

HON. JACK L. LANDAU\*

## David Schuman: An Extraordinary Judge

There was so much to admire about my friend and colleague David Schuman.

There was David the fierce competitor and athlete—a one-time Olympic-level speed skater and lifelong fanatic cyclist who sponsored the annual “Tour de Schuman” in central Oregon. Each year he marked his birthday by cycling his age in miles and then having his picture taken as he hoisted his bicycle above his head in celebration (a feat I daresay I could only dream of doing now, much less at seventy-five).

There was David the gifted teacher of state and federal constitutional law, criminal procedure, legislation, and administrative law at the University of Oregon School of Law, at Willamette University College of Law, and at innumerable bar-sponsored continuing education programs. He and I taught countless classes together, and I never failed to learn something from him. With a soft voice that would make students lean in to hear, he would break down difficult ideas and make them understandable, interesting, even fun. It wasn’t for nothing that David was a recipient of the University of Oregon’s prestigious Ersted Award for Distinguished Teaching.

There was David the scholar—one of the nation’s leading experts on state constitutional law. Among other things, he wrote the definitive histories of Oregon’s great founding moments<sup>1</sup> and insightful analyses

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<sup>1</sup> David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611 (1995); David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U’Ren and “The Oregon System,”* 67 TEMP. L. REV. 947 (1994) [hereinafter *The Oregon System*].

of key provisions of the Oregon Bill of Rights,<sup>2</sup> all of which are regularly cited by courts<sup>3</sup> and scholars alike.<sup>4</sup>

There was David the hardworking and distinguished jurist, one of the most productive members of one of the nation's most productive appellate courts.

Finally, there was David the loyal and caring mentor and friend. David Schuman devoted a fair amount of energy to maintaining a reputation as a curmudgeon. But those of us who knew him well knew that David cared deeply about his work and the people he did it with.

In these pages, I want to focus on David Schuman the appellate court judge. As even a cursory glance of his published opinions will reveal, he was an extraordinary judge whose example can teach all of us who continue in that calling.

To begin with, as I've mentioned, David was quite productive. The Oregon Court of Appeals has long earned a reputation as one of the

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<sup>2</sup> David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35 (1986) [hereinafter *Oregon's Remedy Guarantee*]; David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992) [hereinafter *The Right to a Remedy*]; David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988) [hereinafter *A State's Version of "Equal Protection"*]; David Schuman, *Using State Constitutions to Find and Enforce Civil Liberties*, 15 LEWIS & CLARK L. REV. 783 (2011).

<sup>3</sup> See, e.g., *Horton v. Or. Health and Sci. Univ.*, 359 Or. 168, 263, 376 P.3d 998, 1051 (2016) (Landau, J., concurring) (citing *The Right to a Remedy*); *State v. Savastano*, 354 Or. 64, 74, 309 P.3d 1083, 1090 (2013) (citing *A State's Version of "Equal Protection"*); *Jack Doe 1 v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 352 Or. 77, 90, 280 P.3d 377, 385 (2012) (citing *Oregon's Remedy Guarantee*); *Yancy v. Shatzer*, 337 Or. 345, 355, 97 P.3d 1161, 1167 (2004) (citing *Creation of the Oregon Constitution*); *Billings v. Gates*, 323 Or. 167, 173 n.8, 916 P.2d 291, 295 n.8 (1996) (same); *Hale v. Port of Portland*, 308 Or. 508, 527–28, 783 P.2d 506, 517 (1989) (Linde, J., concurring) (citing *Oregon's Remedy Guarantee*).

<sup>4</sup> See, e.g., Patrick L. Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. REV. 343, 345–46 (1998) (citing *The Oregon System*) (remarking on the "rich texture" of David's account); Jodie Leith Chusid, *Tanner v. Oregon Health Sciences University: Justifying the Mandate for Domestic Partner Benefits*, 8 COLUM. J. GENDER & L. 261, 284 n.124 (1999) (citing *A State's Version of "Equal Protection"*); Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 503 (1998) (citing *The Right to a Remedy*); Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions*, 82 ALB. L. REV. 1449, 1449 (2018–19) (same); Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J.L. & GENDER 177, 204 n.157 (2019) (same); Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 350 (1993) (citing *A State's Version of "Equal Protection"*).

busiest intermediate courts of appeal in the nation.<sup>5</sup> And on that busiest of courts, David proved one of the most productive judges in its history. He authored some 672 opinions during his twelve years on the bench. He did that, by the way, while continuing to teach state constitutional law as an adjunct professor, mentor law students, edit and author chapters for state bar publications, and regularly speak at continuing education programs around the country.

As important, David was remarkably quick. From a more or less random sampling of a hundred or so of David's opinions, I found that the majority of them had been issued within ninety days of oral argument. It was actually hard for me to ferret out examples that took much longer. I found one that took eight months,<sup>6</sup> a couple that took six,<sup>7</sup> and one other that took a little over five.<sup>8</sup> Throughout his time on the bench, David was keenly aware that behind each and every case are litigants who desperately need timely answers on which their freedom or livelihoods often depend. His work showed it.

An essential element of David's productivity as a judge was the relative brevity of his opinions. David scoffed at prolixity and took some pride in the economy of his writing. A large number of his opinions extended no more than three or four paragraphs, cutting immediately to the heart of the contentions on appeal and often dispensing with detailing facts that, though interesting, were not absolutely necessary to the resolution of the issues before the court.<sup>9</sup>

But there was much more to David Schuman's appellate court opinions than speed and flash. His opinions—especially his concurring and dissenting opinions—consistently reflected the mind of a judge who was intensely engaged with the work of the court, concerned not

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<sup>5</sup> A 2009 study by the National Center for State Courts concluded that, “[b]y any accepted measure,” the Oregon Court of Appeals was “one of the busiest, most productive and most overworked, appellate courts in the nation.” Quoted in Jack L. Landau, *The Baker's Dozen: The Oregon Court of Appeals Gains Three New Judges*, 74 OR. ST. BAR BULL. 24, 27 (Oct. 2013).

<sup>6</sup> *Krisor v. Henry*, 256 Or. App. 56, 300 P.3d 199 (2013).

<sup>7</sup> *Permanente v. Bonfiglio*, 241 Or. App. 287, 249 P.3d 158 (2011); *State v. Pettengill*, 243 Or. App. 591, 260 P.3d 540 (2011).

<sup>8</sup> *In re Marriage of Horrell and Cole*, 199 Or. App. 349, 111 P.3d 1142 (2005).

<sup>9</sup> Typical of this is David's dissenting opinion in *State ex rel. Dept. of Human Servs. v. Smith*, 190 Or. App. 570, 571, 79 P.3d 374, 375 (2003), in which he simply stated that “I dissent because I do not agree that the facts meet the standard necessary to justify termination of mother's parental rights to child.” Interestingly, the Oregon Supreme Court allowed review and reversed the decision of the court of appeals, agreeing with David's dissent. *State ex rel. Dept. of Human Servs. v. Smith*, 338 Or. 58, 106 P.3d 627 (2004).

only with doctrinal detail but also with how the application of doctrine produces just and sensible results.

A fine example in that regard is David's dissenting opinion in *State v. Howard*.<sup>10</sup> At issue in that case was whether Article I, section 9, of the state constitution required police to obtain a warrant before searching garbage left at the curb.<sup>11</sup> A majority of the Oregon Court of Appeals, sitting en banc, concluded that a warrant was not required, because no one retains a privacy or possessory interest in garbage that has been collected by a sanitation company.<sup>12</sup>

David disagreed. As he saw it, the governing principle was that public officials cannot engage in a practice at their discretion that “significantly impair[s] ‘the people’s’ freedom from scrutiny[.]”<sup>13</sup> Applying that principle, David reasoned as follows:

Thus, the inquiry in the present case is this: Did the police do something that, if they could do it in similar circumstances whenever they wanted, would diminish the freedom from unwanted government scrutiny to which an Oregonian is entitled? In less abstract (but no less relevant) terms: If police officers (or tax collectors or OR-OSHA inspectors or SAIF investigators), without your knowledge and without cause to believe that you had done anything wrong, had your garbage collectors give them your curbside container immediately after pickup, and then the officers took the container to their office, dumped the contents out on the floor, and went through them with the proverbial fine-toothed comb, in the process discovering your social security number, your bank account numbers, your credit account numbers, your diet, where you shop, what you buy, what medications you take (birth control pills? Viagra? Rogaine? Prozac?), what cosmetics you use, what congenital diseases your DNA might disclose, what periodicals you read, what the discarded drafts of your reports or correspondence say, whom you telephone, how much alcohol you drink, whether or not you threw away that atrocious necktie Aunt Sally gave you for your birthday, and other details of your personal and professional life—in that situation, would *you* feel that *your* privacy had been violated? That is the question, and the answer can only be yes.<sup>14</sup>

David's position was ultimately vindicated in 2019. In *State v. Lien*, the Oregon Supreme Court concluded that the search and seizure guarantee of Article I, section 9, does require a warrant before police

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<sup>10</sup> 204 Or. App. 438, 129 P.3d 792 (2006).

<sup>11</sup> *Id.* at 440, 129 P.3d at 793.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 450, 129 P.3d at 799 (Schuman, J., dissenting).

<sup>14</sup> *Id.* at 452, 129 P.3d at 800 (Schuman, J., dissenting).

can search a defendant's garbage containers.<sup>15</sup> The court framed the controlling question precisely as David said it must be framed in his dissent in *Howard*: whether the government's conduct, if engaged in at its discretion, will "significantly impair 'the people's' freedom from scrutiny[.]"<sup>16</sup> The court answered the question precisely as David had as well.<sup>17</sup>

David Schuman's opinions reflect a deep commitment to the importance of state constitutional law. This comes as no surprise, as he was not only a former law clerk of former Justice Hans Linde—one of the "intellectual godfathers" of the entire field<sup>18</sup>—but also a leading scholar of state constitutional law in his own right.<sup>19</sup> He was especially interested in the proper analysis of discrimination claims under the privileges and immunities guarantee of Article I, section 20. Beginning with its seminal *State v. Clark* decision, the Oregon Supreme Court explained that analysis of Article I, section 20, cases involves a straightforward inquiry that asks first whether a legislative classification involves a "true class" whose members share characteristics apart from the law in question (for example, race, ethnicity, religion, status as veterans, or geographical residence).<sup>20</sup> If no true class is involved, the Article I, section 20, challenge simply fails.<sup>21</sup> If a true class is involved, then the classification is constitutionally permissible so long as it has a rational basis.<sup>22</sup>

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<sup>15</sup> 364 Or. 750 at 781–82, 441 P.3d 185 at 202 (2019).

<sup>16</sup> *Id.* at 760, 441 P.3d at 190–91.

<sup>17</sup> *Id.* at 760–61, 441 P.3d at 191 ("In our view, . . . most Oregonians would consider their garbage to be private and deem it highly improper for others—curious neighbors, ex-spouses, employers, opponents in a lawsuit, journalists, and government officials, to name a few—to take away their garbage bin and scrutinize its contents.").

<sup>18</sup> See, e.g., Richard S. Price, *Linde's Legacy: The Triumph of Oregon State Constitutional Law, 1970-2000*, 80 ALB. L. REV. 1541, 1542 (2016) (referring to Linde as the "intellectual godfather" of state constitutional law).

<sup>19</sup> Before coming to the bench, David was a fierce defender of state constitutional law against those critics who challenged its legitimacy. In James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992), for example, the author complained about the "impoverished" condition of state constitutional analysis. In David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 277 n.18 (1992), David responded by challenging Gardner's apparent romanticizing of federal constitutional analysis: "Perhaps I am more reluctant than Gardner to abandon 'impoverished' state constitutionalism . . . because I find recent *federal* constitutionalism to be impoverished—not because it is increasingly conservative, but because it is increasingly petulant, shrill, formulaic, and intellectually incoherent."

<sup>20</sup> 291 Or. 231, 240–41, 630 P.2d 810, 816, *cert. denied*, 454 U.S. 1084 (1981).

<sup>21</sup> *Id.* See also *Sealey ex rel. Sealey v. Hicks*, 309 Or. 387, 397, 788 P.2d 435, 440 (1990).

<sup>22</sup> See, e.g., *Jensen v. Whitlow*, 334 Or. 412, 424, 51 P.3d 599, 605 (2002).

The foregoing analysis stands in marked contrast to the complex, multitiered analysis that characterizes Fourteenth Amendment Equal Protection case law, which requires different levels of judicial review depending on the nature of the classification involved—for instance, whether the classification is “suspect” or involves “fundamental rights.” David scoffed at the “Two-Tiered Scrutinies, Three-Pronged Tests, Four-Factored Analyses, Sensitive Balances and sundry exotica currently occupying the United States Supreme Court’s menagerie” of Fourteenth Amendment Equal Protection jurisprudence.<sup>23</sup>

The problem was that, over time, the Oregon Supreme Court started complicating its Article I, section 20, analysis, introducing different levels of scrutiny depending on the nature of the legislative classification involved—much like the federal case law.<sup>24</sup> The Oregon Court of Appeals took those developments to amount to a modification of the original analytic template for Article I, section 20.<sup>25</sup> That created some apparent inconsistency in the case law.

In *Cox ex rel. Cox v. State*, David addressed head-on the state of the case law applying Article I, section 20.<sup>26</sup> *Cox* addressed the issue whether temporary differences in funding of different school districts violated the equal privileges and immunities guarantee of Article I, section 20.<sup>27</sup> In a brief, four-paragraph opinion, David’s panel readily concluded that there was no violation because the plaintiffs were not members of a “suspect” class and the funding scheme was minimally rational.<sup>28</sup> David concurred, offering “a more detailed explanation of the decision,” which he said could be useful to the bench and bar “in light of the somewhat confusing state of current Article I, section 20, jurisprudence.”<sup>29</sup>

What followed was an in-depth description of how Article I, section 20, works. David began by observing that the courts have never

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<sup>23</sup> *A State’s Version of “Equal Protection,” supra* note 2, at 221.

<sup>24</sup> This actually started fairly early on, with *In re Compensation of Hewitt*, 294 Or. 33, 45–46, 653 P.2d 970, 977–78 (1982), in which the court introduced the idea that true classes under Article I, section 20, can be understood to include a special subclass, involving “suspect” classifications, which trigger judicial scrutiny more demanding than mere rationality.

<sup>25</sup> *See, e.g., Tanner v. Or. Health Scis. Univ.*, 157 Or. App. 502, 520–22, 971 P.2d 435, 445–46 (1988) (identifying variations in the way courts framed Article I, section 20, analysis).

<sup>26</sup> 191 Or. App. 1, 80 P.3d 514 (2003).

<sup>27</sup> *Id.* at 3, 80 P.3d at 514–15.

<sup>28</sup> *Id.* at 3–4, 80 P.3d at 515.

<sup>29</sup> *Id.* at 5, 80 P.3d at 516.

interpreted that provision (as it had other provisions) by reconstructing the meaning most likely understood by its framers.<sup>30</sup> That's a good thing, he noted, given the overtly racist and sexist view of the state's founders.<sup>31</sup> Instead, he suggested, the correct analysis must be found in case law.<sup>32</sup> That case law shows that, at least as originally articulated, the analysis of Article I, section 20, claims involved the straightforward two-step process that I described above.<sup>33</sup> Later cases from the Oregon Supreme Court, though, introduced the idea that analysis of distinctions based on a true class may depend on the type of true class involved—in particular, whether the classification was “suspicious.”<sup>34</sup> The court may not have openly described its analysis that way, he said, but that was what it was doing; the court of appeals had merely made explicit what was implicit in the supreme court's decisions.<sup>35</sup> The result, he concluded, is that Article I, section 20, cases are now resolved by examining four questions:

(1) Does the government action provide a privilege or immunity to a person based on that person's membership in a class? (2) Is the class a true class? (3) Is it also suspicious? (4) Is the suspicion confirmed; that is, is the governmental action based on stereotype or prejudice instead of a genuine correlation between the trait on which the classification is based and the benefit or burden conferred? If the answers to all four questions are affirmative, the government violates section 20. Otherwise, the action does not violate section 20 if it rationally furthers some lawful government objective. . . .<sup>36</sup>

David's concurrence was largely adopted by the court of appeals in *Advanced Drainage Systems, Inc. v. City of Portland*,<sup>37</sup> and it remains probably the most cogent description of Article I, section 20, analysis to this day.

All that said, David's approach to judging was never overly obsessed with doctrinal niceties and technicalities. His opinions reflect an abiding concern that judicial doctrines deserve our attention, not for their own sakes, but as tools with which to produce just results.

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<sup>30</sup> *Id.* at 6–7, 80 P.3d at 517.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 7, 80 P.3d at 517.

<sup>33</sup> *Id.* at 8–9, 80 P.3d at 517–18.

<sup>34</sup> David explained that he avoided using the term “suspect” classification, both because it “unnecessarily invokes” federal Fourteenth Amendment jurisprudence and because it suggests that something about the class members is suspect, as opposed to the classification itself. *Id.* at 9 n.4, 80 P.3d at 518 n.4.

<sup>35</sup> *Id.* at 10, 80 P.3d at 518–19.

<sup>36</sup> *Id.* at 12, 80 P.3d at 519–20.

<sup>37</sup> 214 Or. App. 534, 539–40, 166 P.3d 580, 584–85 (2007).

David's dissenting opinion in *State v. Vanorum* comes to mind in that regard.<sup>38</sup> Defendant Vanorum had been a participant in an anti-pesticide demonstration in Eugene.<sup>39</sup> He had been taken into custody for disorderly conduct and resisting arrest when he refused to comply with police orders to disperse.<sup>40</sup> At trial on those charges, he asserted that he had acted in self-defense.<sup>41</sup> Following the close of the evidence, the trial court instructed the jury on self-defense.<sup>42</sup> Vanorum did not object to that instruction, but he did ask for another one, which the trial court refused to deliver.<sup>43</sup> Following his conviction, Vanorum appealed, arguing that the trial court erred in instructing the jury on his defense.<sup>44</sup> During the appeal, the Oregon Supreme Court issued a decision in an unrelated case that made clear both that the instruction that the court had delivered in Vanorum's case was erroneous and that the one that Vanorum had requested was correct.<sup>45</sup> The Oregon Court of Appeals, however, declined to address Vanorum's arguments because he had failed to object to the delivery of the instruction that the court actually gave and failed to explain why the court should have given the instruction that Vanorum had offered.<sup>46</sup>

David dissented, remarking that, "in this case, as in many others, our 'preservation' jurisprudence primarily preserves injustice."<sup>47</sup> In his view, the trial court had

refused to give an instruction that, under a subsequently decided Supreme Court case, was a correct statement of the law, and *did* give an instruction that, under the same Supreme Court case, was an *incorrect* statement of the law. Both instructions involved a disputed and potentially dispositive issue in the case. In other words, applying the law as it currently exists . . . it is beyond dispute that defendant did not receive a fair trial.<sup>48</sup>

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<sup>38</sup> See 250 Or. App. 693, 699, 282 P.3d 908, 912 (2012) (Schuman, J., dissenting).

<sup>39</sup> *Id.* at 700, 282 P.3d at 912 (Schuman, J., dissenting).

<sup>40</sup> *Id.* (Schuman, J., dissenting).

<sup>41</sup> *Id.* at 701, 282 P.3d at 912 (Schuman, J., dissenting).

<sup>42</sup> *Id.*, 282 P.3d at 913 (Schuman, J., dissenting).

<sup>43</sup> *Id.* (Schuman, J., dissenting).

<sup>44</sup> *Id.* at 694, 282 P.3d at 909.

<sup>45</sup> *Id.* at 696, 282 P.3d at 910 (citing *State v. Oliphant*, 347 Or. 175, 218 P.3d 1281 (2009)).

<sup>46</sup> The court explained that Vanorum had failed to explain with adequate particularity the basis for his objection, as required by Rule 59 H of the Oregon Rules of Civil Procedure. 250 Or. App. at 697–98, 282 P.3d at 910–11.

<sup>47</sup> *Id.* at 700, 282 P.3d at 912 (Schuman, J., dissenting).

<sup>48</sup> *Id.* at 699–700, 282 P.3d at 912 (Schuman, J., dissenting) (citation omitted).

David conceded that the court of appeals previously had adopted fairly strict rules regarding the preservation of error.<sup>49</sup> He nevertheless complained that, “in too many circumstances, these precepts lead to unjustifiable and unjust results and serve no purpose whatsoever.”<sup>50</sup> Still, the court’s existing cases “are what they are,” David acknowledged, and for that reason, he accepted “under protest” the conclusion that the delivery of that instruction was beyond appellate review.<sup>51</sup> As for the instruction that Vanornum had requested, though, David insisted that what the defendant had told the trial court by way of justification was adequate and that the majority was being unnecessarily picky about the rules of preservation in refusing to entertain the defendant’s claim of error.<sup>52</sup>

The Oregon Supreme Court ultimately reversed, concluding that the court of appeals had indeed erred in applying the wrong standard for determining whether an issue has been preserved.<sup>53</sup>

I want to mention one final aspect of David Schuman’s work as an appellate court judge—his humility. David was no shrinking violet. He didn’t hesitate to make his views known to his colleagues. But he never hectorated them. He never condescended. He always expressed himself with genuine respect, often with a touch of humor. I’m reminded of his dissent in *City of Nyssa v. Dufloth*, a case concerning the constitutionality of a municipal ordinance requiring nude dancers to maintain a certain distance from their audience.<sup>54</sup> A majority of the Oregon Court of Appeals, sitting en banc, upheld the validity of the ordinance, based on that court’s precedent.<sup>55</sup> David again dissented. He thought that precedent had been incorrectly decided. But the tone of his dissent was quintessential David Schuman. “I understand that the majority finds support in an opinion of this court,” he said.<sup>56</sup> “For that reason, this dissent is not only swimming upstream, but swimming upstream through water that is over the dam.”<sup>57</sup>

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<sup>49</sup> *Id.* at 704, 282 P.3d at 914 (Schuman, J., dissenting).

<sup>50</sup> *Id.* (Schuman, J., dissenting).

<sup>51</sup> *Id.* (Schuman, J., dissenting).

<sup>52</sup> *Id.* at 705–06, 282 P.3d at 914–15 (Schuman, J., dissenting).

<sup>53</sup> *State v. Vanornum*, 354 Or. 614, 317 P.3d 889 (2013). The supreme court concluded that the court of appeals had erred in concluding that the Oregon Rules of Civil Procedure govern the determination of whether an issue has been preserved for appellate review. *Id.* at 628–29, 317 P.3d at 897.

<sup>54</sup> 184 Or. App. 631, 634, 57 P.3d 161, 162 (2002).

<sup>55</sup> *Id.* at 638, 57 P.3d at 164.

<sup>56</sup> *Id.* at 655, 57 P.3d at 174 (Schuman, J., dissenting).

<sup>57</sup> *Id.* (Schuman, J., dissenting).

David Schuman was truly an extraordinary judge. He set an example for us all with the energy, intellect, integrity, compassion, and humility that are so clearly reflected in his work on the Oregon Court of Appeals. He will be greatly missed.