

Article

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Oregon Statutory Construction

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INTRODUCTION

Nearly everything a lawyer, judge, businessperson, or public official does is controlled, or at the very least significantly affected, by a statute. Our legal system, as Judge Guido Calabresi colorfully put it, has become “statutorified.”¹ That being the case, it makes sense to understand the law that governs the interpretation of statutes. The Oregon appellate courts have devoted a great deal of attention over the past twenty-five years to developing and applying a predictable set of rules of interpretation. In fact, Oregon’s development of—and, for the most part, adherence to—a set of interpretive conventions has garnered national attention.²

This Article is my attempt to organize that body of law in a helpful way, offering some historical background, conceptual underpinnings, and explanatory examples of the rules that the Oregon courts regularly apply. Included as well is a fair amount of editorial commentary. As an appellate court judge for more than twenty-five years, and as a teacher of law school classes on the subject of statutory construction for an even longer period of time, I’ve developed my own views about many of these rules. They are not etched in stone. They represent choices that courts make. And those choices are, in nearly all cases, debatable. Acknowledging the contestability of the rules of construction makes clear that there is always room for reconsideration and improvement.

¹ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982).

² See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1776 (2010) (Oregon statutory construction cases “offer a perhaps unparalleled example of a judicially imposed, consistently applied interpretive regime for statutory cases.”). What makes Oregon so unusual is the fact that its courts regard the rules of statutory construction as law. Scholars refer to this as “methodological *stare decisis*.” *Id.* at 1822–24. It turns out that a number of courts—notably the United States Supreme Court—do not consider themselves bound by any particular rules of construction. *Id.* at 1823. This has prompted criticism that a failure of courts to agree on binding rules of construction “wastes court and litigant resources,” eliminates the incentive for legislatures to coordinate their actions with judicial rules of interpretation, and makes judicial decisions seem more result oriented. *Id.* at 1767; see also Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 *GEO. L.J.* 1863 (2008). Not all scholars agree. Some like the idea that courts like the United States Supreme Court do not give *stare decisis* effect to statutory interpretation methodology. See, e.g., Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 *GEO. L.J.* 1573 (2014); Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 *YALE L.J. ONLINE* 47 (2010), <http://yalelawjournal.org/forum/the-costs-of-consensus-in-statutory-construction>.

The Article proceeds in three parts. Part I begins with some background—a brief historical introduction to how the Oregon courts have approached the subject of statutory construction, followed by a more detailed examination of the seminal cases of *Portland General Electric Co. v. Bureau of Labor & Industries*³ (*PGE*) and *State v. Gaines*,⁴ which together set out the analytical framework for statutory construction in Oregon. Part II describes the rules of statutory construction that are applied within the *PGE* and *Gaines* framework, including the goal of determining “legislative intent” and the various tools and sources courts commonly employ to accomplish that. Part III then addresses several special problems involving the interpretation of statutes in Oregon, including the interpretation of statutes adopted by initiative, the interpretation of statutes previously interpreted by administrative agencies, and the interpretation of federal statutes by state courts.

I

BACKGROUND

A. Early Statutory Construction

Courts have been interpreting statutes as long as there have been statutes to interpret. In the Anglo-American tradition, judicially developed rules of construction date back at least to the early fourteenth century.⁵ In the broadest of terms, early statutory construction borrowed from canon law the idea that those who enacted a law were best suited to interpret it authoritatively.⁶ That fit well with early English practice; the members of Parliament who enacted statutes were also the judges who interpreted them. Thus, Chief Justice Hengham could famously declare, “Do not gloss the statute, for we know better than you; we made it.”⁷

³ 317 Or. 606, 859 P.2d 1143 (1993).

⁴ 346 Or. 160, 206 P.3d 1042 (2009).

⁵ The classic study of early English interpretive traditions is THEODORE F.T. PLUCKNETT, *STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* (Harold Dexter Hazeltine ed., Cambridge Studies in Legal History 1922).

⁶ On the influence of canon law on the development of statutory construction, see generally Hans W. Baade, *The Casus Omissus: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT’L L. & COM. 45, 59–62 (1994).

⁷ Quoted in PLUCKNETT, *supra* note 5, at 50. For a nice introduction to the role of equity in seventeenth- and eighteenth-century English law, see generally William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985).

In the succeeding centuries, though, a system of courts developed separately from the legislature. And as the legislative and judicial functions separated, ideas about the interpretation of statutes markedly changed. In brief, statutory construction became much more strictly textual. Courts lost interest in the subjective intentions of Parliament and focused instead on the meaning of the words of its enactments.⁸ By the middle of the eighteenth century, resort to extrinsic sources—records of parliamentary proceedings that we would now classify as “legislative history”—was forbidden.⁹ Although courts occasionally mentioned the “spirit” or “reason” of a statute as a guiding interpretive principle, such things were to be gleaned from the words of the statute alone. At the same time, English courts reserved for themselves a measure of leeway to consider matters of fairness and equity.

In the middle of the eighteenth century, Blackstone neatly summarized the state of affairs: statutes are to be interpreted by the “signs” of the legislature’s will. “And these signs are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law.”¹⁰ No mention of extrinsic materials. Blackstone did allow judges, on occasion, to weigh equitable considerations when the legislature did not anticipate a particular problem.¹¹ The authority to do that, though, was to be exercised judiciously. Otherwise, Blackstone explained, courts would “set the judicial power above that of the legislature, which would be subversive of all government.”¹²

⁸ See generally William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 999 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 47–56 (2001).

⁹ The rule against consulting legislative history in England lasted until 1992, when the House of Lords reversed the longstanding prohibition in *Pepper v. Hart*, [1992] UKHL 3, [1993] AC 593 (appeal taken from Eng.). See generally Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v. Hart*, 35 STAN. J. INT’L L. 231 (1999); William S. Jordan III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F.L. REV. 1 (1994).

¹⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *59.

¹¹ “[I]t is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.” *Id.* at *61.

¹² *Id.* at *91.

American judicial views of statutory construction were heavily influenced by Blackstone and the English tradition.¹³ That only makes sense because colonial courts before the Revolution were steeped in English common law.¹⁴ But, at least after the Revolution, not everyone embraced the equitable authority of courts to depart from the text of a statute, which seemed dangerous to some. As Thomas Jefferson commented in 1785, “Relieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into it’s [sic] equity, and the whole legal system becomes uncertain.”¹⁵

A sort of blended approach resulted, one that sought to determine legislative intent with an emphasis on a statute’s text. At the same time, it allowed some amelioration of the potentially inequitable results of literal interpretation through the application of certain canons of construction that had come to be accepted over the years.¹⁶

Early Oregon judicial decisions followed that pattern, searching for the legislative intent, but finding it by means of an analysis of the statute’s text. There was rarely a mention of “equity” and never a reference to anything like what we would now refer to as “legislative history.”¹⁷

B. ORS Chapter 174

In the early to mid-nineteenth century, a codification “movement” developed, calling for a shift from the common law to statutes in a wide variety of areas of the law.¹⁸ I put the word “movement” in quotes because there’s much scholarly debate about whether there was anything so coherent as a single “movement” and whether, instead, the urge to codify actually was a result of different efforts with different

¹³ For an introduction to the history of American statutory construction decisions in the eighteenth and nineteenth centuries, see generally WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY CONSTRUCTION* (1999).

¹⁴ On the relationship between the English common law and early American legal analysis, see generally WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY 1760–1830* (1975). See also John Choon Yoo, Note, *Marshall’s Plan: The Early Supreme Court and Statutory Interpretation*, 101 *YALE L.J.* 1607 (1992).

¹⁵ Letter from Thomas Jefferson to Phillip Mazzei (Nov. 1785), in 9 *THE PAPERS OF THOMAS JEFFERSON* 67, 71 (Julian Boyd ed. 1954).

¹⁶ See generally Manning, *supra* note 8, at 105–07.

¹⁷ For a summary of nineteenth-century Oregon statutory construction cases, see generally Jack L. Landau, *The Intended Meaning of “Legislative Intent” and Its Implications for Statutory Construction in Oregon*, 76 *OR. L. REV.* 47, 88–103 (1997).

¹⁸ See generally CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981).

causes.¹⁹ It's an interesting debate, but not one especially important for my purposes. What is important for my purposes is that this interest in codification prompted the drafting of “codes” of statutory construction, which distilled various principles of interpretation that the courts had developed over the centuries. In 1850, for instance, a proposed New York Code of Civil Procedure included references to proper rules of statutory construction. Among the proposed rules was a statement that “[i]n the construction of a statute, the intention of the legislature . . . is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one, that is inconsistent with it.”²⁰ Although never adopted by the New York legislature, the proposed New York Code proved influential, ultimately being adopted in one form or another by a number of other states, including Iowa, Indiana, and California.²¹

Around the same time, the Oregonian territorial legislature appointed a commission to collect, codify, and modify existing laws of the state into a single code.²² In the process, the commission borrowed from the proposed New York Code. In particular, the commission cribbed the statutory construction provisions verbatim. Shortly after statehood, the legislature again appointed a commission to update a single code of state statutes. Headed by Matthew P. Deady, the commission retained the provisions concerning the construction of statutes. The code that resulted—known to this day as the “Deady Code”—included the following guidelines on interpreting statutes:

¹⁹ For an introduction to the debate, see generally Robert W. Gordon, Book Review, 36 VAND. L. REV. 431 (1981) (reviewing COOK, *supra* note 18).

²⁰ DAVID DUDLEY FIELD ET AL., THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK § 1692 (1850), reprinted in 1 NEW YORK FIELD CODES 1850–1865, at 707 (Lawbook Exchange 1998) (known as the “Field Code”).

²¹ See generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 193–99 (3d ed. 2005) (providing an overview of the Field Code and its influence); Mildred v. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 239–45 (1942) (summarizing development of the code); Henry Upson Sims, *The Problem of Reforming Procedure*, 21 YALE L.J. 215, 216 (1912) (discussing adoption of the 1848 New York code by nearly two dozen states).

²² For an interesting history of the development of the territorial code and the Deady Code, see generally Robert N. Peters, *The “First” Oregon Code: Another Look at Deady’s Role*, 82 OR. HIST. Q. 383 (1981). Peters suggests that Deady perhaps gets too much credit, as the later code borrowed much from the 1853 territorial code, which James K. Kelly principally authored. See *id.*

Sec. 684. In the construction of a statute . . . the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and, where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.

Sec. 685. In the construction of a statute, the intention of the legislature . . . is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it.²³

In succeeding years, the legislature added other rules of statutory construction. For example, it added one governing severability and another governing the effect of repealing a statute that repeals a statute. (Does it have the effect of reviving the original? According to Oregon Revised Statutes (ORS) 174.080, the answer is, no.)²⁴ And, with the wholesale revision of Oregon statutes in 1953, the legislature's rules of construction were codified in ORS chapter 174, where they have resided ever since.²⁵

²³ THE ORGANIC AND OTHER GENERAL LAWS OF OREGON: TOGETHER WITH THE NATIONAL CONSTITUTION, AND OTHER PUBLIC ACTS AND STATUTES 1843–1872, ch. VIII, §§ 684–85 (1874).

²⁴ OR. REV. STAT. § 174.080 (2017).

²⁵ Before 1953, Oregon statutes were periodically compiled and updated by different individuals (often judges), who usually worked from the original Deady Code. These individuals updated previous compilations by removing any provisions that had been repealed, substituting amendments, and inserting new enactments, sometimes with commentary. Deady himself did a compilation in 1866. THE ORGANIC AND OTHER GENERAL LAWS OF OREGON 1845–64 (M.P. Deady ed., 1866). He and Lafayette Lane updated that compilation in 1874, followed by William Lair Hill's compilations in 1887, THE CODES AND GENERAL LAWS OF OREGON (William Lair Hill ed., 1887), and 1892, THE CODES AND GENERAL LAWS OF OREGON (William Lair Hill ed., 1892). Charles Bollinger and William Cotton prepared a new compilation in 1902. THE CODES AND STATUTES OF OREGON (Charles B. Bellinger & William W. Cotton eds., 1902). Eight years later, William Paine Lord, along with Richard Ward Montague, prepared a new compilation, known as "Lord's Oregon Laws." LORD'S OREGON LAWS (William Paine Lord & Richard Ward Montague eds., 1910). Conrad Patrick Olson prepared a new version in 1920. OREGON LAWS (Conrad Patrick Olson ed., 1920). Ten years later, an "Oregon Code Annotated" was prepared under the supervision of the Oregon Supreme Court. OREGON CODE (1930). The court compiled and annotated another version in 1940, known as the "Oregon Compiled Laws Annotated," or "OCLA." OREGON COMPILED LAWS ANNOTATED (1940). In 1949, the legislature chartered a wholesale revision of the state's statutes, which ultimately resulted in the "Oregon Revised Statutes," or "ORS." For details about the history of the codification of Oregon statutes, see generally Charles G. Howard, Editorial, *The Oregon Revised Statutes*, 33 OR. L. REV. 58 (1953).

C. One Hundred Years of Latitude

During the century following statehood, statutory construction decisions followed no consistent pattern. In the late nineteenth century, Oregon Supreme Court opinions tended to be quite textual in emphasis. But the court also began to look beyond the text of a statute to its legislative history. The first time the court did so was in 1892.²⁶

After that, though, the court followed no consistent rule about precisely when it was appropriate to consult such extrinsic evidence of legislative intent. Well into the twentieth century, it invoked the traditional rule that a statute must be ambiguous before there is license to consult legislative history.²⁷ At the same time, the court just as often resorted to legislative history without any mention of ambiguity.²⁸ In other cases, the court hedged, saying that it may be appropriate to examine legislative history to confirm its interpretation of an otherwise unambiguous statute.²⁹

In a similar vein, sometimes the court would resort to dictionary definitions as an aid to interpreting a statute.³⁰ At other times, the court complained that statutory construction “is not done by consulting dictionary definitions of words.”³¹

The court occasionally cited the legislature’s codified rules of statutory construction, but not often. Although I haven’t attempted an actual empirical analysis, my impression is that early Oregon statutory construction cases ignored chapter 174.³² In some cases, the court openly departed from those rules, declaring that they were not to be

²⁶ State *ex rel.* Baker v. Payne, 22 Or. 335, 29 P. 787 (1892).

²⁷ See, e.g., Morasch v. State of Oregon, 261 Or. 299, 301, 493 P.2d 1364, 1365 (1972) (“When a statute is ambiguous, we are authorized to turn to its history in order to determine the legislative intent.” (citation omitted)); Berry Transport v. Heltzel, 202 Or. 161, 166, 272 P.2d 965, 967 (1954) (extrinsic sources of legislative intent allowed “only in cases where the language used in a statute is ambiguous and uncertain”).

²⁸ See, e.g., State v. Leathers, 271 Or. 236, 242, 531 P.2d 901, 904 (1975) (“The primary purpose of statutory construction is to ascertain the legislative intent. In this endeavor, we may give due consideration to legislative history.”).

²⁹ See, e.g., State v. Trenary, 316 Or. 172, 178 n.5, 850 P.2d 356, 359 n.5 (1993) (“Although we need not resort to legislative history, it confirms our conclusion.”).

³⁰ See, e.g., Stephens v. Bohlman, 314 Or. 344, 351, 838 P.2d 600, 604 (1992) (citing Replace, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1976)).

³¹ Davidson v. Or. Gov’t Ethics Comm’n, 300 Or. 415, 420, 712 P.2d 87, 91 (1985).

³² For example, from 1953 to 1993, the court cited ORS 174.020—which declares the foundational principle that the object of statutory construction is to ascertain legislative intent—in only forty-three cases, nearly all of them after 1980. Similarly, during the same period, the court cited ORS 174.010—which states that courts must take statutes as they are enacted—in only fifty-three cases, again, most of them after 1980.

taken too literally. As the court commented in *Johnson v. Star Machinery Co.*, “The rule requiring the court to follow the plain meaning of seemingly unambiguous language is not inflexible and not without exceptions.”³³

D. PGE and the Return to Plain Meaning

In 1993, the Oregon Supreme Court determined that some housecleaning was in order. To do that, it selected *PGE v. Bureau of Labor & Industries*,³⁴ a case involving the interpretation of the state’s parental leave law, ORS 659.360(3). That law states that an employee “shall be entitled to utilize any accrued . . . sick leave . . . during the parental leave.”³⁵ One of PGE’s employees was the parent of a newborn child and asked his employer for a total of twelve weeks of parental leave. He asked that he be permitted to use as part of that twelve weeks of parental leave his accrued sick leave, regardless of whether he was sick. PGE declined the employee’s request on the ground that the collective bargaining agreement governing his employment provided that sick leave could be used only if an employee actually was sick. The employee argued that the statute trumped the agreement in providing that he had the right to use any accrued sick leave during parental leave. The employee filed a complaint with the Bureau of Labor and Industries (BOLI), which took his side of the dispute, concluding that the statute controlled and was not limited by anything in the agreement.³⁶

A sharply divided Oregon Court of Appeals, sitting en banc, affirmed.³⁷ The majority sided with BOLI, concluding that the statute unambiguously provided that the sick leave could be used regardless of any conditions imposed by the collective bargaining agreement.³⁸ The

³³ 270 Or. 694, 703–04, 530 P.2d 53, 57 (1974). Compare that with, for example, *State ex rel. Everding v. Simon*, 20 Or. 365, 373–74, 26 P. 170, 172–73 (1891) (“Courts cannot supply omissions in legislation nor afford relief because they are supposed to exist. . . . [W]hen a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it.” (citation omitted) (quoting *Hobbs v. McLean*, 117 U.S. 567, 579 (1886)), and *Monaco v. U.S. Fidelity & Guar. Co.*, 275 Or. 183, 188, 550 P.2d 422, 424 (1976) (“This court cannot correct clear and unambiguous language for the legislature so as to better serve what the court feels was, or should have been, the legislature’s intent.” (citation omitted)).

³⁴ 317 Or. 606, 859 P.2d 1143 (1993).

³⁵ OR. REV. STAT. § 659.360(3) (1993).

³⁶ *PGE*, 317 Or. at 608–09, 859 P.2d at 1144–45.

³⁷ *PGE v. Bureau of Labor & Indus.*, 116 Or. App. 356, 842 P.2d 419 (1992) (en banc).

³⁸ *Id.* at 359–60, 842 P.2d at 420–21.

Chief Judge dissented, concluding that the statute unambiguously said quite the opposite, that sick leave can be used “during” parental leave, not “as” parental leave.³⁹ Judge Edmonds also dissented, but he concluded that the wording of the statute did not clearly address the matter one way or the other. In his view, though, the legislative history favored PGE’s interpretation.⁴⁰

The Oregon Supreme Court affirmed, unanimously. After describing the facts of the case, the court delivered something of a tutorial on the basics of statutory construction in Oregon:

In interpreting a statute, the court’s task is to discern the intent of the legislature. ORS 174.020. To do that, the court examines both the text and context of the statute. That is the first level of our analysis. . . .

Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. Just as with the court’s consideration of the text of a statute, the court utilizes rules of construction that bear directly on the interpretation of the statutory provision in context. Some of those rules are mandated by statute, including, for example, the principles that, “where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all,” ORS 174.010, and that “a particular intent shall control a general one that is inconsistent with it,” ORS 174.020. Other such rules of construction are found in case law, including, for example, the rules that the use of a term in one section and not in another section of the same statute indicates a purposeful omission, and that use of the same term throughout a statute indicates that the term has the same meaning throughout the statute.

If the legislature’s intent is clear from the above-described inquiry into text and context, further inquiry is unnecessary.

If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history to inform the court’s inquiry into legislative intent. When the court reaches legislative history, it considers it along with text and context to determine whether all of those together make the legislative intent clear. If the legislative intent is clear, then the court’s inquiry into legislative intent and the meaning of the statute is at an end and the court interprets the statute to have the meaning so determined.

If, after consideration of text, context, and legislative history the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. Although some of those maxims of statutory

³⁹ *Id.* at 363–64, 842 P.2d at 423–24 (Joseph, C.J., dissenting).

⁴⁰ *Id.* at 364–65, 842 P.2d at 424 (Edmonds, J., dissenting).

construction may be statutory, *see, e.g.*, ORS 174.030 (natural rights), others more commonly may be found in case law. Those include, for example, the maxim that, where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue.⁴¹

Having thus described the rules of construction, the court turned to the issue at hand. In surprisingly quick fashion, the court concluded that the statute unambiguously entitled employees to use sick leave during parental leave, without any reference to a contrary agreement or employer policy. “We conclude,” the court held, “that the text and context of ORS 659.360(3) unambiguously allows an employee to use accrued leave . . . during the parental leave, even if the employee has not met the conditions of leave eligibility contained in an existing collective bargaining agreement.”⁴²

It’s worth making a number of observations about the Oregon Supreme Court’s opinion.

First, the court’s tutorial on the rules of statutory construction came out of the blue. Nothing in the court’s prior case law signaled an interest in the subject. Nothing about the nature of the case itself remotely suggested that it was a likely candidate for a landmark decision about those rules.

PGE was, if anything, an odd choice. The employee’s claim originally was filed with BOLI, the administrative agency charged with enforcing the statute at issue, and BOLI had authoritatively interpreted it in rendering its decision. Ordinarily, when an agency charged with enforcing a statute interprets it, that charge raises significant issues concerning the extent to which courts reviewing the agency interpretation must defer to that interpretation. And, in fact, several years earlier, in *Springfield Education Association v. School District*, the court took some pains to describe the circumstances under which courts are obliged to defer to the interpretations of administrative agencies.⁴³ In *PGE*, however, the court appeared to have missed that point. There was no mention of *Springfield* or agency deference at all, which—as I’ll discuss in greater detail later—caused no small amount of confusion for several years following *PGE*.⁴⁴

⁴¹ *PGE*, 317 Or. at 610–12, 859 P.2d at 1146–47 (citations omitted) (quoting and citing OR. REV. STAT. §§ 174.010–.030 (1993)).

⁴² *Id.* at 614, 859 P.2d at 1148.

⁴³ *See* 290 Or. 217, 221–31, 621 P.2d 547, 551–57 (1980).

⁴⁴ *See infra* text at notes 839–56.

Second, although *PGE* represented a curious vehicle, there could be little question that the court intended the decision to serve as a reference point for future statutory construction cases. After taking the trouble to catalog the various rules of statutory construction and organizing them into a three-step analytical process, the court proceeded to decide the case before it without any reference to those principles. The court's actual decision in *PGE* was startlingly brief, barely more than a statement of a conclusion that the statute was "unambiguous." Clearly, the court had not set out its catalog of statutory construction principles to explain the decision in *PGE* itself.

Third, the court's description of the rules of statutory construction did not so much announce new rules as organize existing rules into three groups and then sequence the way in which those rules applied. Under *PGE*, statutory construction analysis proceeded in three steps: First, an analysis of the text in context, along with relevant rules of textual analysis. If that analysis produces a clear picture of the legislature's intention, stop. The analysis is at an end. "If, but only if," the textual analysis comes up short, the court commanded, is it appropriate to proceed to a second analytical step—examination of the legislative history. If, but only if, that legislative history analysis comes up short, courts may then proceed to a third level of "general maxims" of construction to resolve the persistent ambiguity.

Students of my legislation classes will no doubt recognize in the foregoing description a familiar pattern: What the court described in *PGE* is remarkably similar to the late nineteenth- and early twentieth-century school of statutory construction known as "plain meaning," famously represented by the United States Supreme Court's decision in *Caminetti v. United States*.⁴⁵ In that case, the Court declared that resort to legislative history or other extrinsic considerations cannot be permitted to alter the "plain" meaning of a statute's text.⁴⁶

Fourth, and relatedly, the court in *PGE* described the principles of statutory construction as settled, if not obvious, matters. In truth, nothing was quite so settled, much less obvious.

⁴⁵ 242 U.S. 470 (1917); see also Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1300 (1975) (citing *Caminetti* as "vintage example" of the plain meaning rule).

⁴⁶ 242 U.S. at 485 ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.").

For example, the court began its description of the rules of statutory construction with the declaration that “the court’s task is to discern the intent of the legislature.”⁴⁷ Again, as students of my legislation classes could explain, there exists a wide spectrum of approaches to statutory construction, and ascertaining legislative intent occupies only one point along that spectrum.⁴⁸ Textualists, for instance, object to the very idea of ascertaining legislative intent, insisting instead that the object of statutory construction is to ascertain the ordinary meaning of the words of the statute as they would have been understood at the time of enactment—not just by legislators, but by anyone.⁴⁹ Pragmatists take a very different approach; they decline (at least in some cases) to give authority to a statute’s text and instead consider an eclectic set of factors, including “statutory text, specific legislative intent, imaginative reconstruction, legislative purpose, evolution of statute, and current [social] values.”⁵⁰ The Oregon Supreme Court was either

⁴⁷ *PGE*, 317 Or. at 610, 859 P.2d at 1145.

⁴⁸ The literature on the subject is truly enormous. Scalia and Garner’s bibliography of books and articles on statutory construction runs some forty pages. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: INTERPRETATION OF LEGAL TEXTS* 465–506 (2012). There has been so much legal scholarship devoted to debating different theories of statutory construction that one scholar queried, “Hasn’t there been enough written on theories of interpretation to give the subject matter a rest?” Robert John Araujo, *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L.J. 225, 225 (1998). And that was twenty years ago. A sampling of some of the more frequently cited writings includes WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons*, 66 STAN. L. REV. 725 (2014); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005); Richard A. Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

⁴⁹ As Scalia and Garner put it, “In their full context, words mean what they conveyed to reasonable people at the time they were written,” which they characterize (not altogether accurately) as “the oldest and most commonsensical interpretive principle.” SCALIA & GARNER, *supra* note 48, at 15–16.

⁵⁰ WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 219–22 (2d ed. 2006).

unaware of the alternative approaches to statutory construction or not interested in entertaining them.

Or the court simply assumed the matter had been foreclosed by the legislature. Note that the court in *PGE* referred to ORS 174.020 in describing the goal of statutory construction as determining legislative intent.⁵¹ But even there, the court glossed over some interesting and contestable matters. Does the legislature have the authority to determine the role of the courts in construing statutes? Or are the rules of statutory construction intrinsic to the judicial power and beyond the reach of the legislature? Remember that, for the first 150 years of the court's existence, it barely acknowledged the existence of those legislative rules. In *PGE*, however, the court cited them as authoritative.

That's no idle, academic issue. A number of scholars have suggested that such legislatively prescribed rules of construction pose constitutional problems.⁵² Some courts have, as well. In Texas, for example, the state legislature enacted a "Code Construction Act,"⁵³ which the Texas Court of Criminal Appeals has concluded violates constitutional principles of separation of powers.⁵⁴

Aside from that, there's the question of what the legislature meant when it stated that the object of statutory construction is determining "legislative intent." Recall that ORS 174.020 dates back to the Deady Code of 1862. What the legislature meant by "legislative intent" in 1862 very well could have been something quite different from what the phrase is commonly taken to mean now.⁵⁵ The court in *PGE* didn't address the question.

⁵¹ See *PGE*, 317 Or. at 610–11, 859 P.2d at 1145–46.

⁵² See, e.g., REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 263–81 (1975); James C. Thomas, *Statutory Construction When Legislation Is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191, 211 n.85 (1966); Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 221–28 (1994).

⁵³ TEX. GOV'T CODE ANN. § 311.023 (West 2017). Among other things, the law lists various considerations that a court may take into account "whether or not the statute is considered ambiguous on its face." *Id.* It also requires courts to "consider at all times the old law, the evil, and the remedy." *Id.* § 312.005.

⁵⁴ *Boykin v. State*, 818 S.W.2d 782, 786, 788 n.4 (Tex. Crim. App. 1991) (en banc); see also *State v. Parsons*, 220 N.W. 328, 331 (Iowa 1928) (it is doubtful that the legislature has the authority "to direct the judiciary in the interpretation of existing statutes"); *Commonwealth ex rel. Roney v. Warwick*, 33 A. 373, 374 (Pa. 1895).

⁵⁵ I took a stab at determining what the legislature most likely understood what is now ORS 174.020 to mean back in 1862 in *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, *supra* note 17. In a nutshell, I concluded that, consistent with prevailing nineteenth-century interpretive conventions, it is unlikely that the legislature understood "legislative intent" to embrace the sort of actual,

For another example of the court oversimplifying the rules in *PGE*, consider the assertion that “[i]f, but only if,” textual analysis demonstrates that a statute is ambiguous may a court resort to legislative history. As I mentioned earlier, the court’s earlier cases reflect no such hard-and-fast rule. Rather, in some cases, the court stated that it is appropriate to examine legislative history to resolve ambiguity, while in other cases the court examined legislative history without reference to ambiguity at all. In fact, as recently as five months before *PGE*, the court examined legislative history in its analysis of what it ultimately determined was an unambiguous statute.⁵⁶ The court in *PGE* ignored such inconsistencies.

Aside from that, the court in *PGE* didn’t question whether any of the rules that it cited made sense in the first place. The court, for example, cited the rule that the use of a term in one section of a statute and the omission of the term in another suggests a purposeful omission.⁵⁷ That certainly is an oft-cited rule.⁵⁸ But, as we’ll see later on, it’s a rule that’s subject to criticism. The court in *PGE* didn’t address such criticism. Its objective was more modest: accept the rules as given and just organize them into a useful sequence of analysis.

E. PGE Applied

The Oregon Supreme Court decisions in the decade and a half following *PGE* confirmed that the court intended the case to serve as something of a landmark. Almost immediately, the court began citing *PGE* in every single opinion involving an issue of statutory construction.⁵⁹ The court went so far as to chide the lower courts if they failed to do likewise. In *Panpat v. Owens-Brockway Glass Container, Inc.*,⁶⁰ the court reversed a decision of the Oregon Court of Appeals with the comment that “[w]e note that the Court of Appeals undertook”

subjective legislative intentions informed by such evidence as legislative history. I suggested that it creates an interesting conundrum: if the court had engaged in a *PGE* analysis of the statute on which *PGE* was supposed to have been based, it would have found that the legislature would not have intended the court to adopt that sort of *PGE* analysis. *Id.* at 105–08. While on the subject, I have to confess that one member of the Oregon Supreme Court at the time I wrote the article reported to me that he had read it and concluded that I needed to “get a life.”

⁵⁶ *State v. Trenary*, 316 Or. 172, 178 n.5, 850 P.2d 356, 359 n.5 (1993).

⁵⁷ *PGE v. Bureau of Labor & Indus.*, 317 Or. 606, 611, 859 P.2d 1143, 1146 (1993) (citing OR. REV. STAT. § 174.010 (1993)).

⁵⁸ See *infra* text at notes 586–96.

⁵⁹ By my count, the court cited *PGE* in approximately 350 cases between 1993 and 2009.

⁶⁰ 334 Or. 342, 351 n.2, 49 P.3d 773, 778 n.2 (2002).

to construe a statute “without reference to *PGE v. Bureau of Labor and Industries* or to the legislature’s intent.”

A significant irony emerged in the cases applying *PGE*, especially the cases from the Oregon Supreme Court. The court had declared in *PGE* that the object of statutory construction is to determine “legislative intent.” In saying that, the court placed itself squarely in a traditional, “intentionalist” school of interpretive thought. But, as I’ve noted, it also invoked the “plain meaning” strain of that traditional approach to statutory construction, which tends to foreclose consideration of a significant source of legislative intent—that is, legislative history. And, in a significant majority of the cases that followed *PGE*, the court concluded that the meaning of the statute in dispute was “plain.” That meant that resort to legislative history all but disappeared.⁶¹ At the same time, resort to textual aids—in particular, dictionary definitions—soared in frequency. In application, then, *PGE* led to statutory construction of a distinctly textual emphasis.

No case better illustrates the point—the court’s invocation of legislative intent as its goal, but its refusal to consider significant evidence of that intent in the form of legislative history—than *Jones v. General Motors Corp.*⁶² At issue in the case was the meaning of recent amendments to Oregon’s summary judgment rule, Oregon Rules of Civil Procedure 47 C. Before the 1995 legislative session, the rule provided that summary judgment may be granted if the pleadings and evidence show that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁶³ In 1995, the legislature added a provision stating that “[n]o genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party.”⁶⁴ In *Jones*, the court of appeals concluded that the additional phrasing was added to the rule to, in effect, “federalize” the state’s summary judgment rule to make it easier for trial courts to grant summary judgment and to create a shifting of burdens.⁶⁵ Under the

⁶¹ Professor Gluck, for example, found that, between 1993 and 1998, the supreme court did not mention legislative history in approximately four out of every five statutory construction decisions. Gluck, *supra* note 2, at 1779. And when the court did mention legislative history, it found it “useless” in approximately one-third of those cases. *Id.*

⁶² 325 Or. 404, 939 P.2d 608 (1997).

⁶³ OR. R. CIV. P. 47 C (1993).

⁶⁴ 1995 Or. Laws, ch. 618, § 5 (codified at OR. R. CIV. P. 47 C (1995)).

⁶⁵ *Jones v. General Motors Corp.*, 139 Or. App. 244, 251, 911 P.2d 1243, 1247–48 (1996) (en banc).

court's understanding of the federal practice, once the moving party makes a prima facie showing that it is entitled to summary judgment, the burden shifts to the nonmoving party to show the existence of the required genuine issue of material fact.⁶⁶

The court acknowledged that the actual wording of the 1995 amendment didn't mention the added burden shifting language and, in fact, "[o]n its face, the added language is capable of meaning exactly the same thing as the existing law."⁶⁷ But, the court held, there is a presumption that, when the legislature amends a law, it intended the amendment to mean something. Moreover, the majority explained, the extensive legislative history plainly showed that the legislature did indeed intend to federalize Oregon summary judgment law.⁶⁸

I concurred, writing separately to express my disagreement with the court's reading of the 1995 amendment on two grounds. First, the wording of the amendment was not capable of being read to accommodate the intricate burden-shifting of federal summary judgment law. Second, in any event, the legislative history wasn't as clear as the court had suggested. As I saw it, the new provision simply parroted the phrasing of several Oregon Supreme Court cases interpreting the existing rule, and the legislature intended to codify that phrasing.⁶⁹

The Oregon Supreme Court reversed.⁷⁰ The court concluded that the meaning of the 1995 amendment was plain and unambiguous and simply restated phrasing in a number of its summary judgment decisions.⁷¹ The court acknowledged that the court of appeals had reached a different conclusion on the basis of the legislative history and that the parties had offered various arguments about whether the court had correctly interpreted that legislative history.⁷² Nevertheless, the court politely declined even to address those arguments:

The parties offer conflicting arguments about why the legislature adopted the 1995 amendments to ORCP 47 C. We decline to resolve that dispute. Paying heed to ORS 174.010, this court must ascertain and declare what is contained in the amendment. If, as here, the

⁶⁶ *Id.* at 263, 911 P.2d at 1254.

⁶⁷ *Id.* at 250, 911 P.2d at 1247.

⁶⁸ *Id.* at 251, 911 P.2d at 1247–48.

⁶⁹ *Id.* at 265–75, 911 P.2d at 1255–60 (Landau, J., concurring).

⁷⁰ *Jones v. General Motors Corp.*, 325 Or. 404, 939 P.2d 608 (1997).

⁷¹ *Id.* at 412–14, 939 P.2d at 613–15.

⁷² *Id.* at 410–11, 939 P.2d at 611–12.

amendment's text is not ambiguous, the parties' disagreement about the legislature's motive for doing what it did is beside the point.⁷³

As much as the *PGE* case was cited, it wasn't popular with everyone. Law review articles took issue with the supreme court's approach to statutory construction. Professor Steve Johansen, for instance, suggested that the decision was "unnecessarily complex, arbitrary, and a little fanciful."⁷⁴ Appellate practitioner Rob Wilsey similarly complained of the decision's "artificial rigidity."⁷⁵ I got into the act as well, asserting that the method of analysis was "unjustifiably artificial," particularly its rule that courts could not examine legislative history in the absence of an established ambiguity.⁷⁶ Members of the Oregon Court of Appeals also expressed frustration with *PGE* in published opinions, usually concurrences or dissents. Among the more memorable was the concurring opinion of Judge (later, Chief Judge) Rick Haselton in *Young v. State of Oregon*.⁷⁷ The case involved the construction of a statute that included an obvious drafting error; the legislature accidentally omitted from the text of the overtime compensation statute an exception for state managers.⁷⁸ The majority dutifully followed *PGE*, concluding that there was nothing in the statute that reasonably could be construed to include the exception.⁷⁹ Judge Haselton reluctantly agreed, commenting that "[t]his case is just the latest, if perhaps the most egregious, of a series of cases in which fidelity to *PGE* has driven our court to patently silly results."⁸⁰ Interestingly, the supreme court denied review.

As it turned out, the Oregon Legislature was unhappy with *PGE* too. What triggered the legislature's displeasure was the supreme court's decision in *Jones*. In the sort of coincidence that only happens in real

⁷³ *Id.* at 415–16, 939 P.2d at 615 (emphasis omitted) (citing OR. REV. STAT. § 174.010 (1997)).

⁷⁴ Steven Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219, 268 (1998).

⁷⁵ Robert M. Wilsey, Note, *Paltry, General & Eclectic: Why the Oregon Supreme Court Should Scrap PGE v. Bureau of Labor & Industries*, 44 WILLAMETTE L. REV. 615, 664–65 (2008).

⁷⁶ Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILLAMETTE L. REV. 1, 67 (1996).

⁷⁷ 161 Or. App. 32, 42–43, 983 P.2d 1044, 1050 (Haselton, J., concurring), *review denied*, 329 Or. 447 (1999).

⁷⁸ *Id.* For background on the legislature's notorious faux pas, see Gregory Chaimov, *How an Idea Really Becomes a Law: What Only Jacques Cousteau Can Know*, 36 WILLAMETTE L. REV. 185, 192–94 (2000).

⁷⁹ *Young*, 161 Or. App. at 35–40, 983 P.2d at 1046–48 (majority opinion).

⁸⁰ *Id.* at 42, 983 P.2d at 1050 (Haselton, J., concurring).

life, the staff counsel for the House Judiciary Committee that conducted hearings on the 1995 amendments to the summary judgment rule, Max Williams, was elected to the House several years later and appointed chair of the very same committee. In 2001, unhappy that the *Jones* court had not deigned even to consider the legislative history that he had worked so diligently to prepare, Williams drafted a bill to put a stop to such practice. What resulted was a set of amendments to ORS 174.020, so that it now provides that “[t]o assist a court in its construction of a statute, a party may offer the legislative history of the statute.”⁸¹ There’s no mention of the necessity of an ambiguity. Rather, the statute as amended provides that “[a] court shall give the weight to the legislative history that the court considers to be appropriate.”⁸²

The response to the 2001 amendments to ORS 174.020 was curious. The new law included a savings provision, stating that it applied only to claims filed after its effective date.⁸³ So some delay was to be expected. But it took a full eight years for the Oregon Supreme Court to address the effect of the amendments. In the meantime, both it and the court of appeals applied the amendments in some cases, resorting to legislative history without first determining the existence of an ambiguity,⁸⁴ but ignored them in other cases, continuing to assert that, under *PGE*, examination of legislative history is inappropriate in the absence of an ambiguity.⁸⁵ In still other cases, the courts intriguingly

⁸¹ OR. REV. STAT. § 174.020(1)(b) (2017).

⁸² OR. REV. STAT. § 174.020(3) (2017).

⁸³ 2001 Or. Laws, ch. 438, § 2.

⁸⁴ See, e.g., *State v. Makuch*, 340 Or. 658, 667 n.6, 136 P.3d 35, 39 n.6 (2006); *Stevens v. Czerniak*, 336 Or. 392, 403 n.12, 84 P.3d 140, 146 n.12 (2004).

⁸⁵ See, e.g., *Liles v. Damon Corp.*, 345 Or. 420, 430, 198 P.3d 926, 931 (2008) (“Because the legislature’s intent is clear from our inquiry into text and context, further inquiry is unnecessary.”); *Dep’t of Revenue v. Faris*, 345 Or. 97, 105, 190 P.3d 364, 367 (2008) (“We conclude, from the text and context of ORS 305.265(2) alone, that the legislature did not intend to require a hand signature in order to certify a notice of deficiency. Taxpayers do not convince us that there is a need to consult legislative history”); *Baker v. City of Lakeside*, 343 Or. 70, 77, 164 P.3d 259, 263 (2007) (“Because there are two plausible interpretations, we look to the legislative history to determine the legislature’s intent.”); *State v. Murray*, 343 Or. 48, 52, 162 P.3d 255, 257 (2007) (“If the meaning of the statute is clear at that first level of analysis, then we proceed no further.”); *State v. Sandoval*, 342 Or. 506, 511, 156 P.3d 60, 62 (2007) (“If, after that initial examination, the legislature’s intent . . . still is unclear, we may proceed to an examination of legislative history.”); *Pacificorp Power Mktg., Inc. v. Dep’t of Revenue*, 340 Or. 204, 215, 131 P.3d 725, 731 (2006) (“If the legislative intent is clear after reviewing the ordinary meaning of the text and context, then no further inquiry is necessary.”); *State ex rel. Dep’t of Human Servs. v. Rardin*, 338 Or. 399, 407, 110 P.3d 580, 584 (2005) (“If the legislature’s intent is clear from the text and context of the statute, then further analysis is unnecessary.”); *Walsh Constr. Co. v. Mut. of Enumclaw*, 338 Or. 1, 10, 104 P.3d 1146, 1150 (2005) (Because first-level analysis

appeared to ignore both *PGE* and the 2001 amendments, proceeding to examine a statute's legislative history without reference to either.⁸⁶ In one case, *State v. Rodriguez-Barrera*, I suggested that the amendments could reasonably be interpreted to have no effect at all.⁸⁷ Even before 2001, the parties could offer legislative history to the courts without first establishing an ambiguity. And courts always were free to give legislative history the weight that they thought appropriate.⁸⁸ As I recall, I thought that such an observation might get the attention of the supreme court. I was wrong about that.

Stranger still, after years of chastening lower courts for failing to cite the decision, the Oregon Supreme Court began omitting its usual reference to *PGE* in its statutory construction cases. And some members of the court began publicly to disavow the notion that *PGE* was ever intended to serve as the watershed decision that it had become. All of which prompted me to write an article for the state bar appellate section's annual "Almanac" entitled *The Mysterious Disappearance of PGE*.⁸⁹

F. *State v. Gaines*

The mystery was solved with *State v. Gaines*.⁹⁰ An otherwise unremarkable criminal case about the statute defining the offense of obstruction of justice, *Gaines* was selected as the case with which the court finally would confront the effect, if any, of the 2001 amendments

"demonstrates the legislature's intent conclusively, we determine that consideration of legislative history is unnecessary."); *State v. Ward*, 224 Or. App. 421, 425, 198 P.3d 443, 444 (2008) (declining to consider legislative history in the absence of ambiguity), *review denied*, 346 Or. 116 (2009).

⁸⁶ See, e.g., *Ware v. Hall*, 342 Or. 444, 452 n.6, 154 P.3d 118, 122 n.6 (2007) ("To the extent that the text and context leave any doubt about the legislature's intent, the legislative history removes it."); *Roberts v. State Action Insurance Fund (SAIF) Corp.*, 341 Or. 48, 53, 136 P.3d 1105, 1107 (2006) (examining the text of a statute, the court stated, "A review of the legislative history confirms that that was the legislature's intent," without identifying any ambiguity); *Mabon v. Wilson*, 340 Or. 385, 391, 133 P.3d 899, 902 (2006) (stating that it is "satisfied" there is no ambiguity when statutory terms are viewed in context, "we nonetheless look to the history of the statute to determine whether that history undercuts in any way our preliminary assessment of the meaning of the wording of [the statute]"); *Bobo v. Kulongoski*, 338 Or. 111, 117–18, 107 P.3d 18, 21–22 (2005); *In re Marriage of O'Donnell-Lamont*, 337 Or. 86, 105, 91 P.3d 721 (2004), *cert. denied*, 543 U.S. 1050 (2005); *Edwards v. Biehler*, 203 Or. App. 271, 275, 124 P.3d 1256 (2005).

⁸⁷ 213 Or. App. 56, 61, 159 P.3d 1201, 1203, *review denied*, 343 Or. 224 (2007).

⁸⁸ *Id.*

⁸⁹ Jack L. Landau, *The Mysterious Disappearance of PGE*, 4 OR. APP. ALMANAC 153 (2009).

⁹⁰ 346 Or. 160, 206 P.3d 1042 (2009).

to ORS 174.020. Under ORS 162.235(1)(a), a person commits the offense of obstruction of justice if he or she “intentionally obstructs, impairs or hinders the administration of law or other governmental or judicial function by means of intimidation, force, physical or economic interference or obstacle.”⁹¹ In *Gaines*, the defendant was taken to jail on an unrelated charge. She refused to permit a police officer to photograph her. A police officer ordered her to cooperate, and she again refused. Rather than physically force her to be photographed, the state charged her with obstruction of justice. She was ultimately convicted.⁹² On appeal, she argued that the trial court should have dismissed the charge because her passive failure to comply with an officer’s order did not amount to obstruction within the meaning of ORS 162.235. The Oregon Court of Appeals rejected her argument and affirmed.⁹³ The defendant petitioned for review in the Oregon Supreme Court.⁹⁴

The supreme court granted the petition. But, as the court sometimes does, it added to its order accepting the petition a list of specific questions for the parties to address in their briefing on review. Among those questions was a request that the parties address the effect, if any, of the legislature’s amendments to ORS 174.020.⁹⁵ Why the court decided to add that issue to its consideration of *Gaines* is not entirely clear. In any event, the defendant asserted that the amendments had the effect of altering *PGE* so that there was no longer any requirement of finding ambiguity in a statute as a prerequisite to examining legislative history.⁹⁶

The Oregon Supreme Court agreed, sort of. Its opinion in *Gaines* is quite subtle and very much worth careful examination. The court began by observing that the amendments posed something of a “conundrum.”⁹⁷ As I had suggested in *Rodriguez-Barrera*, the court in *Gaines* observed that, on the face of things, the amendments to ORS 174.020 did not appear to alter the law.⁹⁸ But, the court said, it could

⁹¹ OR. REV. STAT. § 162.235(1)(a) (2017).

⁹² *Gaines*, 346 Or. at 162–63, 206 P.3d at 1045–46.

⁹³ *State v. Gaines*, 211 Or. App. 356, 361, 155 P.3d 61, 63, *adhered to as modified on reconsideration*, 213 Or. App. 211, 159 P.3d 1291 (2007), *rev’d*, 346 Or. 160, 206 P.3d 1042 (2009).

⁹⁴ Petition for Review of Defendant-Appellant, *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009) (No. S055031), 2007 WL 7042358.

⁹⁵ *State v. Gaines*, 343 Or. 363, 169 P.3d 1268 (2007) (Table).

⁹⁶ *Gaines*, 346 Or. at 165, 206 P.3d at 1046–47.

⁹⁷ *Id.* at 166, 206 P.3d at 1047.

⁹⁸ As the court put it,

not just ignore the fact that the legislative history of those amendments fairly clearly indicated an intention to alter precisely that aspect of the *PGE* analysis.⁹⁹ So, the court concluded, for the purposes of resolving the issues in this particular case, it dispensed with the requirement that there be an ambiguity before examining a statute's legislative history.¹⁰⁰

Turning to that history, the court derived three insights from its examination of the legislative enactment record. First, it was clear that the legislature expected not only that a party would be free to offer legislative history for the court to consider it but also “that the court would in fact do so.”¹⁰¹ Citing comments by Max Williams, the sponsor of the amendments, the court observed that the legislature intended to raise the level of legislative history to “the same level as text and context.”¹⁰²

Second, at the same time, the court said that the legislative history confirmed the legislature's intent that courts retain complete authority to determine the weight to give to legislative history in determining the statute's meaning. As the court observed, “The legislative history thus makes it clear that the legislature specifically intended not to mandate or intrude on that traditional province of the judicial branch.”¹⁰³

Third, the court noted that there was some tension between those two legislative objectives. In the court's view, the legislative history revealed a legislative desire to “strik[e] a delicate balance between the legislature's role in ensuring that its enactments are interpreted in the way that the legislature intended and the court's independent role in performing that interpretive exercise.”¹⁰⁴ The legislature may have wished for a reprieve from the unyielding “if, but only if” constraint that *PGE* imposed on even looking at legislative history, but, beyond

[T]he 2001 amendments would seem to work little change to preexisting practices. No procedural rule or practice in the past has limited a party's ability to present legislative history to a court, ambiguity or no ambiguity. Nothing has ever compelled the court—other than its own resolve to correctly discern legislative intent—to go beyond the legislative history proffered by the parties. And the use that the courts have made of legislative history traditionally has been for the courts to decide.

Id. (discussing OR. REV. STAT. § 174.020 (2009)).

⁹⁹ *Id.* at 166–67, 206 P.3d at 1047–48.

¹⁰⁰ *Id.* at 171–72, 206 P.3d at 1050.

¹⁰¹ *Id.* at 167, 206 P.3d at 1048.

¹⁰² *Id.*

¹⁰³ *Id.* at 168, 206 P.3d at 1048.

¹⁰⁴ *Id.* at 168, 206 P.3d at 1049.

that, it left to the courts to decide what, if anything, to do with that history.¹⁰⁵

The court's opinion in *Gaines* then took an interesting turn. After carefully examining the legislative history of the 2001 amendments to ORS 174.020, the court stated, "This court remains responsible for fashioning rules of statutory interpretation that, in the court's judgment, best serve the paramount goal of discerning the legislature's intent."¹⁰⁶ It was as if the court was saying, the amendments to ORS 174.020 are all well and good, but it remains up to the courts to decide how best to interpret statutes. In other words, the court was deftly hinting at the sort of separation-of-powers issues that it had avoided or ignored in *PGE*. Accordingly, the court concluded that it—not the legislature—would alter its approach to the interpretation of statutes. It did so "in light of the 2001 amendments," but not because those amendments *required* it to do so.¹⁰⁷

The court summarized the effect of its decision in the following terms:

The first step remains an examination of text and context. But, contrary to this court's pronouncement in *PGE*, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step—consideration of pertinent legislative history that a party may offer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where the legislative history appears useful to the court's analysis. However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine. The third, and final, step of the interpretive methodology is unchanged. If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.¹⁰⁸

Gaines then took another interesting turn. The court took some pains to emphasize that, although there no longer exists an artificial barrier to the examination of legislative history, the court remains committed to careful examination of a statute's text, which may impose significant limitations on the amount of weight that may be assigned to legislative history in a given case. "[T]here is no more persuasive evidence of the

¹⁰⁵ *Id.* at 169, 206 P.3d at 1049.

¹⁰⁶ *Id.* at 171, 206 P.3d at 1050.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 171–72, 206 P.3d at 1050–51 (citations omitted).

intent of the legislature,” the court commented, “than the words by which the legislature undertook to give expression to its wishes.”¹⁰⁹ In light of that overriding principle, the court said that

we clarify that a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it. Legislative history may be used to confirm seemingly plain meaning and even to illuminate it; a party also may use legislative history to attempt to convince a court that superficially clear language actually is not so plain at all—that is, that there is a kind of latent ambiguity in the statute. For those or similar purposes, whether the court will conclude that the particular legislative history on which a party relies is of assistance in determining legislative intent will depend on the substance and probative quality of the legislative history itself. . . . When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different.¹¹⁰

With those principles in mind, the court turned to the statute at issue in *Gaines*, examining both the text of the statute in its context and its legislative history, ultimately concluding that the court of appeals had erred in determining that defendant’s mere passive refusal to comply with an officer’s order amounted to obstruction.¹¹¹

Gaines is chock-full of important insights concerning the proper method of statutory construction going forward. I want to emphasize three.

First, *Gaines* did not question the overriding objective of statutory construction that *PGE* had identified—legislative intent.¹¹² Interestingly, although *Gaines* asserted that it is up to the courts to determine the appropriate rules of interpretation, it appeared not to appreciate that *PGE* had relied on a legislative rule—ORS 174.020—for its assertion that the object of statutory construction is legislative intent. Implicit is the apparent assumption that, even without that statute, the court would have reached the same conclusion.

Second, the court’s comments about the judiciary’s paramount authority to determine appropriate rules of interpretation are tantalizing. To be sure, the court said only what it needed to say to resolve the issue before it. But its comments lead to a lot of questions. What, for example, is to be made of the other rules of construction set

¹⁰⁹ *Id.* at 171, 206 P.3d at 1050.

¹¹⁰ *Id.* at 172–73, 206 P.3d at 1051 (emphasis omitted).

¹¹¹ *Id.* at 173–83, 206 P.3d at 1051–57.

¹¹² *See id.* at 165–66, 206 P.3d at 1047.

out in ORS chapter 174? It could be that, as they represent a mere codification of common-law rules (at least as they existed in the mid-nineteenth century), they remain authoritative. Or, it could be that they will be regarded as something less than that.

Third, the court's comments about the primacy of a statute's text seem especially significant. The court clearly was saying that, although legislative history will be given more attention in the future, its effect will remain limited by the reasonable construction of the words that the legislature enacted into law. The court thus reaffirmed its commitment to the sort of careful textual analysis that had characterized its decisions during the *PGE* era.

II

THE RULES OF STATUTORY CONSTRUCTION

So, under *PGE* and *Gaines*, the basic method of statutory construction in Oregon can be summarized as follows: the objective of statutory construction is to determine legislative intent. That objective is achieved by means of analysis that proceeds in two steps. At the first step, the court considers the text of the statute in its context, in light of any relevant rules of textual interpretation. Also included at the first step is consideration of any relevant legislative history, given whatever weight the court deems appropriate. If the analysis adequately reveals the meaning of the statute that the legislature intended, the court's job is done. If some ambiguity remains, the court proceeds to a second step, which consists of applying a relevant "general maxim" of construction.

What we need to do at this point is unpack that summary and examine its components in some detail. What does it mean to say that the goal of statutory construction is "legislative intent?" What's included in the consideration of a statute's "text" or its "context"? What are the rules of textual construction, and how do they apply? What's included in a statute's "legislative history," and how does a court go about giving that history appropriate weight? What is meant by "ambiguity" of the sort that justifies resorting to general maxims of statutory construction? And finally, what exactly are the "general maxims" of statutory construction, and how does a court know which ones to apply?

A. What Is "Legislative Intent"?

Let's begin with what both *PGE* and *Gaines* characterized as the overarching objective of statutory construction—namely, determining

“legislative intent.”¹¹³ As I have already mentioned, the Oregon Supreme Court identified this goal without considering that there are other possibilities. The academic literature on statutory construction is fairly bursting with articles about a wide variety of theories of the proper role of the courts in determining the meaning of statutes.¹¹⁴ Still, in fairness to *PGE* and *Gaines*, in spite of that diversity of theoretical speculation, most courts around the country adhere to the traditional view that the goal of statutory construction is “legislative intent.”¹¹⁵

There remains the issue of what it means to say that the goal of statutory construction is “legislative intent.” Interestingly, aside from the abundance of scholarship challenging the legitimacy of legislative intent as an interpretive objective, there is an equally vast literature debating the meaning of the idea itself. Some use the term in a literal, subjective sense—as Judge Richard Posner put it, an effort “to think [one’s] way . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”¹¹⁶ Others use the term more broadly to refer to a statute’s “general aim” or purpose.¹¹⁷ Still others take a sort of middle position. They concede that it is not useful (or perhaps even possible) to speak of legislative intent in terms of the mental states of legislators, but argue that there is more to it than merely identifying a vague statutory purpose.¹¹⁸

Complicating matters, the meaning of the phrase has tended to shift over time. ORS 174.020, for instance, refers to “legislative intent” as the objective of statutory construction.¹¹⁹ But contemporaneous

¹¹³ See, e.g., *State v. White*, 346 Or. 275, 280, 211 P.3d 248, 251 (2009) (explaining that whether convictions merge depends on “whether the legislature intended to create two crimes or only one”); *State v. Meek*, 266 Or. App. 550, 555, 338 P.3d 767, 769 (2014) (“The legislature’s intent is our lodestar.”); *Montgomery v. City of Dunes City*, 236 Or. App. 194, 199, 236 P.3d 750, 752 (2010); *Friends of Yamhill Cty. v. Yamhill County*, 229 Or. App. 188, 192, 211 P.3d 297, 299 (2009) (noting that under *Gaines* and *PGE*, “we attempt to determine the meaning of the statute most likely intended by the legislature”).

¹¹⁴ See *supra* sources and text accompanying note 48.

¹¹⁵ See, e.g., 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 45.5 (7th ed. 2014) (“[T]he essential idea that legislative will governs decisions on statutory construction has always been the test most often declared by courts.”).

¹¹⁶ Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

¹¹⁷ E.g., Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370 (1947); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 424 (1988).

¹¹⁸ E.g., Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613 (2014).

¹¹⁹ OR. REV. STAT. § 174.020 (2017).

sources suggest that, when that statute was enacted in the mid-nineteenth century, the term likely was understood rather emphatically *not* to embrace the specific, subjective intentions of individual legislators and that resort to evidence of such subjective intentions as legislative history was all but unheard of.¹²⁰

The Oregon Supreme Court appears to have a somewhat fluid idea of what the phrase “legislative intent” means. Ironically, the court has never attempted a sort of “*PGE* analysis” of ORS 174.020, which *PGE* itself cited as the source for the idea that legislative intent is the lodestar of statutory construction. Rather, the court appears to have assumed the term has always meant what it means today.

As for what it means today, most often the court speaks of “legislative intent” in the narrow, specific sense of getting into the minds of legislators to determine what they would have wanted the statute to be taken to mean. It’s quite common to see references to what the legislature as a body or individual legislators “had in mind” when voting a bill into law.¹²¹ Particularly in the years following *Gaines*, the court frequently has resorted to detailed analysis of legislative history to unearth what legislators were specifically contemplating during their deliberations.

*Comcast Corp. v. Department of Revenue*¹²² offers a fine example. The issue in that case was whether the communication giant’s internet transmission of cable television services was subject to a particular form of taxation reserved for “data transmission services by whatever means provided,” under state tax statutes.¹²³ Comcast had argued that the statute was enacted in 1973 and that, although cable television

¹²⁰ See, e.g., THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 243 (1857) (“[T]he tendency of all our modern decisions is to the effect that the intention of the legislature is to be found in the statute itself, and that there only the judges are to look for the mischiefs meant to be obviated, and the remedy meant to be provided.”). For a more detailed description of nineteenth-century interpretive conventions, see generally Landau, *supra* note 17.

¹²¹ See, e.g., *State v. Johnson*, 339 Or. 69, 81 n.7, 116 P.3d 879, 886 n.7 (2005) (“There is no hint . . . that the legislature had any other purpose in mind.”); *Blyth & Co. v. City of Portland*, 204 Or. 153, 159, 282 P.2d 363, 366 (1953) (“It must be presumed that the legislative body had a purpose in mind in all the language that it used.”); *Sch. Dist. No. 24 v. Smith*, 84 Or. 50, 52, 164 P. 375, 376 (1917) (“[I]t was probably not in the legislative mind”); *Guzman v. Bd. of Parole & Post-Prison Supervision*, 200 Or. App. 448, 456, 115 P.3d 983, 987 (2005) (“[I]t appears that the legislature had other remedies in mind.”), *review denied*, 340 Or. 34 (2006).

¹²² 356 Or. 282, 337 P.3d 768 (2014).

¹²³ *Id.* at 314, 337 P.3d at 786 (quoting OR. REV. STAT. § 308.505(2) (2013)).

certainly existed then, the internet did not.¹²⁴ Comcast asserted that it was highly unlikely that the legislature contemplated the phrase “data transmission services” to encompass internet technology that did not yet exist.¹²⁵

The Oregon Supreme Court noted that, in the early 1970s, the term “data transmission” had a particular, technical meaning in the communications industry that broadly encompassed the transmission of any information by means of some code, such as binary code, for storage and processing.¹²⁶ The question, the court said, was whether the legislature had that technical meaning in mind when it enacted the tax legislation.¹²⁷ Turning to the legislative history, the court cited comments of individual legislators to establish that they subjectively “understood” that the term was being used in its broad, technical sense.¹²⁸ The court noted that one legislator specifically asked a representative of the Department of Revenue, “What is data transmission? Is this the phone-to-phone . . . kind of thing?”¹²⁹ And it quoted the representative’s answer that the term referred broadly to “data from a computer terminal into a computer.”¹³⁰ The court also quoted a legislator on the floor of the House of Representatives, who explained that the term encompasses any sort of computer data transmission.¹³¹ The court, in other words, mined the legislative record for evidence as to what legislators actually said and thought about the meaning of the legislation that was being considered.

*State v. Walker*¹³² provides another example. That case required the court to interpret the Oregon Racketeering Influenced and Corrupt Organizations (RICO) law, which applies when an “enterprise” engages in a pattern of racketeering activity.¹³³ Walker had been charged with violating the law when he and a companion entered a local Safeway store and proceeded to shoplift large quantities of Huggies diapers, Tide laundry detergent, beer, and frozen shrimp.¹³⁴ Upon their arrest, police searched Walker’s car and found in the trunk

¹²⁴ *Id.* at 289, 337 P.3d at 772.

¹²⁵ *Id.*

¹²⁶ *Id.* at 297–98, 337 P.3d at 777–78.

¹²⁷ *Id.* at 299–301, 337 P.3d at 778–79.

¹²⁸ *Id.* at 302, 337 P.3d at 780.

¹²⁹ *Id.* at 303, 337 P.3d at 780.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² 356 Or. 4, 333 P.3d 316 (2014).

¹³³ *Id.* at 6, 333 P.3d at 318 (citing OR. REV. STAT. § 166.720(3)).

¹³⁴ *Id.* at 7, 333 P.3d at 318–19.

even more boxes of diapers, detergent, beer, and shrimp.¹³⁵ Walker argued that the charges should have been dismissed because he and his companion did not qualify as an “enterprise” within the meaning of the statute.¹³⁶ Oregon’s RICO law defines an “enterprise” expansively to include “any individual, sole proprietorship, partnership, corporation, business trust or other profit or nonprofit legal entity, and includes any union, association or group of individuals associated in fact although not a legal entity.”¹³⁷ Walker argued that, although broadly worded, the term cannot be taken to include two people who shoplift; he argued that it should only apply to more formally organized criminal activity.¹³⁸ In support, he cited portions of the legislative history of the state RICO law, which he said demonstrated that what the legislature had in mind was something more like organized crime.¹³⁹

The court rejected Walker’s argument.¹⁴⁰ The court acknowledged that “the bill’s sponsors were concerned primarily with the presence and possible future expansion in Oregon of large-scale organized crime consortiums.”¹⁴¹ Nevertheless, the court explained, other legislative history showed that members were aware of the fact that the wording of the bill was broad and could apply to smaller-scale criminal endeavors.¹⁴² The court noted a question from a legislator to a local sheriff’s deputy during committee hearings about whether the law might apply to shoplifting.¹⁴³ The deputy replied that it could.¹⁴⁴ The court also referred to a comment from another legislator during a committee hearing emphasizing the breadth of the proposed law and the fact that it could apply to a group of “amateurs” committing a series of burglaries or shoplifts.¹⁴⁵ The court found such legislative history “particularly telling,” revealing that legislators were aware of the breadth of the bill and its potential to apply to small-scale criminal activity.¹⁴⁶

¹³⁵ *Id.* at 8, 333 P.3d at 319.

¹³⁶ *Id.* at 11, 333 P.3d at 321.

¹³⁷ OR. REV. STAT. § 166.715(2) (2013).

¹³⁸ *Walker*, 356 Or. at 15, 333 P.3d at 323.

¹³⁹ *Id.* at 17, 333 P.3d at 324.

¹⁴⁰ *Id.* at 17–23, 333 P.3d at 324–27.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 17–18, 333 P.3d at 324–35.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 19–20, 333 P.3d at 325.

¹⁴⁶ *Id.* at 20–21, 333 P.3d at 326.

This approach to “legislative intent” isn’t without its problems. A number of scholars have complained that it is not very realistic to speak of the intentions of a ninety-member institution like the Oregon Legislature, or even a simple majority of it.¹⁴⁷ Individual members may vote in favor of a bill for any number of reasons, some of them unknowable. In that sense, actual, specific intent is a fiction.

Aside from that, even assuming it’s possible to determine the intentions of a large-member institution, it’s almost impossible to find reliable evidence of such intentions. In nearly all cases, resort to legislative history will reveal the actual, specific intentions of one, two, or a half-dozen individual members. The courts then simply extrapolate from those individual instances of legislative intent generalizations concerning the intent of the institution as a whole. *Comcast* and *Walker* illustrate the point. In the first case, the court relied on the statement of one legislator in committee hearings and another during floor debates. Similarly, in the second case, the court placed some emphasis on a colloquy between a single legislator and a witness. What the court is doing in such cases is engaging in a series of unspoken inferences and assumptions—that other legislators were aware of the statements of an individual’s intent or understanding, and the record would reveal if those other legislators disagreed or had a different intent or understanding. In *Jones v. General Motors Corp.*, I complained of that problem.¹⁴⁸ The majority had relied on the statement of a single senator during floor debates.¹⁴⁹ I suggested that it was hard to understand how the statements of a single member of one house could be so easily taken to reflect the views of the institution as a whole, especially a bicameral institution.¹⁵⁰ The majority dismissed my complaint with a juridical

¹⁴⁷ Perhaps the most famous critique of “legislative intent” is Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). Scholars still argue about “legislative intent” to this day. See also Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1020–21 (2017) (“[L]egislative intent” is a “useful fiction.”); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2403 (2017) (“[T]he reality seems to be that a complex, multimember legislature likely has no genuine intent about the outcomes in the hard cases that make their way into court.”); Richard I. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W. L. REV. 128, 128 (1972) (“[T]he concept of legislative intent, as discussed in the legal profession, is a fiction.”); Kenneth A. Shepsie, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

¹⁴⁸ 139 Or. App. 244, 265–75, 911 P.2d 1243, 1255–60 (1996) (en banc) (Landau, J., concurring), *aff’d*, 325 Or. 404 (1997).

¹⁴⁹ *Id.* at 256–57, 911 P.2d at 1250–51 (majority opinion).

¹⁵⁰ *Id.* at 271, 911 P.3d at 1259 (Landau, J., concurring).

back of the hand, commenting that “[w]hatever the theoretical merits” of my point, the fact remains that courts engage in such reasoning all the time.¹⁵¹

In short, Oregon courts tend, somewhat fancifully, to speak of legislative intent in very specific terms on the basis of very sketchy evidence.

In some cases, though—particularly when there is no evidence of even an individual legislator’s intentions or understandings—the court views legislative intent in a more general way. In *Bartz v. State*,¹⁵² the court considered whether a petitioner’s post-conviction claim fell within an exception to the 120-day limitation period for filing such claims. The statutory exception applied when the grounds for relief “could not reasonably have been raised in the original or amended petition.”¹⁵³ The petitioner contended that he could not reasonably have raised his claim in that case because his attorney failed to tell him about it.¹⁵⁴ The Oregon Court of Appeals rejected the argument because the petitioner had failed to file an original or amended petition.¹⁵⁵ The Oregon Supreme Court looked to the text of the statute in context, along with available legislative history, and came up empty as to whether the statute was intended to apply only when a petitioner had already filed an original or amended petition.¹⁵⁶ Under the circumstances, the court said, what would control is the general “purpose” of the exception.¹⁵⁷ The court interpreted that purpose to be giving persons extra time to file post-conviction petitions in extraordinary circumstances, a purpose that applied equally to persons who did and did not file an earlier, timely petition.¹⁵⁸

Referring to “legislative intent” in this sense is not without its own problems, principally that there is no *a priori* way to know the proper level of generality with which to describe the purpose of a statute. Still, in my view at least (and, if I am not mistaken, in the view of most courts

¹⁵¹ *Id.* at 258, 911 P.2d at 1252 (majority opinion).

¹⁵² 314 Or. 353, 355, 839 P.2d 217, 219 (1992).

¹⁵³ OR. REV. STAT. § 138.510(2) (1991).

¹⁵⁴ *Bartz*, 314 Or. at 356–57, 839 P.2d at 220.

¹⁵⁵ *Bartz v. State*, 110 Or. App. 614, 617–18, 825 P.2d 657, 659, *aff’d*, 314 Or. 353 (1992).

¹⁵⁶ 314 Or. at 356–58, 839 P.2d at 220.

¹⁵⁷ *Id.* at 358, 839 P.2d at 220–21.

¹⁵⁸ *Id.* at 358, 839 P.2d at 221; *see also, e.g.*, *McKean-Coffman v. Emp’t Div.*, 312 Or. 543, 550, 824 P.2d 410, 414 (1992) (explaining in the absence of more specific evidence of legislative intent, a statute’s purpose controls).

and commentators),¹⁵⁹ referring to “legislative intent” as a general policy or purpose is probably more realistic, certainly more defensible, and probably more useful.

B. First-Level Analysis

With the goal of ascertaining legislative intent in mind, *PGE* and *Gaines* instruct that the first analytical step in statutory construction is to examine the text of the statute in its context, along with relevant rules of textual construction and legislative history, to see whether that legislative intent has been expressed “unambiguously.” If the analysis shows an unambiguously expressed intended meaning, the analysis ends. It is, in effect, a one-step process. If, after the first-level analysis, the intended meaning of the statute remains ambiguous, it is appropriate to resolve that ambiguity by reference to general maxims of construction. Because a subsidiary object of the first-level analysis is determining whether a given statute is “ambiguous,” then, we need to establish precisely what “ambiguity” means in this context.

1. The Meaning of “Ambiguity”

Linguists have come up with a number of distinct categories of indeterminacy.¹⁶⁰ For example, there is “lexical” ambiguity, which occurs when a word has more than one definition or “sense.” The classic example is the word “bank,” which can refer to a financial institution or the side of a stream. This is not often a problem encountered in statutes, either because relevant terms are defined or because their use in context resolves the ambiguity.

There is “syntactic” ambiguity, when a statement yields two possible meanings resulting from its syntax, or sentence structure. Noam Chomsky’s example of “[f]lying planes can be dangerous,” is frequently cited.¹⁶¹ It can mean either that planes that are flying are dangerous or that the act of flying them can be dangerous. This category of ambiguity sometimes arises when statutes use an adverb in an uncertain way, as when defining a mental state for a criminal offense without making clear to what elements the mental state applies.

¹⁵⁹ See, e.g., DICKERSON, *supra* note 52, at 87 (“Whereas the concept of ‘legislative intent’ is in disfavor with many legal writers, that of ‘legislative purpose’ enjoys not only favor but preeminence. For most, it is the touchstone of statutory interpretation.”).

¹⁶⁰ For a helpful discussion of the different types of ambiguity, see generally Lawrence M. Solan, *Linguistic Issues in Statutory Interpretation*, in *THE OXFORD HANDBOOK OF LANGUAGE AND LAW* 87, 88–95 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

¹⁶¹ NOAM CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* 21 (14th ed. 1985).

And there is “semantic” ambiguity, occurring when a statement’s syntax or structure does not produce the uncertainty, but the meaning of the words in the statement does. Take, for example, the statement, “John and Mary are married.” Does it mean that they are married to each other, or to different spouses? This is a relatively common form of ambiguity in statutory construction cases.

Then there is a different form of indeterminacy that linguists refer to as “vagueness,” which refers to uncertainty about just how broadly an otherwise unambiguous term may be applied. For example, is a drivable lawn mower a “vehicle” within the state’s motor vehicle code?

In Oregon—and, in truth, in most jurisdictions—courts don’t use such precise terminology when referring to the uncertainties that arise in statutory construction disputes. Rather, courts tend to lump all such forms of indeterminacy into a single category, referred to as “ambiguity.” That’s understandable, for judges are not linguists. It’s also probably a good thing, for it avoids potential confusion. “Vagueness,” for example, has a distinct meaning in the legal context—a statute may be unconstitutionally “vague” if its meaning cannot reasonably be determined or leaves unfettered discretion in its application—which is entirely foreign to the linguistic use of the word.¹⁶²

In Oregon case law, though, the term “ambiguity” still is treated as one of art. It occurs when a statute is reasonably capable of more than one meaning.¹⁶³ That is to say, the wording of the statute must be reasonably capable of being interpreted to mean at least two different things. A statute may be ambiguous for any number of reasons—whether lexical, syntactical, referential, semantic, or vague in the linguistic sense. The courts refer to all of those different forms of indeterminacy as “ambiguity.”

¹⁶² See, e.g., *Taylor v. United States*, 495 U.S. 575, 600 (1990); *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983).

¹⁶³ See, e.g., *State v. Cooper*, 319 Or. 162, 167, 874 P.2d 822, 825 (1994) (“Because either interpretation is reasonable, the word is ambiguous.”); *State v. Dasa*, 234 Or. App. 219, 230–31, 227 P.3d 228, 235 (“[T]he threshold of ambiguity is a low one. It does not require that competing constructions be equally tenable. It requires only that a competing construction not be ‘wholly implausible.’” (quoting *Godfrey v. Fred Meyer Stores*, 202 Or. App. 673, 686, 124 P.3d 621, 628 (2005), *review denied*, 340 Or. 672 (2006) (internal quotation marks omitted))), *review denied*, 349 Or. 173 (2010); *Rooklidge v. DMV*, 217 Or. App. 172, 180, 174 P.3d 1120, 1126 (2007) (“‘Ambiguity’ is a term of art that means there are at least two reasonable interpretations of the statutory terms.”), *cert. denied*, 557 U.S. 923 (2009).

An important caveat: there must be more than one *reasonable* interpretation to establish a statute’s ambiguity.¹⁶⁴ Remember that Oregon courts are very focused on the text of a statute and the reasonable construction of its terms. Implicit (and often explicit) is the idea that words are not infinitely elastic; there are limits to what courts can interpret them to mean.

At the same time, the cases suggest that the threshold of reasonableness is not an overly demanding one. Especially before *Gaines*, the Oregon Court of Appeals—which tended not to have the Oregon Supreme Court’s aversion to legislative history—often referred to the existence of more than one interpretation that is “not wholly implausible.”¹⁶⁵ Even after *Gaines*, though, the courts appear to apply the same conception of “ambiguity.”¹⁶⁶

2. What Is a Statute’s “Text”?

The answer to this question may seem obvious. But there’s actually quite a bit to think about when considering what constitutes a statute’s “text.” That’s especially true in Oregon, where the courts tend to emphasize the importance of a statute’s text in statutory construction cases.

a. The Words of the Statute

Let’s begin with the obvious: a statute’s “text” consists of the words actually enacted into law. It *doesn’t* include words the legislature, either by choice or accident, did not put in the statute. Courts must “take a statute as [they] find it,” without adding to, or taking from, the actual words enacted into law.¹⁶⁷

After *PGE* and *Gaines*, Oregon courts—especially the Oregon Supreme Court—consider this point central to their statutory construction analysis. Often, courts will refer to the legislature’s own declaration that “[i]n the construction of a statute, the office of a judge is simply to ascertain and declare what is, in terms or in substance,

¹⁶⁴ *Rooklidge*, 217 Or. App. at 180, 174 P.3d at 1126.

¹⁶⁵ See, e.g., *Owens v. MVD*, 319 Or. 259, 268, 875 P.2d 463, 468 (1994); *State v. Blair*, 230 Or. App. 36, 50–51, 214 P.3d 47, 54–55 (2009), *aff’d*, 348 Or. 72 (2010); *State v. Rodriguez*, 217 Or. App. 24, 28, 175 P.3d 471, 474 (2007) (en banc); *State v. Stamper*, 197 Or. App. 413, 417, 106 P.3d 172, 174, *review denied*, 339 Or. 230 (2005); *State v. Walker*, 192 Or. App. 535, 542, 86 P.3d 690, 694, *review denied*, 337 Or. 327 (2004).

¹⁶⁶ See, e.g., *State v. Cloutier*, 351 Or. 68, 95, 261 P.3d 1234, 1249 (2011) (“On the bare face of the statute itself, defendant’s reading of the statute is not wholly implausible.”).

¹⁶⁷ *Wyers v. Am. Med. Response Nw., Inc.*, 360 Or. 211, 221, 377 P.3d 570, 576 (2016).

contained therein, not to insert what has been omitted or to omit what has been inserted.”¹⁶⁸ That statute, in fact, is probably the single most frequently cited statute of the interpretive provisions of ORS chapter 174.¹⁶⁹

But the focus on the text has constitutional dimensions as well. The Oregon Supreme Court emphasized this point at some length in *Gaines*, and the explanation is worth quoting in full:

[A]s this court and other authorities have long observed, there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes. Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law. The formal requirements of lawmaking produce the best sources from which to discern the legislature’s intent, for it is not the intent of the individual legislator that governs, but the intent of the legislature as formally enacted into law:

[N]ot only is it important that the will of the law-makers be expressed, but it is also essential that it be expressed in due form of law; since nothing is law simply and solely because the legislators will that it shall be unless they have expressed their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.

¹⁶⁸ OR. REV. STAT. § 174.010 (2017).

¹⁶⁹ See, e.g., *Comcast Corp. v. Dep’t of Revenue*, 363 Or. 537, 545, 423 P.3d 706, 710 (2018) (“Yet taxpayer’s proposed construction of the statute would require this court to insert similar provisions, contrary to the legislature’s directive that, in construing statutes, courts are to ‘ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted.’ See ORS 174.010.”); *State v. McNally*, 361 Or. 314, 328, 392 P.3d 721, 729 (2017) (“It is axiomatic that this court does not insert words into a statute that the legislature chose not to include. See ORS 174.010.”); *Owens v. Maas*, 323 Or. 430, 435, 918 P.2d 808, 811 (1996) (“The state’s proposed interpretation of section 5 conflicts with the general rule of construction contained in ORS 174.010, which provides that, when construing a legislative enactment, this court may not ‘insert what has been omitted’ nor ‘omit what has been inserted.’”); *Local No. 290, Plumbers & Pipefitters v. Or. Dep’t of Env’tl. Quality*, 323 Or. 559, 567, 919 P.2d 1168, 1172 (1996) (“We are admonished not to add to a statute words that the legislature has omitted. ORS 174.010.”); *State v. Berry*, 293 Or. App. 717, 729, 429 P.3d 1011, 1018 (2018) (“[The state’s view] contradicts the available legislative history and, even more significantly, would require us to impermissibly ‘insert what has been omitted’ into the statute. ORS 174.010.”); *McLaughlin v. Wilson*, 292 Or. App. 101, 105, 423 P.3d 133, 135 (2018) (“In construing the text and context, we neither ‘insert what has been omitted’ nor ‘omit what has been inserted.’ ORS 174.010.”). A recent Westlaw check revealed that the statute had been cited 967 times by the Oregon Supreme Court and the Oregon Court of Appeals.

For those reasons, text and context remain primary, and must be given primary weight in the analysis.¹⁷⁰

A good example of this principle applied is *Monaco v. U.S. Fidelity & Guaranty Co.*¹⁷¹ In that case, the plaintiff was a passenger who was injured in a car crash.¹⁷² The driver was not insured.¹⁷³ The defendant did have insurance.¹⁷⁴ The insurer, however, offset its uninsured motorist payout by medical payments to the plaintiff.¹⁷⁵ The plaintiff sued, arguing that the statute should be read to prohibit such offsets.¹⁷⁶ In support, the plaintiff cited the legislative history of the statute governing mandated uninsured motorist coverage.¹⁷⁷ The Oregon Supreme Court, however, rejected the argument, finding no wording in the statute capable of being read to impose such a requirement.¹⁷⁸ “Whatever the legislative history of an act may indicate,” the court explained, “it is for the legislature to translate its intent into operational language.”¹⁷⁹ “This court cannot correct clear and unambiguous language for the legislature so as to better serve what the court feels was, or should have been, the legislature’s intent.”¹⁸⁰

¹⁷⁰ *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042, 1050 (citations omitted) (internal quotation marks omitted).

¹⁷¹ 275 Or. 183, 550 P.2d 422 (1976).

¹⁷² *Id.* at 185, 550 P.2d at 423.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 187, 550 P.2d at 424.

¹⁷⁷ *Id.* at 187–88, 550 P.2d at 424.

¹⁷⁸ *Id.* at 188, 550 P.2d at 424.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*; see also, e.g., *Bauder v. Farmers Ins. Co.*, 301 Or. 715, 718–22, 724–26, 725 P.2d 350, 351–53, 355–56 (1986) (quoting *Monaco*); *Staiger v. Burkhart*, 299 Or. 49, 53, 698 P.2d 487, 488–89 (1985); *State v. Martin*, 298 Or. 264, 268, 691 P.2d 908, 910 (1984); *Lane County v. R.A. Heintz Constr. Co.*, 228 Or. 152, 157, 364 P.2d 627, 630 (1961) (“[T]he court is not authorized to rewrite a statute or to ignore the plain meaning of unambiguous words to correct the action of the legislature.”); *Dilger v. Sch. Dist. 24 CJ*, 222 Or. 108, 112, 352 P.2d 564, 566 (1960) (“It is axiomatic that the courts cannot in the guise of construction supply an integral part of a statutory scheme omitted by the legislature.”); *State ex rel. Everding v. Simon*, 20 Or. 365, 373–74, 26 P. 170, 173 (1891) (“[W]hen a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.”); *State v. Patton*, 237 Or. App. 46, 50–51, 238 P.3d 439, 441 (2010) (“We are prohibited, by statutory command and by constitutional principle, from adding words to a statute that the legislature has omitted.”), *review denied*, 350 Or. 131 (2011); *Fernandez v. Bd. of Parole & Post-Prison Supervision*, 137 Or. App. 247, 252 n.2, 904 P.2d 1071, 1073 n.2 (1995) (“Intentions of the legislature that have not found expression in actual statutory language have not satisfied the constitutional requirements for enactment and simply are not law.”); *Faverty v. McDonald’s Rests. of Or., Inc.*, 133 Or. App. 514, 533, 892 P.2d 703, 714 (1995) (“Inchoate intentions

Perhaps even more well known is the Oregon Court of Appeals' decision in *Young v. State*.¹⁸¹ The case involved the state's overtime compensation law, which included a fairly obvious mistake.¹⁸² In 1995, the legislature amended the statute to include public employees in the overtime compensation law.¹⁸³ At the same time, it enacted a list of excepted salaried managers from that overtime compensation requirement; the list exempted overtime "[b]y a county, municipality, municipal corporation, school district or subdivision because of the executive, administrative, supervisory or professional nature of their employment."¹⁸⁴ What about *state* executives, administrators, supervisors, and professionals? The statute omitted any reference to them, by all accounts, entirely accidentally. Thus, as passed, the law exempted county, municipal, and school district administrators from overtime compensation, but not state administrators.¹⁸⁵

One such state salaried professional initiated a class action for overtime compensation under the 1995 amendments.¹⁸⁶ His employer argued that the law obviously was intended to include such state salaried professionals in the list of exemptions from overtime compensation, and to read the statute as written would thwart legislative intent and lead to an obviously absurd result.¹⁸⁷ The court of appeals rejected the argument. Writing for the court, Judge (later Chief Justice) Paul De Muniz explained that "*PGE* demarcated a clear boundary line between the powers of the legislature and those of the court, and, in doing so, circumscribed the court's authority to construe a statute."¹⁸⁸ The legislature's authority, Judge De Muniz noted,

are not law, only those intentions that are manifested in language that is enacted."), *review dismissed*, 326 Or. 530 (1998).

¹⁸¹ 161 Or. App. 32, 983 P.2d 1044, *review denied*, 329 Or. 447 (1999).

¹⁸² *Id.* at 40, 983 P.2d at 1049 (Landau, J., concurring) ("Our decision recognizes the uncontested fact that, in this case, the legislature made a significant mistake in its enactment of ORS 279.340 . . .").

¹⁸³ OR. REV. STAT. § 279.340(1) (1995).

¹⁸⁴ OR. REV. STAT. § 279.342(5)(a) (1995).

¹⁸⁵ The legislature quickly discovered and remedied the mistake at the next opportunity. One of the first bills introduced and passed in the succeeding legislative session inserted the word "state" into the list of salaried professionals exempted from the overtime compensation statute. *Compare* OR. REV. STAT. § 279.342(5)(a) (1995), *with* OR. REV. STAT. § 279.342(5)(a) (1997); *see* *Young v. State*, 221 Or. App. 146, 149 n.2, 188 P.3d 476, 478 n.2 (2008), *rev'd*, 346 Or. 507 (2009) (acknowledging the legislature's "exten[sion] to all public employees").

¹⁸⁶ 161 Or. App. at 34–35, 983 P.2d at 1045–46.

¹⁸⁷ *Id.* at 35, 983 P.2d at 1046.

¹⁸⁸ *Id.* at 38, 983 P.2d at 1047.

“includes the authority to write a seemingly absurd law, so long as the intent to do that is stated clearly.”¹⁸⁹ There was simply no principled way, he concluded, to read the words that the legislature enacted into law to say that state salaried professionals were exempt from the overtime compensation requirement.¹⁹⁰

There have been a few exceptions to the textual, positivistic view reflected in such cases. And they are, frankly, hard to explain. Most predate *PGE* and can be written off as examples of the sort of willy-nilly application of statutory construction rules that appeared in early to mid-twentieth-century cases in this state. *Johnson v. Star Machinery Co.* is a good example.¹⁹¹ The issue in that case was whether the plaintiff’s product liability claim, which arose out of the manufacture of a piece of defective industrial machinery, was subject to the general statute of ultimate repose of ten years.¹⁹² The statute of ultimate repose provided that “[i]n no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.”¹⁹³ The plaintiff argued that, strictly speaking, the statute applied only to negligence actions, not strict product liability actions in which negligence is not at issue.¹⁹⁴ The Oregon Supreme Court conceded that the plaintiff had a point as to the wording of the statute. It nevertheless concluded that the statute of ultimate repose applied to strict product liability actions: “[T]he rule requiring the court to follow the plain meaning of seemingly unambiguous language,” the court said, “is not inflexible and not without exceptions.”¹⁹⁵ According to the court, one such exception applied “if the literal import of the words is so at variance with the apparent policy of the legislature as a whole as to bring about an unreasonable result.”¹⁹⁶ In such cases, the court has declared that it is authorized to “look beyond the words of the act.”¹⁹⁷

Turning to the case at hand, the court concluded that the policy underpinnings of the statute of ultimate repose—preserving the reliability of evidence and preventing the burden of protracted potential

¹⁸⁹ *Id.* at 38, 983 P.2d at 1048.

¹⁹⁰ *Id.* at 39, 983 P.2d at 1048.

¹⁹¹ 270 Or. 694, 530 P.2d 53 (1974).

¹⁹² *Id.* at 697, 530 P.2d at 54.

¹⁹³ OR. REV. STAT. § 12.115(1) (1973).

¹⁹⁴ *Johnson*, 270 Or. at 697–98, 530 P.2d at 55.

¹⁹⁵ *Id.* at 703–04, 530 P.2d at 57.

¹⁹⁶ *Id.* at 704, 530 P.2d at 57.

¹⁹⁷ *Id.*

liability—“is applicable to both theories of recovery alike,” that is, to both negligence and strict product liability.¹⁹⁸ As a result, the court held that the statute of ultimate repose applied, even though the statute’s wording suggested the contrary.¹⁹⁹

Johnson wasn’t very persuasive. Its statutory analysis was a mash-up of a variety of precedents and sources that didn’t quite fit together. At one point, for instance, the court quoted the United States Supreme Court’s famous decision in *Church of the Holy Trinity v. United States*,²⁰⁰ in which the Court said that a thing may be within the letter of a broadly worded statute and yet not fall within the embrace of that statute, which is pretty much the opposite of what the Oregon court was doing in *Johnson*.²⁰¹ In any event, *Johnson*’s application of the so-called absurd result exception to the plain-meaning rule was expressly abrogated after *PGE*, in *State v. Vasquez-Rubio*, which I will discuss in greater detail when we get to second-level maxims of construction.²⁰²

Even after *PGE*, an occasional exception has cropped up. A notable example is the Oregon Supreme Court’s decision in *Stevens v. Czerniak*.²⁰³ At issue in that case was whether the Oregon Rules of Civil Procedure permit discovery of expert witnesses.²⁰⁴ By its terms, Rule 36 B would appear to clearly sanction such discovery. It says that “[u]nless otherwise limited by order of the court in accordance with these rules . . . parties may inquire regarding any matter not privileged that is relevant to a claim or defense of the party seeking discovery.”²⁰⁵ There is no other rule limiting the discovery of expert witnesses. Nevertheless, the court concluded that the rule prohibited expert discovery.²⁰⁶ The court acknowledged that the text, “in isolation,” did appear to permit expert discovery.²⁰⁷ But, in the court’s view, the legislative history suggested that the legislature intended to preclude such discovery.²⁰⁸ The court reasoned that the original bill that the

¹⁹⁸ *Id.* at 707, 530 P.2d at 59.

¹⁹⁹ *Id.* at 709, 530 P.2d at 60.

²⁰⁰ 143 U.S. 457, 459 (1892) (quoted by *Johnson*, 270 Or. at 706, 530 P.2d at 58).

²⁰¹ In *Johnson*, the court extended the meaning of a statute well beyond its wording. 270 Or. at 703–04, 530 P.3d at 57–58. In *Church of the Holy Trinity*, the Court significantly narrowed the effect from its ordinary meaning. 143 U.S. at 459.

²⁰² See *infra* text at notes 708–28.

²⁰³ 336 Or. 392, 84 P.3d 140 (2004).

²⁰⁴ *Id.* at 400, 84 P.3d at 144.

²⁰⁵ OR. R. CIV. P. 36 B(1).

²⁰⁶ 336 Or. at 401–05, 84 P.3d at 144–47.

²⁰⁷ *Id.* at 401, 84 P.3d at 144.

²⁰⁸ *Id.* at 403–04, 84 P.3d at 145–47.

legislature ultimately adopted as Rule 36 B included a provision expressly authorizing expert discovery, and the legislature deleted that provision.²⁰⁹ Of course, the court neglected to account for the fact that, once that provision was deleted, what was left in the bill was a declaration that “parties may inquire regarding any matter, not privileged.”²¹⁰

Stevens is even less persuasive than *Johnson* was. There was no wording of the applicable rule that could reasonably be construed to limit expert discovery. The court certainly identified none. Instead, the court permitted legislative history in effect to trump an absence of operable text, which is precisely what *Monaco* said courts lack authority to do.²¹¹

b. Prior Judicial Construction

To say that the “text” of a statute consists of its words leads to a secondary issue: what if a court already has interpreted it? The answer turns out to be a bit complicated. It depends, in part, on the court’s view about the precedential effect of its prior interpretations. It also depends on which court—whether it was the Oregon Supreme Court, the Oregon Court of Appeals, or the court of another jurisdiction—has interpreted the statute and when it did so.

(i) Precedent and Statutory Construction

Let’s begin with the issue of precedent and statutory construction. For quite a while, the Oregon Supreme Court adopted a remarkably strict view of the effect of its statutory construction decisions. Once the court construed a statute, the court viewed that interpretation as having the effect of becoming a part of the statute itself, which only the legislature could alter thereafter. The court explained this unusual view in *State v. King* as follows: “When this court interprets a statute, the

²⁰⁹ *Id.* at 404, 84 P.3d at 146–47.

²¹⁰ *Id.* at 401–05, 84 P.3d at 145–47 (quoting OR. R. CIV. P. 36 B(1)).

²¹¹ It’s interesting to note that, since *Stevens* in *Gwinn v. Lynn*, 344 Or. 65, 72, 176 P.3d 1249, 1253 (2008), the court held that, notwithstanding *Stevens*, experts may be deposed as “fact” witnesses. More recently, in *Ransom v. Radiology Specialists of the Northeast*, 363 Or. 552, 566–67, 425 P.3d 412, 420–21 (2018), the court held that, again, notwithstanding *Stevens*, experts whose conduct is the very issue in the case (in that instance, a malpractice action), could be questioned about the exercise of their expertise in the case. I joined the opinion of the court, but wrote separately to suggest that perhaps the court should reconsider *Stevens* itself. *Id.* at 573, 425 P.3d at 424 (Landau, J., concurring). No one said I was incorrect. Then again, no one joined my opinion, either. Too much water over the dam, perhaps.

interpretation becomes a part of the statute, subject only to a revision by the legislature.”²¹²

There is perhaps no better example of the court’s adherence to this unusual view than *Palmer v. State of Oregon*.²¹³ The issue in that case was whether a post-conviction petitioner may assert a claim that could have been asserted at the underlying criminal trial but wasn’t. The Oregon Post-Conviction Hearing Act would seem to speak clearly to just that issue. It says that “[t]he failure of [a] petitioner . . . to have raised matters alleged in the petition at the trial . . . shall not affect the availability of relief under” the act.²¹⁴ The statutory text should have made the court’s answer easy. But wait. There’s more.

In 1969, in *North v. Cupp*, the Oregon Supreme Court had issued one of those pre-*PGE* decisions that were hard to reconcile with the plain text of the statute.²¹⁵ The court had conceded that “[i]f the statute is interpreted literally,” the failure to raise an issue at trial does not foreclose raising it for the first time in a post-conviction petition.²¹⁶ But, the court said, taking the statute as a whole and in light of its underlying policies, it just didn’t make sense to read the statute as written. In effect, the court read “not” out of the act.²¹⁷

In *Palmer*, the trial court dutifully followed *North* and dismissed Palmer’s claim, because he had failed to raise the issue during the underlying criminal proceeding. Interestingly, the Oregon Court of Appeals disagreed. Relying on the plain language of the statute, the court said Palmer’s failure to raise the issue during the criminal proceeding did not impede Palmer’s ability to raise the issue in a post-conviction petition.²¹⁸ (The court went on to affirm the dismissal on the merits).²¹⁹

The Oregon Supreme Court didn’t agree. The court began by conceding that “[o]n its face, [the statute] might appear to support the

²¹² 316 Or. 437, 445, 852 P.2d 190, 195 (1993); *see also* *State v. Sullens*, 314 Or. 436, 443, 839 P.2d 708, 712 (1992) (“When this court interprets a statute, that interpretation becomes part of the statute, as if written into it at the time of enactment.”); *Walther v. SAIF Corp.*, 312 Or. 147, 149, 817 P.2d 292 (1991) (per curiam); *State v. Clevenger*, 297 Or. 234, 244, 683 P.2d 1360, 1366 (1984).

²¹³ 318 Or. 352, 867 P.2d 1368 (1994).

²¹⁴ OR. REV. STAT. § 138.550(1) (1993).

²¹⁵ 254 Or. 451, 461 P.2d 271 (1969), *cert. denied*, 397 U.S. 1054 (1970).

²¹⁶ *Id.* at 454–55, 461 P.2d at 273.

²¹⁷ *Id.*

²¹⁸ *Palmer v. State of Oregon*, 121 Or. App. 377, 379–84, 854 P.2d 955, 956–59 (1993), *aff’d in part on different grounds and remanded*, 318 Or. 352 (1994).

²¹⁹ *Id.* at 381–84, 854 P.2d at 957–59.

conclusion reached by the court of appeals.”²²⁰ The problem, the court explained, was that the court of appeals didn’t account for the supreme court’s prior construction of the statute in *North*, which held the statute meant precisely the opposite of what the court of appeals believed it said.²²¹ Citing *King*, the court declared, “When this court interprets a statute, that interpretation becomes part of the statute, subject only to amendment by the legislature.”²²²

The supreme court never explained the origin of its view that, once it announces the meaning of a statute—even mistakenly—the court somehow loses authority to correct the mistake. A few years after *Palmer*, I found where the court came up with this notion of prior construction.²²³ The court’s case citation for the rule of prior construction is from a 1954 decision, *State v. Elliot*.²²⁴ That decision, in turn, cited as authority for the statement of law a 1914 Missouri case, *Harvey v. Missouri Athletic Club*²²⁵ and a 1944 *American Jurisprudence* article,²²⁶ the former of which cited the rule but declined to follow it and the latter of which actually recounted an entirely different proposition of law—namely, when a court interprets a statute borrowed from another jurisdiction and, at the time of the borrowing, the statute had been interpreted by the highest court in that other jurisdiction, that other state’s court interpretation is regarded as “integral.”²²⁷ That is known as the “borrowed statute” rule, which I will discuss later. The point here is that the borrowed statute rule supplies no authority at all for the Oregon Supreme Court’s rule of prior construction. The court’s rule, in other words, appears to have been predicated on a legal research error.

That doesn’t mean that the rule was without foundation. Many courts—including, at least on occasion, the United States Supreme Court²²⁸—have adopted, as a matter of policy, the idea that, if the

²²⁰ *Palmer v. State of Oregon*, 318 Or. 352, 356, 867 P.2d 1368, 1370 (1994).

²²¹ *Id.*

²²² *Id.* at 358, 867 P.2d at 1371 (citing *State v. King*, 316 Or. 437, 445, 852 P.2d 190, 195 (1993)).

²²³ See Landau, *supra* note 76, at 17–19.

²²⁴ 204 Or. 460, 277 P.2d 754 (1954), *cert. denied*, 349 U.S. 929 (1955).

²²⁵ 170 S.W. 904 (Mo. 1914).

²²⁶ 50 AM. JUR. *Statutes*, § 221 (1944).

²²⁷ *Id.*

²²⁸ My favorite example is *Flood v. Kuhn*, 407 U.S. 258 (1972). The question in that case was whether Major League Baseball was “interstate commerce” subject to the nation’s antitrust laws. *Id.* at 268–69. In an earlier decision, the Court had concluded that baseball was the national pastime, not commerce. *Fed. Baseball Club v. Nat’l League*, 259 U.S. 200, 208–09 (1922). In the following years, though, the courts concluded that football, basketball,

legislature fails to alter a statute in response to a court's interpretation of it, the legislature may fairly be taken to have acquiesced in that interpretation.²²⁹ Still, the idea of legislative acquiescence is a rank fiction. It assumes that legislatures keep track of each judicial interpretation of their legislative handiwork. It further assumes that if a legislature fails to act in response to such interpretation, the reason for that inaction must be the legislature's agreement with the court's interpretation. It ignores the possibility that the legislature perhaps had other more pressing matters to deal with, that it ran out of time to respond, or that it was merely indifferent to the court's decision, among other things.

Some members of the court eventually began to push back against the rigid rule of prior construction. In *State ex rel. Huddleston v. Sawyer*, the Oregon Supreme Court cited *King* and its rule of prior construction in a case involving whether the matter was properly before the court under the statute allowing for extraordinary relief by means of a petition for a writ of mandamus.²³⁰ Justice Robert Durham concurred, but he wrote separately to suggest that the time had come to rethink *King* and its rule. Justice Durham suggested that there is reason to question "the accuracy of the majority's statement regarding the perpetual effect of this court's prior interpretation of a statute."²³¹ As Justice Durham saw it, "[T]he rule of prior interpretation fairly is open to scrutiny, particularly on the question whether it has introduced needless and harmful rigidity into this court's methodology of statutory construction."²³² Interestingly, the majority relegated its response to a brief footnote, in which it stated that there were "sound prudential

hockey, golf, and other sports were commerce subject to the antitrust statutes. *Flood*, 407 U.S. at 282–83 & nn.19–20 (hockey and golf); *Haywood v. Nat'l Basketball Assn.*, 104 U.S. 1204, 1205 (1971) (basketball); *Radovich v. Nat'l Football League*, 352 U.S. 445, 450 (1957) (football); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 242 (1955) (boxing). That left baseball as something of an anomaly, to say the least. Nevertheless, the Court held that, given its earlier decision, baseball remained exempt. *Flood*, 407 U.S. at 284.

²²⁹ That appears to be the underlying basis for the Oregon Supreme Court's rule of prior construction as well. In *Younger v. City of Portland*, 305 Or. 346, 350 n.5, 752 P.2d 262, 264 n.5 (1988), the question arose whether prior interpretations of the Oregon Court of Appeals have the same effect. The court rejected the idea, commenting that "because finality of interpretation rests with this court, care should be taken in according significance to legislative inaction in the face of statutory interpretations by the Court of Appeals." *Id.*

The implicit message was that legislative inaction had greater significance in the face of statutory interpretations by the state's highest court.

²³⁰ 324 Or. 597, 608, 932 P.2d 1145, 1152 (1997).

²³¹ *Id.* at 638, 932 P.2d at 1168 (Durham, J., concurring).

²³² *Id.* at 643, 932 P.2d at 1171.

reasons for following the principle.”²³³ Among those reasons, the court said, were “a need for stability and certainty in the understanding of statutes and a respect for the interplay between the roles of the legislative and judicial branches of government in the context of statutory construction.”²³⁴

Of course, the majority was correct about the importance of stability and certainty in the law, as well as respect for the role of coordinate branches of government. But, although those values certainly counsel a court to be cautious in overruling a prior interpretation, they surely don’t explain *King*’s more sweeping assertion that, once the court interprets a statute, it will never reconsider it, and, indeed, it’s *powerless* to do so.

Over the course of the following decade and a half, the rigid rule of prior construction quietly loosened its grip on the Oregon Supreme Court. In a number of cases, the court overruled a prior decision interpreting a statute. For example, in *State v. Barnum*, the court addressed whether a criminal defendant could be convicted of two separate burglary charges arising out of the same incident.²³⁵ The court—somewhat summarily—answered the question in the affirmative, because the statute defining the offense merely referred to a defendant entering and remaining unlawfully in a dwelling with the intent to commit a crime, and because there was evidence that defendant had entered a dwelling with the intent to commit two different crimes.²³⁶ Four years later, in *State v. White*, the court overruled *Barnum*, commenting that the earlier decision had failed adequately to determine the legislature’s intent in enacting the statutory definition of the offense.²³⁷ “By assuming, rather than searching for, the legislative intent behind the burglary statutes,” the court explained, “this court in *Barnum* short-circuited the process.”²³⁸ *White* was undoubtedly correct in overruling *Barnum*, but the court’s failure to mention *King* or the rule of prior construction was something of an anomaly.

Then, in 2011, the court finally overruled *King* and dispensed with its remarkable rule of prior construction altogether. In *Farmers Insurance v. Mowry*, the court was asked to reconsider a prior decision

²³³ *Id.* at 608 n.7, 932 P.2d at 1152 n.7 (majority opinion).

²³⁴ *Id.*

²³⁵ 333 Or. 297, 302–03, 39 P.3d 178, 182–83 (2002).

²³⁶ *Id.* at 302–03, 39 P.3d at 181.

²³⁷ 341 Or. 624, 635–37, 147 P.3d 313, 319–20 (2006).

²³⁸ *Id.* at 635, 147 P.3d at 319.

interpreting the state's financial responsibility law.²³⁹ In that prior decision, *Collins v. Farmers Insurance Co.*, the issue was what happens when the court invalidates an exclusion in a motor vehicle policy.²⁴⁰ Does the invalidation have the effect of eliminating it entirely (and entitling a claimant to the stated policy limits), or does it instead simply not operate to exclude whatever minimum amount of coverage the law requires? *Collins* held that the applicable statutes required the latter answer.²⁴¹ Twenty years later, *Mowry* presented pretty much the same case. The plaintiff's argument was that *Collins* had been wrongly decided. The plaintiff insurer cited *King* and the court's rule of prior construction, arguing that the court lacked authority to reconsider its earlier decision.²⁴²

In an opinion by Justice (later Chief Justice) Balmer, the court in *Mowry* first addressed the legitimacy of *King* and its rigid rule of prior construction. The court noted that “[t]he strict application of the rule of prior construction has long been criticized as wrong in principle and unduly restrictive in practice,” citing Justice Durham's separate opinion in *Huddleston*.²⁴³ It further noted that the rule appears to be based on a theory of legislative acquiescence, which the court dismissed as a “legal fiction that assumes, usually without foundation in any particular case, that legislative silence is meant to carry a particular meaning—as relevant here, affirmation of the judicial decision at issue.”²⁴⁴ Accordingly, the court concluded that “we disavow the inflexible rule of prior construction as set out in cases such as . . . *King*.”²⁴⁵ Instead, the court said, it would consider its prior decisions in light of the “prudential” doctrine of *stare decisis*, “defined by the competing needs for stability and flexibility in Oregon law.”²⁴⁶

Turning to whether *Collins* needed to be overruled, the court answered that issue in the negative. It concluded that there were perfectly good arguments on the statutory construction question in dispute, all of which had been addressed in *Collins*.²⁴⁷ The parties in

²³⁹ 350 Or. 686, 688, 695–96, 261 P.3d 2, 2, 6–7 (2011).

²⁴⁰ 312 Or. 337, 822 P.2d 1146 (1991).

²⁴¹ *Id.* at 347, 822 P.2d at 1151.

²⁴² *Mowry*, 350 Or. at 692, 699, 261 P.3d at 5, 8.

²⁴³ *Id.* at 695, 261 P.3d at 6 (citing *State ex rel. Huddleston v. Sawyer*, 324 Or. 597, 638–44, 932 P.2d 1145, 1168–72 (1997) (Durham, J., concurring in part and dissenting in part)).

²⁴⁴ *Id.* at 696, 261 P.3d at 7.

²⁴⁵ *Id.* at 697, 261 P.3d at 7.

²⁴⁶ *Id.* at 697–98, 261 P.3d at 8.

²⁴⁷ *Id.* at 699–700, 261 P.3d at 9.

Mowry had submitted no new arguments and no new evidence that the earlier decision was clearly incorrect.²⁴⁸

The upshot of all this is that the Oregon Supreme Court's prior construction will always be a relevant consideration in the first level of analysis of a statute's text.²⁴⁹ But it doesn't have the effect of unalterably determining the meaning of the statute. If a party believes that a prior decision was reached in error, that party has the tough burden of demonstrating a clear mistake. But prior judicial construction no longer has the rigid effect that it did in earlier years.

(ii) *Pre-PGE Cases and Their Relevance*

To say that prior judicial construction always will be a relevant consideration leads to a number of additional questions. First, does the fact that an earlier decision had been rendered without the benefit of *PGE* and *Gaines* detract from the relevance of the earlier decisions? Said another way, do pre-*PGE* decisions carry the same weight as post-*PGE* decisions? In *Mastriano v. Board of Parole*, the supreme court categorically rejected the idea that, merely because a given prior construction predated *PGE*, it was less authoritative.²⁵⁰ The fact that a decision predates *PGE*, the court said, "provides no basis, in and of itself, to disregard its interpretation."²⁵¹

An earlier decision seemed to suggest otherwise. In *Morales v. SAIF*, the court was confronted with several pre-*PGE* cases interpreting a provision of the workers' compensation statutes.²⁵² The court said that the earlier decisions were not controlling, because "this court did not analyze [the statute] under the now-familiar methodology for construing statutes that this court summarized in *PGE*. . . . This case presents the opportunity to do so."²⁵³ There followed quite a number

²⁴⁸ *Id.* at 704, 261 P.3d at 11.

²⁴⁹ *See, e.g.*, *State v. Cloutier*, 351 Or. 68, 100, 261 P.3d 1234, 1251 (2011) ("Our analysis of [the statute] is also informed by this court's prior construction of that statute or its predecessors."); *Blacknall v. Bd. of Parole & Post-Prison Supervision*, 348 Or. 131, 142, 229 P.3d 595, 601 (2010) ("As context, those [prior] cases may illuminate or explain the meaning of the statutory text."); *Liberty Nw. Ins. Corp. v. Watkins*, 347 Or. 687, 692, 227 P.3d 1134, 1137 (2010) ("As part of that first level of analysis, this court considers its prior interpretations of the statute."); *Mastriano v. Bd. of Parole & Post-Prison Supervision*, 342 Or. 684, 693, 159 P.3d 1151, 1155 (2007) ("[W]e generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes.").

²⁵⁰ 342 Or. at 691–92, 159 P.3d at 1154–55.

²⁵¹ *Id.* at 692, 159 P.3d at 1155.

²⁵² 339 Or. 574, 579, 124 P.3d 1233, 1236 (2005).

²⁵³ *Id.* at 578–79, 124 P.3d 1235.

of cases in which parties argued that *Morales*, in effect, declared open season on any pre-*PGE* case. *Mastriano*, however, expressly disclaimed such a broad reading of *Morales*.²⁵⁴

(iii) *Prior Court of Appeals Decisions*

There is also the issue of the significance of prior interpretations by the Oregon Court of Appeals. The answer to that also is straightforward: at least in cases before the court of appeals, that court's interpretations will have precedential effect and thus always will be a relevant consideration there. As the court of appeals has noted in many cases, "Prior construction of a statute by this court is always relevant to our analysis of the statute's text."²⁵⁵ When the case reaches the supreme court, the lower court's interpretations are still of interest, though obviously in no way controlling.

(iv) *Prior Supreme Court Dicta*

What about prior interpretations of the Oregon Supreme Court that are merely *dicta*?²⁵⁶ After all, it is not unusual for the court to make an observation about the meaning of a statute that is not at issue in the course of deciding a case. It is common to see a statement that the court is not bound by a prior decision expressing a view about the meaning

²⁵⁴ 342 Or. at 691–92, 159 P.3d at 1154–55.

²⁵⁵ *State v. Bryan*, 221 Or. App. 455, 459, 190 P.3d 470, 472 (2008), *review denied*, 347 Or. 290 (2009); *see also* *Waite v. Dempsey*, 203 Or. App. 136, 141, 125 P.3d 788, 791 (2005); *Liberty v. State Dep't of Transp.*, 200 Or. App. 607, 613, 116 P.3d 902, 905, *adhered to as modified on reconsideration*, 202 Or. App. 355 (2005), *rev'd on other grounds*, 342 Or. 11, 148 P.3d 909 (2006); *State v. Stubbs*, 193 Or. App. 595, 600, 91 P.3d 774, 777, *appeal decided*, 195 Or. App. 762, *review denied*, 337 Or. 669 (2004).

²⁵⁶ Defining precisely what constitutes *dictum* has proved difficult for courts and commentators alike. *See generally* Ryan S. Killian, *Dicta and the Rule of Law*, 41 PEPP. L. REV. 1, 7–8 (2013) ("[T]here is no real consensus on the correct definition."). The classical formulation is that *dictum* is any statement in a judicial opinion that is not necessary to the outcome. *See, e.g.*, JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 261 (1921) ("In order that an opinion may have the weight of a precedent . . . it must be an opinion the formation of which is necessary to the decision of a particular case; in other words, it must not be *obiter dictum*."). That's the definition commonly cited by the Oregon Supreme Court. *See, e.g.*, *State ex rel. Huddleston v. Sawyer*, 324 Or. 597, 621 n.19, 932 P.2d 1145, 1159 n.19 (1997) ("[T]hat statement [was] *dictum* because it was not necessary to the outcome of the case."). But what is "necessary" to the decision can, sometimes, be debatable. *See, e.g.*, *Engweiler v. Persson*, 354 Or. 549, 558, 316 P.3d 264, 270 (2013) ("Occasionally, it can be difficult to identify *dictum* in a court's opinion, because nonessential legal analysis and the assertions of immaterial legal propositions can be shrouded by the certitude of the court's views.").

of a statute when that expression is mere *dictum*.²⁵⁷ But there's a bit more to it than that.

The Oregon Supreme Court addressed the issue in some depth in *Halperin v. Pitts*.²⁵⁸ In that case, the question was whether a statute providing for an award of attorney fees in small tort actions required a prevailing defendant to make a timely written demand.²⁵⁹ The statute, ORS 20.080, includes two sections.²⁶⁰ The first section provides for an award of attorney fees to a plaintiff, if the plaintiff prevails in the action. It also spells out certain procedural prerequisites to such an award, including that the plaintiff make a timely written demand to the defendant before initiating the underlying action.²⁶¹ The second subsection of the statute provides for an award of attorney fees to a defendant, if the defendant prevails in the action.²⁶² But that second subsection says nothing about any procedural prerequisites, such as making a timely written demand on the plaintiff. In *Halperin*, the defendant prevailed by getting the plaintiffs' claims for trespass dismissed.²⁶³ When the defendant asked for attorney fees, though, the plaintiffs objected that the defendant had not previously sent a demand letter. In support of their assertion, the plaintiffs relied on an earlier supreme court decision,²⁶⁴ *Bennett v. Minson*, in which the court had said that both plaintiffs and defendants must file written demands as prerequisites to an award of attorney fees.²⁶⁵

The supreme court acknowledged that it had plainly said in *Bennett* what the plaintiffs had argued: both parties must file written demands to be entitled to an award of attorney fees.²⁶⁶ But, the court observed, in *Bennett* the only issue properly before the court was different from the issue in *Halperin*. The issue in *Bennett*, the court explained, was what the statute meant when it provided for attorney fees to a party that

²⁵⁷ See, e.g., *SAIF Corp. v. Allen*, 320 Or. 192, 204, 881 P.2d 773, 780 (1994) (“[T]his court has declined to apply the doctrine of *stare decisis* to *dictum* in earlier statutory construction cases.” (citing *Cutright v. Weyerhaeuser Co.*, 299 Or. 290, 301, 702 P.2d 403, 409 (1985))); *Godfrey v. Fred Meyer Stores*, 202 Or. App. 673, 680, 124 P.3d 621, 625 (2005), *review denied*, 340 Or. 672 (2006); *State v. Thompson*, 166 Or. App. 370, 375, 998 P.2d 762, 765, *review denied*, 331 Or. 192 (2000).

²⁵⁸ 352 Or. 482, 287 P.3d 1069 (2012).

²⁵⁹ *Id.* at 484, 287 P.3d at 1070.

²⁶⁰ OR. REV. STAT. § 20.080 (2007).

²⁶¹ *Id.* § 20.080(1).

²⁶² *Id.* § 20.080(2).

²⁶³ *Halperin*, 352 Or. at 485, 287 P.3d at 1071.

²⁶⁴ *Id.*

²⁶⁵ 309 Or. 309, 315–16, 787 P.2d 481, 484 (1990).

²⁶⁶ *Halperin*, 352 Or. at 493–94, 287 P.3d at 1075.

“prevailed,” not whether a written demand was required.²⁶⁷ Thus, the court concluded, when it expressed a view about whether the statute required a written demand by defendants, it expressed pure *dictum*, which had no precedential value:

[A] court may consider itself bound to follow a prior construction as a matter of stare decisis.

When the court’s prior construction is mere dictum, however, it has no such precedential effect. “Dictum” is short for “obiter dictum,” Latin for “something said in passing.” In judicial opinions, it commonly refers to a statement that is not necessary to the decision.

...

The fact that a prior construction amounts to dictum does not, by itself, mean that it was incorrect and without any force whatsoever. It merely means that we are not required to follow it as precedent. The prior construction, even if dictum, could have persuasive force because of the soundness of its reasoning.²⁶⁸

With those principles in mind, the court turned to the question whether *Bennett* had such persuasive force. It readily concluded that the earlier case did not, because the wording of the second section could in no way reasonably be read to impose the requirement that *Bennett* had suggested.²⁶⁹

In short, prior supreme court *dictum* may or may not have persuasive force, depending on the soundness of its analysis. But it does not have the precedential force of a prior construction of a statute squarely at issue before the court.

(v) *Cases From Other Jurisdictions: The “Borrowed Statute Rule”*

Often the Oregon Legislature borrows phrasing from a statute that originated in another jurisdiction. That makes sense. The wording of another jurisdiction’s statutes already has been carefully considered by the legislature that adopted it. And often that legislation has been interpreted by the courts of that jurisdiction. When the Oregon Legislature borrows statutory language, and when the borrowed statute already has been interpreted by the courts of that jurisdiction, the question arises: what is the value of those cases from the other jurisdiction?

²⁶⁷ *Id.*

²⁶⁸ 352 Or. at 492–94, 287 P.3d at 1074–76 (emphasis omitted).

²⁶⁹ *Id.* at 494–95, 287 P.3d at 1075–76.

The general rule is that when the Oregon Legislature borrows a statute from another jurisdiction, and that statute has been interpreted by the highest court in that jurisdiction, courts in Oregon will regard any such interpretation as authoritative.²⁷⁰ It's hard to know where the "borrowed statute rule" came from. Certainly, it entails a significant fiction that the legislature of the borrowing state was even aware of the case law from the lending jurisdiction and intended to adopt it along with the borrowed statutory language. As I have noted above with respect to the rule of prior construction, it's a bit whimsical to assume that the legislature of a given state is aware of its own state's case law. It's even more so to assume that a legislature is aware of another state's case law. Still, the rule is fairly well established in Oregon and practically everywhere else.

Some cases frame the rule as a "presumption."²⁷¹ At least then, the likelihood that the legislature intended to borrow another state's case law can be rebutted. Other cases more appropriately refer to the rule as providing "useful context,"²⁷² or as simply being "persuasive," depending on the strength of reasoning involved,²⁷³ which is even better. Other cases, however, state the principle as an outright rule or "assumption."²⁷⁴

The borrowed-statute rule does come with a couple of important qualifications. First, and foremost, the rule applies only to the extent that the legislature actually borrowed statutory language from another jurisdiction's laws; there is no basis to infer that the Oregon Legislature intended to borrow another jurisdiction's case law interpreting a statute

²⁷⁰ *State v. Walker*, 356 Or. 4, 23–24, 333 P.3d 316, 327 (2014) ("Oregon's ORICO statute . . . was modeled on the federal RICO statute. . . . [F]ederal case law predating the enactment of ORICO therefore can provide useful context for interpreting our statute.").

²⁷¹ *Lindell v. Kalugin*, 353 Or. 338, 355, 297 P.3d 1266, 1276 (2013) ("As a general rule, when the Oregon legislature borrows wording from a statute originating in another jurisdiction, there is a presumption that the legislature borrowed controlling case law interpreting the statute along with it.").

²⁷² *Walker*, 356 Or. at 23–24, 333 P.3d at 327.

²⁷³ *BRS, Inc. v. Dickerson*, 278 Or. 269, 275, 563 P.2d 723, 725–26 (1977) ("When one state borrows a statute from another state, the interpretation of the borrowed statute by the courts of the earlier enacting state ordinarily is persuasive.").

²⁷⁴ *See, e.g., Jones v. Gen. Motors Corp.*, 325 Or. 404, 418, 939 P.2d 608, 616 (1997) ("If the Oregon legislature adopts a statute from another jurisdiction's legislation, we assume that the Oregon legislature also intended to adopt the construction of the legislation that the highest court of the other jurisdiction had rendered before adoption of the legislation in Oregon."); *State v. Willy*, 155 Or. App. 279, 284, 963 P.2d 739, 741 (1998) ("[I]n borrowing a statute from another state, the legislature is assumed to adopt the then existing case law interpretation of that statute . . ." (quoting *State v. Clark*, 39 Or. App. 63, 65, 591 P.2d 752, 754, *review denied*, 286 Or. 303 (1979))).

if the Oregon Legislature didn't actually borrow the other jurisdiction's statute.²⁷⁵ That doesn't mean that the Oregon Legislature has to borrow another jurisdiction's statutory phrasing *verbatim*. The rationale of the rule would seem to suggest that the strength of the rule will vary depending on just how similar the borrowed language is. The greater identity of phrasing between the Oregon statute and its source, the stronger the likelihood that the legislature intended to borrow with it any controlling case law from the lending jurisdiction.²⁷⁶ If there is no similarity, there is no basis for the rule to apply at all.

For example, in *Taylor v. Baker*, the court once again confronted Oregon's summary judgment rule.²⁷⁷ The court noted that part of Oregon's rule had been patterned after Rule 56 of the Federal Rules of Civil Procedure. But one section of the federal rule—Rule 56(d)—the legislature did not adopt.²⁷⁸ The Oregon Supreme Court concluded that it was obliged to give weight to “federal cases interpreting those aspects of Rule 56, *other than subsection (d)* thereof, and decided prior to the enactment of this state's summary judgment rule statute.”²⁷⁹ Federal cases interpreting the part that the Oregon Legislature chose not to adopt, in other words, weren't considered at all.

Unfortunately, the Oregon Supreme Court hasn't been entirely consistent in adhering to that important qualification of the borrowed statute rule. In *American Federation of State, County, and Municipal Employees, Council 75 v. City of Lebanon*, the court applied federal case law construing parts of the National Labor Relations Act that the Oregon Legislature chose not to adopt when it enacted the state's Public Employee Collective Bargaining Act, erroneously citing the borrowed statute rule.²⁸⁰ At issue in that case was whether a city was responsible for the actions of one of its council members when the council member wrote a letter to the local newspaper encouraging the

²⁷⁵ See, e.g., *State v. Nascimento*, 360 Or. 28, 42 n.4, 379 P.3d 484, 491 n.4 (2016) (“We do not rely on federal court interpretations of the Computer Fraud and Abuse Act . . . because the text of the federal and state statutes have some differences . . .”); *Alfieri v. Solomon*, 358 Or. 383, 410–11, 365 P.3d 99, 115 (2015) (declining to consider federal case law construing a part of the Federal Rules of Civil Procedure that the Council on Court Procedures chose not to adopt in drafting OR. R. CIV. P. 25 A).

²⁷⁶ As the United States Supreme Court explained the rule in *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944), the borrowed statute rule “varies in strength with the similarity of language.”

²⁷⁷ 279 Or. 139, 142–43, 566 P.2d 884, 887 (1977).

²⁷⁸ *Id.* at 142 n.2, 566 P.2d at 886 n.2.

²⁷⁹ *Id.* (emphasis added).

²⁸⁰ 360 Or. 809, 815–32, 388 P.3d 1028, 1032–41 (2017).

decertification of a labor union.²⁸¹ There was no question that a public employer making such anti-labor statements amounts to a violation of the state law. There was a question, though, whether the council member's statements could be attributed to the city, especially when the council member said that she was expressing her personal opinion.²⁸² The statute defines a "public employer" as a government entity or "its designated representative."²⁸³ It was undisputed that the council member was neither.²⁸⁴

The court nevertheless concluded that the city was responsible for her statements, because city employees might reasonably believe she was speaking for the city.²⁸⁵ In reaching that conclusion, the majority relied on a line of cases interpreting the portion of the National Labor Relations Act defining who may commit an unfair labor practice under that law, which includes "any person acting as an agent of an employer, directly or indirectly."²⁸⁶ The problem was, the Oregon Legislature omitted any reference to an "agent of the employer" in adopting the state law, and it was that phrase that was the basis for the federal court decisions on which the majority relied.²⁸⁷ Thus, the court relied on cases interpreting the part of the law that the Oregon Legislature chose not to borrow, directly contrary to *Taylor*. It remains to be seen whether the court's decision will be regarded as an unfortunate aberration or a significant watering down of the borrowed-statute rule.

²⁸¹ *Id.* at 811, 388 P.3d at 1029.

²⁸² *Id.* at 811–13, 388 P.3d 1029–30.

²⁸³ OR. REV. STAT. § 243.650(20) (2017) defines a "public employer" as "the State of Oregon and the following political subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, metropolitan service districts, public service corporations or municipal corporations and public and quasi-public corporations." A "public employer representative" includes "any individual or individuals specifically designated by the public employer." *Id.* § 243.650(21). OR. REV. STAT. § 243.672(1) (2017) then makes it unlawful for a public employer "or its designated representative" to engage in an unfair labor practice.

²⁸⁴ *Am. Fed'n of State, Cty., & Mun. Emps., Council 75*, 360 Or. at 820–35, 388 P.3d at 1034–42.

²⁸⁵ *Id.* at 833–35, 388 P.3d at 1041.

²⁸⁶ *Id.* at 824–33, 388 P.3d at 1036–41 (quoting 29 U.S.C. § 152(2) (2012)).

²⁸⁷ The federal labor law defines an "employer" to include "any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(13). The federal cases construing that phrase have concluded that an "agent" of an employer includes any persons whom "employees could reasonably believe [were] reflecting company policy and speaking and acting for management." *Am. Door Co.*, 181 N.L.R.B. 37, 43 (1970). The court relied on those cases in construing the definition of "public employer" in ORS 243.650(2), despite the fact that the Oregon statute did not adopt the agency phrasing of the federal law.

A third qualification of the borrowed-statute rule is that it applies only to case law from the highest court in the lending jurisdiction. Lower court decisions may be regarded as persuasive, but they do not carry the same force as superior court decisions for obvious reasons.²⁸⁸

A fourth qualification of the rule is that it applies only to decisions from the lending jurisdiction that existed *when the Oregon Legislature enacted the statute*. The rationale is that, at least theoretically, the legislature could have been aware of the case law that existed at the time it borrowed the language from the other jurisdiction's law. That is not so with case law that did not yet exist at the time of enactment.

In *Oregon Occupational Safety & Health Division (OR-OSHA) v. CBI Services, Inc.*,²⁸⁹ for example, the issue was what the Oregon Safe Employment Act means when it says that an employer is not liable for a serious violation if the employer “did not, and could not with the exercise of reasonable diligence,” know of the violation.²⁹⁰ The Oregon Court of Appeals concluded that, because the Oregon law was taken from the federal Occupational Safety and Health Act, it was appropriate to look to federal case law interpreting the federal law.²⁹¹ And that federal case law—much of it dating after the adoption of the Oregon statute—interpreted the federal law not to excuse an employer's serious violation if the employer *knew or should have known* of the violation, taking into account a list of relevant factors.²⁹²

On review, the Oregon Supreme Court concluded that the court of appeals had erred in relying on the federal case law that was published after the enactment of the Oregon statute:

Court decisions that existed at the time that the legislature enacted a statute—and that, as a result it could have been aware of—may be consulted in determining what the legislature intended in enacting the law as part of the context for the legislature's decision. That is so especially as to case law interpreting the wording of a statute borrowed from another jurisdiction. Case law published after enactment—of which the legislature could not have been aware—is another matter. That is not to say that later-decided federal cases cannot be persuasive. Decisions from other jurisdictions may carry

²⁸⁸ See, e.g., *Lindell v. Kalugin*, 353 Or. 338, 355–56, 297 P.3d 1266, 1276 (2013) (stating that lower court decisions construing borrowed federal rules “are at least highly persuasive as to the intentions of the Oregon legislation in borrowing from the federal rules.”).

²⁸⁹ 356 Or. 577, 341 P.3d 701 (2014).

²⁹⁰ *Id.* at 586–87, 341 P.3d at 707 (quoting OR. REV. STAT. § 654.086(2) (2013)).

²⁹¹ *OR-OSHA v. CBI Services, Inc.* 254 Or. App. 466, 476–77, 295 P.3d 660, 667 (2013), *aff'd on other grounds*, 356 Or. 577 (2014).

²⁹² *Id.* at 476–78, 295 P.3d at 667–68.

weight, based on the force of the reasoning and analysis that supports them. But the fact that they involve similarly worded statutes, by itself, does not make the decisions controlling.²⁹³

A final question arises concerning the application of the borrowed statute rule: whether it always applies or applies only when the statute is ambiguous. Some state courts have taken the latter position, resorting to the rule only when a statute has been determined to be ambiguous.²⁹⁴ Oregon's courts take the other approach, applying the rule and considering other jurisdiction's cases as part of the textual analysis of the statute.²⁹⁵

3. *What Is Included In a Statute's "Context"?*

It wouldn't be much of an overstatement to say that the meaning of a statute can never be determined by examining its text alone. The meaning of words—in a statute or anywhere else—always is informed by the context in which they are used. The word “foul,” for example, can mean any number of different things in isolation—an offensive odor, a violation of rules, or a stray baseball.²⁹⁶ Depending on its context, the same word may be used as an adjective (a foul odor), a noun (a foul in basketball play), an adverb (that was foul), or a verb (the factory fouled the air).²⁹⁷ In interpreting the meaning of words, context can be everything.²⁹⁸

²⁹³ 356 Or. at 593, 341 P.3d at 710–11 (citation omitted); *see also* Hillenga v. Dep't of Revenue, 358 Or. 178, 188, 361 P.3d 598, 603 (2015) (“Even if the [later] federal cases are not binding, their reasoning is persuasive.”); State v. Walker, 356 Or. 4, 24, 333 P.3d 316, 328 (2014) (“Cases that came later, however, still may be consulted for their persuasive value.”).

²⁹⁴ *See, e.g.*, Union Pac. R.R. Co. v. State Tax Comm'n, 426 P.2d 231, 232 (Utah 1967) (“In the first place, [the borrowed statute rule] is applicable only where the terms of the statute are of doubtful import, so as to require construction; the rule will not be followed where the language of the statute is plain and free from ambiguity” (citation omitted)).

²⁹⁵ *See supra* text at notes 270–74.

²⁹⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 897 (unabridged ed. 2002) [hereinafter WEBSTER'S THIRD].

²⁹⁷ *Id.*

²⁹⁸ *See, e.g.*, Vsetecka v. Safeway Stores, Inc., 337 Or. 502, 508, 98 P.3d 1116, 1119–20 (2004) (“Viewed in isolation, that text provides support for employer's position. Ordinarily, however, 'text should not be read in isolation but must be considered in context.'” (quoting Stevens v. Czerniak, 336 Or. 392, 401, 84 P.3d 140, 144 (2004))); Lane County v. Land Conservation & Dev. Comm'n, 325 Or. 569, 578, 942 P.2d 278, 283 (1997) (“[W]e do not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole.”); State v. Meek, 266 Or. App. 550, 556, 338 P.3d 767, 770 (2014) (“Text, however, cannot be viewed in isolation, but must, instead, be considered in the totality of the statutory framework.”); Suchi v. SAIF Corp., 238 Or. App. 48, 54, 241 P.3d 1174, 1177 (2010) (“It is an elementary

But what may fairly be considered a statute's context? To answer that question, recall that Oregon statutory construction focuses, if possible, on the actual, specific intentions of the legislature that enacted a statute into law.²⁹⁹ That means that the "context" for a statute is essentially anything of which the legislature could have been aware at the time of a given enactment.

I hasten to point out the use of the word "could" in that last statement. Even though Oregon statutory construction focuses on actual, specific legislative intent, the courts tend to be somewhat lax in their consideration of what constitutes evidence of that actual, specific intent. The courts tend to indulge some fairly broad—and, frankly, questionable—assumptions about what legislatures are aware of at the time of enactment. In general, whether or not there is evidence of what a given legislature actually was aware of at the time of enactment, Oregon law assumes that it was aware of a whole lot.³⁰⁰

That doesn't mean that all context is of equal weight. Even taking into account the generous assumptions that Oregon courts are willing to indulge in considering a statute's context, there remains a sense that some context can be more persuasive than others. For example, it's well established that a statute's context includes other provisions of the same act.³⁰¹ That is the sort of context the legislature is most likely to have been aware of and therefore is usually given the most weight. In contrast, other provisions of unrelated statutes that use the same terms as those in dispute may be considered a statute's context, but it is so unlikely that the legislature was aware of such things that they tend to be given less weight.

The focus on the legislature's actual, specific intentions or understandings has another implication. Just as "context" generally consists of anything the legislature could have been aware of, it also does not include what the legislature could not have been aware of. That means that a statute's context has a temporal component: it cannot include information that did not exist when the statute at issue was enacted. As the Oregon Supreme Court explained in *Holcomb v. Sunderland*, "The proper inquiry focuses on what the legislature

principle of statutory construction in this state that we examine the meaning of a phrase in its context."), *review denied*, 350 Or. 231 (2011).

²⁹⁹ See *supra* text at notes 113–59.

³⁰⁰ See *supra* text at notes 113–59.

³⁰¹ See *infra* text at notes 455–67.

intended at the time of enactment and discounts later events.”³⁰² Consequently, a statute’s context does not include laws that did not yet exist when the statute in dispute was enacted. Given the focus of the courts on the legislature’s actual, specific intentions, this temporal limitation makes sense. Although the courts are willing to indulge some significant fictions in defining a statute’s context, time travel is not one of them.

That doesn’t mean that later-enacted statutes are completely irrelevant. Not infrequently, Oregon courts refer to later-enacted statutes for the purpose of demonstrating that the legislature has consistently used a term or terms over time. That pattern of consistent usage, the courts reason, provides at least indirect evidence of legislative intent.³⁰³

a. Other Provisions of the Same Statute

Probably the most important type of context to consider in statutory construction is other parts of the same statute. This is often referred to as the “whole act rule.”³⁰⁴ It’s one of the oldest statutory construction rules. Sir Edward Coke wrote in 1628 that “[i]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best express[es] the meaning

³⁰² 321 Or. 99, 105, 894 P.2d 457, 460 (1995); *see also* State v. Gaines, 346 Or. 160, 177 n.16, 206 P.3d 1042, 1054 n.16 (2009) (“Ordinarily, only statutes enacted simultaneously with or before a statute at issue are pertinent context for interpreting that statute.”); Stull v. Hoke, 326 Or. 72, 79–80, 326 P.2d 722, 725–26 (1997) (“[E]ven assuming that the present version of [the statute] provides contextual support for [*amicus*’s] position, it did not exist at the time that plaintiff filed his complaint Therefore, it cannot be context for what the legislature intended . . .”).

³⁰³ Halperin v. Pitts, 352 Or. 482, 490–91, 287 P.3d 1069, 1073–74 (2012); Clackamas Cty. Assessor v. Vill. at Main St. Phase II, 349 Or. 330, 345, 245 P.3d 81, 89 (2010) (examining exceptions to the 1907 statute adopted years later confirmed the meaning of the original statute); *Gaines*, 346 Or. at 177 n.16, 206 P.3d at 1054 n.16 (noting that “later enacted statutes can be of some aid in interpreting an earlier one” for the purpose of demonstrating the legislature’s consistent word usage or adherence to drafting conventions); Nibler v. Or. Dep’t of Transp., 338 Or. 19, 22–23, 105 P.3d 360, 361 (2005) (examining later-enacted statutes to determine whether the legislature intended to alter the well-established meaning of a statutory term); Gladhart v. Or. Vineyard Supply Co., 332 Or. 226, 234, 26 P.3d 817, 821 (2001) (examining contrasting phrasing of later-enacted statutes as “strong evidence” of what the legislature intended an earlier statute to mean).

³⁰⁴ *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Question for Neutral Reasoning*, 58 VAND. L. REV. 1, 12–13 (2005) (discussing the “whole act rule”); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1037–39 (1989); John Morris, *What Tautology?: How the Whole Act Rule Could Inform CERCLA’s Ownership Definition and Limit Lessees’ Liability*, 44 TEX. ENV’T L.J. 267, 280–84 (2014).

of the makers.”³⁰⁵ It’s also one of the most frequently noted principles of construction by Oregon courts.³⁰⁶ The underlying rationale is that the legislature is most likely to have been aware of the other provisions of the same law, and it is reasonable to assume that the legislature intended each provision to be read in the context of the others, so as to make the law as a whole sensible. As assumptions about the legislature go, this one is among the more commonsensical.

The idea that the legislature was likely aware of other parts of the “same statute” refers to other parts of the same bill, although the various parts might later be codified in different chapters or sections of the Oregon Revised Statutes.³⁰⁷ It also refers to other parts of the same chapter in which a disputed provision has been codified, even though other parts of the statute may have originated in other bills.³⁰⁸

Occasionally, a law will include a statement of “findings” or legislative policy that expresses some of the factual predicates for the legislation or some overarching policy objectives.³⁰⁹ Courts will not hesitate to consider such statements as part of the context of a given statute.³¹⁰ This practice, too, is commonsensical. The statements of

³⁰⁵ 1 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 381 (1628).

³⁰⁶ *See, e.g.*, *Unger v. Rosenblum*, 362 Or. 210, 221, 407 P.3d 817, 823 (2017) (“[W]e consider all relevant statutes together, so that they may be interpreted as a coherent, workable whole.”); *State v. February*, 361 Or. 544, 550–51, 396 P.3d 894, 900 (2017) (“Our consideration of context includes the structure of a statute as a whole.”); *Wetherell v. Douglas County*, 342 Or. 666, 678, 160 P.3d 614, 620 (2007) (“This court does not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole.” (internal quotation marks omitted)); *Lane County v. Land Conservation Dev. Comm’n*, 325 Or. 569, 578, 942 P.2d 278, 283 (1997) (“[W]e construe each part [of a statute] together with the other parts in an attempt to produce a harmonious whole.”); *Morgan v. Jackson County*, 290 Or. App. 111, 116, 414 P.3d 917, 921 (“[W]e do not ordinarily focus on a single word or phrase in isolation.”), *review denied*, 362 Or. 860 (2018).

³⁰⁷ *See, e.g.*, *State v. Ortiz*, 202 Or. App. 695, 698–700, 124 P.3d 611, 612–13 (2005).

³⁰⁸ *Morsman v. City of Madras*, 203 Or. App. 546, 561–62, 126 P.3d 6, 14–15, *review denied*, 340 Or. 483 (2006).

³⁰⁹ *See, e.g.*, OR. REV. STAT. § 308A.400(1) (2017) (“The Legislative Assembly finds that the State of Oregon has a rich diversity of plants, animals and other natural resources on private lands. Conservation and careful management of these resources is evident in Oregon’s working landscape and is essential to the economic and ecological health of Oregon.”); OR. REV. STAT. § 807.745(1) (2017) (“The Legislative Assembly finds that Oregon recognizes the importance of protecting the confidentiality and privacy of an individual’s personal information contained in driver licenses, driver permits and identification cards.”).

³¹⁰ *See, e.g.*, *Sundermier v. State ex rel. Pub. Emps. Ret. Sys.*, 269 Or. App. 586, 595, 344 P.3d 1142, 1147 (“Statements of statutory policy are also considered useful for interpreting a statute.”), *review denied*, 357 Or. 415 (2015); *Or. Cable Telecomms. v. Dep’t*

policy are direct evidence of the legislature's larger policy objectives, which can serve as a useful basis for sorting through competing interpretations of a statute.

b. Other Statutes "In Pari Materia"

The "context" of a statute includes not just the statute that a disputed provision is a part of, but also other statutes "*in pari materia*," that is, on the same or a related subject.³¹¹ The rationale is that the legislature, in enacting a given statute, is likely to have been aware of other statutes on the same subject or on related subjects and intended all the related statutes to be interpreted consistently. This is stretching things just a bit, given how many statutes could be related to a given enactment. At the same time, it is not outrageous to assume that the legislature intends a statute and related other statutes to be construed together as a workable whole.

The Oregon Supreme Court's decision in *Association of Unit Owners of Timbercrest Condominiums v. Warren* provides a good illustration.³¹² The issue in that case was whether a motion for

of Revenue, 237 Or. App. 628, 641, 240 P.3d 1122, 1129–30 (2010) ("The preamble to the bill further informs our understanding of the legislature's intention . . ."); *Havi Grp. LP v. Fyock*, 204 Or. App. 558, 564, 131 P.3d 793, 795 (2006) (statutory statement of general policy of workers' compensation statutes provides context for particular substantive provisions); *State v. McBroom*, 179 Or. App. 120, 124 n.2, 39 P.3d 226, 228 n.2 (2002) (statutory statement of general policy of vehicle code is context for interpretation of specific provision pertaining to offense of failure to drive within a lane); *Dep't of Land Conservation & Dev. v. Jackson County*, 151 Or. App. 210, 218, 948 P.2d 731, 736 (1997) ("Statutes and rules often contain statements of general policy, like the statement that DLCD cites in this rule. Such expressions *can* serve as contextual guides to the meaning of particular provisions of the statutes or rules, as much as any other parts of the enactment can."), *review denied*, 327 Or. 620 (1998).

³¹¹ *See, e.g.*, *State v. Klein*, 352 Or. 302, 309, 283 P.3d 350, 354 (2012) (a statute's context includes "related statutes"); *State v. Cloutier*, 351 Or. 68, 98–100, 261 P.3d 1234, 1250–51 (2011) (examining other sentencing statutes' use of the word "maximum" to inform meaning of the word used in sentencing appellate review statute); *Weems v. Bd. of Parole & Post-Prison Supervision*, 347 Or. 586, 595, 227 P.3d 671, 676 (2010) (relying on other, related statutes); *State v. Carr*, 319 Or. 408, 411–12, 877 P.2d 1192, 1194 (1994) ("Context includes other related statutes."); *see also* *State v. Werdell*, 340 Or. 590, 596, 136 P.3d 17, 20 (2006) (chiding court of appeals for reading a statutory word "in isolation, rather than reading that word *in pari materia* with the wording of" other relevant subsections); *Springfield Util. Bd. v. Emerald People's Util. Dist.*, 339 Or. 631, 643–44, 125 P.3d 740, 747 (2005) (noting "whether PUDs are 'municipalities' within the meaning of a particular statute, [depends upon] the specific statutory context at issue"); *State v. Hansen*, 253 Or. App. 407, 413, 290 P.3d 847, 850 (2012) (providing other provisions of the criminal code); *Simpson v. Dep't of Fish & Wildlife*, 242 Or. App. 287, 298, 255 P.3d 565, 570 (2011) (looking at other related statutes to determine that "property" had a specialized meaning).

³¹² 352 Or. 583, 595, 288 P.3d 958, 964 (2012).

reconsideration of an order granting summary judgment is a motion for a “new trial.”³¹³ Oregon statutes provide different deadlines for filing a notice of appeal, depending on whether a motion for a “new trial” has been filed.³¹⁴ The court noted that the statute did not define the term “new trial.” But the statute did expressly cross-reference Rule 64 of the Oregon Rules of Civil Procedure, which governs the procedure for obtaining a “new trial.”³¹⁵ That rule, the court noted, also defined the term “new trial” as a “re-examination of an issue of fact in the same court after judgment,” which suggested something other than a request for reconsideration of a summary judgment ruling.³¹⁶ Moreover, the court observed that “the manner in which the word ‘trial’ is used throughout the Oregon Rules of Civil Procedure makes clear that the word is used to connote something distinct from a summary judgment.”³¹⁷ For example, Rule 47 C provides that a summary judgment motion has to be filed a specified number of days “before the date set for trial,” indicating that summary judgment and trials are distinct events.³¹⁸ Thus, the way in which the key terms “new trial” and “trial” are used in related provisions was key to the court’s decision.³¹⁹

The opinion of the Oregon Court of Appeals in *Rogozhnikov v. Essex Insurance Co.* provides another good illustration.³²⁰ In that case, a cab driver’s customer pulled a gun on him and fatally shot him.³²¹ The estate of the cab driver claimed uninsured motorist benefits from his automobile liability insurance company.³²² The insurer was required by statute to provide such coverage when the insured was injured by the “operator” of an uninsured vehicle.³²³ The estate argued that the carjacker was, in effect, the “operator” of the cab, for which he had not

³¹³ *Id.* at 585, 288 P.3d at 959.

³¹⁴ Under ORS 19.255(1), subject to exceptions, “a notice of appeal must be . . . filed within thirty days after the judgment” has been entered. OR. REV. STAT. § 19.255(1) (2011). One exception is set out in ORS 19.255(2)(a), which provides that, when a motion for a new trial “is filed and serviced within the time allowed by ORCP 64,” the deadline is thirty days after the order disposing of that motion is entered. ORCP 64 F(1), in turn, says that the motion for a new trial must be filed no later than ten days after the entry of the judgment to be set aside.

³¹⁵ 352 Or. at 591, 288 P.3d at 962.

³¹⁶ *Id.* (quoting OR. R. CIV. P. 64 A).

³¹⁷ *Id.* at 595, 288 P.3d at 964.

³¹⁸ *Id.* (quoting OR. R. CIV. P. 47 C).

³¹⁹ *Id.*

³²⁰ 222 Or. App. 565, 195 P.3d 400 (2008).

³²¹ *Id.* at 567, 195 P.3d at 401.

³²² *Id.*

³²³ *Id.* at 567–58, 195 P.3d at 402.

obtained insurance.³²⁴ Is a carjacker, in other words, an “operator” of the car?

The court of appeals said no. The court noted that the term “operator” had not been defined in the relevant insurance statutes, but that it had been defined in the state’s Motor Vehicle Code.³²⁵ That statute defined an “operator” of a motor vehicle as one “who is in actual physical control of a vehicle.”³²⁶ The court explained, “While that definition of ‘operator’ does not apply to the [insurance] statutes, it provides useful context, because the Motor Vehicle Code and the automobile insurance statutes both address the operation of motor vehicles.”³²⁷ Where the legislature uses the same term in different statutes on the same subject, the court explained, it is reasonable to infer that the term has the same meaning in all the related statutes.³²⁸

A corollary to the principle that the context of a statute includes other related statutes is that it also includes judicial interpretations of those other related statutes.³²⁹ That makes sense. If the judicial construction of the statute itself is always relevant, it would seem to follow that judicial construction of related statutes is always relevant as well.

Sometimes, the courts go even further and include as part of a statute’s context the legislative history of the related statutes. It’s difficult to explain the basis for that extension of the principle, given the likelihood that any member of the legislature (much less a majority) was aware not only of related legislation but also of the legislative history of that related legislation. Still, it is not uncommon for courts to refer to such material as part of a statute’s “context.”³³⁰

³²⁴ *Id.* at 568, 195 P.3d at 402.

³²⁵ *Id.* at 569, 195 P.3d at 403.

³²⁶ *Id.* (quoting OR. REV. STAT. § 483.008(2) (1967)).

³²⁷ *Id.* at 569–70, 195 P.3d at 403.

³²⁸ *Id.* (citing *PGE v. Bureau of Labor & Indus.*, 317 Or. 606, 611, 859 P.2d 1143, 1146 (1993)).

³²⁹ *See, e.g.*, *Keller v. Armstrong World Indus., Inc.*, 342 Or. 23, 35, 147 P.3d 1154, 1161 (2006) (in construing statutes of limitation, the court considered its prior construction of other, similarly worded, statutes of limitation); *Or. Cable Telecomms. v. Dep’t of Revenue*, 237 Or. App. 628, 637–38, 240 P.3d 1122, 1127–28 (2010) (analyzing prior court interpretation of related statute as part of contextual analysis); *Doe v. Medford Sch. Dist.* 549C, 232 Or. App. 38, 55, 221 P.3d 787, 796 (2009) (“Also relevant to our analysis of the statute is any prior judicial construction of it or related statutes.”); *State v. Bryan*, 221 Or. App. 455, 459, 190 P.3d 470, 472 (2008) (“Prior construction of a statute by this court is always relevant to our analysis of the statute’s text.”), *review denied*, 347 Or. 290 (2009).

³³⁰ *See, e.g.*, *State v. Ofodrinwa*, 353 Or. 507, 517, 300 P.3d 154, 159 (2013); *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc.*, 322 Or. 406, 415–16, 908 P.2d 300, 306 (1995), *modified on reconsideration*, 325 Or. 46, (1997); *Lamb v. Coursey*, 238 Or. App. 647, 655, 243 P.3d 130, 134–35 (2010), *review denied*, 350 Or. 230 (2011); *State v. Stamper*,

I hasten to add at this juncture that, although the courts may look to the legislative history of related statutes as context, courts may only look to related statutes that the legislature actually enacted into law. A statute's "context" doesn't include the legislative history of related statutes that the legislature decided *not* to enact.³³¹

Whether a given statute is sufficiently "related" to form the "context" for a statute at issue is an interesting question. The answer appears to be that there's no bright line between related statutes that may be referred to as "context" and unrelated statutes that may not. In fact, the courts sometimes cast a fairly wide net in examining other statutes as context in statutory construction cases. For instance, in *Elk Creek Management Co. v. Gilbert*, the court addressed the meaning of the term "retaliate" as it is used in the state's landlord-tenant law in the context of "retaliatory eviction" claims.³³² Specifically, the court determined whether the statute required the tenant to establish that, in retaliating, the landlord intended to cause the tenant some form of injury.³³³ The court's analysis of the statute included an examination of the use of the word "retaliate" in a wide variety of other statutes, including those concerning retaliatory action against hospital employees,³³⁴ against public utility customers,³³⁵ against persons making child support payments,³³⁶ and against milk producers.³³⁷ The court observed that, throughout the statutes, the legislature appeared to use the term consistently.³³⁸

Similarly, in *State v. Holloway*, the court addressed the meaning of a criminal statute involving manufacture and distribution of a controlled substance on "public land."³³⁹ Finding no definition of the term in the criminal statutes, the court looked elsewhere. The court

197 Or. App. 413, 420, 106 P.3d 172, 176 ("Also considered part of the broader context of a statute is the legislative history of related statutes."), *review denied*, 339 Or. 230 (2005).

³³¹ See, e.g., *Ofodrinwa*, 353 Or. at 522 n.15, 300 P.3d at 162 n.15 ("Ordinarily, the failure to enact legislation, such as a proposed definition, does not provide persuasive evidence of the legislature's intent."); *Berry v. Branner*, 245 Or. 307, 311, 421 P.2d 996, 998 (1966).

³³² 353 Or. 565, 580–82, 303 P.3d 929, 938–39 (2013).

³³³ *Id.* at 582, 303 P.3d at 939.

³³⁴ *Id.* at 581, 303 P.3d at 938 (quoting OR. REV. STAT. § 441.174 (2013)).

³³⁵ *Id.* at 581 n.13, 303 P.3d at 938 n.13 (citing OR. REV. STAT. § 774.140(1) (2013)).

³³⁶ *Id.* (citing OR. REV. STAT. § 25.337(2) (2013)).

³³⁷ *Id.* (citing OR. REV. STAT. § 430.673(3) (2013)).

³³⁸ *Id.* at 580–81, 303 P.3d at 938.

³³⁹ 138 Or. App. 260, 262, 908 P.2d 324, 325 (1995).

observed that the term appeared in some 600 other statutes, all in a consistent manner.³⁴⁰

The basic idea emerging from the cases is that the weight to assign to a statute's context is relative. The closer the context is to the subject of the statute at issue, the stronger the inference that the legislature was probably aware of it and the greater weight it is likely to be given.³⁴¹ But just because some statutes do not directly concern the one in dispute does not necessarily mean that they are not relevant. Especially if they demonstrate a consistent pattern of usage across different subjects, as in the *Elk Creek Management* and *Holloway* cases, those statutes still may be very informative.

c. Prior Versions of the Same Statute

Often, a statute is the latest version of one that has been subject to amendments over the course of many years. In such cases, courts readily look to the history of those changes over time as part of the context of the statute, because the history of those changes in a statute's phrasing can shed light on the meaning of the most recent version.³⁴²

³⁴⁰ *Id.* at 265–67, 908 P.2d at 327–28.

³⁴¹ *See, e.g.*, *State v. Bailey*, 346 Or. 551, 561 & n.4, 213 P.3d 1240, 1245 & n.4 (2009) (relying heavily on “closely” related statute as context); *Herring v. Am. Med. Response Nw., Inc.*, 255 Or. App. 317, 320, 297 P.3d 9, 13 (remotely related statutes are not as persuasive), *review denied*, 353 Or. 867 (2013).

³⁴² *See, e.g.*, *Kohring v. Ballard*, 355 Or. 297, 307–09, 325 P.3d 717, 724–26 (2014) (tracing history of venue legislation); *State v. Ziska*, 355 Or. 799, 806, 334 P.3d 964, 967–68 (2014) (“Analysis of the context of a statute may include prior versions of the statute.”); *Weldon v. Bd. of Licensed Prof'l Counselors & Therapists*, 353 Or. 85, 92–93, 293 P.3d 1023, 1027–28 (2012) (tracing enactment history of occupational licensing statutes); *State ex rel. Portland Habilitation Ctr. v. Portland State Univ.*, 353 Or. 42, 54–55, 292 P.3d 537, 544–45 (2012) (recounting history of various versions of mandamus statutes); *State v. Cloutier*, 351 Or. 68, 76–94, 261 P.3d 1234, 1239–48 (2011) (tracing ORS 138.050 from the Deady Code to present version); *In re Marriage of Harris*, 349 Or. 393, 402, 244 P.3d 801, 807 (2010) (“[T]he context of a statutory provision, including its prior versions, is helpful in determining [the statute's] reach.”); *State v. Blair*, 348 Or. 72, 76, 228 P.3d 564, 566 (2010) (“[T]he context that we consider along with the text [of the criminal code] includes the law as it existed before the adoption of the 1971 criminal code.”); *Dep't of Revenue v. Faris*, 345 Or. 97, 102, 190 P.3d 364, 366 (2008) (examining predecessor statutes as part of the context of the statute in dispute); *Krieger v. Just*, 319 Or. 328, 336, 876 P.2d 754, 758 (1994) (“[W]ording changes adopted from session to session are a part of context of the present version of the statute being construed.”); *see also* *Ware v. Hall*, 342 Or. 444, 449–51, 154 P.3d 118, 121–22 (2007); *Nibler v. Or. Dep't of Transp.*, 338 Or. 19, 22–23, 105 P.3d 360, 361 (2005); *State v. Murr*, 254 Or. App. 456, 461–62, 295 P.3d 122, 126, *review denied*, 358 Or. 788 (2013); *State ex rel. Juv. Dept. v. Z.D.B.*, 238 Or. App. 377, 381, 242 P.3d 714, 716 (2010) (“[The statutory construction] analysis is informed by, among other things, prior versions of the statute[.]”); *Belinsky v. Clooten*, 237 Or. App. 106, 110, 239 P.3d 251, 255 (2010) (“That [interpretation] is bolstered by consideration of the . . .

Again, the underlying rationale is that the legislature was, or at least could have been, aware of those changes when it enacted the most recent version into law. And, again, that can seem like a bit of a stretch. That said, statutes aren't usually enacted in a vacuum; it's common for the legislature to receive background information on the earlier history of a statute in hearings on its most recent iteration.³⁴³

In re Marriage of Harris illustrates the principle.³⁴⁴ In that case, the Oregon Supreme Court resolved a dispute about the meaning of a statute authorizing a court in a dissolution of marriage case to award spousal support to compensate a spouse for contributing to another's earning capacity.³⁴⁵ The court compared earlier versions of the statute with the most recent amendments and saw a "broadening of the types of contributions by one spouse that will qualify for an award of compensatory spousal support."³⁴⁶

d. The Common Law at the Time of Enactment

It's not unusual for the legislature to enact a statute against a backdrop of existing common law. In such cases, Oregon courts frequently state that they assume that the legislature was aware of that common law when it enacted the statute at issue.³⁴⁷ This principle, like

context, which includes wording changes between that version and its predecessor."), *review denied*, 349 Or. 601 (2011); *Pete's Mountain Homeowners Ass'n v. Or. Water Res.*, 236 Or. App. 507, 520, 238 P.3d 395, 402 (2010) ("Consideration of prior versions of a statute certainly is appropriate as part of a statute's context."); *Montgomery v. City of Dunes City*, 236 Or. App. 194, 199, 236 P.3d 750, 752 (2010) ("Changes in the text of a statute over time are context for interpreting the version at issue in a given case."); *Farmers Ins. Co. of Or. v. Conner*, 219 Or. App. 337, 343, 182 P.3d 878, 881 (noting that review of earlier versions of statute in dispute "is particularly instructive"), *review denied*, 345 Or. 94 (2008).

³⁴³ See, e.g., *State v. McNally*, 361 Or. 314, 326–28, 392 P.3d 721, 728–29 (2017) (including testimony during legislative committee hearings concerning earlier versions of statute under consideration); *Tharp v. Psychiatric Sec. Review Bd.*, 338 Or. 413, 426–30, 110 P.3d 103, 109–12 (2005) (detailing legislative history that included consideration of earlier versions of legislation).

³⁴⁴ 349 Or. 393, 244 P.3d 801.

³⁴⁵ *Id.* at 416–18, 244 P.3d at 815.

³⁴⁶ *Id.* at 408, 244 P.3d at 810.

³⁴⁷ See, e.g., *Johnson v. Gibson*, 358 Or. 624, 635, 369 P.3d 1151, 1157 (2016) ("We presume that the legislature was aware of that existing [common] law."); *Montara Owners Assn. v. La Noue Dev., LLC*, 357 Or. 333, 341, 353 P.3d 563, 568 (2015) ("The context for interpreting a statute's text includes the preexisting common law, and we presume that the legislature was aware of that existing law."); *State v. Nix*, 355 Or. 777, 790–97, 334 P.3d 437, 444–47 (2014) (interpreting animal cruelty statute in light of common-law history and prior versions of legislation), *vacated*, 356 Or. 768 (2015); *Blachana, LLC v. Bureau of Labor & Indus.*, 354 Or. 676, 691, 318 P.3d 735, 744 (2014) ("We presume that the legislature was aware of existing law."); *Chase v. Chase*, 354 Or. 776, 782–83, 323 P.3d

others I have mentioned with respect to a statute's context, is predicated on a fiction of legislative omniscience. It's a questionable assumption as an empirical matter, especially in the case of a citizen legislature with relatively few law-trained members. But the courts show no signs of backing down.

To say that the courts assume that the legislature was "aware" of the common law doesn't quite give a complete picture of what inferences the courts will draw from that awareness. Most often, the courts will assume that the legislature intended to incorporate any relevant common law in the absence of evidence to the contrary.

Thus, for example, in *Joshi v. Providence Health System of Oregon*, the court construed the provision in the state's wrongful death statute that requires proof that a defendant "caused" the death of the decedent.³⁴⁸ The decedent had arrived at a hospital complaining of a headache, blurred vision, and dizziness. The emergency room physician conducted some tests and eventually discharged the decedent with a prescription for pain medication. Several days later, the decedent returned to the hospital, where it was determined that he had suffered a stroke. Treatment was unsuccessful. When he later died, his estate brought a wrongful death action, claiming that had the emergency room physician given the decedent aspirin, it would have substantially

266, 270 (2014) ("[T]he statutory history of ORS 82.010 and the case law underlying its evolution provide a clearer contextual picture."); *State v. Ofodrinwa*, 353 Or. 507, 512, 300 P.3d 154, 156 (2013) ("The context for interpreting a statute's text includes the preexisting common law." (internal quotation marks omitted)); *Lindell v. Kalugin*, 353 Or. 338, 349, 297 P.3d 1266, 1272 (2013) ("Case law existing at the time of the adoption" of the rule or statute "forms a part of the context."); *Comcast of Oregon II, Inc. v. City of Eugene*, 346 Or. 238, 254, 209 P.3d 800, 809 (2009) ("[W]e must be mindful of . . . settled law as part of our analysis of statutory context."); *Mastriano v. Bd. of Parole & Post-Prison Supervision*, 342 Or. 684, 693, 159 P.3d 1151, 1155 (2007) ("[W]e generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes."); *Fresk v. Kraemer*, 337 Or. 513, 520–21, 99 P.3d 282, 286 (2004) ("Statutory context includes other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted."); *In re Marriage of Weber*, 337 Or. 55, 67, 91 P.3d 706, 713 (2004) ("[T]his court presumes that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing upon those statutes."); *State v. Pusztai*, 269 Or. App. 893, 897–900, 348 P.3d 241, 243–44 (2015) (describing common-law background of statutory offense of unlawful use of a vehicle); *State v. Dasa*, 234 Or. App. 219, 230–32, 227 P.3d 228, 234–35 (stating that preexisting felony murder case law provides context for determining the meaning of current felony murder statute), *review denied*, 349 Or. 173 (2010); *State v. Spears*, 223 Or. App. 675, 684–85, 196 P.3d 1037, 1041–42 (2008) (reviewing common-law definition of larceny, including references to Blackstone and Bishop, as background for Oregon's statutory definition of the offense).

³⁴⁸ 342 Or. 152, 155, 149 P.3d 1164, 1165–66 (2006).

increased his chances of surviving the stroke. At trial, the court directed a verdict for the defendant because the estate could not prove that it was reasonably probable that the defendant “caused” the decedent to die, only that it reduced his chances of surviving the stroke.³⁴⁹ On appeal, the estate argued that it should not be required to prove that it was reasonably probable that the defendant’s negligence caused the decedent to die.³⁵⁰

The Oregon Supreme Court affirmed. The court noted that the term “cause” was not defined in the wrongful death statute, but it nevertheless had been enacted against a backdrop of case law concerning the issue of causation.³⁵¹ “We assume that, in using the term ‘caused,’” the court explained, “the legislature intended to incorporate the legal meaning of that term that this court has developed in its cases.”³⁵² Under those cases, the court observed, a standard of reasonable probability applied.³⁵³

Once again, however, the courts aren’t consistent in treating the common-law context of statutes in this way. Take, for example, *State v. Couch*.³⁵⁴ Couch was charged with multiple violations of the state wildlife laws for importing exotic species of deer not indigenous to Oregon and then permitting hunting of those deer without a hunting license. The case turned on whether the imported, nonindigenous deer were “wildlife” within the meaning of the statutes that authorized the state to regulate wildlife hunting.³⁵⁵

The Oregon Court of Appeals concluded that the nonindigenous deer were not “wildlife” within the meaning of the relevant statutes.³⁵⁶ The court began by observing that the only statutory definition of “wildlife” tautologically referred to “wild mammals.”³⁵⁷ So the court looked to the broader context of the state’s wildlife laws, including common-law conceptions of “wildlife” dating from the English common law and earlier. The court noted that, at common law, the only wildlife that was considered subject to state regulation were animals that were running

³⁴⁹ *Id.* at 155–56, 149 P.3d at 1166.

³⁵⁰ *Id.* at 159, 149 P.3d at 1168.

³⁵¹ *Id.* at 158, 149 P.3d at 1167.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ 196 Or. App. 665, 103 P.3d 671 (2004), *aff’d*, 341 Or. 610 (2006).

³⁵⁵ *Id.* at 670–71, 103 P.3d at 674–75.

³⁵⁶ *Id.* at 678, 103 P.3d at 678.

³⁵⁷ *Id.* at 673, 103 P.3d at 675–76.

wild in the jurisdiction, known by the Latin phrase “*ferae naturae*.”³⁵⁸ The court noted that its understanding of common-law authority of the state was confirmed by *Belanger v. Howard*,³⁵⁹ an Oregon Supreme Court on all fours (sorry) with *Couch*.³⁶⁰

The supreme court disagreed.³⁶¹ The court noted that the statutes defined “wildlife” to include “wild mammals” and that the ordinary definitions of those words did not say anything about the animals needing to be wild in the jurisdiction that was regulating their capture.³⁶² The court ignored the common-law context on which the court of appeals had relied and did not mention its earlier decision in *Belanger*. Go figure.

Sometimes, the courts rely on the common-law context of a statute not to establish the assumed meaning of a statute but rather to show that the legislature intended to depart from it. That occurs when the common law stands in marked contrast to the wording of a statute on the same matter.³⁶³

4. What Rules Apply to the Analysis of a Statute’s Text?

When courts examine the text of a statute in its relevant context, they bring to the task a number of well-established “rules,” “canons,” or “maxims” of statutory construction. There’s no difference between a rule, a canon, and a maxim, by the way. They are all words for the same thing.

There are a lot of these rules. Scalia and Garner, in their book *Reading Law: The Interpretation of Legal Texts*, list sixty-one canons,³⁶⁴ and they are being quite selective, as textualists are wont to

³⁵⁸ *Id.* at 673–76, 103 P.3d at 675–77.

³⁵⁹ *Id.* at 677–78, 103 P.3d at 677–78 (citing *Belanger v. Howard*, 166 Or. 408, 112 P.2d 1022 (1941)).

³⁶⁰ 196 Or. App. at 677, 103 P.3d at 677–78. In *Belanger*, the defendants bred “Yukon brood” minks without a license. 166 Or. at 412, 417, 112 P.2d at 1024–25. When they sold their farm along with the minks, the buyers alleged fraud. *Id.* at 410, 112 P.2d at 1023. The buyers argued that, because the defendants had bred the minks without a license, they lacked lawful title to the animals. *Id.* at 418–19, 112 P.2d at 1026. The supreme court disagreed, reasoning that, because the particular breed of minks was not indigenous to Oregon, they were not part of the wildlife subject to state regulation. *Id.* at 420, 112 P.2d at 1027.

³⁶¹ 341 Or. 610, 147 P.3d 322 (2006).

³⁶² *Id.* at 617–18, 147 P.3d at 326.

³⁶³ *See, e.g.*, *Gragg v. Hutchinson*, 217 Or. App. 342, 350, 176 P.3d 407, 411 (2007) (noting that, in contrast with broader common-law rule, legislature enacted collateral source statute without an exception for evidence of collateral benefits to show bias or interest of a witness), *review denied*, 344 Or. 401 (2008).

³⁶⁴ SCALIA & GARNER, *supra* note 48.

do.³⁶⁵ The classic work on the subject, *Sutherland on Statutory Construction*, fills eight volumes cataloging practically every canon ever mentioned (and, as we'll see shortly, making up some, as well).³⁶⁶ I will not plow through them all. Instead, I will discuss several of the textual canons that are most frequently cited by Oregon courts.

The textual canons of construction are rooted in assumptions about the ways that language works, as well as assumptions about what legislatures know and intend. Those assumptions can be problematic. Some of the canons assume that language works in ways that make linguists cringe. The rule of consistency is one example. The rule of the last antecedent is another. Other canons are predicated on assumptions about legislatures that, as in the case of context, are somewhat unrealistic. That legislators are aware of, and intend courts to honor, the rules of *ejusdem generis* or *expressio unius*, for instance, is highly unlikely. The same holds true of the assumption that legislators are familiar with abstruse principles of grammar and syntax. That does not stop the courts from relying on those assumptions, however.

The canons have been subjected to withering criticism over the years for being not only of questionable validity but also contradictory. The great Karl Llewellyn authored perhaps the most cited law review article on statutory construction ever concerning the contradictory nature of the so-called rules of construction.³⁶⁷ He listed twenty-eight pairs of seemingly contradictory canons of statutory construction, citing authorities for each.³⁶⁸ Thus, for example, Llewellyn cited the familiar canon that “[a] statute cannot go beyond its text” and then paired it with the opposing canon that “[t]o effectuate its purpose, a statute may be implemented beyond its text.”³⁶⁹ Ever the realist, Llewellyn’s thesis was that, because every canon had an opposite, judicial decisions obviously are not driven by such rules but by unspoken grounds for selecting one over the other.³⁷⁰

³⁶⁵ See Bradford Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527 (1997–98).

³⁶⁶ 1–8 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION (Norman J. Singer ed., 6th ed. 2002).

³⁶⁷ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

³⁶⁸ *Id.* at 401–06.

³⁶⁹ *Id.* at 401.

³⁷⁰ As Llewellyn put it, “Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially by means other than the use of the canon” *Id.*

Llewellyn's critique never took hold in the judiciary. As Judge Richard Posner quipped, "Although there is a fine literature debunking the canons of construction, one has only to skim any recent volume of the *Federal Reporter* or the *United States Reports* to discover that it has had little impact on the judicial reading of statutes."³⁷¹ Even among legal scholars, there has emerged something of a consensus that Llewellyn probably exaggerated, that the rules are not so much contradictory as qualified under appropriate circumstances.³⁷²

That consensus strikes me as undoubtedly correct. Still, I think that a fair measure of skepticism is in order whenever applying these rules of textual construction. They are, as I said, assumptions about language and legislative intentions. Those assumptions should readily give way when more persuasive evidence of legislative intent is available. Moreover, as I'll discuss in greater detail as we get to the individual rules, the textual canons of construction are based on rationales that, when properly understood, should serve to limit their application. It's important not to get carried away when applying these rules.

a. Ordinary Meaning Rule

If the legislature defines a term, then that's what it means. Period. It doesn't matter whether the legislature's definition comports with our understanding of what words ordinarily mean or how they function in a sentence or a paragraph.³⁷³ Remember, the goal of statutory

³⁷¹ Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 801 (1983).

³⁷² See, e.g., Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 163 (2018) ("Canons are taking their turn down the academic runway in ways that no one would have foretold just a decade ago."); John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2D 283, 284 (2002) ("[A] large and growing number of academics (and academics-turned-judges) now believe in the utility of canons of construction . . ."); Michael Sinclair, "Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," *One to Seven*, 50 N.Y.L. SCH. L. REV. 919 (2005) (examining Llewellyn's first seven pairs of canons and finding little real conflict); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989) ("In fact, however, [Llewellyn's] claim of indeterminacy and mutual contradiction was greatly overstated."). Justice Hans Linde echoed that sentiment in *Davis v. Wasco Intermediate Education District*, 286 Or. 261, 274, 593 P.2d 1152, 1158 (1979), in noting of the canons that "[e]ach of these common sense approaches fits some cases but not others, each has 'exceptions' and opposite-and-equal counterparts, and each causes more harm than it is worth if it is not cheerfully ignored whenever it is an obstacle to understanding what the legislature enacted."

³⁷³ See, e.g., *Patton v. Target Corp.*, 349 Or. 230, 239, 242 P.3d 611, 616 (2010) ("Of course, the legislature is free to define words to mean anything that it intends them to mean, including defining words in a manner that varies from a dictionary definition or common understanding." (internal quotation marks omitted)).

construction is legislative intent. If the legislature defined a term, then it's clear what it intended the term to mean. So, for instance, if the legislature chooses to define the term "doctor" for purposes of the state's workers' compensation statutes to include nurse practitioners, then that's what the statute means, even though in ordinary parlance it would be unusual to equate the two.³⁷⁴

Problems arise when the legislature doesn't define its terms. In such cases—and that's most statutory construction cases—courts will invoke an assumption that, in the absence of evidence to the contrary, the legislature intended that words mean what they ordinarily mean.³⁷⁵

The rationale here is pretty obvious: legislators are ordinary people, an assumption that seems especially fair in the case of a nonprofessional, citizen legislature like Oregon's. And ordinary people tend to communicate by means of a set of shared understandings about the meaning of words. Moreover, the ordinary legislators enact laws that are designed to be understood, at least in most cases, by ordinary people.

I'm aware of the fact that there is a fair amount of academic literature that contests the very idea that any word has an ordinary meaning.³⁷⁶ Common experience would seem to refute that, though. The fact is that, day in and day out, human affairs are conducted by means of a

³⁷⁴ *Cook v. Workers' Comp. Dep't*, 306 Or. 134, 143 n.5, 758 P.2d 854, 859 n.5 (1988).

³⁷⁵ *State v. Eastep*, 361 Or. 746, 751, 399 P.3d 979, 982 (2017) ("When statutes do not define their terms, we assume that the legislature intended them to have their plain, ordinary meanings."); *State v. Dickerson*, 356 Or. 822, 829, 345 P.3d 447, 452 (2015) ("When the legislature does not provide a definition of a statutory term, we ordinarily look to the plain meaning of the statute's text to determine what particular terms mean."); *Ogle v. Nooth*, 355 Or. 570, 578, 330 P.3d 572, 578 (2014) ("We give words of common usage their plain ordinary meaning."); *State v. Walker*, 356 Or. 4, 14, 333 P.3d 316, 322 (2014) ("Because the term 'enterprise' is not otherwise defined, we also consider its ordinary meaning."); *Stuart v. Pittman*, 350 Or. 410, 418, 255 P.3d 482, 486 (2011) ("Words of common usage, such as 'clear' and 'express,' should be given their plain and ordinary meaning."); *Haynes v. Tri-Met*, 337 Or. 659, 663, 103 P.3d 101, 104 (2004); *State v. Powell*, 242 Or. App. 645, 653, 256 P.3d 185, 190 (2011); *Barrett v. Dep't of Corr.*, 203 Or. App. 196, 200, 125 P.3d 98, 100 (2005), *review denied*, 341 Or. 197 (2006); *Guild v. Baune*, 200 Or. App. 397, 403, 115 P.3d 249, 253, *adhered to on reconsideration*, 201 Or. App. 514, (2005).

³⁷⁶ *See, e.g.*, Stanley E. Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625 (1978), *reprinted in* STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 269 (1980); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 178 (2011) (explaining that it is a "fiction" that "an objective measure for the 'ordinary meaning of a given' term may be determined through 'judicial introspection'").

generally accepted set of understandings about language. Moreover, whatever its theoretical plausibility, the idea of unavoidable indeterminacy doesn't help much in the real world, where judges have to decide what statutes mean and how they apply. Not surprisingly, judges throughout the country tend to be untroubled by theoretical indeterminacy and embrace instead the ordinary meaning rule.³⁷⁷

The real challenge posed by the ordinary meaning rule is determining what the ordinary meaning of a given statutory word or term actually is. Judges are not inclined simply to assert that the ordinary meaning of a statute is “obvious” and leave it at that.³⁷⁸ Instead, they tend to look to some external sources that establish the ordinary meaning of terms in dispute.

The external source of choice in Oregon is a dictionary.³⁷⁹ And not just any dictionary. At least since *PGE*, the courts have shown a marked

³⁷⁷ See, e.g., BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION* 4 (2015) (“[T]hat language in legal texts should be interpreted in accordance with its ordinary meaning is a uniformly accepted presumption among judges. In fact, it is perhaps the most widely cited axiom of legal interpretation.”); SCALIA & GARNER, *supra* note 48, at 69 (“The ordinary-meaning rule is the most fundamental semantic rule of interpretation.”).

³⁷⁸ For an amusing, and unusual, example to the contrary, see the United States Supreme Court’s decision in *Nix v. Hedden*, 149 U.S. 304 (1893), in which the Court determined it was obvious that—contrary to dictionary definitions—a tomato is a vegetable and not a fruit.

³⁷⁹ *Jenkins v. Bd. of Parole & Post-Prison Supervision*, 356 Or. 186, 194, 335 P.3d 828, 833 (2014) (“Because the legislature has not expressly defined the words in the disputed phrase, dictionary definitions . . . can be useful.”); *State v. Newman*, 353 Or. 632, 641, 302 P.3d 435, 440 (2013) (“We have recognized that ‘conscious’ . . . is a word of common usage. Accordingly, we turn to the dictionary for further guidance.” (citation omitted)); *Dep’t of Revenue v. Faris*, 345 Or. 97, 101, 190 P.3d 364, 365 (2008) (“The word ‘certify’ is not statutorily defined. Thus, we look to the dictionary.”); *State v. Murray*, 340 Or. 599, 604, 136 P.3d 10, 12 (2006) (“Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense.”); *In re Marriage of Masee*, 328 Or. 195, 202, 970 P.2d 1203, 1209 (1999) (“The statute provides no definition of [‘homemaker’]. Thus, we rely for the meaning of the term ‘homemaker’ on its common dictionary definition”); *State v. Kimble*, 236 Or. App. 613, 618, 237 P.3d 871, 874 (2010) (“When the legislature has not provided an express definition for a particular term, we generally look to the term’s plain and ordinary meaning.”); see also *Pete’s Mountain Homeowners Ass’n v. Or. Water Res. Dep’t*, 236 Or. App. 507, 516–17, 238 P.3d 395, 400 (2010) (“The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage.”). Since the 1990s, dictionaries have also become more commonly cited in United States Supreme Court opinions, a fact that has generated quite a bit of scholarly commentary. See, e.g., Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 *BUFF. L. REV.* 227 (1999); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 *HARV. L. REV.* 1437 (1994).

preference for *Webster's Third New International Dictionary*,³⁸⁰ so much so that I once authored an only slightly tongue-in-cheek article characterizing Noah Webster as the Oregon Supreme Court's "eighth justice."³⁸¹

Why *Webster's* and not, say, the *American Heritage* or the *Oxford* dictionary? Fair question. The answer lies in recognizing that not all dictionaries are the same. Some take what lexicographers call a "prescriptive" approach and report the "correct" usage of words. Others adopt a "descriptive" approach and simply report actual, ordinary usage, whether or not it is in some sense "correct."³⁸² Before 1961, most dictionaries purported to be prescriptive. But in 1961, the editors of *Webster's Third New International Dictionary* decided to take a different approach and describe actual usage. The literary world was appalled. The editors of the august *New York Times* refused even to call *Webster's Third* a "dictionary."³⁸³ (They referred to it as a "word book."³⁸⁴) To this day, *Webster's Third* has its critics. Scalia and Garner, for example, complain that it is a "notoriously permissive" dictionary that includes "doubtful, slipshod meanings without adequate usage notes."³⁸⁵ (They prefer the more prescriptive *American Heritage Dictionary*.)

When it's recalled that the object of statutory construction in Oregon is to determine what the state's legislators actually intended, resorting to *Webster's Third* seems sound enough. If it's assumed that those legislators use words in their ordinary senses, then it's understandable

³⁸⁰ WEBSTER'S THIRD, *supra* note 296. A recent Westlaw search revealed that, since 1993, the Oregon courts have cited *Webster's Third* in 1465 cases.

³⁸¹ Jack L. Landau, *The Eighth Justice? Webster, His Dictionary, and Its Influence on Oregon Law*, 2007 OR. APP. ALMANAC 65. For a detailed history of the use of dictionaries in Oregon appellate court case law, see generally Nora Coon, *161 Years of Dictionary Use in the Oregon Appellate Courts*, 55 WILLAMETTE L. REV. (forthcoming 2019).

³⁸² For a more detailed description of the history of the role of "correctness" in lexicography, see generally SIDNEY I. LANDAU, *DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY* 244–54 (2d ed. 2001).

³⁸³ *DICTIONARIES AND THAT DICTIONARY* 78 (James Sledd & Wilma Ebbitt eds. 1962). The *Times* was not alone in condemning *Webster's Third*. The *Washington Post* called it a "monstrosity." *Id.* at 125. Garry Wills, writing for the *National Review*, referred to it as "madness." *Id.* at 131.

³⁸⁴ *Id.* at 78. The *Times* charged that "*Webster's* has, it is apparent, surrendered to the permissive school that has been busily extending its beachhead on English instruction in the schools. This development is disastrous because, . . . it serves to reinforce the notion that good English is whatever is popular." *Id.*

³⁸⁵ SCALIA & GARNER, *supra* note 48, at 418, 422. Justice Scalia vented about *Webster's Third* in *MCI Telecomm. Corp. v. A.T. & T. Co.*, 512 U.S. 218, 228 n.3 (1994), noting that it cited as proper usage of "infer" to mean "imply." The horror.

that the court would look to a dictionary that reports ordinary usage. In any event, that's the explanation that the Oregon Supreme Court offered in *Kohring v. Ballard*.³⁸⁶

In most cases, it won't make much difference which dictionary gets consulted. It's going to be an unusual case in which the meaning of a statute will turn on whether a word is defined by what it is supposed to mean, as opposed to what it commonly is taken to mean. My own practice—and my advice to other judges and advocates—is always to cite more than one dictionary.³⁸⁷ Doing that is more persuasive. Demonstrating that a word or phrase is consistently defined across multiple sources makes it more likely that you have identified its “ordinary” usage and avoids the possibility that dictionary selection affects the argument.

Especially when a statute is of more ancient vintage, it seems important to canvas a variety of sources to establish the ordinary meaning of a term at the time. Seventeenth-, eighteenth-, and nineteenth-century dictionaries were notoriously idiosyncratic.³⁸⁸ Samuel Johnson's famous dictionary refused to ever quote Thomas Hobbes.³⁸⁹ Noah Webster's original 1828 dictionary reflected his unique patriotic and overtly religious notions of what he thought English should look like.³⁹⁰ When construing an old statute, it's always best to cast a wide lexicographical net.

³⁸⁶ 355 Or. 297, 304 n.2, 325 P.3d 717, 722 n.2 (2014).

³⁸⁷ See, e.g., *State v. Lane*, 357 Or. 619, 626, 355 P.3d 914, 919 (2015) (citing *Webster's Third*, *American Heritage Dictionary*, and *The Oxford Dictionary*); *State v. Ziska*, 355 Or. 799, 805, 334 P.3d 966, 967 (2014) (citing the 1910 edition of *Webster's*, *The Encyclopaedic Dictionary*, and *The Century Dictionary*); *State v. Nix*, 355 Or. 777, 782–83, 334 P.3d 437, 440 (2014) (citing *Webster's Third*, *The Oxford English Dictionary*, and *The American Heritage Dictionary*), *vacated on other grounds*, 356 Or. 768 (2015).

³⁸⁸ For a terrific critique of relying on old dictionaries for determining the meaning of old statutes, see generally Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 *FORDHAM L. REV.* 2177 (2003). For a more in-depth history of lexicography, see generally JONATHAN GREEN, *CHASING THE SUN: DICTIONARY MAKERS AND THE DICTIONARIES THEY MADE* (1996).

³⁸⁹ And it is chock-full of his nationalist prejudices. Consider, for instance, his definition of “oats”: “A grain, which in England is generally given to horses, but in Scotland supports the people.” SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (unpaginated) (1755). Bill Bryson reports that Johnson similarly called “colonists” a “race of convicts” who “ought to be grateful for anything we allow them short of hanging.” BILL BRYSON, *MADE IN AMERICA: AN INFORMAL HISTORY OF THE ENGLISH LANGUAGE IN THE UNITED STATES* 73 (1994).

³⁹⁰ Webster, whom Bryson describes as a “severe, correct, humorless, religious, temperate man who was not easy to like, even by other severe, religious, temperate, humorless people,” was disdainful of dictionaries (like Johnson's) that included references to such “low” authors as Shakespeare, and preferred examples taken from the King James

There's much more to using a dictionary than just looking up a word, though.

First, there's a temporal variable. Recall again that the object of statutory construction is to determine what the Oregon Legislature actually intended a statute to mean. As we have already seen with respect to determining a statute's context, that focus on the legislature's actual intentions necessarily means that those intentions must be defined as of a specific point in time—the date of enactment. In other words, determining the ordinary meaning of otherwise undefined statutory terms is to determine that ordinary meaning at the time of enactment.

Looking at the ordinary meaning at the time of enactment is important because the meaning of words can change over the years. Once upon a time, the word “meat” referred to any sort of food³⁹¹ (“meat and drink”),³⁹² now it refers to animal flesh.³⁹³ Once, the word “nice” meant foolish;³⁹⁴ now it means pleasant or agreeable.³⁹⁵

Such changes in meaning occur in the law. My favorite example is a United States Supreme Court decision in *Saint Francis College v. Al-Khazaraji*.³⁹⁶ The issue in that case was whether a college had violated the 1876 Civil Rights Act when it denied a professor tenure because he had been born in Iraq.³⁹⁷ The professor argued that he had been

Bible. BILL BRYSON, *THE MOTHER TONGUE: ENGLISH AND HOW IT GOT THAT WAY* 154–57 (1990). That would seem to make Webster's 1828 dictionary a poor indicator of common usage, given that so many of the examples were taken from a source that was more than 200 years old at the time. I would venture to guess that few if any Americans in the 1820s were going around saying Jacobean things like, “Anon, anon, sir—Score a pint of bastard in the Half-moon.” WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE SIXTH* act 1, sc. 2.

³⁹¹ The *Oxford English Dictionary*, for example, lists the original meaning of the word as “[f]ood in general; anything used as nourishment for men or animals”. IX OXFORD ENGLISH DICTIONARY 530 (2d ed. 1989); see also WEBSTER'S THIRD, *supra* note 296, at 1400 (defining “meat” as “something eaten by man or beast for nourishment”).

³⁹² WILLIAM SHAKESPEARE, *AS YOU LIKE IT*, act 5, sc. 1 (“It is meat and drink to me to see a clown.”).

³⁹³ WEBSTER'S THIRD, *supra* note 296, at 1400 (“animal tissue used as food”).

³⁹⁴ Interestingly, the *Oxford English Dictionary* lists the earliest meaning of the word “nice” as “foolish, stupid, senseless.” X OXFORD ENGLISH DICTIONARY, *supra* note 391, at 386. *Webster's Third*, on the other hand, lists the earliest meaning of the word as “lewd, wanton, dissolute.” WEBSTER'S THIRD, *supra* note 296, at 1523.

³⁹⁵ WEBSTER'S THIRD, *supra* note 296, at 1523 (defining the word “nice” as “pleasant and satisfying”).

³⁹⁶ 481 U.S. 604 (1987).

³⁹⁷ *Id.* at 608.

unlawfully discriminated against because of his “race.”³⁹⁸ The college argued discrimination on the basis of ancestry is not the same thing as discrimination on the basis of “race.”³⁹⁹ The Supreme Court sided with the professor, noting that, although the college was correct that modern conceptions of “race” did not include mere ancestry, the fact remained that, when Congress enacted the law in the late nineteenth century, “race” was understood in a much broader, inclusive sense.⁴⁰⁰

Closer to home, the Oregon Court of Appeals faced a similar problem in *State v. Leslie*.⁴⁰¹ In that case, the defendant had been charged with unlawful possession of a firearm, which the police had found concealed in a truck where he had been living.⁴⁰² The defendant argued that the charges should have been dismissed because of a statutory exemption for firearms found in a “place of residence.”⁴⁰³ He argued that he had been living in his truck, and it was his “place of residence.”⁴⁰⁴ He cited *Webster’s Third*, which broadly defined a “residence” as the place “where one actually lives.”⁴⁰⁵ The court, however, noted that the statute had been enacted nearly a hundred years earlier, and contemporaneous dictionaries defined the word “residence” in a narrower sense of a “fixed and permanent abode.”⁴⁰⁶

Because the legislature enacts legislation at specific points in time, and because the meaning of words can change with time, when looking for evidence of the “ordinary meaning” of a statute, it’s important to consult dictionaries that will show the meaning of words at the time of enactment.⁴⁰⁷

Second, dictionaries will hardly ever report a single, settled meaning of a given term. The English language is simply too complex and

³⁹⁸ *Id.* at 606.

³⁹⁹ *Id.* at 609.

⁴⁰⁰ *Id.* at 610–13.

⁴⁰¹ 204 Or. App. 715, 132 P.3d 37 (2006).

⁴⁰² *Id.* at 717, 132 P.3d at 38.

⁴⁰³ OR. REV. STAT. § 166.250(2)(b) (2005).

⁴⁰⁴ 204 Or. App. at 718–19, 132 P.3d at 38–39.

⁴⁰⁵ *Id.* at 719–20, 132 P.3d at 39.

⁴⁰⁶ *Id.* at 722–23, 132 P.3d at 40–41.

⁴⁰⁷ *See, e.g.,* Nw. Nat. Gas Co. v. City of Gresham, 359 Or. 309, 327–28, 374 P.3d 829, 840–41 (2016) (examining 1914 and 1930 dictionaries in construing 1911 statute); Comcast Corp. v. Dep’t of Revenue, 356 Or. 282, 296 n.7, 337 P.3d 768, 776 n.7 (2014) (“In consulting dictionaries, however, it is important to use sources contemporaneous with the enactment of the statute.”); State v. Glushko, 351 Or. 297, 312, 266 P.3d 50, 57–58 (2011) (rejecting use of modern dictionary definitions of term in 1864 statute); State v. Perry, 336 Or. 49, 52, 77 P.3d 313, 314–15 (2003) (“In interpreting the words of a statute enacted many years ago, we may seek guidance from dictionaries that were in use at the time.”).

subtle. The *Oxford English Dictionary* reports over 400 different definitions of the single word “set,” running 60,000 words long.⁴⁰⁸ The question arises as to which of the different definitions will apply. It is tempting to assume that the first definition in a list of several reported in the dictionary is the preferred one. And I certainly have seen a number of appellate briefs that have succumbed to that temptation. Unfortunately, it is usually wrong. Different dictionaries may have different conventions when it comes to the order in which they list their “senses,” or definitions.⁴⁰⁹ *Webster’s Third*, for example, lists its senses in historical order; the first sense in the list is simply the oldest.⁴¹⁰

Third, it’s crucial to remember what dictionaries do and do not accomplish. They do not—and cannot—tell us what the words of a statute mean. What dictionaries do is provide a range of definitional *possibilities*. They establish what a given word used in a statute *could* reasonably mean. Whether the word used in a statute actually lines up with one dictionary definition or another depends on the context in which it is used.⁴¹¹

⁴⁰⁸ XV OXFORD ENGLISH DICTIONARY, *supra* note 391, at 50–75.

⁴⁰⁹ Dictionary definitions may be listed in historical order, or in order of usage frequency, or any number of other variables. *See generally* Robert Lew, *Identifying Ordering and Defining Senses*, in *THE BLOOMSBURY COMPANION TO LEXICOGRAPHY* (Howard Jackson ed. 2013).

⁴¹⁰ WEBSTER’S THIRD, *supra* note 296, at 19a (“The order of senses is historical: the one known to have been first used in English is entered first.”). *Oxford English Dictionary*, likewise, lists its definitions historically. I OXFORD ENGLISH DICTIONARY, *supra* note 391, at xxxi (explaining “that sense is placed first which was actually the earliest in the language; the others follow in the order in which they appear to have arisen”). In contrast, *The American Heritage Dictionary*, which takes a more prescriptive approach, lists the “central and often the most commonly sought meaning” first. *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* xxiv (5th ed. 2011).

⁴¹¹ *See, e.g.*, *Alfieri v. Solomon*, 358 Or. 383, 393, 365 P.3d 99, 105 (2015) (“[I]n construing statutes, we should not simply consult dictionaries and interpret words in a vacuum.”); *Jenkins v. Bd. of Parole & Post-Prison Supervision*, 356 Or. 186, 194, 335 P.3d 828, 833 (2014) (context and legislative history determine which among dictionary definitions the legislature most likely intended); *Elk Creek Mgmt. Co. v. Gilbert*, 353 Or. 565, 574, 303 P.3d 929, 934 (2013) (“The correct construction of [a statute] does not, however, turn only on the dictionary definition of one of its words. We also must consider the context in which the legislature used the word”); *State v. Cloutier*, 351 Or. 68, 96, 261 P.3d 1234, 1249 (2011) (“In construing statutes, we do not simply consult dictionaries and interpret words in a vacuum. Dictionaries, after all, do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used.”); *State v. Fries*, 344 Or. 541, 546, 185 P.3d 453, 456 (2008) (explaining that context determines which of multiple definitions is the one the legislature intended); *State ex rel. Dep’t of Transp. v. Stallcup*, 341 Or. 93, 99–100, 138 P.3d 9, 13 (2006) (dictionary definitions give way to meaning suggested by statutory context); *State v. Glaspey*, 337 Or.

In *State v. Gonzalez-Valenzuela*,⁴¹² for example, the question for the court was whether a person who knowingly possessed drugs in her purse while in a car with her two children committed the offense of reckless endangerment. The statute defining that offense requires proof that the defendant knowingly permitted a minor to be in a “place” where unlawful activity involving controlled substances is “maintained or conducted.”⁴¹³ The defendant argued that a car used to transport her children was not such a “place.” The state argued that the ordinary meaning of the words controlled and that *Webster’s Third* defined a “place” as a “physical environment,” or a “space,” or an “area.”⁴¹⁴ A car, argued the state, certainly fits those definitions.⁴¹⁵ Defendant pointed out, however, that the same *Webster’s Third* also defined a “place” as “a building or locality used for a special purpose” and argued that a car certainly does not fit that definition.⁴¹⁶

The Oregon Supreme Court noted the competing definitions and commented, “Although dictionaries may provide a useful starting point to identifying the plain meaning of a statute, this case highlights their limitations.”⁴¹⁷ A dictionary definition, the court explained, “should not be relied on to resolve a dispute about plain meaning without critically examining how the definition fits into the context of the statute itself.”⁴¹⁸ The court then turned to the immediate context—the accompanying reference to a place where illegal drug activity is “maintained or conducted”—as well as other statutes *in pari materia*

558, 564–65, 100 P.3d 730, 733 (2004) (rejecting dictionary definition of term in favor of narrower meaning suggested by context); *State v. J.C.N.-V.*, 268 Or. App. 505, 515, 342 P.3d 1046, 1053 (2015) (“We are mindful, however, that the meaning of the statute does not turn only on the dictionary definition of one of its words; we must examine how each word is used in context.” (internal quotation marks omitted)), *rev’d*, 359 Or. 559, 380 P.3d 248 (2016); *State v. Urie*, 268 Or. App. 362, 364, 341 P.3d 855, 856 (2014) (“However, we do not simply consult dictionaries and interpret words in a vacuum; dictionaries do not tell us what words mean, only what words can mean, depending on their context.”); *Larsen v. Bd. of Parole & Post-Prison Supervision*, 231 Or. App. 59, 63–64, 219 P.3d 28, 30 (2009) (after noting several possible definitions of statutory term, stating that “[w]e look to the context in which the word appears to determine which meaning the legislature intended”), *review denied*, 348 Or. 13 (2010); *State v. Oliver*, 221 Or. App. 233, 237–38, 189 P.3d 1240, 1242 (explaining that the relevant dictionary definition is the one that makes sense in the context of the statute), *review denied*, 345 Or. 318 (2008).

⁴¹² 358 Or. 451, 461, 365 P.3d 116, 122 (2015).

⁴¹³ OR. REV. STAT. § 163.575(1)(b) (2017).

⁴¹⁴ *Gonzalez-Valenzuela*, 358 Or. at 467, 365 P.3d at 125.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 461, 365 P.3d at 122.

⁴¹⁸ *Id.*

and cases construing those other statutes to resolve the ambiguity. The court noted, in particular, how the offense of child endangerment was intended to fill gaps in existing criminal nuisance law, which pertained to maintaining drug houses. Under the circumstances, the court concluded the legislature more likely intended the narrower definition.⁴¹⁹

When consulting dictionaries to determine the meaning of statutory words, remember to limit the definitions to the appropriate part of speech.⁴²⁰ The part of speech can make a difference in the word's definition. In *State v. Glushko/Little*,⁴²¹ the question was whether the defendant had given "consent" to a delay of his trial within the meaning of the state speedy trial statute when he failed to appear at a scheduled hearing. The state cited a dictionary definition of the verb consent—"to allow"—and argued that, by failing to show up, the defendant had consented. The Oregon Supreme Court rejected the argument, noting that the definition on which the state had relied referred to the verb form of the word.⁴²² The noun form of the word, the court noted, referred to a sequence of events in which there is an affirmative response to a proposal.⁴²³

Finally, it's important to understand how definitions work. Each dictionary employs a variety of shorthand symbols, abbreviations, typefaces, and fonts to communicate a lot of information about the meaning of a given word. It pays to know such things. The outcome of *Edwards v. Riverdale School District* turned on precisely that information.⁴²⁴ The issue was whether Edwards, a school athletic director, was an "administrator." Administrators were not subject to the procedures that apply to the dismissal of teachers. Edwards supervised

⁴¹⁹ *Id.* at 470, 365 P.3d at 127.

⁴²⁰ *See, e.g.*, *State v. Marshall*, 350 Or. 208, 218 n.9, 253 P.3d 1017, 1023 n.9 (2011) (noting as relevant to the analysis that "compel" is a transitive verb); *State v. Bray*, 342 Or. 711, 719 n.6, 160 P.3d 983, 988 n.6 (2007) (rejecting a party's proposed dictionary definition of a term because the definition refers to the use of the term as a noun, when the statute uses the term as a transitive verb); *State v. Rowland*, 245 Or. App. 240, 245, 262 P.3d 1158, 1161 (2011) (discussing importance of use of the article "the"); *State v. Cox*, 219 Or. App. 319, 322, 182 P.3d 259, 261 (2008) (stating that whether a word in a statute is used in its noun or verb form can make a definitional difference), *superseded by statute*, Or. Laws 2011, ch. 675, *as recognized in* *State v. Streeter III*, 270 Or. App. 441, 444 n.2, 348 P.3d 290, 292 n.2 (2015).

⁴²¹ 351 Or. 297, 311, 266 P.3d 50, 57 (2011).

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ 220 Or. App. 509, 188 P.3d 317 (2008), *review dismissed*, 346 Or. 66 (2009).

coaches, organized the coach selection committee, and played a role in monitoring the department's budget.⁴²⁵

The applicable statute stated that an "administrator" included one whose work was primarily service as a "supervisor, principal, vice-principal, or director of a department."⁴²⁶ There was no contention that Edwards was a supervisor, principal, or vice-principal; the dispute centered on whether he was a "director" of a department. The Fair Dismissal Appeals Board looked at the definition of the word in *Webster's Third*: "one that directs as a : the head or chief of an organized occupational group." The board drew from that definition that a "director" must be the "head" or "chief" of an organization. It then looked up the definition of "chief," which it found to be "accorded highest rank, office or rating."⁴²⁷ The board then concluded that, because Edwards was not the highest rank within a department, he was not a "director" within the meaning of the law.

The Oregon Court of Appeals reversed. The problem with the board's conclusion was that it was based on a misunderstanding of how definitions work. The definition of the term "director," the court explained, was "one that directs."⁴²⁸ The material that followed the definition was what is known as a series of "coordinate subsenses," signified by the lightface colon.⁴²⁹ Those coordinate subsenses function as *examples* of the definition that precedes them, not as the definition itself.⁴³⁰ Thus, the reference to a "head" or "chief" merely served as illustrations, not as requirements.⁴³¹ That Edwards was not a "head" or "chief" simply established that he did not qualify as one of the examples of a director, not that he was not a director. Given his supervisory responsibilities, the court concluded, it was clear that he was, in fact, a "director," and thus an "administrator" within the meaning of the statute.⁴³²

b. Terms of Art

There's an exception to the ordinary meaning rule: when otherwise undefined statutory terms are obviously of a sort that have acquired

⁴²⁵ *Id.* at 511–12, 188 P.3d at 318.

⁴²⁶ OR. REV. STAT. § 342.815(1) (2017).

⁴²⁷ *Edwards*, 220 Or. App. at 512–13, 188 P.3d at 318–19.

⁴²⁸ *Id.* at 515, 188 P.3d at 320.

⁴²⁹ *Id.* at 515–16, 188 P.3d at 320.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.* at 516, 188 P.3d at 320.

particular meanings when used by professionals in particular disciplines—law, medicine, or engineering, for instance—courts assume that the legislature intended those words to have that particular meaning.⁴³³ The practice of giving terms of art their specialized meaning is one that dates back at least a couple of centuries. Blackstone explained in his *Commentaries* that “terms of art, or technical terms, must be taken according to the acceptance of the learned in each art, trade, and science.”⁴³⁴ And for just about as long, courts have been vexed by two subsidiary problems: how do you know if a given word or phrase has a technical meaning, and how do you determine what that technical meaning is?

Let’s begin with the first of those problems, determining precisely when a word has a non-ordinary, technical meaning. Sometimes the answer is obvious from the face of the statute’s wording, as when the legislature uses terms that are familiar to lawyers as having particularized legal meaning. In *Dess Properties, LLC v. Sheridan Truck & Heavy Equipment, LLC*, for instance, the court readily concluded that a statute’s reference to a “void contract” referred to a legal phrase with a settled meaning.⁴³⁵

⁴³³ See, e.g., *State v. Dickerson*, 356 Or. 822, 829, 345 P.3d 447, 452 (2015) (“Because ‘legal interest’ and ‘equitable interest’ are legal terms, however, we give those terms their established legal meanings”); *Comcast Corp. v. Dep’t of Revenue*, 356 Or. 282, 296, 337 P.3d 768, 776 (2014); *Zimmerman v. Allstate Prop. & Cas. Ins. Co.*, 354 Or. 271, 280, 311 P.3d 497, 502 (2014) (“When the term has acquired a specialized meaning in a particular industry or profession, however, we assume that the legislature used the term consistently with that specialized meaning.”); *Dep’t of Revenue v. Croslin*, 345 Or. 620, 628, 201 P.3d 900, 904 (2009) (explaining that the term “damages” is a legal term of art as used in statute authorizing Tax Court to award damages and attorney fees); *Zottola v. Three Rivers Sch. Dist.*, 342 Or. 118, 122, 149 P.3d 1151, 1153 (2006) (determining the ordinary meaning of “back pay” by referring to *Black’s Law Dictionary*); *Wal-Mart Stores, Inc. v. City of Central Point*, 341 Or. 393, 398, 144 P.3d 914, 916 (2006) (“The word ‘service’ is a term of art with a specific, legal meaning.”); *State ex rel. Dep’t of Transp. v. Stallcup*, 341 Or. 93, 99, 138 P.3d 9, 12 (2006) (“[W]e give words that have well-defined legal meanings those meanings.”); *Tharp v. Psychiatric Sec. Review Bd.*, 338 Or. 413, 423, 110 P.3d 103, 108 (2005) (explaining that “terms of art that are used in the context of professional disciplines” are not given their plain, natural, and ordinary meaning); *Mueller v. Psychiatric Sec. Review Bd.*, 325 Or. 332, 339, 937 P.2d 1028, 1031–32 (1997); *Or. Cable Telecomms. v. Dep’t of Revenue*, 237 Or. App. 628, 634, 240 P.3d 1122, 1126 (2010) (“[W]ords that have well-defined legal meanings are given those specialized meanings.”).

⁴³⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *59.

⁴³⁵ 220 Or. App. 336, 115 P.3d 1115 (2008); see also *State v. Hess*, 342 Or. 647, 650, 159 P.3d 309, 310–11 (2007) (resorting to *Black’s Law Dictionary* to define the term “stipulation,” which the court characterized as a “legal term”); *State v. Bassett*, 234 Or. App. 259, 265, 228 P.3d 590, 593 (referring to *Black’s Law Dictionary* to determine the meaning of the statutory phrase “element of the crime”), *review denied*, 348 Or. 461 (2010).

In other cases, though, whether a word or phrase is a term of art is not so clear. In *State ex rel. Engweiler v. Cook*, the Oregon Court of Appeals concluded that the phrase “term of incarceration” as used in state sentencing statutes was a term of art with a particularized meaning.⁴³⁶ The Oregon Supreme Court disagreed, interpreting the phrase in accordance with the ordinary meaning of the component words.⁴³⁷

Usually, whether a term has acquired some specialized meaning is determined by resorting to ordinary rules of statutory construction and examining the text in context and in light of relevant legislative history. *Department of Consumer & Business Services v. Muliro* is a good example.⁴³⁸ The state workers’ compensation statutes require an injured worker with more than one employer to provide notice of secondary employment as a condition for receiving certain benefits.⁴³⁹ The question in *Muliro* was whether the “notice” requirement referred to actual notice, as opposed to constructive notice. The Oregon Supreme Court noted that, as “notice” was undefined in the statute itself, the court must interpret the word according to its plain, ordinary meaning unless it is clear that the word is used as a term of art.⁴⁴⁰ The court observed that whether the word should be treated as a term of art could make a difference because the ordinary meaning of the term connotes actual notice, while the term’s technical, legal meaning could also include constructive or imputed knowledge.⁴⁴¹ Ultimately, the court concluded that the legislature intended the word to have its ordinary meaning because of the way “notice” was used in context.⁴⁴² The statute referred to notice having been “received,” which suggests actual notice, given that constructive notice is not actually received.⁴⁴³

That leaves the issue of determining what a term of art actually means. The general rule is that courts determine the meaning of technical terms by resort to references that are regularly consulted within the relevant discipline.⁴⁴⁴ If a term is one of legal usage, courts

⁴³⁶ 197 Or. App. 32, 38–41, 103 P.3d 1205, 1208–09 (2005).

⁴³⁷ *State ex rel. Engweiler v. Cook*, 340 Or. 373, 378–79, 133 P.3d 904, 906–07 (2006).

⁴³⁸ 359 Or. 736, 380 P.3d 270 (2016).

⁴³⁹ OR. REV. STAT. § 656.210(2)(b) (2017).

⁴⁴⁰ *Muliro*, 359 Or. at 745–46, 380 P.3d at 275.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *See, e.g., Comcast Corp. v. Dep’t of Revenue*, 356 Or. 282, 296, 337 P.3d 768, 776 (2014) (“An exception [to the ordinary-meaning assumption] arises when the legislature uses technical terminology—so-called ‘terms of art’—drawn from a specialized trade or

routinely quote *Black's Law Dictionary* or relevant case law.⁴⁴⁵ If a term is medical, courts will cite *Stedman's Medical Dictionary* or some other medical dictionary.⁴⁴⁶

Once again, remember that Oregon statutory construction is a temporally focused exercise: courts seek the meaning of a statute that the legislature most likely intended at the particular moment in time when the statute was enacted. This means that, as with ordinary meaning, references to specialized meaning also must relate to the meaning of the term at the time of enactment. The Oregon Supreme Court's decision in *Comcast Corp. v. Department of Revenue* illustrates this principle.⁴⁴⁷ Oregon statutes subject "data transmission services" to a special method of taxation.⁴⁴⁸ The issue in this case was whether Comcast's cable television and internet access services qualified as "data transmission services," which are subject to the special method of taxation.⁴⁴⁹ There was no question that the term "data transmission services" is a term of art.⁴⁵⁰ The question was what the term of art meant when the statute was enacted in 1973, long before the digital revolution.⁴⁵¹ Comcast argued that, at the time of enactment, the term referred to a limited universe of point-to-point, private-line microwave communication networks.⁴⁵² After consulting telecommunications engineering textbooks from the early 1970s, contemporaneous articles,

field. In that circumstance, we look to the meaning and usage of those terms in the discipline from which the legislature borrowed them.”)

⁴⁴⁵ See, e.g., *Alfieri v. Solomon*, 358 Or. 383, 407, 365 P.3d 99, 113 (2015) (citing *Black's Law Dictionary* to determine the meaning of "allow[ing]" a motion); *Powerex Corp. v. Dep't Revenue*, 357 Or. 40, 61–62, 346 P.3d 476, 489 (2015) (citing *Black's Law Dictionary* to determine meaning of "tangible property"); *State v. Dickerson*, 356 Or. 822, 829–30, 345 P.3d 447, 452 (2015) (citing *Black's Law Dictionary* to define a legal or equitable "interest" in property); *Dep't of Revenue v. Croslin*, 345 Or. 620, 628, 201 P.3d 900, 904 (2009) (citing *Black's Law Dictionary* for the word "damages").

⁴⁴⁶ See, e.g., *Hopkins v. SAIF Corp.*, 349 Or. 348, 361, 245 P.3d 90, 97 (2010) (citing *Stedman's Medical Dictionary* and *Dorland's Illustrated Medical Dictionary* in construing statutory reference to "arthritis"); *Barrett v. Coast Range Plywood*, 294 Or. 641, 643–44, 661 P.2d 926, 928 (1983) (citing *Stedman's Medical Dictionary* to construe "functional" overlay); *Landis v. Liberty Nw. Ins. Corp.*, 281 Or. App. 639, 648 n.6, 383 P.3d 349, 355 n.6 (2016) (citing *Stedman's Medical Dictionary* to define "prosthesis").

⁴⁴⁷ 356 Or. 282, 337 P.3d 768 (2014).

⁴⁴⁸ ORS 308.505 to ORS 308.665 provide for what is known as "central assessment," which applies to "communication" services. OR. REV. STAT. § 308.515(1)(h) (2017). Under ORS 308.505(2), "communication" is defined to include "data transmission services," a term that is not further defined.

⁴⁴⁹ *Comcast Corp.*, 356 Or. at 301, 337 P.3d at 779.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.* at 289, 337 P.3d at 772.

Federal Communications Commission decisions from the era, and similar sources, the Oregon Supreme Court rejected Comcast's proposed definition.⁴⁵³

Similarly, in cases involving legal terminology from times past, courts will examine editions of law dictionaries and case law from the relevant era to determine the meaning that the legislature most likely intended.⁴⁵⁴

c. The "Whole Act" Rule Redux

In the earlier discussion of a statute's context,⁴⁵⁵ I mentioned the much-cited "whole act" rule, which states that statutory construction should always take into account the statute as a whole, not just particular words in a vacuum. This idea that statutes must be examined as a whole gives rise to a number of corollary interpretive principles—a rule against surplusage, an assumption of consistency, and an assumption that different words mean different things. Courts are very fond of each of those principles. But I think those principles need to be applied with a measure of caution. Let me explain why.

(i) Everything Must Mean Something: The Rule Against Surplusage

Statutes are always enacted as part of a larger whole—never word-by-word and rarely section-by-section. It stands to reason that the legislature can be assumed to have intended for the parts of every statute to be read in context so that each part means something and serves the larger purpose that animates the statute as a whole.⁴⁵⁶

⁴⁵³ *Id.* at 295–301, 337 P.3d at 777–79.

⁴⁵⁴ *See, e.g.,* *State v. Clemente-Perez*, 357 Or. 745, 764, 359 P.3d 232, 245 (2015) (citing the 1891 edition of *Black's Law Dictionary* and the 1926 edition of *Bouvier's Law Dictionary* to determine the meaning of a 1910 criminal statute).

⁴⁵⁵ *See supra* text at notes 301–10.

⁴⁵⁶ *Force v. Dep't of Revenue*, 350 Or. 179, 190, 252 P.3d 306, 312 (2011) ("Statutory provisions, however, must be construed, if possible, in a manner that 'will give effect to all' of them." (internal quotation marks omitted)); *Liles v. Damon Corp.*, 345 Or. 420, 424, 198 P.3d 926, 928 (2008) ("We begin with the text and context of the statutes and endeavor to give meaning to all parts of those statutes."); *Hazell v. Brown*, 238 Or. App. 487, 508, 242 P.3d 743, 755 (2010) ("Accordingly, if . . . [plaintiffs] were correct, [the provision] would be meaningless, because its prerequisites would be illusory. We are constrained from attributing such an intent . . ."); *Wilson v. Tri-County Metro. Transp. Dist.*, 234 Or. App. 615, 625, 228 P.3d 1225, 1230 ("[S]tatutory provisions must be construed, if possible, in a manner that 'will give effect to all' of them." (quoting *Powers v. Quigley*, 345 Or. 432, 438, 198 P.3d 919, 922 (2008))), *review denied*, 348 Or. 669 (2010); *State v. L.C.*, 234 Or. App. 347, 355, 228 P.3d 594, 598 (citing OR. REV. STAT. § 174.010 (2017)), *review allowed*, 349 Or. 171, 243 P.3d 69 (2010), *review dismissed*, 349 Or. 603, 249 P.3d 124 (2011); *Waxman v. Waxman & Assocs., Inc.*, 224 Or. App. 499, 508, 198 P.3d 445, 451 (2008) (requiring

That commonsense notion has led courts to adopt the “general rule” that the legislature intends each and every word of a statute to be given meaning, if possible.⁴⁵⁷ Said another way, when construing a statute, courts will take pains to avoid leaving any part of the statute as surplusage.⁴⁵⁸ The legislature itself has expressed a similar sentiment, declaring that “[w]here there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.”⁴⁵⁹

It’s important, though, not to get carried away with the idea that every single word of a statute has to have meaning. It’s not a hard-and-fast rule. Redundancy is simply too common a feature of ordinary communication,⁴⁶⁰ and it is no less common in the law. The multilingual roots of English legal vocabulary have resulted in a centuries-long tradition of lawyers using two or three words when one might suffice.⁴⁶¹ Quite a few statutes, for example, refer to “clear and convincing” evidence.⁴⁶² That doesn’t mean that “clear” must mean

courts to give effect to all relevant provisions); *City of Eugene v. Nalven*, 152 Or. App. 720, 725–26, 955 P.2d 263, 266 (noting “our obligation to give full meaning and effect to all relevant statutory provisions”), *review denied*, 327 Or. 431 (1998).

⁴⁵⁷ *Crystal Commc’ns, Inc. v. Dep’t of Revenue*, 353 Or. 300, 311, 297 P.3d 1256, 1261 (2013) (“As a general rule, we construe a statute in a manner that gives effect, if possible, to all its provisions.”); *see also Vill. at Main St., Phase II, LLC v. Dep’t of Revenue*, 356 Or. 164, 175, 339 P.3d 428 (2014); *Nw. Nat. Gas Co. v. Dep’t of Revenue*, 347 Or. 536, 556, 226 P.2d 28 (2010).

⁴⁵⁸ *Blachana, LLC v. Bureau of Labor & Indus.*, 354 Or. 676, 692, 318 P.3d 735, 745 (2014) (“[R]edundancy, of course, is a consequence that this court must avoid if possible.”); *State v. Kellar*, 349 Or. 626, 636, 247 P.3d 1232, 1237 (2011) (“Defendant’s interpretation results in a redundancy, something that we seek to avoid in interpreting statutes.”); *Powers v. Quigley*, 345 Or. 432, 438, 198 P.3d 919, 922 (2008); *State v. Connally*, 339 Or. 583, 593, 125 P.3d 1254, 1259 (2005); *Bolt v. Influence, Inc.*, 333 Or. 572, 581, 43 P.3d 425, 429 (2002); *Quintero v. Bd. of Parole & Post-Prison Supervision*, 329 Or. 319, 324, 986 P.2d 575, 577 (1999) (referring to “this court’s stated goal of giving effect to every provision of a statute”); *State v. Hansen*, 253 Or. App. 407, 414, 290 P.3d 847, 851 (2012) (“[C]ourts normally seek to avoid an interpretation of a statute that results in a redundancy.”); *State v. Donovan*, 243 Or. App. 187, 196, 256 P.3d 196, 201 (2011) (“Any other interpretation would mean the amendments were merely redundant of what was already in the statute.”); *Certain Underwriters at Lloyd’s London & Excess Ins. Co. v. Mass. Bonding & Ins. Co.*, 235 Or. App. 99, 129, 230 P.3d 103, 129 (rejecting the argument that would make another statutory provision “meaningless surplusage”), *review denied*, 349 Or. 173 (2010), *adhered to as modified on reconsideration*, 245 Or. App. 101 (2011); *State v. Stamper*, 197 Or. App. 413, 418, 106 P.3d 172, 175 (“[W]e assume that the legislature did not intend any portion of its enactments to be meaningless surplusage.”), *review denied*, 339 Or. 230 (2005).

⁴⁵⁹ OR. REV. STAT. § 174.010.

⁴⁶⁰ THE NEW FOWLER’S MODERN ENGLISH USAGE 661 (R.W. Burchfield ed., 3rd ed.1996) (“Actual or concealed redundancy occurs with great frequency in the language.”).

⁴⁶¹ *See generally* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 120–22 (1963).

⁴⁶² *See, e.g.*, OR. REV. STAT. § 125.400 (2017) (stating that court must find “by clear and convincing evidence that the respondent is a minor or financially incapable”); OR. REV.

something distinct from “convincing.” The fact is that the phrase dates back centuries to a time when, to avoid any misunderstanding of what the law required, lawmakers would commonly pair an English or French word with a Latin word that meant the same thing.⁴⁶³ Even today, legislatures engage in redundancy out of caution, in an apparent desire to leave no doubt as to a particular point. For instance, the statutory definition of theft, states that a person commits the offense if he or she “[t]akes, appropriates, obtains, or withholds” property from its owner.⁴⁶⁴ It would be foolish to attempt to parse some distinction between “tak[ing],” “appropriat[ing],” and “obtain[ing]” property. All three words are obviously synonyms. Similarly, the crime of forgery includes an element that the defendant has falsely “uttered” an instrument.⁴⁶⁵ The statutory definition of “utter” is to “issue, deliver, publish, circulate, disseminate, transfer, or tender.”⁴⁶⁶ On the face of things, it’s clear that the legislature was not attempting to draw distinctions among each and every one of those definitional components. Rather, the legislature was trying to be careful and comprehensive. That’s the way legislative drafting sometimes works.

It’s better to think of the rule against surplusage as only an assumption, born of deference to the legislature and tempered by an understanding that the rule is not set in stone. As the Oregon Supreme Court said in *State v. Cloutier*:

[T]he fact that a proposed interpretation of a statute creates some measure of redundancy is not, by itself, necessarily fatal. Redundancy in communication is a fact of life and of law. . . . But, at the least, an interpretation that renders a statutory provision meaningless should give us pause, both as a matter of respect for a coordinate branch of government that took the trouble to enact the provision into law and as a matter of complying with the interpretive

STAT. § 192.363(2) (2017) (stating that a party seeking disclosure of certain public records “shall show by clear and convincing evidence that the public interest requires disclosure”); OR. REV. STAT. § 426.130(1)(a) (2017) (determining whether a person suffers a mental illness is “based upon clear and convincing evidence”); OR. REV. STAT. § 464.280(1) (2017) (stating that applicants for bingo, lotto, or raffle licenses must establish qualifications “by clear and convincing evidence”); OR. REV. STAT. § 723.478(1) (2017) (stating that joint accounts belong to parties in proportion to net contributions “unless there is clear and convincing evidence of a different intent”).

⁴⁶³ *Riley Hill Gen. Contractor v. Tandy Corp.*, 303 Or. 390, 395–97, 737 P.2d 595, 599–601 (1987) (explaining historical origins of the phrase “clear and convincing evidence”).

⁴⁶⁴ OR. REV. STAT. § 164.015(1) (2017).

⁴⁶⁵ OR. REV. STAT. § 165.007(1)(b) (2017).

⁴⁶⁶ OR. REV. STAT. § 165.002(7) (2017).

principle that, if possible, we give a statute with multiple parts a construction that will give effect to all of those parts.⁴⁶⁷

(ii) *The Assumption of Consistency*

Also flowing from the whole act rule is the idea that the same words in the same or related statute can fairly be assumed to mean the same thing.⁴⁶⁸ Certainly nothing precludes the legislature from using the same word to mean different things. Homographs and heteronyms, after all, are common features of the English language. (“She had to crane her neck to see the crane sitting on the crane.”) But statutes are the products of deliberation, and it seems fair to think that, if the legislature had intended to communicate different ideas, then it would have used different words.

This rule, too, needs to be taken with a proverbial grain of salt, though; the legislature has not been so careful at times. I have found that to be especially true when a particular statute has been amended a number of times over the years. Drafting inconsistencies work their way into the law without anyone noticing, which can prove vexing when it comes to interpreting the law as a whole.

The poster child for this problem is *Brown v. SAIF Corp.*⁴⁶⁹ The issue in that case was whether the phrase “compensable injury,” as it is

⁴⁶⁷ 351 Or. 68, 97–98, 261 P.3d 1234, 1250 (2011) (internal quotation marks omitted) (citations omitted); *see also* *Thomas Creek Lumber & Log Co. v. Dep’t of Revenue*, 344 Or. 131, 138, 178 P.3d 217, 220 (2008) (“[N]othing prohibits the legislature from saying the same thing twice”); *Friends of Yamhill Cty. v. Yamhill County*, 229 Or. App. 188, 195, 211 P.3d 297, 300 (2009) (“[I]n both ordinary day-to-day communication and in legal drafting, redundancy is a fairly common phenomenon.”).

⁴⁶⁸ *See, e.g.*, *Vill. at Main St., Phase II, LLC v. Dep’t of Revenue*, 356 Or. 164, 175, 339 P.3d 428, 434 (2014) (“[T]he general assumption of consistency counsels us to assume that the legislature intended the same word to have the same meaning throughout related statutes unless something in the text or context of the statute suggests a contrary intention.”); *Cloutier*, 351 Or. at 99, 261 P.3d at 1251 (“Although, in the abstract, there is nothing that precludes the legislature from defining the same terms to mean different things in the same or related statutes, in the absence of evidence to the contrary, we ordinarily assume that the legislature uses terms in related statutes consistently.”); *Force v. Dep’t of Revenue*, 350 Or. 179, 189, 252 P.3d 306, 311–12 (2011); *Ware v. Hall*, 342 Or. 444, 449, 154 P.3d 118, 121 (2007); *State v. Meek*, 266 Or. App. 550, 556, 338 P.3d 767, 770 (2014) (stating the “general assumption that, when the legislature employs different terms within the same statute, it intends different meanings for those terms” (internal quotation marks omitted)); *Pete’s Mountain Homeowners Ass’n v. Or. Water Res. Dep’t*, 236 Or. App. 507, 518, 238 P.3d 395, 401 (2010) (“It is a longstanding principle of statutory construction that words may be assumed to be used consistently throughout a statute.”); *Aronson v. Pub. Emps. Ret. Bd.*, 236 Or. App. 17, 24–25, 236 P.3d 731, 734–35 (2010); *State v. Ferguson*, 228 Or. App. 1, 6, 206 P.3d 1145, 1148 (2009).

⁴⁶⁹ 361 Or. 241, 391 P.3d 773 (2017).

used in the state workers' compensation statutes, refers to either a "medical condition" or a "workplace accident that produces a medical condition."⁴⁷⁰ The phrase itself had not been defined in the statute. The claimant nevertheless argued that other provisions of the same law made clear that "compensable injury" referred to a workplace accident, while the employer argued that different other provisions of the same law made clear that the term referred to an accepted medical condition.⁴⁷¹ The court (with just a hint of exasperation) said that both parties were right. And wrong:

Both parties contend that their arguments are supported by the "plain text" of the statute. In that respect, both parties are mistaken. There is little that is "plain" about this state's workers' compensation statutes. In fact, there appears to be a tendency on the part of the legislature to use a number of different terms in not altogether consistent fashion, sometimes treating them as essentially synonymous and at other times treating them as signifying different things.⁴⁷²

The court noted that one provision of the workers' compensation statute, for example, expressly equated an "injury or disease" with a "condition," while another referred to a condition that resulted from an injury.⁴⁷³ The court ultimately interpreted the term "compensable injury" to mean an accepted medical condition, concluding that this meaning best effectuated the workings of the statute as a whole.⁴⁷⁴

The bottom line is that the assumption of consistency is just that—an assumption. This principle of construction gives way to persuasive evidence that the legislature intended that the same words have different meanings.⁴⁷⁵

(iii) Different Words Mean Different Things

The assumption of consistency gives rise to the related notion that when the legislature uses different words in a statute, courts should

⁴⁷⁰ *Id.* at 243, 391 P.3d at 774.

⁴⁷¹ *Id.* at 252–53, 391 P.3d at 778–79.

⁴⁷² *Id.* at 253, 391 P.3d at 779.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 254–55, 391 P.3d 779–80.

⁴⁷⁵ *See, e.g.,* *Mid-Century Ins. Co. v. Perkins*, 344 Or. 196, 211–12, 179 P.3d 633, 642 (2008) (“[The court is] not bound by [the] assumption [of consistency] if an examination of the text and context of the statutes reveals that the word, in fact, does have more than one meaning.”).

assume that the words have different meanings.⁴⁷⁶ This rule, like the assumption of consistency, is not absolute. Although the assumption that different words mean different things makes sense as a starting proposition, it should always be abandoned in the face of contrary evidence of legislative intent.⁴⁷⁷

d. Rules of Grammar, Syntax, and Punctuation

Courts generally assume that legislatures intend that statutes be read in a manner consistent with settled rules of grammar, syntax, and punctuation.⁴⁷⁸ At least in the abstract, the assumption seems fair; to the extent that there are such settled rules that govern ordinary communication, it makes sense that legislatures draft their statutes consistently with those rules.

The problem is that there are few such settled rules that govern our language.⁴⁷⁹ Many of the so-called rules that our middle-school grammar teachers tried to drum into our heads are not really rules at all.⁴⁸⁰ The rule against splitting infinitives, for instance, is something that English grammarians made up in the nineteenth century, born of a

⁴⁷⁶ See, e.g., *Baker v. Croslin*, 359 Or. 147, 157–58, 376 P.3d 267, 273 (2016) (explaining that alternative terms do not mean the same thing, unless there is evidence in the statute to the contrary); *State ex rel. Dep’t of Transp. v. Stallcup*, 341 Or. 93, 101, 138 P.3d 9, 14 (2006) (explaining that the use of different terms in real estate appraisal statute suggests that each term was intended to have a different meaning); *State v. Glaspey*, 337 Or. 558, 564–65, 100 P.3d 730, 732–33 (2004) (use of different terms in assault statute—“victim” in one provision and “victim’s child” in the other—means that one is not the same as the other); *State v. Keeney*, 323 Or. 309, 316, 918 P.2d 419, 423 (1996); *Johnson v. Dep’t of Pub. Safety Standards & Training*, 253 Or. App. 307, 313–14, 293 P.3d 228, 232 (2012); *Carrillo v. City of Stanfield*, 241 Or. App. 151, 158–59, 255 P.3d 491, 495 (2011); *State v. Newell*, 238 Or. App. 385, 392, 242 P.3d 709, 713 (2010) (“If the legislature uses different terms in statutes, we generally will assume ‘that the legislature intends different meanings’ for those terms.” (quoting *Stallcup*, 341 Or. at 101, 138 P.3d at 14)).

⁴⁷⁷ *State v. Lane*, 357 Or. 619, 629, 335 P.3d 914, 920 (2015) (“Such ‘rules’ of interpretation are mere assumptions that always give way to more direct evidence of legislative intent.”).

⁴⁷⁸ See, e.g., *State v. English*, 269 Or. App. 395, 399, 343 P.3d 1286, 1288 (2015) (relying on the “grammatical structure” of the statute in dispute); *Brock v. State Farm Mut. Auto. Ins. Co.*, 195 Or. App. 519, 526, 98 P.3d 759, 763 (2004) (“[W]e do not construe statutes in a manner that is grammatically untenable.”).

⁴⁷⁹ See generally Terri LeClerq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 J. LEGAL WRITING INST. 81, 86 (1996) (“The English language has fewer absolute ‘rules’ than most other languages. Most of what information we learn about the rules of English grammar is a fusion of stylistic advice and rules for classical languages that evolved into English.”); KORY STAMPER, *WORD BY WORD: THE SECRET LIFE OF DICTIONARIES* 46 (2017) (“So where do these rules come from, if not from actual use? Most of them are the personal peeves, codified into law, of dead white men of yore.”).

⁴⁸⁰ See generally LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993).

neoclassical desire to emulate the structure of Latin.⁴⁸¹ Most modern usage guides have long since abandoned it.⁴⁸²

Aside from that, a good number of the so-called rules of grammar, syntax, and punctuation are fairly arcane, and it seems unlikely as an empirical matter that legislators—ordinary persons as they are supposed to be—are familiar with them. I daresay that few, if any, legislators have even heard of the “rule of the last antecedent,” much less had it in mind when drafting legislation. Yet the rule crops up quite often in statutory construction opinions. In a similar vein, at least one Oregon case noted a distinction between “dynamic” and “stative” verbs.⁴⁸³ I confess that I had to look that one up, and I expect that any legislators who happened to read the opinion had to do the same. In spite of such examples, judges adhere to the fiction that such rules exist, that they are in fact rules, and that the legislature enacted legislation with these rules in mind. Scalia and Garner go so far as to assert that the presumption that legislators are schooled in the rules of grammar and punctuation is “unshakable.”⁴⁸⁴

⁴⁸¹ The earliest record of someone declaring the existence of a rule against splitting infinitives is JOHN COMLY, *ENGLISH GRAMMAR MADE EASY TO THE TEACHER AND PUPIL* 192 (1803) (“An adverb should not be placed between a verb of the infinitive mood and the preposition *to* which governs it.”). The rule against splitting infinitives similarly derives from a neoclassical desire to emulate Latin. STAMPER, *supra* note 479, at 46–47. The problem, of course, is that English isn’t Latin. You can’t split a Latin infinitive, and you can’t end a Latin sentence with a preposition. As Stamper comments, “Blending grammatical systems from two languages on different branches of the Indo-European language tree is a bit like mixing orange juice and milk: you can do it, but it’s going to be nasty.” *Id.* at 47.

⁴⁸² Bill Bryson sums up the state of affairs very nicely:

I can think of two very good reasons for not splitting an infinitive.

1. Because you feel that the rules of English ought to conform to the grammatical precepts of a language that died a thousand years ago.
2. Because you wish to cling to a pointless affectation of usage that is without the support of any recognized authority of the last 200 years, even at the cost of composing sentences that are ambiguous, inelegant, and patently contorted.

It is exceedingly difficult to find any authority who condemns the split infinitive—Theodore Bernstein, H.W. Fowler, Ernest Gowers, Eric Partridge, Rudolph Flesch, Wilson Follett, Roy H. Copperud, and others too tedious to enumerate here all agree that there is no logical reason not to split an infinitive.

BILL BRYSON, *THE MOTHER TONGUE: ENGLISH AND HOW IT GOT THAT WAY* 144 (1990). And, in any event, it appears that the Oregon Legislature does not follow it. *See, e.g.*, OR. REV. STAT. § 124.005(1)(g) (2017) (defining “abuse” of an elder to include “conveying a threat to wrongfully take or appropriate money”).

⁴⁸³ *State v. Gonzalez-Valenzuela*, 358 Or. 451, 457, 365 P.3d 116, 120 (2015).

⁴⁸⁴ SCALIA & GARNER, *supra* note 48, at 140.

I would be less dogmatic about such things. As with other rules of statutory construction, the assumption of legislative familiarity with principles of grammar, punctuation, and syntax should be applied with a certain amount of skepticism, flexibility, and common sense. The overriding objective is to determine the meaning of a statute most likely intended by those who enacted it, not to blindly follow (or, perhaps, not “blindly to follow”) so-called rules.

Still, courts continue to rely on the assumption that legislatures are familiar with the rules of grammar, syntax, and punctuation. So it makes sense to more thoroughly discuss which of those rules the courts tend to invoke.

(i) *Verb Tense*

Oregon courts regularly cite the tense of verbs used in statutes as a “significant indicator” of the legislature’s intended meaning.⁴⁸⁵ For example, *Cuff v. Department of Public Safety Standards & Training*⁴⁸⁶ concerned the interpretation of a 1999 law that authorized the Department of Public Safety Standards and Training to revoke the certification of a public safety officer if it finds that the officer “does not meet the applicable minimum standards, minimum training or the terms and conditions established” by law.⁴⁸⁷ The question arose whether that statute was retroactive—that is, whether the statute authorized the department to revoke an officer’s certification based on a finding that, before the statute was enacted in 1999, the officer did not meet applicable standards. The court concluded that the statute did not have that effect. “As a matter of simple grammar,” the court explained, “the key phrases of [the statute’s] provisions are worded in the present tense.”⁴⁸⁸ The court’s analysis precluded an interpretation of the statute as authorizing the department to revoke certification based on pre-enactment conduct.

⁴⁸⁵ *Brownstone Homes Condo. Ass’n. v. Brownstone Forest Heights LLC*, 358 Or. 223, 232, 363 P.3d 467, 472 (2015); see also *Washburn v. Columbia Forest Prods., Inc.*, 340 Or. 469, 479, 134 P.3d 161, 166 (2006) (verb tense of statute is dispositive); *V.L.Y. v. Bd. of Parole & Post-Prison Supervision*, 338 Or. 44, 50, 106 P.3d 145, 147–48 (2005) (verb tense of statute is dispositive).

⁴⁸⁶ 345 Or. 462, 198 P.3d 931 (2008).

⁴⁸⁷ OR. REV. STAT. § 181A.640(1)(c) (2017).

⁴⁸⁸ *Cuff*, 345 Or. at 470, 198 P.3d at 936.

(ii) Passive or Active Voice

Statutes drafted in the passive voice have proven something of a challenge to courts.⁴⁸⁹ By its nature, the passive voice introduces ambiguity into almost any sentence because it makes the object of the sentence its subject and leaves unstated the identity of the actor. Courts sometimes reason that, because a statute drafted in the passive voice leaves the actor's identity unstated, the statute is intended to apply broadly without regard to who the actor may be.⁴⁹⁰ In other cases, though, courts say that the use of passive voice merely aggravates ambiguity, which requires examination of other contextual clues to resolve the statute's meaning.⁴⁹¹

(iii) The Rule of the "Last Antecedent"

This is an obscure rule that crops up surprisingly often in case law. The rule of the last antecedent actually isn't much of a rule at all, at least not among linguists. Rather, it was invented in 1891 by a lawyer named Jabez Sutherland, the original author of the now famous multivolume treatise on statutory construction.⁴⁹² The first edition of the treatise explains that "[r]eferential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence."⁴⁹³ Sutherland was trying to address how to resolve the problem that occurs when a modifier at the end of a sentence can plausibly be read to apply to more than one preceding subject.⁴⁹⁴ Consider, for instance, the statement of a parent to a teenager: "You will be punished if you throw

⁴⁸⁹ For a critical analysis of the way the United States Supreme Court has treated statutory passive-voice references, see generally Anita S. Krishakumar, *Passive-Voice References in Statutory Construction*, 76 BROOK. L. REV. 941 (2011).

⁴⁹⁰ *Powerex Corp. v. Dep't of Revenue*, 357 Or. 40, 46–47, 346 P.3d 476, 481 (2015) (stating that passive voice indicates that application of a statute does not depend on identity of actor); *State v. J.L.S.*, 268 Or. App. 829, 835, 343 P.3d 670, 674 (2015) (noting that the statute is set out in passive voice and therefore does not identify an actor).

⁴⁹¹ *State v. Serrano*, 346 Or. 311, 322, 210 P.3d 892, 899 (2009) (explaining that statute's use of passive voice is not dispositive); *Brentmar v. Jackson County*, 321 Or. 481, 487, 900 P.2d 1030, 1033 (1995) (noting that the use of passive voice creates ambiguity in statute).

⁴⁹² See Terri LeClerq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 J. LEGAL WRITING INST. 81 (1996). For more on the origins of the rule, see generally Jeremy L. Ross, *A Rule of Last Resort: A History of the Doctrine of the Last Antecedent in the United States Supreme Court*, 39 S.W. L. REV. 325 (2009).

⁴⁹³ JABEZ SUTHERLAND, SUTHERLAND ON STATUTORY CONSTRUCTION § 267 (1st ed. 1891).

⁴⁹⁴ *Id.*

a party or engage in any other activity that damages the house.”⁴⁹⁵ What happens if the son or daughter throws a party but does not damage the house? Does the modifier “that damages the house” apply only to “other activity,” or does it also apply to “throw a party”? The rule of the last antecedent posits that, in the absence of any contrary indication, the modifier applies only to the subject immediately preceding it—the last antecedent.

The seminal Oregon case applying the rule of the last antecedent is *State v. Webb*.⁴⁹⁶ The statute at play in *Webb* concerned the jurisdiction of the state’s district courts (which have since been merged with the circuit courts).⁴⁹⁷ That statute provided that “[d]istrict courts shall have the same criminal and quasi-criminal jurisdiction as justices’ courts, and shall have concurrent jurisdiction with the circuit courts of all misdemeanors committed or triable in their respective counties where the punishment prescribed does not exceed . . . a fine of \$3,000.”⁴⁹⁸

The law thus expresses two grants of jurisdiction. First, district courts have the same criminal and quasi-criminal jurisdiction as justices’ courts. Second, the district courts have concurrent jurisdiction with circuit courts over misdemeanors. The question before the court was whether the qualifier “does not exceed . . . a fine of \$3,000” applied to both of those grants of jurisdiction. To answer that question, the Oregon Supreme Court invoked the “long-recognized principle” of the rule of the last antecedent. The court concluded that the phrase “does not exceed . . . a fine of \$3,000” applied only to the latter of the two grants of jurisdiction, not to both.⁴⁹⁹

There’s an exception to the rule of the last antecedent: if a comma precedes the modifier, the modifier following the comma is interpreted as “nonrestrictive”—that is, the modifier is not limited to the immediately preceding phrase.⁵⁰⁰ That strikes me as an awful lot to read into the presence or absence of a mere comma. Even if it’s fair to assume that a rule of the last antecedent exists and that legislators are

⁴⁹⁵ I have purloined the example from *Barnhart v. Thomas*, 540 U.S. 20, 27–28 (2003).

⁴⁹⁶ 324 Or. 380, 386–88, 927 P.2d 79, 82–84 (1996). The Oregon Supreme Court previously had mentioned the rule in *Standard Insurance Co. v. State Tax Commission*, 230 Or. 461, 470–71, 370 P.2d 608, 612 (1962), and *Johnson v. C.W. Craddock*, 228 Or. 308, 316–17, 365 P.2d 89, 94 (1961), but it did not apply the rule in either case. *Webb* was the first Oregon Supreme Court case to apply it.

⁴⁹⁷ *Webb*, 324 Or. at 382, 927 P.2d at 80.

⁴⁹⁸ *Id.* at 384–85, 927 P.2d at 81 (quoting OR. REV. STAT. § 46.040 (1993)).

⁴⁹⁹ *Id.* at 389, 927 P.2d at 83–84.

⁵⁰⁰ *See, e.g., Liberty Nw. Ins. Corp. v. Watkins*, 347 Or. 687, 693–94, 227 P.3d 1134, 1138 (2010) (applying exception).

aware of the rule, it's an entirely different matter to assume that those legislators are also familiar with the effect of including or omitting a comma.

In fact, in more recent cases, there seems to be some pushback—appropriate, in my view—against too readily applying the rule of the last antecedent. Both the Oregon Supreme Court and the Oregon Court of Appeals have cautioned that the rule of the last antecedent is not a hard-and-fast rule and applies only where no contrary intention appears.⁵⁰¹

(iv) *Parts of Speech*

I've already mentioned the importance of attending to parts of speech in relying on dictionary definitions. In other respects as well, courts have relied on the significance of particular parts of speech in construing statutes. In a number of cases, courts have relied on the significance of the function of prepositional phrases,⁵⁰² the distinction between “dynamic” and “stative” verbs,⁵⁰³ and the functions of adverbs.⁵⁰⁴

Probably the most common examples are cases relying on the distinction between definite and indefinite articles.⁵⁰⁵ Take *Osborn v.*

⁵⁰¹ *Baker v. City of Lakeside*, 343 Or. 70, 75, 164 P.3d 259, 262 (2007); *see also* *Brown v. City of Grants Pass*, 291 Or. App. 8, 13, 414 P.3d 898, 902 (2018); *Home Builders Ass'n of Metro. Portland v. City of West Linn*, 204 Or. App. 655, 661–62, 131 P.3d 805, 808–09 (explaining that the rule of the last antecedent is but one way to solve the problem of the ambiguous pronoun; the “law of prominence” is another), *review denied*, 341 Or. 80 (2006).

⁵⁰² *State v. Simonov*, 358 Or. 531, 547, 368 P.3d 11, 20 (2016).

⁵⁰³ *State v. Gonzalez-Valenzuela*, 358 Or. 451, 457, 365 P.3d 116, 120 (2015).

⁵⁰⁴ *Vill. at Main St., Phase II, LLC v. Dep't of Revenue*, 356 Or. 164, 174 n.3, 339 P.3d 428, 433 n.3 (2014); *SIF Energy, LLC v. State ex rel. Dep't of Energy*, 275 Or. App. 809, 816, 365 P.3d 664, 667–68 (2015).

⁵⁰⁵ *See, e.g., Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 578–79, 931 P.2d 763, 467 (1997) (explaining that the definite article “the” denotes a specified thing); *Daniel N. Gordon, P.C. v. Rosenblum*, 276 Or. App. 797, 808, 370 P.3d 850, 856 (2016) (“The legislature’s use of ‘a’ as an indefinite article preceding ‘customer’ refers to an unidentified, undetermined, or unspecified person.”), *aff'd*, 361 Or. 352 (2017); *State v. Stark*, 248 Or. 573, 578, 273 P.3d 941 (2012) (“The legislature’s use of the definite article ‘the’ indicates that there is only one pertinent ‘time of judgment’ at which a court may declare the conviction to be a misdemeanor. If the legislature had intended the construction that defendant proffers, that any judgment entered at the time may qualify as ‘the time of judgment’ . . . it likely would not have used the definite article ‘the.’”) (emphasis omitted); *Belknap v. U.S. Bank Nat'l Ass'n.*, 235 Or. App. 658, 670, 234 P.3d 1041, 1047 (2010) (“The use of the definite article indicates that the 2001 legislature intended the exception that it added to [the statute] to apply to the wage claim asserted by a specific plaintiff.”), *review denied*, 349 Or. 654, 249 P.3d 542 (2011); *State v. Nguyen*, 223 Or. App. 286, 291, 196 P.3d 40, 43 (2008) (“If the legislature had intended to allow drivers to choose from

Psychiatric Security Review Board.⁵⁰⁶ In that case the court addressed whether a person previously committed to the board's jurisdiction because of a mental disease or defect must be released from the board's jurisdiction if he or she no longer suffers from that mental disease or defect. The relevant statute provided that, when a person applies for discharge from the board's jurisdiction, the board must make the following findings:

(a) If the board finds that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others, the board shall order the person discharged from commitment or from conditional release.

(b) If the board finds that the person is still affected by a mental disease or defect and is a substantial danger to others, but can be controlled adequately if conditionally released with treatment as a condition of release, the board shall order the person conditionally released . . .

(c) If the board finds that the person has not recovered from the mental disease or defect and is a substantial danger to others and cannot adequately be controlled if conditionally released on supervision, the board shall order the person committed to, or retained in, a state hospital.⁵⁰⁷

The petitioner had been convicted of a sex offense, diagnosed with an organic personality disorder, and committed to the jurisdiction of the board.⁵⁰⁸ Some time later, the petitioner had been rediagnosed with pedophilia and mixed personality disorder, not an organic personality disorder.⁵⁰⁹ The petitioner asked for release because he no longer suffered from the condition he had when first committed.⁵¹⁰ The board refused, arguing that it retained jurisdiction so long as the petitioner suffered from any mental disease or defect.⁵¹¹

different 'fronts' of their vehicles in the positioning of registration plates, it would not have chosen the definite article 'the.'"); *State v. Branam*, 220 Or. App. 255, 260, 185 P.3d 557, 559 (2008) ("The fact that the legislature used the definite article 'the' and the singular form of the noun 'sentence' suggests that it intended the requirements [of the statute] to apply to only one particular sentence."); *State v. Rodriguez*, 217 Or. App. 24, 30–31, 175 P.3d 471, 475 (2007) ("[W]e ordinarily assume that the use of the indefinite article, as opposed to the definite article, has legal significance.").

⁵⁰⁶ 325 Or. 135, 934 P.2d 391 (1997).

⁵⁰⁷ *Id.* at 140, 934 P.2d at 394 (quoting OR. REV. STAT. § 161.346(1) (1995)) (emphasis omitted).

⁵⁰⁸ *Id.* at 137–38, 934 P.2d at 392.

⁵⁰⁹ *Id.* at 138–39, 934 P.2d at 392–93.

⁵¹⁰ *Id.* at 141, 934 P.2d at 394.

⁵¹¹ *Id.* at 137–40, 934 P.2d at 393–94.

The Oregon Supreme Court agreed with the board. The key, the court explained, was to read each of the three paragraphs of the statute in order.⁵¹² This process revealed the significance of the legislature's use of indefinite and definite articles:

When read in the order written, all parts of that statute are clear. That is, the three paragraphs . . . must be read sequentially to understand the logic in using first no modifier and then two different modifiers. By not using a modifier in the first paragraph, the legislature intended that the PSRB discharge any person who no longer suffers from *any* mental disease or defect or who, if affected, is not dangerous. Under paragraph (b), if the PSRB has found under (a) that a person still suffers from *a* mental disease or defect and is dangerous, the board must conditionally release that person if he or she can be controlled adequately. Finally, in paragraph (c), the legislature intended for continued confinement of a person who suffers from *the* mental disease or defect that was identified under paragraph (b) and who is dangerous and cannot safely be released conditionally. A textual analysis thus shows that the legislature intended for the PSRB to continue jurisdiction over a person who suffers from any mental disease or defect, even if the diagnosis has changed.⁵¹³

The distinction between definite and indefinite articles should not, however, be taken as an absolute. Whether it makes a difference will depend on the context. In *Lake Oswego Preservation Society v. City of Lake Oswego*, the law provided that, once a historic designation has been imposed on a property, the local government may allow “a property owner” to remove the historic designation.⁵¹⁴ The original owner didn't challenge the city of Lake Oswego's designation of his property as historic.⁵¹⁵ But a later owner did object, citing the statute that allowed “a property owner” to challenge a city's designation.⁵¹⁶ The city approved the new owner's request.⁵¹⁷ A local preservation society appealed, arguing that the statute referred to the owner at the time of the historic designation.⁵¹⁸

The Oregon Supreme Court agreed with the preservation society.⁵¹⁹ The court acknowledged the legislature's use of the indefinite article

⁵¹² *Id.* at 142, 934 P.2d at 394.

⁵¹³ *Id.* at 142, 934 P.2d at 395 (emphasis added).

⁵¹⁴ 360 Or. 115, 125, 379 P.3d 462, 469 (2016).

⁵¹⁵ *Id.* at 121–22, 379 P.3d at 467.

⁵¹⁶ *Id.* at 122, 379 P.3d at 467.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at 123, 379 P.3d at 468.

⁵¹⁹ *Id.* at 141, 379 P.3d at 478.

“a” in the phrase “a property owner” could be read as referring to *any* property owner.⁵²⁰ Still, the court continued,

the use of the article “a” as a determiner does not always mean that the referenced noun is unspecified in the most generic sense. For example, “a” may also be used quantitatively. As a result, “a” may simply signal that the specified noun is one of a particular class, whether that class is defined by a subsequent restrictive clause or other modifier or is implied more generally by the context in which the phrase appears. When used in that manner, the determiner “a” indicates that the noun that follows is one unspecified member of a limited group. Read in that way, the phrase “a property owner” . . . could also be interpreted as referring to one of an otherwise limited group of property owners.⁵²¹

The court then examined the larger context of the statute and concluded that the legislature did intend that “a property owner” be used in the more restrictive sense to mean any property owner who is part of a more limited group—namely, property owners at the time of designation.⁵²²

Another common example of the courts focusing on the function of a particular part of speech comes into play with the use of the disjunctive conjunction “or.” It is often asserted rather categorically that “the words ‘and’ and ‘or,’ as used in statutes, are not interchangeable, being strictly of a conjunctive or disjunctive nature, respectively.”⁵²³ That assertion isn’t quite accurate, as *Burke v. Department of Land Conservation and Development*⁵²⁴ makes clear. At issue in that case was whether an individual purchasing a parcel of land was an “owner” authorized to bring a claim for the diminution in value resulting from the imposition of land use restrictions.⁵²⁵ The statute defined an “owner” to mean the following:

(a) The owner of fee title to the property as shown in the deed records of the county where the property is located;

⁵²⁰ *Id.* at 126–27, 379 P.3d at 470.

⁵²¹ *Id.* at 127, 379 P.3d at 470 (citations omitted).

⁵²² *Id.* at 128, 379 P.3d at 470; *see also* SAIF Corp. v. DeLeon, 352 Or. 130, 138, 282 P.3d 800, 804 (2012) (“[T]he definite article ‘the’ is not dispositive.”); *Chu v. SAIF Corp.*, 290 Or. App. 194 198–99, 415 P.3d 68, 71 (2018) (explaining that “the” employment refers not just to one job but to all jobs claimant held at time of injury).

⁵²³ *Lommasson v. School Dist. No. 1*, 201 Or. 71, 79, 261 P.2d 860, 864 (1953), *opinion withdrawn in part on reh’g*, 201 Or. 71, 267 P.2d 1105 (1954).

⁵²⁴ 352 Or. 428, 290 P.3d 790 (2012).

⁵²⁵ *Id.* at 430, 290 P.3d at 791.

(b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or

(c) If the property is owned by the trustee of a revocable trust, the settlor of the revocable trust, except when the trust becomes irrevocable only the trustee is the owner.⁵²⁶

The Department of Land Conservation and Development argued that, under the statute, there could be only one owner at a time, because the statute listed three categories of individuals separated by the disjunctive “or.”⁵²⁷

The Oregon Supreme Court disagreed:

To say that “or” is “disjunctive” is true enough. But authorities agree that a disjunctive connector can have either an “inclusive” or an “exclusive” sense. Thus, “A or B” can mean one or the other, but not both. But it also can mean one or the other, or both.

That is certainly true in ordinary conversation. If, for example, a person is told, “If you obtain a passport, you may travel to England, France, or Germany,” that does not necessarily mean that he or she may travel to only one of those destinations. . . .

It is also true in the law that, particularly in the drafting of contracts and statutes, it is common to arrange material in “tabular” form, with terms and conditions arranged in lists separated by connective terms such as “and” and “or.” In fact, it has been asserted that, in legal drafting, it is more often the case that the connective “or” is used in the inclusive sense.⁵²⁸

In that particular case, the court concluded that the statute’s wording in context made clear that the legislature intended the “or” to operate in the inclusive sense.⁵²⁹

Courts have similarly struggled with the modal verb “shall” and its counterpart “may.” It is common to see cases declaring categorically that the word “shall” is mandatory, signifying a command, and distinct from the word “may,” which signifies discretion.⁵³⁰ But think about it

⁵²⁶ *Id.* at 434, 290 P.3d at 793 (quoting OR. REV. STAT. § 195.300(18) (2011)).

⁵²⁷ *Id.* at 435, 290 P.3d at 793.

⁵²⁸ *Id.* at 435–36, 290 P.3d at 794 (citations omitted) (emphasis omitted).

⁵²⁹ *Id.* at 439–40, 290 P.3d at 796.

⁵³⁰ *See, e.g.,* Williams v. Philip Morris, Inc., 344 Or. 45, 59, 176 P.3d 1255, 1262–63 (2008) (the word “shall” “generally indicates that something is mandatory”); Smothers v. Gresham Transfer, Inc., 332 Or. 83, 91, 23 P.3d 333, 338 (2001) (the word “shall” “is a statement prescribing how government must conduct its functions”), *overruled on other grounds by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 376 P.3d 998 (2016); Preble v. Dep’t of Revenue, 331 Or. 320, 324, 14 P.3d 613, 615 (2000) (the word “shall,” as used in particular statutory provisions, connotes a command); Cain v. Rijken, 300 Or. 706, 718, 717 P.2d 140, 147 (1986) (“[S]hall’ create[s] a mandatory duty while ‘may’ create[s] only

more carefully, and it gets more complicated. Although the word “shall” does ordinarily signify obligation or duty,⁵³¹ it often gets used in other ways, especially in statutes.

Consider that statutes and rules commonly include the command no person “shall,” as in “[n]o party shall file a reply brief”⁵³² or “[n]o person shall operate a livestock auction market without a valid license.”⁵³³ Those statutes obviously do not mean that no person has an obligation to file a reply brief or operate a livestock auction market without a license. The statutory phrase “no person shall”—and there are hundreds of examples of this phrase in the Oregon Revised Statutes⁵³⁴—actually means “no person may.” In other cases, the word “shall” denotes futurity, not obligation, as in a statute that provides that “no further pleadings shall be necessary”⁵³⁵ or that “on and after the 60th day from the date of the first publication of the notice it shall be unlawful for livestock or a class of livestock to be permitted to run at large within the boundaries of the livestock district.”⁵³⁶

As the late professor David Mellinkoff noted, “The standard grammatical use of may (permitted) and shall (required) is also a legal use, often described as the ‘presumed’ use. But may and shall in legal writing, especially in statutes, are so frequently treated as synonyms that the grammatical standard cannot be considered the legal standard.”⁵³⁷ Bryan Garner has similarly observed that the use of the words “may” and “shall” is a “horrible muddle.”⁵³⁸

The point is that the meaning of “shall” and “may” isn’t as simple as the cases sometimes categorically suggest; their meanings will depend on their context. Of particular significance are cases in which these two words both appear in the same statute. In such cases, courts treat the

authority to act.”); *State v. Justice*, 273 Or. App. 457, 465, 361 P.3d 39, 44 (2015) (“Generally, the word ‘shall’ implies that the legislature intended to create an obligation” (internal quotation marks omitted)).

⁵³¹ See, e.g., WEBSTER’S THIRD, *supra* note 296, at 1396 (defining “shall” as, among other things, “will have to: must”).

⁵³² OR. R. APP. P. 12.25(3)(c).

⁵³³ OR. REV. STAT. § 599.215(1) (2017).

⁵³⁴ A recent Westlaw search for the phrase “no person shall” produced more than 500 hits in the Oregon Revised Statutes.

⁵³⁵ OR. REV. STAT. § 545.579(1) (2017).

⁵³⁶ OR. REV. STAT. § 607.040(1) (2017).

⁵³⁷ DAVID MELLINKOFF, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE 402 (1992).

⁵³⁸ BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939 (2d ed. 1995). Garner points out that the word “shall” is especially “slippery,” being subject to at least eight different senses, sometimes shifting meaning in midsentence. *Id.*

two words as distinct terms.⁵³⁹ That makes sense. It clearly flows from the general principle that, when the legislature uses different words, it generally intends them to have different meanings.⁵⁴⁰

(v) *Punctuation*

Punctuation marks originated as signals used by orators to indicate different types of pauses. In the late seventeenth century, for example, a colon indicated a pause that lasted twice as long as a semicolon, which lasted twice as long as a comma.⁵⁴¹ Suffice it to say that it took a long time to develop any agreement about the significance of punctuation. Early nineteenth-century cases tended to disparage the significance of punctuation in the interpretation of statutes and other documents of legal significance. The Oregon Supreme Court explained in *State ex rel. Baker v. Payne* that “the rule is that courts will, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the lawmakers, disregard the punctuation, or re-punctuate, if need be, to render clear the true meaning of the statute.”⁵⁴² Some cases went so far as to say that “punctuation is not part of the statute.” Scalia and Garner suggest that this lack of enthusiasm for punctuation may have been based on early legislative traditions of voting on legislation as read aloud or on the fact that punctuation sometimes was inserted by printers.⁵⁴³

At all events, times have changed. Now, it is not at all uncommon for courts to ascribe dispositive significance to one punctuation mark

⁵³⁹ See, e.g., *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 346 Or. 415, 426, 212 P.3d 1243, 1249 (2009) (“[W]hatever the possibility for confusion or ambiguity that might exist when either word appears alone in a statute, regulation, or other directive, when both words appear side by side in the same section of a document, our normal interpretive principles dictate that we presume that different meanings are intended.”).

⁵⁴⁰ See, e.g., *Atkinson v. Bd. of Parole & Post-Prison Supervision*, 341 Or. 382, 388, 143 P.3d 538, 541 (2006) (“[Wh]en the legislature uses different terms within the same statute, normally it intends those terms to have different meanings.”); *Scott v. State Farm Mut. Auto. Ins.*, 345 Or. 146, 153, 190 P.3d 372, 376 (2008) (“The legislature’s use of the same term, ‘proof of loss,’ in all three of the statute’s subsections indicates that the legislature intended the term to have the same meaning throughout the statute.”).

⁵⁴¹ For a history of punctuation, see generally KEITH HOUSTON, *SHADY CHARACTERS: THE SECRET LIFE OF PUNCTUATION, SYMBOLS & OTHER TYPOGRAPHICAL MARKS* (2013). Especially fun is the history of the “octothorpe,” now known as the “hashtag.” See *id.* at 41–57.

⁵⁴² 22 Or. 335, 341–42, 29 P. 787, 789 (1892).

⁵⁴³ SCALIA & GARNER, *supra* note 48, at 161; see also NORMAN J. SINGER & J.D. SHAMBIE SINGER, *supra* note 115, § 47:15 (noting that early parliamentary enactments were not punctuated).

or another. Courts seem particularly impressed with the significance of commas, the presence of which can indicate that a clause is nonrestrictive or parenthetical.⁵⁴⁴

I have yet to encounter an Oregon case involving the use of the controversial “serial comma,” a comma placed immediately before the coordinating conjunction in a list or series of terms: “A, B, C, and D.” A number of style manuals require the serial comma. The *Oxford Companion to the English Language*, for instance, requires that “[c]ommas are used to separate items in a list or sequence.”⁵⁴⁵ As a result, the serial comma rule is often known as the “Oxford comma” rule. The *Chicago Manual of Style* likewise calls for it,⁵⁴⁶ as do Strunk and White in *The Elements of Style*⁵⁴⁷ and the Government Printing Office’s *Style Manual*.⁵⁴⁸ Garner’s *Modern American Usage* also advocates for using the serial comma.⁵⁴⁹

There is good reason for the foregoing authorities to urge the use of the serial comma. In short, it avoids unnecessary ambiguity. Consider a now famous Maine statute, which required overtime pay for each hour worked over forty hours, subject to an exemption for “[t]he canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of: (1) Agricultural produce; (2) Meat and fish products; and (3) Perishable foods.”⁵⁵⁰

Does the law require overtime for “packing for shipment or distribution” of the listed products? Or does it require overtime for “packing for shipment” of the listed products, as well as “shipment” of those products without packing? In *O’Connor v. Oakhurst Dairy*,⁵⁵¹ a group of delivery drivers sued for overtime compensation because they delivered—that is, they “shipped”—milk. Their employer argued that

⁵⁴⁴ See, e.g., *Alfieri v. Solomon*, 358 Or. 383, 393, 365 P.3d 99, 106 (2015) (explaining that the use of commas in a statute indicates restrictive, as opposed to nonrestrictive, clauses); *Blacknall v. Bd. of Parole & Post-Prison Supervision*, 348 Or. 131, 140, 229 P.3d 595, 600 (2010) (applying “the familiar grammatical principle that a phrase set off by commas functions as a parenthetical”); *State v. Bailey*, 346 Or. 551, 560, 213 P.3d 1240, 1245 (2009) (discussing significance of using commas).

⁵⁴⁵ Tom McArthur, *Comma*, in *CONCISE OXFORD COMPANION TO THE ENGLISH LANGUAGE* (Tom McArthur & Roshan McArthur eds., 1998).

⁵⁴⁶ *THE CHICAGO MANUAL OF STYLE* § 6.18 (16th ed. 2010).

⁵⁴⁷ WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 3 (Maria Kalman illus., 2005).

⁵⁴⁸ U.S. GOV’T PRINTING OFF. *STYLE MANUAL: AN OFFICIAL GUIDE TO THE FORM AND STYLE OF FEDERAL GOVERNMENT PUBLISHING* 202 (31st ed. 2016).

⁵⁴⁹ BRYAN A. GARNER, *GARNER’S MODERN AMERICAN USAGE* 676 (3d ed. 2009).

⁵⁵⁰ 26 ME. REV. STAT. ANN. tit. 26 § 664(3) (2015).

⁵⁵¹ 851 F.3d 69 (1st Cir. 2017).

the exemption applied only to “packing . . . for shipment,” not just shipping by itself.⁵⁵²

The Court of Appeals for the First Circuit sided with the drivers. The court began by stating, “For want of a comma, we have this case.”⁵⁵³ The absence of the Oxford comma, the court explained, introduced an ambiguity, which, after carefully analyzing the statute in context along with its legislative history, the court found itself unable to resolve. The court ultimately invoked a Maine statutory construction principle that counsels courts to interpret such remedial statutes broadly in cases of ambiguity.⁵⁵⁴ The Dairy ultimately settled the case for \$5 million.⁵⁵⁵ In the meantime, the Maine legislature amended the statute.⁵⁵⁶

In spite of the obvious benefits of employing the serial comma, its use is not universally embraced. The *New York Times* does not use it,⁵⁵⁷ nor does the *Associated Press*.⁵⁵⁸ In that regard, I find it especially noteworthy that the Oregon Legislature is among those who apparently abjure the use of the serial comma. The latest edition of the *Form and Style Manual for Legislative Measures* advises practitioners to “[g]enerally, omit serial commas before the conjunction in a series of words, phrases or clauses, as in ‘men, women and children’ rather than ‘men, women, and children.’”⁵⁵⁹

That suggests that the omission of a serial comma in Oregon legislation would have no particular significance. But it depends on whether the courts would regard the legislature’s form and style manual as evidence of legislative intent. I am not aware of an Oregon case that has addressed the issue. I can think of no good reason why it wouldn’t be. And there is one case, *Burke v. Department of Land Conservation and Development*, in which the court cited the Oregon Office of

⁵⁵² *Id.* at 71.

⁵⁵³ *Id.* at 70.

⁵⁵⁴ *Id.* at 79.

⁵⁵⁵ John McCoy, *Oakhurst Dairy’s \$5M Settlement Driven by Grammar Rules*, BLOOMBERG LAW (Feb. 9, 2018, 4:28 PM) (<https://bna.com/daily-labor-report/oakhurst-dairys-5m-settlement-driven-by-grammar-rules>).

⁵⁵⁶ The statute now reads, “The canning; processing; preserving; freezing; drying; marketing; storing; packing for shipment; or distribution of: (1) Agricultural produce; (2) Meat and fish products; and (3) Perishable foods.” 26 ME REV. STAT. ANN. tit. 26 § 664(3)(F) (2018).

⁵⁵⁷ ALLAN M. SIEGAL & WILLIAM G. CONNOLLY, *THE NEW YORK TIMES MANUAL OF STYLE AND USAGE* 67 (revised by Corbett, et al., 5th ed. 2015).

⁵⁵⁸ *THE ASSOCIATED PRESS STYLEBOOK AND BRIEFING ON MEDIA LAW* 329–30 (Norm Goldstein ed. 2002).

⁵⁵⁹ OREGON LEGISLATIVE ASSEMBLY, *FORM AND STYLE MANUAL FOR LEGISLATIVE MEASURES* 5 (2017–2018 ed.).

Legislative Counsel's *Bill Drafting Manual* for that purpose, albeit on a different issue.⁵⁶⁰

e. Ejusdem Generis

The rule of *ejusdem generis* (pronounced eh-yoos-dem generis) is one of the classics of statutory construction.⁵⁶¹ It's even in Latin. The rule states that, when a statute provides a list of specific items followed by a general catchall phrase—such as “and other”—the general catchall phrase includes only things of the same character or nature as the specific items in the list.⁵⁶² So, if a statute refers to automobiles, trucks, sport utility vehicles, tractors, motorcycles, “and other vehicles,” the statute would not be read to include bicycles, as all the specific items listed share the common characteristic of being motorized. The rationale is straightforward: if the legislature has taken the trouble to make a list of specifics, it presumably had that list in mind when it added the general catchall at the end. This rule also avoids redundancy. Think about it. If, in the example, the legislature had intended the phrase “other vehicles” to be read literally to apply to all other vehicles, it would render superfluous the list of specific vehicles that preceded the catchall phrase.

Still, the rule of *ejusdem generis* has been subjected to sustained criticism in recent years.⁵⁶³ The principal problem is that the common characteristics of any given list of specific items can be described at many different levels of generality.⁵⁶⁴ The Oregon Court of Appeals decision in *State v. Ruff* is a terrific illustration of the problem.⁵⁶⁵ Oregon law prohibits carrying concealed upon a person a switchblade

⁵⁶⁰ 352 Or. 428, 436, 290 P.3d 790, 794 (2012).

⁵⁶¹ The rule of *ejusdem generis* dates back at least to the sixteenth century and *The Archbishop of Canterbury's Case*, 76 Eng. Rep. 519, 520–21 (1596).

⁵⁶² See, e.g., *Bellikka v. Green*, 306 Or. 630, 636, 762 P.2d 997, 1001 (1988) (“When the legislature chooses to state both a general standard and a list of specifics, the specifics do more than place their particular subjects beyond the dispute; they also refer the scope of the general standard to matters of the same kind, often phrased in Latin as ‘*ejusdem generis*.’”).

⁵⁶³ See, e.g., REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 249 (1975) (*ejusdem generis* and similar canons are “convenient fictions for deciding specific controversies . . . [that] should not be confused with what they caricature, measures of actual meaning”).

⁵⁶⁴ See, e.g., *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 217 (William D. Popkin ed., 5th ed. 2009) [hereinafter *MATERIALS ON LEGISLATION*] (“Its application can still be troublesome, however, because it is hard to know what generic category the list describes.”).

⁵⁶⁵ 229 Or. App. 98, 211 P.3d 277 (2009).

knife, as well as “any dirk, dagger, ice pick, slungshot, metal knuckles, or any similar instrument by the use of which injury could be inflicted upon the person or property of another.”⁵⁶⁶ Police stopped Ruff when he was carrying a 42-inch “samurai-type” sword concealed under his coat. During the stop, the police also found methamphetamine. Following his arrest on the charge of possession of a controlled substance, Ruff moved to suppress the evidence of the methamphetamine, as the police lacked cause to stop him in the first place. His theory was that the sword that he carried was not of the sort prohibited in the concealed weapons statute.

A majority of the court of appeals disagreed. “While a three-and-one half foot long samurai sword is not a dirk or a dagger,” the court explained, “it could qualify as an ‘other similar instrument’” for the purposes of the statute.⁵⁶⁷ The majority reasoned that the weapons specifically listed in the statute were designed for stabbing, and so also was the samurai sword.

The dissent argued that the majority erred in concluding that the samurai sword was “similar” to the other weapons enumerated in the statute:

It seems to me that a “similar instrument” is one that shares similar physical characteristics to the listed weapons. Because the statute primarily defines the covered weapons as ones that can be carried on the person, the size or concealability of the weapon would seem to be an essential characteristic. A “similar instrument” is one that is similar in size to the listed instruments. Switchblades, daggers, dirks, stilettos, and ice picks are all relatively small stabbing weapons. Swords are large stabbing weapons. I do not read the statute to include large stabbing weapons as “similar instruments.”⁵⁶⁸

Who was right? Both the majority and the dissent appear to have applied the principle of *ejusdem generis* correctly. Both looked for the common characteristic of the weapons specifically enumerated in the statute.⁵⁶⁹ The problem was that each came up with a different common

⁵⁶⁶ OR. REV. STAT. § 166.240(1) (2017).

⁵⁶⁷ *Ruff*, 229 Or. App. at 104, 211 P.3d at 281.

⁵⁶⁸ *Id.* at 109–10, 211 P.3d at 284 (Sercombe, J., dissenting).

⁵⁶⁹ Or at least almost. It occurs to me that the statute includes in the list of prohibited weapons brass knuckles and a “slungshot” (no, not a slingshot). A slungshot is a weight affixed to a long cord, used by mariners in casting a line from one place to another, or, perhaps, to hurt people. Both weapons are not used for stabbing. In describing the common characteristics of the listed weapons, then, both the majority and the dissent didn’t quite get it right.

characteristic of the listed items, and the canon itself did not aid in determining which characteristic was the correct one.⁵⁷⁰

In spite of that rather fundamental problem with the *ejusdem generis* canon, courts have repeatedly applied it.⁵⁷¹ A few cases have suggested that *ejusdem generis* has its limits and cannot be applied if doing so would lead to redundancy or to a construction that otherwise would lead to a result at odds with the legislature's intentions.⁵⁷² Those cases are correct.

In recent years there has emerged something of a kerfuffle about just when the *ejusdem generis* canon applies. Does it apply only to statutes that follow a sequence of listed specifics with a general catchall? Or does it also apply to statutes that begin with a general statement that a general term "includes" or "includes but is not limited to" a list of specific items that follow? Scalia and Garner have staked out the position that the *ejusdem generis* rule applies only to the specific-to-general pattern of legislative drafting.⁵⁷³ *Sutherland Statutes and Statutory Construction*, on the other hand, suggests that the rule applies in either case.⁵⁷⁴

⁵⁷⁰ For another fine example of the problem, see *State v. Corcilus*, 294 Or. App. 20, 430 P.3d 169 (2018). At issue in that case was whether the defendant violated a statute that prohibited "[d]iscarding or depositing any rubbish, trash, garbage, debris, or other refuse upon . . . any public way" when he urinated on a public sidewalk. *Id.* at 22, 430 P.3d at 171. The majority said no because urine and urinating are not like any of the items specifically prohibited, *id.* at 30, 430 P.3d at 175, while the dissent argued that urine and urinating are like the other listed items, *id.* at 36, 430 P.3d at 178 (Hadlock, J., dissenting).

⁵⁷¹ See, e.g., *Liberty v. State Dep't of Transp.*, 342 Or. 11, 20, 148 P.3d 909, 913 (2006); *Lewis v. CIGNA Ins. Co.*, 339 Or. 342, 350–51, 121 P.3d 1128, 1132 (2005); *Vannatta v. Keisling*, 324 Or. 514, 533, 931 P.2d 770, 782 (1997); *State v. K.P.*, 324 Or. 1, 11 n.6, 921 P.2d 380, 385 n.6 (1996); *Scharfstein v. BP W. Coast Prods., LLC*, 292 Or. App. 69, 79–80, 423 P.3d 757, 763–64 (2018); *State v. Moore*, 174 Or. App. 94, 99, 25 P.3d 398, 401 (2001).

⁵⁷² See, e.g., *Clinical Research Inst. of S. Or., P.C. v. Kemper Ins. Cos.*, 191 Or. App. 595, 603, 84 P.3d 147, 152 (2004) ("Caution is warranted when applying the rule, both because of its uncertain justification and because of its malleability." (citation omitted)); *State v. Mayorga*, 186 Or. App. 175, 181–82, 62 P.3d 818, 822 (2003) ("[T]he rule applies in limited circumstances. . . . It does not apply when its application would lead to redundancy or to a construction that otherwise is at odds with the legislature's apparent intentions."); *Sanders v. Or. Pac. States Ins. Co.*, 110 Or. App. 179, 183, 821 P.2d 1119, 1121 (1991) (rejecting application of canon when it would lead to surplusage).

⁵⁷³ SCALIA & GARNER, *supra* note 48, at 203–05.

⁵⁷⁴ NORMAN J. SINGER & J.D. SHAMBIE SINGER, *supra* note 115, § 47:17 ("The doctrine applies equally to the opposite sequence, *i.e.*, specific words following general ones, to restrict application of the general terms to things that are similar to those enumerated."); see also Gregory R. Englert, *The Other Side of Eiusdem Generis*, 11 SCRIBES J. LEGAL WRITING 51, 54 (2007).

The Oregon Supreme Court at first appeared to side with *Sutherland*. In *Liberty v. State Department of Transportation*, the court applied the *ejusdem generis* canon to a statute that included the phrase “outdoor activities such as hunting, fishing,” and other specified activities.⁵⁷⁵ However, the court expressly rejected the specific-to-general only argument in *Schmidt v. Mount Angel Abbey*,⁵⁷⁶ a case involving a statute that extended the statute of limitation for tort actions based on “child abuse.”⁵⁷⁷ The statute defined “child abuse” to include “sexual exploitation,” which, in turn, was defined as “including, but not limited to” three specific examples. The defendant argued that the statute of limitations extension did not apply because he had not been accused of engaging in any of the three specified examples or anything of the same nature as those examples. The plaintiff argued that the term “sexual exploitation” did not have to be limited to the three specified examples or others like them. According to the plaintiff, the principle of *ejusdem generis* did not apply to statutes that begin with a general term and are followed by specifics. The court rejected that argument, explaining that “[i]n interpreting a general term, we have considered the context provided by specific examples when those examples fall after the general term, as well as when they are placed before that term.”⁵⁷⁸

But then, in *State v. Kurtz*,⁵⁷⁹ the court appeared to suggest that the *ejusdem generis* canon does *not* apply when the statute begins with a general term and follows that with specific examples. After acknowledging the canon and its operation, the court stated the following:

The legislature, however, can alter the calculus by signaling that it does not intend to confine the scope of a general term in a statute according to the characteristics of listed examples. Typically, statutory terms such as “including” and “including but not limited to,” when they precede a list of statutory examples, convey an intent that an accompanying list of examples be read in a nonexclusive sense.⁵⁸⁰

The court continued with the observation that, “of course,” the specific examples remain a significant source of context, even if they do not

⁵⁷⁵ 342 Or. 11, 20, 148 P.3d 909, 913 (2006).

⁵⁷⁶ 347 Or. 389, 403–04, 223 P.3d 399, 407 (2009).

⁵⁷⁷ OR. REV. STAT. § 12.117(1) (2017).

⁵⁷⁸ *Schmidt*, 347 Or. at 403–04, 223 P.3d at 407.

⁵⁷⁹ 350 Or. 65, 75, 249 P.3d 1271, 1277 (2011).

⁵⁸⁰ *Id.*

constitute the entire universe of relevant examples.⁵⁸¹ The court confirmed this approach in *Daniel N. Gordon, PC v. Rosenblum*,⁵⁸² explaining that, although the *ejusdem generis* canon holds that the general term is limited by the common characteristics of the specifically listed matters, that rule applies only in the case of specific lists followed by general catchall terms.⁵⁸³

At first blush, this can seem like much ado about very little. In all cases—whether the general catchall term appears at the beginning or at the end—the meaning of the general term is informed by specific terms that are listed. There is, however, an important practical distinction. In cases to which the *ejusdem generis* canon applies, the general term is defined by the common characteristics of the specifics listed, and no others. In cases to which the canon does not apply, the meaning of the general term certainly may be informed by the specifics listed, but the specifics listed will be taken as illustrative, not exhaustive. Of course, whether the legislature is actually aware of such a fine distinction—as *Kurtz* appears so confidently to assume—is another matter.

f. Noscitur a Sociis

The *noscitur a sociis* canon essentially adopts the commonsense notion that surrounding words can shed light on what those in dispute mean.⁵⁸⁴ Literally meaning “by your friends you know them,” this

⁵⁸¹ *Id.*

⁵⁸² 361 Or. 352, 393 P.3d 1122 (2017).

⁵⁸³ *Id.* at 364–65, 393 P.3d at 1129; *see also* 1000 Friends of Or. v. Jackson County, 292 Or. App. 173, 184, 423 P.3d 793, 800 (2018) (*ejusdem generis* “does not generally apply when the list begins with ‘includes’ or the phrase ‘including but not limited to’”); *Dep’t of Human Servs. v. K.W.*, 273 Or. App. 611, 622, 359 P.3d 539, 545 (2015).

⁵⁸⁴ *See, e.g.*, *Goodwin v. Kingsmen Plastering, Inc.*, 359 Or. 694, 702, 375 P.3d 463, 468 (2016) (“It is a familiar rule that the meaning of words in a statute may be clarified or confirmed by reference to other words in the same sentence or provision.”); *Johnson v. Gibson*, 358 Or. 624, 629–30, 369 P.3d 1151, 1154 (2016) (“[T]he meaning of an unclear word may be clarified by the meaning of other used in the same context”); *State v. Walker*, 356 Or. 4, 15 n.5, 333 P.3d 316, 323 n.5 (2014) (“*Noscitur a sociis* is an old maxim which summarizes the rule both of language and of law that the meaning of words may be indicated or controlled by those with which they are associated.” (quoting *Nunner v. Erickson*, 151 Or. 575, 609, 51 P.2d 839 (1935))); *State v. Baker-Krofft*, 348 Or. 655, 663, 239 P.3d 226, 230 (2010) (applying *noscitur a sociis* rule); *Pendergrass v. Fagan*, 218 Or. App. 533, 539, 180 P.3d 110, 114 (“[W]hen the legislature prohibits a list of different acts, the meaning of each term in the list is determined in light of the common characteristics of other terms in the same list.”), *review denied*, 344 Or. 670 (2008); *King City Rehab, LLC v. Clackamas County*, 214 Or. App. 333, 340–41, 164 P.3d 1190, 1194 (2007); *In re Marriage of Austin*, 191 Or. App. 307, 326, 82 P.3d 170, 181 (2003) (“Under that maxim general words, found in a statute, may take the color and meaning of associated words of

canon is more general than *ejusdem generis* and is not limited to lists. In fact, *noscitur a sociis* is sometimes invoked in cases involving the interpretation of statutes that are not controlled by *ejusdem generis*.⁵⁸⁵

g. Expressio Unius Est Exclusio Alterius

This is another hoary maxim—literally, “the expression of one thing is the exclusion of others”—that applies to the interpretation of statutory lists. Unlike *ejusdem generis*, though, it applies when a statute states a list and does not end with a general catchall phrase that invites interpreters to add to it. The essence of the *expressio unius* canon is the idea that the legislature, by having taken the trouble to state a list, implicitly intended that anything not on the list was omitted purposefully.

Obviously, the rule makes no sense if taken literally.⁵⁸⁶ The statement “if you obtain a passport, you can travel to England, France, and Germany” in no way means that you cannot also go to Italy. Whether a list may fairly be read as exhaustive will depend on the circumstances. For example, the longer the list, the more likely that it is complete. If the statement “if you obtain a passport, you can travel to . . . ,” was followed by a list of 197 countries, it would be fair to infer that the list is exhaustive.

The problem is that the conclusion that the list is complete is based on its length, not on any canon of construction. The *expressio unius* rule doesn’t add anything to the analysis, except perhaps to supply a fancy Latin label with which to state a conclusion. This lack of usefulness is why the canon has been the subject of significant criticism over the years, at least from academics.⁵⁸⁷ As is often the case with the canons, though, judges still frequently rely on the *expressio unius* rule.⁵⁸⁸

specific connotation.” (quoting *White v. State Indus. Accident Comm’n*, 227 Or. 306, 317, 362 P.2d 302, 307 (1961))).

⁵⁸⁵ See, e.g., *Daniel N. Gordon, PC v. Rosenblum*, 361 Or. 352, 365, 393 P.3d 1122, 1130 (2017).

⁵⁸⁶ See, e.g., MATERIALS ON LEGISLATION, *supra* note 564, at 223 (“The ‘*expressio unius*’ canon is clearly doubtful as a description of political language.”).

⁵⁸⁷ See, e.g., DICKERSON, *supra* note 52, at 234 (citing *expressio unius* as an example of “maxims [that] masquerade as rules of interpretation while doing nothing more than describing results reached by other means”).

⁵⁸⁸ See, e.g., *Morgan v. Amex Assurance Co.*, 352 Or. 363, 372, 287 P.3d 1038, 1042 (2012) (“Given the close relationship among sections 335, 372, and 375, we assume that the omission of the word ‘only’ from section 335 was purposeful.”); *State v. Bailey*, 346 Or. 551, 562, 213 P.3d 1240, 1246 (2009) (“Generally, when the legislature includes an express provision in one statute and omits the provision from another related statute, we assume that

In *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, however, the Oregon Supreme Court acknowledged the limitations of the rule and suggested a more cautious approach to its application.⁵⁸⁹ At issue was whether the court had authority to recognize a common-law exception to the evidentiary attorney-client privilege for cases in which an attorney's fiduciary obligations may take precedence over the privilege.⁵⁹⁰ The state evidence code expressly provides that "[t]here is no privilege" in five enumerated instances.⁵⁹¹ There is no mention of a "fiduciary exception."⁵⁹² The court concluded that the legislature apparently intended the list to be exhaustive:

[B]y taking the trouble to enumerate five different circumstances in which there is no privilege, the legislature fairly may be understood to have intended to imply that no others are to be recognized. That much follows from the application of the familiar interpretive principle of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others).

Of course, care must be taken in applying [the *expressio unius*] principle. The mere expression of one thing does not *necessarily* imply the exclusion of all others. A sign outside a restaurant stating "No dogs allowed" cannot be taken to mean that any and all other creatures are allowed—including, for example, elephants, tigers, and poisonous reptiles. The *expressio unius* principle is simply one of inference. And the strength of the inference will depend on the circumstances. For example, the longer the list of enumerated items and the greater the specificity with which they are stated, the stronger the inference that the legislature intended the list to be exhaustive.⁵⁹³

The court noted that the evidence code included both a fairly long and specific list of exclusions, strongly suggesting the legislature intended that list to be exhaustive.⁵⁹⁴

the omission was deliberate."); *Springfield Util. Bd. v. Emerald People's Util. Dist.*, 339 Or. 631, 642, 125 P.3d 740, 746 (2005) ("[U]se of a term in one section and not in another section of the same statute indicates a purposeful omission." (quoting *PGE v. Bureau of Labor & Indus.*, 317 Or. 606, 611, 859 P.2d 1143, 1146 (1993))); *Waddill v. Anchor Hocking, Inc.*, 330 Or. 376, 382, 8 P.3d 200, 203 (2000), *adhered to on reconsideration*, 331 Or. 595, 18 P.3d 1096 (2001); *Fisher Broad., Inc. v. Dep't of Revenue*, 321 Or. 341, 353, 898 P.2d 1333, 1340 (1995); *Pete Mountain Homeowners Ass'n v. Or. Water Res. Dep't*, 236 Or. App. 507, 516 n.2, 238 P.3d 395, 400 n.2 (2010) ("It appears that, when the legislature wanted to adopt a definition from the APA, it said so . . .").

⁵⁸⁹ 355 Or. 476, 497–98, 326 P.3d 1181, 1193 (2014).

⁵⁹⁰ *Id.* at 478, 326 P.3d at 1183.

⁵⁹¹ *Id.* at 493, 326 P.3d at 1191 (quoting OR. EVID. CODE Rule 503 (codified at OR. REV. STAT. § 40.225 (2017))).

⁵⁹² *Id.* at 501, 326 P.3d at 1195.

⁵⁹³ *Id.* at 497, 326 P.3d at 1193 (citations omitted).

⁵⁹⁴ *Id.* at 498–99, 326 P.3d at 1193–94.

Other decisions of the Oregon Supreme Court and the Court of Appeals have similarly—and properly—acknowledged that the *expressio unius* rule should be applied carefully and always takes a back seat to more direct evidence of legislative intent.⁵⁹⁵

h. The “Specific” Controls the “General”

Another classic canon of statutory construction goes by a Latin phrase—*generalalia specialibus non derogant*—though not many cite it in that form any more. The phrase means “things general do not restrict (or detract from) things special.”⁵⁹⁶ The rule tends to be overused and underappreciated. It’s a canon that addresses a specific problem in statutory construction—namely, what to do when more than one statute applies and the statutes appear to contradict one another. The rule is supposed to provide a principled way of reconciling the apparently conflicting statutes: in cases of irreconcilably conflicting statutes, the more specific one is treated as an exception to the more general one.

Remember the assumption of consistency. It’s presumed that the legislature, in enacting multiple statutes, intended all of them to have meaning. If two or more statutes appear to apply, every effort must be made to reconcile them.⁵⁹⁷ If, but only if, there is no reasonable way to interpret all applicable statutes so that they do not conflict, then, and only then, does the specific-versus-general rule apply.⁵⁹⁸

⁵⁹⁵ See, e.g., *Rogue Valley Sewer Servs. v. City of Phoenix*, 357 Or. 437, 453, 353 P.3d 581, 590 (2015) (“*Expressio unius* arguments are most powerful when there is reason to conclude that a list of enumerated terms was intended to be exhaustive.”); *McDermott v. SAIF Corp.*, 286 Or. App. 406, 415, 398 P.3d 964, 969 (2017) (“[T]he *expressio unius* guide to legislative intent corroborates, rather than supplies, meaning to a statute.”); *MEC Or. Racing, Inc. v. Or. Racing Comm’n*, 233 Or. App. 9, 20, 225 P.3d 61, 67 (2009) (“[A] rule of permissible [negative] inference . . . gives way to other, more direct, and contrary evidence of legislative intent.”).

⁵⁹⁶ *Generalalia specialibus non derogant*, BLACK’S LAW DICTIONARY 705 (8th ed. 1999).

⁵⁹⁷ See, e.g., *Powers v. Quigley*, 345 Or. 432, 438, 198 P.3d 919, 922 (2008) (“[W]hen multiple statutory provisions are at issue in a case, this court, if possible must construe those statutes in a manner that will give effect to all of them.” (internal quotation marks omitted)); *State v. Guzek*, 322 Or. 245, 268, 906 P.2d 272, 286 (1995) (“[W]hen one statute deals with a subject in general terms and another deals with the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, while giving effect to a consistent legislative policy.”).

⁵⁹⁸ See, e.g., *In re Marriage of Grossman*, 338 Or. 99, 109, 106 P.3d 618, 623 (2005) (“[A]s the more specific statute regarding property settlement in a marital dissolution proceeding, it controls to the extent that it is inconsistent with the general ‘just and proper’ distribution requirement.”); *State ex rel. Juvenile Dep’t v. M.T.*, 321 Or. 419, 426, 899 P.2d 1192, 1195 (1995) (“When a general statute and a specific statute both purport to control an area of law, this court considers the specific statute to take precedence over an inconsistent general statute related to the same subject.”); *State v. Pearson*, 250 Or. 54, 58, 440 P.2d 229,

Courts will go to great lengths to avoid concluding that statutes irreconcilably conflict. In *State v. Guzek*, for example, the question was whether victim-impact evidence is admissible during the penalty phase of a capital case.⁵⁹⁹ Two statutes applied and, at least on the surface, they appeared to suggest two different answers. On the one hand, ORS 137.013 provided that the victim or the victim's next of kin had the right to appear at the time of sentencing "to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim, and the need for restitution and a compensatory fine."⁶⁰⁰ On the other hand, ORS 165.150(1) provided that only relevant evidence is admissible during the penalty phase of a capital case,⁶⁰¹ and the Oregon Supreme Court had concluded that victim-impact statements are not relevant to any of the issues to be decided in those cases.⁶⁰² The court strained to reconcile the two statutes and ultimately concluded that the former statute simply didn't apply to capital cases. "Any inconsistency between those two statutes can be resolved," the court explained, "if we construe ORS 137.013 to apply only to sentencing in non-capital cases. That construction gives effect to both statutes."⁶⁰³

Once the court concludes that multiple statutes are irreconcilable, the specific-controls-the-general canon comes into play. *Kambury v. DaimlerChrysler Corp.* illustrates how the canon works.⁶⁰⁴ At issue in that case was which of two statutes of limitation applied to an action for the death of a person killed by a defective product.⁶⁰⁵ Either of two different statutes seemed to apply. One, Oregon's product liability statute, provided that actions for death, injury, or damage arising out of

231 (1968) ("[I]f the two statutes cannot be harmonized, the specific statute is considered to be an exception to the general rule."); *Smith v. Dep't of Corr.*, 276 Or. App. 862, 867, 369 P.3d 1213, 1216 (2016) (explaining that the rule applies "if two statutes are inconsistent"); *In re Concealed Handgun License for Stanley v. Myers*, 276 Or. App. 321, 328, 369 P.3d 75, 79 (2016); *see also* OR. REV. STAT. 174.020(2) (2017) ("When a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."); *Olsen v. Deschutes County*, 204 Or. App. 7, 13, 127 P.3d 655, 659 ("Applying the maxim necessarily renders one of the [two] statutes—the older and more general—meaningless, and should therefore be used only when a conflict actually exists and cannot be avoided."), *review denied*, 341 Or. 80 (2006).

⁵⁹⁹ 322 Or. 245, 906 P.2d 272 (1995).

⁶⁰⁰ *Id.* at 264, 906 P.2d at 284 (quoting OR. REV. STAT. § 137.013 (1989)).

⁶⁰¹ *Id.* (citing OR. REV. STAT. § 165.150(1)(b)(D) (1989)).

⁶⁰² *Id.* at 260–63, 906 P.2d at 282–84.

⁶⁰³ *Id.* at 269, 906 P.2d at 286.

⁶⁰⁴ 334 Or. 367, 50 P.3d 1163 (2002).

⁶⁰⁵ *Id.* at 370, 50 P.3d at 1164.

defective products must be brought “no later than two years after the date on which the death, injury or damage complained of occurs.”⁶⁰⁶ The other, Oregon’s wrongful death statute, provided that such actions must be brought no later than “[t]hree years after the death of the decedent.”⁶⁰⁷

With no obvious way to reconcile the two statutes, the court examined them to determine which statute was more specific.⁶⁰⁸ The test, the court said, was whether one statute deals with the problem in a “more minute and definite way.”⁶⁰⁹ The court determined that the product liability statute was more specific because it spoke to claims arising out of a specific source, as opposed to wrongful deaths generally.⁶¹⁰ In the case of the product liability statute, the legislature created a remedy for death caused by a particular source, specifically product defects, and provided a two-year period of limitations for those claims.⁶¹¹ In so doing, the legislature has dealt with wrongful death actions based on product liability in a more minute and definite way, and so the product liability statute of limitations must control over the more general wrongful death statute of limitations.⁶¹²

The trick, of course, is trying to figure out which statute deals with a problem in a more minute and definite way. As the court of appeals put it,

[T]he rule that, in cases of conflict, specific statutory provisions control over general ones can produce different results depending on which statute is characterized as the specific and which as the general. The problem is that, in many cases, the same statutes may be characterized as specific or general depending on which features a court chooses to emphasize.⁶¹³

In *State v. Haugen*, for example, the question arose whether a sentence of death for aggravated murder must be imposed only after a defendant

⁶⁰⁶ *Id.* at 371, 50 P.3d at 1164 (quoting OR. REV. STAT. § 30.905(2) (2001)).

⁶⁰⁷ *Id.* at 372, 50 P.3d at 1165 (quoting OR. REV. STAT. § 30.020(1) (2001)).

⁶⁰⁸ *Id.* at 373–74, 50 P.3d at 1166.

⁶⁰⁹ *Id.* at 374, 50 P.3d at 1166.

⁶¹⁰ *Id.* at 375, 50 P.3d at 1166.

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ *Oregonians for Sound Econ. Policy v. SAIF Corp.*, 187 Or. App. 621, 631, 69 P.3d 742, 746, *review denied*, 336 Or. 60 (2003); *see also* *City of Lowell v. Wilson*, 197 Or. App. 291, 306, 105 P.3d 856, 864 (in many cases, “the application of the maxim that a ‘particular’ statute controls over a more ‘general’ statute becomes a circular exercise”), *review denied*, 339 Or. 406 (2005).

completes a life sentence that he or she has already been serving.⁶¹⁴ The defendant said yes based on ORS 137.123(3), which provided that, when a defendant is sentenced for a crime committed after being sentenced for the commission of a previous crime, “the court shall provide that the sentence for the new crime be consecutive to the sentence for the previous crime.”⁶¹⁵ The state said no, the imposition of the death sentence need not await the completion of the sentence on the earlier offense, because death penalty statutes require the execution of the sentence without any delays following the exhaustion of all appeals and collateral remedies.⁶¹⁶

In the face of that statutory conflict, both parties argued that one statute or the other was the more specific.⁶¹⁷ The defendant argued that ORS 137.123(3) applied only to a subset of sentences for aggravated murder—those committed after the commission of an earlier crime—whereas the death penalty statutes on which the state relied applied to all death sentences for aggravated murder.⁶¹⁸ The state argued that the death penalty statutes applied only to death sentences, while the statute on which the defendant relied applied to sentences for any crime committed if the defendant was incarcerated at the time of the crime.⁶¹⁹ The supreme court wrestled with the question at some length, before settling on the conclusion that the state had the better of the argument.⁶²⁰ The point, though, is that neither the defendant nor the state was plainly wrong. Both of their arguments were perfectly consistent with the applicable statutes, and it’s not always going to be easy to predict which argument about “general” and “specific” statutes will prevail.

5. *Legislative History*

One of the defining aspects of statutory construction under *PGE* was that legislative history analysis could occur only if the first-level textual analysis was inconclusive; that is, if the statute remained “ambiguous”

⁶¹⁴ 349 Or. 174, 202–03, 243 P.3d 31, 48 (2010).

⁶¹⁵ *Id.* at 200, 243 P.3d at 46–47 (quoting OR. REV. STAT. § 137.123(3) (2009)).

⁶¹⁶ *Id.* at 201, 243 P.3d at 47–48. After the defendant exhausts those remedies, the trial court is required to hold a death warrant hearing. OR. REV. STAT. § 137.463(3) (2017). If the court determines that the defendant is mentally competent, the court is required to issue a death warrant that specifies a date of execution, which is to take place no more than 120 days from the effective date of the appellate judgment. § 137.463(5).

⁶¹⁷ *Haugen*, 349 Or. at 202, 243 P.3d at 48.

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

⁶²⁰ *Id.* at 204, 243 P.3d at 49.

in the technical sense of the term. All that changed with *Gaines*. Now, “a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute’s text, where that legislative history appears useful to the court’s analysis.”⁶²¹

Gaines was occasioned by the legislature’s amendment of ORS 174.020 in 2001, which declared that a party may offer legislative history “at any time” and that courts will give that history the weight it warrants. Interestingly, the amendments also provided that “[a] court may limit its consideration of legislative history to the information that the parties provide to the court.”⁶²² This language suggests that courts will not—or at least might not—independently research a statute’s legislative history. And, in fact, *Gaines* itself suggests that “the court permissibly may limit its consideration to that history [provided by the parties]; the court is not obligated to independently research legislative history.”⁶²³

The court was mistaken in suggesting that it is permissible to limit consideration of legislative history to what the parties may have offered. It has long been the rule in Oregon that courts have an obligation to interpret statutes correctly, regardless of the parties’ arguments.⁶²⁴ It has never been the case that courts will merely select the least wrong interpretation of a statute. And, in fact, in cases since *Gaines*, the Oregon Supreme Court has gone out of its way to emphasize its independent responsibility to determine legislative intent.⁶²⁵ It’s always best to assume that courts will not limit

⁶²¹ *State v. Gaines*, 346 Or. 160, 172, 206 P.3d 1042, 1050–51 (2009).

⁶²² *Id.* (discussing 2001 revision of OR. REV. STAT. § 174.020(3)).

⁶²³ *Id.* at 166, 206 P.3d at 1047.

⁶²⁴ *See, e.g.*, *Weldon, LPC v. Bd. of Licensed Prof’l Counselors & Therapists*, 353 Or. 85, 91–92, 293 P.3d 1023, 1027 (2012) (obligating the court to correctly construe statutes, regardless of parties’ arguments); *Stull v. Hoke*, 326 Or. 72, 77, 948 P.2d 722, 724 (1997) (“In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.”); *State v. Joseph*, 238 Or. App. 152, 158, 241 P.3d 752, 756 (2010) (noting obligation to correctly construe statutory terms); *State v. Hardesty*, 238 Or. App. 146, 151, 241 P.3d 741, 744 (2010) (quoting *Stull*, 326 Or. at 77, 948 P.2d at 724), *review denied*, 349 Or. 654 (2011); *Wilson v. Tri-County Metro. Transp. Dist.*, 234 Or. App. 615, 624, 228 P.3d 1225, 1230 (“[O]nce the meaning and application of a statute have been put before us, we have an obligation to correctly construe and apply that statute.”), *review denied*, 348 Or. 669 (2010); *Lovinger v. Lane County*, 206 Or. App. 557, 565, 138 P.3d 51, 56 (“[W]e have an obligation to determine the proper meaning of statutes, regardless of the correctness of the parties’ arguments”), *review denied*, 342 Or. 254 (2006).

⁶²⁵ *See, e.g.*, *State v. Cloutier*, 351 Or. 68, 76, 261 P.3d 1234, 1239 (2011) (“Both parties tend to cherry-pick from the history of the relevant statutes and the cases construing them, and only by providing a more complete account may we fairly assess their arguments and

themselves to the legislative history offered by litigants, but will instead resolve to construe statutes correctly.

a. What Exactly Constitutes “Legislative History”?

Commentators often speak of the legislative “history” of a statute in three different senses: 1) the historical background that led to the introduction of a particular bill; 2) the enactment history of the bill as it winds its way through the legislative process from introduction to enactment; and 3) “post-enactment” history, or any developments after enactment.⁶²⁶

Oregon courts take a narrower view. They treat the first category of pre-enactment events as part of a statute’s historical context. As we have seen, Oregon courts regard a statute’s context broadly to include pretty much anything that legislators might have been aware of before introducing a bill, including prior versions of a statute, prior interpretations of a statute, and the existing common-law context. Once upon a time, the distinction mattered, because, under *PGE*, legislative history could be consulted only in the face of ambiguity, while context was always available as a “first-level” consideration.⁶²⁷ Since *Gaines*, though, the distinction is immaterial.

Oregon courts also tend to reject the notion that post-enactment events are relevant to a statute’s “legislative history.” That is especially true with respect to post-enactment statements of legislators, such as affidavits prepared for litigation or statements made in subsequent legislative sessions.⁶²⁸ This tendency makes sense. Comments of legislators that are generated during the legislative process are

identify the likely intentions of the legislature in enacting those statutes.”); *Blacknall v. Bd. of Parole & Post-Prison Supervision*, 348 Or. 131, 139, 229 P.3d 595, 600 (2010) (“We first examine the text and context of the disputed provision to determine its meaning. In doing so, we are not constrained by the interpretive arguments proffered by the parties.”).

⁶²⁶ See, e.g., NORMAN J. SINGER & J.D. SHAMBIE SINGER, *supra* note 115, at § 48:1 (describing three types of “legislative history”).

⁶²⁷ See, e.g., *State v. Chakerian*, 325 Or. 370, 378–79, 938 P.2d 756, 760 (1997) (classifying Criminal Code Revision Commission Commentary as “context” or “legislative history” mattered, because only the former could be consulted in the absence of ambiguity).

⁶²⁸ See, e.g., *Tektronix, Inc. v. Dep’t. of Revenue*, 354 Or. 531, 546, 316 P.3d 276, 285 (2014) (“[L]ater testimony is irrelevant.”); *DeFazio v. Wash. Pub. Power Supply Sys.*, 296 Or. 550, 561, 679 P.2d 1316, 1324 (1984) (“The views legislators have of existing law may shed light on a new enactment, but it is of no weight in interpreting a law enacted by their predecessors.”); *Salem-Keizer Ass’n of Classified Emps. v. Salem Sch. Dist.* 24J, 186 Or. App. 19, 26–28, 61 P.3d 970, 974 (2003) (“The rule in this state is that ‘subsequent statements by legislators are not probative of the intent of statutes already in effect.’” (quoting *United Tel. Emps. PAC v. Sec’y of State*, 138 Or. App. 135, 139, 906 P.2d 306, 308 (1995))).

generally regarded as having authority, at least in part, because other legislators may rely on them in determining how to vote.⁶²⁹ That is not the case when legislators offer their opinions outside the context of the legislative process,⁶³⁰ where no particular consequences flow from a legislator's comments. At best, legislative comments made outside the legislative process represent the views of a single member and cannot be attributed to the legislature as a whole.

Unfortunately, the courts are not altogether consistent about relying on subsequent legislative history.⁶³¹ On occasion, the Oregon Supreme Court has examined later legislative history to determine whether the legislature's failure to enact a bill in response to a judicial decision was intended to signal agreement with the court's decision.⁶³² Such cases, however, stand at odds with others taking precisely the opposite position, that "a later legislature's failure to change a previously-enacted statute is not part of the legislative history of that statute."⁶³³ Moreover, reliance on such subsequent "history" strikes me as inconsistent with more recent decisions that cast a more skeptical view on the idea of legislative acquiescence.⁶³⁴

In general, then, Oregon courts view "legislative history" as the record of a bill's progress from introduction to enactment. That covers a lot of ground. As a bill courses through the legislative process, there are quite a number of junctures at which legislative history can be generated. The courts have shown an inclination to take advantage of every one of those junctures as sources of evidence of legislative intent.

Interestingly, the Oregon courts have shown no inclination to explain why they regard legislative history—any legislative history—

⁶²⁹ See, e.g., NORMAN J. SINGER & J.D. SHAMBIE SINGER, *supra* note 115 § 48.06 ("[M]ost members of Congress are likely to consult the committee report in order to gain an understanding of the purpose and effect of a bill before they cast their votes.").

⁶³⁰ See, e.g., MATERIALS ON LEGISLATION, *supra* note 564, at 656–57 ("[T]here is not even a semblance of an argument that [post-enactment statements] are part of the historical context for members of Congress voting on the adopted text."). For an interesting argument that, at least in some cases, post-enactment expressions of opinion about the meaning of a statute previously enacted by Congress may have probative value, see generally James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1995).

⁶³¹ See, e.g., *State v. Cloutier*, 351 Or. 68, 103, 261 P.3d 1234, 1253 (2011) ("This court has stated that subsequent legislative history is irrelevant, although, on other occasions, the court has been less categorically dismissive." (internal citation omitted)).

⁶³² See, e.g., *Harris v. Bd. of Parole & Post-Prison Supervision*, 288 Or. 495, 501–02, 605 P.2d 1181, 1183–84 (1980).

⁶³³ *Hilton v. Motor Vehicles Div.*, 308 Or. 150, 156, 775 P.2d 1378, 1381 (1989).

⁶³⁴ See *supra* text at notes 239–49.

as a reliable source of evidence of legislative intent. It's not as if the matter is intuitively obvious that, say, the comments of a witness before a committee consisting of three legislators is a reliable indicator of what any of the other eighty-seven members thought. And, in fact, there is a sizeable body of literature challenging the idea that legislative history provides anything useful to a determination of legislative intent.⁶³⁵

Critics of legislative history complain that, for example, there is no way to explain how the comments of a single legislator can be taken as evidence of what the institution as a whole understood or intended. Particularly in small states like Oregon, where so much legislative history consists of recordings of oral remarks that were actually heard only by those in the audience at the time, it is tough to explain how such remarks reliably demonstrate anything approximating "legislative intent." The criticism applies even more forcefully to remarks of nonlegislator witnesses who testify in committee hearings. Critics also contend that it's unconstitutional to rely on legislative history, given that it was never subjected to a vote of the legislature, and that, in any event, legislative history is often every bit as indeterminate as the statute it is designed to clarify.

There is some truth to each of those criticisms. But they don't so much demonstrate the invalidity of legislative history as they demonstrate the need for the careful use of it. The fact that it's difficult to attribute the remarks of a single legislator or witness to the legislature as a whole, for example, cannot be denied. Still, doing so isn't impossible. In some cases, such as those in which legislators expressly state their reliance on certain statements, there may be good reason to believe that such statements were influential in the understandings or intentions of the body as a whole. That said, courts still would do well to articulate such considerations rather than simply rely uncritically and without explanation on any form of legislative history that happens to be available.

⁶³⁵ See, e.g., William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Construction*, 41 EMORY L.J. 113 (1992); Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313 (2014) (contesting claims of the unconstitutionality of reliance on legislative history); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 6–10 (1998) (summarizing critiques of legislative history); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 212–21.

(i) Comments of Legislators in Committee Hearings

The courts probably rely on comments of legislators in committee hearings and work sessions more than on any other type of legislative history. This is doubtless due, in large part, to the fact that Oregon's legislative process is very committee-centric. The legislature doesn't permit amendments on the floor of either house without the unanimous consent of the members, so most of the work on crafting a bill occurs in committees, not on the floor.⁶³⁶

There remain problems associated with relying on statements of legislators in committee hearings. As I have mentioned, it can be tough to explain how the remarks of a single legislator demonstrate the intentions of an entire house, much less the legislature as a whole. That is especially true when the record shows that relatively few legislators were even in attendance at the time the statement was made. The courts acknowledge this problem, at least on occasion. In one notable decision, *Errand v. Cascade Steel Rolling Mills, Inc.*, a majority of the Oregon Supreme Court relied on the comments of two legislators and two nonlegislator witnesses in a committee hearing.⁶³⁷ That prompted a dissent from Justice Susan Graber:

This case presents an opportunity to make a general observation about the use of legislative history. Much of the majority's discussion concerns statements of two witnesses before a committee and two legislators. . . . In general, an examination of legislative history is most useful when it is able to uncover the manifest general legislative intent behind an enactment. By contrast, an examination of legislative history is most fraught with the potential for misconstruction, misattribution of the beliefs of a single legislator or witness to the body as a whole, or abuse in the form of "padding the record" when the views of only a small number of persons on a narrow question can be found.⁶³⁸

The majority ignored the criticism.⁶³⁹ But then, in a case decided later the same year, a majority of the court cited Justice Graber's dissent in *Errand* in discounting the comments of a single person.⁶⁴⁰ More recent

⁶³⁶ Indispensable to making the most of legislative history is an accurate understanding of the process that generated it. The best account of Oregon's legislative process that I have found is Gregory Chaimov, *How an Idea Really Becomes Law: What Only Jacques Cousteau Can Know*, 36 WILLAMETTE L. REV. 185 (2000).

⁶³⁷ 320 Or. 509, 888 P.2d 544 (1995).

⁶³⁸ *Id.* at 539 n.4, 888 P.2d at 559 n.4 (Graber, J., dissenting).

⁶³⁹ *Id.* at 522–24, 888 P.2d at 550–52.

⁶⁴⁰ *State v. Guzek*, 322 Or. 245, 260, 906 P.2d 272, 282 (1995) ("[T]he dissent relies almost exclusively on the inconclusive testimony of one person."). Ironically, Justice Graber authored the dissent in that case.

decisions sometimes echo Justice Graber's critique of relying on the comments of a single legislator.⁶⁴¹ But just as often, Oregon courts are wont to rely on such comments without any qualification.⁶⁴²

A couple of cautions are in order. First, it appears that the status of a particular legislator can matter. The courts are more likely to rely on the comments of a single legislator if that legislator is a bill sponsor or a committee chair or cochair.⁶⁴³ That's understandable, as the colleagues of such individuals are likely to assume that a bill's sponsors, committee chairs, or cochairs are more knowledgeable about a bill and its contents and thus are more likely to rely on these individuals' statements.

Second, evidence of statements of legislators in committee generally comes in two forms: staff-prepared minutes of the committee hearings and audio recordings. The committee minutes are often quite detailed and accurate, but sometimes they are not. The best evidence of what transpired in a committee hearing is the audio recording. In fact, courts have been known to reject reliance on committee minutes.⁶⁴⁴ Only if audio recordings are not available should the minutes be quoted as a source of legislative history.⁶⁴⁵

(ii) Statements of Legislators in Floor Debates

Although legislators are not ordinarily permitted to amend bills during floor debates, such debates can nevertheless generate useful legislative history. If anything, the argument for relying on floor debates is stronger than arguments promoting reliance on statements

⁶⁴¹ *Patton v. Target Corp.*, 349 Or. 230, 242, 242 P.3d 611, 618 (2010) (“[T]he comment of a single legislator at one committee hearing generally is of dubious utility in determining the intent of the legislature in enacting a statute.”).

⁶⁴² *See, e.g., State v. Baker-Krofft*, 348 Or. 655, 664–65, 239 P.3d 226, 230–31 (2010) (relying on comments of Senator Ed Fadeley before the Special Committee on Aging).

⁶⁴³ *See, e.g., Bobo v. Kulongoski*, 338 Or. 111, 117–18, 107 P.3d 18, 21–22 (2005) (relying on comments of Ways and Means Committee cochair); *In re Marriage of O'Donnell-Lamont*, 337 Or. 86, 105 n.9, 91 P.3d 721, 732 n.9 (2004) (relying on statement of bill sponsor in committee), *cert. denied*, 543 U.S. 1050 (2005); *Belknap v. U.S. Bank Nat'l Ass'n*, 235 Or. App. 658, 670–71, 234 P.3d 1041, 1047–48 (2010) (relying on bill sponsor's statements in committee), *review denied*, 349 Or. 654 (2011); *Olsen v. Deschutes County*, 204 Or. App. 7, 40, 127 P.3d 655, 674 (relying on statement of committee chair), *review denied*, 341 Or. 80 (2006).

⁶⁴⁴ *See, e.g., Vector Marketing Corp. v. Emp't Dep't*, 275 Or. App. 999, 1008 n.6, 365 P.3d 686, 691 n.6 (2015) (rejecting arguments based on committee minutes because “audio recordings of the relevant hearings demonstrates that the minutes do not fully reflect the content of the committee's discussion.”).

⁶⁴⁵ *See, e.g., Wright v. Turner*, 354 Or. 815, 823 n.5, 322 P.3d 476, 481 n.5 (2014) (“Because no audio recording is available, we quote from the minutes.”).

made during committee hearings. When a legislator makes a statement about a pending bill on the floor, a quorum of an entire house is present, and those other legislators have the opportunity to contradict the statement. In the absence of such contradiction, there is good reason to infer that the legislator's statement represents an accurate assessment of the bill, its purposes, or its effects. In any event, Oregon courts routinely rely on statements of legislators in floor debates without qualification.⁶⁴⁶

(iii) Testimony of Nonlegislator Witnesses

Oregon courts routinely quote testimony of nonlegislator witnesses as reliable legislative history.⁶⁴⁷ This can be problematic. It's one thing for a legislator to make a statement about the meaning or purpose of a bill. It's another thing entirely for a nonlegislator to do so.

⁶⁴⁶ See, e.g., *Baker-Krofft*, 348 Or. at 665–66, 239 P.3d at 231 (relying on Sen. Carson's statements during Senate floor debate); *Doyle v. City of Medford*, 347 Or. 564, 578, 227 P.3d 683, 691 (2010); *State v. Shaw*, 338 Or. 586, 605, 113 P.3d 898, 909–10 (2005); *Tharp v. Psychiatric Sec. Review Bd.*, 338 Or. 413, 427–29, 110 P.3d 103, 110–11 (2005); *Indus. Customers of Nw. Utils. v. Oregon Dep't of Energy*, 238 Or. App. 127, 131–32, 131 n.3, 241 P.3d 352, 354–55, 354 n.3 (2010); *Oregon Cable Telecomms. Ass'n v. Dep't of Revenue*, 237 Or. App. 628, 635, 640–41, 240 P.3d 1122, 1126, 1129 (2010) (relying on carrier of the bill's statement during floor debates); *State v. Roberts*, 231 Or. App. 263, 271–72, 219 P.3d 41, 45 (2009) (relying on carrier of the bill's statement during floor debates), *review denied*, 347 Or. 608 (2010); *Crooked River Ranch Water Co. v. Pub. Util. Comm'n*, 224 Or. App. 485, 492, 198 P.3d 967, 971 (2008) (relying on carrier of the bill's statement during floor debates).

⁶⁴⁷ See, e.g., *State v. Zolotoff*, 354 Or. 711, 717–18, 320 P.3d 561, 564–65 (2014) (quoting statements of prosecutors who proposed legislation); *State v. Marshall*, 350 Or. 208, 223–24, 253 P.3d 1017, 1026 (2011) (quoting statements of bill proponents and opponents); *State v. Partain*, 349 Or. 10, 20, 239 P.3d 232, 239 (2010) (quoting letter that nonlegislator proponents of the bill submitted); *Snider v. Prod. Chem. Mfg., Inc.*, 348 Or. 257, 266–67, 230 P.3d 1, 6 (2010) (discussing statement of representative of the Oregon State Bar, which sponsored the bill); *Ram Tech. Servs., Inc. v. Koresko*, 346 Or. 215, 234–35, 208 P.3d 950, 960–61 (2009) (quoting nonlegislator member of Oregon Law Commission); *Tharp*, 338 Or. at 426–27, 110 P.3d at 109–10; *Errand v. Cascade Steel Rolling Mills, Inc.*, 320 Or. 509, 521–24, 888 P.2d 544, 550–51 (1995), *superseded by statute*, OR. REV. STAT. § 656.018 (1999), *as recognized in* *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 88, 23 P.3d 333, 337 (2001); *State v. Ryder*, 267 Or. App. 150, 159–61, 340 P.3d 663, 668–69 (2014) (quoting the Department of Justice lawyer, in support of department bill); *State v. Pugh*, 255 Or. App. 357, 364, 297 P.3d 27, 32 (2013) (quoting Deputy District Attorney answering question from legislator); *Elk Creek Management Co. v. Gilbert*, 244 Or. App. 382, 388–89, 260 P.3d 686, 689–90 (2011) (quoting statement of representative of Oregon Association of Realtors), *rev'd*, 353 Or. 565 (2013); *Lamb v. Coursey*, 238 Or. App. 647, 655, 243 P.3d 130, 134–35 (2010) (quoting statement by Oregon state police detective), *review denied*, 350 Or. 230 (2011); *Belknap v. U.S. Bank Nat'l Ass'n*, 235 Or. App. 658, 671, 234 P.3d 1041, 1047–48 (2010) (quoting statements by the director of the Oregon Law Center), *review denied*, 349 Or. 654 (2011).

Nonlegislators are, well, not legislators. They are commonly stakeholders who have a direct interest in pending legislation and, as such, are inclined to exaggerate a bill's benefits or its flaws, depending on the case. For that reason, it is not uncommon to see a court disparage reliance on the comments of witnesses in statutory construction cases.⁶⁴⁸

There are nevertheless some cases in which it makes sense for courts to rely on statements of nonlegislator witnesses. In small states such as Oregon in which nonprofessional legislatures meet on a part-time basis, it's a fact of life that state agencies, commissions, or ad hoc groups of interested citizen stakeholders draft a substantial number of bills. Those bills are then explained to relevant legislative committees or subcommittees. At that point, the legislators may approve the bills, based at least in part on the representations of the nonlegislator witnesses about the nature of the bill, the problem it was drafted to target, and its intended effects. In such cases, courts are much more comfortable turning to the legislative history, even though individuals other than legislators generated it. The key to knowing if it makes sense for courts to rely on statements of nonlegislator witnesses is whether there is reason to believe that the legislature relied on the representations of the nonlegislator witnesses.

In *Kohring v. Ballard*, for instance, the Oregon State Bar drafted a bill to amend state statutes defining the proper venue for actions involving corporations or limited partnerships.⁶⁴⁹ On behalf of the bar,

⁶⁴⁸ See, e.g., *Patton v. Target Corp.*, 349 Or. 230, 242, 242 P.3d 611, 618 (2010) (“[T]he comment of a single legislator at one committee hearing generally is of dubious utility in determining the intent of the legislature in enacting a statute (and the comment of a nonlegislator witness even less helpful) . . .”); *State v. Guzek*, 322 Or. 245, 261, 906 P.2d 272, 282 (1995) (cautioning against relying on statements of nonlegislator witnesses); *Qwest Corp. v. City of Portland*, 275 Or. App. 874, 893–94, 365 P.3d 1157, 1167–68 (2015) (finding that a statement of a lobbyist was not persuasive evidence of legislative intent), *review denied*, 360 Or. 465 (2016); *Tran v. Bd. of Chiropractic Exam’rs*, 254 Or. App. 593, 606, 300 P.3d 169, 176 (reading views of “a nonlegislator, in seeking a different statutory change six years later provides minimal guidance”), *review denied*, 353 Or. 748 (2013); *State v. Kuperus*, 241 Or. App. 605, 611, 251 P.3d 235, 238 (2011) (providing nonlegislator’s statement in a subcommittee “given little weight” (quoting *State v. Kelly*, 229 Or. App. 461, 466, 211 P.3d 932, 934, *review denied*, 347 Or. 446 (2009))); *State v. Stamper*, 197 Or. App. 413, 424–25, 106 P.3d 172, 178 (“[W]e are hesitant to ascribe to the Legislative Assembly as a whole the single remark of a single nonlegislator at a committee hearing.”), *review denied*, 339 Or. 230 (2005); *Linn-Benton-Lincoln Ed. v. Linn-Benton-Lincoln ESD*, 163 Or. App. 558, 569, 989 P.2d 25, 32 (1999) (“[W]e are reluctant to draw decisive inferences concerning legislative intent [because] . . . the statements were made by witnesses and are not direct expressions of legislative intent.”).

⁶⁴⁹ 355 Or. 297, 309–12, 325 P.3d 717, 725–27 (2014).

a University of Oregon professor explained the bill to the Senate Committee on the Judiciary, and the committee approved the bill without further debate.⁶⁵⁰ On the house side, another representative of the bar similarly explained the nature of the amendments.⁶⁵¹ A representative of the business community proposed an amendment to the bar's bill, which was adopted without objection, and the House Committee approved the bill without further discussion.⁶⁵² The "legislative history" of the bill thus consisted almost entirely of comments of nonlegislator witnesses. The Oregon Supreme Court nevertheless relied on those comments to determine legislative intent:

To be sure, the foregoing legislative history consists principally of statements of nonlegislators, which sometimes provides limited assistance in determining the legislature's intent. In some cases, however, it is appropriate to give greater weight to such legislative history, as when the nonlegislators were the drafters and principal proponents of a bill, and it is clear that the legislature relied on their explanations.⁶⁵³

In a related vein, the legislature may authorize the Oregon Law Commission or an ad hoc legislative task force to investigate a particular subject and report back to the legislature with proposed legislation. Courts do not hesitate to consult the comments of members

⁶⁵⁰ *Id.* at 310, 325 P.3d at 725–26.

⁶⁵¹ *Id.* at 310, 325 P.3d at 726.

⁶⁵² *Id.* at 311, 325 P.3d at 726.

⁶⁵³ *Id.* at 311–12, 325 P.3d at 726–27 (emphasis omitted) (citations omitted); *see also* *Alfieri v. Solomon*, 358 Or. 383, 398–99, 399 n.7, 365 P.3d 99, 108–09, 108 n.7 (2015) (relying on statements of the Director of Oregon Dispute Resolution Commission, which was "responsible for drafting the text of the legislation"); *Jenkins v. Bd. of Parole & Post-Prison Supervision*, 356 Or. 186, 201–02, 335 P.3d 828, 837–38 (2014) (relying on statements of representatives of the Department of Justice, which drafted the bill); *State v. Walker*, 356 Or. 4, 17–18, 333 P.3d 316, 324 (2014) (relying on statements of representatives of the Department of Justice, which drafted the bill); *Ass'n of Unit Owners of Timbercrest Condos. v. Warren*, 352 Or. 583, 596–97, 288 P.3d 958, 965 (2012) (relying on statements of Oregon State Bar representatives as to intended meaning of bar-proposed bill); *State v. Cloutier*, 351 Or. 68, 84–88, 261 P.3d 1234, 1243–45 (2011) (relying on statements of court of appeals judges regarding a bill that the court proposed to limit its appellate jurisdiction); *State ex rel. Engweiler v. Felton*, 350 Or. 592, 626–27, 260 P.3d 448, 468 (2011) (relying on statements of then-Chairman of the Board of Parole, the bill proponent); *State v. Worth*, 274 Or. App. 1, 38–41, 360 P.3d 536, 558–60 (2015) (relying on statements of representatives of the Oregon District Attorneys Association, which sponsored the bill and whose comments were "consistent with" statements of legislators), *review denied*, 359 Or. 667 (2016); *Ogle v. Nooth*, 254 Or. App. 665, 672, 298 P.3d 32, 36 (2013) (relying on statement of Assistant Attorney General in support of proposed amendments to Post-Conviction Hearing Act), *aff'd in part and rev'd in part*, 355 Or. 570 (2014); *State v. Wray*, 243 Or. App. 503, 509, 259 P.3d 972, 974–75 (2011) (relying on statement of bill's proponent, Ben Swank, representative of Pacific Northwest Bell).

of the Commission or of such task forces, recognizing that legislators routinely rely on such statements.⁶⁵⁴

That leads to an interesting question: whether the deliberations of a commission or task force constitute relevant legislative history. In the late 1960s, for example, the legislature appointed a Criminal Law Revision Commission to propose a revised criminal code. Over several years, the commission examined the state's existing criminal statutes, as well as the Model Penal Code and the criminal laws of a number of other states. That work resulted in several drafts of a proposed new state criminal code, which the commission debated at some length. Those debates themselves were recorded in commission minutes. Are the various tentative drafts and the discussions of those drafts part of the "legislative history" of the final version that the legislature adopted in 1971? In *State v. Branch*, the Oregon Supreme Court declared that, in the absence of some indication to the contrary, it's fair to assume "that the legislature accepted the commission's explanations for its drafting choices."⁶⁵⁵

⁶⁵⁴ See, e.g., *ACN Opportunity, LLC v. Emp't Dep't*, 362 Or. 824, 835, 418 P.3d 719, 725 (2018) (citing report of Independent Contractors Task Force); *Dep't of Human Servs. v. G.D.W.*, 353 Or. 25, 35, 292 P.3d 548, 554 (2012) (citing Commentary to Oregon Evidence Code); *State v. Hamilton*, 348 Or. 371, 379, 233 P.3d 432, 436 (2010) (citing Commentary to the Criminal Law Revision Commission on the Proposed Oregon Criminal Code); *Ram Tech. Servs., Inc. v. Koresko*, 346 Or. 215, 234–35, 208 P.3d 950, 961 (2009) (citing Oregon Law Commission report); *State v. Reed*, 339 Or. 239, 249 n.10, 118 P.3d 791, 796 n.10 (2005) (Kistler, J., dissenting) (citing Commentary to the Criminal Law Revision Commission on the Proposed Oregon Criminal Code); *State v. Wolleat*, 338 Or. 469, 476–77, 111 P.3d 1131, 1134–35 (2005) (citing Commentary to the Criminal Law Revision Commission on the Proposed Oregon Criminal Code); *State v. Wesley*, 254 Or. App. 697, 704, 295 P.3d 1147, 1150 (citing Commentary to the Criminal Law Revision Commission on the Proposed Oregon Criminal Code), *review denied*, 354 Or. 62 (2013); *State v. Beck*, 254 Or. App. 609, 614, 295 P.3d 169, 172 (2013) (citing minutes of Criminal Law Revision Commission meetings); *State v. Lunacolorado*, 238 Or. App. 691, 699–700, 243 P.3d 125, 129–30 (2010) (Wollheim, J., concurring) (citing the Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System), *review denied*, 350 Or. 530 (2011); *State v. Vargas-Torres*, 237 Or. App. 619, 624–26, 242 P.3d 619, 622–23 (2010) (citing Commentary to the Criminal Law Revision Commission on the Proposed Oregon Criminal Code); *State v. Blair*, 230 Or. App. 36, 51–56, 214 P.3d 47, 55–58 (2009) (providing an extensive discussion of Criminal Law Revision Commission Commentary and testimony), *aff'd*, 348 Or. 72 (2010); *Filipetti v. Dep't of Fish & Wildlife*, 224 Or. App. 122, 130–31, 197 P.3d 535, 539–40 (2008) (providing an extensive discussion of Criminal Law Revision Commission Commentary and testimony); *State v. Spears*, 223 Or. App. 675, 694–95, 196 P.3d 1037, 1046–47 (2008) (providing an extensive discussion of Criminal Law Revision Commission Commentary and testimony); *State v. Walker*, 192 Or. App. 535, 543, 86 P.3d 690, 695 (citing report of Governor's Task Force on Sex Offenses against Children), *review denied*, 337 Or. 327 (2004).

⁶⁵⁵ 362 Or. 351, 363, 408 P.3d 1035, 1042 (2018).

The assumption may be a slight exaggeration. The commission's explanations for its drafting choices, which appear in the commission's printed commentary, were available to the legislature and no doubt readily relied on. As a result, there's no shortage of cases citing such explanations.⁶⁵⁶ But whether the legislature was aware of details such as the internal deliberations of the commission concerning earlier drafts as reflected in its minutes is questionable. This appears to be another example of the courts treating sources that the legislature could have been aware of as ones that the legislature actually was aware of.

The legislature also frequently borrows statutory wording from model codes prepared by the Uniform Law Commission. The Uniform Commercial Code is perhaps the most well-known example.⁶⁵⁷ But there are many others, ranging from arbitration to partnership law.⁶⁵⁸ Official commentaries are usually prepared for such model codes.⁶⁵⁹ And courts readily cite such commentaries as evidence of what the Oregon Legislature intended when it adopted a model code.⁶⁶⁰

⁶⁵⁶ See, e.g., *State v. Fonte*, 363 Or. 327, 333, 422 P.3d 202, 205 (2018); *State v. Eastep*, 361 Or. 746, 756, 399 P.3d 979, 985 (2017); *State v. King*, 361 Or. 646, 662–63, 398 P.3d 336, 346 (2017); *State v. Long*, 294 Or. App. 192, 195–96, 430 P.3d 1086, 1088 (2018); *State v. McKnight*, 293 Or. App. 274, 276–77, 426 P.3d 669, 671, *review denied*, 363 Or. 817 (2018); *State v. Bales*, 289 Or. App. 470, 485–86, 410 P.3d 1088, 1096 (2017); *State v. Lomax*, 288 Or. App. 253, 261, 406 P.3d 94, 99 (2017); *State v. Robinson*, 288 Or. App. 194, 201, 406 P.3d 200, 205 (2017); *State v. Zielinski*, 287 Or. App. 770, 778–79, 404 P.3d 972, 976–77 (2017); *Norwood v. Premo*, 287 Or. App. 443, 452–53, 403 P.3d 502, 508, *review denied*, 362 Or. 300 (2017); *State v. Gonzalez-Aguillar*, 287 Or. App. 410, 414, 403 P.3d 539, 541 (2017). In at least one case, *State v. White*, 341 Or. 624, 639 n.7, 147 P.3d 313, 321 n.7 (2006), the supreme court characterized the published commentary as “official” and entitled to some sort of special weight, over and above the weight accorded to other legislative history.

⁶⁵⁷ OR. REV. STAT. §§ 71.1010–79.0628 (2017).

⁶⁵⁸ See, e.g., OR. REV. STAT. §§ 36.600–36.740 (2017) (Uniform Arbitration Act); OR. REV. STAT. §§ 67.005–67.990 (2017) (Oregon Revised Partnership Act, which is based on the former Uniform Partnership Law); OR. REV. STAT. §§ 314.605–314.675 (2017) (Uniform Division of Income for Tax Purposes Act).

⁶⁵⁹ See, e.g., MODEL PENAL CODE AND COMMENTARIES (AM. LAW INST., Official Draft and Revised Comments 1980).

⁶⁶⁰ See, e.g., *Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc.*, 355 Or. 44, 52–54, 322 P.3d 531, 536–37 (2014) (citing official commentary to Uniform Commercial Code); *Elk Creek Mgmt. Co. v. Gilbert*, 353 Or. 565, 574–75, 303 P.3d 929, 935 (2013) (relying on commentary to Uniform Residential Landlord and Tenant Act); *Snider v. Prod. Chem. Mfg., Inc.*, 348 Or. 257, 267, 230 P.3d 1, 6 (2010) (noting fact that commentary for the Revised Uniform Arbitration Act did not discuss the issue before the court); *Datt v. Hill*, 347 Or. 672, 680, 227 P.3d 714, 719 (2010) (relying on history of Uniform Post-Conviction Procedure Act on which Oregon post-conviction statute was based); *Torres v. Mason*, 315 Or. 386, 389, 848 P.2d 592, 593 (1993) (relying on commentary to Uniform Child Custody Jurisdiction Act in construing Oregon's version of the law); *Gemstone Builders, Inc. v. Stutz*, 245 Or. App. 91, 99, 261 P.3d 64, 69 (2011) (relying on commentary to the Uniform

(iv) Statements of Committee Counsel

The House and Senate Committees on the Judiciary are generally staffed by a lawyer who provides advice and drafting assistance during the legislative session. In the course of a committee's deliberations, counsel may be called upon to summarize the contents of a bill, explain its background, or express an opinion about the meaning of its terms. Members of the committees commonly rely on counsel's comments, and as a result, courts rely on those comments as evidence of the legislature's intentions.⁶⁶¹

(v) Amendment History

As a bill makes its way through the legislative process, its text may undergo any number of changes. The record of those changes themselves—apart from any legislators' comments about them—can provide significant insight as to the intended meaning or effect of a bill. *Doyle v. City of Medford* illustrates this point.⁶⁶² The case involved a statute providing that local governments “shall, insofar as and to the extent possible,” make the same health insurance coverage available to

Arbitration Act); *May Trucking Co. v. Nw. Volvo Trucks, Inc.*, 238 Or. App. 21, 35, 241 P.3d 729, 738 (2010) (relying on commentary to the UCC), *review denied*, 350 Or. 130 (2011); *Prime Props., Inc. v. Leahy*, 234 Or. App. 439, 445, 228 P.3d 617, 620–21 (2010) (because Oregon statute was based on Uniform Arbitration Act, commentary of National Conference of Commissioners on Uniform State Laws “helps to explicate the meaning of the statutory terms, so it provides a useful tool for promoting uniformity of the law, and we consider it where appropriate”); *Livingston v. Metro. Pediatrics, LLC*, 234 Or. App. 137, 143–44, 227 P.3d 796, 801–02 (2010) (“A commentary to a uniform act that is enacted by the Oregon legislature is a part of the act’s legislative history.”); *In re Marriage of Rudder*, 230 Or. App. 437, 448–52, 217 P.3d 183, 190–92 (history of Uniform Premarital Agreement Act), *review denied*, 347 Or. 365 (2009); *State DCS ex rel. Alaska v. Anderson*, 189 Or. App. 162, 169–70, 74 P.3d 1149, 1154 (history of Uniform Interstate Family Support Act), *review denied*, 336 Or. 92 (2003).

⁶⁶¹ See, e.g., *Spearman v. Progressive Classic Ins. Co.*, 361 Or. 584, 599, 396 P.3d 885, 893 (2017); *State v. Makin*, 360 Or. 238, 254, 381 P.3d 799, 807 (2016); *In re Marriage of Chase*, 354 Or. 776, 783, 323 P.3d 266, 270–71 (2014); *Doyle v. City of Medford*, 347 Or. 564, 577–78, 227 P.3d 683, 690–91 (2010); *State v. Wolleat*, 338 Or. 469, 476, 111 P.3d 1131, 1134–35 (2005); *State ex rel. Juvenile Dep’t v. Ashley*, 312 Or. 169, 178–79, 818 P.2d 1270, 1275–76 (1991); *State v. Carey-Martin*, 293 Or. App. 611, 665–66, 430 P.3d 98, 129–30 (2018); *State v. Rankins*, 280 Or. App. 673, 688–89, 382 P.3d 530, 538 (2016); *State v. Bevil*, 280 Or. App. 92, 104, 376 P.3d 294, 300 (2016); *State v. Meek*, 266 Or. App. 550, 557, 338 P.3d 767, 770 (2014); *State v. Medina*, 262 Or. App. 140, 147, 324 P.3d 526, 530 (2014), *aff’d in part and rev’d in part*, 357 Or. 254 (2015); *State v. Smith*, 259 Or. App. 36, 41–42, 312 P.3d 552, 554 (2013); *Simpson v. Dep’t of Fish & Wildlife*, 242 Or. App. 287, 302–03, 255 P.3d 565, 573 (2011); *Jensen v. Bevard*, 215 Or. App. 215, 222–25, 168 P.3d 1209, 1213–14, *adhered to on reconsideration*, 217 Or. App. 309 (2007); *State v. Walker*, 192 Or. App. 535, 544–45, 86 P.3d 690, 695–96, *review denied*, 337 Or. 327 (2004).

⁶⁶² 347 Or. 564, 227 P.3d 683 (2010).

retired employees as they make available to current employees.⁶⁶³ The issue was whether the word “shall” indicated a mandatory obligation on the part of the local governments.⁶⁶⁴ The word “shall,” of course, can be used in any number of senses in statutes, not all of them signifying an obligation.⁶⁶⁵ Not surprisingly, the City of Medford argued just that, asserting that it had discretion whether to make health care insurance available to retirees.⁶⁶⁶ The Oregon Supreme Court acknowledged the inherent ambiguity of the word “shall” but noted that the original version of the law used the term “may” and was later amended to substitute the word “shall.”⁶⁶⁷ That change in wording, the court concluded, strongly suggested that the legislature intended the word to be understood in its mandatory sense.⁶⁶⁸

b. How Courts Weigh Legislative History

In *Gaines*, the supreme court declared that, although parties may offer legislative history at any time, it’s up to the courts to determine what weight to give that legislative history.⁶⁶⁹ That leads to the question: how do courts weigh legislative history? Unfortunately, there is a paucity of case law addressing that question in a general way. Several principles may be gleaned from that case law, though, that may be useful to keep in mind.

First and foremost, courts will always give primacy to the text of a statute.⁶⁷⁰ *Gaines* took some pains to emphasize the point that, whatever the legislative history demonstrates about intent, the intent

⁶⁶³ *Id.* at 569, 227 P.3d at 686 (quoting OR. REV. STAT. § 243.303(2) (2009)) (emphasis omitted).

⁶⁶⁴ *Id.* at 566–67, 227 P.3d at 684–85.

⁶⁶⁵ *See supra* text at notes 530–40.

⁶⁶⁶ *Doyle*, 347 Or. at 570, 227 P.3d at 687.

⁶⁶⁷ *Id.* at 570–73, 227 P.3d at 687–88.

⁶⁶⁸ *Id.* at 570–72, 227 P.3d at 687–88; *see also* *State v. Partain*, 349 Or. 10, 20, 239 P.3d 232, 239 (2010) (“The history of the amendment confirms that general sense of the legislature’s intentions.”); *Owens v. Maass*, 323 Or. 430, 442–44, 918 P.2d 808, 814–16 (1996); *Eusiquio v. State ex rel. Dep’t of Human Servs.*, 243 Or. App. 100, 106–110, 259 P.3d 917, 920–22 (2011) (examining history of Oregon’s vital statistics laws and how certain amendments tracked changes in the model code); *State v. Godines*, 236 Or. App. 404, 418–21, 236 P.3d 824, 832–33 (examining amendment history of Measure 11), *review denied*, 340 Or. 480 (2010); *Koennecke v. Lampert*, 198 Or. App. 444, 450–53, 108 P.3d 653, 657–59, *review denied*, 339 Or. 66 (2005); *State v. Walker*, 192 Or. App. 535, 543–44, 86 P.3d 690, 694–95, *review denied*, 337 Or. 327 (2004).

⁶⁶⁹ *State v. Gaines*, 346 Or. 160, 172, 206 P.3d 1042, 1050–51 (2009).

⁶⁷⁰ As the Oregon Supreme Court said in *PGE*, “the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature’s intent.” 317 Or. 606, 610–11, 859 P.2d 1143, 1146 (1993).

must be capable of being effectuated by the wording of the statute.⁶⁷¹ If the text of the statute, when reasonably construed, cannot effectuate what the legislative history shows the legislature intended, then that history has no weight at all.⁶⁷²

Second, in general, the testimony of legislators will be given more weight than that of nonlegislators.⁶⁷³ This preference makes sense, as the intentions of the legislature are the focus of the interpretive effort. Still, as I've noted above, in some circumstances, the testimony of nonlegislators can prove quite useful. The key to ensuring weight will be given to testimony of nonlegislators is to show that the legislature actually relied on the statements of the nonlegislators.⁶⁷⁴ In the absence of that showing, courts are more likely to give little weight to such statements.⁶⁷⁵

Third, in the case of legislative history, more is always better. A single statement from a legislator will not often carry the day.⁶⁷⁶ It's important to remember that the focus of statutory construction is determining the intentions of the legislature as a whole, not just of selected members.⁶⁷⁷ As the court of appeals explained in *State v. Kelly*, "Cherry-picked quotations from single legislators or of nonlegislator witnesses, are likely to be given little weight, as the likelihood that such scraps of legislative history represent the views of

⁶⁷¹ *Gaines*, 346 Or. at 172–73, 206 P.3d at 1050–51.

⁶⁷² *Id.*; see also *State v. Rainey*, 294 Or. App. 284, 291, 431 P.3d 98, 102–03 (2018) (“[W]hatever the legislative history may show the legislature intended by the enactment of a statute, the wording ultimately enacted must be capable of carrying out that intention.”); *Suchi v. SAIF Corp.*, 238 Or. App. 48, 55, 241 P.3d 1174, 1177 (2010) (“Even assuming that the legislative history supported claimant’s interpretation, we are required not to construe a statute in a way that is inconsistent with its plain text.”), *review denied*, 350 Or. 231 (2011); *State v. Elvig*, 230 Or. App. 57, 61, 213 P.3d 851, 853 (2009) (rejecting an argument based on legislative history because the argument “has no basis in the statute’s text”).

⁶⁷³ See, e.g., *State v. Guzek*, 322 Or. 245, 260, 906 P.2d 272, 282 (1995) (explaining that a statement of a nonlegislator says little “about the intent of the Oregon Legislative Assembly as a whole”).

⁶⁷⁴ See, e.g., *Kohring v. Ballard*, 355 Or. 297, 311–12, 325 P.3d 717, 726–27 (2014) (“In some cases, however, it is appropriate to give greater weight to such legislative history, as when the nonlegislators were the drafters and principal proponents of a bill, and it is clear that the legislature relied on their explanations.”).

⁶⁷⁵ See *id.*

⁶⁷⁶ See, e.g., *Suchi*, 238 Or. App. at 55, 241 P.3d at 1177 (“[W]e generally are reluctant to place too much weight on a single statement of a single witness in a legislative hearing.”).

⁶⁷⁷ See, e.g., *State v. Kelly*, 229 Or. App. 461, 466, 211 P.3d 932, 934 (“[T]he purpose of resorting to legislative history is to aid the court in determining what the legislature as an institution intended the statute to mean.”), *review denied*, 347 Or. 446 (2009).

the institution as a whole is slim.”⁶⁷⁸ The more legislative history that can be brought to bear, the more likely the courts will give weight to it.⁶⁷⁹ At the same time, the less consistency there is to the legislative history, the less weight courts will be inclined to ascribe to it.⁶⁸⁰

Fourth, the more specific the legislative history, the better. Courts are more likely to be persuaded by legislative history that bears on a particular point in dispute, as opposed to evidence of more general legislative purposes.⁶⁸¹ The problem with legislative history that relates more generally to a statute’s purpose is that it leaves the court in the difficult spot of trying to determine the appropriate level of generality with which to describe that purpose.

c. The Absence of Legislative History

Sometimes, there just isn’t any legislative history to be found. This absence of legislative history can lead to the temptation to propose that certain inferences should be drawn from the silence. The argument goes something like this: the opposition’s proposed interpretation of the statute is preposterous because if the legislature had intended it, surely there would have been some indication of that intention in the legislative history. Given the absence of any legislative history on the point, we can rest assured that the legislature had no such intentions. The idea is sometimes referred to as a “dog that didn’t bark” argument, after the Sherlock Holmes story in which the great detective observes that the family dog must have known the thief, because it had failed to bark.⁶⁸²

⁶⁷⁸ *Id.*

⁶⁷⁹ *See, e.g., State ex rel. Or. State Treasurer v. Marsh & McLennan Cos.*, 353 Or. 1, 13–14, 292 P.3d 525, 531–32 (2012) (holding that testimony of multiple legislators from both houses was “consistent and compelling”).

⁶⁸⁰ *See, e.g., Conrady v. Lincoln County*, 260 Or. App. 115, 127–28, 316 P.3d 413, 419 (2013) (“Given the cross-cutting remarks on the House floor, we cannot say with any certainty what the House understood to be the effect of [the bill].”), *review denied*, 355 Or. 567 (2014).

⁶⁸¹ *See, e.g., Tran v. Bd. of Chiropractic Exam’rs*, 254 Or. App. 593, 606, 300 P.3d 169, 176 (rejecting testimony of witness because “even if the testimony were relevant, it would not be persuasive because it does not clearly address” the specific issue), *review denied*, 353 Or. 748 (2013).

⁶⁸² ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 349 (1930). The argument frequently surfaces in United States Supreme Court decisions. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (“We reject that construction because we are convinced that if Congress had such an intent . . . Members would have identified or mentioned it at some point in the unusually extensive legislative history”); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (“In a case where the construction of legislative language such as this makes so sweeping and so relatively

Resist the temptation to make the “dog that didn’t bark” argument; it’s not likely to work. In *Wyers v. American Medical Response Northwest, Inc.*,⁶⁸³ for example, one of the parties advanced this argument, which prompted the following retort from the Oregon Supreme Court:

At the outset, it relies on unrealistic assumptions about the legislative process and the omniscience of legislators. That is, it assumes that legislators are in a position to predict all the potential consequences of legislation and that they will always address them. Such an assumption ignores the fact that legislators often cannot be aware of every potential consequence of enacting the bills before them, as well as the fact that the press of time in legislative sessions of limited duration often does not provide legislators the opportunity to comment on all of a bill’s potential consequences. Moreover, drawing conclusions from silence in legislative history misapprehends the nature of legislative history itself, which often is designed not to explain to future courts the intended meaning of a statute, but rather to persuade legislative colleagues to vote in a particular way. Thus, for example, a proposed legislative change to the status quo might not prompt comment precisely because everyone understands that the law will have that effect or because supporters do not wish to draw attention to it.⁶⁸⁴

There are just too many other possible explanations for silence in the legislative record to support the argument that silence necessarily implies legislative rejection of any particular interpretation.

C. Second-Level Analysis

In the majority of cases, a careful analysis of the text in context and in light of applicable rules of textual construction and the legislative history will reveal the meaning of a statute most likely intended or understood by the legislature.⁶⁸⁵ In a few cases, though, the statute will remain stubbornly ambiguous; in such cases, courts will resort to

unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”).

⁶⁸³ 360 Or. 211, 377 P.3d 570 (2016).

⁶⁸⁴ *Id.* at 227, 377 P.3d at 579; *see also* *State v. Carlton*, 361 Or. 29, 43, 388 P.3d 1093, 1101 (2017) (“[S]ilence in the legislative history . . . does not inform our inquiry.”); *Baker v. City of Lakeside*, 343 Or. 70, 85, 164 P.3d 259, 267 (2007) (Durham, J., concurring) (“Legislative silence about the intent underlying a legislative proposal is just that: silence.”). For more in-depth analysis of the problems with reasoning from silence in legislative history, see generally Anita S. Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1, 21–39 (2016).

⁶⁸⁵ For example, Professor Abbe Gluck found in her examination of Oregon statutory construction decisions that the Oregon Supreme Court resolved the “vast majority” of its statutory construction on the basis of textual analysis. Gluck, *supra* note 2, at 1779.

certain canons or maxims of construction that serve to break the interpretive logjam.⁶⁸⁶ *PGE* denominated these rules “general maxims” of construction.⁶⁸⁷ I’ve never understood where that particular term came from. Most authorities draw a distinction between “textual” canons or maxims—those we’ve already encountered, which deal with assumptions about language, syntax, word order, and the like—and “substantive” canons or maxims—those that have to do with the substance of the statute at issue.⁶⁸⁸

These substantive canons are usually judicially created, based either on assumptions about what judges think the legislature would prefer or on judicial preferences. An example of a substantive canon based on assumptions about what judges think are legislative preferences is the rule that when a statute is reasonably capable of more than one construction, and one such construction would lead to an absurd result, courts will avoid that construction.⁶⁸⁹ The underlying rationale is that the legislature presumably would want courts to make this choice.⁶⁹⁰ An example of a substantive canon based on assumed judicial preferences is the rule that penal statutes should be construed leniently.⁶⁹¹ As we’ll see, that rule is rooted both in historical aversion to legislative overkill in criminal sentencing and in modern notions of due process and fair notice.⁶⁹²

There is no canon that courts can invoke to determine which substantive canon applies.⁶⁹³ Moreover, the fact that several of the substantive canons are based on naked judicial preferences has led to a great deal of criticism from scholars aimed especially at textualists, who are accused of using the more policy-based canons as ways to get around the strictures of their approach to statutory construction.⁶⁹⁴ This

⁶⁸⁶ *State v. Gaines*, 346 Or. 160, 172, 206 P.3d 1042, 1051 (2009).

⁶⁸⁷ *PGE v. Bureau of Labor & Indus.*, 317 Or. 606, 612, 859 P.2d 1143, 1146–47 (1993).

⁶⁸⁸ *See, e.g.*, Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017).

⁶⁸⁹ *See infra* text at notes 698–728.

⁶⁹⁰ *Id.*

⁶⁹¹ *See infra* text at notes 799–811.

⁶⁹² *Id.*

⁶⁹³ *See, e.g.*, *State v. Stamper*, 197 Or. App. 413, 426, 106 P.3d 172, 179 (“As we have endeavored to demonstrate, depending on which rules are given emphasis, different readings of the relevant statutes may be justified. And the law neglects to supply a rule for determining which rules should prevail.”), *review denied*, 339 Or. 230 (2005).

⁶⁹⁴ Krishnakumar, *supra* note 688, at 826–27 (“There is a popular belief among statutory interpretation scholars that substantive canons of statutory construction—that is, policy-based background norms or presumptions such as the rule of lenity and the canon of constitutional avoidance—act as an ‘escape valve’ that helps textualist judges eschew, or

criticism strikes me as having less force in Oregon, where there are relatively few substantive canons that the courts ever invoke and relatively few cases in which courts invoke them.⁶⁹⁵ In fact, several of the better-known substantive canons have been expressly abandoned in Oregon.⁶⁹⁶

1. *The Unreasonable Results Canon*

If a statute is reasonably capable of at least two different constructions, and one of those two constructions would lead to an absurd result, courts will commonly assume that the legislature didn't intend such an absurdity and will opt for the other interpretive alternative. This rule is based on the assumption that the legislature intends its enactments to accomplish reasonable objectives and to not lead to absurd results.⁶⁹⁷

In *Schutz v. La Costita III, Inc.*, for example, the plaintiff drank past the point of intoxication at a bar and then was severely injured when she drove home, traveling in the wrong direction on Interstate 5.⁶⁹⁸ She brought an action for negligence against the bar for having served her alcohol when she had already consumed too much and for failing to prevent her from driving home.⁶⁹⁹ The bar moved to dismiss on the basis of a statute providing that a plaintiff who “voluntarily consumes alcoholic beverages” does not have a claim against the person who

‘mitigate,’ the rigors of textualism.”); see also Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 527 (1997–98) (“[T]extualist judges selectively prefer clear-statement rules that favor states’ rights and private economic interests, and usually narrow a statute’s meaning.”); Manning, *supra* note 8, at 125 (Canons such as avoidance “mitigate the textualists’ strict focus on the conventional meaning of the enacted text.”).

⁶⁹⁵ For example, professor Abbe Gluck found that, during a ten-year period from 1999–2009, the Oregon Supreme Court applied the PGE framework in 185 cases and reached a substantive canon of construction in a single instance. Gluck, *supra* note 2, at 1779.

⁶⁹⁶ See *infra* text at note 800.

⁶⁹⁷ See, e.g., Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1012 (2006) (“[C]ourts presume that the legislature wants the judiciary to alleviate the inevitable absurdities that would otherwise result from the application of general rules to unforeseen circumstances as a normal function of the interpretive process.”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389 (2003) (“The standard justification for the absurdity doctrine is straightforward. In a system marked by legislative supremacy (within constitutional boundaries), federal courts act as faithful agents of Congress.”).

⁶⁹⁸ 256 Or. App. 573, 575, 302 P.3d 460, 461 (2013), *abrogated by* 288 Or. App. 476 (2017), *review allowed*, 362 Or. 794 (2018).

⁶⁹⁹ *Id.*

served them, even if the plaintiff was visibly intoxicated.⁷⁰⁰ The plaintiff argued that she had not “voluntarily” consumed alcoholic beverages because she had become too intoxicated and lacked capacity to exercise judgment.⁷⁰¹ The bar took the position that the word “voluntary” refers not to capacity but to an absence of coercion, trickery, or constraint.⁷⁰²

The Oregon Court of Appeals noted that both senses of the word “voluntary” find support in the dictionary, but that the legislative history revealed the statute had been enacted in response to an Oregon Supreme Court decision, *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, which held that a bar could be held responsible for negligently serving a visibly intoxicated patron.⁷⁰³ That history showed that the legislature intended to ensure that a patron may not sue a bar for injuries resulting from the patron’s “own voluntary intoxication.”⁷⁰⁴ The court then added:

More significantly—indeed, dispositively—we rely on the precept that we should avoid interpreting a statute so as to produce an absurd result, a precept that “is best suited for helping the court to determine which of two or more plausible meanings the legislature intended. In such a case, the court will refuse to adopt the meaning that would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole.” We cannot believe that, in an attempt to negate the holding in *Fulmer*—that the server of an alcoholic beverage to a visibly intoxicated patron can incur liability for the patron’s injuries—the legislature would have enacted a statute that provided immunity for serving visibly intoxicated patrons but not for serving patrons who had crossed the (invisible) line between visible intoxication and volition-negating intoxication. Nor would legislators have enacted a statute that required factfinders in cases such as this to determine whether, and to what extent, a plaintiff’s injuries were the result of alcohol consumed before the loss (invisible) of volition and alcohol consumed afterward.⁷⁰⁵

The absurd results canon is one that parties often invoke, but one that courts rarely apply, for essentially two reasons. First, the canon puts judges in the position of second-guessing the reasonableness of a

⁷⁰⁰ *Id.* at 577, 302 P.3d at 462 (quoting OR. REV. STAT. § 471.565(1) (2011)) (emphasis omitted).

⁷⁰¹ *Id.* at 575, 302 P.3d at 461.

⁷⁰² *Id.* at 579, 302 P.3d at 463.

⁷⁰³ *Id.* at 578–79, 302 P.3d at 463–64 (citing *Fulmer v. Timber Inn Rest. & Lounge, Inc.*, 330 Or. 413, 9 P.3d 710 (2000)).

⁷⁰⁴ *Id.* at 579–82, 302 P.3d at 464–66.

⁷⁰⁵ *Id.* at 583, 302 P.3d at 465–66 (citation omitted).

statute as a matter of policy.⁷⁰⁶ That's an uncomfortable position for courts. One person's absurdity is another's sound public policy. In *State v. Vasquez-Rubio*,⁷⁰⁷ for instance, the statute at issue provided that a person commits the crime of unlawful possession of a machine gun if he or she "knowingly possesses any machine gun . . . not registered as required under federal law."⁷⁰⁸ The issue was whether that statute required the state to prove, as an element of the offense, that the defendant had not registered the machine gun.⁷⁰⁹ The state argued that it would be absurd to interpret the law as requiring the state to prove a negative and, moreover, that the state could not get access to the information.⁷¹⁰ The Oregon Supreme Court rejected the state's argument.⁷¹¹ The statute, the court explained, was unambiguous and required the state to prove lack of registration as an element.⁷¹² But, in any event, the state had failed to demonstrate the absurdity of such an interpretation of the statute. Although it may be difficult for the state to obtain the information, the state had failed to demonstrate that obtaining the information was impossible.⁷¹³

The Oregon courts have not articulated a test for determining whether a given interpretation is truly "absurd," but cases like *Vasquez-Rubio*—which mentioned an absence of proof of outright impossibility of enforcement—suggest that it's a tough sell.⁷¹⁴ It strikes me that, to qualify for the absurd results rule, the statutory interpretation at issue would, at the least, have to be one that no reasonable person could support.

Second, the absurd results canon applies only in those rare cases in which a statute is persistently ambiguous, even after an examination of

⁷⁰⁶ This has led some critics of the absurd results canon to question its legitimacy, because it involves courts usurping the legislative function. *See, e.g.,* Manning, *The Absurdity Doctrine*, *supra* note 697, at 2391 ("The Constitution's sharp separation of lawmaking from judging reflects a rule-of-law tradition that seeks to preclude legislatures from making ad hoc exceptions to generally worded laws. By asking judges to carve out statutory exceptions on the ground that the legislature would have done so, the absurdity doctrine calls on judges to approximate the very behavior that the norm of separation seeks to forbid.").

⁷⁰⁷ 323 Or. 275, 917 P.2d 494 (1996).

⁷⁰⁸ *Id.* at 277, 917 P.2d at 494 (quoting OR. REV. STAT. § 166.272 (1991)).

⁷⁰⁹ *Id.*

⁷¹⁰ *Id.* at 282, 917 P.2d at 497.

⁷¹¹ *Id.*

⁷¹² *Id.* at 282–83, 917 P.2d at 497.

⁷¹³ *Id.* at 283 n.4, 917 P.2d at 497 n.4.

⁷¹⁴ *See id.*

the text in context and in light of relevant legislative history.⁷¹⁵ If the statute is unambiguous, it means what it says, regardless of how absurd it might appear. As the supreme court said in *Vasquez-Rubio*,

When the legislative intent is clear from an inquiry into text and context, or from resort to legislative history . . . it would be inappropriate to apply the absurd-result maxim. If we were to do so, we would be rewriting a clear statute based solely on our conjecture that the legislature could not have intended a particular result.⁷¹⁶

This holding, of course, is consistent with the general textual focus of statutory construction after *PGE* and *Gaines*.

Some judges have voiced frustration with this aspect of the absurd results rule. In *Young v. State*, for instance, the statute at issue did not include state management employees in its list of public employees who are exempt from overtime compensation, which was pretty clearly a legislative oversight.⁷¹⁷ The Oregon Court of Appeals nevertheless concluded that it was required to read the statute as written; there was simply no text that, when reasonably interpreted, permitted a different conclusion.⁷¹⁸ Judge Haselton reluctantly concurred, but only after observing,

⁷¹⁵ See, e.g., *Coos Waterkeeper v. Port of Coos Bay*, 363 Or. 354, 371–72, 423 P.3d 60, 70 (2018) (“Petitioners also argue that DSL’s ‘lopsided’ interpretation is unlawful because it is ‘absurd.’ But without ambiguity as to the legislative intent after consulting the text, context, and legislative history, we do not reach canons of construction.”); *Comcast Corp. & Subsidiaries v. Dep’t of Revenue*, 363 Or. 537, 550, 423 P.3d 705, 713 (2018) (citing *Vasquez-Rubio*, 323 Or. at 282–83, 917 P.2d at 494); *Greenway v. Parlanti*, 245 Or. App. 144, 150, 261 P.3d 69, 72 (2011) (“We have previously determined that a court cannot subvert the plain meaning of a statute, even to avoid a supposedly absurd result.”); *State v. Chilson*, 219 Or. App. 136, 140, 182 P.3d 241, 242–43 (“If this were a jurisdiction where we could construe a statute so as to avoid the plainly absurd results of a literal interpretation that the legislature could not possibly have intended—that is, every other jurisdiction in the United States—the outcome of this case would be a simple and straightforward affirmance. . . . Not here. The legislature and the Supreme Court have foreclosed that option.”), *review denied*, 344 Or. 670 (2008); *Folkers v. Lincoln Cty. Sch. Dist.*, 205 Or. App. 619, 626–27, 135 P.3d 373, 377 (2006) (the absurd results rule “is, under *PGE*, applicable only if the intent of the legislature cannot be discerned from the statutory text and context or from the legislative history”); *Freightliner LLC v. Holman*, 195 Or. App. 716, 722, 98 P.3d 1165, 1168 (2004) (“[E]mployer argues that ORS 656.807(1) as interpreted by the board creates a potentially limitless statute of limitations and that no rational legislature could have intended such an absurd result. That argument, however, must give way to the statute’s textual indicators and its legislative history.”); *Brundridge v. Bd. of Parole & Post-Prison Supervision*, 192 Or. App. 648, 656, 87 P.3d 703, 707 (“[W]here a term has an unambiguous meaning, the fact that it could lead to an absurd result does not justify interpreting it to mean something else.”), *review denied*, 337 Or. 327 (2004).

⁷¹⁶ 323 Or. at 283, 917 P.2d at 497.

⁷¹⁷ 161 Or. App. 32, 42–43, 983 P.2d 1044, 1050 (1999) (Haselton, J., concurring).

⁷¹⁸ *Id.* at 36, 983 P.2d at 1047 (majority opinion).

If we are to live, sensibly, with *PGE*, the “absurd results” principle must be available at the so-called “first level,” not the “third level,” of the analysis. That is, there must be an escape hatch for those rare circumstances in which any reasonable person would conclude, notwithstanding unambiguous text, that the legislature could not possibly have intended the result that the text ostensibly yields.⁷¹⁹

The courts, however, have not been entirely consistent about this aspect of the absurd results canon. As I’ve mentioned above, there are a number of cases before *PGE* suggesting that the absurd results rule may justify departing from the text of a statute as enacted.⁷²⁰ But even after *PGE*, the court has mentioned the rule at the very outset of its analysis, not as a tie-breaking canon to resolve stubborn ambiguity, but as a way to frame possible, competing constructions. The statute in *Marshall v. SAIF Corp.*,⁷²¹ for example, provided that no workers’ compensation claim may be allowed unless the record included “evidence in addition to the evidence of the claimant.”⁷²² The claimant supported her claim with her own testimony and the report of her treating physician.⁷²³ The insurer argued that the physician’s report did not qualify as “corroborating evidence” because it was based on the claimant’s testimony.⁷²⁴ The Oregon Supreme Court rejected this argument.⁷²⁵ After quoting from the statute and citing *PGE*, the court said,

It is clear that the legislature could not have intended the phrase “evidence of the claimant” to mean all the evidence a claimant presents at a workers’ compensation hearing, for that would lead to the absurd result that no claimant could ever meet the burden because any evidence offered as corroboration would, itself, be “evidence of the claimant.” . . . The text, therefore, suggests that something more is required . . .⁷²⁶

The court went on to conclude that the term “corroborative evidence” is any evidence “independent of and apart from claimant’s own statements” that corroborates compensability.⁷²⁷

⁷¹⁹ *Id.* at 42–43, 938 P.2d at 1050 (Haselton, J., concurring).

⁷²⁰ *See supra* text at notes 186–201.

⁷²¹ 328 Or. 49, 55, 968 P.2d 1281, 1285 (1998).

⁷²² *Id.* (quoting OR. REV. STAT. § 656.128(3) (1997)).

⁷²³ *Id.* at 58, 968 P.2d at 1286.

⁷²⁴ *Id.* at 58, 968 P.2d at 1287.

⁷²⁵ *Id.*

⁷²⁶ *Id.* at 56, 968 P.2d at 1285.

⁷²⁷ *Id.* at 56–57, 968 P.2d at 1286.

There's no question that the court was ultimately correct, but its invocation of the absurd results rule is impossible to square with what the court said in *Vasquez-Rubio*. Advocates should be aware of cases like *Marshall*, but they shouldn't expect too much from them.

2. The Avoidance Canon

In *Vokoun v. City of Lake Oswego*, the plaintiffs brought an inverse condemnation claim against the city based on property damage that resulted when inadequate city drainage maintenance led to a landslide during a storm.⁷²⁸ The city invoked the \$50,000 liability limitation of the Oregon Tort Claims Act in effect at the time, which applied to claims for “damage to or destruction of property.”⁷²⁹ The plaintiffs argued that the statute was not intended to apply to inverse condemnation claims.⁷³⁰ The court of appeals acknowledged that both parties had a point.⁷³¹

On the face of things, the plaintiffs' action could readily be characterized as a claim for damage to property. On the other hand, it could also reasonably be asserted that the claim was not a tort claim at all, but rather a claim to enforce the federal and state constitutional guarantees against unlawful takings of property. The court found no relevant legislative history, so it turned to a canon of construction: when faced with competing reasonable constructions of a statute, and one construction raises constitutional issues, courts will favor the construction that avoids such constitutional issues.⁷³² In this case, the court explained, imposing a liability limit on an inverse condemnation claim raises a constitutional question whether such a limit would run afoul of the constitutional guarantee of fair compensation for takings of property.⁷³³ *Vokoun* thus illustrates one of the classic substantive canons of construction, known as the “avoidance canon.”⁷³⁴

⁷²⁸ 189 Or. App. 499, 501, 76 P.3d 677, 679 (2003), *review denied*, 336 Or. 406 (2004).

⁷²⁹ *Id.* at 509, 76 P.3d at 683 (quoting OR. REV. STAT. § 30.370(1)(a) (1999)).

⁷³⁰ *Id.* at 510, 76 P.3d at 683.

⁷³¹ *See id.* at 510–11, 76 P.3d at 684.

⁷³² *Id.* at 511, 76 P.3d at 684.

⁷³³ *Id.* at 510–11, 76 P.3d at 684.

⁷³⁴ *See also, e.g.*, *State v. Stoneman*, 323 Or. 536, 540 n.5, 920 P.2d 535, 538 n.5 (1996); *State v. Wesley*, 254 Or. App. 697, 708, 295 P.3d 1147, 1152, *review denied*, 354 Or. 62 (2013); *State v. Lafferty*, 240 Or. App. 564, 584, 247 P.3d 1266, 1277 (2011); *Pete's Mountain Homeowners Ass'n v. Or. Water Res. Dep't*, 236 Or. App. 507, 522, 238 P.3d 395, 403 (2010); *State v. Bordeaux*, 220 Or. App. 165, 175–76, 185 P.3d 524, 530 (2008).

Although the avoidance canon is recognized as a classic—the United States Supreme Court has referred to it as being “beyond debate”⁷³⁵—the canon resists easy explanation.⁷³⁶ It is frequently justified on the ground that it accords with what the legislature most likely would have intended.⁷³⁷ The underlying assumption is that the legislature intended to color within constitutional lines and would prefer that the courts give it the benefit of the doubt. This assumption is dubious.⁷³⁸ The legislature may not even have thought about the constitutional implications of its enactment, or it may have been aware of those implications and intended to force the matter.

Perhaps a more defensible rationale for the avoidance rule is one of judicial restraint. Regardless of whether the legislature may have thought about the constitutional implications of a statute’s enactment, courts ought to tread lightly to minimize the possibility of conflict between the branches.⁷³⁹

Complicating the discussion is the fact that there is a lack of agreement about how the avoidance canon works. In particular, there

⁷³⁵ Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

⁷³⁶ There are abundant scholarly writings about the canon. A sampling of notable articles on the subject includes Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015); Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401 (2002); William K. Kelly, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71; Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

⁷³⁷ Justice Scalia invoked this justification for the canon in *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005), asserting that the canon rests “on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts” and thus is “a means of giving effect to congressional intent,” an ironic assertion coming from one who asserted that congressional intent is irrelevant to statutory interpretation.

⁷³⁸ And, for that reason, the justification has been roundly criticized. See, e.g., HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 210 (1967).

⁷³⁹ See, e.g., SCALIA & GARNER, *supra* note 48, at 249 (“A more plausible basis for the rule is that it represents judicial policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly, or perhaps a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 468–69 (1989) (stating that the avoidance canon is a “natural outgrowth of the system of separation of powers” that “minimizes interbranch conflict”).

is disagreement about the level of constitutional difficulty that is deemed sufficient to trigger the canon. Some courts hold that the canon applies only when a particular interpretation renders the statute under consideration unconstitutional.⁷⁴⁰ Justice Oliver Wendell Holmes formulated the rule this way: “[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”⁷⁴¹ In order for the rule to apply, one of the competing constructions must be unconstitutional. This version of the avoidance rule is sometimes known as “classical” avoidance.⁷⁴²

Others say that the avoidance canon applies when there is any possibility of constitutional infirmity posed by an alternative interpretation. How much of a possibility of constitutional infirmity required to trigger the rule is not clear,⁷⁴³ but something short of actual unconstitutionality is sufficient.⁷⁴⁴

Oregon cases tend to reflect the latter, modern approach—that the avoidance canon applies when a competing construction of an ambiguous statute might be unconstitutional. Some of the Oregon cases speak of a “likelihood” of unconstitutionality.⁷⁴⁵ Others invoke the canon if there is “even a tenable argument of unconstitutionality.”⁷⁴⁶ But none requires actual unconstitutionality as a prerequisite for

⁷⁴⁰ See, e.g., *Hooper v. California*, 155 U.S. 648, 657 (1895) (“The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”).

⁷⁴¹ *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

⁷⁴² See generally Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

⁷⁴³ Although referred to as a “modern” approach, it actually dates back at least to *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”).

⁷⁴⁴ See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

⁷⁴⁵ *State v. Lanig*, 154 Or. App. 665, 674, 963 P.2d 58, 63 (1998) (rejecting proposed construction of ballot measure that “likely would set the measure on a collision course with state and federal constitution[s]”); see also *State v. Duggan*, 290 Or. 369, 373, 622 P.2d 316, 318 (1981) (rejecting interpretation that “may well” be unconstitutional).

⁷⁴⁶ *State v. Bordeaux*, 220 Or. App. 165, 176, 185 P.3d 524, 530 (2008) (quoting *State v. Rodriguez*, 217 Or. App. 24, 34, 175 P.3d 471, 477 (2007)); see also *Westwood Homeowners Ass’n v. Lane County*, 318 Or. 146, 160, 864 P.2d 350, 359 (1993) (rejecting proposed interpretation that “arguably would infringe on the constitutional rights” of parties), *adhered to as modified on reconsideration*, 318 Or. 327, 866 P.2d 463 (1994).

application of the avoidance canon. This rejection of “classical” avoidance seems to be in keeping with the rationale of restraint as the underlying justification for the avoidance rule.

There is also disagreement about how much judicial intervention the avoidance canon justifies. Some—probably most—argue that the canon provides a mechanism for selecting from competing and reasonable interpretations of statutory wording.⁷⁴⁷ Others, though, have invoked the canon as a justification for embarking on a much more vigorous, wholesale rewriting of statutes in the name of saving them from possible or probable unconstitutionality.⁷⁴⁸ Oregon cases again reflect the former view.⁷⁴⁹ As Justice Linde explained for the court in *State v. Robertson*, any saving construction must “be attributed to the legislature with reasonable fidelity to the legislature’s words and apparent intent.”⁷⁵⁰

3. *The Natural Rights Canon*

ORS 174.030 provides that “[w]here a statute is equally susceptible of two interpretations, one in favor of a natural right and the other against it, the former is to prevail.”⁷⁵¹ This rule dates back to the original Deady Code and has not been changed since.⁷⁵² It’s a relic of nineteenth-century thinking that has not been invoked by the courts in more than a half-century.⁷⁵³ Even when the rule was invoked, it was

⁷⁴⁷ See, e.g., *Del. & Hudson Co.*, 213 U.S. at 407 (“It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one . . . it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.”).

⁷⁴⁸ The Roberts Court has engaged in this sort of wholesale rewriting of statutes in the name of avoiding unconstitutionality in a number of cases. For a critical assessment of those cases, see generally Katyal & Schmidt, *supra* note 736.

⁷⁴⁹ See, e.g., *State v. Kitzman*, 323 Or. 589, 602, 920 P.2d 134 (1996) (“[W]hen one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning.”).

⁷⁵⁰ 293 Or. 402, 411, 649 P.2d 569, 575 (1982).

⁷⁵¹ OR. REV. STAT. § 174.030 (2017).

⁷⁵² THE ORGANIC AND OTHER GENERAL LAWS OF OREGON 1843–1872, ch. VIII, §§ 692 (1874).

⁷⁵³ *PGE* mentioned ORS 174.030 as an example of interpretive maxims appearing in statutes, but it did not apply the rule. 317 Or. 606, 612, 859 P.2d 1143, 1147. Justice Ed Fadeley cited it in a dissenting opinion in *State ex rel. Roberts v. McConville*, 310 Or. 283, 289, 797 P.2d 365, 368 (1990) (Fadeley, J., dissenting). Justice Dean Bryson also cited the rule in his dissent in *McAlmond v. Myers*, 262 Or. 521, 538, 500 P.2d 457, 465 (1972) (Bryson, J., dissenting). And Justice Lamar Tooze invoked it in his dissenting opinion in *State v. Kuhnhausen*, 201 Or. 478, 559–60, 272 P.2d 225, 250 (1954) (Tooze, J., dissenting).

not clear that the rule actually applied. *Buell v. State Industrial Accident Commission*⁷⁵⁴ concerned the extent to which the workers' compensation law permitted an appeal from certain orders of the State Industrial Accident Commission. The court found the statute ambiguous and the legislative history unavailing. So the court concluded that it was obliged to construe the statute in favor of the worker.⁷⁵⁵ The court noted that "ORS 174.030 requires a construction of ambiguous statutory language that will favor 'natural right' and the avoidance of harsh results."⁷⁵⁶ The court acknowledged that "[w]hile there is no 'natural' right to receive compensation, there is a strong legislative policy in favor of it."⁷⁵⁷

The *Buell* case reveals the major challenge of applying this particular rule: identifying the "natural right" in favor of which the court should interpret an ambiguous statute. Defining the scope of natural rights has occupied scholars for many years in the context of the Ninth Amendment to the Federal Constitution, which provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁷⁵⁸ Those "other" rights are commonly understood to be "natural rights."⁷⁵⁹ But there's no consensus about what those natural rights are.⁷⁶⁰ Describing—much less attempting to weigh in on—the debate over the

⁷⁵⁴ 238 Or. 492, 395 P.2d 442 (1964).

⁷⁵⁵ *Id.* at 496–97, 395 P.2d at 444.

⁷⁵⁶ *Id.* at 498, 395 P.2d at 444.

⁷⁵⁷ *Id.*

⁷⁵⁸ See generally DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* (2007); KURT T. LASH, *THE FORGOTTEN HISTORY OF THE NINTH AMENDMENT* (2009). In particular, scholars debate the original meaning of the amendment. See, e.g., Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011); Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 CATO SUP. CT. REV. 13; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

⁷⁵⁹ See, e.g., Scott Rosenow, Comment, *The Ninth Amendment: Textual Support for Marriage Freedom*, 28 WIS. J.L. GENDER & SOC'Y 39, 59 (2013) ("James Madison introduced the Ninth Amendment to calm concerns that the Bill of Rights would be read as exhaustive and thus allow unenumerated individual natural rights to be violated . . ."); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 401 (2004) ("[T]here is no textual reason and little historical reason to believe that the 'other rights' of the Ninth Amendment did not include natural rights.").

⁷⁶⁰ Some scholars, for example, argue for an "alternative" reading of the Ninth Amendment, which holds that the "other" rights are not those derived from sources beyond the Constitution itself. See, e.g., Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 68 (1996).

natural rights protected by the Ninth Amendment and its state counterpart, article I, section 33, of the Oregon Constitution, is beyond the scope of this Article. My point is simply to suggest that anyone thinking about invoking ORS 174.030 in a statutory construction case had best be prepared to explain the source of the “natural right” that is the basis for favoring one interpretation over another.

4. The Rule That Statutes in Derogation of Common Law Are Strictly Construed

As we’ve seen, the common law is considered part of the context of a statute, and the legislature is presumed to have been aware of that common law when enacting any given statute. The derogation canon goes a big step further: it doesn’t just presume that the legislature was aware of the common law but also presumes that the legislature didn’t intend to change the common law. The derogation canon holds that a statute that arguably alters the common law should be given the narrowest interpretation, thus preserving as much of the common law as possible.⁷⁶¹

The derogation canon is rooted in longstanding judicial hostility to legislation.⁷⁶² Lord Coke remarked, “The wisdom of the judges and sages of the law has always suppressed new and subtle inventions in derogation of the common law.”⁷⁶³ But this hostility to legislation was especially vigorous in nineteenth-century America, when judges viewed state legislatures as corrupt institutions and the common law as having been based on reason, not political bargaining. Roscoe Pound, writing at the turn of the twentieth century, noted “the indifference, if not contempt, with which [legislation] is regarded by courts and lawyers.”⁷⁶⁴ It is “fashionable,” he said, for courts “to preach the superiority of judge-made law.”⁷⁶⁵

⁷⁶¹ See generally R. Pery Sentell, Jr., *Statutes in Derogation of the Common Law: In the Georgia Supreme Court*, 53 MERCER L. REV. 41 (2001).

⁷⁶² See, e.g., SCALIA & GARNER, *supra* note 48, at 318 (“It has often been said that statutes in derogation of the common law are to be strictly construed. That is a relic of the courts’ historical hostility to the emergence of statutory law.”).

⁷⁶³ Quoted in *Pillsbury Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 425 N.W.2d 244, 250 (Minn. Ct. App. 1988) (quoting *Francis v. W. Union Tel. Co.*, 59 N.W. 1078, 1081 (Minn. 1894)).

⁷⁶⁴ Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908).

⁷⁶⁵ *Id.* at 383–84.

That judicial hostility to legislation continued well into the twentieth century. And, in fact, the canon has its defenders to this day.⁷⁶⁶ In Oregon, the courts invoked it up through the 1970s.⁷⁶⁷ Beginning in the 1980s, the courts began to recognize that, whatever the arguments in favor of judicial hostility to legislation in earlier eras, those arguments no longer apply. The leading decision is *Beaver v. Pelett*, in which Justice Hans Linde observed of the derogation canon that “[t]his formula, expressing in part resistance to changes in existing law and in part the profession’s historical preference for caselaw over legislation, is long overdue to be put to rest.”⁷⁶⁸ Linde pointed out that, in fact, practically every statute “derogates” prior law in some way or another, and the idea that courts should place artificial constraints on the interpretation of statutes was at odds with the basic objective of determining legislative intent.⁷⁶⁹ Since *Beaver*, the Oregon courts have stated that they no longer apply the derogation canon.⁷⁷⁰ The legislature has even agreed, adopting a statute concerning the interpretation of adoption laws that declares, “The rule that statutes in derogation of common law are to be strictly construed does not apply to the adoption laws of this state.”⁷⁷¹ For some reason, though, lawyers

⁷⁶⁶ Or at least a version of the canon. I’m not aware of anyone who defends the sort of outright hostility to legislation that characterized nineteenth-century American judging. But some argue that at least a more moderate version of the canon is defensible. Scalia and Garner, for instance, argue that a statute should be construed to alter the common law “only when that disposition is clear.” SCALIA & GARNER, *supra* note 48, at 318. In their view, a “fair construction” of a statute “ordinarily disfavors change.” *Id.* Similarly, Professor David Shapiro argues that the canon “should be viewed more sympathetically as part of a larger picture—a picture that focuses . . . on the importance of continuity as a factor in the balance.” David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992).

⁷⁶⁷ See, e.g., *Naber v. Thompson*, 274 Or. 309, 311, 546 P.2d 467, 468 (1976) (“It is a cardinal rule of statutory construction that statutes in derogation of a common law right must be strictly construed.”); *Marsh v. McLaughlin*, 210 Or. 84, 89, 309 P.2d 188, 190 (1957) (“We must therefore look to some legislative enactment of state or city as the basis for liability, bearing in mind that statutes in derogation of the common law are to be strictly construed.”); *Smith v. Meier & Frank Inv. Co.*, 87 Or. 683, 686, 171 P. 555, 556 (1918) (“It is axiomatic that statutes in derogation of the common law must be construed strictly.”).

⁷⁶⁸ 299 Or. 664, 668–69, 705 P.2d 1149, 1151 (1985).

⁷⁶⁹ *Id.*

⁷⁷⁰ See, e.g., *State v. Lanig*, 154 Or. App. 665, 676, 963 P.2d 58, 64 (1998) (citing derogation canon as example of those “that reflect a fundamental judicial hostility to legislation [which] appropriately may be regarded as relics of a view that no longer survives”).

⁷⁷¹ OR. REV. STAT. § 109.305(1) (2017).

continue to cite the derogation canon in statutory construction cases. Don't be one of those lawyers.⁷⁷²

5. *The Rule That Remedial Statutes Are Broadly Construed*

Another age-old, substantive canon of construction is one that provides that “remedial” statutes are to be liberally, or broadly, construed.⁷⁷³ As often as the rule gets cited, it’s surprisingly difficult to nail down precisely where the rule came from and what it’s supposed to accomplish. Two problems in particular haunt the rule and its application.

First, there is the problem of determining which statutes the canon applies to. What is a “remedial” statute? Practically all statutes are remedial in the sense that they provide remedies. Early on, Blackstone wrestled with this issue and proposed that “remedial” statutes are limited to those that are enacted to address inadequacies of the common law.⁷⁷⁴ Oregon cases appear to define “remedial” more broadly. Statutes pertaining to garnishment of wages to satisfy a debt,⁷⁷⁵ workers’ compensation benefits,⁷⁷⁶ interest and penalties for delinquent taxpayers,⁷⁷⁷ the rights and property of married women,⁷⁷⁸ unemployment compensation,⁷⁷⁹ relief from judgment,⁷⁸⁰

⁷⁷² See, e.g., *Ass’n of Unit Owners of Bridgeview Condos. v. Dunning*, 187 Or. App. 595, 609 n.3, 69 P.3d 788, 796 n.3 (2003) (“We wish that parties would stop invoking that canon of construction. It is an anachronism reflecting a nineteenth century preference for case law over legislation, which the Supreme Court has stated ‘is long overdue to be put to rest.’” (quoting *Beaver*, 299 Or. at 668–69, 703 P.3d at 1150–51)).

⁷⁷³ See generally NORMAN J. SINGER & J.D. SHAMBLE SINGER, *supra* note 115, at § 60:2 (“[I]f a statute is considered remedial, it should be given a liberal interpretation and should be construed to give the terms used the most extensive meaning to which they are reasonably susceptible.”).

⁷⁷⁴ Blackstone said that statutes “are either declaratory of the common law, or remedial of some defects therein.” 1 WILLIAM BLACKSTONE, COMMENTARIES *86.

⁷⁷⁵ *Crites v. Bede*, 86 Or. 460, 463, 168 P. 941, 942 (1917).

⁷⁷⁶ *Russell v. State Accident Ins. Fund*, 29 Or. App. 295, 300, 563 P.2d 738, 741 (1977), *rev’d*, 281 Or. 353, 574 P.2d 653 (1978).

⁷⁷⁷ *State ex rel. Thompson v. Marion County*, 117 Or. 426, 428, 243 P. 558, 558 (1926).

⁷⁷⁸ *Velten v. Carmack*, 23 Or. 282, 288, 31 P. 658, 660 (1892).

⁷⁷⁹ *Puget Sound Bridge & Dredging Co. v. State Unemployment Comp. Comm’n*, 168 Or. 614, 620–21, 126 P.2d 37, 40 (1942).

⁷⁸⁰ *Wells v. Wells*, 7 Or. App. 243, 245–46, 490 P.2d 213, 214 (1971), *aff’d*, 262 Or. 44 (1972).

professionalization of fire fighters,⁷⁸¹ mechanics' liens,⁷⁸² civil procedure,⁷⁸³ and stray animals⁷⁸⁴—to pick a handful of examples—all have been classified as remedial for the purposes of triggering the liberal construction rule. It's hard to imagine what is not a “remedial” statute.

Second, there is the problem of explaining how the canon works. What does it mean to give a statute a “liberal” construction? There are cases that frame the rule in terms of a command that a remedial statute must be liberally construed. This framing has led some to argue that the rule applies at the outset of the interpretive process.⁷⁸⁵ The Oregon cases take a much narrower view: the remedial statutes rule permits courts to choose between alternative reasonable interpretations when textual and legislative history analysis is unavailing.

The court of appeals addressed just that point in *Strader v. Grange Mutual Insurance Co.*⁷⁸⁶ In that case, the plaintiffs sought attorney fees from an insurer under a statute that generally provides for such an award if the insurer doesn't settle and the plaintiff prevails.⁷⁸⁷ The insurer, though, invoked a statutory exemption from the provisions of the state Insurance Code for a “patrons of husbandry association.”⁷⁸⁸ The plaintiff argued that, because the attorney-fee statute was remedial in nature, it should be liberally construed to apply, notwithstanding the exemption.⁷⁸⁹ The court of appeals disagreed:

Plaintiffs . . . mischaracterize the “rule” regarding liberal construction as a “first level” rule under the so-called “template” established by PGE. In fact, the rule regarding liberal interpretation of remedial statutes is a policy-based rule, as opposed to a syntax-based rule, and

⁷⁸¹ *Myers v. Bd. of Dirs. of Tualatin Rural Fire Dist.*, 5 Or. App. 142, 152, 483 P.2d 95, 100 (1971).

⁷⁸² *State ex rel. Weiser Loan & Tr. Co. v. Aetna Cas. & Sur. Co.*, 125 Or. 194, 195, 265 P. 782, 782 (1928) (citing *State ex rel. Hagquist v. U.S. Fid. & Guar. Co.*, 125 Or. 13, 265 P. 775 (1928)).

⁷⁸³ *Brown v. Becker*, 135 Or. 353, 355–56, 295 P. 1113, 1114 (1931).

⁷⁸⁴ *Tucker v. Constable*, 16 Or. 407, 412, 19 P. 13, 15–16 (1888).

⁷⁸⁵ It is often argued that because a given statute is obviously remedial in nature—take the Americans with Disabilities Act, for example—it should in some general sense always be interpreted broadly to effectuate its purposes. *See, e.g.*, Lawrence D. Rosenthal, *Reasonable Accommodations for Individuals Regarded as Having Disabilities Under the Americans with Disabilities Act? Why “No” Should Not Be the Answer*, 36 SETON HALL L. REV. 895, 962 (2006) (“The ADA, as a [r]emedial [s]tatue, [s]hould [b]e [i]nterpreted [b]roadly to [e]liminate [d]iscrimination in the [w]orkplace . . .”).

⁷⁸⁶ 179 Or. App. 329, 39 P.3d 903, *review denied*, 334 Or. 190 (2002).

⁷⁸⁷ *Id.* at 332, 39 P.3d at 905.

⁷⁸⁸ *Id.* (citing OR. REV. STAT. § 731.032(4) (1999) (repealed 2003)).

⁷⁸⁹ *Id.* at 337, 39 P.3d at 907–08.

therefore operates at the “third level” under PGE—a level we do not reach when, as here, the text and context of a provision are clear.⁷⁹⁰

At all events, the rule is never a justification for going beyond the wording of the statute. As the Oregon Supreme Court stated in *Halperin v. Pitts*, the remedial-statute rule “guides the interpretation of statutory wording that the legislature actually enacted. It is not a justification for supplying statutory wording that the legislature did not pass into law.”⁷⁹¹

6. *The Rule of Lenity*

The rule of lenity—that, as Blackstone put it, “penal statutes must be construed strictly”⁷⁹²—is one of the most familiar substantive canons.⁷⁹³ It is also one that, for the most part, doesn’t apply in Oregon.

The rule originated in England, during a time when Parliament had imposed the death penalty on an astonishing number of criminal offenses. (According to one authority, in the seventeenth century, there were more than 200 capital offenses, including “maliciously” cutting down hops.)⁷⁹⁴ Judges of a more humanitarian bent sought to ameliorate the harshness of the criminal law by imposing a rule that any doubts about the meaning of such laws must be resolved in favor of the accused.⁷⁹⁵

The rule was adopted in America rather early on. Chief Justice John Marshall cited it in *United States v. Wiltberger*, remarking that the rule “is founded on the tenderness of the law for the rights of individuals.”⁷⁹⁶ The Oregon Supreme Court invoked the rule in one of its very first published opinions in 1859.⁷⁹⁷

⁷⁹⁰ *Id.* at 337, 39 P.3d at 908.

⁷⁹¹ 352 Or. 482, 495, 287 P.3d 1069, 1076 (2012).

⁷⁹² 1 WILLIAM BLACKSTONE, COMMENTARIES *88.

⁷⁹³ See, e.g., *Skilling v. United States*, 561 U.S. 358, 410–11 (2010) (relying on the “familiar principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” (quoting *United States v. Cleveland*, 531 U.S. 12, 25 (2000))).

⁷⁹⁴ 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, 10–11 (1948), quoted in John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 n.23 (1985).

⁷⁹⁵ See generally Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 750 (1935) (“It was against this background of unmitigated severity in serious crimes that the doctrine of strict construction emerged.”).

⁷⁹⁶ 18 U.S. (5 Wheat.) 76, 95 (1820).

⁷⁹⁷ *Horner v. State*, 1 Or. 267, 268 (1859) (citing the “well-known rule that criminal statutes are strictly construed”).

But the Oregon Legislative Assembly had other ideas. Only a few years after statehood, the legislature enacted a statute expressly disowning the common-law rule and instead requiring that provisions of the state criminal code be construed in accordance with “the fair import of their terms.”⁷⁹⁸ The Oregon Supreme Court duly noted the legislative change and abandoned the rule of lenity.⁷⁹⁹

In 1971, the legislature completely revised the state criminal code but retained the century-old abrogation of the rule of lenity.⁸⁰⁰ As part of the revision, ORS 161.025(2) provides that “[t]he rule that a penal statute is to be strictly construed shall not apply” to the state criminal code.⁸⁰¹ Since then, Oregon courts have followed that statute and declined to apply the common-law rule.⁸⁰²

There is a possible exception, though. ORS 161.025(2) provides that the rule of lenity doesn’t apply to the state’s criminal code, which it defines as “Chapter 743, Oregon Laws 1971.” There are laws of a penal nature that are not included in the 1971 revisions or their amendments.⁸⁰³ It could be argued that ORS 161.025(2) does not apply to those laws.

⁷⁹⁸ Act of Oct. 19, 1864, ch. 53, § 730, 1854–1866 Or. Gen. Laws at 578 (Deady ed. 1866) (current version at OR. REV. STAT. § 161.025(2) (2017)).

⁷⁹⁹ See, e.g., *State v. Brantley*, 201 Or. 637, 644–45, 271 P.2d 668, 672 (1954) (“[T]he rule of the common law, that penal statutes are to be strictly construed, has no application in this state, and all its provisions are to be construed according to the fair import of their terms”) (citing § 23-106 O.C.L.A.); *State v. Dunn*, 53 Or. 304, 308, 99 P. 278, 280 (1909) (“It is urged on behalf of defendant that the juvenile act, under which defendant is convicted, is a criminal statute, and must be strictly construed, in support of which our attention is directed to *Horner v. State*, 1 Or. [at] 268. While the holding in that case appears to be in harmony with defendant’s theory on this point, it merely states the rule at common law upon the subject, which at that time (1859) had not been modified by statute. This rule, however, was subsequently modified by the adoption of section 2192 of the Code (B. & C. Comp.), as follows: ‘The rule of the common law that penal statutes are to be strictly construed has no application to this Code, but all its provisions are to be construed according to the fair import of their terms’”), *reh’g denied*, 53 Or. 304 (1909); *State v. Brown*, 7 Or. 186, 209 (1879) (“The statute is to be construed according to the fair import of its terms; and not according to the rule of the common law, that penal statutes must be construed strictly.”).

⁸⁰⁰ 1971 Or. Laws, ch. 743, § 2.

⁸⁰¹ OR. REV. STAT. § 161.025(2) (2017).

⁸⁰² See, e.g., *State v. Partain*, 349 Or. 10, 21, 239 P.3d 232, 239 (2010) (“The ‘rule’ [of lenity] was abrogated by the legislature when it adopted ORS 161.025(2), which directs courts to construe penal statutes ‘according to the fair import of their terms.’” (citation omitted)); *State v. Maney*, 297 Or. 620, 624 n.5, 688 P.2d 63, 66 n.5 (1984) (“We note that the common law rule that a criminal statute must be strictly construed in favor of an accused has been abolished in this state.”).

⁸⁰³ ORS 161.035(2) expressly contemplates that there may be statutory offenses “outside chapter 743, Oregon Laws 1971.” OR. REV. STAT. § 161.035(2) (2017). The Oregon Vehicle

The Oregon Court of Appeals noted that possibility in *State v. Thomas*.⁸⁰⁴ In that case, the state charged defendant with misdemeanor driving under the influence of intoxicants.⁸⁰⁵ At the time, driving under the influence was a traffic infraction, but under ORS 484.365, it could be elevated to a misdemeanor if the defendant was previously convicted of a traffic infraction or traffic crime within the previous five years.⁸⁰⁶ In *Thomas*, the defendant was convicted of the same offense in California the previous year.⁸⁰⁷ The defendant, however, argued that the state couldn't charge him with a misdemeanor, because the California conviction didn't count.⁸⁰⁸ The court of appeals agreed with the defendant based on its analysis of the text of the statute in context.⁸⁰⁹ The court then added an interesting observation:

ORS 484.365 is a penal statute. The common law rule with respect to penal statutes is strict construction. Under this rule, the fact that the statute does not expressly provide for the use of prior foreign convictions precludes the construction urged by the state. However, the common law rule has been abrogated with respect to the Oregon Criminal Code ORS 484.365 is not a part of [the Oregon Criminal Code]. However, assuming arguendo that the rule embodied in the statute applies to all penal statutes, whether or not found in the Criminal Code, the construction of ORS 484.365 we adopt here is according to the fair import of its terms.⁸¹⁰

In other words, care must be taken before ignoring the rule of lenity too quickly.

7. The “Hail Mary” Canon: What Would the Legislature Have Done if It Thought of the Issue?

A final canon must be mentioned, if only because the courts tend to invoke it so often. When faced with intractable ambiguity and no other tie-breaking substantive canon of construction comes to mind, courts will adopt the construction the legislature most likely would have preferred had it thought about the matter.⁸¹¹

Code, OR. REV. STAT. §§ 811.005–811.812 (2017), for example, includes a number of criminal offenses that are not part of the Oregon Criminal Code.

⁸⁰⁴ 34 Or. App. 187, 578 P.2d 454 (1978).

⁸⁰⁵ *Id.* at 190, 578 P.2d at 454.

⁸⁰⁶ OR. REV. STAT. § 484.365 (1977) (repealed 1981).

⁸⁰⁷ *Thomas*, 34 Or. App. at 190, 578 P.2d at 454.

⁸⁰⁸ *Id.* at 191, 578 P.2d at 455.

⁸⁰⁹ *Id.* at 193–95, 578 P.2d at 456–57.

⁸¹⁰ *Id.* at 195–96, 578 P.2d at 457.

⁸¹¹ *See, e.g., Carlson v. Meyers*, 327 Or. 213, 225, 959 P.2d 31, 37 (1998) (“Where no legislative history exists, this court will resort to general maxims of statutory construction,

I've always found this rule perplexing. It seems to me that the Hail Mary canon doesn't really add much to the analysis. Statutory construction is always about determining what the legislature intended, looking at the usual sources of legislative intent. The canon seems to say that if that analysis doesn't reveal what the legislature actually intended, courts should look at those same usual sources—presumably for some more generalized evidence of intent—to determine what the legislature most likely would have intended if it had thought of the specific matter at issue.⁸¹² But statutory construction frequently doesn't establish conclusively what the legislature actually intended. Rather, statutory construction offers various bases for inferring what the legislature most likely intended.⁸¹³ The Hail Mary canon doesn't really say anything more than that.

III

SPECIAL PROBLEMS IN OREGON STATUTORY CONSTRUCTION

In this final Part, I address how all the foregoing rules apply in particular circumstances or to particular problems common to statutory construction cases. I've singled out three such problems because they arise especially frequently.

including the maxim that where no legislative history exists the court will attempt to determine how the legislature would have intended the statute be applied, had it considered the issue.” (citation omitted)); *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or. 451, 463, 878 P.2d 417, 424 (1994) (“[W]hat the legislature would have intended, had it considered the specific issue.”); *Angle v. Bd. of Dentistry*, 294 Or. App. 470, 479, 431 P.3d 447, 453 (2018) (“[W]hen a specific issue is not addressed clearly in a statute or its legislative history, we use ‘the broader purpose of the statute’ as a guide in our ‘attempt to discern what the legislature would have intended had it considered’ it.” (quoting *State v. Mayes*, 220 Or. App. 385, 395, 186 P.3d 293, 300 (2008))); *Mayes*, 220 Or. App. at 395, 186 P.3d at 300 (in case of ambiguity, “we attempt to discern what the legislature ‘would have intended had it considered th[e] problem’” (quoting *State v. Abdelrasul*, 111 Or. App. 276, 279, 826 P.2d 58, 59 (1992) (emphasis omitted) (alteration in *Mayes*))).

⁸¹² See, e.g., *State v. Tannehill*, 341 Or. 205, 211, 141 P.3d 584, 587 (2006) (to determine “how the legislature would have resolved the issue if it had considered it,” the court “draw[s] guidance from the statutes that we previously have discussed”); *Windsor Ins. Co. v. Judd*, 321 Or. 379, 387–88, 898 P.2d 761, 765 (1995) (identifying what the legislature “would have intended” based on general purpose of the statute); *Linn-Benton-Lincoln Ed. Ass’n v. Linn-Benton-Lincoln ESD*, 163 Or. App. 558, 570–71, 989 P.2d 25, 32–33 (1999).

⁸¹³ See, e.g., *Dowell v. Or. Mut. Ins. Co.*, 361 Or. 62, 67, 388 P.3d 1050, 1053 (2017) (consulting text, context, and legislative history “[t]o discern the meaning of the statute most likely intended by the legislature that enacted it”); *Dep’t of Consumer & Bus. Servs. v. Muliro*, 359 Or. 736, 742, 380 P.3d 270, 273 (2016) (“We attempt to discern the meaning of the statute most likely intended by the legislature that enacted it, examining the text in context, any relevant legislative history, and pertinent rules of interpretation.”).

A. *Interpreting Statutes Enacted by Initiative*

Most Oregon statutes are enacted by the legislature, but a number of them are products of direct democracy, specifically, the power of initiative or referendum.⁸¹⁴ Statutes enacted by the legislature are treated no differently—in terms of enforceability—than statutes enacted by the people directly. Yet, there remains a question whether statutes enacted by the legislature should be interpreted by the same methods as statutes enacted by initiative or referendum.

A fair amount of scholarly commentary exists on the subject, much of it taking the position that the rules should be different.⁸¹⁵ Such arguments tend to be predicated on either of two concerns about statutes enacted by direct democracy. First, there are concerns about the nature of direct democracy and the extent that it circumvents the deliberation that is presumed to attend ordinary legislative enactments. Because of that lack of deliberation, the argument goes, statutes enacted by initiative or referendum should be subject to rules that narrow or limit their effect in the absence of clear statutory wording to the contrary.⁸¹⁶

Second, there are concerns that the rules of interpretation that apply to traditional legislation don't apply well to the interpretation of statutes enacted by initiative or referendum. In particular, these critics note, the focus of traditional statutory construction on legislative intent doesn't make sense when applied to statutes enacted by direct democracy.⁸¹⁷ "Voter intent," critics argue, is too difficult to ascertain

⁸¹⁴ The Oregon Constitution vests the legislative power of the state in the legislature and in the people, through the powers of initiative and referendum. OR. CONST. art. I, § 1 (1859). During the 2015 regular session, the Legislative Assembly introduced 2641 bills, of which 847 became law. Since 1902, the people have passed a total of 127 initiative measures and approved 257 referrals from the legislature. SECRETARY OF STATE, OREGON BLUE BOOK 2017–18 at 129, 289.

⁸¹⁵ See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535; Glenn C. Smith, *Solving the "Initiatory Construction" Puzzle (and Improving Direct Democracy) by Appropriate Refocusing of Sponsor Intent*, 78 U. COLO. L. REV. 257 (2007); Glen Staszewski, *Contestatory Democracy and the Interpretation of Popular Initiatives*, 43 SETON HALL L. REV. 1165 (2013); D. Zachary Hudson, Comment, *Interpreting the Products of Direct Democracy*, 28 YALE L. & POL'Y REV. 223 (2009); Evan C. Johnson, Comment, *People v. Floyd: An Argument Against Intentionalist Interpretation of Voter Initiatives*, 45 SANTA CLARA L. REV. 981 (2005); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748 (2005).

⁸¹⁶ See, e.g., Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477 (1996).

⁸¹⁷ Probably the leading article on the subject is Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

to form a useful focus of the meaning of statutes.⁸¹⁸ As a result, these critics also argue for the application of rules that narrow the effect of statutes enacted by initiative or referendum.⁸¹⁹

My own view is that neither of these criticisms justifies treating the interpretation of initiatives or referenda any differently from the interpretation of traditionally enacted statutes.⁸²⁰ Criticisms of the lack of deliberation in enacting laws by direct democracy tend to romanticize the amount of deliberation that occurs in the ordinary legislative process. And criticisms of the applicability of traditional rules of statutory construction tend to gloss over the difficulties of determining legislative intent.

In any event, Oregon courts have never taken the position that specialized rules apply to the interpretation of initiatives or referenda. *PGE* itself declared, after setting out its method of interpretive analysis, that “[t]he same structure . . . applies, not only to statutes enacted by the legislature, but also to the interpretation of laws . . . adopted by initiative or referendum.”⁸²¹

Nevertheless, there are some slight, but important, differences in application of construction rules depending on how a statute was enacted. In the case of statutes adopted by initiative or referendum, although the goal is still to determine legislative intent, the “legislative” intent refers to the intention of the voters who adopted the law.⁸²² Because the focus of interpreting statutes adopted by direct democracy

⁸¹⁸ See, e.g., Hudson, *supra* note 815, at 225 (2009) (“[D]iscovering the intent of the general public in passing a ballot measure is extremely difficult when compared to ascertaining the intent of legislative actors.”).

⁸¹⁹ *Id.* at 227.

⁸²⁰ See generally Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487 (1998).

⁸²¹ *PGE v. Bureau of Labor & Indus.*, 317 Or. 606, 612 n.4, 859 P.2d 1143, 1147 n.4 (1993); see also *State v. Guzek*, 322 Or. 245, 265, 906 P.2d 272, 284 (1995) (“This court applies the same method of statutory analysis to a statute enacted by the voters as it would to a statute enacted by the Legislative Assembly.”).

⁸²² See, e.g., *Burke v. State ex rel. Dep’t of Land Conservation & Dev.*, 352 Or. 428, 433, 290 P.3d 790, 792 (2012) (“When we interpret a referendum . . . our goal is to discern the intent of the voters who adopted it.”); *Guzek*, 322 Or. at 265, 906 P.2d at 284 (“In interpreting a statute enacted by initiative, the court’s task is to discern the intent of the voters who passed the initiative.”); *Papworth v. Or. Dep’t of Land Conservation & Dev.*, 255 Or. App. 258, 265, 296 P.3d 632, 636 (2013) (“When interpreting a statute enacted by legislative referral, our task is to discern the intent of the voters.”); *Dep’t of Land Conservation & Dev. v. Klamath County*, 215 Or. App. 297, 303, 168 P.3d 1241, 1244 (2007) (“We attempt to determine the meaning of the statute intended by those who enacted it—in this case, the voters who adopted it by initiative—by examining the text in context and, if necessary, relevant enactment history and other aids to construction.”).

is the intent of the voters, the relevant sources of that intent necessarily are different. To be sure, the focus of the courts remains on the text of the measure.⁸²³ But when the analysis reaches the “legislative history” of a measure, the evidence of legislative intent isn’t the same. In the case of statutes enacted by the legislature, the enactment process leaves a trail of evidence of legislative intent in the form of recordings of committee hearings and bill files containing amendment histories, committee minutes, and recordings of floor debates.⁸²⁴ Statutes enacted by direct democracy leave behind a different trail of evidence of legislative intent, particularly the official voters’ pamphlet, which sets out a ballot title and arguments for and against a measure.⁸²⁵ The basic idea of interpreting voter intent of such statutes is to examine any information that was available to voters at the time of enactment.⁸²⁶ That means that media reports are also a potential source of the legislative intent behind an initiative or referendum. In *State v. Allison*, for example, the court addressed the meaning of a mandatory minimum sentencing law that had been adopted by the people.⁸²⁷ The court examined the text of the measure in context, along with information in the voters’ pamphlet, newspaper stories, magazine articles, and “other reports from which it is likely that the voters would have derived information about the initiative.”⁸²⁸ Some caution is warranted here, of course, given the potential for contradictory information.⁸²⁹

⁸²³ See, e.g., *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 56, 11 P.3d 228, 238 (2000) (“The best evidence of the voters’ intent is the text of the provision itself.” (quoting *Roseburg Sch. Dist. v. City of Roseburg*, 316 Or. 374, 378, 851 P.2d 595, 597 (1993))); *Guzek*, 322 Or. at 265, 906 P.2d at 284 (“The text of the statute is the starting point because the text is the best evidence of the voters’ intent.”).

⁸²⁴ See *supra* text at notes 637–69.

⁸²⁵ See, e.g., *Burke*, 352 Or. at 445, 290 P.3d at 798 (examining voters’ pamphlet); *Friends of Yamhill Cty., Inc. v. Bd. of Comm’rs*, 351 Or. 219, 224, 264 P.3d 1265, 1268 (2011) (voters’ pamphlet); *State v. Moyer*, 348 Or. 220, 226, 230 P.3d 7, 11, *cert. denied*, 562 U.S. 895 (2010) (voters’ pamphlet); *State v. Urie*, 268 Or. App. 362, 366, 341 P.3d 855, 858 (2014) (“[W]e determine the voters’ intention by examining the Oregon Voters’ Pamphlet and other information that was available to the public at the time of the vote.”).

⁸²⁶ See, e.g., *Con-Way Inc. & Affiliates v. Dep’t of Revenue*, 353 Or. 616, 627–28, 302 P.3d 804, 810 (2013) (“When interpreting a statute adopted through the initiative process, this court will look to ‘other sources of information that were available to the voters at the time the measure was adopted and that disclose the public’s understanding of the measure.’” (quoting *Ecumenical Ministries of Or. v. Or. State Lottery Comm’n*, 318 Or. 551, 559 n.8, 871 P.2d 106, 111 n.8 (1994))).

⁸²⁷ 143 Or. App. 241, 923 P.2d 1224, *review denied*, 324 Or. 487 (1996).

⁸²⁸ *Id.* at 251, 923 P.2d at 1230.

⁸²⁹ See, e.g., *Johnson v. Dep’t of Pub. Safety Standards & Training*, 253 Or. App. 307, 314, 293 P.3d 228, 232 (2012) (“We also note that the enactment history of [the disputed

B. *Judicial Review of Administrative Agencies' Interpretations of Statutes*

As I said at the very beginning of this Article, statutes govern nearly every corner of the modern legal landscape. One of the most significant ways they do so is by creating administrative agencies to enforce statutes. The website Oregon.gov lists some 387 administrative agencies, boards, and commissions, and every single one is governed by and authorized to enforce one or more statutes.⁸³⁰ Thus, the agencies, boards, and commissions must interpret those statutes they are authorized to enforce, and their interpretations are ultimately subject to judicial review.⁸³¹

That leads to an important question: when courts review an agency's interpretation of a statute, what weight (if any) do the courts give the interpretation? Said another way, do the courts accord any deference to an agency's construction of a statute?

In the abstract, it's a fascinating question, one that has occupied scholars for decades.⁸³² In general, there are three different approaches.⁸³³ First, there are those who see statutory construction as

measure] is not helpful in discerning the voter's intent because it contains inconsistent explanations of the purpose of the provision at issue.”)

⁸³⁰ See, e.g., OR. REV. STAT. § 240.086 (2017) (authorizing Employment Relations Board to enforce collective bargaining law, rules, and agreements); OR. REV. STAT. § 561.020(1) (2017) (providing Department of Agriculture with “full responsibility and authority for all the inspectional, regulatory and market development work provided for under the provisions of all statutes which the department is empowered and directed to enforce”); OR. REV. STAT. § 673.730(1) (2017) (authorizing Board of Tax Practitioners to enforce statutes governing the qualifications of tax preparers); OR. REV. STAT. § 684.155(1)(b) (2017) (authorizing Board of Chiropractic Examiners to enforce statutes governing the qualifications of chiropractors).

⁸³¹ See, e.g., OR. REV. STAT. § 183.400 (2017) (judicial review of validity of rules); OR. REV. STAT. § 183.480 (2017) (judicial review of agency orders).

⁸³² Early commentary on the subject includes JOHN LANDIS, *THE ADMINISTRATIVE PROCESS* 14053 (1938); 4 KENNETH DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 30.00–30.14 (1958); and L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 546–94 (1965). More recent commentary includes Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735 (2002); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559 (2006).

⁸³³ See, e.g., MICHAEL ASIMOW, ARTHUR EARL BONFIELD & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 557–64 (2d ed. 1998) (identifying three

essentially a question of law, which the courts are best equipped to answer without any deference to an agency's prior interpretations.⁸³⁴ Second, there are those who view the legislature's delegation of responsibility to an administrative agency to interpret statutes as imparting a measure of interpretive authority, to which the courts should defer so long as the interpretation is reasonable.⁸³⁵ Third, there are those who take a sort of middle position that in cases in which an agency brings a substantial measure of expertise to bear, courts should defer to administrative agency interpretations.⁸³⁶

Oregon law started out in the middle position, but then it more or less gravitated in the direction of the first position. Courts now treat statutory construction largely—but not exclusively—as a question of law requiring no deference to agency interpretations.⁸³⁷ Here's how that happened.

The seminal case is *Springfield Education Association v. Springfield School District No. 19*.⁸³⁸ In that case, the Oregon Supreme Court explained that the extent to which a court must defer to an administrative agency's statutory interpretation depends on the nature of the wording that the agency interpreted.⁸³⁹ The court classified statutory words and phrases into three categories, each of which triggered a different degree of deference:

categories of deference to administrative agency interpretations: strong, weak, and none). *But see* Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 985 n.26 (2008) (arguing for four classifications).

⁸³⁴ As the Delaware Supreme Court explained in *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382–83 (Del. 1999), “Statutory interpretation is ultimately the responsibility of the courts. . . . A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.”

⁸³⁵ This is often referred to as “strong” deference and is associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 835 (2001); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1117 (2001).

⁸³⁶ This brand of deference to agency interpretations is often associated with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and is known as “weak” deference. *See, e.g.*, Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1194–98 (1995); Colin Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565 (1985).

⁸³⁷ *See infra* text at notes 839–41.

⁸³⁸ 290 Or. 217, 621 P.2d 547 (1980).

⁸³⁹ *Id.* at 222–23, 621 P.2d at 552.

1. Exact Terms

The first class is of statutory terms which impart relatively precise meaning, e.g., 21 years of age, male, 30 days, Class II farmland, rodent, Marion County. Their applicability in any particular case depends upon agency factfinding. . . .

2. Inexact Terms

The second class is of terms which are less precise. Whether certain things are included will depend upon what the user intended to communicate or accomplish by the use of the word. To determine the intended meaning of inexact statutory terms, in cases where their applicability may be questionable, courts tend to look to extrinsic indicators such as the context of the statutory term, legislative history, a cornucopia of rules of construction, and their own intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase. . . . An agency interpretation may be given an appropriate degree of assumptive validity if the agency was involved in the legislative process or if we infer that it has expertise based upon qualifications of its personnel or because of its experience in the application of the statute to varying facts. Judicial deference, however, is not automatic or unreasoning. If a statute must be interpreted to determine its applicability to the facts of a contested case, then, it is necessary for the agency to express in its order, to the degree appropriate to the magnitude or complexity of the contested case, its reasoning demonstrating the tendency of the order to advance the policy embodied in the words of the statute. Explicit reasoning will enable the court on judicial review to give an appropriate degree of credence to the agency interpretation. . . .

3. Delegative Terms

The third class of statutory terms . . . express non-completed legislation which the agency is given delegated authority to complete. The legislature may use general delegative terms because it cannot foresee all the situations to which the legislation is to be applied and deems it operationally preferable to give to an agency the authority, responsibility and discretion for refining and executing generally expressed legislative policy. . . . The delegation of responsibility for policy refinement under such a statute is to the agency, not to the court. The discretionary function of the agency is to make the choice and the review function of the court is to see that the agency's decision is within the range of discretion allowed by the more general policy of the statute.⁸⁴⁰

Thus, *Springfield* adopted a nuanced approach to the issue of deference. An exact term involved no deference, an inexact term could involve

⁸⁴⁰ *Id.* at 223–29, 621 P.2d at 553–56.

deference depending on the agency's expertise, and a delegative term accorded an agency considerable deference.

The fly in the ointment was *PGE*. Recall that the issue in *PGE* was whether an administrative agency, the Bureau of Labor and Industries, correctly construed the parental leave statute to permit employees to use accrued sick leave as parental leave.⁸⁴¹ What the supreme court in *PGE* should have done is first classify the statutory phrase under *Springfield* and then determine the amount of deference, if any, to be given to the agency's interpretation. The problem was the court didn't do that—it didn't even mention *Springfield*. Instead, the court announced its new template for statutory construction analysis, applied it, and determined the meaning of the statute on its own without any reference to deference.

Decisions immediately following *PGE* didn't clarify matters. The court continued to cite *Springfield* in agency cases.⁸⁴² In *Gage v. City of Portland*,⁸⁴³ for example, the court referred to its earlier opinion for the proposition that “judicial deference to an administrative agency's interpretation of a statutory term may be appropriate.”⁸⁴⁴ Yet in other cases, such as *SAIF Corp. v. Allen*, the court reviewed the agency's interpretation of an inexact provision of a statute as a matter of law, without any explanation as to why the agency was not entitled to deference.⁸⁴⁵

In the years that followed, mention of deference to agency interpretations of inexact terms simply disappeared from the supreme court's decisions.⁸⁴⁶ Eventually, the court declared that an agency's construction of an inexact term is entitled to no deference.⁸⁴⁷ The court

⁸⁴¹ See *supra* text at notes 34–36.

⁸⁴² See, e.g., *Drew v. Psychiatric Sec. Rev. Bd.*, 322 Or. 491, 500, 909 P.2d 1211, 1215 (1996); *Holland v. City of Cannon Beach*, 323 Or. 148, 151, 915 P.2d 407, 408 (1996); *SAIF Corp. v. Allen*, 320 Or. 192, 209–10, 881 P.2d 773, 782 (1994); *Don't Waste Or. Comm. v. Energy Facility Siting Council*, 320 Or. 132, 164 n.6, 881 P.2d 119, 137 n.6 (1994) (Unis, J., dissenting).

⁸⁴³ 319 Or. 308, 877 P.2d 1187 (1994).

⁸⁴⁴ *Id.* at 316, 877 P.2d at 1191.

⁸⁴⁵ 320 Or. 192, 881 P.2d 773 (1994).

⁸⁴⁶ See, e.g., *Norden v. State ex rel. Water Res. Dep't*, 329 Or. 641, 645–49, 996 P.2d 958, 961–63 (2000) (interpreting Administrative Procedure Act without reference to *Springfield* or agency deference); *King Estate Winery, Inc. v. Dep't of Revenue*, 329 Or. 414, 418, 988 P.2d 369, 371 (1999) (interpreting state tax law without reference to *Springfield* or agency deference).

⁸⁴⁷ See, e.g., *Blachana, LLC v. Bureau of Labor & Indus.*, 354 Or. 676, 687, 318 P.3d 735, 742 (2014) (holding that an agency's interpretation of an inexact term “is not entitled to deference on review”); *Schleiss v. SAIF Corp.*, 354 Or. 637, 642, 317 P.3d 244, 247 (2014) (“[T]he Director's construction of the [inexact] statutory term in his rule is not

has never explained the disappearance of the “assumptive validity” of an agency’s interpretation of an inexact term that *Springfield* mentioned. But there’s no question that it’s gone.

In other respects, though, *Springfield* remains relevant. An agency’s application of exact terms is still reviewed without interpretive deference,⁸⁴⁸ and an agency’s interpretation of a delegative term is still given considerable deference.⁸⁴⁹ Courts continue to review an agency’s interpretation of a delegative term to determine whether the interpretation is within the range of discretion allowed by the statute’s general policy.

Of course, that raises the issue of identifying the “range of discretion” that the statute allows, which is itself a question of statutory construction. The range of discretion is determined by the analytical process required by *PGE* and *Gaines*, without any deference.⁸⁵⁰ In fact, determining whether a given term is “delegative” in the first place is a question of statutory construction. In *J.R. Simplot Co. v. Department of Agriculture*, for example, the company challenged the amount of fees that the Department of Agriculture charged to inspect the company’s potato-processing operations.⁸⁵¹ The statute allowed the department to charge fees that were “reasonably necessary to cover the cost of . . . inspection and administration.”⁸⁵² The department argued that what

entitled to deference on review.”); *Bobo v. Kulongoski*, 338 Or. 111, 116, 107 P.3d 18, 21 (2005) (determining whether Department of Administrative Services correctly interpreted the state “kicker” law was governed by interpretive principles set forth in *PGE*); *V.L.Y. v. Bd. of Parole & Post-Prison Supervision*, 338 Or. 44, 53, 106 P.3d 145, 149 (2005) (holding that because the statutory terms in dispute were not delegative, the objective is to determine their intended meaning by reference to the principles of construction described in *PGE*); *Moon v. Gov’t Standards & Practices Comm’n*, 198 Or. App. 244, 250, 108 P.3d 112, 115 (2005) (reviewing agency construction under *PGE* interpretive principles).

⁸⁴⁸ See, e.g., *Coast Sec. Mortg. Corp. v. Real Estate Agency*, 331 Or. 348, 353, 15 P.3d 29, 33 (2000) (citing *Springfield Educ. Ass’n v. Springfield Sch. Dist. No. 19*, 290 Or. 217, 223, 621 P.2d 547, 552 (1980)).

⁸⁴⁹ See, e.g., *Bergerson v. Salem-Keizer Sch. Dist.*, 341 Or. 401, 411–13, 144 P.3d 918, 924–25 (2006); *Qwest Corp. v. Pub. Util. Comm’n*, 205 Or. App. 370, 380, 135 P.3d 321, 326, review denied, 342 Or. 46 (2006); *SAIF Corp. v. Avery*, 167 Or. App. 327, 331, 999 P.2d 1216, 1218 (2000), review denied, 331 Or. 583 (2001); *Olney Sch. Dist. 11 v. Olney Educ. Ass’n*, 145 Or. App. 578, 582–83, 931 P.2d 804, 806 (1997).

⁸⁵⁰ See, e.g., *Bergerson*, 341 Or. at 413, 144 P.3d 918, 925 (2006) (“Determining the general policy of a statute is a matter of statutory construction controlled by the *PGE* framework.”); *Hale v. Water Res. Dep’t*, 184 Or. App. 36, 41, 55 P.3d 497, 500 (2002) (“Determining the general policy expressed in the statute is itself a matter of statutory construction.”).

⁸⁵¹ 340 Or. 188, 190, 131 P.3d 162, 163 (2006).

⁸⁵² *Id.* at 196, 131 P.3d at 166 (quoting OR. REV. STAT. § 632.940 (2001)) (emphasis omitted).

was “reasonably necessary” was a matter delegated to its discretion. The court disagreed:

In our view . . . the phrase “reasonably necessary to cover the cost of inspection and administration” is not so general as to constitute a delegative term, because it does more than simply set a generally expressed legislative policy for the department to pursue. Instead, that phrase tells the department how to pursue the policy objective of funding an inspection program: It is to do so by setting fees that bear a defined relationship with the likely range of costs for the program. The department may determine what the cost of inspection and administration likely will be, and then it must set the fees at a level that will “cover” those costs. Therefore, that phrase is an “inexact term” that expresses a complete legislative policy, and we review the department’s action to determine whether it effectuated that policy.⁸⁵³

In *Oregon Occupational Safety & Health Division v. CBI Services, Inc.*, the court attempted to articulate a set of factors that explain when a given term is “delegative” in nature.⁸⁵⁴ The court named four factors: 1) Is the term in dispute like one of those the court already has concluded is delegative? 2) Is the term defined by statute or instead readily susceptible to multiple interpretations? 3) Does the term in dispute require the agency to engage in policy determination or make value judgments, as opposed to simply interpreting the statute? 4) Is there anything in the larger statutory context that suggests the legislature did not intend the term to be delegative?⁸⁵⁵

C. Interpreting Federal Statutes

State courts are often required to interpret federal statutes.⁸⁵⁶ In such cases, *PGE* and *Gaines* don’t apply, as those decisions govern only the interpretation of Oregon statutes. When state courts interpret federal statutes, they must apply federal rules of statutory construction. For example, in *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*,⁸⁵⁷ the supreme court was tasked with reviewing the Columbia River Gorge Commission’s interpretation of the federal

⁸⁵³ *Id.* at 197–98, 131 P.3d at 167 (emphasis omitted).

⁸⁵⁴ 356 Or. 577, 341 P.3d 701 (2014).

⁸⁵⁵ *Id.* at 590, 341 P.3d 708–09.

⁸⁵⁶ *See, e.g.*, *Etter v. Dep’t of Revenue*, 360 Or. 46, 52–53, 377 P.3d 561, 565 (2016) (Internal Revenue Code); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159, 173–74, 230 P.3d 518, 526–27 (2010) (Controlled Substances Act); *Greenhaw v. Pacific-Atlantic S.S. Co.*, 190 Or. 182, 190, 224 P.2d 918, 921–22 (1950) (Jones Act).

⁸⁵⁷ 346 Or. 366, 213 P.3d 1164 (2009).

Columbia River Gorge National Scenic Area Act.⁸⁵⁸ The question arose whether the commission's interpretations of the act were entitled to deference under the federal case law governing deference to administrative agency interpretations of federal statutes.⁸⁵⁹ The court concluded that the matter was governed by federal law, and under that law, the commission's interpretations were entitled to deference.⁸⁶⁰

The challenge is identifying precisely what the federal statutory interpretation rules are. In *Friends of the Columbia Gorge*, the matter was relatively straightforward, as the federal courts have a well-developed doctrine concerning deference to agency interpretations of statutes.⁸⁶¹ The same cannot be said of more mundane issues of statutory construction.⁸⁶² The United States Supreme Court has never reached agreement about what rules govern the interpretation of federal statutes. Justice Breyer, for example, doesn't recognize a rule forbidding consideration of legislative history,⁸⁶³ and he often cites such history.⁸⁶⁴ Justice Ginsburg, likewise, routinely relies on legislative history.⁸⁶⁵ Justice Scalia, on the other hand, famously regarded legislative history as illegitimate.⁸⁶⁶ Justice Thomas

⁸⁵⁸ *Id.* at 369, 213 P.3d at 1167 (citing 16 U.S.C. §§ 544–544p (2012)).

⁸⁵⁹ *Id.* at 377–78, 213 P.3d at 1171–72.

⁸⁶⁰ *Id.* at 384, 213 P.3d at 1175.

⁸⁶¹ Literally hundreds of articles have been written about the United States Supreme Court's doctrine of deference to administrative agency construction. For an introduction to the topic, see generally David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271 (2008); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327 (2000); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

⁸⁶² As professors Henry Hart and Albert Sacks famously complained of federal courts a half-century ago, "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory construction." HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* 1169 (William N. Eskridge & Philip P. Frickey eds. 1994). Scholars agree that complaint continues to apply. See generally Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1866 (2008).

⁸⁶³ See generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

⁸⁶⁴ See, e.g., *Reynolds v. United States*, 565 U.S. 432, 442–43 (2012).

⁸⁶⁵ See, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015).

⁸⁶⁶ *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy.").

apparently agrees with Scalia,⁸⁶⁷ and it appears that Justice Kavanaugh may as well.⁸⁶⁸

Courts in Oregon tend to fudge when describing the rules of federal statutory construction. Usually, the courts will adopt a vague formulation that refers to the text, context, and legislative history. In *Etter v. Department of Revenue*, for instance, the court explained that “[i]n interpreting a statute, the federal courts may examine the statute’s text, its structure, and its legislative history.”⁸⁶⁹ Obviously, this explanation is a bit of oversimplification. But then, given that the United States Supreme Court has proven itself incapable of settling on the applicable rules, it’s not clear to me what else the state courts are supposed to do.

CONCLUSION

The Oregon courts have devoted a great deal of attention to the principles that govern the interpretation of statutes. They’ve had to, as so much of the law today is governed by statutes. *PGE* marked the beginning of that effort. The decision attempted to impose some order on the chaos of case law that had existed before then. It was a flawed beginning, to be sure. *PGE* properly emphasized the importance of a statute’s text, but it significantly limited reliance on legislative history for less than persuasive reasons, harkening back to the early twentieth-century “plain meaning rule.”⁸⁷⁰ With *Gaines*, though, statutory construction became somewhat less artificial without sacrificing the appropriate emphasis on the limitations of a statute’s text.⁸⁷¹ At the same time, the courts have begun to examine more carefully the individual rules, describing the rules’ underlying rationales and limitations. The result is a reasonably coherent approach to statutory

⁸⁶⁷ *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176 (2014) (Scalia, J., joined by Thomas, J., concurring) (“I do not endorse, however, the Court’s occasional excursions beyond the interpretive terra firma of text and context, into the swamps of legislative history.”).

⁸⁶⁸ Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SCOTUSBLOG (June 28, 2018, 5:48 PM), <http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/>.

⁸⁶⁹ 360 Or. 46, 52, 377 P.3d 561, 565 (2016); *see also* *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 346 Or. 366, 378, 213 P.3d 1164, 1172 (2009) (“examining the text, context, and legislative history of the statute”); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 338 Or. 453, 463, 111 P.3d 1123, 1128 (2005) (“Federal courts generally determine the meaning of a statute by examining its text and structure and, if necessary, its legislative history.”).

⁸⁷⁰ *See supra* text at notes 45–46.

⁸⁷¹ *See supra* text at notes 106–07.

construction. It isn't perfect. It's predicated on a number of fictions—though commonly accepted and arguably unavoidable fictions in light of the emphasis on the subjective intentions of the legislature. There is more work to be done. For example, the court would do well to spell out more clearly the role of legislative “rules” of construction such as those codified in chapter 174 of the Oregon Revised Statutes. The case law also still contains annoying inconsistencies, though I'm pleased to say they are only occasional.

My hope is that this Article helps to make Oregon's approach to statutory construction understandable and the rules involved more accessible. Because statutory construction is such an integral part of modern law, business, and public administration, everyone should comprehend the rules involved and be able to predict, with some measure of confidence, what appellate courts will do in statutory construction cases.

