OREGON AS A LABORATORY OF STATUTORY INTERPRETATION

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

Let me begin with a few words about Professor Gluck's work, in particular, her article *The States as Laboratories of Statutory Interpretation*, recently published in the Yale Law Journal.[1] Actually, I can begin with a single word: "terrific." Professor Gluck proposes that, although examination of the statutory construction decisions of the United States Supreme Court has led many scholars to conclude that judges lack the ability to agree on, much less apply, a predictable and coherent set of rules of interpretation, the fact is that state courts have been agreeing on and applying just such a predictable and coherent set of rules for some time. Academic scholarship, she contends, has been too quick to dismiss the possibility of consensus about the rules of statutory interpretation because it has been based on an inadequate sampling of the relevant case law. To prove the point, Professor Gluck carefully examined the statutory construction decisions of the courts of last resort in five states. Among those five states is Oregon, in which she finds a remarkably well developed and coherent approach to statutory construction in the case law following the publication of the Oregon Supreme Court's decision in *Portland General Electric Co. v. Bureau of Labor and Industries* (*PGE*).[2] This is encouraging, Professor Gluck concludes, because of the important

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1. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

2. 859 P.2d 1143 (Or. 1993).

rule of law values promoted in judicial adherence to what she calls "methodological stare decisis."[3]

I could not agree more heartily that, for too long, legal scholarship in this area has focused on decisions of the United States Supreme Court, as if that were all the law that matters. Since the early 1990s, scholars have pored over decisions of the high court, dissected them, quantitatively analyzed them, and critiqued them, all with a view to identifying a coherent methodological approach to the interpretation and application of statutes. Finding no such coherence in the decisions of the high court, scholars declared the matter hopeless.

Now, I appreciate the pressures in the world of academic scholarship to focus on federal law and, in particular, decisions of the United States Supreme Court. If for no other reason than marketability, scholars understandably tend to devote themselves to matters of easily transferrable national interest; it's hard to market expertise in North Dakota law on prescriptive easements.

But the fact remains that academic obsession with United States Supreme Court decisions has resulted in a warped view of the law, at least the law of statutory construction. Where the vast majority of the cases are being generated in this country–where most of the law gets made–is the *state* courts. The United States Supreme Court issues somewhere in the neighborhood of 70 opinions each year. The 43 state supreme courts that report data to the National Center for State Courts issue more than *7,000*.[4]

To declare, on the basis of a sample of a small fraction of one percent of the reported appellate opinions in the country, that statutory construction is hopeless strikes me as tenuous, to say the least. In that context, Professor Gluck's call for increased attention to state court decisions is as refreshing as it is wise. And her painstaking examination of state court statutory construction analysis is an

3. Gluck, *supra* note 1 at 1754 ("Methodological stare decisis - the practice of giving precedential effect to judicial statements about methodology . . . .").

4. According to the National Center for State Courts, the state appellate courts received over 280,000 appeals in 2007, the most recent year for which data have been analyzed. The 43 states reporting data to the NCSC issued over 7,000 opinions that year. *See* Nat'l Ctr. for State Courts: *Court Statistics Project*, http://www.ncsconline.org/d_ research /csp/CSP_Main_Page. html (lasted visited Aug. 24, 2010). That same year, the U.S. Supreme Court received a total of 8,241 filings, resulting in a total of 67 signed opinions. CHIEF JUSTICE JOHN ROBERTS, 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10 (2008) *available at* http://www.supremecourt.gov/publicinfo/ year-end/2008year-endreport.pdf.

important first step toward a better appreciation for how the law actually works in our compound republic.

I also concur with Professor Gluck in extolling the virtues of methodological stare decisis. As she rightly observes in her article, agreement on the rules of statutory construction serves the goals of consistency and legitimacy, promoting the idea that statutory construction decisions are made in accordance with the rule of law, not the personal preferences of those making the decisions.

I am aware that some scholars question the value of such consensus and contend that, instead, "dissensus" is to be preferred.[5] As I understand them, they suggest that dissensus in the realm of statutory construction encourages lively, productive debate that avoids the tendency of consensus-driven decisions to compromise deliberation and, in the process, produce incorrect results.[6]

I am skeptical of such calls for dissensus. To begin with, they appear to be predicated on an assumption that all–or most, or even many–statutory construction decisions are so difficult that methodological consensus increases the risk of reaching the wrong result. In my experience, the real world is not nearly so interesting.[7] I suspect that, in the vast majority of cases, the application of different approaches to statutory construction simply won't matter. In that regard, consider Professor Cass Sunstein's interesting analysis of statutory construction decisions of Judges Frank Easterbrook and Richard Posner, two Seventh Circuit judges who are about as far apart as anyone could be in their approaches to statutory construction theory.[8] Sunstein found that the two disagreed only two percent of

5. *See, e.g.*, Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47 (2010), http://yalelawjournal.org/2010/7/30/leib_serota.html.

6. *Id*. at 49-50 ("The world of statutory interpretation benefits from having aggressive textualists, committed intentionalists, and dynamic purposivists in a single judicial system because it requires each adherent of an interpretive approach to engage others to argue for a preferred result.").

7. In the Oregon Court of Appeals, for example, most cases do not even require an explanation by published opinion. The court decides more than 2,000 cases each year, most of them involving the interpretation of statutes or administrative rules. Of those, however, only approximately 500 result in written opinions; the rest of the cases are disposed of either by affirmance without any opinion or by unpublished order. *See* NAT'L CTR. FOR STATE COURTS, OREGON COURT OF APPEALS JUDICIAL AND STAFF WEIGHTED CASELOAD STUDY 10 (2010), http://courts.oregon.gov/COA/docs/ORCOAWorkloadFinalReport.pdf.

8. Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U.L. REV. 1409, 1409-10 (2000) (Although Seventh Circuit judges Richard A. Posner and Frank Easterbrook's theoretical writings reveal approaches to interpretation that "are as far

the time.

It also strikes me that calls for methodological dissensus assume that consensus eliminates debate. Again, in my experience, that is simply not the case. In the hard cases at least, there remains much room for disagreement as to case outcomes even when there is consensus about the proper method of analysis.[9]

I do quarrel somewhat with Professor Gluck's enthusiasm for the interpretive regime described in *PGE*. In short, I am not quite as sanguine as she is about the coherence of *PGE* as a method of statutory construction. That is not to say that I regard *PGE* as an object of scorn that should be abandoned. Rather, over the last 18 years since that case first was published I have–as both a judge and a teacher–developed a sort of love-hate attitude toward the case.

Beginning with the "love" category, I think that *PGE* has had a positive effect in two key respects: First, it has brought a predictable order of analysis to Oregon statutory construction. Second, it has resulted in what I regard as an entirely appropriate emphasis on the importance of the statutory text.

With respect to the first point, it is worth recalling what the world looked like before *PGE*. To be frank, few paid any attention to statutory construction analysis, and, as a result, the cases were pretty much a mess.[10] In one case, the Oregon Supreme Court would

apart as two judges could be," their actual decisions show remarkable unanimity, showing the relationship between different theories of interpretation and outcomes to be "quite limited.").

9. For example, consider the Oregon Supreme Court's decision in *Costco Wholesale Corp. v. City of Beaverton*, 161 P.3d 926 (2007). At issue was the meaning of a statute that authorized a city to annex property without the consent of the owners of the property to be annexed if the property is "surrounded by" city boundaries. The controversy arose out of the fact that the parcel to be annexed was one of two contiguous parcels that, taken together, were surrounded by city boundaries; but the city boundary did not contiguously and completely encircle the single parcel. A divided Supreme Court determined that the parcel was not "surrounded by" city boundaries within the meaning of the statute. *Id.* at 929 ("We conclude that, in requiring that territory be 'surrounded by' city boundaries, the legislature required that city boundaries encircle the territory completely and contiguously."). A strongly worded dissent argued the contrary. *Id.* at 932 (Gillette, J., dissenting) ("For the life of me, I cannot understand how such a reading of the statute could persuade anyone . . . .."). Both the majority and the dissent agreed on the statutory construction principles that applied. It was in the application of those settled principles that the majority and the dissent parted company.

10. I am aware of only two law review articles on Oregon statutory construction in the years before the appearance of the *PGE* decision: David Frohnmayer, *Of Legislative Intent, the Perils of Legislative Abdication, and the Growth of Administrative and Judicial Power*, 22 WILLAMETTE L. REV. 219 (1986); and Karen L. Uno & Mark Stapke, Comment, *Evaluating Oregon Legislative History*, 61 OR. L. REV. 421 (1982).

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

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

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

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

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

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

15. Dinger v. Sch. Dist. 24CJ, 352 P.2d 564, 566 (Or. 1960) ("It is axiomatic that courts cannot in the guise of construction supply an integral part of a statutory scheme omitted by the legislature."(citations omitted)); *see also* OR. REV. STAT. § 174.010 (2009) ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted . . . .").

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

17. *PGE* was one of several decisions that the Oregon Supreme Court issued in the 1990s in which the court carefully articulated (usually three-step) methods of interpreting various documents of legal significance. *See, e.g.*, Yogman v. Parrott, 937 P.2d 1019 (Or. 1997) (three-step process for interpreting contracts); Ecumenical Ministries v. Or. State Lottery Comm'n, 871 P.2d 106 (Or. 1994) (three-step process for interpreting amendments to Oregon Constitution); Priest v. Pearce, 840 P.2d 411 (Or. 1992) (three-step method of analysis for interpreting provisions of original state constitution); Hoffman Constr. Co. v. Fred S. James & Co., 836 P.2d 703 (Or. 1992) (three-step method for interpreting insurance policies).

determining it: First, examine the text in context with associated rules of construction; if the intentions are clearly revealed by that analysis, you are done.[18] Second, if the textual analysis reveals an ambiguity, then examine the legislative history to resolve that ambiguity.[19] Third, if the legislative history does not resolve the ambiguity, resort to an appropriate canon of construction to put the matter to rest.[20] The three-part test provided an effective road map for practitioners to use in briefing their arguments and for judges in crafting their opinions. Everyone engaged in the process of statutory construction knew which rules of construction applied at which level of analysis and when it was appropriate to examine legislative history.

Turning to the second salutary effect of *PGE*, I think it is fair to say that it resulted in an obviously more textual orientation to statutory construction. Note that this was not *necessarily* dictated by the terms of the *PGE* analysis itself, which emphasized that the object of statutory construction is intentionalist in nature.[21] Nevertheless, in the years following the publication of the decision, the Oregon Supreme Court's statutory construction cases took a noticeably textual turn, nearly always with reference to its *PGE* method of analysis. A concrete indication of such a textual turn is, as Professor Gluck observed in her recent article, a noticeable drop in the court's reliance on legislative history, accompanied by a marked increase in reliance on dictionary definitions of statutory terms.

In general, I regard the court's post-*PGE* emphasis on the importance of the statutory text as healthy. The state constitution, after all, defines statutes in rather formal, textual terms. It provides that words obtain the force of law only if they have been approved either by the people or the two houses of the legislature (and signed into law by the governor).[22] Treating the reasonable construction of those words as the touchstone of the endeavor forces everyone involved in the lawmaking process to respect the roles of the others.

18. *PGE*, *supra* note 3 at 1146.

19. *Id.*

20. *Id*. at 1146–47.

21. *Id*. at 1145 ("In interpreting a statute, the court's task is to discern the intent of the legislature.").

22. *See generally* OR. CONST. art IV, § 1 (legislation by initiative or referendum); *id.* art. IV, § 25 ("[A] majority of all the members of each House shall be necessary to pass every bill or Joint resolution."); *id.* art. V § 15b (describing legislative approval and executive presentment requirements for bills to become law).

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

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

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

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

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

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

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

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

Examples of the latter–rules based on assumptions that are empirically questionable–are legion. Consider the rule against surplusage–that we assume that every word of a statute must be given meaning and the legislature is never redundant.[26] In what other area of human communication do we assume that redundancy is impermissible? The fact of the matter is that communication is commonly redundant and, in the law, frequently intentionally so–a drafting practice that dates back at least to the fourteenth century, when cautious English lawyers often repeated French, English, and Latin terms for the same things to make sure that no one missed the point.[27] To insist that legislatures are never redundant is questionable as an empirical matter and runs the risk of confounding what the legislature actually intended.

The second problem with the failure of *PGE* to question the individual rules that it organized is that, as a result, its method of analysis actually contradicted itself at key junctures.

An example of such a contradictions may be found in *PGE*'s assertion that the object of statutory construction is the ascertainment of "legislative intent," which refers to the actual, subjective intentions of the legislature that enacted a disputed statute into law as revealed by, among other things, legislative history. Where did *PGE* get that idea? Ostensibly, it got the idea from ORS 174.020, which does say that the object of statutory construction is to ascertain legislative intent.[28] But did *PGE* attempt to determine what the legislature that adopted that statute intended when it said "legislative intent"? The answer is no; *PGE* apparently assumed that legislative intent, as the term is used in the statute, means what it ordinarily means today, legislative history and all. The problem is, ORS 174.020 was first enacted in 1864, and an examination of the prevailing interpretive

in Oregon).

26. *See, e.g.*, Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You*, 45 VAND. L. REV. 561, 572 (1992) ("[P]erhaps this [surplusage] canon is so contrary to real life experience that courts should simply stop using it."); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 810, 812-13 (1983) (criticizing surplusage canon as based on the "improbable proposition" of "legislative omniscience").

27. *See generally* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 120-22 (1963) (explaining that an "ancient addiction to language mixing" combined with an "Old English relish for synonym" resulted in frequent, and intentional, redundancy in early drafting).

28. "In the construction of a statute, a court shall pursue the intention of the legislature if possible." OR. REV. STAT. § 174.020(1)(a) (2009).

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

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

I should note that, in some respects, my concerns about the contradictory nature of *PGE* have been rendered somewhat academic. In 2001, the Oregon legislature enacted amendments to ORS 174.020, so that the statute now provides that, in any case–ambiguity or not–parties may offer legislative history, and the courts may give that history such weight as they deem appropriate.[33] In *State v. Gaines*,[34]

29. *See generally* Jack L. Landau, *The Intended of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47 (1997).

30. Even then, the reference to legislative history was made in a dissenting opinion. State ex rel. Baker v. Payne, 29 P. 787, 791 (1892) (Strahan, C.J., dissenting). *see also* 1 THE CODES AND GENERAL LAWS OF OREGON 548 (William L. Hill ed., 2d ed. 1892) ("Discussions in legislature, etc., cannot be referred to in construing statutes.").

31. On the origins of the rule, see generally Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975). On the origins of modern textualism and its roots in the plain meaning rule, see generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

32. The problem is one of latent ambiguity. *PGE* foreclosed the possibility that resort to extrinsic could reveal an ambiguity in the wording of a statute that its bare text did not. Interestingly, Oregon's statutory parol evidence rule expressly recognizes such a possibility. *See* OR. REV. STAT. § 41.740 (2009) (evidence of circumstances of contract execution admissible "to explain an ambiguity, intrinsic or extrinsic.").

33. OR. REV. STAT. § 174.020 (2009) ("To assist a court in its construction of a statute, a

the Oregon Supreme Court responded to those amendments by altering the *PGE* method of analysis. The court held that, henceforth, it is not necessary to establish an ambiguity before considering legislative history in statutory construction cases.[35] The question remains whether *Gaines* signals any other changes to Oregon statutory construction analysis and whether it raises any new issues. Let me make a couple of suggestions in that regard.

To begin with, I would not look for *Gaines* to signal the end of *PGE*'s textual emphasis. To the contrary, the court in *Gaines* went to some pains to emphasize that, although legislative history is now more freely available, that does not mean that it will make a difference.[36] In weighing the significance of legislative history, the court stated, the text and its reasonable construction remains to touchstone of statutory construction analysis in this state.[37]

Aside from that, there remains the question of the legitimacy of the individual rules of construction that the courts continue to apply,

party may offer the legislative history of the statute. . . . A court shall give the weight to the legislative history that the court considers to be appropriate.").

34. State v. Gaines, 206 P.3d 1042 (Or. 2009).

35. The court's explanation for the change is somewhat ambiguous. At the outset, the court observed that the wording of the statute itself "would seem to work little change to preexisting practices." *Id.* at 1047. After all, the court observed,"[n]o procedural rule or practice in the past has limited a party's ability to present legislative history to a court, ambiguity or no ambiguity." *Id.* Moreover, the court declared, "the use that the courts have made of legislative history traditionally has been for the courts to decide." *Id.* Yet, having said that—and without identifying the ambiguity that *PGE* ordinarily would have required—the court then proceeded to examine the legislative history and, on the basis of that legislative history, concluded that the legislature intended to alter *PGE* by eliminating the ambiguity requirement itself. *Id.* at 1048. Having determined what the legislature intended, however, the court reiterated that "[t]his court remains responsible for fashioning rules of statutory interpretation that, in the court's judgment, best serve the paramount goal of discerning the legislature's intent." *Id.* at 1050. The court then declared "that, in light of the 2001 amendments to ORS 174.020, the appropriate methodology for interpreting a statute" is to eliminate the ambiguity requirement for consideration of legislative history. *Id.* The implication seems to be that the court, perhaps prompted by the 2001 amendments, decided on its own to change *PGE*. But then several sentences later, in explaining the effect of the change, the court emphasized what the statute "*obligates* the court to consider." *Id.* (emphasis added).

36. *Id.* at 1051 ("We emphasize again that ORS 174.020 obligates the court to consider proffered legislative history only for whatever it is worth—and what it is worth is for the court to decide. When the text of the statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different.").

37. *Id.* at 1050 ("[T]ext and context remain primary, and must be given primary weight in the analysis.").

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

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

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

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

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

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