

**COMMENTS ON ROBERT WILLIAMS'S *STATE
CONSTITUTIONAL PROTECTION OF CIVIL LITIGATION***

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Professor Robert “Bob” Williams has long been the godfather of state constitutional law scholarship, and his paper demonstrates why.¹ I would like to expand on one aspect of state constitutional law that Professor Williams mentions and that, in fact, was one of the under-implemented contributions by another godfather in the field, Hans Linde.² While Justice Brennan’s 1977 *Harvard Law Review* article *State Constitutions and the Protection of Individual Rights*³ brought the topic into the national conversation, that article appeared seven years after then-Professor Linde of the University of Oregon explained and advocated state constitutional primacy in an *Oregon Law Review* article⁴—an article that Justice Brennan himself acknowledged as a source and inspiration.⁵ More significantly, after Professor Linde became Oregon Supreme Court Justice Linde, he was the first to demonstrate that the theory of state constitutional primacy with respect to individual rights could be translated into a robust body of case law differing from analogous United States Constitutional law in kind and not merely in degree.⁶

It is by now universally recognized that state courts can interpret individual rights guarantees more expansively than the United States Supreme Court interprets analogous provisions of the Federal

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1. Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 RUTGERS U. L. REV. 905 (2018).

2. Richard S. Price, *Linde’s Legacy: The Triumph of Oregon State Constitutional Law, 1970–2000*, 80 ALB. L. REV. 1541, 1542 (2016) (referring to Justice Linde as “the intellectual godfather’ of state constitutional law”).

3. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

4. Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970).

5. William J. Brennan, Jr., *Foreword: The Law of the Land*, 70 N.C. L. REV. 1701, 1701 n.3 (1992).

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

Constitution, and many have participated in doing so. As Professor Williams's paper shows, though, state courts typically do this by applying the analytic structure from federal cases, sometimes reaching more rights-generous results.⁷ For example, in defining what government actions trigger a person's constitutional right to be free from searches, state courts relying on state constitutions usually employ the federal formulation—"reasonable expectation of privacy"⁸—but may apply a more expansive vision of what a reasonable person expects. Rarely do courts question, much less abandon, the federal template. But it can be done.

For example, in Oregon, a search is defined as any government action that, if government could engage in it at will, would reduce the people's freedom from unwanted scrutiny.⁹ A particular defendant's subjective expectation, reasonable or not, is simply irrelevant. More to the point in the context of civil litigation, Oregon courts adjudicating equal protection claims do not use the federal "levels of scrutiny" framework—namely strict scrutiny for suspect classifications, intermediate scrutiny for gender, rationality review for everything else.¹⁰ Instead, the courts pose a structured sequence of inquiries:¹¹ First, does the challenged action confer a benefit or burden on a true class, that is, a group that is not defined by the law in question, but rather shares some "antecedent personal or social characteristics"? Thus, a law that requires filing a notice of appeal within thirty-five days is not subject to equal protection analysis because late filers would never be considered a class if not for the law establishing the deadline. Likewise, a law imposing tax surcharges on homeowners who do not recycle. On the other hand, racial or ethnic groups, veterans, Portland residents, Catholics, college graduates, lawyers, and redheads, have a socially-recognized identity pre-existing any law that might affect them.

Next, the court asks whether the particular true class at issue is one that is based on immutable traits such as race, ethnicity, age, or what might be called quasi-immutable traits such as gender or religion, as opposed to classes such as Portland residents or college students that can

7. Williams, *supra* note 1, at 911–34.

8. *E.g.*, United States v. Knotts, 460 U.S. 276, 280–81 (1983).

9. State v. Campbell, 759 P.2d 1040, 1044 (Or. 1988) (“[T]he privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*.”).

10. See Cooper v. Harris, 137 S. Ct. 1455, 1463–64 (2017).

11. The following template is taken from *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435, 445–47 (Or. Ct. App. 1998). See also Cox v. Oregon, 80 P.3d 514, 517–18 (Or. Ct. App. 2003) (Schuman, J., concurring); David Schuman, *The Right to “Equal Privileges and Immunities”: A State’s Version of “Equal Protection,”* 13 VT. L. REV. 221, 223–24 (1988).

be more or less freely assumed or discarded. The latter classifications are not subject to any equality guarantees. The former, however, are rebuttably presumed to be unconstitutional. In the analogous terminology of federal law, these classifications might be called suspect, because they raise the suspicion that they are driven by prejudice, animus, or stereotype.

That presumption, however, can be rebutted if government can establish that the disparate treatment can be justified by relevant genuine differences, usually biological, between the disparately treated classes. Thus, for example, a law requiring annual driving tests for persons over seventy-five, or sickle-cell anemia for African-Americans, or prostate exams for males, are not unconstitutional. Absent from this analysis are “tiers” of scrutiny, rationality review, and balancing governmental interests against individual rights.

Of course, there are state constitutional rights that have no federal analogue. For these provisions, courts have no choice but to develop an independent analytical framework. As Professor Williams notes, among the uniquely state provisions most frequently invoked by tort plaintiffs are the remedy clauses in thirty-seven state constitutions, typically guaranteeing a legal remedy for injury to person, property, or reputation. Courts have developed a dizzying array of interpretations, probably because these provisions must mean something, but they cannot possibly mean what they say. There neither is, nor should there be, a legal remedy for the injury to person caused by age-related arthritis, the injury to uninsured property caused by lightning, or the injury to reputation caused by dropping an easily-catchable fly ball in the world series. Courts, therefore, struggle. A quick summary of some solutions illustrate this difficulty.¹²

Some courts subscribe to the theory that the guarantee is purely procedural: it imposes no limits on non-judicial lawmakers’ authority to declare what is or is not an injury, and only requires courts to provide a fair and accessible process for individuals to seek remedies for these injuries. However, in most jurisdictions, courts recognize that the remedy guarantee imposes some limitations on lawmakers. In some, the clause protects only those remedies that were in existence when the constitutional guarantee was adopted. Still others allow legislatures to eliminate or limit remedies if and only if they provide an adequate substitute remedy, either to an injured individual or to the state’s citizens collectively. Some courts adopt variations or combinations. For example, the legislature can abolish a pre-constitutional remedy only if it provides

12. For a more elaborate survey of these interpretations, see David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1203–17 (1992).

an adequate quid pro quo, but can freely eliminate remedies created after constitutional adoption.

Each of these interpretations has obvious problems. Nobody can seriously argue that a legislature should be able to eliminate all remedies for personal injury. On the other hand, nobody can seriously argue that a legislature should not be able to eliminate such common law torts as alienation of affections. And the various quid pro quo and balances require courts, in Justice Scalia's formulation, to measure the length of a line against the weight of a rock.¹³ For this reason, I believe that remedy clause litigation will continue to confound courts, plaintiffs, and defendants equally.

13. *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).