OREGON AS A LABORATORY OF STATUTORY INTERPRETATION

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My thanks to the Willamette Law Review for inviting me to participate in this interesting and important event. I am honored to share the podium with such a distinguished group of scholars and practitioners. My charge, as I understand it, is to offer some thoughts on Professor Abbe Gluck's presentation this evening about statutory construction generally, and as it is practiced in Oregon particularly, and then share some observations of my own about those subjects.

Let me begin with a few words(L)s and

declare that it is appropriate to examine legislative history "[w]hen a statute is ambiguous."[11] While, in another case the court would resort to such history with no mention of ambiguity.[12] In one case, the court would say that statutory construction "is not done by consulting dictionary definitions of words,"[13] yet, in another case, the court would resort to dictionary definitions as an aid to interpreting a statute.[14] In one case, the court would say that it lacked constitutional authority to rewrite statutory wording to avoid an absurd result,[15] yet, in another case, it would do precisely that.[16] What resulted is what I have called a "cooked-pasta" approach to statutory construction litigation: Lawyers would throw at the court anything they could find–text, rules, history, dictionaries–in the hope that one of them would stick.

PGE was designed to bring order to the chaos.[17] And it must be said that it largely delivered. In *PGE*, the court articulated an overarching goal–legislative intent–and a three-step method of

11. Morasch v. State, 493 P.2d 1364, 1365 (Or. 1972); *see also* State *ex rel.* Appling v. Chase, 355 P.2d 631, 633 (Or. 1960) ("If the language used in the statute is plain and understandable, then legislative intent must be gathered from the language and there is no need to resort to rules of statutory construction. When the language is not so plain and understandable that it speaks for itself, as is the situation here, the legislative history becomes relevant."(citations omitted)).

12. State v. Leathers, 531 P.2d 901, 904 (Or. 1975) ("The primary purpose of statutory construction is to ascertain the legislative intent. In this endeavor, we may give due consideration to legislative history.").

13. Davidson v. Or. Gov't Ethics Comm'n., 712 P.2d 87, 91 (Or. 1985).

14. Stephens v. Bohlman, 838 P.2d 600, 604 (Or. 1992) (using Webster's New International Dictionary to define "replace").

15. Dinger v. Sch. Dist. 24CJ, 352 P.2d 564, 566 (Or. 1960) ("It is axiomatic that courts cannot in the guise of construction supply an integral part of a statutory scheme omitted by the legislature."(citations omitted)); *see also* OR. REV. STAT. § 174.010 (2009) ("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 . . . .").

16. Johnson v. Star Mach. Co., 530 P.2d 53, 57 (Or. 1974) ("[I]f the literal import of the words is so at variance with the apparent policy of the legislation as a whole as to bring about an unreasonable result, the literal interpretation must give way and the court must look beyond the words of the act.").

17. *PGE* was one of several decisions that the Oregon Supreme Court issued in the 1990s in which the court carefully articulated (usually three-step) methods of interpreting various documents of legal significance. *See, e.g.* Yogman v. Parrott, 937 P.2d 1019 (Or. 1997) (three-step process for interpreting contracts); Ecumenical Ministries v. Or. State Lottery Comm'n, 871 P.2d 106 (Or.9 0.3-0.09opt0e00073Tc 8.52 0 0 80s in r of inc999 318 Tm [o [the E0.00600126 Tc 0.5nad61. 1 t

determining it: First, examine the text in context with associated rules of construction; if the intentions are clearly revealed by that analysis, you are done.[18] Second, if the textual analysis reveals an ambiguity, then examine the legislative history to resolve that ambiguity.[19] Third, if the legislative history does not resolve the ambiguity, resort to an appropriate canon of construction to put the matter to rest.

It keeps judges out of the business of second-guessing the legislature's policy decisions. And it requires the legislature to own the expression of its policy decisions in the words that it employs to express them.

Having acknowledged that there are things to like about PGE, let me address what I regard as some of its shortcomings.

In my view, the order that PGE brought to the world of statutory construction was largely superficial. The court in that case simply took existing rules of statutory construction and organized them into three piles–text, legislative history, and canons of construction. But it did so without ever questioning the legitimacy of any of the rules themselves. I see several problems with that.

First, some of the rules don't make much sense. Rules of statutory construction were not handed down from on high, etched on stone tablets. They are products of tradition and history and, most important, underlying assumptions about the nature of language, legislation, and the role of the courts in interpreting them.[23] A number of those rules don't stand up to scrutiny today, sometimes because they were mistaken in the first place, sometimes because their premises simply no longer apply.

An example of the former–that is a rule of construction based on a mistake–consider the "rule of prior construction." The Oregon Supreme Court occasionally maintains that, when it construes a statute, its construction becomes part of the statute, and the court is rendered powerless to reconsider that interpretation. According to the court, once announced, the interpretation may be changed by the legislature only.[24] I can understand why a court, as a matter of policy, may be reluctant to overturn prior statutory construction decisions. But to say that the court is powerless to fix its own mistakes is another matter entirely. As it turns out, the genesis of the rule appears to be mistaken reliance on a line of earlier cases pertaining to the effect of borrowing a statute from another state (the general rule being that the legislature, in borrowing the statute, borrows also any existing interpretation from the Supreme Court of that state).[25]

23. *See, e.g.*, Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183-91 (1990) (tracing roots of modern interpretive canons to ancient rules of interpretation of Roman law and sacred texts).

24. State v. King, 852 P.2d 190, 195 (Or. 1993) ("When this court interprets a statute, the interpretation becomes a part of the statute, subject only to a revision by the legislature.").

25. *See generally* Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILLAMETTE L. REV. 1, 17-18 (1996) (tracing origins of rule of prior construction

conventions of the mid-nineteenth century shows that the Oregon Supreme Court's assumption that "legislative intent" referred to actual, subjective intentions–at least those revealed by evidence extrinsic to the text of the statute itself–-is at least debatable.[29] In fact, resort to legislative history as a source of legislative intent did not emerge until, at the earliest, the 1890s.[30] That leaves us with an interesting conundrum. If the PGE court had done a PGE-type analysis of the statute that it cited as the justification for its PGE analysis, the court could have found that the legislature did not intend to adopt such PGE analysis.

Another example of PGE's internally contradictory nature lies in its stated intentionalist emphasis, on the one hand, and its declaration that legislative history is off-limits in absence of textual ambiguity, on the other. Students in my legislation class will recognize in PGE's artificial limitation on the availability of legislative history the old, nineteenth-century "plain meaning" rule, the archetype of textualism in statutory construction.[31] The PGE court never explained why, if it was truly committed to ascertaining the legislature's intentions, it would ever turn a blind eye to any evidence of legislative intent, even if the text of the statute appeared on the surface to be unambiguous.[32]

I should note that, in some respects, my concerns about the contradictory nature of PGE have been rendered somewhat academic. In 2001, the Oregon legislature enacted amendments to ORS 174.020, so that the statute now provides that, in any case–ambiguity or not–parties may offer legislative history, and the courts may apars91302tory .77tSade on 41 0e2(4y

even after *Gaines*. What, for example, of the rule of lenity–the rule that criminal statutes are to be strictly construed? The Oregon legislature has decreed that there is no such rule as it pertains to the Oregon criminal code.[38] And sometimes the courts heed the statute.[39] But sometimes they do not.[40] Sometimes, notwithstanding the statute, the courts cite the old rule.[41] What about such chestnuts as the rule of prior construction, the avoidance canon, the rule against surplusage, the *expressio unius* canon, the rule that particular statutes control over general ones, the absurd results canon? Arguments have been made that each one is based on assumptions that are empirically questionable or that logically don't make sense.

In closing, let me say that Oregon may be a laboratory of statutory construction law, but the experimentation is ongoing. There is much work yet to be done. In the meantime, I want to express my appreciation for the work that Professor Gluck has done in bringing attention to the work of the Oregon courts–and state courts generally–in this important area of the law.

38. OR. REV. STAT. § 161.025(2) (2009) (stating that "the rule that a penal statute is to be strictly construed shall not apply" to the Oregon Criminal Code).

39. State v. Maney, 688 P.2d 63, 66 n.5 (Or. 1984).

40. State v. Welch, 505 P.2d 910, 912 (Or. 1973).

41. Especially interesting is *State v. Isom*, 837 P.2d 391 (Or. 1992). In disposing of one issue, the court notes that, "[b]ecause this legislative directive is clear and the issue is one for the legislature to decide, there is no occasion for this court to consider the principle of "lenity" that is sometimes followed when legislative intent is not clear." *Id.* at 396 n.4. On the next page, however, in its disposition of another issue, the court notes that, citing OR. REV. STAT. § 161.025(2) (2009), "[w]e are instructed by the Oregon Criminal Code itself," not to strictly construe penal statutes. *Isom*, *supra* at 397 n.6.