OF LESSONS LEARNED AND LESSONS NEARLY LOST: THE LINDE LEGACY AND OREGON CONSTITUTIONAL LAW

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It is an honor to have been asked to pay tribute to former Justice, and distinguished scholar-in-residence, Hans Linde and an

years on the bench. The Oregon Supreme Court has adopted a much more rigid originalist view of constitutional interpretation and a method of constitutional analysis more receptive to interest scrutiny and rationality review. Both threaten to undo much of Linde's constitutional legacy. To explore precisely how that is so, I examine in some detail the development of one aspect of Oregon law, pertaining to the constitutional guarantee of freedom of expression, and recount how one of Justice Linde's most well known contributions to the constitutional law of this state very nearly unraveled. In the end, the court retreated. But that result was by no means a sure thing.

I do not mean to suggest that everything that Justice Linde has ever said is inerrant wisdom from on high. In fact, I have been among those who have questioned some of Justice Linde's most well known doctrines, including his thinking about freedom of expression. Some reevaluation of Justice Linde's constitutionalism is not merely inevitable, but is a good thing. At the same time, I remain deeply troubled that the courts are relenting in their commitment to some important principles of Oregon constitutional law that Linde was so instrumental in bringing to fruition. My remarks therefore are in part a tribute and in part a caution.

I. THE FUNDAMENTALS OF LINDE'S CONSTITUTIONALISM

Justice Linde's constitutionalism is nuanced and sophisticated, not easily reduced to a few simple talking points. For my purposes, however, it may be useful to emphasize three key aspects of his thinking about constitutional law.

First, the overarching principle of Linde's approach to constitutional law is the recognition of the independence of state constitutions as sources of law—independent, that is, of the federal constitution. It is common for scholars to trace the origins of state constitutionalism to a 1976 Harvard Law Review article authored by the late Justice William Brennan.¹ But the truth is that Justice Brennan stood on the shoulders of Hans Linde in calling for state

^{1.} William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977). For articles crediting Justice Brennan with initiating a state constitutional revolution, see, e.g., Cathleen Herasimchuk, The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals? 68 TEX. L. REV. 1481, 1492 (1990) (referring to Justice Brennan's article as a "clarion call to state judges to wield their own bills of rights").

courts to recognize the independent significance of their own constitutions as safeguards of the civil liberties of its citizens. Others have addressed this aspect of Linde's contributions, so I will not belabor the point. But any discussion of the Linde Legacy must begin with the recognition of that fundamental principle.

Second, for Linde, state constitutional law is not just significant; it is primary. In fact, in Linde's view, it is not logically possible to speak of state legislation violating a federal constitutional guarantee until state constitutional remedies have been exhausted.² explained in his path-breaking Without "Due Process" article, the federal Bill of Rights applies to the states only through the Due Process Clause of the federal Constitution; that is to say, the federal Bill of Rights applies only if it has been determined that there has been a deprivation of due process in the first place.³ If, however, the state constitution provides a remedy to a litigant, then there has been no deprivation. The point, as Linde is often quick to add, is not pedantic. As Michigan v. Long⁴ makes clear, when a decision rests on an independent state ground, it is not reviewable by the federal courts.

Third, consider Linde's approach to judicial restraint and emphasis on the importance of constitutional text. I understand that it may be surprising to think of Linde in such terms. We have come to associate references to "textualism" with the political conservatism of the likes of Robert Bork and Justice Antonin Scalia. Moreover, we have come to assume that scholars, particularly scholars of Linde's generation, are believers in the legal realist orthodoxy of the academy. Hans Linde, however, has been swimming against the current of realism throughout his career. The trouble with realism, he once remarked, is that it confuses describing what courts actually do with determining what they *ought* to do.⁵

In place of realism, Linde proposed what Robert Nagel characterized as "a relatively modest and sophisticated literalism." 6

^{2.} See, e.g., Hans Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. BALT. L. REV. 379, 383 (1980) ("Just as rights under the state constitutions were first in time, they are first also in the logic of constitutional law.").

^{3.} See Hans A. Linde, Without "Due Process," 49 OR. L. REV. 125, 133 (1970).

Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

^{5.} Linde, supra note 3, at 131. See also Hans A. Linde, Judges, Critics, and the Realist Tradition, 82 YALE L. J. 227 (1972).

^{6.} ROBERT F. NAGEL, INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM 5 (1995).

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In Linde's own words, "textual premises matter in constitutional litigation. There is no such thing as 'unconstitutionality' at large." 7

analysis. As Linde characterized the matter:

[C]ourts must scrutinize the reasons for laws and other actions more or less closely according to a rising scale of elements linked like the double helix of DNA. At the bottom, government acts need only be "rationally" linked to "legitimate" purposes. Plausible claims of constitutional violations demand heightened scrutiny to determine whether the act is "substantially related" to achieving "significant" or "important" governmental interests or objectives. At the top of the scale, the [United States Supreme] Court's formulas allow patent departures from otherwise binding norms if, upon "strict scrutiny," a government's interests are found to be "compelling" and its acts "necessary and narrowly tailored" to achieve those compelling interests. 14

At the core of this "modest literalism," is a concern with the legitimacy of judicial review; that is, the exercise of judicial power to invalidate legislation. That concern has been the peculiar obsession of all constitutional theorists writing during the past half-century, since *Brown v. Board of Education.* For Linde, the answer has always been relatively straightforward: "[A]s long as the court can point convincingly to a command democratically placed in the constitution itself," there simply is no problem of legitimacy when a court acts merely to enforce that democratically originated command. The key is rooting the judicial decision in the text of the constitution.

The unanswered question, of course, is precisely how to determine what the text of the constitution says; how, to return to Linde's colorful metaphor, to ensure that courts do not create butterflies from tadpoles. Interestingly, it is a question to which Linde has devoted little attention. His writings, both on and off the court, are tantalizingly vague about matters of constitutional interpretation.

Linde once likened constitutional interpretation to playing jazz, in that the musician is not tied to the written notes, yet remains "scrupulously faithful to [the] theme." Still, how are we to know that we remain "scrupulously faithful" to the "theme"? I have never been able to get Justice Linde to explain that. For Linde, theories of constitutional interpretation are interesting, but not particularly useful.

^{14.} Linde, *supra* note 9, at 219.

^{15.} Linde, supra note 8, at 167-68.

^{16.} Id. at 169.

^{17.} Id. at 171.

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met by state law.²⁶

That tracks precisely what Linde proposed as early as 1970 in his Without "Due Process" article. Moreover, during the 1980s, when

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A. Continuing Vitality in General

There is no question but that the Oregon courts remain committed to the independent significance of state constitutional law. There is no hint that the Oregon courts are retreating to the sort of lockstep federal jurisprudence of the past. To this day, the courts of this state decide some of the most important and controversial issues of the day—the authority of local governments to recognize gay marriage,⁴⁷ the regulation of nude dancing,⁴⁸ the criminalization of distributing obscene materials to children⁴⁹—with barely a mention of the federal constitution, relying instead on the Oregon Constitution. That much of Linde's constitutionalism appears safe and secure.

The *primacy* of the state constitution is, however, a slightly different proposition. As I have noted, in the 1980s, the appellate courts seemed committed to the first-things-first doctrine. More recently, however, the courts are inclined to pay little more than lipservice to the rule, if they cite it at all. The courts continue to cite *Clark* and *Kennedy* for the proposition that we generally decide state constitutional issues before deciding federal issues, to be sure. But, in a surprising number of cases, without any reference to *Sterling*, *Clark*, *Kennedy*, or the first-things-first doctrine, the courts proceed to decide cases by reference to federal constitutional law without first determining whether state constitutional law is dispositive.

In regulatory takings cases, for example, the Supreme Court repeatedly and expressly has assumed that the state and federal constitutions mean the same thing, simply because none of the parties suggested anything different. That practice is directly contrary to the first-things-first doctrine and, in particular, *Kennedy*. In a similar vein, my own court has taken to declining to address state constitutional contentions that have not been previously raised to the

^{47.} Li v. State of Oregon, 110 P.2d 91 (Or. 2005).

^{48.} City of Nyssa v. Dufloth, 121 P.3d 639 (Or. 2005).

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trial court or agency whose decisions we are reviewing. 53 Thus, considerations of preservation now effectively trump what Sterling

without knowing their history." ⁵⁹ Yet he was quick to add that "it does not follow that larger principles are confined to what the generation that adopted [specific clauses] was ready to live by." ⁶⁰

The Supreme Court has a much more rigid view of the role of history in constitutional interpretation. As the court declared in Lakin v. $Senco\ Products$, for example, concerning the meaning of the constitutional provision guaranteeing the right to a jury trial, "whatever the right to a jury trial in a civil case meant in 1857, it has the same meaning today." In a wide variety of constitutional cases, the court has applied the same sort of rigid originalism, including the prohibition against $ex\ post\ facto\ laws, 62$ the grand jury quorum requirement, $ex\ post\ facto\ laws, 63$ the separate vote requirement for amendments to the state constitution, $ex\ post\ facto\ laws, 64$ the imitation on legislative enactments,

That point is worth emphasizing. The court did not overrule *Whiffen* because it had found some "silver bullet" of historical evidence demonstrating that the case had been wrongly decided. The court overruled the case because "we have found nothing to support the conclusion set out in *Whiffen*." That is a relatively low threshold for overruling established precedent.

The second respect in which the Oregon Supreme Court is charting a course rather different from the one set out by Justice Linde pertains to an emergence of more overt balancing of interests and a

But a year later, Linde was off the bench, and the court decided *Sealy v. Hicks*, ⁷⁸ a challenge to the constitutionality of a statute of ultimate repose on Article I, section 20, grounds. The court upheld the statute, explaining that "[i]f the legislature attempted to deny a recovery to specific individuals, or to permit the courts to deny such a recovery to arbitrarily chosen members of the same class, Article I, section 20, might be violated. But that is not the case here." ⁷⁹ The implication was that, if the legislature acts in a non-arbitrary manner, its classifications are constitutionally permissible.

That implication was confirmed in *Seto v. Tri-County Metropolitan Transportation District of Oregon*, ⁸⁰ in which the court upheld a legislative classification based upon geography. The court held that the classification was "tested by whether the legislature had authority to act and whether the classification [had] a rational basis." ⁸¹ *Sealy* was cited as authority for that analysis.

It is now quite common for Oregon appellate court decisions applying Article I, section 20, to frame their analysis in terms of the very "rising scale of elements" that Linde has derided throughout his career. Courts now routinely frame Article I, section 20, challenges in terms of, first, slotting a classification as either "suspect" or not and, second, applying an appropriate level of scrutiny depending on the nature of the classification.

The Supreme Court's decision in *In re Marriage of Crocker*⁸³ nicely illustrates the current practice. At issue in that case was the constitutionality of ORS 107.108(1), which requires non-custodial divorced parents to pay child support to children in school, while imposing no such requirement of parents who are not divorced. The court explained its Article I, section 20, analysis in terms of determining first, "whether the legislature had authority to act"; second "whether the disparate treatment had a rational basis." ⁸⁴ Elaborating on, and applying, that test, the court explained:

A person who is denied what a favored class receives has standing to demand equal treatment, though this leaves an issue whether to strike down the special privilege or to extend it beyond the favored

^{78. 788} P.2d 435 (Or. 1990).

^{79.} Id. at 440.

^{80. 814} P.2d 1060, 1061 (Or. 1993).

^{81.} Id. at 1066.

^{82.} *Id*.

^{83. 22} P.3d 759, 765 (Or. 2001).

⁸⁴ Id.

class. Under the equal-privileges doctrine, the classification must be based on the personal or social characteristics of the asserted "class." When distinctions are based on personal characteristics

restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Bearly Oregon case law on the provision is sparse. Among the earliest is State v. Jackson, In which the court addressed the constitutionality of a state law prohibiting the creation and distribution of obscenity. In dictum, the court noted that Article I, section 8—with its two clauses, one a broad declaration of freedom and the other a reservation of state authority to regulate "abuse" of that freedom—appeared to reflect the English common law distinction between prohibiting prior restraint and permitting punishment of offensive publication after the fact, as famously set out by Blackstone in his Commentaries.

In the meantime, the United States Supreme Court for a halfcentury had struggled to articulate a coherent interpretation of the

is of a kind which falls under any circumstances within the meaning of the [F]irst [A]mendment. 92

That is to say, if the subject of the regulation is "speech" within the meaning of the First Amendment, the regulation is unconstitutional. Period.

Linde was quick to add that reading the First Amendment in that fashion did not leave legislators powerless to regulate the harmful effects that prompted their legislative concern in the first place. The answer, he said, is to regulate the effects themselves, not the speech that creates a risk that the effects will occur. ⁹³

The justification for such an absolute approach to the protection of speech, Linde insisted, was the text of the First Amendment itself. Dryly acknowledging that "[a]ttention to text earns only professional scorn in constitutional law," he nevertheless insisted that, "when one of among many constitutional limitations is literally directed against lawmaking, might the text perhaps embody a reason that even realists can respect?" ⁹⁴

When he moved from the classroom to the bench, Linde found an opportunity to apply his brand of textualism to free expression rights under the state constitution in *State v. Robertson*. At issue in *Robertson* was the constitutionality of a state law defining the crime of coercion. That law provided that it is a crime to coerce another "to engage in conduct from which he has a legal right to abstain from engaging in conduct which he has a legal right to engage" by means of threats of publishing private information about that individual. The defendant had argued that, among other things, the statute violated both Article I, section 8, and the free speech guarantee of the First Amendment.

Justice Linde began by declining to address the applicability of the First Amendment before addressing state constitutional issues—an approach that, by 1982, had become common. He then turned to Article I, section 8. The way he did so is intriguing, because he made no mention of the fact that he was announcing a new approach to interpreting that particular provision. Almost nonchalantly, Linde

^{92.} Id. at 1183.

^{93.} Id. at 1179.

^{94.} Id. at 1175.

^{95. 649} P.2d 569 (Or. 1982).

^{96.} Id. at 571.

^{97.} Id.

declared, as if the conclusion were obvious to anyone who read the constitutional text, that

Article I, section 8 . . . forbids lawmakers to pass any law "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," beyond providing a remedy for any person injured by the "abuse" of this right. This forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.

If—and only if, Linde emphasized—a law passes that test is it open to a narrowing construction to avoid unconstitutional overbreadth. Continuing with the subject of overbreadth, Linde explained:

That an offense includes the use of words is not in itself fatal to the enactment of a prohibition in terms directed at causing harm rather than against words as such. Communication is an element in many traditional crimes. As stated above, article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences It means that laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end. 99

The foregoing explanation of the scope of Article I, section 8, was patently based on Linde's earlier writing—in particular, the *Brandenberg* article—which, in turn, was plainly rooted in the categorical nature of the constitutional text. That emphasis on text, however, led to problems, one of which deserves some emphasis.

A literal reading of Article I, section 8, necessarily would mean that the state is powerless to regulate crimes that involved speech—perjury, solicitation, fraud, and the like. It seemed to Linde obvious that the framers of the Oregon Constitution could not have intended to

^{98.} Id. at 576 (citations and footnotes omitted).

^{99.} Id. at 578-79.

prohibit regulation of such activities. So he fashioned an exception to the otherwise absolute protections of Article I, section 8, for restraints that are "wholly contained within some historical exception that was well established" at the time of the framing of the constitution that Article I, section 8, "demonstrably [was] intended not to reach."

It has always struck me that the recognition of a historical exception is oddly dissonant with Linde's modest literalism. Where are the words in Article I, section 8, that support the existence of a historical exception, much less a strangely inverted historical exception that requires one to prove a negative; that is, to prove that the framers would *not* have intended Article I, section 8, to extend to a particular restraint? Those and other questions harried the *Robertson* analysis in the succeeding years. Two problems in particular are important to mention because they threatened the vitality of the *Robertson* framework.

The initial challenge had to do with the nature of the historical exception test and how it applies. What exactly does it mean to say that there must be proof that the framers intended the state constitution *not* to apply to a given restraint? What sort of evidence would suffice? It is not an idle or academic question. Because the fact is that there is *no* affirmative evidence that the framers of the Oregon Constitution intended anything in particular about the scope of Article I, section 8, as there are no recorded debates concerning the provision.

The cases following Robertson offered few answers. And the answers that they offered were not entirely consistent. In $State\ v$. Moyle, 100 the court addressed the constitutionality of a harassment statute. The state argued that the statute was wholly contained within a well established exception for verbal harassment that dated back to the Waltham Black Act of 1723. 101 If the court seriously meant that the state's burden was to show that the framers affirmatively intended that such offenses were not to be subject to Article I, section 8, the

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An additional challenge to the vitality *Robertson* lay in its absolute and uncompromising nature. The fact is, in some cases, *Robertson* led where the courts did not want to go. That forced the court to qualify the analysis, ultimately in ways that left in question precisely what the *Robertson* analysis currently comprises. In some cases, it even led the court to speak in terms of balancing rights of free expression against other constitutional interests.

In re Lasswell¹⁰⁸ serves as an example. As I have mentioned, that was a disciplinary case in which a prosecutor was charged with violating a rule prohibiting public statements regarding pending criminal litigation. Is it a regulation of the content of speech? Certainly. Is it wholly contained within a well established historical exception? Certainly not, given that regulation of the legal profession did not occur until well after the adoption of the constitution. So the regulation is unconstitutional, right? Wrong. In Lasswell, the court in effect said that, on balance, the prosecutor's rights of free expression simply were outweighed by the right of the criminally accused to a fair trial.

In re Fadeley¹⁰⁹ presents another example. At issue there was the constitutionality of a rule of judicial conduct that prohibited judges from personally soliciting campaign contributions. Again, is it a restraint of expression? Under the court's cases, clearly so. Is it wholly contained within a well established historical exception? No one even suggested that. So it is unconstitutional under *Robertson*, right? Wrong again. The court held that, notwithstanding what it said in *Robertson*, "[n]ot even Article I, section 8, is absolute—there are exceptions to its sweep."

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In the meantime, in the early 1990s, the Supreme Court began to frame its analysis of other constitutional provisions in the originalist manner that I have described. 112 Free expression cases, however, remained unaffected, at least for a time.

In *State v. Stoneman*, ¹¹³ for example, the court addressed the constitutionality of a statute that prohibited the production or dissemination of child pornography. ¹¹⁴ The court did so without pausing to consider whether the *Robettlo*

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is the way in which the Supreme Court addressed the state's challenge to the vitality of *Robertson* as a viable constitutional doctrine. In brief, the court recast the inquiry before it in two ways that made the answer a foregone conclusion.

First, the court openly acknowledged that *Robertson* had not exactly been developed with the framers' intentions in mind, although it, somewhat disingenuously, suggested that the reason for that is simply that "the parties in that case did not emphasize it." ¹³⁵ But, in deciding to entertain the state's challenge to *Robertson*, the court did something that it did not do in *Stranahan*: It required the state to establish not just that current doctrine cannot be justified by reference to historical materials but that there is evidence that the framers did *not*

wide variety of the most controversial of issues on the basis of the state constitution without much mention of the federal constitution at all. That, to me, is a good thing. At the same time, the courts are relenting in their commitment to the first-things-first doctrine, ostensibly because of considerations of preservation and efficiency. I am troubled by that development. I do not understand how we may relegate a doctrine of judicial authority to one of convenience. In my view, Justice Linde articulated sound reasons, analytical and practical, for adhering to the first-things-first doctrine, 154 and we should return to it.

As for the substance of recent state constitutional decisions, again, my reaction is mixed. I find some of the current case law anomalous. Privileges and immunities cases, for example, now look strikingly like federal equal protection cases, with multiple tiers of scrutiny and rationality review. In fairness to the current court, perhaps that is unavoidable. It is in the nature of legislation to draw distinctions, and they cannot all be impermissible. At some point, the

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today is a tribute to the strength of his remarkable work.

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