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Dave Frohnmayer in the United States Supreme Court

C. Robert Steringer and Brett E. Applegate

A native son, Dave Frohnmayer lived one of the most remarkable public lives in Oregon history: Harvard College, Rhodes Scholar at Oxford University, and Boalt Hall; law professor, law school dean and university president; philanthropic leader; State Representative and Attorney General. Frohnmayer's passing has generated well-deserved recognition of his leadership in myriad venues, from the hearing room to the courtroom to the boardroom to the classroom.

This article focuses on the courtroom–the United States Supreme Court courtroom, to be exact. There, Frohnmayer amassed an unparalleled record for any contemporary state Attorney General, personally arguing seven cases on behalf of the State of Oregon and winning six of them. This is an account of those cases and the constitutional law they created.

Oregon v. Kennedy, 456 US 667, 102 S Ct 2083 (1982).

Frohnmayer's first case in the Oregon Supreme Court developed Fifth Amendment double jeopardy law on the issue of whether a defendant's successful motion for mistrial bars a second trial. Kennedy was charged with theft. In the first trial, the prosecution put on an expert witness to testify about the value of the rug Kennedy was charged with stealing. On cross-examination, defense counsel apparently attempted to establish bias by questioning the expert on whether he had ever filed a criminal complaint against Kennedy, which the expert eventually admitted. During redirect, the trial court sustained a series of objections to the prosecutor's attempt to elicit testimony about why the expert had filed a criminal complaint. Apparently exasperated, the prosecutor established that the expert had never done business with Kennedy and then asked: "Is that because he is a crook?" Not surprisingly, the court granted Kennedy's immediate motion for a mistrial.

At issue was the standard to be applied when determining whether a successful motion for mistrial creates a double jeopardy bar to retrial. The circuit court held that there was no double jeopardy bar because it was not the intention of the prosecutor to cause a mistrial. The Oregon Court of Appeals reversed, holding that retrial is barred not only when there is a prosecutorial intent to cause a mistrial, but also when the prosecutor's error is motivated by bad faith or undertaken to harass or prejudice the defendant. Accepting the circuit court's finding that the prosecutor did not intend to cause a mistrial, the Court of Appeals nevertheless found that the prosecutor's conduct was "overreaching," and reversed. The Oregon Supreme Court denied review, and the US Supreme Court accepted review.

Frohnmayer asked the Court to rein in lower court expansions of the double jeopardy right in the area of defendant-requested mistrials by adopting a rule that attaches jeopardy only when the prosecutor was motivated to cause the mistrial. Pet. Br. at 33-37. But regardless of the standard the Court might apply, he argued, the prosecutor's conduct would not have triggered it. *Id.* at 47. Justice Rehnquist, writing for the majority, agreed with the proposed rule and its reasoning, explaining that an inquiry into the prosecutor's intent was the only manageable rule in the circumstances. *Kennedy*, 456 US at 675. The remaining justices argued that the Court's precedents correctly took a more expansive view of the type of conduct that would trigger application of the Double Jeopardy clause, including overreaching and harassing conduct, but concurred in the judgment based on their conclusion that the prosecutorial conduct in question was not the kind of overreaching or

harassment that would bar a retrial under the rule they would apply. *Id.* at 681-93.

On remand, the Oregon Court of Appeals considered whether Article 1, section 12, of the Oregon Constitution required a different conclusion. The court concluded that it did not, that in fact, "with respect to the precise and narrow issue under consideration here, both constitutions embody the same standard." *State v. Kennedy*, 61 Or App 469, 473, 657 P2d 717 (1983). Accordingly, Kennedy's conviction in the second trial was affirmed.

Oregon v. Bradshaw, 462 US 1039, 103 S Ct 2830 (1983) and *Oregon v. Elstad*, 470 US 298, 105 S Ct 1285 (1985).

Frohnmayer made contributions to federal constitutional criminal procedure when he argued and won a pair of cases involving the scope of the *Miranda* rule. The first, *Oregon v. Bradshaw*, 462 US 1039, 103 S Ct 2830 (1983), involved the scope of the rule the Court had previously announced in *Edwards v. Arizona*, 451 US 477, 101 S Ct 1880 (1981). In *Edwards*, the Court held that a suspect who has invoked his right to counsel is not subject to further interrogation without counsel present "unless the accused himself initiates further communication, exchanges, or conversations with the police."

In *Bradshaw*, the defendant, Bradshaw, was brought to the police station for questioning regarding the death of the defendant's friend in a serious auto accident. Bradshaw invoked his right to counsel after being properly advised of his *Miranda* rights. Later, while he was being transferred from the police station to the county jail, Bradshaw asked a police officer, "Well, what is going to happen to me now?" A conversation ensued between Bradshaw and the officer, and Bradshaw agreed to the officer's suggestion that he take a polygraph test. After the test, Bradshaw confessed to having been the driver of the car in which his friend was killed. The Oregon Court of Appeals reversed Bradshaw's conviction for manslaughter, concluding that the confession had been obtained in violation of Bradshaw's *Miranda* rights.

Frohnmayer persuaded the Court to reverse the Oregon Court of Appeals' decision. A plurality of the Court concluded that the Oregon Court of Appeals had misunderstood the Court's decision in *Edwards*, which the plurality described as "a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers." *Bradshaw*, 462 US at 1044. The plurality concluded that, "[a]lthough ambiguous, [Bradshaw's] question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Id.* at 1045-46. Accordingly, the plurality concluded that the officer did not violate *Edwards* when he engaged in a conversation with Bradshaw upon Bradshaw's "initiation."

Frohnmayer's next contribution to *Miranda* jurisprudence was *Oregon v. Elstad*, in which the Court agreed with Frohnmayer's argument that the Fifth Amendment does not require exclusion of a confession made after a valid *Miranda* warning solely because that confession followed a prior, un-*Mirandized* confession.

Without advising Elstad of his *Miranda* rights, an officer sat with him in his living room and said that the officer "felt" Elstad had been involved in a burglary. Elstad responded that he "was there." Later, at the police station, officers advised Elstad of his *Miranda* rights, and Elstad signed a confession. Elstad moved to suppress both his oral and written confessions, arguing that their admission would violate his Fifth Amendment rights because the first confession was not preceded by a *Miranda* warning. The trial court excluded Elstad's oral statement but admitted the written confession, and Elstad was found guilty of burglary. The Oregon Court of Appeals reversed Elstad's conviction, concluding that because the two confessions were separated by only a short period of time, "the cat was sufficiently out of the bag to exert a coercive impact on [Elstad's] later

admissions." *State v. Elstad*, 61 Or App 673, 678, 658 P2d 552 (1983).

The US Supreme Court reversed, holding that Elstad's written confession was voluntary and admissible. In so holding, the Court rejected the Oregon Court of Appeals' "cat out of the bag" analysis, which had led the lower court to conclude that a confession obtained in violation of *Miranda* presumptively taints a subsequent confession. To the contrary, the Court concluded that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Elstad*, 470 US at 314. In a later decision, the Court clarified that *Elstad* does not apply in cases where police use a deliberate two-step, question-first, warn-later strategy to diminish the effectiveness of *Miranda* warnings. *Missouri v. Seibert*, 542 US 600, 124 S Ct 2601 (2004). *See also Bobby v. Dixon*, 132 S Ct 26, 31, 181 L Ed 2d 328 (2011) (noting distinction).

Tower v. Glover, 467 US 914, 104 S Ct 2820 (1984).

In *Tower*, the only case Frohnmayer argued and lost in the Supreme Court, he sought to establish immunity from 18 USC § 1983 claims for public defenders sued by their clients. Glover sued his court-appointed public defenders under Section 1983, claiming they had engaged in a conspiracy with the State to secure his conviction. The US District Court dismissed the claim, and the Ninth Circuit Court of Appeals reversed. The US Supreme Court granted certiorari and affirmed the Court of Appeals. Although Section 1983 itself provides for no immunities, the Court has applied immunities historically accorded public officials at common law in 1871, when the Civil Rights Act was enacted. Justice O'Connor's opinion observed that there were no public defenders in 1871, but went on to examine English common law and post-1871 cases involving public defenders in the United States, concluding that there has never been immunity for intentional conduct by English barristers or American public defenders. *Tower*, 467 US at 921-23. Accordingly, Glover's lawyers were not entitled to absolute immunity from his claims of a massive conspiracy against him.

Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 US 753, 105 S Ct 3420 (1985).

The *Klamath* case resulted from a nineteenth century surveying error, of all things. In 1864, the United States had entered into a treaty with several Indian tribes now collectively known as the Klamath Indian Tribe, whereby the Tribe conveyed its remaining land to the United States, with a portion set aside as a reservation. The 1864 Treaty provided that the Tribe had exclusive fishing and hunting rights within the reservation, but included no off-reservation rights. When the land for the reservation was surveyed, land that was supposed to have been within the reservation was erroneously excluded. Due to encroachment of white settlement in the erroneously excluded territory, the United States agreed in 1901 to purchase "all their claim, right, title and interest in and to" the erroneously excluded land from the Tribe rather than simply correct the error.

In 1982, the Tribe sued the Oregon Department of Fish and Wildlife and various state officials, seeking an injunction against state regulation of tribal members' hunting and fishing on the land ceded by the Tribe in 1901. The Tribe took the position that, although it had transferred the title of the land to the United States, it retained the exclusive hunting and fishing rights that had been conferred on the Tribe under the 1864 Treaty. The District Court and the Ninth Circuit Court of Appeals agreed with the Tribe, declaring that the 1901 agreement did not abrogate the Tribe's treaty rights to hunt and fish on the ceded lands free of state regulation.

The Supreme Court disagreed and reversed. In an opinion written by Justice Stevens, the Court concluded that the 1864 Treaty's grant of hunting and fishing rights was limited to land that was within the limits of the reservation. According to Justice Stevens, the exclusivity of the Tribe's

hunting and fishing rights could not consistently survive off the reservation, on lands the Tribe had sold. *Klamath*, 473 US at 767-69. The Court later limited *Klamath* to its facts, emphasizing that it reached its decision in that case not only based on the terms of the 1901 agreement, but also based on an examination of the historical record and context of the treaty negotiations, which is central to the interpretation of treaties. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 US 172, 202, 119 S Ct 1187 (1999) (holding that the Mille Lacs Band did not relinquish hunting and fishing rights when it entered into an 1855 treaty ceding certain lands).

Whitley v. Albers, 475 US 312, 106 S Ct 1078 (1986).

Albers was an Oregon State Penitentiary inmate shot in the leg by a guard during a prison riot. He sued, claiming that prison officials subjected him to cruel and unusual punishment in violation of his Eighth Amendment rights by shooting him. At the conclusion of the trial on Albers' claims, District Judge Panner directed a verdict in favor of the prison officials, holding that the use of force was justified under the unique circumstances of the case. The Ninth Circuit Court of Appeals reversed in part and affirmed in part, holding that an Eighth Amendment violation could be established by proving an act with "deliberate indifference" to Albers' right to be free from cruel and unusual punishment. Pointing to evidence that the general disturbance was subsiding and the testimony of an expert that the use of deadly force was excessive under the circumstances and should have been preceded by a warning, the Court of Appeals held that a jury could have found an Eighth Amendment violation. 743 F2d 1371 (1984).

The Supreme Court rejected application of a "deliberate indifference" standard in the context of prison security. Writing for a 5-4 majority, Justice O'Connor explained that the "deliberate indifference" standard announced in *Estelle v. Gamble* was appropriate in that context (allegedly inadequate medical care) because the State's responsibility to attend to the medical needs of prisoners ordinarily does not clash with other equally important government responsibilities. In the setting of a prison disturbance, however, the Court concluded that the "deliberate indifference" standard did not adequately capture the importance of competing obligations "or convey the appropriate hesitancy to critique in hindsight decision necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 US at 320. Instead, the question "whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F2d 1028, 1033 (2nd Cir 1973)). Applying that standard to the facts, the Court concluded that the prison officials did not violate Albers' Eighth Amendment rights. The Court subsequently extended its holding in Whitley to all claims against prison officials accused of using excessive physical force, regardless of whether it occurs in the setting of a prison disturbance. *Hudson v. Millian*, 503 US 1, 112 S Ct 995 (1992).

Employment Division v. Smith, 494 US 872, 110 S Ct 1595 (1990).

Frohnmayer's final case before the Court was also the most consequential. In *Employment Division v. Smith*, Frohnmayer persuaded the Court that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment." *Holt v. Hobbs*, 135 S Ct 853, 859 (2015). The Court's holding in *Smith* remains hotly debated and central to First Amendment jurisprudence.

The respondents in *Smith* were members of the Native American Church who were fired by a private drug rehabilitation facility for ingesting peyote during a church ceremony. The Oregon Department of Human Resources denied their applications for unemployment benefits because the Department determined that the respondents had been fired for work-related "misconduct."

The Oregon Court of Appeals reversed the Department's determination, concluding that the denial of benefits violated the respondents' First Amendment rights. The Oregon Supreme Court agreed with the Oregon Court of Appeals. The US Supreme Court did not. In a 6-3 decision, the Court held that the Free Exercise Clause did not prevent Oregon from applying neutral, generally applicable Oregon drug laws to the ceremonial use of peyote. In his majority opinion, Justice Scalia observed: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Smith*, 494 US at 878-79.

Even so, it is undisputed that *Smith* represented a major sea change in Free Exercise jurisprudence. In Free Exercise cases prior to *Smith*, the Court had applied a balancing test that examined whether government burdens on religious exercise were necessary to further a compelling state interest. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 US 205, 92 S Ct 1526 (1972); *Sherbert v. Verner*, 374 US 398, 83 S Ct 1790 (1963). In *Smith*, the Court flipped the balancing test on its head. Congress was not pleased. In 1993, three years after the Court's decision in *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat 1488, 42 USC § 2000bb et seq., "to provide greater protection for religious exercise than is available under the First Amendment." *Holt*, 135 S Ct at 859-60. RFRA provides that the government may not substantially burden a person's exercise of religious freedom unless the government shows that the burden is the least restrictive means of furthering a compelling governmental interest. 42 USC §§ 2000bb–1(a), (b). The Court recently affirmed the continued vitality of RFRA as applied to actions by the federal government, holding that for-profit corporations are "persons" entitled to RFRA's protections. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S Ct 2751 (2014) (concluding that Department of Health and Human Services contraceptives mandate violated RFRA).

Congress purported to act pursuant to Section 5 of the Fourteenth Amendment to make RFRA applicable to state and local governments. However, in *City of Boerne v. Flores*, 521 US 507, 514, 117 S Ct 2157 (1997), the Court held that RFRA exceeded congressional authority under Section 5. Congress responded by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC § 2000cc-1(b), pursuant to its power under the Spending and Commerce Clauses. RLUIPA mirrors the strict scrutiny mandate of RFRA, but it only applies to two limited realms of state government action: (1) land-use regulation, and (2) religious exercise by institutionalized persons.

Given RLUIPA's limited scope of applicability—and despite Congress' best efforts—*Smith* remains the law of the land when it comes to most Free Exercise challenges to state and local government actions in Oregon and elsewhere. *See*, *e.g.*, *Church at 295 S. 18th Street, St. Helens v. Employment Dept.*, 175 Or App 114, 28 P3d 1185 (2001) (concluding that Smith "controlled" a case involving a church's liability for unemployment taxes). Indeed, *Smith* has formed the basis for state appellate court decisions regarding some of today's most hotly debated topics. *See*, *e.g.*, *Sanderson v. People*, 12 P3d 851 (Colo App 2000) (relying on *Smith* and holding that the Free Exercise Clause does not prevent the enforcement of a manslaughter statute in the context of assisted suicide).

Dave Frohnmayer's appearances in the U.S. Supreme Court are notable not only for their number and his winning percentage, but also for the breadth of issues adjudicated. In a life of extraordinary accomplishments, Frohnmayer's role as a Supreme Court advocate stands out for its immense impact on federal constitutional law.

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Property Rights in the Public Employment Context—Taking Another Look at the Peacocks

Thomas C. Sand and Kevin Flannery

Imagine that you are the general counsel of a public university. One of your top tenured professors—whose research and scholarship are unassailable—is also the self-appointed project director for the largest, most high-profile federal grant in the history of your institution. The problem: his leadership style has led to threats of withdrawal by other important participants and threatened discontinuation of the grant itself. You need to decide whether you can replace him. The law is clear in recognizing that tenure provides him with a constitutionally protected property-right interest in his professorship. But the question is: does the professor have the same property-right interest in his position as project director so that he is entitled to a due process hearing?

Washington State University faced such a situation in March 2012, just seven months after it received a $40 million grant from the USDA for research into airplane biofuels. The University removed the professor from the administrative role, but left his academic appointments and salary unaffected. Even so, the professor sued, alleging that the University and its officers had violated his right to due process.

In May 2015, the United States Supreme Court let stand a Ninth Circuit decision that affirmed summary judgment for the University on three grounds: (1) the University was entitled to sovereign immunity under the Eleventh Amendment, (2) the University's individual officers were entitled to qualified immunity, and (3) the professor lacked a property-right interest in the position. This article explores the district court and Ninth Circuit rulings in *Lewis v. Washington State University*, along with the precedent supporting them. Unfortunately, the state of the law following these decisions remains somewhat ambiguous, because while the district court issued an expansive, thoughtful opinion, the Ninth Circuit limited its discussion to the single issue of the alleged property-right interest. And it did so in an unpublished, memorandum opinion.

The district court began its analysis with the University's assertion of sovereign immunity under the Eleventh Amendment. Undisputedly, the University was "an instrumentality of the State of Washington" and so had immunity as an institution. *Lewis v. Wash. State Univ.*, No. CV-12-475-RHW, 2013 WL 1858604, at *2 (ED Wash May 2, 2013) ("*Lewis I*"). But the lawsuit also named the University's president and provost as defendants. The district court recognized that "[w]hile a state's sovereign immunity from suit in federal court normally extends to suits against its officers in their official capacity, there is an exception recognized in *Ex parte Young*, 209 US 123 (1908). * * * [A] plaintiff may maintain a suit for prospective relief against a state official in his official capacity when that suit seeks to correct an ongoing violation of * * * federal law." *Id.* As a result, the district court faced the question whether ordering a due process hearing, as the professor sought, would correct an ongoing violation of federal law and therefore fit within the *Ex parte Young* exception. Despite the professor's presentation of the relief as prospective, the district court considered it substantively retroactive and found that "Holding the hearing would not prevent future harm to [the professor] * * *." 2013 WL 1858604, at *3. (Former federal regulations provided that the USDA, which sought the professor's removal in the first place, had the power to accept or decline the University's appointment of any project director. *See* 2 CFR § 215.25(c) (2013); 7 CFR § 3015.113(c)(2), (3) (2014).) Accordingly, the *Ex parte Young* exception did not apply, and sovereign immunity extended to the president and provost in their official capacities.

The district court also found that the president and provost were entitled to qualified immunity in their individual capacities because "'their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lewis I*, 2013 WL 1858604, at *3 (quoting *Harlow v. Fitzgerald*, 457 US 800, 818, 102 S Ct 2727, 73 L Ed 2d 396 (1982)). This finding necessarily involved a discussion of the alleged property-right interest because without it there could not have been a constitutional right to due process, let alone a clearly established one. The district court immediately clarified that its inquiry concerned the alleged property-right interest in the administrative position overseeing the federal grant, not the professor's undisputed property interest in his tenured professorship. 2013 WL 1858604, at *3-4.

The three cases that the professor cited in support of his position were "easily distinguishable." *Lewis I*, 2013 WL 1858604, at *5. In *Malla v. Univ. of Conn.*, 312 F Supp 2d 305 (D Conn 2004), the plaintiff, a professor, sued the university after it removed him as director of a space-grant consortium, a position that he had held for nine years. *Lewis I*, 2013 WL 1858604, at *5. The plaintiff had also received compensation for his service as director, which was not subject to annual review. *Id.* By contrast, "at the time [the professor] was terminated as project director, he had only been there seven months and was not receiving compensation for serving in the position." *Id.*

Hamid v. John Jay Coll. of Criminal Justice, No. 99 CIV 8669 WK, 2000 WL 666344 (SDNY May 19, 2000), did not apply because the underlying complaint in that case alleged that the college's unwritten tenure rights protected a professor's role as project director. *Lewis I*, 2013 WL 1858604, at *5. "Here, [the professor] has not alleged, or established, that he had tenure in the position as co-director or that any unwritten tenure rights covered the position." *Id.*

The professor and the University each also cited contradictory dicta from the Ninth Circuit's pair of rulings in *Peacock v. Bd. of Regents of Univs. & State Colls. of Ariz.*—510 F2d 1324 (9th Cir 1975) ("*Peacock I*"), and 597 F2d 163 (9th Cir 1979) ("*Peacock II*"). As with *Lewis I*, an aggrieved tenured professor brought a claim against his public university employer for his removal from an administrative position without a hearing. *Peacock I*, 510 F2d at 1325. The professor, Peacock, had served as head of the department of surgery within the university's medical school. *Id.* But unlike the WSU professor's situation, Peacock's contract with the university, which set out a one-year timeline, included the administrative role, not just his professorial duties. *Id.*

Peacock sought a preliminary injunction reinstating him to the administrative role. *Peacock I*, 510 F2d at 1326. The district court, finding that Peacock had a property-right interest in the administrative role, enjoined Peacock's removal but permitted his suspension pending a university hearing. *Id.* Still unsatisfied, Peacock appealed.

The Ninth Circuit offered promising words for the university. "We think there is a great deal of merit in the University's contention that the contractual appointment should be read as merely delimiting the term during which appellant was to serve at sufferance and that, as the position was terminable at will, he had no protected interest in it." *Peacock I*, 510 F2d at 1326 27 (citation omitted). Nonetheless, the court applied the clearly erroneous standard and affirmed noting its unwillingness to rule otherwise with an undeveloped factual record. 510 F2d at 1327. Accordingly, the court remanded the case.

Back at the district court level, a jury found for Peacock. The victory was short-lived, however. The district court judge vacated the verdict, ordered a new trial, granted partial summary judgment for the university, and granted a directed verdict on the remaining issues for the university. *Peacock II*, 597 F2d at 165. Effectively, the judge reversed the verdict. Peacock appealed again.

A different panel of the Ninth Circuit affirmed for the university but offered favorable dicta to Peacock. "[W]e begin by recognizing appellant's constitutionally protected property interests in both his tenured professorship and departmental headship, as entitling him to due process." *Peacock II*, 597 F2d at 165. The analysis went no deeper. Moreover, because the court found for the university, the university had no grounds to appeal the unreasoned conclusion.

In *Lewis*, the district court found the *Peacock* cases distinguishable rather than binding. "In *Peacock*, the professor had a one-year contract that included the position as Department Head, which would provide the basis for the property interest. Even so, the Ninth Circuit expressed doubt as to whether the position as Department Head was a protected property interest. Here, [the professor] did not have a contract with the University that covered his [administrative] position * * *." 2013 WL 1858604, at *5 (citations omitted).

Having dealt with the professor's cited authority, the district court turned to decisions outside the Ninth Circuit. Rulings in the Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits rejected assertions that changes to an employee's administrative responsibilities or status implicated property-right interests. *Lewis I*, 2013 WL 1858604, at *6. For example, in *Huang v. Bd. of Governors of Univ. of N.C.*, 902 F2d 1134 (4th Cir 1990), North Carolina State University transferred a tenured professor from one department to another and also reduced the professor's contract period from 12 to 9 months, but without reducing his pay. "[T]here is no evidence that he has been deprived of [his property right interest in his position as a tenured professor]. He remains a tenured full professor in the University at the same or effectively greater salary. * * * As Dr. Huang remains more than fully compensated in his DUS position, we are unable to conclude that the inter-departmental transfer resulted in an infringement of a constitutionally protected property interest." 902 F2d at 1141-42. In *Lewis*, the University had likewise ensured that the professor remained fully compensated. 2013 WL 1858604, at *8. Relying on these various decisions, the district court held that "it was not clearly established that [the professor had] a property interest in his position as co-project director for a federal grant, sufficient to put the administrators at Washington State University on notice that removing him as project director required a pre- or post-termination hearing." 2013 WL 1858604, at *6. The University's officers therefore enjoyed qualified immunity.

Nonetheless, the district court assumed otherwise "for the sake of completeness" and examined the professor's alleged property-right interest in his role as project director of the federal grant. *Lewis*, 2013 WL 1858604, at *6. The professor contended that three independent bases granted him a property-right interest in the position. First, he argued that the University's faculty manual granted him a property right because of the protection it afforded against "suspension," which included within its definition a "reduction in assigned responsibilities." 2013 WL 1858604, at *7. Second, he argued that his course of dealing with the University granted him a property right interest. Third, he claimed that his listing as project director on the grant application created a contract that provided him with a property interest. 2013 WL 1858604, at *6.

Each argument failed. The faculty manual did not grant a property right because "there [was] nothing in the record to support [the professor's] contention that the University contemplated that the disciplinary process applie[d] to administrative positions. The Faculty Handbook [was] clearly limited to cover persons who have received tenure or who [were] on the tenure-track." *Lewis*, 2013 WL 1858604, at *8. The district court acknowledged the professor's second contention about the parties' course of dealing only briefly, noting that the argument lacked sufficient proof. The professor's allegation "that other grant directors had not been removed * * * [did] not convert a grant position into a property interest." 2013 WL 1858604, at *9. With respect to the third argument, "[t]he grant approval document, if it [was] a contract, [was] an agreement between Washington State University and the Department of Agriculture, and [did] not provide [the

professor] with a property interest." 2013 WL 1858604, at *8.

On appeal, the professor and the University devoted much of their briefs to arguing over the meaning and significance of *Peacock I* and *II*. Yet the Ninth Circuit sidestepped the pair of opinions altogether. The court also declined to review the immunity issues because its ruling on the alleged property-right interest was dispositive.

Like the district court, the Ninth Circuit held that Lewis had failed to establish that he had a property right in his administrative role overseeing the grant. The court found that the University's faculty manual applied to the professor's position as a professor and did not extend to administrative roles on federal grant projects. *Lewis v. Wash. State Univ.*, 586 F App'x 271, 272 (9th Cir 2014). The court then found that Lewis's removal as project director violated none of the substantive protections that the faculty manual offered with respect to his position as a tenured professor. *Id.* Lewis had made the manual's substantive protections for faculty's assigned responsibilities and pay a strong point of contention. Yet the court noted that removal from the grant project did not alter his assigned professorial responsibilities or diminish his pay. *Id.*

The Ninth Circuit's observations were, of course, correct from the University's perspective. But the court missed an opportunity to untangle its *Peacock* jurisprudence. The court's invocation of *Bd. of Regents of State Colls. v. Roth*, 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972)—"[T]o establish a property interest in a right or a benefit, 'a person clearly must have more than an abstract need or desire for it,' and '[h]e must have more than a unilateral expectation of it.' * * * Rather, he must set forth * * * his 'legitimate claim of entitlement to it.'"—is helpful only to the point of stating the standard. *Lewis*, 586 F App'x at 271 (quoting *Roth*, 408 US at 577). Few would dispute that, as a general principle, employees on contract have a legitimate claim of entitlement to ongoing employment. But it is important for employers to understand the outer bounds of that claim of entitlement. When the contract is silent or ambiguous, how do the employer's actions shape the expectations of the employees?

The question is particularly important for employers with formal redress procedures. For the University, the faculty manual sets forth those procedures. But in another case it could just as easily be a labor contract for an employer with a unionized workforce. Or it could be a companywide employee handbook for a corporate employer. For many employers—and the University is no exception—these documents may confer property interests in certain benefits in addition to providing redress procedures. For that reason, an employee may attempt to conflate redress procedures with property rights, just as Professor Lewis tried to do. The key, then, is distinguishing between the substantive property rights and procedural rights that these documents create. But with *Peacock*'s unresolved variation in its colors, litigants and district courts will likely argue and interpret property interests in the public employment context for years to come.

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Couey v. Atkins— *A Study in Differences Between Federal and State Judicial Power*

Alan Galloway

The Oregon Supreme Court resolved a longstanding discrepancy in its jurisprudence on justiciability last summer. On July 16, 2015, the court issued a decision in *Couey v. Atkins*.[*] As a result of that decision, Oregon became the 50th state in the union to (again) recognize that its courts have jurisdiction to hear certain cases that have become moot, including those that are "capable of repetition, yet evading review." Although the "capable of repetition, yet evading review" doctrine comes from the federal courts, *Couey* is not a case of federal jurisprudence encroaching on Oregon's tradition of state constitutionalism. *Couey*'s resolution of the conflict between two lines of the Oregon Supreme Court's justiciability cases, and its recognition of state courts' jurisdiction to hear moot cases, are based on the court's recognition that there are key differences between state and federal judicial power. The Court's decision jettisons a framework borrowed from federal cases interpreting Article III of the federal constitution, and returns to a broad conception of state judicial power that would have been recognizable to the Framers that drafted Article VII of the Oregon Constitution.

Facts & Procedural History

The facts of *Couey v. Atkins* concerned a registered signature collector's challenge to the constitutionality of an election law statute. ORS 250.048(9) forbade—and still forbids—a registered signature collector who is paid to gather initiative petition signatures from also volunteering as a signature collector for other initiative petitions. The plaintiff, Marquis Couey, filed suit, but during the litigation he stopped working as a signature collector and his registration lapsed. The Secretary of State then moved for, and obtained, summary judgment against *Couey* on the basis that the dispute had become moot.

On appeal, Mr. Couey first argued that the matter was not moot, based both on his future plans and the fact that his overbreadth challenge to the statute invoked the free expression rights of others, not just himself. Second, he argued that if the matter were moot, it would proceed to the merits based on ORS 14.175, which authorizes courts to adjudicate cases where (1) the party had standing to commence the action, (2) the challenged act is continuous in effect or capable of repetition, and (3) the challenged policy or activity is "likely to evade judicial review in the future."

The Court of Appeals, in an opinion by Judge Schuman, held that Mr. Couey's challenge was indeed moot, and further held that it did not meet the "likely" element for review under ORS 14.175, reasoning that expedited review has allowed some election-law challenges to be adjudicated by the Oregon Supreme Court within two years—the maximum time that a ballot initiative may be circulated for signatures. *Couey v. Brown*, 257 Or App 434, 444-45, 306 P3d 778, 784 (2013), *rev'd sub nom. Couey v. Atkins*, 357 Or 460 (2015). But in a footnote, the Court of Appeals noted that ORS 14.175's constitutionality was unclear in light of the Oregon Supreme Court's decision in *Yancy v. Shatzer*:

> If we were to hold that a particular case qualifies for review under ORS 14.175, we would have to confront the obvious question of whether that statute violates the Oregon Constitution under *Yancy*, * * * where the Supreme Court held in no

[*] Although the author argued *Couey v. Atkins* (or *Couey v. Brown*, as it was known at the time) on behalf of *amicus curiae* ACLU of Oregon, the views expressed herein are his own and may not reflect the views of his firm, his clients, or any organization with which he is associated.

> uncertain terms, "The judicial power under the Oregon Constitution does not extend to moot cases that are 'capable of repetition, yet evading review.'"

Couey, 257 Or App at 445. The uncertainty regarding the constitutionality of ORS 14.175 was compounded by competing views of justiciability in the Oregon Supreme Court's case law.

Tension in Oregon's Pre-*Couey* Cases on Justiciability

ORS 14.175 was passed by the Legislative Assembly in 2007 as a reaction to the Oregon Supreme Court's decision in *Yancy v. Shatzer*, 337 Or 345, 349, 97 P3d 1161, 1163 (2004). *Couey v. Atkins*, 357 Or at 479 (citing legislative history). In *Yancy*, the Oregon Supreme Court held that mootness reflected a fixed, constitutional limit on the "judicial power" granted to Oregon courts under Article VII (Amended) of the Oregon Constitution. *Yancy*, 337 Or at 349. Analyzing original Article VII, the *Yancy* court stated that "the framers * * * and those who later adopted that constitution, are most likely to have understood the grant of judicial power in the restrained sense espoused in the early [U.S.] Supreme Court cases—that is, an authority limited to the adjudication of an existing controversy." *Id.* at 353, 362 (alteration added). And with respect to the 1910 amendment that replaced original Article VII, *Yancy* concluded that the voters intend no change to the scope of "judicial power" from the original Article VII. Therefore, *Yancy* held that that judicial power simply "does not extend to moot cases." *Id.* at 363.

Reasoning from the premise that its jurisdiction was constitutionally limited to non-moot cases, *Yancy* logically concluded that the Court could not create exceptions allowing certain moot cases to be decided on the merits, for by doing so the Court would in effect be granting itself jurisdiction not conferred—in the *Yancy* court's view—by Article VII. Accordingly, *Yancy* concluded that once a case becomes moot, it must be dismissed for lack of jurisdiction—even if it is a type of case that, because of time-sensitive issues, is unlikely to reach the Oregon Supreme Court before becoming moot (e.g., cases involving upcoming elections, pregnancies, or high-school commencement addresses). *Id.* at 363.

The influence of federal jurisprudence on *Yancy* is complicated. On one hand, *Yancy* flatly rejected the introduction of a federal concept into Oregon law. After all, the federal courts recognize the "capable of repetition, yet evading review" exception that *Yancy* rejected. But on the other hand, *Yancy*'s rejection of that doctrine was ultimately rooted in the federal concept that courts have limited jurisdiction. The idea that Article VII placed firm limits on a court's jurisdiction stemmed from cases discussing limits on *federal* jurisdiction under Article III. Such firm limits may make sense in a federal system in which the national government was deliberately given only limited powers, with remaining powers left to the states. Especially in retrospect, reading such limits into a state constitution was fraught with peril. Whatever limits Article III imposes on federal jurisdiction are probably best understood as efforts to limit the role of the federal judiciary while preserving the traditional role of the state courts. That goal is undercut if the Article III limits are construed as limits on "judicial power" in general, and then applied to curtail state court jurisdiction. That appears to be what happened in *Yancy*.

Justice Balmer specially concurred in *Yancy*, disagreeing with the court's analysis and concluding that the text, context, and historical background suggested "the contours of mootness as a prudential, rather than a constitutional, matter." *Id.* at 367 (Balmer, J., specially concurring).

Just two years later, in *Kellas v. Department of Corrections*, 341 Or 471, 145 P3d 139 (2006), the Oregon Supreme Court took a different approach to a justiciability issue, holding that a statute conferring standing to challenge administrative rules on "any person" was consistent with the Oregon Constitution. *Kellas*, 341 Or at 476. The Court cited a key difference in the scope of the

judicial power granted by Article VII (Amended) and the federal judicial power set forth in Article III of the U.S. Constitution. The Court noted that while Article III, section 2 of the U.S. Constitution limits the power of federal courts to resolution of "cases" or "controversies," the Oregon Constitution contains no "cases" or "controversies" provision. Based on that difference, the Court cautioned against "import[ing] federal law regarding justiciability into our analysis of the Oregon Constitution and rely[ing] on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government." *Id.* at 478. The Court quoted former Justice Hans Linde:

> "In sum, rejecting premature or advisory litigation is good policy, but rigid tests of 'justiciability' breed evasions and legal fictions. It is prudent to keep judicial intervention within statutory or established equitable and common law remedies. It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, and thereby to foreclose lawmakers from facilitating impartial, reasoned resolutions of legal disputes that affect people's public, rather than self-seeking, interests. Requirements that rest only on statutory interpretations can be altered to meet desired ends, but change becomes harder once interpretations are elevated into supposedly essential doctrines of 'justiciability.' * * *"

Id. at 478-7 (quoting Hans A. Linde, "The State and the Federal Courts in Governance: Vive La Différence!," 46 Wm & Mary L Rev 1273, 1287-88 (2005)). In *Kellas*, the Court held that the Oregon Constitution does not impose a strict requirement that litigants have a "personal stake" in a case, or that the outcome have a practical effect on the parties' rights. *See id.* at 484-86. Thus, the Court rejected a federal-style "case or controversy" limitation on judicial power, and moved closer to Justice Linde's view that standing is a prudential doctrine to avoid premature or advisory litigation. That view allows the legislature to establish standing by statute (as in *Kellas* itself). *See id.* at 478, 482 (discussing plenary power of legislature, including power to "deputize its citizens to challenge government action in the public interest"). As the Oregon Supreme Court later noted in *Couey*, the approach to justiciability in *Kellas* was "easier to reconcile with Justice Balmer's specially concurring opinion in *Yancy* than with the majority opinion in that case." *Couey*, 357 Or at 487.

Later in *Morgan v. Sisters School Dist. No. 6*, the Oregon Supreme Court reiterated that standing is based on "the particular requirements of the statute under which he or she is seeking relief," with no discussion of Article VII (Amended) or limits on judicial power imposed by the Oregon Constitution. *Morgan v. Sisters School Dist. No. 6*, 353 Or 189, 194, 301 P3d 419, 423 (2013) (citing *Local No. 290 v. Dept. of Environ. Quality*, 323 Or 559, 566, 919 P2d 1168 (1996)). In the wake of *Kellas* and *Morgan*, it was clear that the Oregon Supreme Court's analytical approach to justiciability issues had shifted since *Yancy*, even though *Yancy* had not been overruled. *See Pendleton School Dist. 16R v. State*, 220 Or App 56, 65-66, 185 P3d 471, 477 (2008) (concluding that "whatever the broader discussion in *Kellas* might otherwise suggest, *Yancy* remains good law"), *overruled on another point of law*, 345 Or 596, 200 P3d 133 (2009).

Couey Returns to a Prudential Doctrine of Jurisprudence Grounded in the Common Law

In *Couey*, then, the Oregon Supreme Court was confronted with justiciability cases grounded in two different concepts of judicial power: the federal Article III concept of fixed and limited jurisdiction, and the common law concept holding that standing, mootness, and ripeness are matters of judicial discretion and statutory interpretation, rather than absolute limits on court jurisdiction. Before the Court could resolve that conflict of constitutional law, however, it had to determine whether the case was in fact moot, and whether ORS 14.175 applied.

The Oregon Supreme Court agreed with the Court of Appeals that Mr. Couey's challenge was moot. First, the Court held that an affidavit from Mr. Couey regarding intent to work as a signature collector was insufficient to show that the case was not moot, explaining that because future harm to Mr. Couey was contingent on four uncertain conditions, such harm was merely speculative, and therefore did not show that the case was not moot. *Couey*, 357 Or at 471.

Second, the Court rejected the argument that Mr. Couey's overbreadth claims saved the case from mootness. The Court's analysis there begin with the premise that overbreadth doctrine is borrowed from federal law, and, noting, that federal law requires an overbreadth plaintiff to have standing throughout the proceeding, concludes that loss of a personal interest renders such cases moot just as it would for other cases. As the Court explained, "overbreadth may represent a loosening of the ordinary prudential rule that parties cannot assert the rights of others, but it does not represent a loosening of the federal constitutional requirement that the party asserting the law's overbreadth have standing and that the party's interest continue throughout the proceeding." *Id.* at 473.

The Court then reversed the Court of Appeals on the application of ORS 14.175, explaining, in essence, that although even if expedited challenges to the law could possibly be made within two years, the fact that expedited treatment was possible did not change the fact that it was "likely" that most such actions would evade review, thus satisfying the third and final element for application of ORS 14.175. As the Court stated, "the fact that this court theoretically could accept certification of an appeal from the Court of Appeals or that it could exercise discretion to entertain a mandamus action does not establish that cases such as plaintiff's are unlikely to evade review." *Id.* at 483. The different conclusions reached by the courts on this point may rest on different interpretations of what it means to "evade review," and therefore of when such evasion is "likely." The Court of Appeals' decision is consistent with the position that evading review means that the issue is likely *never* to be adjudicated. In contrast, the Supreme Court's analysis is consistent with the view that evasion of review occurs whenever cases typically become moot before full adjudication, and that the evasion would be properly said to have occurred even if, someday, an atypically speedy case allowed the issue to be resolved.

Having held that the case was moot, and subject to ORS 14.175, the Court addressed the constitutionality of ORS 14.175. The Court rejected the Secretary of State's argument that *Yancy* could be harmonized with the statute, stating:

> [I]f *Yancy* correctly holds that the "judicial power" conferred under Article VII (Amended), section 1, does not permit the courts to recognize a mootness exception for cases that are capable of repetition, yet evade review, then that limitation on the judicial power cannot be "deemed" eliminated by legislative enactment.

Id. at 485. If Article VII imposed a constitutional limit barring jurisdiction over moot cases, then logically that limit could not be eliminated by the legislature any more than it could be eliminated by the court itself. The question, then, was whether *Yancy*'s was correct in holding that Article VII imposed such strict limits on judicial power. In addressing whether to overrule *Yancy*, the court summarized the warring views of justiciability in its own jurisprudence:

> Thus, on the one hand, *Yancy* holds that justiciability is a constitutional doctrine, rooted in the conferral of "judicial power" under Article VII (Amended), section 1, and based in part on case law arising under Article III of the federal constitution. But, on the other hand, *Kellas* holds that we should be loath to "import federal law regarding justiciability into our analysis of the Oregon Constitution" to erect "constitutional barriers to litigation with no support in either the text or history of Oregon's charter of

> government." 341 Or at 478, 145 P3d 139. The fact of the matter is that none of the aspects of justiciability that the majority in *Yancy* listed—standing, mootness, or ripeness—finds the sort of direct textual support that *Kellas* suggests is required to support a "constitutional barrier to litigation." The two decisions cannot be reconciled.

Id. at 488. The Court's resolution of the conflict began by clarifying the methodology for interpreting voter-approved amendments to the Oregon constitution. The Court explained that although under *Ecumenical Ministries* such amendments are subject to the methodology for statutory interpretation, as a result of the shift in *State v. Gaines* away from *PGE v. BOLI*'s strict sequential interpretive approach to statutes, "there remains little, if any, practical distinction between our approach to the construction of original provisions of the constitution [under *Priest v. Pearce*, 314 Or 411, 415–16, 840 P2d 65 (1992)] and our method of interpreting provisions later adopted by initiative." *Id.* at 490. The Court summarized the operative methodology as follows:

> In all cases, we examine the text, in its historical context and in light of relevant case law, to determine the meaning of the provision at issue most likely understood by those who adopted it, with the ultimate objective of identifying "'relevant underlying principles that may inform our application of the constitutional text to modern circumstances.'"

Id. at 491 (citing *State v. Sagdal*, 356 Or 639, 642, 343 P3d 226 (2015)). Turning from procedure to substance, the Court began by examining how state "judicial power" would have been understood in 1857, based upon common law concepts and nineteenth-century cases. The Court explained:

> English common-law decisions reveal scant, if any, evidence of concerns about what we would now term "justiciability." To the contrary, English courts recognized the right of "strangers"—those with no personal interest in a particular dispute—to enforce public rights by prerogative writs, such as prohibition, *certiorari*, *quo warranto*, and mandamus.

Id. at 493. The Court then noted that the few nineteenth-century cases concerning justiciability reflected a broad view of judicial power in which courts had jurisdiction, in the court's discretion, to hear cases that were moot or in which the plaintiff has no personal stake. *Id.* at 509 (discussing *Burnett v. Douglas County*, 4 Or 388 (1873), *State v. Ware*, 13 Or 380, 10 P 885 (1886) and *David v. Portland Water Committee*, 14 Or 98, 104-05, 12 P 174 (1886)). Far from indicating the existence of jurisdictional limits, those cases look at whether reaching an issue is in the public interest, or would decide a public right, or was of public importance. As the Court explained, this was typical for nineteenth-century decisions in other jurisdictions as well. *Id.* at 496-501 (discussing nineteenth-century cases); *see also* Matthew I. Hall, The Partially Prudential Doctrine of Mootness, 77 Geo Wash L Rev 562 (2009), at 569-570 ("[N]ineteenth century decisions generally do not indicate that the court lacked authority to hear moot cases. Rather, courts dismissed moot cases using language suggesting an exercise of discretion.").

The Court concluded its examination of the historical context of original Article VII and the 1910 amendment by noting "a complete absence of evidence that the framers would have understood the "judicial power" conferred in either 1857 or in 1910 to have been limited to what we now term 'justiciable' cases." *Couey*, 357 Or at 509-10. The Court observed that "[t]he notion that federal courts are without constitutional authority to decide "nonjusticiable" cases did not emerge until well into the twentieth century." *Id.* at 510. The Court went on to underscore the absence of support for applying relatively modern federal justiciability doctrines to Article VII:

> Nothing in the text of Article VII, section 1, or Article VII (Amended), section 1, imposes any limitations on the exercise of "judicial power." In particular, there are no "case or controversy" limitations of the sort that are imposed under Article III of the United States Constitution. Nor are there any explicit references to a lack of constitutional authority to hear cases initiated by parties lacking a personal stake in the outcome. Moreover, nothing in the historical context of either provision of the Oregon Constitution lends support for the notion that the framers would have understood them to have included such limitations implicitly because of the very nature of the term "judicial power," at least not in public action cases or those involving issues of "public importance."

Id. at 510. Turning to more recent jurisprudence, the Court noted that until *Yancy*, Oregon had previously allowed moot cases to be heard if they were "capable of repetition, yet evading review." *Id.* at 511 (citing *Perry v. Oregon Liquor Commission*, 180 Or 495, 498–99, 177 P2d 406 (1947)). As Chief Justice Balmer noted in his special concurrence in *Yancy*, the Court had done so in *Perry v. Oregon Liquor Commission*, and at least seven later cases. *Yancy*, 337 Or at 366 n.6 (Balmer, J., specially concurring). *Perry* had recognized and applied an exception to mootness:

> Where the question is one involving the public welfare, and there is a likelihood of it being raised again in the future, a court in the exercise of its discretion may decide it for the guidance of an official administrative agency.

Perry, 180 Or at 498-99. *Perry* had grounded this exception in a more general exception allowing courts to determine a moot question that is of sufficient public interest. *See id.* at 499 ("We think the question involved herein is of sufficient public interest to warrant this court in deciding the question."). *Perry's* delineation of the exceptions to mootness in terms of not only likelihood of repetition, but in terms of questions of public interest, differs from the "capable of repetition, yet evading review" formula more familiar to today's practitioners, but echoes the common-law tradition.

The passage in *Perry* appears consistent with the historical development of mootness as a prudential doctrine based that was later explored by the court in *Couey*. As noted at the outset, *Couey* ultimately held that courts have discretion to hear certain moot cases. The *Couey* court explained that "Oregon courts long have recognized the authority of courts to entertain public actions without regard to whether those who initiate such actions have a personal stake in their outcome," noting that such a practice arose in the English common-law tradition and was adopted by American courts. *Couey*, 357 Or at 516. The formulation in which it articulated that rule echoes a broad, common-law conception of judicial power that in which review of moot cases is constrained by judicial discretion and considerations of public importance, rather than precluded by rigid constitutional limits:

> [B]ased on the foregoing analysis of the text, historical context, and case law interpreting Article VII (Amended), section 1, there is no basis for concluding that the court lacks judicial power to hear public actions or cases that involve matters of public interest that might otherwise have been considered nonjusticiable under prior case law.

Id. at 520. Overall, *Couey* provides a much-needed clarification of Oregon's law concerning jurisprudence. It completes a turn back to the common-law tradition with respect to the nature of judicial power in state courts that was initiated in *Kellas*. In the wake of the decision, Oregon's rules on the three aspects of justiciability–standing, mootness, and ripeness–now appear to share a common foundation that is well-grounded in the state common-law tradition and consistent with Article VII's grant of "the judicial power" to the courts.

Questions for Another Day

Of course, *Couey* necessarily leaves many questions for future cases to answer, a few of which are briefly noted below.

First, the Court declined to settle the question of whether Article VII (Amended) imposes any constraints on judicial power. The Court decided only that it imposes no constraint that would impair a court's power to decide moot cases in public actions or cases involving matters of public interest. *Id.* at 519-20. However, the Court indicated that even if Article VII does not impose limits on "judicial power," that does not mean that there are no limits. The Court expressly warned against reading its decision to mean that "Article VII (Amended), section 1, is an empty vessel to be filled as it pleases the legislature," and added that "[s]eparation of powers principles make clear that there are limits to what constitutes the "judicial power" that courts may exercise. *Id.* at 520. Perhaps illustrating one of these limitations, earlier in the opinion the Court noted federal cases where separation of powers, not justiciability, precluded courts from rendering advisory opinions that were subject to review by another branch of government. *Id.* at 507.

Second, the Court expressly declined to precisely define the criteria for determining whether a case is a "public action" or a case "involving issues of 'public interest,'" deciding only the cases to which ORS 14.175 applies. One would expect those questions to be addressed in future cases as litigants explore the courts' willingness to hear public actions in particular.

Third, the decision leaves it unclear whether ORS 14.175 is actually necessary. Although the constitutionality of ORS 14.175 is at the heart of the Court's opinion, given the Court's rejection of the *Yancy* view of judicial power, and its embrace of the broader conception reflected in *Kellas*, *Perry*, and the common law tradition, it would appear that even if ORS 14.175 were repealed, Oregon cases would have discretion to hear the type of moot cases that ORS 14.175 was designed to allow to be heard.

Finally, the Court did not, of course, decide the constitutionality of ORS 250.048(9). Indeed, although the dismissal of Mr. Couey's case was reversed, the remand to the trial court gives that court the first opportunity to determine if this is the type of moot case that courts should exercise their discretion to hear. If the case does move forward, then the question of whether that election restriction is constitutional will also be addressed on remand by the lower courts.

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