WILLIAM COHEN*

Rationality Review of Tort Reform Legislation Under State Constitutions: Justice Linde's Methodology of Judicial Review

IN a recent interview, Justice Hans Linde stated that "most lawyers are trained right from the beginning of law school to do their research in Federal case law, and they never learn to take state courts as seriously."[1] Long before he was appointed to the Oregon Supreme Court, Professor Linde was not like "most lawyers" — he took state courts and state law very seriously. This was particularly true regarding issues traditionally decided under the United States Constitution. I am unable to count the number of times Justice Linde pointed out to me that my constitutional law casebook, along with every other casebook available, made almost no mention of state constitutions. Justice Linde insisted that state constitutions were more than reruns, in lower case, of their federal counterpart, the United States Constitution. As Justice Linde said, "Many state constitutions contain explicit textual guarantees of certain personal liberties that the Federal Constitution is much more vague about."[2]

Despite Justice Linde's complaint about the condition of legal education, state courts *have* taken state constitutional law more seriously in recent years.[3] Justice Linde has made it abundantly clear, however, that not all of this is what *he* meant by taking state consti-

* C. Wendell and Edith M. Carlsmith Professor of Law, Stanford University.

[1] London, *Gay Groups Turn to State Courts to Win Rights*, N.Y. Times, Dec. 21, 1990, at B6, col. 3.

[2] *Id.*

[3] Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1143 (1985); Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 972-74 (1982); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1216 (1985); Note, *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328 n.20 (1982).

tutional law seriously. To demonstrate this difference, I will compare the approach of the Oregon Supreme Court, an approach heavily influenced by Justice Linde, with the decisions of state courts holding that state tort reform laws are unconstitutional if they "unreasonably" restrict plaintiffs' rights to compensation.

I

STATE LAW FIRST

Some state courts, heeding a call from Justice Brennan,[4] selectively invoke state constitutions when they disagree with decisions of the Burger and Rehnquist Courts. They claim independence from federal constitutional law by looking first to federal doctrine, "and then discuss whether or why the state should, as it is put, 'go further' than the Supreme Court."[5] These state decisions follow the structure and methodology of the Supreme Court's federal doctrine, while they adopt the conclusions of the Court's dissenters. This treats state constitutions not as independent sources of rights, but as documents creating "supplemental rights that require an explanation."[6]

Other state court opinions selectively invoke the provisions of the state constitution, while they engage in lengthy analysis of the Federal Constitution. They conclude that there has been a federal constitutional violation, but "independently" decide that there has also been a state constitutional law violation.[7] Some of these decisions are unprincipled attempts to block Supreme Court review of the decision of the federal issue[8] or attempts to amend the state

---

[4] Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[5] Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 177 (1984).

[6] *Id.* Of course, one explanation may simply be that the state constitution had earlier been interpreted to mean what the Warren Court said the similar provision of the Federal Constitution meant. If the Burger or Rehnquist Courts have abandoned the earlier interpretation of the Federal Constitution, the earlier state decision may continue to bind the state court even when U.S. Supreme Court doctrine changes.

[7] *See* Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973).

[8] The California Supreme Court was clearly selective in its citation to the California Constitution. When it decided that equal protection required equalization of state funding for local school districts, it invoked the California Constitution's equality guarantee in the midst of lengthy analysis of the fourteenth amendment. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). When it decided that equal protection invalidated all racial classifications in affirmative action programs, it showed its preference that the United States Supreme Court have the last word by conspicuously omit-

constitution.[9]

Justice Linde's alternative emphasizes that, in a federal system, state constitutions are truly independent. State constitutional protections of individual liberty may have different texts and different histories than their federal analogues. Even when they do not, a court need not presume that the United States Supreme Court's interpretation of the federal text is correct. Justice Linde's solution is both logical and elegant: state courts should look first to state law and state constitutions and should address federal constitutional questions only after a determination that neither state law nor the state constitution provides the protection claimed.[10] The Oregon Supreme Court adopted Justice Linde's position in 1981.[11]

---

ting any citation to the state constitution. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *rev'd in part*, 438 U.S. 265 (1977).

Michigan v. Long, 463 U.S. 1032 (1983), made it more difficult for a state court to block Supreme Court review with a casual citation to a parallel state constitutional provision. However, a state court can still discuss the federal issue at length and then consciously block review by including a "plain statement . . . that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Id.* at 1041.

[9] Critics of the court's decision who try to amend the state constitution face their state supreme court's opinion that the amendment would be futile, since the Federal Constitution commands the same result. To complete this Catch 22, there is no way to obtain Supreme Court review of the state court's decision on the federal issue. Linde, *State Constitutional Law*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1738, 1742 (L. Levy, K. Karst & D. Mahoney, eds. 1986).

[10] Professor Linde first made the point in Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970), and in Linde, Book Review, 52 OR. L. REV. 325, 332-41 (1973). Justice Linde made the argument in a series of separate opinions between 1977 and 1981: State v. Tourtillott, 289 Or. 845, 869-93, 618 P.2d 423, 435-48 (1980) (dissenting opinion), *cert. denied*, 451 U.S. 972 (1981); State *ex rel.* Oregonian Pub. Co. v. Deiz, 289 Or. 277, 286-90, 613 P.2d 23, 28-30 (1980) (concurring opinion); State v. Heintz, 286 Or. 239, 255-59, 594 P.2d 385, 393-95 (1979) (concurring opinion); State v. Greene, 285 Or. 337, 345-60, 591 P.2d 1362, 1366-73 (1979) (concurring opinion); State v. Flores, 280 Or. 273, 282-89, 570 P.2d 965, 970-73 (1977) (dissenting opinion).

[11] Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981). Justice Linde wrote this opinion. He reiterated the position in Oregon v. Kennedy, 295 Or. 260, 262, 666 P.2d 1316, 1318 (1983). In a decision the year before *Sterling*, the Oregon Court of Appeals had reversed a conviction on double jeopardy grounds in an opinion melding federal and state precedents. State v. Kennedy, 49 Or. App. 415, 619 P.2d 948 (1980), *review denied*, 290 Or. 551 (1981), *rev'd*, 456 U.S. 667 (1982). After the Oregon Supreme Court denied review, a divided United States Supreme Court determined that the court of appeals decision rested on the federal ground and reversed. Oregon v. Kennedy, 456 U.S. 667 (1982). On remand, the court of appeals decided that there had been no state constitutional violation, 61 Or. App. 469, 657 P.2d 717, *aff'd*, 295 Or. 260, 666 P.2d 1316 (1983), and the Oregon Supreme Court affirmed. Justice Linde noted that if the court of appeals had followed a "state law first" practice in its original opinion,

> [W]e might not only have decided the state claim against the defendant, as we

The New Hampshire Supreme Court is one of a handful of state courts that have cited Justice Linde's "state law first" decisions for the Oregon Supreme Court and have adopted his position. *State v. Ball* [12] reversed a marijuana possession conviction on the ground that observation of a partially-smoked, hand-rolled cigarette on an automobile's dashboard during a traffic stop did not justify its seizure. The court's approach to that question incorporated another aspect of Justice Linde's approach to interpreting state constitutions. The court concluded that the key to interpreting the state ban on unreasonable search and seizure was that searches not falling within "established and well-delineated" exceptions were invalid, and that the search could not be justified by an ad hoc judgment whether the search was "reasonable under the circumstances."[13]

The New Hampshire court's approach to searches and seizures may be more expansive than contemporary Supreme Court doctrine. Justice Linde does not, however, base his contention that state judges should pay more attention to state constitutional law on an argument that state constitutional law should be more protective of personal liberty than the Burger and Rehnquist Courts have been. His contention has been coupled, instead, with repeated objections to the Supreme Court's pervasive contemporary constitutional doctrine that balances competing liberty and state interests. "In practice," he argues, "all there is to the 'balancing' to which the Supreme Court has reduced contemporary constitutional law" is the substitution of pragmatic judicial policy-making for law.[14] In its rule-oriented approach to searches and seizures, the New Hampshire Supreme Court is a model of Justice Linde's approach to state constitutional law.

> do today, but also his federal claim, thereby relieving the Supreme Court of concern about a reading of the fifth amendment more expansive than its own. As it is, we reach the issue of Oregon law two and one-half years and hundreds of pages of briefs after it might have been decided in the Oregon Courts.

Kennedy, 295 Or. at 265, 666 P.2d at 1320. The United States Supreme Court's difficulty in Kennedy's case in determining whether the Oregon Court of Appeals had decided on state grounds was a catalyst for its decision in Michigan v. Long, 463 U.S. 1032 (1983), where it concluded that, in cases of ambiguity, it would now presume that a state court discussing a federal ground for its decision had rested on that ground. *Id.* at 1040-41.

[12] 124 N.H. 226, 471 A.2d 347 (1983). Another state case adopting the position is State v. Cadman, 476 A.2d 1148 (Me. 1984).

[13] *Ball*, 124 N.H. at 234, 237, 471 A.2d at 352, 354.

[14] Linde, *supra* note 5, at 190.

II

RATIONALITY REVIEW IN STATE CONSTITUTIONAL LAW

Another group of New Hampshire decisions, however, is considerably at odds with Justice Linde's positions. *Heath v. Sears, Roebuck & Co.*[15] is representative. The court held that statutes restricting personal injury actions for defective products were unconstitutional. The invalid statutes required plaintiffs to bring product liability actions within twelve years of the time a product was first sold, and imposed a shorter statute of limitations for product liability claims than for other personal injury cases. The court had previously concluded, in a case striking down limitations on medical malpractice recoveries, that the right to recover personal injury damages is an "important substantive right," and that its impairment violates equal protection of the laws unless it rests "upon some ground of difference having a fair and substantial relation to the object of the legislation."[16]

Ironically, New Hampshire's "equal protection" analysis proceeds in the absence of an equal protection clause in the state constitution. Decisions enforcing the state requirement of "equal protection of the laws" cite two provisions of the New Hampshire Constitution[17] but are careful not to quote them. Neither provision contains the phrase "equal protection," and neither appears to embrace a general concept of equality. The provision explicitly dealing with "equality" states that "[e]quality of rights shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."[18] It is hard to see how a law limiting product liability for injuries caused by older products constitutes discrimination "on account of race, creed, color, sex or national origin."[19]

In applying state "equal protection" analysis to legislation restricting plaintiffs' tort remedies, the New Hampshire Supreme

---

[15] 123 N.H. 512, 464 A.2d 288 (1983).

[16] Carson v. Maurer, 120 N.H. 925, 931-32, 424 A.2d 825, 830-31 (1980).

[17] N.H. CONST. pt. 1, arts. 2 and 12.

[18] *Id.* at pt. 1, art. 2.

[19] It is even harder to understand the relevance of article 12, which provides:

> Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

Court has adopted the United States Supreme Court's multiple tiers of equal protection scrutiny. It has, however, rejected the Court's implicit conclusion that legislation restricting plaintiffs' tort remedies would fall within the lowest tier.[20]

The outcome of "middle tier" scrutiny is to subject all defendant-oriented tort legislation to judicial veto if a majority of the judges of the New Hampshire Supreme Court consider the legislative policy unwise. The flavor of that judgment is illustrated in *Carson v. Maurer*,[21] a medical malpractice decision in which the New Hampshire court considered an argument that restriction of recoveries was "substantially related" to a goal of reducing medical and insurance costs. Even if the limitations on liability contained costs, the court concluded that the limitations offended "basic notions of fairness and justice,"[22] and "the potential cost to the general public and the actual cost to many medical malpractice plaintiffs is simply too high."[23]

One justification given by the New Hampshire Supreme Court for its conclusion that personal injury recovery is an important personal right is based on the "remedy clause" of its state constitution. The New Hampshire Constitution, like many other state constitutions, contains a provision adapted from the Magna Carta:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.[24]

Beyond justifying open-ended review of the reasonableness of tort legislation for violations of equal protection, the remedy clause had provided the New Hampshire Supreme Court with a second string

---

[20] We recognize that recently the United States Supreme Court has restricted its application of the substantial relationship test to cases involving classifications based upon gender and illegitimacy. . . . In interpreting our State Constitution, however, we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires.

Carson, 120 N.H. at 932, 424 A.2d at 831. Of course, in light of the language of the New Hampshire guarantee of equality of rights, it is hardly necessary to consult the United States Supreme Court's jurisprudence when classifications in New Hampshire legislation are based on gender. *See* N.H. CONST. pt. 1, art. 2.

[21] 120 N.H. 925, 424 A.2d 825 (1980).

[22] *Id.* at 944, 424 A.2d at 838.

[23] *Id.* at 941, 424 A.2d at 836.

[24] N.H. CONST. pt. 1, art. 14.

to its bow.[25] Adapting dictum from a 1917 United States Supreme Court decision upholding New York's workers' compensation laws,[26] the New Hampshire Supreme Court had required that there be a reasonably just substitute for elimination of any pre-existing remedies.[27] While the New Hampshire court has retreated from an extreme position that any limitation of plaintiffs' remedies must be matched by a contemporaneous enactment of a new plaintiffs' benefit, it continues to use the remedy clause to invalidate benefit reductions that the court considers unreasonable.[28]

State courts are notably divided on whether state constitutions authorize courts to second-guess legislative judgments about tort law. The New Hampshire Supreme Court, however, joins a number of state courts in using equal protection analysis and the state rem-

---

[25] In City of Dover v. Imperial Casualty & Indem. Co., 133 N.H. 109, 575 A.2d 1280 (1990), the court used both equal protection and the remedy clause to invalidate a statute immunizing municipalities from liability for negligent maintenance of sidewalks. Dissenting, Judge Souter stated:

> And so the 'fair and substantial' relation test is metamorphosed yet again. A formulation that began its juridical life as a rational basis test, and was ostensibly adopted by this court as a standard of intermediate review, is now being applied by a majority of the court to impose the strictest scrutiny known to equal protection analysis.

Id. at 127, 575 A.2d at 1291.

[26] New York Cent. R.R. v. White, 243 U.S. 188, 201 (1916) ("[I]t perhaps may be doubted whether the State could abolish all rights of action . . . without setting up something adequate in their stead."). No one believes that the quid pro quo requirement is today a viable standard under the fifth or fourteenth amendments' due process clauses. The Supreme Court, however, missed an opportunity to say clearly that it is not in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). In upholding the Price-Anderson Act's limitation of nuclear power plant liability, Chief Justice Burger's opinion began by stating that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme . . . provide a reasonable substitute remedy." *Id.* at 88. The Court went on, however, to spend nearly four pages in the U.S. Reports, *id.* at 89-92, to demonstrate that the Act did provide a "reasonably just substitute for the common-law or state tort remedies it replaces." *Id.* at 88.

[27] In Estabrook v. American Hoist & Derrick, Inc., 127 N.H. 162, 498 A.2d 871 (1985), the court invalidated amendments to the state's workers' compensation law that restricted tort actions between co-employees. The court was, candidly, influenced by its perception that workers' compensation awards provided inadequate compensation to injured workers. Judge Souter's dissent pointed out the anomaly that there would have been no constitutional problem if the workers' compensation law, at the outset, had barred tort actions against co-employees.

[28] Young v. Prevue Prods., Inc., 130 N.H. 84, 534 A.2d 714 (1987), *overruled Estabrook,* recognizing that it did not make sense "[t]o require that the legislature always increase benefits to a particular group of individuals whenever it takes other benefits away." *Id.* at 88, 534 A.2d at 717. Three years later, however, City of Dover v. Imperial Casualty & Indem. Co., 133 N.H. 109, 575 A.2d 1280 (1990), relied on the remedy clause, as well as equal protection, to invalidate increased municipal tort immunity.

edy clause to maintain a judicial veto over pro-defendant tort legislation that it considers to be unwise. Other state courts have developed similar analyses under state due process[29] and jury trial clauses.[30]

There are provisions in a few state constitutions that contain relatively explicit guarantees of pre-existing tort remedies. The Pennsylvania Constitution, for example, provides that, in cases not covered by the state's workers' compensation law, the General Assembly shall not "limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property."[31] Of course, judicial enforcement of such a provision presents no serious questions of methodology or the limits of the judicial function. These questions are raised by close judicial supervision of legislative policy in tort reform legislation rooted in more general due process, equal protection, remedy clause, or jury trial provisions. These are questions that Justice Linde has addressed for several decades.

III

DUE PROCESS AND RATIONALITY REVIEW

When the United States Supreme Court abandoned its economic due process jurisprudence in the 1930s, it replaced a doctrinal structure that denied government power to regulate the economy[32] with a formula that, read literally, would allow courts to decide whether laws made sense.[33] The inquiry whether laws bear a "rational relationship" to a "legitimate government purpose" has, however, been

[29] *E.g.*, Aldana v. Holub, 381 So. 2d 231 (Fla. 1980) (pretrial screening panels in medical malpractice cases); Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251 (1988) (damage limitation and periodic payment in malpractice actions); Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972) (application to minors of requirement that negligence claims be filed within 60 days of event).

[30] *E.g.*, Samsel v. Wheeler Trans. Servs., Inc., 246 Kan. 336, 789 P.2d 541 (1990) (limitation on medical malpractice recoveries); Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989).

[31] PA. CONST. art. 3, § 18. Apparently, however, the tendency to balance competing interests is irresistible. In Smith v. City of Philadelphia, 512 Pa. 129, 516 A.2d 306 (1986), the Pennsylvania Supreme Court upheld a statute imposing limits on state and municipal liability for tort on the ground that the prohibition on limiting liability applied only to private party defendants. The judges in the majority divided on the question whether, despite the inapplicability of article 3, section 18, the liability limitation must be justified on the basis of "heightened scrutiny."

[32] *E.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

[33] United States v. Carolene Prods. Co., 304 U.S. 144 (1938); Nebbia v. New York, 291 U.S. 502 (1934).

coupled with practically conclusive deference to legislative judgments.[34] The result has been that the Court has not used due process to invalidate a state or federal economic regulatory law for more than half a century.[35] However, the same verbal formula applied to state constitutions in the state courts has not always been coupled with the same deference.[36]

Justice Linde has consistently opposed the use of a general conception of due process by courts to exercise a veto power over laws the judges deem unwise. In 1961, he was appointed as one of seventeen members of a distinguished commission to revise the Oregon Constitution.[37] Another member was Kenneth J. O'Connell who, like Justice Linde, had been a long-time member of the Oregon Law School faculty before his appointment to the Oregon Supreme Court.[38] The Commission for Constitutional Revision recommended that a due process clause be added to the Oregon Bill of Rights. The Commission's majority supported its recommendation with the argument that Oregon courts ought to have the power to consider whether some forms of economic regulation were reasonable.

> The most frequent cause — but not the only cause — of 'substantive' due process court cases is laws enacted at the behest of economic groups to restrict competition; for instance, licensing or other procedures may be required in order to put price cutters out of business. With a 'substantive' due process clause in its arsenal, a court can consider the price cutter's case when he argues that the licensing act is aimed at taking his property — his right to compete — away from him.[39]

Seven members of the Commission, including Justice Linde, dissented from this recommendation. While the text of the separate views of these seven members is not attributed to any of them, its

---

[34] Williamson v. Lee Optical Co., 348 U.S. 483 (1955); *Carolene Prods.*, 304 U.S. 144 (1938).

[35] E. BARRETT, JR., W. COHEN & J. VARAT, CONSTITUTIONAL LAW: CASES & MATERIALS 573 (8th ed. 1989).

[36] Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

[37] The work of the Commission is reviewed in Goodwin, *The Commission for Constitutional Revision*, 67 OR. L. REV. 1 (1988). For the Commission's draft revision of the Oregon Constitution and report, *see* The Commission for Constitutional Revision, *A New Constitution for Oregon*, 67 OR. L. REV. 127 (1988) [hereinafter *New Constitution*].

[38] *New Constitution*, *supra* note 37, at 177.

[39] *Id.* at 198-99.

substance and style make it clear to me that Justice Linde drafted it. The dissent said:

> Economic freedom is not the issue, and it injects a false and emotional note. The issue is whether a "due process" clause is a proper tool of judicial supremacy over legislators, the Governor, county commissioners, city councils, and other policy-making constitutional bodies — even over the people themselves when they act by initiative!
>
> . . . Judicial usurpation of policy-making under the guise of "substantive due process" must ultimately pay the price in loss of public status of and respect for the judiciary, as the earlier experience has shown.[40]

The dissenters won an interim victory when the legislative joint committee draft for revision of the Oregon Constitution was submitted to the legislature with the dissenters' procedural due process language substituted for the Commission's substantive due process proposal.[41] The entire enterprise of constitutional revision collapsed, however, when the legislature failed to submit the proposed revision to the voters.[42]

During the course of the Commission's deliberations, there had been "hot debate" on whether Oregon's constitution should contain a substantive due process clause.[43] Major participants in that debate were two good friends — Justice O'Connell, who proposed adding the explicit substantive due process clause to the state constitution, and Professor Linde, who opposed it. That debate had been sparked a year earlier, when Linde wrote an article criticizing the Oregon Supreme Court's decision invalidating a licensing requirement for operation of a truck rental business.[44] Linde pointed out that the Oregon court's construction of the due process clause of the fourteenth amendment was out of line with contemporary United States Supreme Court decisions.

> On the merits, one may applaud a policy which protects freedom of entry into any economic enterprise or market against politically drawn artificial barriers for which no public interest is demonstrated . . . . But there is no modern basis for holding that the choice of economic policy within a state is imposed upon the

---

[40] *Id.* at 230-31.

[41] *Id.* at 132 (quoting H.J. Res. 1, 52d Or. Legis. Ass'y, art. 1, § 10 (1963)).

[42] Goodwin, *supra* note 37, at 9-10.

[43] *Id.* at 8.

[44] Linde, *Constitutional Law — 1959 Oregon Survey*, 39 OR. L. REV. 138, 143-52 (1960). The criticized decision was Hertz Corp. v. Heltzel, 217 Or. 205, 341 P.2d 1063 (1959).

> state by the . . . due process clause of the fourteenth amendment.[45]

Justice O'Connell took the position that if the federal due process clause was no longer available to check unwise special interest economic legislation, state judges should have state-conferred authority to protect "individualism as expressed in freedom of economic enterprise"[46] from a legislature captured by special interests.

Linde continued the debate in 1970, when he criticized another decision of the Oregon Supreme Court that invalidated a local ordinance regulating underground storage tanks.[47] This time, the state court had referred to "the due process . . . clauses of the Federal and state constitutions . . . ."[48] Linde pointed out, at length, that article I of the Oregon Constitution has no due process clause. There was "no constitutional command to our elected officials not to act unreasonably, no such requirement with which courts may (reluctantly and with all due deference to the judgment of the coordinate legislative branch, etc.) hold a law to be irreconcilably inconsistent."[49] "An allegation that a law is 'arbitrary' or 'unreasonable' does not by itself state a constitutional claim."[50] Linde's argument, that Oregon judges had neither the constitutional text nor the institutional competence to safeguard the public from unwise legislative economic policies, never fully persuaded Justice O'Connell. In a concurring opinion in *Tupper v. Fairview Hospital & Training Center*,[51] he cited Linde's argument that the Oregon Constitution contained no due process clause, and replied to it.

> [I]n the states which have provisions similar to Art. I, § 10 [the Oregon "remedy" clause[52]] the courts, including this court, have regarded the provisions as the equivalent of the due process clause of the Fourteenth Amendment.[53]

Justice Linde, Justice O'Connell's successor, was not convinced.

---

[45] Linde, *supra* note 44, at 150-51 (footnote omitted).

[46] *New Constitution*, *supra* note 37, at 198.

[47] Linde, *Without "Due Process" — Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 126 (1970). The criticized decision is Leathers v. City of Burns, 251 Or. 206, 444 P.2d 1010 (1968).

[48] *Leathers*, 251 Or. at 208, 444 P.2d at 1011.

[49] Linde, *supra* note 47, at 145.

[50] *Id.* at 185.

[51] 276 Or. 657, 556 P.2d 1340 (1976).

[52] The Oregon remedy clause 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. I, § 10.

[53] *Tupper*, 276 Or. at 667-68 n.4, 556 P.2d at 1346 n.4.

In a series of cases, the court hammered away at the point that due process arguments could not be premised on the Oregon Constitution.

> In common parlance a claimed denial of due process of law may intend simply a claim of illegality, of failure to follow what the claimant asserts to be the law. But when a state law is attacked for failure to provide due process, we are in the realm of the fourteenth amendment, where guidance must be found in the decisions of the United States Supreme Court.[54]
>
> Because the Oregon Constitution does not have a due process clause of its own, any pronouncement made by this court concerning due process . . . must rest upon the due process clause of the Constitution of the United States.[55]
>
> As a constitutional premise, the phrase "due process" must refer to this federal clause . . . since the phrase does not appear in the Oregon Constitution.[56]

IV

EQUAL PROTECTION AND RATIONALITY REVIEW

In most state courts, exorcising the ghost of economic due process does not guarantee that those courts will not use the state constitution to veto selected legislation judged by them to be unreasonable. The New Hampshire Supreme Court, as noted,[57] has used the standard federal formula for equal protection analysis, coupled with considerably lower deference to legislative judgments, to decide whether state legislation aimed at reducing plaintiffs' tort recoveries should be sustained. A significant number of state courts have used their state equality guarantees in a similar manner.[58] A

---

[54] Megdal v. State Bd. of Dental Examiners, 288 Or. 293, 300, 605 P.2d 273, 276 (1980) (footnote omitted).

[55] State v. Stroup, 290 Or. 185, 200, 620 P.2d 1359, 1368 (1980) (footnote omitted) (Justice Linde concurred in this opinion).

[56] State v. Clark, 291 Or. 231, 235 n.4, 630 P.2d 810, 813 n.4, *cert. denied*, 454 U.S. 1084 (1981).

[57] *See supra* text accompanying notes 17-20.

[58] *E.g.*, Austin v. Litvak, 682 P.2d 41 (Colo. 1984) (three-year statute of repose for medical malpractice actions unconstitutional); Ryszkiewicz v. City of New Britain, 193 Conn. 589, 479 A.2d 793 (1984) (legislation limiting municipal liability for damage caused by ice or snow unconstitutional); Flax v. Kansas Turnpike Auth., 226 Kan. 1, 596 P.2d 446 (1979) (unconstitutional to immunize turnpike authority, but not other state agencies, from tort liability); McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605 (Minn. 1984) (damage cap in dram shop act unconstitutional); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (limitations on medical malpractice recovery unconstitutional); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) (statute establishing medical malpractice pretrial mediation panel unconstitutional); Condemarin v. University Hosp.,

prominent California case, *Brown v. Merlo*,[59] illustrates the technique. California's conventional "guest statute," limiting recoveries by automobile social guests against their hosts, violated equal protection because there was no rational reason — at least no reason that the court credited as rational — to treat these tort plaintiffs less favorably than all other tort plaintiffs, including social guests in homes.[60] Remarkably, the guest statute was consistent with common-law tort rules governing claims by social guests on residential property when it was enacted and had become unreasonable only as the California Supreme Court abandoned the earlier common-law limits on recovery.[61] These courts' inquiry into whether a challenged law bears a rational relationship to a legitimate government objective has become an open invitation to some courts to protect the common law of torts from what is judged to be unreasonable legislative meddling.

The engine that drives these activist state court decisions is the

---

775 P.2d 348 (Utah 1989) (damage limit in claim against uninsured government entity); Hunter v. North Mason High School, 85 Wash. 2d 810, 539 P.2d 845 (1975) (120 day notice requirement for government tort claims unconstitutional); O'Neil v. City of Parkersburg, 160 W. Va. 694, 237 S.E.2d 504 (1977) (30 day notice requirement for government tort claims unconstitutional); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (six-year statute of repose for tort suits involving improvements to real property unconstitutional); Hoem v. State, 756 P.2d 780 (Wyo. 1988) (medical malpractice medical review panel unconstitutional).

[59] 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[60] *Brown* was followed in Cooper v. Bray, 21 Cal. 3d 841, 582 P.2d 604, 148 Cal. Rptr. 148 (1978), which invalidated a remaining fragment of the guest statute. Later cases, however, have upheld contemporary legislative limitations on torts recovery against equal protection attack. *E.g.*, Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985) (upholding limitations on medical malpractice recoveries).

[61] Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), held that ordinary negligence rules applied in a social guest's suit against his host. Linde has pointed out that an open-ended inquiry into whether a law is rational inevitably leads to an inquiry whether it makes sense at the time of trial. Even if one concludes that state judges have been given an open-ended mandate to require the legislature to act responsibly, it is not sensible to strike down laws that have become unreasonable only with the passage of time. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 215-18 (1976). Professor C. Edwin Baker agrees with Linde that it is nonsensical to test laws on the basis of their rationality at the present time in a specific place. "His argument is less forceful if the . . . judicial duty is not to eliminate irrationality, which could become an all-consuming task, but to strike down laws that over time become contrary to a substantive constitutional standard." Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 981-82 n.128 (1983). Dean Guido Calabresi discusses *Brown* as an example of techniques common-law courts have used to cope with old statutes that are out of line with later common-law developments. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 10-11 (1982).

standard federal equal protection formula: a statute violates equal protection if its classifications do not bear an appropriate relationship to a legitimate governmental purpose. The standard analysis requires that classifications made by the statute be matched with the objectives the legislature is trying to achieve.[62] Taken literally, that formula would allow courts to second-guess all legislative choices and to veto those with which the court disagrees. The federal courts have upheld the vast bulk of legislative choices against equal protection attack by applying a form of "rational basis" scrutiny that tolerates extreme "overbreadth" or "underbreadth" in legislative classifications, or assigns purposes to the legislation that roughly coincide with the classifications.[63] State courts that have invalidated tort legislation with an equal protection analysis have used the federal equal protection formula, but have reached results different from those under the Federal Constitution by deferring less to the legislative judgments.[64] With the exception of the Oregon Supreme Court, state courts that have upheld tort legislation against equal protection attack also use the federal formula, but have agreed with or shown greater deference to legislative judgments.[65]

---

[62] The analysis can be traced to an extremely influential article, Tussman and ten-Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). The student editor-in-chief of volume 37 of the *California Law Review* was Hans Linde!

[63] Cohen, *State Law in Equality Clothing: A Comment on* Allegheny Pittsburg Coal Co. v. County Comm'n, 38 UCLA L. REV. 87, 94 (1990).

[64] *See* cases cited *supra* note 58.

[65] *E.g.*, Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971) (upholding statute of limitations in tort suits based on faulty building design and construction); Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985) (upholding limitations on medical malpractice recoveries); Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980) (upholding limitations on medical malpractice recoveries); Sibley v. Board of Supervisors of La. State Univ., 477 So. 2d 1094 (La. 1985) (upholding limit on medical malpractice damages); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978) (upholding limitations on medical malpractice recoveries); State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970) (upholding limitation on tort damage recovery against state); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972) (upholding statute of repose in tort suits based upon faulty building design and construction); Espanola Hous. Auth. v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977) (upholding shorter statute of limitations for suits against local government than for suits against state); Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975) (upholding automobile no-fault statute); Roberts v. Durham County Hosp. Corp., 307 N.C. 465, 298 S.E.2d 384 (1983) (upholding medical malpractice statute of limitations); Tarrant County Hosp. Dist. v. Ray, 712 S.W.2d 271 (Tex. Ct. App. 1986) (upholding differing tort liability limits for state and local government); Allen v. Intermountain Health Care, Inc., 635 P.2d 30 (Utah 1981) (upholding medical malpractice statute of limitations); Sambs v. City of

Linde has persuasively made the case that it is a mistake to read the Federal Constitution as if it contains a general requirement that laws, or their classifications, be reasonable.[66] I agree with his position that, if an economic regulatory statute is upheld against equal protection and due process attack, it should not be because the court has "deferred" to the legislative judgment that the law rationally achieves some purpose.[67] Instead, it should be because nothing in the Federal Constitution requires that laws be reasonable or rational.[68] Still, the United States Supreme Court continues to write opinions that speak of rationality and minimum scrutiny in fending off due process and equal protection challenges,[69] rather than stating candidly that these are cases where there is no scrutiny at all.[70]

Linde has also argued that the wrong approach to independent state constitutional law is to take the question of reasonableness seriously, while adopting the federal rational basis formula.[71] The problem is that state courts are even more vulnerable than their federal counterparts "to prudential . . . arguments about the pragmatic impact of the challenged law or of the desired judicial decision, about their benefits or costs as public policy"[72] because they are common-law courts "accustomed to arguments about right and wrong, about fairness and equity and social utility."[73]

It should come as no surprise that state courts that have opted for

---

Brookfield, 97 Wis. 2d 356, 293 N.W.2d 504, *cert. denied*, 449 U.S. 1035 (1980) (upholding limitation on damages against municipality for highway defect).

[66] Linde, *supra* note 10, at 166-81; Linde, *supra* note 61, at 203-22.

[67] Cohen, *supra* note 63, at 104-05.

[68] Linde, *supra* note 61, at 201-22.

[69] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (due process); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (due process); Schweiker v. Wilson, 450 U.S. 221 (1981) (equal protection); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (equal protection).

[70] On the rare occasions when he spoke for the Court on these issues, Justice Black's opinions denied that there was any rationality inquiry. Ferguson v. Skrupa, 372 U.S. 726 (1963); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

[71] Every law student learns that the Supreme Court interprets equal protection in terms of different levels of judicial scrutiny, but state judges may not agree that a formula for judicial action properly describes what is first a limitation on governmental action. They may decline to explain the state's guarantee of equal treatment in terms that do not describe the kind of laws legislators may not make, but only degrees of the judges' own scrutiny, even though this solipsistic formula appears in the interminable literature of federal equal protection doctrine.

Linde, *supra* note 5, at 187.

[72] *Id.* at 190.

[73] *Id.* at 191.

an activist approach to pro-defendant tort legislation use the federal verbal formula while they ratchet up the level of scrutiny. Nor is it surprising that state courts disagreeing with this approach and its outcomes have opted for the language of deference to legislative factual conclusions.

Under Justice Linde's leadership, Oregon has taken a unique approach to the definition of equality. Prior to his joining the Oregon Supreme Court, the court interpreted article 1, section 20, of the state constitution, a guarantee of "equal privileges and immunities," as being substantially equivalent to the equal protection clause of the fourteenth amendment.[74] In two companion cases challenging a system where some felony suspects were charged by indictment while others were given a preliminary hearing, Justice Linde announced a fresh definition of "equal privileges and immunities."[75] The Oregon clause, which can be traced to the 1776 Virginia Declaration of Rights, appears in fifteen state constitutions.[76] It was adopted by the 1857 Oregon Constitutional Convention more than a decade before the ratification of the fourteenth amendment.[77] Linde rejected the interpretations of all other state courts[78] by announcing that the equal privileges and immunities clause was irrelevant in judging different treatment of classes that only existed because of a comparison of those the statute covers and those it excludes. An equality inquiry is not triggered by a distinction between two classes of persons charged with felonies because a statute treats them differently. A "true class" — one whose differential treatment will invoke an equality inquiry — is one whose identity is established independent of its differential treatment by the statute. A "pseudo-class"[79] has no group identity beyond the statutory treatment.

Problems remain in drawing a line between "true" and "pseudo"-classes[80] and in developing standards for judging differential treatment of "true" classes.[81] Linde's approach for Oregon, however,

---

[74] *E.g.*, School Dist. No. 12 v. Wasco County, 270 Or. 622, 627-28, 529 P.2d 386, 389 (1974); Plummer v. Donald M. Drake Co., 212 Or. 430, 437, 320 P.2d 245, 248 (1958).

[75] State v. Edmonson, 291 Or. 251, 253-54, 630 P.2d 822, 823 (1981); State v. Clark, 291 Or. 231, 235-41, 630 P.2d 810, 813-17, *cert. denied*, 454 U.S. 1084 (1981).

[76] Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection"*, 13 VT. L. REV. 221, 223 (1988).

[77] *Clark*, 291 Or. at 236, 630 P.2d at 814.

[78] Schuman, *supra* note 76, at 225.

[79] *Id.* at 232.

[80] *See infra* note 92.

[81] Schuman, *supra* note 76, at 233-44.

easily avoids the use of a rationality formula when sustaining measures reducing tort liability. Measures will be sustained not because they are rational enough to pass the appropriate level of scrutiny, but because their rationality is none of the court's business.

V

THE REMEDIES CLAUSE AND RATIONALITY REVIEW

A number of state courts, as in New Hampshire,[82] have used the remedy clause in state constitutions to examine whether tort reform statutes reasonably reduce plaintiffs' remedies.[83] Other states with identical state constitutional clauses disagree.[84] It has been forcefully argued by Professor David Schuman that these clauses, including Oregon's article 1, section 10, should not be interpreted to impose any substantive limitation on government power. They are, rather, a requirement of procedural due process.[85] While Linde convinced the Oregon Supreme Court that article 1, section 10, is not a guarantee of substantive due process,[86] he was not called upon during his service on the Oregon Supreme Court to accept or reject Schuman's analysis.[87] The Oregon Supreme Court had adopted the position that article 1, section 10, creates a substantive right to a tort remedy, but contemporary cases had uniformly sustained limitations on tort liability by balancing that right against legislative

---

[82] City of Dover v. Imperial Casualty & Indem. Co., 133 N.H. 109, 575 A.2d 1280 (1990).

[83] *E.g.*, Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (medical malpractice statute of limitations); Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) (cap on damages); Strahler v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986) (statute of repose for medical malpractice); Daugaard v. Baltic Coop Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984) (defective improvement to real property and product liability statutes of limitations); O'Neil v. City of Parkersburg, 160 W. Va. 694, 237 S.E.2d 504 (1977) (30 day notice of claim requirement in suit against political subdivision).

[84] McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981); Schuman, *Oregon's Remedy Guarantee: Article 1, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35 (1986); Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202 (1964); Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150 (1983).

[85] Schuman, *supra* note 84, at 67-72.

[86] *See* cases cited *supra* note 10.

[87] Schuman, who clerked for Linde, relies, in part on statements in Linde's concurring opinion in Davidson v. Rogers, 281 Or. 219, 222-23, 574 P.2d 624, 625-26 (1978), and his opinion for the court in Cole v. Department of Revenue, 294 Or. 188, 191, 655 P.2d 171, 172 (1982). Schuman argues that Linde's argument that article 1, section 10, is not a due process clause should be understood to be a rejection of substantive, not procedural due process. Schuman, *supra* note 84, at 55-56, 64-66.

reasons for the abridgment.[88] This is the kind of rhetoric that Linde has rejected under Oregon's equality clause.

The Oregon Supreme Court's decision in *Sealey v. Hicks*,[89] which came down after Linde's retirement, appears to abandon even a formal requirement that laws restricting tort remedies be "reasonable." Plaintiff was injured when an automobile, which was more than ten years old, rolled over, and its roof came off. His products liability claim was barred by a "statute of repose," barring such claims brought more than eight years after a product is first sold.[90] Plaintiff's attack on the statute's constitutionality relied heavily on the New Hampshire Supreme Court's decision in *Heath v. Sears, Roebuck & Co.*[91] The Oregon Supreme Court rejected the claim of denial of equal privileges or immunities because "the legislature has the authority to decide . . . that increases in insurance rates or other costs associated with litigation warrant legislation to limit the liability of manufacturers . . . ."[92] As to the claim of denial of a remedy under article 1, section 10, the court noted that the New Hampshire Supreme Court had viewed New Hampshire's similar clause as creating a substantive guarantee that subjected the limitation of plaintiffs' tort claims to attack as a denial of equality if the court concluded the limitation was unreasonable. The Oregon remedies clause was simply inapplicable because the "legislature has the authority to determine what constitutes a legally cognizable injury."[93]

---

[88] Schuman, *supra* note 84, at 56-58.

[89] 309 Or. 387, 788 P.2d 435, *cert. denied*, 111 S. Ct. 65 (1990).

[90] OR. REV. STAT. § 30.905(1) (1989).

[91] 123 N.H. 512, 464 A.2d 288 (1983).

[92] *Sealey*, 309 Or. at 397-98, 788 P.2d at 440. The court concluded that two of the three classes at issue were classes "created by the challenged law itself" and not within the purview of the clause: persons injured by products more than eight years old, contrasted with persons injured by newer products; and tortfeasors who injure victims with eight-year-old products, contrasted with all other tortfeasors. However, it conceded that persons injured by products, contrasted with all persons injured by other causes was a class that "does exist apart from the statute." *Id.* at 397, 788 P.2d at 740. The court concluded that an equality claim could still succeed only if the legislature denied recovery to a specific individual, or "arbitrarily chosen members of the same class." Its examples were a statute of repose "that applied only to this defendant, to injured persons with facial hair, or to persons born in Canada." *Id.* at 398 n.12, 788 P.2d at 440 n.12.

[93] *Id.* at 394, 788 P.2d at 439.

VI

RATIONALITY AND THE CONSTITUTIONALITY OF TORT REFORM LEGISLATION

State court opinions concerning constitutional attacks on legislation restricting plaintiffs' tort remedies discuss a number of constitutional clauses and come to a wide variety of outcomes. For the most part, however, the opinions borrow the structure of federal constitutional law to assert that the "rationality" of the law — its wisdom — is part of the inquiry. The spectrum of outcomes can be attributed to differing judgments concerning the wisdom of identical laws and differences in the degree of deference given to the legislative process. Justice Linde's long-time opposition to rationality review, whether or not accompanied by extreme deference to legislative decision, has borne fruit in Oregon's unique conclusion that the wisdom or rationality of tort legislation is none of the Oregon Supreme Court's business.

It is particularly interesting to compare the Oregon decisions with those in New Hampshire. The New Hampshire Supreme Court not only believes that the wisdom and rationality of tort reform legislation is part of the appropriate state constitutional formula, but has given little weight to arguments that would support challenged legislation limiting plaintiffs' remedies for personal injury. In *Sealey*,[94] the Oregon court rejected the reasoning of the New Hampshire court in striking down nearly identical legislation.

> The 12-year statute of repose was found unreasonable because it could deprive persons of a remedy before their claim had accrued and because it was, in that court's view, unrelated to the underlying purpose of holding down insurance rates, primarily because "the crisis in products liability insurance had abated nationwide independent of [this law]."
>
> Such statements reflect a fundamental difference between the powers and duties of the Supreme Court of New Hampshire and of this court. There is no "substantive due process" clause in our constitution. We are not empowered to strike down a duly enacted law simply because we believe it is unwise, unnecessary, or unsuccessful. Apparently, the Supreme Court of New Hampshire is so empowered. Lacking such a power, we are in no position to strike down [the law].[95]

The Oregon Supreme Court could only have been ironic in suggesting that there is a difference between the Oregon Constitution

---

[94] *Id.* at 395-96, 788 P.2d at 439.

[95] *Id.* (footnotes omitted).

and the New Hampshire Constitution that explains the different approaches of the two courts. The New Hampshire cases have not been based on New Hampshire's due process clause, but on New Hampshire's remedy clause, coupled with an equal protection analysis. The New Hampshire and Oregon remedy clauses have a common historical root and are not textually different in a way that explains divergent interpretations.[96] While the Oregon and New Hampshire guarantees of equality are completely different, and have different histories, the Oregon text would lend itself more easily to the open-ended inquiry of the New Hampshire Supreme Court than does the New Hampshire text.[97]

A standard legal realist explanation justifies less judicial restraint by state judges in reading state constitutions than is appropriate for federal judges in interpreting the Federal Constitution: state judges are more politically accountable because they lack the lifetime tenure of federal judges, and state constitutions are more easily amended than the Federal Constitution.

The New Hampshire and Oregon experiences belie that realist explanation. Oregon Supreme Court justices are elected for six-year terms,[98] and the Oregon Constitution can be amended by a majority of the voters, upon submission by a majority vote of each house of the legislature.[99] The more activist New Hampshire Supreme Court judges, like their federal counterparts, are appointed and serve dur-

---

[96] The New Hampshire remedy clause provides:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without denial; promptly, and without delay; conformably to the laws.

N.H. CONST. pt. 1, art. 14. The Oregon remedy clause 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.

[97] The New Hampshire Constitution provides: "Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." N.H. CONST. pt. 1, art. 2. The New Hampshire Supreme Court continues to refer to a state guarantee of "equal protection" in a state constitution that contains no such guarantee. *See supra* text following note 16. The Oregon Constitution has no equal protection language either. *See supra* text following note 74. Article 1, section 20, however, contains more general language: "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. 1, § 20.

[98] OR. CONST. art. VII, § 1.

[99] *Id.* at art. XVII, § 1.

ing good behavior.[100] The New Hampshire Constitution is also harder to amend, requiring a three-fifths vote of each legislative house, and a two-thirds popular vote.[101] Yet it is the New Hampshire court that has taken to itself the power to veto tort legislation on policy grounds, and the Oregon court that has denied itself that role.

Linde has demonstrated that even assuming that realist theory explains differences between activist and restrained courts, it can not justify those differences.

> Theorists assume that judicial review is problematic because federal judges have lifetime appointments, because they are not 'representative.' Some state judges are appointed for long terms; most are elected. Does this really bear on the legitimacy of constitutional decisions? Should an elected supreme court . . . decide cases with an eye to popular wishes more than our appointed colleagues . . . ?
>
> . . . .
>
> Theorists defend judicial invention of new constitutional rights because the United States Constitution is hard to amend. Does a constitution properly mean something different in a state where amendment is difficult from one where voters can initiate an amendment simply by collecting a few more signatures than for a statute?
>
> . . . .
>
> . . . In my view, what matters to the legitimacy of judicial review is not whether judges are elected for short terms or appointed for life. What matters is whether they act in a judicial mode rather than in a legislative mode, whether the court's decision plausibly can stand as applying a constitutional premise, however generously, rather than as a new choice among social values.[102]

CONCLUSION

Hans Linde and I share one experience — a clerkship for Justice William O. Douglas of the United States Supreme Court.[103] We both attended a conference in 1989 that examined Douglas' views. Another Douglas clerk, Professor L. A. Powe, Jr., concluded that Douglas' doctrinal contributions to constitutional jurisprudence were "simply not impressive. . . . His opinions were not models; . . .

---

[100] N.H. CONST. pt. 2, art. 73.

[101] *Id.* at pt. 2, art. 100.

[102] Linde, *supra* note 5, at 198-99.

[103] I first met Hans when I was clerking for Justice Douglas during the 1956 Term and Hans, who had clerked six years earlier, was working for Oregon Senator Neuberger.

and they are easy to ignore. For those of us who think Douglas was correct in his results and instincts, this is too bad."[104]

I do not fully agree with Professor Rowe. In our conversations over thirty-five years, however, I have seldom disagreed either with Hans Linde's results, or with his instincts. Fortunately, his articles and opinions are not "easy to ignore." The decision of the Oregon Supreme Court in *Sealey v. Hicks*,[105] which came after his retirement, demonstrates that he has stamped his thinking on that court for decades to come. I can only hope that other state courts will listen.

[104] Powe, *Justice Douglas, the First Amendment, and the Protection of Rights*, in "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 69, 75 (S. Wasby ed. 1990).

[105] 309 Or. 387, 788 P.2d 435, *cert. denied*, 111 S. Ct. 65 (1990).