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“DOES OREGON’S CONSTITUTION NEED A DUE PROCESS CLAUSE?”

THOUGHTS ON DUE PROCESS AND OTHER LIMITATIONS ON STATE ACTION

Thomas A. Balmer*

INTRODUCTION

During a legislative hearing last year, an Oregon state senator asked, “Does Oregon’s Constitution need a due process clause?” That question raises fundamental issues of constitutional law and of the relationship between the federal and state constitutions. Can and should state courts rely primarily on federal constitutional principles, made applicable to the states through the Fourteenth Amendment’s Due Process Clause, in deciding critical questions about the rights of criminal defendants, freedom of speech and religion, and equal protection? Or should state courts focus on their own constitutions—state due process, equal privileges and immunities, and similar “great ordinances” or more specific state provisions—in determining whether state laws and executive branch actions are valid? Would that focus still allow state courts to reach the “right” result in cases where no specific constitutional provision provides a clear basis for decision?

Professor (and later Oregon Supreme Court Justice) Hans Linde’s path-breaking 1970 article, *Without “Due Process”: Unconstitutional Law in Oregon*,¹ addressed some of those questions and contributed to the state constitutional revolution of the succeeding decades.² That

* Chief Justice, Oregon Supreme Court. I am indebted to Zoe Turill Powers and Alletta Brenner for research and editorial assistance and to Jack Landau and Hugh Spitzer for their helpful comments on an earlier draft.

1. Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

2. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113–34 (2009); Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 815–26 (2000); *see also* INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995) [hereinafter INTELLECT AND CRAFT].

revolution, with its emphasis on examining the text and meaning of state constitutional provisions,³ has had the positive effect of requiring courts (and litigants) to articulate the specific interests at stake in light of those provisions, rather than engaging in an open-ended inquiry into whether a state's economic regulatory scheme was arbitrary or unreasonable and thus potentially unconstitutional under the Federal Due Process Clause or whether a state law impermissibly interfered with some fundamental right. But it has its shortcomings as well, and, at times, has been susceptible to the same kind of result-oriented decisions for which substantive due-process-driven analysis has long been criticized. In this Essay, I briefly examine several aspects of state court reliance on "due process" provisions—both state and federal—in an effort to see what is lost and what is gained by relying instead on other state constitutional provisions. In doing so, we can see some of the changes in state constitutional interpretation forty-five years after Linde's article and begin to seek an answer to our legislator's question.⁴

I. THE OREGON CONSTITUTION HAS NO DUE PROCESS CLAUSE—BUT THE OREGON SUPREME COURT DIDN'T NOTICE FOR 100 YEARS

We begin where Linde did, with several Oregon cases that purported to rely on the due process clause of the Oregon Constitution and that illustrate what he saw as the shortcomings of constitutional analysis at the time. In *Leathers v. City of Burns*,⁵ the Oregon State Supreme Court considered two city ordinances that regulated the unloading and storage of flammable liquids by, among other things, prohibiting unloading fuel from a truck with a capacity of over 2200 gallons and using a storage tank holding more than 3000 gallons (or 4000 for a single service station or facility).⁶ A service station operator challenged the constitutionality of the ordinances as arbitrary and unreasonable, arguing that they deprived him of property and liberty interests without due process of

3. Indeed, Linde can be seen as an early "textualist," although not necessarily an "originalist" of the Antonin Scalia variety. Linde's teachings have influenced academics and courts in Oregon and elsewhere. See Thomas A. Balmer & Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 ALB. L. REV. 2027, 2028, 2047–49 (2012–2013).

4. I should note, however, that we are using the questions posed here primarily to illuminate aspects of state constitutional law and that the outlines of any answers are only suggestive and conditional.

5. 444 P.2d 1010 (Or. 1968).

6. *Id.* at 1011.

law.⁷ What was as interesting to Linde as the substantive decision in the case—the Court upheld the restriction on tanker size but struck down the storage tank size limit—was the way the Court went about deciding the case and what it said about due process. The Court first summarized the complaint as alleging that “the ordinances violate the due process and equal protection clauses of the Federal and state constitutions.”⁸ Then, after reviewing the evidence at trial, and to introduce its legal analysis under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court observed, “What we hold applies equally to plaintiff’s claim of violation of comparable provisions of the Constitution of Oregon.”⁹

Similarly, just a few weeks before *Leathers*, the Court held a municipal vagrancy ordinance unconstitutional on the grounds that the ordinance was “too vague to provide a standard adequate for the protection of constitutional rights.”¹⁰ The Court stated that the law invited “arbitrary and discriminatory enforcement,”¹¹ and held that it violated the “due process clause of [a]rticle I, [s]ection 10 of the Oregon Constitution, as well as the Fourth and Fourteenth Amendments of the United States Constitution.”¹²

Professor Linde had the chutzpah to point out that despite the Oregon Supreme Court’s statements in *Leathers*, *City of Portland*, and other cases, “Oregon has no ‘due process’ clause. It also does not guarantee the equal protection of the laws.”¹³ As we will discuss below, the Oregon Constitution has other broad provisions protecting individual rights and liberties from government interference, but it has no provisions that track the text or specific focus of the Due Process or Equal Protection Clauses of the Fourteenth Amendment. To the extent that Oregon courts have sometimes based their decisions on the “due process” or “equal protection” provisions of the Oregon Constitution,

7. *Id.* at 1015.

8. *Id.* at 1011.

9. *Id.* at 1015.

10. *City of Portland v. James*, 444 P.2d 554, 557 (Or. 1968).

11. *Id.* at 557.

12. *Id.* at 555. Article 1, section 10 of the Oregon Constitution is worded differently from the Due Process Clauses of the Fifth and Fourteenth Amendments and from similar provisions in other state constitutions. As I discuss below, it is more accurately described as an “open courts,” “remedy,” or “due course of law” provision. It provides: “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” OR. CONST. art. 1, § 10.

13. Linde, *supra* note 1, at 135 (emphasis in original).

they have erred. We have no such provisions.

Linde's legacy had two different and important aspects, and the double entendre of his article's title captures both: First, the absence of a due process clause in the Oregon Constitution and second, the process of constitutional decision-making without relying on the Federal Due Process Clause. As we have just seen, *Without "Due Process"* suggests first that, the Oregon State Supreme Court's occasional contrary statements notwithstanding, the Oregon Constitution does not have a due process clause. Linde urged lawyers and judges to actually read, interpret, and apply constitutional (and other) texts, rather than simply balance an amorphous and malleable understanding of the state's "police power"—another term, Linde often observed, that does not appear in the Constitution of Oregon (or any other state)—against asserted constitutional rights.¹⁴ And he often pointed out that many state constitutions have specific, often detailed, provisions regarding rights of expression, religion, and criminal procedure that are not found in the Federal Bill of Rights and that could provide a firmer basis for state court decisions.¹⁵

Before long, the Oregon State Supreme Court came around, citing Linde's article and holding (contrary to earlier decisions) that article I, section 10, of the Oregon Constitution was not a due process provision and that the equal privileges and immunities clause (article I, section 20, of the Oregon Constitution) and the Equal Protection Clause of the Fourteenth Amendment were not necessarily "equivalents."¹⁶ In 1985, after Professor Linde had become Justice Linde, the Court, in a routine case, rejected state and federal due process and equal protection challenges to a statute requiring payment of assessed income taxes as a precondition to judicial review of a tax dispute.¹⁷ Writing for the Court, Linde stated that, contrary to the taxpayer's argument, "[a]rticle I,

14. *Id.* at 147–49.

15. *See, e.g., State ex rel. Oregonian Publ'g Co. v. Deiz*, 613 P.2d 23, 28–30 (Or. 1980) (Linde, J. concurring) (discussing constitutional protection of right to open administration of justice under Oregon Constitution and arguing that it is more stringent than that offered by the Federal Bill of Rights).

16. *Olsen v. State*, 554 P.2d 139, 143 (Or. 1976). Several years earlier, the Court had noted that "Professor Linde demonstrates that [article I, section 10] is not a due process provision, but rather has to do with the protection of legal remedies which assert interests recognized in tort law," but had also pointed out that "[t]his court has not always agreed with him." *Sch. Dist. No. 12 of Wasco Cty. v. Wasco Cty.*, 529 P.2d 386, 391 (Or. 1974). Article I, section 20 of the Oregon Constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

17. *Cole v. Or. Dep't of Revenue*, 655 P.2d 171, 173 (Or. 1982).

section 10, of the Oregon Constitution, which guarantees that ‘every man shall have remedy by due course of law for injury done him in his person, property, or reputation,’ is neither in text nor in historical function the equivalent of a due process clause.”¹⁸ The debate was essentially over.

But the title *Without “Due Process”* also suggests Linde’s larger project, namely his argument that state courts should not turn first to the substantive provisions of the Federal Constitution when deciding constitutional cases.¹⁹ Linde asserted—irrefutably, as a matter of logic—that there is no federal due process violation if state law, including the state constitution, provides the relief a party seeks:

The proper sequence is to analyze the state’s law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake of parochialism or style, but because the state does not deny any right claimed under the [F]ederal Constitution when the claim before the court in fact is fully met by state law.²⁰

This latter impact of Linde’s legacy has been much discussed and is thoroughly engrained in Oregon law.²¹ Other states, Washington being an example, have reached similar conclusions.²² But, to return to our legislator’s question, has it mattered that Oregon does *not* have a due process clause?

II. THE OREGON COURT IN THE *LOCHNER*/SUBSTANTIVE DUE PROCESS ERA

Interestingly, the cases that Linde used to make his point that the Oregon Constitution lacks a due process clause did not involve

18. *Id.*

19. See Linde, *supra* note 1, at 133–35.

20. *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981). Linde’s view may be supported by logic and important prudential considerations, but it is not clear that his central legal contention—that no violation of a federal constitutional right has occurred if a state court vindicates the claim under the state constitution—is correct. In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Court stated that, at least as to nonprocedural federal constitutional guarantees, “the [federal] constitutional violation is complete when the wrongful action is taken.” *Id.* at 125; see also *State v. Stoudamire*, 108 P.3d 615, 624–26 (Or. Ct. App. 2005) (Landau, J., concurring) (explaining *Zinermon* in context of applying federal and state search and seizure protections).

21. See generally, e.g., INTELLECT AND CRAFT, *supra* note 1; Symposium, *Symposium on the Work of Justice Hans Linde*, 70 OR. L. REV. 679 (1991) (volume dedicated to discussion of Linde’s legacy and impact on state and federal constitutional law); Symposium, *Unparalleled Justice: The Legacy of Hans Linde*, 43 WILLAMETTE L. REV. 157 (2007) (same).

22. See, e.g., *State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984).

procedural claims that the state had denied a person life, liberty, or property without adequate process, but rather claims that the state had restricted *substantive* economic or personal liberties protected by the federal and state constitutions.²³ Moreover, Linde's examples were from the 1960s, long after the United States Supreme Court had stopped using "substantive due process" to strike down economic regulation, and as the Court was beginning to use the concept of substantive due process instead to protect rights of privacy and personal autonomy. Nevertheless, it's useful to look back to the era when both state and federal courts often used substantive due process to invalidate statutes regulating labor and other aspects of the economy, and to observe how the Oregon State Supreme Court approached those kinds of challenges. Based on now-discredited cases such as *Lochner v. New York*,²⁴ the United States Supreme Court is often viewed as having been hostile to labor and economic legislation at the turn of the twentieth century. But, as Emily Zacklin reminds us, the Court, in fact, upheld a number of progressive efforts to protect working people.²⁵ Rather, as Zacklin argues, state courts—interpreting both state and federal due process clauses (often without even quoting the provisions or differentiating between state and federal law)—struck down many regulatory statutes, and were, on the whole, probably more hostile to labor and other progressive legislation at the time than the United States Supreme Court.²⁶ Similarly, Hugh Spitzer has surveyed the Washington decisions of the same period and finds that the Washington State Supreme Court in the late nineteenth and early twentieth centuries often struck down regulatory legislation, such as a law providing for the inspection of commodities, even though those commodities were not intended for immediate sale to the public.²⁷ By the second decade of the new century, however, the Washington State Supreme Court was routinely upholding legislation regulating public utilities, maximum working hours for women, and mandatory workers' compensation insurance.²⁸

23. See, e.g., *City of Portland v. James*, 444 P.2d 554 (Or. 1968); *Leathers v. City of Burns*, 444 P.2d 1010 (Or. 1968).

24. 198 U.S. 45 (1905).

25. EMILY ZACKLIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 134–38 (2013).

26. *Id.* at 109.

27. Hugh Spitzer, *Pivoting to Progressivism: Justice Stephen J. Chadwick, the Washington Supreme Court, and Change in Early 20th-Century Judicial Reasoning and Rhetoric*, 104 PAC. NW. Q. 107 (2013).

28. *Id.* at 108.

But what about Oregon? While the Oregon Supreme Court seriously entertained substantive due process challenges to labor and economic regulation during this period, it generally deferred to the legislature and upheld laws that seemed reasonably related to a legitimate legislative goal. In 1902, for example, a barber challenged a state law that prohibited the operation of barbershops on Sunday, arguing that, by permitting (some) other businesses to remain open, the law was arbitrary and unreasonable.²⁹ Accordingly, the barber asserted that the act violated the Federal Due Process Clause “in that it deprived [him] of liberty or property without due process of law,” and also violated article I, section 1 of the Oregon Constitution “in that it encroached upon his guaranty of equal rights.”³⁰ The Court reviewed the history of Oregon’s Sunday closure laws and decisions from around the country upholding such laws as reasonable exercises of the state’s police power. Indeed, a similar case—involving a general Sunday closure law that exempted businesses of “necessity and charity,” but did not include barbers in that group—had gone to the United States Supreme Court, which had upheld the law.³¹ The United States Supreme Court had noted the “wide discretion confessedly necessarily exercised by the states in these matters,”³² which prohibited only classifications “so palpably arbitrary as to bring the law into conflict with the federal constitution.”³³ The Oregon Court followed suit, quoting other state decisions regarding legislation that would prevent “overwork” and protect “the physical welfare of the citizen,” and upheld the Sunday closing requirement.³⁴

Perhaps the most famous Oregon case of that period was *State v. Muller*,³⁵ where the Court considered due process and other constitutional challenges to a statute that made it unlawful to employ a woman in a laundry for more than ten hours a day.³⁶ Curt Muller had been fined ten dollars for employing a Mrs. E. Gotcher for more than the maximum permissible hours at his Portland laundry on September 4,

29. *Ex parte Northrup*, 69 P. 445, 445–46 (Or. 1902).

30. *Id.* at 446. Article I, section 1, of the Oregon Constitution, provides in part: “We declare that all men, when they form a social compact are equal in right.” OR. CONST. art. I, § 1.

31. *Northrup*, 69 P. at 493–46 (citing *State v. Petit*, 77 N.W. 225 (Minn. 1898), *aff’d*, 177 U.S. 164 (1900)).

32. *Id.* at 447 (quoting *Petit v. Minnesota*, 177 U.S. 164, 168 (1900)).

33. *Id.*

34. *Id.* at 494–47.

35. 85 P. 855 (Or. 1906).

36. *Id.*

1905.³⁷ Seeking to overturn his conviction, Muller argued that the law interfered with his female employees' liberty of contract and that it discriminated against women and in favor of men.³⁸ The Oregon Court cited the then-recent decision in *Lochner* for the general proposition that the freedom to contract is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment and "cannot be arbitrarily interfered with by the legislature."³⁹ But the Court quickly added that "the right to labor and to contract for labor, like all rights, is itself subject to such reasonable limitations as are essential to the peace, health, welfare, and good order of the community."⁴⁰ The Court upheld the statute.

When Muller took his case to the United States Supreme Court, Louis Brandeis was recruited to support the state's defense of its statute. He briefed and argued the case (along with a local Oregon lawyer), and prevailed in *Muller v. Oregon*.⁴¹ The Supreme Court opinion's emphasis on the role of women as mothers whose health is "essential to vigorous offspring," and to protecting "the strength and vigor of the race," was certainly a victory for progressive labor legislation, even at the temporary expense of the broader cause of women's equality, including the right to vote that was gaining prominence at the same time.⁴² That focus, at least, allowed the Court to distinguish *Lochner*, but it would be almost another thirty years before the Court altered its substantive due process analysis and began regularly upholding labor and economic regulatory legislation against due process challenges.

While the Oregon courts generally upheld progressive legislation under general federal or state constitutional provisions, they certainly took such challenges seriously, often evaluating new laws to decide whether they were "arbitrary" or "unreasonable" or beyond the state's "police power." More interesting perhaps, as *Without "Due Process"* reminds us, is that state courts have continued to apply substantive due process principles to economic and other regulatory statutes long after the United States Supreme Court abandoned that approach in the late 1930s.⁴³ Robert Williams also has pointed out that states continue to use

37. *Id.*

38. *Id.* at 855–56.

39. *Id.* at 856.

40. *Id.*

41. 208 U.S. 412 (1908). For interesting additional background on the case, see Ronald K.L. Collins & Jennifer Friesen, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 294 (1983).

42. *Muller*, 208 U.S. at 421.

43. Linde, *supra* note 1, at 163–66.

substantive due process to scrutinize—and occasionally hold unconstitutional—economic regulation, despite the federal courts’ “hands-off” approach. In contrast to the *Lochner* era, however, Williams points out that state courts generally act in what they perceive to be the interest of the general public, rather than narrower business interests.⁴⁴

III. THE PIVOT FROM DUE PROCESS TO OTHER, SPECIFIC CONSTITUTIONAL PROVISIONS

If a state constitution lacks a due process clause, and if we follow Linde and consider state constitutional arguments before turning to the Federal Due Process Clause, how should a state court approach broad constitutional challenges to state laws or policies? One answer, driven by Linde’s suggestion that courts actually consider the text—the whole text—of their state constitutions, is for litigants and state courts to focus on the narrower and sometimes forgotten provisions that hide in dark corners of many state constitutions.

State constitutions often have more specific protections of individual rights than we find in the Federal Constitution. As a result, at least with respect to these specific provisions, state constitutions may provide more direct guidance to courts. One notable example of such a case is Linde’s decision in *Sterling v. Cupp*.⁴⁵ In that case, male prison inmates challenged a state practice allowing female prison guards to conduct body searches of male inmates and to monitor them, even in showers or toilets.⁴⁶ The inmates argued that those activities violated their constitutional right to privacy.⁴⁷ The Oregon Court of Appeals had agreed with the inmates, relying on the United States Supreme Court’s then-recent decision in *Griswold v. Connecticut*,⁴⁸ in which the Court concluded that the Due Process Clause of the Fourteenth Amendment (when considered with other provisions in the Bill of Rights) protects a “right of privacy,” and held that the state policy at issue violated that right.⁴⁹

The Oregon Supreme Court affirmed the court of appeals’ decision in *Sterling*, but on a different ground, looking instead to Oregon’s own constitution. Justice Linde, consistent with his earlier article, first

44. WILLIAMS, *supra* note 2, at 190–92.

45. 625 P.2d 123 (Or. 1981).

46. *Id.* at 125.

47. *Id.* at 126.

48. 381 U.S. 479 (1965).

49. *See Sterling*, 625 P.2d at 126 (citing *Griswold*, 381 U.S. 479).

rejected the court of appeals' approach of turning to the Federal Due Process Clause before it had considered whether the Oregon Constitution precluded the state's policy.⁵⁰ Perhaps to the surprise of the plaintiffs, who had not raised the argument, Linde looked to article I, section 13, of the Oregon Constitution, which provides, "No person arrested, or confined in jail, shall be treated with unnecessary rigor."⁵¹ Nothing in the history of that provision indicated that it had anything to do with searches, pat-downs, or the monitoring of incarcerated individuals, let alone of the gender of the prison guards performing those functions.⁵² To fill that gap, Linde looked to and relied upon what he conceded were "nonofficial"⁵³ standards regarding the treatment of prisoners, including those adopted by the American Bar Association and the American Correctional Association, as well as the Universal Declaration of Human Rights and documents from various United Nations agencies.⁵⁴

Sterling illustrates the strengths and potential weaknesses of focusing on specific state constitutional provisions rather than trying to discern the ill-defined parameters of the substantive aspect of the Due Process Clause—particularly the "right to privacy"—and apply that provision to a novel fact situation. Linde correctly pointed out the difficulties of defining the privacy right protected by the Due Process Clause,⁵⁵ but a disinterested observer might question whether the interpretive exercise Linde undertook instead—deciding whether a male prisoner searched or observed while showering by a female guard had been "treated with unnecessary rigor"—was much less open-ended. A dissenting opinion made the reasonable point that there appeared to be nothing to indicate "that the 'unnecessary rigor' clause was intended to authorize the courts to enforce standards of delicacy or courtesy among adults in prison in the name of the constitution," and added that the correctional standards Linde cited "are worthy of respectful attention from the legislature or the executive branch, but they are no substitute for the constitution and they

50. *Id.* at 126.

51. *Id.* at 128.

52. *See id.* at 128–29 (discussing historical underpinnings of provision); *id.* at 140 (Tanzer, J. dissenting) (arguing that there is "no evidence that the 'unnecessary rigor' clause was intended to authorize courts to enforce standards of delicacy or courtesy among adults in prison in the name of the constitution").

53. *Id.* at 130 (majority opinion).

54. *Id.* at 128–32.

55. *Id.* at 129.

do not provide a mandate for judicial intervention.”⁵⁶

Nevertheless, *Sterling* reminds us that state constitutions contain a variety of sometimes forgotten provisions that may provide better, or at least state constitution-based, grounds for invalidating state statutes or policies; this may avoid other problems that can arise from reliance on the Due Process Clause. And, as Linde also noted in *Without “Due Process,”* grounding a decision on an independent interpretation of a state constitutional provision, rather than the Due Process Clause, insulates the decision from possible review and reversal by the United States Supreme Court.⁵⁷

A less dramatic, but perhaps more satisfying example of using a narrow, more specific state constitutional provision rather than a more general state or federal provision, can be found in Oregon’s handling of challenges to criminal penalties on the ground that they are not proportional to the offense.⁵⁸ Article I, section 16, of the Oregon Constitution provides, in part, “[c]ruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.”⁵⁹ In earlier days, if a defendant challenged a sentence as unconstitutional because it was draconian compared to the crime—say, life in prison for a first-time trespass—the defendant and the court would look to the cruel and unusual punishment provision of the Eighth Amendment or to an analogous state constitutional provision.

In a case from the early twentieth century, *State v. Ross*,⁶⁰ the defendant was convicted of larceny and sentenced to pay a fine of \$576,853.74, to serve five years in the state penitentiary, and to spend one day in the county jail for every two dollars of the fine, not to exceed 288,426 days.⁶¹ The Oregon Supreme Court held that the sentence was so excessive as to constitute cruel and unusual punishment, but engaged in essentially no textual or other analysis of any state or federal

56. *Id.* at 140 (Tanzer, J., dissenting). The dissent also rejected the “privacy” theory adopted by the court of appeals, pointing out that the plaintiffs had not challenged the State’s right to search inmates, but only “the authority of the [S]tate to have the searches performed by persons of either sex.” *Id.* at 139. The dissent argued that “plaintiffs’ expectation of privacy is not lessened and their exposure to searches is not enlarged according to the sex of the person searching.” *Id.*

57. Linde, *supra* note 1, at 134–35, 159–60.

58. See generally Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783 (2008).

59. OR. CONST. art. 1, § 16.

60. 104 P. 596 (Or. 1909), *modified*, 106 P. 1022 (Or. 1910), *appeal dismissed*, 227 U.S. 150 (1913).

61. *Ross*, 104 P. at 599.

constitutional provision.⁶² A decade later, when a defendant challenged his sentence of six months in jail and a \$500 fine for possessing two quarts of “moonshine,” the Court expressly addressed under the Oregon Constitution his claim that the sentence was not “proportioned”⁶³ to the offense, although the decision relied primarily on a United States Supreme Court case interpreting the Eighth Amendment’s prohibition of cruel and unusual punishment.⁶⁴ More recently, the Court has analyzed the proportionality requirement in detail and developed an analytical structure to guide that determination.⁶⁵ That approach has been particularly important because of uncertainty as to whether the Eighth Amendment’s prohibition of cruel and unusual punishment contains an implicit ban on sentences that are simply excessive or disproportionate to the crime in some respect, or instead whether the prohibition speaks only to the nature of the sanction itself.⁶⁶ By relying on Oregon’s explicit proportionality requirement, the Oregon Court has used the appropriate state constitutional provision to examine claims that sentences were excessive, has been able to develop case law interpreting the explicit requirement of proportionality in the constitution, and has, on occasion, overturned criminal sentences on that ground.⁶⁷

The larger point, briefly alluded to before, is that state constitutions often have more specific protections of individual rights than are found in the United States Constitution. Reliance on those state texts—rather than on federal provisions made applicable to the states by the Due Process Clause—is not only legally sound (legally required, Linde would say), but more satisfactory generally because they provide more direct guidance to the courts and have the legitimacy of being traceable to the work of the constitutional framers. Other examples of Oregon’s constitution providing more specific provisions than the Federal Constitution include its free expression provision, which is written in broader terms than the First Amendment;⁶⁸ the multiple provisions regarding religious liberty, including a specific provision preventing state funds from being spent in support of religion;⁶⁹ and the specific directives that “no court shall be secret,” and that justice is to be

62. *See Ross*, 106 P. at 1024.

63. *Sustar v. Cnty. Court of Marion Cnty.*, 201 P. 445, 448 (Or. 1921).

64. *Id.* at 446, 448.

65. *See, e.g., State v. Wheeler*, 175 P.3d 438 (Or. 2007).

66. Balmer, *supra* note 58, at 799–804.

67. *See, e.g., State v. Rodriguez*, 217 P.3d 659 (Or. 2009).

68. *See OR. CONST.* art. I, § 8.

69. *See, e.g., id.* §§ 1–6

administered “openly.”⁷⁰

IV. GREAT ORDINANCES: EQUAL PRIVILEGES AND IMMUNITIES, AND DUE COURSE OF LAW

Suppose a government action seems to intrude too far into areas of personal privacy, to be arbitrary and unreasonable, or to discriminate unfairly against a particular person or group—and in contrast to a punishment that involves “excessive rigor” or is not “proportioned to the offense,” there is no specific constitutional provision that can plausibly be invoked. Do other provisions of the Oregon Constitution protect those individual rights that are less well-defined? Although, as we have seen, the Oregon Constitution does not contain a true due process clause or an equal protection clause, it does include several of what Williams, quoting Justice Holmes, has called the “great ordinances of the Constitution”—those broadly, and somewhat vaguely, phrased provisions by which constitution writers attempted to circumscribe government actions that they could not (or did not want to) identify with specificity.⁷¹ In the Oregon Constitution, these include the equal privileges and immunities clause⁷² and the “due course of law” provision⁷³ that guarantees open courts and a “remedy by due course of law” for injury to “person, property, or reputation.”⁷⁴

Not surprisingly, the Oregon courts have often used those provisions to evaluate challenges to state statutes and actions, and sometimes have found the state action unconstitutional. In *Hewitt v. State Accident Insurance Fund Corp.*,⁷⁵ for example, the statute permitted an unmarried woman to collect death benefits upon the death of an unmarried man with whom she had cohabited for over a year, but did not provide for a similarly situated man to receive death benefits.⁷⁶ The Court agreed with the plaintiff—an unmarried man—that the statute treated one class of people (unmarried women who had cohabited with unmarried men for a particular time period) more favorably than unmarried men in the same position.⁷⁷ The Court described that gender-based classification as

70. *Id.* § 10.

71. WILLIAMS, *supra* note 2, at 336–37 (quoting *Vreeland v. Byrne*, 370 A.2d 825 (N.J. 1977)).

72. OR. CONST. art. I, § 20.

73. *Id.* § 10.

74. *See id.*; *see also* Linde, *supra* note 1, at 135.

75. 653 P.2d 970 (Or. 1982).

76. *Id.* at 971.

77. *Id.* at 977–79.

“suspect” and thus subject to close scrutiny.⁷⁸ Finding no basis to justify the different treatment of women and men in that context, the Court held that the statute violated the equal privileges and immunities clause of article I, section 20.⁷⁹

If the Court’s analysis in *Hewitt* sounds suspiciously like that found in federal equal protection decisions, that is because the Court, in fact, cited and relied on those cases. The Court recognized that the Equal Protection Clause was intended to prevent discrimination *against* certain groups or individuals, while the privileges and immunities provision was focused on preventing privileges—usually economic privileges—from being *granted* unequally to favored individuals and groups.⁸⁰ Nevertheless, the Court found helpful the equal protection analysis of when differential treatment of similarly situated persons might raise constitutional problems, although it was quick to point out that it did not need to follow then-controlling federal equal protection precedents, which were somewhat equivocal on the issue of gender discrimination.⁸¹

Hewitt then provided the groundwork for an important court of appeals decision holding that the equal privileges and immunities clause of the state constitution barred the state medical school from offering health insurance benefits to the spouses of employees but not to the similarly situated same sex domestic partners of employees.⁸² The same sex partners argued that, although it might be reasonable to limit benefits to spouses, they were unable to become spouses under state law; the effect of the benefit policy and the state statute limiting marriage to two persons of different genders, considered together, denied them a privilege conferred on similarly situated employees.⁸³ The court of appeals agreed and held that the disparate treatment violated article I, section 20.⁸⁴ The court observed that the insurance benefits constituted a privilege that was not made available to the same-sex partners of OHSU employees.⁸⁵ Those employees constituted a “class” that was treated differently solely because of their sexual orientation—and that differential treatment was permissible only if it could be justified by

78. *See id.* at 977.

79. *Id.* at 979.

80. *See id.* at 975–76.

81. *Id.* at 974–75.

82. *See Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 437 (Or. 1998).

83. *Id.* at 444.

84. *Id.* at 448.

85. *Id.*

their sexual orientation.⁸⁶ As the Court stated, “The parties have suggested no such justification, and we can envision none.”⁸⁷

Although article I, section 20, provides that “[n]o law shall be passed” granting privileges and immunities to some that are not equally available to all citizens,⁸⁸ the Oregon courts have long held that provision to apply to executive and other government decisions, as well as to laws enacted by the legislature.⁸⁹ And, despite the provision’s origin in concerns about economic privileges, the courts have viewed it as a more general prohibition on differential treatment, including for example, charging decisions by district attorneys.⁹⁰ In one recent case, the state attorney general argued that the Court should disavow its longstanding approach to article I, section 20, and return to what it argued was the original scope of the provision as applying only to the legislature and only to economic benefits.⁹¹ The Court had little trouble rejecting that effort to turn the clock back more than 100 years.⁹²

The most obvious other “great ordinance” in the Oregon Constitution, article I, section 10, is the Oregon constitutional provision most frequently confused with the Due Process Clause of the Fourteenth Amendment. It provides:

No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.⁹³

As the text of the provision makes clear, it touches on a number of vital aspects of government and justice. It is referred to as an “open courts” or “remedies” or “due course of law” provision. It is not, however, a “due

86. *Id.* at 447.

87. *Id.*

88. OR. CONST. art. I, § 20.

89. *See, e.g.*, *State v. Savastano*, 309 P.3d 1083, 1093 (Or. 2013) (describing cases).

90. *See, e.g.*, *State v. Clark*, 630 P.2d 810 (Or. 1980).

91. *Savastano*, 309 P.3d at 1099.

92. *See id.* (finding that the state’s argument “sweeps too broadly” and noting: “[t]he state is correct that many early privileges or immunities cases involved monopolies or other economic benefits, but nothing in the words of the provision or the historical definitions of those words indicates that they do not also apply to noneconomic privileges or immunities conferred by the government”). Interestingly, the ACLU of Oregon filed an amicus brief in the *Savastano* case that took no position on the defendant’s underlying argument—that the district attorney was required to have an established policy for charging decisions in order to comply to article I, section 20—but that vigorously opposed the Attorney General’s effort to return to a narrower interpretation of the provision. Amended Brief of Amicus Curiae ALCU Foundation of Oregon, Inc., *Savastano*, 309 P.3d 1083 (No. S059973), 2012 WL 3569903.

93. OR. CONST. art. I, § 10.

process” clause, as Linde and others have demonstrated; and indeed its origins trace back to a different chapter of Magna Carta than the chapter that provides the basis for the Due Process Clause in the Federal Constitution.⁹⁴ The meaning and proper interpretation of article I, section 10, are beyond the scope of this brief Essay, but its ancient roots, broad application, and contemporary importance place it firmly in the “great ordinance” category. The provision has provided fertile ground for litigants, particularly related to tort claims, and the Oregon courts have sometimes used it to avoid what most people would consider to be grossly unjust results. In *Clarke v. Oregon Health Sciences University*,⁹⁵ for example, the Court held unconstitutional a statutory tort claims limit of \$200,000 as applied to a claim for medical negligence against a state hospital and its employees, when the conceded economic damages to a newborn caused by the negligence exceeded twelve million dollars.⁹⁶ But whether article I, section 10, could be used to protect substantive rights outside the tort context is unclear.

In addition to its importance in tort law, article I, section 10 may protect some procedural rights, although, as we have noted, it is not a due *process* clause. We need to recall that Linde’s critique was aimed at substantive due process and the use of state and federal due process analysis to invalidate state statutes—particularly, but not only, regulatory laws—on the grounds that they were arbitrary, unreasonable, or not within the so-called police power of the state.⁹⁷ But aside from those categories of cases, article I, section 10 has long been held to provide at least some guarantee of procedural fairness, including an appropriate and fair hearing before a person can be deprived of property rights.⁹⁸

94. Linde, *supra* note 1, at 136–38. *See generally* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199–1202 (1992) (describing history and origins of remedy clauses in state constitutions). Oregon’s remedy clause is derived from Chapter 40 of the Magna Carta. *See* Linde, *supra* note 1, at 138. Sir Edward Coke’s commentary on the Magna Carta, one of the most commonly read legal texts in early America, expounded on Chapter 40, providing the language from which the remedy clause was later developed: “[E]very Subject of this Realm, for injury done to him in [goods, land or person,] . . . may take his remedy by the course of the Law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.” Schuman, *supra*, at 1199 (alterations in original).

95. 175 P.3d 418 (Or. 2007).

96. *Id.* at 420–22, 434.

97. *See* Linde, *supra* note 1, at 181–87 (summarizing critique).

98. *See* *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 338–40, 351–57 (Or. 2001) (summarizing procedural due process decisions under article I, section 10); *Tupper v. Fairview Hosp. and Training Ctr., Mental Health Div.*, 556 P.2d 1340, 1345–48 (Or. 1976) (O’Connell, J., specially concurring) (concluding that article I, section 10, required pre-termination notice and

CONCLUSION: DOES OREGON'S CONSTITUTION NEED A DUE PROCESS CLAUSE?

Returning to our legislator's question, one response is that we have a Federal Due Process Clause, so we don't need another one in the state constitution. The *Federal* Due Process Clause protects our procedural and substantive rights, and it is regularly interpreted and applied by federal and state courts. As Alan Tarr notes, in describing Linde's state law first approach, the Federal Due Process and Equal Protection Clauses are "state-failure" provisions, available to protect rights if state law does not.⁹⁹ But the United States Supreme Court is the final arbiter of those federal constitutional provisions, of course, so in the absence of an analogous state provision, states lose the potential for a more expansive, rights-protective interpretation of due process. In contrast, the Oregon Supreme Court's interpretation of its own constitution is not subject to federal review, even when that interpretation is different from the United States Supreme Court's interpretation of parallel federal constitutional provisions. When one considers the importance of the state constitution's free speech and search and seizure provisions (as interpreted by the Oregon courts) to Oregon law, and our preference not to rely on federal interpretations of the parallel federal constitutional guarantees, the inability to take the same approach to rights that could be protected under a state due process clause starts to look significant.

Looking at the Oregon Constitution as it is, without a due process clause, does it protect the rights we think important? Like many state constitutions, Oregon's contains a number of provisions that expressly protect rights or impose limits on government actions, often in robust terms. Our free speech provision, article I, section 8, for example, protects the right to "speak, write, or print freely on any subject whatever," although each person is "responsible for the abuse of this right."¹⁰⁰ The constitution bars the appropriation of money for any religious institution,¹⁰¹ protects the right of the "people to bear arms for the defence [sic] of themselves,"¹⁰² provides specific directions

related procedural protections to state employee; criticizing majority for relying on federal due process without first considering state constitution). Moreover, the procedural aspects of article I, section 10, are supported by specific provisions protecting the right to a jury trial in criminal (article I, section 11) and civil cases (article I, section 17).

99. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 184 (1998).

100. OR. CONST. art. I, § 20.

101. *Id.* § 5.

102. *Id.* § 27.

regarding bail,¹⁰³ and requires that punishments be proportioned to the offense,¹⁰⁴ just to name a few. More recent provisions give crime victims the right to participate in proceedings against those who have caused them harm and the right to receive restitution.¹⁰⁵ And just recently in November 2014, voters approved an “equal rights amendment,” providing that equal rights “shall not be denied or abridged . . . on account of sex.”¹⁰⁶ When state courts rely on those specific state constitutional provisions, rather than the Federal Due Process Clause, they have more substantive guidance from the state constitution’s framers about the meaning and scope of the restrictions they sought to impose on state government and the rights they wanted to protect.

Even without a due process clause that tracks the Fifth and Fourteenth Amendments, the Oregon Constitution has provisions that protect some important procedural rights, ranging from specific rights related to jury trials and appellate review to the more general right to a “remedy by due course of law for injury” to person, property or reputation in article I, section 10.¹⁰⁷ And in terms of substantive review of statutes and other state actions, the Oregon Constitution, as noted previously, does contain two broadly phrased, potentially far-reaching, provisions: The open courts/remedies provision of article I, section 10,¹⁰⁸ and the equal privileges and immunities provision of article I, section 20.¹⁰⁹ But the extent to which those provisions could be interpreted to protect the kind of individual rights covered by the “substantive” component of the Federal Due Process Clause is unclear.

Are there potential laws or policies so oppressive, intrusive, or unfair that most thoughtful people would consider them beyond the authority of state government—but that do not appear to violate any existing provision of the Oregon Constitution? Take, for example, the ban on the use of contraceptives by married couples that gave rise to the “right to privacy” articulated in *Griswold*.¹¹⁰ A more far-fetched hypothetical, but perhaps useful for discussion purposes, would be a state law that ordered the removal of children from their parents at the age of two, to be returned to the parents at age ten. Such a law would presumably be

103. *Id.* §§ 14, 16.

104. *Id.* § 13.

105. *Id.* § 42.

106. *Id.* § 46.

107. *Id.* § 10.

108. *Id.*

109. *Id.* § 20.

110. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

found to violate parental rights protected by “substantive due process” under the Fourteenth Amendment, despite the fact that nothing in the Constitution speaks specifically to such rights.

Does the Oregon Constitution offer anything to citizens who might challenge the hypothetical statute allowing the state to take custody of all children? Certainly, a court would look hard at the “remedy” clause and the equal privileges and immunities provision, both of which are written in capacious, general terms and which sometimes have been interpreted expansively—although neither speaks very clearly to rights of parenthood, privacy, or personal autonomy. Some decisions interpreting the “remedy” clause have stated that it provides a remedy only for rights that existed when the Oregon Constitution was adopted in 1857,¹¹¹ and although the equal privileges and immunities provision has played the role of an equal protection clause, it has been interpreted as a bar against discrimination and unequal treatment, rather than as the source of unenumerated personal rights.¹¹²

An Oregon court faced with a claim asserting a novel constitutional right could perhaps draw some support from article I, section 33, which provides, “[t]his enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people.”¹¹³ That provision, of course, is almost identical to the Ninth Amendment, which the Supreme Court relied upon, in part, in *Griswold*.¹¹⁴ It suggests, at a minimum, that the framers of the Oregon Constitution did not view the specific “rights” and “privileges” enumerated in the Oregon Bill of Rights as encompassing all the rights that Oregonians “retain.” But it gives no indication of what those rights might be or the sources to which one might look for them, let alone the scope and limitations of any unenumerated rights.¹¹⁵

The task, however, probably would not be any less daunting—or less firmly rooted in constitutional text, or less controversial—than the

111. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356 (Or. 2001).

112. *See, e.g.*, *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 445–47 (Or. 1998) (discussing meaning and application of article I, section 20); *Hewitt v. State Accident Ins. Fund*, 653 P.2d 970, 975–78 (Or. 1982) (same).

113. OR. CONST. art. I, § 33.

114. *Griswold*, 381 U.S. at 484–87.

115. Few cases discuss or even cite article I, section 33. However, in *Hall v. Northwest Outward Bound School*, 572 P.2d 1007 (Or. 1977), Justice Linde suggested an extremely limited view of the provision, stating that any “rights, and or privileges” would probably need to be asserted by the legislature, rather than by the judiciary, and that the only rights that could be “retained” would be rights that were recognized as such at the time the Oregon Constitution was adopted. *Id.* at 1010–11 n.11. Whether Linde’s brief comments are correct or not is a topic for another day.

efforts of the United States Supreme Court to decide what is protected by the substantive component of the Federal Due Process Clause. Certainly, in states like Oregon and Washington, with their strong traditions of independent state constitutional analysis, the courts would approach such challenges with open minds—and likely would not find the absence of a state due process clause to make much difference one way or the other. On the other hand, as discussed above, the texts, origins and purposes of Oregon’s remedy and equal privileges and immunities provisions are distinct from those of a true “due process” clause. A due process clause in the Oregon Constitution would be another “great ordinance” in the constitutional toolkit, another source courts could look to in constitutional cases to help ensure that the fundamental rights of Oregon citizens are protected, even as state and local governments engaged in the necessary regulatory activities that our society needs to function effectively. In the end, perhaps Oregon’s constitution could use a due process clause after all.