

The Remedy Clause, Reexamination of Verdicts, and Separation of Powers Principles

Panelists: Travis Eiva,* Susan Marmaduke,† W. Eugene Hallman,‡
Hon. David Schuman§

* Travis Eiva obtained his bachelor's degree from Evergreen State College in Olympia, Washington, and then received his J.D. *cum laude* from Lewis and Clark Law School in Portland in 2005, where he was editor of the law review. He worked for several years as an appellate public defender. He then turned to civil practice, first with the Corson and Johnson Law Firm where he mentored with trial lawyer Don Corson and then opening his own firm (Zemper Eiva) in 2015 and specializing in complex litigation in both trial and appellate courts. He has written numerous articles for various legal periodicals, routinely presents CLE trainings for bar organizations, and regularly writes *amicus curiae* briefs to the Oregon Supreme Court on matters affecting the rights of Oregon citizens. He is currently a member of the Oregon Council on Court Procedures, is on the Executive Committee of the Constitutional Law Section of the Oregon State Bar, and is a member of the Oregon Trial Lawyers Association.

† Susan Marmaduke practices law in the Portland office of Harrang Long Gary Rudnick, PC, with a focus on business litigation and appeals. She received her J.D. from Berkeley Law, and her B.A. from Portland State University, as well as a certificate in Arabic at the Bourguiba Institute of Modern Languages in Tunis. She served as Associate Country Director for the Peace Corps–Yemen and wrote a book on technical training programs in Yemen for the United States Agency for International Development. Susan is admitted to practice in Oregon, California, and Washington. She has been listed in *The Best Lawyers in America* in the fields of commercial litigation and appellate practice every year since 2009. She has written reference resources for lawyers, including the Oregon State Bar's Barbooks chapters on "Jurisdiction, Removal, and Remand," "Statutes of Limitations and Statutes of Repose," and "Special Writs: Writ of Review and Quo Warranto." She has given instructive presentations to lawyers on shareholder disputes, business valuation, judgments, and various other litigation and appellate topics. She has chaired the Local Rules Advisory Committee and the U.S. Magistrate Selection Panel for the U.S. District Court of Oregon. She served as a member of the amicus committee of the Oregon Association of Defense Counsel for more than a decade and is a member of the board of the Multnomah Bar Foundation. Susan received the Hon. James M. Burns Federal Practice Award in recognition of her work to improve the practice of law in the United States District Court of Oregon, and the Award of Merit given by the Multnomah Bar Association in recognition of her pro bono work.

‡ Gene Hallman has practiced civil litigation and appeals in Oregon since 1975. He obtained his B.S. from Portland State University in 1971, and his J.D. *magna cum laude* from Willamette University College of Law in 1974; he was the editor in chief of the *Willamette Law Journal* between 1973 and 1974. The year before he entered practice he

HON. DAVID SCHUMAN: We move now from what has essentially been a national focus to a more local one with a panel of distinguished Oregon litigators, all of whom have not only argued jury trial and remedy clause cases, but have fought long, hard, and productively about the Oregon constitutional provisions that are the basis of these decisions. And in addition to the distinguished litigators, there will be me.

First, we will be hearing from Travis Eiva, who actually wrote the *amicus* brief for the Oregon Trial Lawyers Association in *Horton*. [Then we will hear from] Susan Marmaduke, who practices with the Harrang Long Gary & Rudnick firm, Gene Hallman, from the Hallman Law Office in Pendleton, and me. So, I'll turn it over now to Travis.

TRAVIS EIVA: Good morning, everyone. Oregon, as many of you know, is unique in that we have two jury trial right clauses. Now, one would think that would motivate the court to doubly protect them. Not so. Because of the limitation in time, I'm just going to focus on one of them in particular. Article I, section 17, was originally adopted with the 1857 constitution. But in 1910 the people amended the constitution to include article VII (amended), section 3. So that section says, "In actions at law . . . the right of trial by jury shall be preserved," which you would anticipate means the common law right that was enshrined in article I, section 17, stays the same, or the authority of the jury is just as extensive as it's always been "and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."¹ Now, to understand this amendment I think it's really critical that we also understand the time and place and what was going on [in] Oregon history when it was passed.

was law clerk to Oregon Supreme Court Justice Ed Howell. He was named Distinguished Trial Lawyer by the Oregon Trial Lawyers Association in 2008; he became a fellow of the American College of Trial Lawyers in 2003; he has been a member of the American Board of Trial Advocates since 2002 and was its state president from 2010 to 2012.

§ Hon. David Schuman served as a judge of the Oregon Court of Appeals from 2001 to 2014. He received his B.A. from Stanford University, his Ph. D. from the University of Chicago, and his J.D. from the University of Oregon Law School. He served as a clerk to Justice Hans Linde, Oregon Supreme Court, in 1985; as Assistant Attorney General in the Oregon Department of Justice from 1985 to 1987; and was a professor at the University of Oregon Law School from 1987 to 1996. He was Deputy Attorney General in the Oregon Department of Justice from 1997 to 2001, when he was appointed to the Oregon Court of Appeals. Since 2014 he has been a Senior Judge in the Oregon Judicial Department, and Professor of Practice at the University of Oregon Law School.

¹ *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 251, 376 P.3d 998, 1044 (2016).

Words are given meaning by that time and place, because of the unique quality of it—as a time of progressive reform, of limiting legislative power, limiting the power of state offices against the primacy of direct democracy, the primacy of citizen power.

So if we're going to be in Oregon, when we interpret the law here, . . . we look at the historical context. And this historical context I want to bring up here today was not one that was really addressed by the Oregon Supreme Court in *Horton*, when they decided that article VII (amended), section 3, would not get in the way of the legislature telling the trial court to set aside the verdict.²

Now this historical context is a story, really. It's a story that starts, maybe, with a man named William S. U'Ren. He was born to immigrant parents in Wisconsin. It was a family of blacksmiths and preachers, and he was trained in both of those trades at a very young age. His father immigrated to the United States from Cornwell, England, because the opportunities were so limited by subjugation to wealthy landholders. When he came to America, he quickly found out that opportunity was still quite subjugated to the bosses, as they were referred to in the United States at that time. And so . . . he moved his family from state to state to state trying to find a freer piece of life that was not so controlled by the landowners. This search for more freedom was not lost on young William; when he was seventeen, he struck out on his own. He went to Denver to practice law, and he apprenticed at a law firm.

He started getting deeper and deeper into progressive politics at that time, and he came to see America is controlled by monopolists. And he became afraid—he said once, “God never intended that a few should monopolize so much in this country.” He saw the monopolists capturing state legislatures for their own selfish ends—to secure and increase their land holdings and to raid their state treasuries in order to improve their own business. He believed “that all political evils of all the cities and states culminated in the betrayal of the people by their representatives in favor of the monopolists.”

Around 1890, he took these beliefs to Oregon, and he started a law practice in Portland. U'Ren quickly learned that the Oregon legislature was no exception to the legislative corruption that was throughout the country. In fact, one author wrote of Oregon, that it enjoyed the unenviable reputation of having one of the most corrupt

² *Id.* at 168, 376 P.3d at 998.

and inefficient governments found north of Mexico and west of Pennsylvania. Legislatures represented the street railways, gas and electric light companies, the banks, timber companies, and the railroads. Corporate officers of these corporations controlled the political nominations, the agenda of legislative committees, and directed the legislation. U'Ren, now trained as a lawyer, but always a blacksmith at heart, craved tools to change this. He wanted tools to reinvigorate the democracy of the people so that government served the people [and] not the few who were powerful in this gilded age. He first came across the work of J.W. Sullivan, describing a system of direct legislation in Switzerland. He saw this as a tool to pass laws in the public interest, no matter the industry capture of the legislature.

And with this he saw, in Oregon, the people were taking notice of legislative control by the bosses. It was a time that was ripe for reform, and [so] he started the Direct Legislation League. Now, this league started—[it] sought to amend the Oregon Constitution, to include the initiative and referendum system, so the primacy of the people could be recognized in the legislative process. Eventually that initiative and referendum process was passed by the legislature, through some very hard-fought battles. It could take many hours just talking about that.

From there, they started the Direct Primary League. And it took away from the legislature the authority to appoint the senators from Oregon, in Washington. Instead we, in Oregon, the people would pick which senators would represent us in Washington. We were the first state to do this. Many other states followed, and eventually, a constitutional amendment to allow the people to directly elect the senators occurred.

He moved on to there to create the Peoples' Power League, after obtaining the initiative and referendum, after obtaining the ability for us to actually pick who our senators were and not those who control the legislature—the bosses, and the political parties that were owned by the bosses. And he started the Peoples' Power League to now take more control and start to more infuse the rights of people into our state governments. He, with the help of the Peoples' Power League, passed legislation for the recall elections, so you could recall any state officers. He passed the Employer Liability Act. Working conditions were so hazardous in Oregon. As we know, we're a timber state and death and maiming was very common amongst our employees here. But the common law rules (of fellow servant, as we heard before) of

contributory negligence were getting in the way of these workers who were hurt getting to a jury. And so this law took away those aspects.

And he also passed article VII (amended), section 3, to instill or to reinvigorate the primacy of the people—of the jury—in decision in a civil case. Ultimately, what this says is that no fact tried by a jury shall be touched in a court once it's been found. It stays what it is. U'Ren put it forward, but he had the help of Judge Thomas O'Day, from the Oregon circuit court, to draft it. And this is what Judge O'Day explained, "The purpose of this amendment was to make the verdict effective, because twelve persons selected from the body of the community are more competent to pass upon and determine rightly a question of fact than any other member of the community. If the question of fact in an action at law is submitted to the jury, the verdict of the jury ought to settle it for all time."

And all this work of the Direct Legislation League, the Direct Primary League, the Peoples' Power League—all coming from William S. U'Ren and his patriots—made Oregon kind of a rock star in progressive politics across the country. There was one article—*Oregon, The Most Complete Democracy in the World*—"Oregon saw that special privilege was the cause of corruption; that privilege always works through the agents of the people rather than through the people themselves . . . Oregon law, before the rest of us, that the trouble was not with the law breakers but with the lawmakers." Woodrow Wilson said of Oregon's system, of bringing the government back and empowered to the people, that "Oregon, whose effect has been to bring government back to the people and to protect it from the control of the representatives of selfish and special interests."

Now, when the Oregon Supreme Court in *Horton* said that a judge can now set aside a verdict as long as the legislature told her to do so, I don't think they were taking into account this historical context of where these amendments come from. It was a time when we were pulling back legislative power and reinvigorating people's power (particularly in the jury, particularly at the ballot box), and we were limiting the scope of control of the legislature. When the Oregon Supreme Court held that a court can review a jury verdict that is supported by the evidence and set it aside if the legislature tells it to do so, how does that interpretation survive this historical context, of primacy in the people, in certain areas? How does that interpretation survive the stated purpose of the amendment: If the question of fact in

an action of law is submitted to the jury, the verdict of the jury ought to settle it for all time.

W. EUGENE HALLMAN: Thank you. I'm Gene Hallman. I'll take a little issue with Judge Schuman's introduction: as one of the many lawyers who has successfully litigated remedy cases in the Oregon Supreme Court, I've litigated remedy cases in the Oregon Supreme Court. Let's just perhaps leave it at that.

I want to talk a little bit about a perhaps lesser aspect of the *Horton* decision, but one that was extremely important to people who have claims, and that's the elimination of "bright-line" of 1857 as the fountainhead of all remedy jurisprudence. Before *Horton*, it was established that the remedy protections protected cases that existed in 1857. *Smothers* was the latest case to hold that.³ [The court in *Smothers*] said "the history of the remedy clause indicates that its purpose is to protect absolute common-law rights respecting person, property and reputation, as those rights existed when the Oregon Constitution was drafted in 1857."⁴ The court even went through and provided a formula for litigants analyzing the remedy clause, and it says, "the first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. Stated differently, when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury?"⁵ Interestingly, one of the first proponents of that 1857 requirement was the author of the case of *Eastman v. Clackamas County*,⁶ Matthew Deady, and he wrote as a federal judge—and I really like this quote because it so captures his idea of the importance of the remedy clause as a more than a prohibition against charging admissions to trial, but as an actual protection of the right of the people against the actions of the legislature—and he writes, the remedy clause

is not intended for the redress of any novel, indefinite, or remote injury that was not then regarded as within the pale of legal redress. But whatever injury the law, as it then stood, took cognizance of and furnished a remedy for, every man shall continue to have a remedy for by due course of law . . . If this then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the legislature, in

³ *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001).

⁴ *Id.* at 118, 23 P.3d at 353.

⁵ *Id.* at 124, 23 P.3d at 356.

⁶ *Eastman v. Clackamas*, 32 F. 24, 31 (D. Or. 1887).

some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt?⁷

Now, his idea that everything flows from 1857 has been rejected in *Horton*, which gives a whole different idea for the concept of originalist. [There was a] different concept there because Judge Deady was the chairman of the Oregon Constitutional Convention and perhaps had some understanding of what the original intent of the Constitutional Convention and the passage of the Bill of Rights was. But, be that as it may, the bright line of 1857 gave rise to what I call a legal subspecialty of legal archaeology. And the most significant part of that was its effect on one of, I think, the most important claims—the wrongful death claim. Basically, in Oregon, the wrongful death statute was passed in 1862, so [during] that five years—they missed the window by five years with enormous consequences to cases—all the wrongful death cases [were taken] out of any remedy analysis. And it wasn't always that way. In fact, the case that I argued, *Storm v. McClung*,⁸ followed shortly after a case in which the Oregon Supreme Court had held that the remedy clause does apply to statutory claims such as wrongful death. There's an interesting argument, and I quoted that to the court. And one of the judges said, "no, it doesn't." I said, "well, yes it does." And we didn't want to continue that way, so I gave him the cite, and he read it, and he was quiet after that. And I felt pretty good about it, but when I got the opinion in *Storm*, the [Oregon] Supreme Court said the holding of *Naher v. Chartier*,⁹ which was the case that had just come down a few years earlier, that "the immunity provision in ORS 30.265(3)(a) that barred the plaintiff's statutory wrongful death action denied the plaintiff a remedy in violation of article I, section 10, was error and is disavowed."¹⁰ And just so that everybody knows who gets the last word on this, they actually put it in italics so that I would be sure to notice that one.

That bright-line rule has led to some pretty interesting inquiries. The case of *Klutschkowski v. Peacehealth*,¹¹ we were as amicus, looking at the existence of a remedy for prenatal injury, citing things such as the historical of obstetrics in the brief to determine if there's

⁷ *Id.* at 32.

⁸ *Storm v. McClung*, 334 Or. 210, 47 P.3d 476 (2002).

⁹ *Neher v. Chartier*, 319 Or. 417, 879 P.2d 156 (1994).

¹⁰ *Id.* at 482, 879 P.2d at 223.

¹¹ *Klutschkowski v. PeaceHealth*, 245 Or. App. 524, 263 P.3d 1130 (2011).

anything at all that happened in 1857. Fortunately, the supreme court saved us on that one and correctly ruled that it wasn't a prenatal injury, but it was a birth injury.¹² We got auto insurance requirements such as *Lawson v. Hoke*,¹³ which had to do with the question of—why are we having to deal with this if there were no cars in 1857? Products liability cases, such as the first decision in *Rains v. Stayton Builders Mart*,¹⁴ which says that products liability action did not exist in 1857, and therefore the caps applied to the plaintiff injury. But as far as the spouses claim for loss of consortium, that did apply in 1857. So you have the rather unusual situation of the primary injury being capped at \$500,000, but the derivative injury of loss of consortium being uncapped. The bright line is not there anymore. Fortunately, with all due respect to Judge Deady and the prior court, *Horton* erased the bright line. What does that mean?

Cases that previously would not have been considered for a remedy analysis are now eligible, most importantly wrongful death. Things like products liability, things like internet defamation—it doesn't go the whole way in any kind of a remedy analysis. It's perhaps like a bull riding analogy—you don't go the full eight seconds, but it does get you out of the chute.

So, the court in *Horton* held that the court in *Smothers* had erred in—apparently Judge Deady had erred in—stating that there was a static conception of common law as it existed in 1857.¹⁵ The remedy protection is now determined by three tests from *Horton*. Number one, a complete denial of remedy, or the provision of an insubstantial remedy, violates the remedy clause.¹⁶ And that's important, obviously for itself, but also to constitute a further rejection that the remedy clause does not act as any kind of a break of a constraint on the legislature. Again the old question—does “open court” just mean that you've got to keep the courthouse open, or does it mean that the legislature can't interfere in the remedy that's been acknowledged?

Second, and this is the part that has given everybody a lot of interesting discussions, is that the adjustment of the remedy, as a part of a larger scheme for the benefit of society, depends on the quid pro quo. That is, what are you trading? What are you giving to take away some part of a remedy? And of course the *Horton* case was an Oregon

¹² Klutschkowski v. PeaceHealth, 354 Or. 150, 311 P.3d 461 (2013).

¹³ Lawson v. Hoke, 339 Or. 253, 119 P.3d 210 (2005).

¹⁴ Rains v. Stayton Builders Mart, Inc., 264 Or. App. 636, 336 P.3d 483 (2014).

¹⁵ Horton v. Or. Health & Sci. Univ., 359 Or. 168, 251, 376 P.3d 998, 1044 (2016).

¹⁶ *Id.*

Tort Claims Act case, and it had to do with sovereign immunity. And the court listed these wonderful things that you're getting in exchange for bankruptcy, but it's the things such as the ability to actually sue the government, the ability to sue—have the deep pockets of the individuals, if you chose to sue the individuals, stand behind the claim. And it's the primary issue that I see in the very, very early stages of this litigation involving *Horton*—what is the quid pro quo? How much does the quid pro quo have to give or take away? Who does the quid pro quo go to? Those sort of things. But anyway, the quid pro quo has to be considered in determining whether the reduced benefit that the legislature has provided an individual is substantial in the overall statutory scheme.

Just as an aside, one of the more interesting aspects of the case in the 125-page opinion is the court's citation to the *Kansas Malpractice Victims' Coalition* case¹⁷ and subsequent cases, and they were a little obtuse, they didn't say, "this is where we're going to go," but they did say that, they did take note of the fact that the *Kansas Malpractice Victims' Coalition* declared their cap—and it's a malpractice cap—and they declared their cap unconstitutional for the lack of a quid pro quo.¹⁸ And then a later decision of the Kansas court examined the new malpractice cap and said that in that case there was a sufficient new benefit to the potential claimants that made that statute constitutional because of the existence of an adequate quid pro quo.

And then, finally, the third aspect that they did was the legislature can modify or eliminate common law actions if the common law action could no longer protect core interests. This seems to be primarily cases where the court uses the "modern times" in their opinion or somehow acknowledges a change in basic societal structure, and the cases that were cited by the [Oregon] Supreme Court was the 1935 case approving the guest passenger statute, even though it took away the rights of some claimants. Of course, I guess modern times have changed again because that's now been abolished. But, and then, the alienation of affections cases. And so the court acknowledged, and has always really acknowledged, the existence of the ability to change things, or the acknowledgment that these don't protect the core interests any longer.

¹⁷ Kan. Malpractice Victims' Coal. v. Bell, 757 P.2d 251 (Kan. 1988).

¹⁸ *Id.* at 264.

I want to briefly end by doing another quote [about the] importance of the remedy act and its action as a break in the legislature. Delison Smith was the first. [He] was a delegate to the Oregon Constitutional Convention from Linn County. He was also Oregon's first senator, although he only served for three weeks and never made it to Washington, D.C., because his term expired, and they didn't reappoint him. Anyway, he was a delegate, and very active in the debates of the Bill of Rights and the remedy clause. And, take it with a grain of salt because his name, by some people in that organization was "Delusional Smith," but he did make the comment that the [Oregon] Bill of Rights is "something more than a Fourth of July oration. To a certain extent he, Mr. Shattuck, from Multnomah County, was in favor of a doctrine that the legislative assembly can do no wrong, that their acts are to be regarded as the law. Now, the history of the world teaches us that the majority may become fractious . . . that through the madness of party spirit they may infringe upon the rights of the individual citizens Then, if the individual citizen is to be protected in this point in which he is endangered, there must be restrictions put into this constitution."¹⁹

And that's basically the foundation of our remedy clause. Thank you.

SUSAN MARMADUKE: Well, Gene usually practices on the plaintiffs' side, as you know, and I usually practice on the defense side. But we have something in common, which is that I've managed to lose my share of remedy clause cases as well, including *Clarke*²⁰ and *Ackerman*.²¹

I wanted to step back and just say a few words about the history and meaning of article I, section 10. To me, it seems to have particular resonance now during the Trump presidency because we find ourselves having to rely even more heavily than in normal times on the independence of our judiciary. It seems pretty much agreed that the state remedy clauses have their genesis in Magna Carta. [The slide shown] shows the pertinent provision of the 1225 version of Magna Carta, the Wellspring, as well as the text of article I, section 10, at the bottom of the page. And you can see the similarity in those two texts. Between the two, both physically and historically, is Coke's 1797 reinterpretation of Magna Carta, an interpretation that

¹⁹ THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, 101 (Charles Henry Carey ed., 1926).

²⁰ *Clarke v. Or. Health Scis. Univ.*, 343 Or. 581, 175 P.3d 418 (2007).

²¹ *Ackerman v. OHSU Med. Grp.*, 233 Or. App. 511, 227 P.3d 744 (2010).

was very influential in the United States. Coke was inspired to reinterpret Magna Carta by royal interference with the courts. King James had asserted the authority to appoint or remove judges at his pleasure and to influence their decisions at his whim. Reading Coke's writing today, at a time when undocumented people are being intimidated by [Immigration and Customs Enforcement] agents into staying away from our courthouses, I was especially struck by the statement that every subject of the realm, be freed or outlawed, may have justice. So whatever else article I, section 10, means, I hope we remember that it is a guarantee of access to justice for everyone, regardless of their station in life.

That said, as we all know, the majority in *Horton* rejected the argument that article I, section 10, means only that.²² To paraphrase, the *Horton* majority essentially said, "we don't need to decide how we would interpret Oregon's remedy clause if we were considering it for the first time because we've been working on this problem for 100 years—debating the meaning of the clause, deciding cases—we may not toss that considered body of decisions aside." So although we overrule *Smothers*, we reaffirm our remedy clause decisions that preceded it, including the cases that *Smothers* disavowed.²³

So, what does that really mean? Does it mean that the cases that preceded *Smothers* are resurrected as full, binding authority, or does it mean something less than that? I've heard some plaintiffs' lawyers in the post-*Horton* days assert that those cases aren't really very authoritative because they didn't grapple with the *Horton* construct.

I'm aware of at least three cases that present this issue now in the Oregon Court of Appeals. There are more of them than three, but three are pretty well along in the process, that will shed some light on this question. One of them, *Lunsford v. NCH Corporation*, was a wrongful death product liability action.²⁴ The defendant argued that the claim was barred by the products liability statute of repose, and the Court of Appeals initially rejected the argument the statute of ultimate repose violates article I, section 10, based on *Smothers*.²⁵ After *Horton*, the Oregon Supreme Court remanded the case to the court of appeals for reconsideration in light of *Horton*, and just last week on April 26, [2017], the court of appeals issued its ruling, and it

²² See *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 251, 376 P.3d 998, 1044 (2016).

²³ See *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001).

²⁴ *Lunsford v. NCH Corp.*, 285 Or. App. 122, 396 P.3d 288 (2017).

²⁵ *Id.* at 125, 396 P.3d at 290.

again concluded that the plaintiff's challenge to the statute of ultimate repose was foreclosed. But this time, the court concluded that it was foreclosed based on *Sealey v. Hicks*,²⁶ a 1990 case that *Smothers* had disavowed. In *Sealey*, the Oregon Supreme Court had rejected an article I, section 10, challenge to the statute of ultimate repose because the court said, "It is a permissible constitutional legislative function to balance the possibility of outlawing [some] legitimate claims against the public need that at some definite time there be an end to potential litigation."²⁷ So, in other words, the *Lunsford* court of appeals panel made its article I, section 10, decision on the basis of *Sealey*'s determination that the legislature can decide that a claim is simply not cognizable if it's brought after the statute of ultimate repose has lapsed.

I'm aware of two other cases that present this problem of deciding the precedential effect of pre-*Horton* cases. One is *Rains v. Stayton Builders Mart, Inc.*,²⁸ which Maureen Leonard argued just last week, I think it was. That case presents the question of whether the statutory cap on noneconomic damages²⁹ violates article I, section 10. The Oregon Supreme Court remanded the case for reconsideration in light of *Horton*. It was argued in the court of appeals on the twentieth of April, [2017], and it will be very interesting to see whether, in that case, the court of appeals applies the *Greist* decision,³⁰ which is another pre-*Smothers* opinion disavowed by *Smothers*. In *Greist*, the court rejected the plaintiff's argument that the cap on noneconomic damages violates article I, section 10, and concluded that—as I think we've all discussed here—the cap on noneconomic damages allows for recovery of up to \$500,000 in noneconomic damages and allows unlimited recovery of economic damages.³¹ And in the *Greist* case, the court said that amount of recovery, uncapped economic damages and up to \$500,000 in noneconomic damages, is a substantial amount.³²

The *Vasquez v. Double Press* case, pending now in the court of appeals, presents the same question, as well as the question about the

²⁶ *Sealey v. Hicks*, 309 Or. 387, 788 P.2d 435 (1990).

²⁷ *Id.* at 394, 788 P.2d at 438.

²⁸ *Rains v. Stayton Builders Mart, Inc.*, 359 Or. 610, 375 P.3d 490 (2016).

²⁹ OR. REV. STAT. § 31.710 (2010).

³⁰ *Greist v. Phillips*, 322 Or. 281, 906 P.2d 789 (1995).

³¹ *Id.* at 289, 906 P.2d at 794.

³² *Id.* at 291, 906 P.3d at 795.

scope of noneconomic damages cap.³³ The court's focus in the *Greist* case on the fact that the noneconomic damages were capped but the economic damages were uncapped is an interesting theme that I see repeated again and again in recent Oregon cases. I don't frankly grasp particularly why there should be—why noneconomic damages should be a different constitutional footing than economic damages—but it does seem to me, just from reading the cases, that the Oregon Supreme Court views them as such. In the *Clarke* case, for example, the court discussed the *Greist* case and explained that *Greist* was based on the fact that placing no limit on the recovery of economic damages allowed the plaintiffs to recover fully their out-of-pocket losses, including their expenses for medical, burial, and memorial services.³⁴ And then in *State v. Rodriguez*, which is a 2009 case, the Oregon Supreme Court explained its ruling in *Clarke* by emphasizing the impact that the Oregon Tort Claims cap at that time had had on limiting recovery, not only of noneconomic damages but of economic damages, and really focused on the impact of economic damages.³⁵ Which, interestingly enough, the supreme court described as “actual damages”—sort of implying that the noneconomic damages weren't actually actual damages.

Again, this theme was struck in the *Horton* case, where the court again explained its ruling in *Clarke* by emphasizing the impact that that the Oregon Tort Claims cap had had on the plaintiff's recovery of his economic damages, saying *Clarke* focused solely on whether the capped damages of \$200,000 was a substantial remedy in light of the economic damages that the plaintiff had suffered. In fact, in *Clarke*, it was stipulated that the plaintiff had also suffered \$5 million in noneconomic damages.

So, and I would just note that, this approach is consistent with the decision of then-court of appeals Judges Brewer and Landau, in the *Lawson v. Hoke* case.³⁶ That case involved the statute that denied recovery of any noneconomic damages to persons who didn't have liability insurance at the time of a car accident. And in that case, then-Judges Brewer and Landau, both of whom are now Oregon Supreme Court Justices, concluded that the statute left the plaintiff with a substantial remedy, for remedy clause purposes, because the

³³ *Vasquez v. Double Press Mfg., Inc.*, 288 Or. App. 503, 406 P.3d 225 (2017).

³⁴ *Clarke v. Or. Health Scis. Univ.*, 343 Or. 581, 609, 175 P.3d 418, 434 (2007).

³⁵ *State v. Rodriguez*, 347 Or. 46, 80, 217 P.3d 659, 680 (2009).

³⁶ *Lawson v. Hoke*, 339 Or. 253, 119 P.3d 210 (2005).

challenged statute imposes no restriction on plaintiffs' economic damages. So, again, I personally don't understand the basis for treating them as having different standing under the remedy clause. But the one thing I'll say is that there is some benefit to that approach, which is that it enables courts to essentially evaluate the constitutionality of these issues on a statute-by-statute basis, rather than, what I think is a very difficult to administer case-by-case evaluation where you never know what the answer is until it's finally spoken to by the Oregon Supreme Court. I think there's value to a system that would at least accord statutes some presumption of validity, subject to overturning the event of truly extreme situations such as the *Clarke* case, for example.

SCHUMAN: Let me begin with a quick comment that refers back to what Travis mentioned about the historical context of article VII (amended), which was right at the turn of the century. The historical context of article I, section 17, is also interesting. At the Oregon Constitutional Convention, the pro-jury sentiment was so strong and so passionate that they almost passed a provision that would have given the jury the right to decide questions of fact and of law. That was only avoided at the last minute by a provision that allowed the jury to decide questions of fact and of law under instruction from the court. But [there was] a very powerful, pro-jury inclination.

I want to talk about some of the nonsubstantive aspects of *Horton*. By that I mean, not the outcomes, not whether or not caps are constitutional or not, whether or not they're good policy or not—although my views on that have not been a secret. I think that *Horton* is a bad case, but I want to talk about how the Oregon Supreme Court decides these cases, their constitutional methods. Now the basic general template that the Oregon Supreme Court adopted for deciding constitutional questions, in an older case called *Priest v. Pearce*,³⁷ said that—and it said this in one sentence and more or less in a parenthetical—that the court will look to the text, the surrounding case law, and historical circumstances, which as far as I'm concerned kind of covers the waterfront. I mean, what else will they look at?

In practice, that turned out to be a very rigid form of originalism, culminated in a frequently overinterpreted statement from *Lakin v. Senco Products*, the first of the jury trial cases, where the court said that trial by jury means “whatever the right to a jury trial . . . meant in

³⁷ *Priest v. Pearce*, 314 Or. 411, 415, 840 P.2d 65, 67 (1992).

1857, it has the same meaning today.”³⁸ Well that has been modified, and it has more or less morphed, I think, into a less rigid formulation where the court now says that it will “identify the historical principles embodied in the text . . . [and] apply those principles faithfully to modern circumstances as they arise. Put differently, the historical inquiry set out in *Priest* invites us to identify the principles that . . . [a constitutional provision] was intended to advance, while recognizing that the scope of that provision is not limited to the historical circumstances surrounding its adoption.”³⁹ Still, [this is] a fairly powerful originalist way of looking at constitutional interpretation. All that, I suppose, is fine, but there has been, I think, a much more fundamental shift in Oregon constitutional law, which I find regrettable and which I find exemplified in *Horton*. This is part of an ongoing process, which I referred to [in] another forum as the “de-Lindification” of Oregon constitutional law.

I think it’s most obvious in the movement from a rule-based interpretation into a balancing-based interpretation. Since the 1970s, not coincidentally about the time that Justice Linde became Justice Linde as opposed to Professor Linde, the courts have rejected balancing over and over and over again as part of Oregon constitutional adjudication. “Courts exist to serve whatever rights people have . . . it is not for them to weigh or ‘balance’ their own institutional concerns against the merits of such a right.”⁴⁰ “The balancing of regulatory goals against the economic consequences is the daily stuff of politics rather than of litigation for just compensation.”⁴¹ “There is no agreed common measure to ‘weigh’ or ‘balance,’ for instance, an esthetic environment against commercial profit . . . or the prevention of caries against strongly felt objections to fluoridation of the water supply . . . if state and local policy should differ on such matters. Such choices are the essence of political, not judicial, decisions.”⁴² In rejecting the State’s repeated urge for the court to adopt a balancing test in free speech cases under article I,

³⁸ *Lakin v. Senco Prods., Inc.*, 329 Or. 62, 69, 987 P.2d 463, 468, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 250, 376 P.3d 988, 1044 (2016).

³⁹ *State v. Savastano*, 354 Or. 64, 72, 309 P.3d 1083, 1089 (2013).

⁴⁰ *Norwest v. Presbyterian Intercmty. Hosp.*, 293 Or. 543, 552, 652 P.2d 318, 323 (1982).

⁴¹ *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 259, 656 P.2d 306, 309 (1982).

⁴² *City of La Grande v. Pub. Emps. Ret. Bd.*, 281 Or. 137, 148, 576 P.2d 1204, 1211 (1978).

section 8, the court referred to those kinds of decisions as malleable and indistinct. In a case called *State v. Stoneman*, the court said, “We think, however, that the balancing approach for which the state contends is so contrary to the principles that have guided this court’s jurisprudence . . . that it cannot be countenanced.”⁴³ Final quote: “[G]overnment cannot avoid a[n unqualified] constitutional command by ‘balancing’ it against another of its obligations.”⁴⁴

Now, much has been written about why balancing is a bad idea, or why it’s a good idea—it’s certainly subject to a lot of debate. Justice Scalia wrote a famous article contrasting the rule of law with the law of rules. In an opinion, Justice Scalia once talked about balancing as comparable to comparing the length of a stick to the weight of a stone. And I should say that this is one of the few areas in which Justice Linde agreed wholeheartedly with Justice Scalia. Say what you will about balancing, in my view, and I think in the view of other critics, it seems to replace analysis with unexplainable, obscure, judicial value judgments. The court will set out a number of considerations and then appear to take three or four steps backwards, squint, and announce an outcome.

The balance always involved, in constitutional litigation, an individual’s rights in competition with a governmental interest—an interest which, of course, has been endorsed by legislation. *Horton*, I think, is a perfect example of how this has occurred. The old system, *Smothers*—and don’t get me wrong, I thought *Smothers* was a very bad opinion, it involves a lot of fancy footwork trying to get around a lot of early cases, it leaves many unanswered questions, as I indicated earlier—but it does not allow judges to engage in weighing competing policy goals. It asks, did the right exist at common law? Yes or no? Not as bright a line, I think, as I indicated earlier. [It] depends a lot on the level of generality that you’re going to look at the common law. If so, is there a substantial remedy? Again, substantial has its problems—it’s subjective and imprecise—but the answer under *Smothers* had nothing to do with whether or not the State had a good reason for depriving someone of, for example in *Horton*, \$9 million.

The new regime—the *Horton* regime—does a lot of things, many of them wrong. The first wrong thing I think that it does—well, not the first, but among them—is reinvigorating the pre-*Smothers* case law. They’re reinvigorating a line of cases, which they themselves

⁴³ *State v. Stoneman*, 323 Or. 536, 542, 920 P.2d 535, 539 (1996).

⁴⁴ *Oregonian Publ’g. Co. v. O’Leary*, 303 Or. 297, 305, 736 P.2d 173, 178 (1987).

have said is utterly chaotic. And the kind of cases that are now working their way through the system are going to reflect that. But most of the cases that—Gene has talked about the three different types of cases that the court tries to categorize the existing cases in—the most problematic, I think, are these sort of “Type 2” cases, the quid pro quo cases: “[W]hen the legislature has sought to adjust a person’s rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others, we have considered that quid pro quo in determining whether the reduced benefit that the legislature has provided an individual plaintiff is ‘substantial’ in light of the overall statutory scheme.”⁴⁵ This necessarily implies an inquiry as to whether one individual’s loss or losses is justified by what other individuals gain. How do we do that? Length of a stick, weight of a stone.

I think that the so-called “Type 3” remedy clause cases, where the court’s going to look at the reasons for the legislative change in the common law remedy measured against the extent to which the legislature has departed from the common law is, again, a very thinly disguised, pure, balancing test. What’s the government’s interest to be gained by limiting or eliminating an individual’s right against harm to the individual due to the loss of that right? In other words, the legislature’s policy objective in reducing a remedy balanced against how much that reduction or elimination is costing the plaintiff. Again, how is this to be done?

I will conclude, and leave significant time for questions, by quoting, I think, a sentence from *Horton* that in many ways sums up not only its substantive impact but also its methodological failure. The sentence goes like this, it’s at the end of the opinion (the end of the majority opinion): “We recognize that the damages available under the Tort Claims Act are not sufficient in this case to compensate plaintiff for the full extent of the injuries her son suffered. However, our remedy clause cases do not deny the legislature authority to adjust, within constitutional limits, the duties and remedies that one person owes another.”⁴⁶ Well, in addition to being fairly heartless, that, ladies and gentlemen, is a classic example of question begging. What that says is—and this is something that Justice Linde always railed against—it presumes the conclusion

⁴⁵ *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 219, 376 P.3d 998, 1027 (2016).

⁴⁶ *Id.* at 224, 376 P.3d at 1030.

instead of reasoning to it. The court says, “we can constitutionally deny plaintiff her remedy, because the constitution permits us to do that.”