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Appellate Practice Section
of the Oregon State Bar.

VOLUME 9

OREGON APPELLATE ALMANAC

2019

A Collection of Highly Specific Scholarship, Exuberant Wordplay,
and Fond Memories from the Appellate Practice Section

Nora Coon, Editor

Cite as: 9 Oregon Appellate Almanac ____ (2019)

The Oregon Appellate Almanac is published annually by the Appellate Section of the Oregon State Bar. Copies are archived on our website, <http://appellatepractice.osbar.org/appellate-almanac>, as well as on HeinOnline.

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Publication Information

The Oregon Appellate Almanac is printed by Joe Christensen, Inc.
Back issues may be ordered in print from HeinOnline.

ISSN 2688-5034 (print)

ISSN 2688-5018 (online)

OREGON APPELLATE ALMANAC

Volume 9 (2019)

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The Almanac welcomes submissions of approximately 500 to 2000 words in the following areas:

- Biographies, interviews, and profiles of current and past figures in Oregon law
- Court history, statistics, and trivia
- Legal analysis of recent, significant, or overlooked Oregon appellate cases
- Miscellany: humor, poetry, wit, and word puzzles

The annual submission deadline is **June 1**.

Submissions should be lightly footnoted as necessary to support the author's assertions. In deference to the fact that most contributors and readers are practitioners, citations should conform to the Oregon Appellate Courts Style Manual.

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Introduction

Welcome to the 2019 edition of the Oregon Appellate Almanac! After a hiatus of a few years, the Almanac is back with new articles, new puzzles, and a special feature to celebrate the 50th anniversary of the Oregon Court of Appeals. Thank you to all of our authors for their articles, and to those who have already started thinking about next year's submissions! We also greatly appreciate the sponsorship of Stoel Rives, Davis Wright Tremaine, Landye Bennett Blumstein, and Markowitz Herbold, whose contributions to the Appellate Section made the printing of this Almanac possible.

This edition of the Almanac is dedicated to the memory of two judges of the Oregon Court of Appeals: the Honorable Robert Wollheim and the Honorable David Schuman. Judge Wollheim was, in the words of former Chief Judge Haselton, "the great, generous, humane heart of the Oregon Court of Appeals," and we are honored to publish his article, written for this edition, celebrating the richness of the Yiddish language and its use in Oregon court opinions. Judge Schuman, a keen intellect and a true *mensch*, served the state of Oregon for more than three decades as an attorney, educator, and judge. Both will be missed.

We hope that you enjoy this edition of the Almanac, and we welcome your questions, feedback, and submissions for future editions at oregon.appellate.almanac@gmail.com.

—Nora Coon, Editor

[Judicial] notice may be taken of facts which are generally known. And, as the common knowledge of man ranges far and wide, so the doctrine embraces matters so curiously diverse as, e.g., the rising of the sun, the status of the Isle of Cuba, the late Civil War, the contents of the Bible, the character of a camp meeting, the height of the human frame, the fable of "the frozen snake," the characteristics and construction of the ice cream freezer, the general use of the diamond stack or the straight stack spark arrester, the habits of those who shave, in fine, "all things, both great and small."

Peterson v. Standard Oil Co., 55 Or 511, 517-18, 106 P 337 (1910)

Court of Appeals 50th Anniversary Feature

Remarks to New Clerks (August 17, 2015)

Hon. Rick T. Haselton

Good morning. This is so exciting. It's wonderful to see all of you: The "first day of school."

You are about to begin some of the most challenging and grueling, exhilarating and fulfilling, times of your life. Years from now, when you are, G-d willing, old women and old men, you will think of these times and smile. Certainly, I do: 36 years ago, I began my clerkship. That was the most important year of my life, and the best—until I became a judge. I trust, and pray, that the same will be true for each of you.

So, some thoughts and themes:

First: *Community*. This is a special place—a community, and, at its best, a family. It is a community dedicated to an ethic of public service and excellence, committed to intellectual rigor and integrity, and forged under the unrelenting pressures of impossible caseloads (for example, the Court of Appeals addresses approximately 2,000 substantive matters a year). Every member of our community—judicial assistants, staff attorneys, law clerks, and judges—is committed to that ethic. Beginning today, you will be, and are, an essential part of this community—*your* community—contributing, immeasurably, to our work and forming immutable bonds.

This is a special community because of the people—those who are here today and those who came before us. One of the remarkable, and wonderful, aspects of this community is that we renew ourselves from generation to

generation. Law clerks learn from judges, and judges from law clerks (*truly*—that’s why we hired you). Sometimes, quite happily, law clerks become judges, the baton passing to the next generation. Get to know the people here—they are extraordinary—and get to know our history, which is now *your* history. You are a part of it, and it will forever be a part of you.

And, yes, this is a family, with all that connotes—not the least, occasional dysfunctionalities. You will spend more time here over the next two years than you will with your partners, spouses, children, and friends. You will share some of the best and worst of times and forge friendships that will last for the rest of your life. In the years to come, you will, together, dance at one another’s weddings, rejoice in the birth of your children, and mourn the loss of loved ones. Be there for one another; support one another. Family.

The second, transcendent ethic: *Public Service*. That phrase can be so casually invoked as to be cynically debased. So let’s be clear: Our work is not a “job”; it is a trust. Everyone with whom you will work in your time here is committed to the service of something greater than themselves. It is a daily privilege—a privilege for *each of us*—to serve the people of Oregon. Never forget that; never denigrate that. And never forget that that is not some mere abstract ideal: Our work affects the lives of thousands of Oregonians, often in the most immediate, traumatic, and irrevocable ways. That is an awesome responsibility—and, believe me, you will be entrusted with greater responsibilities in your time here than you will for many years to follow in whatever practice you pursue. Approach our work with humility and humanity.

A third constant: “*The Conundrum*.” Our essential challenge and our fundamental charge is to do our work as well as we can, as expeditiously as we can.

Thus, the two classic dictums: “Get it right” and “Get it out.” Only a charlatan or a fool would pretend that those two imperatives are always, or even frequently, compatible. Indeed, it is disingenuous to think that we ever “get it right”—instead, all we can do is “do the best we can,” ever mindful that reasonable minds can reasonably differ. Still, when “Get it right” and “Get it out” are in irreconcilable tension, the first—“Get it right”—must *always* prevail. Nothing is more important.

Now, for a few practical tips:

(1) The single most important feature of your clerkship will be your personal relationship with your judge. Invariably, that will determine whether you have a “good” clerkship or a “bad” clerkship. So work to maintain that relationship, including with regular, preferably *daily* contact. Many of the judges have formal structures to ensure that sort of regular contact—but, in all events, if that is not happening, *you* must take the initiative to make sure that it does. Don’t be shy. *Don’t* be shy.

(2) Ask questions. You’ve heard this forever—and you may not believe it, but it really is true here. Our entire process is dependent on questioning, debating, struggling, striving. The greatest vice is misplaced ego; the second greatest is certitude.

(3) Your irreducible obligation is to help your judge—and, concomitantly, the court—get it right. I touched on this before, but what that means in practical terms is that you are a “clean conduit” in your research,

thinking, and writing—and you don’t “pull any punches” in your discussions about cases with your judge. Obviously, at the end of the day, it’s our name that is on the gubernatorial commission or the Secretary of State’s certification of election, but your obligation is to give us your best counsel and advice.

(4) Use the *entire* court as a resource and support network. Because every judge, staff attorney, or law clerk on both courts is committed to “getting it right,” every one of us welcomes discussing issues, regardless of whether we are personally participating in the case or not. What that means in practical terms is (unless your judge imposes some limitations) never feel constrained about talking with, say, a staff attorney from another department about an issue that you may be working through. Although our staff attorneys are generalists, many of them are especially, superbly skilled in particular subject areas—and you are just shortchanging yourself (and the ultimate work product) if you pass up the opportunity to benefit from their experience.

(5) No one is more important than judicial assistants. Yes, I saved the best for last—I may have said that your relationship with your judge was most important, but I was lying: If you work well and happily with your judge’s judicial assistant, your time here will be a joy; if you don’t, it may well be living hell. They know more about what makes these institutions function than the rest of us do—or ever will.

So roll up your sleeves and unlimber your synapses. The best times in your professional life now begin. Welcome aboard!

Clerks' Memories of Chief Judge Herbert Schwab

From the inception of the Oregon Court of Appeals in 1969 through his retirement in 1980, Herbert Schwab served as the chief judge of the Oregon Court of Appeals. In recognition of his outsized influence on the court, and his equally memorable personality, the Almanac requested that some of his former clerks share their memories of clerking for him.

Phillip M. Margolin, 1970-1971:

I clerked for Judge Schwab from Fall 1970 to the Fall of 1971, during the second year of the Oregon Court of Appeals' existence. During my 25-year career as an attorney, I developed a large and successful appellate practice during which I argued in the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit on approximately 15 occasions, the Oregon Supreme Court approximately 16 times and made roughly sixty appearances in the Oregon Court of Appeals. I believe that I owe my development as an appellate attorney to the year I spent as Judge Schwab's clerk.

Judge Schwab was gruff and demanding, and I got my fair share of criticism during my clerkship, but I could never get upset with the criticism because the judge was usually right. One of my most vivid memories is of an argument we had about a hearsay issue in a criminal case, where I was convinced that he had made the wrong decision. I wrote a memo citing several Oregon Supreme Court cases I believed were on point and required reversal. A month later, the judge sent me a draft of an opinion affirming the trial court ruling. I stormed into his office and demanded to know how he could affirm the case when the Supreme Court cases required reversal. I pointed out that

the Court of Appeals was an inferior court to the Supreme Court and told him if he didn't like the way the Supreme Court had ruled, he could point that out in an opinion reversing the case. We went back and forth for a while. Then Judge Schwab leaned back in his chair, smiled at me and said, "Phil, you might be right, but I have the vote." I cracked up laughing and left. The Supreme Court took the case on review and backed Judge Schwab, but the opinion was not unanimous and there were several opinions going every which way.

My other vivid memory is about the way the Judge handled a case where the Law and Justice collided. A married minister who had a child had a part-time job at a pharmacy in a small Eastern Oregon town. Stores used to give "green stamps" to customers that could be redeemed for prizes. The minister left his job at the pharmacy, but kept a key. One night, he entered the store and stole enough green stamps to get a guitar. He was arrested and convicted of burglary and theft. This was his first offense, but the trial judge sentenced him to serve 10 years in the State Penitentiary on the burglary and five for theft, to run consecutively. On appeal, the minister's lawyer argued that this was cruel and unusual punishment.

I was very upset by what I saw as judicial overkill. The Court of Appeals held that the appellant could not be sentenced to five years for theft because the burglary charge required proof of theft, but it upheld the ten-year sentence for burglary because it was within the permissible range of sentences for that crime. I couldn't argue with the result, but Judge Schwab could see that the decision upset me. A week or so later, he called me into his chambers and told me that the Parole Board had paroled the minister a day after he was admitted to the Oregon State Penitentiary. I never asked if Judge Schwab had anything to do with that

decision, but he was one of the most powerful and respected politicians in Oregon and I have always suspected that he thought there had been a miscarriage of justice, even if the lower court decision was legally correct, and had done something that resulted in a just result.

Terry Lukens, 1973-1974

In 1972 and 1973 I was finishing law school at Rutgers University in New Jersey. My wife and I had lived in the Northeast for most of our lives, but wanted to move to a more open, family-friendly environment with our young son. I had a good friend in graduate school who was born and raised in Salem, Oregon; he raved about the town and its many virtues.

Although we had never been to Oregon, since we could live almost anywhere after law school, and based on my friend's recommendation, I decided to pursue job opportunities in Oregon. That led me to the Oregon Court of Appeals and Judge Schwab. I applied for a clerkship with the court and was first interviewed, by phone, by Kendall Barnes, Judge Schwab's "super clerk." That was followed by a brief phone interview with Judge Schwab.

I was ultimately hired as Judge Schwab's clerk and we moved to Salem in June 1973. I took the bar preparation course at Willamette and sat for the Oregon bar in July. My clerkship started in August when I walked into Judge Schwab's chambers and met him, face to face, for the first time. That was the beginning of a long, enjoyable relationship.

Working for Judge Schwab was an extremely rewarding experience. He was a great lawyer and judge. In addition, he was an excellent mentor and helped me

develop the skills I would need to be a successful lawyer. He would question and challenge my legal conclusions and advice, as well as my legal writing. We would have long discussions in his chambers about cases and appropriate decisions. Most of the time he would change my mind about a case, and sometimes I would change his. I remember once when we disagreed, he made it clear to me that “he had the vote and I didn’t.” But he said that with the voice of a mentor, not as a personal slight.

In the early 1970s the jurisdiction of the Court of Appeals was somewhat limited as to civil matters. Yet Judge Schwab knew that I was interested in a civil practice after my clerkship and made sure that I was assigned interesting civil cases, including the Rose City Transit case and Corvallis Sand and Gravel. That sort of personal consideration was particularly appreciated.

We became quite close during my year as a clerk and stayed in touch long after I left to practice law in Seattle in August 1974. We visited at least once at his house in Cannon Beach and met in Seattle on several occasions. We exchanged holiday greetings with Judge Schwab and Barbara every year.

In January 1999, I was appointed a judge in the King County Superior Court. It was no surprise that, shortly thereafter, Judge Schwab sent his congratulations. That was especially meaningful.

In short, Judge Schwab was a judge’s judge—open minded, thoughtful, dedicated, hardworking, and a mentor to all who worked with him. He was a role model for me throughout my legal career, particularly during my time on the bench.

Will Aitchison, 1976–1978:

As I write this 43 years later, Judge Schwab remains the best judge I’ve encountered. Blindingly intelligent, resolutely fair and unbiased, and with a firm sense of the role the Court of Appeals should and should not play, Judge Schwab shaped the mission of the Court for years to come. He sat on every panel and participated in every decision. His opinions were direct and to the point; two words would not be allowed where one would do. Oral argument was an exercise in getting directly to the point. Pity the lawyer who read from a script, for it would lay in tatters minutes into blunt questioning from Judge Schwab. Pity more the lawyer who came unprepared or was facile with the facts or the law. Judge Schwab’s sense of ethics would tolerate neither.

His clerks will tell you that Judge Schwab changed them profoundly. They learned by his example to be incisive and to quickly spot the real issues at the heart of a case. They learned how to write with terse elegance. Above all, they learned from his example that all litigants should be accorded the same dignity and fairness, and that what mattered was the evenhanded application of the law, not anyone’s status or the politics of a case. Oregon could not have picked a better person as its first chief judge of the Court of Appeals.

Michael L. Marowitz, 1978–1979:

I clerked for Judge Schwab between 1978 and 1979. He was like the Ayatollah of the appellate court, a man who was not to be crossed. Some called him “grumble guts.” He had a baritone voice and wanted simple, not complex draft opinions. When I wrote a draft saying that “defendant discharged his firearm,” he changed it to “defendant shot his gun.” When he asked me why I had written “discharged

his firearm,” I answered, “Because I didn’t go to school for 15 years to write like a 10-year old.”

About six months after I worked exclusively for him, he said he was going to send me to write draft opinions for other judges on the court. As to one of those judges, Lee, a former ambulance-chasing PI lawyer who many believed had been elected as a judge just because of his last name (a famous name in Oregon because of early Mormon settlers), Schwab said, “And if Lee changes a single word of your draft, get back to me, and I’ll take care of it.”

There was a case involving a situation similar to the famous US Supreme Court case often referred to as the “Christian burial speech” case. Defendant had been put on a train, accompanied by two members of law enforcement, and had been induced to confess. I wrote a draft opinion that said this was another example of law enforcement taking advantage of an unrepresented defendant who was about to speak with his lawyer at the end of the train trip. I talked to Schwab after he read my draft opinion. He told me, “Nice opinion. Now, be a lawyer, write another opinion that comes out the other way.”

He was not a fun judge or a judge with much patience. He was always about business. He would often sum up the best argument that a lawyer could make on behalf of his/her client, and when the attorney started to squirm or not adopt Schwab’s summary, he swiveled his chair to face the back of the room and shot paper balls into a home-made basket he had fashioned to amuse himself in such moments. When he turned his back to the lawyer, that was his signal that “I’ve heard enough from you.”

The (Former) Appellate Commissioner's Retrospective

Jim Nass

I was hired as Appellate Legal Counsel for the Oregon Supreme Court and Court of Appeals in 1983, and retired in 2019 as Appellate Commissioner for the Oregon Court of Appeals. I attempt here to chronicle the evolution of my work with the appellate courts, and other professional activities. I vainly hope it serves as an inspiration to others, but fear it will serve only as a cautionary tale.

From the Beginning of Time Until Recently

Chief Justice Berkeley Lent and Chief Curmudgeon George Joseph hired me to serve as Appellate Legal Counsel for both the Supreme Court and Court of Appeals in 1983.¹ My duties included recommending dispositions of substantive motions filed in the Supreme Court (miniscule number) and the Court of Appeals (much larger number), and serving as staff administrator of the Oregon Rules of Appellate Procedure (ORAP) Committee. My duties also included working with the Records Section to identify and recommend resolution of jurisdictional and non-jurisdictional defects in cases filed in both courts.²

¹ Three months after Chief Justice Lent participated in hiring me, possibly realizing the mistake he had made, he retired. Edwin Peterson became Chief Justice and deserves much credit for guiding the Judicial Department through the process of county circuit courts becoming state courts. Chief Justice Peterson and I still have lunch together occasionally and also see each other at Willamette College of Law appellate moot court events.

² Fun fact: For those appellate practitioners who remain concerned about the quality, timeliness, and expense of transcripts on appeal, I met with Chief Judge Joseph in February 1988 to address issues with transcripts. It is not a recent problem.

But wait, there's more: I also recommended disposition of petitions for writs of mandamus, habeas corpus, and *quo warranto* in the Supreme Court, served as media contact person for both courts (which included preparing media releases summarizing Supreme Court decisions), and served as the liaison between the Supreme Court and the Oregon State Bar for bar admission and disciplinary matters.³

In the beginning, the position also included serving as legal counsel to the State Court Administrator. That would have been substantially more responsibility because of the transition to a statewide circuit court system. Mercifully, the administrator soon hired Linda Zuckerman, who served long and honorably in the role of legal counsel to the administrator. I happily handed off to Linda the handful of those matters more or less in their virgin state.

Before my arrival, the Court of Appeals' practice was to decide substantive motions by my predecessor writing a letter to the parties. The Chief Judge quickly acceded to my recommendation that motions be decided by order bearing the Chief Judge's signature. Additionally, both the Supreme Court and Court of Appeals refrained from issuing "speaking orders"—that is, orders that explained the ruling on a motion. Rather, the parties were notified that the motion was granted or denied and that was about it. The Supreme Court continues to adhere to that practice, in part because some decisions on motions are collegial and the justices may have different reasons for ruling in a particular

³ Like most position descriptions, mine included "other duties as assigned," which Chief Justice Lent explained meant I would be the "designated hostage" when events got out of hand at the Records Section counter. They never did and I never was.

way. For better or worse, orders deciding motions filed in the Court of Appeals, decided mostly by the Chief Judge or the presiding judge of a department (and, later, by the Appellate Commissioner), often include some explanation.⁴

A word or two about my philosophy of writing orders, originally for the Chief Judge and later as Appellate Commissioner deciding matters other than routine motions: An order should include a statement of the material facts on which the court relied to decide the matter so that, if the court gets a key fact wrong, the parties would be aware of it. An order also should include some explanation of the applicable law, even it is only citation to a statute, rule, or case. And the order should apply the law to the facts to arrive at a reasoned result and corresponding disposition of the motion. I believe orders should include sufficient explanation that the parties know why the court decided the matter as it did. An order may or may not include a summary of the parties' arguments, depending on whether it appears important that the parties understand that the court considered particular arguments.⁵

When Judge Kurt Rossman retired at the end of his term in 1993, I and four other Oregon attorneys ran for the position. Judge Rex Armstrong won that election. Apparently I'm neither a great candidate nor campaigner: I didn't even carry my own county.

⁴ Given the length of many Appellate Commissioner orders, some might say too much explanation.

⁵ When one or more parties is self-represented, an order may include more explanation of the law or reflect the court's consideration of particular arguments, to afford assurance that the court considered the party's contentions and had a reason for rejecting them.

Eventually, the Supreme Court hired its own staff attorneys, who assumed responsibility for motions and writs. Other Supreme Court staff members became responsible for media releases and, eventually, the Oregon State Bar liaison work. By 1998, I was serving as Appellate Legal Counsel exclusively for the Court of Appeals.⁶

eCourt

When I was hired, the Oregon state courts had an electronic case register system (OJIN). In 1985, the appellate courts began using the Wang word processing system, replaced in 1990 by WordPerfect, later succeeded by the Word processing system. Beginning in about 2004, much of my time was devoted to assisting the appellate courts in developing a new electronic case register (ACMS), and, later, an electronic document management and workflow system, and an electronic filing system.⁷ That effort was initiated by Chief Judge Mary Deits and carried forward to completion by Chief Judge David Brewer.⁸ Eventually, in September 2008, the appellate courts became “paperless” and any attorney could electronically file a

⁶ I found out later that all this was orchestrated by the Supreme Court’s then-senior staff attorney, Keith Garza, who was appalled at the ethical and organizational pitfalls of a legal professional working for both the Supreme Court and Court of Appeals.

⁷ I also served on the Law, Policy and Standards Committee, beginning in 2007, which became the Law and Policy Work Group, admirably chaired by now-Supreme Court Appellate Legal Counsel Lisa Norris-Lampe.

⁸ At about the same time, Chief Justice Paul De Muniz led the effort to adopt a new circuit case register, document management, hearing and trial scheduling, and electronic filing system (Odyssey).

document with either court.⁹ My biggest disappointment with the appellate courts: The failure, to date, to adopt a system allowing self-represented parties to electronically file documents; I am told that will take yet another year or two.

Those People

Part of the reason I served with the appellate courts as long as I did is the judges I worked for, or really, with. Although, technically, my bosses were the judges generally and whomever was Chief Justice or Judge at the time, I never felt supervised. I was always treated respectfully, as a colleague, which I very much appreciated.¹⁰ I had the honor of working with Chief Justices Ed Peterson, Wallace Carson, Paul De Muniz, Thomas Balmer, and Martha Walters, and Chief Judges George Joseph, Bill Richardson, Mary Deits, David Brewer, Rick Haselton, Erika Hadlock, and Jim Egan. The State of Oregon has been well-served by the leadership of the appellate courts over the years.

Likewise, I enjoyed working with both courts' staff attorneys, law clerks, and judicial assistants: intelligent, diligent, professional.

In my own office, we enjoyed very low turnover; I had but four successive secretarial support staff for all 36 years (Silvia Vervane, Anne Koenig, Flora Whitlock, and Donna Berg), and two motions clerks (Stephanie Hudson

⁹ Chief Justice De Muniz deserves a great deal of credit for overseeing the transition of the circuit courts to electronic courts, including electronic filing. The judicial department has refrained from seeking publicity for successful implementation of major new computer systems, in contrast to other state administrative agencies' struggles with implementing new systems.

¹⁰ Especially since they were smarter and wiser than me.

and Ed Johnson).¹¹ As funding permitted, I also had the assistance of law clerks and staff attorneys from time to time. Two notable law clerks: Lora Keenan, my first law clerk who eventually became a Court of Appeals staff attorney, serving many years in that capacity; and Jan Shea, who started out as a half-time law clerk in 1987 and, 25 years later, completed her service as a full-time staff attorney.

In the course of hiring law clerks and externs, I often focused as much on prior work history or other life experiences as sheer intellectual horsepower. Ruling on motions often requires the exercise of mature judgment, and nothing contributes to judgment as much as just having lived life. I had the honor of working with externs and law clerks with substantial experience in such diverse occupations as newspaper reporter, baker, wedding planner, massage therapist, and tours of duty in the military. I also had an extern who was emancipated at age 16 and had lived on her own since then, an extern who competed in martial arts, and a tournament poker player.

My office was not physically located with the Court of Appeals' offices generally; it was part of the Records Section, which serves as clerk of the court for both the Supreme Court and Court of Appeals.¹² Over the years, practitioners told me the Records Section staff had a reputation of being more customer friendly than most

¹¹ Stephanie Hudson went on to serve various positions in the Records Section and is now the section's computer technical specialist.

¹² Obscure fact: I occupied the same office, and used the same desk, as my predecessor, David Gernant, who later became a Multnomah County Circuit Court Judge. I am told that the same office and desk also was used by Judge Loren Hicks, Oregon's first State Court Administrator (1972–1980).

clerks' offices.¹³ That is my impression as well. On many occasions, I observed how patiently and thoroughly Records Section staff members assisted self-represented parties, who were often in a state of considerable distress and with little or no knowledge of court procedures.¹⁴

From time to time, I was told by federal court judges that Oregon lawyers had a reputation of being more candid with the court than practitioners from other states. My experience was the same. That is important, because once an attorney acquires a reputation for playing fast and loose with the facts—or mischaracterizing a statute or case holding—the attorney's value as an advocate plummets.¹⁵

¹³ The emphasis on customer service was already well-established under Carol Justice, who served as manager of the Records Section when I began in 1983, and was carried forward by her successor Appellate Court Services Directors Scott Crampton, Becky Osborne, and Daniel Parr.

¹⁴ Often more difficult were those folks—mostly self-represented parties—who believed they were knowledgeable about the law, but were not, or who had substantially different interpretations of the law than we did.

¹⁵ The word limit for this article prevents me from mentioning other great people I came to know in the course of my employment with the appellate courts. I list some of those people, knowing that, undoubtedly, I have left some out; my apologies to those I have omitted: Stephen Armitage, Elaine Bensavage, Marc Brown, Todd Cherry, Ann Christian, Kingsley Click, James Comstock, Nori Cross, Tom Dashiell, Robert Fuller, Karen Hightower, Greg Kaeser, Mikki Kelly, Ernie Lannet, Maureen Leonard, Bill Linden, Katie Martin, Olivia Miller, Jonah Morningstar, Jim Mountain, Anne Munsey, Jenny Myrick, Joseph Nations, Marianne Ober, Kerensa Pearce, Catherine Pickett, Roy Pulvers, Carol Reis, Ted Reuter, Corey Riley, Virginia Rossman, Samrach Sar, Phil Schradle, Matt Shoop, Julie Smith, Irene Taylor, Andrea Turner, Gabe Walsh, and Mary Williams.

Other Professional Activities

Throughout my career with the Oregon appellate courts, I was afforded the opportunity to suggest legislative changes to statutes governing procedures in the appellate courts. I was permitted to testify in support of Judicial Department bills that I had proposed, or, occasionally, in opposition to bills supported by others, relating to appellate procedures. Those activities led to my participation in a number of work groups working on legislation, including the Judicial Department's Mediation Confidentiality Work Group in 1997, the Oregon Law Commission's 2002–2005 Judgments Work Group, the Attorney General's Victim's Rights Work Group in 2007, and the 2016 Direct Criminal Appeals Work Group. I very much enjoyed my legislative work, and found it professionally rewarding.¹⁶

From time to time, I was asked to participate in continuing legal education presentations or preparation of CLE publications. Again, very professionally rewarding. I also took advantage of joining the Bar's Appellate Practice Section, serving as Chair of the Executive Committee in 1997.¹⁷

Chief Judge Joseph encouraged my participation in the American Bar Association's Council of Appellate Staff

¹⁶ That remained true even when the Supreme Court or Court of Appeals cited my testimony on a bill in support of an interpretation I did surely did not intend.

¹⁷ At that time, spearheaded by practitioner Barbee Lyon, the Section successfully sponsored a bill revising and adopting statutes governing stays pending appeal, including the use of letters of credit as security for undertakings, which, I am told, has become the primary way appellants secure their supersedeas undertakings.

Attorneys. I had the honor of serving as Chair of the Council in 1990–1991 and, from time to time, attended the annual seminars sponsored by that group or, later, the National Committee of Court Staff Attorneys.

Beginning, as I recall, in the early 2000s, I began to be contacted by law students interested in serving as an extern in my office. Over the years, a great many law students have served in that capacity. Also, in 2013, I began participating in Willamette Law School's first-year law student mentoring program and served as mentor for a number of law students. Those relationships, some of which continue to this day, proved to be very rewarding. Also, I volunteered for the Oregon State Bar's New Lawyer Mentoring Program, but the first new lawyer assigned to me in 2016 never responded to me, nor, yet, has the new lawyer assigned to me a month or so ago. But the new lawyer assigned to me in 2017, Megan Cox, did, and we successfully completed the program.

Judy Henry, who deserves much credit for developing and administering for many years the Appellate Settlement Conference Program, invited me to train to serve as a mediator in that program. Of the four cases thereafter referred to me, I failed to settle any of them, thus ending my career as a mediator.¹⁸ Judy also deserves additional credit for settling some very difficult cases I referred to her for mediation, typically family law cases, often involving self-represented parties.

I also had the dubious honor of being named as a defendant in a number of federal court actions filed by self-

¹⁸ Two of the cases later settled. I like to think that my efforts may have contributed to the settlement; alas, there is no evidence of that.

represented plaintiffs and, regarding events that occurred in the course of an appeal, testifying on behalf of the appellate courts in a number of bar disciplinary proceedings, before a grand jury, and in civil depositions. Good times.

The Days of Our Lives

I retained all 36 years' worth of my calendars, having continued to keep a manual calendar even after electronic ones became available. Having taken the time now to review those, I reach these conclusions: Calendars come in a wide variety of styles and sizes; often I have very poor handwriting; and, based on the number of entries, apparently I spent most of my time at medical, dental, and other health-professional appointments for myself or my two sons, attending my sons' various sporting or other activities, meeting house or appliance repair people, taking family vehicles in for servicing or repair, and taking pets to veterinarian appointments. Also, I attended a LOT of committee meetings.

But It Wasn't All Fun and Games

My time with the appellate courts was not all fun and games. Sometimes things got serious, such as during the annual golf Tagline Tournament and the annual softball game.¹⁹ Though I am a terrible golfer, I have long participated in the Tagline Tournament, originally established by Justice Skip Durham (who continues to participate in the tournament). After his retirement, Chief Justice Walters and I become co-commissioners of the

¹⁹ A couple of years ago, the appellate courts decide to substitute a kickball game for the softball game. As a longtime baseball fan, I disagreed with that decision but continued my participation as umpire.

Tagline Tournament.²⁰ Upon my retirement, Justice Chris Garrett assumed the mantle of co-commissioner.

The annual softball—now kickball—game between teams fielded by the Supreme Court and Court of Appeals, continues to be a competitive event.²¹ My first year with the court, I garnered an award of having hit the longest ball; whatever skills I had waned over the years to the point that, a few years ago, I was politely encouraged to assume the role of umpire, which I gratefully accepted. Back in the day, from time to time, there also would be a game between an appellate court team and a team fielded by the Solicitor General's office or Office of the Appellate Public Defender.²² I hope at some point those traditions can be renewed.

Back to the Future

My successor is Commissioner Theresa Kidd. Commissioner Kidd briefly worked for me on her return to Oregon about 10 years ago but served as a Court of Appeals staff attorney since then. She is smart, hardworking, has

²⁰ For me, that is more or less an honorific, since my role is limited to calling the golf course and obtaining tee times, and encouraging judges and staff to participate. The judge commissioner is responsible for selecting the prizes for the various awards (longest drive, closest to the pin, most trees hit, most balls into the water, most pathetic story, etc.). Judicial Assistant Julie Reynolds does all the real work organizing the event.

²¹ Somebody found a trophy featuring an animal that could be a weasel, so the annual event is for the right to possess for a year the coveted Weasel Cup.

²² The game between the court team and the public defenders is billed as the Battle for the Advil Cup, derived from a trophy the top of which appears to have broken off and on which somebody jammed an empty plastic bottle of Advil painkiller.

lots of common sense, and exercises good judgment; I leave the commissioner position knowing it is in very capable hands.

Well, that about wraps it up. It has been an honor and a pleasure serving the State of Oregon for these many years.

Chief Judge: “Mom”?

Hon. Rick T. Haselton

No one grows up dreaming of being Chief Judge of the Court of Appeals. Well, maybe Dave Brewer did—but I certainly didn’t. I *loved* being a “regular” and presiding judge—the work I came to believe I was born to do—and I’ve never had any particular aptitude (or interest) in administrative, budgetary, personnel, intramural political, or technological matters (indeed, with all things technologic, I had a notorious “dis-aptitude”). As I wrote to Mary Deits not long after I did become Chief, for years I had been blissfully (in some instances, perhaps willfully) ignorant: I was like a child who simply assumes that “Mom” will “put the bread on the table and a roof over your head” and didn’t understand that “those things don’t just simply ‘happen.’”

Then my life changed. Dave moved on to the Supreme Court. And I became “Mom.”

I went from dealing with fewer than ten emails a week, to dozens—a day. From attending three opinion conferences a month (two for my department, and one full court conference) to more than a dozen (including staff attorney meetings). Scores of motions to rule on. Every day there were administrative meetings on technology, docketing, the budget, and legislative matters, and almost every day there were mini-crises, just something blowing up randomly and sometimes literally—like photocopiers going on the fritz or an early winter storm threatening to morph into “Snow-maggedon,” requiring a court closure. And silly things, that would never even occur to you, like whether the green, white, and red lightbulbs on the courtroom podium needed to be changed because they weren’t sufficiently distinct on sunny days, or what kind of gift to get for a

judge's retirement, or whether the water in the courtroom, which lawyers and judges had been drinking for years, should be tested for trace elements (it came from the tap).... "Real judge" work became, with a few happy and notable exceptions, a distant memory.

It was a time of great challenge and generational change at our court. At the beginning of my tenure, on April Fool's Day 2012, the state was in a severe budgetary crisis, forcing me to discharge two long-time employees within days of my becoming Chief. At the same time, we were seeking—and, incredibly, thanks to Dave's monumental efforts over the years, obtained—unfunded legislative approval of the first expansion of the court (from 10 to 13 judges) in over 30 years; the funding for the expansion was deferred until at least the next legislative session, contingent on improved revenue projections. Meanwhile, our backlog was listing towards the point of no return, exacerbated by the loss of some of our most senior and most productive judges, with Dave, the legendary Woodchipper, also departing at year's end to join the Supreme Court.

It was completely discombobulating, and I would have been lost but for Dave's and our staff attorney Julie Smith's constant support and gentle and wise counsel in that transitional period. As I sought my footing, I tried to do what I thought I could do best—and why I took on the job: Set a tone and try to maintain and safeguard the quality and integrity of the court's decision-making, especially as expressed in our opinions. Shortly before I became Chief, I wrote to our daughter, Molly, who was considering pursuing the Officer Candidate School path to the Marine Corps: "Leadership is never easy, and, in truth, rarely an honor; it is, instead, something that we who are called upon to do it assume, not because we are somehow

‘anointed,’ but because we have been ‘blessed’ with a certain capacity to help others, collectively, to transcend what they might do individually [O]thers may be (and, no doubt, are) wiser or braver or more beautiful or more generous than we are, but, again, inexplicably, we have the capacity to help [what is most special in others] be realized.”

Later, about 16 months into my tenure and right after Molly had been commissioned following Officer Candidate School at Quantico, I spoke of how “being personal can make up for a lot of other deficits in leadership (of which I have many . . .). But, if you’re present and try to lead by example (never expecting folks to do what you wouldn’t do yourself), and people know you care—*really* care, instead of just talking a good game—about them and your common mission, then, most times, everything will come out right in the end.” I believed that, deeply. I still do. And that was how I tried to be as Chief.

The other, for me non-negotiable, aspect of the Chief’s responsibilities was, as I alluded to above, “riding herd” on the quality, cogency, and consistency of the court’s work product. In response to an inquiry from a law student in 2015, I elaborated on that role, noting that I personally “vetted” roughly 500 proposed opinions each year and emphasizing how essential that type of consideration was to the court’s institutional credibility and, ultimately, its authority. In that regard, I was merely following the example of my predecessors as Chief, including the almost iconic Herb Schwab and George Joseph, who were both legendary “editors.”

By the time I wrote that second email to Molly in August 2013, the Court faced new and unprecedented challenges of the “both a blessing and a curse” variety: In the summer of 2013, after I and others testified and

informally “lobbied,” the legislature approved funding for the additional judges, a full new department with attendant staffing, to come on line that fall. In very short order, I, with our newly hired executive manager, needed to coordinate the hiring and training/integration of a new staffing complement of two judicial assistants, two staff attorneys, and five law clerks (not to mention the three new judges), as well as a very substantial physical expansion, because, with the addition of the new panel, the court outgrew its space: For the first time in our history, we could not all be on one floor. That division presented not only physical/logistical challenges, but daunting “psychic” challenges to our cultural/communal integrity and identity, akin to those challenges that, when my old firm had expanded onto multiple floors, had accelerated and accentuated our firm’s implosion.

I believe, in retrospect, that we did pretty well with that transition/integration (and by “we,” I mean “we”—all of us, incumbents and newbies alike, worked thoughtfully and hard to make it work), though, of course, with that much change in both personnel and space, things could not be, and never were, quite the same again. There was just a difference in “feel”—two floors, not one; four panels, not three; thirteen seats around the table at Full Court conference, not ten.

With all of that came additional stress, even beyond the “normal,” and an essential part of my “setting the tone” role as Chief (or so I believed) was to regularly “check the pulse” and act preemptively and empathetically. There were so many ways to do that: Just walking the floor(s) and chatting *personally*. *Listening*. Keeping folks (especially permanent legal and administrative staff) in the loop by seeking their input and keeping them apprised of developments. Simple silliness, promoting, and partaking

of, court “culture,” like random treats and birthday brownies, and focused, “customized” personal notes of appreciation.

I am, frankly, proud of my work—my *leadership*—in that respect. People knew that, whatever my other, manifest, deficits, I *cared*. And there are so many other good, real, comforting sources and moments of pride from my time as Chief: Swearing in the three new judges on 11/12/13; administering the oath a few months later to my former clerk, Meagan Flynn; the first time I led the full Court, *our* court, fully robed, into the Capitol’s House chamber for Oregon’s analog to the State of the Union address; a timeless retreat in glorious sunshine at Cape Kiwanda; presiding over the Court’s first *en banc* oral argument in decades; re-instituting our court’s “road show” school sittings—and going home, one last time, to West Albany. All of that, along with some “small,” quiet, sweet moments, like hosting court retirement dinners here at home—or unilaterally approving special work accommodations so a clerk could volunteer in her little girl’s classroom.

It was, from the first and to the end, a labor of love. Exhausting labor to be sure—at the end, I had nothing more to give—but I so loved the Court and her people. I always will.

[E]ven when the historical record does permit some inferences and conclusions about the original intentions and understandings of the framers, the idea that those intentions and understandings are controlling makes the state's highest law little more than a historical artifact of an era that few in this century actually would choose as a determinant of individual rights and government authority—an era, it should be remembered, when women possessed few political and civil rights, when the common law recognized no protections for workers, and when the people decreed that a “negro” or “mulatto” who did not already reside in the state when the constitution was adopted was not permitted to reside in Oregon.

State v. Hemenway, 353 Or 129, 156-57, 295 P3d 617, vac'd, 353 Or 498 (2013) (Landau, J., concurring)

Heavy Lifting

History in Oregon Constitutional Interpretation – Why We Should Do It That Way

James N. Westwood

Sixth Circuit Judge Jeffrey Sutton’s new book¹ shows that even federal judges understand the influence of state constitutions on subjects such as criminal rights, civil liberties, and free expression. Judge Sutton acknowledges the role of Hans Linde and Oregon courts in bringing state constitutional study out of the shadows.² It’s true that the Oregon Constitution punches above its weight nationally. In this article I’ll focus on history in interpreting the Oregon Constitution, why it is so important, and why the nature of our government actually requires use of that originalist tool.

Methods of Constitutional Interpretation

In broadest terms—I’m using a very broad brush here—constitutional interpretation has two schools: (1) the history-centered bunch who tend to look first for the meaning that people attached to a provision when it was adopted, and (2) the more text-analytic folks for whom history is a prelude to the current social norms that can govern meaning. For want of better terms, I’ll call the first group “originalists” and the second group “pragmatists.” They overlap tremendously.

¹ Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018). Judge Sutton was the principal speaker at this year’s annual Oregon Constitution Law CLE.

² *Id.* at 178-82.

Historicism in Oregon Constitutional Law

Text, historical context, precedent. Those inquiries have become the sacrosanct guide for interpretation of Oregon constitutional provisions.³ Serious attention to history became necessary after Justice Linde's opinion in *State v. Robertson* recognized the "historical exception" limits on protection of expression.⁴ From there the Oregon Supreme Court took up the banner of historic originalism. Sometimes history was recited off the cuff. For example, the court "perceive[d]" that most members of the 1857 Constitutional Convention were "rugged and robust individuals" who would approve Article I, section 8 protection for an otherwise prohibited pornographic bookstore in a Central Oregon community.⁵

We knew historicism was entrenched when the Supreme Court decided *Smothers v. Gresham Transfer, Inc.* in 2001, spending 20 pages of Oregon Reports on history of the remedies clause in the Oregon Constitution, Article I, section 10.⁶ Justice Leeson's scholarly opinion drew an

³ *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). It is notable that Justice Gillette installed those factors seemingly offhand, without citing to a source. For an initiated constitutional amendment, the history of its ratification is a factor. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994).

⁴ *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982). Examples include perjury and solicitation of a crime, which had no legal protection when Article I, section 8 was adopted. *Id.* at 412.

⁵ *State v. Henry*, 302 Or 510, 523, 732 P2d 9 (1987).

⁶ *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 94-124, 23 P3d 333 (2001). The case was overruled in 2016, drawing an equally detailed and contradictory historical analysis in Justice Landau's

immediate challenge based equally on historical scholarship,⁷ and in the following year the Court of Appeals (Landau, J.) weighed in with at least a conditional acknowledgment that historic originalism was the accepted approach to constitutional interpretation.⁸

I mention Justice Landau's name because he would become the Oregon Supreme Court's main skeptic of historic originalism, writing with apparent approval that Supreme Court cases have often veered from that track,⁹ and sounding positively pragmatic in his 2016 *Horton v. OHSU* concurrence:

“[T]he purpose of [historicism] * * * is instead to determine the *general principles* that animate [the constitutional text] and that may be applied to modern circumstances.

“* * * * *

“Whatever construction we adopt must be faithful both to the text and the *general purposes* reflected by the context in which that text was adopted.”¹⁰

concurring opinion. *Horton v. OHSU*, 359 Or 168, 254, 376 P3d 998 (2016) (Landau, J., concurring).

⁷ Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 Rutgers LJ 1005 (2001).

⁸ *State v. Ciancanelli*, 181 Or App 1, 21-22, 45 P3d 451 (2002), *aff'd in part, rev'd in part*, 339 Or 282, 121 P3d 613 (2005).

⁹ *State v. Hemenway*, 353 Or 129, 155, 295 P3d 617 (Landau, J., concurring), *vac'd*, 353 Or 498, 302 P3d 413 (2013).

¹⁰ *Horton*, 359 Or at 261, 279 (Landau, J. concurring) (emphasis added).

The court's majority didn't hold their colleague's separate view, and nothing since *Horton* indicates any change.

In a just-published *Willamette Law Review* article, however, the now-retired Justice Landau concludes that the Oregon Supreme Court has embraced a “new originalist” approach, where “construction” replaces “interpretation,” and “underlying *policies* of the provision or other background *principles* like deference to coordinate branches of government” (similar words are in his *Horton* concurrence) guide the court's approach.¹¹

“New originalism” is largely pragmatism by another name. I suggest Justice Landau's policies-and-principles approach does not fairly represent the Oregon Supreme Court's interpretative process. Nor, as I hope to explain in the following sections, is much of that approach even permissible in a constitutionally divided government like ours.

The “Why” of Historic Originalism in Interpretation of the United States Constitution

Seventh Circuit Judge Frank Easterbrook is known as an originalist. He has made what I consider the tightest short case for *why* the United States Constitution needs to be interpreted from an historic originalist viewpoint:¹²

¹¹ Jack L. Landau, *An Introduction to Oregon Constitutional Interpretation*, 55 *Willamette L Rev* 261, 292 (2019) (emphasis added).

¹² Frank H. Easterbrook, *Originalism and Pragmatism: Pragmatism's Role in Interpretation*, 31 *Harv JL & Pub Policy* 901 (2008).

(a) Congress and the president derive their authority from election. They are free to act as pragmatically as they like because they are politically accountable for those actions.

(b) Federal judges are different because their authority comes from appointment to a long (lifetime) term, insulated from accountability. The doctrine of judicial restraint recognizes that. Fidelity to the historical record fosters that restraint.

(c) Social compact—a contract theory—is the fundamental basis of governmental legitimacy in the United States. In the law, social and private contracts are both hard to change, and society is stabilized that way. Historic originalism respects the contractual concept by respecting the understanding of the parties (to a contract *or* to a constitution) at the time the compact was made.

To Judge Easterbrook, originalism is “the *only* approach that explains why judges have the final word.”¹³ However, he sees that “[n]ew problems pose unanswerable questions to someone who thinks originalism the sole method of interpretation.”¹⁴ The political branches are best qualified to address policy questions that may not be encoded in the Constitutional text. The courts, though, have a deferential but final power to say (to expound, in John Marshall’s words¹⁵) what the Constitution means. Says Judge Easterbrook, “When judges can reach such a firm

¹³ *Id.* at 904 (emphasis in original).

¹⁴ *Id.* at 902.

¹⁵ “[W]e must never forget that it is a *constitution* we are expounding.” *McCulloch v. Maryland*, 17 US 316, 407 (1819) (emphasis in original).

conclusion, they may insist that the political outcome yield.”¹⁶ That is the full sense of historic originalism.

Is Historic Originalism Unsited to the Oregon Constitution?

On its face, the Easterbrook case for federal originalism goes nowhere in Oregon. First, our judges are elected and in theory accountable to the voters. They do not serve for life. Second, the Oregon Constitution is not “hard to change.” By legislative referral or by initiative, a simple majority vote in one election changes the constitution, which has endured 253 amendments since 1902.

The Oregon Supreme Court has not told us *why* it applies historic originalism in its interpretations. Justice Landau has not explained why the structure of Oregon’s constitution would instead allow a “general principles” pragmatism, but is his position perhaps the better one? In a Jacksonian democracy like Oregon’s, with elected judges and an easily changed constitution, why isn’t Justice Landau’s approach the natural and constitutionally permitted result? Why should Oregon judges feel any more restrained than the political branches to make policy choices and call them “the law”?

Why Historic Originalism Is Required Under the Oregon Constitution

Judge Easterbrook’s “appointment to a long term” rationale for judicial restraint does indeed operate in Oregon. In practice, our judges are no more politically accountable—maybe even less so—than federal judges.

¹⁶ Easterbrook, *supra* note 12, at 904.

Elections at the appellate level almost never turn out incumbents.¹⁷ The governor's appointment power is that of a "unitary executive" at its strongest. The governor appoints, and the judge takes office, without any confirmation process to check the governor's prerogative. In practice, an Oregon appellate judge derives authority from his or her initial appointment or election, and subsequent elections have no practical effect on that. Appellate judges in Oregon serve as long as they want to.

In Oregon the Easterbrook "constitution is hard to change" rationale is largely missing. Capital punishment comes and goes with disturbing regularity, for example, and other constitutional amendments are a biennial feature of Oregon ballots. However, the authorship and sponsorship of every amendment is widely known, and the public debates are if anything *too* extensive for a court to review conveniently. Objective evidence of what the Oregon public understood its new constitution to mean in 1857 is also a lot easier to find than the critics contend.¹⁸ The *Ecumenical Ministries* methodology¹⁹ ensures that the well-understood histories of the text and voter intent will be determinative.

¹⁷ I have found only one occasion where an elected judge failed at re-election. Court of Appeals Judge William Fort was defeated in 1976 by Judge William Richardson who ran not on philosophy but instead on age, describing himself as "not ready to retire." *State of Oregon Voters' Pamphlet*, Primary Election, May 25, 1976, at 55.

¹⁸ This statement may draw fire from "living constitution" advocates as insensitive to precluded Oregonians of the day. The charge would be simplistic and misplaced, but that discussion is worth joining at another time.

¹⁹ *Ecumenical Ministries*, 318 Or at 559-60.

There is more. Even with its judges elected, Oregon's government is one of divided powers. Alexander Hamilton argued in *Federalist* 78 that judges get the final say because in a constitutional government the judiciary needs the power to rein in a properly powerful legislature or executive that exceeds its constitutionally delegated (in a state, its constitutionally limited) authority. If checks and balances in a government of divided powers are to survive, we need that constraint.

Judge Easterbrook says, "When originalism fails, so does judicial power to have the final say. And democracy remains."²⁰ Such a residuum of unchecked democracy is not a republican form of government. Observance of the republican form is something Oregon judges can and arguably must impose on themselves, if only because it's the right thing under the oath they've taken.

Historic originalism and judicial restraint have a compelling claim to primacy in interpretation of the Oregon Constitution. The structure of our constitutional government calls for it. A court deciding that a politically accountable body is violating constitutional rules must be firmly convinced of it. Pragmatic resort to "principles," that seem always to agree with the judge's personal view, is a policymaking exercise that should be invoked rarely and with greatest restraint. A judge who knows his or her history well, and applies it impartially, is using the objectively verifiable method the pragmatists lack. That feature keeps originalism viable as the most sensible and most plainly mandated approach to Oregon constitutional interpretation.

²⁰ Easterbrook, *supra* note 12, at 904.

History in Oregon Constitutional Interpretation - Why We Should Not Do It That Way

Timothy Wright

Justice Jack Landau, recently retired from the Oregon Supreme Court, spoke at the 2019 Oregon Constitutional Law CLE, explaining the main points of his recent article in the *Willamette Law Review*.¹ In his talk, he rebutted what he called the “old originalism” of the *Priest v. Pearce* interpretative methodology,² arguing that *Priest* fails to look at the intent of the voters who ratified the constitution, freezes the constitution’s meaning, seeks the subjective intent of the framers, and has not been uniformly applied. He contended there, as he does in the article, that the Oregon Supreme Court has, in the last 20 years, “refined” its constitutional analysis in significant ways: (1) it acknowledged that it had not previously uniformly applied the *Priest* analysis; (2) it expanded *Priest*’s application to constitutional amendments adopted by initiative; and (3) it “began to temper its emphasis on original intent” by shifting the inquiry’s focus from the subjective intent of the framers towards identifying “relevant underlying principles that may inform [the court’s] application of the constitutional text to modern circumstances.”³ He calls that refined methodology “new originalism.”

James Westwood, who attended that CLE, disagrees both with Justice Landau’s contention that the court has shifted its focus and with the need for such a shift. He contends that Justice Landau may be overstating the extent

¹ Jack L. Landau, *An Introduction to Oregon Constitutional Interpretation*, 55 *Willamette L Rev* 261 (2019).

² 314 Or 411, 415-16, 840 P2d 65 (1992).

³ Landau, *supra* note 1, at 269 (quoting *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011)).

to which the court has adopted the “new originalism” approach that Justice Landau describes.⁴ He further makes the argument that “new originalism” is simply pragmatism and that the Oregon Constitution requires the state’s court’s to apply an historic originalism methodology.⁵ Westwood rests his historic originalism argument on the state’s “constitutionally divided government,” offering that, structurally, the governor’s unchecked appointment power and the relative ease with which judges—especially appellate judges—win reelection make Oregon judges politically unaccountable, and, practically, the courts can conveniently review the voters’ intent from both 1857 and forward.⁶ Westwood concludes that “[p]ragmatic resort to ‘principles,’ that seem always to agree with the judge’s personal view, is a policymaking exercise that should be invoked rarely and with the greatest restraint[,]” that the knowledgeable and impartial use of history is an “objectively verifiable method,” and, as a result, originalism is “the most sensible and most plainly mandated approach” to constitutional interpretation in Oregon.⁷

I take a third position. I contend that applying either form of originalism to the Oregon Constitution—particularly to those amendments adopted by the framers—reinforces the position of the framer’s animating principles—namely, white supremacy—as the bedrock of our constitution in a way that is inherently less democratic than an elected judge untethering from any consideration of either those framers or ratifying voters. Here, I will briefly

⁴ James N. Westwood, *History in Oregon Constitutional Interpretation - Why We Should Do It That Way*, 9 Or App Almanac 31, 34 (2019).

⁵ *Id.* at 36-38.

⁶ *Id.* at 36-37.

⁷ *Id.* at 38.

review the degree to which white supremacy guided the framers and the voters who ratified the constitution and outline why the shift in interpretation described by Justice Landau does little to address that inconvenient reality.

While by no means the only way in which white supremacy dominated the Oregon Constitution's framing and ratification, the most obvious example is that Oregon is the only state to enter the union with a black exclusion clause in its constitution.⁸ How that happened reveals more about the intent of the framers or the voters, as well as the underlying principles that might inform the court's constitutional interpretation, than the most extensive survey of contemporary dictionaries.

Going into the convention, there were two conversations about race: whether white men would enslave people of color and what proximity to people of color would be required of those white men and their families. The federal government had largely controlled the question of slavery in the territory until shortly before the convention: the Missouri Compromise of 1820 divided the nation into free and slave states, with Oregon north of the Compromise line, making it a free state.⁹ The Kansas–Nebraska Act of 1854, however, permitted territories to determine for themselves whether they would allow slavery.¹⁰ Between those compromises, the Oregon Territory had prohibited slavery, although it also restricted voting and political office to “free male descendants of a

⁸ Cheryl A. Brooks, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 Or L Rev 731, 739 (2004).

⁹ David Schuman, *The Creation of the Oregon Constitution*, 74 Or L Rev 611, 615–16 (1995).

¹⁰ *Id.* at 616.

white man” and passed two exclusion bills prohibiting free blacks from entering the territory.¹¹ It was after federal forces intervened in civil unrest in Kansas that the white men in the Oregon Territory voted to convene a constitutional convention and decide for themselves whether to enslave people of color.¹²

The convention itself did not attempt to settle the question of slavery in Oregon, with delegates instead deciding to send the question to the voters. The convention was, nonetheless, obsessed with race. They created “so thoroughly a ‘white man’s document’ that the provision for the establishment of a ‘free and white’ militia was offered, debated, and rejected as unnecessary.”¹³ The convention president, Matthew Deady, successfully amended Article I, section 34, which insured “the same right in respect to possession, enjoyment and descent of property as native-born citizens” to “foreigners who are or may hereafter become residents of this state,” to apply only to “white” foreigners. When Deady showed concern with language in Article II, section 1, which read that “[a]ll elections shall be free and equal,” Delazon Smith assured him that “it did not mean Chinese or niggers.”¹⁴ Near the end of the convention, delegates debated whether to include Chinese people in the black exclusion clause they were sending to voters. Ultimately, the delegate who introduced the motion withdrew it, offering instead what became Article XV, section 8, which prohibited Chinese people “entering the

¹¹ Brooks, *supra* note 8, at 736 (quoting D. Duniway & N. Riggs eds., *The Oregon Archives 1841-1843*, 60 Or Hist Q 211, 256 (1959)).

¹² Schuman, *supra* note 9, at 616-17.

¹³ Brooks, *supra* note 8, at 738 (quoting K. Keith Richard, *Unwelcome Settlers: Black and Mulatto Oregon Pioneers*, 84 Or Hist Q 29, 31 (1983)).

¹⁴ Schuman, *supra* note 9, at 631-32.

state after 1857 from owning real property or holding or working a mining claim.”¹⁵

The delegates sent three questions to voters: whether to permit slavery, whether to allow “free negroes” to live in the state, and whether to ratify the constitution.¹⁶ Voters approved the constitution and, by a vote of 7727 to 2645, rejected slavery. Voters also approved the exclusion of free blacks and “mulattoes” by 8640 to 1081, entering the union in 1859 as the only state admitted with a constitution possessing a black exclusion clause.¹⁷ That the only two independent questions sent to voters were about race, and that voters excluded free blacks by a wider margin than they rejected slavery, show a white male voting population concerned more with institutionalizing white supremacy than with any other concern we might prefer to assign to our state’s founders.

Following the state constitutional interpretation revolution, the court first applied a variety of interpretive methods to the constitution, but eventually settled in the early 1990s on a methodology put forward in *Priest*.¹⁸ The *Priest* analysis is in line with a long history of the court giving significance to the founders’ intent by citing to records documenting their opinions on a variety of subjects and acquiescing to the views espoused therein.¹⁹ As *Priest*

¹⁵ Ralph James Mooney, *Remembering 1857*, 87 Or L Rev 731, 759 (2008).

¹⁶ Schuman, *supra* note 9, at 630-31.

¹⁷ Brooks, *supra* note 8, at 739.

¹⁸ See Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 Or L Rev 793, 827 (2000).

¹⁹ *Id.* at 827-33.

explained, “[t]here are three levels on which [a] constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation.”²⁰

The court updated *Priest* in *State v. Savastano*, although *Priest* remains the starting point for interpreting original provisions of the constitution.²¹ In *Savastano*, the court defined its goal in applying *Priest* in two ways: (1) “to identify the historical principles embodied in the text * * * and to apply those principles faithfully to modern circumstances as they arise;” and (2) “to identify the principles that [the amendment] was intended to advance, while recognizing that the scope of that provision is not limited to the historical circumstances surrounding its adoption.”²²

Savastano appears to shift the *Priest* inquiry away from the founders’ intent toward these seemingly more malleable “historical principles.” It expands the inquiry’s focus to include the ratifying voters’ interests and acknowledges that the provision’s scope is broader than the historical circumstances in which it was adopted. However, the focus remains on male white supremacists who were either delegates at the convention or voters in 1847. Whatever methodology a court adopts, it is applying the resulting rule to modern circumstances, and while the language the court uses in *Savastano* allows the court broader discretion, the analysis suffers from the same ailment: the ultimate goal remains historical. The court

²⁰ *Priest*, 314 Or at 415-16.

²¹ *State v. Savastano*, 354 Or 64, 72, 309 P3d 1083 (2013).

²² *Id.*

continues to reinforce the notion that the founders' animating principles are the bedrock of the constitution. That is unacceptable when we understand that the founders' most obvious animating principle was white supremacy.

Two Cheers for Certified Questions

Hon. Thomas A. Balmer¹

Certification is a process through which state courts agree to answer questions of state law for the benefit of other courts. The procedure—codified in Oregon at ORS 28.200 to 28.255, and in most other states as well—may include answering state law questions for courts of other states, but in practice is almost exclusively used by federal courts to ask questions of state courts. State courts, however, although required on a daily basis to resolve sometimes difficult questions of federal law, have no comparable mechanism for asking “certified questions” of the federal courts. Even if they did, one might marvel at the temerity of a state trial court asking the United States Supreme Court to answer an unresolved question of federal law so that the trial court can resolve a pending case—despite the fact that *federal* trial courts certify questions to state supreme courts as a matter of routine. That one-sided relationship led a former justice of the Oregon Supreme Court to remark that “certified questions are the federal courts’ way of getting us to be their law clerks.”

The reason for the practice of certification is the venerable principle of comity. “Comity,” a term evoking cooperation and mutuality, might better be understood in this context primarily as an excuse by federal courts to ease their workload, whether the federal court is declining to exercise jurisdiction,² finding a reason to duck the merits of a habeas petition,³ or, as is relevant here, taking the easy

¹ Needless to say, the views expressed here are my own and not those of the Oregon Supreme Court.

² *Levin v. Commerce Energy, Inc.*, 560 US 413, 130 S Ct 2323 (2010).

³ *McCleskey v. Zant*, 499 US 467, 111 S Ct 1454 (1991).

way out of deciding a dull question of state law. But don't let the connotations of the word "comity" mislead you into thinking that equivalent doctrines are available to state courts.⁴

State courts, finding themselves on the short end of the comity stick with respect to certified questions, have adopted a variety of approaches. North Carolina, at this point uniquely, has no process for accepting certified questions. Other states, including Texas, accept them only from federal appellate courts.⁵ Our court, however, has dutifully risen to the occasion and generally accepts certified questions put to us by all federal courts. True, we do have a set of conditions that must be met, and an intimidating case, *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*,⁶ in which we articulated them, but our bark is worse than our bite. Since 2006, we have had 20 questions certified to us and have accepted all of them. And even *Western Helicopter* makes clear that "[w]e may, on occasion, accept certification of questions that, were they tendered to us in a traditional petition for review, we would decline to address."⁷ True, we recently dismissed a certified question before answering it—but only after both parties sought to have the certified question withdrawn.⁸

I hardly mean to suggest that certified questions are only good for shunting federal work onto state courts. They

⁴ See *Howlett v. Rose*, 496 US 356, 367, 110 S Ct 2430 (1990) ("The Supremacy Clause makes [federal] laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.").

⁵ Tex R App P 58.1.

⁶ 311 Or 361, 811 P2d 627 (1991).

⁷ *Id.* at 369.

⁸ *United States v. Lawrence*, 364 Or 796, 441 P3d 587 (2019).

also appear to be a valuable mechanism for parties who, having lost in the district court or otherwise been given cause (perhaps after oral argument) to doubt the favorability of the forum in which they find themselves, may make a last-ditch effort to save their case. That may be one reason why most of our certified questions—16 out of 20 since 2006—have come from federal appellate courts (and all but one of those from the Ninth Circuit) and relatively few have come from the federal district court for the District of Oregon, which is no less able to certify questions to the Oregon Supreme Court. Another reason is likely the fact that all federal judges in the District of Oregon are from Oregon, and most have dealt extensively with Oregon law before joining the federal bench, many as judges in Oregon state courts. Those judges are likely better versed in Oregon law than the average Ninth Circuit panel and may feel more confident in resolving difficult questions of Oregon law.

But, having lightly impugned the motives of judges who certify or parties who seek to have questions certified to us, I remain convinced that Oregon’s more generous approach to certified questions is the right one, not just for the benefit of federal courts, but for the benefit of state law. Cases that reach our court are subject to multiple types of selection pressures. That may mean that many important issues of state law do not get decided by us at all. That is not an idle concern, and it is one that may be especially severe in some areas of civil law today.⁹ For example, issues involving the interpretation and validity of “shrinkwrap” or “clickwrap” contracts for apps or software are no doubt

⁹ See Florencia Marotta-Wurgler & Samuel Issacharoff, *The Hollowed Out Common Law*, 67 UCLA L Rev (forthcoming 2019) (describing paucity of state appellate decisions in certain developing common law areas).

important, but no Oregon appellate court has had occasion to weigh in on the issue. We know the reason is not that Oregonians have uniformly declined to enter such contracts. Rather, those cases tend to wind up in federal court, often as part of a class action, or in a contractually prescribed arbitration forum. I am aware of at least three federal district court decisions that have determined, under Oregon law and without apparent difficulty, that clickwrap contracts are valid.¹⁰ Impressively, they all did so without citing or discussing a single Oregon case or statute. That does not mean that they got it wrong, but a state court might have approached the question differently.

Certification might seem particularly appropriate when federal courts are asked to interpret the Oregon Constitution—and we do get such questions.¹¹ Naturally, we appreciate being asked to weigh in on important state constitutional questions, yet our regular fare of appeals from state trial court decisions ordinarily brings the interpretation of many critical constitutional and statutory provisions to our doorstep. But significant gaps remain. In a federal class action asserting elder abuse claims under ORS 124.100(2) on behalf of buyers of disability insurance policies, for example, the certification process provided us with our first opportunity to interpret that important

¹⁰ See *Walsh v. Microsoft Corp.*, No. C14-424-MJP, 2014 WL 4168479 (WD Wash Aug 20, 2014); *Mendoza v. Microsoft Inc.*, No. 2:14-CV-00316-MJP, 2014 WL 4540225 (WD Wash Sept 11, 2014); *Beard v. PayPal, Inc.*, No. 09-1339-JO, 2010 WL 654390 (D Or Feb 19, 2010).

¹¹ See *DeMendoza v. Huffman*, 334 Or 425, 51 P3d 1232 (2002) (answering five certified questions as to whether Oregon statute allocating portion of punitive damages award to state criminal justice compensation account violated various provisions of Oregon Constitution).

statute.¹² And infrequently litigated common law claims—such as the contours of the equitable remedy of a constructive trust—may come our way through certified questions.¹³

In a world where some recurrent, and important, questions of state law are likely to arise almost exclusively in federal court, the comity rationale for certifying questions takes on a more persuasive character. After all, in answering those questions we provide guidance not only to federal courts and individual litigants, but also to Oregon lawmakers, lawyers, and the citizens of the state as a whole. Given that certified questions may prove essential to the development of our own law on common law and statutory questions like these, the Oregon Supreme Court should approach them not with grudging toleration, but with at least a charitable quantum of gratitude.

¹² *Bates v. Bankers Life and Casualty Co.*, 362 Or 337, 408 P3d 1081 (2018).

¹³ See *Wadsworth v Talmage*, 364 Or 408 (2019) (order accepting certified questions).

The legislature, in writing an act, and this court, in preparing its opinions, have at their command only words with which to express ideas. The sculptor has at his avail marble, bronze and other materials; the painter possesses a full palette of colors and may make use of canvas, boards or parchment. The architect may resort to drawings, specifications and even models. But a statute and a legal opinion can be couched only in words, and the latter present the difficulty of multiple meanings.

Hecker v. Crown Mills, 229 Or 8, 17, 365 P2d 840 (1961)

Commentary

Oy Vey!¹

What's Yiddish Doing in Court of Appeals Opinions?

Hon. Robert Wollheim

Created in 1969, the Court of Appeals strives to write opinions in plain English that are easily understandable to the bench, bar and the public. So, what is Yiddish doing in the court's opinions?² A very good question.

Yiddish did not appear in American legal opinions until 1929.³ I'm not going to say what word it was because the word used was not accurate, but if you want you can look it up. Be my guest. By the way, *Lawsuit Shmawsuit* is the only law review article I'm aware of that discusses Yiddish in appellate opinions. A quick review of that article reveals that the Southeast uses more Yiddish in opinions than any other section of the country. Who knew?

¹ *The Joys of Yiddish* describes oy vey "as an all-purpose ejaculation to express anything from trivial delight to abysmal woe." Leo Rosten, *The New Joys of Yiddish* 275 (2d ed 2001).

² Yiddish is not Hebrew. Rather it is a combination of Hebrew, German and a mix of other eastern European languages depending on where the Jewish people lived. Yiddish flourished in eastern Europe. It was brought to America by the Jews who immigrated to the United States in the late 19th and early 20th centuries. Yiddish developed as the language of Jewish women. Jewish women were prohibited from learning Hebrew, which was limited to Jewish men who studied the Bible and other religious texts. *Id.* at 428-29.

³ Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 Yale LJ 463, 463 n 4 (1993) (citing *In Re Kladneve's Estate*, 234 NYS 246 (Surrogate's Ct 1929)).

In Oregon, Yiddish first appeared in *State v. Young*.⁴ The case generated five prior appellate opinions and concerned overtime pay for certain white-collar state employees between 1995 and 1997. The opinion did not want to restate the history of the case because it was unnecessary to decide the issues in the case; instead the court said “we will not state the whole *megillah* here.” In a footnote the court explained that in Yiddish ‘*megillah*’ meant, in part, ‘anything very long, prolix, a rigmarole’ citing the first edition of *The Joys of Yiddish*.⁵

The 2011 case *State v. Easter*,⁶ in its first sentence, boldly declares: “This case involves *chutpza*.” *Chutzpa* is a cherished Yiddish word because it is so descriptive of a particular situation. The classical definition describes a man who is being sentenced for killing his mother and father and throws himself on the mercy of the court because he is an orphan.⁷ Well, *Easter* is not quite that dramatic. The defendant argued and implored the trial court to allow the defendant to present closing arguments to the jury. The trial court allowed the defendant’s request. On appeal an issue was whether the trial court erred in accepting the defendant’s waiver of his right to counsel during closing arguments.

The facts were not disputed. The defendant was charged with second-degree theft from a large department store and interfering with a police officer. This defendant was a frequent flyer with the criminal justice system. He had been arrested 27 times and had been convicted of

⁴ 246 Or App 115, 265 P3d 32 (2011)

⁵ The description of *megillah* did not change in the second edition.

⁶ 241 Or App 574, 249 P3d 991 (2011).

⁷ Rosten, *supra* note 1, at 81.

property crimes 15 times since 1966, and nine of the convictions were felonies. The court-appointed counsel also represented the defendant in two pending cases. At trial the defendant actively participated. He made various motions, attempted to make an objection and participated in the discussion of jury instructions.

After the state completed its closing argument, the defendant moved to discharge his attorney and make closing arguments. Discussions with the trial court ensued, with the trial court explaining to the defendant that representing himself was a bad idea. The defendant responded he could present his closing arguments because “. . . no one is failing to meet my needs. I’m meeting my own. I can clearly express myself.”⁸

After further discussions with the defendant, the trial court set ground rules for the defendant’s presentation of closing arguments, including keeping the court-appointed counsel as a legal advisor.⁹ The defendant argued to the jury. Neither party had any objections to the jury instructions. The defendant was convicted on both charges.

On appeal the defendant argued his waiver of the right to counsel for closing argument was neither voluntarily nor knowingly made. The opinion carefully discussed the relevant precedent and responded to the defendant’s arguments on appeal and rejected the defendant’s arguments. But for me, as the opinion declares, this case is about *chutzpa*. The defendant demanded his right to present the closing arguments to the jury. The trial court granted the defendant’s demand and then, on appeal,

⁸ *Easter*, 241 Or App at 578.

⁹ *Id.* at 578-79.

the defendant argued the trial court erred in granting the defendant's demand. That's *chutzpa*!

No other Oregon appellate opinion has used Yiddish. Who knows whether Yiddish will make another appearance. I hope so.

But there are some Yiddish words that have sufficiently entered American English that their meaning is understood. *Kibitzer* (pronounced to rhyme with “lib-hits-er”) describes a bystander who gives unrequested advice or suggestion to someone playing a game or a person who butts into the affairs of others.¹⁰ Another word, *kvetch* (pronounced to rhyme with fetch), has many definitions, but the most common describes a person who frets, complains, gripes, grunts and signs.¹¹ While both *kibitzer* and *kvetch* have negative implications, *mensch* (rhymes with bench) is totally positive.¹² A *mensch* is an upright, honorable and decent person and someone to admire and emulate.

There are other Yiddish words that are on the cusp of entering American English. *Schmooz* (pronounced to rhyme with loose) is a friendly, gossipy, prolonged, heart-to-heart talk, or to have such a talk.¹³ *Shlep* (pronounced to rhyme with hep) means either to drag, pull or lag behind or to stall, drag one's heels or to delay, or to slowly, lazily and inefficiently perform one's job.¹⁴

Finally, there are Yiddish words I'd like to see enter American English because they are so expressive. *Mishpoke*

¹⁰ Rosten, *supra* note 1, at 171

¹¹ *Id.* at 198.

¹² *Id.* at 232.

¹³ *Id.* at 355.

¹⁴ *Id.* at 345.

describes one's family, including one's extended family of all relatives whether far or near and no matter how numerous.¹⁵ Another Yiddish word, *kvell*, means beaming with immense pride and pleasure, usually concerning an achievement of a child or grandchild. To be proudly happy that one's "buttons can burst."¹⁶ Two Yiddish words, *gonif* and *meshuge*, are negative. A *gonif* (pronounced to rhyme with "Don-if") is a thief or a crook, not someone to be trusted.¹⁷ *Meshuge* (pronounced m'shu-gehi, which rhymes with Paducah) simply means crazy or nuts or absurd.¹⁸

Last are my personal favorite Yiddish words, which I doubt will be included in any opinions for some time. But they are so expressive. The words are *schlemiel* and *shlimazl*. Both describe a fool but there is a critical distinction in the type of fool each word describes.¹⁹ "A *schlemiel* is a man who is always spilling hot soup—down the neck of a *shlimazl*."²⁰ Never are the roles reversed; one fool only spills and the other fool only has the hot soup poured down his neck. The two fools never switch roles. To me that distinction demonstrates the wonder of Yiddish.

The future of Yiddish in future appellate opinions is unknown. But I will certainly *kvell* if one of the judges is able to include Yiddish in future opinions in the appropriate case.

¹⁵ *Id.* at 252.

¹⁶ *Id.* at 198.

¹⁷ *Id.* at 114.

¹⁸ *Id.* at 240.

¹⁹ *Id.* at 344.

²⁰ *Id.*

Should Westlaw “Correct” a Supreme Court Opinion?

Charles F. Hinkle

At page 27 of the current version of the Oregon Appellate Courts Style Manual (2018),¹ the authors state: “NOTE: The appellate courts do not use ‘supra’ as a substitute for short citations.” That appears to be a twenty-first century development. In days gone by (*i.e.*, the twentieth century), the Oregon Supreme Court regularly used “supra” to refer back to a case previously cited in the same opinion. When, you may wonder, was that practice abandoned?

You might expect a Westlaw search to produce the answer to that important question. Westlaw does provide an answer, but it’s wrong. According to Westlaw, the practice survived into the present century; it reports that the Supreme Court used the word “supra” in that circumstance in *Kain v. Myers*.² In that case, according to Westlaw, the court concluded its opinion by saying:

“We refer the ballot title to the Attorney General for modification consistent with, and for the reasons stated in, *Kain, supra*.”

Reliance on Westlaw leads to the conclusion that in *Kain* the Supreme Court used “supra” to refer back to an earlier decision cited previously in its opinion. But that conclusion is incorrect. The concluding sentence in *Kain*, as it appears in the bound volumes of the Oregon Reports, reads as follows:

¹ Available at <https://www.courts.oregon.gov/publications>.

² 333 Or 452, 454, 41 P3d 1063 (2002).

“We refer the ballot title to the Attorney General for modification consistent with, and for the reasons stated in, *Kain*, above.”³

Thus, when the Supreme Court referred back to its citation of the earlier *Kain* case, it used the word “above,” not “*supra*.” Westlaw changed it. A minor discrepancy, but a discrepancy nevertheless. Contrary to Westlaw, the Supreme Court’s practice of using “*supra*” to refer to a case previously cited in the same opinion did not survive into the twenty-first century. In fact, the word “*supra*” did not appear at all in the *Kain* opinion.

The change from “above” to “*supra*” is not the only discrepancy in Westlaw reports of Oregon cases. One of the cases that turns up in a Westlaw search for the Supreme Court’s use of the word “*supra*” is a case that appears in Westlaw under the name *Association of Oregon Corrections Employees v. State*.⁴ In the Westlaw version of the opinion in that case, the following sentence appears: “We return first to the text of ORS 243.672(1)(e), set out *supra*, 353 Or. at 175–76, 295 P.3d at 42, ***.” In the bound volume of the Oregon Reports, however, that sentence reads as follows: “We return first to the text of ORS 243.672(1)(e), set out *infra*, 353 Or at 176, ***.” That “*infra*” is of course mistaken, since the court is referring to text that appeared earlier in the opinion, not later. Westlaw corrected it, changing the “*infra*” to “*supra*.”

Was that an appropriate thing to do? Perhaps, but at least when Westlaw changed the court’s wording in *Oregon Corrections*, it did so in order to correct an obvious error. In contrast, there was no obvious error in the *Kain*

³ *Id.*

⁴ 353 Or 170, 181, 295 P3d 38 (2013).

case. The court's use of the word "above" may have been unconventional, but it wasn't erroneous. Nevertheless, Westlaw changed it, replacing an English word with a Latin word—to make it sound more "legal"?

Regardless of its reasons for changing the court's wording, Westlaw's versions of both *Kain* and *Oregon Corrections* deviate from the "official" text in the Oregon Reports. The proper way to quote the sentence in question from *Oregon Corrections* is to use the wording from the "official" text, and to add "[sic]" after the word "*infra*." That is relatively easy to do, if you have the Oregon Reports close at hand. However, most Oregon lawyers now rely exclusively on the Internet to read court opinions, and those who reach for a bound volume of the Oregon Reports are a vanishing breed. But the *Kain* and *Oregon Corrections* cases show that you can't rely on the Westlaw version to be an accurate copy of what the Court actually said—and what it actually published.

One more point. Why doesn't Westlaw give the name of a case as it appears in the Oregon Reports? According to Westlaw, the name of the case cited above is *Association of Oregon Corrections Employees v. State*. But the name of the case in the Oregon Reports is *Assn. of Oregon Corrections Emp. v. State of Oregon*. If you use the name of the case as it appears in Westlaw, you will run afoul of the instruction at pages 16-17 of the Appellate Courts Style Manual—an instruction that the appellate courts feel so strongly about that they use capital letters to make the point:

"When citing Oregon appellate cases, DO NOT use the title page, a regional reporter, Premise, Westlaw, or LEXIS as a source for the official case name. Use the case name

exactly as published in the official state reporter, located at the top of either the odd- or even-numbered pages.”

The “official” title and the Westlaw title should be identical. But they are not, so Oregon lawyers who use Westlaw must take an extra step to check the accuracy of case names, to make sure they comply with the instructions of the Style Manual. The law clerks in our appellate courts presumably take that extra step; surely they use Westlaw or other Internet resources to find relevant cases when they draft a memo or opinion for their bosses. Do they then, at the last minute, go to the library, blow the dust off a bound volume, and check the accuracy of the quotations and case names that they’ve cited? How quaint. In an era of increasing reliance on Internet resources (not to mention disappearing libraries), it may be time for the authors of the Style Manual to rethink their insistence that lawyers use the case name “exactly as published in the official state reporter.”

Things were better in days of yore.

Thanks to the Editor
Hon. Erin C. Lagesen

With all apologies to Nick Hornby,¹

BOOKS BOUGHT:

- *The Lively Art of Writing* — Lucile Vaughan Payne
- *The Elements of Style* — William Strunk, Jr., and E.B. White
- *Legal Writing in Plain English* — Bryan A. Garner
- *Point Taken: How to Write Like the World's Best Judges* — Ross Guberman

BOOKS READ:

- *The Lively Art of Writing* — Lucile Vaughan Payne
- *Dreyer's English* — Benjamin Dreyer
- *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* — Stephen V. Armstrong and Timothy P. Terrell

As is most likely the case with the other submissions to this almanac, this one was triggered by an email from Nora Coon. She said that she had heard that I recommended *Dreyer's English*, and wondered whether I'd be willing to write up some book recommendations for lesser-known books along the lines of *Dreyer's*.

¹ Since 2003, the novelist Nick Hornby (*Fever Pitch*, *High Fidelity*, *About a Boy*, among others) has written the column "Stuff I've Been Reading" for the magazine *The Believer*. Each column begins with an accounting of "Books Bought" and "Books Read" for the period covered by the column. *Housekeeping vs. The Dirt* (Believer Books 2006) collects 14 months of those columns written over the course of 2005-06.

Nora's idea was a good one; the Almanac is the perfect place to include recommendations about books on writing. Appellate lawyers and judges—professional writers—make up its audience. To recommend some books along the lines of *Dreyer's*, however, I would need to read some. Even then, would it be right to recommend a book on writing just from reading? To earn a recommendation, shouldn't the book first have to show itself to be a trustworthy resource in the course of day-to-day work?

True, I recently read *Dreyer's* on the recommendation of Kelly Zusman, the appellate chief and writing expert at the U.S. Attorney's Office for the District of Oregon. I also promptly placed copies of *Dreyer's* in the hands of Department Three's judges and staff, because it seems a potentially helpful tool for resolving the style and tone choices we must make in our written opinions. At a minimum, it is an entertaining read for anyone who writes or who thinks about writing and offers easy-to-understand lessons (or reminders) on grammar and style. The index makes it quick to find the answers you need. Unlike most (or all) other writing books, the footnotes offer celebrity gossip, trivia, and authorial confessions. But the book is not yet dog-eared, and it is too soon to tell if it will be.

The only other book on which I've relied regularly in my current work is Armstrong and Terrell's *Thinking Like a Writer*. I've used it mainly for its instruction on editing, which is invaluable if you need to bring along other writers so that you can rely on their work in your own. It demonstrates how to edit another's work without rewriting it for them. I've given the book to clerks for its lessons on writing—the book contains helpful exercises for improving legal writing and good advice on how to think about the structure of legal arguments or opinions. But I haven't looked to it when thinking about my own writing.

Not wanting to disappoint Nora, I bought some books to see if I could find something to recommend. Some were books I'd read or owned in the past; some were books that I'd heard about, or that others had recommended, but that I'd never gotten around to reading. I would have bought more, but some were out of stock and not likely to arrive in time to be read and recommended. So now the living room table contains a stack that paints the household as one track when it comes to reading. The salvation, perhaps, is that most of the books have not been cracked.

The problem comes down to this: most of what I know about writing I learned from people, and from reading and listening to writers who write about things other than writing itself.² To the extent I can write, it is because three high school teachers—Mrs. Salvi (Freshman English); Mr.

² I've learned plenty from reading and listening. Raymond Carver wrote in stark and simple terms with empathy, and without sentimentality, about everyday life in and around the Northwest. Willy Vlautin writes that way today. That is often what lawyers and judges are called upon to do when writing about the disputes that they are helping to resolve in the Oregon courts. The singer-songwriter Jeff Tweedy routinely manages to construct phrases that sound as if they've been part of American speech for years even though they are completely new. Communicating a new idea in way that sounds familiar makes the idea less frightening, encouraging a reader or listener to stay with it and think about it, rather than run away. That also can be important when talking about the law. The opinions of other appellate courts offer a lot to think about in terms of structure, tone, and style. The variety of approaches and writing styles is enormous, and it is always helpful to think about whether an opinion accomplished what it needed to accomplish in the best way possible, or whether better choices might have been available to communicate a particular holding.

Basaraba (Sophomore English); Mr. Murray (Junior English, Philosophy through Literature)—insisted that we learn to explore complex topics, form educated opinions on those topics, corral the evidence needed to support those opinions, and then communicate them in a structure that made sense, using words and phrases that made our points concrete. Often, they accomplished this by taking words and constructs away from us, barring us from using passive voice; the phrases “there is” and “there are”; the first person; weak or overused words like “nice,” “good,” and “bad.” They would enforce these restrictions by dropping our papers a letter grade for each use of a prohibited term or construct.³ Then they took the time to critique our writing with honesty.⁴

It is also because my parents (especially my mother, who was a teacher herself) cared enough to provide direct and honest criticism of my high school writing, even though it meant they risked detonating the incomparable, irrational fury of a teenager who knows what she’s hearing is right, and who knows she needs to do more work (but she’s

³ It was terrifying. Our teachers took away the major tools in the teenage vocabulary (anyone’s vocabulary, really) without supplying replacements; how easy it would be to slip up! At the same time, without those words and phrases, our writings started to reveal voice and character. But did we want anyone to hear our voices, or know our characters? Wouldn’t it be better, or at least easier, to remain invisible, to sound the same as everyone else, at least until we figured out who we really were?

⁴ They did not set themselves up for pleasure reading. Here’s what Mr. Murray got from me junior year: “Sartre: Elusive Escapes. Thesis: In his works, Sartre depicts characters who attempt to escape the absurdity and anguish of their existences by establishing dependencies.” What could a 16-year-old possibly have to say about that? I’m afraid to read past the cover. Mr. Murray wasn’t.

already worked hard, and it's April and sunny, and that hardly ever happens in Oregon, and her brothers are in the back shooting HORSE with friends and clearly having a good time, and it would be awesome to be outside with them to get a tan or at least a sunburn).

And, it is because the people with whom I have worked as a lawyer and as a judge have thought a lot about how best to communicate ideas in writing and have been generous with honest feedback and suggestions about how to make a point in writing in way that will resonate with a reader.

Still, how not to disappoint Nora? As I thought about it, I could identify one book on writing that I—with honesty—could say helped me become a writer. Perhaps other Oregon appellate judges and justices, past and present, would be able to do the same. Then we could supply a list of books that have helped people become better writers, rather than a list of books that, in the perspective of a single reader (me), seem like they might have that potential.

For me that book is Lucile Vaughan Payne's 1965 *The Lively Art of Writing*. I met this book at age 15 in Mr. Basaraba's sophomore English class. It was the source of many of the word and construct limitations that he placed on us.⁵ That book, and his classroom implementation of it, showed me why becoming a good writer is worth the serious amount of work that it takes. But at the time Nora asked me to submit this piece to the Almanac, several decades had elapsed since I last read it. Did it hold up after

⁵ Payne's first two "commandments" are:

- "1. Do not use the first person.
- "2. Do not use the word 'there'—ever."

all that time? So many more books about writing have been written since 1965. I needed to revisit it before recommending it.

The book is slim, the cover promising help with “one of today’s most necessary skills” to “students, teachers, businessmen, aspiring authors [and] complaining consumers.” The introductory note is direct about the book’s objective:

“This book has one purpose: to help you improve your writing style.

“Style, if it can be summed up in a sentence, is the ability to say in writing, with clarity and economy and grace, precisely what you want to say. It sounds quite simple, put that way. But of course it is not simple at all. And it is not an easy thing to learn.”

Then, in 15 short chapters (typically, seven to nine pages each) the book walks through the components of compelling writing: forming an opinion, developing the knowledge to support it, connecting the sentences within a paragraph, connecting one paragraph to another, eliminating passive voice when possible,⁶ adding rhythm,

⁶ Payne’s thoughts on the passive voice illustrate the book’s flavor:

“What bores us in real life bores us no less in writing. And although good manners usually prevent us from shaking some life into passive, listless acquaintances, politeness need not deter us from shaking up our own sentences.”

using parallel structures, choosing words to set tone and make ideas “real and tangible,” using metaphors and allusions to make reading more pleasurable for those who understand them, but without detracting from the experience of the readers who don’t. It supplies an “odds and ends” list of things to consider and things to avoid.⁷ Each chapter ends with exercises, allowing for practice of the points just learned. Throughout the book, Payne reiterates an important message: stay focused on communicating the intended point, not on yourself. Payne recommends writing about a subject as if you are photographing it, and avoiding cuteness which, in her view, is a way for the author to talk about herself and not her subject.⁸ For legal writers, this is a useful insight. Although

⁷ Payne says that she hopes some of the words and constructs identified in her list will vanish from American speech and usage completely, and it seems that her wishes may have come true. In *Dreyer’s*, Benjamin Dreyer provides similar lists in Chapter 9, “Peeves and Crotchets,” and in Chapter 13, “The Miscellany.” Comparing Dreyer’s thoughts with Payne’s provides an interesting insight into how American patterns of speech and usage have changed over the past fifty years or so.

⁸ Jeff Tweedy makes a similar point about writing songs in his memoir, *Let’s Go (So We Can Get Back): A Memoir of Recording and Discording with Wilco, Etc.* (Dutton 2018), equating cleverness with an attempt to “show off”:

“I don’t feel like I’m always trusted to make the best choices consciously. I trust myself enough to commit to a process, see what gets made, and respond with feeling and intuition, but when my ego gets involved I know I’m just going to cater to it, in other words, avoid embarrassment, be clever, show off. There’s nothing that makes me crazy like a song that just wants to be clever.”

we're often told to avoid cleverness in legal writing, we're not always told the reason for it (apart from the fact that it can be a distraction): that it represents a shift in subject matter from the subject at hand to the writer's own self, a shift that can derail otherwise powerful writing by redirecting the reader's attention from the subject of the law to the subject of the author of the brief or opinion.

As I reread the book, I was struck by how well it communicates the why and how of good writing, and how well it captures the work required. Apart from the fact that some of the hypotheticals in the exercises and several other aspects of the book appear to embody a 1965 perspective on gender roles, making the book sound a little dated, the book remains a helpful reference for people seeking to communicate more compellingly in writing—including lawyers and judges.

As it turns out, a number of other judges also were able to identify with precision the book, books or other works that influenced them as writers. Here are those works:

Judge DeHoog: the works of Tim Terrell and Bryan Garner.

Justice Flynn: Armstrong and Terrell, *Thinking Like a Writer*.

Justice Garrett: George Orwell, "Politics and the English Language" (Essay).

Judge Hadlock: Appellate briefs authored by writers she admired, including Virginia Linder and Rives Kistler (before they were judges).

Judge Haselton (retired, Court of Appeals): Grant Gilmore, *The Death of Contract* and *The Ages of American Law*.

Judge James: Anthony Weston, *A Rulebook for Arguments*.

Justice Landau (retired, Supreme Court and Court of Appeals): Armstrong and Terrell, *Thinking Like a Writer*.

Judge Mooney: Megan McAlpin, *Beyond the First Draft: Editing Strategies for Powerful Legal Writing*.

Judge Shorr: Strunk and White, *The Elements of Style*.

The Michigan Mystery

Nora Coon

Criminal lawyers rely on the Criminal Law Reform Commission's Commentary to its Final Draft Report in arguing about the meaning of statutes. But that Commentary contains a citation mystery: numerous references to the "Michigan Revised Criminal Code." As the Foreword to the Final Draft Report explains,

"The rationale of the proposed Code is in many instances derived from the Model Penal Code, although the structure and frequently the substance of the Oregon proposal generally follows the New York Revised Penal Law (1965, amend. 1967-8) and the Michigan Revised Criminal Code (1967). Other state codes or drafts on which some of our proposals are based are the Illinois Criminal Code (1961) and the Proposed Connecticut Penal Code (1969)."¹

The New York Revised Penal Laws are still readily available. But not so Michigan—at least not in that format.

In 1948, Michigan renumbered the Michigan Penal Code according to the format 750.xxx.² But the penal code's numbering does not correspond to that of the "Michigan

¹ Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report XXIV (1970), *available at* <https://sos.oregon.gov/archives/Pages/records/criminal-law.aspx>.

² Email from Janice Selberg, State Law Library of Michigan, Sept 26, 2019.

Revised Criminal Code.” For example, this search was prompted by a hunt for Michigan Revised Criminal Code § 4601—a bit too high for the Michigan Penal Code’s numbering scheme.

After some sleuthing, it turns out that the “Michigan Revised Criminal Code” was the *proposed* Michigan Revised Criminal Code.³ The final draft of that proposed Michigan revision was in turn largely lifted from New York’s penal code.⁴ Despite providing a model for both Oregon’s and Colorado’s criminal law reform project, the proposed Michigan Revised Criminal Code was never enacted into law.⁵

Oregon’s Criminal Law Revision Commission appears to have first mentioned the proposed Michigan code on January 10, 1968, during its early discussions of how to overhaul Oregon’s criminal laws.⁶ It recognized that the code was a proposed one, rather than formally adopted. But that fact was lost in citation in Oregon’s Final Draft Report. Even though it noted that other codes were merely proposed (like Connecticut’s), the Report does not describe the Michigan code as “proposed.”⁷

³ Jerold H. Israel, *The Process of Penal Law Reform - A Look at the Proposed Michigan Revised Criminal Code*, 14 Wayne L Rev 772 (1968).

⁴ B.J. George, Jr., *A Comparative Analysis of the New Penal Laws of New York and Michigan*, 18 Buffalo L Rev 233, 235-36 (1968).

⁵ See John C. Steele, *Extreme-Indifference Murder: The Impact of People v. Marcy*, 54 U Colo L Rev 83, 102 & n 34 (1982).

⁶ Minutes, Criminal Law Revision Commission, Jan 10, 1968, at 3-6.

⁷ Commentary at XXIV.

Certain Oregon Supreme Court cases have cited portions of that code and its commentary, and even recognized that it was proposed but not enacted.⁸ But Oregon’s State Law Library does not contain a copy of the proposed Michigan Revised Criminal Code on which the Commission relied. Michigan’s State Law Library was similarly unable to locate it, and it does not appear to be available anywhere online.

The Court of Appeals has gone so far as to say that “the Michigan statute was never adopted by its legislature and is of no value in construing our own statute.”⁹ Harsh and only somewhat true—there never was any caselaw on the Michigan code, but the commentary of that code’s drafters is certainly of value in understanding what Oregon’s drafters were thinking. To that end, a paper copy is currently wending its way to Salem through the magic of interlibrary loan.¹⁰

⁸ *E.g.*, *State v. Ferman-Velasco*, 333 Or 422, 443, 41 P3d 404 (2002) (quoting commentary to Michigan Revised Criminal Code, Final Draft); *State v. Warner*, 298 Or 640, 645 n 4, 696 P2d 1052 (1985). That list does not include those cases that clearly quote only portions of the Michigan code and its commentary that were already included in Oregon’s Commentary. *E.g.*, *State v. McColly*, 364 Or 464, 479, 435 P3d 715 (2019).

⁹ *State v. Laemoa*, 20 Or App 516, 525, 533 P2d 370 (1975).

¹⁰ The hunt for the Michigan Revised Criminal Code did offer one unexpected benefit: a window into some extant Michigan statutes that Oregon did not see fit to adopt, including one making it a misdemeanor to “profanely curse or damn or swear by the name of God, Jesus Christ or the Holy Ghost.” MCL § 750.103.

How Many Times Do We Have to Tell You?

Charles F. Hinkle

There are recurring themes in the opinions of every appellate court. Some of them shouldn't have to recur quite so often.

It's been the law of Oregon, at least since 1942, that if a complaint seeking a declaratory judgment states a justiciable controversy, the trial court may not dismiss the case, but must instead enter a judgment declaring the rights of the parties, even if the declaration is adverse to the plaintiff's contentions.¹ By the time the Court of Appeals was established, it was regarded as a "well-settled rule."²

Is there any other "well-settled rule" in Oregon procedural law so often violated as this one? Just this year, the Court of Appeals has twice vacated a judgment that dismissed a declaratory judgment claim and instructed the trial court to enter a judgment declaring the parties' rights.³

This year's experience is not an aberration; the Court of Appeals has had to make the point over and over again,

¹ *Central Or. Irr. Dist. v. Deschutes Co.*, 168 Or 493, 507, 124 P2d 518 (1942). That rule was reaffirmed in *Cabell v. Cottage Grove*, 170 Or 256, 262, 130 P2d 1013 (1943), and again in *Webb v. Clatsop County School Dist. No. 3*, 188 Or 324, 332, 215 P2d 368 (1950).

² *Myatt v. State*, 7 Or App 584, 586, 492 P2d 495 (1972).

³ *Western Radio Services Co. v. Verizon Wireless, LLC*, 297 Or App 446, 454, 442 P3d 218 (2019); *Chernaik v. Brown*, 295 Or App 584, 601, 436 P3d 26 (2019).

doing so once last year,⁴ twice in 2017,⁵ and making similar statements in 2016 and 2014.⁶ That's seven times in the past five years that the Court of Appeals has had occasion to vacate judgments that were entered in violation of the "well-settled rule" that in a declaratory judgment action, the trial court may not dismiss a complaint that alleges a justiciable controversy but must instead enter a judgment declaring the parties' rights. What accounts for this phenomenon? If it is a "well-settled rule," why is it so often ignored?

Justice Peterson once wrote, in dissenting from what he regarded as a misapplication of a statutory requirement, that "[s]urely, it is not necessary for the legislature to re-enact [the statute] and then add 'and this time we really mean it.'"⁷ It is equally true that it shouldn't be necessary for the Court of Appeals to continue to vacate judgments that mistakenly dismiss declaratory judgment actions instead of declaring the parties' rights. If the occasion arises again, the court might consider adding, "and this time we really mean it."

⁴ *Schroeder v. Clackamas County Bank*, 291 Or App 16, 21, 419 P3d 726, rev den, 363 Or 815 (2018).

⁵ *Kramer v. City of Lake Oswego*, 285 Or App 181, 215, 395 P3d 592 (2017); *Fenner v. Fenner*, 288 Or App 540, 549, 405 P3d 159 (2017).

⁶ *Bell v. City of Hood River*, 283 Or App 13, 20, 388 P3d 1128 (2016); *FountainCourt Homeowners' Ass'n v. FountainCourt Development, LLC*, 264 Or App 468, 478 n 8, 334 P3d 973 (2014), *aff'd*, 360 Or 341, 380 P3d 916 (2016).

⁷ *Brown v. Portland School Dist. No. 1*, 291 Or 77, 94, 628 P2d 1183 (1981) (Peterson, J., dissenting).

A Conversation with Justice Kistler
Drew Eyman & Hon. Rives Kistler



Drew Eyman clerked for Justice Kistler from October 2016 to August 2017.

Q: You're from North Carolina and went to law school at Georgetown, so what brought you to Oregon?

A: I had worked in New York City for a summer after my second year in law school, and I couldn't see myself living and working in New York City and having that lifestyle. So I started looking around at medium-sized cities all over the country that I thought offered a good law practice, but also a good place to live. I talked to people at Stoel Rives and really liked them. They invited me to come out for the summer after my third year of law school. I remember the judge I clerked for at the time telling me that I shouldn't go to Portland because it was economically depressed, and I should stay in DC. I came out here anyway and really loved it.

Q: How long have you been commuting to Salem?

A: I commuted for DOJ even before I was a judge. I commuted from Portland to Salem from 1987 to 2018, virtually every day during the workweek. I do not know how many days that is, but it is a lot and I worry that I've commuted to Salem more than most anybody else. 31 years.

Q: What is the most unconventional source that you have cited in an opinion?

A: Jay-Z. I elevated it slightly. My clerk, Chris Perdue, was the inspiration and we cited a law review article that cited Jay-Z. I think it was "99 Problems."

Q: Can you explain your fondness for the Urban Dictionary? Did you ever cite to it?

A: I don't think I ever cited to it, but I learned a great deal from it. There are terms that I did not understand and it helped me appreciate them.

Q: Why did you decide to become a judge?

A: I worked for Judge Edwards at the D.C. Circuit Court, Judge Clark at the Fifth Circuit, and Justice Powell at the U.S. Supreme Court. All those people were inspiring. You respect the role they play, how they do their job, and I thought that if I could do that, that would be great. But you don't just decide to become a judge. You have to get appointed or elected, so that's the hard part. It's like getting married. You don't just decide to get married, you need somebody else to help you.

Q: Do you have any pet peeves in briefs or oral arguments?

A: Pet peeves are my pet peeve. Pet peeves imply that people are doing things wrong. It puts you in a position of being critical of lawyers who are doing so many things right and are good. I try to stay away from listing pet peeves. I don't think it's a good role for judges to get into. I try to emphasize the positive. For the most part, people do a really good job in Oregon. We have a really good culture in the appellate courts. The lawyers are thoughtful. [Saying] "you should have done this or should have done that" doesn't seem to me to advance the ball and gives people the wrong impression because overall they're doing a good job.

Q: Do you have strong feelings about the use of the terms "which" and "that?"

A: Oh yeah. There are times you get the impression that judges don't believe that "which" is still a word, or they will use "that" when referring to a person, as in "the person that was here." Typically "who" modifies persons, not "that." I will try to use "who" rather than "that" if I'm talking about a person. I also think we've read "these" out, we've read "which" out and I think there are times where those words are useful.

Q: Favorite part of being a judge?

A: How often do you get a job where you're asked to find the legally correct answer, and I stress legally correct, when you're trying to help people resolve things in accordance with the law, where every case is different, every case you're trying to come up with the answer and you work with really smart, really bright people? It's a wonderful and awesome responsibility. And awesome in the sense that

there is a lot of responsibility, you're resolving disputes that affect people's lives. Whether they stay in jail, their monetary futures, their kids, their families, all sorts of stuff that matters a great deal to people. That's a huge responsibility that shouldn't be taken lightly. To have that responsibility, that opportunity, and have people pay you for it is really kind of a wonderful thing to be a part of.

Q: Do you feel the courts have adequate funding?

A: You should probably ask the Chief Justice, or the Presiding Judge of Multnomah County. They deal with things like what kind of staff is available in the records office, how many people are there to help process information. As compared to the federal system, we don't have the number of law clerks or externs, which would help in processing the cases. Which is better, more staff attorneys or more clerks? I favor the federal model I grew up with, more clerks. I would increase the number of clerks, who serve only a limited time, rather than taking on more permanent staff. Not that I don't love staff attorneys.

Q: Plans for retirement?

A: I specifically refrained from trying to make commitments. I didn't want to jump into something immediately without knowing where I was jumping. If anything, it's probably teaching at a law school. Probably more procedural stuff: choice of law, federal courts, civil procedure. That kind of stuff I find interesting.

*We of the West dare not claim that the influence of any other thirteen states could compare in matters of human welfare with that of the glorious thirteen first comprising this government * * *; but in all modesty we feel that when thirteen legislative assemblies, four of which share in the enviable distinction of being of the original thirteen states, speak with one voice in accord with congressional enactment * * *, even though most of the others so speaking are western, we, who are of a state among those last to be kissed good night by the beauty and glory of the sunset, ought not to close our eyes, dull our ears, or dim our minds to the action of such a host of Legislators.*

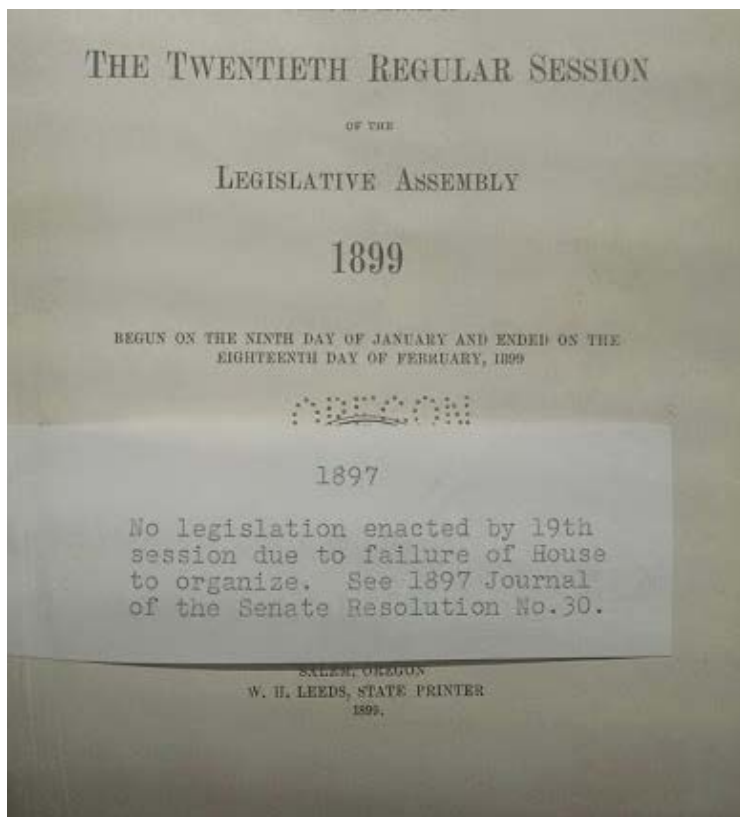
Starr v. Laundry & Dry Cleaning Workers' Local Union No. 101, 155 Or 634, 639-41, 63 P2d 1104 (1936)

The Long View

Mitchell and the Hold-Up Session

Lewis C. Zimmerman

I work as the reference librarian for the State of Oregon Law Library. Usually my research involves dry legal questions. One notable exception is when I discovered the story of John H. Mitchell and the Hold-Up Session. It is a story of bigamy, corruption, and political deadlock, and it started with a small note I found in the 1899 Oregon session laws.



I immediately looked up Senate Resolution No. 30 in the Oregon 1897 *Senate Journal* to get the story:

EVENING SESSION

SENATE CHAMBER

Salem, Oregon

March 2, 1897

The senate was called to order at 7:30 o'clock p. m. by the president, pursuant to adjournment.

...[sic]

Unanimous consent being given, Senator Bates introduced senate resolution No. 30.

SENATE RESOLUTION NO. 30

Whereas, for the purpose of perfecting a complete and proper organization of the house every possible effort has been made by it to secure the return of the members who have absented themselves without leave; and

Whereas, the process issued under the direction of the house to secure the return of such absent members have been resisted and its officers arrested, and suits have been instituted, designed to complicate and delay the same, intending thereby to prevent the enactment of remedial legislation and the election of a United States senator; and

Whereas, the high-handed and revolutionary tactics adopted by the members of the house in so absenting themselves there-from and resisting all efforts made to compel their attendance make it manifest that it will be impossible to secure a constitutional quorum to transact business; and

Whereas, the senate has been for nearly a week past without a quorum to transact business for like reasons, and it is now apparent that a dissolution of the legislature is imperative; therefore, be it

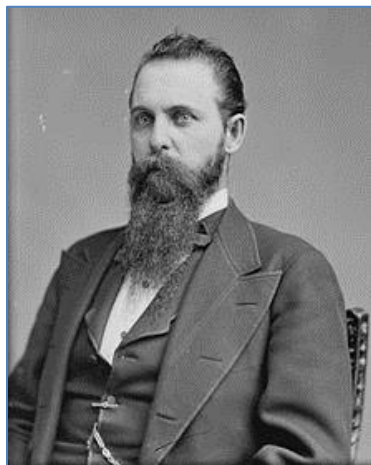
Resolved by the senate, That the senate now dissolve, and the members thereof return to their respective homes.

Senator Bates moved the adoption of the resolution.

The motion prevailed, and the senate was dissolved.

S.L. MOORHEAD
Chief clerk

The Oregon Senate castigates the House for failing to reach a quorum. It blames the “high-handed and revolutionary tactics” of the House for the lack of legislation and the failure of the Senatorial election. What could have so upset the politics of Oregon that the House refused to convene? The answer is a political flip-flop by the U.S. Senator John H. Mitchell.



John M. Hipple (John H. Mitchell), between 1865-1880¹

John H. Mitchell was born John M. Hipple in 1835 in Pennsylvania. In the 1850s, after graduating from college, he worked briefly as a schoolteacher. During this employment he impregnated one of his students, the 15-year-old Sadie Hoon. They quickly married and had three children. However, soon after being admitted to the Pennsylvania bar, he deserted his wife and traveled to California with his eldest daughter and his mistress. In 1860 he left his mistress in California and traveled to Oregon with his daughter. In Oregon John M. Hipple called himself John H. Mitchell and married a local woman without obtaining a divorce from his first wife, Sadie.

Mitchell's immorality wasn't limited to his private life. In 1868 he participated in a scheme to obtain title to valuable land near Portland. The owner of the land, Fenice Caruthers, had recently died intestate and without apparent heirs. Mitchell and some friends located a person willing to

¹ Library of Congress Prints and Photographs Division, Brady-Handy Collection, <http://hdl.loc.gov/loc.pnp/cwpbh.04276>.

pose as Fenice's long lost father in return for \$8,000. As soon as their fraudulent claim was recognized they formed a new development company and awarded themselves shares, including a \$10,000 share for Mitchell. The scheme was exposed in 1873 but no action was taken by the authorities.

Despite public allegations of bigamy and outright criminal activity, Mitchell went on to secure three terms in the U.S. Senate; one from 1873 to 1879 and two more from 1885 to 1897.

If you remember the note that first brought Mr. Mitchell to my attention, the date of 1897 should stand out—it's the year that the Oregon House refused to convene. Mitchell's reelection to the U.S. Senate was about to cause the Hold-Up session!

In 1897 U.S. Senators were chosen by state legislatures rather than by popular election. Naturally, you would think that the legislature balked at reelecting Mitchell based on his sordid personal and public dealings. You would be wrong.

The real reason for the Hold-Up session was money, not morals. The year 1893 had seen a major financial panic and economic recession. In 1896 Republican William McKinley rode economic disaffection to the White House. As part of his 1896 campaign McKinley supported a gold standard for the currency. Before the 1896 election Senator Mitchell, like most Oregonians, supported a silver backed currency. During the 1896 presidential election and under pressure from the national Republican party, Mitchell flip-flopped and called for a gold standard.

In Oregon, a combined faction of Free-Silver Republicans, Democrats, and Populists supported silver

coinage. They saw silver coinage as a way to inflate their way out of the debt piled up during the financial crisis of 1893. Mitchell's switch to advocating a gold standard angered his Free-Silver allies in the Oregon Republican party and united them with the Democrats and Populists. They were determined to block his election in 1897.

The anti-Mitchell faction acted quickly. They knew the Republican caucus would line up the votes to elect Mitchell if the legislature convened. They had to prevent the House from voting on the U.S. Senate seat at all. They accomplished this by quickly staffing the House credentials committee with anti-Mitchell legislators and refusing to credential new members:²

HOUSE JOURNAL.

HOUSE OF REPRESENTATIVES,
Salem, Oregon, January 11, 1897.

The house of representatives of the 19th biennial session of the legislative assembly of Oregon met in the hall of the house of representatives at the State capital this day at ten o'clock a. m.

Sixty members being present and in their seats, Hon. Ralph E. Moody, clerk of the house of representatives of the 18th biennial session of the legislative assembly, called the body to order.

Mr. Barkley, of Marion, placed in nomination for temporary speaker E. J. Davis, of Umatilla County, and Mr. Benson placed in nomination Representative Smith, of Marion County.

Upon a viva voce vote, Mr. Davis was declared elected temporary speaker.

Mr. Davis, of Multnomah County, then placed in nomination for temporary chief clerk Ralph E. Moody, of Multnomah County, who was duly elected by viva voce vote.

Mr. Thomas moved that the temporary speaker appoint a committee of five on credentials. The motion was seconded and carried.

The chair appointed Messrs. Barkley of Marion, Stanley of Union, Thomas of Multnomah, U'Ren of Clackamas, Bilyeu of Linn, as the committee.

On motion the house then took recess until four o'clock p. m.

² The Journal of the House of the Legislative Assembly of the State of Oregon for the Nineteenth Regular Session (1897).

With no credentialed members, the House couldn't form a quorum. At the same time the Oregon Constitution prohibited the House from adjourning without the consent of the pro-Mitchell Senate. Thus, the House couldn't convene to elect Mitchell and couldn't adjourn. This was the deadlock the Senate would eventually complain of in Senate Resolution Number 30. No legislation could be passed, and no U.S. Senators could be elected exactly as the anti-Mitchell faction planned. This lasted until the Senate agreed to adjourn two months later. The Hold-Up session was underway.

It suddenly appeared that a U.S. Senate seat was up for grabs. The corrupt and power-hungry across Oregon sprang into action. An aborted attempt to bribe members of the legislature was recorded by the future governor Oswald West in the *Oregon Historical Quarterly*:

An amateur politician representing a wealthy Portland gentleman, with senatorial ambitions, thought he sensed a chance to set the ball rolling for his candidate. He gave a sum of money to a political associate who claimed he could land a couple of house members. This friend, not wishing to appear in the transaction, turned the money over to a temporary state house janitor (for the session only) for delivery to the two alleged prospects. The folding money looked so good to the janitor that he sunk it all deep in his pocket—peeling off just enough to buy a railroad ticket south.

This was all done without the knowledge or consent of Simon or Bourne [the leaders of the anti-Mitchell faction]. To

make matters worse the amateur politicians swore out a warrant for the janitor's arrest and had him returned to Salem where some of the money was recovered. The event, of course, gave the city a laugh. No one thought for a moment that any jury would convict a man who had decamped with money given him to buy two members of the legislature. The charges where, therefore, dropped—the janitor left free to walk the streets of Salem, and, by talking, make himself a political nuisance.

Although in no way responsible for this senatorial fiasco, the anti-Mitchell forces wished to get the janitor out of town—to stop his chatter. So, on a certain date, around about midnight, a messenger was sent for a Marion County man, who was asked to come to Bourne's sleeping quarters in the Eldriedge block. Arriving there, he knocked on the door, and was told to come in. Entering the room he found Bourne, in his nightgown, sitting on the edge of the bed. In a chair near its head, sat Senator Simon. Bourne did the talking. He said he wanted that damn janitor taken out, and kept out, of the state, until after the adjournment of the legislature.

On the dresser, near the head of the bed, stood two of Bourne's detachable cuffs. He reached and pushed one over—and out tumbled a roll of bills. He counted out what he said was \$2,000 and handed to his visitor, stating that that should cover all expenses.

When he arrived home (as he told it to me) he found \$2,100 in the roll. So, early in that day he rounded up the janitor, took him over to our neighboring State of Washington and, upon [the janitor] promising to keep going gave him \$600, retaining \$1,500 as his commission on the transaction. Thus ended another chapter of the hold-up session.³

The result of all this political maneuvering was that no Senator was elected that session. Governor Lord appointed a replacement for Mitchell's seat. However, the U.S. Senate, responding to Mitchell's influence, refused to seat the replacement. Only in 1898 was Joseph Simon elected to fill the vacancy, leaving Oregon short one Senator for two years.

Undeterred, John H. Mitchell rallied and was again elected in 1901 to the U.S. Senate. Despite his political difficulties he never slackened his drive for corrupt dealings. The end of his long political career came as a result of the Oregon land fraud scandal. Dozens of prominent Oregonians conspired to fraudulently secure homestead claims to valuable timber and range land. These claims were then sold to Eastern business interests.

Senator Mitchell was convicted in 1905 for accepting bribes as part of this scheme. He died later that year with U.S. Senate expulsion proceedings and a criminal appeal pending. In 1908 Oregon became the first state to provide for the popular election of Senators.

³ Oswald West, *Reminiscences and Anecdotes: Mostly About Politics*, 51 Or Hist Q 95-110 (1950)

The story of Mitchell and the Hold-Up session is encouraging or discouraging depending on your perspective. The flamboyantly corrupt Senator Mitchell was defeated in 1897. Yet he would come back to win a fourth term in 1901, only to be convicted of taking bribes in 1905. His long career must have discouraged proponents of good government. Yet Oregon's gilded age was coming to an end and by 1905 the progressive movement was on the rise. Indeed, one of the accomplishments of that movement was the direct election of Oregon's U.S. Senators. In any event, it's always a good idea to keep an eye out for little notes tucked into books!

For more on Senator Mitchell and Oregon's turn-of-the-20th-century establishment, see:

MacColl, E. K. & Stein, H. H., *Merchants, Money, and Power: The Portland Establishment, 1843-1913*. Georgian Press, 1988.

Case Flashback: *State v. Rohrs*

The following documents offer a window into the mind of the prosecutor in *State v. Rohrs* in 1990.¹ The defendant, Mr. Rohrs, ultimately rose to prominence in a subsequent *State v. Rohrs*, 157 Or App 494, 970 P2d 262 (1998), *aff'd by equally divided court*, 333 Or 397, 40 P3d 505 (2002), which Oregon drivers have to thank for the warnings administered with field sobriety tests.

¹ File provided by the Clackamas County District Attorney's office pursuant to a public records request.

**STATE OF
OREGON**

vs.

ROHRS

90-12478

May it please the Court. Counsel. Members of the jury:

I'm going to begin by saying something I rarely say about a man who has committed a crime:

"ISN'T MR. ROHRS KIND OF A BIG, CHARMING, LIKEABLE GUY?!"

We've all seen him for a couple of days now and drawn the same conclusion:

He's intimidating at first,
when you first look at him,
But after a while, after he talks to ya,
He just seems so harmless.

But ladies & gentleman, sure as I'm standing here, you'd have seen a whole different Mr. Rohrs if you had been with Deputy Erickson on June 22, 1990 @ 2:10 a.m.

He wasn't different because he's secretly evil or bad... he was different because he was intoxicated, and he got caught driving that way.

If you had been with Deputy Erickson on 6-22, you would have seen a man who spoke incoherently, slurring and growling, ignoring instructions & making demands, a large, intimidating man who smells strongly of alcohol.

② WHO BOLSTERED CREDIBILITY?

- ① CO-WORKERS W/INTEREST IN INTEGRITY OF LAW ENFORCE.
- ② PEOPLE WHO WERE THERE.

② WHO BOLSTERED CREDIBILITY?

- ① BAR OWNERS WHO WEREN'T THERE.
- ② FRIENDS WHO WEREN'T THERE.
- ③ AS WIFE, WHO WASN'T THERE.

③ IN A POSITION TO KNOW?

YES.

NOT DRINKING.
TRAINED. EXPERIENCED.
ALERT → SHARP.
IT'S THEIR JOB.

③ IN A POSITION TO KNOW?

No.

DRINKING.
CAN'T SEE HIMSELF FROM THE OUTSIDE.
CAN'T SEE HIMSELF DRIVE.
FATIGUED & ANGRY TOO.

④ BASIC LIKELIHOOD OF FACTS GIVEN.

VERY.
CONSISTENT.
LOGICAL.
NO GLARING MISTAKES.
(color of car?!)

④ BASIC LIKELIHOOD OF FACTS GIVEN.

NOT VERY.
INCONSISTENT.
ILLOGICAL.
(How likely drinking all night - shouting off car, etc.)

YOUR VERDICT WILL SAY WHO YOU TRUST
TO BE OBJECTIVE ABOUT
EVENTS OF THIS NIGHT. WHO IS MORE
OBJECTIVE THAN OFFICER!?

As defense lawyer is arguing to you, keep asking, in your mind, why did the defendant refuse the tests really. You will conclude that

REBUTAL

deep down, he knew he had something to hide.
You will conclude that "if you had been there, you would've seen" it.

IF HE REALLY KNEW, DEEP DOWN, THAT HE WAS
RIGHT, HE'D BLOW MACHINE
OFF THE TABLE!

HOW CAN YOU BE
TRUTHFUL & HONEST
ABOUT SOMETHING
YOU WON'T ADMIT TO SELF?

You'll find him guilty.
List symptoms.

I.

1990 Trial, p. 4:

DIDN'T
HAPPEN.

"The gentleman has not told me why he had pulled me over and I'm going: Here we go. Here we go again."

1992 Trial, p. 28:

"Mr. Rohrs, when Deputy Erickson asked you, or when you asked Deputy Erickson, why you were stopped, and he didn't respond, what was your reaction? * * * My feelings were, you know, here we go. Here we go again."

"

1990 Trial, p. 4:

DIDN'T
HAPPEN

"This is all over a period of I would estimate four to five minutes, the third request, still requesting him politely what is the reason for the stop?"

1992 Trial, p. 16:

"And I asked him, to begin with, you know, why he pulled me over. I asked him three times. (Did he tell you?) No, he did not."

93
TRIAL

" wouldn't tell me what's wrong. Asked over and over and over. Don't think it's an unusual request.

- You know, what's the problem, why pull me over.
And his response? was "nothing." "

1990 Trial, p. 5:

DON'T
RECALL

"I would appreciate if you could just go call in my license plate, they'll tell you who owns it."

1992 Trial, p. 16:

"Or, you know, you can use the license plate and find out who owns the car."

93
TRIAL

" And I also says "you can call in my plate & they'll tell you I have a current driver's license." "

“Our job,” said the count, “is to see that all the words sold are proper ones, for it wouldn’t do to sell someone a word that had no meaning or didn’t exist at all. For instance, if you bought a word like ghlbtsk, where would you use it?”

“It would be difficult,” thought Milo—but there were so many words that were difficult, and he knew hardly any of them.

“But we never choose which ones to use,” explained the earl as they walked toward the market stalls, “for as long as they mean what they mean to mean we don’t care if they make sense or nonsense.”

Norton Juster, *The Phantom Tollbooth* (1961)

Good Clean Fun

FUNGO Word Puzzles

Dan Bennett, Erik Blumenthal & Josh Crowther

Each puzzle consists of three clues that all point to the same answer. For example: “Crafty card player,” “Gang from West Side Story,” and “Jaws” would be “Shark.” The questions on this quiz all relate to Oregon law and the courts. Some answers will add up to a full case name, while others may be a single word or phrase.

<i>Set One</i>	<i>Set Two</i>
<ul style="list-style-type: none"> ○ Jagger ○ Razor blade ○ “There’s no hook in this.” 	<ul style="list-style-type: none"> ○ Richard and Tommy ○ Record on judicial review ○ Made of blades
<ul style="list-style-type: none"> ○ The Loudest Voice ○ Pettygrove’s winnings ○ Sopranos role 	<ul style="list-style-type: none"> ○ Rex ○ Neil ○ Stretch
<ul style="list-style-type: none"> ○ religious [sic] ○ Offences [sic] ○ grievances [sic] 	<ul style="list-style-type: none"> ○ Cinderella ○ Pearl Jam album ○ Make happy
<ul style="list-style-type: none"> ○ Vernonia School District ○ Philip Morris ○ Elstad 	<ul style="list-style-type: none"> ○ Circuit rider ○ Walk to the court ○ Fabrics & home furnishings
<ul style="list-style-type: none"> ○ Melchizedek’s home ○ Cotton Mather’s court ○ Winston’s partner 	<ul style="list-style-type: none"> ○ ATM ○ Returned <i>Balfour</i> letter ○ March 29, 1973
<ul style="list-style-type: none"> ○ Binturong ○ Anatinae ○ Creator of the LaserDisc 	<ul style="list-style-type: none"> ○ Bodybuilding ○ Contradict ○ Mugshot

Answers are available on the Appellate Almanac website,
<https://appellatepractice.osbar.org/appellate-almanac/>.

Crossword Puzzle

J. Aaron Landau

Across

1. H.S. grads-to-be (abbr.)
4. Film critic Leonard
10. Disappointing result for an appellant
11. Skin care brand
12. Country singer McEntire
13. _____ v. Parrott (notable 1997 Oregon contract construction case)
14. What many judges spent their first years after law school doing
16. Standing still
17. Body of procedural law that applies in only two courts (abbr.)
21. It divides a different kind of court
22. FedEx competitor
24. Angsty music genre
25. Irish Gaelic tongue
27. Retired Oregon appellate judge known familiarly as "Ginny"
29. [See 4-down]
31. What the Queen of England might do at around 3 PM
34. Early 12th century year
35. Judges DeHoog and Taney, e.g.
36. Numerical prefix meaning "ten"
37. Existing, as an heir or a corporation (Lat.)
38. That, in Tijuana

Down

1. Feel the heat
2. First woman judge on both of Oregon's appellate courts
3. Ten pins in two tries
4. With 29-across, typical opening words of an oral argument
5. Shakespeare's river
6. Command to a toaster-waffle thief?
7. Judge pro ____
8. "____ pig's eye!"
9. Parisian's refusal
10. Impenetrable, as some statutes
15. Manhattan school
18. Lessens, as a prison sentence
19. The "thee" of "Of Thee I Sing"
20. *Merchant of Venice* heroine
23. [It wasn't my typo, judge!]
26. Suffix with cigar, kitchen, or Rock (pl.)
28. ____ plume (pseudonym)
30. Half of a matched set
31. ____ Lanka
32. Charged particle
33. Petitioner in Oregon's most oft-cited statutory construction case

	1	2	3		4	5	6	7	8	9
10					11					
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16								17	18	19
21					22		23		24	
25				26		27		28		
				29	30					
31	32	33						34		
35								36		
37								38		

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