a requirement of unanimity and that this requirement applies fully to the states. The Court expressly overruled **Apodaca v. Oregon, 406 U.S. 404 (1972)**, which had previously allowed Oregon to use non-unanimous jury verdicts in felony cases. Because **Article I, § 11** authorizes felony convictions by a vote of ten jurors, it is directly inconsistent with the constitutional rule announced in **Ramos**. As a result, Oregon courts may not enforce the non-unanimity provision notwithstanding its continued inclusion in the constitutional text.

#### **Practical effect:**

Oregon courts may not enter felony convictions based on non-unanimous jury verdicts. The non-unanimity language in **Article I, § 11** is unenforceable to the extent it authorizes non-unanimous convictions, though the remainder of **§ 11** remains operative.

#### **Historical note:**

Prior to **2020**, Oregon's non-unanimous jury system was upheld in **Apodaca v. Oregon, 406 U.S. 404 (1972)**, which held that jury unanimity was not required in state criminal trials. **Ramos** expressly overruled **Apodaca**, making jury unanimity fully applicable to the states.

**Article II, Section 2(1)(b) — Six-Month Durational Residency Requirement for Voting (54 years since it became unenforceable)**



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**Issue:** Whether Oregon may enforce a six-month state residency requirement as a precondition to voting.

**Oregon constitutional text (relevant excerpt):**

**"Section 2. Qualifications of electors.** (1) Every citizen of the United States is entitled to vote in all elections ... if such citizen: (a) Is 18 years of age or older; (b) Has resided in this state during the six months immediately preceding the election ...; and (c) Is registered not less than 20 calendar days immediately preceding any election ..."

**Oregon enactment:**

**Article II** dates to the original **1859 Oregon Constitution**. The six-month durational residency requirement has been retained into the current text.

**Federal law rendering it unenforceable in significant part:**

**Dunn v. Blumstein, 405 U.S. 330 (1972); Voting Rights Act Amendments of 1970**, codified at **52 U.S.C. § 10502**.

**Federal rule:**

Lengthy durational residency requirements burden the fundamental right to vote and the constitutional right to travel and are subject to strict scrutiny under the **Fourteenth Amendment**. Federal law also prohibits durational residency requirements as a condition of voting for **President and Vice President**.

**Application of federal law and cases:**

In **Dunn v. Blumstein, 405 U.S. 330 (1972)**, the **U.S. Supreme Court** struck down one-year and three-month residency requirements, holding that such laws violate the **Equal Protection Clause** and impermissibly burden the right to travel. The Court made clear that extended durational residency requirements cannot be justified by administrative convenience. Separately, Congress enacted the **Voting Rights Act Amendments of 1970**, now codified at **52 U.S.C. § 10502**, expressly preempting state durational residency requirements for presidential elections. Together, these authorities render Oregon's six-month residency requirement unenforceable as a categorical precondition to voting.

**Practical effect:**

Oregon may not constitutionally enforce a six-month residency prerequisite as a categorical bar to voting by otherwise qualified citizens. Any application of **Article II, § 2(1)(b)** must yield to federal constitutional limits and federal statutory preemption.



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## Oregon Statutes Unenforceable Due to Federal Preemption

### **ORS 743A.040 — Mandatory Health Insurance Benefit Requirements (ERISA Preemption) (52 years since it became partially unenforceable)**

**Issue:** Whether Oregon may enforce state-mandated health insurance benefit requirements against self-funded employer health plans.

#### **Oregon statutory text (relevant excerpt):**

**ORS 743A.040** requires health insurance policies and health benefit plans issued in Oregon to include specified minimum benefits and authorizes the legislature to impose additional mandated benefits applicable to health plans regulated by the state.

#### **Oregon enactment:**

**ORS chapter 743A** was enacted in **1973** as part of Oregon's comprehensive statutory framework governing health insurance benefits and has been amended repeatedly since enactment.

#### **Federal law rendering it unenforceable in part:**

**Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a).**

#### **Federal rule:**

**ERISA** expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," while preserving state authority to regulate insurance only as applied to fully insured plans.

#### **Application of federal law and cases:**

In **Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)**, the **U.S. Supreme Court** held that **ERISA** preempts state laws that have a connection with or reference to an employee benefit plan, establishing the broad preemption framework that governs state benefit mandates. In **FMC Corp. v. Holliday, 498 U.S. 52 (1990)**, the Court clarified that this preemption applies fully to self-funded employer plans even when similar state laws remain valid for insured plans. In **Oregon Teamster Employers Trust v. Hillsboro Garbage Disposal, Inc., 800 F. Supp. 1471 (D. Or. 1992)**, the **U.S. District Court for the District of Oregon** applied these principles to Oregon benefit regulation and confirmed that Oregon benefit requirements cannot be enforced against **ERISA**-covered plans. In **Standard Insurance Co. v. Morrison, 584 F.3d 837 (9th Cir. 2009)**, the **Ninth Circuit** reaffirmed that the insured/self-funded divide is structural under **ERISA** and that self-funded plans remain exempt from state insurance mandates, explaining why **ORS 743A.040** remains codified but partially unenforceable.



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#### **Practical effect:**

Since **1974**, Oregon may not enforce **ORS 743A.040** or any benefit mandate adopted under it against self-funded employer health plans governed by **ERISA**. The statute remains fully enforceable for individual and fully insured group health plans and remains codified because it continues to operate lawfully in those contexts.

#### **ORS 646.608 — Unlawful Trade Practices Act (Airline Deregulation Act Preemption) (34 years since it became partially unenforceable)**

**Issue:** Whether Oregon may apply its consumer protection statutes to airline prices, routes, or services.

#### **Oregon statutory text (relevant excerpt):**

**ORS 646.608** declares specified acts and practices in the course of business to be unlawful trade practices and authorizes enforcement actions by the **Attorney General** as well as private civil claims by consumers.

#### **Oregon enactment:**

**ORS 646.608** was enacted in **1971** as part of Oregon's **Unlawful Trade Practices Act** and has remained a central component of Oregon consumer protection law.

#### **Federal law rendering it unenforceable in part:**

**Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1).**

#### **Federal rule:**

The **Airline Deregulation Act** expressly preempts state laws "related to a price, route, or service of an air carrier," including generally applicable state consumer protection statutes when applied to airline operations.

#### **Application of federal law and cases:**

In **Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)**, the **U.S. Supreme Court** held that the **Airline Deregulation Act** preempts state deceptive-practices laws as applied to airline advertising and pricing, even when those laws are generally applicable. In **American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)**, the Court reaffirmed that consumer protection statutes cannot be enforced against airlines when they relate to prices, routes, or services, allowing only narrow contract-based claims to proceed. In **Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998) (en banc)**, the **Ninth Circuit** broadly interpreted "service" under the **ADA**, barring state-law consumer claims involving airline operations and establishing controlling law in Oregon. In **Hickcox-Huffman v. US Airways, Inc., 855 F.3d 1057 (9th Cir. 2017)**, the **Ninth Circuit**



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confirmed that this preemption continues to bar **UTPA**-style claims decades later, explaining why **ORS 646.608** remains on the books but unenforceable in the airline context.

#### **Practical effect:**

Since at least **1992**, Oregon may not enforce **ORS 646.608** against airlines for claims that relate to airline pricing, routes, or services. The statute remains fully enforceable against non-airline businesses and remains codified because it continues to apply broadly outside the federally preempted field.

#### **ORS 431A.175 — Restrictions on Tobacco Advertising and Promotion (Federal Cigarette Labeling and Advertising Act Preemption) (25 years since it became partially unenforceable)**

**Issue:** Whether Oregon may enforce state restrictions on cigarette advertising and promotion based on smoking and health.

#### **Oregon statutory text (relevant excerpt):**

**ORS 431A.175** authorizes restrictions on the advertising and promotion of tobacco products, including limitations on the location, manner, and content of tobacco advertising for public health purposes.

#### **Oregon enactment:**

**ORS 431A.175** was enacted in **1997** as part of Oregon's tobacco control and public health statutes and remains codified in **ORS chapter 431A**.

#### **Federal law rendering it unenforceable in part:**

**Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–1341.**

#### **Federal rule:**

The **Federal Cigarette Labeling and Advertising Act** expressly preempts state laws imposing requirements or prohibitions “based on smoking and health” with respect to the advertising or promotion of cigarettes whose packaging complies with federal labeling requirements.

#### **Application of federal law and cases:**

In **Lorillard Tobacco Co. v. Reilly**, **533 U.S. 525 (2001)**, the **U.S. Supreme Court** struck down Massachusetts cigarette advertising restrictions as expressly preempted by the **FCLAA**, holding that states may not regulate cigarette advertising based on smoking and health. The Massachusetts regulations invalidated in **Lorillard** were materially similar to the restrictions authorized by **ORS 431A.175**, so Oregon may not enforce its statute to regulate cigarette advertising content,



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placement, or promotion within the preempted field. In **Altria Group, Inc. v. Good**, 555 U.S. 70 (2008), the Court clarified that while some fraud-based claims may survive, state regulation of cigarette advertising content and placement remains preempted, reinforcing that **ORS 431A.175** survives only in non-preempted applications. Together, these cases explain why **ORS 431A.175** remains codified but partially unenforceable as applied to cigarette advertising.

#### **Practical effect:**

Since 2001, Oregon may not enforce **ORS 431A.175** to regulate cigarette advertising content, placement, or promotion based on smoking and health. The statute remains enforceable only in non-preempted contexts and remains on the books because it retains lawful applications.

#### **Oregon Administrative Rules Unenforceable Due to Federal Preemption**

#### **OAR 741-305-0000 et seq. — Railroad Clearance and Safety Requirements (at least 45 years in the OAR; partially unenforceable for decades)**

**Issue:** Whether Oregon may enforce administrative rules governing railroad clearances and related safety requirements in areas occupied by federal regulation.

#### **Oregon administrative rule text (relevant excerpt):**

**OAR 741-305-0000 et seq.** establish minimum clearance, overhead, and safety requirements applicable to railroad operations within Oregon.

#### **Oregon enactment:**

The rule history reflects adoption effective **December 21, 1981 (PUC 13-1981)**, establishing that the operative language has been in the **Oregon Administrative Rules** for at least 45 years.

#### **Federal law rendering it unenforceable in part:**

**Federal Railroad Safety Act of 1970**, codified at **49 U.S.C. § 20106**.

#### **Federal rule:**

The **Federal Railroad Safety Act** preempts state laws and administrative rules covering the same subject matter as federal railroad safety regulations, permitting state regulation only where federal law has not occupied the field or where a narrow local safety hazard exception applies.

#### **Application of federal law and cases:**

In **CSX Transportation, Inc. v. Easterwood**, 507 U.S. 658 (1993), the **United States Supreme Court** held that federal railroad safety regulations preempt state requirements governing operational matters such as train speed and related safety subjects. The Court reaffirmed and clarified this doctrine in **Norfolk Southern Railway Co. v. Shanklin**, 529 U.S. 344 (2000).



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emphasizing that once federal regulations cover a subject, state requirements are displaced by operation of law. Because federal railroad regulations now comprehensively govern clearance and safety standards, Oregon's administrative rules are unenforceable to the extent they address the same subject matter. The rule text nevertheless remains published in the **Oregon Administrative Rules** and is applied only in areas not occupied by federal regulation.

#### **Practical effect:**

Oregon agencies may not enforce these railroad-related **OARs** where federal railroad safety regulations govern the same issues. The rules remain on the books because they continue to apply in residual areas not preempted by federal law.

#### **OAR 740-110-0060 — Transportation of Radioactive Material by Highway (at least 47 years in the OAR; partially unenforceable for decades)**

**Issue:** Whether Oregon may enforce administrative rules governing the transportation of radioactive and hazardous materials in areas occupied by federal regulation.

#### **Oregon administrative rule text (relevant excerpt):**

**OAR 740-110-0060** governs requirements applicable to the highway transportation of radioactive materials within Oregon.

#### **Oregon enactment:**

The rule history reflects adoption effective **August 23, 1979 (PUC 3-1979)**, establishing that the operative language has been in the **Oregon Administrative Rules** for at least 47 years.

#### **Federal law rendering it unenforceable in part:**

**Hazardous Materials Transportation Act**, now codified at **49 U.S.C. §§ 5101-5128**.

#### **Federal rule:**

The **Hazardous Materials Transportation Act** establishes uniform national standards for the transportation of hazardous materials and expressly preempts state laws and administrative rules that impose additional or different requirements, subject to limited exceptions.

#### **Application of federal law and cases:**

Federal courts have consistently recognized that Congress intended to occupy the field of hazardous materials transportation to ensure national uniformity. In **CSX Transportation, Inc. v. Public Utilities Commission of Ohio, 901 F.2d 497 (6th Cir. 1990)**, courts acknowledged that state requirements differing from federal hazardous materials regulations are displaced by federal law. The **U.S. Department of Transportation** has likewise issued preemption determinations



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confirming that state rules regulating packaging, labeling, routing, or handling of hazardous materials are unenforceable where federal standards apply. As a result, Oregon's administrative rule may not be enforced to the extent it diverges from or supplements federal hazardous materials regulations, notwithstanding its continued inclusion in the **OAR**.

#### **Practical effect:**

Oregon agencies may not enforce **OAR 740-110-0060** in a manner inconsistent with federal hazardous materials transportation standards. The rule remains on the books because it continues to apply only within the narrow scope permitted by federal law.

#### **OAR 837-005-0000 et seq. — Natural Gas Pipeline Safety Standards (at least 55 years in the OAR; partially unenforceable for decades)**

**Issue:** Whether Oregon may enforce administrative rules governing natural gas pipeline safety in areas occupied by federal regulation.

#### **Oregon administrative rule text (relevant excerpt):**

**OAR 837-005-0000 et seq.** establish safety standards, inspection requirements, and operational obligations applicable to natural gas pipeline facilities operating within Oregon.

#### **Oregon enactment:**

The rule history reflects adoption effective in **1971** by the **Oregon Public Utility Commission**, establishing that the operative language has been in the **Oregon Administrative Rules** for at least 55 years.

#### **Federal law rendering it unenforceable in part:**

**Natural Gas Pipeline Safety Act of 1968**, now codified at **49 U.S.C. §§ 60101–60141**.

#### **Federal rule:**

The **Natural Gas Pipeline Safety Act** authorizes the **U.S. Department of Transportation** to establish uniform national pipeline safety standards and expressly preempts state laws and administrative rules covering the same subject matter, except where a state has obtained federal certification to enforce standards identical to federal requirements.

#### **Application of federal law and cases:**

Federal courts have consistently held that Congress intended to occupy the field of interstate pipeline safety regulation to ensure national uniformity. In **Northern Border Pipeline Co. v. Jackson County, 512 F. Supp. 1261 (D. Minn. 1981)**, courts recognized that state and local requirements affecting pipeline safety are preempted where federal standards apply. **Supreme**



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**Court** precedent has likewise emphasized that states may not impose additional or different safety requirements in federally regulated pipeline fields. As applied to Oregon, administrative rules governing pipeline safety are unenforceable to the extent they regulate matters addressed by federal pipeline safety standards, notwithstanding their continued inclusion in the **OAR**.

#### **Practical effect:**

Oregon agencies may not enforce these pipeline safety **OARs** where federal pipeline safety regulations govern the same subject matter. The rules remain on the books because they continue to operate only within the narrow scope permitted by federal law, including federally delegated enforcement of identical standards.