

HONORING HANS: ON LINDE, LAWMAKING, AND LEGACIES

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It is a great honor to present the keynote address at this symposium, “Unparalleled Justice: The Legacy of Hans Linde.” The symposium raises several concerns, however. First, consider the title. In his wonderful book, *The Devil’s Dictionary*, Ambrose Bierce defined “legacy” as “a gift from one who is legging it out of this vale of tears.”¹ Yet the work of Hans Linde remains vigorous and ongoing. Indeed, to those of us who know and follow his activities, he remains the Energizer bunny of public law at the age of 82. He just keeps right on going, on the Council of the American Law Institute, on the Oregon Law Commission, and in conversation with students and scholars alike.

Second, in honoring Hans, we run the risk of duplication. This is not the first festschrift for him.² To see if I could find anything new to say, I ran a Google search. I discovered the following: “Hans Linde happens to have a big thing for blondes.”³ Alas, it turns out that this particular Hans Linde is a middle-aged fellow who lives in Germany and is involved in some sort of flight simulation club. This Hans Linde likes to simulate flights to Scandinavia. Not our Hans Linde. But for a moment there, I thought I had a new headline for all

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1. AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 76 (Dover Publications 1958) (1911).
2. See *Symposium on the Work of Justice Hans Linde*, 70 OR. L. REV. (1991); 1984 ANN. SURV. AM. L. (1984) (The volume is dedicated to Justice Hans Linde. Tributes by John P. Frank, *A Tribute to Justice Hans A. Linde*, xxi; Alfred Goodwin, *A Tribute to Hans Linde*, xv; Abner Mikva, *Hans Linde: Hard to Bluff*, ix; Robert Summers, *Hans A. Linde as Seen by a Junior Colleague—A Personal Tribute*, xi); INTELLECT AND CRAFT: THE CONTRIBUTIONS OF HANS A. LINDE TO AMERICAN CONSTITUTIONALISM (Robert Nagel ed., Westview Press 1995).
3. Flight Club Profile of Hans Linde, <http://toomuchfs.com/profiles/hl/hl.htm> (last visited Jan. 10, 2007).

of us.

Notwithstanding this introduction, I think it is important for an event of this sort to be substantive. There are a lot of good people in the world. Very few of them will have an event held in their honor attended by this many people. We can't do anything about that right now, though maybe we all ought to go home later and give people like that the hugs that they deserve. And there are quite a few people who have made important contributions to the law, and yet very few of them will have an event held in their honor attended by this many people. We owe it to all those good people, and all those people who have meaningfully contributed to the law, to justify what we are doing today by making it crystal clear why this man justifies this much attention.

So, who is this fellow who is the Hans Linde of Oregon,⁴ not the flight simulation guy in Germany? Hans was born in Berlin in 1924. His family moved first to Denmark, then, in 1939, to Portland. The military, in its infinite wisdom, might have taken this native speaker of German and sent him to the Pacific in World War II or, given Hans's obvious intellect, made him a cook or something. But in this case, they got it right: he was an interpreter. Following the war, he finished his degree at Reed College, where he graduated Phi Beta Kappa, and then attended law school at Boalt Hall, the University of California at Berkeley, where I now have the privilege of teaching. Hans graduated in 1950 with academic honors, after serving as Editor in Chief of the California Law Review.

Hans then did what most highly talented young people from the smaller states do—he hightailed it out of town, to Washington, D.C. I speak as one who has done the same thing: I grew up in Kansas. He spent a year as law clerk to Justice William Douglas of the U.S. Supreme Court, then two years working as an attorney in the Office of the Legal Advisor to the Department of State and Advisor to the United States Delegation to the United Nations General Assembly. He came back to Oregon to start his academic career as a law professor at the University of Oregon, only to be promptly called back to Washington for three years service as a Legislative Assistant to Oregon's U.S. Senator, Richard Neuberger. He returned to Oregon for good in 1959, when he joined the law faculty at the University of

4. See, e.g., http://en.wikipedia.org/wiki/Hans_A._Linde (last visited Jan. 10, 2007); Phil Stanford, *Law Shall Build the Land*, REED MAGAZINE, May 2000, available at http://web.reed.edu/reed_magazine/may2000/a_lawshallbuild/index.html.

Oregon. While a law professor at Oregon, Hans had a highly distinguished academic career. In 1977 Governor Straub appointed Hans to the Oregon Supreme Court, and he was elected to his seat in 1978 and then re-elected in 1984. Since 1990, when he retired from the Oregon Supreme Court, Hans has led something of the life of the itinerant or nomadic intellectual, being a visiting professor at various top law schools, a leader in the American Law Institute, an elected member of the American Academy of Arts and Sciences, a member of the Oregon Law Commission, and of course the Distinguished Scholar in Residence here at Willamette.

But before turning to some of Hans's many accomplishments as a judge and scholar, allow me to comment on the life that Hans has led. I would like to make three points.

First, I wish that I could have had a chance to get to know Hans as a colleague. I would like to know more about his life in Germany and in Denmark. I would like to know more about his father, a German lawyer, and the potential influences his father's continental, civil law perspective may have had upon Hans as he became a lawyer, law professor, and judge in our common law system. I would like to know how his parents were able to get out of Germany, and then out of Denmark, when so many others were not so fortunate. I would like to know how this experience in his youth may have influenced his sense for the importance of the rule of law, for an independent judiciary, for legislatures independently elected and insulated from the leaders of their political parties.

To take a concrete example, in an interview,⁵ Hans said that he was skeptical about generalizations about the world—this was in the context of his work as a law professor and judge—skeptical that courts can understand social phenomena, the rationality of legislation, and so on, better than legislators or executive officials. This is a theme of one of his most important law review articles, which I will discuss shortly. I wonder where this skepticism came from. From his youth? One could become quite skeptical about the human condition itself, when you consider what his family went through. From his father's perspective on the law?

Second, very few persons who end up being legal academics or appellate judges have had the opportunity, as Hans did, to work at the highest levels of all three branches of the federal government. To

5. See Stanford, *supra* note 5.

take a concrete example, he saw the Supreme Court work during a very difficult term, the 1950 Term, in which the first wave of cases involving alleged communist subversion or American disloyalty began going to the Court. He then worked in the State Department, which surely gave a different and illuminating framing to such questions. He then worked in the Senate, from 1955-58, which was when the McCarthy Era controversies were the hottest. I have recently written about this era, focusing on Court-Congress relations and judicial opinions from a divided Supreme Court under enormous political pressure to dilute constitutional rights in response to arguments of necessity and national security.⁶ One of the themes of some of Han's most distinguished scholarship is that the greatest danger to constitutional rights is the argument of necessity.⁷ Surely his work in all three branches at this time in our history provided him a novel perspective on precisely this question.

More generally, you get the feel, while reading Han's scholarly work, that his sense of executive power, legislative prerogatives, and judicial obligation to enforce the rule of law grows out not only of his careful study of history, law, and politics, but from some sense of practical experience. Academics may be smart, though some are not. They may know a lot, though some don't. They may even be humble, though very few are. But one thing very few academics have—at least legal academics—is a working sense for the institutions of our government. This can be a benefit, frankly, for sometimes a sense for how things works blinds people to insights that are outside the box, so to speak. But in Hans's case, nobody with any knowledge of his work would accuse him of failing to think outside the box. I don't know if Governor Straub had a sense for Hans's practical as well as theoretical preparation for judging, but it was an inspired appointment.

The third point I want to make about Hans's life is that, though he left Oregon as a young man to participate in national affairs, he came back here. Everyone in this room knows of the lasting and negative impact of the brain drain from most states to Washington, D.C., and to a lesser extent, a few other major metropolitan areas. It

6. See Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005).

7. See Hans A. Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 STAN. L. REV. 1163 (1970).

starts with college admissions and goes on from there. Had Hans chosen to do so, no doubt he could have had a distinguished career in Washington as a practicing attorney with occasional forays into important staff positions in the executive branch or Congress. He would have made a whole lot more money and had a lot of excitement along the way. Or, if Hans had chosen to do so, he could have played the law professor mobility game, moving from law school to law school in search of ever-greater prestige and salary. But instead he came back to Oregon, and he stayed. He has contributed extraordinary service academically and judicially, as well as in public service generally. Indeed, in this, his 82nd year, he is a member of the Oregon Law Commission—and anyone who speculates that he probably just shows up occasionally for meetings and nods off in the corner, does not know anything about Hans. Every minute of this man's life is used to the fullest, so far as I can tell. This state is so lucky to have him. Not just to *have* had him, but to have him still.

The panels that follow my talk will no doubt stress a number of singular contributions. Surely Hans's unique contribution to bringing state constitutional law to its rightful place in the foreground of American public law will be analyzed. Let me just say a few words about it here. Hans is the single most important architect of one of the most important changes in American constitutional law of the late 20th century—the quite correct notion that when a state statute is challenged as unconstitutional, attorneys should make the claim that it violates not only the federal, but also the state constitution. Further, the state court exercising judicial review is obliged to consider the state constitutional challenge first. The point is quite obvious—decide state law issues before federal issues. First things first, as Hans has said.⁸

The obvious effect of this new judicial federalism is to note, quite correctly, that the federal Constitution provides a baseline, a floor, a minimum guarantee, of rights on a nationwide basis. If a state has chosen to be more generous as to any particular individual right—whether that is a right that liberals tend to love, like freedom of expression or protection from unreasonable searches and seizures, or a right that conservatives tend to love, like the right to bear arms or the right to be free from state or local government taking of private property except in very narrow circumstances—that is up to each state

8. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

to decide.

An area of constitutional law that well illustrates the beneficial policy implications of this first-things-first attitude is public school finance. In 1973, the U.S. Supreme Court held that a state public K-12 educational funding approach based primarily on local property taxes, which led to great disparity in the dollars per student available to local school districts, with more poorly funded districts tending to have greater enrollment of minority students, did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.⁹ After all, public education has always been the responsibility of the states and localities, and the federal Constitution says nothing directly about the subject. Advocates for greater equalization in public school funding turned to the state constitutions, which not surprisingly often say quite a bit about public education. In wide-ranging litigation in many states, state supreme courts, populated by elected judges rather than federal judges with life tenure, have interpreted their own constitutions with local conditions in mind.¹⁰ On the whole, it appears that state supreme courts have undertaken a pragmatic effort to engage their state legislatures into a process by which public school financing can become more rationalized, and this has worked itself out in a variety of ways across the states.¹¹ It has been an area in which federalism has seemed to work pretty well. No one-size-fits-all solution from Washington was likely to be nearly as productive.

Turning to other matters, no doubt several people in the panels that follow will discuss the many important opinions Hans wrote while on the Oregon Supreme Court. I hope someone will discuss his important leadership in the American Law Institute. I leave to others to fill in those and other details.

What I want to do, in the time that I have remaining, is discuss one gift that Hans has given to me, and to other legal scholars who are interested in constitutional law and legislation. About thirty years ago, Hans delivered the prestigious Holmes Devise lectures. He called the article encompassing these lectures “Due Process of

9. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

10. For an optimistic overview, see MICHAEL A. REBELL, *Adequacy Litigations: A New Path to Equity*, BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 291 (Janice Petrovich & Amy Stuart Wells eds., Teacher’s College Press 2005).

11. *Id.*

Lawmaking.”¹² In the lectures, he took iconoclastic positions on several important clusters of issues surrounding the relationship of legislatures and courts. Now, if you know Hans, that he took an iconoclastic position will not surprise you—he has always been a free thinker. And if you know Hans, it probably also will not surprise you that these lectures represent among the best analyses of their subjects, even to the present day. Public law judging and scholarship would be improved by greater attention to his analysis today.

Hans wrote at a time of transition in constitutional law. In a 1905 decision, *Lochner v. New York*, the Court famously struck down a state law specifying the maximum hours that bakers could work, on the ground that it infringed liberty to intrude upon the employer-employee relationship without hard facts demonstrating that the extra hours of work were harmful.¹³ But by the late 1930s, and from then until the 1970s, courts would not second-guess the rationality of legislation.¹⁴ *Lochner* was the Mr. Yuck sticker of constitutional law.

Hans was educated in law school at a time in which the exercise of judicial power under vague constitutional provisions like due process and equal protection to evaluate run-of-the-mill statutes regulating everyday events was viewed as a dubious enterprise. Just the year before Hans clerked for Justice Douglas, Douglas wrote an opinion in the case of *Railway Express Agency v. New York*, refusing seriously to entertain the argument that New York City traffic laws were unconstitutionally irrational because they permitted companies to advertise their own businesses on their vehicles, but not somebody else’s businesses.¹⁵ Now you have to admit, if the purpose of the limitation on signs on vehicles was to avoid distracting pedestrians, presumably a sign for your own company could be every bit as distracting as a sign for another company. Thus, the limitation on advertising seems unrelated to the goal of pedestrian safety, and thus irrational. But Douglas, for the majority of the Court, would have none of it.¹⁶ If there is discrimination, he said, it is not the kind of discrimination or irrationality that the Constitution cares about.¹⁷ New York City can do what it wants.

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

13. 198 U.S. 45 (1905).

14. See, e.g., *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

15. 336 U.S. 106 (1949).

16. *Id.*

17. *Id.*

But by the mid-1970s, enthusiasm for the role of courts and the institution of judicial review had come back full force. Fueled by the Court's efforts to establish federal constitutional rights for racial minorities to be free from disadvantaging legislation arising out of racial prejudice, beginning in *Brown v. Board of Education*¹⁸ in 1954, and the Court's reapportionment decisions¹⁹—which took a constitutionally dubious but highly popular path of imposing one-person, one-vote standards upon state legislatures—many academics, and not a few members of the citizenry, saw the Court as an institution of genuine reform. The Court was able to achieve reform that Congress and the state legislatures had been unable to find the political will to undertake. Progress, it seemed, was being driven by the federal judicial branch—not by Congress, the President, or the state governments.

This enthusiasm for judicial review—for courts as useful partners of legislatures, pointing out legislative failure or unreasonableness—began to move courts back toward inquiries about the reasonableness of legislation. In 1973, in *United States Department of Agriculture v. Moreno*, the Court considered a federal food stamp program subsidizing poor families that excluded from participation any household containing an individual unrelated to any other member of the household.²⁰ The case involved Ermina Sanchez, her three children, and Jacinta Moreno, a 56-year-old diabetic person whom Sanchez cared for.²¹ The majority of the Court struck down the regulation because the line drawn in the statute between households of related people and otherwise “is clearly irrelevant to the stated purposes of the Act,” which were to assure better nutrition and alleviate hunger.²²

Moreno is a great case because, of course, Congress was not so venal as to desire to harm households like Ms. Sanchez's, in which the grouping of persons is unobjectionable to anyone, and for whom the provision of food stamps makes perfect sense. No, the legislative history revealed that Congress drew the relatedness rule not to get at the Ms. Sanchezes of the world, but to exclude “hippie communes”

18. 347 U.S. 483 (1954).

19. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

20. 413 U.S. 528 (1973).

21. *Id.*

22. *Id.* at 534.

from taking advantage of the food stamp program.²³ There is obviously a rational connection between the relatedness rule and excluding hippie communes, though the relatedness rule is grossly overinclusive, as Ms. Sanchez's situation shows. However, the majority of the Supreme Court in *Moreno* was unthwarted: "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."²⁴

Thus, *Moreno* did two interesting things: it measured the rationality of the statute against its stated purpose (alleviating hunger) and found it irrational, and it refused to countenance a different statutory purpose (keep hippie hands off food stamps), because that purpose was rooted in animus against a politically unpopular group. To be sure, if the group being targeted for disadvantage had been a racial minority, the decision would have been unsurprising. But it is doubtful that the framers of the Fourteenth Amendment thought their equal protection clause protected long-haired commune dwellers who found life's meaning in the music of the Grateful Dead.

The first move in *Moreno* looked like a return to *Lochner*-style rationality review. The second move, relating to a new judicial power to determine the legitimacy of legislative purpose, seemed novel, for the Court was moving outside the traditional paradigm of protecting only racial and perhaps religious minorities from discrimination. One might ask, if hippies get protection under the equal protection clause, why not companies that want to sell advertising on their trucks to other businesses?

Two years before *Moreno*, in 1971, the Court decided *Reed v. Reed*.²⁵ Up to that time, the anything-goes rational basis test that replaced the old *Lochner* balancing test had applied to distinctions drawn between men and women. For example, in a 1948 case, the Supreme Court upheld a state statute allowing a woman to work as a bartender only if she was the wife or daughter of the bar owner.²⁶ But *Reed* started the Court in a different direction. In that case, an Idaho law provided a "tie-breaker" preference for males over females of

23. *Id.*

24. *Id.* (emphasis in original).

25. 404 U.S. 71 (1971).

26. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

equal degrees of relationship to be appointed to administer an estate.²⁷ Thus a son, rather than a daughter, would be automatically made administrator.²⁸ The obvious rational basis here is that, in general, men are more likely to have had some experience in business affairs, paying off debts, keeping track of property, and so on, than women. No doubt that generalization was true, to a rough extent, when the statute was enacted by the state legislature many years before, and was probably also true in 1971, when the Court heard the case. The automatic preference was for the administrative convenience of the state court; instead of holding a hearing, it simply followed the rule.

There was nothing “irrational” about the Idaho probate statute, as the goal of efficient court proceedings was probably advanced by the automatic preference in a utilitarian sense. But nonetheless the Supreme Court struck it down, in an awkward opinion by Chief Justice Burger.²⁹ The Court labeled the preference for males over females “arbitrary.”³⁰ And of course it was, if we care about gender equality. But when did gender equality become a constitutionally salient concern?

What the Court was doing was using rationality review language in *Moreno* and *Reed* to disguise what it was really up to. What it was really doing was saying that some congressional purposes—the bare desire to harm a politically unpopular group or a group confined by outmoded stereotypes—are constitutionally wrong. What it was also saying is that following perfectly reasonable purposes (efficient probate proceedings) can sometimes cause constitutional problems if those purposes are implemented by means that draw distinctions between people that are discriminatory.

In part, I think, it is this confusion between rationality review and the emergence of a new kind of review—based on discrimination against groups that theretofore had not received any constitutional solicitude—that led Hans to develop his lectures, put together in the article, “Due Process of Lawmaking.”³¹

Hans explained cases like *Reed* and *Moreno* well. They should be understood as involving a suspicion of prejudice or insensitivity in

27. *Reed*, 404 U.S. at 72.

28. *Id.*

29. *Id.* at 71.

30. *Id.* at 76.

31. *Linde*, *supra* note 13.

the lawmaker's sense of values, not a focus on his or her rationality.³² Hans was agnostic on whether gender classifications or anti-hippie sentiments displayed animus or stereotyping that should be understood as constitutionally prohibited.³³ His point was to categorize these cases, because unless this distinction between the legislature's values and the legislature's rationality is made clear, *Lochner*-like rationality review might return for the great run of cases. For he sensed a temptation at that time for courts to take a thoroughly instrumental view of law and overestimate how much courts could add to the utilitarianism of our law in cases in which it cannot plausibly be contended that the disadvantaged persons have been targeted by animus or stereotypic thinking, inhibiting their desires to flourish as full members of the community.

Hans acknowledged that, on the surface, who could be against the notion that legislatures should adopt only those laws that are rational means to legitimate ends?³⁴ To put it the other way, who would be in favor of having irrational laws? Nobody, including Hans. That is why he is still working on the Oregon Law Commission, of course. But just because a law is not purely rational does not mean that a court should invalidate it.

Hans squarely addressed why rationality review is not an administrable form of judicial review. Here, I think, Hans presented the single best critique of rationality review that exists, even up to the present day. His practical experience with legislatures comes through to make the argument incredibly persuasive. He uses examples of mundane state statutes—not old state statutes that run afoul of evolving society, like the gender-discriminatory statute in *Reed*, or arguably mean-spirited federal statutes like in *Moreno*—to make the point.

The first step in rationality review is to identify the goal of the law, and then the second step is to determine whether the means chosen rationally work to achieve that goal. How, Hans asked, do we identify the goal of a law?³⁵ Most laws have multiple goals, achieved by a compromise of means.³⁶ He gave a great example: Suppose Oregon, in the interest of highway maintenance and safety, imposed a

32. *See id.* at 202, 213, 219.

33. *Id.* at 201.

34. *Id.* at 205.

35. *Id.* at 208.

36. *Id.* at 208-13.

weight limit on trucks, but allowed a higher limit on logging trucks.³⁷ The higher limit for logging trucks is not designed to promote lower maintenance costs or safety, obviously. Instead, it is designed to accommodate a major industry. The legislature desired to protect its drivers and its highways, but not at all costs.

Is such a law rational? Well, yes, overall it probably would reduce highway maintenance somewhat and increase traffic safety somewhat. Well, no, the exception for logging trucks is inconsistent with the goals of maintenance and safety. But of course, without the exception, the law might not have passed in the first place, as the lobbyists for the timber industry might have been able to block the law completely. Debating the law in highly rationalistic terms is wholly artificial, a game only lawyers could love. The real question in such instances, Hans persuasively contended, is the constitutionality of the legislature's policy choice, not the rationality of the law.³⁸ Legislatures pass statutes providing more benefits to some interests than others all the time. Courts that seek to impose rationality on that process are going to be very busy, and very frustrated.

Hans pointed out that another problem with rationality review is that it presumes there is a pragmatic public policy goal at work in the first place.³⁹ But sometimes a statute lacks that. In *Railway Express*, the law involving signs on trucks might have simply reflected a desire to soften the distractions of outdoor New York City life as a sort of esthetic matter, but with a sense that a business advertising its own product stands on a higher moral ground that does one that sells space on its trucks to others. There is nothing rational about that, it is simply an intuition about fairness or equity. Yet if legislatures cannot engage in intuitive notions of that sort, much legislation will be in peril.

Hans also pointed out serious problems with rationality review as a statute ages.⁴⁰ At best, a legislature can only work to create a reasonable law when it is considering and passing it. Even assuming that responsible lawmaking is required by the Constitution, that is all we can ask of a legislature. Those legislators are out of office or often deceased when the law—having become increasingly

37. *Id.* at 208.

38. *See id.* at 209.

39. *Id.* at 209-10.

40. *Id.* at 215-19.

unreasonable because of social evolution—is challenged later in court. Yet, of course, it is the unreasonableness of the law today that causes the harm that will get the focus of today’s actors, attorneys and judges.

Hans used another great Oregon example.⁴¹ A small town in Oregon limited gasoline storage tanks to a few thousand gallons in a 1949 ordinance.⁴² In 1966, a dealer installed a much larger tank and sued to have the town’s limit declared unconstitutional.⁴³ At trial, the court heard extended testimony from expert witnesses on the relationship between the underground storage tanks (presumably the 1966 versions, which probably were safer than 1949 versions) and the risk of accidental fire, and the topography, sewer system, traffic patterns, and firefighting capacities in the town.⁴⁴ The Oregon Supreme Court affirmed the ruling of the trial judge that found no rational relation between any associated public purpose and the size limitation, striking it down as unconstitutional.⁴⁵

Did the city council act reasonably in 1949? No inquiry was made about that. Could the council have foreseen that by 1966 the law might seem unreasonable? Who knows? What is the point of litigation of this sort? It puts an implicit burden on legislatures to review their laws and update them, perhaps. Of course, anyone can go to the city council and ask for a repeal or amendment. That is democracy. What this is instead, Hans suggested, is judicial interference with democracy.⁴⁶

Note, of course, as Hans pointed out, that the precedent stands for very little. Another town, with different topography, might be able to justify the rationality of the small tank size. And what if the tank size limit had been in a state statute rather than a local ordinance? Would counsel have to defend the tank size by producing information on many small towns? Would the irrationality of the tank size requirement in Portland mean that the statute is unenforceable in small towns where it might make more sense? Can a statute be unconstitutionally irrational as applied? Is the only way to figure out the lawfulness of the statute statewide to have case-by-case litigation

41. *Id.* at 218-19.

42. *Leathers v. City of Burns*, 444 P.2d 1010, 1011 (1968).

43. *Leathers*, 444 P.2d 1010.

44. *Id.* at 1012-16.

45. *Id.* at 1018.

46. *See Linde, supra* note 13.

involving every community in Oregon? This would, of course, be a boon to the income of the Oregon bar, and one in my position cannot really oppose that, I suppose. But if so, the legislature has the impossible duty of foreseeing not only the future, but every little aspect of the future.

Moreover, as Hans argued, rationality review envisions an obligation on the part of the legislature to be purely instrumental—to design and evaluate every law as a means to an end beyond itself.⁴⁷ It would require careful hearings, staff study, and so on. It would, in effect, turn the legislative process into a process very similar to that which administrative agencies are required to follow. But it is obvious that there is no constitutional mandate that statutes be created by a deliberative, interactive, lawmaking process—or else the Oregon Supreme Court and its sister courts in the western United States would have to strike down laws adopted by initiative—a process that obviously has no public oriented hearings, expert testimony, staff reports, amendments in light of evidence presented, and so on, built into it.⁴⁸ And anyone who has spent time in the legislature knows that legislatures are not finely tooled machines producing reasonable laws. They are lawmaking institutions made up of persons with differing motives and world views. They scratch and claw and compromise. They spend money in many ways, good and bad, maybe sometimes even irrationally as measured against anybody's wishes. It simply blinks reality to try to turn the legislature into a think-tank or a faculty meeting. I should add the rationality of faculty meetings is often honored in the breach as well.

Instead of judicial review imposing generalized deliberative rationality requirements upon legislatures, which the federal and state constitutions are silent about, Hans suggested that judicial review focus on what state constitutions actually do impose upon legislative lawmaking procedure. For him, “due process of lawmaking” means following the duly required lawmaking procedures required by the state constitution and, perhaps, by statute as legislative rule as well.⁴⁹ If the constitution says the bill must be read three times before passage, that is a requirement. If the constitution says that a bill may have only one subject, which must be expressed in its title, that is a requirement. Courts have no greater discretion to ignore express

47. *Id.* at 222-28.

48. *Id.* at 227-28.

49. *Id.* at 235-55.

constitutional procedural limits on state legislation than they have to make up unwritten, ill-advised rationality requirements.

The lectures that together form the article, “Due Process of Lawmaking,” demonstrate three characteristics about Hans that he himself has admitted. One is that he is a positivist rather than a utilitarian in the way he approaches judicial review. That is to say, a court should enforce to the fullest what a constitution requires, but avoid enforcing in the guise of judicial review what a constitution does not require. The second characteristic is that Hans is a proceduralist. He emphasized in the lectures that if the American experiment in public law is remembered in the distant future, it is more likely to be remembered for our efforts to impose appropriate structures and procedures upon our lawmaking than for the substance of the laws that we have made.⁵⁰ The third characteristic is that he is a skeptic, especially about the capacities of courts to improve constitutional law on a case-by-case basis based on the judges’ own utilitarian calculations.

As a consequence, Hans’s instincts are to do at least two things that many judges are reluctant to do. For many reasons—some of them I think reflecting good human instincts—judges are necessarily reluctant to let a stupid, misguided, silly, dysfunctional law survive judicial review. My own instincts still point in that direction. Cannot our courts, especially our state supreme courts, with elected judges who are much closer to state legislatures in practical and social ways than are unelected federal judges, form a lawmaking partnership with their legislative colleagues under which the judges at least occasionally can invalidate a law that seems evidently to flunk anybody’s utilitarian calculus? Hans disagrees. Our judges need to be tied to the mast to avoid the siren call of rationality review. He did not put it this way, but I think he is saying that invalidation under rationality review is like eating potato chips: you can’t eat just one. Having one makes you want to gobble quite a few more, and pretty soon the whole bag is empty. Lots of laws are invalidated, lawyers get the message and bring many more suits based on legislative irrationality, and pretty soon, the state supreme court is a super-legislature.

I am more of a utilitarian than Hans, so I am still somewhat attracted to rationality review. But his argument gives me great pause. It is a major, major contribution to scholarship, even these

50. *Id.* at 255.

three decades later.

The second thing that Hans suggested that many judges will be reluctant to do is to invalidate a perfectly rational law if it was adopted through a constitutionally deficient procedural process.⁵¹ Hans acknowledged that the problem of what remedy, if any, there should be for faulty legislative procedure is a serious one.⁵² As a positivist, Hans would say courts should simply enforce the rules. Ideally, the legislature would get the message and start following them. But there would be, at a minimum, a serious problem of retroactive impact. There are probably quite a few laws on the books already that were adopted through deficient legislative procedures, and creating the potential of the invalidity of all of them would surely give courts pause. One way out would be to enforce the procedural rules in a case and say that the decision will be applied only prospectively, to new laws passed after the date of the judicial decision. But a problem with that, at least from Hans's perspective, I would guess, is that prospective judicial lawmaking might violate his legal positivism. What in the state constitution allows the state supreme court to adopt a constitutional rule only for the future?

I note my qualms about Hans's analysis because I think his work, as excellent scholarship, deserves the highest compliment that can be paid to scholarship, which is analysis and critique. All of us today owe him that. Notwithstanding the reference to his legacy in the title to the program, we are certainly not here to bury Hans. But we should not only be here to praise him, either. Let's engage in an analytical and critical conversation, all of us, in celebration of the great accomplishments and lasting impact of his work. Let's not call it a legacy. Instead, I see his contributions as an ongoing gift, subject to constant reevaluation and revision, with Hans an ongoing major player in the debates.

Hans, there is a Paul Simon song—I don't know if you know who Paul Simon is, but it does not matter—with the title, "Still Crazy After All These Years."⁵³ "Crazy" is wrong, but the easy sentimentality of the song feels right. So here's to you, Hans, not crazy, still fresh as a daisy though older than Guido Calabresi, worthy

51. *Id.* at 242-43.

52. *Id.*

53. PAUL SIMON, *Still Crazy After All These Years*, on STILL CRAZY AFTER ALL THESE YEARS (Warner Brothers 1975).

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of a film by Scorsese, still not hazy or lazy after all these years.⁵⁴

54. *Id.*

