NOT IN, BUT LARGELY ABOUT, THE APPELLATE COURTS IN THE STATE OF OREGON

In Re: A Publication of the Appellate Practice Section of the Oregon State Bar.

Volume 11

OREGON APPELLATE ALMANAC

2021

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

Nora Coon, Editor

OREGON APPELLATE ALMANAC

Volume 11 – 2021

Cite as: 11 Oregon Appellate Almanac ____ (2021)

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.

To contact the editor, send an email:
oregon.appellate.almanac@gmail.com

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 11 (2021)

SUBMISSIONS

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

- Analysis of intriguing or obscure issues in Oregon appellate law and procedure
- Biographies, interviews, and profiles of figures in Oregon law and history
- Court history, statistics, and trivia
- Humor, wit, poetry, and puzzles

The annual submission deadline is **June 1**. In case of pandemic, natural disaster, or other forces beyond everyone's control, extensions will be granted liberally.

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.

TABLE OF CONTENTS

Historical Commentary

For Your Consideration

Introduction

Welcome to the 2021 edition of the Oregon Appellate Almanac! We're celebrating our 11th issue with the answer to the legal community's most contentious debate—one space or two between sentences.[1] This year's Almanac also contains a set of very important proposed temporary amendments to the Oregon Rules of Appellate Procedure—turn (or scroll) to **page 113** to read the rules and learn how you can submit feedback to the court by **March 31, 2022**.

Thank you 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 2020 contributions to the Appellate Section of the Oregon State Bar made the printing of this year's edition possible.

Our 2021 edition of the Almanac is dedicated to the memory of Christine Moore, previous chair of the Appellate Section of the Oregon State Bar and contributor to last year's Almanac. Her brilliance, kindness, humor, and grace is missed by all of us.

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

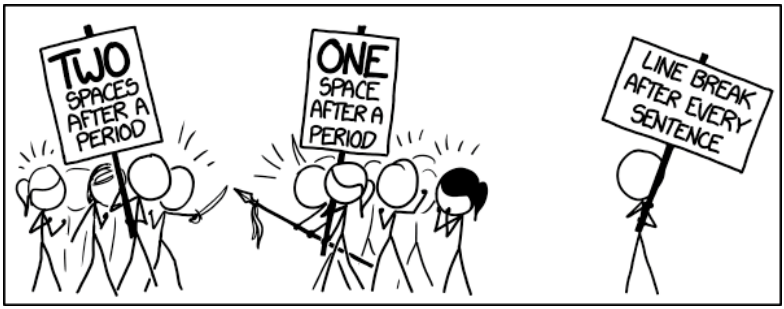
[1] This edition of the Almanac follows the prevailing style of the Oregon legal community but is open to adjustments in the future.

*[NOTE—In consequence of not having an opportunity to read proof, some typographical and other errors will occur in our reports of the proceedings of the convention, which we must trust to the good taste of our readers to correct. We have noted only a few so far, but even a few are extremely annoying. * * *

—Reporter]*

Weekly Oregonian, Sept 2, 1857, *in* Charles Henry Carey ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (1926).

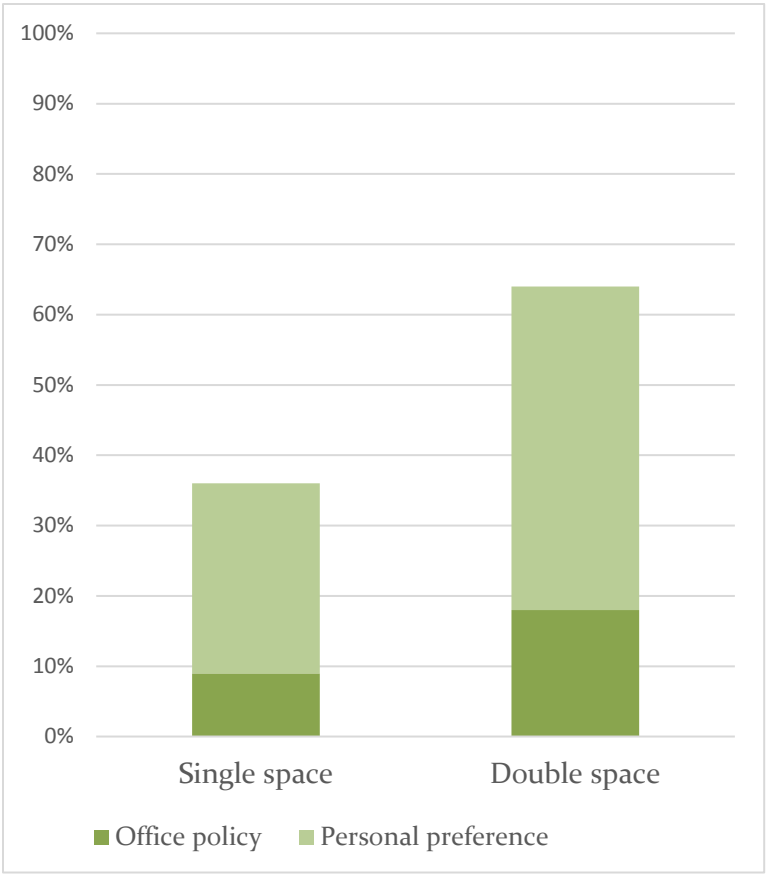
The Great Space Debate



[1]

[1] Randall Munroe, "Third Way," https://xkcd.com/1285/. Licensed under Creative Commons Attribution-Non-Commercial 2.5 License.

Figure 1: Spaces Between Sentences (Legal Writing)



Sense, Sensibility, and Single Spacing

Drew Eyman[1]

How many spaces do you insert between sentences? The Oregon Appellate Almanac conducted a highly scientific survey of the spacing habits of Oregon attorneys.[2] Of the 347 attorneys who responded, 64% double space and 36% single space in their legal writing. To the attorneys who double space, this article is for you. For you single-spacers, read on to help convert our double-spacing friends.

Double-spacers likely have strong feelings about the practice. They have probably typed that way for a long time. Muscle memory is powerful. Bryan Garner, one of the foremost legal writing scholars and authors, can empathize. He detailed his conversion from double to single spacing in an article for the ABA Journal.[3] In 1991, upon realizing that the Oxford University Press published his books with a single space between sentences, he combed through a

---

[1] Drew is an attorney at Snell & Wilmer. The opinions asserted are those of the author and not those of the firm or the author's colleagues. He previously clerked for the Honorable Rives Kistler at the Oregon Supreme Court. Drew received his J.D. from Boston University School of Law and his B.S. in Political Science from the University of Oregon.

[2] The data was obtained by emailing a link to a survey to a number of different attorney listservs as well as all-office email addresses.

[3] Bryan A. Garner, *4 Vignettes Lead to a Single Moral about Writing Better Briefs*, ABA Journal (Jan 4, 2014), https://www.abajournal.com/magazine/article/4_vignettes_lead_to_a_single_moral_about_writing_better_briefs.

reference library and found that every reputable source supported single spacing.

That remains true today. All of the major typography authorities agree that a single space should follow a period—one tap of the space bar. Those authorities include *The Redbook: A Manual on Legal Style*, the American Psychological Association (APA), *The Chicago Manual of Style*, the Associated Press (AP), and the U.S. Government Printing Office *Style Manual*.[4]

Publishers follow the one-space rule recommended by those typography and style manuals. As Matthew Butterick, author of *Typography for Lawyers*, points out, "pick up any book, newspaper, or magazine and tell me how

[4] Bryan Garner, *The Redbook: A Manual on Legal Style* 4.12(b), p. 94 (3rd ed 2002); *Q&A: One Space or Two?*, Chicago Manual of Style, https://www.chicagomanualofstyle.org/qanda/data/faq/topics/OneSpaceorTwo.html; *Spacing After a Period*, APA Style (2019), https://apastyle.apa.org/style-grammar-guidelines/punctuation/space-after-period; Melissa Harris, *One Space Between Sentences, Please*, Chicago Tribune (May 6, 2015), https://www.chicagotribune.com/business/ct-confidential-two-spaces-0506-biz-20150505-column.html ("The Bible for journalistic style, 'The Associated Press Stylebook,' says: 'Use a single space after the period at the end of a sentence.'"); *Style manual: An Official Guide to the Form and Style of Federal Government Publications*, U.S. Government Publishing Office, ch 2.49, p 16 (2016), https://www.govinfo.gov/content/pkg/GPO-STYLEMANUAL-2016/pdf/GPO-STYLEMANUAL-2016.pdf.

many spaces there are between sentences. Correct—one."[5] Technology companies have followed suit too. Microsoft recently updated the default settings in Microsoft Word to identify two spaces after a period as an error.[6] Apple's iMessage text messaging software will automatically insert a period followed by a single space when the user simply taps the space bar twice at the end of a sentence. Give it a try.

Most importantly for Oregon attorneys, Oregon courts endorse single spacing by reference. Although the Oregon Appellate Courts Style Manual is silent on sentence spacing, the manual itself is single spaced. The courts use *The Chicago Manual of Style* "to resolve style issues not addressed in the Oregon Appellate Courts Style Manual."[7] The same goes for Washington appellate courts.[8] As identified above, *The Chicago Manual of Style*, like all modern style manuals, recommends single spacing.

So, why do most Oregon attorneys double space between sentences? The survey results indicate that double

---

[5] *One Space Between Sentences*, https://typographyforlawyers.com/one-space-between-sentences.html (accessed Dec 31, 2020).

[6] Tom Warren, *Microsoft Word Now Flags Double Spaces as Errors Ending the Great Space Debate*, The Verge (Apr 24, 2020), https://www.theverge.com/2020/4/24/21234170.

[7] *Oregon Appellate Courts Style Manual* 66 (2021), https://www.courts.oregon.gov/publications/Documents/UpdatedStyleManual2002.pdf.

[8] *Style Sheet*, Washington Office of Reporter of Decisions (July 3, 2018), https://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.style.

spacing decreases as the formality of the format decreases, from legal writing to text messaging. That could indicate attorneys feel obligated to double space in formal documents like legal briefs. But as the above authorities indicate, that's not the standard in any industry. Another likely answer is they learned to type on a typewriter, or they were taught how to type by someone who learned on a typewriter. Typewriters used monospaced font.[9] That means every letter and punctuation mark occupies the same amount of space, for example:

> This is Courier New font. It's a monospaced font. As you can see, in contrast to the proportionally spaced Constantia font in which the rest of this article appears, the monospaced Courier New font creates a lot of white space between letters, words, and sentences.

In that monospaced world, double spaces helped improve readability by identifying breaks between sentences, since there would otherwise be as much space between words within a sentence as there would be between sentences. But proportional fonts took over with the introduction of computers.[10] There's no longer a reason

[9] Farhad Manjoo, *Space Invaders*, Slate (Jan 12, 2011), https://slate.com/technology/2011/01/two-spaces-after-a-period-why-you-should-never-ever-do-it.html.

[10] *Id.*

to double space between sentences, aside from personal preference.

If typography rules aren't enough, there are also practical reasons to single space. As the Seventh Circuit's *Practitioner's Handbook for Appeals* explains:

> "Put only one space after punctuation. The typewriter convention of two spaces is for monospaced type only. When used with proportionally spaced type, the extra spaces lead to what typographers call 'rivers'—wide, meandering areas of white space up and down a page. Rivers interfere with the eyes moving from one word to the next."[11]

In addition to inhibiting general readability and increasing eye fatigue, those "rivers" created by double spacing are especially challenging for readers with dyslexia.[12]

Double spacing also increases costs, both environmental and financial. More space means more pages to print. Over the course of a lengthy legal document like an appellate brief, those double spaces add up. Plus, as a double-spacer, your poor thumbs have to hit the same button twice to get the desired result.

---

[11] *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* 175 (2020), http://www.ca7.uscourts.gov/forms/Handbook.pdf.

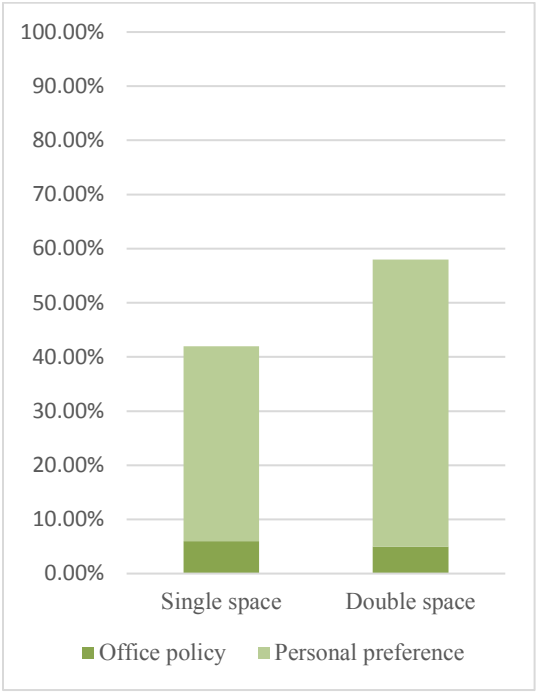
[12] *Accessible Typography*, APA Style (June 2020), https://apastyle.apa.org/style-grammar-guidelines/paper-format/accessibility/typography.

Oregon attorneys should embrace the long-settled typography rule of a single space between sentences. Your thumbs, your spacebar, and your readers will thank you.[13]

[13] [*Editor's note*: In deference to the author's argument, this article remains single spaced. The 2021 edition of the Oregon Appellate Almanac is double spaced. The editor will take Mr. Eyman's arguments and authorities into consideration when formatting next year's Almanac.]

Email and Texting Data[1]

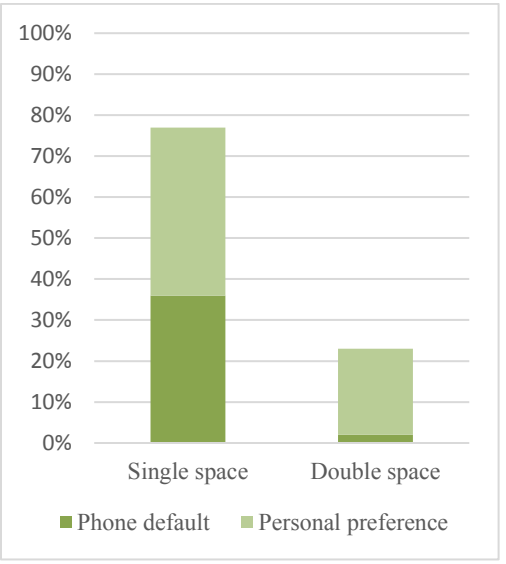
Figure 2: Spaces Between Sentences (Email)



As the type of writing got more casual, the responses changed. When it came to writing emails, the percentage of single-spacer respondents inched up from 36% to 42% and double spacers fell from 64% to 58%, a small but significant change.

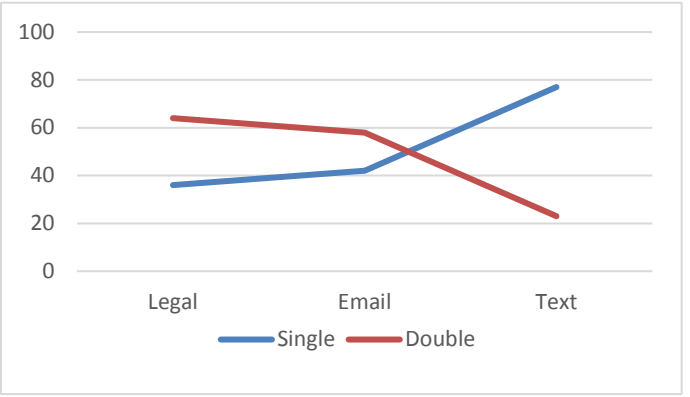
[1] Summarized by your editor. All data on file with Drew Eyman and Nora Coon.

Figure 3: Spaces Between Sentences (Text Messages)



The numbers changed drastically when it came to texting. Single spacing became the majority opinion, both by preference and by default (no one reported an office policy on texts). Texters single-spaced 77% to 23%.

Figure 4: Change by Formality of Writing



Other (please specify)[1]

As part of our spacing survey, we offered an "Other (please specify)" option. Here's what you told us:

Some of you said it was habit to use two spaces:

- "I sometimes use two spaces due to habit. I then spend extra time being annoyed for using a second, unnecessary, space."
- "Two, because it's muscle memory due to office policy."
- "My preference/habit may be blamed on the Judiciary due to my time working in it." (two spaces)
- "My fingers automatically double-space. Also looks better."

Some of you double-spacers said it was divinely inspired:

- "Two. It's God's will."
- "God also prefers two spaces."
- "Two—mandate from above."

Some said it was how you'd been trained (mostly double-spacers):

- "I started typing in an era where two spaces after period was standard and 'correct.'"
- "Two: learned that in typing class in high school."

[1] Compiled by your editor, who takes no responsibility for the legal community's opinions. Spacing choices are those of the original authors.

- "I am old school and learned on manual typewriters two spaces after. But know from Modern coursework and interviewing for the state that the newer norm now is one space. Whichever is chosen, however, it must be consistent throughout any document."
- "That is how I was taught and used that method for 40+ years."
- "I use one space but I wouldn't say I do it out of personal preference. Rather, it's a consequence of my age. Nobody I know who graduated from law school in the past decade uses two periods. We learned to type on computers instead of typewriters. So using two spaces after a period is as appealing as saving a file to a floppy disk or going to a James Taylor concert. (Which is to say, it's not appealing.)"
- "Two is for typewriters."

Many of you had strong feelings:

- "I use two because at least that USED to be the court policy in the golden era. And one space is très déclassé."
- "Two spaces are UNACCEPTABLE."
- "One space after a period just proves that you are a monster."
- "Only spammers use one space."

You disagreed on court policy:[2]

- "OJD style manual" (two spaces)
- "Two because OSC justices said they liked it that way."
- "It is also what the style manual requires, which SOME PEOPLE seem to forget." (two spaces)
- "one for federal filings and two for Oregon appellate filings (shrug emoji)."
- "One - Oregon appellate opinions."

You disagreed about readability (settled by the preceding article):

- "Please read: https://www.audioeye.com/post/dyslexia. It is an ADA compliance issue." (one space)
- "Two, unless the email is short/not dense (because two makes it WAY easier to read long/dense paragraphs!)"
- "Two, because it is correct. And it is easier for readers."

[2] Editor's note: of the respondents who identified themselves as working in the judiciary, 89% said that office policy required double spacing in legal writing and 11% said that it required single spacing. The Almanac does not verify employment status.

An anonymous source reported that, some years ago, an attempt to include an explicit single- or double-space rule in the Style Manual was met with such furor that it had to be abandoned.

And few of you cared when it came to texting:

- "I have no idea, LOL. Don't pay attention as much in texts."
- "irregular, often avoid periods"
- "I may not use punctuation"
- "Rarely do I send a text of more than one sentence. If a text is only one sentence, no period."
- "Depends…sometimes include period, other times omit"
- "Varies, depending on how lazy I am."
- "Depends on the text. More casual, no punctuation at all"
- "i've never tracked it"
- "Depends upon pagination within a text - but typically two"
- "Because texts are not real writing." (one space)

"(Cleaned Up)": The Pioneering Explanatory Parenthetical

James S. Coon[1]

On March 15, 2017, Federal Trade Commission staff lawyer Jack Metzler tweeted: "I propose a new parenthetical for quotes that delete all messy quotation marks, brackets, ellipses, etc: (cleaned up)." Riding a wave of likes and retweets, later that year, Metzler published *Cleaning Up Quotations*[2], more formally describing his proposal for a simplifying explanatory parenthetical "cleaning up" quotations in legal writing. The *Bluebook* has yet to tumble to it, and "(cleaned up)" hasn't yet reached the Oregon appellate judicial vocabulary, but it's hit the U.S. Supreme Court (once, as of writing), and most of us have seen it somewhere. As a legal writer, one might become an ambassador, or even an evangelist. Or not.

Why Quote Others?

We quote others to make the persuasive point that "I'm not the only one saying this." The English Common Law has formalized this a bit more with ideas like "precedent" and *stare decisis,* to make the related points that (1) other, possibly more influential folks have said this before; (2) there are lots of them; and (3) we should do what they did to keep the law consistent and reward legitimate

[1] Appellate counsel for Thomas, Coon, Newton and Frost and its predecessors since 1992.

[2] Jack Metzler, *Cleaning Up Quotations*, 18 J App Practice & Process 143 (2017).

expectations. When writing for a lower tribunal, whether as an advocate or as a judge, there may be the added bonus that what the relevant higher courts have said *is the law*. *See, e.g.*, *Marbury v. Madison*. The writer may paraphrase, but verbatim quotation is hard currency.

Why Clean It Up?

Problems arise, however, when the writer quotes a Court of Appeals decision that quotes a Supreme Court decision that quotes another Supreme Court decision. There may be language in the original case that pertains only to that case, requiring a bracketed substitution of something more generic: "it was [plaintiff's] burden to produce evidence." Or the original quotation might contain footnotes that concern only the particular case, hence "(footnote omitted)." Maybe the original includes extraneous qualifications that apply to its context but not to the general rule, or additional case citations the current writer wishes to omit, hence "…" or "* * *." Perhaps capitalization, the tense of a verb, or the number of a noun doesn't agree with the current writer's context, thus [more brackets].

Then there are the other authorities cited by the original writer or one of the intermediate opinions. These citations may contain important information about the weight and significance of a quotation, but do we really need all the "*recon denied*" and "*aff'd on remand sub nom*" or "(citations omitted)" or "(emphasis by the court)?" Maybe, but also maybe not. Anything other than regular English syntax interrupts and may diminish the clarity, and

therefore the power, of the language being quoted. But "cleaning up," just like using *Bluebook*-compliant incantations, requires judgment. Either can be misused or even abused.

What Does It Look Like?

Here's an example Metzler provides in his law review article, a passage from *Buchanan v. Maine*:[3]

> "Plaintiffs claiming an equal protection violation must first 'identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently, instances which have the capacity to demonstrate that [plaintiffs] were singled . . . out for unlawful oppression.'" *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) (alteration and omission in original) (emphasis added) (quoting *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989), *overruled on other grounds by Educadores Puertorriqueos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004)).

To "clean up" this quotation, the citations by the First Circuit Court of Appeals to these other First Circuit cases can be omitted, along with their internal ellipses, quotation marks, brackets, and explanatory parentheticals. What remains is the far more readable:

[3] *Buchanan v. Maine*, 469 F3d 158, 178 (1st Cir 2004).

> "Plaintiffs claiming an equal protection violation must first identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently, instances which have the capacity to demonstrate that plaintiffs were singled out for unlawful oppression."

Devotees of "(cleaned up)" would argue that the words quoted by the court are, because it has chosen to quote them, *the court's own words*. Plagiarism is not in play, though a writer intoning, "The life of the law has not been logic: it has been experience," without mentioning Justice Holmes would surely raise eyebrows. The cleanup above might miff the authors of the *Rubinovitz*, *Dartmouth Review*, and *Hernandez* opinions who, after all, are not getting credit for what they wrote. And one might complain that the attribution-free "cleaned up" version of the above quote lacks any sense of the sources and development of the substantive ideas expressed. There are no breadcrumbs to follow backward into history: they've been cleaned up. Certainly the tidying court or advocate foregoes any *gravitas* that might attend the citation of language with a long or otherwise impressive pedigree. Those who like to count the number of times a case has been cited for a certain proposition would have to look elsewhere for footholds. As in other pursuits, cleaning up incurs certain losses.

Whom Do You Trust?

The difference between the *Bluebook* method of altering quoted language and the "(cleaned up)" method is that the former tells you something about what's been done, while the latter just tells you the writer has done something. The reader needs to find the quotation to learn what the clutter was and how it was cleaned up. Assuming the writer includes at least one citation to the backward trail, that's no inconvenience to the careful lawyer, judge, or clerk. Understanding that legal writers seek to present their authorities in the light most favorable to their preferred outcome (or just plain not trusting their opponent), any good legal reader, especially one whose task it is to respond to what's being argued, will track down every quotation, indeed every reference to any authority, to see whether it offers a fair representation of the original. As President Reagan said, "trust, but verify." And Judge Richard Posner has written that, "at the same time that they rely heavily on lawyers, judges do not trust lawyers completely, or even very much."[4] The use of "(cleaned up)" unquestionably implies that nothing that has been omitted is of any substantive disadvantage to the writer's argument. The writer's credibility depends, as ever, on fairly reporting what the quoted source said.

[4] Richard A. Posner, *The Federal Courts: Challenge and Reform* 241 (1996), quoted in Metzler, *supra* note 2, at 144 n 7.

Fixing Mistakes

A much more limited sub-task of cleaning up is the fixing of typographical or grammatical errors in quoted material. Brackets can do any job that requires altering the original text without changing its meaning for present purposes. Where the original quotation contains an irrelevant error, the *Bluebook* still requires "[sic]," meaning, "This wasn't my mistake, it was the original author's!" But most modern writers consider that churlish and correct the error in brackets. The Oregon Appellate Courts Style Manual allows this "where it is desired to place less emphasis on the error," and, if the error is an obvious typo, allows correction without any notation. Just fix it; who's going to complain?

Who's Been Cleaning Up?

Surely the most notable example to date of the use of "(cleaned up)" is *Brownback v. King*,[5] in which Justice Thomas took the following section of *Semtek International Inc. v. Lockheed Martin Corp.*:[6]

> The original connotation of an "on the merits" adjudication is one that actually "pass[es] directly on the substance of [a particular] claim" before the court. Restatement § 19, Comment *a*, at 161.

[5] *Brownback v. King*, 592 US ___, ___, 141 S Ct 740, 748, 209 L Ed 2d 33 (2021).

[6] *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 US 497, 501–02, 121 S Ct 1021, 149 L Ed 2d 32 (2001).

and quoted it as:

> "Under that doctrine as it existed in 1946, a judgment is 'on the merits' if the underlying decision 'actually passes directly on the substance of a particular claim before the court.' [*Semtek Int'l Inc.*] at 501–502 (cleaned up)."

Justice Thomas, writing for the unanimous Court, made minimal use of "cleaning up," expanding the quotation from the Restatement Comment to include "actually" from the *Semtek* decision and deleting the brackets around "a particular" in that quotation. Then he deleted the reference to the Restatement, attributing the quotation directly and only to the Court's *Semtek* decision. When the Supreme Court has spoken, who cares whether the language came from the Restatement? Justice Thomas did not introduce or explain his use of "(cleaned up)"; he drew no attention to it other than by using it in these modest circumstances to "clean up" a not-very-cluttered statement.[7] It's almost as if Justice Thomas meant nothing more than quietly to bless the new explanatory parenthetical.

As above, no reported Oregon decision has yet taken advantage of the "(cleaned up)" device. But as of March 2018, Metzler counted more than 150 judicial opinions in which it had been used.[8] In 2021 alone, "(cleaned up)" has appeared in more than 100 opinions by the Ninth Circuit

[7] The language "cleaned up" from the *Semtek* opinion was Justice Scalia's.

[8] Metzler, *supra* note 2, at 160.

Court of Appeals. So it's trending out there. There are doubtless situations in which material one wishes to quote is so hopelessly tangled in *Bluebook* jargon as to lose some of its persuasive power. But cleaning up for its own sake may not always be the best use of precious time and energy, and it's always a good idea to take account of what one may be throwing out with the bathwater.

*[NOTE—We have not time to write out all the speeches made on the present occasion and if any speaker finds himself neglected in this respect, we beg of him to charitably reflect that it is a physical impossibility for one reporter to do the work of eight. * * * We shall endeavor to write out as much of the speeches as we can, according as we find the time—Reporter.]*

Weekly Oregonian, Aug 18, 1857, *in* Carey, *Proceedings and Debates of the Constitutional Convention* 86.

A Public Defender

Lane Borg[1]

I want to posit that in our society the role or existence of the public defender is a unique aspect of the Rule of Law. By unique I mean that, out of most of the characteristics of Rule of Law— expressed rules, fair courts, protection of private property—it is the public defender that is the only actual additional component not already existing for the privileged. The powerful people of society, regardless of Rule of Law, can protect their property and generally expect fair treatment from government. But the position or idea of providing learned and qualified counsel to those without resources or power and with the express job of resisting the urges of the state, I posit, is unique.

Well before our experiment in democracy was launched, the nascent Common Law system understood the importance of lawyers. We have all likely had to smile and laugh at some boresome exclamation of a drunk uncle trying to quote Shakespeare: "The first thing we do is kill all the lawyers…" Usually this is an attempt to trivialize attorneys, but the line in context from Henry VI is delivered by revolutionary conspirators recognizing that attorneys will stand up for the right of others.

---

[1] Public Defender, North Coast Public Defender, 2020 to present; Executive Director of the Office of Public Defense Services, 2018–2020; Executive Director of Metropolitan Public Defender, 2008–2018.

But even here, I would assert that the role of public defender is different than private defense counsel. Not that the duties to one's client are any different, but that the role of the public defender is more. For much of my career I have heard court appointed counsel say, "I am not a social worker" or some such qualifier on their duties. After 35 years in this part of the law, I believe they are wrong, even under the current Rule of Professional Responsibility. And I will make my case here. But I am getting ahead of myself.

For many criminal defense lawyers our hero or patron saint is John Adams; yes, the second President of the United States. This is because, during the early stages of the American Revolution, he volunteered to represent British soldiers on trial for homicide after the Boston Massacre. He did this at great cost to his standing and reputation among Patriots, but to a true criminal defense attorney this is a given, an easy call, albeit a courageous one. And while I admire and honor that history and example for criminal defense attorneys, I think it is only part of the story for public defenders. This is because in a career, if you get one chance to represent British soldiers or their modern counterpart, good for you and take it with head held high. But the majority of the public defender's cases will be ordinary people caught in desperate or tragic or pathetic circumstances, and our job is to help guide and represent them regardless of public, or even private, acknowledgement.

As one who has had experience with both private and court appointed clients, another difference I have observed is that there is likely a social and financial network supporting the retained client that the criminal defense attorney does not have to help construct.

The involuntary client and their circumstances need to be served and addressed. If we pretend like there is no difference between retained and appointed clients then we fail to understand a fundamental aspect of serving them. These clients have a higher rate of trauma history and a healthy skepticism of the adage "showing up is half the battle," because showing up has too often not worked out for them. Finally, their lack of social and financial support limits their options to divert criminal prosecution. Failing to understand and address these realities of our society and criminal justice system will not allow the public defender to fully serve the client.

Public defenders should understand that their clients are being assigned to them largely involuntarily and often with a dose of skepticism. The first job is to get the client on board with the representation, a problem largely unknown to the retained attorney. To actually represent a client effectively, the public defender must meet the client where they are and find options to achieve their goals when possible; the public defender must communicate effectively, which means taking a trauma-informed approach to representation. It is my position that the Rules of Professional Conduct actually require public defenders to encompass all of the client' s circumstances.

The public defenders also have an internal conflict regarding their role. As a group they tend to see themselves as rebels and pirates to the system. Public defenders, regardless of who employs them (the state, private non-profit, or consortia) will often not identify as a public servant or "working for the man." And yet because it is their job to push back on the state, it is in the very act of contentiousness that they are most performing their function for "the man" or the Rule of Law. Another conflict comes from the notion that public defenders are unpopular—less now in this moment of justice reform, but for years I have taught law students that the public defender must be the most scrupulous person in the courtroom because they are there representing the second most unpopular person in the room. With a brief pause, the impact of who is the most unpopular dawns on the students. And most public defenders at some point in their career will bemoan this fact, if not give up the path because of it. But again, the nature of the public defender's job is to point out errors of others. Put another way, we don't win unless someone else makes a mistake. And who likes the persistent although professional critic?

A more apt role model for public defenders is Sisyphus, at least his punishment. Sisyphus is punished by the Gods for trickery and guile to endlessly push a boulder up a hill only to have it tumble down, thus requiring the effort over and over again. While most people use this as an example of futility, Albert Camus gave us a different perspective and one that I have found insightful to public defense. In Camus' subset of existentialism, Absurdism, he

suggests that Sisyphus is a metaphor for the human condition of toiling against a mostly unattainable goal, but Camus adds that one must see Sisyphus as happy. And I would echo that the successful public defender must toil with long odds, difficult clients, and hostile venues, but with a happy heart and endless optimism.

Clerkship: A Journey and an Adventure

Hon. Rick T. Haselton[1] *& H.M. Zamudio*[2]

The following is a pair of essays on the appellate court clerkship experience written by a former judge and a former law clerk.

Hon. Rick T. Haselton:

"Lots of hard slogging for glimpses of revelation. . ."

That phrase is lifted from the note I'd send to clerkship applicants who'd accepted my offer of employment—that is, my future clerks:

> *I am delighted that we will be working together for two years!*
>
> *It will be a journey and an adventure—like all adventures, one fraught with challenge and frustration, disappointment and exhilaration, peril and triumph, lots of hard slogging for glimpses of revelation. G-d willing, we will do good and honorable and, occasionally, memorable work together—and, at the end of that journey, whether in two years, or in the friendship that continues a lifetime, we will each be better than when we began because of what we have shared.*

[1] Chief Judge, Oregon Court of Appeals, 2012–2015; Judge, Oregon Court of Appeals, 1994–2012.

[2] Board Member, Land Use Board of Appeals. H. M. Zamudio clerked with Judge Haselton from 2011 to 2014.

> *I will do my best to make it so—and, if I fall short, I trust that you will let me know. You are a person, and lawyer, of remarkable promise—and it will be a gift to work with you and to learn from you. Thank you for accepting my offer.*
>
> *With abiding appreciation and friendship*
> *—Rick*

Clerking . . .

Where to begin? Perhaps not at the beginning—but, instead, at the end (of sorts): At one point or another, or even several, I have told each of my clerks that s/he had "damn well better show up at my funeral." Some might think that morbid, but, in fairness, I also promised all of them (at least those who were unmarried) that I would dance at their weddings: a promise I have delivered on unfailingly, including once, most happily, officiating at Erin Snyder and Constantin Severe's wedding, and camping out in the wilderness (at least for me) for Hilary Zamudio and Sam Scharf's wedding. Our bond is ineffable and immutable: Yes, we have daily shared at least one year, and usually two, of "good and honorable work," the stuff of the "glimpses of revelation" of this title—not to mention Court Street Dairy Lunch milkshakes and Book Bin runs. But, even more, we have shared the births (and *brises* and *bar mitzvah*s) of children, the deaths of parents, the ends of relationships, and every sort of personal and professional crisis and triumph, including (so far) two judicial investitures. We are, ever, a family.

Having given the matter some thought, I honestly can't describe the "typical" Haselton clerk. Each presented unique challenges and conferred unique blessings. Still, all were (and are) intellectually curious and rigorous and thoughtful, and all were (and are) innately kind. And all were completely and faithfully committed to public service, even, sometimes, at great personal cost.

I tried to pattern my relationship with my clerks—a relationship that, at its best, was akin to partnership—on my own clerkship (with the Hon. Ted Goodwin, in 1979–80). I hired intelligent and gifted people to avail myself of their talents, not to have them parrot my thinking or to write to a pre-directed result. And I hired only people with whom I experienced a special, personal "click" of connection in the interview process, a visceral sense that we would have a lot of fun working together, while bringing out the best in each other in the process.

In truth, those considerations prevailed over sheer horsepower or even writing skills (though, in narrowing the field down to those I would interview, I did put real weight on exceptional cover letters, as a "window" into the applicant's character). I had the conceit that, over time, I could help solid writers become good, and good writers, great. I tended to favor applicants with "real world" experience, especially those who had worked their way through school—in that regard, no one ever topped Josh Ross's combination of serving as a paratrooper in the Israel Defense Forces and working as a chef in a world-class Moroccan kosher restaurant in Jerusalem. (I figured that

anyone who had dodged bullets wouldn't be intimidated by cutting a draft loose, and I was right.) For whatever reasons, over time, I hired many more women than men (Josh, Jeff Piampiano, and Jeremy Rice were the only guys—though I inherited Mike Peterson from Mary Deits, and he was also superb).

The hiring decision was frequently agonizing, because, even in a half-hour or 45 minutes, I really came to like some people and care about their futures. But, of course, I could hire only two (and later, one). As I wrote to our daughter, Molly, on the morning of one "Hiring Day" in early July, when all the clerkship offers were extended:

> It will be a series of phone calls—the very private thrill of victory and agony of defeat, as the phones ring in some homes or offices (or, these days, pockets), while others wait for a call that will never come (they'll get an email within an hour)—all over in just a few unremarkable (for us) minutes. And yet for many, perhaps all, of those folks, their lives will be forever changed; a door opened or closed, other paths to explore. And, so too, our lives will be changed in unimagined, and unimaginable, ways.

Many of those to whom I could not extend an offer ended up working with a colleague, and our interview conversations became the bases of a continuing connection. There were a few others with whom I stayed in touch, semi-mentoring, over the years. Regardless, I always wrote personal notes to candidates whom I had interviewed but

not hired—that just seemed right. The applicants whom I did hire received a note of the sort set out above, as well as an invitation to join me, with a spouse, partner, or friend of their choice for drinks (or whatever) at O'Connor's, my favorite, now sadly defunct, watering hole in Multnomah Village. Since we extended our offers in early July, the weather was almost always wonderful, and some of my happiest memories are of really getting to know some of my clerks for the first time, schmoozing out on the back porch at O'C's.

I won't pretend that clerking with me (I consciously use "with," not "for") was at all easy—especially at the beginning of each relationship. In fairness, I made that clear during the interview process: They were going to see more red ink than they ever had in their lives (and, since many were good writers, that could be very hard to take).

Here's how it worked: Consistently with my experience with Judge Goodwin, on the morning of each day of oral argument (or sometimes on the afternoon before), I'd work through each case on the docket with my clerk(s) before pre-argument conference with my panel mates. After argument and post-argument conference, I'd again sit down with my clerk(s) to debrief on how arguments and conference had gone—I wanted them to have complete context for any case on which they might be writing, as well as to have an overall "feel" for the legal culture of the panel and the Court as a whole. (In later years, when clerks attended pre- and post-argument conferences, I would still

meet with them to give them my perspective, to hear theirs, and to answer questions.)

I'd also dictate impressionistic memoranda on each case for which we had writing responsibility (as well as shorter memos on all cases on which the department was writing), summarizing questions, possible lines of inquiry/"attack," etc. The whole point of those memos was to function as a sort of "bookmark" in time, when the case was still fresh following argument and conference, so that, when a clerk (or staff attorney) picked up the file off the shelf perhaps several months later, s/he and I would have a frame of reference and point of departure for our initial discussions.

So, we'd talk about the case, including possible lines of analysis, interrelationship of issues/assignments of error, potential "doors out," etc. Those discussions (as well as the content of the post-argument memos) were never intended to be directive, only (at best) suggestive. As I noted above, I hired talented people to use their talents. So, as with my judge (and my old firm Lindsay Hart's "throw them in in the deep end" ethic), I "let them run"—exploring, working through the case. But that freedom was conditioned upon continuing *conversation*. On the first morning of each clerkship, I would point at my office door and say that (except in the rarest circumstances) it was always open—and that there was a reason for that: I expected them to come to me to talk whenever they had a question or "hit a fork in the (analytic) road," so that I wouldn't be surprised when I received their initial drafts. It was an intensely

collaborative process and relationship—again, at its best a partnership.

So far, so good—that doesn't sound so hard. Where it became hard was once I received any clerk's first draft opinion. The red ink would flow—and, no matter how much they had been edited in law school and no matter how fervent their assurances during the interview process (in response to my *in terrorem* warnings) that they embraced editing, it was never easy, and sometimes devastating. (It is striking, and a little frightening, that, when I changed offices, moving down to the third floor in the fall of 2013, I discovered that I had stockpiled red pens—three times as many as any other color. As I wrote to our daughter, Molly, "What does that say about me as an editor ('You never know when you won't have enough red ink!')?? My poor clerks! My poor colleagues! My poor daughter! So much for the kinder, gentler Judge Abba.").[3]

The saving grace was that I always sat down with the clerk, within no more than two days of receiving the draft (usually one: delay can be deadly) and explained the reasons for my edits in detail, inviting their thoughts and, in response, sometimes altering or withdrawing the edit. That is, it was a *conversation*—not a unilateral hatchet job that the clerk only learned of later, when the opinion was circulated to the department. There was a second saving grace, too: Over time, as we became more in synch, the tide of red ink, particularly related to matters of the Court's style

[3] "Abba" means "father" in Hebrew.

or my idiosyncratic style, would ebb; the "Mickey Mouse stuff" would disappear, and our editorial conversations would focus only on the "macro" of overall analytic/substantive correctness or the "micro" of how best to craft pivotal passages. At that point—truly the best, most fun times in the clerkship for me (and, I think, for the clerks)—our conversations would be akin to a tutorial on jurisprudence and advocacy.

Different clerks reached that point in different ways and at different speeds. Still, within six months, and usually between three and four, we were there. With very few exceptions, by far the hardest aspect of the work for clerks (even harder than the initial editing) was acquiring a sense—really, *confidence*—of when to cut an opinion loose for my review. The pace of the Court's work was, for almost everyone, unlike anything they'd ever experienced, overwhelming for new clerks (and new judges). So, the single greatest survival skill is to develop the judgment of how much time/work a case warrants and the confidence to "trust the process" and turn the product loose for review by your judge (for clerks) or by your colleagues (if you're a judge). Like other aspects of our work, this is something that can be learned—but only up to a point; ultimately, it may be a variable of temperament: In my experience, Dave Brewer and Jack Landau had an obvious genius in that regard, and other colleagues, frankly, struggled. I never knew how to "teach" that sense (which, of course, is also essential to success in practice) to my clerks. But somehow, over time, through experience, perhaps in part trust born of our relationship, each found equilibrium.

The hardest part of every clerkship for me? Saying goodbye.

H.M. Zamudio:

I had the good fortune of clerking for Judge Haselton (who insisted that I call him Rick from the start) for three years right out of law school. I recall our interview during the summer between my second and third year of law school. Rick and I connected on a lot of levels during that fairly short and informal interview. We were both raised in rural parts of Oregon by determined and demanding mothers. We had both gone to the east coast for law school and returned to Oregon (or at least, at the time of the interview, I had hoped to return to Oregon). I was surprised by how open and friendly Rick was considering the seriousness and status of his position as a judge and the fact that we were strangers. Rick has a unique way of listening with his whole being and he is genuinely curious about almost every topic I can think of. He put me at ease and helped me feel like I could belong and succeed. I left the interview hopeful, but in no way feeling confident that I would land the clerkship. I knew that I was only one in a group of highly qualified candidates.

That summer I was working in downtown San Francisco. Upon receiving the call offering me the clerkship position, I was immediately filled with a sense of relief and wellbeing, knowing that I would be able to return home to Oregon and start a legal career as a clerk. What I didn't

know then was how much I would learn from Rick about writing, decision making, professionalism, and friendship. At the end of that summer, I met with Rick for a beer at O'Connor's in Multnomah Village. Afterward, I gave Rick a ride home in my old Subaru that was packed up with my personal gear for the cross-country drive east for my final year of law school.

The three years that I spent clerking for Rick remain some of the most formative years of my adult life. I moved back to Oregon, reconnected with old friends, and established a new identity as a young lawyer. I went through quite a few periods of personal upheaval and growth during those years. I think because Rick had mentored so many young lawyers in transition between law school and practice, he knew where to push and where to support. I always felt challenged in thinking and writing. I worked through many lapses of confidence. Rick was unwavering in having high expectations, but also understanding and accepting of the errors that are inevitable with limited experience.

Unlike many other judges, Rick required that his clerk physically be in the office every workday—no remote working. At the time, that struck me as a little bit old-school and rigid. In retrospect, I see that being in the office at the same time allowed us to talk through tough analyses and provided opportunities for informal mentoring during quick trips to the Capitol for coffee or a walk downtown for milkshakes on special occasions. Those experiences were invaluable gifts of time and attention that could not have

happened with remote working. Those were times that we got to talk about our lives outside the office and build trust in our working relationship and a lasting friendship.

After clerking, I moved from Salem to southern Oregon and commenced private practice in a small firm. Rick and I continued to communicate and he helped me reflect and gain perspective on the new challenges and opportunities in my career. He doesn't often offer advice, but rather asks questions and makes observations that help me better understand my own experiences and aims. While Rick comprehends so quickly that it almost seems immediate, he leads with listening. Genuine and active listening demands humility, patience, and restraint. That can be hard exercise when one is sharp and decisive. However, listening leads to understanding, which is a prerequisite to good decision making. That is the most valuable personal and professional lesson that Rick has modeled for me.

When my spouse and I married in a rustic and rural camp out, Rick gladly showed up and embraced adventure and some physical discomfort to be there for me, and for us. That meant a lot to me. In the early morning on my wedding day, I was up early and encountered Rick in the meadow where our friends and family had pitched tents. Not many folks were awake and about and I had not yet engaged with the day's tasks and activities. I took the opportunity to walk with Rick down to the river to show him a peaceful place for his morning prayers. It was a simple thing. A morning walk to the river with a friend. In

the quiet and calm of the morning, I felt so reassured that this person, who had already taught me so much and gifted me so much, was there in this very personal moment gifting me presence and support. What good fortune for us both to be able to share the journey and adventure of clerkship and a lasting friendship.

The remainder of the forenoon was spent in discussing various amendments to the judiciary committee's report. We have taken full notes of the discussion, but find it impossible to write them out at present.

Weekly Oregonian, Aug 28, 1857, *in* Carey, *Proceedings and Debates of the Constitutional Convention* 208.

Schuman, Linde, Landau, and the State of "First Things First"

Hon. Christopher L. Garrett[1]

Last summer marked the release of *A Voice for Justice*, a compilation of writings and speeches by the late Judge David Schuman. If you are the sort of person who reads the Appellate Almanac, then *A Voice for Justice*, edited by Judge Schuman's wife, Sharon, deserves to be on your reading list.

The book includes some of Schuman's early fiction writing, excerpts from a handful of his law review articles and Court of Appeals opinions, some op-eds and speeches, tributes from colleagues and friends, and other material. The selections highlight some recurring themes of Schuman's life and work: his passionate belief in service to one's community (discussed in, among other pieces, "Education and Solipsism," an engaging 1981 account of life at Deep Springs College, where Schuman taught); his warnings against the "coldness of heart" that can result from legal training and practice; and his consciousness of his debts to "authorities," by which he meant those who "authored" him, or helped him become who we was. Chief among the latter: his father (a lawyer and prolific community volunteer), and his mentor, Justice Hans Linde.

---

[1] Justice, Oregon Supreme Court (2019 to present); Judge, Oregon Court of Appeals (2014–2018). The author thanks Jack Landau for his comments on a draft of this essay.

The release of this book, and the recent deaths of Schuman and Linde in such proximity, give us reason to reflect on their extraordinary contributions to state jurisprudence. The most well-known of them, of course, is the core insight—fathered by Linde, nurtured by Schuman—that state constitutions should be interpreted independently rather than by rote adoption of the meanings given to parallel provisions in the federal constitution. It is hard to believe now that, back when Linde first asserted it, it was a novel proposition.

A related insight, and one that I focus on here, is the view that state courts should look *first* to their state constitutions before considering claims under the federal constitution. Writing for the Oregon Supreme Court in 1981, Linde said this "first things first" approach was "required."[2] Schuman cogently explained why, in a 2011 law review article:

> "[N]o violation of the Federal Constitution occurs, according to the Oregon courts, until the state, through its laws—*all* of its laws, including its constitutional law—has denied to a person the right to, for example, free speech. We simply do not know if there has been a violation of the First Amendment until we know that Oregon law, *including Oregon constitutional law, fully vindicated in state*

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

> *court*, has, in fact, denied anything to anybody."[3]

Thus, for Linde and Schuman, "first things first" was a logical imperative. By the time Schuman wrote those words, however, the Oregon Supreme Court had long stopped treating it that way. That history has been well documented by Justice Jack Landau.[4] Suffice to say, not very long after the trilogy of cases[5] in which the court characterized "first things first" as a rule, the court began referring to it instead as a "practice" or "preference." And, as often as not, that "preference" has been honored in the breach. Moreover, the factors determining when the court will follow a "first things first" approach have been largely unexplained. The court has departed from the Linde view, but has never really accounted for why.

Clearly, however, a decisive factor has been preservation. For Linde, because state law issues had to be given primacy as a matter of constitutional logic, it was of little consequence whether a party developed those arguments. In *Sterling* and *Clark*, Linde's opinions resolved

---

[3] David Schuman, *Using State Constitutions to Find and Enforce Civil Liberties*, 15 Lewis & Clark L Rev 783, 787–88 (2011) (first italics in original; second italics added).

[4] *See, e.g.*, Jack L. Landau, *"First-Things-First" and Oregon State Constitutional Analysis*, 56 Willamette L Rev 63 (2020); Jack L. Landau, *Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law*, 43 Willamette L Rev 251 (2007).

[5] *Sterling*, 290 Or 611; *State v. Clark*, 291 Or 231, 630 P2d 810 (1981); *State v. Kennedy*, 295 Or 260, 666 P2d 1316 (1983).

the cases on state constitutional grounds that had not been raised by the parties, and his reasoning in both cases was sharply criticized by Justice Tongue for that reason. However, Tongue's more conventional concern with deciding cases on the grounds litigated by the parties was largely vindicated in the years that followed. Earlier this year, in *State v. Link*,[6] the court took note of the disconnect between the strict "first things first" approach articulated in *Sterling*, *Clark*, and *Kennedy*, on the one hand, and the way that the court has actually decided cases ever since, on the other. *Link* acknowledged that the court had not given "systematic treatment" (some would say any treatment) to the question of how to balance "first things first" with prudential concerns like preservation, but concluded that the court's more recent approach has been "decidedly against reaching unpreserved arguments under state law."[7] *Link* went on to follow that approach, deciding the case on Eighth Amendment grounds and declining to address the merits of a state constitutional claim that the defendant had raised at the trial court, then abandoned at the Court of Appeals. At the same time, *Link* expressly left open the possibility of reaching unpreserved state law claims before federal ones in future cases if prudential considerations warrant. The court did not elaborate on what those might be, but the court did not see a prudential justification in *Link* for allowing a party to revive a claim on review that the

[6] *State v. Link*, 367 Or 625, 482 P3d 28 (2021).
[7] *Id.* at 641.

party had thought to raise at an early stage of the case and then chosen to drop.

Characterizing "first things first" as a prudential matter rather than a requirement will strike some as unsatisfying, or simply incorrect. But the strongest version of the Linde approach—what one might call "first things first, always, because we must"—proved fleeting and seems unlikely to be revived, at least in part because, as Landau has discussed, its rationale rests on a premise about *federal* constitutional law that the United States Supreme Court has since rejected.[8] Those who still argue that Oregon courts must always consider state law issues before considering federal constitutional claims are (to use a Schumanism) probably "not only swimming upstream, but swimming upstream through water that is over the dam."[9] Even Landau, a critic of the court's approach to "first things first," believes that the doctrine, properly understood, is a question not of "must we" but of "should we." When

[8] Landau, *"First-Things-First," supra* note 4, at 86–95 (citing *Zinermon v. Burch*, 494 US 113 (1990), and other cases making clear that federal Due Process violations are complete at the time of state action, irrespective of the availability of later judicial remedies; "*Sterling*, then, was incorrect, at least in explaining that the first-things-first rule necessarily follows from the idea that there has been no violation of the Due Process Clause of the Fourteenth Amendment until state remedies have been exhausted.").

[9] *City of Nyssa v. Dufloth*, 184 Or App 631, 655, 57 P3d 161, 174 (2002), *rev'd*, 339 Or 330, 121 P3d 639 (2005) (Schuman, J., dissenting).

framed normatively rather than as a matter of necessity, however, the question no longer calls for a simple yes or no answer, but can be weighed pragmatically, in each case, together with other important jurisprudential values. Among those values? The idea, normally uncontroversial (even codified!),[10] that courts should allow the adversary process to work and confine their analysis to the issues properly raised by the parties.

So, when should state courts, as a prudential matter, reach unpreserved or undeveloped state law claims before turning to a party's federal constitutional arguments? Few people seem to have written about the question. Linde and Schuman had relatively little to say about it (probably because they thought that the premise—treating it as a matter of choice—was flawed). As noted, the court has taken inconsistent approaches to it with minimal explanation. For his part, Landau has said in these pages that, "[e]ven if unpreserved, state law issues should usually be addressed first."[11] Elsewhere, he has been more expansive, observing that "there might be cases in which the policies that support preservation would outweigh those that support the first-things-first rule," but urging courts not to "assume categorically" that that is so.[12] Landau offers several reasons for adhering to "first things first" as a matter of policy: (1) state constitutions are independent sources of

[10] *See* ORAP 5.45(1) (requiring preservation of claimed error).

[11] Jack L. Landau, *Tribute to Justice Hans Linde: First Things First*, 10 Or App Almanac 23, 26 (2020).

[12] Landau, *"First-Things-First," supra* note 4, at 106.

law; (2) federal courts have developed doctrines aimed at avoidance of federal questions if a case can be resolved on state law grounds, so it makes sense for state courts to do the same; (3) state constitutions have "a claim to historical primacy," in that the federal Bill of Rights was modeled on existing state constitutions; and (4) one of the asserted benefits of the contrary approach—uniform application of constitutional principles throughout the country—is illusory.[13] In my view, those are strong arguments for independent state constitutionalism generally, but they speak less to the tough question of when courts should give primacy to *unpreserved* state constitutional claims. There is value in deciding state issues first, and there is value in limiting a court's analysis to the issues that the parties have brought to it. (The reasons for the latter deserve their own discussion, but for present purposes I take it as a given, at least as reflected in how courts conduct their business every day.)

What to do when those values conflict? On that specific question, Landau echoes an "efficiency" argument that he traces back to Linde.[14] Under the "independent state grounds" doctrine, the U.S. Supreme Court will not review a state court decision that disposes of a case solely on state law grounds. Thus, as Linde explained in *Kennedy*, courts that proceed directly to federal questions without first considering "possibly decisive state issues" may end up "wast[ing] a good deal of time and effort of several courts

[13] *Id.* at 97–103.
[14] *Id.* at 104–05.

and counsel and spur pronouncements by the United States Supreme Court on constitutional issues of national importance in a case to whose decision these may be irrelevant."[15] As a cautionary tale, Landau cites *Williams v. Philip Morris Inc.*,[16] which bounced up and down the Oregon Court of Appeals, the Oregon Supreme Court, and the United States Supreme Court for many years after the jury verdict, as the parties argued a question of federal due process. Had the Oregon courts began where they ended up—deciding the case based on state law—the U.S. Supreme Court would never have gotten involved.

Despite the logical appeal of the efficiency argument, there are reasons to question whether it justifies reaching unpreserved issues as a "usual" practice. *Williams* is an extreme example; moreover, U.S. Supreme Court review is so uncommon that it is worth asking how much energy our courts should expend to avoid it. Routinely reaching out to decide unpreserved state law issues might avoid the occasional grant of certiorari, but there will be costs involved: these include costs to the parties, if courts ask for supplemental briefing; possible costs to the orderly development of the law, if the Oregon Supreme Court decides important questions without benefit of a vigorous adversary process or consideration by lower courts; and costs to the system, if federal constitutional claims readily answered by settled caselaw are slowed down for courts to

[15] *Kennedy*, 295 Or at 264–65.

[16] *Williams v. Philip Morris Inc.*, 344 Or 45, 176 P3d 1255 (2008), *cert dismissed as improvidently granted*, 565 US 178 (2009).

investigate whether unraised state law issues might, instead, be dispositive.[17]

My point is not to take a strong position on the circumstances in which courts should reach unpreserved state law issues before preserved federal constitutional claims. Rather, I view that as a difficult question that has not received the discussion it deserves from courts or commentators (Landau aside). Emphasizing the importance of state constitutionalism seems an incomplete answer.

Such a discussion would be timely. Once he retired and was at greater liberty to say what he thought about the Oregon Supreme Court, Judge Schuman didn't hold back. Speaking in 2017 in acceptance of an award named for his mentor, Schuman expressed blunt dismay at (among other things) the court's propensity for overruling precedent, its substantive rulings in the area of individual rights, and its adoption of "methodological, jurisprudential, and analytical apostasies."[18] Whatever one thinks about that critique, the court has changed considerably since Schuman spoke those

[17] Landau agrees that one situation in which the policies supporting preservation might outweigh the policies supporting "first things first" is where a case can be resolved by "unambiguously controlling federal authority." Landau, *"First-Things-First," supra* note 4, at 106. Of course, whether a federal authority is "unambiguously controlling" will often be subject to reasonable disagreement. Even so, this category is probably substantial.

[18] David Schuman, "Remarks on Receiving the Hans Linde Award," delivered to the American Constitution Society (March 22, 2017), *in A Voice for Justice* 121, 123.

words. The law will continue to develop. Linde and Schuman would see "first things first" as a doctrine in disarray, but it need not stay that way.

Appellate Motions Practice: Advice from the Appellate Commissioner

Theresa Kidd[1]

What is the Appellate Commissioner's Office and what is the nature of your work?

The Appellate Commissioner position was established in 2008 pursuant to ORS 2.570(6), which provides that the Chief Judge may "delegate the authority to rule on motions and issue orders in procedural matters to an appellate commissioner." As the statute suggests, the Appellate Commissioner's Office (ACO) reviews and rules on appellate motions—specifically, motions that are filed prior to the case being scheduled for argument. Motions filed after the point at which the case has been scheduled for argument are handled by the presiding judge and/or panel of judges that the case has been assigned to, although we do assist with those motions as needed. Our office also participates in ruling on petitions for attorney fees, which arise after the panel has ruled on the case. For both fee petitions and motions that seek disposition of an appeal or judicial review on the merits—for example, a motion for summary reversal or an opposed motion for summary affirmance—our office works with the court's Motions Department. We also handle other work, including, among other things, correspondence with parties on behalf of the

[1] Theresa Kidd was appointed as Appellate Commissioner at the Oregon Court of Appeals in 2019. Prior to her appointment, she served in the roles of staff attorney and assistant appellate legal counsel at the court, taught legal writing, worked in private practice, and clerked for both state and federal courts.

court and assessment of issues relating to the notice of appeal or petition for judicial review that the Appellate Court Records Office has flagged.

Some of the many types of motions we rule on include: motions to determine jurisdiction or appealability, motions to dismiss, motions to stay, motions for review of a trial court order affecting the appeal, motions to correct or supplement the record on appeal, and motions to strike. Petitions for reconsideration of an appellate commissioner decision are considered first by the ACO and then, if I would deny the petition, it is sent to the Chief Judge of the Court of Appeals for a decision.

How long does it typically take for you to rule on a motion?

The short answer is, it depends. That said, generally, our policy is to decide motions within 60 days of the date that they are at issue. "At issue" does not refer to the date that the motion itself was filed; rather, it refers to when each side of the dispute has submitted argument on the motion. Under ORAP 7.05, a party opposing the motion has 14 days to file a response, and the moving party is then permitted seven days to file a reply.

Unopposed motions are usually decided within one week. The time it takes to rule on opposed motions varies depending on the complexity of the issues raised by the motion—it can take anywhere from two weeks to two months. Emergency motions may be ruled on within a day or two, but they can take up to a few weeks, depending on the circumstances and the filing of any response or reply.

For motions that are processed through the ACO but that require referral to the Motions Department (motions that would dispose of the appeal or judicial review on the merits and attorney fee petitions), it depends on when our monthly Motions Conference with the Motions Department occurs.

What, if anything, should a party do if a motion has been pending for a while and the party wants a status update?

If a motion has been at issue for more than two months, and the party thinks it has somehow been lost in the shuffle, so to speak, the party may call the court (the Records Office), send a letter, or send an email inquiring about its status. The party should communicate when the motion was filed and when it became "at issue." Otherwise, my best advice is to be patient. In those circumstances, the motion is almost certainly under advisement and will be ruled on in due course, and the court will likely not be able to provide any additional information.

What are some common mistakes that you see lawyers make? Do you have any tips or information that you'd like lawyers to know?

- Be aware of timelines; don't wait until the last minute to file. Notices of appeal, transcripts, and briefs all have timelines that must be adhered to.

- Pay attention to the rules surrounding service: triple check service addresses and representation information (watch out for withdrawal of counsel), and don't serve by email unless you have an explicit

(written) agreement providing for email service. Make sure all of the addresses in your certificate of service are correct. Lack of compliant service of a notice of appeal can be fatal to an appeal.

- Attorneys often overlook certain ORAPs—for example, ORAP 16.15(1), which provides that electronically filed documents "shall allow text searching and shall allow copying and pasting text into another document," among other things, and ORAP 16.15(5), which provides that electronic filings must be submitted as a unified single PDF. Lack of compliance with those seemingly small rules makes our job more difficult and does not go unnoticed.

- Attorneys should think about appealability before filing the notice of appeal and should structure the notice of appeal accordingly. For example, under our caselaw, if you attach the wrong document or identify the wrong date of judgment in your notice of appeal, those aren't necessarily fatal errors. However, if your notice of appeal asserts that the appeal is from an order, and you attach that order to the notice of appeal and identify that order's date, but the order is not appealable, that can kill the appeal. Identification of the appealable document is a jurisdictional requirement; if you don't think carefully about appealability before filing the notice, that could potentially result in dismissal of the appeal.

- On a similar note, it's helpful for us when attorneys flag potential appealability issues in the notice of appeal. For example, if you file an appeal from

something other than a judgment or you file the appeal apparently past the typical 30-day timeline, you can note, in the notice of appeal, the statutory basis for appealability or why the appeal is timely. Perhaps you know that the document appealed from is not appealable, but you believe that the trial court intended to enter an appealable judgment and want to ask the Court of Appeals to give the trial court leave to enter an appealable judgment pursuant to ORS 19.270(4)—again, you could make note of that in the notice of appeal. Those efforts make the appeal less likely to be held up by things like show-cause orders and motions to dismiss for lack of appealability or jurisdiction.

- When the court issues an order to show cause, especially to a *pro se* party, attorneys representing the opposing party should consider whether their input on the issue at hand could be helpful and, if so, consider filing a response or motion setting forth their position on the matter.

- We see a lot of motions to strike filed by represented parties when the opposing party appears *pro se*. Attorneys filing motions to strike under those circumstances should consider why they are filing those motions and whether the errors identified in those motions will genuinely affect their ability to respond to the document or the court's ability to conduct meaningful review. Are they filing the motion to achieve those goals, or more so to bully or harass the *pro se* party? The court often affords *pro se* parties leniency when it comes to strict compliance with the ORAPs; for example, if the brief

is largely compliant with the rules and coherent enough for the court to work with it, the motion to strike will likely be denied.

- When filing a motion for stay, attorneys should consider what attachments or supplemental filings will help us rule on the motion. Generally, issues related to a stay will have been first addressed by the trial court. *See* ORS 19.350; ORS 19.360. A motion for stay at the Court of Appeals is typically filed very early in the appeal, at which point the transcript and/or trial court record has not yet been transmitted to our court. Further, pleadings or testimony related to any post-judgment hearings may not have been designated in the record on appeal. Yet, when ruling on motions for stay, we typically conduct *de novo* review, and we'll be much more equipped to do that with sufficient material. To the extent that attorneys need additional time to provide transcripts, they should consider asking for that.

- Finally, I want to remind attorneys to be polite and professional with each other, and especially with *pro se* litigants. Most attorneys who practice in the Oregon appellate courts *are* polite and professional but, occasionally, we are faced with cases where the parties appear to be fighting with each other through their pleadings; that is not helpful to either our work or the parties' case. Forcing the court to "play referee" in that way is a waste of everyone's time.

What is the Appellate Pro Bono Program, and what is the role of the Appellate Commissioner's Office in the Program?

The Pro Bono Program helps connect self-represented litigants with attorneys who may volunteer to represent those litigants, *pro bono*. The program has a number of benefits, including: it serves the court's (and bar's) interest in the access of justice for parties with limited financial resources; it helps the court have a clearer understanding of the issues presented on appeal and be in a better position to efficiently fulfill its duties, because attorneys are typically better at performing the work needed on appeal, compared to non-attorneys; it removes some of the "emotional filing" that we sometimes see from *pro se* litigants (often regardless of legal background); and it helps the parties themselves have a better understanding of their own cases.

The ACO administers the program on the court's end. Before the ACO gets involved, paralegals in the Records Office screen the cases to ensure that various general criteria for potential referral to the Program are met—for example, they make sure that only one side of the dispute is represented by an attorney, that the case is a type in which the self-represented party does not have a right to appointed counsel, and that the self-represented party has filed a motion for waiver or deferral of court costs, among other things. If the case meets the general eligibility criteria, the Records paralegals add the case to a spreadsheet. The ACO checks that spreadsheet on a regular basis and reviews the cases listed therein to determine

whether the case is a legitimate candidate for referral. If so, the ACO sends the self-represented party a letter informing the party that they are being considered for referral, and requesting that the party respond with a one-page letter detailing the issues the party believes the case raises. If the court receives a response, then, based on the information provided therein, the ACO decides whether to refer the case to the Program. If the ACO determines that referral is appropriate, it refers the case via email.

Currently, the referral emails are sent to only those members of the bar who have specifically signed up to be part of the Appellate Pro Bono Program. Visit https://appellatepractice.osbar.org/78-2/ for more information.

LASO Is *Kvelling* Over Its Appellate Referral Process[1]

Rachael Federico[2]

Legal Aid Services of Oregon (LASO) has appeared in a number of cases over the years, including in domestic relations, public benefits, and housing appeals. In the past few years, however, LASO has steadily increased its appellate presence and expanded the capacity to assist more low-income Oregonians with cases that are likely to have a broad-reaching effect on the organization's client base. LASO's Executive Director Janice Morgan is proud of the recent appellate growth and several successful cases handled by LASO and Oregon Law Center attorneys. "We see this as a valuable service to clients. A single appellate

[1] Judge Robert Wollheim called for the use of some good Yiddish expression in his commentary, *Oy Vey! What's Yiddish Doing in Court of Appeals Opinions?*, 9 Or App Almanac 53, 57 (2019). This article's title is a nod to the memory of Judge Wollheim, a true mensch on the bench whose memory is a blessing to those who worked with him.

[2] Rachael Federico is a Supervising Attorney with Legal Aid Services of Oregon, where she has practiced for five years. She began her legal career as a judicial law clerk at the Oregon Court of Appeals, for the Honorable Joel DeVore. Rachael's practice areas include family, housing, appellate, and administrative law cases on behalf of low-income clients in Marion and Polk counties. Her casework includes representation of many survivors of domestic violence and sexual violence. Rachael earned her Bachelor of Arts degree from Union College in 2008, her Master of Arts degree from Texas Woman's University in 2010, and her Juris Doctor from Northwestern School of Law of Lewis and Clark College in 2013.

decision can right a wrong that affects thousands of our clients," she shared.

To aid in identifying and screening appellate cases, the LASO Salem Regional Office designed a streamlined process—a simple, one-page form that practitioners may fill out and submit to refer civil appellate cases for potential representation. The referral form encourages statewide civil or administrative appellate referrals and includes the possibility of both direct representation for qualifying prospective clients as well as appearances as *amicus curiae* on behalf of LASO. The Salem Regional Office rolled out the new form in November 2019, during the *Accessing Appeals: Low-Income Litigants and Oregon Appellate Law* CLE, with the generous help of the Honorable Joel DeVore and Appellate Commissioner Theresa Kidd as speakers. That office currently has an appeal pending involving a trial court's application of child support rebuttal factors and recently prevailed in the first published decision interpreting Oregon's Sexual Abuse Protection Order (SAPO) statutes.

Supervising Attorney Rachael Federico and Staff Attorney Rachel Hungerford, both in LASO's Salem Regional Office, have also encouraged community partner organizations' use of the appellate referral process. Those attorneys have presented about the new process to a number of community partner organizations over the past year, including the De Muniz Legal Clinic, Oregon Crime Victims Law Center, Oregon Coalition Against Domestic and Sexual Violence, and the Oregon State Bar's Appellate

Pro Bono Program. During their presentations to community partner organizations, Rachael and Rachel have enthusiastically shared their experience handling appeals accepted for LASO's representation and explained how the outcome of one appeal can affect the legal landscape for a great number of low-income Oregonians.

The success of LASO's appellate referral process and the need to protect access to appellate justice successfully intersected on December 31, 2020, with publication of *State v. Chapman*.[3] *Chapman* was the first case accepted through the new appellate-referral process, after a private attorney requested LASO to appear in the case as *amicus curiae*. The undisputed facts posed an undeniably poignant legal dilemma for unrepresented litigants—"Wishing to appeal from [a] judgment and acting without legal representation, defendant sent a notice of appeal to the Appellate Court Administrator by first-class mail."[4] Due to the timing of mailing, the Appellate Court Administrator received the notice of appeal after the judgment already had been entered for over 30 days. The appeal was deemed "untimely" and the Appellate Commissioner "issued an order dismissing the appeal on that ground."[5] The Court of Appeals concluded that, unlike commercial carrier services or other costlier forms of mailing, first-class postage did not permit the date of filing to relate back to the date of mailing as a "class of delivery calculated to achieve delivery within three calendar days" under ORS 19.260(1)(a)(B). LASO

[3] *State v. Chapman*, 367 Or 388, 478 P3d 960 (2020).
[4] *Id.* at 390–91.
[5] *Id.* at 391.

submitted a Supreme Court brief, joining the unrepresented litigant's challenge to the presumed jurisdictional bar. The Supreme Court concluded that first-class mailing was not categorically excluded from the relation-back benefit under ORS 19.260(1)(a)(B).[6] Unrepresented litigants who rely on first-class postage can now benefit from the relation-back provision, so long as the posting fits within mailing "designed and estimated by the USPS to achieve delivery of the notice within three calendar days," such as on a Monday with no intervening government holidays.[7]

As with LASO's trial and administrative-level representation, all attorney and support staff time used to handle appeals come at *no cost* to clients. Clients who qualify for LASO services are also able to receive legal advice and support in filing appellate fee waivers, so that those clients may seek waiver or deferral of those costs. Because LASO's service eligibility includes income-tested criteria under the federal poverty guidelines, a large percentage of LASO clients are also eligible to have their appellate filing fees waived.

[6] *Id*. at 415.
[7] *Id.*

Please help LASO continue to assist low-income Oregonians through the appellate referral process by referring civil or administrative cases for potential representation. For more information about referring appellate cases for direct representation or *amicus* support, please email Rachael Federico at rachael.federico@lasoregon.org.

[We have preserved full notes of the discussion, but as it was mostly an exposition of questions of jurisdiction, and as such is of very little interest to our general readers, and being pressed for time, we have concluded to omit it for the present.—Reporter]

Weekly Oregonian, Aug 24, 1857, *in* Carey, *Proceedings and Debates of the Constitutional Convention* 158.

Paging Through Provenance
or
The Travels and Tribulations of a Law Book

Georgia Armitage[1]

Scribbles (read: GRAFFITI) in books pain law librarians' souls—unless they're old scribbles. Then we call them marginalia, and they earn our interest, love, and an article.

While this love for marginalia sounds hypocritical, there is a logic behind it. Modern scribbles tell us that a reader lacked respect for books. We live in the now—we could ask why patrons need the book.[2] Marginalia, on the other hand, helps us understand the person who wrote it, their time period, and the reason the State of Oregon Law Library (SOLL) added the book to our collection.

A Book on the Warpath:

Take the "scribbles" in *The Military Laws of the United States* by John F. Callan. Published in 1863, the book

---

[1] Georgia Armitage is a research assistant at the State of Oregon Law Library. Before joining the law library, Georgia studied at Beloit College. As a student, she conducted independent historical research into Chicago's Neo-Gothic churches at the Newberry Library. She also examined whether remittances influence educational outcomes in Vietnam and presented her work at the Midwest Economics Association's 2019 conference. Many thanks to Cathryn Bowie for her help selecting books and editing this piece. And thank you to Amanda Duke for her help researching Moses Levy. Any mistakes are my own.

[2] So no, "I want to help future historians and librarians" will not excuse any graffiti habits.

contains military law regarding "the Army, Volunteers, Militia, and to Bounty Lands and Pensions, from the Foundation of the Government to the Year 1863."[3] It includes rules of war, the U.S. Constitution, and laws passed in Congress. Within a year of publication, the book was at war (or at least in the hands of a military man).

The remnants of what seems to be a Civil War era letter bled through to the cover. One can make out the words: "Alt. Adj to Gen [illegible] Army, John F [illegible] Aug [illegible] 1864."

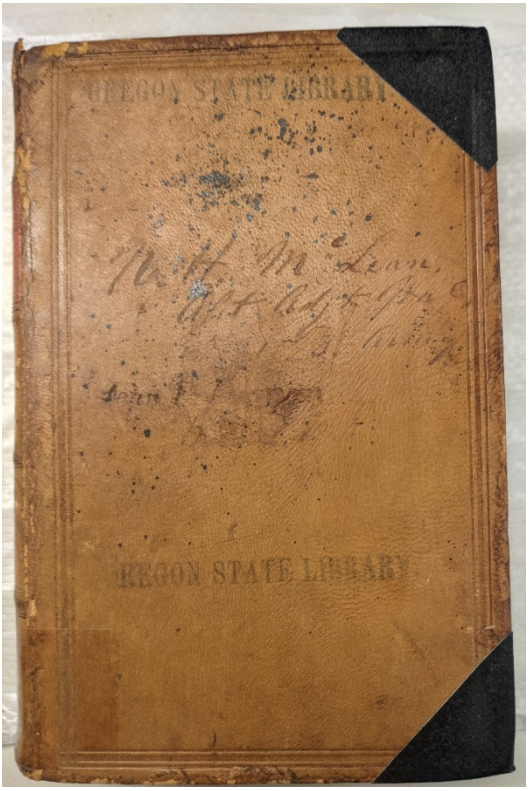
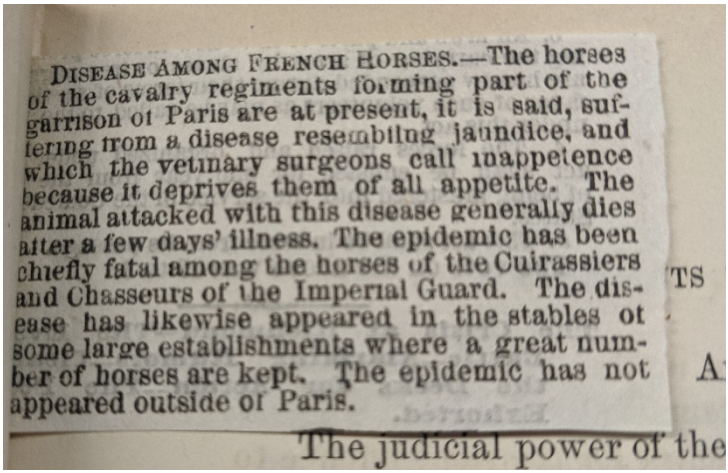


Figure 1: Front cover of SOLL's Military Laws of the United States

[3] John F. Callan, *The Military Laws of the United States* (Philadelphia: George W. Childs, 1863), title page.

Based on this, the writer was likely part of the U.S military late in the Civil War (1861–1865) and desperately needed a hard surface to write on—suggesting that he was traveling or living rough.

A skim of the index suggests why a military man might lug this book on campaign, despite its size (6.25 x 9.25 x 2.25 inches). It covers everyday U.S. military policy, such as the pay for everyone from "assistant apothecaries" to "light-horse inspector[s]."[4] Need to discipline an officer for drunkenness? Turn to page 183.[5]



DISEASE AMONG FRENCH HORSES.—The horses of the cavalry regiments forming part of the garrison of Paris are at present, it is said, suffering from a disease resembling jaundice, and which the vetinary surgeons call inappetence because it deprives them of all appetite. The animal attacked with this disease generally dies after a few days' illness. The epidemic has been chiefly fatal among the horses of the Cuirassiers and Chasseurs of the Imperial Guard. The disease has likewise appeared in the stables of some large establishments where a great number of horses are kept. The epidemic has not appeared outside of Paris.

The judicial power of the

Figure 2: A Civil War-era news clipping tucked between page 50 and 51. Perhaps, our writer was in the cavalry or concerned about his horse's health.

[4] *Id.* at 583, 585.
[5] *Id.* at 563.

Once discharged, the book gained a new signature. "J Quinn Thornton" is scrawled inside the front and back covers, and "Thornton" is printed on the spine. Although, we cannot confirm the signature by comparing it with another, the most likely signer is Judge J. Quinn Thornton (1810-1888), Chief Justice of Oregon's provisional Supreme Court.[6]

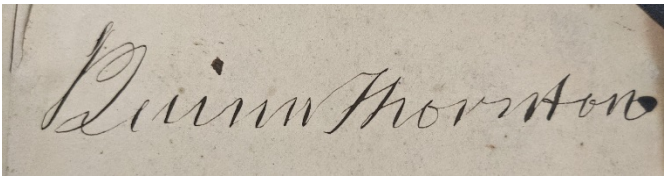


Figure 2: "J Quinn Thornton" written inside back cover.

An early emigrant to Oregon, Thornton had an imperialistic appreciation for the military, which likely explains his interest in the book. Like the rest of the country, Oregonians wanted access to resources that belonged to others—Native Americans.[7] Over the course of

[6] Photograph, 1848, "J. Quinn Thornton, 1810–1888, Oregon pioneer," Salem Public Library, https://www.salemhistory.net/digital/collection/max/id/184/ (accessed June 17, 2021); Arthur F. Benson, *J. Quinn Thornton*, State of Oregon Law Library, https://soll.libguides.com/index/OJD_history (accessed June 17, 2021).

[7] For more information about Oregonians' attitudes and interactions with Native Americans, see: Eva Guggemos, *Timeline of Indigenous History of Oregon*, Pacific University Libraries, https://pacificu.libguides.com/c.php?g=1050460&p=7794169 (updated Feb 13, 2021); Amy E. Platt, *Oregon Cavalry Volunteers Uniform*, Oregon History Project, https://www.oregonhistoryproject.org/articles/oregon-cavalry-volunteers-uniform (updated Mar 17, 2018); Melinda Jette,

the 1800s, Oregon and the federal government forced Native Americans off their lands and into reservations. Keeping people out of their homes requires manpower.

Thornton advocated for military manpower. His book, *Oregon and California in 1848*, discusses a variety of topics including Thornton's experiences on the Oregon Trail, Oregon and California's geography and resources, and arguments for military protection.[8] Thornton's discussions of the latter tend to run along these lines:

1. This area has fertile soil, plentiful trees, and water.[9]
2. Native Americans are dangerous.[10]
3. The military should protect emigrants.[11]

Thornton's advocacy for military involvement in the West explains his interest in a military policy book.

After Thornton's ownership, the book joined our collection sometime before 1913, based on the stamp

---

Broadside, To Arms!, Oregon History Project, https://www.oregonhistoryproject.org/articles/historical-records/broadside-to-arms (updated Mar 17, 2018); Joshua Binus, *Proceedings of the Wasco Council, 1855*, Oregon History Project, https://www.oregonhistoryproject.org/articles/historical-records/proceedings-of-the-wasco-council-1855 (updated Mar 17, 2018).

[8] J. Quinn Thornton, *Oregon and California in 1848* (New York: Harper & Brothers, 1849), *available at* Internet Archive, https://archive.org/details/oregoncalifornio2thoruoft.

[9] *Id.* vol. 1, 67; *id.* vol. 2, 256.

[10] *Id.* vol. 1, 66, 68; *id.* vol. 2, 256.

[11] *Id.* vol. 1, 67–68, 114; *id.* vol. 2, 256–57.

"Oregon State Library" on the cover. In 1913, the State Library was divided into the Supreme Court Library (now the State of Oregon Law Library) and the State Library.[12]

The library likely added the book to our collection for two reasons. Firstly, Oregonians engaged in military action against Native Americans during the 1800s.[13] Although by the time the book joined the library (probably after Thornton's death in 1888) the conflicts had ended, the memory likely remained.[14] Secondly, the library believed that "the usefulness of the library depends upon its completeness" during the 1800s.[15] A complete collection included primary law (like military statutes) from the United States and the entire British Commonwealth.[16]

Political Cartoonists and Precedent:

The library's interest in "completeness" had a point. The battered, crumbling 1807(?) copy *Trial of Thomas O. Selfridge*—a Massachusetts manslaughter trial from 1806—interested not only the Oregon Supreme Court over a 100 years later, but possibly also a political cartoonist.

---

[12] Oregon Legislative Assembly, "Chapter 149" in *General Laws and Joint Resolutions and Memorials Enacted and Adopted By The Twenty-Seventh Regular Session of the Legislative Assembly*, 27th Legislative Session (Salem: Willis S. Duniway, State Printer, 1913), 263–65.

[13] Guggemos, *supra* note 7.

[14] Guggemos lists the last military conflict as in 1878.

[15] Joe Stephens, *Some Comments on a Few Old Law Books*, 1 Or App Almanac 173 (2006).

[16] *Id.*

Variations on "James Akin bot this book at Newbury port 1806 price one Dollar," are scrawled repeatedly on the first few pages. The most likely signer is James Akin, an engraver and political cartoonist, who lived in Newburyport, Massachusetts from 1804 to 1807.[17]

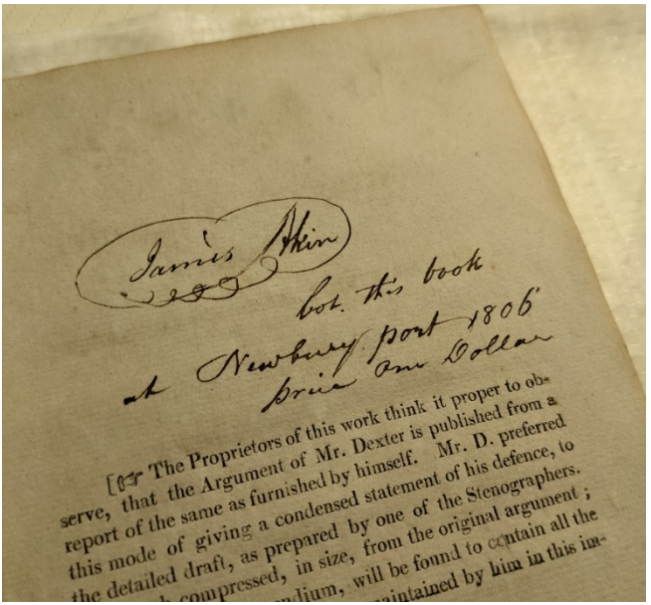


Figure 4: One of the inscriptions inside SOLL's Trial of Thomas O. Selfridge.

Akin's time in Newburyport led to a dueling challenge, skillet skirmish, jail time, and cartoons. Arriving in 1804, Akin worked for James Blunt, but the two fought (in

[17] Maureen O'Brien Quimby, *The Political Art of James Akin*, 7 Winterthur Portfolio 59, 62, 65 (1972), http://www.jstor.org/stable/1180534. Akin was in Philadelphia by early 1804 and announced he was leaving Newburyport in late 1807.

and out of court) over Akin's employment bond.[18] Blunt accused Akin of thievery.[19] Akin challenged Blunt to a duel.[20] In response, Blunt threw a skillet at Akin.[21] During his stint in jail for the dueling challenge, Akin created a caricature of Blunt wielding the skillet.[22] One wonders if Blunt regretted "refusing" the duel.

While in Newburyport, Akin also targeted President Thomas Jefferson (a Democratic–Republican) with the cartoons *The PRAIRIE DOG sickened at the sting of the HORNET or a diplomatic puppet exhibiting his deceptions* and *A Philosophic Cock*.[23]

Akin's political interests combined with his dueling habit, explain why the *Trial of Thomas O. Selfridge* might have interested him.[24] The book covers the manslaughter trial of Thomas O. Selfridge—a federalist who killed the Boston chairman of Democratic–Republican Party's son.[25]

---

[18] *Id.* at 62.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 64.

[22] *Id.*

[23] James C. Kelly and B. S. Lovell, *Thomas Jefferson: His Friends and Foes*, 101 Va Mag of Hist & Biography no. 1, 149–50 (1993), http://www.jstor.org/stable/4249333.

[24] Georgia Armitage, *Marginalia Morals: Do Not Throw Skillets at People!*, State of Oregon Law Library Research Blog, https://soll.libguides.com/blog/DRAFT-Marginalia-Morals-Do-Not-Throw-Skillets-at-People (Jan 16, 2020).

[25] Jack Tager, *Politics, Honor, and Self-Defense in Post-Revolutionary Boston: The 1806 Manslaughter Trial of Thomas Selfridge*, 37 Hist J of Mass no. 2, 86–88 (2009),

The trial was highly political and, thus, probably relevant to Akin's work.[26] It also addressed whether it was legal to kill in defense of one's honor.[27] (Spoiler: The judge said no.)[28] Recently jailed for a dueling proposition, the question might have drawn Akin's attention.

The case also drew the Oregon Supreme Court's attention three times during the next 100 or so years. According to Dr. Tager, Emeritus Professor of American History at the University of Massachusetts, Selfridge's case "became the legal authority for the plea of self-defense and was cited well into the late nineteenth century."[29] The Oregon Supreme Court references the case in *State v. Butler*,[30] *Goodall v. State*,[31] and *Hannah v. Wells*.[32] It's possible the court used SOLL's copy, although we do not know when our copy entered the collection.

---

https://www.westfield.ma.edu/historical-journal/wp-content/uploads/2018/06/Thomas-Selfridge.pdf.

[26] Tager notes, "The judge, the prosecution, and the defense all worried that political bias would affect the jury's decision and worked hard during the trial to curb partisan tendencies." *Id.* at 90.

[27] *Trial of Thomas O. Selfridge* 128–29 (Boston: Russell and Cutler, Belcher and Armstrong, and Oliver and Munroe, [1807?]).

[28] *Id.* at 165–66.

[29] Tager, *supra* note 25, at 86.

[30] *State v. Butler*, 96 Or 219, 186 P 55 (1919).

[31] *Goodall v. State*, 1 Or 333 (1861).

[32] *Hannah v. Wells*, 4 Or 249 (1872).

One man's rebellion is another man's revolution: Occasionally, our books are revolutionary. Less by being rebels themselves, and more by inspiring revolution in other people. *The Reports of Sir Creswell Levinz* fall into this category.

Figure 5: Levy signed the title page of volume 1-2. Inscription reads, "Moses Levy October 1.st 1785 Es."

Moses Levy,[33] who signed volume 1-2 in 1785, was revolutionary in at least two respects. First, Levy (1757–

[33] Signature in SOLL's book compared with two other images of Levy's signature: "1792 Autograph Document Signed of Moses Levy, prominent Philadelphia Jew, involving Robert Morris, financier of the American Revolution," Rare Americana, https://www.rareamericana.com/pages/books/3726368/moses-levy; "Legal document; Levy, Moses; Philadelphia, Pennsylvania,

1826) became "the first Jewish person to practice as an attorney in the Commonwealth of Pennsylvania[,]" despite widespread discrimination.[34, 35] He proved an extremely capable lawyer—serving as a court recorder and judge during his career.[36] Similarly, Leon Hühner, historian, speculates that President Thomas Jefferson considered him as a candidate for U.S. Attorney General.[37]

Levy was also literally a revolutionary. He fought in the Continental Army during the American Revolution, and he even crossed the Delaware with George Washington.[38] Amanda Duke, SOLL's technical services librarian, speculates that Levy's involvement in the American

---

United States; 1807 March 3," Colenda Digital Repository, Penn Libraries, https://colenda.library.upenn.edu/catalog/81431-p33x88 (accessed June 18, 2021).

[34] Nathan Dorn, *Moses Levy, First Jewish Attorney in the Commonwealth of Pennsylvania*, In Custodia Legis, https://blogs.loc.gov/law/2021/05/moses-levy (May 28, 2021).

[35] For an overview of Jews in America, see Amanda Duke, "Jewish American Heritage Month: the Story of Moses Levy," State of Oregon Law Library Research Blog, https://soll.libguides.com/blog/Jewish-American-Heritage-Month-the-Story-of-Moses-Levy (May 28, 2020).

[36] Leon Hühner, Note, *Jefferson's Contemplated Offer of the Post of Attorney-general of the United States to Moses (?) Levy, of Philadelphia*, 20 Am Jewish Hist Q 161, 162 (1911).

[37] *Id.* at 161–62.

[38] Tina Levitan, *First Facts in American Jewish History: From 1492 to Present* 59 (Northvale, NJ: Jason Aronson, 1996); *Jewish American History in Brief*, Christian Sci Monitor, https://www.csmonitor.com/2004/0915/p12s02-lire.html (Sept 15, 2004).

Revolution explains his interest in *The Reports of Sir Creswell Levinz*.[39]

Volume 3 of *The Reports of Sir Creswell Levinz*, which Levy did not sign, covers (among other cases) the fallout of the Monmouth Rebellion. The Monmouth Rebellion occurred in 1685, when the Duke of Monmouth rebelled against King James II of Britain.[40] The rebellion failed. Among other difficulties, the Duke's supporters were inexperienced and lacked the supplies to defeat the King's army.[41] The trials for the rebels earned the name the Bloody Assizes.[42] In the end, 200 to 300 people were executed, and most who escaped execution were sent to penal colonies in the West Indies.[43]

As Duke notes in SOLL's blog post, the similarities to the American Revolution and Monmouth Rebellion may explain Levy's interest in Judge Levinz's reports.[44] Both sets of rebels faced a more organized and experienced foe with an inexperienced and poorly equipped army.[45] Americans

---

[39] Duke, *supra* note 35.

[40] *Monmouth's Rebellion*, Oxford Reference, https://www.oxfordreference.com/view/10.1093/oi/authority.20111221130823603 (accessed Dec 31, 2021).

[41] *Id.*

[42] Elliot Vernon, "Bloody Assizes," in *The New Oxford Companion to Law* (Oxford University Press, 2008).

[43] *Id.*

[44] Duke, *supra* note 35.

[45] See the description of the Continental Army in William P. Kladky, *Continental Army*, Mount Vernon, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/continental-army/ (accessed June 18, 2021).

also likely feared their own Bloody Assizes if they lost. During the war, captured Americans faced poor treatment, in part because they were rebels.[46] Leaders, like the signers of the Declaration of Independence, expected execution if captured.[47] The Declaration of Independence argues, in part, that declaring independence isn't treason in their case.[48]

We do not know when the books joined SOLL's collection, but they likely helped ensure the library's "completeness." Some researchers argue that the Bloody Assizes influenced the 1689 English Bill of Rights,[49] and by extension the U.S. Bill of Rights.[50] The Eighth

---

[46] For discussions of the treatment of American prisoners of war, see the review of T. Cole Jones's *Captives of Liberty* (University of Pennsylvania Press, 2019), https://www.upenn.edu/pennpress/book/16007.html (accessed June 18, 2021); and Timothy J. Compeau, *Prisoners of War*, Mount Vernon, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/prisoners-of-war/ (accessed June 18, 2021).

[47] Randy E. Barnett, *What the Declaration of Independence Really Claimed*, Washington Post, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/04/what-the-declaration-of-independence-really-claimed (July 4, 2015).

[48] *Id.*

[49] The long-held view was that the Bloody Assizes influenced the English Bill of Rights, but now some researchers suggest that it was another incident. For an overview of the discussion, see Jessica Powley Hayden, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 Georgetown L J 237, 251 (Nov 2007); *Harmelin v. Michigan*, 501 US 957, 111 S Ct 2680, 115 L Ed 2d 836 (1991).

[50] Hayden, *supra* note 49, at 251.

Amendment's provision against "cruel and unusual punishment" is taken from the English Bill of Rights.[51]

Alternately, past SOLL law librarian Ray Stringham might have collected it. English law fascinated Stringham, and he even wrote a book on the Magna Carta.[52] Supposedly, "he spent his vacation each summer in London, poking around in bookshops in search of antique law books."[53]

Trials and Travels of a Law Book:

Ray Stringham may have followed a long line of book collectors. Our copy of *Ioannis Seldeni Mare clausum* wound its way through at least two book collectors before reaching Oregon.

Mare clausum is the Latin title of John Selden's *The Right and Dominion of the Sea*.[54] Specifically, the work justified Britain's dominion over the seas. According to the Tarlton Law Library, it "provided the basis of England's official position on the seas for over 100 years."[55] Originally published in 1635, Selden wrote it in response to Hugo

---

[51] Leonard Williams Levy, *Origins of the Bill of Rights* 231 (Harrisonburg, VA: R. R. Donnelley & Sons, 2001).

[52] Stephens, *supra* note 15, at 174.

[53] *Id.*

[54] Kasia Solon Cristobal, curator, *The Works of John Selden, The First Definitive Work on the Dominion of the Sea*, University of Texas School of Law, Tarlton Law Library, Jamail Center For Legal Research, https://tarltonapps.law.utexas.edu/exhibits/selden/mare_clausum.html (2014).

[55] *Id.*

Grotius's *Mare liberum* (free sea), and he dedicated it to King Charles I.[56]

Figure 6: Sir Thomas Sebright's Bookplate inside SOLL's copy of Mare clausum.

Sir Thomas Saunders Sebright, 4th Baronet (1692–1736) was the first known owner of SOLL's copy of *Mare clausum*.[57, 58] Just inside the cover is his bookplate. Sir

[56] *Id.*

[57] A. N. Newman, "SEBRIGHT, Sir Thomas Saunders, 4th Bt. (1692-1736), of Beechwood, Herts," History of Parliament, https://www.historyofparliamentonline.org/volume/1715-1754/member/sebright-sir-thomas-saunders-1692-1736 (accessed June 21, 2021).

[58] I compared the bookplate with another example of Sir Thomas Sebright's bookplate: "Pastedown and flyleaf of inside

Thomas was a Tory member of the House of Commons and an avid book collector.[59]

John Selden interested Sir Thomas: he subscribed to *Joannis Seldeni Jurisconsulti Opera Omnia, Tam Edita Quam Inedita: in tribus voluminibus* (The works of John Selden: in three volumes).[60]

When Sir Thomas's descendent, Sir John Sebright, 7th Baronet auctioned his "fine library" in 1807, the catalog listed five books by John Selden—perhaps remnants of Sir Thomas's library.[61] Two of the five were copies of *Mare*

---

front cover with visible endpaper construction, two leaves folded and sewn with double short guards, not trimmed at an angle that were adhered prior to the pastedown, STC 15142 copy 2," Folger Bindings Image Collection, Folger Shakespeare Library, https://luna.folger.edu/luna/servlet (accessed June 21, 2021).

[59] Newman, *supra* note 57.

[60] *See* "The Names of the Subscribers," *in* Joannis Seldeni, *Jurisconsulti Opera Omnia Tam Edita quam Indita. In Tribus Voluminbus*, ed. David Wilkins, S.T.P. (Londini: 1726), https://books.google.com/books?id=YYquFuMzxoAC&pg=PP49.

[61] The auction also sold books collected by Sir Roger Twysden and Mr. E. Lhwyd, but it seems most likely that Sir John Sebright owed the Selden books (likely inherited from Sir Thomas)—the catalog states that Twysden and Mr. E. Lhywd's collection includes: "MANUSCRIPTS, Of ancient Chronicles, Monastic History, Charters, etc." *A Catalogue of the Duplicates and a considerable Portion of the Library of Sir John Sebright, Bart. (Of Beechwood, Herts.)* (Leigh and S. Sotheby, 1807), National Library of Wales, https://viewer.library.wales/5201840#?c=&m=&s=&cv=6; R. G. Thorne, "SEBRIGHT, Sir John Saunders, 7th Bt. (1767-1846), of Beechwood, Herts, and Besford, Worcs.," History of Parliament, https://www.historyofparliamentonline.org/volume/1790-

clausum, although both list a publication date of 1635, while SOLL's copy was published in 1636.[62]

SOLL's copy of *Mare Clausum* quickly made its way to another owner. The next inscription reads:

> "This book was considered of such importance that Charles I in council ordered that copies of it should be printed in the Court of Admiralty, Exchequer, and King's Council. It was written in answer to Grotius's Mare Liberum. - J. Bindley, Stamp Office."

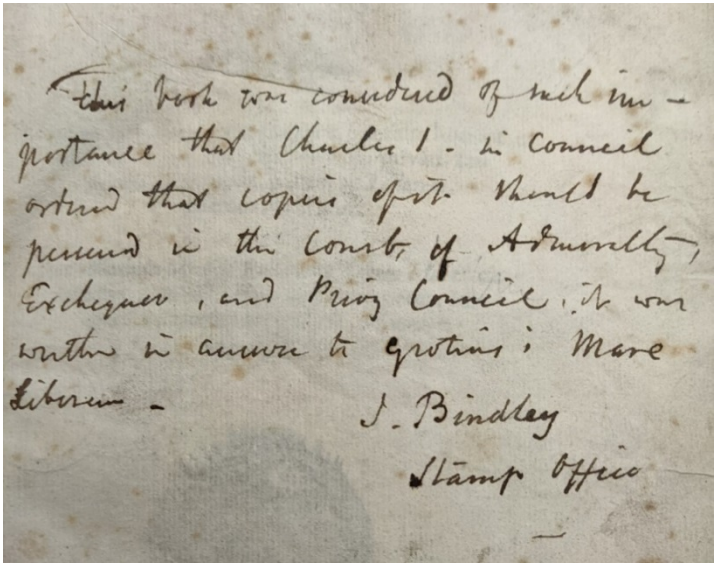


Figure 7: Inscription inside SOLL's copy of Mare clausum.

1820/member/sebright-sir-john-saunders-1767-1846 (accessed June 21, 2021).

[62] *A Catalogue of . . . the Library of Sir John Sebright*, *supra* note 61, at 30.

The most likely signer is James Bindley (1737–1818), a Commissioner of the Stamp Office and a book collector.[63]

Interestingly, Bindley does not tell us why Charles I was interested in *Mare clausum*. Perhaps Bindley's inscription is the 19th Century equivalent of driving a fancy car downtown—"Look at my status symbol!" Alternately, Bindley might have expected his reader to know enough about Charles I to understand the book's importance—a fair expectation since Charles I was notorious. As Encyclopedia Britannica puts it, Charles I's "authoritarian rule and quarrels with Parliament provoked a civil war that led to his execution."[64] He dismissed Parliament for years.[65] Since Parliament created taxes, Charles I relied on ship-money—taxes raised to fund ships for naval protection.[66] For Charles, *Mare clausum* justified his rule over the sea and the ship-money tax.[67]

---

[63] *James Bindley*, British Museum, https://www.britishmuseum.org/collection/term/BIOG84819 (accessed June 21, 2021).

[64] Maurice Ashley, *Charles I*, Encyclopedia Britannica, https://www.britannica.com/biography/Charles-I-king-of-Great-Britain-and-Ireland (updated Nov 15, 2021).

[65] *Charles I (1600–1649)*, BBC, https://www.bbc.co.uk/history/historic_figures/charles_i_king.shtml (2014).

[66] "Ship money," *A Dictionary of British History*, ed. John Cannon & Robert Crowcroft (Oxford University Press, 2015); *Charles I (1600–1649)*, *supra* note 64.

[67] David Armitage, *The Ideological Origins of the British Empire* 115–16 (Cambridge: Cambridge University Press, 2000), https://www.google.com/books/edition/The_Ideological_Origins_of_the_British_E/PkuozOfNnKkC; Mark Somos, *Selden's Mare*

Bindley died in 1818, and his book collection was auctioned off.[68] We do not know how it made it into SOLL's collection, although we know based on the stamp on the cover reading "Supreme Court Library" that it joined the collection after 1913. Librarian Ray Stringham likely found it in a London bookstore and, recognizing its importance to British history, brought it back to Oregon.

Marginalia Morals:

Marginalia in SOLL's collection has taught us a few different lessons. Such as, if you decide to use a book as a hard surface to write on, maybe put an extra paper between your work and the book cover (unless you want to leave ink stains). Additionally, honor is not a valid reason for murder. But we hope it also demonstrated the ways the marks of previous owners can illuminate a book's context—the concerns and fears of punishment for treason during the American Revolution, Oregonians' interest in the military in the 1800s, and how the law library thought about its collection over time.

Clausum: The Secularisation of International Law and the Rise of Soft Imperialism, 14 J Hist Int'l L no. 2, 293–94 (2012).

[68] *A Catalogue of the Curious and Extensive Library of the Late James Bindley, ESQ. F.S.A, Removed From His Late Residence in Somerset Place. Part The First.* (W. Bulmer and Co. Cleveland-row, St. James's, 1818), Hathitrust Digital Library, https://hdl.handle.net/2027/mdp.39015033646061.

Reporter Rejected at the Oregon Constitutional Convention

Nora Coon[1]

The Oregon Constitutional Convention of 1857 is known for many things—the production of the Oregon Constitution, overt racism,[2] overlong speeches,[3] xenophobia,[4] and personal sniping.[5] But there was another lurking argument: the problem of hiring a reporter to document the Convention. Some delegates argued that hiring a reporter was well worth the cost to document the

---

[1] Deputy Public Defender, Office of Public Defense Services; former law clerk to the Hon. Jack L. Landau, Oregon Supreme Court; former law clerk to the Hon. Robyn Ridler Aoyagi, Oregon Court of Appeals; J.D. Lewis & Clark Law School; B.A. English, Grinnell College.

[2] *See generally* Charles Henry Carey ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (Oregon Historical Society facsimile 1984) (1926). The majority of the information in this article comes from Carey's reprinting of *Weekly Oregonian* and *Oregon Statesman* articles documenting the debates. All dates are the date of debate rather than date of publication.

[3] "Mr. Grover: I see the convention is getting into a very bad habit * * * of stringing out long speeches upon subjects not before the convention." Oregonian, Aug 17, 1857, *in* Carey at 63.

[4] "Mr. Smith offered a resolution requiring all laws of Oregon to be published in no other language than the English language, and that judicial proceedings shall be conducted, preserved, and published in no other than the English language. * * * Adopted." Statesman, Sept 18, 1857, *in* Carey at 379.

[5] "Mr. Williams said that if the gentleman from Polk (Waymire) could be induced to put his $100 into so transparent a humbug as the telegraph line, he ought to lose it." Statesman, Sept 2, 1857, *in* Carey at 261.

momentous happenings of the constitutional convention. Others said that even a few hundred dollars was too high a price for their constituents to pay and that their debates didn't need to be transcribed because what they were doing was not actually that momentous.[6] It was very important to some of the delegates to have all of their reasons and motives expressed at the convention written down for posterity—a choice that may not reflect on them so positively with the passage of time.

"Penny Wise and Pound Foolish": Haggling Over the Cost of a Reporter

From the beginning, journalists from the *Weekly Oregonian* and the *Oregon Statesman* documented and published news of the convention, though their coverage sometimes varied so much that they didn't seem to be covering the same event.[7] They reported the number of

---

[6] *See* Oregonian, Aug 22, 1857, *in* Carey at 141–42. As Mr. Logan put it, "The constitution that we may make, and every principle we can engraft into it, has been discussed and decided time and again." *Id.* Logan was a Kentucky native who father was friends with Abraham Lincoln; Logan "was described as having 'no politics, he is only opposed to the Democratic Party.'" *Biographical Sketch of David Logan*, https://sos.oregon.gov/archives/exhibits/constitution/Pages/during-about-logan.aspx. He voted against the final Constitution.

[7] For example, in a debate over liability for stockholders and corporations, one delegate went on an extended tirade against the "effeminate" nature and "degeneracy" of present-day Massachusetts. Oregonian, Sept 2, 1857, *in* Carey at 258. As reprinted by Carey, the *Oregonian*'s coverage of the rant lasts multiple columns. By contrast, the *Statesman*'s coverage of the rant is limited to a paragraph. *See* Carey at 265.

votes for president of the convention differently, including whether certain delegates were present or absent.[8] Speeches were sometimes printed only in the *Oregonian* or only in the *Statesman*.[9]

The question of hiring an *official* convention reporter provoked the very first debate. Mr. Kelly offered a resolution to elect a series of officers, explaining, "The only [officer] I apprehend that may cause a difference of opinion is, perhaps the reporter of debates."[10] Kelly challenged the other members of the convention to refuse: "I have introduced that resolution for the purpose of eliciting discussion as to whether this convention is willing to follow

[8] Noted by Carey at 77, along with further basic discrepancies at 78 and 79.

[9] As another example, the *Oregonian*, after capturing direct quotes from some several members, was then forced to print "Mr. Boise made a lengthy speech * * *. After several other speeches by various members, the amendment of Mr. Olney was adopted." Oregonian, Aug 19, 1857, *in* Carey at 98. The *Oregonian*'s reporter added a note stating, "The remainder of the debate upon this question, including Mr. Boise's excellent speech, we are unable to find time to transcribe into long hand at present." *Id.* In contrast, the *Statesman* lacked the extended direct quotes of the earlier speeches, but was able to print a summary of the content of Boise's speech as well as the responses of two other delegates. *See* Carey at 99–100. Sometimes they didn't print anything substantial at all. *See* note 55, *infra*.

[10] Oregonian, Aug 17, 1857, *in* Carey at 57. Kelly was later a U.S. Senator and, subsequently, Chief Justice of the Oregon Supreme Court, and therefore possibly interested in the value of legislative history. *See* Biographical Directory of the U.S. Congress, https://bioguide.congress.gov/search/bio/K000074 (accessed Dec 20, 2021). See note 13, *infra*, for a bit more about Kelly.

the precedents of other conventions of this character and preserve a record of its debates for future reference."[11] And Kelly wasn't thinking of the near future: "[I]t will hardly be advisable at this time to have the debates published. But a convention of this character * * * happens only once in an age. * * * What an interest we feel in looking over the records of similar proceedings in other states of those who have gone before us!"[12] Kelly suggested that it would only cost a "small amount" of four or five hundred dollars to have the debates reported.

Some other members of the convention didn't think the amount was so small. Mr. Olney objected, saying, "No reporter ought to be created or called into existence as an officer of this convention, and the expense therefore incurred for the people to pay ultimately in some form."[13]

---

[11] Oregonian, Aug 17, 1857, *in* Carey at 57–58.

[12] *Id.* at 58.

[13] *Id.* In a fascinating bit of background, (Judge) Olney and Kelly had met before in very different circumstances. In 1854, Kelly was appointed to represent Charity Lamb, a woman accused of murdering her abusive husband; Judge Olney presided over her trial and sentencing. Ronald B. Lansing, *The Tragedy of Charity Lamb, Oregon's First Convicted Murderess*, 101 Or Hist Q 40, 43–44 & n 7 (2000). According to later news coverage, Charity's infant son attended her trial "in the arms of Mrs. Elkins, a wet nurse," who was probably not the wife of Luther Elkins, another convention delegate (or at least I can't find any source that says exactly who she was). *Id.* at n 15; *Biographical Sketch of Luther Elkins*, https://sos.oregon.gov/archives/exhibits/constitution/Pages/during-about-elkins.aspx (accessed Dec 20, 2021). Ultimately, Kelly had the last word: As a Supreme Court justice, he ruled on the

Another delegate, Mr. Dryer,[14] said that Kelly was "a little ahead of his time. He is 'Young America.'"[15]

Kelly was not prepared to back down on the question of a reporter to document the proceedings. "Such a body as this assembles but once in a lifetime; its proceedings are sought after as a matter of historical record, and I do think we ought not to let them pass by when we

---

disposition of all of Olney's assets after Olney's death. *Brown v. Brown*, 7 Or 285, 295 (1879).

[14] Editor of the *Weekly Oregonian*, engaged in a decade-long journalistic battle with Asahel Bush, editor of the *Oregon Statesman*. *Biographical Sketch of Thomas Dryer*, https://sos.oregon.gov/archives/exhibits/constitution/Pages/during-about-dryer.aspx.

[15] Oregonian, Aug 17, 1857, *in* Carey at 59. It's unclear whether Dryer meant this as an insult, a compliment, or a joke. For more on the "Young America" political movement, *see generally* David B. Danbom, *The Young America Movement*, 67 J Ill St Hist Soc'y 294 (1974), which provides an overview. Among other things, Young Americans believed in "popular sovereignty for territories and direct popular election of the President, judges, and senators" as well as states' rights. *Id.* at 301. Before the 1852 Democratic National Convention, one leading Young American wrote,

> "Young America is *not* the offspring of old fogydom. Being wise in our generation, and being determined not to be burthened with more fathers than there is any need for, we declare that the young democracy, either in its principles or in its actions, has no connection * * * with those antiquated, stiff-cravated personages, who have hitherto regarded themselves as the owners of the democratic party * * * who individually are deficient in everything, excepting a questionable mediocrity * * *."

Id. at 302 (quoting George Sanders, *Congress, the Presidency and the Review*, 30 Democratic Rev 203 (1852)).

can preserve them in full at a comparatively small cost."[16] He said that history would benefit from the record:

> "Every person knows that there are many questions arising at the birth of a state of deep interest in after years and to know how eagerly men look back to see the motives that prompt men in the formation of a state; what they assign as their reasons for supporting this clause in the constitution, and opposing that."[17]

He accused the men who opposed hiring a reporter of being "penny wise and pound foolish" for complaining about the cost of a few hundred dollars—men who would prefer to "allow what is said and done at this convention to pass to oblivion."[18]

Olney supported having a guard and someone to clean up (a sergeant-at-arms and a doorkeeper), but again argued, "I think it is not pertinent to the business for which we are called together, that we should have a reporter."[19] Dryer supported the idea of having a reporter, saying, "I will contribute my mite from my own pocket to pay him, if he is

[16] Oregonian, Aug 17, 1857, *in* Carey at 60.

[17] *Id.*

[18] The delegates disagreed strongly about exactly how much it would cost to hire a reporter. Kelly estimated a total of four or five hundred dollars; Logan argued that, at a rate of $10 per day for transcribing, the cost could easily rise to "$900, or $2,000, or more." Oregonian, Aug 22, 1857, *in* Carey at 141.

[19] Oregonian, Aug 17, 1857, *in* Carey at 61.

paid in no other way."[20] Ultimately, the hiring of a reporter was put off for another day. But the delegates did turn to the records of other constitutional conventions to answer another important question: whether each member of the convention should be required to swear an oath to support the United States Constitution.[21]

Still without consensus on the question of a reporter, the delegates took care of other administrative tasks, including adopting a resolution for the purchasing of stationery to be used at the convention.[22] The next step was "to furnish desks for the use of the several reporters that may present themselves her and desire to report the proceedings of this convention for the different newspapers in this territory."[23] Dryer noted that "there were but two reporters here inside the bar [and he] did not desire that those two newspapers should get ahead of their compeers [sic]."[24] Given Dryer's position as editor of the *Oregonian*, one of the two newspapers regularly reporting on the convention, his concern seems a bit performative.

---

[20] *Id.* at 62. As editor of the *Oregonian*, Dryer was likely already making a great deal of money from documenting the convention.

[21] Oregonian, Aug 18, 1957, *in* Carey at 68. Dryer objected strenuously, saying, "It may be important for the gentleman from Benton (Mr. Kelsay) that he should take an oath to obey the requirements of the constitution of the United States. I do not think it is with me, for I am a good-law abiding citizen, intending to do that." *Id.* at 69.

[22] *Id.* at 71.

[23] *Id.* at 75.

[24] *Id.*

After another delegate pointed out that there were an additional three desks already available, Dryer objected that "there were five newspapers in the territory besides the two represented within the bar" and insisted that their reporters should also be invited in.[25] Of course, Dryer said, "he saw that his friend Bush [editor of the *Statesman*] was there, and for his own (Mr. Dryer's) part, he would take care to look after the interests of the *Oregonian*," but the other reporters should be invited.[26] So the outside reporter question was resolved, without the formal hiring of a Convention reporter. No one mentioned how much those extra desks would cost.

The convention inched forward toward hiring an official reporters. Smith proposed creating a three-person committee, who would "confer with, and, if practicable, secure the services of one or more reporters to report the debates and proceedings of this body," noting that the reporters would have to agree to be paid only after Congress or the legislature appropriated money for them.[27] Smith

---

[25] *Id.* A reporter from California was allowed to use one of those desks beginning August 27, 1857. Oregonian, Aug 27, 1857, *in* Carey at 196.

[26] Oregonian, Aug 18, 1857, *in* Carey at 76.

[27] Oregonian, Aug 19, 1857, *in* Carey at 104. That's Delazon Smith, who, according to an excellent collection of sources assembled on Wikipedia, was expelled from Oberlin, and "after a display of his true character he was excommunicated from the church and expelled from a literary society." *Misplaced Honors*, Oberlin Evangelist, Dec 19, 1860, http://dcollections.oberlin.edu/digital/collection/evangelist/id/5551. He served as Oregon's U.S. Senator from February 14 to March 4, 1859. And, of course, he assured Mr. Deady that the word "free"

claimed, "I have heard numerous members of the convention express a desire to have the debates and proceedings of this convention reported, taken down at this time, and filed with the archives of the territory or state, for future publication." He assured the delegates that he had already "conferred with the two best reporters in the territory, and who are doubtless competent of the task," and that those reporters were willing to work on the basis of promised future payment.[28]

Even so, not everyone was on board. Logan continued to oppose it "on the ground of expense."[29] He warned that the expenses of the convention would already "swallow up the entire revenue of the territory for one year, if not more," and did not want to add to them.[30] Olney came up with a middle ground: the committee would research reporters, but it would not have the authority to hire one.[31] After some negotiating—Smith said reporting would not cost more than $300 to $500, Watkins wanted to know "if the $500 would pay for simply taking the debates in shorthand, or for writing them out"—the delegates agreed.[32]

---

in "free and equal elections" did not refer to anyone other than white men and advocated strongly for using the word "white" to exclude all children of color from schools. *See* Oregonian, Sept 10, 1857, *in* Carey at 318; Oregonian, Sept 11, 1857, *in* Carey at 331.

[28] Oregonian, Aug 19, 1857, *in* Carey at 104.

[29] *Id.*

[30] Statesman, Aug 19, 1857, *in* Carey at 105.

[31] Oregonian, Aug 19, 1857, *in* Carey at 104.

[32] Statesman, Aug 19, 1857, *in* Carey at 105.

The reluctant Logan was appointed to the committee with Smith and Hendershott.[33]

By August 21, the delegates had voted down a resolution to consider employing a chaplain, on religious rather than fiscal grounds.[34] And by the afternoon of the 22nd, they had come up with a creative new solution to the problem of a reporter. Mr. Logan offered a resolution that a three-person committee be appointed to actually employ (not just consider) a reporter for the convention,

> "provided, said reporters shall receive no compensation except such as may be paid by the federal government, or by the individual members of this convention; and provided further, that in case said expenses are paid by the members of the convention, *each member shall pay in proportion to the amount or bulk*

[33] Oregonian, Aug 19, 1857, *in* Carey at 104. Hendershott is perhaps most interesting for having suggested Jacksonville as the capital of Oregon, which at the time contained Oregon's first Chinatown. *See* Jeanena Whitewilson, *Chinatown*, Jacksonville Rev (Jan 28, 2012), http://jacksonvillereview.com/chinatown-by-jeanena-whitewilson/; *Biographical Sketch of Sidney B. Hendershott*, https://sos.oregon.gov/archives/exhibits/constitution/Pages/during-about-hendershott.aspx (accessed Dec 20, 2021).

[34] Oregonian, Aug 21, 1857, *in* Carey at 113. Mr. Campbell, who had proposed the resolution, said that he understood fears about "the union of church and state," but that "there was no danger of such a union in the convention or even in the United States." *Id.* The resolution was voted down anyway.

> *reported for him*, to be estimated by the reporter and approved by the convention."[35]

In a way, they had taken Dryer up on his offer to pay out of his own pocket for the reporter. And they had found a reporter to perform the task "for the sum of $10 for every day actually employed in note-taking and making the transcript."[36]

Smith said the cost would be a "trifling expense, * * * a very small sum to secure the manuscript of the more important proceedings of this body, including the debates."[37] Optimistically, Smith said that he thought the people of Oregon would very cheerfully pay for the reports

---

[35] *Journal of the Proceedings*, Aug 22, 1857, *in* Carey at 134 (emphasis added). Several delegates were unhappy about this plan. Smith, speaking at some length, complained, "And the idea that every man shall pay for the publication of what he says, and all that sort of thing, is, in my opinion, conceived in a spirit anything but creditable to the author of the resolution. I may be selfish in opposing that, because I think it would break me to have to pay for my much speaking." Oregonian, Aug 22, 1857, *in* Carey at 138.

[36] *Id.* at 134–35. The reporter who had offered to work for $10 per day was Mr. P.J. Malone. *Journal of the Proceedings*, Aug 22, 1857, *in* Carey at 134. It's likely he was the same P.J. Malone who was later the editor of Smith's *Oregon Democrat*, renamed *The Inquirer*, "the first of several papers suppressed for disloyalty to the government"—that is, "its opposition to the conduct of the war"— in 1862. Flora Belle Ludington, *Oregon Newspapers 1846-70*, 26 Q Or Hist Soc 229, 233-34 (1925). The other potential reporter, Pearne, was then editor of the *Pacific Christian Advocate*, which "made itself felt in favor of Oregon as a free state." *Id.* at 254.

[37] Oregonian, Aug 22, 1857, in *Carey* at 135.

of the debates and proceedings of this convention, that they might have them for future reference and use."[38]

But things devolved from there. Logan—who had never wanted to hire a reporter in the first place—suggested an amendment to the resolution for hiring a reporter that began, "Resolved, that it is *inexpedient* to have the proceedings reported at the expense of the territory of the state," which prompted a series of lengthy speeches in response accusing him of acting in bad faith and insulting the reporter.[39]

Smith began by saying, "I should very much regret to see a factious spirit possess the convention on so grave a matter as debating the constitution." He lambasted the claim that the proposed reporter was too expensive at $10 per day, saying that Congress paid its reporters that price and "[p]apers of very moderate means pay their reporters this sum and sometimes more."[40] He reframed the issue as the problem of men being embarrassed about their own words and positions:

> "I have much miscounted the mental calibre of this body, if there is not much uttered here worthy of being properly recorded * * *. To say that we are going to utter a great deal of nonsense is to commit ourselves, and render ourselves ridiculous in the eyes of our

[38] *Id.*

[39] *Id.* (emphasis added).

[40] *Id.* at 136. No information on whether the *Oregonian* was one of those papers.

> constituents and contemptible in the eyes of the country."[41]

The irony of the drive to obtain the services of a reporter for the convention is that some of the very worst things said might not have been documented, or at least might not have been as well-known.[42] When Smith said, "For myself, it is no part of my purpose to utter anything in this hall that I do not desire to see upon the record, and meet me on the judgment or elsewhere," he was obviously unconcerned that anything he said might reflect poorly on him in the future.[43] Indeed, he expected that he would be lauded in the future for his statements and actions.

Not everyone believed that the convention was so important that it was worth at least $300 to record it. Logan, ever skeptical, said that they were just stitching together scraps: "The making of a constitution now is not such an interesting proceeding as it may have been heretofore. * * * It is no solution of new principles; it is no

---

[41] *Id.* at 137.

[42] *See generally* Timothy Wright, *History in Oregon Constitutional Interpretation—Why We Should Not Do It That Way*, 9 Or App Almanac 39 (2019) (arguing that convention records demonstrate that white supremacy was the animating principle of the convention delegates). It's unnecessary to reprint some of the particularly vile things said at the convention, but a few items—debate over whether the constitution should refer to "white" or "pure white" people, concern about the risk of people with any Black or native blood being able to attend schools—should give you the general sense. *See* Statesman, Sept 10, 1857, *in* Carey at 324; Oregonian, Sept 11, 1857, *in* Carey at 331.

[43] Oregonian, Aug 22, 1857, *in* Carey at 137.

solution of new doctrines. We have a number of models before us, and have only to select such as are applicable to the country at this time."[44]

Be Careful What You Wish For: Relying on the Delegates' Motives

The delegates never actually managed to hire a reporter.[45] The advocates of hiring a reporter anticipated a future in which their own motives and opinions might guide the interpretation of the constitution itself. Kelly said, "It is our duty to transmit those things to posterity which take place at the birth of a state, to those who may come after us, for their guidance, for the government."[46] He likened the need for reports of their own debates to the desire for a record of the United States Constitutional Convention, commenting on just how much Madison's notes had been worth and saying (modestly), "It is true the interest does not cluster round us that they were the center of, but it may not be so in aftertimes."[47] Smith warned that the convention journal, which recorded only amendments proposed and votes taken, would not suffice. He said that "the life and

[44] *Id.* at 141–42.

[45] *See* Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)*, 37 Willamette L Rev 469 (2001). Although the framers didn't agree on hiring a reporter, arguably those statements demonstrate that at least some of the framers believed that the record of their intent *would* inform later interpretation of the Constitution, whether or not it *should*.

[46] Oregonian, Aug 22, 1857, *in* Carey at 141.

[47] *Id.* at 140.

soul of the whole proceedings here [are] our reasons why we have acted thus and so, and * * * [t]he journal will not show that. Perhaps it will never be referred to in them, but it is not so with the debates."[48]

Smith foreshadowed one of Oregon's models of statutory and constitutional interpretation—relying on the drafters' intent[49]:

> "Everyone knows that the spirit of a law is that which entered into its production at the time it was enacted. What reasons demanded it; what was the will and intention of the legislators; what were their motives for passing that law? How will that be gathered? From the record and from the history of the times. But if these be gone, how are we to arrive at the motives of that legislature?"[50]

The framers' failure to hire a reporter may suggest that at least the majority of the convention didn't care about documenting their motives, however much Smith and Kelly thought it was vital to do so.[51] But it appears to have been entirely about the cost. Waymire, Logan, and Williams all

---

[48] *Id.* at 141.

[49] Like it or not.

[50] Oregonian, Aug 22, 1857, *in* Carey at 140.

[51] *See State v. Hemenway*, 353 Or 129, 157 n 7, 295 P3d 617, 634 (2013), *vac'd*, 353 Or 498, 302 P3d 413 (2013) (Landau, J., concurring) ("That the delegates to the Oregon Constitutional Convention expressly declined to create any official record of their debates would seem to suggest that they did not care one way or the other.").

opposed it on the basis of expense.[52] Logan added that "[t]he making of a constitution now is not such an interesting proceeding as it may have been heretofore."[53] And Williams didn't think a single reporter would be able to keep up but didn't want to pay for a second.[54] Sadly, the arguments of Mr. Marple, who supported hiring a reporter, were never documented.[55] The motion to hire a reporter was withdrawn. and no reporter ever hired.

Since then, in at least some cases the early Oregon appellate courts indeed discerned the "spirit" of certain laws by considering the will and intent of the framers. In 1863, only four years after ratification, the Supreme Court relied on the linguistic choices of the framers to decide the authority of justices of the peace.[56] It said, "If the framers of the Constitution had intended to limit [their jurisdiction] to one hundred dollars, they could and certainly would have used different and more appropriate language to embody their intention."[57] There's certainly no indication that it

---

[52] Oregonian, Aug 22, 1857, *in* Carey 135, 141, 143. Waymire added "that "[h]e had often said many things which he had as lief *[sic]* not have reported; certainly he would not be willing to pay for having them reported, though if the reporters reported him without charge, he would take it as a compliment." *Id.* at 143.

[53] *Id.* at 141–42.

[54] *Id.* at 142.

[55] The *Oregonian* says that Marple "followed in a speech of considerable length" in favor of an official reporter but does not summarize it. *Id.* at 143. Likewise, the *Statesman* reports only, "Mr. Marple addressed the convention at length. He closed by announcing that he should support [the motion]." *Id.* at 146.

[56] *Noland v. Costello*, 2 Or 57 (1863).

[57] *Id.* at 58.

looked to anything beyond the specific wording of the constitutional provision to reach its decision.

But Kelly, one of the greatest advocates of hiring a reporter, did consult the history of the convention during his time as a Supreme Court justice. Of his some 20 opinions, five engaged with the framers' intent to interpret the constitution. In Kelly's third case on the Supreme Court, *Burch v. Earhart*, he delved into the framers' intent.[58] The case involved the apparently insufficient amount of money appropriated for the expenses of the penitentiary system and the prison superintendent's request for a writ of mandamus instructing that he be paid.[59] Kelly relied several times on the intent of the framers, saying, "To specify the several appropriations [in the title of a bill] more minutely would be to make the title of the act as long as the act itself, which surely was never contemplated by the framers of the constitution."[60]

Addressing an argument regarding Article 9 , section 7 of the constitution, Kelly wrote,

> "We think these words were not intended by the framers of the constitution to be taken in that restricted sense. If it had been so intended, they doubtless would have used the words 'current expenses of the state

[58] *Burch v. Earhart*, 7 Or 58 (1879).

[59] The legislature had appropriated $40,000 for penitentiary expenses over a two-year period. The penitentiary fund ran nearly $10,000 over budget. *Id.* at 64.

[60] *Id.* at 66.

> during the biennial term," or some other apt words to express that meaning. * * * The object had in view by the insertion of that section in the constitution was to prevent the introduction of such matters of legislation into appropriation bills as were not germane."[61]

He added, "We think that neither the letter nor the spirit of the constitution requires that such a construction should be placed upon that instrument."[62] The prison superintendent got his writ of mandamus.

Kelly's reliance on his personal knowledge of the framers came particularly to the fore in a subsequent banking case.[63] The case involved the interpretation of Article II, section 1 of the constitution, which addressed the ability of the legislature to establish a state bank or any bank to exist that issued banknotes.[64] Addressing the bank's argument that Article II, section 1 contained two distinct provisions about banking, Kelly turned to a range of historical sources. He began by saying that the bank's argument "is not the proper construction to be placed upon it, nor was it so intended by the convention which framed the Constitution."[65] He stated that "as a matter of history,"

---

[61] *Id.*

[62] *Id.* at 67. Recall that at the convention, Smith had argued that "the spirit of a law" came from the motives of the men who wrote it. Oregonian, Aug 22, 1857, *in* Carey at 140.

[63] *State ex rel. Caples v. Hibernian Savings and Loan Ass'n*, 8 Or 396 (1880).

[64] *Id.* at 399.

[65] *Id.*

Oregon had only ever used currency made of gold and silver, never bank notes.[66] He then turned to the personal experiences of the convention delegates: "Many of the members of the constitutional convention * * * were not unfamiliar with banking operations, in the States where they had lived before coming to Oregon. They had known or heard * * * of the losses and consequent suffering" that people experienced when banks failed to redeem bank notes, and "it was to prevent a recurrence of these remembered evils" that the framers included a prohibition of issuance of banknotes.[67] Kelly directly described the knowledge of the framers:

> "It is hardly to be supposed that the members of that body did not know that banks of deposit and discount and banks of exchange were necessary to properly transact business in every commercial State; or that they were ignorant of the benefits * * *. In order to arrive at a correct understanding of what the convention intended by placing that section in the Constitution, we have examined its journal and proceedings, and they only tend to confirm the opinions before expressed."[68]

He cited the debates at the convention, to the extent that a record did exist, referencing "the debate which took place upon this section" and the purpose of one delegate's

[66] *Id.* at 399–400.
[67] *Id.* at 400.
[68] *Id.*

proposed amendment to the section.[69] Based on a comparison of the engrossed copy of the article with the printed version, Kelly concluded that the court was "well satisfied" as to the convention's intent and that a stray semicolon "was a clerical mistake."[70]

Penny Foolish

There's some irony in the fact that, for all the high-minded soaring rhetoric espoused by the delegates, they were unwilling to pay for those speeches to be reported officially. The cost appears to have been the primary obstacle, rather than some belief that the records should reveal nothing about their deliberations.[71] That penny-pinching does align with a popular rumor that Oregon eliminated periods in its case citations to save the cost of the ink.[72]

Of course, it was no secret to the delegates that their statements *were* being reported—by the *Oregonian* and the

[69] *Id.* at 401.

[70] *Id.*

[71] *See* David Schuman, *The Creation of the Oregon Constitution*, 74 Or L Rev 611, 619 (1995) (describing failure to hire reporter as "an early indication of the convention's obsession with thrift"); *id.* at 621 (explaining that "delegate accountability to constituents" was "a minor factor in a convention that was scheduled to meet only one time").

[72] The author and multiple other former Supreme Court and Court of Appeals clerks recall this story but not its source. As of writing I have been unable to find a historical source to cite.

Statesman and later by a California newspaper.[73] For the price of several hundred dollars, there is no objective report. We are fortunate that the *Oregonian* and *Statesman* documented the convention as closely as they did[74] because they reveal much more than the framers might have anticipated in the absence of an official reporter.[75] Justice Kelly could rely to his own memory of those debates. But we have only the notes of unnamed journalists at the *Oregonian* and *Statesman*, two competing newspapers with different political agendas that chose which speeches to document closely and which to elide.[76]

I'm not advocating that the courts should look to the unofficial newspaper records of the convention any more than they already do as evidence of what the framers intended the Constitution to mean, particularly given the inconsistencies between newspaper reports. But, as a matter of history alone, there is indeed evidence that at

---

[73] Oregonian, Aug 18, 1957, *in* Carey at 75; Oregonian, Aug 27, 1857, *in* Carey at 196.

[74] Poor Mr. Marple might disagree, given the inattention to his speeches. Oregonian, Aug 22, 1857, *in* Carey at 143; Statesman, Aug 22, 1857, *in* Carey at 146 (both indicating that Marple spoke at length without delving into contents).

[75] Although delegates would have known that their statements were being reported in some form, there was at times a significant lag between an actual debate and the publication of the newspaper account. *E.g.*, Carey at 354 (events of September 15, 1857 published in October 10, 1857 edition of *Oregonian*).

[76] As Judge Schuman notes, the newspaper accounts "are not always reliable. The editor of each major newspaper was a delegate. The speeches and pet issues of each are fully reported in his own paper, while the rival editor's tend to receive less scrupulous attention." Schuman, *supra* note 71, at 622.

least some of the framers believed that their motives and intent would and should guide the state in the future.

OREGON COURT OF APPEALS
1163 STATE STREET
SALEM, OREGON
97301-2563

(503) 986-5678
TTY (503) 986-5504
FAX (503) 986-5865

December 22, 2021

Dear Appellate Practitioner:

We are pleased to share a draft of a proposed temporary-rule amendment to the Oregon Rules of Appellate Procedure (ORAP). The proposed changes appear in "redline" changes to the current rules. This temporary ORAP will allow our court to issue nonprecedential opinions when it goes into effect. Due to the bar's significant interest in this proposal, we are first sharing it with you for comment.

Our court diligently worked over the past year to decrease our time to disposition and issue more timely opinions. As you have heard in the past, our court is one of the busiest intermediate appellate courts in the nation and we also lack comparable staff resources to similar state intermediate appellate courts. Despite our resource challenges, we have had great success in 2021. We had a very productive year and great success getting out opinions without sacrificing quality or attention

to our mission of justice. We have accomplished that, in part, by issuing more short *per curiam* opinions that do not always recite all of the facts or provide an exhaustive explanation of the court's analysis on every issue. These opinions are directed to the parties and the trial courts and other tribunals that already have the background information on the case. The opinions, however, are still considered precedential even though they are not intended to serve as precedent and make no new law.

To address that concern, clarify our jurisprudence, and match our limited resources to our cases while maintaining our focus on justice, we have concluded that we need to add a new form of disposition to those currently available for resolving the matters presented to us: a nonprecedential opinion. This new option will allow us to better match the form of disposition to the nature and complexity of the case at issue. For nonprecedential opinions, we anticipate producing more short, clear, and timely dispositions targeted at resolving the disputes presented to us by the parties rather than announcing law for the entire state. Having a new form of disposition available to us will not change our approach to reviewing briefs, preparing for argument, analyzing cases, or reaching decisions, but will, in some cases, change how much we write in a particular opinion.

Every case is important to the parties to the case. Not every case sets new law or requires an explanation targeted at an audience beyond the parties and the lower tribunal. A nonprecedential

opinion option will allow us to issue more timely opinions through both nonprecedential and precedential dispositions. Significantly, we have researched other similar courts, and every state intermediate appellate court that we examined issues a form of nonprecedential opinion to help ensure the timely and case-appropriate disposition of appeals.

We also anticipate that adopting nonprecedential opinions as on option for our decisions will provide a building block to reduce our "AWOP" rate and to issue more written decisions in the future. That is because a nonprecedential opinion option will allow us to provide the parties with an explanation on cases that are not appropriate for publication and we might otherwise AWOP. Without that option or without further resources, we will not have the ability to make a significant dent in our current AWOP rate.

We understand that this change may be new for some although not different for those who have practiced before other intermediate appellate courts. We would like to hear and consider your comments. To address any concerns, we have provided an extended comment period until March 31, 2022 to provide comments or suggestions on the enclosed text. If you wish to comment, please send any comments to COA.Rule.Comment@ojd.state.or.us by that date. Subject to our consideration of your comments, we expect that a temporary amendment would likely take effect in April or May 2022. Once in effect as a temporary rule, we will continue to

analyze whether it makes sense to pursue this option as a permanent rule based on our analysis of the project and your feedback.

Thank you for your work with us in helping us to continue, and improve, the delivery of justice to those who appear before our court.

- The Oregon Court of Appeals

PROPOSED TEMPORARY AMENDMENTS TO OREGON RULES OF APPELLATE PROCEDURE (REDLINE CHANGES)

(Markup applied to Amendments Effective January 1, 2021, Version date: July 12, 2021)

Rule 5.20
REFERENCE TO EVIDENCE AND EXHIBITS; CITATION OF AUTHORITIES

(1) Briefs, in referring to the record, shall make appropriate reference to pages and volumes of the transcript or narrative statement, or in the case of an audio record, to the tape number and official cue or numerical counter number or, in the case of an exhibit, to its identification number or letter.

(2) If the precise location on the audio record cannot be determined, it is permissible to indicate between which cue numbers the evidence is to be found.

(3) In referring to any part of the record transmitted to the Administrator by optical disk or by Secure File Transfer Protocol (SFTP) in Portable Document Form (PDF), the court prefers citation to the page number of the PDF file. In any judicial review in which the agency has served a self-represented party with the record in conventional paper form, a party citing to the record may either:

(a) Include in the party's brief parallel citations to the record in conventional paper form; or

(b) On request of any self-represented party, provide in writing to that party parallel citations to the record in conventional paper form.

(4) The following abbreviations may be used:

"P Tr" for pretrial transcript;

"Tr" for transcript;

"Nar St" for narrative statement;

"ER" for Excerpt;

"App" for Appendix;

"AR Tape No. ___, Cue No. ___" for audio record;

"PAR" for pretrial audio record;

"PDF" for PDF of agency record filed by electronic means with the Administrator;

"TCF" for trial court file;

"Rec" for record in judicial review proceedings only;

"Ex" for exhibit.

Other abbreviations may be used if explained.

(5) Guidelines for style and conventions in citation of authorities may be found in the Oregon Appellate Courts Style Manual.[1]

(6) Cases affirmed without opinion by the Court of Appeals should not be cited as authority. Cases decided by nonprecedential memorandum opinion may only be cited as provided in ORAP 10.30(4).

Rule 5.40
APPELLANT'S OPENING BRIEF: STATEMENT OF THE CASE

The appellant's opening brief shall open with a clear and concise statement of the case, which shall set forth in the following order under separate headings:

(1) A statement, without argument, of the nature of the action or proceeding, the relief sought and, in criminal cases, the indictment or information, including citation of the applicable statute.

(2) A statement, without argument, of the nature of the judgment sought to be reviewed and, if trial

was held, whether it was before the court or a jury.

(3) A statement of the statutory basis of appellate jurisdiction and, where novelty or possible doubt makes it appropriate, other supporting authority.

(4) A statement of the date of entry of the judgment in the trial court register, the date that the notice of appeal was served and filed, and, if more than 30 days elapsed between those two dates, why the appeal nevertheless was timely filed; and any other information relevant to appellate jurisdiction.

(5) In cases on judicial review from a state or local government agency, a statement of the nature and the jurisdictional basis of the action of the agency and of the trial court, if any.

(6) A brief statement, without argument and in general terms, of questions presented on appeal.

(7) A concise summary of the arguments appearing in the body of the brief.

(8) (a) In those proceedings in which the Court of Appeals has discretion to try the cause anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall concisely state the reasons why the court should do so.*

(b) In those proceedings in which the

Court of Appeals has discretion to make one or more factual findings anew on the record and the appellant seeks to have the court exercise that discretion, the appellant shall identify with particularity the factual findings that the appellant seeks to have the court find anew on the record and shall concisely state the reasons why the court should do so.*

(c) The Court of Appeals will exercise its discretion to try the cause anew on the record or to make one or more factual findings anew on the record only in exceptional cases. Consistently with that presumption against the exercise of discretion, requests under paragraph (a) or (b) of this section are disfavored.

(d) The Court of Appeals considers the items set out below to be relevant to the decision whether to exercise its discretion to try the cause anew on the record or make one or more factual findings anew on the record. These considerations, which are neither exclusive nor binding, are published to inform and assist the bar and the public.

(i) Whether the trial court made express factual findings, including demeanor-based credibility findings.

(ii) Whether the trial court's decision comports with its express factual findings or with uncontroverted evidence in the record.

(iii) Whether the trial court was specifically alerted to a disputed factual matter and the importance of that disputed factual matter to the trial court's ultimate disposition of the case or to the assignment(s) of error raised on appeal.

(iv) Whether the factual finding(s) that the appellant requests the court find anew is important to the trial court's ruling that is at issue on appeal (i.e., whether an appellate determination of the facts in appellant's favor would likely provide a basis for reversing or modifying the trial court's ruling).

(v) Whether the trial court made an erroneous legal ruling, reversal or modification of which would substantially alter the admissible contents of the record (e.g., a ruling on the admissibility of evidence), and determination of factual issues on the altered record in the Court of Appeals, rather than remand to the trial court for reconsideration, would be judicially efficient.

(9) A concise summary, without argument, of all the facts of the case material to determination of the appeal. The summary shall be in narrative form with references to the places in the transcript, narrative statement, audio record, record, or excerpt where such facts appear.

(10) In a dissolution proceeding or a proceeding involving modification of a dissolution judgment,

the summary of facts shall begin with the date of the marriage, the ages of the parties, the ages of any minor children of the parties, the custody status of any minor children, the amount and terms of any spousal or child support ordered, and the party required to pay support.

(11) Any significant motion filed in the appeal and the disposition of the motion. A party need not file an amended brief to set forth any significant motion filed after that party's brief has been filed.

(12) Any other matters necessary to inform the court concerning the questions and contentions raised on the appeal, insofar as such matters are a part of the record, with reference to the parts of the record where such matters appear.

In the Court of Appeals, the appellant's brief may also include, under the heading "ORAP 10.30," a statement explaining whether, in the appellant's view, the court's decision in the case should be precedential under the factors listed in ORAP 10.30(2).

Rule 5.55
RESPONDENT'S ANSWERING BRIEF

(1) (a) The respondent's answering brief must follow the form prescribed for the appellant's opening brief, omitting repetition of the verbatim parts of the record in appellant's assignments of error.

(b) The brief must contain a concise answer to each of the appellant's assignments of error preceding respondent's own argument as to each.

(2) Under the heading "Statement of the Case," the respondent specifically shall accept the appellant's statement of the case, or shall identify any alleged omissions or inaccuracies, and may state additional relevant facts or other matters of record as may apply to the appeal, including any significant motion filed on appeal and the disposition of the motion. The additional statement shall refer to the pages of the transcript, narrative statement, audio record, record, or excerpt in support thereof but without unnecessary repetition of the appellant's statement.

(3) In the Court of Appeals, the respondent's brief may also include, under the heading "ORAP 10.30," a statement explaining whether, in the respondent's view, the court's decision in the case should be precedential under the factors listed in ORAP 10.30(2).

(~~3~~4) If a cross-appeal is abandoned, the respondent shall immediately notify the appellate court in writing and, if notice has not been given previously, the respondent shall notify the court of the abandonment when the respondent's answering brief is filed, in writing and separately from the brief.

(45) If the court gives an appellant leave to file a supplemental brief after the respondent's answering brief has been filed, the respondent may file a supplemental respondent's answering brief addressing those issues raised in the appellant's supplemental brief.

Rule 6.25
RECONSIDERATION BY COURT OF APPEALS

(1) As used in this rule, "decision" means an opinion, per curiam opinion, affirmance without opinion, and an order ruling on a motion or an own motion matter that disposes of the appeal. A party seeking reconsideration of a decision of the Court of Appeals shall file a petition for reconsideration. A petition for reconsideration shall be based on one or more of these contentions:

(a) A claim of factual error in the decision;

(b) A claim of error in the procedural disposition of the appeal requiring correction or clarification to make the disposition consistent with the holding or rationale of the decision or the posture of the case below;

(c) A claim of error in the designation of the prevailing party or award of

costs;

(d) A claim that there has been a change in the statutes or case law since the decision of the Court of Appeals; ~~or~~

(e) A claim that the Court of Appeals erred in construing or applying the law; or~~.~~

(f) A claim that a decision issued as a nonprecedential memorandum opinion, as defined in ORAP 10.30, should be designated as precedential under the factors listed in subsection (2) of that rule. A party seeking reconsideration under this paragraph shall prominently display in the caption of the petition the words "SEEKS RECONSIDERATION OF NONPRECEDENTIAL DESIGNATION."

Claims addressing legal issues already argued in the parties' briefs and addressed by the Court of Appeals are disfavored.

(2) A petition for reconsideration shall be filed within 14 days after the decision. The petition shall have attached to it a copy of the decision for which reconsideration is sought. The form of the petition and the manner in which it is served and filed shall be the same as for motions generally, except that the petition shall have a title page printed on plain white paper and containing the following information:

(a) The full case caption, including appropriate party designations for the parties as they appeared in the court from which the appeal was taken and as they appear on appeal, and the trial and appellate court case numbers; and

(b) A title designating the party filing the petition, such as "Appellant's Petition for Reconsideration" or "Respondent's Petition for Reconsideration."

(3) The filing of a petition for reconsideration is not necessary to exhaust remedies or as a prerequisite to filing a petition for review.

(4) If a response to a petition for reconsideration is filed, the response shall be filed within seven days after the petition for reconsideration was filed. The court will proceed to consider a petition for reconsideration without awaiting the filing of a response, but will consider a response if one is filed before the petition for reconsideration is considered and decided.[1]

(5) A request for reconsideration of any other order of the Court of Appeals ruling on a motion or an own motion matter shall be entitled "motion for reconsideration." A motion for reconsideration is subject to ORAP 7.05 regarding motions in general.

Rule 10.30
NONPRECEDENTIAL MEMORANDUM OPINIONS

(1) In the Court of Appeals, the judges participating in the decision of an appeal submitted to a department may issue a decision as a nonprecedential memorandum opinion. A decision shall be nonprecedential only if it is designated as such as provided in subsection (5) of this rule, or if it is an affirmance without opinion. A nonprecedential memorandum opinion may be authored or per curiam.

(2) The following factors are relevant in determining whether a written opinion will be precedential:

(a) whether the opinion establishes a new principle or rule of law or clarifies existing case law;

(b) whether the opinion decides a novel issue involving a constitutional provision, statute, administrative rule, or rule of court;

(c) whether the opinion resolves a significant or recurring legal issue for which there is no clear precedent;

(d) whether the opinion criticizes existing law;

(e) whether the opinion is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests that the disposition of the Court be precedential; or

(f) whether the opinion resolves a conflict among existing nonprecedential Court of Appeals' decisions brought to the Court's attention.

(3) All written opinions issued by the Court of Appeals sitting *en banc* are precedential.

(4) (a) Nonprecedential memorandum opinions have no precedential effect in the Oregon appellate courts, nor shall they be considered precedential in other tribunals of this state, except as relevant under the law of the case doctrine or the rules of claim preclusion or issue preclusion. However, nonprecedential memorandum opinions may be cited as persuasive authority if no precedential opinion adequately addresses the issue before the court, in briefing under ORAP 5.40 or 5.55 to argue that a precedential decision is warranted because of conflicting nonprecedential memorandum opinions, or in a petition for reconsideration under ORAP 6.25 claiming that a decision issued as a nonprecedential memorandum opinion should be designated as precedential under the factors listed in subsection (2) of this rule.

(b) If a party cites a nonprecedential memorandum opinion, the party shall explain the reason for citing it and how it is relevant to the

issues presented. Additionally, the case citation must include a parenthetical indicating "nonprecedential memorandum opinion."

(5) An opinion designated as a nonprecedential memorandum opinion under this rule will contain a notation on the title page of the opinion substantially to the effect of the following: "***This is a nonprecedential memorandum opinion pursuant to ORAP 10.30 and may not be cited except as provided in ORAP 10.30(4).***"

(6) The court may, upon a petition for reconsideration under ORAP 6.25 or on the court's own motion, remove the nonprecedential designation from an opinion.