

**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 honor to be among such distinguished company in carrying out that responsibility.

My particular area of focus is Justice Linde’s impact on the development of Oregon constitutional law. In a sense, it is not a difficult task. I daresay it would be impossible to open up a page of the reported constitutional decisions of the Oregon appellate courts over the past two decades and fail to find Hans Linde’s fingerprints. His influence has been profound. In this essay, I discuss the nature of that influence and how it came to define so much of what we know as Oregon constitutional law.

I also examine the extent to which Justice Linde’s influence endures. That is a more difficult question. There are aspects of Linde’s constitutionalism that are firmly rooted in the jurisprudence of this state and are in no danger of being unsettled. In other aspects, however, his influence is being challenged. In particular, since Justice Linde’s retirement, the constitutional law of this state has been moving in directions quite different from those charted during his

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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 As he 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. Long*⁴ 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).

4. *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).

In Linde's own words, "textual premises matter in constitutional litigation. There is no such thing as 'unconstitutionality' at large."⁷ In a more poetic mood, he once complained in the following terms about decisions of courts less concerned with such textual premises:

A long buried grub surprisingly metamorphoses into a butterfly and remains the same insect, and an underwater tadpole turns into an airbreathing frog; but some decisions have made butterflies grow from tadpoles, to the applause of theorists who prefer butterflies. There are limits to what can be explained as constitutional law before turning it into genetic engineering.⁸

A corollary of that emphasis on constitutional text is an aversion to the balancing of constitutional interests. To Linde, such balancing is incoherent nonsense, precisely because constitutional texts do not support it. "The Constitution," he explained, "directs governments how to act and how not to act. The Constitution does not say that a government may act contrary to those directives if judges believe that the government has good enough reasons to do so."⁹

The sort of rationality review that has become so common in cases arising under the Equal Protection clause of the Fourteenth Amendment to the federal Constitution is a subject of special scorn from Linde. "The battery of adjectives that make up the conventional formula of attack on governmental action—'arbitrary,' 'capricious,' 'discriminatory,' as well as 'reasonable,' and 'legitimate' and their opposites," he said derisively, "are the most cherished ammunition in the lawyer's verbal arsenal."¹⁰ They are, however, no more than "conclusory epithets," but at best "mere rhetorical surplusage."¹¹ Worse, Linde explained, they are not constitutional terms.¹² Constitutional guarantees of equal protection or equal privileges and immunities say nothing about legislation needing to be "reasonable," "rational," or the like.¹³

Still worse for Linde was the hierarchy of levels of interest scrutiny that had come to characterize federal Equal Protection

7. Linde, *supra* note 3, at 131.

8. Hans A. Linde, *E Pluribus-Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 196 (1984).

9. Hans A. Linde, *Who Must Know What, When, and How: The Systematic Incoherence of "Interest" Scrutiny*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 219, 219 (1993).

10. Linde, *supra* note 3, at 166.

11. *Id.* at 166-67.

12. *Id.* at 167.

13. *Id.*

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*.¹⁵ 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.¹⁶ 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.”¹⁷ 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.

As he once quipped, such theories are “brilliant, articulate, erudite, often witty, full of serious purpose, and well worth reading. The show itself is good fun, if your taste runs to such things as Tom Stoppard’s plays. Those less fond of theory for its own sake, who include most law students and lawyers, may wonder whether anything practical follows from it.”¹⁸

It is not that Linde denies the importance of interpretation. As he acknowledged in *Without “Due Process,”* “[u]ndeniably the constitutional text requires interpretation; courts must decide what the words *mean*.”¹⁹ But his only prescription for determining that meaning is that the answer will depend from case to case. “Battles rage,” he commented, “over what role verbal meaning, historic purposes, and present needs should play in the interpretation. The answer must differ for different kinds of text.”²⁰

If there is a weakness in the Linde legacy, this is it: a failure to provide a theoretical foundation for determining what the text of a state constitution means. Complicating matters is the fact that, when Professor Linde became Justice Linde, he found that it was not so easy to adhere to his own core principles of constitutionalism. Unlike his law review articles, Justice Linde’s judicial opinions required votes. The result was a series of compromises that, when combined with his disinclination to concern himself with matters of interpretation, left his work vulnerable.

I submit that this point is key to understanding the current vitality—and in some cases lack of vitality—of Justice Linde’s vision for Oregon constitutional law. For, within a few short years of Linde’s departure from the bench, the Oregon Supreme Court filled the interpretive vacuum that he left behind. And the court filled it with a rigid, if revisionist, originalism that has produced constitutional decisions justified by resort to original intent, often with the most tenuous connection to constitutional text and only the most fragile relation to core principles of Linde’s constitutionalism.

II. THE IMPACT OF LINDE’S CONSTITUTIONALISM

But I am getting ahead of myself. At this point, let us consider how Linde’s constitutionalism became a part of the fabric of Oregon

18. *Id.* at 172.

19. Linde, *supra* note 3, at 131 (emphasis in original).

20. *Id.*

constitutional law. It did just that, and in a remarkably short period of time. In part, that is no doubt a tribute to the compelling nature of Linde's arguments. In part, I suspect that it is also a tribute to the compelling nature of Linde's personality. As his former colleagues readily attest, Linde was untiring in his efforts to reshape Oregon constitutional law. Those efforts paid off. During his thirteen years on the bench, the Oregon courts underwent a revolution in their thinking about the constitutional law of this state.

First, the courts embraced the independent significance of state constitutional law. To be sure, there were hints of independent thinking about state constitutional law much earlier.²¹ But such hints were just that. And they were exceptional. In most cases, the Oregon courts during the first three-quarters of the twentieth century parroted federal constitutional doctrines without giving any thought to the possibility of independent state constitutional analysis.²²

That changed in the late 1970s—so quickly that, less than a decade later, Justice W. Michael Gillette could confidently declare that “I should like to think that the Oregon Constitutional Revolution has been accomplished.”²³ According to Justice Gillette, the independence of the Oregon Constitution, “so long neglected, is now accepted by all.”²⁴

Second, the courts embraced the primacy of Oregon constitutional law. In *Sterling v. Cupp*,²⁵ the Supreme Court explained:

The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. That is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully

21. See, e.g., *State v. Savage*, 184 P. 567, 570 (Or. 1919) (recognizing differences between the wording and potential legal significance of the federal Equal Protection Clause and the state privileges and immunities clause).

22. See, e.g., *Minielly v. State*, 411 P.2d 69, 73-77 (Or. 1966) (First Amendment analysis controls both federal and state free expression arguments); *Cereghino v. State Highway Comm'n*, 370 P.2d 694 (Or. 1962) (state and federal takings clauses “are identical in language and meaning”); *Plummer v. Donald Drake Co.*, 320 P.2d 245, 248 (Or. 1958) (“The controlling principles which guide the courts in determining questions of alleged unconstitutional discrimination . . . are the same whether it is the [E]qual [P]rotection [C]ause of the Fourteenth Amendment of the Constitution of the United States which is invoked or the privileges and immunities provision in Article I, § 20 of the Oregon Constitution.”).

23. *State v. Owen*, 729 P.2d 524, 531 (Or. 1986) (Gillette, J., concurring).

24. *Id.*

25. 625 P.2d 123 (Or. 1981).

met by state law.²⁶

That tracks precisely what Linde proposed as early as 1970 in his *Without "Due Process"* article.²⁷ Moreover, during the 1980s, when Linde was on the court, the "first-things-first" rule explained in *Sterling* was taken seriously.²⁸ In *State v. Clark*, for example, the court concluded that it was obligated to address an issue of state constitutional law that the appellant had actually disclaimed in favor of a federal constitutional argument.²⁹ Similarly, in *State v. Kennedy*, the court held that the fact that the parties have failed to articulate a separate analysis of an otherwise applicable provision of the state constitution does not relieve the court of the obligation to address it.³⁰

Third, Linde's modest literalism and his aversion to balancing found fertile ground in the cases that came before the court during his tenure as a judge. The Oregon Supreme Court, for example, came to conclude that, as Linde had insisted, the Oregon Constitution contains no due process clause.³¹ It is now quite common to see cases that repeat the observation;³² one that is directly traceable to Justice Linde's work.

The Oregon Supreme Court similarly came to abandon its propensity to equate the Equal Protection Clause and the privileges and immunities clause of Article I, section 20, of the Oregon Constitution. In *Clark*,³³ one of Linde's most well known opinions, the court concluded that the two clauses are distinct in phrasing, in history, and in legal significance. In particular, the court abjured the sort of tiers of scrutiny and rationality analysis that had come to characterize Equal Protection jurisprudence.³⁴

The word "balancing" became a pejorative, mentioned always in quotation marks and usually by way of disparaging federal

26. *Id.* at 126.

27. Linde, *supra* note 3, at 135.

28. 625 P.2d at 126.

29. 630 P.2d 810, 812 n. 1 (Or. 1981). Justice Thomas Tongue wrote separately to complain that the majority had reached a state constitutional issue that the defendant had not cited in his brief and, in fact, had disclaimed at oral argument before the court. *Id.* at 820 (Tongue, J. concurring).

30. 666 P.2d 1316, 1320-21 (Or. 1983).

31. *Cole v. Dept. of Revenue*, 655 P.2d 171, 173 (Or. 1982) (Article I, section 10 "is neither in text nor in historical function the equivalent of a due process clause").

32. *See, e.g., State v. Miller*, 969 P.2d 1006, 1013 (Or. 1998); *State ex rel. Juvenile Dept. of Multnomah County v. Geist*, 796 P.2d 1193 (Or. 1990).

33. 630 P.2d at 810.

34. *Id.*

constitutional law.³⁵ As the court explained in *Libertarian Party of Oregon v. Roberts*,³⁶ for example, “[a] court’s proper function is not to balance interests but to determine what the specific provisions of the constitution require and to apply those requirements to the case before it.”³⁷ Perhaps most famously, in free expression cases, the Supreme Court came to adopt Justice Linde’s view that the constitutional text did not permit the sort of balancing of interests that had become so familiar to First Amendment cases.³⁸ More about that presently.

By the end of his time on the bench, Justice Linde had authored opinions that literally redefined this state’s law pertaining to criminal law,³⁹ religion,⁴⁰ free speech,⁴¹ state preemption of local government authority,⁴² gubernatorial authority,⁴³ justiciability and judicial authority,⁴⁴ privileges and immunities,⁴⁵ and zoning.⁴⁶ And that refers only to the opinions that he authored.

III. CONTINUING VITALITY OF LINDE’S CONSTITUTIONALISM

What of Linde’s constitutionalism in the years that have followed his retirement from the bench? As I mentioned at the outset, Linde’s approach to constitutional law is doing very nicely in some respects. But, in other respects, it has been subject to significant challenge.

35. See, e.g., *Hale v. Port of Portland*, 783 P.2d 506, 515 (Or. 1989) (rejecting an argument based on a “test drawn from the equal protection doctrine (and akin to ‘balancing’) that for purposes of Article I, section 20, has been superseded by more recent decisions”); *Oregonian Publishing Co. v. O’Leary*, 736 P.2d 173, 178 (Or. 1987) (“The government cannot avoid a constitutional command by ‘balancing’ it against another of its obligations.”).

36. 750 P.2d 1147, 1151 (Or. 1988).

37. *Id.*

38. See *infra* notes 86-99 and accompanying text.

39. *Brown v. Multnomah County Dist. Ct.*, 570 P.2d 52 (Or. 1977).

40. *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or. 1986).

41. *State v. Robertson*, 649 P.2d 569 (Or. 1982); *City of Portland v. Tidyman*, 759 P.2d 242 (Or. 1988).

42. *LaGrande/Astoria v. PERB*, 576 P.2d 1204, *adh’d to on reh’g*, 586 P.2d 765 (Or. 1978).

43. *Lipscomb v. State Bd. of Higher Educ.*, 753 P.2d 939 (Or. 1988).

44. *Kay v. David Douglas Sch. Dist. No. 40*, 738 P.2d 1389 (Or. 1987).

45. *State v. Clark*, 630 P.2d 810 (Or. 1981).

46. *Suess Builders Co. v. City of Beaverton*, 656 P.2d 306 (Or. 1982).

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.⁵⁰ More recently, however, the courts are inclined to pay little more than lip-service 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.⁵¹ 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.⁵² 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).

49. *State v. Maynard*, 5 P.3d 1142 (Or. App. 2000).

50. *See supra* notes 25-30 and accompanying text.

51. *See, e.g., Davis v. Bd. of Parole and Post-Prison Supervision*, 144 P.3d 931, 934 (Or. 2006) (citing *Kennedy* as “counseling against reaching federal constitutional issues unnecessarily”); *State v. Vasquez*, 34 P.3d 1188, 1192 (Or. App. 2001) (citing *Kennedy* for the proposition that courts “will reach federal constitutional arguments only if questions of state law are not dispositive”); *State v. Joslin*, 29 P.3d 1112, 1116 (Or. 2001) (“We begin with defendant's state constitutional argument.”).

52. *See, e.g., GTE Nw., Inc. v. Pub. Util. Comm'n*, 900 P.2d 495, 501 n.6 (Or. 1995).

trial court or agency whose decisions we are reviewing.⁵³ Thus, considerations of preservation now effectively trump what *Sterling* described as a matter of state and federal constitutional authority. Neither the Oregon Supreme Court nor the Court of Appeals has ever explained this relegation of the first-things-first rule to a doctrine of convenience.

As for substantive Oregon constitutional law, a review of the cases suggests that the Oregon Supreme Court is charting a rather different course from the one set out by Justice Linde in two respects that I wish to highlight.

The first respect in which the course is changing pertains to constitutional interpretation generally. The Oregon Supreme Court's cases over the last 15 years have come to reflect a vigorous commitment to a jurisprudence of original intent. As I have mentioned, Linde did not devote much attention to matters of interpretive theory. In the 1990s, however, the Supreme Court did. With three-part interpretive templates for constitutions,⁵⁴ statutes,⁵⁵ contracts,⁵⁶ and insurance policies,⁵⁷ the Oregon Supreme Court began to systematize its thinking about all matters interpretive. In the case of constitutions, the court staked out a decidedly originalist vision. Henceforth, the Oregon Constitution would mean what its framers in 1857 intended it to mean.

This was decidedly not what Linde had in mind. Not that he was averse to resorting to history. Linde often relied on history in an effort to understand the context in which particular provisions emerged to become part of the constitution.⁵⁸ "Often," he once observed, "you cannot argue intelligently about specific clauses

53. See, e.g., *State v. Riggs*, 923 P.2d 683, 685 (Or. App. 1996).

54. The approach was formalized into a three-part method of analysis in *Priest v. Pearce*, 840 P.2d 65, 67 (Or. 1992), that requires examination of the "specific wording" of a provision of the original constitution, "the case law surrounding it and the historical circumstances that led to its creation." The goal of that analysis, the Oregon Supreme Court has explained, is "to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it." *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 237 (Or. 2000) (quoting *Jones v. Hoss*, 285 P. 205, 206 (Or. 1930)). A similar method of analysis is required for determining the legal significance of provisions adopted by initiative. See generally *Ecumenical Ministries of Oregon v. Oregon State Lottery Comm.*, 871 P.2d 106, 110-11 (Or. 1994).

55. *PGE v. Bureau of Labor and Indus.*, 859 P.2d 1143, 1146 (Or. 1993).

56. *Yogman v. Parrott*, 937 P.2d 1019, 1021-22 (Or. 1997).

57. *Hoffman Constr. Co. v. Fred S. James & Co.*, 836 P.2d 703, 706 (Or. 1992).

58. See, e.g., *Lipscomb v. State Bd. of Higher Educ.*, 753 P.2d 939, 943-46 (Or. 1988).

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.”⁶¹ 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,⁶³ the separate vote requirement for amendments to the state constitution,⁶⁴ and the one-subject limitation on legislative enactments,⁶⁵ to name but a few examples.

In fact, the court has invited parties to argue to it that settled doctrines should be reconsidered and overruled if they were developed without adequately considering the intentions of the framers. In *Stranahan v. Fred Meyer*,⁶⁶ the court explained, after setting out its originalist method of analysis, that “[w]e will give particular attention to arguments that . . . demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question.”⁶⁷ In *Stranahan*, the court entertained just such a suggestion, concluding that an earlier case, *Lloyd Corp. v. Whiffen*⁶⁸ (in which the court recognized a constitutional right to collect initiative petition signatures on certain private property), could no longer be sustained.⁶⁹ The court concluded that the doctrine could not be sustained because of a complete absence of evidence that the framers of the Oregon Constitution intended it.⁷⁰

59. Linde, *supra* note 8, at 184.

60. *Id.*

61. *Lakin v. Senco Products, Inc.*, 987 P.2d 463, 468 (Or. 1999).

62. *State v. Cookman*, 920 P.2d 1086, 1091-93 (Or. 1996).

63. *State v. Conger*, 878 P.2d 1089, 1093 (Or. 1994).

64. *Armatta v. Kitzhaber*, 959 P.2d 49, 54-55 (Or. 1998).

65. *McIntire v. Forbes*, 909 P.2d 846, 854 (Or. 1996).

66. 11 P.3d 228 (Or. 2000).

67. *Id.* at 237.

68. 849 P.2d 446 (Or. 1993).

69. *Stranahan*, 11 P.3d at 243.

70. *Id.*

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*.”⁷¹ 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 revival of interest scrutiny and rationality review. Particularly in the area of privileges and immunities case law, the Oregon courts quite commonly employ a method of analysis that is only modestly distinct from federal Equal Protection analysis.

To some extent, the genesis of that development may be found in Justice Linde’s own opinion in *Clark*.⁷² In that case, the court concluded that Article I, section 20, of the Oregon Constitution “forbids inequality of privileges or immunities not available ‘upon the same terms,’ first, to any citizen, and second, to any class of citizens.”⁷³ *Clark*, however, did not go so far as to say that *all* differences in treatment among classes of citizens are unlawful, only those differences that are not justified by “legitimate reasons.”⁷⁴ What are “legitimate reasons”? According to Justice Linde (in an often overlooked passage), they are reasons determined by “the usual criteria of equal privileges and immunities or equal protection.”⁷⁵

At first, the court rejected any suggestion that *Clark* stood for the proposition that state privileges and immunities analysis involves anything like Equal Protection analysis. In *Hale v. Port of Portland*,⁷⁶ for example, the plaintiffs challenged the constitutionality of a tort liability limit, arguing that the cap had no rational basis. The court rejected the contention, explaining that “[t]his is a test drawn from federal equal protection doctrine (and akin to ‘balancing’) that for purposes of Article I, section 20, has been superseded by our more recent decisions.”⁷⁷

71. *Id.*

72. *State v. Clark*, 630 P.2d 810 (Or. 1981).

73. *Id.* at 814.

74. *Id.* at 816.

75. *Id.* at 817.

76. 783 P.2d 506 (Or. 1989).

77. *Id.* at 515.

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.⁸²

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 that are not immutable, this court reviews the classification for whether the legislature had a rational basis for making the distinction. Marital status is not an immutable trait. Thus to withstand constitutional scrutiny under Article I, section 20, it is necessary only that the statute in question be based on rational criteria. We turn to the issue whether there is a rational basis for treating the class of which father is a member in the way that it is treated under the statute. The answer to that question is not difficult. A legislator rationally could believe that households in which the parents do not live together might need judicial assistance in making educational decisions, because the absence of cohabitation itself likely reflects a lack of harmony and consensus in parental decision-making. There is no basis for invalidating ORS 107.108(1) under Article I, section 20, of the Oregon Constitution.⁸⁵

What is surprising is how closely state privileges and immunities analysis parallels federal equal protection analysis. At this point, the differences between the two are rather subtle. State analysis consists of two tiers of scrutiny; one for suspect classifications and the other for all other constitutionally significant classifications. The former classifications are subject to heightened scrutiny, while the latter are reviewed for rationality. Federal analysis, in contrast, is generally described in terms of three tiers of scrutiny. But in other respects, the analysis is remarkably similar.

B. Threats to Linde’s Constitutionalism: The Free Expression Example

The combination of the Supreme Court’s commitment to a jurisprudence of original intent, combined with a relaxation of its earlier aversion to balancing of constitutional interests, threatens to undo much of the constitutionalism of Justice Linde. Space does not permit an exhaustive examination of how that it so. Let us instead consider one example in some detail to see how those factors very nearly undermined one of Justice Linde’s most well known contributions to Oregon constitutional law, namely the law of free expression.

Article I, section 8, provides that “[n]o law shall be passed

85. *Id.* at 766 (internal quotation marks and citations omitted).

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.”⁸⁶ Early Oregon case law on the provision is sparse. Among the earliest is *State v. Jackson*,⁸⁷ 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*.⁸⁸

In the meantime, the United States Supreme Court for a half-century had struggled to articulate a coherent interpretation of the even more sweepingly phrased First Amendment. The federal constitutional provision, unlike its Oregon counterpart, is absolute in its phrasing and contains not even an exception for regulation of abuses of any sort. Notwithstanding the phrasing of the First Amendment, the United States Supreme Court steadfastly refused to give the clause such absolute effect, preferring to construe the constitution to permit regulation of some forms of speech, such as speech that produced what the United States Supreme Court regarded as impermissible harmful effects. In 1969, in *Brandenburg v. Ohio*,⁸⁹ the Court phrased such permissible regulation in terms of controlling incitement to “imminent lawless action.”⁹⁰

The following year, Linde published his influential critique of *Brandenburg*.⁹¹ In the *Brandenburg* article, Linde challenged the Supreme Court’s disinclination to read the First Amendment as written; that is, as an absolute prohibition of any legislation that abridges free speech:

The [F]irst [A]mendment invalidates any law directed in terms against some communicative content of speech or of the press, irrespective of extrinsic circumstances either at the time of enactment or at the time of enforcement, if the proscribed content

86. OR. CONST. art. I, § 8.

87. 356 P.2d 495 (Or. 1960).

88. *Id.* at 499-500.

89. 395 U.S. 444 (1969).

90. *Id.* at 447.

91. Hans A. Linde, “*Clear and Present Danger*” Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

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*.⁹⁵ 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.⁹⁶ 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.⁹⁷

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.⁹⁸

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 *Brandenburg* 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 opinion could have been quite brief. As I have mentioned, there is no historical evidence affirmatively demonstrating that the framers of the Oregon Constitution intended that *any* particular restraints survive adoption of Article I, section 8. The court did not rely on that point, however. Instead, the court embarked on a recounting of the common law and legislative history of the subject, ultimately

100. 705 P.2d 740, 745-46 (Or. 1985).

101. *Id.* at 744.

concluding that the state failed in its burden because the Oregon Territory's version of the Waltham Black Act had been repealed by the time of statehood. The implicit suggestion was that, if the legislation had survived statehood, things might have turned out differently.

In *State v. Henry*,¹⁰² the court took a similar tack. At issue was the constitutionality of a statute prohibiting distribution of obscene publications. Once again, the state argued that regulating obscenity was wholly contained within a well established historical exception to constitutional guarantees of free expression. This time, the state even had an Oregon territorial statute that had survived the adoption of the constitution.¹⁰³ The court still was not persuaded. It relied instead on its own version of the history of the regulation of obscenity, ending with the conclusion that—withstanding unbroken centuries of state regulation of the material, including Oregon statutes prohibiting the distribution of obscene materials to minors—Oregon's framers intended something different. Oregon's framers, the court said, were a "robust" bunch that did not concern themselves with such matters, at least not as to adults.¹⁰⁴ The court expressly left open the possibility that there might indeed be room for an historical exception for regulation of speech for the protection of children.¹⁰⁵

Some observers—like me—noted that cases such as *Moyle* and *Henry* seemed to suggest that the court interpreted the historical exception not so narrowly as *Robertson* had stated, but instead on a more general determination of what the framers intended Article I, section 8, to mean.¹⁰⁶ That created an interesting problem, for if it is the appropriate analysis, then the *Robertson* historical "exception" could well swallow the rule. It is, after all, relatively easy to demonstrate that the predominant view in the nineteenth century was that constitutional guarantees of freedom of expression had no greater effect than to prohibit prior restraints.¹⁰⁷

102. 732 P.2d 9 (Or. 1987).

103. *Id.* at 15.

104. *Id.* at 16.

105. *Id.* at 18.

106. Jack L. Landau, *Hurrah for Revolution*, 79 OR. L. REV. 793, 848-50 (2000). See also William R. Long, *Requiem for Robertson: The Life and Death of a Free-Speech Framework in Oregon*, 34 WILLAMETTE L. REV. 101, 118 (1998) (referring to the court's apparent focus on whether there existed particular regulations of speech at the time of the ratification of the First Amendment and the Oregon Constitution).

107. See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 421 (1868) ("[I]t is well understood and received as a commentary on this

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 Lasswell*¹⁰⁸ 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 Fadeley*¹⁰⁹ 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."¹¹⁰ The court then recognized one such exception for the regulation of judges, occasioned by the need to balance individual rights of free expression against the larger public interest in regulating certain public professions.¹¹¹

provision for the liberty of the press that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments." (emphasis in original); JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 667-68 (1858) ("It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions on any subject whatsoever, without any prior restraint.").

108. 673 P.2d 855 (Or. 1983).

109. 802 P.2d 31 (Or. 1990).

110. *Id.* at 38.

111. *Id.* at 40. Linde shared his own critical thoughts about *In re Fadeley* in a tribute to Richard Unis, the dissenting judge in that case. Linde commented that, although the "outcome would hardly surprise a realist," the court's analysis was "surprising and disturbing" in reliance

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 *Robertson* framework was the method of analysis intended by the framers of Article I, section 8. The court simply applied that framework.¹¹⁵ Even then, however, it did so in an unexpected way.

By its terms, the challenged law was directed at speech—the content of books, photos, or films depicting proscribed activity of child porn. Under *Robertson*, you would think that the only question is whether the regulation of such activity is wholly contained within a well established historical exception. And, under *Henry* and its depiction of our “robust” framers, you would think that the answer to that question is a foregone conclusion. But that was not how the court saw matters. In *Stoneman*, the court held that the statute was not even about speech in the first place.¹¹⁶ According to *Stoneman*, even though the statute, by its terms, regulated speech, that regulation “necessarily involves harm to children.”¹¹⁷ Thus, the legislation may be understood actually to be a regulation of harmful effects—not speech itself—even though the statute did not say so.¹¹⁸ That is strikingly contrary to *Robertson* and the *Brandenberg* article on which it was based, both of which emphasized that regulation of speech—even in the name of avoiding the harmful effects that the speech may produce—is unconstitutional.¹¹⁹

on an “interest balancing explanation” that was antithetical to *Robertson*. Hans A. Linde, *Unis, J.: The Judge as Justice*, 76 OR. L. REV. 9, 10-11 (1997).

112. See *supra* notes 54-71 and accompanying text.

113. 920 P.2d 535 (Or. 1996).

114. See OR. REV. STAT. § 163.680 (1987) (repealed 1995) (making it “unlawful for any person to pay or give anything of value to observe sexually explicit conduct by a child known by the person to be under 18 years of age, or to pay or give anything of value to obtain or view a photograph, motion picture, videotape or other visual reproduction of sexually explicit conduct by a child under 18 years of age”).

115. *Stoneman*, 920 P.2d at 539.

116. *Id.* at 541.

117. *Id.*

118. *Id.*

119. See *supra* notes 91-99 and accompanying text.

Clearly, Article I, section 8, jurisprudence was becoming muddled. That fact is plainly reflected in several cases from the late 1990s. In *State v. Maynard*,¹²⁰ for example, the Court of Appeals addressed the constitutionality of a statute regulating the furnishing of obscene materials to minors. Not surprisingly, the case produced no fewer than five different opinions from the Court of Appeals, ranging from a majority that concluded that, although the statute did not directly regulate speech, it was overbroad;¹²¹ to a concurrence that concluded that the statute was about speech and, because not subject to a historical exception, is unconstitutional under *Robertson*;¹²² to two dissents, both arguing that, following the suggestion in *Henry* itself, the statute is subject to a historical exception for the regulation of speech to protect harm to children.¹²³ Oddly enough, the Supreme Court denied review.¹²⁴

Things came to a head in *State v. Ciancanelli*,¹²⁵ a case involving the constitutionality of a statute prohibiting public performance of sexual acts. The Court of Appeals, sitting *en banc*, split again.¹²⁶ I wrote the opinion for the majority, which concluded that the regulation of such activities, even if communicative in nature (we assumed the point, but did not decide it), is wholly contained within a well established historical exception that dated back centuries before and decades beyond statehood.¹²⁷ The opinion noted that there seemed to be some tension between the *Robertson* analysis generally and the Supreme Court's recent affinity for a jurisprudence of original intent.¹²⁸ But the opinion sidestepped that issue, both because none of the parties had briefed it and because, given the state of the historical record concerning the regulation of public sexual conduct, it did not seem to make a difference in the final analysis.¹²⁹ According to the majority opinion, whether stated in terms of *Robertson*'s historical exception analysis or a determination of the intended scope of Article

120. 5 P.3d 1142 (Or. App. 2000), *rev. den.*, 27 P.3d 1043 (Or. 2001).

121. *Id.* at 1144-59.

122. *Id.* at 1159-64 (Armstrong, J., concurring).

123. *Id.* at 1164-68 (Edmonds, J., dissenting); *Id.* at 1168-89 (Landau, J., dissenting).

124. *State v. Maynard*, 27 P.3d 1043 (Or. 2001).

125. 45 P.3d 451 (Or. App. 2002), *aff'd in part and rev'd in part*, 121 P.3d 613 (Or. 2005).

126. *Id.*

127. *Id.* at 460.

128. *Id.* at 454.

129. *Id.*

I, section 8, the bottom line remained that no one in this country suggested that such public sexual activity was constitutionally protected until well into the twentieth century.¹³⁰

That precipitated an interesting battle in the Supreme Court. The state took the occasion to suggest that *Robertson* should be abandoned altogether.¹³¹ The state noted that the court in *Stranahan* had invited parties to present principled arguments that earlier constitutional decisions do not comport with the court's originalist interpretive vision.¹³² According to the state, *Robertson*'s more or less absolute framework could not be squared with what the framers most likely intended when they adopted Article I, section 8, which, as the Supreme Court itself had suggested in *State v. Jackson*, most likely was intended to reflect the more limited prohibition of prior restraint described in Blackstone's *Commentaries*.¹³³ Instead of that limited interpretation of the state constitutional guarantee, the state proposed one that involved an explicit balancing of individual rights of free expression against the state's authority to regulate abuses of that right.¹³⁴

The state was not unreasonable in offering that proposal. In fact, in light of *Stranahan*, you would think that the state would have had a fairly easy case to make with respect to *Robertson*. It was not produced by application of the court's originalist interpretive analysis, which had not been developed until a decade after *Robertson*. Justice Linde made no pretense that *Robertson* or his earlier thinking on the subject in the articles on which the case was plainly based was rooted in concern for the intentions of the framers. And no one ever had suggested that there is any evidence that the more or less absolutist vision of free expression reflected in *Robertson* was what the framers of the Oregon Constitution had in mind. What the state proposed in *Ciancanelli* seemed to be little more than the logical extension of the case law that the Supreme Court had been issuing over the previous decade.

The Supreme Court, however, would have none of that. The court turned back the challenge to *Robertson*. Its opinion is a 50-page *tour de force*. For my purpose, the important thing on which to focus

130. *Id.* at 455-60.

131. *State v. Ciancanelli*, 121 P.3d 613, 616 (Or. 2005).

132. *Id.* at 617 (quoting *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 237 (Or. 2000)).

133. *Id.* at 616, 620.

134. *Id.* at 615.

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* intend what *Robertson* held.¹³⁶ "A decent respect for the principle of *stare decisis*," the court said, required no less.¹³⁷

This point is important. As I noted—and as the Supreme Court itself observed in *Ciancanelli*—there is no direct, affirmative evidence of what the framers intended Article I, section 8, to mean.¹³⁸ As a result, by arranging the state's burden in the way that it did, the court made it quite unlikely that the state would meet it.

The second way in which the court recast the relevant inquiry in *Ciancanelli* was in its framing of the question that it chose to address in putting the state to that burden. Justice Linde once remarked to me that the one who controls how the question is asked controls the answer. That certainly appears to be the case in *Ciancanelli*.

The Supreme Court said that the proper question was not whether the framers of the Oregon Constitution would have understood that Article I, section 8, clothed, so to speak, public sexual conduct with constitutional protection.¹³⁹ The proper question, the court said, is broader and much more abstract; namely, what sort of

135. *Id.* at 618.

136. *Id.*

137. *Id.* at 617. The court explained that *Stranahan* was different. According to the court, "the *Stranahan* majority simply acted at the earliest possible moment to correct what it perceived to be an analytical mistake made in the immediately preceding case." *Id.* The court was stretching things just a bit, however. Following *Lloyd Corporation v. Whiffen*, 849 P.2d 446 (Or. 1993), the court confronted the same issue in two cases. In one, *State v. Cargill*, 851 P.2d 1141 (Or. 1993), the court held the case for three years before deciding that it could not reach a decision and affirmed a lower court decision by an equally divided court. In the other, *State v. Dameron*, 853 P.2d 1285 (Or. 1993), the court decided to take the case but generated six different opinions, without a majority agreeing on a particular theory of the case.

138. 121 P.3d at 627-30.

139. *Id.* at 616.

analysis the framers intended Article I, section 8, to embody.¹⁴⁰

The court then refined that question as a choice between two—and only two—alternatives. On the one hand, there was Blackstone’s dichotomy between prior restraint and after-the-fact authority to regulate.¹⁴¹ On the other, was what the court characterized as the “natural rights” view of things, a view that, at least as the court described it, regarded rights of free expression as more or less absolute, subject only to actions based on harm to others resulting from the exercise of those rights.¹⁴² The latter view, the court observed, was remarkably, although not perfectly, close to the doctrine that Justice Linde had set out in *Robertson*.¹⁴³ The court then proceeded to review what it regarded as the historical record in that regard and concluded that the record simply was not decisive one way or the other.¹⁴⁴ That meant that the state failed in its burden of demonstrating that *Robertson* was demonstrably incorrect.

At that point, the court turned to the application of *Robertson* to the particular statute at issue, a matter that detained the court only briefly. The court readily concluded that the statute regulated expression in the form of public performances of sexual activity.¹⁴⁵ Thus, it concluded, the regulation is unconstitutional unless wholly contained within a historical exception, as *Robertson* requires.¹⁴⁶ This time, in contrast to its decisions in *Moyle* and *Henry*,¹⁴⁷ the court did not engage in any extensive analysis of what the framers likely understood. The court acknowledged the extensive historical record of that question on which the Court of Appeals majority had relied.¹⁴⁸ The court stated, briefly and simply, that the evidence was beside the point.¹⁴⁹ According to the court, none of that evidence demonstrated that the framers did *not* intend to extend the constitutional protections

140. *Id.* at 628.

141. *Id.* at 623.

142. *Id.* at 624.

143. The court noted, for example, that *Robertson* suggested that the “abuse clause” pertains to *civil* responsibility for harm done to others as a result of the exercise of rights of free expression, while natural rights theory would permit criminal punishment arising out of such harm, as well. *Ciancanelli*, 121 P.3d at 631 n. 27. The court nevertheless asserted that the distinction did not present a “serious conflict.” *Id.*

144. *Id.* at 630.

145. *Id.* at 635.

146. *Id.* at 631-34.

147. *See supra* notes 99, 101.

148. *Robertson*, 121 P.3d at 634.

149. *Id.* at 634-35.

of Article I, section 8, to the regulation of public sexual performances.¹⁵⁰ The statute, the court held, was unconstitutional.¹⁵¹

Ciancanelli thus represents a ringing reaffirmation of *Robertson*. The court was presented with the perfect opportunity to jettison Justice Linde's approach to free expression, but it declined. Indeed, it not only declined to abandon *Robertson*, it shored up at least some of the weaknesses in the case law that had followed *Robertson*, particularly concerning the historical exception. It is now clear that, whatever might be said about the court's prior case law in the future, *Robertson*'s historical exception is truly exceptional. None will be recognized in the absence of evidence that the framers intended Article I, section 8, *not* to apply. In other words, given the state of the historical record, none is likely ever to be recognized.

Not that *Ciancanelli* solved every analytical problem that has troubled *Robertson* since its publication. The court's new reading of the historical exception, for example, creates the interesting anomaly that the historical exceptions in *Robertson* itself could not satisfy that test.¹⁵² There likewise remains considerable uncertainty about precisely when a given regulation will be regarded as targeting speech or the harmful effects of speech. And there remains the question whether the court's new commitment to Justice Linde's "free speech fundamentalism" can be reconciled with such cases as *In re Lasswell*, *In re Fadeley*, and *Stoneman*.¹⁵³ All that said, the fact remains that, after *Ciancanelli*, Justice Linde's free speech legacy is even more firmly rooted than it was before.

IV. CONCLUSION

My own take on all of this, as I said at the outset, is somewhat ambivalent. The courts remain committed to the independence of state constitutional law, and to this day, the courts routinely decide a

150. *Id.*

151. *Id.* at 635.

152. The *Ciancanelli* court anticipated that issue by asserting a distinction in *Robertson* between "longstanding verbal crimes" and "conventional" crimes. 121 P.3d at 632 n. 28. The former are subject to the historical exception requirement, while the latter are not. *Id.* at 632-33. Why are "conventional" crimes not subject to the historical exception requirement? According to the court, because "the distinction between 'conventional' and other historical speech crimes fits remarkably well with *Robertson*'s overall point—that Article I, section 8, is concerned with prohibitions that are directed at the content of speech[.]" *Id.* at 633. That strikes me as entirely circular.

153. *See supra* notes 108-09, 113.

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 balancing acts that Justice Linde so eloquently decries will come into play. As Judge Patricia Wald once observed, the federal courts place that balancing out front, while Linde “surrounds and delays it.”¹⁵⁵ But in either case, at the end of the journey, “the beast awaits.”¹⁵⁶

I applaud the Supreme Court’s courage in adhering to *Robertson* in a very controversial case. And—even if I find its efforts ultimately unpersuasive—I appreciate its attempt to wrestle with the problems that had crept into its free speech jurisprudence. But I struggle to understand the current court’s fascination with dead-hand originalism. I think that Justice Linde’s observation was a wise one when he suggested that just because the history of a clause may be relevant, it does not follow that the meaning of the clause is frozen in time.

In sum, Justice Linde has profoundly influenced the development of Oregon constitutional law. Hardly an aspect of Oregon constitutional law fails to reflect, in some measure, Linde’s constitutionalism. That influence is being challenged. In some cases, that is inevitable, even good. In other cases, as I have suggested, it appears to be unnecessary and unexplained. In all events, it cannot be denied that Linde’s ideas persist. That we are still debating them

154. See generally Linde, *supra* note 2.

155. Patricia M. Wald, *Hans Linde and the Elusive Art of Judging: Intellect and Craft Are Never Enough*, 75 TEX. L. REV. 215, 224 (1996).

156. *Id.*

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LESSONS LEARNED AND NEARLY LOST

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

