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Tribute

LOUIS H. POLLAK*

Judge-Professor Linde

THERE is good reason to think that Judge George Wythe would have approved of Justice Hans Linde. As America's first law teacher[1] and an early practitioner of law reform,[2] Wythe would certainly have given high marks to Linde's many years of dedicated teaching and scholarship. As the author of the most celebrated of the several opinions handed down by judges of the Virginia Court of Appeals in *Commonwealth v. Caton*,[3] Wythe would

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[1] Arguably, Wythe was also America's most influential law teacher. Other judge-professors of years gone by have achieved comparable or greater celebrity, *e.g.*, James Wilson, James Kent, Joseph Story, Thomas Cooley, Felix Frankfurter, and William H. Hastie. But it seems unlikely that any of those listed—or, indeed, all of them taken together—could boast a cohort of students matching Wythe's best and brightest: Thomas Jefferson, John Marshall, and Henry Clay.

[2] In particular, Wythe worked with Jefferson and Edmund Pendleton to rewrite the laws of Virginia. Participation in the Constitutional Convention may also be appropriately characterized as "law reform." In that endeavor, however, Wythe did not play a major role. One reason for this, it seems, was that he had to leave Philadelphia and get back to his courtroom well before the Convention finished its work. Gordon, *George Wythe (1726-1806)*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2079 (1986). But Wythe's role was not just as a walk-on; he had a significant speaking part. *See infra* note 4.

[3] 8 Va. (4 Call) 5 (1782). The case presented, inter alia, the questions (1) whether a Virginia statute vesting the pardoning power in cases of treason in the legislature was

have appreciated Linde's disciplined exploration of the theory and exercise of the practice of judicial review. As a staunch opponent of slavery, Wythe would have applauded Linde's commitment to the realization of human rights through law, both domestic and international. And as a state court judge in his native Virginia, Wythe would surely have looked with favor on Linde's devoted service as a justice on the highest court of Oregon, Linde's home state.

Not that Wythe would have had any reason to deprecate service on the federal bench,[4] had that been Linde's judicial venue. But Wythe doubtless recognized that in the nascent American confederation he helped bring into being, the judicial institutions vested with principal responsibility for ordering primary legal rights and obligations would continue to be the courts of the several states, the sovereignties of general jurisdiction. To be sure, in the past two centuries the balance of judicial authority—and, of course, of legislative and executive authority as well—has shifted decisively to the federal side of the ledger, an inexorable consequence of the fact that "it is *a constitution* [the Supreme Court has been] expounding"[5] and the related fact that the Constitution is "supreme." But the enhancement of federal judicial authority was accompanied by an unwarranted and unbecoming abdication by the state courts of their role as expounders of state law. And it has been Linde's singular achievement to have reversed that abdication. He has recalled the judges of Oregon—and, by his example, the judges of other states as well—to their paramount responsibility to interpret and apply state law, including state constitutional law, as an independent source of law on a parity, within its proper sphere, with federal law, including

incompatible with a provision of the Virginia Constitution of 1776 giving the governor the power to pardon in cases other than impeachment, and (2) whether, assuming such incompatibility, the court had authority to declare the statute—as an ordinary legislative enactment of lesser dignity than the state constitution—unconstitutional and hence without legal effect. The opinions attributed to Wythe and his colleagues in Call's Reports were not published until 1833, fifty-one years after the case was decided; they are regarded by Professor Leonard W. Levy as "unreliable" *ex post* reconstructions. However, Levy reports that Wythe's actual opinion appears to have stated that courts do have authority to measure ordinary legislative enactments against a constitution and to declare them unconstitutional in a proper case, although Wythe found no reason to conclude that the statute challenged in *Commonwealth v. Caton* was unconstitutional. Levy, *Commonwealth v. Caton*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 334 (1986).

[4] On May 30, 1787, at an early stage of the Constitutional Convention, Wythe proposed approval of the Randolph Plan which contemplated "that a national government . . . be established consisting of a supreme legislature, judiciary and executive." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 41 (M. Farrand 2d ed. 1937).

[5] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

federal constitutional law.[6] It is an achievement that stands with

[6] State supreme courts are, of course, final arbiters, not subject to United States Supreme Court review, with respect to matters of state law; and this means that when state supreme courts find liberty interests enshrined in state statutes and constitutions, those interests are secured even though the United States Supreme Court does not construe cognate provisions of federal laws, including the Constitution, with the same breadth. Matters can become complicated, however, when a determination of the proper scope of a federal claim depends, in the view of the United States Supreme Court, on how a state supreme court reads a relevant aspect of state law. The most intriguing recent instance of this interplay was Employment Div. v. Smith, 494 U.S. 872 (1990), which came to the United States Supreme Court from the Oregon Supreme Court toward the end of Linde's judicial tenure. In *Smith*, a divided United States Supreme Court, disagreeing with the unanimous Oregon Supreme Court, held that an Oregon anti-drug use statute of general application could, without offense to the first amendment, be applied to the ingesting of peyote as part of a religious ceremony of the Native American Church. As a matter of substantive constitutional law, the decision in *Smith* is a substantial contraction of what had appeared to be settled free exercise doctrine. But, as an illustration of procedural oddities, *Smith* is of independent interest. The procedural aspects of the case are aptly summarized in Professor Michael W. McConnell's recent article, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990):

> Like many important cases, *Smith* was an unlikely vehicle for reconsideration of fundamental doctrine. The case arose when two employees at a drug rehabilitation clinic, Alfred Smith and Galen Black, applied for unemployment compensation after they had been fired for ingesting peyote for sacramental purposes at a ceremony of the Native American Church. The Employment Division of the Oregon Department of Human Resources denied their claim on the ground they had been dismissed for work-related "misconduct," but the state appellate and supreme courts reversed on the ground that the state may not constitutionally treat the exercise of religious practices as "misconduct" warranting a denial of otherwise available benefits. This holding appeared to be an unexceptional application of settled precedent from the United States Supreme Court.
>
> On certiorari, however, the Supreme Court vacated the judgment and remanded to the Oregon court to decide whether the religious use of peyote is lawful in the state, reasoning that if a practice can be punished under the criminal law it may also be the basis for the lesser penalty of denial of unemployment benefits. This disposition was odder than it might appear, since the Oregon Supreme Court had already held that the criminality of peyote use is "immaterial" to eligibility for unemployment benefits as a matter of state law. Under Oregon law, being fired for the use of peyote was like being fired for not working on Saturday: both are work-related derelictions which, if religiously motivated, could not be treated as misconduct under the First Amendment.
>
> On remand, the Oregon Supreme Court reiterated that the criminality of the sacramental use of peyote is irrelevant under both state and federal law, and reaffirmed its decision. The court went on to say that Oregon drug law "makes no exception for the sacramental use." And although Oregon apparently does not now enforce the law against sacramental peyote use, the court concluded that enforcement, should it ever occur, would violate the Free Exercise Clause.
>
> The United States Supreme Court again granted certiorari, this time to decide whether a criminal law against peyote use is constitutional. *Smith* thus

Erie Railroad v. Tompkins,[7] as one of this century's most important judicial contributions to the better working of the American federal system.

Unlike George Wythe, Hans Linde was not born to America and the common law. Linde was an alien who chose to become an American citizen; that is to say, Linde's foreign birth made him an advertent, and hence, a better American.[8] It also made him a better, more rounded, lawyer[9]—a better common lawyer, a better civil lawyer, a better international lawyer—and a better, more rounded, historian and political scientist as well. Linde is a professor and a judge for the new age of our old-new nation whose mission is to provide leadership as a free society in a new-old world.

* * * * * *

As World War II drew to a close, Denis Brogan—an alien who came to know our country well, but who did not elect to become an American—undertook to write about America and Americans. Brogan recaptured Thoreau's mid-nineteenth century parochialism, epitomized in Thoreau's description of what always happened when he would venture out of doors to take a walk. Wrote Thoreau:

> I turn round and round irresolute sometimes for a quarter of an hour, until I decide, for the thousandth time, that I will walk into the southwest or west. Eastward I go only by force; but westward I go free. Thither no business leads me. It is hard for me to believe that I shall find fair landscapes or sufficient wildness

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> involved a question that was entirely hypothetical and, according to the highest court of Oregon, irrelevant to the outcome as a matter of state law. Looking ahead to the result, it remains a mystery why Smith and Black were not entitled to unemployment benefits even assuming the Supreme Court was correct on the merits. Granted, the state *could*, consistent with the Free Exercise Clause, deny benefits for any activity that violates the criminal law. But according to the Oregon Supreme Court's construction of state law, Oregon had not availed itself of that opportunity. Until it does, there would seem to be no basis in state or federal law for denying benefits to Smith and Black. And if that is true, then the entire discussion of free exercise exemptions was beyond the Court's jurisdiction.

Id. at 1111-13 (footnotes omitted).

Linde was not the author of the first Oregon Supreme Court opinion. The second opinion is labelled "per curiam," so we cannot tell whether Linde wrote it; but Linde does appear in his scholarly capacity, as author of the magisterial article, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10 (1965) (cited in Smith v. Employment Div., 307 Or. 68, 74 n.4, 763 P.2d 146, 148-49 n.4 (1988), *rev'd*, 494 U.S. 872 (1990)).

[7] 304 U.S. 64 (1938).

[8] Exactly the same may be said of Linde's eminent East Coast judge-professor counterpart, Chief Justice Ellen Peters of Connecticut.

[9] *See supra* note 8.

> and freedom behind the eastern horizon. I am not excited by the prospect of a walk thither; but I believe that the forest which I see in the western horizon stretches uninterruptedly toward the setting sun, and there are no towns or cities in it of enough consequence to disturb me. Let me live where I will, on this side is the city, on that the wilderness, and ever I am leaving the city more and more and withdrawing into the wilderness. I should not lay so much stress on this fact if I did not believe that something like this is the prevailing tendency of my countrymen. I must walk toward Oregon and not toward Europe.[10]

Then Brogan talked about the change in America's perspective in the century since Thoreau turned his steps toward the Oregon trail:

> All American experience, down to very recent times, was on the side of Thoreau. Oregon was no longer the wilderness; the Columbia River no longer rolled hearing "no sound save its own dashings," but was tamed by the greatest dams in the world and—toward the ocean, at least—rimmed with cities. But the westward drive was still potent; Americans rejoiced still in "the inward eye which is the bliss of solitude." It is only in this century that they have begun to learn, slowly, inadequately, humanly, that the world is really round, that to walk toward Oregon is to walk toward Europe. It has been a shock to their optimism, a shock to their view of their destiny. It is now necessary to turn from the lesson of Thoreau — or to apply it in a new world.[11]

[10] Quoted in D. BROGAN, THE AMERICAN CHARACTER xliv-xlv (1962) (citation omitted).

[11] *Id*. at xlv.