Response

Why State Constitutions Matter

ROBERT F. WILLIAMS*

I want to thank Professor Lawrence Friedman and the New England Law Review for organizing this Paper Symposium on my new book, The Law of American State Constitutions. Also, many thanks to the authors who took the time to read the book and write about it and associated topics of state constitutional law. I have learned a good deal from all of them, as well as the readers of this Paper Symposium.

State constitutions are becoming more and more relevant both legally and politically. In November 2010, voters in Iowa, Michigan, Maryland, and Montana voted, in automatic, periodic referenda, on whether to call state constitutional conventions.1 The Maryland vote was very close, but all four failed. Such votes also failed in 2008 in Illinois, Connecticut, and Hawaii. New Yorkers voted against a constitutional convention in 1997. Similar automatic referenda will take place in 2012 in Alaska, New Hampshire, and Ohio. A major move for constitutional revision is taking place in Pennsylvania,2 and similar efforts regularly arise in Alabama,3 California,4 New York,5 and other states.

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* Distinguished Professor of Law, Rutgers University School of Law, Camden; Associate Director, Center for State Constitutional Studies, camlaw.rutgers.edu/statecon.
In the 2011 Wisconsin standoff, Democratic legislators left the state to defeat a quorum for a bill repealing public sector unions’ collective bargaining rights. This was made possible by a state constitutional provision requiring a three-fifths quorum to enact “fiscal” legislation. The standoff ended when the Republicans deleted the fiscal provision from the bill, and it could be enacted without the Democrats under the normal quorum rule. The law was enjoined, however, based on a statutory open meetings claim.

Virtually all of the activity on same-sex marriage, as pointed out by Robert Peck and Indiana Chief Justice Randall Shepard, has taken place under state constitutions, including California’s Proposition 8. So has litigation concerning equal and adequate school finance, eminent domain, free speech on private property, challenges to tort reform measures, and recall of public officials such as that leading to Arnold Schwarzenegger’s election as governor of California. A campaign, fueled by out-of-state money, succeeded to unseat all three of the Iowa Supreme Court justices up for retention (as required by the state constitution) who voted to strike down, under the state constitution, the ban on same-sex marriage. Similar challenges have been made to state judges who interpreted state constitutions to invalidate various tort reform measures. The upcoming decennial redistricting of the U.S. House of Representatives

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9 Vikram David Amar, California Constitutional Consundrums—State Constitutional Quirks Exposed By the Same-Sex Marriage Experience, 40 RUTGERS L.J. 741, 742 (2009).
10 Peck, supra note 8.
13 Peck, supra note 8; Symposium, Tort Reform and State Constitutional Law, 32 RUTGERS L.J. 897 (2001).
15 See Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009).
16 Peck, supra note 8.
and state legislatures will take place primarily under state constitutions. Florida and California recently amended their state constitutions to prohibit their redistricting commissions from providing partisan advantage or disadvantage. The current state and local fiscal and public pension crises directly implicate state constitutions’ balanced budget mandates and limits on borrowing and taxation.

In 2002, Florida amended its state constitution to provide detailed requirements for the treatment of pregnant pigs. This was the result of a national campaign by animal rights activists, who targeted Florida because of the relative ease of amending its constitution. Then, in 2010, South Carolina amended its constitution to guarantee the rights of hunters, in response to perceived threats to hunting by animal rights groups.

Finally, in 2010, state constitutional amendments were adopted in a few states (Arizona, Oklahoma, and Missouri) in an attempt, likely unsuccessful, to block federal health care and labor law reform measures, and in Oklahoma to ban the use of international and Islamic law. The Oklahoma provision has already been enjoined, and the Acting General Counsel of the National Labor Relations Board has written to the Attorneys General of Arizona, South Carolina, South Dakota, and Utah, informing them that their state constitutional amendments purporting to guarantee all employees a secret ballot union election conflicts with federal labor law and is therefore preempted. Interestingly, as a number of these issues reflect, we have seen a nationalism of state constitutional law issues, with out-of-state interest and money flowing on hot button issues perceived as

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19 FLA. CONST. art. X, § 21.


affecting nationally-oriented interest groups.

State constitutional developments are carefully reviewed by Dr. John Dinan in the Book of the States, in which he also includes important data on the fifty state constitutions.25 Any intelligent discussion of these processes and issues requires an understanding of state constitutions themselves and the variety of ways in which they differ from the more familiar Federal Constitution. State constitutions are, however, low-visibility constitutions and are not well understood.26 This leads to an interesting paradox in American constitutionalism. The Federal Constitution is much more familiar in our country, but it is in fact remote and out of reach for any significant public involvement. State constitutions, on the other hand, are much closer to the people and are realistically accessible to popular involvement through a number of avenues. However, as noted, state constitutions are not well understood by the public or even many legal or political professionals.

Many people will assume a familiarity with their state constitutions because of surface similarities with the Federal Constitution. They are both called “constitutions,” but there are many differences, as well. One way to build understanding of state constitutions is to compare and contrast them with the more familiar Federal Constitution.27 State constitutions, as noted by Justice Scott Kafker, perform different functions (generally limit plenary powers rather than grant enumerated powers),28 have different origins (from the people themselves),29 and, as described by Alabama Chief Justice Sue Bell Cobb, have a different (longer and more detailed) form.30 The content and quality of state constitutions is also very different, with state constitutions containing many more policy-oriented provisions, built up

26 WILLIAMS, supra note 14, at 1-2.
27 For an excellent and accessible single volume explaining state constitutions, see generally G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998).
28 WILLIAMS, supra note 14, at 27; see also Scott L. Kafker, America’s Other Constitutions: Book Review of The Law of American State Constitutions, 45 NEW. ENG. L. REV. (forthcoming 2011):

The functions of the state and federal government, and therefore their respective constitutions, are also different. As James Madison explained in Federalist, Number 45, the powers of the national government set out in the Federal Constitution are enumerated and limited. In contrast, the powers “which are to remain in the State governments are numerous and indefinite . . . . and will extend to all the objects which, in the ordinary course of affairs concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”

Id.

30 Id. at 28-30; Cobb, supra note 3.
over time, as well as provisions concerning the character, virtue, and even morality of the state’s people.\textsuperscript{31}

In fact, state constitutions are more democratic than the Federal Constitution in that they involve the citizenry in approving their amendment and revision, voting to approve borrowing, and in some states, approving new forms of gambling. In many states, like Iowa, for better or worse there is popular participation through electing or retaining judges.\textsuperscript{32}

Further, because of the many waves of revision of state constitutions over the years, they reflect the input of the alternative voices of African Americans, Hispanics, Native Americans and women—voices that had little impact on the Federal Constitution.\textsuperscript{33} Finally, these waves of state constitutional revision have reflected a continuing dialogue about fundamental matters of governmental structure and function that cannot take place under the difficult-to-amend Federal Constitution.\textsuperscript{34} Such differences can obscure one of the most fundamental aspects of state constitutions: the significant impact that a number of them were adopted before the Federal Constitution had on the framing of our Federal Constitution.\textsuperscript{35}

One of the more recent developments that has helped create a rebirth in state constitutional study and practice is the growth of what is known as the New Judicial Federalism (“NJF”), in which attorneys and others mine state constitutions for interpretations that offer more protective rights than similar provisions of the Federal Constitution.\textsuperscript{36} The initial thrust of this development, as described by Justice Robert Cordy, was in the area of criminal procedure, where constitutional defenses were expanded from just federal claims to include state constitutional arguments.\textsuperscript{37}

\begin{footnotesize}
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\item Williams, supra note 14, at 21-23, 30-31.
\item Id. at 31; Kafker, supra note 28.
\item Williams, supra note 14, at 34-35.
\item See generally John Dinan, The American State Constitutional Tradition (2006) (addressing the importance of constitutional debates at the state level).
\item WILLIAMS, supra note 14, at 37-71.
\item Id. at 113-34; Kafker, supra note 28; Peck, supra note 8.
\item Robert J. Cordy, Criminal Procedure and the Massachusetts Constitution, 45 NEW. ENG. L. REV. (forthcoming 2011):
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As the U.S. Supreme Court continues along a path of closely divided opinions seemingly veering back and forth on the meaning and application of the Fourth, Fifth, and Sixth Amendments to the myriad of factual situations confronting state court criminal judges, it is likely that the trend toward NJF so evident in the dozens of cases noted in this brief article will continue. Defense counsel have become more adept at looking to the Massachusetts Constitution for the protections and explication of the rights of their clients, and the jurisprudence on the subject has accordingly increased in its depth and breadth.
commentator referred to these as “evasion” cases. U.S. Supreme Court Justice William Brennan helped energize this movement when, quoting Justice Brandeis, he called states “laboratories of democracy.” This raises the potential for dual, or dueling, claims of rights in state and federal court, which implicate a number of methodology issues, including the sequencing of arguments and development of criteria for recognizing rights beyond the federal minimum standards. Too many state courts fail to acknowledge the possible differences between state and federal rights protections, and as Professor Lawrence Friedman states, others engage in “lockstepping,” in which they purport to prejudge future cases by announcing that, in the future, the state and federal rights provisions will be interpreted identically or similarly. Both approaches are problematic. Also, the NJF has given rise to state constitutional amendments aimed at overruling state constitutional rulings providing more rights than required by the Federal Constitution. Proposition 8 in California, overturning the same-sex marriage decision, is the most recent example. Now, of course, California’s explicit state constitutional ban on same-sex marriage is the subject of a federal constitutional challenge, which has succeeded at the trial level. A critical area in which state constitutional law is distinguished from federal doctrine is the separation or distribution of powers. The Federal Constitution does not mandate any particular arrangement of

Id.

40 WILLIAMS, supra note 14, at 135-92; see also NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS (James A. Gardner & Jim Rossi eds., 2011) [hereinafter NEW FRONTIERS OF STATE CONSTITUTIONAL LAW].
42 NEW FRONTIERS OF STATE CONSTITUTIONAL LAW, supra note 40, at 128-29; see John Dinan, Foreword: Court-Constraining Amendments and the State Constitutional Tradition, 38 RUTGERS L.J. 983, 984 (2007).
43 See Amar, supra note 9.
44 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). On appeal the California Attorney General refused to defend Proposition 8. The U.S. Court of Appeals for the Ninth Circuit issued an order in early January 2011, certifying a question to the California Supreme Court as to whether the proponents of Proposition 8 had standing to appeal the district court’s decision striking down Proposition 8. See Order Certifying a Question to the Supreme Court of California, 628 F.3d 1191 (2011).
governmental powers in the states except that they be “republican.” In contrast to provisions involving individual rights, the Federal Constitution’s separation-of-powers doctrine has not been determined to constrain the states. Therefore, federal separation-of-powers doctrines should be even less persuasive in state courts than federal constitutional rights interpretation. The states’ constitutional distribution-of-powers arrangements, however, also differ greatly from state to state. Some states elect their judges, while others follow the appointment system. Judicial remedies utilized by state courts may be different from federal remedies. Some states have strong, single executives, whereas others have a number of statewide elected executive officials. One state (Nebraska) has a one-house legislature, and others have part-time legislatures, term limits, initiative and referendum, etc. Most state constitutions, in contrast to the Federal Constitution, contain extensive procedural limits and requirements for the process of enacting statutes. Therefore, it is important to apply a state-specific separation-of-powers analysis based on a state’s specific arrangements.

A final significant area of difference between state constitutions and the Federal Constitution is the mechanisms of amendment or revision.

45 See WILLIAMS, supra note 14, at 240-42.
46 Id.
47 Shepard, supra note 8:

Selecting the right remedy can often be the greatest complication in state constitutional work. Remedies are particularly difficult in state constitutional cases because, unlike their federal counterparts, state constitutions are full of positive commands and mandates. A federal constitutional violation can often be remedied simply by ordering the offending party to refrain from engaging in the unconstitutional behavior. State remedies, by contrast, often require a party to take some affirmative action, and often that party is a member of another coequal branch of government. Once a state constitutional violation is identified, courts are stuck with the difficult task of fashioning a remedy that is feasible and will correct the violation. Judges and claimants frequently underestimate the importance and difficulty of this task.

48 Friedman, supra note 41:

Many state constitutions provide specific instructions and rules on how lawmaking can be accomplished. Disputes about whether a state legislature honored these procedural requirements raise concerns about the judiciary’s role in interpreting and enforcing these kinds of constitutional provisions—provisions that have no analogue in the federal constitution.

Id.
49 WILLIAMS, supra note 14, at 238-40.
While there is but one, relatively difficult, way to amend the Federal Constitution (another constitutional convention has never been called), amendments or revisions of state constitutions can be accomplished through legislative, constitutional convention (even limited conventions) or constitutional commission proposals, as well as by initiative in some states. State constitutions are therefore much more malleable and have been changed at a fairly rapid pace over the years. Indeed, state constitutional change is one of the tools of lawmaking, often resorted to for policymaking by interest groups such as those opposed to same-sex marriage or higher taxes.

There are substantial political difficulties today with state constitutional amendment and revision, including popular distrust of constitutional conventions and other constitution-making processes as just more “government as usual.” Approving a constitutional convention is a leap of faith, or desperation, and certainly faith in governmental processes is in very short supply. To some extent, limited state constitutional conventions that take certain hot button issues off the table and targeted advisory commissions can engender a bit more faith.

Further, there is extensive judicial involvement in litigation considering the substance and procedure of state constitutional amendment and revision. Some processes of state constitutional change can only be utilized, for example, to amend the state constitution but not to revise it. This was the basis of the unsuccessful challenge to Proposition 8 in California. Most states require proposed amendments to contain only a “single subject” when presented to the voters. Several of the single amendments banning both same-sex marriage and civil unions were unsuccessfully challenged in court on this basis.

Interest in state constitutional law has continued to increase in the legal academy, demonstrated by Jim Gardner’s important book, as well as in

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50 Id. at 380-97.
51 Id. at 388.
52 Id. at 392-97; G. Alan Tarr & Robert F. Williams, Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform, 36 RUTGERS L.J. 1075, 1085-92 (2005).
54 See Amar, supra note 9, at 742-43.
55 WILLIAMS, supra note 14, at 405-08. For a thoughtful and in-depth consideration of the single-subject rule in the context of Florida constitutional law, see generally Patrick O. Gudridge, Florida Constitutional Theory (For Clifford Allaway), 48 U. MIAMI L. REV. 809 (1994).
56 See, e.g., Perdue v. O’Kelly, 632 S.E.2d 110, 113 (Ga. 2006) (upholding an amendment to the Georgia Constitution banning same-sex marriage and civil unions).
the legal profession. In addition, the Rutgers Center for State Constitutional Studies completed a three-volume work on State Constitutions for the Twenty-First Century.58

Professor Robert Schapiro published a thoughtful book on federalism more generally but also touched in significant ways on state constitutional law.59 In 2008, Professor Jeffrey Shaman published a comprehensive book on state constitutional equality and liberty guarantees.60

In an extremely important 2010 development, the Conference of Chief Justices adopted a resolution encouraging all law schools to offer courses in state constitutional law. The resolution is included here as an Appendix to this Response. This reflects a notable recognition by the highest judges in the fifty states that further education on state constitutional law is necessary.

Many are familiar with the Greenwood Press series Reference Guides to State Constitutions. This series, currently including volumes on forty-six of the fifty states, edited by Dr. G. Alan Tarr, has now been purchased by Oxford University Press. This new publisher plans to complete the series as The Oxford Commentaries on the State Constitutions of the United States, reissue existing volumes, publish updates, and put the series online.61 This is a tremendous boost to state constitutional research.

The past year has seen the publication of additional, important new books in the field of state constitutional law. After a number of years where my casebook was the only national teaching resource on state constitutional law,62 a welcome new casebook has been published by Justice Randy J. Holland of Delaware, Professor Steven R. McAllister of the University of Kansas School of Law, Professor Jeffrey M. Shaman of DePaul College of Law, and Judge Jeffrey S. Sutton of the U.S. Court of

60 See generally JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW (2008).
62 ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (4th ed. 2006). Professor Lawrence Friedman will be joining me as a coauthor on this casebook.
Appeals for the Sixth Circuit.65

Professors Jim Gardner and Jim Rossi have edited an important new book on the dual enforcement of state constitutional norms.64 The contributions in this new book are by leading figures in the field of state constitutional law, and they advance the field by analyzing state constitutional law as not separate from, but rather interrelated with, federal constitutional law.

The classic 1966 book edited by Merrill D. Peterson, Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820s, has been reissued by the Liberty Fund, with an excellent new foreword by my long-time colleague, Alan Tarr.65 Dr. Tarr’s foreword sheds important light on these early debates about, and revisions of, state constitutions, together with their current relevance.

Rutgers Law Journal, for well over twenty years, has devoted one issue a year to state constitutional law. The invited forewords, as well as other articles, have built up an invaluable component of scholarship in this area. These issues also include, every year, a number of excellent student Comments on the most important state constitutional cases decided in the past year. These Comments reflect a wide range of issues that arise in state constitutional law, together with the variety of interpretation techniques utilized by state courts. Less detailed coverage of other cases is included online.66

Given the increased focus on state constitutions over the past generation, both as sources of enhanced rights through litigation in state courts and as avenues for policymaking by entrenching rules about such matters as same-sex marriage, eminent domain, and taxation in a state’s highest law, people generally, and drafters of state constitutional amendments and revisions specifically, need to become more familiar with our little-understood, other American constitutions.67 In fact, we are even coming to recognize that there may be valuable lessons to be learned from a comparative study of state (“subnational”) constitutions in other countries that are based on constitutional federalism.68 Perhaps, with

64 NEW FRONTIERS OF STATE CONSTITUTIONAL LAW, supra note 40.
67 GRAD & WILLIAMS, supra note 58.
greater understanding that state constitutions do matter, we can make progress in addressing the many problems in our state governments through state constitutional amendment and revision in the public interest.  

APPENDIX

Conference of the Chief Justices

Resolution 1**

Encouraging the Teaching of State Constitutional Law Courses

WHEREAS, all lawyers take an oath to support the United States Constitution and the Constitution of their state; and

WHEREAS, although all law schools offer a course in constitutional law, the overwhelming majority of those courses are taught from the perspective of the federal Constitution; and

WHEREAS, the United States Constitution creates a dual system of government with two sets of sovereigns whereby all powers not delegated to the federal government are reserved to the states; and

WHEREAS, state constitutions contain different structures of government, unique provisions, and substantive provisions or declarations of rights that are often greater than federally guaranteed individual rights and liberties; and

WHEREAS, being a competent and effective lawyer requires an understanding of both the Federal Constitution and state constitutional law;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages all law schools to offer a course on state constitutional law.