



THE OREGON SUPREME COURT ORAL ARGUMENTS



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CURRICULUM UNIT: JUDICIAL REVIEW & THE OREGON SUPREME COURT

In this exclusive curriculum unit, you will find everything you need to prepare yourself and your students for a day with the Oregon Supreme Court. Each of the components to this set are available to teachers on the Classroom Law Project Website. You will receive digital access information with this packet of materials.

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Moot Court simulation strategy to prepare students for the hearings



JUDICIAL REVIEW & THE OREGON SUPREME COURT



Introduction Information

Part I

Objectives

Students will be able to:

- Explain how the Oregon Supreme Court works and what an appellate hearing (oral argument) looks like
- Prepare for and take quality notes while observing Oregon Supreme Court oral argument
- Demonstrate an understanding of the cases before the Court
- Produce a critical analysis of the cases and the hearings
- Participate and collaborate in a moot court simulation
- Synthesize the information and experiences from this unit and seek further information from and about the Court
- Reflect on issues of law and justice

Theme

Judicial Review and the Oregon Supreme Court

Appellate hearings are very different from trials, whether they are based on crimes or on civil actions. The Oregon Supreme Court hears cases that directly connect to an interpretation of our state constitution and applies judicial review to decide whether a law and/or ruling is constitutional. By experiencing live Oregon Supreme Court hearings (oral arguments), students will see judicial review in action and understand the crucial importance of this aspect of our democracy.

Oregon Social Sciences Standards (High School)

- HS.6 Examine the institutions, functions, and processes of Oregon's state, county, local and regional governments.
- HS.13 Examine and analyze provisions of the Oregon Constitution and the U.S. Constitution.
- HS.71 Construct arguments using precise claims, integrating and evaluating information provided by multiple sources, diverse media, and formats, while acknowledging counterclaims and evidentiary strengths and weaknesses.

- HS.72 Construct explanations using sound reasoning, correct sequence (linear or nonlinear), examples, and details with significant and pertinent information and data, while acknowledging the strengths and weaknesses of the explanations given its purpose (such as validity, value and limitation, cause and effect, chronological, procedural, technical).
- HS.73 Identify and analyze multiple and diverse perspectives as critical consumers of information.
- HS.74 Analyze an event, issue, problem, or phenomenon, critiquing and evaluating characteristics, influences, causes, and both short- and long-term effects.
- HS.75 Evaluate options for individual and collective actions to address local, regional and global problems by engaging in self-reflection, strategy identification, and complex causal reasoning.
- HS.76 Propose, compare, and evaluate multiple responses, alternatives, or solutions to issues or problems; then reach an informed, defensible, supported conclusion.
- HS.77 Engage in informed and respectful deliberation and discussion of issues, events, and ideas applying a range of strategies and procedures to make decisions and take informed action.

Classroom Law Project

Classroom Law Project (CLP) is an Oregon not for profit organization that has been providing civics education resources, professional development, and student programs for over 30 years throughout the state. We coordinate the statewide high school Mock Trial and We the People Congressional Hearing competitions and provide support for teachers to bring inquiry-based, active civics projects into their classrooms. Our goal is to bring engaging opportunities for students to learn about civic participation and their power in a democracy. We are excited to work with the Oregon Supreme Court to provide these materials for students to get the most out of the public hearings in which they will participate. Check out our many professional development opportunities, resources, and student program options: www.classroomlaw.org.

Pre-Unit Survey for Students

Following is an optional handout you can use with your students to survey them on their understandings about judicial review, the courts, and the Oregon Supreme Court. It's okay if they don't know much at this point because the idea is that at the end of this unit, they will! The survey is an effective way for teachers to measure the learning that takes place during the unit when matched with the post-survey, which asks the same questions along with some reflective pieces.

Before you go to an Oregon Supreme Court Hearing: Pre-Hearing Survey

Directions: Answer the questions below - if you don't know yet, just note that. There is no grade attached to this but it will help you see how much you learn from this experience once it's concluded.

1. Explain the difference between a trial and an appellate (or Supreme Court) oral argument:
2. Who makes decisions about facts in a case? _____
3. Who makes decisions about law in a case? _____
4. How do cases get to the Supreme Court?
5. What makes an argument persuasive or not?
6. What is judicial review?
7. What do you know about the Oregon Supreme Court?
8. What are you most curious about the Oregon Supreme Court?



JUDICIAL REVIEW & THE OREGON SUPREME COURT



What is the Oregon Supreme Court and How Does it Work?

Part 2

In this section:

- 2.1 Judicial Review & Court Vocabulary
- 2.2 Background on the Oregon Supreme Court & Judicial System
- 2.3 What is Judicial Review?
- 2.4 How the Courts work - Graphic Organizer

Note to Teachers:

This section contains most of the background information you can use to scaffold learning for your students into a Moot Court activity and the culminating experience of watching live Oregon Supreme Court Hearings. You are free to modify the information into a format you prefer. However, we created it to be as digestible as possible while still engaging the knowledge needed for the entire experience.

Judicial Review and the Court System Vocabulary

Amicus curiae - Latin for "friend of the court." It is advice formally offered to the court in a brief filed by an entity interested in, but not a party to, the case.

Answer - The formal written statement by a defendant in a civil case that responds to a complaint, articulating the grounds for defense.

Appeal - A request made after a trial by a party that has lost on one or more issues that a higher court review the decision to determine if it was correct. To make such a request is "to appeal" or "to take an appeal." One who appeals is called the "appellant;" the other party is the "appellee."

Appellant - The party who appeals a district court's decision, usually seeking reversal of that decision.

Appellate courts - The part of the judicial system that is responsible for hearing and reviewing appeals from legal cases that have already been heard in a trial-level or other lower court.

Brief - A written statement submitted in a trial or appellate proceeding that explains one side's legal and factual arguments.

Burden of proof - The duty to prove disputed facts. In civil cases, a plaintiff generally has the burden of proving his or her case. In criminal cases, the government has the burden of proving the defendant's guilt. (See standard of proof.)

Case law - The law as established in previous court decisions. A synonym for legal precedent. Akin to common law, which springs from tradition and judicial decisions.

Clerk of court - The court officer who oversees administrative functions, especially managing the flow of cases through the court. The clerk's office is often called a court's central nervous system.

Common law - The legal system that originated in England and is now in use in the United States, which relies on the articulation of legal principles in a historical succession of judicial decisions. Common law principles can be changed by legislation.

Complaint - A written statement that begins a civil lawsuit, in which the plaintiff details the claims against the defendant.

Counsel - Legal advice; a term also used to refer to the lawyers in a case.

Court - Government entity authorized to resolve legal disputes. Judges sometimes use "court" to refer to themselves in the third person, as in "the court has read the briefs."

Court reporter - A person who makes a word-for-word record of what is said in court, generally by using a stenographic machine, shorthand or audio recording, and then produces a transcript of the proceedings upon request.

Damages - Money that a defendant pays a plaintiff in a civil case if the plaintiff has won. Damages may be compensatory (for loss or injury) or punitive (to punish and deter future misconduct).

Defendant - In a civil case, the person or organization against whom the plaintiff brings suit; in a criminal case, the person accused of the crime.

Docket - A log containing the complete history of each case in the form of brief chronological entries summarizing the court proceedings.

Due process - In criminal law, the constitutional guarantee that a defendant will receive a fair and impartial trial. In civil law, the legal rights of someone who confronts an adverse action threatening liberty or property.

Habeas corpus - Latin, meaning "you have the body." A writ of habeas corpus generally is a judicial order forcing law enforcement authorities to produce a prisoner they are holding, and to justify the prisoner's continued confinement. Federal judges receive petitions for a writ of habeas corpus from state prison inmates who say their state prosecutions violated federally protected rights in some way.

Judge - An official of the Judicial branch with authority to decide lawsuits brought before courts. Used generically, the term judge may also refer to all judicial officers, including Supreme Court justices.

Judicial Review - The power of the courts (specifically appellate courts) to determine if a law is constitutional.

Jurisdiction - The legal authority of a court to hear and decide a certain type of case. It also is used as a synonym for venue, meaning the geographic area over which the court has territorial jurisdiction to decide cases.

Lawsuit - A legal action started by a plaintiff against a defendant based on a complaint that the defendant failed to perform a legal duty which resulted in harm to the plaintiff.

Litigation - A case, controversy, or lawsuit. Participants (plaintiffs and defendants) in lawsuits are called litigants.

Opinion: A judge's written explanation of a decision of the court or of a majority of judges. A **dissenting opinion** disagrees with the majority opinion because of the reasoning and/or the principles of law on which the decision is based. A **concurring opinion** agrees with the decision of the court but offers further comment.

Oral argument - An opportunity for lawyers to summarize their position before the court and also to answer the judges' questions.

Plaintiff - A person or business that files a formal complaint with the court.

Precedent - A court decision in an earlier case with facts and legal issues similar to a dispute currently before a court. Judges will generally "follow precedent" - meaning that they use the principles established in earlier cases to decide new cases that have similar facts and raise similar legal issues. A judge will disregard precedent if a party can show that the earlier case was wrongly decided, or that it differed in some significant way from the current case.

Remand - Send back.

Reverse - The act of a court setting aside the decision of a lower court. A reversal is often accompanied by a remand to the lower court for further proceedings.

The Oregon Judicial System & the Oregon Supreme Court

I. The Rule of Law

The Oregon court system fulfills a tremendously important purpose in our democratic society. We usually think of the court system in terms of its obvious functions:

- to try those who are suspected of committing criminal acts, or
- to settle disputes between parties who cannot reach an agreement themselves.

However, the courts fulfill many other vital functions, including:

- the protection of individual rights,
- the assurance that no one will be above the law, and
- the preservation of the balance of power among the three branches of government.

The court's decisions are based upon the constitutions and the laws of the United States and the State of Oregon and include city and county ordinances.



The Oregon courts hear disputes brought by private citizens, corporations, business organizations, and the state and local governments. There are two broad categories of disputes adjudicated by the courts: **criminal** and **civil** disputes.

A **criminal case** involves a dispute where an individual has broken a law of the state created by the Legislature or local government. If the individual violated a federal law that case will be heard in federal district court. In general, crimes are described as either felonies or misdemeanors and they are classified according to the terms of punishment prescribed by the Legislature for a specific crime. A felony is a crime for which the punishment is imprisonment for more than one year. Misdemeanors are lesser crimes for which the penalty

is imprisonment for less than one year. When an individual is charged with a criminal offense, they are referred to as the defendant in the case. The district attorney who represents the state is called the prosecutor.

Civil disputes include all matters that are not criminal. They often involve disputes between private citizens and business organizations over matters relating to contracts, personal injury, and property disputes. The party who files the suit is called the plaintiff and the responding party is called the defendant. The adjudicatory process begins when the plaintiff files a complaint with the county clerk in the circuit court that has jurisdiction over the matter. The complaint generally states the accusations against the defendant and informs the defendant that they must appear in court.

Criminal law is enforced by the government, while civil law is enforced by private citizens through civil action.

2. Oregon Judges

All judges in Oregon are elected to their positions and each serves a six-year term. This includes judges who serve on the Oregon Supreme Court. While Oregon judges have to run for election similar to state legislators and county officials, they have an entirely different set of responsibilities owed to the public.

Judges are tasked with promoting justice by making fair and impartial decisions that do not rely on public opinion. They rely exclusively on the law to inform their decisions, and it is the judge's responsibility to act as a steward of the law to make sure it is applied to each case correctly. The most important duty of a judge is to identify the relevant law that applies to the facts of a specific case and to make sure the law is applied to the facts correctly. There are a variety of sources of law that may apply in any given case and most people are familiar with the two main types: **statutory law** created by the Legislature and **common law** created by judges.



Like the organization of Oregon's court system, both statutory and common law follow a hierarchy where all laws must be consistent with the law at a higher level. For instance, a local ordinance must be consistent with a state statute that must not contradict the United States Constitution.

Statutory law is written law created by the Legislature that aims to clarify the functioning of government or define rules for civil order. Most criminal cases involve statutory law because the defendant broke a law that the state Legislature put in place to make certain acts a punishable offense.

Common law, on the other hand is generally used to settle disputes between individuals in civil cases. Common law is created through the decisions of judges in state appellate courts. These decisions become binding on the lower courts within the state. The tradition of common law extends all the way back to 12th Century England when King Henry the II established central courts to help consolidate the laws of England and move away from system of solving disputes based upon local custom.

3. Jury Trial

A jury trial is the cornerstone of the United States legal system. The right of citizens to have a dispute decided by a fair and impartial decision maker is protected by the **6th Amendment** of the Constitution and represents an essential aspect of the administration of justice in the United States.

A citizen's right to trial by jury in Oregon is secured by the State's constitution for both criminal trials (**Article 1, section 11**) and civil trials (**Article 1, section 17**). In every criminal case, the defendant is entitled to a jury trial unless they waive this right. In civil cases however, the right to a jury is only automatic for cases involving \$750 or more in controversy. If the amount in controversy is less than \$750, defendants will receive a **bench trial** where a judge alone acts as the "finder of fact" as well as deciding issues of law.



Jury trials are composed of either six or twelve jurors depending upon the nature of the crime alleged, or the amount of money involved in the case. Civil suits involving \$10,000 or less are only tried by six jurors. In Oregon, **all citizens over the age of 18 are eligible for jury duty** so long as they have not served on jury duty within the last 24 months or been convicted of a felony.

The jury trial is exclusively administered by the circuit courts. It is essentially a judicial examination of the dispute between the parties where the judge provides the jury with instructions on the relevant law that relates to the case, and the jury applies this law to the facts. The jury will act as a **finder of fact**, deciding which facts are relevant and which witnesses to believe. In a criminal trial, the relevant law will likely be found Oregon’s statutes that relate to criminal offenses.

Great deference is given towards the jury’s verdict in a case. Article VII, Section 3 of the Oregon Constitution prohibits a trial judge or an appellate court from reexamining any fact found by the jury unless the court can affirmatively say there is no evidence to support the verdict.

Jury Decisions in Oregon:

Type of Case	# of jurors present at trial	# of jurors required to agree in order to reach a verdict
Criminal Felony	12	12
Murder	12	11
Death Penalty	12	12
Criminal Misdemeanor	6	6
Civil case between \$750 & \$10,000	6	5
Civil case greater than \$10,000	12	9

“It is your sole responsibility to make all decisions about the facts in this case. You must evaluate the evidence to determine how reliable or how believable that evidence is. When you make your decision about the facts, you must then apply the legal rules to those facts and reach your verdict.”

Jury instructions from a civil case in Multnomah County,
Robert Hill v. LaGrand Industrial Supply

4. Circuit Courts: deal with the FACTS of a case

The circuit courts are the real workhorse of Oregon’s court system. Circuit courts are courts of **general jurisdiction**. That means they hear every kind of criminal and civil case with the exception of tax cases that have their own exclusive tax court. Circuit courts also perform the important function of holding the jury trial to resolve factual matters in disputes.

In order for any judicial system to be successful, it must be accessible to the citizens who rely on it. Everything from minor traffic violations to class A felonies to civil cases involving important contract disputes are adjudicated by the circuit courts. Unlike the Oregon Supreme Court and Court of Appeals where there is just one of each court for the entire state, **each one of Oregon’s 36 counties has a circuit court**. There are 173 circuit court judges in 27 judicial districts within the state. The citizens who live in the judicial districts that the judges serve elect the judges to their positions. Some judicial districts cover more than one county. For example, District No. 24 includes both Grant and Harney Counties in eastern Oregon. The number of judges in each district is based upon population in that district as well as size of the district’s case load. Multnomah County, in District No. 4, is the largest judicial district and has 38 circuit court judges.

5. Oregon Court of Appeals: deals with the LAW in a case

The Court of Appeals hears all civil and criminal cases appealed from the circuit courts. This court serves as **the first level of appeal after a trial**. The adjudicatory process in an appeal is very different from the trial procedure used in the circuit court and places a different level of responsibility on the attorneys who represent the two parties and the judges who ultimately decide the case. Ten judges serve on the Court of Appeals.

Appellate Procedure

When a party makes an appeal, they do not get a whole new trial with a jury. This is the primary difference between an appeal and a case initially decided in circuit court. Each party is only allowed to submit a written brief and present an oral argument of the merits of their case to the judges who will be making the decision. **The written brief is a summary of the how the law relates to the facts of the case.**



The party who made the appeal is called the **appellant** and they will be asking the court to reverse the lower court's decision. The party that did not appeal is called the **appellee** and they will argue the reasons why the lower court's decision should be affirmed. The two opposing parties are also given the opportunity to present an **oral argument** to the judges who will be deciding the case. This is another opportunity for each party to present the merits of their case, but mostly it is a chance for the judges to ask the respective attorneys questions about the law as it applies to the case.

Because appeals almost exclusively involve questions of law, judges and not a jury decide them. In certain situations however, the judges in an appeal might send a case back to the circuit court because the dispute centers around an important fact that the jury must decide. **The judges' main role in an appeal is to make sure the lower circuit court was correct in applying the law that determined the outcome of the case.**

To help manage the heavy appeals caseload, the court of appeals is divided into three panels with three judges each. Each panel evaluates the trial record from the circuit court and the written briefs from the opposing parties, and hears oral arguments presented by both parties. In some cases the panel will agree to **affirm** the lower court's decision without writing a formal opinion. In other cases, one member of the panel may draft an opinion explaining the panel's reasoning.

6. The Oregon Supreme Court: interprets the law and the Oregon Constitution

The Oregon Supreme Court is the highest court in the Oregon state court system. Any decision by this court is binding upon all of the other lower courts in the state. The United States Supreme Court is the only court that can reverse a decision by the Oregon Supreme Court. Seven justices serve on the Oregon Supreme Court and each serves a six-year term.



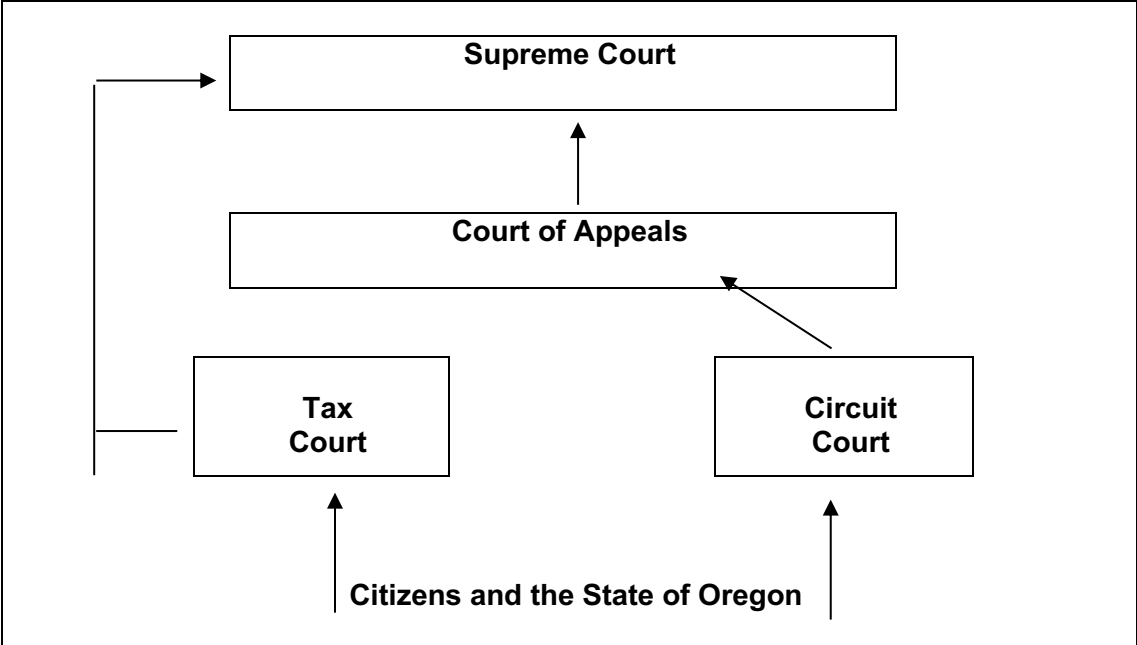
Standing from left to right: Justice Rebecca A. Duncan, Justice Adrienne Nelson, and Justice Christopher L. Garrett.

Seated from left to right: Justice Thomas A. Balmer, Chief Justice Martha L. Walters, Justice Lynn Nakamoto, and Justice Meagan A. Flynn

The Oregon Supreme Court is primarily an appeals court. They have discretionary review of cases from the Court of Appeals. If a party thinks the Court of Appeals has made a mistake in interpreting the law, they may petition the Oregon Supreme Court to review that decision. The Supreme Court may choose to accept or deny that petition.

The Oregon Supreme Court has direct review of certain kinds of cases. This means that the case goes directly to the Supreme Court without review by the Court of Appeals. Death penalty cases and decisions from the Oregon Tax Court are two examples of cases where the Supreme Court has direct review.

Judicial Pathways in Oregon:



Number of cases filed in Oregon courts in 2016:

Supreme Court	813
Court of Appeals	2,812
Circuit Court	716,712

Judicial Review

The United States Constitution does not specifically mention **Judicial Review**, but in explaining Article 3 powers of the judiciary, Alexander Hamilton wrote in *Federalist 78*:

“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.”



Alexander Hamilton

In short, the judiciary’s ability to check and balance the powers of the Executive and Legislative branches lie in its authority to interpret laws based on the constitution. **That is what Judicial Review is.**



John Marshall

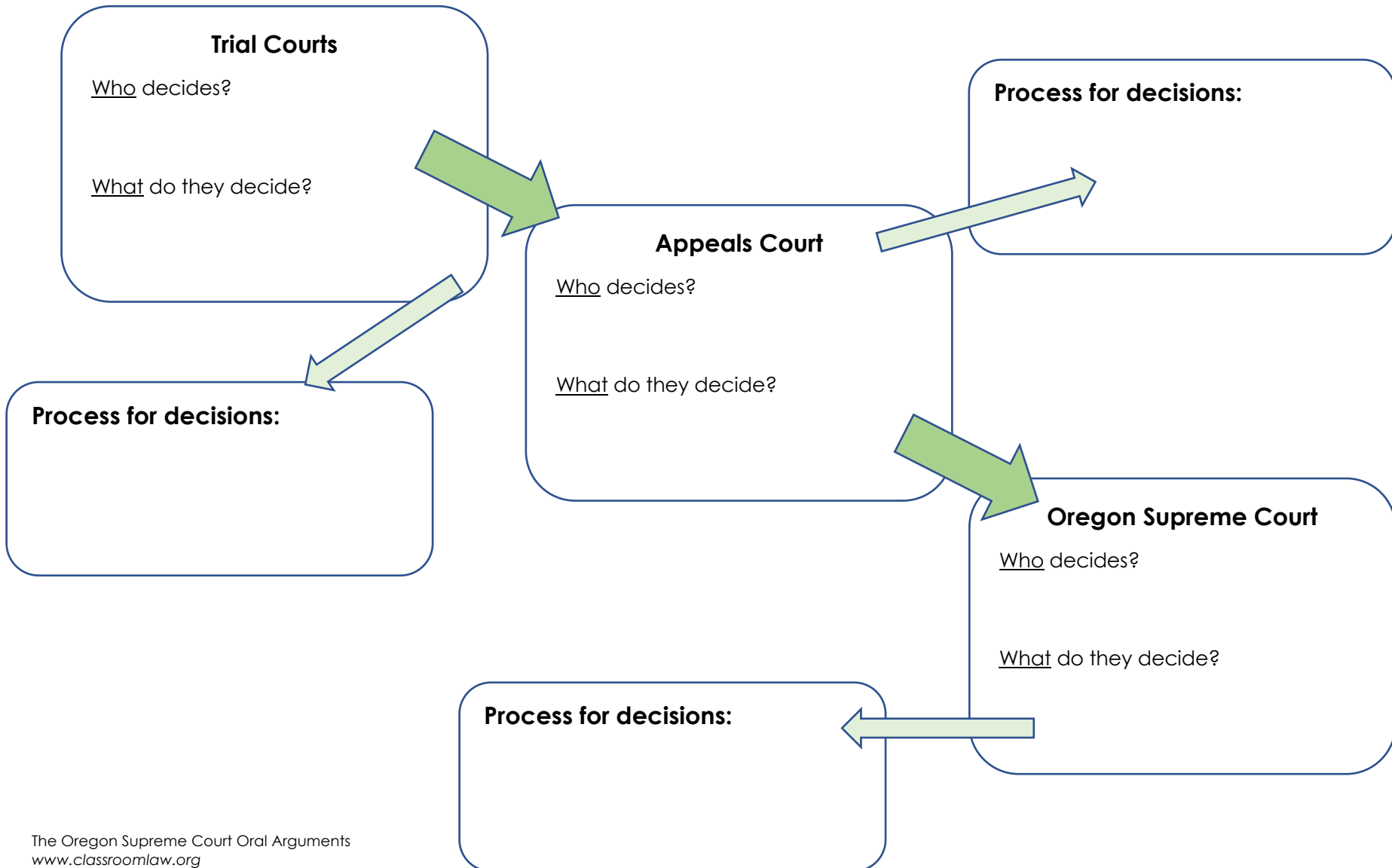
Chief Justice John Marshall put it another way when he led the Supreme Court to use judicial review for the first time to judge the constitutionality of a law in the case *Marbury v. Madison*:

“It is emphatically the province and duty of the judicial department to say what the law is.”

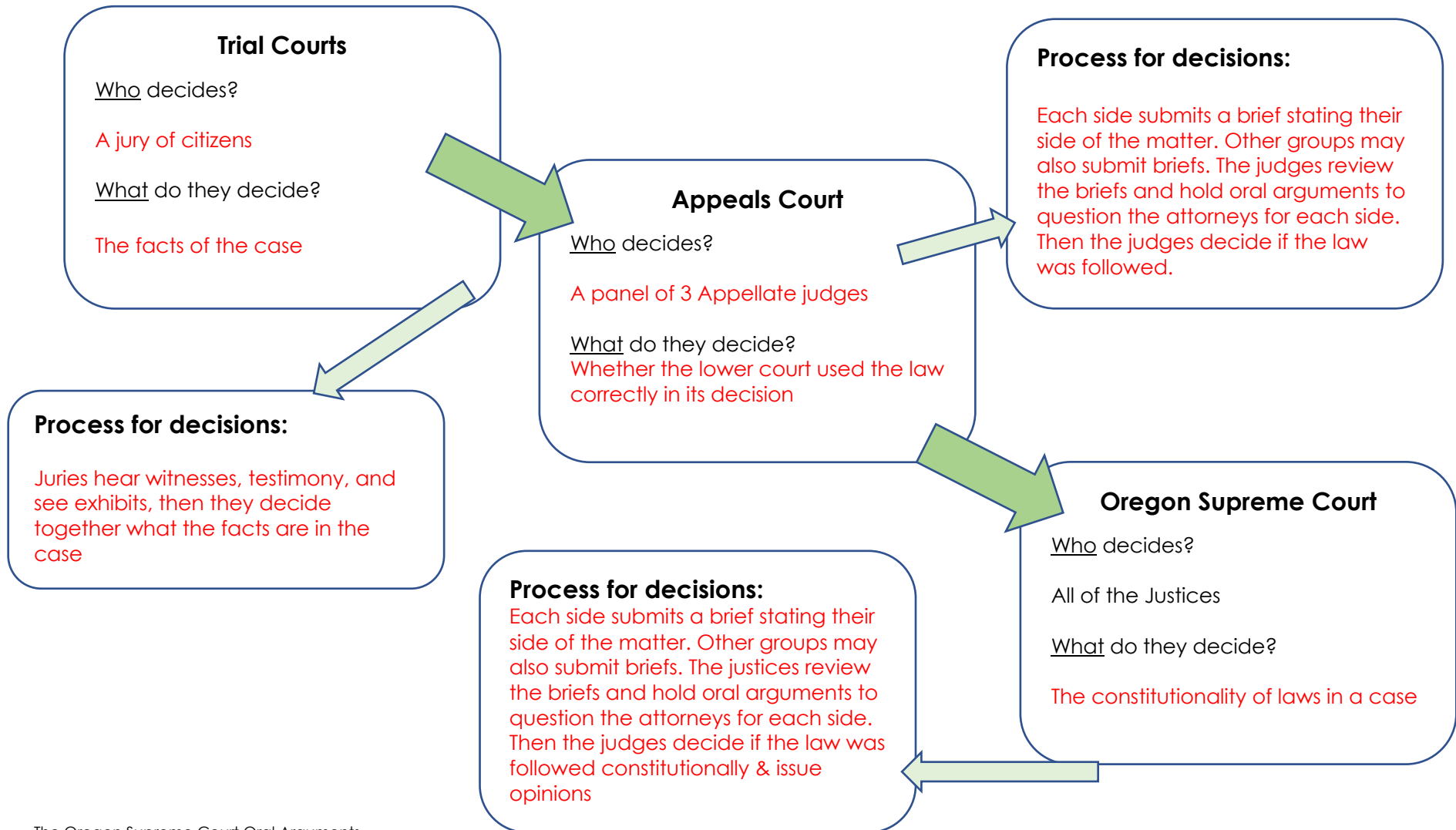
Questions to Consider:

1. Why do you think the Courts should have the power of judicial review (rather than the other two branches)?
2. What dangers might there be in the power to declare a law constitutional or not?
3. How might Judicial Review protect citizens' rights?
4. Do you think Oregon's state supreme court justices remain independent with their power of Judicial Review if they are up for election every 6 years? Why or why not?

The Oregon Court System: A Graphic Organizer



The Oregon Court System: A Graphic Organizer - KEY





JUDICIAL REVIEW & THE OREGON SUPREME COURT



How do we Prepare for Supreme Court Oral Arguments?

Part 3

In this section:

- 3.1 How a Supreme Court Hearing / Oral Argument works
- 3.2 Persuasive Speaking / Rhetoric
- 3.3 Student-friendly summaries of both cases the Court will hear
- 3.4 Preparation materials to complete about the cases (students should bring these with them to the hearings)

Note to Teachers:

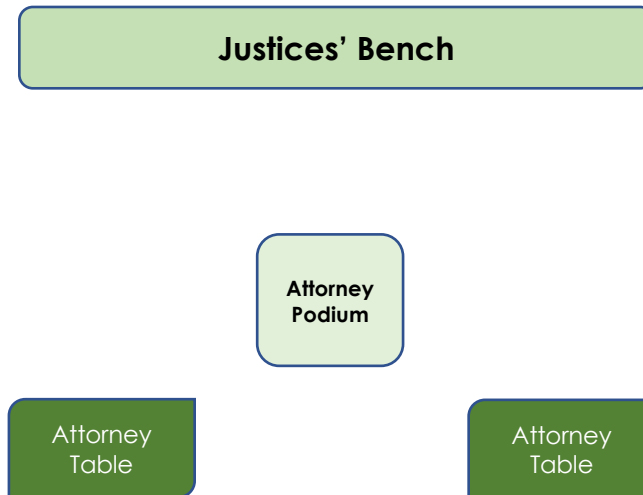
This section will give students a prepared and positive experience when they see Oregon Supreme Court in live oral arguments. They will be seeing two separate hearings, but an appellate hearing is much different than the traditional trial format students may be used to seeing on television. This section will explain how a hearing works and will provide background on both of the cases, as well as materials students can use to prepare for watching the arguments and forming opinions themselves.

The below url links to a video of the most recent Pace University Moot Court competition where you can view multiple examples of law students in oral argument. Any one or several of these examples will give your students an idea of what to expect at the May 15 hearings:

<http://tinyurl.com/y4d7wkqb>

How Oral Arguments Work

How the courtroom looks:



In a Supreme Court hearing (also called "oral argument"), there are:

- no juries
- no witnesses
- no exhibits

The Justices have already read briefs of the case prior to the hearing. Each side (and even third parties) submit briefs - or stories of the case. The hearing is simply a final chance to make their most important points.

Petitioner's attorney and the Respondent's attorney each have a set amount of time (usually 30 minutes) to make their case before the bench of Justices. The attorneys must use all of their public speaking skills to make their case concisely and persuasively.

Then, they must be able to think quickly and flexibly because the Justices can ask any questions they want of either attorney. The attorneys must be ready to respond to any question put to them by the Court.

Persuasive Speaking / Rhetoric

Because there are no witnesses or exhibits in an appellate hearing, attorneys must use their best persuasive skills to present their case and answer questions from the Court. Below are the 3 main parts of rhetoric you might use to persuade someone to your way of thinking on a topic. Consider each one, and then try them out in brief persuasive sentences.

Scenario: You must convince your principal that attending a live hearing of the Oregon Supreme Court would be a good idea for your class. How might you convince the principal?

Logos: appealing to the *logic* of your listener. You might cite facts or statistics, or authorities (in a hearing, this would include former cases or the law) to appeal to the *reason* of your listener to convince them of your view.

1. Write a **Logos** argument for the above scenario:

Ethos: making an *ethical* appeal to your listener based on your *good character* or reliability. You must convince the listener that you are fair, reliable, and understand what you are talking about.

2. Write an **Ethos** argument for the above scenario:

Pathos: appealing *emotionally* to your listener. You persuade by appealing to the emotions of your audience, calling on personal experiences, sympathetic stories, drawing compassion and empathy from your listener.

3. Write a **Pathos** argument for the above scenario:

Background of Case #1:

OLIVIA CHERNAIK
Plaintiff-Appellant-Petitioner
v.
KATE BROWN & STATE OF OREGON
Defendants-Respondents-Respondents

Supreme Court Case S066564

1. Original Trial / Facts of the Case*:

Plaintiffs sued defendants for relief related to the state's alleged failure to take sufficient steps to protect the state's public-trust resources from the effects of climate change. This is the second time this case has been before the Court of Appeals: the first time they reversed the trial court's dismissal of the case, and remanded for the trial court to determine whether plaintiffs were entitled to declare that the atmosphere and other natural resources are trust resources that the state has an obligation to protect.

The trial court ruled that

- (1) Only state submerged and submersible lands are resources encompassed by the public trust doctrine; and
- (2) The state does not have an obligation to protect public-trust resources from the effects of climate change.

The Appeals Court decided the first time around that the trial court made the correct conclusions but because the case had been dismissed, the Appeals Court once again remanded (sent back) the case to the trial court to make the declaratory judgement on the case (the trial court must state the above two rulings in its judgment).

The plaintiffs had amended their complaint and then asked the trial court to make a summary judgement on the following 4 declarations:

1. A declaration of law that the State of Oregon, as a trustee and sovereign entity, has a fiduciary obligation to manage the atmosphere, water resources, navigable waters, submerged and submersible lands, shorelands and coastal areas, wildlife and fish as public trust assets, and to protect them from substantial impairment caused by the emissions of greenhouse gases in, or within the control of, the State of Oregon and the resulting adverse effects of climate change and ocean acidification;
2. A declaration that atmospheric concentrations of carbon dioxide (CO₂) exceeding 350 parts per million (ppm) constitutes substantial impairment to the atmosphere and thereby the other public trust assets;
3. A declaration that to protect these public trust assets from substantial impairment, Oregon must contribute to global reduction in emissions of CO₂ necessary to return atmospheric concentrations of carbon dioxide to 350 ppm by the year 2100; and
4. A declaration that Defendants have failed, and are failing, to uphold their fiduciary obligations to protect these trust assets from substantial impairment by not adequately reducing and limiting emissions of carbon dioxide and other greenhouse gases in, or within the control of, the State of Oregon."3 Plaintiffs specifically did not seek a rul

The defendants then asked the trial to dismiss the plaintiff's amended complaint and rule that:

- 1) The common law public trust doctrine does not extend to the atmosphere.
- 2) The common law public trust doctrine does not impose the particular affirmative actions associated with traditional legal trusts (i.e., fiduciary obligations or duties). Instead, Oregon courts have applied it only as a restraint on alienation.
- 3) Because there are no fiduciary duties associated with the common law public trust doctrine, any declaratory or injunctive relief based on an alleged violation of such duties must be denied.
- 4) Even if this Court recognizes new fiduciary duties under the public trust doctrine, injunctive relief is not warranted, because the Court must presume that the State will comply with the new law as announced, and therefore, that no future violation of law is likely.
- 5) This Court is without authority to grant injunctive or further relief, because doing so would violate the principle of separation of powers.
- 6) Finally, this Court lacks authority to grant injunctive relief, because such relief would cause the Court to decide a political question that our constitutional system entrusts to the other branches of government." The trial court granted the state's motion

The trial court granted the state's motion and dismissed the case.

On appeal, plaintiffs argue that the court erred by concluding the public-trust doctrine applies only to submerged and submersible lands, and that the court was wrong to conclude that the state doesn't have an obligation to protect trust resources from climate change. They also argue that the trial court erred in not reaching the question of whether the state has upheld its duty to protect public trust resources from "substantial impairment due to climate change."

**summarized from the Court of Appeals Opinion*

2. Oregon Court of Appeals: Decided January 9, 2019

The Appeals Court began its opinion by discussing the history of Oregon's public-trust doctrine. Briefly, upon admittance to the union, Oregon obtained title to the submerged and submersible land underlying "title-navigable" water because it now had "state sovereignty." Later it was decided by Oregon courts that no matter if title of submerged and submersible lands is in private hands, the state still has the power to intervene on behalf of the public interest. When they decide cases about public-trust doctrine, Oregon courts usually focus on the extent to which the state has the power to intervene in navigable waterways to protect the public uses of those waterways.

The Appeals Court then concludes that the plaintiffs argument that the public-trust doctrine applies to more than just submerged and submersible land (waterways) is not essential for their decision, the court says that their opinion will refer to "public-trust resources" in the abstract, but won't specific what that includes.

Next, the Court determined that Oregon's common law public-trust doctrine is not a legally binding obligation for the state. "Rather, the public-trust doctrine uses the word "trust" as an imperfect metaphor to capture the idea that the state is restrained from substantially impairing the common-law public right to use public trust resources for certain purposes."

The Appeals court concluded that the trial correctly granted the state's motion for summary judgement. Because that conclusion resolves the controversy between the parties, the Appeals Court did not address the other declarations sought by the plaintiffs. The Court vacated the trial court's actions, however, saying that the trial court needed to enter a judgement that declared the parties' rights, and thus the Appeals Court remanded the case back to the trial court to re-issue the judgment.

3. Oregon Supreme Court - Oral Arguments, November 13, 2019

Briefs available (and soon to be available) on the Supreme Court's website:

Petitioner Brief on the Merits (rec'd 7/31/19)
Amicus Curiae Brief (Multnomah County)
Amicus Curiae Brief (Organizations, businesses and individuals)
Amicus Curiae Brief (Law Professors)
Amicus Curiae Brief (Fourteen Oregon Elected Officials)
Amicus Curiae Brief (Kenneth Kaufman's clients)
Amicus Curiae Brief (Elisabeth Holmes' clients)
Amicus Curiae Brief (Multnomah and Lane Counties)
Amicus Curiae Brief (Oregon Trial Lawyers Association)
Respondents Brief on the Merits
Petitioners Reply Brief

Background of Case #2:

State of Oregon,
Plaintiff-Respondent-Petitioner
v.
Tamara Louise Fulmer,
Defendant-Appellant-Respondent

Supreme Court Case SO66654

1. The Original Trial Court / Facts of the Case*

On patrol one night, Officer Delepine of the Hillsboro Police Department pulled a car over for having an expired license plate registration. When Officer Delepine asked Tamara Fulmer, the defendant, for her driver's license and registration, she admitted her registration was expired and her license was suspended, and that she did not have insurance.

Following protocol, because the officer intended to impound the car from there, as he wrote a citation for the defendant, he called for a second officer to assist. They asked the defendant to step out of the car so that they could take an inventory of the car before it was impounded. When defendant exited the car, she took her cell phone and a pack of cigarettes with her but left her purse on the passenger seat.

The Hillsboro Police Department's policy on inventory states that upon taking custody of the vehicle, officers must inventory "all personal property and contents of open containers found" in the vehicle's passenger compartment. It does not allow the opening of closed containers, but specifically excludes "item[s] designed for carrying money and/or small valuables" (such as closed wallets, coin purses, purses, and waist packs) from the definition of "closed container." So the policy does allow for items like purses and wallets to be inventoried including their contents.

When Officer Weed (the second officer on the scene) examined the defendant's purse to take inventory, he found needles and a small bag of methamphetamine. Upon that discovery, he directed Officer Delepine to arrest the defendant. The state charged the defendant with one count of unlawful possession of methamphetamine. But at trial, defendant moved to suppress the evidence from her purse.

She claimed that the officers had unlawfully seized her purse because they did not give her a chance to remove her belongings from the car before they took inventory. The court determined that the stop had been lawful, the decision to impound the car had been lawful, and that the inventory had been lawfully conducted in accordance with the department's policy.

Defendant was tried and convicted. She appealed the conviction by challenging the denial of her motion to suppress the evidence from her purse.

**summarized from the Appellate Court's opinion*

2. The Court of Appeals, decided February 6, 2019

The Oregon Court of Appeals reviewed the law relating to police inventory of impounded vehicles.

Article I, Section 9 of the Oregon Constitution states: that people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure." The question is whether the search of Ms. Fulmer's purse was unreasonable under the state constitution.

The Court clarified that an inventory search is non-investigatory. That means that an officer can't order someone to leave items in a vehicle that is being impounded, nor may they inventory items the passenger has taken with them. They also stated in their opinion that if defendant had taken her purse with her or asked to take it with her when she got out of the car, the police would not have been able to search it and thus would not have found the items in it.

Defendant made two arguments to the Appeals Court:

- a. **An "Affirmative Duty" Argument:** Ms. Fulmer argued that a rule should be adopted that requires the police to ask the passenger if there are any items they want to remove from the car before they take the inventory. In other words, they should have the *duty* to inform before they take an inventory. The Court recognized that there is no legally valid reason not to want people to know that they are free to remove items before a vehicle is impounded. Requiring officers to ask first, could also ease the public's mind that inventories are just investigative searches "in disguise." **But the question isn't whether it's a good idea for officers to give this warning, the question is whether the Oregon Constitution requires them to do so.**

The Appeals Court decided that though Fulmer made a thoughtful argument for a new policy, she did not persuade the Court that an inventory search of an administratively seized vehicle is unreasonable - and thus it is not a violation of Article I, Section 9 of the Oregon Constitution.

- b. **A "Reasonable Person" Argument:** Ms. Fulmer also argued that the seizure of her purse was unlawful because a reasonable person in her position would believe "that she was to exit the car immediately and that she was not free to reach around the car to retrieve her personal items." She argues that by having her leave the car the way they did, she felt intimidated and assumed, as a reasonable person, that she had no choice to take her personal items with her.

The Appeals Court concluded that "the mere act of an officer asking a person who is not under arrest to step out of a car because it is being impounded, without more, is not enough to cause an objectively reasonable person to believe that they cannot remove any personal items from the car."

The Appeals Court majority opinion* concluded the officers did not violate Ms. Fulmer's rights under Article I, Section 9 of the Oregon Constitution. Ms. Fulmer appealed to the Oregon Supreme Court.

*The Hon. C.J. Egan dissented from the majority opinion.

3. Oregon Supreme Court - Oral Argument: November 13, 2019

Briefs for the Supreme Court have yet to be posted on the Court's site. Expected briefs:

- Petitioner Brief on the Merits
- Respondents Brief on the Merits
- Petitioners Reply Brief

Preparing to Observe Oral Arguments

Olivia Chernaik
v.
Kate Brown & State of Oregon
Supreme Court Case S066564

What are the **FACTS** of the case (what's the story behind the lawsuit)?

- | | |
|----|-----|
| 1. | 6. |
| 2. | 7. |
| 3. | 8. |
| 4. | 9. |
| 5. | 10. |

What is the Petitioner asking the Court to decide?

What is the Respondent asking the Court to decide?

What is the key part of the law that must be decided by the Court?

What questions do you have about the case, or what facts do you want clarified?

(you will not be able to ask the Court questions specifically about the cases - this is to prepare you to observe whether your questions get answered in the course of the Oral Arguments)

Preparing to Observe Oral Arguments

State of Oregon
v.
Tamara Louise Fulmer
Supreme Court Case SO66654

What are the **FACTS** of the case (what's the story behind the lawsuit)?

- | | |
|----|----|
| 1. | 5. |
| 2. | 6. |
| 3. | 7. |
| 4. | 8. |

What is the Petitioner asking the Court to decide?

What is the Respondent asking the Court to decide?

What is the key part of the law that must be decided by the Court?

What questions do you have about the case, or what facts do you want clarified?

(you will not be able to ask the Court questions specifically about the cases - this is to prepare you to observe whether your questions get answered in the course of the Oral Arguments)



JUDICIAL REVIEW & THE OREGON SUPREME COURT



How do we follow what is happening during the Oral Arguments?

Part 4

In this section:

- 4.1 Handouts and Guides for Students to use during the Oral Argument so that they can take notes and begin to critically think through the issues and what they observe
- 4.2 How to ask quality questions of the Justices at Q and A time

Note to Teachers:

This section is mostly made up of handouts for the students to prepare ahead of time and take with them to the hearings.

The experience of the Oral Argument is really only meaningful if students know what is happening and are prepared to not only follow what is being said, but also have questions prepared for the Justices afterwards. This section gives them the materials they need to do those things.

Oral Argument Notes & Observations

Olivia Chernaik

v.

Kate Brown & State of Oregon
Supreme Court Case SO66564

Complete this worksheet and take it with you to the hearings. You should use this accompanied by the preparation worksheet you've already done regarding this case.

At issue in this case:

Argument of the Petitioner

What did the Petitioner's attorney argue and how persuasive do you think they were?

Questions from the Court to the Petitioner - list some of the questions the court asked and how the petitioner answered:

1.

2.

3.

4.

Argument of the Respondent

What did the Respondent's attorney argue and how persuasive do you think they were?

Questions from the Court to the Respondent - list some of the questions the court asked and how the petitioner answered:

1.

2.

3.

Conclusions

1. Which side do you think argued most persuasively to the Court? Why?
2. How do you think the Court reacted to the arguments (did you sense they favored one over the other?)
3. What is the most interesting part of the hearing to you and why?
4. Which part of the hearing lost your interest - why?
5. How do you think the Court will decide in this case?

Oral Argument Notes & Observations

State of Oregon
v.
Tamara Louise Fulmer
Supreme Court Case SO66654

Complete this worksheet and take it with you to the hearings. You should use this accompanied by the preparation worksheet you've already done regarding this case.

At issue in this case:

Argument of the Petitioner

What did the Petitioner's attorney argue and how persuasive do you think they were?

Questions from the Court to the Petitioner - list some of the questions the court asked and how the petitioner answered:

1.

2.

3.

4.

Argument of the Respondent

What did the Respondent's attorney argue and how persuasive do you think they were?

Questions from the Court to the Respondent - list some of the questions the court asked and how the petitioner answered:

1.

2.

3.

Conclusions

6. Which side do you think argued most persuasively to the Court? Why?
7. How do you think the Court reacted to the arguments (did you sense they favored one over the other?)
8. What is the most interesting part of the hearing to you and why?
9. Which part of the hearing lost your interest - why?
10. How do you think the Court will decide in this case?

Questions for the Court

Following the hearings, the Justices on the Court will answer questions from the audience. This part of the event can be really interesting and fun, but that depends on the types of questions asked. Please prepare ahead of time several questions you might like to ask the Justices to make this time a really worthwhile opportunity for everyone.

Important: The Justices will NOT answer any questions about the cases currently before them (you can't ask about the cases you have witnessed because the Justices can't legally comment on them)

Consider asking question about how the Court works, issues about judicial review, their experience on the Court, how they make their decisions (generally), perhaps the differences between them and other State Supreme Courts or the Federal Supreme Court.

Your Questions:

1.

2.

3.



What Happened at the Hearings?

Part 5

In this section:

- 5.1 Suggestions for contacting the Justices & opportunities to visit the Court and other Oregon Courts
- 5.2 Analysis & Extension ideas following the Oral Argument
- 5.3 Oral Argument Analysis Handout for Students
- 5.4 Post-Unit Survey for Students

Note to Teachers:

Reflection after the hearing experience will be an important way to wrap up the event. We provide several ideas for how to do that with your students as well as some follow up activities with Oregon Courts. Finally, the post-unit survey for students are the same questions as the pre-unit survey and will hopefully give you quality information on how this experience and event provided a learning opportunity for your students.

Thanking the Oregon Supreme Court

You can write to the Justices of the Oregon Supreme Court! We recommend sending them a thank you for coming to do Oral Arguments in your District. You can write to any one of them who was at the hearing or you can write to the whole Court.

The names of the justices and the mailing address of the Court:

Chief Justice Martha Walters
Justice Thomas Balmer
Justice Christopher Garrett
Justice Lynn Nakamoto
Justice Meagan Flynn
Justice Rebecca Duncan
Justice Adrienne Nelson

Oregon Supreme Court
1163 State Street
Salem, OR 97301

Touring the Oregon Supreme Court

There are regularly offered tours for students of the Supreme Court in Salem. You can go to their website and sign up for a tour:

<https://www.courts.oregon.gov/courts/appellate/supreme/Pages/tour.aspx>

Court Tours by Classroom Law Project

Classroom Law Project offers a Court Tour Experience throughout the school year. Teachers can sign up their classes to come to downtown Portland at any time during the year on Tuesdays, Wednesdays, or Thursdays. The students get to see the Gus Solomon Federal Courthouse, the Mark Hatfield Federal Courthouse, and the Multnomah County Circuit Court. After an introduction briefing by an experienced Court Tour Guide, the students are able to explore the courts, attend trials and hearings in progress, and sometimes even get to chat with judges! It's a fantastic field trip and experience for any class looking into the realities of the legal and justice system.

<https://classroomlaw.org/student-programs/courthouse-tours/>

Students can complete the **Follow-Up Analysis** worksheet to help them prepare for:

1. A **Socratic Seminar** - based on their pre, during, and post- notes about the hearings the students can answer a question together through discussion:

Is appealing to the Supreme Court an effective way for Oregonians to challenge Oregon laws? Why or why not?

Is it okay for a Supreme Court of a small number of people to have the power to interpret the laws of the state (judicial review power)? Why or why not?

2. A **Reflective or Persuasive Essay** on either of the two cases based on further research or simply the work done prior to and during the hearings
3. A simulated **Congressional Hearing** or **Townhall Meeting** where students prepare brief testimony about the laws in question and how they believe they should be most fairly interpreted
4. A **Moot Court** hearing on other Supreme Court cases to have the experience themselves of the appellate process.

You can find how-to guides and materials for each of these strategies at www.classroomlaw.org/resources

Oral Argument Follow Up Analysis

After you've observed an Oregon Supreme Court Oral Argument, reflect on your experience and what you observed & learned:

1. Which case did you find more interesting & why?
2. What did you find most interesting about the Justices themselves?
3. Do you think the process you observed was an effective way to decide the meaning of Oregon Laws? Why or why not?
4. What might you change about a Supreme Court hearing if you could?
5. Do you feel confident that the Oregon Supreme Court can use their power of **judicial review** effectively for the state? Why or why not?

Now that you've Seen a Supreme Court Hearing: Post-Hearing Survey

Directions: Answer the questions below honestly. There is no grade attached to this but it will help you see how much you learned from this experience.

1. Explain the difference between a trial and an appellate (or Supreme Court) oral argument:
2. Who makes decisions about facts in a case? _____
3. Who makes decisions about law in a case? _____
4. How do cases get to the Supreme Court?
5. What makes an argument persuasive or not?
6. What is judicial review?
7. What do you know about the Oregon Supreme Court?
8. What are you still curious about the Oregon Supreme Court or judicial system?