PALTRY, GENERAL & ECLECTIC: WHY THE OREGON SUPREME COURT SHOULD SCRAP *PGE V. BUREAU OF LABOR & INDUSTRIES*

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On October 22, 2007 the Oregon Supreme Court granted review in *State v. Gaines*,[1] a run-of-the-mill criminal case interpreting the statute establishing the obstruction of government or judicial administration.[2] What made the grant of review remarkable is the question certified by the court; a question which, depending on the answer, could spell the end of the three-step paradigm[3] of *PGE v. Bureau of Labor & Industries*.[4] That question was:

> Whether ORS 174.020 requires the Oregon courts to consider evidence of legislative history presented by a party when engaging in *PGE* analysis.[5]

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1. 155 P.3d 61 (Or. 2007), *adh'd to on recons.*, 159 P.3d 1291 (Or. Ct. App. 2007).

2. OR. REV. STAT. § 162.235(1) ("A person commits the crime of obstructing governmental or judicial administration if the person 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.").

3. The Supreme Court has referred to the *PGE* framework as a "paradigm" on several occasions. *See e.g.*, State v. Johnson, 116 P.3d 879, 882 (Or. 2005) ("The state's argument presents an issue of statutory construction to be considered under the paradigm set out in *PGE*.") (internal citation omitted).

4. 859 P.2d 1143 (Or. 1993) [hereinafter *PGE*].

5. Oregon Supreme Court, Media Release 5 (Oct. 22, 2007). On reconsideration, the court of appeals "reject[ed] defendant's statutory construction argument without discussion" an

An affirmative answer to this question would make *Gaines* a watershed case,[6] and the Court should be commended for putting the question to the parties so directly, a welcome change from the court's usual practice of grafting methodological declarations onto otherwise routine cases.[7] *PGE* looms over the legal landscape of Oregon like no other decision; it is easily the most cited by Oregon's two appellate courts,[8] and its rigidly sequential nature and its rejection of legislative history at the first level of analysis have made reliance upon dictionaries and statutory "context" the dominating features of statutory interpretation in Oregon.[9] In light of the grant of review in *Gaines*, this Comment provides a needed reevaluation of *PGE*.

This Comment surveys all the cases decided under the *PGE* paradigm between 1999 and 2006[10] and draws from them several conclusions, the most striking of which is the near total disappearance of legislative history in the decisionmaking of the Oregon Supreme Court.[11] Between 1999 and 2006, in the one hundred and fifty cases

argument which, the supreme court explained in granting review, had been based "on legislative history supporting her interpretation of ORS 162.235." *PGE*, 859 P.3d at 1292; *Media Release* at 5.

6. Not the least because it would be an admission by the court that the legislature may dictate how statutes are interpreted. That conclusion would, at the least, require a consideration of the separation of powers concerns presented by all of ORS chapter 174. *See* Jack L. Landau, *Some Observations About Statutory Interpretation in Oregon*, 32 WILLAMETTE L. REV. 1, 9–10 (1996) (assuming, but finding "debatable," the constitutionality of "the legislature's enactment of rules that dictate to the judiciary the manner in which statutes are to be construed").

7. This was the case in the litigation leading to *PGE*; as Judge Landau has pointed out, "[T]he court articulated its methodology on its own initiative. The adoption of a particular methodology for construing statutes was not at issue in *PGE* and was not the subject of briefing by the parties." *Id.* at 13. The court has also used routine cases to announce particular methodologies in other contexts. *See Yogman v. Parrot*, 937 P.2d 1019 (Or. 1997) (setting out three- step method for interpreting contracts); *Ecumenical Ministries v. Oregon Lottery Comm.*, 871 P.2d 106 (Or. 1994) (announcing method for construing constitutional provisions passed by initiative); *Priest v. Pearce*, 840 P.2d 65 (Or. 1992) (announcing method for interpretation of the Oregon constitution).

8. *See infra* table I.

9. The court's reliance upon dictionaries has become so prominent that Judge Landau published an article naming, in mock seriousness, Daniel Webster as "arguably, the person most influential in the recent development of Oregon law[.]" Jack L. Landau, *The Eighth Justice? Webster, His Dictionary, and Its Influence on Oregon Law*, 2 OREGON APPELLATE ALMANAC 65 (2007).

10. This date range was chosen because the last major article published on *PGE* was published in this Law Review in 1998. *See* Steven Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219 (1998).

11. This disappearance of legislative history is almost surely a result of the adoption of the *PGE* paradigm. As Judge Landau noted, pre-*PGE* the Oregon Supreme Court was not shy about examining legislative history where the text was clear on its face. *See* Landau, *supra*

published by the supreme court citing *PGE*, only nine[12] reached the second "step" of the *PGE* analysis and considered legislative history, and no decision reached the third step of the paradigm. On the sixty-one occasions where the court has seen fit to reverse the court of appeals, it reached step two of *PGE* a mere five times,[13] and in the only instance of third step analysis to be addressed by both courts between 1999 and 2006,[14] the interpretation of competing constructions of Oregon's venue statute[15] in *State v. Werdell*,[16] the court of appeals was reversed on the basis of its first-step analysis of the underlying criminal statute[17] with no comment from the supreme

note 6, at 44 (finding that "not all of [the Oregon Supreme Court's] prior decisions adhere to the rule that the reviewing court must declare statutory language ambiguous to enable it to look at legislative history").

12. See Table 1 for all figures dealing with numbers of cases and their dispositions as well as an explanation of the methodology by which they were derived. Johansen, surveying the supreme court's use of *PGE* between 1993 and 1998, found that "of the 137 statutory issues addressed using the *PGE* approach, 104 were resolved at level one." *See* Johansen, *supra* note 10, at 221 n.9. One important caveat to this data is that those cases where the court has interpreted statutes, but not cited to *PGE*, are not included. While I have not read every case decided by the Oregon Supreme Court between 1999 and 2006, it is my impression that such cases are rare.

13. *See* Tharp v. Psychiatric Sec. Review Bd.,110 P.3d 580 (Or. 2005) (reversing an affirmance without opinion by the court of appeals, 72 P.3d 1011 (Or. Ct. App. 2003); State v. Barnes, 986 P.2d 1160 (Or. 1999) (reversing in part a decision by the court of appeals which *did not* cite *PGE*, 945 P.2d 627 (Or. Ct. App. 1997); State v. Edson, 985 P.2d 1253 (Or. 1999) (reversing in part a decision by the court of appeals which *did not* cite *PGE*, 912 P.2d 423 (Or. Ct. App. 1996); State v. Murray, 136 P.3d 10 (Or. 2006) (reversing in part an affirmance without opinion by the court of appeals, 117 P.3d 297 (Or. Ct. App. 2005); State v. Wolleat, 111 P.3d 1131 (Or. 2005) (reversing an affirmance from the bench by the court of appeals, 75 P.3d 469 (Or. Ct. App. 2003). Note that in all of these instances, which comprise more than half the cases in which the supreme court reached step two of *PGE*, the court of appeals either provided no explanation whatever, or did not cite *PGE*.

14. Contrast this with Johansen's finding that, between 1993 and 1998 the court, in one third (11 out of 33) of the cases in which it examined legislative history found that history useless and proceeded to step three. Johansen, *supra* note 9, at 244 n.169.

15. OR. REV. STAT. § 131.315(10) (2007).

16. 122 P.3d 86 (Or. Ct. App. 2005), *rev'd.*, 136 P.3d 17 (Or. 2006). The court of appeals continues to reach step three of the *PGE* analysis on occasion. *See e.g.*, State v. Stamper, 106 P.3d 172, 178 (Or. Ct. App. 2005), *rev denied*, 119 P.3d 790 (Or. 2005) (stating, with admirable candor, that "[u]ltimately, our interpretation of the statute is a judgment call based on our best estimation of what the legislature intended." 106 P.3d at 179.)

17. OR. REV. STAT. § 162.325 (establishing the crime of hindering prosecution). The court of appeals construed the meaning of the words "discovery" and "apprehension" in that statute at the first step of the *PGE* framework, employing *Webster's Third New International Dictionary* (unabridged ed. 2002). *See* Werdell, 122 P.3d at 89. The bulk of the court of appeals' analysis focused on the separate question of "whether the legislature intended for the conduct, or, instead, the status of the underlying offender to constitute the element at issue here." *Id.* at 90. That question implicated the venue statute because if the *status* of the offender

court regarding its rare foray.[18]

Why the court persists in using the *PGE* paradigm has never been adequately explained, and the paradigm has been rigorously critiqued since its inception.[19] What is clear is that the paradigm has produced outcomes provoking jurists into "primal screams" on two published occasions,[20] and has injected an air of artificiality and rigidness into the practice of the Oregon courts which has not been matched by any concomitant increase in clarity or transparency. As will be seen, what is nominally a three-step sequence moving from

(here the offender would have been a felon in possession of a firearm) were the "pertinent element of ORS 162.325(1), then, in cases where all the hindering conduct occurred in one county, that would be "the county where the crime was committed . . . thus there would have been no need for the legislature to provide an exception or a more specific rule governing venue for hindering prosecution trials." *Id.* Resort to the third step of the *PGE* analysis was necessary because the court found no answer to this question in the text, context or legislative history of ORS 131.315, or *former* ORS 131.390, and after an extended discussion of the interaction of these venue statutes with Article I, § 11 of the Oregon Constitution, the court applied the canon of construction counseling against constructions leading to constitutional conflict to conclude that ORS 131.315(10) could establish venue "where no element occurred." *Id.* at 95.

18. The supreme court, after faulting the court of appeals for not reading "discovery" in ORS 162.325(1)(e) "*in pari materia*" with the rest of the statute, and holding that, after purporting to have applied *ejusdem generis*, the court of appeals' construction of the statute failed for not having done so, the supreme court mentioned only that "because of the disposition that we make of this case under ORS 162.325(1)(e), we need not address defendant's alternative argument that venue for the alleged offense could not lie in Curry County." *Werdell*, 136 P.3d at 20, 21 n.5.

19. Johansen concluded in 1999 that "[f]ive years after *PGE*, the court's effort to create a predictable mechanism for interpreting statutes is in danger of collapsing," and that the "*PGE* approach" was "unnecessarily complex, arbitrary, and a little fanciful." Johansen, *supra* note 10, at 268. Judge Landau, writing in 1996, concluded that "the precision of the *PGE* methodology is illusory." Landau, *supra* note 9, at 68. I agree in part with both these criticisms, and the cases decided between 1999 and 2006 only reinforce the accuracy of these early critiques: statutory interpretation has not become less complex nor has there been an increase in precision since Johansen and Landau wrote their articles. That said, however, I do not agree with Johansen that statutory interpretation has become "arbitrary" under *PGE*—it is certainly dissatisfying, but *PGE* has not generated the kind of *ipse dixit* reasoning that I would consider arbitrary.

20. *See* Grijalva v. Safeco Ins. Co., 956 P.2d 995, 1002 (Or. Ct. App. 1998) (Haselton, J., concurring) ("This is a primal scream concurrence: Under *PGE*, our construction of ORS 742.061 is "correct"—and, indeed, inevitable. But in the real world—the world in which insureds and insurers live—that construction defies common sense and sanctions unconscionable results. In the real world, we are wrong.") (internal citations omitted). *See also* Dockins v. State Farm Ins. Co., 963 P.2d 119, 120 (Or. Ct. App. 1998) (Wollheim, J., concurring) ("This is Primal Scream II, the sequel concurrence . . . . In reality . . . the statute allows an insurer to force an insured to engage in lengthy litigation without fear of liability for attorney fees under ORS 742.061 . . . . This result encourages litigation and guts the 'purpose of the statute.'") (internal citations omitted).

text and context to legislative history, and then to interpretive canons, is in fact a winding and often circular path, filled with redundancies, appeals to silence in the statute, and at times a rejection of the text. Much like a kaleidoscope, the *PGE* paradigm is made up of strong primary elements which while at rest seem to have a set order and pattern, but yet when stirred to motion that pattern disappears, reappearing as a constantly shifting combination and recombination of the primary elements. It is this uncertainty that robs the *PGE* paradigm of whatever value it could add to the process of interpreting statutes.

This Comment proceeds in four sections, and as it does I cheerfully echo the words of Justice Balmer and "[c]aution the reader at the outset that this statutory interpretation exercise involves mind-numbing detail."[21] The first section lays out the *PGE* paradigm as it was originally articulated, as well as subsequent cases that have added to the paradigm in significant ways. The second section explores two key questions left unanswered by *PGE*: first, whether the inquiry at the first step is one of text *then* context, or whether text *and* context are of equal weight; second, it reviews the recently settled controversy over the validity of pre-*PGE* statutory constructions. The third section examines the few cases in which the supreme court has reached the second- step of the analysis and explores that court's increasingly rare use of legislative history. The fourth section concludes by proposing that the Oregon Supreme Court scrap the *PGE* paradigm because its adds little or no value to statutory interpretation, opens their decisions up to attack, and has been a failed attempt to inject mechanical predictability into what is, at bottom, an exercise in advocacy and judgment. The appellate bench in Oregon is filled with uniquely talented and able jurists of good faith, and the appellate bar is their equal: neither bench nor bar is in need of analytical crutches, or analytical straight-jackets. *PGE* ought to be scrapped.

21. Save Our Rural Oregon v. Energy Facility Siting Council, 121 P.3d 1141, 1152 (Or. 2005) (applying *PGE*'s step-one and holding that "[i]n this case, a comparison of the two statutes makes clear that the legislature used ORS 197.732(1)(c) as the basis for the later-enacted ORS 469.504(2)(c) but omitted the requirement of an alternatives analysis. We therefore conclude that the legislature did not intend to require the council to perform an alternatives analysis in making a determination under ORS 469.504(2)(c) that an exception could be taken to a land use planning goal."). As will be seen this method of comparing prior statutes with later enactments is a common interpretive practice for the court at step one; prior enactments of different statutes on the same issue are considered part of a statute's "context." *See* Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto Inc., 908 P.2d 300, 305 (Or. 1995).

Table One: *PGE v. Bureau of Labor & Industries,* 1999–2006

Case Data[22]	
Total Cases, 1999–2006	150
Cases Resolved at Level One	141*
Cases Resolved at Level Two	9
Cases Resolved at Level Three	0
Total Dissenting Opinions	9
Dissents Resolved at Level One	6
Dissents Resolved at Level Two	1
Dissents Resolved at Level Three	0
**Note: 94% of all cases were resolved at level one, 6% were resolved at level two.*	
Dictionary Citations	
Total Citations: 61 (40% of all cases)	
Citations by Dictionary:	
Webster's New Third International, 3d ed. 1993	50*
Black's Law Dictionary	8
Bouvier's Law Dictionary:	1
Dictionary of Modern American Usage	1
Diagnostic Statistical Manual III	1
Note: 81.9% of all citations were to Webster's, 13% were to Black's Law Dictionary.	

22. This data was derived by entering in the citation from *PGE v. Bureau of Labor & Industries*, 859 P.2d 1143, into Westlaw and conducting a "keycite©" search. This search, conducted on March 11, 2007, generated 1753 results from all categories of materials; of those materials, 1221 were cases from the Oregon courts at both the state and federal district court level. The search was restricted to those Oregon Supreme Court cases issued between 1999 and 2006 in order to have a manageable level of cases; moreover, the last article published on *PGE* dealt only with pre-1999 cases. *See* Johansen, *supra* note 10. This restriction generated a set of 150 cases citing *PGE.* I then examined each case to determine what level of the *PGE* analysis the court reached, whether a dictionary was employed, whether the court was reversing the court of appeals, whether there was a dissent, and what level of the *PGE* analysis, if any, the dissenting opinion reached.

Supreme Court cases reversing the Court of Appeals	
Total cases	62
Reversing Cases Resolved at Level One	57
Reversing Cases Resolved at Level Two	5[23]
Reversing Cases Resolved at Level Three	0
Cases Reversing the Court of Appeals which cited Dictionaries	29
Reversed Cases Resolved by the Court of Appeals at Level One	15[24]
Reversed Cases Resolved by the Court of Appeals at Level Two	7
Reversed Cases Resolved by the Court of Appeals at Level Three	1
Reversed Cases Not Citing *PGE*	28[25]
Reversed Cases Resolved by Summary Disposition	9[26]

23. What is striking is that reversals of the court of appeals constitute over half of the court's level two cases.

24. This category includes one case, State ex rel. Dept. of Human Servs. v. Rardin, 110 P.3d 580 (Or. 2005), which applied *PGE* to reverse an order issued August 5, 2004 by the Court of Appeals; Rardin does not cite the order, and no such order appears in the table of cases in the 2004 volumes of the Oregon Reports. Westlaw also does not show an order in its display of this case's prior and subsequent history, the order interpreted ORS 419A.200(5)(a) and this interpretation was overturned by the supreme court under the PGE methodology.

25. This is significant in that it may demonstrate that firm adherence to the *PGE* framework is a phenomenon unique to the supreme court. *See infra* note 90.

26. This category includes 3 opinions affirming with citation, 4 affirmances without opinion, and 2 affirmances from the bench.

I. THE PGE PARADIGM

The paradigm of statutory interpretation that has come to dominate the scene in Oregon was announced with little fanfare in an otherwise ordinary employee leave case. *PGE v. Bureau of Labor & Industries* dealt with whether, under ORS 659.360, "an employee" could "utilize paid sick leave as part of parental leave, even though the employee has not met the conditions of sick leave eligibility contained in the collective bargaining agreement."[27]

The court of appeals, sitting en banc and with four judges dissenting, had held that the statute was clear: an employee may use any accrued leave during his or her parental leave and that "the only limitation on that right . . . is that the leave have accrued. Period."[28] Interpreting the statute by examining its text in light of nearby statutes,[29] legislative history,[30] and with a nod to the legislature's admonition in ORS 174.010 that the court may not insert into a statute what had been omitted,[31] the majority's opinion followed a traditional tripartite progression from text, to context, to legislative history. In affirming the lower court, the supreme court would lay out the same components, only it would arrange them into a rigid sequence with progression from one step to the next requiring a showing of irreconcilable ambiguity.

Chapter 174 of the Oregon Revised Statutes lays out several interpretive guides the courts are bound to follow, or at least to invoke. The court began its opinion in *PGE* with a cite to ORS 174.020, which at the time read:

> 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.[32]

27. *PGE*, 859 P.2d 1143, 1144 (Or. 1993).

28. PGE v. Bureau of Labor & Indus., 842 P.2d 419, 421 (Or. Ct. App. 1992).

29. *Id.* at 422.

30. *Id.* at 423.

31. *Id.*

32. OR. REV. STAT. § 174.020 (1993). This section was amended in 2001 to read:

(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

…

(3) A court may limit its consideration of legislative history to the information that the parties

"To do that," the court wrote, "the court examines both the text and the context of the statute. That is the first level of our analysis."[33] While text and context are combined at the first level, "the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent."[34] This favoring of text, when viewed in light of the combination of text and context in level one, has been a source of persistent ambiguity within the *PGE* paradigm; in some subsequent cases context has been allowed to control over text,[35] and in others context has been all that is examined in construing a statute.[36]

Also at the first level, and in order to "ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text."[37] The rules of

provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.

The court has never conclusively ruled on the effect of these amendments, and that promises to be a key issue in how the court resolves *State v. Gaines*. Judge Landau, writing for the court of appeals in *State v. Rodriguez-Barrera*, 159 P.3d 1201 (Or. Ct. App. 2007), *review denied*, 168 P.3d 1155 (Or. 2007), assessed the supreme court's practice regarding legislative history and foreshadowed one potential avenue for the court's construction of ORS 174.020.

Even before the enactment of those amendments parties were permitted to *offer* legislative history to the courts, and the courts were free to give that legislative history the weight the courts thought appropriate. The Supreme Court's response to the amendments to ORS 174.020 has been somewhat ambiguous. On occasion, the court has noted the existence of the amendments, but deferred determining their significance because of their delayed effective date. In other cases, the court has, without reference to the amendments—and apparently after their effective date—continued to adhere to the rule of *PGE* that resort to legislative history is inappropriate in the absence of an ambiguity.

. . .

Perhaps the best course—at least until the Supreme Court sorts out the matter—is to view the appropriateness of resorting to legislative history in less doctrinal, and more pragmatic terms. It has always been, and continues to be, appropriate for counsel to offer legislative history to the courts. What use the courts will make of that history will depend on whether the history can make a difference. If the wording of a statute is truly capable of one, and only one, reasonable construction then, whatever the legislative history may show, it cannot alter the unambiguous meaning of a statute.

Rodriguez-Barrera, 159 P.3d at 1203–04 (emphasis in original, citations omitted).

33. *PGE*, 859 P.2d 1143, 1146 (Or. 1993) (internal citations omitted).

34. *Id.* (internal citations omitted).

35. *See infra* notes 120–134 and accompanying text.

36. *See infra* notes 109–119 and accompanying text.

37. *PGE*, 859 P.2d at 1146. Judge Landau has criticized the use of "textual canons at the first level of the *PGE* analysis" finding them "troubling" because, "[b]y definition, canons of construction are assumptions about legislative intent that arguably may be invoked in the absence of other evidence of legislative intent." Landau, *supra* note 6, at 28.

construction the court had in mind were those contained in ORS chapter 174, and those "found in the case law, including, for example, the rules that words of common usage typically should be given their plain, natural and ordinary meaning."[38]

Alongside text 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 related statutes."[39] Emphasizing the linkage between text and context, the court wrote that it "utilizes rules of construction that bear on the interpretation of the statutory provision in context," again finding those rules both in ORS chapter 174 and in the case law.[40] To this point the opinion had been mostly a gathering of prior precedents, arranged in much the same way as the opinion of the court of appeals.[41] What was new was the striking two line paragraph at page 1146: "If the legislature's intent is clear from the above described inquiry into text and context, further inquiry is unnecessary."[42] Later opinions would see "unnecessary" morph into "improper,"[43] as the court's citations to legislative history dwindled in comparison to its citations to *Webster's New Third International Dictionary*.[44] This abrupt division in the sequence stood in contrast to the court of appeals' opinion, which had examined legislative history in order to support its textual finding presumably because the parties had raised the issue. "To the extent that there is any ambiguity," the court of appeals' majority wrote, (clearly suggesting there was no ambigu-

38. *PGE*, 859 P.2d at 1146 (internal citations omitted). It is interesting to note that, while the words "plain, natural, and ordinary" meaning have a certain rhythm to them, the court has settled upon the appellation of "ordinary" for statutory terms which will be defined by reference either to a dictionary or by invocation of "common usage."

39. *Id.* (internal citations omitted).

40. *Id.* (internal citations omitted).

41. The court cited nine Oregon Supreme Court cases and three sections of ORS 174 in laying out the "text and context" inquiry.

42. *Id.*

43. State v. Pine, 45 P.3d 151, 161 (Or. Ct. App. 2002) (Haselton, J., dissenting), *rev'd*, 82 P.3d 130 (2003).

44. The reliance upon dictionaries that has grown up under *PGE* has not gone unnoticed, and has provoked some rather humorous judicial asides. For example, the court of appeals in *In Re Marriage of Cheever & Halperin*, 162 P.3d 287 (Or. Ct. App. 2007), wrote:

Power is an amorphous term. Rather than engaging in the frequently vacuous and innately pedantic exercise of canvassing dictionary definitions, it suffices to say that, in this context, 'power' connotes an amalgam of authority and ability. On the face of the statute, if the prerequisite conditions are met, the 'power' conferred is, ostensibly, unqualified.

This paragraph included a footnote, which read: "For those who prefer to 'look it up,' see *Webster's Third New Int'l Dictionary*, 1778–79 . . .", *Id.* at 290 n.6.

ity), "the legislative history supports BOLI's and our reading."[45] This inquiry, under the paradigm announced a year later in the same case, would not merely have been duplicative,[46] it would have been "unnecessary."

The extent of the inquiry the court was willing to conduct at the first level of analysis was hinted at in PGE, which listed four canons of construction for use in resolving textual ambiguity before looking to a statute's context or legislative history:

> [W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.[47]
>
> [A] particular intent shall control a general one that is inconsistent with it.[48]
>
> [U]se of a term in one section and not in another section of the same statute indicates a purposeful omission.[49]
>
> [U]se of the same term throughout a statute indicates that the term has the same meaning throughout the statute.[50]

Throughout the years following *PGE*, the interpretive canons the court imported into level one from both statute and case law continued to multiply. They included:

> In a serially amended statute . . . the wording changes adopted from session to session are a part of context of the present version of the statute being construed.[51]

45. PGE v. Bureau of Labor & Indus., 842 P.2d 419, 422 (Or. Ct. App. 1992).

46. As much of both the court of appeals' and the supreme court's use of legislative history is. *See infra* notes 86-90 and accompanying text.

47. *PGE*, 859 P.2d 1143, 1146 (Or. 1993) (citing ORS 174.010); *accord* State v. Keeney, 918 P.2d 419, 423 (Or. 1996).

48. *Id.* (citing OR. REV. STAT. § 174.020).

49. *Id.* (internal citation omitted).

50. *Id.* (internal citation omitted).

51. Krieger v. Just, 876 P.2d 754, 758 (Or. 1994). *But see* Swarens v. Dept. of Revenue, 883 P.2d 853, 856–57 (Or. 1994) (hinting that only "substantive" wording changes from session to session are to be considered the "context" of a provision because only substantive changes are indicative of legislative intent).

> Decisions of the Supreme Court of the United States concerning the Federal Rules of Civil Procedure, that predat[e] the adoption of the Oregon counterpart inform us as to the intent of the Oregon lawmakers.[52]
>
> [W]e do not lightly disregard the legislature's choice of verb tense, because we assume that the legislature's choice is purposeful. In most cases, we best effectuate the legislative intention by giving effect to the plain, natural and ordinary meaning of the verb tense chosen by the legislature.[53]
>
> [W]ords in a statute that have a well-defined legal meaning are to be given that meaning in construing the statute.[54]
>
> [W]hen this court has construed a statute, that construction becomes part of the statute as if written into it.[55]
>
> [T]he inclusion of one is the exclusion of the other (*inclusio unius est exclusio alterius*). . . .[56]
>
> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.[57]
>
> The context of the statute including related statutes enacted by the same legislature, demonstrate[s] the legislative intent.[58]

52. Pamplin v. Victoria, 877 P.2d 1196, 1199 (Or. 1994).

53. Martin v. City of Albany, 880 P.2d 926, 930 (Or. 1994). Tense is not the only grammatical feature which the courts find indicative of legislative intent. In *Herring v. Lane Co.*, 171 P.3d 1025, 1030 (Or. Ct. App. 2007), the court of appeals held that where, "as a matter of syntax the legislature employed a parallel structure," the "qualifying phrase" in the statute would apply equally to both the kinds of income covered by the statute. The court relied upon *Priest v. Pearce*, 840 P.2d 65, 68 (Or. 1992), where the supreme court had employed the principle of parallel construction to a constitutional provision. The court also pointed out that "the limited legislative history on this point confirms that construction." *Herring*, 171 P.3d at 1031 n.5.

54. Gaston v. Parsons, 864 P.2d 1319, 1322 (Or. 1994); *accord* Stull v. Hoke, 948 P.2d 722 (Or. 1997).

55. State v. Reid, 872 P.2d 416 (Or. 1994); *accord* Stephens v. Bohlman, 838 P.2d 600 (Or. 1992). *But see* State v. Sandoval, 156 P.3d 60 (Or. 2007), discussed *infra* note 195.

56. Fisher Broad. v. Dept. of Revenue, 898 P.2d 1333, 1340 (Or. 1995).

57. State v. Webb, 927 P.2d 79, 82 (Or. 1996).

58. Atkins v. Dept. of Revenue, 894 P.2d 449, 452 (Or. 1995).

> The *entire text* of the statute is the legislature's definition . . . .[59]
>
> 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.[60]
>
> [W]e do not look at one subsection of a statute in a vacuum; rather, we construe each part together with other parts in an attempt to produce a harmonious whole.[61]
>
> [T]his court assumes that, when the legislature includes a provision in one section of an act, but omits it from another, it does so intentionally.[62]
>
> Because some background is necessary to a proper understanding of the text . . . we address, briefly, the historical context of the statute.[63]
>
> Under the principle of *noscitur a sociis*, terms in a list are interpreted in light of the common characteristics of other terms in the same list.[64]
>
> [T]he context of the statutory provision at issue . . . includes . . . the pre-existing common law and the statutory framework within which the law was enacted.[65]
>
> The application clause contained in § 5 was not codified . . . . However, because that clause is part of the law enacted by the 1993 legislature, we focus upon § 5, as part of our contextual analysis. . . .[66]

59. Errand v. Cascade Rolling Mills, Inc., 888 P.2d 544, 548 (Or. 1995) (emphasis in original).

60. Fresk v. Kraemer, 99 P.3d 282, 286 (2004).

61. Lane Co. v. Land Conservation & Dev. Comm., 942 P.2d 278, 283 (Or. 1997).

62. Bayridge Assoc. Ltd. P'ship v. Dept. of Revenue, 892 P.2d 1002 (Or. 1995).

63. Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc., 908 P.2d 300, 306 (Or. 1995), *modified on recons.*, 932 P.2d 1141, 1143 (Or. 1997).

64. King City Rehab, LLC v. Clackamas County, 164 P.3d 1190, 1194 (Or. Ct. App. 2007) (citing State v. Moen, 786 P.2d 111, 138 n.17 (Or. 1990)).

65. *In re* Marriage of Denton, 951 P.2d 693, 697 (Or. 1998).

66. Owens v. Maass, 918 P.2d 808, 810 n.5 (Or. 1996).

> It is evident that, in referring to specific provisions of the criminal procedure code in ORS 810.410(3), the legislature intended that certain legal terms that are common to both the vehicle code and the criminal procedure code . . . would carry the same meaning and be interpreted in the same manner, unless otherwise provided.[67]

With each of these cases, the court brought within the *PGE* paradigm a pre-existing rule of construction either created by statute, or, most commonly, developed by the court in its pre-*PGE* statutory construction jurisprudence. The breadth of pre-*PGE* methodology that was imported into the paradigm not as legal precedent, but as background rules of statutory construction, blunts any assertion that *PGE* has wrought a fundamental revolution in Oregon statutory interpretation, at least as it applies to the first level analysis of text and context. The true revolution has come at levels two and three [68] in the form of a near total rejection of legislative history,[69] and an aggressive enforcement of that rejection with regard to court of appeals' opinions that venture past the text and context.[70]

The second step of *PGE*, as laid out in the court's opinion, reinforces the paradigm's sequential and cumulative nature. "Legislative history," the court wrote, is "considered along with text and context to determine whether all of those together make the legislative intent clear."[71] Like the first level, once any ambiguity is resolved, "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

67. State v. Toevs, 964 P.2d 1007, 1012–13 (Or. 1998).

68. *See* Roy Pulvers & Wendy Willis, *Revolution and Evolution: What is Going on with Statutory Interpretation in the Oregon Courts?* 56 OR. ST. B. BULL. 13, 13 (Jan. 1996) ("The revolutionary change announced in *PGE v. BOLI* is the court's stated adherence to a singe interpretive method and its refusal to consider legislative history or other extrinsic matters if the statutory text and context clearly answers the question before the court.").

69. Legislative history continues to be used by the court of appeals, and with greater frequency and with fewer prerequisites to use than in the supreme court. *See, e.g.*, Jensen v. Bevard, 168 P.3d 1209, 1211–1214 (Or. Ct. App. 2007) (finding that where the statutory text "provides little guidance" and precedent, "while [the text was] strongly suggestive," it did not resolve the question of legislative history—although it did "not directly address the issue before us" it did "point decisively to one conclusion."). *Jensen* illustrates both the greater willingness of the court of appeals to reach legislative history and the uncertainties inherent in doing so. The court recognized that the legislative history it relied upon—the statement of committee counsel—was "of limited authority," but chose to adopt its construction because of "the unacceptable implications of its opposite[.]" *Id.* at 1214.

70. *See infra* note 90.

71. *PGE*, 859 P.2d 1143 (Or. 1993).

determined."[72] This tying together of the inquiry's first and second steps, considering legislative history alongside the text and context, raises the question of which is to be considered determinative. As will be seen below, often the court's use of legislative history does no more than confirm their reading of the text and context at the first level;[73] in other instances legislative history is employed in order to fill a legislative silence, in contrast to the court's frequent recourse to negative inference when the legislature has failed to address an issue. The interaction of legislative history with other features of the paradigm has also been a source of confusion. A pair of cases, where the court was faced with interpreting the asportation requirement in the kidnapping statute,[74] provide an interesting picture of the inconsistent treatment of prior constructions and legislative history that sometimes takes place under the paradigm.[75]

In *State v. Murray*, the Court deemed the asportation requirement a "metaphysics problem" because the statute had no definition of "place" in the element which read, in part, "takes the person from one place to another."[76] The court had previously construed the asportation element in *State v. Garcia*,[77] by looking to the statute's legislative history. The court used that *construction* at the second level of its *PGE* analysis as "legislative history" to resolve the question before it, despite the fact that, as the dissent pointed out, *Garcia* had involved *first*-degree kidnapping and the defendant in *Murray* faced only second-degree kidnapping charges.[78] Why the court did not apply *Garcia* at the first level of the *PGE* analysis as a prior construction of the statute was not explained. As a prior construction the court's conclusion in *Garcia* would have fallen under the rule that such constructions become part of the statute as if written therein.[79] Moreover, the fact that *Garcia* was a pre-*PGE* interpretation of the kidnapping stat-

72. *Id.*

73. Johansen came to a similar conclusion based on the cases he surveyed for his 1999 work. "In only one case in the last five years did the court use legislative history to reach a result that conflicted with the result it would have reached at level one." Johansen, *supra* note 10, at 245.

74. OR. REV. STAT. § 163.225(1) (2007).

75. State v. Murray, 136 P.3d 10 (Or. 2006); State v. Wolleat, 111 P.3d 1131 (Or. 2005).

76. *Murray*, 136 P.3d at 12; OR. REV. STAT. § 163.225(1)(a).

77. 605 P.2d 671 (Or. 1980)

78. *Murray*, 136 P.3d at 15 (Kistler, J., dissenting).

79. *See, e.g.*, State v. Reid, 872 P.2d 416, 418 (Or. 1994); *accord* Stephens v. Bohlman, 838 P.2d 600 (Or. 1992).

ute was not mentioned, and this omission is startling given that *Murray* was decided after *Morales v. SAIF*, where the court had re-examined a prior construction solely because it had been decided prior to the articulation of the *PGE* approach.[80] That the court used a *discussion* of legislative history *as* legislative history at step two of the paradigm is only important because it deviates from the sequence laid out in *PGE*; the decision to place evidence of legislative intent labeled "first level" (a prior construction) in the "second level" of the analysis is an example of the kind of eclecticism which takes place under the paradigm and this move would likely have passed unnoticed but for the court's self-created methodology.

In *State v. Wolleat*, by contrast, the court interpreted another part of the asportation requirement (the phrase "intent to interfere substantially with [the victim's] personal liberty") in the context of a first-degree kidnapping.[81] The court found the term to be ambiguous, and examined its prior construction from *Garcia* at the first level of the paradigm, as it "provide[d] guidance."[82] Finding the intent of the legislature to still be ambiguous, the court then went to the Commentary on the Proposed Criminal Code and the Minutes of the Criminal Law Revision Commission, which, when considered alongside statements from then-Attorney General Lee Johnson, resolved the ambiguity.[83]

Reading these two cases alongside one another is a useful exercise for anyone wondering what *PGE* has done to the style of appellate decision writing in Oregon. The reasoning of both cases is open to attack, be it the court labeling an element in a criminal statute a "metaphysics problem," or the court's finding in *Murray* of ambiguity in what was, at first blush, clear statutory text. But more important is that the style of each opinion reveals the distortion generated by adherence to the *PGE* approach. That the court first had to find an ambiguity in order to look to the convincingly dispositive, and unusually comprehensive, evidence of legislative intent that accompanied the Oregon criminal code can only be explained by *PGE*. That the court's reliance on *Garcia* at "level one" was in any way remarkable—it was, after all, simply an application of precedent—comes only from measuring the opinion against the artificial edifice of the paradigm.

While step two of *PGE* has virtually disappeared—with only

80. 124 P.3d 1233, 1235 (Or. 2005).

81. 111 P.3d 1131, 1133 (Or. 2005).

82. *Id.*

83. *Id* at 1134–36.

nine cases treating legislative history between 1999 and 2006—it is unclear whether that is cause for lament. The court has never articulated a clear justification for either using or ignoring legislative history.[84] One possibility for their rejection might be that, given the paucity of materials in Oregon and the prevalence of non-legislator testimony in the materials that are available,[85] the court simply finds little in the legislative history that is of aid in their analysis; they have noted as much on occasion.[86] This should come as no surprise, as Oregon is not unique among the states in having little formal legislative history, such as committee reports, staff analyses or the like.[87] What legislative history does exist is often in the form of tape re-

84. Landau, *supra* note 6, at 43 ("The Court has never explained why it is impermissible to resort to legislative history unless the first level of inquiry leaves the legislature's intent unclear.").

85. This phenomenon was the subject of the memorable exchange between the majority of Justices and dissenting Justice Graber. "First," the majority wrote "the dissent relies almost exclusively on the inconclusive testimony of one person, Penn. Penn is a witness and representative of the district attorney's association; he is not a legislator. As such, his statements say little about the intent of the Oregon Legislative Assembly as a whole." State v. Guzek, 906 P.2d 272, 282 (Or. 1995). Justice Graber, after laying out Penn's statement before the Senate Committee on the Judiciary, also noted that "[i]mmediately after that explanation [from Penn,] Senator Hill moved to substitute 'the language just described' for the prior proposal." *Id.* at 291 (Graber, J., dissenting). The majority did not explain why the statement of a non-legislator witness that was immediately adopted by a legislator would not be indicative of legislative intent. The majority did, however, give Penn's comments extensive treatment, spending nearly a page in the Oregon Reports showing how his comments were inapposite to the issue presented by the case, a curious exercise given that the majority considered his comments to have said "little" about the legislative intent. *Id.* at 282–83. For a more complete discussion of *Guzek* and related cases, see Landau, *supra* note 6, at 49–50.

86. *See*, *e.g.*, Kaib's Roving R.Ph. Agency, Inc. v. Employment Dept., 111 P.3d 739, 744 n.5 (Or. 2005) ("It is sufficient here to note that our review of the legislative history to which the department has referred us does not change our view of the intended meaning of the phrase . . . ."); American Banker's Ins. Co. v. State, 92 P.3d 117, 120 (Or. 2004) ("in any event, nothing in the legislative history or the policy arguments that the parties advance is inconsistent with that analysis"); V.L.Y. v. Board of Parole & Post-Prison Supervision, 106 P.3d 145, 150 n.6 (Or. 2005) ("[O]nce we recognize the inescapable and directive content of ORS 181.585(1)(a), nothing in the Court of Appeals majority's extensive consultation with the legislative history… demonstrates anything to the contrary.") (internal citation omitted).

87. The legislative history utilized by the court in *Mclean v. Buck Medical Services*, 45 P.3d 120, 126–30 (Or. 2000) is typical. In seeking to determine the intent of the legislature with regard to the term "contract for personal services" in ORS 279.316(1)(a) (1997) the court looked to statements from two legislative committee administrators, a lobbyist for the League of Oregon Cities, a representative from the Oregon Department of Transportation, an assistant attorney general, and the committee chairman. When interpreting the Oregon Criminal Code, the court will look to the Commentary on the Proposed Criminal Code, Final Draft and Report-1970. *See* State v. Chakerian, 938 P.2d 756, 758–60 (Or. 1997); *accord* State v. Barnes, 986 P.2d 1160, 1166 (Or. 1998).

cordings, which can be costly and time consuming to perscrutate.[88] Moreover, once the celluloid depths are plumbed and some tidbit has been found, a litigant's frustrations are not at an end because *PGE* "does not distinguish between types of legislative history," so deciding what is relevant, or whose recorded voice will carry the most weight, is a shot in the dark.[89] Nevertheless, step two remains part of the paradigm and therefore litigants would do well to marshal what support they can from the legislative history because it is difficult to predict either whether or when such history truly is "unnecessary."[90]

The third step of the *PGE* paradigm is reached "if, after consideration of text, context and legislative history, the intent of the legislature remains unclear" and consists of "general maxims of statutory construction" that "aid in resolving the remaining uncertainty."[91] Those maxims, like the rules of construction for text and context, "may be statutory" but "more commonly may be found in the case

88. *See, e.g.*, Johansen, *supra* note 10, at 226 (noting cost of researching legislative history).

89. Landau, *supra* note 6, at 48.

90. And litigants should remember that legislative history is likely to receive a warmer reception in the court of appeals. One fascinating subtext running through the cases decided under *PGE* is the stricter adherence to the paradigm at the supreme court as compared to the often visible chafing under the paradigm's strictures in the court of appeals. This can be best seen by examining the supreme court's markedly frequent reversal of court of appeals decisions grounded in legislative history. In *American Bankers Ins. Co. v. State*, 72 P.3d 666 (Or. Ct App. 2003), for example, the court of appeals looked to the legislative history of ORS 59.925(2) to determine who would be entitled to a bond under the statute; finding that history dispositive, the court affirmed the trial court's grant of summary judgment. *Id.* at 670. On review, the supreme court reversed by looking to the various legislative definitions provided in the section and finding that "the legislative intent becomes evident. Accordingly, we find no reason to look beyond the text and context of ORS 59.925." American Bankers Ins. Co. v. State, 92 P.3d 117, 159 (Or. 2004). No mention was made of the contrary legislative history examined by the court of appeals, and no justification was given for not venturing beyond the "text and context." *See also* V.L.Y. v. Board of Parole & Post-Prison Supervision, 72 P.3d 993 (Or. Ct App. 2003), *rev'd*, 106 P.3d 145 (Or. 2005) (reversing an interpretation based on legislative history in favor of one drawn from *Webster's* dictionary); Smoldt v. Henkels & McCoy, Inc., 7 P.3d 638 (Or. Ct App. 2000), *rev'd*, 53 P.3d 443 (Or. 2002) (reversing construction based on legislative history in favor of one based on the definition of "otherwise" in *Webster's*); Duvall v. McLeod, 984 P.2d 287 (Or. Ct App. 1999), *rev'd*, 21 P.3d 88 (Or. 2001) (reversing construction based on legislative commentary on ORCP 71 in favor of one based on *Webster's* definition of "accompany"); *State ex rel.* Dept. of Trans. v. Stallcup, 97 P.3d 1229 (Or. Ct App. 2004), *rev'd*, 138 P.3d 9 (Or. 2006) (reversing Court of Appeals' first-level construction of term "appraisal," which had been confirmed by legislative history, in favor of a definition drawn from a separate statutory chapter); State v. Pine, 45 P.3d 151 (Or. Ct App. 2002), *rev'd*, 82 P.3d 130 (Or. 2003) (reversing interpretation based on "dispositive" legislative history in favor of definition from *Webster's* dictionary). Eighth member of the court indeed. *See* Landau, *supra* note 9.

91. *PGE*, 859 P.2d 1143, 1146 (Or. 1993).

law."[92] The court gave as an example of one such general maxim: "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."[93] Not surprisingly, this has become one of the more controversial aspects of the paradigm, perhaps accounting for why step three has not been utilized by the supreme court in recent years. Johansen argued that "[i]n reality, at level three the court does one of two things: Where the statute is truly ambiguous, the court relies solely on its own judgment to derive meaning; in other cases. . . the court relies on level three merely to reinforce the meaning that was already evident."[94] Judge Landau, parsing the court's third-level opinions in *Westwood Homeowners Ass'n v. Lane County.*,[95] *Weidner v. Oregon State. Penitentiary*[96] and *Windsor Insurance. Co. v. Judd*,[97] concluded that

> [T]o the extent that the court went beyond the legislative history and the contextual statutes . . . it based its decision on its own judgment as to what it thought reasonable, as a matter of substantive policy. In other words, the court quite literally second-guessed the policy judgment of the legislature. In my view, the court's reliance on its own judgment on matters of substantive policy comes perilously close to the constitutionally separated power of the legislature to enact legislation.[98]

This is not the only maxim that has been used or considered for use at step three of the paradigm. In *State v. Vasquez-Rubio*,[99] the court rejected an invitation to apply the maxim that "we should avoid a literal application of the statutory text if it will produce an absurd result," because it had already "determined that the legislative intent is clear from an inquiry into text and context."[100] Such a maxim, the court held, "is best suited for helping the court determine which of two or more plausible meanings the legislature intended" and applying it where the text was already clear after the first step of the *PGE* analysis "would be rewriting a clear statute based solely on our con-

92. *Id.* at 1147.
93. *Id.*
94. Johansen, *supra* note 10, at 250–51.
95. 864 P.2d 350 (Or. 1993).
96. 877 P.2d 62 (Or. 1994).
97. 898 P.2d 761 (Or. 1995).
98. Landau, *supra* note 6, at 64.
99. 917 P.2d 494 (Or. 1996).
100. *Id.* at 497.

jecture that the legislature could not have intended a particular result."[101] While the court has never explained its recent reluctance to reach step three of the paradigm, that reluctance might possibly stem from the tension that the application of third-step maxims creates between the court's function of interpreting statutes faithfully according to the intent of the legislature and the court's need to derive *some* interpretation to settle the issue before them. Regardless of the reason, it is clear that step three of the paradigm has been put to pasture for the past seven years.[102]

The reaction to *PGE* from the bench and bar has been mixed, but on the whole, critical. Pulver and Willis argued in the Oregon State Bar Bulletin that "the court's analytic model . . . was announced without any explanation of the rationales for the choices that were made"[103] and was developed "without significant input from members of the bar."[104] Judge Landau expressed a similar view, pointing out that "the *PGE* opinion noticeably lacks any explanation justifying the manner in which the court fashioned it."[105] Johansen based his entire article on an analysis of the difficulty in predicting when the court would find a statute to be ambiguous,[106] illustrating, among other things, the veneer of distraction *PGE* has glued to the bench. As this Comment proceeds through the past seven years of cases citing *PGE*, it will become reasonably clear that these criticisms continue to tell. The court has still offered no explanation for its choice of paradigm beyond citations to ORS chapter 174, which, as Judge Landau pointed out, represents an intentionalist model that is simply one of many alternative approaches.[107] The court has also continued to be unpredictable in its finding of ambiguity, and even more sparing in its explanation of the ambiguities found. For better or for worse, though, the citations demonstrate that the paradigm is still the model for statutory interpretation in Oregon and until the supreme court says otherwise, litigants argue outside it at their peril.

101. *Id.* at 282-83.

102. *See* Table I. *But see* State v. Werdell, *supra* notes 17 and 18.

103. Pulver & Willis, *supra* note 68, at 15.

104. *Id.* at 13.

105. Landau, *supra* note 6, at 14.

106. Johansen, *supra* note 10, at 253.

107. Landau, *supra* note 6, at 4. *See also* Jack L. Landau, *The Intended Meaning of 'Legislative Intent' and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47 (1997).

II. UNANSWERED QUESTIONS

The Court's opinion in *PGE* left two important questions unanswered. The first unresolved issue is whether the inquiry is one of text then context, or text and context: that is, may the "context" of a statute control over the text of the statute itself? Is step one actually two steps where the court must first find an ambiguity in the text before examining the context, or is it a single step where context may be examined without first finding an ambiguity in the text? As will be seen, the court's cases from the past seven years demonstrate little more than inconsistency. The second unanswered question was whether statutory constructions decided prior to *PGE* remained viable, or whether a litigant could gain a reversal of a prior construction based on nothing more than that the court had not applied *PGE*. This was not an idle question, and has only recently been answered.

The court was clear in *PGE* that the statutory text is the "best evidence of the legislature's intent."[108] This favoring of text over context seemed to indicate a two-step inquiry at step one. First, the court would look to the text to resolve an ambiguity; second it would look to context. But that has not been the court's practice. Indeed, in a number of cases the "best evidence" has not been examined at all.

For example, *Dockins v. State Farm Insurance Co.*[109] presented the court with the question of what content the term "proof of loss" contained in ORS 742.061 was to have. After helpfully pointing out that "the term 'proof of loss' . . . is not self-defining," the court went directly to the context of the statute.[110] In this instance the context was "case law," which "establishes that the term encompasses more than the ordinary, policy-based meaning."[111] No parsing of the language and no citations to *Webster's* were employed; nor was the rule of prior construction invoked—as it could have been—given that the court's entire discussion focused upon its previous interpretations of the statute.

The same approach was taken in *State v. Barrett*[112] in order to determine the meaning of "two or more statutory provisions" as the term had been used in *former* ORS 161.062(1). Though the statute "itself d[id] not define specifically either 'statutory provision' or

108. *PGE*, 859 P.2d 1143, 1146 (Or. 1993) (internal citations omitted).

109. 985 P.2d 796 (Or. 1999).

110. *Id.* at 799.

111. *Id.*

112. 10 P.3d 901 (Or. 2000).

'separate statutory violation,'" the court "ha[d] discussed the meaning of 'statutory provision' in two prior cases."[113] The court used those prior constructions as context (rather than as text) to determine that a separate statutory provision is one that addresses a "*separate and distinct legislative concern*."[114] Therefore, the fact that the aggravated murder statute Barrett was charged under contained thirty-two aggravating factors did not make any of those factors a separate crime because the statute defined aggravated murder "as murder 'committed under, or accompanied by, *any*' of various aggravating circumstances."[115] Taking the definition of "any" from *Webster's*, the court held that "any or all of the enumerated circumstances simply serve to prove the single essential element of 'aggravation,'"[116] and therefore Barrett's multiple life sentences arising out of his murder of one victim were inappropriate and required a remand for re-sentencing.[117] *Ahern v. Oregon Public Employees Union*[118] dealt with the issue of whether text is to be considered before context in a swifter manner; after a single paragraph reciting the relevant statute, the court declared "we turn to statutory context."[119]

At other times, rather than being allowed to create an ambiguity in what would otherwise have been clear statutory text, context is allowed to control in the face of that text. For example, in *State ex rel. Click v. Brownhill*,[120] the court interpreted ORS 10.215(1). That statute provided that "any jury list containing names selected from a source list shall not be used for any purpose other than the selection and summoning of persons for service as jurors."[121] The court found the statutory language clear in denying a murder defendant access to the list for which he had filed a subpoena *deuces tecum* in order to support his theory that the jury pool did not represent a fair cross-section of Clatsop County.[122] Despite that clear text, however, the court looked beyond it to the context of the statute, first examining ORCP 57A(2), which provided for disclosure of jury-related docu-

113. *Id.* at 904.
114. *Id.* (emphasis in the original).
115. *Id.* at 905 (emphasis in the original).
116. *Id.*
117. *Id.* at 906.
118. 988 P.2d 364 (Or. 1999).
119. *Id.* at 367.
120. 15 P.3d 990 (Or. 2000).
121. *Id.* at 991.
122. *Id.* at 991–92.

ments to litigants in civil cases, and then ORS 10.215(6), 10.255 and 10.265,[123] all of which related to the duty of court clerks to preserve documents regarding jury selections. The court found "the foregoing contextual materials to be decisive. Although the wording of the last sentence of ORS 10.215(1) is direct and sweeping when read in isolation . . . . We are satisfied that the legislature did not intend that its limitation on the 'uses' to which the list could be put would sweep so broadly."[124] Justice Durham, joined by Justice Kulongoski, concurred, inviting the legislature "to address the ambiguity in ORS 10.215(1)" which he argued was left unresolved by the majority opinion.[125] That the concurring justices found the statute ambiguous enough to request legislative clarification leaves one wondering why it was not ambiguous enough to justify resort to legislative history.

In *Mabon v. Wilson*[126] context, including the development of the *quo warranto* statute[127] from its common law writ origin, was found to "make[] it clear that the district attorney has control over the proceedings brought under ORS 30.510."[128] The court made this determination despite the statute's clear use of the disjunctive "or" in the clause "or upon the relation of a private party."[129] Despite the legislature's use of that disjunctive, the court was "satisfied that the statutory scheme as a whole contemplates that the district attorney must participate in cases like the present one,"[130] where the appellant, a prominent initiative activist, was attempting to challenge the right of a judge to "sit as a judge of the Circuit Court for Multnomah county."[131] Safeway Stores suffered the same fate in *Vsetecka v. Safeway Stores, Inc.*[132] where the court found that "viewed in isolation" (that is to say, perhaps, read plainly) the "text provides support for employer's position,"[133] but the context of the worker's compensation notice statute, ORS 656.265, demonstrated that "[p]arsing each

123. *Id.* at 993–94.

124. *Id.* at 994.

125. *Id.* at 995 (Durham, J., concurring).

126. 133 P.3d 899 (Or. 2006).

127. OR. REV. STAT. § 30.510 (2007) (providing that a quo warranto action could be brought "upon the information of the district attorney, or upon the relation of a private party.")

128. *Mabon*, 133 P.3d at 901.

129. *Id.* at 901.

130. *Id.* at 902.

131. *Id.* at 899.

132. 98 P.3d 1116 (Or. 2004).

133. *Id.* at 1119.

word in the phrase . . . as employer would have us do, is at odds with, and indeed may defeat, the purpose of the notice statute" as the court had set it out in a prior interpretation.[134] In each of these cases, context controlled in the face of an admittedly clear statute, and while the court nodded to the truism that words ought not to be read in isolation, no mention was made of why the "best evidence" of the legislature's intent should have been given anything less than decisive weight.

What brings these cases into relief is the traditional use of context under the paradigm as a method for resolving ambiguities found in the text. For example, in deciding whether "victim" in ORS 163.160(3)(c) would include child witnesses to spousal abuse in *State v. Glaspey*,[135] the court initially held that "we think that the statute can be read sensibly only if the 'victim' of fourth-degree assault is the person who is directly and physically injured by an assault."[136] That reading was reinforced by looking to the other substantive criminal statutes, all of which indicated that "when the term 'victim' is used . . . it is used in the precise sense of a person who suffers harm that is an element of the offense."[137] "That context," the court concluded, "coupled with our analysis of the wording of ORS 163.160 itself, confirms that the legislature did not intend that child witnesses of domestic assaults be viewed as victims."[138] Similarly in *SAIF v. Dubose*,[139] the court found that, although "the wording of that condition, viewed in isolation, does not make clear whether the word 'requests' requires a claimant specifically to request an *expedited* hearing" in a worker's compensation denial of benefits action, "that potential ambiguity disappears . . . when we consider that statute together with ORS 656.291."[140] In both of these cases, as well as the cases in which con-

134. *Id.* at 1120–21 (citing Colvin v. Indus. Indem., 725 P.2d 356, 358 (Or. 1986)). That *Colvin* was a pre-*PGE* interpretation of the statute was not mentioned by the court. The court in *Colvin* explained that "[t]imely notice 'facilitates prompt investigation and diagnosis of the injury. It assures the opportunity to make an accurate record of the occurrence, and decreases the chance for confusion due to intervening or non-employment-related causes.'" *Id.* This is clearly a prior construction of the worker's compensation notice statute and thus could have been (or, perhaps, *should* have been) held to have been part of the text of the statute as if written therein under the rule in *Bohlman*. *See supra* note 55.

135. 100 P.3d 730 (Or. 2004).

136. *Id.* at 733.

137. *Id.*

138. *Id.* at 734.

139. 74 P.3d 1072 (Or. 2003).

140. *Id.* at 1075 (emphasis in the original).

text was considered before text, no mention was made of any sequence of "text *to* context" or whether the court was free to consider text *or* context at step one. Only one case in the past seven years that I am aware of has made any mention of factors influencing the choice the court makes at step one of deciding whether to consider text, context, or both.

That case was *State v. Johnson*,[141] where the court, looking to the dismissal statutes[142] at issue stated first that "the foregoing points, which are based on purely textual analysis, strongly indicate that a trial court's discretion to continue an action under ORS 137.750 is limited."[143] That analysis, however, had left out "any consideration of other contextual information that the state contends is relevant at this level."[144] Before proceeding to an analysis of the statute's context, the court wrote this curious paragraph:

> Moreover, a purely textual reading of the statutes raises some difficult questions about the intended operation of the statutes as a whole. When read together, the statutes have a circular quality that suggests to us that some earlier meaning has been lost. . .. If that is so, as logic suggests that it should be, then the intent behind the requirement in ORS 135.750 . . . becomes difficult to discern. *In such circumstances*, the historical evolution of the statutes and the case law not only provide context . . . but also provide insight into understanding the intended collective operation of the statutes.[145]

Whether the court meant this paragraph to be a justification for looking to context, or merely a foreshadowing of its creative use of that context in reaching its holding in the case, was left unex-

141. 116 P.3d 879 (Or. 2005).

142. OR. REV. STAT. § 135.747 ("If a defendant charged with a crime, whose trial has not been postponed upon the application of the defendant or by the consent of the defendant, is not brought to trial within a reasonable period of time, the court shall order the accusatory instrument to be dismissed."); OR. REV. STAT.§ 135.745 ("When a person has been held to answer for a crime, if an indictment is not found against the person within 30 days or the district attorney does not file an information in circuit court within 30 days after the person is held to answer, the court shall order the prosecution to be dismissed, unless good cause to the contrary is shown."); OR. REV. STAT. § 135.750 ("If the defendant is not proceeded against or tried, as provided in ORS 135.745 and 135.747, and sufficient reason therefore is shown, the court may order the action to be continued and in the meantime may release the defendant from custody as provided in ORS 135.230 to 135.290, for the appearance of the defendant to answer the charge or action.").

143. *Johnson*, 116 P.3d at 883.

144. *Id.*

145. *Id.* at 883–84.

plained.[146] The words "in such circumstances" may seem to indicate a sequencing of text and context; *viz.*, that text is to control unless the "circumstances" of circularity, possible lost meaning or difficulty of operation, are present in the text of the statute. That is a weak inference, however, in the face of the court's practice of going to context before text and allowing context to control over a clear statute. More likely than not, the court's statement in *Johnson* was a make-weight; but make-weight though it may be, it is odd that a court operating under an ostensibly clear paradigm would have need of such statements.

The other question that was neither asked nor answered in the original *PGE* opinion was whether the new methodology rendered interpretations of statutes decided prior to *PGE* vulnerable to attack on the basis that they were not decided under it. Subsequent cases prior to *Mastriano v. Board of Parole & Post Prison Supervision*[147] did little to settle this question, and in fact exacerbated the uncertainty. For example the supreme court, reversing the court of appeals' holding that Rule 503 of the Oregon Evidence Code "codified certain aspects of the work-product doctrine," in *State v. Riddle*, wrote that "the first point, even if true, necessarily relies on cases that do not purport to construe OEC 502(3) or to follow this court's statutory construction paradigm. They are not controlling."[148] The confusion in that statement—whether the court of appeals' citations were not controlling because inapposite or were not controlling because they were pre-*PGE*—recurred often between 1999 and 2006 as litigants began aggressively pressing the court to reject its prior statutory precedents.[149]

These efforts received encouragement from the benches of both courts. Judge Edmonds, dissenting from the court of appeals' opinion in *Kambury v. Daimler Chrysler Co.*, which involved a statute of limitations issue, wrote that "[e]ven if *Korbut*[150] was held by the [s]upreme [c]ourt to have decided what was intended by this court, the law and the parties would be better served if we would forgo the application of *stare decisis* in this case and interpret the existing statutes in accordance with their plain language."[151] Judge Edmonds followed

146. See the discussion of *State v. Johnson infra* notes 215-225 and accompanying text.

147. 159 P.3d 1151 (Or. 2007).

148. State v. Riddle, 8 P.3d 980, 985 (Or. 2000).

149. *See, e.g.*, *State v. Young*, 103 P.3d 1180 (Or. Ct. App. 2004) (urging court to treat pre- *PGE* construction as not controlling).

150. Korbut v. Eastman Kodak Co., 787 P.2d 896 (Or. Ct. App. 1990).

151. Kambury *ex rel.* Kambury v. DaimlerChrysler Co., 21 P.3d 1089, 1098 (Or. Ct. App. 2001) (Edmonds, J., dissenting) *rev'd*, 50 P.3d 1163 (Or. 2002).

that sentence with a footnote stating "[b]oth *Korbut* and *Western Helicopter Service* were decided before *PGE v. Bureau of Labor & Industries*."[152] The defendants in *Kambury* had urged the court to reinterpret both *Korbut* and *Western Helicopter*[153] but the majority declined, emphasizing the "special force" of *stare decisis* with regard to interpretations of statutes of limitation.[154] On review the supreme court reversed, distinguishing both *Korbut* and *Western Helicopter*, and applied *PGE* to ORS 30.020. The court made no mention of Judge Edmonds' or the defendant's contentions that *Korbut* and *Western Helicopter* required reevaluation because they were decided pre-*PGE*.[155] Such lack of guidance likely produced the footnotes in the court of appeals' opinions in *State v. Snyder*[156] and *Kaib's Roving R.Ph. Agency, Inc. v. Employment Dept.*,[157] both of which further contributed to the ambiguity.

One concurring opinion had held that the application of *PGE* alone, without any change to the statute, would suffice to overturn the prior construction of a statute. Then-Judge DeMuniz, concurring in the opinion of the court of appeals in *State v. Barrett*,[158] wrote that "I agree, for the most part, that the majority's holding is dictated by our opinions in *State v. Hessel*[159] and *State v. Burnell*,"[160] but "were I writing on a clean slate, I would hold otherwise."[161] Applying *PGE* to

152. *Kambury*, 21 P.3d 1089, 1098 n.7 (Edmonds, J., dissenting).

153. Western Helicopter Servs. v. Rogerson Aircraft, 811 P.2d 627 (Or. 1991).

154. *Kambury*, 21 P.3d at 1095.

155. *Kambury v. DaimlerChrysler Co.*, 50 P.3d 1163, 1165–67 (Or. 2002).

156. 69 P.3d 802, 806 n.7 (Or. Ct. App. 2003) *rev'd*, 97 P.3d 1181 (Or. 2004) ("*Heintz* was decided before the Supreme Court adopted its current statutory construction methodology."). The court left this observation unadorned and the opinion followed the ruling in *Heintz* which the court held to be "substantially identical" to the foundational showing requirement in ORS 813.160(1)(a) which was at issue in the case. *Id.* at 806.

157. 77 P.3d 327, 335 n.9 (Or. Ct. App. 2003) (Wollheim, J., dissenting) *rev'd*, 111 P.3d 739 (Or. 2005) ("Finally, I note both that *Van Gordon* was decided before *PGE v. Bureau of Labor & Industries*, and did not use the interpretive analysis set forth in that case. However, the parties do not challenge either case based on *PGE*.") (internal citations omitted). Judge Wollheim did not elaborate as to whether the interpretation in *Van Gordon* was independently valid though pre-*PGE*, or was simply not at issue.

158. 958 P.2d 215 (Or. Ct. App.1998) (DeMuniz, J., concurring) *rev'd*, 10 P.3d 901 (Or. 2000).

159. 844 P.2d 209 (Or. Ct. App. 1992) *abrogated by* State v. Wilkins, 29 P.3d 1144 (Or. Ct. App. 2001).

160. 877 P.2d 1228 (Or. Ct. App. 1994) ("[W]here we [the court of appeals] relied, without analysis, on *Hessel*." *Barrett*, 958 P.2d at 221 (DeMuniz, J., concurring)).

161. *Barrett*, 958 P.2d at 221 (DeMuniz, J., concurring).

the aggravated murder statute at issue,[162] Judge DeMuniz concluded that both *Hessel* and *Burnell* were wrongly decided, but declared that because "the Supreme Court has not revisited the issue of multiple convictions and sentences since our decisions . . . for now, our precedents stand." On review, the supreme court applied *PGE*, reached the same conclusion, and reversed without commenting on the issue of pre- and post-*PGE* interpretations.[163]

The lack of comment was no indication that the supreme court was unaware of the ambiguous status of pre-*PGE* constructions. In *Morales v. SAIF*[164] the court leapt at the opportunity to revisit their pre-*PGE* construction of a worker's compensation statute, writing that though "[t]he [c]ourt of [a]ppeals cited correctly this court's statement in *Buddenberg*[165] in rejecting claimant's argument . . . in *Buddenberg* this court did not analyze ORS 656.325(5)(b) under the now-familiar methodology for construing statutes that this court summarized in *PGE* . . . . This case presents the opportunity to do so."[166] The court applied *PGE* and cited a pre-*PGE* interpretation of the statute from *Cutright v. Weyerhauser*,[167] a case that itself pre-dated the holding in *Buddenberg*. The court concluded that, because the legislature had not amended the text of the statute in the twenty years since *Cutright*, they must have adopted *Cutright's* construction.[168] The court made no mention of why one pre-*PGE* interpretation would be allowed to trump another pre-*PGE* interpretation at the context level of the paradigm, or why the court in 1993 did not follow the rule of prior construction in deciding *Buddenberg*.

When not reaching out to "reinterpret" pre-*PGE* constructions, the court did, from time to time, treat them as dispositive. For instance, in *Ryerse v. Haddock*,[169] the court was faced with competing constructions of ORCP 64F. Specifically, the issue was "whether, when the legislative amended ORS 3.070 in 1991, the legislature intended the "entry" of the order at issue in the present case to be the act that makes the order effective and thus determined for purposes of

162. OR. REV. STAT. § 163.095 (2007).
163. State v. Barrett, 10 P.3d 901, 904–907 (Or. 2000).
164. 124 P.3d 1233, 1235–1237 (Or. 2005).
165. Buddenberg v. Southcoast Lumber Co., 850 P.2d 360 (Or. 1993).
166. *Morales*, 10 P.3d at 1235–1237.
167. 702 P.2d 403 (Or. 1985).
168. *Morales*, 124 P.3d at 1235–1237.
169. 95 P.3d 1120 (Or. 2004).

ORCP 64F."[170] Two cases had previously construed the word "determine" in ORCP 64F—one in 1964[171] and the other in 1966.[172] Both cases were held to be "context" for the 1991 amendment, and the court held "that context is dispositive here: A trial court determines a motion for new trial pursuant to ORCP 64F when it makes an effective order."[173]

When not dispositive, pre-*PGE* constructions had been found to be supportive of the court's construction of a statute. *Ahern v. Oregon Public Employees Union*[174] was such a case. There the court sought to determine whether the trial court had lacked jurisdiction to hear Ahern's unfair labor practices claim because the Public Employee Collective Bargaining Act (PECBA) vested exclusive jurisdiction over such claims in the Employment Relations Board (ERB).[175] Applying *PGE* to the text and context of the statutes, the court announced that they had "no doubt that the legislature intended ERB to have exclusive jurisdiction to determine whether an unfair labor practice has been committed."[176] Some doubt must have persisted, though, because the court could not resist pointing out that "the reasoning in *Tracy v. Lane Co.*[177] supports our conclusion."[178] No comment was made regarding the pre-*PGE* vintage of *Tracy*.

The supreme court eventually began to shift toward strongly affirming the validity of pre-*PGE* interpretations as part of the context of a statute at step one of the paradigm. This shift emerged in the form of a footnote in *Bergerson v. Salem-Keizer School District.*[179] There the petitioner had argued that a prior case construing ORS 342.905[180] "no longer applies because this court decided that case prior to deciding its germinal case on statutory construction, *PGE v. Bureau of Labor & Industries*."[181] After applying *PGE* to the statute at issue, the court dropped a footnote announcing "we reject without

170. *Id.* at 1122.
171. Clark v. Western Auto Wholesale Co., 391 P.2d 754 (Or. 1966).
172. Charco, Inc. v. Cohn, 411 P.2d 264 (Or. 1966).
173. *Ryerse*, 95 P.3d at 1123.
174. 988 P.2d 364 (Or. 1999).
175. *Id.* at 365.
176. *Id.* at 367.
177. 752 P.2d 300 (Or. 1988).
178. *Ahern*, 988 P.2d at 367.
179. 144 P.3d 918 (Or. 2006).
180. Ross v. Springfield School Dist. No. 19, 657 P.2d 188 (Or. 1982).
181. *Bergerson*, 144 P.3d at 922.

further discussion petitioner's contention that the FDAB must disregard any cases decided by this court if they predate our decision in *PGE*. *See e.g.*, *State v. Reid* . . . (citing and relying on pre-*PGE* case law); *State ex rel. Huddleston v. Sawyer*. . . (same)."[182] While that statement carried a sting, it apparently did not send the desired message to the Oregon bar, as litigants continued to challenge prior constructions on the basis of their decision date, apart from, or supplemental to, their arguments on the merits.

Just such a challenge was brought in *Cole v. Sunnyside Marketplace, LLC*,[183] where the court of appeals was presented with the argument that *Morales* had suggested that a pre-*PGE* decision[184] did not have "the full effect of an authoritative construction." In answering that argument, the court wrote that "the [s]upreme [c]ourt's statutory construction decisions—whether pre or post *PGE*—remain binding on us until the court *itself* reexamines them or until the legislature alters the statutes that they construed."[185] By characterizing *Morales* as a case where "the [s]upreme [c]ourt opted to revisit one of its own decisions," the court of appeals concluded that "nevertheless, it does not follow that, because the court has elected to reexamine *its own* decisions, we are free to do the same."[186]

Mastriano v. Board of Parole & Post Prison Supervision placed this issue squarely before the supreme court because there the court of appeals *had* explicitly declined to follow a prior construction of the judicial review statute[187] solely because it was decided pre-*PGE*.[188] After the Board petitioned for reconsideration, the court of appeals again declined to follow the prior construction of ORS 144.335(1), this time citing to the court's comment in *Morales*.[189] At the supreme

182. *Id.* at 925 n.7 (internal citations omitted).

183. Cole v. Sunnyside Marketplace LLC, 160 P.3d 1, 5 (Or. Ct. App. 2007).

184. Berry v. Branner, 421 P.2d 996 (Or. 1966).

185. *Cole*, 160 P.3d at 6 (emphasis added).

186. *Id.* at 5 (emphasis in the original).

187. OR. REV. STAT. § 144.335(1) ("A person over whom the Board exercises its jurisdiction may seek judicial review of a final order of the Board as provided in this section if: (a) The person is adversely affected or aggrieved by a final order of the board; and (b) The person has exhausted administrative review as provided by board rule.").

188. 159 P.3d 1151, 1152 (Or. 2007). The court of appeals' unpublished order had declined to follow the court's interpretation of ORS 144.335(1) set out in *Esperum v. Board of Parole*, 681 P.2d 1128 (Or. 1984).

189. *Id.* As the supreme court pointed out, Judge Landau dissented from this order, writing that "nothing in *Morales* . . . proposes to overrule that long line of cases [decided after *Esperum*], and the majority errs in concluding otherwise." *Id.*

court, both parties agreed that the court's 1984 interpretation of the statute was "on point," and "directly addressed and resolved" the issue presented by Mastriano's appeal.[190] At the outset of its analysis, the court dealt directly with the confusion caused by the *Morales* comment and firmly rejected the Court of Appeals' reliance upon it, writing that:

> In *PGE*, this court did not fashion new rules for determining the meaning of statutes; nor did the court disavow old or settled rules for doing so. Rather, the court synthesized existing interpretive principles—some codified in Oregon statutes since nearly the beginning of statehood, others reflected in settled case law for many years—into a logical methodology. Thus, *PGE* did not change the substantive principles that apply to statutory interpretation so much as it provided a coherent and predictable order in which to invoke those principles. The absence of a *PGE*-style examination of legislative intent *does not* deprive a prior statutory interpretation of its ordinary effect as precedent. Consequently, a decision of this court interpreting a statute can be neither discounted nor disregarded merely because it predates *PGE*.[191]

The court accordingly applied the interpretation set out in *Esperum*, after first finding that what legislative amendments had been made after that case had not altered its essential holding.[192]

While *Mastriano* certainly settled the question of the viability of pre-*PGE* interpretations,[193] the court's description of the methodology as "logical," "coherent," and "predictable"[194] is simply not supported by its application of the paradigm over the past seven years. Moreover, the court's description of *PGE* is interesting for what it does not include: no mention is made of the rigidity of the steps, or of the requirement of ambiguity to proceed through them. No justification is given for the rejection of legislative history, which is explored below, nor are the rare third-step canons mentioned. Thus, what is apparently the most extensive comment by the court on the nature of the paradigm in the past seven years succeeded in answering only one of the most pressing questions produced by its operation.[195] But the reaf-

190. *Id.* at 1135.

191. *Id.* at 1154–55 (emphasis added).

192. *Id.* at 1156–57.

193. The court of appeals applied the holding in *Taylor v. Lane Co.*, 162 P.3d 356, 361 (Or. Ct. App. 2007), to reject an argument that one of its interpretations from 1971 was no longer valid.

194. *Mastriano*, 159 P.3d at 1155.

195. Two cases illustrate a related, but different facet of the pre-/post-*PGE* conundrum:

firmation of the validity of pre-*PGE* constructions only raises the more fundamental question of what *PGE* really does: to claim that it has not wrought a transformation in the court's practice of statutory interpretation would be inaccurate, but the conclusion that it has rests uneasily alongside the court's description of the paradigm as merely a synthesis of prior practice, organized more "coherently."

III. THE DISAPPEARANCE OF LEGISLATIVE HISTORY

This section analyzes the few cases decided where the supreme court has reached the second step of the *PGE* paradigm and considered legislative history. What will emerge from the cases considered in this section is an uncertainty as to how much of what the court needs to reach step two of the paradigm. In some cases ambiguity—being reasonably susceptible to two or more constructions—is enough. In other cases competing constructions need be only "plausible," and in one case the court declined to go to step two because the result of the construction derived at step one was not "inherently irrational."[196] It is also uncertain whether the ambiguity must be in the text, the context, or both; in some cases contextual ambiguity has

what precisely is a "prior construction?" *State v. Sandoval*, 156 P.3d 60 (Or. 2007) dealt with whether the jury instructions for self-defense under ORS 161.209 and 161.219 required an instruction on the duty of retreat. The court had previously ruled that such an instruction was required in *State v. Charles*, 647 P.2d 897 (Or. 1982), but the *Sandoval* court, rather than applying that prior construction under the rule in *Bohlman*, interpreted the statutes anew and ruled contrary to the holding in *Charles*. *Sandoval*, 156 P.3d at 64. The court's rationale for doing so was straightforward: though *Charles* purported to interpret the self-defense statutes the holding had actually been based on principles drawn from Oregon case law and therefore "ha[d] nothing to contribute to our present effort, which is to discern what the *legislature* intended with respect to the 'duty of retreat' question." *Id. State v. Murray*, 162 P.3d 255 (Or. 2007) presented a similar issue, dealing with the meaning of the term "cause" in the third degree assault statute, ORS 163.125. The court had previously interpreted that term in the context of whether a defendant could be liable for harm to a willing participant in the reckless conduct leading to the injury in *State v. Petersen*, 526 P.2d 1008 (Or. 1974). In distinguishing that holding, the court pointed out that "*Petersen* predates by almost 20 years this court's articulation of its statutory construction methodology in *PGE*. The court, therefore, did not follow that methodology in interpreting ORS 163.125, nor could it have been expected to." *Murray*, 162 P.3d at 259. But this was not the rationale behind not relying on *Petersen*; that course was warranted, the *Murray* court explained, because "neither this court nor Chief Judge Schwab specifically relied on the statutory wording or its context in interpreting that statute." *Id.* What *Sandoval* and *Murray* teach, then, is that the rule of prior construction requires that the court actually have interpreted the words of the statute specifically, and that the inquiry the court will engage in to determine the authority of such prior constructions will be a searching one.

196. Bollinger v. Bd. of Parole & Post-Prison Supervision, 992 P.2d 445, 449 (Or. 1999). *See* discussion *infra* notes 226–233 and accompanying text.

overridden a clear reading of the text. The cases will also show the court filling in legislative silences in the text with evidence from legislative history, contrary to the court's frequent practice of using negative inference where the legislature is silent.

The court in *PGE* wrote that "[i]f, but only if, the intent of the legislature is not clear from the text and context inquiry, the Court will then move to. . . consider legislative history."[197] What substance the word "clear" would have was not laid out in that opinion. Some indication of the content the court has recently given to the term "clear" was shown in *Tharp v. Psychiatric Security Review Board*,[198] where the court found that "[b]oth petitioner's and the board's interpretations of 'personality disorder' are *plausible* interpretations of that term as used in ORS 161.295(2)."[199] *Tharp* dealt with whether marijuana dependency would be considered a personality disorder excluded from the statutory definition of mental disease or defect, making Tharp eligible for release from the state mental hospital.[200] Having found both Tharp's and the Board's interpretations to be "plausible," the court declared that the term "as used in ORS 161.295(2), is ambiguous, and we turn to legislative history. . . ."[201] The competing interpretations that qualified as "plausible" were Tharp's argument that, based on the Diagnostic and Statistical Manual of Mental Disorders (DSM III), which had previously been identified as an "important source for interpreting statutory terms related to mental illness,"[202] "the legislature intended the term 'personality disorder' to include substance dependency and, therefore, that substance dependency is excluded from the definition of 'mental disease or defect.'"[203] The Board's construction was based on the fact that the DSM III dealt with substance disorders in the section on clinical disorders, not the section on personality disorders, showing that marijuana dependency could not be a personality disorder.[204] The court considerably lightened its burden in resolving the ambiguity by adopting the court of

197. *PGE*, 859 P.2d 1143, 1146 (Or. 1993).

198. 110 P.3d 103, 109 (Or. 2005).

199. *Id.* (emphasis added).

200. *Id.* at 104.

201. *Id.* at 109.

202. *Id.* at 424 (citing Mueller v. Psychiatric Sec. Review Bd., 937 P.2d 1028 (Or. 1997)).

203. *Id.*

204. *Id.*

appeals' "detailed review of the legislative history"[205] from that court's opinion in an earlier case,[206] and held that "[t]he legislative history shows that the legislature intended to exclude personality disorders such as drug and alcohol dependency from the terms 'mental disease' and 'mental defect.'"[207] Why either of the proffered interpretations was "plausible" was not explained by the court.[208]

Adjectival proliferation continued with *State v. Edson*,[209] where the court conjured two interpretations of ORS 138.222(5) and, while finding one to be "less plausible," nevertheless decided both were "tenable" and thus resorted to legislative history.[210] What qualified as "tenable" was the fact that the final sentence of the statute[211] "[r]ead by itself . . . would appear to apply broadly to various kinds of errors that a court could make, including that committed here. An alternative reading is that the third sentence merely is an elaboration of the second."[212] Reading the third sentence to only refer to the errors set out in the second sentence was "less plausible because, had the legislature intended that result, it needed only to insert the word 'entire' in the second sentence; addition of the third sentence would have been unnecessary."[213] Still, the court found that reading to be "tenable," and went to legislative history. The legislative history the court consulted reinforced its plain-text reading of the third sentence in ORS 138.222(5), and the court remanded the case to the circuit court for re-

205. *Id.*

206. Beiswinger v. Psychiatric Sec. Review Bd., 84 P.3d 180 (Or. 2004).

207. *Tharp*, 110 P.3d at 112.

208. That "plausibility" is the standard for ambiguity is problematic not only because it is inconsistently applied but also because, as Johansen observed, "it seems axiomatic that any statutory issue that reaches the court must have more than one 'plausible' resolution. If the statute truly were incapable of two meanings, the parties would not likely be in court, nor would the court see a need to accept review." Johansen, *supra* note 10, at 253. Of course, rather than advancing an ambiguous interpretation in the appellate courts a litigant may simply be clinging to one that is *wrong*.

209. 985 P.2d 1253 (Or. 1999).

210. *Id.* at 1260.

211. In 1999, ORS 138.222(5) provided:

(5) The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. If the appellate court determines that the sentencing court, in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing. The sentencing court may impose a new sentence for any conviction in the remanded case.

212. *Edson*, 985 P.2d at 1260.

213. *Id.*

sentencing.[214] Why the court did not simply apply the rule from ORS 174.010 that no part of a statute is to be omitted was not explained. Application of that first-level rule would have made the "less plausible," but still "tenable" reading, which required the court to either ignore or give no effect to the third sentence, implausible and untenable as against the legislature's command to the court on how to read statutes.

In two instances where it seemed the court would look to legislative history, it refrained, lending further uncertainty as to what it considers "ambiguity." *State v. Johnson*[215] involved the interaction of ORS 135.750 and ORS 135.747, both statutes dealing with the speedy trial requirement. Johnson made a motion in the trial court to have his indictment for murder dismissed on speedy trial grounds. The trial court dismissed Johnson's motion, finding the delay to have been Johnson's own fault.[216] On appeal, Johnson argued that the delay was "unreasonable" and thus grounds for dismissal under ORS 135.747 which required dismissal "when the state fails to bring a defendant to trial within a 'reasonable period of time.'"[217] After the court of appeals reversed the trial court's denial of Johnson's motion, the state appealed, arguing that ORS 135.747 had to be "read in tandem with ORS 135.750" which contained "discretionary wording . . . [providing that] 'the court *may* order the action to be continued.'" The state contended that this was "evidence that the legislature intended to 'grant a wide range of discretion as to a trial court's determination of both reasonableness and remedy for delay.'"[218] Therefore, the state argued, the court of appeals erred in reviewing the denial of the motion as a question of law rather than as an exercise of discretion.[219]

After concluding that the plain text of the statute "strongly indicate[s] that a trial court's discretion to continue an action under ORS 135.750 is limited,"[220] the court examined the historical evolution of the statute as part of its context, which it concluded would "provide insight into understanding the intended collective operation of the statutes."[221] Examining the predecessor statute ORS 134.120 from

214. *Id.*
215. 116 P.3d 879 (Or. 2005).
216. *Id.* at 881.
217. *Id.* at 882.
218. *Id.*
219. *Id.*
220. 116 P.3d at 883.
221. *Id.* at 884.

1959, which had been "amended by removing the words 'unless good cause to the contrary is shown' and by requiring that a defendant be tried within a 'reasonable period of time,'" the court concluded that "there is no reason to believe that the 1959 legislature was imparting any particular content to the term 'reasonable.'" [222] That was not the end of the inquiry, however, because, the court continued, "on the other hand, the legislature's choice to remove the final phrase . . . 'unless good cause to the contrary is shown'—is enigmatic. *We can only guess* that the legislature removed the 'good cause' phrase because the phrase was unnecessary."[223] Wrapping up their historical review, the court rejected the state's contention that the statute granted the trial court discretion and concluded that "the court must decide the issues that arise under [ORS 137.747 and ORS 137.750] as a matter of fact and law, rather than discretion."[224] In a footnote, the court added that "the [1959] legislature's clear overall purpose in enacting the amendments was to remove references to term-based scheduling. There is no hint anywhere in the statute that the legislature had any other purpose in mind."[225] Yet if there was no hint of any contrary intent, why did the court have to *guess* that the "good cause" phrase was removed because it was unnecessary? What this case appears to show is an instance in which the interaction of two statutes rendered their application to the facts ambiguous—that is, susceptible to two or more plausible constructions. The court recognized this ambiguity and purported to resolve it at the first level by examining context, but that contextual inquiry generated only a "guess" as to the legislature's intent, and a footnote asserting no contrary intent had been found. Why the court did not examine the legislative history, if any, was left unexplained.

The second instance of the court refraining from examining legislative history in the face of an ambiguous statute came in *Bollinger v. Board of Parole & Post-Prison Supervision*,[226] where the court of appeals had held that "the inmate had a right to refuse parole under the statutes that were in effect at the time of his crime and, therefore, that applying ORS 144.245(3) to [him] to prevent his discharge on this good time date . . . violat[ed] the constitutional prohibition

222. *Id.* at 885.

223. *Id.* (emphasis added).

224. *Id.* at 886.

225. *Id.* at 886 n.7.

226. 992 P.2d 445 (Or. 1999).

against *ex post facto laws*."[227] The Board appealed, asking the supreme court to decide whether Bollinger, who had been convicted prior to the enactment of ORS 144.245(3) and thus was not subject to its provisions, was "entitled to reject the Board's decision to release him" on parole.[228] The court began its inquiry by looking to a contextual statute, ORS 144.050, which, when Bollinger committed his crimes, had read "the State Board of Parole may *authorize any inmate*. . . *to go upon parole*. . .."[229] Finding the definition of "authorize" in *Webster's New Third International Dictionary* to "connote choice on the part of the person authorized to act or refrain from acting," the court held that the statute "appears to contemplate that inmates will take an active role in determining whether [their going out on parole] will occur."[230] Despite that plain text reading, the court entertained the Board's proffered interpretation "derived from a more holistic analysis of the parole statutes"[231] which argued that "it is impossible to believe that the legislature intended inmates to be permitted to nullify the Board's decision to grant parole by refusing to accept that parole."[232]

Though this construction clearly conflicted with the plain-text reading the court had just adopted, the Board's construction arguably created an ambiguity in the statute; at the very least the construction was "plausible" (or "tenable") such that an inquiry into legislative history might have been useful. No, said the court; the plain text reading of the statute was not negated by the Board's alternate construction because "there is nothing *inherently irrational* in endowing the Board with broad authority to determine whether, when, and under what conditions an inmate may be paroled, while at the same time requiring voluntary acceptance of the parole and its conditions by the inmate."[233] Whether "inherently irrational" was intended to be a new standard for whether a competing construction could create an ambiguity was not addressed. The inconsistency in the standard for finding ambiguity that these cases illustrate is important for litigants arguing

227. *Id.* at 446 (citing Bollinger v. Bd. of Parole & Post-Prison Supervision, 920 P.2d 1111, 1114 (Or. Ct. App. 1996)).

228. *Id.* at 447.

229. OR. REV. STAT. § 144.050 (1983); *Bollinger*,.992 P.2d at 448 (emphasis in the original).

230. *Id.*

231. *Id.* at 449.

232. *Id.*

233. *Id.* (emphasis added).

within the paradigm because without a finding of ambiguity the court will refuse to examine legislative history, even if that history is dispositive.

One example of where potentially dispositive legislative history was ignored, or at least not mentioned, by the majority opinion is *Thompson v. TLAT, Inc*.[234] In *Thompson*, the court of appeals was asked to determine whether a judgment, which had been rendered unappealable by the filing of a motion for new trial or JNOV, nevertheless remained enforceable.[235] This required the majority to construe ORS 18.082(1),[236] which it did, applying the *PGE* paradigm.[237] The majority began by looking to contextual statutes and rules of civil procedure and, construing those provisions "in harmony with each other," held that the "enforceability and appealability of a judgment are separate and distinct concepts."[238] Accordingly, the plaintiff's appeal, which had been dismissed for lack of jurisdiction,[239] was reinstated.[240] The majority observed in a footnote that, though "the legislature may not have intended for appealability and enforceability to be severable. . . . we nevertheless are led to our conclusion *by [our] principles of statutory construction*. Without further guidance from the legislature, we cannot hold otherwise."[241]

But there was further guidance from the legislature: the legislative history of ORS 18.082(1) which Chief Judge Brewer, writing in

234. 134 P.3d 1099 (Or. Ct. App. 2006).

235. *Id.* at 1100.

236. OR. REV. STAT. § 18.082(1) (2007). Oregon's statute provides:

(1) Upon entry of a judgment, the judgment:

(a) Becomes the exclusive statement of the court's decision in the case and governs the rights and obligations of the parties that are subject to the judgment;

(b) May be enforced in the manner provided by law;

(c) May be appealed in the manner provided by law;

(d) Acts as official notice of the court's decision; and

(e) May be set aside or modified only by the court rendering the judgment or by another court or tribunal with the same or greater authority than the court rendering the judgment.

237. *Thompson*, 134 P.3d at 1101.

238. *Id.* at 1101–02.

239. *Id.* at 1101. The court of appeals previously dismissed Thompson's appeal because it found that the trial court had lacked jurisdiction to sustain the defendant's challenge to the writ of garnishment Thompson had attempted to enforce. Because the court of appeals held that the trial court retained the power to enforce the judgment despite the filing of a motion for new trial or JNOV, Thompson could appeal the trial court's decision to sustain the defendant's challenge to that writ.

240. *Id.* at 1102.

241. *Id.* at 1102 n.5 (emphasis added).

dissent, relied upon to reach precisely the opposite conclusion. "The legislative history of ORS 18.082(1)" the Chief Judge wrote, "supports the view that judgments must be both enforceable . . . *and* appealable" and therefore plaintiff's appeal should have been dismissed because the underlying judgment "was not enforceable while it remained nonappealable pending the trial court's determination of the motion for new trial or JNOV."[242] Chief Judge Brewer did follow the *PGE* paradigm, finding ORS 18.082(1) to be ambiguous because there were at least two "plausible" readings of the statute due to the legislature's use of the conjunctive.[243] Why the majority did not find that same ambiguity was not explained; indeed, why the majority had to rely solely upon "principles of statutory construction" where there was dispositive legislative history was a question left unanswered. Indeed, even when distinguishing Chief Judge Brewer's dissent, the majority made no mention of his use of legislative history. What *Thompson* illustrates is the artificiality of the court's inquiry into legislative intent when *PGE* is treated rigidly: the majority's footnote five makes no sense in light of the dissent's use of legislative history unless there is something other than the determination of legislative intent that is driving the process of statutory interpretation. Footnote five is thus like the Court's finding of ambiguity in *Murray*—the only explanation is the truly dissatisfying one that adherence to the *PGE* paradigm was, in this instance, an end in itself.

While text and context are tied together at step one, the favoring of text as the "the best evidence of the legislature's intent"[244] would seem to augur against allowing an otherwise clear statute's context to render it ambiguous. But this is exactly what the Court has found on a number of occasions. *Stevens v. Czerniak*,[245] a case interpreting ORCP 36B(1), is an example: there, the issue was whether the identity and the content of expert testimony was discoverable prior to trial.[246] Rule 36B(1) provided that "[f]or all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant. . . ."[247] The court read this language and concluded that "it may be that the text of that subsection, if read in isolation, could be inter-

242. *Id.* at 1104 (Brewer, C.J., dissenting)

243. *Id.* at 1103–04.

244. *PGE*, 859 P.2d 1143 (Or. 1993) (internal citations omitted).

245. 84 P.3d 140 (Or. 2004).

246. *Id.* at 141.

247. *Id.* at 144.

preted to permit expert discovery if it is (1) relevant and (2) not privileged."[248] That indeed is the plain reading of ORCP 36B(1), but, the court continued, "text should not be read in isolation, but must be considered in context. In this case, context cuts in a different direction."[249] The context consulted included the federal counterpart to Oregon's rule, FRCP 26, which included a provision for expert discovery, a counterpart of which had been introduced and rejected by the legislature when it amended ORCP 36 in 1979.[250] "At minimum," the court held "this legislative action undercuts the suggestion that the phrase 'any matter' in ORCP 36B(1) necessarily includes expert witnesses."[251] Having found the statute ambiguous, but having announced early in the opinion their conclusion regarding the meaning of the rule, the court examined the legislative history, found it supported their already-declared conclusion and "agree[d] with petitioner that the legislature did not intend to authorize pretrial disclosure of . . . the expert's testimony."[252]

Context was found to undermine the clear reading of the statute in *State v. Shaw*[253] as well. There, the court conjured up a "context" of statutes ostensibly showing a legislative concern for speedy trial violations.[254] Finding that "context" created an ambiguity in the statute at issue (ORS 138.060(2)(b)), the court examined the legislative history which contained—of all things—a statement from a legislator concerned with speedy trial violations.[255]

At issue in *Shaw* was whether the court had exclusive statutory jurisdiction over the state's appeal from an order dismissing a murder indictment with prejudice and entering a judgment of acquittal.[256] ORS 138.060(2)(b), as a textual matter and in light of the court's prior

248. *Id.*

249. *Id.* 144–45 (internal citations omitted).

250. *Id.* at 145.

251. *Id.* The court noted in a footnote after this statement that:

> Ordinarily, the legislature's failure to enact legislation does not provide persuasive evidence of its intent. . . . This is not a case, however, in which the legislature failed to act. Rather, it is a case in which the legislature passed a law deleting a subsection of ORCP 36 that, had the legislature not acted, would have gone into effect. The legislature's action and the reasons for it thus provide valuable evidence of the legislature's intent.

Id. at 145 n.10.

252. *Id.* at 146–47.

253. 113 P.3d 898 (Or. 2005).

254. *Id.* at 909.

255. *Id.* at 909–10.

256. *Id.* at 906–07.

construction of the same language in an adjacent statute,[257] appeared to provide "exclusive statutory jurisdiction over state appeals from *all* pretrial orders. . . *except* those orders where the trial court had dismissed the indictment with prejudice and entered a judgment of acquittal."[258] "However," the court found, "other aspects of the context of ORS 138.060(2)(b) cause us to question whether those rules of textual construction should control our interpretation here."[259] Those "other aspects" were the other "types of state appeals that the legislature selected for this court's exclusive statutory jurisdiction" which the court found to be "types of state appeals that uniquely may implicate speedy trial requirements."[260] "Thus," the court concluded, prior to any examination of legislative history, "the legislature *appears* to have intended to minimize the risk of speedy trial violations in cases involving those serious criminal charges . . . [T]hat *context* strongly suggests to us that the legislature intended this court to have exclusive statutory jurisdiction over both types of dismissals in those prosecutions."[261]

Whether that "appearance" had to be divined from "context" for any reason other than the requirement of the paradigm that an ambiguity be found before legislative history can be examined was not explained by the court. An explanation would have been welcome because, despite the court's confident finding of a suggestion of intent in the context of the statute, it then declared that "because the legislature's intent is unclear . . . we turn to the legislative history . . . for further guidance."[262] After quoting Senator Kate Brown's statement that "the bill served to prevent speedy trial violations," the court declared "that history convinces us that the legislature intended this court to have exclusive statutory jurisdiction . . . ."[263] What is interesting about *Shaw* is the gymnastics that adherence to the paradigm re-

257. State v. Carillo, 804 P.2d 1161 (Or. 1991). The court made no mention of the fact that this was a pre-*PGE* construction of the statute and it was used as context in the same manner as other prior constructions.

258. *Shaw*, 113 P.3d at 909.

259. *Id.*

260. *Id.*

261. *Id.* at 909 (emphasis added).

262. *Id.* at 909.

263. *Id.*at 910.

quired of the court in order for it to reach the legislative history that merely reinforced its reading of the statute at the first step of the paradigm. Rather than assembling all available evidence of legislative intent at the outset and declaring a conclusion based upon it (as the court of appeals' majority had done in *PGE*[264]), the paradigm requires the court to jump through a series of hoops, each contingent on a finding of "ambiguity." If those hoops produced progressively finer-grained explanations of the rationale behind each holding, then adherence to the paradigm would be laudable. Unfortunately, as *Shaw* demonstrates, at times they do not.

State v. Ferman-Velasco[265] is another example of contextual ambiguity. At issue was whether the "statutory [exemption] in ORS 161.665(1) also encompasses those expenses associated with the defendant's right to meet witnesses face to face, such as the prosecution's witness fees . . . ."[266] ORS 161.665(1), like ORCP 36B(1), was an unequivocal statute which in 2002 read "costs shall not include expenses inherent in providing a constitutionally guaranteed jury trial . . . ."[267] When considered in context, however, the court found that it was "apparent that the legislature, at the least, did not intend that exception [to] apply [to] expenses associated with *all* constitutional rights that protect a defendant at trial."[268] The context referred to was ORS 161.665(1) which "specifically excludes from the exception those expenses associated with payment of court appointed counsel—expenses that clearly are associated with the right to assistance of counsel, which . . . serves to protect a criminal defendant during a trial."[269] Because of this context, the court could not conclude that the statutory phrase "'expenses inherent in providing a constitutionally guaranteed jury trial' necessarily encompasses expenses associated with the right to meet witnesses face to face.'"[270]

Accordingly, the court examined the legislative history of the statute, including the commentary on the Oregon Criminal Code,[271] the commentary on the Michigan Criminal Code[272] from which Ore-

264. 842 P.2d 419, 422 (Or. Ct. App. 1992).
265. 41 P.3d 404 (Or. 2002).
266. *Id.* at 415.
267. *Id.* at 414 (citing OR. REV. STAT. § 161.665(1) (2001)).
268. *Ferman-Velasco*, 41 P.3d at 415.
269. *Id.*
270. *Id.*
271. *Id.* at 415 n.16.
272. *Id.* at 415.

gon's was derived, and a 1941 case from the Michigan Supreme Court which had "upheld the imposition of witness fees without comment."[273] "Taken as a whole" the court concluded, "the legislative history demonstrates that . . . the legislature intended to except expenses associated with a criminal defendant's jury trial itself, such as juror fees," not witness fees or other expenses "associated with the defendant's constitutional right to meet witnesses face to face."[274] In this case, unlike the contextual ambiguity found in *Stevens*, the unequivocal term in ORS 161.655 ("constitutionally guaranteed jury trial") was not rendered ambiguous by prior practice or by the statute from which it was derived, but was found ambiguous on account of a separate clause in the same statute. In other words, the term "constitutionally guaranteed jury trial" was a qualified term, and the issue was the extent to which it was qualified by the other exceptions in the statute.

What these three cases show is the extent to which the court's broad reading of context at level one, while primarily designed to eliminate ambiguity, can also produce ambiguity by drawing the court's analysis outward from the text at issue to adjacent statutes, their predecessors, and the wider historical and legal environment from which they emerged. [275] These cases also demonstrate that, while text is favored as the "best evidence" of the intent of the legislature, it is not the last evidence of that intent. Litigants in Oregon should not fall into the trap of seeing the *PGE* paradigm as a variant of the "plain meaning" rule—it is anything but. The sweep of the contextual inquiry, and the willingness of the court to find ambiguity in what is otherwise clear text, demonstrates that, if nothing else.[276]

273. *Id.* (citing People v. Hope, 297 N.W. 206, 208 (Mich., 1941)).

274. *Ferman-Velasco*, 41 P.3d at 416.

275. *See* Landau, *supra* note 6, at 45 ("There is little that *cannot* be considered in the first level of analysis.").

276. On this point I disagree (though the degree of disagreement may be slight) with Judge Landau, who has argued that *PGE* is, "in its essence, a reformulation of the turn of the century 'plain meaning rule.'" Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 875 (2000). The "plain meaning rule" has a number of formulations, the most famous likely being the variant used by the United States Supreme Court in *Caminetti v. United States*, 242 U.S. 470 (1917). The Court's articulation of the rule provided that "[w]here 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 . . . . Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." *Id.* at 485. This is similar to *PGE*, but *PGE* diverges—critically—from this rule by incorporating canons of statutory construction at level one of the paradigm. The will-

In two out of nine of the cases in the past seven years where the court considered legislative history, that history was used to fill in a "silence" found in the law by the court and attributed to legislative oversight. This contrasts with the court's usual treatment of the silences it finds, which is to treat them as indicative of negative intent. What explains this variation in the treatment of silences has been left unexplained by the court; given the limited legislative history the court will treat as determinative,[277] the cases where the court has used negative inference in the face of silence cannot be explained by arguing that no legislative history was available. As the cases considered below will demonstrate, this style of argumentation does little for the coherence of the *PGE* paradigm.

Stevens v. Czerniak,[278] treated above, saw the court claiming not to be filling a legislative silence by finding in the legislative history of ORCP 36B a statute[279] preventing the proposed ORCP 36B(4) from going into effect. While the court claimed not to be filling a silence, the rule itself said nothing about the discoverability or non-discoverability of expert testimony prior to trial. The rule mentioned only "any matter, not privileged . . . ," and it was only by a reading of the rule's context that any ambiguity justifying going to legislative history was found. The discoverability of experts issue presented by the case may have been enough to tease a silence out of the rule, but the court chose not to explain its resort to the rule's context in that manner. In this respect *Stevens* is similar to *State v. Ferman-Velasco*,[280] where the presence of certain exceptions to the restitution requirement for costs related to a constitutionally guaranteed jury trial in ORS 161.665(1) was found to create an ambiguity justifying examination of legislative history of the statute because of the *absence* of an exception for witness fees.[281] Why the court did not take the legislative silence to be indicative of intent to *exclude* witness fees from

ingness of the court to utilize tools such as *esjusdem generis* and *noscitur a sociis*, among others, at the first level shows that even nominally unambiguous text still receives a measure of "interpretation." One intriguing possibility is that, if *PGE* were indeed a strict "plain meaning" rule, the court might be more likely to reach legislative history because fewer ambiguities would be capable of resolution at the first level in the absence of interpretive canons.

277. *See supra* note 87.

278. 84 P.3d 140 (Or. 2004).

279. *Id.* at 145 (citing Or. Laws 1979, ch. 284 § 23).

280. 41 P.3d 404 (Or. 2002).

281. *Id.* at 415. The other exemptions the court found in the statute were for court-appointed counsel costs and juror's fees.

the exemption was not explained,[282] though that was the ultimate holding the court reached.[283]

The court's usual approach to legislative silence was neatly set out in *Barackman v. Anderson*,[284] where the court was faced with the question of whether the legislature intended a personal injury protection (PIP) arbitration to have a preclusive effect in any future lawsuit.[285] Applying *PGE* to the ORS 742.522(1), the court declared that "the statutory context demonstrates that the legislature has known for some time how to prevent arbitration proceedings from having a preclusive effect," and "in this instance, plaintiff has failed to demonstrate that the words of ORS 742.522(1) reflect a legislative intent to prohibit courts in this state from applying the doctrine of issue preclusion to arbitration decisions."[286] "It is true, of course," the court wryly continued, "that the statute also does not indicate that the legislature *intended* to authorize the preclusive use of PIP arbitrations. But that fact only establishes that the statute is neutral on the issue."[287] And a showing that the statute was neutral was not enough; the court wanted "something more" from the plaintiff.[288] What that was, or how a future litigant could bring it before the court, was left unsaid.[289]

Though they are not considered true context because they cannot demonstrate the previous enacting legislature's intent,[290] subsequent enactments have been used by the court as "strong evidence"[291] when

282. The court did just the opposite with the legislative silence it encountered in *Rico-Villalobos v. Giusto*, 118 P.3d 246, 250 (Or. 2005). *Rico-Villalobos* required the court to construe OEC 101(4)(g) so as to determine whether a trial court could consider, at a pre-trial release hearing, evidence that could not be considered at a grand jury hearing. In answering that question in the affirmative, the court reasoned:

We agree that the legislature's decision expressly to *exclude* evidence that would not be admissible at trial from a grand jury proceeding, but not expressly to exclude such evidence from a pretrial release hearing, supports the inference that we draw from OEC 101(4)(g) that the legislature did not intend any such exclusion.

Id. at 250 (emphasis in original).

283. *Ferman-Velasco*, 41 P.3d at 416.

284. 109 P.3d 370 (Or. 2005).

285. *Id.* at 371.

286. *Id*. at 373.

287. *Id.* at 376 (emphasis added).

288. *Id.*

289. In perhaps a nod to the nakedness of their use of negative inference, the Court did note that "in general, arbitration proceedings have been accorded preclusive effect in subsequent civil actions for decades." *Id.* at 373 n.4.

290 *See* Stull v. Hoke, 948 P.2d 722 (Or. 1997) (setting out principle).

291. Gladhart v. Oregon Vineyard Supply Co., 26 P.3d 817 (Or. 2001).

applying negative inference. Such subsequent enactments regarding the products liability statute were held by the court to show that "when the legislature intends to condition the commencement of a limitation period on the discovery of the harm, it knows how to express that intention."[292] In *Gladhart v. Oregon Vineyard Supply Co.*, the court surveyed the context of the statute and found that "by 1977, the legislature clearly had demonstrated its ability to express a discovery rule in numerous other limitations statutes," and, because it had not done so "the legislature's intent is clear, ORS 30.905(2) does not contain a so-called 'discovery rule.'"[293]

Such demonstrated expertise on the part of the legislature was sufficient to uphold the defendant's conviction for carrying an unlicensed concealed weapon in *State v. Perry*.[294] There, the court found that "[t]he fact that the legislature enacted an exception, for example, that permits a merchant of firearms to possess unloaded weapons as merchandise demonstrates that the legislature did not intend that the place of business exception permit an employee of a business to possess a concealed weapon at work, unless the employee has a concealed weapon license."[295] The defendant had argued that the "place of business exception," which allowed owners of businesses to carry handguns without first obtaining a concealed carry license, ought to apply to him as an employee.[296] His argument was unavailing because the legislature had demonstrated an ability to enact exceptions to the general ban on carrying concealed weapons, and because no such specific exception applied to employees, the legislature *must* have intended them to be subject to the general ban.[297]

Similar reasoning in *Bergmann v. Hutton*[298] provoked three judges to dissent from the court's holding that "the phrase 'any amount payable under the terms of this coverage' in ORS 742.504(7)(c) refers to the amount that the insured legally would be entitled to recover" not subject to any limits of liability.[299] To reach that holding, the court examined the context of the statute and concluded, "[g]iven that the UM/UIM statute repeatedly employs the

292. *Id.*
293. *Id.*
294. 77 P.3d 313 (Or. 2003).
295. *Id.* at 318.
296. *Id.* at 314–315.
297. *Id.* at 318.
298. 101 P.3d 353 (Or. 2004).
299. *Id.* at 361.

phrases 'limits of liability' and 'liability limits,' we think that, if the legislature had intended the phrase 'any amount payable under the terms of this coverage' in ORS 742.504(7)(c) to mean the insurer's liability limit, it would have done so expressly."[300] Justice Kistler, dissenting alongside Chief Justice Carson and Justice Balmer, argued for a wider reading of the context of the statute reasoning that context would show the absence of any silence because "[b]y definition, the 'terms' which ORS 742.504(7)(c) refer to are *all* the terms of ORS 742.504, which includes both the scope of coverage . . . and the limit on liability."[301] In a more indirect manner, the court found that the legislature's silence regarding its use of the term "colorable claim" in contexts other than the termination of the parental rights statute it was contained in, made the court's prior construction of that statute applicable to the term "colorable claim" in ORS 144.335(12), a post-conviction relief statute.[302] The court needed to apply that prior construction of colorable claim[303] to the term "colorable claim" in ORS 144.335(12) in order to give substance to the term "substantial question of law" in ORS 144.335(6).[304] Finding that a "colorable claim" simply "embodie[d] a lower quantum of merit than 'substantial question of law,'"[305] the court held, as they had held in *Rardin* regarding the term "colorable claim," that a substantial question of law contained both a factual and a legal component.[306] The court engaged in this exercise despite giving each word in "substantial question of law" a definition from either prior construction or *Webster's Dictionary*.[307]

Why in each of these cases negative inference was preferable to legislative history was not explained. Perhaps in *Ferman-Velasco* and *Czerniak* the presence of strong contextual hints regarding the legislature's actual intent augured against using negative inference, though in *Ferman-Velasco* the result of applying negative inference would have been the same.[308] *Gladhart*, *Perry*, *Barackman*, and *Bergmann*, on the other hand, all seem to indicate that, where the court finds a

300. *Id.* at 359.

301. *Id.* at 363 (Kistler, J., dissenting) (emphasis in original).

302. Atkinson v. Board of Parole & Post-Prison Supervision, 143 P.3d 538, 542 n.7 (Or. 2006).

303. *See* State *ex rel.* Dept. of Human Servs. v. Rardin, 110 P.3d 580, 584 (Or. 2005).

304. *Atkinson*, 143 P.3d at 542.

305. *Id.* at 541.

306. *Id.* at 542.

307. *Id.* at 541.

308. *See supra* notes 265-274 and accompanying text.

statute with multiple, recurring terms or provisions, the absence of such a term or provision in any part of the statute will be taken as evidence that the legislature intended the absence because if the legislature had wanted to include it "they knew how to." But the court did not follow that approach in *State v. Shaw*,[309] preferring instead to treat the absence of a grant of exclusive jurisdiction to the court as a legislative silence to be filled by the finding of a "context" of legislative concern for speedy-trial violations justifying resort to legislative history.[310] While negative inference may be a more common approach under the *PGE* paradigm than resort to legislative history, it does not appear to be any more coherent or predictable.[311]

By citation count alone it is clear that the second step of *PGE* has withered over the past seven years. For the court to have gone past the first step only nine times in seven years, as compared to thirty-three times in the first five years of the paradigm,[312] some change must have occurred in the court's practice—certainly the problems of statutory interpretation did not become less acute, nor is it likely that in 1999 legislative history suddenly became less reliable than it was before. Whatever the reason, or if perhaps there is no reason, the court would do well to articulate a principled rationale for its reluctance to reach legislative history. The advantage of a paradigm is that it provides a shared space within which to argue, but if that paradigm has been altered, then the court owes it to the bar to make that clear because, although the second step of *PGE* has withered, it still remains upon the vine.

IV. WHY PGE OUGHT TO BE SCRAPPED

Those ages, which in retrospect seem most peaceful, were least in search of peace. —Henry Kissinger.[313]

And so it could be said of statutory interpretation—perhaps those

309. 113 P.3d 898 (Or. 2005).

310. *See id.* at 909–910.

311. Indeed, as Johansen pointed out in his discussion of the court's use of legislative silence, "[i]t is more likely that the legislature simply did not anticipate the situation." Johansen, *supra* note 10, at 231; *see also id.* at 231–232 (showing how the court's use of legislative silence illustrated the tension between subjective and objective intent approaches under *PGE*). This is true enough but unsatisfying. To say that the legislature simply "didn't think of it," while having the advantage of being true, has the distinct disadvantage of being indeterminate.

312. *See* Johansen, *supra* note 10, at 221 n.9.

313. HENRY A. KISSINGER, A WORLD RESTORED 1 (1956).

courts, whose practice in retrospect seems so consistent, might have been least in search of consistency. Recall the discussion of the court of appeals' majority opinion in *PGE* at the opening of this Comment.[314] The sequence of interpretation, though not particularly elegant, was clear and lucid: text, then context, then legislative history. There was no invocation of a paradigm, no quibbling over whether a certain source could or should be consulted in either the presence or absence of an ambiguity. Though four judges dissented, those dissents were not grounded in the methodological wrangling that has come to characterize many dissents and concurrences from statutory interpretations under *PGE*.[315]

That would be the world restored if the supreme court were to scrap *PGE*.

What the foregoing review has demonstrated is that the *PGE* paradigm, for all its pretense to regularity, has in fact become a distraction from the court's work of construing statutes. The distraction

314. *See supra* notes 28–31 and accompanying text.

315. Justice Durham's concurring opinion in *Baker v. City of Lakeside*, 164 P.3d 259 (Or. 2007) is illustrative of this phenomenon. In *Baker*, the majority of the court found the statute to be ambiguous because "we cannot completely discount the city's interpretation of that subsection," and had examined its legislative history. *See id.* at 263. Dissenting from the majority's use of legislative silence, and its use of legislative history, Justice Durham, wrote "I would not resort to legislative history because no statutory ambiguity justifies that step." *Id.* at 267 (Durham, J. concurring). Justice Durham also took the majority to task for its use of legislative silence in the legislative history it did look to:

> Nevertheless, the majority transforms that silence in the legislative record into affirmative evidence that removes all reasonable doubt about what the legislature meant to accomplish. I cannot join in that reasoning. Legislative silence about the intent underlying a legislative proposal is just that: silence.

Id. Another example is Justice Gillette's dissent in *Costco Wholesale Co. v. City of Beaverton*, 161 P.3d 926 (Or. 2007). There the majority concluded that "from our examination of the text of ORS 222.750, the statutory scheme in which it is embedded, and, relatedly, its historical roots, that the legislature has granted cities the right to annex property beyond its borders in only particular, limited circumstances." *Id.* at 931. "For the life of me," Justice Gillette announced, "I cannot understand how such a reading of the statute could persuade anyone, much less the majority." *Id.* at 932 (Gillette, J. dissenting). After summarizing the majority's construction of the term "surround," Justice Gillette concluded that:

> [f]or some reason, the majority fails to recognize the circularity in the foregoing discussion. The majority *begins* by positing the correctness of the very definition it seeks to uphold. It is no wonder that it can conclude that that narrow definition is the correct one . . . . The truth is that neither the wording of the statute, nor the specific wording of any other statutes, answers the issue before us. We are left to logic and good sense respecting the scope of authority that the legislature intended to grant to cities under ORS 222.750.

Id. at 932 (Gillette, J. dissenting). Why Justice Gillette did not include legislative history along with "logic and good sense" as indicators of the legislature's intent regarding ORS 222.750 was not explained.

that *PGE* has become can be seen when looking to what this Comment has not done: this Comment has not questioned the merits of the court's conclusions in the cases decided under *PGE*. The court may have been correct that the legislature did not intend the defendant in *Perry* to be covered by the exception granted to his employer for the carrying of concealed weapons; and the court in *Johnson* may well have guessed correctly that the legislature intended speedy trial decisions to be reviewed as a matter of law. But, regardless of the merits of those conclusions, those cases remain open to attack because of the methodology employed. Because the court in *Perry* reasoned from legislative silence rather than proceeding to "step two" of the paradigm, and because the court in *Johnson* "guessed" rather than examining legislative history, future litigants facing similar questions will be tempted to argue them anew. They will do so not because those decisions are wrong, but because they were decided in "the wrong way": that is, "the wrong way" under the Court's self-imposed paradigm.

Why use a paradigm at all? The historian of science Thomas Kuhn, in his path-breaking work on paradigms, wrote that "[p]aradigms gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognize as acute."[316] Was statutory interpretation a problem that the bar in Oregon considered to be acute prior to *PGE*? If so, then the court did not note that concern in *PGE*, and I am comfortable assuming that the answer is no. What this Comment has argued, however, is that statutory interpretation has *become* an acute problem, given the defects of the paradigm explored above.

PGE adds little value to the court's decisionmaking. It is a paltry paradigm in that it neither restricts nor guides the court's decisionmaking; the sweep of what is called "context" shows how *PGE* certainly does not act as a limiting principle with regard to any extrinsic evidence besides legislative history.[317] *PGE* is also a general para-

316. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 23 (2d ed. 1970). Kuhn defined a "paradigm" as a work or works that "served for a time implicitly to define the legitimate problems and methods of a research field . . . . Their achievement was sufficiently unprecedented to attract an enduring group of adherents away from competing modes of scientific activity. Simultaneously, it was sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve." *Id.* at 10.

317. Johansen made a similar point in his discussion of the court's various rules at step one of the paradigm. "These tools," he wrote, "are flexible enough to give the court the ability to attain virtually any desired outcome. Under the guise of judicial restraint, the court is potentially able to engage in results-oriented reasoning and to ignore evidence that may clearly sug-

digm: its "three steps" are really little more than a recitation of the available classes of materials any court would look to in interpreting a statute.[318] It is the artificial rigidity and the requirement of ambiguity in order to move through the steps that makes the paradigm unique, not its focus or what it commands the court to examine. Because its only unique facets are those most deleterious to clarity, what little *PGE* adds would best be left out. And finally, and most fatally, *PGE* is eclectic. The panoply of materials that the court relies upon at step one gives the court wide flexibility in reaching its conclusions; and it is this flexibility that makes *PGE* so unpredictable. A method which can neither predict nor explain is not a method at all, and the Oregon Supreme Court has little to lose by scrapping the *PGE* paradigm.

gest a contrary legislative goal." Johansen, *supra* note 10, at 225. This latter part of this criticism neatly describes the court of appeals' decision in *Thompson v. TLAT*, 134 P.3d 1099 (Or. Ct. App. 2006). I do *not* agree, however, that "results-oriented" judging is caused by adherence to *PGE*, unless adherence to the paradigm itself is counted as a result which, as noted above, is the only conclusion I can draw from the majority's rejection of legislative history in *Thompson*. What Johansen's criticism misses, moreover, is that *PGE* has never, to my knowledge, been touted by the court as a restraint upon judicial decisionmaking. The "failure" of the court to either confirm or deny that *PGE* is intended to operate as a restraint is another facet of the frustratingly ambiguous nature of the paradigm that this Comment has explored. It is reasonably clear from the case law that the paradigm *does not* restrain the court; whether that is a feature or a "bug" is an open question.

318. The California Supreme Court's methodology is similar to the *PGE* approach, although it comes closer to the "plain meaning rule" of *Caminetti* than does *PGE*. *See supra* note 268. That California court wrote:

> Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs. The words, however, must be read in context, considering the nature and purpose of the statutory scheme.

Hunt v. Superior Court, 987 P.2d 705, 717 (Cal. 1999) (citations omitted).