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FOREWORD

Hans Linde: Architect of Democratic Institutions

DAVE FROHNMAYER*

It is a special pleasure to write introductory comments to this *Oregon Law Review* symposium honoring the work of Hans A. Linde: scholar, jurist, teacher, and architect of democratic institutions. I intend specially to dwell on the last of these descriptive words and phrases.

Before exploring the justifications of this deliberately high praise, let me indulge in a few autobiographical notes that help underscore both a long association as well as a deep intellectual debt to Hans Linde.

As a law student at Berkeley during the turbulent years of the “Free Speech Movement,”¹ I took an experimental first year course entitled “Legislative and Administrative Processes” from visiting

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¹ The Free Speech Movement spawned an outpouring of legal scholarship on academic freedom, the then newly emerging concepts of freedom of speech in public forums, the structure of student disciplinary proceedings at public universities and the application of procedural due process to the internal operations of public institutions. Professor Linde participated in a symposium issue of the *California Law Review* with a pathbreaking article on the need for campus lawmaking and appropriate adjudication processes. See Linde, *Campus Law: Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40 (1966). My own student contribution to the issue drew heavily on Professor Linde’s highly original scholarship on constitutional rights in the public sector. See Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CALIF. L. REV. 132, 158 n.116 (1966). Indeed, Hans Linde’s seminal work, *Justice Douglas on Liberty in the Welfare State—Constitutional Rights in the Public Sector* (pts. 1&2), 39 WASH. L. REV. 4 (1964), 40 WASH. L. REV. 10 (1965), inventively explores ideas similar to those in the far more widely cited article published contemporaneously by Charles Reich. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

Professor Linde and his Boalt Hall faculty colleagues.² This was a rigorous introduction to the law of the processes of government. It was a class that opened new windows of insight into the understanding of statutes, agency processes, and the law governing institutions of government. Little did I then realize during those demanding and sometimes perplexing hours that I subsequently would teach this course as a colleague of Professor Linde at the University of Oregon only a few years later.

When I served as an assistant to the Secretary of the then Department of Health Education and Welfare in 1969, I called Hans Linde for his ideas on a speech topic I was developing for the Secretary. It was at that time that my former teacher startled me by asking my interest in joining the faculty of the University of Oregon School of Law. In a few short months that startling suggestion became a reality. After arriving in Eugene, I rescheduled my class in Legislative and Administrative Processes so that I could listen to Hans teach his section. This overt display of apprenticeship on my part was no doubt discomfiting to my observant students, but it presented an unparalleled opportunity to learn even more from this brilliantly original thinker.

Justice Linde left the faculty to join the Oregon Supreme Court in 1976. Our careers intersected subsequently in totally different ways after I became Attorney General in 1981.

These pages are not the place to reargue cases where the Attorney General's position at oral argument on behalf of the state was at odds with Justice Linde, speaking later for a majority of the court. But two arguments, among many, deserve some note. In *State v. Kennedy*,³ Justice Linde considered and forthrightly rejected the proposition of my office that state courts should give special deference to federal court interpretations when the language of the Oregon Constitution was identical to that of a parallel provision in the text of the United States Constitution. The court's opinion is a clear and unequivocal statement of Linde's now widely accepted methodology of state constitutional interpretation.

Justice Linde had the last word also in adjudicating the legality of the 1981 reapportionment by the Oregon Legislative Assembly.

² The evolution of the experimental materials into a text and law school course is described in H. LINDE, G. BUNN, F. PAFF & W. CHURCH, LEGISLATIVE & ADMINISTRATIVE PROCESSES xx-xxi (2d ed. 1981).

³ 295 Or. 260, 666 P.2d 1316 (1983).

The state had argued that a technical flaw in the legislative plan was self-correcting. However, Justice Linde, in an opinion that surveyed fundamental theories of representative government, concluded otherwise, voided the plan, and triggered transfer of the duty of reapportionment *de novo* to the Oregon Secretary of State.⁴

These were hardly years of personal distance, however. Hans kept alive his scholarship in forums other than formal opinions. Justice Linde and I participated in a national symposium on state courts and the separation of powers. The papers of that conference sparkle with Linde's insights into the role of the state judicial institution.⁵

It would be easy to continue this Foreword with more biographical anecdotes and personal tributes. In part, however, that task has been accomplished superbly elsewhere.⁶ Let me turn instead to Hans Linde's career-long fascination with illuminating the law of the processes of government. The famous legal historian Willard Hurst recognized this Linde contribution more than fifteen years ago in his flattering review of the first edition of Linde and Bunn's casebook, *Legislative and Administrative Processes*: "The authors . . . hammer home what may be the most important lesson of Anglo-American legal history—that procedures of policy making and application are as important as the substance of policy because procedures inexorably shape the impress that policy puts on life."⁷

Hans Linde is hardly a stranger to the inner workings of government institutions and the complex interrelations among legal doctrines and political agendas. In his early career, he clerked for Supreme Court Justice William O. Douglas. He then served as a lawyer to the United States Department of State. And, to complete his quick circuit of all three branches of the national government, he became an activist—in the best sense—in his service as legislative assistant to United States Senator Richard L. Neuberger.⁸

⁴ *Cargo v. Legislative Assembly*, 291 Or. 663, 634 P.2d 233 (1981).

⁵ See generally *The Courts: Sharing and Separating Powers*, in THE EAGLETON INSTITUTE OF POLITICS ON THE STATE OF THE STATES (1988).

⁶ See, e.g., *Dedication and Tributes*, 1984 ANN. SURV. AM. L. vii-xxv.

⁷ Hurst, Book Review, 28 J. LEGAL EDUC. 597, 598 (1977) (reviewing H. LINDE & G. BUNN, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* (1976)).

⁸ Three very innovative and divergent public policy contributions by Hans Linde during these years deserve wider public recognition. First, together with Senator Neuberger, Linde in 1955 studied a then-pending Canadian plan to divert a full third of the flow of the upper Columbia into the Fraser River basin, a proposal with untold harmful

It is not primarily Linde's familiarity with the machinery of government that so impresses his students and colleagues. Rather, it is his capacity to theorize creatively within and around these intensely political processes that has, in my judgement, no modern equal. Consider the raw variety in this partial inventory of creative contributions.

CREATIVE CONTRIBUTIONS OF HANS LINDE

A. Impeachment and Presidential Succession

In the aftermath of the Watergate controversy, the nation faced near paralysis in the face of a proposed Senate trial after the House of Representatives voted Articles of Impeachment against President Richard M. Nixon. Crisis was avoided by the President's resignation in August, 1974. But serious questions still remained about the adequacy of our constitutional processes to resolve issues surrounding loss of national confidence in executive leadership.

In a contemporary symposium volume of eminent commentators of that era, Linde's proposals for constitutional reform ring of authenticity as models of constitutional policy, legislative realism and political common sense.⁹

Authors of the era were consumed with questions of the standards of proof to establish presidential wrongdoing or perplexed by issues of timing and process in providing avenues for presidential succession. Linde's article tackled both questions with refreshing candor and originality. He would discard constitutional standards in the impeachment provisions that confuse issues of personal wrongdoing with larger questions about the capability of the executive branch, for whatever reasons, to exercise national power with

implications for the lower Columbia's multiple resource user communities in the Pacific Northwest. The Neuberger report to the Senate Interior Committee, authored in large part by Linde, led to hearings and eventual negotiation of a treaty addressing division of downstream power benefits of Canadian storage projects.

Second, he designed the billboard limitation amendments to the interstate highway act, including the idea of locating information for travellers at stops.

Finally, Hans Linde drafted the first proposals for provision of conditional public funds as the means toward voluntary limits on political campaign funds; a subject he revisited again in his lecture as Wayne Morse Professor in 1990. See generally, Hans Linde, *Do We Really, Truly Want "Free and Equal" Elections?*, Wayne L. Morse Address to Portland City Club (Nov. 9, 1990).

⁹ Linde, *Replacing a President: Rx for a 21st Century Watergate*, 43 GEO. WASH. L. REV. 384 (1975).

continuing political legitimacy. His proposal recognized three paramount issues: the need to adjudicate issues of the executive's conduct and performance with fair procedures; the imperative of speed, once the process begins; and the critical issue of deliberate and predictable processes for presidential succession.

Many distinguished authors contributed to this symposium. None touches the originality of Linde's contribution for range or depth.

B. Congressional Procedures

The processes of the Congress of the United States have always been a mystery and an enigma and, regrettably, in recent years, often a disgrace. Where disgrace is borne of perceived misconduct, the predictable public outcry, often with partisan overtones, compels official action.

But what happens if the alleged wrongdoing of a member of Congress is to be assessed by a house of the Congress itself, rather than by a court? Strict separation of powers thinking precludes the notion that Congress is an adjudicatory body. Yet a judicial process of sorts is precisely what is conferred on the Congress, not only by the Constitution's impeachment provisions, but also by the expulsion and exclusion clauses of Article I.

The adequacy of congressional processes to discipline members is in the currency of political dialogue as I write these words. Whether the "Keating Five" were appropriately sanctioned by the Senate and the adequacy of leadership reactions to public outcry over the abuses of the House of Representatives' "bank" will be fodder for the 1992 election year debate and perhaps beyond. But an earlier dispute demonstrates that this ground already has been well tilled by Hans Linde.

When flamboyant New York Congressman Adam Clayton Powell, Jr. was called to task by his colleagues for alleged misconduct in office more than two decades ago, the manner in which Congress resolved his case quickly reached the United States Supreme Court.¹⁰

The editors of the *UCLA Law Review* asked twelve constitutional scholars to submit comments on *Powell v. McCormack*.¹¹ Eleven

¹⁰ 395 U.S. 486 (1969).

¹¹ *Comments on Powell v. McCormack*, 17 *UCLA L. REV.* 1 (1969).

discussed what the Supreme Court said or failed to say about the “political questions” doctrine, the separation of powers, the Court’s use of historical arguments, and theories of judicial review. Only one commentator, Hans Linde, analyzed what *Congress* did or should have done. In Linde’s view (correctly, in *my* view) *Powell* in reality was a case about the law governing the Congressional process, a law which was developed and should properly be applied by that institution itself.

Linde began politely by chiding the academic community for its misplaced focus:

Our lengthening experience with judicial review has turned constitutional law scholars into a fraternity of Supreme Court watchers, preoccupied with the judicial function, its strategies, its quality, and its limits. . . . The custom of putting the cart before the horse in constitutional law deserves the same fate as that of the Corvair. . . .

. . . The *Powell* Case was a case in the House before there was a case in the courts, and it is still a case in the House.¹²

Linde examined how lawyers and members of the House should have performed as an autonomous tribunal of constitutional law. He demonstrated that the required issues of procedure were never isolated from disposition of *Powell*’s case on the merits. As a consequence, presentation of the serious constitutional issues in debate never proceeded in a systematic fashion.

This all is vintage Linde: constitutional premises embedded in concrete textual language are the point of departure; premises which establish legal standards relating to that text are the precondition for fair proceedings; and fact finding can proceed only after those standards have underscored which facts are relevant and important to Congress as an adjudicative body.

Does all this matter? The answer is surely “yes.” At stake are the procedures by which a constituency of a representative body—and a minority constituency at that—might otherwise be deprived of its voice by an overbearing majority.

C. State Legislative Processes

1. Structural Reform

Hans Linde articulated his interest in state constitutional reform

¹² *Id.* at 175.

early in his career. Thirty years ago, as a young professor, he participated in a massive and nearly successful effort to revise the archaic Oregon Constitution.¹³ The respect of Linde's colleagues for his insightful contributions is remembered to this day.¹⁴

Linde returned to the issue of legislative reform in a more modest form in 1977 when we co-authored a proposal for reallocation of powers between the houses of the Oregon Legislative Assembly.¹⁵ Our concern was to resolve a dilemma facing all American states: "How can we maintain effective control of government through elected representatives with true 'citizen representation' by part-time, nonprofessional legislators?"¹⁶

The solution—a twentieth century redefinition of bicameralism—was novel, and perhaps not surprisingly, unsuccessful.¹⁷ The Senate would serve as a full-time body, assuming functions of interim budget adjustment, confirmation of executive appointees, law development and agency oversight. The House would remain a part-time body able to accommodate the needs and perspectives of citizens, not full-time political professionals. In its hands would reside the shared responsibility for the legislature's primacy in representative government: the enactment of laws, taxes, and appropriations.

Why reargue this cause today? The answer is that Linde's diagnosis of the structural problems of representative institutions is as pertinent today as it was in 1977, and its relevance extends to fifty states—even to emergent democratic regimes—not just to the government of Oregon.

2. *Constitutional Restrictions on Lawmaking*

Linde's powerful intellect has probed not merely the structural processes of the state legislative branch, but also the judicial prem-

¹³ See COMMISSION FOR CONSTITUTIONAL REVISION, *A NEW CONSTITUTION FOR OREGON* (1962), reprinted in *A New Constitution for Oregon*, 67 OR. L. REV. 127 (1988).

¹⁴ See, e.g., Goodwin, *A Tribute to Hans Linde*, 1984 ANN. SURV. AM. L. xv.

¹⁵ Linde & Frohnmayer, *Prescription for the Citizen Legislature: Cutting the Gordian Knot*, 56 OR. L. REV. 3 (1977).

¹⁶ *Id.* at 4.

¹⁷ See H.J. Res. 54, 59th Or. Leg. Ass'y (1977). The proposal did, however, pass in the Oregon House of Representatives. See Final Leg. Calendar, 59th Or. Leg. Ass'y H-196 (1977).

ises used to analyze legislative outcomes. *Without Due Process*¹⁸ began as a teacher's guide to his students in constitutional law. Over the years, it has become a classic in its own right. It is a pedagogical guide for judges, litigators, and scholars, not merely for students struggling over the meaning of judicially-crafted epithets (such as "police power," "arbitrary and capricious," and "reasonableness") that served in earlier years to describe and obscure the true contours of legislative authority. The fourteen premises that conclude Linde's masterpiece¹⁹ remain the point of departure for anyone whose work requires taking state constitutions seriously.

Linde returned to the task of illuminating the limits of the legislative function in his *Oliver Wendell Holmes Devise Lecture* in 1975.²⁰ This work also is a work of architecture. It begins not with a recitation of judicially crafted formulas for review of legislative enactments, but with a probing analysis of constitutional norms governing the legislative process.

The originality of Linde's contribution here lies not only with his conclusions, which strip away the barnacles of conventional thinking, but also rests in the richness of sources and examples which accompany the march of his arguments. The due process clause commands procedural safeguards in the enactment of laws. It does not restrict the means and ends of policy otherwise available to legislators within the ambit of constitutional choices.

From this lecture emerge themes that run throughout the corpus of Hans Linde's work: the need to articulate first premises; his distrust of open-ended formulaic balancing tests; his insistence that standards for judicial review be administrable apart from result-oriented jurisprudence; and his focus on the constitutional responsibilities of law-making bodies themselves rather than on our society's preoccupation with judicial review as the source of articulated constitutional law.²¹

¹⁸ Linde, *Without Due Process: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

¹⁹ *Id.* at 181-87.

²⁰ Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

²¹ This is not to suggest that Linde has ignored equivalent confusion that prevails in the jurisprudence of judicial review, especially in the field of administrative law. See generally Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537.

3. *The Law of the Initiative Process*

Hans Linde's concern with the process by which laws are enacted extends beyond the procedures of Congress and state legislatures. And well it should. In California, Oregon and elsewhere in recent years, sweeping initiative measures have reinstated capital punishment, enacted fundamental changes in criminal laws relating to victims, and severely limited property tax financing of local government. Direct legislation by the people, a device developed by social reformers at the beginning of this century, has generated sober second thoughts in the wake of decades of experience.

What limits, if any, do political theories or legal doctrines suggest for plebiscites which bypass the legislative process? Hans Linde has explored this subject with special inventiveness. Rejecting the conventional wisdom suggesting that the federal constitutional guarantee of a "republican form of government"²² presents a "political question" immune from judicial review, Linde postulates both the circumstances and the criteria by which state court review of direct legislation might be not only plausible but necessary.²³

As a primer in constitutional theory directly relevant to the issues of the day, Linde's brief essay sparkles. Does his argument rest on decided cases? No—because there are none precisely on point. But true to the architectural spirit that runs through the corpus of his work, Hans Linde has structured and refined the elements of a new and vital debate.

CONCLUSION

More evidence could easily be marshalled to demonstrate the breadth of Hans Linde's contributions to the theoretical understanding and protection of democratic institutions. Some of these have received wide acclaim, such as the Francis Biddle Lecture at Harvard²⁴ where Linde creatively juxtaposed legal issues of the

²² U.S. CONST. art. IV, § 4.

²³ Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159 (1989).

²⁴ Linde, "A Republic . . . If You Can Keep It," 16 HASTINGS CONST. L.Q. 295 (1989). Linde explores numerous practical solutions to the political stalemate arising from divided partisan control of the executive and legislative branches of the national government. See, e.g., *id.* at 303 n.41. Undergirding each premise of his lecture is a passionate concern for identifying the legal institutions that can insure the accountability and integrity of government action.

Iran-Contra controversy with questions raised during the failed confirmation of United States Supreme Court nominee Robert Bork. Other contributions by Hans Linde are not as readily accessible to a wider public, but are equally worthy of mention.²⁵

Public law is not the only area in which Hans Linde continues to reinforce his reputation as one of this generation's most original thinkers. But it is illustrative of the passion of his inquiry. For a sampling of a fuller variety of Linde's magnificent contributions to our larger understanding, I invite the reader to explore with gratitude other articles of this most welcome symposium issue.

²⁵ See, e.g., H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES TEACHER'S MANUAL (1976). The concluding pages identify seven sweeping propositions that capture the law of the American policy process. See *id.* at 165-66.