

NOT IN, BUT LARGELY ABOUT, THE APPELLATE
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Appellate Practice Section
of the Oregon State Bar.

VOLUME 10

OREGON APPELLATE ALMANAC

2020

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

Nora Coon, Editor

Cite as: 10 Oregon Appellate Almanac ____ (2020)

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.
Past issues may be ordered in print from HeinOnline.

ISSN 2688-5034 (print)

ISSN 2688-5018 (online)

OREGON APPELLATE ALMANAC
Volume 10 (2020)

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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 2020 edition of the Oregon Appellate Almanac! It's been a difficult year, to say the least, but neither pandemic nor fire can stop publication of the Almanac. Thanks to all of our authors for their articles, and to those who have already started thinking about next year's submissions—write early and write often! We also greatly appreciate the sponsorship of Markowitz Herbold, Davis Wright Tremaine, Thomas Coon Newton & Frost, and Tonkon Torp, whose contributions to the Appellate Section made the printing of this year's edition possible.

This edition of the Almanac is dedicated to the memory of Justice Hans Linde, who served on the Oregon Supreme Court from 1997 to 1990. He was an immigrant, “a giant among American judges” and the architect of Oregon's modern legal framework. Memorials to Justice Linde from retired Justice Jack Landau, Judge Erin Lagesen, and Judge Rex Armstrong appear in this year's Almanac. We also remember U.S. Supreme Court Justice Ruth Bader Ginsburg, who was a groundbreaking advocate and enduring role model for many women in the law. 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

*The majority opinion in this case will be remembered as the case in which we shot down United States v. Robinson * * * and departed on a lonely journey in the dark of the moon and against the wind into the quagmire of the law of “search and seizure” with only “reasonableness” as a compass.*

*State v. Caraher, 293 Or 741, 760, 653 P2d 942 (1982)
(Campbell, J., concurring in the judgment)*

Tributes to Justice Hans Linde

Justice Linde's Structural Approach to Constitutional Construction

*Hon. Rex Armstrong*¹

Hans Linde had a profound influence on my approach to law, my legal and judicial career, and my life. His influence began before I met him. I had taken a political science course in American constitutional law at the University of Pennsylvania, which, among other things, had led me to read the recently released first volume of Justice William O. Douglas's autobiography.² I came away from that experience enamored of Douglas's absolutist approach to the First Amendment and interested in knowing more about the analysis and its application. I decided to pursue a legal education and, as a native Oregonian, I applied to and was admitted to Oregon's three law schools. I learned about Hans's background as a Douglas law clerk while considering which Oregon law school to attend, and I chose the University of Oregon in part because I thought that I could learn more about absolutism and the First Amendment from Hans.

Before classes began my first year at Oregon in 1974, I went to Hans's office in Fenton Hall to introduce myself and to explain my interest in the First Amendment and an absolutist approach to it. I had been assigned to Hans's section of the course that he had pioneered at the law school, Legislative and Administrative Processes, and I told him that I looked forward to the course and asked if I could

¹ Judge, Oregon Court of Appeals (1995 to present).

² William O. Douglas, *Go East, Young Man* (1974).

meet with him periodically to talk about law. He said that he would welcome that.

In addition to Legislative and Administrative Processes, I also took a first-year seminar from Hans on Due Process, a subject about which Hans had distinctive and, to me, compelling views, which, among other things, had led him as a member of the 1961–62 Oregon Constitutional Revision Commission to oppose adding a Due Process Clause to the Oregon Constitution. Hans left for a one-year sabbatical as a Fulbright professor in Germany during my second year at Oregon, so I waited until my third year to take Constitutional Law from Hans. As things turned out, Hans's appointment by Governor Straub to the Oregon Supreme Court meant that I was able to study constitutional law with Hans for only one semester, but the appointment, in turn, led to a clerkship with Hans at the Oregon Supreme Court and a lifelong seminar in law and so much else with Hans, and a path through my life and legal career that was profoundly influenced by him.

As it is, the first semester of Constitutional Law dealt principally with governmental structure and functions, which Hans told me were the constitutional law subjects that he most enjoyed teaching, and I came to share his preference for them as subjects. The second semester, which Les Swanson taught as Hans's replacement, dealt principally with civil liberties, about which Hans cared deeply but which focused on U.S. Supreme Court doctrine in those areas. And, in light of Hans's subsequent success in getting Oregon judges to accept their obligation to construe the Oregon Constitution independently, Oregon constitutional law on civil liberties differs in many respects from the equivalent federal constitutional law.

Hans had a deep and abiding interest in constitutions and the ways in which they establish, define, and allocate governmental power. The breadth and depth of his interest in those aspects of constitutional law support my view that Hans was a structuralist in his approach to the construction of constitutional terms. What I mean by that is that Hans approached the task of determining the meaning of constitutional terms by thinking about constitutional structure and function before turning to constitutional text, and he understood the text in terms of his structural thoughts and ideas.

Hans considered himself a textualist in his approach to the construction of constitutional texts, but I view his textualism as having a structural overlay in which his ideas about structure and function preceded his focus on the text. Two examples of the structural approach that I believe applies to Hans's work come readily to mind.

First is Hans's construction of the home-rule amendments in the Oregon Constitution that he addressed in 1978 in *LaGrande/Astoria v. PERB*.³ I worked on the case as Hans's law clerk and discussed it at length with him as it unfolded. In it, Hans replaced the construction of the home-rule amendments that the Oregon Supreme Court had established in 1962 in *State ex rel Heinig v. City of Milwaukie*⁴—which viewed the amendments as dividing between the state and local governments the power to establish substantive governmental policies—with a construction that limited the state's authority to determine

³ *City of La Grande v. Pub. Emps. Ret. Bd.*, 281 Or 137, 576 P2d 1204, *aff'd on recons*, 284 Or 173, 586 P2d 765 (1978).

⁴ *State ex rel Heinig v. City of Milwaukie*, 131 Or 473, 373 P2d 680 (1962).

the form and powers of local governments but otherwise gave the state a preeminent role in establishing substantive policy in Oregon.

The case was decided by a 4–3 vote, causing great consternation and opposition from local governments and leading the court to grant rehearing with additional briefing and oral argument, but Hans’s construction was sustained on reconsideration, and it remains Oregon law to this day. For my purpose, the important point is that Hans’s understanding of the home-rule provisions can be traced to his view of earlier federal cases that had construed Congress’s power narrowly to preserve scope for states to enact substantive policies. Hans thought that that approach made little sense, and he did not believe that it made sense for the home-rule amendments to be construed to have established a similar allocation of power between the state and local governments to enact substantive policy.

Relatedly, Hans’s construction of the amendments also reflected his long-standing focus on the difference in roles between the legislative and the judicial branches in establishing public policy. The construction of the home-rule amendments in *State ex rel Heinig* had assigned to courts a fact-finding function in which parties would litigate, and, depending on the record developed at trial, courts would determine whether local law took precedence over state law, depending on whether the local interest in its policy choices was more weighty than the state interest in its policy choices. The idea that the enforceability of state law in that context would depend on the factual record in each case and would vary in location and time depending on the trial record made no sense to Hans, nor to me, as a design for the exercise of law-making power and of judicial power. In sum, I think that Hans had a structural

understanding about the design embodied in the home-rule amendments from which his construction of their terms proceeded.

My second example is provided by Oregon's distinctive construction of its state constitutional guarantee of free expression in Article I, section 8, of the Oregon Constitution. I am intimately familiar with that law, having spent a number of years litigating cases under it for the Oregon ACLU,⁵ having written a law-review article about it,⁶ and having written a number of opinions for and with my court about it.⁷

The Oregon analysis can fairly be traced to an analysis that Hans published in a 1970 *Stanford Law Review* article that articulated an absolutist analysis of the First

⁵ See, e.g., *City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988); *State v. Henry*, 302 Or 510, 732 P2d 9 (1987); *State v. Harrington*, 67 Or App 608, 680 P2d 666, rev den, 297 Or 547 (1984).

⁶ Rex Armstrong, *Free Speech Fundamentalism—Justice Linde's Lasting Legacy*, 70 Or L Rev 855 (1991).

⁷ See, e.g., *Or. Nat. Res. Council Fund v. Port of Portland*, 286 Or App 447, 466, 398 P3d 923 (en banc) (Armstrong, J., concurring), rev den, 362 Or 175 (2017); *City of Nyssa v. Dufloth*, 184 Or App 631, 651, 57 P3d 161 (2002) (en banc) (Armstrong, J., dissenting), rev'd, 339 Or 330, 121 P3d 639 (2005); *State v. Ciancanelli*, 181 Or App 1, 47, 45 P3d 451 (2002) (en banc) (Armstrong, J., dissenting), aff'd in part, rev'd in part, 339 Or 282, 121 P3d 613 (2005); *Higgins v. DMV*, 170 Or App 542, 13 P3d 531 (2000) (en banc), aff'd, 335 Or 481, 72 P3d 628 (2003); *State v. Maynard*, 138 Or App 647, 656, 910 P2d 1115 (1996) (en banc) (Armstrong, J., concurring), vac'd, 327 Or 582, 964 P2d 264 (1998), on remand, 168 Or App 118, 148, 5 P3d 1142 (2000) (en banc) (Armstrong, J., concurring), rev den, 332 Or 137 (2001).

Amendment guarantee of free speech.⁸ By focusing on law-making, rather than adjudication, it gave substance to the absolutist approach to the First Amendment to which Douglas and Black had aspired but for which they had not developed a workable analysis. Hans was not surprised that the U.S. Supreme Court did not adopt his analysis. However, Hans's service as a justice on the Oregon Supreme Court gave him the opportunity to persuade his colleagues to adopt the analysis under Article I, section 8, of the Oregon Constitution, which they did in a 1982 decision that Hans wrote for the court, *State v. Robertson*.⁹

The First Amendment and Article I, section 8, are similar in concept and phrasing, in that they both impose a limit on the power of the legislative branch to adopt laws restricting expression,¹⁰ so that the construction that Hans proposed in his Stanford article appropriately can bear on the construction of Article I, section 8. Nonetheless, I believe that Hans's concept of the respective guarantees arose from an understanding that did not begin with the text but, rather, from ideas about the policies that could be understood to be embodied in them and the nature of the law-making function to which they are addressed and, hence, that his construction of Article I, section 8, in

⁸ Hans A. Linde, "Clear and Present Danger" Reexamined: *Dissonance in the Brandenburg Concerto*, 22 Stan L Rev 1163 (1970).

⁹ *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982).

¹⁰ The First Amendment provides, as relevant, that "Congress shall make no law * * * abridging the freedom of speech[.]" Article I, section 8, provides, in turn, that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Robertson did not begin with the text of the provision but, rather, with Hans's ideas about governmental structure and the exercise of governmental power.

Although the court adopted Hans's construction, the construction did not meet with universal approbation. The Oregon Department of Justice made a sustained effort after Hans retired from the court to get the court to overrule *Robertson* and to replace its analysis with the balancing analysis used by the U.S. Supreme Court under the First Amendment. Fortunately, in my view, the Oregon Supreme Court definitively rejected that effort in 2005 in *State v. Ciancanelli*.¹¹

I later spoke with Hans about the criticism of the *Robertson* analysis and the suggestion by some that his construction of Article I, section 8, bore no relationship to the restriction on law making intended by those who drafted and adopted the Oregon guarantee in 1857, who could be understood to have been intended only to prevent the legislature from enacting laws to permit the imposition of prior restraints on expression but otherwise to allow the legislature to restrict expression as it saw fit. Hans responded that, if that were the intention, the drafters did not do a particularly good job of articulating it. In the end, I believe that Hans's construction of the words of the guarantee is faithful to them, but his construction did not originate from a focus or attention on the words.

A final example of Hans's structuralism was his recognition that, in light of the federalist system established by the state and federal constitutions, state officials are obliged to independently determine the meaning of the

¹¹ *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005).

state constitutions that govern their work, which eventually led other state courts to adopt an approach to their work that is embodied in what has been characterized as the new federalism, for which Hans is justly credited.¹² I believe that it, too, arose from Hans's focus on the constitutional design of governments and their authority and not from a focus that began with the words of the respective constitutions.

¹² See, e.g., Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018); Rex Armstrong, *State Court Federalism*, 30 Val U L Rev 493 (1996).

First Things First: The Legacy of Justice Hans Linde and State Constitutionalism

Opening Remarks (as prepared, if not delivered, and with post-discussion elaboration)

*Hon. Erin C. Lagesen*¹

I'm delighted to be participating on this panel to honor Justice Linde. While I didn't have the same type of personal relationship with him that Judge Armstrong and Justice Landau did, when I was editor-in-chief of the law review, and he was Willamette's Distinguished Jurist-in-Residence, I spent about a year arguing with him about the content and direction of our law review symposium. He had many thoughts and strong opinions that he was very happy to share. (Ultimately, those discussions led to a symposium with which we both were happy.) Later, after I became a judge, I had a chance to join in on the almost weekly Tuesday lunches with him that Judge Armstrong and Judge Breithaupt organized. I'm very grateful to them for including me, and to have had those opportunities to talk with him in that judge-to-judge environment.

Although I didn't meet Justice Linde until law school, I'd heard about him much earlier. The honorific, I'm fairly confident, wasn't "Justice" or "Judge" or even "Professor." It was more like "That Guy." As in "That Guy Linde just decided three cases that make no sense."

It was the spring of 1987. Justice Linde had just authored what's become known as the *Fazzolari* trilogy:

¹ Judge, Oregon Court of Appeals (11/12/13 to present); Presiding Judge, Department 3 (Green Department) (7/1/17 to present).

Fazzolari v. Portland School District;² *Donaca v. Curry County*;³ and *Kimbler v. Stilwell*.⁴ In that set of cases, the Oregon Supreme Court took what had been treated as call for judges in the context of a negligence case (whether a negligence defendant had a legal “duty” to guard against harm to the negligence plaintiff) and gave that call to the community in the form of the jury. For my dad, one of the defense lawyers on the *Kimbler* case, this meant a reversal of the dismissal he’d obtained on behalf of his client, G.I. Joe’s, on the ground that G.I. Joe’s owed no legal “duty” to the plaintiff, who had been shot and killed by a man who had stolen the murder weapon, a shotgun, and ammunition from G.I. Joe’s. Like any lawyer who’s prevailed in the trial court, he was not too happy about the appellate court’s four-and-a-half-page transformation of a victory to defeat.

We talked about the facts of the three cases around the family dinner table, and whether we thought the defendant in each case bore some responsibility to the injured plaintiff. It’d be a lie to suggest that my memory is crystalline, but the conversations went something like this:

Fazzolari. Should a school district be liable to a high school student arriving a bit early to school when the student is assaulted and raped by a criminal and the district knew about some similar crimes in the area? That made some sense to those of us high school students at the table; didn’t we want our school to make sure we were safe, especially when the school knew crime was afoot?

² *Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 734 P2d 1326 (1987).

³ *Donaca v. Curry Co.*, 303 Or 30, 734 P2d 1339 (1987).

⁴ *Kimbler v. Stilwell*, 303 Or 23, 734 P2d 1344 (1987), overruled by *Buchler v. Or. Corr. Div.*, 316 Or 499, 853 P2d 798 (1993).

Donaca. Should a county be liable to a motorcyclist injured in a collision with a car at an intersection, where the driver of the car was unable to see the motorcyclist because the county had let the grass at the intersection grow too long? To us new drivers at the table, that made sense; we could use all the help we could get. To the more experienced (and tax-paying) drivers, maybe not.

Kimbler. Should a store be liable to a person harmed by another person using a weapon and ammunition stolen from the store? Well, that was my dad's case. Loyalty allowed for one answer and one answer only: No.

Years later, those conversations sprung to mind when, after becoming a judge, I found myself sitting at a conference table having difficult-to-distinguish discussions with judicial colleagues. If the same conversations can be had as intelligently around the family dinner table as they can be around the judicial conference table, perhaps Justice Linde was onto something. Why are such questions more suited for resolution by judges, with the answers becoming frozen into law, than by the community? What might we be losing?⁵ There may be good reasons for judges to take for themselves a decision that the community, in the form of the jury or a representative legislature, may be as competent to make, but the bench owes the public a discussion of those reasons, and the countervailing risks of

⁵ As a postscript, the Saturday after this panel discussion, my dad (a former Marine) and I walked the virtual 2020 Marine Corps Marathon 10K. When I brought up the discussion, my dad was quick to point out that, notwithstanding the Supreme Court's reversal of the dismissal in *Kimbler*, the jury had been quick to find in his client's favor at trial. "Dad," I said, "I'm pretty sure that may be the perfect illustration of Justice Linde's point."

narrowing and eliminating avenues for community engagement.

Appellate judges have an enormous amount of power. They write an opinion, secure whatever number of votes needed to make that opinion a majority, and the opinion not only resolves the dispute between the parties in front of them: it often establishes the rule of law for an entire state, judicial circuit or the country as a whole in a way that can be very difficult to displace, especially when the opinion is anchored in constitutional law. A constant question for any appellate judge has to be how to exercise that power without, at the same time, enlarging it in a way that displaces the ability of others to play a role in our constitutional democracy.

That is a question for which Justice Linde had plenty of ideas about how to answer. His ideas are ones that, I've come to think, were rooted in the firm conviction that for democracy to work, the rule of law must be responsibility of everybody, not just judges. That is, democracy and the rule of law can be compromised when the courts too quickly or too finally claim the rule of law as their own territory, to the exclusion of the other branches of government and to the exclusion of the members of the community.

Here are just a very few of Justice Linde's lessons, as expressed, primarily, in two of his dissenting opinions worth reading and thinking about: *State v. Smith*, 301 Or 681 (1986); and *State v. Brown*, 301 Or 268 (1986).

1. Ensure the broadest possible range of engagement in constitutional issues by insisting on independent state constitutionalism, particularly when it comes to implementing individual rights.

Rex [Armstrong] and Jack [Landau] have spoken about Justice Linde's immeasurable contributions to modern independent state constitutionalism and the premises for that approach. What I would add to those remarks is this: independent state constitutionalism equals opportunity.

I had the privilege of co-teaching an undergraduate class on state constitutional law last winter at my undergraduate school, and, alongside many other members of the Oregon State Bar, have helped coach a high school constitutional law team for ten years. When you work with bright young people on questions of constitutional law and hear what they have to say, you can't help but think about what opportunities they'll have—what opportunities you want for them to have—to be able to play a part in preserving the rule of law under our constitutions. If we treat the U.S. Supreme Court as the ultimate authority on constitutional questions, by refusing to give independent effect to our state constitutions, we eliminate the opportunity for a great number of people to participate meaningfully in constitutional conversations.

These days, and maybe always, the pathway both to serving on, and appearing before, the U.S. Supreme Court is fairly narrow. That means a lot of people won't be able to contribute to constitutional discourse if we view that Court as the only place to have it. Although we can hope for change, independent state constitutionalism is one concrete way to counter this. Think about how many more state supreme courts there, how much more diverse those courts are or can be, how many more cases they hear, and the much greater range of people able to appear before them to argue constitutional questions. All of these people have the potential to supply valuable insights into how we should put

our constitutions into play. Why take away that opportunity for participation, that opportunity to gain new insights, by treating every constitutional question as belonging to the U.S. Supreme Court under the federal constitution?

Our federalist system contains a number of safety valves to protect against the risks to freedom inherent in concentrating power in a small number of people; that is one of the system's intended strengths. Because of the broader opportunity for participation that it affords, independent state constitutionalism can be one of those safety valves. This understanding appears to have been one of the animating forces behind Justice Linde's commitment to, and promotion of, independent state constitutionalism.

2. *Wait for, when appropriate, and encourage legislative action in implementing constitutional principles.*

At issue in *Smith*⁶ was whether *Miranda* warnings should be required under Article I, section 12, of the Oregon Constitution. Reversing course from a prior decision, the plurality decided to take a hard line against requiring such warnings. Taking the plurality to task, Justice Linde argued that the court should not definitively resolve the question, but answer it in a way that left room for—and encouraged—the legislature to speak on the matter:

“Sometimes it is unavoidable to spell out in detail how a broad constitutional principle is to be administered, but there is no need for a court to freeze details into constitutional law when guidance can be found in laws like

⁶ *State v. Smith*, 301 Or 681, 725 P2d 894 (1986).

ORS 135.070(1) and 136.435 that can be further considered and refined by the ordinary lawmaking process.”⁷

He explained further that, to encourage legislative engagement with the question of how to balance protection for individual rights with the public interest in law enforcement, in his view, the Court should, as a practice, default to rules that afford a high level of protection for individual rights, that the legislature could then alter to account for public safety needs:

“Regrettably, the court’s present approach is to say that if the legislature wants to protect the rights of Oregonians beyond the inescapable minimum that this court finds in the constitution itself, the legislature is free to do so. I believe, to the contrary, that a court should assume that individual liberty is to be protected unless and until politically accountable lawmakers legislate to the contrary and force the constitutional issue. ‘It is the government that must ask lawmakers for authority against the citizen, not the citizen that must ask lawmakers to enact laws against “inherent” official power.’”⁸

Thus, for Justice Linde, part of the job of judge when it comes to the constitution is to perform the role in the way that simultaneously protects individual rights while

⁷ *Id.* at 713 (Linde, J., dissenting).

⁸ *Id.* at 713-14 (quoting *State v. Brown*, 301 Or 268, 298, 721 P2d 1357 (1986) (Linde, J., dissenting)).

encouraging (if not forcing) the community, through the legislature, to confront question at hand and to engage with the choices to be made. In other words, the aim of a judge, when possible, should be to start or continue a constitutional conversation, not to end it for all time.

3. Recognize and **talk about** the difference between *interpreting the constitution and putting it into play*, so as to allow for further legislative action on how to put constitutional principles in play.

During Justice Linde's time on the court, the court (and not just Justice Linde, although it's hard not to think he was central to this) was very good about recognizing the difference between *interpreting* the constitution and *implementing* it—that is, putting it into play. Not surprisingly, one place that recognition appears is in the context of the *Miranda* cases, in which all justices appeared to acknowledge that the imposition of a warning requirement was a matter of constitutional implementation, rather than a matter of constitutional interpretation:

“The Oregon Constitution similarly guarantees the right not to be compelled to testify against oneself in a criminal prosecution. Or Const, Art I, § 12. Like the United States Supreme Court, this court is called upon from time to time to specify the procedure by which a guarantee is to be effectuated. Such specifications are not the same as interpretations of the guarantee itself, that is to say, they may not always and in all settings be the only means toward its effectuation but may be adapted or replaced from time to time by decisions of this court

or by legislation in the light of experience or changing circumstances.”⁹

This recognition of the difference between constitutional interpretation and constitutional implementation is significant for several reasons. When a court interprets a constitutional provision (or represents that that is what it is doing), that will often mean that the only way to alter that interpretation will be through amending the constitution itself.

By contrast, when a court implements a provision, and acknowledges that that is what it is doing, that allows for ongoing community engagement with how the provision should be put into play. It allows for the legislature to enact a scheme implementing different choices. It allows for the court to come back and change course based on new information supplied by engaged parties and advocates.

4. Be explicitly not forever, just for now when implementing, as distinct from interpreting, the constitution (and force the majority opinion to be the same when you're the dissent).

State v. Brown is the case in which the Oregon Supreme Court adopted the automobile exception to the warrant requirement of Article I, section 9. What is remarkable about it is how explicitly temporary it is, as the court envisions a future with a 24-7, one-stop magistrate center:

⁹ *Smith*, 301 Or at 703-04 (Linde, J., dissenting) (quoting *State v. Mains*, 295 Or 640, 645, 669 P2d 1112 (1983)).

“In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement of the state and federal constitutions can be fulfilled virtually without exception. All that would be needed in this state would be a central facility with magistrates on duty and available 24 hours a day. All police in the state could call in by telephone or other electronic device to the central facility where the facts, given under oath, constituting the purported probable cause for search and seizure would be recorded. * * * Thus, the desired goal of having a neutral magistrate could be achieved within minutes without the present invasion of the rights of a citizen created by the delay under our current cumbersome procedure and yet would fully protect the rights of the citizen from warrantless searches.”¹⁰

Although Justice Linde dissented in *Brown*, it’s reasonable to think that his dissent played a significant role in encouraging the “just for now” approach taken by the majority, given his pointed critique of the majority’s decision to find persuasive the approach taken by the U.S. Supreme Court: “It may be tempting to adopt another court’s reasoning by reference rather than to spell out one’s own, but in areas such as search and seizure law, quotations only beg the question why the quoted opinion is more persuasive than other opinions or academic critiques that are not quoted.”¹¹

¹⁰ *Brown*, 301 Or at 278 n 6.

¹¹ *Id.* at 284 (Linde, J., dissenting).

One way or another, by being explicitly temporary when implementing a broad constitutional provision (particularly when doing so in a way that expands executive-branch power at the expense of individual liberty), the court allows for ongoing conversations on the topics, ensuring that the community can continue to play a role in the ongoing conversation about how to strike the balance between individual rights and the public interest in law enforcement. The court also puts the public on notice that it could play a role in resolving the issue by seeking legislation either to cement or displace the judicial approach.

5. Talk about the role of the judge explicitly, and the consequences of performing the role in a particular way, so that the people can see that there are choices being made as to how to perform the role and can think about the consequences of those choices.

Justice Linde's dissents in *Smith* and *Brown* are a small sample of his work. But they are good examples of what can be found in much of his work: frank discussions of the choices that the court is making in going about its job in enforcing the constitution, recognition that there are different choices to be made, and analysis of the likely consequences of those choices for public engagement with the rule of law.

Tribute to Justice Hans Linde: First Things First
Hon. Jack L. Landau¹

I am honored to have been asked to speak a few minutes about Justice Hans Linde and his contributions to the law. Hans was a giant among American judges, and his contributions were myriad. He was also a friend and mentor to many of us.

What I recall about Hans was not just the force of his intellect but the warmth of his friendship, his generosity of spirit. He and I disagreed on occasion. But Hans seemed to relish the disagreement. What mattered to him was not that you saw eye to eye, but that you engaged with him and with the difficult issues that interested him. He would occasionally favor me with critiques of my opinions, usually accompanied by a homework assignment consisting of an opinion or article of his and an invitation to lunch. I miss those conversations.

What I want to mention in this program is Hans's contributions to the subject of state constitutionalism. By "state constitutionalism" I mean the fundamental principle that state constitutions have legal significance independent of the federal Constitution. We in Oregon take the idea for granted. To us, it's obvious. But, in point of fact, most states haven't yet bought into the idea that state constitutions mean any more than what the United States Supreme Court says parallel provisions of the Bill of Rights mean.

¹ Distinguished Jurist-in-Residence, Willamette University College of Law; Justice, Oregon Supreme Court (2011–2017); Judge, Oregon Court of Appeals (1993–2011).

Hans basically invented state constitutionalism. Or perhaps more precisely, Hans *reinvented* state constitutionalism. For at least a century, state courts routinely applied their state constitutions. But during the twentieth century, with the rise of the Warren Court's expansive individual-rights jurisprudence, a generation of lawyers and judges essentially forgot about state constitutional law. Anticipating the more conservative Burger Court that followed, it was Hans Linde who reminded us that state constitutions contain independent guarantees of rights—guarantees that may be interpreted to afford greater protection than the federal Bill of Rights. I know that conventional wisdom credits United States Supreme Court William Brennan with that message, based on a Harvard Law Review article that he authored in the 1977.² But in fact, Hans Linde had made the same argument years earlier.³

Hans is also responsible for a most important corollary to that foundational principle of state constitutional law, known as the “first-things-first” principle.⁴ According to that principle, judges, lawyers, legislators, and agency administrators should *always* look first to the state constitution for remedies to the problems they confront before entertaining any thought about the federal constitution. What's more, Hans suggested that

² William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489 (1977).

³ Hans A. Linde, *Without “Due Process”*: *Unconstitutional Law in Oregon*, 49 Or L Rev 125 (1970).

⁴ See, e.g., Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga L Rev 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U Balt L Rev 379 (1980).

they *must*—as a matter of federal constitutional law—always look first to the state constitution.

Hans’s explanation for that principle was set out in his opinion for the Oregon Supreme Court in *Sterling v. Cupp*.⁵ *Sterling* says that the federal Bill of Rights can apply to the states only if there has been a deprivation of due process of law, and there can be no such deprivation of due process until we first determine whether state law—including state constitutional law—affords complete relief.

Hans and I had a longstanding disagreement about *Sterling*. I think that the first-things-first principle is absolutely correct, but not for the reason set out in *Sterling*. The idea that there’s no deprivation of due process until state law remedies have been exhausted can’t be reconciled with U.S. Supreme Court decisions about how the Due Process Clause works.⁶ Hans, characteristically, told me that consistency with U.S. Supreme Court precedent just wasn’t something that he spent time worrying about.

He and I whole-heartedly agreed, though, that the principle is sound for other reasons—in particular, reasons of judicial efficiency. Under the independent state grounds doctrine of *Michigan v. Long*, the U.S. Supreme Court lacks authority to review a state court’s decision if it rests solely on a state law ground.⁷ That means that, if a state’s high court disposes of a case on solely state law grounds, the case

⁵ *Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981).

⁶ See, e.g., *Zinerman v. Burch*, 494 US 113, 125-26, 110 S Ct 975, 108 L Ed 2d 100 (1990). For a more complete critique of *Sterling*, see Jack L. Landau, “*First Things First*” and *Oregon State Constitutional Analysis*, 56 Will L Rev ___ (forthcoming 2021).

⁷ *Michigan v. Long*, 463 US 1032, 1038-39, 103 S Ct 3469, 77 L Ed 2d 1201 (1983).

is at an end. Addressing federal law claims first opens up the possibility of extra layers of federal court review, perhaps unnecessarily. As Hans cogently explained in his opinion for the court in *State v. Kennedy*, “a practice of deciding federal claims without attention to possibly decisive state issues can * * * waste a good deal of time and effort of * * * courts and counsel and needlessly spur pronouncements by the United States Supreme Court on constitutional issues [that] * * * may be irrelevant.”⁸

For a while at least, the Oregon Supreme Court steadfastly adhered to the first-things-first rule. In cases such as *State v. Kennedy*, the court held true to the idea that it should address state constitutional issues first, before entertaining federal ones, even if state law contentions hadn’t been preserved. More recently, though, the court appears to have forgotten those cases. Now, the Oregon Supreme Court routinely disregards state law and advances directly to federal constitutional claims if the state law claims were not preserved.

In my view, that’s a shame. Even assuming that the rationale stated in *Sterling* was in error, the essential soundness of the first-things-first rule that Hans championed remains unassailable. Even if unpreserved, state law issues should usually be addressed first.

Consider what happened in *Williams v. Philip Morris*.⁹ In that case, the jury returned a verdict against the cigarette company for \$800,000 in economic damages and

⁸ *State v. Kennedy*, 295 Or 260, 264-65, 666 P2d 1316 (1983).

⁹ *Williams v. Philip Morris, Inc.*, 344 Or 45, 176 P3d 1255 (2008), cert dismissed as improvidently granted, 556 US 178 (2009).

nearly \$80 million in punitives. Philip Morris objected to the award on the ground that it violated due process. The trial court agreed, and the plaintiff appealed. The case went to the Court of Appeals, the Oregon Supreme Court, and the U.S. Supreme Court on the due process issue. Then back to the Court of Appeals, and the Oregon Supreme Court, and the U.S. Supreme Court for a second time on the due process issue. On remand—nine years after the initial verdict—the Oregon Supreme Court cited the “independent and adequate state ground” rule and concluded that reconsideration of the due process issue wasn’t necessary. As Hans said in *State v. Kennedy*, what a waste of time and effort.

Hans Linde truly was a giant in the field. We are indebted to him for many insights, not the least of which is the importance of state constitutionalism generally and its primacy in particular. We would do well to honor him by remembering and adhering to those insights.

An appeal to ideological or moral group judgment is hard to disguise, and it is harder to hide in a public initiative campaign than in a legislature. If a wartime law prohibits teaching children the enemy's language, the motivating passion is obvious. So is the racism of the laws that were enacted in Oregon and elsewhere to preclude Asian immigrants from owning land. And there could be little misunderstanding why the anti-Catholic Ku Klux Klan promoted the Oregon initiative that required all children to attend public schools.

Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or L Rev 19, 35-36 (1993)

Past, Present & Future

Living Up to Our Values

*Justice Adrienne Nelson*¹

We are living in unprecedented times. The year 2020 brought the COVID-19 pandemic, a reckoning of centuries of racial injustice in our country and state, and most recently wildfires and smoke. Many people are asking, often for the first time, “Who are **we**? How did things get to where we are now?”

“We” is an inclusive term that welcomes, mobilizes and represents. For ages, “we” wasn’t more than one gender or race or sexual orientation. The great moral force of the 20th century and, so far, the 21st was the fight to bring greater self-awareness to more truths: about suffrage, civil rights, marriage equality, religious pluralism, and challenges faced by the disabled. But expanding the meaning of “we” is hard, because inclusion gets complicated fast. “We” quickly morphs into the “other,” which unconsciously translates to “they are not like me, so I can treat them differently.”

You can tell a great deal about a country and a people by what they deem important enough to remember,

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honor, and celebrate—what they put in their museums, and the statutes and monuments they erect. But we learn even more about a country by what it chooses to forget—its mistakes, its disappointments, and its embarrassments. America has always been uncomfortable with confronting the dark and painful parts of its legacy. States like Oregon, for example, have never directly confronted their racial history. As Maya Angelou teaches us, “history, despite its wrenching pain cannot be un-lived, but if faced with courage, need not be lived again.”² This is a lesson that America has yet to learn or put into practice.

After the Civil War, slavery was abolished; however, states passed laws circumventing that change.³ Laws authorizing prisoners to be leased to private industries were enacted using a loophole in the Thirteenth Amendment. These laws effectively restored some of the monetary benefits of slavery. Southern states and private companies derived great wealth from the labor of mostly Black prisoners who were paid little or nothing for generations after slavery was formally abolished. Legislators also enacted discriminatory “Black Codes” to criminalize newly freed people as vagrants and loiterers. Slave patrols were prevalent during this time.

In addition to convict leasing systems, lynching Black people enforced white supremacy through terror, while sharecropping and disenfranchisement created a system of unchecked racialized economic domination.⁴

² Maya Angelou, *On the Pulse of Morning* (1993).

³ See generally The Equal Justice Initiative, The Legacy Museum: From Enslavement to Mass Incarceration, <https://museumandmemorial.eji.org/resources>.

⁴ In Oregon, Black people experienced racial terror of being threatened with lynching. For instance, in 1902, a mob

Discriminatory laws and lending practices largely barred Black people from land ownership. Through sharecropping, white landowners built generational wealth off Black workers' agricultural labor, thereby solidifying a system of generational poverty and debt for the Black workers and their descendants. All these systems persisted with legal and political protections and remnants are evident today in our correction systems.

Poll taxes, grandfather clauses, and violent intimidation excluded and banned Black people from participating in the democratic process well into the 1960s, which prevented them from electing officials to advocate for their rights or represent their interests.

Today we continue to grapple with the economic and political effects of these systems. History lives in the present.

Bryan Stevenson has said that “the great evil of American slavery was not involuntary servitude” but rather the “narrative of racial difference” and “the ideology of white supremacy” created to legitimize slavery.⁵ Because

lynched Alonzo Tucker in Coos Bay. *Oregon Remembrance Project*, <https://oregonremembrance.com/the-story/>. Although Mr. Tucker's is the state's only officially recorded lynching there is anecdotal evidence of many more lynchings that went uninvestigated. See Walidah Imarisha, *The Truth About Alonzo* (Oct 26, 2020), <https://www.walidah.com/blog/2020/10/26/essay-on-oregon-black-history-amp-alonzo-tucker/>; Andie E. Jensen, *Law on the Bay: Marshfield, Oregon 1874-1944* (2010).

⁵ Bryan Stevenson, *This Is the Conversation About Race that We Need to Have Now*, TED (Aug 17, 2017), <https://ideas.ted.com/opinion-this-is-the-conversation-about-race-that-we-need-to-have-now/>.

“we never talked about the narrative of racial differences, [Stevenson doesn’t] believe that slavery ended in 1865”; rather, it just evolved. There is truth in his statement because discrimination and violence continued the widespread economic exploitation of the Black community for generations after slavery’s end.

Today, Black people live in a painful intersection of a pandemic within a pandemic bearing the brunt of three crises: COVID-19, police violence, and income and wealth inequalities including crushing unemployment.⁶ This pandemic within a pandemic has created a perfect storm, one that precludes us from looking the other way or allowing the status quo to continue. In many ways, the coronavirus pandemic exposed long-standing, historical racial disparities. That history is deeply connected to the current civil unrest expressed by protesters across our nation. The killing of George Floyd is a case in point. George Floyd, who had coronavirus antibodies in his blood, survived infection only to die in police custody. George Floyd’s death is like the death of other Black people from the 17th, 18th, 19th, 20th, and now 21st century. It is a continuum of slavery that has been reverberating through every generation in this country for 401 years. And yet, his death has helped spark a reckoning in which our past has finally caught up with us as a nation, a reckoning that further pushes our self-awareness to understand how Black people have been othered and left out of the inclusive we.

⁶ See generally Nikole Hannah-Jones, *What is Owed*, NY Times Mag (June 30, 2020), available at <https://www.nytimes.com/interactive/2020/06/24/magazine/repatriations-slavery.html>.

Keep in mind, the racial disparity in every system and sector in America since the inception of this country is and was intentional. It didn't just happen. Racial bias is unquestionably odious and responsible for many of the disparities of opportunity prevalent in our society.⁷ In June 2020, a Monmouth University poll showed that 76 percent of Americans, and 71 percent of white Americans, believe that racial and ethnic discrimination is a "big problem" in the United States.⁸ Just a few years ago, little more than half of white Americans believed that.⁹ The percentage continues to fluctuate as public opinion changes. As of September 2020, the percentages have returned to where they were a few years ago—around the 50th percentile.¹⁰

We are now living at an inflection point in America and specifically in Oregon. As a progressive state, we are in the national spotlight due to the protests that are informed by our state's past. Community voices are raising awareness that Oregon's relative homogeneity is intentional and not accidental.¹¹ Oregon entered statehood as a "whites only"

⁷ See *Pena-Rodriguez v. Colorado*, 580 US ___, 137 S Ct 855, 859, 197 L Ed 2d 107 (2017) (permitting reexamination of verdict based on a juror's strong "anti-Hispanic bias" against the defendant and an alibi witness).

⁸ *Protestors' Anger Justified Even If Actions May Not Be*, Monmouth Univ Polling Inst (June 2, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_US_060220/.

⁹ *Id.*

¹⁰ *Covid, Economy, Unity, Race Top the Public Agenda*, Monmouth Univ Polling Inst (Nov 23, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_112320/.

¹¹ *White Supremacy & Resistance*, 120 Or Hist Q (Special Issue Winter 2019).

state with racial discrimination woven into our laws. It is still with us. Oregon's history includes banning slavery while making it illegal for free Blacks to live in the state, Black exclusion laws in the 1840s, homestead laws and the redlining of neighborhoods designed to exclude Black people. Indeed, it was not uncommon in the 1920s for Oregon's elected leaders to be members of the KKK. Their occupation of Oregon's executive and legislative branches facilitated the enactment of reconstruction and sundown laws and put in place a system of laws that perpetuates racial bias even today. The nightly protests against racial injustice that began with George Floyd's death have paused in Oregon due to September's wildfires but have now resumed. The protesting will eventually end and, at that time, the long work to dismantle the systemic racism and bias in the legislature, city councils, boardrooms, schools, and the legal system can and should continue. We must face the reality that inequality is not merely a problem of individual actions but a consequence of our institutions and social structures. We must encourage all Oregonians to see these links and parallels. Once we have this awareness, we can address America's inequities and dismantle the systems that create and perpetuate them.

Today, courts are challenged by the COVID-19 pandemic, the demand for equitable outcomes, the expectation for more access, as well as the erosion of public trust and confidence across all governmental branches on national, regional, state, and local levels. The core values of the legal system—fairness, equality, trust, impartiality, and accountability—can only be affirmed through the lens of diversity, equity, and inclusion. On June 5, 2020, my colleagues and I issued a joint statement which acknowledges Oregon's past and identified starting points to bring change to the Oregon legal system while living in

the truth of a society that has been “ripped apart by the legacy of slavery and racism.”¹² We are showing leadership from the top to contribute to and support the efforts of law schools, lawyers, and judges to improve Oregon’s legal system and to address inequities. All of us in the legal system should breathe new life into the constitution we have been sworn to uphold to ensure that the principles this country was founded upon apply to all of us, not just a select few. I have confidence in our legal system, but it can only be as good as the people in it.

A recent collaborative effort of the bar and bench addressing systemic racism in our legal system is the unconscious-bias video for jurors. The Committee on Bias in the Justice System in Oregon¹³ created the video, which is modeled after a similar video used in Washington federal courts. This video was equally funded by the Oregon Judicial Department and the Oregon federal courts. The unconscious-bias juror video is a new resource available for courts to show to individuals summoned for jury duty.¹⁴ The video is aimed at combating the negative

¹² Links to this statement are on the Oregon Judicial Department’s website, <https://www.courts.oregon.gov/news/Lists/ArticleNews/Attachments/1259/Floyd%20letter%20of%20from%20court%20corrected.pdf>, as well as on the Oregon State Bar’s website, <https://www.osbar.org/docs/resources/OSCMessages/reGeorgeFloyd.pdf>.

¹³ The Committee on Bias in the Justice System in Oregon was formerly known as the Ad Hoc Committee on Unconscious Bias in the Justice System in Oregon and is made up of both state and federal practitioners and judges.

¹⁴ The video is available on the Oregon Judicial Department’s *Find Juror Information* webpage,

impact of unconscious bias in jury trials. The video explains the concept of unconscious bias and provides useful tools for jurors to use to ensure fair and impartial judicial proceedings. It is being shown voluntarily in state judicial districts, but you may ask for it to be shown in your individual case. The incorporation of unconscious bias language has occurred in ORCP 57D(4) and both sets of uniform civil and criminal jury instructions to be used with the video, with an eye for statewide use in 2021.

Oregon courts belong to everyone.¹⁵ We encourage all litigants to seek justice in our courts despite the flaws of our legal systems. Justice may be accomplished even in the face of systemic injustice. Members of the public often think that the law is a set of rules that judges mechanically apply, but interpretation and application of the law inevitably involves drawing upon one's own experiences and understanding of the world. Lawyers and judges must be beacons for the rule of law. With hard work and commitment, the cumulative effect of our efforts will cause justice to roll down like water. As Dr. Martin Luther King, Jr. said, "let us realize the arc of the moral universe is long but it bends toward justice." Why? Because again as Dr. Martin Luther King, Jr. recognized, "[i]njustice anywhere is a threat to justice everywhere. We are caught in an

<https://www.courts.oregon.gov/how/Pages/jury.aspx>, and at https://www.youtube.com/watch?v=BA-z4mS_Evg/.

¹⁵ In Oregon, access rights are guaranteed by Article I, section 10 of the Oregon Constitution, which provides that "[n]o court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay[.]" This provision has been interpreted not government. *See Oregonian Publ'g Co. v. O'Leary*, 303 Or 297, 301-02, 736 P2d 173 (1987). The protections of Article I, section 10 are absolute. *State v. Jackson*, 178 Or App 233, 236-37, 36 P3d 500 (2001).

inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.” We should face the longstanding and growing discontent in our country today but not be overwhelmed or silenced by it. Nor should we be afraid of stepping outside our comfort zone—although we are what we are exposed to and we don’t trust what we don’t understand.

I encourage you to do something to create an America better than the America our forefathers envisioned. As Margaret Mead said, “Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it is the only thing that ever has.” So, let’s not be afraid to face the dark and painful parts of our history. Let’s speak up and do our work. Our voices and efforts are more important than ever. America has not experienced the greatness it could and should achieve—our true greatness is still out there waiting for an opportunity to come to fruition. Our opportunity is now. I hope we bravely meet it.

Harlots, Adventuresses, and . . . Wrestlers? The Maligned Women of Oregon's Judicial Decisions

Sara Werboff¹

I am writing this article in the days after the 2020 presidential race was called. For the first time a woman, and a woman of color, has been elected to the office of the Vice Presidency. Our Oregon Supreme Court also recently made similar history. For the first time, a majority of its justices are women and its Chief Justice is a woman. Oregonians should be proud of our highest court's new legacy and celebrate the achievements of women in the law. But these recent developments are also a reminder that it was not always thus.

For example, Justice Betty Roberts, the first woman appointed to the Oregon Supreme Court in 1982, was subjected to overt sexism her entire career, including her career on the bench. During her first conference as a then-Court of Appeals judge, a male judge groped her breast!² That a woman could endure such treatment even while serving as a judge in Oregon's appellate courts is, to our modern sensibilities, horrifying. But it is not surprising.

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² The account comes from Justice Roberts's memoir: Betty Roberts with Gail Wells, *With Grit and By Grace: Breaking Trails in Politics and Law* (2008); see also Martha Neil, *Trailblazing Oregon Judge Fought 'Shockingly Overt Sexism'—and Won*, ABA J (Sept 15, 2008), available at https://www.abajournal.com/news/article/trailblazing_oregon_judge_fought_shockingly_overt_sexism_and_won/.

As our society undergoes a general reckoning with the misogyny it has long tolerated, excused, or in some cases encouraged, the legal profession should do so as well. Although the law likes to think of itself as existing above and apart from a particular time and place, we know that is not true. Judicial opinions and statutes, like the judges and legislators who write them, are a product of their time even if the effects of those words last longer. And Oregon’s legal rulings at times display attitudes towards women ranging from mere paternalism to rank misogyny.

My own interest in these opinions piqued when working on a case involving the witness-false-in-part instruction. In the early 1960s, the Oregon Supreme Court decided what was then the lead case on that instruction, noting that a “female witness might be consciously in error about her age but yet be able to recount the facts of an auto accident faithfully.”³ This analogy was so casual, and written with a clear assumption that any reader would understand the tired trope that women lie about their ages. *See also*, any late 20th century sitcom. I wondered what else lurked within the bound beige volumes of the Oregon Reports. Suffice it to say that preserved for posterity in Oregon’s judicial decisions (often interpreting statutes enacted by Oregon’s legislators) are beliefs that women are weak, helpless, foolish, immoral, dangerous, and pernicious.

Perhaps unsurprisingly, many of the early attitudes and assumptions about women are expressed in decisions concerning the institution of marriage. Indeed, marriage was so integral to a woman’s status in society that a woman could sue her alleged betrothed for breach of a promise to marry. She could receive damages if the proposed alliance

³ *Ireland v. Mitchell*, 226 Or 286, 294, 359 P2d 894 (1961).

led her to be “seduced.” But, to receive those damages, she was required to establish that she had “yielded her virtue” (or as the court put it, “all that noble women hold dear in life”) *only* on the promise of marriage; otherwise it was not seduction, but “mere fornication, indulged in to gratify mutual passions.”⁴

Indeed, the Supreme Court seemed very concerned about the risk that breach-of-promise cases would reward a woman of loose morals. As the court observed, the nature of the claim would naturally engender sympathy from (presumably male) judges and jurors.⁵ As such, the court required direct evidence of a promise in order to curtail abuse from “evil-disposed and designing women” who could fabricate an offer of marriage and take some poor unsuspecting sap to the cleaners:

“An adventuress could come into court and swear to a promise of marriage, and then bring others of like ilk, her friends and intimates, to sustain her with testimony of the stories she had told them in furtherance of her plan to secure damages. There is no necessity of throwing open the doors of courts to such opportunities to work injustice. When the plaintiff has the equal right with the defendant to place fully before the jury the story of her wrongs, aided, as she will ever be, by the sympathy always accorded to both the weakness and the beauty of her sex,—a sympathy which the most rigid administration of justice cannot

⁴ *Stamm v. Wood*, 86 Or 174, 185, 168 P 69 (1917).

⁵ *Osmun v. Winters*, 25 Or 260, 269-71, 35 P 250 (1894).

entirely prevent,—right and equity demand that she shall no longer have the aid which the law refuses in all other cases.”⁶

The very existence of the breach-of-promise suit suggests that women’s economic comfort is tied to the institution of marriage, but the court’s efforts to curtail a woman’s recovery if it deemed her to behave in an unvirtuous manner suggests that only a certain kind of woman deserves the law’s protection.

In addition to limiting economic recovery to only virtuous women, the court has also sanctioned some patently discriminatory statutes. For example, the court upheld a criminal conviction for a bar owner who violated a statute that prohibited “suffer[ing] or permit[ing] any female under the age of twenty-one years to remain in or about such saloon,” or “sell[ing] or giv[ing] to any female under the age of twenty-one years * * * any intoxicating liquor” if unaccompanied “by her husband or parent.”⁷ The bar owner challenged the law as unconstitutional. The court disagreed.

The court noted that the act existed “to suppress the evils incident to the frequenting of saloons by women” which was “regarded as harmful to good morals.”⁸ The court asserted that the act was not discriminatory because women and men are different:

“By nature citizens are divided into the two great classes of men and women,

⁶ *Id.* at 270-71 (quoting *McPherson v. Ryan*, 59 Mich 33, 39, 26 NW 321 (1886)).

⁷ *State v. Baker*, 50 Or 381, 382-83, 92 P 1076 (1907).

⁸ *Id.* at 385.

and the recognition of this classification by laws having for their object the promoting of the general welfare and good morals does not constitute an unjust discrimination. A police regulation to prevent immorality and for the good of the community based upon such classification is proper; and, as Mr. Cooley says: ‘Under the police power, some employments may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women from engaging in them would be open to no reasonable objection.’”⁹

No reasonable objection, indeed! I think the adult woman who just wanted to have a beer in peace might object to such a law.

This analysis was then applied in one of the oddest cases I’ve ever encountered: *State v. Hunter*.¹⁰ In that case, the defendant, a woman, was *charged with a crime* for wrestling. Understandably, the defendant challenged the law as unconstitutional.

In answering that question (in the negative, of course), the court took judicial notice “of the physical differences between men and women.”¹¹ As a result, the court explained, it was a “proper exercise of the police power in the interests of the public health, safety, morals, and welfare” to criminalize wrestling by women.¹² But then, in a fascinating bit of...judicial honesty, the court went on:

⁹ *Id.* at 385-86.

¹⁰ *State v. Hunter*, 208 Or 282, 284, 300 P2d 455 (1956).

¹¹ *Id.* at 286.

¹² *Id.*

“In addition to the protection of the public health, morals, safety, and welfare, what other considerations might have entered the legislative mind in enacting the statute in question? We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal. It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. *Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman.* It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled. In the business and industrial fields as an employe or as an

executive, in the professions, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere man, and, we are frank to concede, in many instances had outdone him. *In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges? Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not.*¹³

The foregoing is a classic example of saying the quiet part out loud. What else but a sense of panic amongst certain people (*i.e.*, men) could have resulted in those words? This opinion was written in 1956. The increasing participation of women in life outside of the home was viewed as an “assault” and an “encroachment.” This court did not want to find the statute unconstitutional because it was genuinely distressed that women were slowly achieving some form of equality.

Obviously, decisions are not written like this today. It is difficult to imagine any judge taking pen to paper and calling a litigant a “harlot.”¹⁴ It is difficult to imagine a

¹³ *Id.* at 287-88 (emphases added).

¹⁴ See *Huard v. McTeigh*, 113 Or 279, 295, 232 P 658 (1925) (“[C]ommon-law marriage is contrary to public policy and public morals. It places a premium upon illicit cohabitation and offers encouragement to the harlot and the adventuress.”).

judge upholding a criminal judgment against a woman whose only offense was wanting to wrestle. But that does not mean that we should simply have a hearty laugh at the expense of yesterday's misguided male judge and relegate these decisions to the dustbin of history. These decisions are quite literally case studies on how prevailing negative attitudes toward women, or people of color, or people from other countries and so on become enshrined in our laws. While perhaps now we understand that it is inappropriate to write about the marginalized in such a nakedly disdainful way, that does not mean that these attitudes are gone. Indeed, each day seems to bring fresh reminders that progress is tenuous.

Perhaps we won't go back to the days where it was a crime for a woman to wrestle, but women's rights to their full bodily autonomy or physical and economic safety are not secure. These opinions and attitudes may seem like ancient history, but we would do well to remember that our history is never far behind us.

The Strange Project of a Female Attorney¹

Cheryl Coon²

In 1977, as I prepared to graduate from Boston University Law School, I wasn't focused on the historic aspects of being a female law graduate in the 1970s. But I was aware of inequities. I had applied to law school with the "understanding" that no more than 25 percent of my class could be women (10 percent if I had gained entrance to Harvard).³ When I was interviewed by major law firms, I wasn't surprised when they asked me what my plans were with regard to children, even to the point of asking what type of birth control I used.⁴ As the student representative

¹ The title of this article is a quote from an 1897 *New York Times* article regarding Clara Foltz's groundbreaking proposal for public defenders. See Barbara Allen Babcock, *Inventing the Public Defender*, 43 Am Crim L Rev 1267, 1273 (2006).

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³ Women constituted about 3 percent of the law school class between 1951 and 1965 and remained below 5 percent of the enrollment at ABA-approved law schools until the 1970s. In 1970, women comprised 8.5 percent of the class. Susan Ehrlich Martin & Nancy C. Jurik, *Doing Justice, Doing Gender: Women in Law and Criminal Justice Occupations* 107-09 (1996).

⁴ For similar reports, see Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 Maine L Rev 1, 14 n 96 (2009); Bowman comments that, "after an

(and sole woman) on the search committee for the law school's new dean, after "we" selected our choice, we celebrated at a Boston club that required me to enter from the back. Most memorably, in my belief that my responsibility on the search committee was to bring to the attention of the committee qualified women candidates, I proposed two women for their consideration: Stanford Professor Barbara Babcock and Columbia Professor Ruth Bader Ginsburg. Both women were swiftly dismissed from consideration on the ground that neither was qualified to be our dean.

So, when I was invited to write an article about early women lawyers in the West, I was delighted to have the opportunity to learn more. The West has many women lawyers who broke new ground; in this article, I focus on two of them: Clara Foltz and Lelia Robinson, who exemplify the challenges that women lawyers faced in the 1890s. Clara Foltz was the first woman lawyer in the Ninth Circuit; she also proposed and secured passage of legislation to create the concept of public defenders. As well, she assisted Mary Leonard in becoming Oregon's first lawyer.

Lelia Robinson was the first female graduate from Boston University Law School, nearly one hundred years before I graduated. She practiced law in Seattle, where she was the first woman in Washington to argue a case to a jury. She fought to be admitted to the Massachusetts Bar and

earlier version of [her] article was presented at the 2007 Gender and Law Conference at Santa Clara University School of Law, participants reported having been asked about their use of contraceptives in law firm interviews in the late 1960s and early 1970s."

authored numerous books for the public to demystify the law.

To understand how far we've come since Lelia Robinson and Clara Foltz tried to become practicing attorneys, a brief history. In 1869, Iowa was the first state to admit a woman to the bar.⁵ But in most other states, women applicants were denied entry. In 1872, Myra Bradwell, after being denied admittance by the Illinois Supreme Court, appealed to the U.S. Supreme Court. The Supreme Court affirmed the denial and, in a concurring opinion, Justice Bradley wrote:

“[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”⁶

In 1890, women lawyers were less than half of one percent of the profession (208 women out of 89,630 total lawyers nationwide, according to the census),⁷ although there had never been a systematic effort to identify all of them. Robinson set out to remedy that, and she published

⁵ Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America, 1638 to the Present* 11 (1986).

⁶ *Bradwell v. State of Illinois*, 83 US 130, 141 (1873) (Bradley, J., concurring in the judgment).

⁷ See *Special Census Report on the Occupations of the Population of the United States: 1890*, at 11 (1896), available at <https://www2.census.gov/library/publications/decennial/1890/occupations/>.

the results of her research in *The Green Bag*.⁸ She identified 120 women lawyers (counting herself) from 21 states, Washington D.C. and Hawaii.⁹ Of these women, more than 80 had attended law school, while 40 or so had read law in the offices of male family members or, in several instances, of other women lawyers or unrelated men.¹⁰

It was not until 1920, more than 50 years after women first became lawyers in the United States, that women were permitted to practice law before the courts in every state.¹¹ Access to legal education remained very limited. Many law schools, particularly the more elite, denied admittance to women altogether. Columbia only opened its doors to women in 1928, and Harvard did so in 1950.¹² Despite increasing numbers of women applicants, women law students constituted about 3 percent in each class between 1951 and 1965. Women remained less than 5 percent of the enrollment at ABA-approved law schools until the 1970s.¹³

⁸ Lelia J. Robinson, *Women Lawyers in the United States*, 2 *Green Bag* 10 (1890). The *Green Bag* was a popular legal magazine published from 1889 to 1914 with news of legal events, biographies, and essays.

⁹ That breakdown comes from Barbara Babcock, *Making History: Lelia Robinson's Index to American Women Lawyers*, Speech at Stanford Law School (July 1998). Babcock has written extensively about women's legal history, and in doing so has compiled many of the materials cited in this article at https://wlh.law.stanford.edu/biography_search/articles/.

¹⁰ *Id.* Law school attendance was not the primary vehicle at the time for pursuing a legal career and particularly not for women.

¹¹ Martin & Jurik, *supra* note 3, at 106.

¹² *Id.*

¹³ *Id.* at 107.

While it is generally accepted that the West was more welcoming to nineteenth-century women lawyers,¹⁴ it still was not an easy road. As a single mother of five, Clara Foltz, having studied law as an apprentice to her father, sought to take the California bar examination.¹⁵ California law, however, allowed only white males to become members of the bar. Foltz therefore authored a state bill that replaced “white male” with “citizen or person,” and in September 1878 she passed the examination and became the first woman admitted to the California bar, and the first female lawyer on the entire West Coast.¹⁶

Foltz had little formal education and her dream was to attend law school. It was a dream she never realized. She applied to Hastings College of the Law but was denied admission because she was a woman.¹⁷ Foltz sued and then wrote an amendment to the California State Constitution that prohibited disqualification based on gender from any “lawful business, vocation, or profession.”¹⁸ She successfully argued that, if women could practice as lawyers, they must certainly be allowed to attend law school. In *Foltz v. Hoge*,¹⁹ the court ruled that Foltz should be admitted to Hastings. But the fight had left her impoverished and she could not afford tuition.

¹⁴ See Barbara Allen Babcock, *Western Women Lawyers*, 45 Stan L Rev 2179 (1993).

¹⁵ Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz* 14-15 (2011).

¹⁶ *Id.* at 22.

¹⁷ *Id.* at 43-44.

¹⁸ *Id.* at 52-53 (quoting Cal Const Art XX, § 18 (1879), renumbered as Cal Const Art I, § 8).

¹⁹ *Foltz v. Hoge*, 54 Cal 28 (1879).

Foltz nevertheless went on to achieve an astonishing number of firsts and, significantly for Oregon, one of these was making sure women in Oregon could practice law. When Foltz came to Oregon to lecture as a means of raising money, she brought her passion for women's rights. In an interview with the *San Jose Mercury*, Foltz recounted that she had been visited in Oregon by a "lady friend" who explained that she had been refused admission to the Oregon Bar.²⁰ According to press reports, Foltz immediately drafted legislation and, within 40 minutes of presenting the bill to the Oregon Legislature, it passed both Houses and thereafter was signed by the Governor.²¹ Without Foltz's work, Mary Leonard might never have become the first woman lawyer in Oregon.

Newspaper accounts suggested Foltz was an accomplished orator with a great wit. When a trial opponent referred to her as "the lady lawyer," she responded that she had "never heard anybody call him any kind of a lawyer at all."²² When told that she should be at home with her children, she responded that a woman "would be better off most anywhere than home raising men like you."²³

One of her surviving opening arguments was made at a trial in the late nineteenth century in a San Francisco courtroom. The judge had appointed Foltz to represent an

²⁰ Babcock, *supra* note 15, at 100 (citing *The Part Played by Mrs. Foltz in the Oregon Legislature*, *San Jose Daily Mercury*, Mar 29, 1891). Mary Leonard was identified as the visitor.

²¹ *Id.*

²² Babcock, *supra* note 14, at 2184 (quoting Clara Shortridge Foltz, *Struggles and Triumphs of a Woman Lawyer*, *New Am Woman*, Jan 1918).

²³ Babcock, *supra* note 15, at 51.

immigrant charged with arson; her opponent was Thaddeus Stonehill.²⁴ Stonehill opened his argument by focusing on her gender and Foltz responded:

*Counsel opened his argument with the astounding revelation that I am a woman. * * * And yet, after this magnificent burst of blazing genius the sun does not appear to be darkened nor the moon paled by the contrast.*

I am that formidable and terrifying object known as a woman—while he is only a poor, helpless, defenseless man, and he wants you to take pity on him and give him a verdict in this case. I sympathize with counsel in his unhappy condition. True, the world is open to him. He is the peer of all men—he can aspire to the highest offices, he can carry a torch over our streets during a political campaign and sell his vote for a dollar and a half on election day, and yet he isn’t satisfied. Like Alexander, who wanted more worlds to conquer, he wants verdicts, and in order to awaken your sympathy for him he tells you that I am a woman and he is only a man.

** * * I repel the covert slur and innuendo that came with the words, “She is a woman”—words intended to depreciate me and my efforts before you in this cause, words none the less obnoxious because spoken under the cloak of a honeyed compliment. In the*

²⁴ As Foltz described him, Stonehill “had been a captain in the Southern Confederacy, but by common consent everybody called him Colonel.” Babcock, *supra* note 14, at 2184.

*name of the mothers who nursed you, and of the wives and maidens who look love into your eyes I resent this hidden appeal to a supposed prejudice of this jury. I resent this ill-concealed slur and covert innuendo that the presence of woman in a law suit contaminates her and that her sex must militate against her client. And I resent for you gentlemen, whose mouths are closed, the implication that you are small enough and narrow enough to bring prejudice into the jury box, and the insulting inference that you could be induced to visit punishment upon this defendant in violation of your solemn oaths * * * .*

** * * I ask no special privileges and expect no favors, but I think it only fair that those who have had better opportunities than I, who have had fewer obstacles to surmount and fewer difficulties to contend with should meet me on even ground, upon the merits of law and fact without this everlasting and incessant reference to sex—reference that in its very nature is uncalled for and which is as unprofessional as it is unmanly.*

Within minutes, the jury found Foltz's client not guilty.²⁵

One of Foltz's lasting accomplishments was her idea of a government-funded system of public defenders. Professor Babcock, Foltz's biographer, explains that Foltz often gained experience by representing clients who could

²⁵ *Id.* at 2185-86.

not afford the fees charged by male lawyers.²⁶ Her experience convinced her of the desperate need for public defenders and she advanced the idea of a public defender, equal in stature to the public prosecutor, at the Chicago World's Fair in 1893.²⁷ Although others previously had discussed the idea,²⁸ Foltz honed it to a detailed proposal, blending practical insights from her own experience. In her speech, Foltz proposed salaried public defenders, chosen in the same way and paid out of the same fund as public prosecutors. Los Angeles County adopted her idea in 1912, opening the nation's first public defender's office.²⁹ Foltz drafted a model statute providing for public defenders, which was introduced in 33 states and became the law in California in 1921.³⁰

Foltz practiced law continuously for 50 years and was renowned for her jury work, yet at the end of her life, she told a reporter that women had yet to achieve the status of a "constitutional lawyer" who, in her mind, concerned themselves with the public good rather than commercial or criminal law.³¹

²⁶ Babcock, *supra* note 15, at 290.

²⁷ *Id.* at 305-08.

²⁸ Edward Bellamy is credited with first inventing the idea of a public defender by including it in his book, *Looking Backward: 2000-1887* (1888), which chronicled the time-travels of a Boston lawyer who falls asleep one night and awakens in the year 2000. His book was a huge success, selling a half million copies. See Sara Mayeux, *Free Justice: A History of the Public Defender in Twentieth-Century America* (2020).

²⁹ Babcock, *supra* note 15, at 317-18.

³⁰ Morello, *supra* note 5, at 65.

³¹ Babcock, *supra* note 14, at 2183.

Across the country, another groundbreaker, Lelia Robinson,³² enrolled at Boston University School of Law in 1878 as the lone woman student; in 1881, she became the first woman to graduate from the School of Law.³³ Her tuition was \$35 for a term.³⁴ Robinson previously had been a journalist, including a stint as a foreign correspondent in Berlin.³⁵ After graduating from law school and “utterly failing” to obtain a position, she hung out her shingle.³⁶ Robinson also applied for admission to the Massachusetts Bar, just like her fellow male students, but unlike them, her application was sent to the Massachusetts Supreme Judicial Court. While she could conduct office business without admission to the bar, she could not take cases to trial

³² Lelia Robinson inspired the establishment of multiple awards that are still given today. The Robinson Award, given by the Women’s Bar Association of Massachusetts, recognizes women who are engaged in groundbreaking work in the legal profession.

³³ Morello, *supra* note 5, at 68.

³⁴ Jill Norgren, *Rebels at the Bar: The Fascinating, Forgotten Stories of America’s First Women Lawyers* 158 (2013).

³⁵ *Id.* at 156.

³⁶ *Id.* at 159; see also Letter of Lelia Robison to Equity Club Members (Apr 9, 1887), reprinted in Virginia G. Drachman, *Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887 to 1890*, at 64 (1993). The Equity Club was established by 19th century women lawyers to share their experiences. All women lawyers and law students were invited; its mission was to “promote acquaintance among women pursuing law as a study or a profession * * * and to take such steps as may seem advisable to secure the success and usefulness of women in the profession.” A unique feature of the club was the requirement that members each write a letter every year “giving personal experiences.” See Judy Jolley Mohraz, *The Equity Club: Community Building Among Professional Women*, J Am Culture, Winter 1982, at 34.

without bar admission.³⁷ Robinson argued in her brief to the Supreme Judicial Court that the requirement that she be a “citizen” in order to be admitted was a sex-neutral term. She also argued that to withhold the opportunity to take the bar examination would abridge her rights under the Fourteenth Amendment.³⁸

While Boston was the home of many progressives, many of those same progressives opposed women’s rights. The bar’s opposition was so great that it actually arranged for briefs in opposition to be submitted as *amici curiae* by two Boston attorneys.³⁹ The Massachusetts Supreme Judicial Court unanimously denied her petition, claiming that existing law set no precedent for allowing women to practice in the courts, and that the legislature’s failure to expressly provide that women could become members of the bar was further support of that opinion.⁴⁰

Robinson took her fight to the legislature, drafting a bill that would allow women to take the bar exam and practice law in the court. Robinson lobbied hard for Massachusetts to join the 15 other states and territories that had admitted women to the bar, speaking publicly whenever she could and testifying before the Massachusetts

³⁷ Norgren, *supra* note 34, at 159.

³⁸ *Id.*

³⁹ *Id.* at 161; see also Dan Ernst, *Lelia Robinson, Part 2*, Legal Hist Blog (Dec 22, 2009), <http://legalhistoryblog.blogspot.com/2009/12/lelia-robinson-part-2.html/>.

⁴⁰ *Lelia J. Robinson’s Case*, 131 Mass 376 (1881). Her case later was cited in the efforts of women lawyers in other jurisdictions who applied for bar admission in their states, including Mary Leonard. See Norgren, *supra* note 34, at 239-40 n 20.

Legislature.⁴¹ The legislature passed the bill, effectively overruling the Supreme Judicial Court’s ruling, and, in June 1882, Robinson took and passed the Massachusetts Bar, becoming the first woman to be admitted to the bar and practice in the courts of Massachusetts.⁴²

But like other women’s experience, Robinson’s admission to the bar did not mean clients. Robinson’s cases were few and consisted mostly “of small and rather hopeless claims for collection.”⁴³ Although she began work on her first book, *Law Made Easy: A Book for the People*,⁴⁴ she decided to move to the Washington Territory, hoping for “the liberality of western views on the ‘woman question.’”⁴⁵ Indeed, the world she would go to was more liberal at least at that time: married women’s property laws had been reformed, and women had been voted full suffrage rights and could serve on juries.⁴⁶

Robinson was offered a desk in the office of Seattle’s premier law firm, Struve, Haines & McMicken. When she came to the firm, she met Mary Leonard, who at that time was studying law with Haines and also had a desk in the office.⁴⁷ Later in her tenure at the firm, Robinson helped the male lawyers understand that women jurors were “intelligent, clear-headed, quick-witted, and reliable” and

⁴¹ Norgren, *supra* note 34, at 162.

⁴² *Id.*

⁴³ Letter of Lelia Robinson to Equity Club Members (Apr 7, 1888), *reprinted in* Drachman, *supra* note 36, at 117, 121.

⁴⁴ Lelia Robinson, *Law Made Easy: A Book for the People* (Chicago 1886).

⁴⁵ Letter of Lelia Robinson, *supra* note 43, at 121.

⁴⁶ Norgren, *supra* note 34, at 164.

⁴⁷ *Id.* at 166.

not to be pandered to.⁴⁸ Robinson impressed judges, in particular Judge Roger S. Greene, who encouraged her to debut as a trial advocate by appointing her to defend Ah Mon, who had been indicted for bringing other Chinese people to the United States.⁴⁹ Robinson thus became the first woman in Washington to argue a case to a jury and to argue in front of a jury consisting of both men and women. She won the case and it established her reputation as a skilled advocate.⁵⁰

In what was sadly a very brief life,⁵¹ Robinson's "strong sense of justice and her independence in expressing her views caused her to be misapprehended at times by those who did not know the warm heartedness that lay beneath." So wrote her dearest friend in a eulogy published in the *Women Lawyer's Journal*, who continued that Robinson "was always devising means to bring [women] into closer and more social relations with each other, and she was generously delighted at their successes as she would have been at her own."⁵² She left behind not only the steps she had taken to break barriers for other women lawyers but also her books for the public about the law.⁵³

⁴⁸ *Id.* at 168 (quoting Lelia J. Robinson, *Women Jurors*, *Chi L Times*, Nov 1886).

⁴⁹ *Id.* at 169.

⁵⁰ *Id.*

⁵¹ Robinson died at the age of 40, after falling ill with the flu and accidentally taking an overdose of medicine. *Id.* at 180.

⁵² *Id.* (quoting Mary A. Green, *Mrs. Lelia Robinson Sawtelle—First Woman Lawyer of Massachusetts*, *Women Lawyers' J*, Apr 1918, at 51).

⁵³ Robinson's books include *The Law of Husband and Wife* (1889), which received glowing reviews. For example, the *Green Bag* wrote:

Reading about the lives of these two pioneering western women attorneys, I couldn't escape noticing parallels. As a woman whose law degree was earned in 1977, I faced a world far less daunting than Foltz and Robinson, yet not free of opposition and difficulties stemming from both the fundamental inability of society, as well as individual men and women, to accept the right of women to behave no differently than men in the practice of law. I am grateful for the groundbreaking work Foltz and Robinson did; I am hopeful that the groundbreaking work, less spectacular but just as necessary, that women of my generation did, will help the newest women lawyers to break through the remaining barriers.

In the compilation of this little book Miss Robinson has designed it for popular as well as professional use. A general outline of the laws defining the mutual rights of husband and wife is clearly and succinctly given, and a vast deal of valuable information is condensed into the 72 pages composing the text.

Book Notices, 2 Green Bag 41 (1890) (reviewing Lelia Robinson, *The Law of Husband and Wife* (1889)).

The Fusion Plot: How Oregon's First Senator Joseph Lane Plotted to Save Slavery and Destroy the Union

*Lewis Zimmerman*¹

As this article is being written, the United States is engaged in one of the most consequential presidential elections in recent history. We can easily sympathize with the uncertainty and fear of the 1860 presidential election. Nationally the election was perceived as a final referendum on slavery. Southerners saw the likely election of Abraham Lincoln and the ascent of the Republican party in the North as an existential threat. Joseph Lane, after whom Lane County is named, was at the crux of a desperate political gamble by the southern Democrats known as the Fusion Plot. This plot proposed to split the electoral college and throw the selection of the president on Congress. The hoped-for result would have been Lane as president, slavery preserved, and the South reconciled. The story of the scheme and its fortunate failure follows the complexities of politics in early Oregon and echoes our current presidential election, fraught with worries about the democratic legitimacy of the electoral college.

Joseph Lane was born in rural North Carolina in 1801. At the age of 21 he began a promising career in politics, serving several terms in the Indiana state

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legislature from 1822 to 1846. In 1846 he served with the Indiana volunteers in the Mexican-American War, rising to the rank of major general. With a national reputation as a soldier he was appointed to the territorial governorship of Oregon, a post first refused by his future rival Abraham Lincoln. A prominent Oregon Democrat, Lane was later elected Oregon's first senator in 1859. However, his promising political career then foundered on national and local divisions in the Democratic Party.

In 1857, the Democratic Senator Stephen A. Douglas from Illinois publicly challenged the Democratic President Buchanan's pro-slavery stance on Kansas. The national Democratic Party was thrown into disunion and split into northern and southern factions. Local chapters of the party were quickly drawn into the national argument. Although Oregon was geographically and ideologically distant from the slave-holding South, many in the Oregon Democratic Party, including Lane, were sympathetic to slavery and southern interests. Thus, in 1858 Joseph Lane and a faction of the state party broke publicly from the editor of the Oregon Statesman (and Democratic Party boss) Asahel Bush, aligning themselves with southern Democrats.

With the Democratic party split locally and nationally, the stage was set for the fateful 1860 election and the Fusion Plot. The northern Democrats nominated Stephen Douglas, while the southern Democrats nominated John C. Breckinridge with Joseph Lane as the vice-presidential candidate. With the rump of the Whig Party nominating a Constitutional Union Party candidate, the contest was split four ways. The Republican Party's solid grip on the populous northern states would have made even a unified Democratic ticket uncertain; divided, the Democratic Party was sure to lose the popular vote.

The multiple candidates vying for the office opened the way for the Fusion Plot. With four major candidates, it was possible that no one person would win a majority in the electoral college. This outcome depended on a major weakness in the Republican hold on the North: New York City. The state of New York held a commanding 35 of 303 available electoral-college seats. While the state was generally Republican, New York City was controlled by the powerful Democratic Tammany Hall machine. If New York City could swing the state for the Democrats then Lincoln would likely lack a majority in the electoral college.

If no candidate could claim a majority in the electoral college, then the Constitution required that the House of Representatives select the president and the Senate the vice-president. The proponents of the Fusion Plot hoped that a divided House of Representatives, deadlocked between four factions, would be unable to pick a President. The Democratic-controlled Senate would then have chosen Joseph Lane for the vice presidency. Once established as vice president, Lane would have immediately assumed the presidency of the United States.

Joseph Lane's position on slavery and secession was clear. Throughout the campaign of 1860 he championed the right to hold slaves and called for rigorous enforcement of the Fugitive Slave Act. Lane also maintained that any state might secede if it so wanted. If Lane had become president one can easily imagine the grim course the country would have taken. Strict federal enforcement of the Fugitive Slave Act would have angered the northern states. The federal government would have been under the control of a President who had not been elected by the people. Joseph Lane would have faced a rebellious North without the gifts of Abraham Lincoln to draw on. Given his public stance on

secession and his weak claim to legitimacy it is hard to see how he would have stood in the way of northern secession.

As it happened, Lincoln won in New York and the Fusion Plot died before it was launched. Abraham Lincoln was elected president on November 6th, 1860. On November 9th the South Carolina general assembly passed a *Resolution to Call the Election of Abraham Lincoln as U.S. President a Hostile Act and to Communicate to Other Southern States South Carolina's Desire to Secede from the Union*. The resolution declared in part:

“That this General Assembly is satisfied that Abram [sic] Lincoln has already been elected President of the United States, and that said election has been based upon principles of open and avowed hostility to the social organization and peculiar interests of the slave holding states of this Confederacy.”

The American Civil War, the end of slavery in the United States, and all that came after flowed from the 1860 election and the failure of the Fusion Plot. The political failure of the Joseph Lane's presidential hopes and the end of his political career may have doomed slavery and saved the United States from dissolution.

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Jason E. Pierce, *Making the White Man’s West: Whiteness and the Creation of the American West* (2016).

The decisions of other courts on this subject are so inharmonious that we do not undertake the task of attempting to reconcile them. The many appeals pending in this court, and the pressing necessity of disposing of its rapidly accumulating business render impracticable an opinion fully discussing every phase in which this subject has been presented in the remarkably able brief submitted by counsel for defendant. While it has been thoroughly considered, we are forced to content ourselves with a bare statement of our conclusions.

State v. La Rose, 54 Or 555, 559, 104 P 299 (1909)

The Appellate Courts

Women in the Law, RBG, and Federalism: A Conversation with Chief Justice Walters

*Christine Moore*¹

Before my interview with Chief Justice Martha Walters started, she first wanted to know how my family and I were doing in the time of the COVID-19 pandemic. She wanted to know how women in the law were handling the burden of working while also managing distance learning for their children. In other words, she embodied what we later discussed to be attributes that women bring to the practice of law: empathy and a focus on relationships.

Indeed, Walters experienced those attributes firsthand in our highest court, when she appeared in the United States Supreme Court on behalf of Casey Martin, a golfer who had brought a disability-discrimination claim.² Justice Ruth Bader Ginsburg knew Mr. Martin was in the audience, but she could not ask who he was during argument. As Walters explained in a recent KGW News article:

“[Justice Ginsburg wanted to] have a picture in her mind of, ‘Who is this person? I’m going to be deciding a case, and I want to know, who is he?’ * * * She wanted to see the real person behind the case * * * [s]o she sent

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² See *PGA Tour, Inc. v. Martin*, 532 US 661, 121 S Ct 1879, 149 L Ed 2d 904 (2001).

her clerk out to stand near him so that then she could put the two together and know which was the person who the case involved.”³

And just like Justice Ginsburg, Walters wants to know more about the people behind the case, and how deciding the case will impact people, not just the law in the abstract.

When Walters attended the University of Oregon School of Law in 1974, she was in one of the first classes of law students that were at least 25 percent women. She described the monumental experience by relating it to another powerful woman, Oregon’s first female Attorney General, Ellen Rosenblum.

“Ellen was in the class before me and she spoke on the first day of school. I couldn’t believe there was a woman like this who could stand up in front of everybody and speak so eloquently. She was so inspiring. There just weren’t women who I had as role models before this. It was so good to see that there were women who had started making their way.”

After law school, Walters was hired as the first female associate at her firm, but it was at a time when she believed firms had decided that they needed to hire women. “The women in our class did not have difficulty finding employment.” Even though employment was widely

³ Maggie Vespa, *‘She definitely paved the way’: Female judges and lawyers across Oregon reflect on RBG*, KGW8 (Sept 24, 2020), <https://www.kgw.com/article/news/politics/female-judges-and-lawyers-across-oregon-reflect-on-rbg/283-60b0919b-ec16-4b68-b41d-07b07be1e90f/>.

available, she felt that as a woman she had something to prove and needed to work her tail off.

Then, as now, children added extra hurdles for women in the practice of law. Walters explained:

“I always had the idea that I’m not going to ask for extra consideration as a mother, but I just don’t think that’s fair to expect. Now, for both men and women, there seems to be more acceptance that if you’ve got family responsibility, you can’t be expected to do everything as that of someone without a family. I feel so jealous of people now who are stronger about emphasizing that this is my chance with my children and if that’s not accepted, then too bad. It should be that there’s some understanding that while you’re having children that you’re not going to be expected to produce at the same level as people without children. It’s not going to last forever and we all need to support it.”

When Justice Walters and her law partner Les Swanson started their own law firm in 1986, she had a son and a brand new baby. She later created, with two other partners who were also mothers, one of the first all-women law firms in Oregon. As a woman, being responsible for her small firm while raising children was one of the most difficult times in her career. In addition, her litigation practice frequently included contingency-fee cases, which required financing and the uncertainty of knowing whether a case would be successful. Yet, she had the support of her partners: “We covered for each other and lived our lives

and worked together. We worked really hard. It was quite remarkable.”

Eventually, she made the difficult decision to leave the firm and join the judiciary. But at the time, in 2006, the Oregon Supreme Court had no women. (Justice Susan Leeson, three years prior, had been the last woman on the court.) Walters thought as a woman she had something different to contribute to the court. She was the sole woman on the court for three months, at which time Justice Virginia Linder joined. Justice Walters described the makeup of the court as being “so far removed from her experience of practicing law with it being all men. I was used to being in a firm with all women. And it was very odd that it was such a big deal to have a woman join the court given that women were such a strong force in the legal community.”

She explained:

“I don’t know whether it was because of who Justice Linder and I were, but we asked lots of questions and there seemed to be more free exchange. We were very welcomed by the other justices and treated like we had something to offer. Having Justice Linder there with me made us both feel like there was somebody else there who had similar life experiences, it made it easier. I think it would’ve been harder to just be the sole woman.

“I think it’s hugely important to have women on the court for the same reason we want any kind of diversity. People look at things differently from their lived experiences and their way of approaching

questions of law. There's all different kinds of diversity we need. The experience of being a woman in society is just different than that of a man. We need those different views.”

Justice Linder has since retired, but four other women have joined the court with Walters. Having a majority of women on the court for the first time in Oregon history has changed the court's dynamic. Justice Walters explained: “[T]here's a patience with discussion, working things through, working things through again. Seniority doesn't particularly matter. There's more equality and an openness. No one is seeking to dominate.”

In July 2018, Justice Walters became the first woman Chief Justice of the Oregon Supreme Court. She recognizes that her experience as a woman has impacted her role as Chief Justice:

“Having been in practice for so long I care a lot about the trial courts and how they operate. The trial courts are operated by trial court administrators, many of whom are women, and I think they appreciate my willingness to listen to them and to recognize how much they care about their jobs. My main job is to be their cheerleader. I can tell people what a good job they are doing and it's important to them to be heard. It's an important part of my job and I'm glad I can do it.”

One of Justice Ginsburg's noted strengths was her strong dissents. Justice Walters agrees that there is power in dissents. As she described:

“You do hope that you’re speaking to the future. The law does not have to remain the same so you may be giving ideas that will spark change. Also, it’s important to you as a judge to have that ability to speak out and give a different point of view, because [otherwise] it would be hard to be a justice on the court, you’d feel closed down, shut out of things. You can at least express dissent. It’s your way of operating within a structure, to have a way of saying you look at it differently but still be part of that structure. It’s important to the litigants as a way of letting them know they were heard. It may not have won the day, but at least they were heard.

“The most meaningful dissent to me was in *Emerald Steel Fabricators v. BOLI*.⁴ * * * In *Emerald Steel Fabricators*, an employer discharged an employee due to his medical marijuana use. The majority held that Oregon law, which protected the employee’s rights, had to fall because federal law didn’t allow for it. As I said in my dissent: ‘I do not understand why, in our system of dual sovereigns, Oregon must fly only in federal formation and not, as Oregon’s motto provides, “with her own wings.”’⁵ I think it’s an important issue for Oregon to be able to carve out its own law.”

⁴ *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 348 Or 159, 230 P3d 518 (2010).

⁵ *Id.* at 206 (Walters, J., dissenting).

And so, like Oregon needing to carve out its own path, Chief Justice Walters emphasizes the importance of women and other marginalized groups carving their own path in today's society. She recognizes the difficulty of making a path "that is different than the societal one; at times you may be walking alone, or think you are." She believes that it certainly is not wrong to join the path with others, but "be aware of the choices you are making and why you are making them." Walters also underscores that you must not make your path too narrow: "We are all afraid." However, she advises that we must try to be brave and pick a path we have not yet trod; "walk with those whose paths have been different." Granted, "you will need to circle back; start over; look anew," but as Chief Justice Walters states, "we are all in this together."

**Remarks Delivered at the 50th Anniversary Celebration
for the Oregon Court of Appeals, September 6, 2019
(lightly edited for clarity)**

Hon. Erika Hadlock¹

Ever since I sent my resignation letter to the Governor and the Secretary of State back in June, I've been thinking about the work I've done at the Court of Appeals. I've also been thinking about the work of others that I've been privileged to witness since I started appellate practice in the mid-90s and made the transition to a judicial role in 2011.

And, in preparing to participate on this “judicial process” panel, I've been pondering ideas that have resonated with me as I think back on the nearly 25 years that I've worked in and around this court.

The theme I keep coming back to is this: There is so much, as a judge, that I don't know.

Now, some of you may be thinking: We realize that, Hadlock, just look at some of your opinions! But I'm not referring to knowledge of the law; each of us has our own limitations and areas of expertise in that regard.

What I'm talking about are two particular types of “things I don't know”:

The first type of “things I don't know” relates to the challenge that all of us inevitably face in trying to understand the world, or ideas, when they are presented from a perspective that differs from our own—the effort that we as judges have to make to even perceive our own “bubbled” thinking, before we can figure out how to move

¹ Judge, Oregon Court of Appeals (2011–2019).

beyond that, so we are able to hear and learn from people who experience the world, or think about it, differently than we do.

The second category of “things I don’t know” is related, and is what I’ll spend time on here, as it can have particular significance to a judge on an intermediate appellate court. That “thing I don’t know” is how little I know about **The Truth**—with big capital letters—if there is any such thing: The unknowable, complete identification and explanation of the events, experiences, and perceptions that lay beneath any case that comes before me at the court.

Litigation itself reveals only a part of the reality of any human interaction, whether it be the dissolution of a marriage, the events that culminate in the arrest and interrogation of a criminal suspect, or the events that lead individuals to form a business partnership and later to dissolve it. Because of rules of evidence, limited court time, choices about what matters and what people are willing to expose about themselves—and sometimes because of deception or manipulation—only part of the picture is displayed in court. Litigation lets us see only part of the picture.

And on appeal, we see an even smaller part of the picture—of The Truth—because we see only a piece of what was revealed, or developed, during litigation. We know only what made it into the record. Usually, that means we have no way of knowing the strategic decisions that informed the parties’ identification of claims and defenses, the development of the evidence, their choices of what dispositive motions to make, or their decisions about how to present their cases and when—and when not to—object to evidence or to events at trial. We know nothing about

the parties themselves—their virtues and their sins—other than what the record tells us.

It can be tempting to assume that we understand why the litigants ended up where they did—that we have insights into why people made certain choices or behaved in certain ways. About who’s the “bad guy” and who’s not. And those kinds of assumptions may often be right. But sometimes—and we have no way of knowing which times—they will be wrong.

So, what do I do with that? Understanding that I see only a small piece of The Truth of any given case, what does that mean for me as a judge of an intermediate appellate court?

It sheds some light, I hope, on the reasons I care so much about some of the principles that guide our work.

Because we see only a part of the truth: We cannot know why the parties have chosen to make only certain arguments to us, and not others that we may think they ought to have made. Why hasn’t the appellant assigned error to a particular ruling? Usually, we don’t have enough information to know whether that was an advocate’s strategic choice, the client’s personal choice, or a lawyer’s terrible mistake. In part because we don’t know—and in large part because it is not our job as neutrals, rather than advocates—we do not address issues that the parties have not raised on appeal. Instead, we limit ourselves to addressing what we can know—the issues that the parties have chosen to put before us.

Because we see only a part of the truth: It can be problematic to address issues that were not litigated in the trial court. Suppose the appellant assigns error to the

admission of hearsay evidence, but did not object to admission of the evidence at trial. We don't know why the appellant did not object below. Perhaps the trial lawyers agreed off the record that the evidence could come in. Perhaps the appellant's lawyer thought at the time that the evidence would benefit her client, and only later realized that it had been detrimental? Because **we don't know** why no objection was made—or what might have happened if it had been—we generally will not address unpreserved claims of error. Certainly not when we would have to draw inferences or make assumptions about what does not appear on the record.

Because we see only a part of the truth: what is reflected in a transcript and on paper—we (mostly) decide only the law, and we do not substitute our judgment for those of factfinders and trial-court judges who were physically in the courtroom, who could listen to and observe the witnesses, and could make the discretionary calls and in-the-moment decisions that are not fairly second-guessed on the basis of a cold record. It's a big part of why we pay such close attention to the standard of review.

My basic point is this: There are deep, fundamental reasons why we apply the rules that require assignments of error, preservation, and application of the correct standard of review. The requirements of ORAP 5.45 are not just hoops that an appellant must jump through on the way to getting to the meat of an appeal. Properly understood and applied, those principles guide us in deciding only those issues that the parties bring us, that were fairly litigated below, and that we have a right to pass judgment on from an appellate perspective. We decide only those issues, in that way, because that is what we can fairly do on the basis of the limited information we have—the small slice of

reality that we can see—from the perspective of an intermediate appellate court.

Beyond that, understanding that we see only a small slice of The Truth of any given case has informed my judicial work in additional ways, at least when I'm at my best.

- It helps me really listen to all the parties' arguments, to avoid discounting an argument merely because it is presented by a party (or lawyer) whose viewpoint may—based solely on the little slice of reality we see on appeal—seem somehow less compelling or deserving of attention.
- It helps me maintain an even tone in my writing, sticking to the facts and the law without characterizing individuals or entities as good actors, or bad.
- It leads me to move carefully when I consider writing on aspects of the law that the parties have not addressed. There may be good reason the parties didn't go there and, without their input, I'm unlikely to identify and appropriately deal with all the arguments the parties would have made, had they chosen to go in that direction.
- It keeps me grounded in my role—the role I have been so fortunate to perform these last eight years—of helping resolve the disputes that the parties bring to us. It leads me to ask, when I decide a case or write an opinion:
 - Am I fully informed? Have I done my best to hear and understand the information and arguments presented?
 - What information have I not been given? What perspectives may I not have heard?

- Am I at risk of basing my decision on outside-the-record assumptions about events, people’s conduct, or how the world works—assumptions that the parties have had no reason to anticipate, and to which they’ve had no chance to respond?
- And, if I’m writing an opinion, have I disciplined myself to deciding only the dispute in front of me? Not because of some formalistic, rigid avoidance of dictum, but because I want to leave room for the law to develop appropriately if, in a future case, the advocates present information or ideas that I might not have taken into account in this one.

I’m afraid all of that may sound somewhat parsimonious or cramped. It’s not meant to. And, in reality, I don’t think it is. When we center our decision-making on the cases that are presented to us, based on the information that we do have, we perform the core function of this court—fairly and impartially resolving the hundreds of cases that each judge votes on each year.

When we do our job based on what we do know, from the information presented by the advocates, we can be more confident that our decisions are well informed and do not stray into areas about which we may know less than we realize. We can take pride that we are properly resolving each of those hundreds of cases on its own merits.

And when our work is based on information we have been given, in what we might call the “big” cases, we can take pride that our advancement of the law is as informed as it can be—that, in a proper exercise of the judicial function, we are developing (or moving) the law consciously, in

response to the parties' arguments, based on the facts of actual disputes.

When we do our work that way, we help build public confidence in the courts, because people can see that we are doing our work—the work of the judiciary—and doing it in a way that most fairly and evenhandedly makes room for everybody to be heard. For everybody to have their day in court and their opportunity to explain why we should resolve a dispute in their favor. To have their fair shot at influencing development of the law.

Because, in the end, our work is about the parties and the disputes they bring to us for resolution. It is not about us.

**Then and Now:
The Appellate Settlement Conference Program**
Genevieve Evarts

In 1995, the Oregon Court of Appeals created the Appellate Settlement Conference Program (the “SCP” or “program”) to encourage the resolution of appeals through mediation. While the adoption of mediation programs at the appellate level nationally was still in its infancy at the time, the court secured a grant from the federal State Justice Institute to facilitate the creation of an experimental mediation program in Oregon. Susan Leeson championed the effort and worked with Bill Richardson, James Nass, and others at the court during that time to develop what would eventually become the SCP.

Judy Henry was hired as the SCP’s director to launch the program starting in 1995, and she remained in that role until her retirement in 2018. During Judy’s tenure with the court, she worked tirelessly to build and sustain the program. Thanks to her efforts and the efforts of others who worked for and with the SCP, thousands of appeals were resolved through mediation rather than being submitted for full appellate review.

Today, 25 years later, the SCP continues to thrive under new leadership. Genevieve Evarts was hired as the program’s staff attorney in 2017, and became the director when Judy retired in fall 2018.¹ Mark Friel was then hired as

¹ Genevieve was a partner at Folger Levin LLP in San Francisco after graduating from the University of California Hastings College of the Law in 2003. In 2015, she left the Bay Area and shifted the focus of her practice solely to mediation.

the program's senior staff counsel in late 2018.² Both Genevieve and Mark are trained and experienced mediators. While they both draw on their extensive litigation background to assist parties with matters in the SCP, they have given up their advocacy roles and instead now serve as neutrals for the Court.

The primary purpose of the SCP remains the same: to provide parties with the opportunity to resolve their disputes at the earliest stage of the appellate process.

As trial and appellate practitioners know, one of the many benefits of a mediated resolution is that it saves the parties the expense and uncertainty associated with continued litigation. Mediation provides an opportunity for parties to have control over the outcome of their case and encourages the development of creative solutions to complex, lengthy legal disputes. In family-law matters, for example, tension levels and the continuing effects of litigation on the lives of children can be reduced with a settlement on appeal. In any matter involving parties with a continuing business or personal relationship, mediation provides a valuable opportunity to try to resolve both pending and potential claims.

Each appeal that can be resolved through the program also saves the court significant resources. In many cases, appellate settlements also save resources at the trial court and administrative levels when those settlements also resolve related claims or disputes between the same parties (so-called "global settlements"). Potential or actual

² Mark was a partner at Stoll Berne in Portland and mediated both privately and for the SCP for several years prior to joining the program. Mark graduated from the University of California Berkeley School of Law in 2000.

malpractice claims and attorney-fee claims are also often ripe for inclusion in a global settlement where appropriate. The SCP is uniquely situated to assist parties with issues that go beyond the possible assignments of error, so program staff endeavor to explore global settlement potential whenever possible.

In terms of how the SCP operates, its overall structure, approach, and governing rules remain largely the same.

The SCP is mandatory at the beginning of the appellate process for certain categories of appeals, including general civil, domestic relations, probate, and workers' compensation matters, subject to certain exceptions.³ In addition to mandatory referrals, the SCP is always eager to accept an "opt-in" or voluntary referral when the court or a party requests it, or for matters pending before the Oregon Supreme Court. The program has also assisted with the resolution of select opt-in criminal and juvenile-dependency matters, certain land-use matters, and appeals involving *pro se* parties where appropriate. The court and the SCP are committed to facilitating resolutions in all types of appellate matters whenever possible.

When an appeal is referred to the SCP, each matter is screened to determine whether the case is a good candidate for continuation in the program. A standard 120-day abeyance is mandated by ORAP 15.05(4), which pauses transcript and briefing deadlines to encourage parties to participate in settlement discussions. Appellants are

³ When an appeal involves a *pro se* party, restraining/stalking order, filing deficiency, fee waiver, or when the state or a state agency is a party, referral to the program is not mandatory.

required to submit a Settlement Conference Statement and each side's counsel is contacted by program staff to assess a number of criteria, such as the dispute's factual and procedural background; issues on appeal; interpersonal dynamics; prior settlement efforts; the risks, costs, and benefits of continued litigation; and the parties' respective views on potential settlement.

It is critically important that, under ORAP 15.05 (and ORS Chapter 36), communications with program staff are confidential. As amended in 2019, ORAP 15.05(6)(a) provides that “‘mediation,’ which is defined in ORS 36.110(5), begins when an appeal is referred to the program and ends when the program director removes the appeal from the program, or when the court dismisses the appeal, whichever occurs first.” Therefore, conversations between parties, attorneys, and program staff are protected as confidential mediation communications, as defined in ORS 36.110(7), throughout the SCP's screening process.

The SCP relies on confidential information shared during the screening process to determine whether to informally facilitate a resolution, schedule a formal mediation, or reactivate and remove an appeal from the program. Mediation can be compelled by the director, and attendance at SCP mediations is mandatory. For those cases that are not suitable for continuation in the SCP, the director will reactivate and remove the appeal from the program to return it to the court's active docket before the initial abeyance period ends.

Some formal mediation sessions are conducted by SCP staff—either in person, or, due to the current COVID-19 pandemic, virtually by video conference or phone. Other matters are assigned to one of the mediators on the program's panel, many of whom are retired judges or

practitioners with extensive appellate mediation training and experience. ORAP 15.05(7) prescribes program mediation fees for matters set up with program staff and panel mediators; the court and the SCP are immensely grateful to the panel mediators who do this important work at steeply discounted rates in an effort to encourage participation in mediation.

In terms of the road ahead, the SCP looks forward to continuing to serve parties seeking a way to explore resolution of appellate matters and to serve the court by reducing its caseload. While in-person mediation is on hold during the COVID-19 pandemic, remote mediation is proving to be effective and will likely continue to be an attractive option for parties and mediators after the pandemic ends. With that said, the SCP will welcome a return to in-person mediation when the time is right.

*A court which treats a particular provision of a statute as though it were a waif without known parents, relatives or associates, is likely to miss the meaning of the particular provision. This court has recently emphasized the necessity of considering a statute as a whole in order to ascertain the meaning of a part. * * * As someone has said: "A text without a context is a pretext."*

Berry Transp. v. Heltzel, 202 Or 161, 184, 272 P2d 965 (1954) (Lusk, J., dissenting)

Legal Commentary

Let's Face the Music: It's Time to Narrow the Abscond-Dismissal Rule

*Brett Allin*¹

Regular criminal-appellate practitioners are probably familiar with the abscond-dismissal rule, which has its roots in common law but is now ensconced into Oregon appellate procedure at ORAP 8.05(3):

“If a defendant in a criminal case, a petitioner in a post-conviction relief proceeding, a plaintiff in a habeas corpus proceeding, a petitioner in a parole review proceeding, or a petitioner in a prison disciplinary case, on appeal of an adverse decision, escapes or absconds from custody or supervision, the respondent on appeal may move for dismissal of the appeal. If the court determines that the appellant is on escape or abscond status at the time the court decides the motion, the court may dismiss the appeal or judicial review.”²

Unlike prior iterations of the rule, the current iteration is based on a sole rationale: enforceability—*i.e.*,

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² “Abscond status” means the defendant “is both engaging in evasive conduct and exhibiting an intent to evade or avoid legal process[.]” *State v. Lazarides*, 358 Or 728, 735-36, 369 P3d 1174 (2016).

“the inability of the appellate court to enforce a judgment against a fleeing defendant[.]”³

As an appellate public defender, I usually see the abscond-dismissal rule arise in a situation something like this: The defendant is convicted, sentenced to probation, and appeals. I file the appellant’s opening brief. Meanwhile, the defendant violates probation by failing to report to her probation officer, and then fails to appear for the show-cause hearing. Sometime before the state’s response brief comes due, the state files a motion to dismiss under ORAP 8.05(3), arguing that the defendant’s abscond status makes an appellate judgment unenforceable. Fight as I may, the appellate commissioner will almost certainly agree and dismiss the appeal.⁴

Missing from this scenario is any sort of analysis of whether the defendant’s abscond status actually makes an appellate judgment unenforceable. Rather, it is assumed that an appellate judgment cannot be enforced against an absconding defendant. I think it’s time to question that assumption.

I advocate a new approach to the abscond-dismissal rule in Oregon’s appellate courts—one that would require a more nuanced, fact-based analysis of whether the defendant-appellant’s abscond status actually impairs the court’s ability to enforce an appellate judgment. That would depend on the nature of the defendant’s absconding

³ *Id.* at 738-39.

⁴ Of course, if the defendant stops absconding before the court rules on the motion, the court will deny the motion and keep the appeal alive.

behavior and the nature of the remedy that the defendant requests.⁵

For instance, the Florida Supreme Court allows dismissal under its analogous rule only if there is “a sufficiently detrimental connection between” the appellant’s fugitive status and the appellate process.⁶ To illustrate that rule, the Florida court posed the example of fugitivity that causes crucial evidence to grow stale or key witnesses to become unavailable, unduly prejudicing the State’s burden at retrial.

Let’s apply that to some hypotheticals. If the defendant’s only argument on appeal is that the state presented legally insufficient evidence to support a conviction, no level of absconding could affect the enforceability of the appellate judgment. That is because a win on appeal means the conviction is reversed with no need for remand, and a loss means that the status quo remains in place. In short, dismissal of the appeal does nothing to improve the enforceability of the judgment. Similarly, if the defendant’s only argument is that the trial court erred in imposing a court-appointed attorney fee, the remedy for which is reversal of the fee without a remand for resentencing, then the defendant’s abscond status does not prevent the enforcement.

Of course, if the defendant’s assignments of error would necessitate a remand for retrial or resentencing, then

⁵ And if the defendant has not yet filed the opening brief, a motion to dismiss under ORAP 8.05(3) would not be ripe, because the court would not be able to determine whether an appellate judgment would be enforceable until it knows the nature of relief that the defendant requests on appeal.

⁶ *Griffis v. State*, 759 So 2d 668, 672 (Fla 2000).

the defendant's flight from justice might logically impair the enforceability of the appellate judgment. But the state would need to prove as much by showing, for example, that the defendant's flight precludes the state from exercising its right to retry him.

This approach better effects the enforceability rationale without straying into a punishment or waiver rationale for dismissal.⁷ The defendant's flight from probation might prevent enforcement of the trial court's judgment. But it does not necessarily affect the enforceability of the appellate judgment, and trial courts have their own tools to deal with a defendant's flight from its jurisdiction.⁸

On a final note, the enforceability rationale is based on the principal of judicial efficiency. After all, if the appellate court cannot enforce its judgment, then why should it spend time deciding the appeal on its merits? But as the rule is currently enforced, it often causes great expense of resources by OPDS, the Department of Justice, and the court without any meaningful improvement in the enforceability of appellate judgments. DOJ files a motion to dismiss, OPDS invariably files a response, and, often, DOJ files a reply. Then the appellate commissioner must expend precious time deciding whether the state has proven the defendant's abscond status and issue a written order

⁷ To be clear, the Oregon Supreme Court has said that the abscond-dismissal rule is not intended to punish a defendant for his behavior in absconding. *Lazarides*, 358 Or at 738-39. Thus, the defendant's culpability in avoiding the legal process must play no part in the decision to dismiss the appeal.

⁸ See *Griffis*, 759 So 2d at 672 (“[T]rial courts have at their disposal a variety of sanctions with which to punish this affront to their authority.”).

explaining its decision. Given that drawn-out process, the defendant often comes back into custody before the court decides the motion, meaning all that effort has been in vain.

A more nuanced approach to the abscond-dismissal rule would meaningfully reduce that litigation and allow appeals to be decided on their merits. Since OPDS has typically filed an opening brief before the state moves to dismiss, and because similar issues often come up over and over again in criminal cases, we should favor reaching those argument on their merits, providing valuable case law that can reduce future litigation of that same issue.

In sum, a more nuanced analysis of motions to dismiss under the abscond-dismissal rule will promote judicial efficiency, give effect to the enforceability rationale of ORAP 8.05(3), and respect the appellate rights of Oregonians.

Circumstantial Evidence: Using History to Interpret Legislative Enactments

*Nora Coon*¹

Courts often rely on the history of a law to determine its meaning. And, in doing so, the courts “appl[y] the same method of statutory analysis to a statute enacted by the voters as [they] would to a statute enacted by the Legislative Assembly.”² But, practically speaking, the courts consider different sources of information depending on the source of law. If the law was passed by the legislature, the legislative history is typically found in “recordings of committee hearings and bill files containing amendment histories, committee minutes, and recordings of floor debates”;³ essentially, materials generated by the legislature or contained in the legislative record.

By contrast, the “legislative history” of laws enacted through the initiative process comprises “other sources of information that were available to the voters and that disclose the public’s understanding of the measure.”⁴ That can be anything from the voters’ pamphlet to newspaper or magazine stories to editorials on the measure.⁵ But neither

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² *State v. Guzek*, 322 Or 245, 265, 906 P2d 272 (1995).

³ Jack L. Landau, *Oregon Statutory Construction*, 97 Or L Rev 583, 732 (2019).

⁴ *Ecumenical Ministries of Or. v. Or. State Lottery Comm’n*, 318 Or 551, 559 n 8, 871 P2d 106 (1994).

⁵ See *Lipscomb v. State Bd. of Higher Educ.*, 305 Or 472, 483, 753 P2d 939 (1988) (listing sources).

the courts nor the parties seem to use that same broad range of material when interpreting laws that originate in the legislature. Why not?

Since Oregon's early days, the appellate courts have held that statutory interpretation should involve consideration of the surrounding circumstances of the enactment of a law. In *Keith v. Quinney* in 1861, the Oregon Supreme Court said, "This court may properly take notice of the existing state of things when this law was passed."⁶ The case involved interpretation of a set of statutes that had allegedly changed the requirements for service of process; the court explained, "As the [statutes] are not very clearly drawn, it becomes necessary to examine a little into the circumstances under which these acts were passed, and of the necessity and consequent object of the legislature in making the change, if it was made."⁷ The court went on to describe the circumstances before the law was passed: "[T]his palpable hardship fell on litigants, that in many cases suits could not be commenced without many days of expensive travel to the place where one of the three courts of this territory would be held."⁸ Relying on both "the circumstances and the letter of the statute," the court interpreted the contested statute to abolish the old service practices.

⁶ *Keith v. Quinney*, 1 Or 364, 366 (1861) (citing *Tonnele v. Hall*, 4 NY 140 (1850), without specific attribution). Eight years later, the U.S. Supreme Court agreed: "[I]t is the duty of a court in construing a law to consider the circumstances under which it was passed and the object to be accomplished by it." *United States v. Anderson*, 76 US 56, 65-66, 19 L Ed 615 (1869) (addressing post-Civil War legislation regarding forfeiture of property).

⁷ *Keith*, 1 Or at 364.

⁸ *Id.* at 366.

A national collection of annotations (like the modern-day American Law Reports) caught wind of that case and incorporated it into its own description of proper approaches to statutory interpretation. The 1910 *Cyclopedia of Law and Procedure* listed *Keith* (among many other cases) as support for the proposition that, when interpreting a statute, “it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one.”⁹

Oregon continued to consider the circumstances surrounding enactment, saying, “It is the duty of the court to take notice of the conditions obtaining at the time when a law is enacted.”¹⁰ Oregon relied on the *Cyclopedia* as well as another compilation of modern caselaw, *Ruling Case Law*, in 1920:

“[I]f the words of the statute are not of themselves sufficiently explicit to manifest the intention of the lawmakers, the intention is then to be ascertained by considering the context, the subject-matter, the necessity for the law, and the circumstances under which it was enacted, the mischief sought to be remedied, and the object to be attained.”¹¹

In other words, courts should consider both the legal context and the factual context in which legislation was enacted. That appears to have been a relatively uncontroversial statement through the 1950s, repeated most

⁹ *Cyclopedia of Law and Procedure*, 36 Cyc 1110 (1910).

¹⁰ *State v. Hyde*, 88 Or 1, 49, 169 P 757 (1918).

¹¹ *Union Fishermen’s Co-operative Packing Co. v. Shoemaker*, 98 Or 659, 671, 193 P 476 (1920) (citing 36 Cyc 1110 and 25 RCL 1012 (1919)).

recently in Oregon Supreme Court caselaw in 1952.¹² And it continues to be true in the context of ordinary voter-made law, where the courts can consider any source of information that would “disclose the public’s understanding” of the meaning of a law.¹³

But the practice of considering the non-legal circumstances surrounding enactment of law seems to have fallen out of favor when it comes to legislature-made law. The Oregon Supreme Court has used the term “historical context” to refer to the *legal* circumstances surrounding enactment; courts presume that the legislature was aware of both “the preexisting common law”¹⁴ and existing caselaw on a topic at the time that it legislated.¹⁵ But what about the then-existing factual circumstances? Legislators are just as aware of current events as the broader group of voters, if

¹² *Peters et al. v. McKay et al.*, 195 Or 412, 439-40, 238 P2d 225 (1951), *reh’g den*, 195 Or 412 (1952) (“When, in the process of statutory construction, the legislative intent is not manifest, courts may properly seek the intent by considering the subject matter, the necessity for the law, the circumstances under which it was enacted, the mischief sought to be remedied and the objective to be attained.”)

¹³ *Ecumenical Ministries of Or.*, 318 Or at 559.

¹⁴ *Montara Owners Ass’n v. La Noue Dev., LLC*, 357 Or 333, 341, 353 P3d 563 (2015); *State v. Pipkin*, 354 Or 513, 526, 316 P3d 255 (2013).

¹⁵ *Mastriano v. Bd. of Parole & Post-Prison Supervision*, 342 Or 684, 693, 159 P3d 1151 (2007) (“[W]e generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes.”); *State v. Raper*, 174 Or 252, 255, 149 P2d 165 (1944) (“It must be presumed that the legislature, in enacting the law here under consideration, was familiar with the construction which this court had * * * given a similarly worded statute, and therefore intended a like construction to be given the language hereinabove”).

not more aware. Sometimes, the legislators put those current events into the legislative record by submitting newspaper articles as exhibits or otherwise discussing them.¹⁶ But if no legislator or witness has done so, the courts' approach to discerning legislative intent should not be limited by that failure to include newspaper articles in the record.

The recent U.S. Supreme Court decision in *Ramos v. Louisiana* demonstrates the importance of considering factual circumstances existing at the time of enactment.¹⁷ *Ramos* struck down the portion of Oregon's constitution that allowed conviction by a nonunanimous jury. That constitutional provision was enacted in 1934, against the backdrop of the rise of the Ku Klux Klan; two high-profile ethnically charged cases involving compromise verdicts; and a massive dockworker strike that had paralyzed trade along the West Coast.¹⁸ Because the provision was enacted by the voters, all of that information disclosed the public's understanding of the new nonunanimous jury provision. But, under what tends to be our current approach, if the legislature had enacted the law rather than the voters, it's

¹⁶ See, e.g., *BP W. Coast Prods., LLP v. Or. Dept. of Justice*, 284 Or App 723, 732, 396 P3d 244, rev den, 361 Or 800 (2017) (legislator included an *Oregonian* article as an exhibit to show the problem that the legislation was intended to address);

¹⁷ *Ramos v. Louisiana*, 590 US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020).

¹⁸ See *Amicus Curiae* Brief from Prominent Current and Former State Executive and Judicial Officers, Law Professors, and the OCDLA, in Support of the Petitioner at 6-16, *Ramos v. Louisiana*, available at https://www.supremecourt.gov/DocketPDF/18/18-5924/103324/20190618153604654_RamosAmicus.pdf (describing historical circumstances of Oregon's nonunanimous jury provision in early 20th century).

likely that the only material before the court would be the materials created in the legislative process. Although *Ramos* itself was not decided based on the racist origins of Oregon’s law, a challenge under the Equal Protection Clause of the Fourteenth Amendment could have put those issues squarely before the Supreme Court.

Similarly, in *State v. Carey-Martin*, the Oregon Court of Appeals interpreted a set of statutes to determine whether a defendant’s 25-year prison sentence for “sexting” violated Oregon’s Article I, section 16, prohibition on disproportionate sentences.¹⁹ The legislative record of the statutes criminalizing the defendant’s conduct was full of references to the present circumstances and the evil to be remedied in enacting the law.²⁰ Those circumstances guided the court’s determination that the defendant’s conduct, despite falling within the prohibitions of the statutes, was not so severe as to justify a 25-year prison sentence. But, if the legislature had not so explicitly included information about all of those circumstances, that deficit could have changed the outcome entirely.

A recent Oregon Court of Appeals decision, *State ex rel Hoyle v. City of Grants Pass*, more explicitly acknowledged that history outside of the legislature can be relevant to interpreting a statute, referring to both “historical and legislative materials.”²¹ The court identified both “statutory context” and “practical context” for the legislature’s enactment of a statute regarding overtime pay

¹⁹ *State v. Carey-Martin*, 293 Or App 611, 614, 430 P3d 98 (2018).

²⁰ *Id.* at 653.

²¹ *State ex rel Hoyle v. City of Grants Pass*, 297 Or App 648, 660, 443 P3d 628 (2019).

for firefighters.²² Although there was “relatively little in the legislative record” about the legislature’s understanding of “the idiosyncrasies of fire department scheduling,” the court “assume[d] that the legislature is generally familiar with the subject matter on which it legislates.”²³ The court further noted the “materials in the record and additional resources cited on appeal” that discussed those scheduling quirks, which indicated that the legislature would have been familiar with such schedules.²⁴ By consulting the scope of materials that it did, the court identified the historical circumstances surrounding the enactment of the statute as an aid in determining the legislature’s intent.²⁵

Outside the context of language-based interpretation, cases in both the Oregon Supreme Court and the Oregon Court of Appeals have acknowledged that reports on existing factual circumstances could shed light on the present meaning of protections under Article I, section 9, of the Oregon Constitution.²⁶ Similarly, in more

²² *Id.* at 657.

²³ *Id.*

²⁴ *Id.* at 658.

²⁵ Of course, for many statutes, particularly older laws, the apparent absence of legislative history does not mean it never existed; legislative materials may have been lost over time or rendered inaccessible by changing technology.

²⁶ *E.g.*, *State v. Arreola-Botello*, 365 Or 695, 713, 451 P3d 939 (2019) (noting “significant statistical data to illustrate the disparate treatment of black and Hispanic motorists during the course of traffic stops, showing specifically that nationwide, and in Oregon, people of color are statistically more likely to be searched during traffic stops than their white counterparts”); *State v. Taylor*, 308 Or App 61, 68 n 3, __ P3d __ (2020) (noting, without relying upon, report of FDIC documenting that “use of cash is more common among individuals living in poverty” and thus “the state’s characterization of possession of a large amount

infamous historical examples, the Oregon Supreme Court has presumed the legislature's intent from then-existing attitudes toward women. In *State v. Muller*, precursor to *Muller v. Oregon*, the Oregon Supreme Court stated, “[T]he statute in question was plainly enacted, *although not so declared therein*, in order to conserve the public health and welfare by protecting the physical well-being of females who work in mechanical establishments, factories, and laundries.”²⁷

All of this is not to say that every statutory interpretation case should include a sheaf of newspaper articles, U.S. Census reports, extended block quotes from Twitter, online forum posts, press releases, or anything similar. Just as many cases are decided without any meaningful legislature-created legislative history, external history may not shed any light on the legislature's intent in enacting a statute. But where the legislative record is scanty or ambiguous, both litigants and courts should also employ materials showing the factual circumstances in which a law was enacted.

of cash as unusual and suspicious can be problematic considering these realities”).

²⁷ *State v. Muller*, 48 Or 252, 255, 85 P 855 (1906), *aff'd*, 208 US 412, 28 S Ct 324, 52 L Ed 551 (1908) (emphasis added). See generally Sara Werboff, *Harlots, Adventuresses, and . . . Wrestlers? The Maligned Women of Oregon's Judicial Decisions*, 10 Or App Almanac 39 (2020) (discussing court reliance on stereotypes about women when interpreting statutes).

A Reply to Westwood and Wright

*Hon. Jack L. Landau*¹

Last year, *Willamette Law Review* published an article of mine, “An Introduction to Oregon Constitutional Interpretation.”² That article provided a brief account of how the Oregon Supreme Court has tended to interpret the Oregon Constitution over the last 50 years or so and then catalogued the various principles and sources that the court currently employs when trying to determine what the state constitution means. In the process, I noted that, at least for a while, the court purported to apply a fairly strict historical approach that looked to what the framers “had in mind” at the time they adopted the provision at issue. I then observed that, more recently, the court appears to have backed off from that strictly historical approach and moved to a more flexible one that looks to Oregon’s history not to freeze the meaning of a provision in the nineteenth century, but to identify underlying policies that may be applied to modern circumstances.

That article prompted two thoughtful pieces published in the last Appellate Almanac. In the first, Jim Westwood takes issue with my article on essentially two grounds, namely, that it doesn’t accurately portray current Supreme Court analysis and that, in any event, the sort of “pragmatic” (his term, not mine) originalism is just wrong.³ In the second article, Timothy Wright doesn’t take issue

¹ Distinguished Jurist-in-Residence, Willamette University College of Law; Justice, Oregon Supreme Court (2011–2017); Judge, Oregon Court of Appeals (1993–2011).

² 55 Will L Rev 261 (2019).

³ James N. Westwood, *History in Oregon Constitutional Interpretation—Why We Should Do It That Way*, 9 Or App Almanac 31 (2019).

with my description of the court’s current practice. He does argue that the court’s current practices are wrong, though for very different reasons.⁴

Both of their articles were refreshingly brief, as the Almanac encourages. I can’t promise to be refreshing, but I will respond in brief.

Let’s start with Jim Westwood’s critique. He first complains that my description of the Oregon Supreme Court’s current approach doesn’t “fairly represent the Oregon Supreme Court’s process.” Jim didn’t offer an explanation of why he thinks my characterization is inaccurate. I based that description of the court’s current practice on such cases as *State v. Davis*, in which the court stated that the purpose of historical analysis “is not to freeze the meaning of the state constitution in the mid-nineteenth century. Rather it is to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances.”⁵

Second, Jim offers a critique of what I have described as the court’s “less rigid” historicism by reference to Seventh Circuit Judge Frank Easterbrook’s defense of originalism in federal courts, which is based principally on

⁴ Timothy Wright, *History in Oregon Constitutional Interpretation—Why We Should Not Do It That Way*, 9 Or App Almanac 39 (2019).

⁵ *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011); see also *State v. Mansor*, 363 Or 185, 205, 421 P3d 323 (2018); *Couey v. Atkins*, 357 Or 460, 490, 355 P3d 866 (2015); *State v. Sagdal*, 356 Or 639, 642, 343 P3d 226 (2015); *State v. Mills*, 354 Or 350, 354, 312 P3d 515 (2013); *State v. Copeland*, 353 Or 816, 822, 306 P3d 610 (2013) (all quoting *Davis*).

the idea that judges aren't elected. The problem with relying on that argument, as Jim candidly acknowledges, is that Oregon judges *are* elected. Still, he argues that the fact that Oregon judges are elected doesn't really matter because so many are appointed by the governor and rarely fail to be re-elected.

Hmmm. I came to the Supreme Court by election, not appointment. So did Paul De Muniz. So also did Arno Denecke, Ralph Holman, Dean Bryson, Berkeley Lent, George Van Hoomissen, Ed Fadeley, Ted Kulongoski, Gini Linder, Dave Brewer, and Dick Baldwin. In fact, a total of 37 justices—more than a third—came to that court by election, not appointment. On the Court of Appeals, Jason Lee (who defeated incumbent Jake Tanzer), Lee Johnson (who defeated incumbent Virgil Langtry), Bill Richardson, George Van Hoomissen, Jonathan Newman, Rex Armstrong, and Jim Egan were elected, not appointed.

In any event, the fact that there's a high rate of retention hardly seems remarkable to me. The same is true of other, non-judicial elective offices. In Congress, for example, the retention rate in the House of Representatives has been as high as 97 percent, a rate that *The Economist* has suggested ranks our democracy with that of North Korea.

At bottom, Jim asserts, the failure to limit the constitution to what it meant by its framers is anti-democratic. In my view, the contrary is true. Why should the views of long-dead framers trump (in the non-presidential sense, of course) the will of living citizens who never had the chance to vote on the constitution? As Thomas Jefferson famously said, "the earth belongs to the living, not the dead."

I'm aware that there's an originalist response to the "dead hand" argument—that we become democratic participants in the constitution by agreeing to live under its precepts (and not moving to, say, Hawaii). In that sense, the argument goes, we're all continually ratifying the constitution. It seems to me that very argument undercuts, rather than justifies, originalism. If the democratic legitimacy of our constitutional system derives from the fact that all of us over the last 160 years have continually ratified it by our consent to live under its terms, then the sort of originalism that Jim defends fails to explain why the views of only one group of us—the first to give such consent back in the 1850s—are privileged over all others.

Aside from that, it strikes me that the sort of strict originalism that Jim proposes is impossible. Take the right to bear arms guaranteed under Article I, section 27. At the time it was ratified, the only sort of "arms" the framers would have understood the constitution guarantees a right to possess would be very primitive. I'm not aware of anyone—not even the most ardent originalist—who thinks the constitutional guarantee is limited to such nineteenth-century weapons. To the contrary, common sense (and, incidentally, the Oregon Supreme Court's case law⁶) suggests that we look for the underlying purpose of the guarantee and then use that principle to determine what weapons we have a right to possess in the twenty-first century. As even uber-originalist Judge Robert Bork acknowledged, "it is the task of the judge in this generation

⁶ See, e.g., *State v. Kessler*, 289 Or 359, 372, 614 P2d 94 (1980) ("arms" to which the constitutional guarantee applies are not limited to those in existence in 1857, but include modern arms used for the same purposes as those underlying the guarantee).

to discern how the framers' values, defined in the context of the world that they knew, apply to the world we know."⁷

Let's briefly turn to Timothy Wright's critique. He argues that both the more rigid sort of historicism that Jim proposes and the more pragmatic version that I have described are wrong, because either "reinforces the position of the framers' animating principles—namely, white supremacy—as the bedrock of the constitution."

At the outset, I hasten to say that Tim is correct: Many of the framers of the Oregon constitution were white supremacists. I made the very point in my opinion in *State v. Hemenway* as a reason we should be wary of any claims that the constitution means only what it meant in 1857.⁸

⁷ *Ollman v. Evans*, 750 F2d 970, 995 (DC Cir 1984) (en banc) (Bork, J., concurring).

⁸ *State v. Hemenway*, 353 Or 129, 157, 295 P3d 617 (2013) (Landau, J., concurring) (suggesting that the meaning of the constitution cannot be limited by what its framers understood because, among other things, the framers lived in 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"); see also Philip Thoennes & Jack L. Landau, *Constitutionalizing Racism: George H. Williams's Appeal for a White Utopia*, 120 Or Hist Q 468, 468 (2019) ("Beginning with the founding of a provisional government in 1843 and continuing through the writing of the Oregon Constitution in 1857, the framers of Oregon's legal systems designed laws to exclude racial minorities.").

But the argument that, because the framers were white supremacists all historical circumstances of the constitution's adoption are irrelevant doesn't follow. In logical terms, it "proves too much."

Article V, section 14, for instance, confers on the governor the power to grant "reprieves, commutations, and pardons." The fact that some, or even most, of the framers were white supremacists doesn't seem to me to justify the assertion that the historical origins of that authority are irrelevant. Article VII (Original), section 1, to pick another example more or less at random, vested "judicial power" in the Supreme (actually, the "Suprume") Court. The fact that the framers were racists doesn't mean that the historical context of that provision is of no use in determining the scope of that power.

Constitutions—like all laws—are words that were adopted at a particular point in time. They are commands and, as such, naturally invite consideration of their purposes. They are historical documents the phrasing of which often can be understood only in light of their historical contexts. Article I, section 25, of the Oregon Constitution, for instance, prohibits a criminal conviction from working a "corruption of blood." There's no way to understand that without taking into account its historical usage. Article IX, section 1a, to take another example, prohibits a "poll tax." Modernly, that commonly refers to a tax on the right to vote. But, at the time the provision was adopted it referred more broadly to any sort of per capita tax.

That doesn't mean that the constitution can mean only what it meant when it was adopted. In part because the framers were different people, with different values, and

different prejudices, we must look for broader principles revealed by the historical context in which the constitution was adopted so that we can apply the constitution in a sensible way in the twenty-first century.

In short, we should always be skeptical of the history of a constitutional provision. But that doesn't mean we should ignore it.

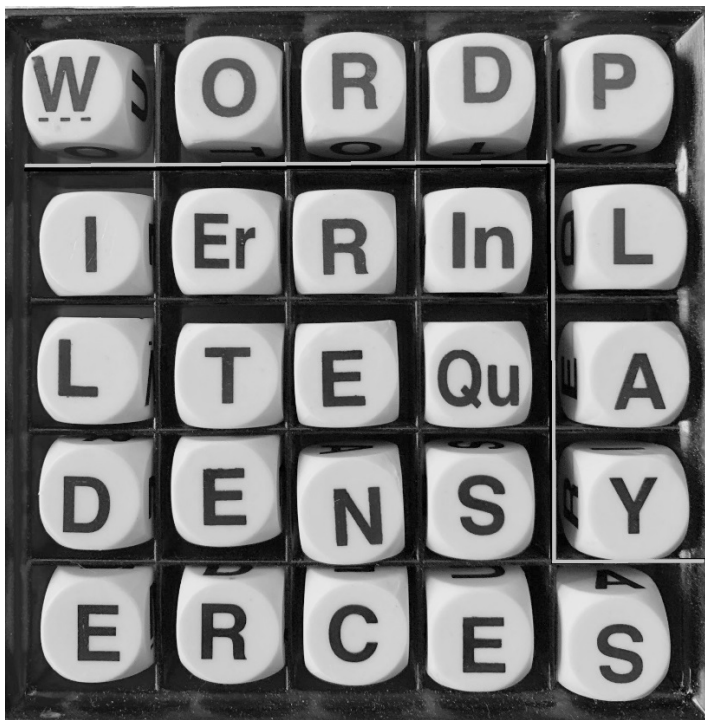
*The [defendant] would take comfort in the following pronouncement of the Supreme Court of Oregon in State v. Florance, * * * a search and seizure case:*

*“If we choose we can continue to apply this interpretation. We can do so by interpreting Article 1, section 9, of the Oregon constitutional prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the federal constitution. Or we can interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court.” * * **

The second sentence of this quoted excerpt is, of course, good law. The last sentence, unsupported by any cited authority, is not the law and surely must be an inadvertent error; in any event, we reject it.

Oregon v. Hass, 420 US 714, 719 n 4, 95 S Ct 1215, 43 L Ed 2d 570 (1975)

Wordplay



How many words can you find? (Words must be at least three letters. Letters must touch vertically, horizontally, or diagonally, and no letter cube can be re-used in a single word.)

Submit your word list to oregon.appellate.almanac@gmail.com and the best list sent by June 1, 2021 will receive a prize!

An Ode to the Reasonable Person

Geoff Briggs¹

In reading torts cases, you see more and more,
A certain personage whom judges adore.
And what, you may ask, is the source of their² fame?
Why, only the fact that they're never to blame!

This person's transcendence of time and of space
Is all the more strange for they haven't a face,
They haven't a name, and they haven't a height.
But one thing's for certain: they'll always do right.

They keep all their barrels so safe and secure,
They'd never be charged with *res ipsa loquitur*.³
And if, on occasion, their vats overturned,
They'd ad-mit their fault to the poor souls they burned.⁴

If driving a car, they'd go slow in their lane
For fear of young children who run through the rain.⁵
And if, for some reason, they're hunting with friends,
They'd (each) know with foresight what buckshot portends.⁶

¹ Law clerk to Hon. Douglas L. Tookey, Oregon Court of Appeals; J.D., University of Oregon (2020); B.A., Western Washington University (2014). The author would like to thank his 1L Torts Professor, Merle H. Weiner, for provoking his obsession with the reasonable person's superhuman virtue, which, like the fruit of Tantalus's tree, seems ever to evade our mortal grasp.

² Though grammatically repugnant to some, this poem employs the singular "they" pronoun and its various inflections for the twin aims of gender neutrality and poetic utility.

³ *Byrne v. Boadle*, 159 Eng Rep 299 (Exch 1863).

⁴ *Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308, 414 NE2d 666 (1980).

⁵ *Kibler v. Maddux* (hypothetical case in Dobbs, Hayden & Bublick, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 185 (8th ed 2017)).

⁶ *Summers v. Tice*, 33 Cal 2d 80, 199 P2d 1 (1948).

Or if their dear friend asked to use the toilette,
“*The handle is cracked!*” they’d preemptively say.⁷
But if that same friend helped them reroof a shed,
They’d say “*It’s your fault if you fall on your head!*”⁸

If catching a train, they would board without fail,
Despite dropping ‘splosives on top of the rails.
And if the explosion tipped scales upon thee,
They may cause you harm, though not proximately.⁹

This person would never leave kerosene lamps
Ablaze, unattended, for fear they’d burn scamps.¹⁰
But if they saw fire that threatened the masses,
They’d burn down your house to a pile of ashes.¹¹

And if on a vessel they served as bargee,
They’d work all week long, though not negligently.¹²
But sailing their yacht, if the seas threw a fit,
They’d tie to your dock and would smash it to bits.¹³

I hope I’ve explained and that now you’re convinced
Of this person’s impact on juris-pru-dence.
But one final word: Just don’t co-mmit a tort,
Else the Reasonable Person will see you in court!

⁷ *Rowland v. Christian*, 69 Cal 2d 108, 443 P2d 561 (1968)

⁸ *Stinnett v. Buchele*, 598 SW2d 469 (Ky Ct App 1980).

⁹ *Palsgraf v. Long Island R.R. Co.*, 248 NY 339, 162 NE 99 (1928).

¹⁰ *Hughes v. Lord Advocate* [1963] AC 837 (HL).

¹¹ *Surocco v. Geary*, 3 Cal 69 (1853).

¹² *United States v. Carroll Towing Co.*, 159 F2d 169 (2d Cir 1947).

¹³ *Vincent v. Lake Erie Transp. Co.*, 109 Minn 456, 124 NW 221 (1910).

Crostic

*Erik Blumenthal*¹

The following pages contain a crostic and a series of clues (designated A through Y).

Answer the clues to discover the quotation hidden in the grid.

- Each numbered space for a letter in the clues corresponds to a numbered box in the grid.
- Some words may be split over two lines in the grid.
- The first letter of the answer to each clue will spell out the author's name and the title of the work containing the quotation.

For those who prefer a full-size version (or don't like to write in published material), the full crostic and clues are available on our website:

<https://appellatepractice.osbar.org/appellate-almanac/>

An answer sheet will be available at some point in the future.

¹ When he isn't puzzling or fly-“fishing” (as opposed to “catching”), Erik Blumenthal moonlights as a Senior Deputy Public Defender in the Appellate Division of the Office of Public Defense Services.

1 I	2 U	3 N	4 S	5 A	6 K	7 W	8 C	9 T		10 I	11 Q	12 V	13 A	14 J	15 K	16 E	17 S		18 D	19 M	20 F		21 W
22 O	23 B	24 Y	25 C	26 S		27 E	28 M	29 S		30 G	31 N	32 U	33 P		34 K	35 J		36 I	37 Q	38 C	39 H	40 D	41 X
	42 R	43 W	44 O	45 L		46 U	47 J		48 Q	49 E	50 V		51 Q	52 W		53 Y	54 P	55 F	56 H		57 B	58 J	59 A
60 H	61 D	62 W		63 I	64 X		65 R	66 B	67 F	68 H		69 M	70 J	71 K	72 D		73 U	74 O	75 W	76 E	77 V	78 P	79 L
80 R	81 X	82 P	83 K		84 B	85 I	86 Y	87 H	88 T	89 Q		90 W	91 I	92 C	93 N		94 N	95 A	96 Y		97 J	98 X	99 K
100 D	101 U	102 B		103 T	104 E	105 H		106 M	107 I	108 Q	109 O	110 K	111 R		112 F	113 N	114 M	115 J	116 I	117 H	118 G	119 O	120 A
121 V		122 C	123 Q		124 Y	125 R	126 P	127 I		128 B	129 L	130 C	131 V	132 D	133 R	134 H		135 J	136 Q	137 E		138 Y	139 P
140 T	141 V		142 W	143 B		144 Q	145 M	146 J	147 S	148 Y	149 I	150 P		151 J	152 W	153 B	154 H	155 P	156 V	157 D		158 F	159 G
	160 U	161 F	162 E		163 A	164 N	165 L	166 J	167 I	168 S		169 T	170 K	171 R	172 F	173 O	174 C						

A) Common Law creator

95 59 13 163 120 5

B) Can be administered orally

153 128 84 66 102 23 57 143

C) Counter, as a burden of proof

8 174 38 92 122 25

D) Not resolved by the court, or well-resolved by the court

157 61 18 40 100 72 132

E) Acquitted of murder, became Oregon's first female attorney

49. 162 27 16 104 137 76

F) Subject of Article II, section 4, of the U.S. Constitution, and ORS 40.360

158 67 172 20 112 55 161

G) First name of a hilly shopping district in Portland?

159 118 30

H) County named after the falls?

134 56 105 154 39 87 117 68 60

I) Ged when he was wee, per an Oregonian's classic (2 words)

127 10 36 63 91 116 107 149

167 85 1

J) One of Oregon's
greatest track-and-field
innovations (2 words)

35 70 47 166 115 146 14

— — — —
135 58 151 97

K) Vehicle for a warrant?

6 110 71 34 99 15 83 170

L) Author's alma mater,
1947

165 129 79 45

M) First chief judge,
Oregon Court of Appeals

69 114 19 28 145 106

N) Not objecting to secure
post-conviction relief
would be a questionable
one

93 164 3 94 31 113

O) State park name
meaning "wild plum," in
Klamath language

22 74 119 44 173 109

P) Author's opinion
recognizing intentional
infliction of emotional
distress (3 words)

139 82 33 155 126

— — —
78 54 150

Q) By the fact itself
(2 words)

37 11 89 136

— — — —
144 48 108 51 123

R) One of the first two Native American tribes to sue for land taken without a treaty or compensation

80 133 65 125 42 111 171

S) Landmark case interpreting offense of obstructing governmental administration

17 147 4 29 168 26

T) Where to find an opinion in advance?

9 103 140 88 169

U) Circumstance in which further preservation is not required

73 46 160 101 32 2

V) Inviting to a party?

131 141 12 50 156 77 121

W) Author's seminal case on vagueness and freedom of speech

152 7 142 43 62 90 21 52 75

X) Narrator of *To Kill a Mockingbird*

41 130 64 98 81

Y) Author's *State v Kennedy* held that this constitutional section is "truly independent of the rising and falling tides of federal case law both in method and in specifics"

138 148 96 86 53 24 124