

HON. DAVID SCHUMAN\*

## Jack Landau: A Tribute

Jack Landau was the best appellate court judge in Oregon history, with the sole exception of Hans Linde. His opinions for the Oregon Court of Appeals and the Oregon Supreme Court are lucidly written, flawlessly organized, thoroughly researched, courageously independent, and ideologically unbiased. Two examples demonstrate these characteristics, as well as his willingness to confront difficult issues of first impression under the Oregon Constitution: *Tanner v. Oregon Health Sciences University*,<sup>1</sup> a 1998 court of appeals opinion, and *Couey v. Atkins*,<sup>2</sup> from the supreme court in 2015.

In *Tanner*, two lesbian state employees challenged the employer's policy of denying health and life insurance benefits to same-sex couples. After concluding that the policy did not violate Oregon's antidiscrimination statute,<sup>3</sup> the Court addressed the more consequential and difficult issue: Did the discrimination against homosexual couples violate Article I, section 20, of the Oregon Constitution's equal treatment guarantee?<sup>4</sup> At that time, as then Judge Landau explained, the Oregon courts' interpretation of section 20 was "something of a work in progress."<sup>5</sup> What followed was an orderly analysis harmonizing a long history of apparently contradictory case law and drawing an easily followed template for applying that provision in future cases—without reference to the Equal Protection Clause of the United States Constitution. It bears emphasis that this decision

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<sup>1</sup> 157 Or. App. 502, 971 P.2d 435 (1998).

<sup>2</sup> 357 Or. 460, 355 P.3d 866 (2015).

<sup>3</sup> OR. REV. STAT. § 659.030(1)(b) (2017).

<sup>4</sup> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

<sup>5</sup> *Tanner*, 157 Or. App. at 520, 971 P.2d at 445.

occurred long before the legal battles against antihomosexual legislation had been joined by many other courts and well ahead of popular sentiment on that topic. It was, in other words, prescient, independent, and brave. Beyond the immediate context of gay rights, the opinion's analysis also concluded that Oregon's equality guarantee, unlike the Equal Protection Clause, applies to government action that has an unlawfully discriminatory effect, even if that effect is incidental to a nondiscriminatory intention.<sup>6</sup> *Tanner* was not appealed to the supreme court; it remains the most definitive interpretation of Article I, section 20.

*Couey v. Atkins* involved a challenge to a statute prohibiting persons from gathering initiative petition signatures for pay if the person was also an unpaid signature gatherer on another measure.<sup>7</sup> When Couey initiated the challenge, he fell within the statute's prohibition, but by the time the case reached the trial court, he was no longer collecting signatures for pay. The trial court dismissed the case on the ground that it was moot and did not qualify for the statutory mootness exception for cases that are "capable of repetition . . . [yet] likely to evade judicial review."<sup>8</sup> Ducking the issue, the Court of Appeals affirmed, concluding the case was moot, but also that it was not, in fact, likely to evade review. The court noted that, had it concluded that the case did qualify for the "evading review" statutory exception, it would have raised the obvious question whether the statute was constitutional—in other words, whether the Oregon Constitution, like its federal counterpart, contained a "case or controversy" requirement.<sup>9</sup>

In his opinion for the Oregon Supreme Court, now Justice Landau ventured where the court of appeals feared to tread. He agreed that Couey's case was moot, but parted ways with the courts below by also concluding that the case was, indeed, capable of repetition yet evading review. Having convincingly argued that the case could not be resolved on subconstitutional grounds, he squarely confronted the constitutional issue: Did the statutory authorization of some moot cases contravene a "case or controversy" requirement in the Oregon Constitution? Like the

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<sup>6</sup> *Id.* at 524–25, 971 P.2d at 447 ("According to OHSU, the fact that such a facially neutral classification has the unintended side effect of discriminating against homosexual couples who cannot marry is not actionable under Article I, section 20. We are not persuaded by the asserted defense. Article I, section 20, does not prohibit only intentional discrimination. . . . OHSU's intentions in this case are not relevant.").

<sup>7</sup> OR. REV. STAT. § 250.048(9) (2017).

<sup>8</sup> OR. REV. STAT. § 14.175 (2017).

<sup>9</sup> *Couey v. Brown*, 257 Or. App. 434, 445 n.1, 306 P.3d 778, 784 n.1 (2013), *rev'd sub nom.* *Couey v. Atkins*, 357 Or. 460, 355 P.3d 866 (2015).

supreme court's Article I, section 20, case law, the court's prior jurisprudence regarding justiciability was in complete disarray. One case, *Kellas v. Department of Corrections*, held in no uncertain terms that "[t]he Oregon Constitution contains no 'cases' or 'controversies' provision."<sup>10</sup> An earlier case, *Yancy v. Shatzer*, pointed with equal vigor in the opposite direction: "The judicial power under the Oregon Constitution does not extend to moot cases that are 'capable of repetition, yet evading review.'"<sup>11</sup>

Justice Landau's opinion on this issue began with a clarification of the court's theory of *stare decisis*, explaining that, while it precludes the court from reversing an earlier decision "merely because the court's current members may hold a different view than its predecessors," nonetheless "the value of stability that is served by adhering to precedent may be outweighed by the need to correct past errors."<sup>12</sup> Rather than simply announcing that one of the earlier cases, *Yancy* or *Kellas*, was a "past error," and in recognition of the importance of carefully justifying overruling precedent, Justice Landau conducted a detailed and thorough review of the Oregon Constitution's text, the historical context surrounding its adoption, the common law background (citing Coke),<sup>13</sup> nineteenth-century Oregon and other state cases, federal treatment of the issue, and numerous law review articles and scholarly treatises. He ultimately concluded that, unlike the United States Constitution as construed by the U.S. Supreme Court, the Oregon Constitution had no *per se* "justiciability" requirement. He was careful, however, to limit the scope of the opinion to the facts presented by the case:

[T]here is no basis for concluding that the court lacks judicial power to hear public actions or cases that involve matters of public interest that might otherwise have been considered nonjusticiable under prior case law. Whether that analysis means that the state constitution imposes no such justiciability limitations on the exercise of judicial power in other cases, we leave for another day.

We also do not hold that moot cases will no longer be subject to dismissal. We hold only that Article VII (Amended), section 1, does not *require* dismissal in public actions or cases involving matters of public interest.<sup>14</sup>

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<sup>10</sup> 341 Or. 471, 478, 145 P.3d 139, 143 (2006).

<sup>11</sup> 337 Or. 345, 363, 97 P.3d 1161, 1176 (2004), *abrogated by Couey*, 357 Or. 460, 355 P.3d 866 (2015).

<sup>12</sup> *Couey*, 357 Or. at 485, 355 P.3d at 881.

<sup>13</sup> *Id.* at 495, 355 P.3d at 887.

<sup>14</sup> *Id.* at 520, 355 P.3d at 901.

*Couey*, then, perfectly demonstrates Justice Landau's jurisprudence: articulate, thorough, thoughtful, careful, and respectful of precedent without letting it perpetuate error. No judge in Oregon history (with, again, the exception of Hans Linde) would have been capable of such work.

What makes the quality of Jack Landau's opinions even more remarkable is their quantity. In his eighteen years on the Court of Appeals, he authored over 1000 majority opinions—an astonishing average of more than one per *week*, far more than any of his colleagues. He did this while also serving as a Presiding Judge of one of the court's three-judge panels, a position requiring a significant amount of administrative work. Further, no opinion issues from the court of appeals without having been subjected to the editorial and substantive scrutiny of all the court's judges. The same is true of the supreme court. Although I was never privy to the inner workings of the supreme court, I can testify from personal knowledge that Judge Landau's contribution to the many thousands of opinions that issued from the court of appeals during his tenure benefited incalculably from his comments, critiques, and encouragement, always delivered with tact and, frequently, with humor.

By the time I arrived at the court, Jack was a veteran and an acknowledged leader by virtue of his intelligence and experience. Like other new judges, as well as his (and other judges') clerks and staff attorneys, I benefitted from his kindness, patience, and mentorship. And, in what I regard as an acid test of a judge's collegiality, he was beloved by his judicial staff.

All of Jack's judicial accomplishments occurred while, in his "leisure" time, he also authored an impressive collection of law review articles, acquired a Master of Laws degree from the University of Virginia, taught courses in legislation at all of Oregon's law schools, played classical guitar, participated in a long-standing regular poker game, raised a family, and became an accomplished chef specializing in Italian cuisine. He has been not only an invaluable part of Oregon's legal culture but a true renaissance man. The Court will suffer in his absence, but his contributions to that culture, as well as to his family, his friends, his many former clerks, his former students, and his many admirers will live on.