A CHAMPION OF STATE CONSTITUTIONS

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It is a distinct honor for me to be able to contribute to the dedication of this issue of the Albany Law Review to Chief Justice Christine Durham, just as it was my great privilege to have served as her law clerk twenty years ago. While I want to focus my remarks on one of her many contributions to American law—namely, her impact on state constitutional law—I hope to be forgiven for a brief personal indulgence first. My year working with her at the Utah Supreme Court remains a career highlight. As all who know her can attest, she was then—and remains now—a thoughtful and humane jurist, who thereby helped to make real for a new law school graduate the way that law both shapes and is shaped by society and social problems. But more than that, she was an energetic, friendly, good-humored, and caring mentor. The office was always an inviting place to be, and her chambers also frequently drew clerks from other chambers for conversation and advice. I have been fortunate to be able to keep in touch with her, and to continue to benefit from her mentorship and example in the intervening years, even though I did not remain in Utah.

Of course, that enduring and expanding influence, writ large, is the point of this dedication, for Chief Justice Durham’s impact has extended far beyond her state in many respects. In particular, during her three decades on the bench she has been a central figure in state constitutionalism and a leading voice for the idea of state primacy in interpreting state constitutions. And while state constitutional law today remains an underdeveloped field of study, Chief Justice Durham is an important part of the story of the gratifying increase in interest in state constitutions.

As the reach of the Bill of Rights grew during the Warren Court era, state constitutions were generally seen as fundamentally “subordinate” to the U.S. Constitution, despite the fact that

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provisions of state constitutions might be construed as more protective of individual liberties than their federal counterpart, as well as the fact that a number of state constitutions predate the adoption of the U.S. Constitution. But during the Burger and early Rehnquist eras, a movement developed—heralded prominently by Justice Brennan’s 1977 law review article—advocating that states look at their own constitutions independently (and in some cases exclusively) of the U.S. Constitution. By the early 1980s, Justice Durham was thoughtfully taking up Justice Brennan’s invitation from her position on the Utah court.

Shortly after her arrival on the bench, the Utah court had held unanimously that although the “uniform operation” clause of the Utah Constitution “incorporated the same general fundamental principles as are incorporated in the Equal Protection Clause,” the Utah court’s construction of the clause was not controlled by federal Equal Protection Clause jurisprudence. But actual departures from federal jurisprudence were not common, especially with respect to identical or similar textual provisions. Indeed, in 1987 when the Utah Supreme Court followed federal Fifth Amendment jurisprudence to decide whether refusal to take a breathalyzer test violated the state constitution, Justice Durham dissented from the court’s reasoning, advocating for an independent analysis of Utah’s constitution.

In 1988, Justice Durham once again was in dissent, joining a colleague who wrote:

I certainly do not agree with the categorical assertions in the majority opinion that this Court has “never drawn any distinctions” between article I, section 14 [of the Utah Constitution] and the federal fourth amendment and has “always considered the protections afforded to be one and the same,” or the majority opinion’s intimation that there is no substantive distinction between the state and federal

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3 Gardner & Rossi, supra note 1, at 1233.
5 E.g., American Fork City v. Cosgrove, 701 P.2d 1069 (Utah 1985) (construing the Utah constitution’s self-incrimination provisions like their federal analog).
6 Sandy City v. Larson, 733 P.2d 137, 139 (Utah 1987).
7 Id. at 142–43 (Durham, J., concurring and dissenting). The prior year Justice Durham also had written a separate concurrence in a case, arguing for a separate state constitutional analysis. See State v. Bishop, 717 P.2d 261 (Utah 1986) (Durham, J., concurring on the basis of provisions of the Utah constitution).
provisions.\(^8\)

The next year, Justice Durham penned an article in the Utah Bar Journal encouraging counsel to raise independent arguments based on provisions of the state constitution.\(^9\) Then, in 1990, Justice Durham wrote a watershed opinion for a divided Utah Supreme Court, in which she construed the state constitution’s prohibition of unreasonable searches independently of the U.S. Constitution’s Fourth Amendment.\(^10\) The decision prompted additional calls for litigants to pay more attention to state constitutional arguments.\(^11\)

I arrived in her chambers the following year, and the issue remained a frequent topic of discussion. I recall her gentle but forceful instruction of the importance of independent state constitutional analysis. At that time she was in what I believe was her second year teaching a seminar on state constitutional law as an adjunct faculty member at the University of Utah law school, working to correct a glaring deficiency in American legal education.\(^12\) The lesson was powerful and enduring.

On other occasions, Chief Justice Durham has advocated using state constitutional law to decide a case even if federal constitutional law would provide the same answer. This “primacy approach” argues that where provisions of state constitutions have potential applicability in deciding cases, they should be considered independently, before or alongside federal law.\(^13\) Separate state analysis not only provides an independent ground for decision but also may provide lower courts with valuable guidance for future cases. For instance, in 1996 the state court affirmed the denial of a defendant’s motion to suppress evidence taken from his car.\(^14\) While concurring in the court’s result, Justice Durham dissented from


\(^9\) Christine M. Durham, Employing the Utah Constitution in the Utah Courts, 2 UTAH B.J. 25 (Nov. 1989).


\(^12\) Indeed, even today, well less than half of the two hundred or so accredited American law schools regularly teach a course in state constitutional law, according to Judge Jeffrey Sutton, who for many years has taught exactly that course as part of our curriculum at The Ohio State University Moritz College of Law. See Jeffrey S. Sutton, Why Teach and Why Study State Constitutional Law, 34 OKLA. CITY U. L. REV. 165, 166 (2009).

\(^13\) State v. Daniels, 40 P.3d 611, 626 (Utah 2002) (Durham, J., concurring) (“I continue to be a proponent of independent state constitutional analysis on federalism grounds, believing we should use a primacy approach or dual analysis whenever possible.”); see Sinead McLoughlin, Note, Choosing a “Primacy” Approach: Chief Justice Christine M. Durham Advocating States Rights in Our Federalist System, 65 ALB. L. REV. 1161, 1167–68 (2002).

applying only federal law without conducting an “independent Utah analysis.” A few years later she conducted precisely this independent analysis for the court in another landmark opinion, which held that an administrative highway checkpoint to detect traffic violations was an unconstitutional search and seizure under both Article I, Section 14 of the Utah Constitution and the Fourth Amendment of the U.S. Constitution. Other examples of Chief Justice Durham’s judicial analysis of state constitutions independent of the U.S. Constitution include ex post facto cases, death penalty cases, and self-incrimination cases.

Chief Justice Durham also has been increasingly involved in advancing the cause of state constitutional law well beyond her court, through her own scholarly writings as well as through her extensive public service efforts. For instance, in 1998, she wrote the foreword for a law review issue on “emerging issues in state constitutional law.” In 2001, she delivered the Brennan Lecture at NYU on differences between federal and state governments with respect to separation of powers principles. By 2002, the pages of this law review could demonstrate her importance to the field of state constitutional law with a separate article describing her impact on the field. In 2004, she was again a part of a symposium on state constitutional law at Valparaiso University, where Professor Robert Williams, one of the most active and important state constitutional law scholars, recognized her as “an established figure in the area of state constitutional law.” In 2007, she was back at Albany Law School for another symposium on the evolving topic.

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15 Id. at 1241 (Durham, J., concurring in part and dissenting in part).
17 Daniels, 40 P.3d at 626 (Durham, J., concurring).
18 See McLoughlin, supra note 13, at 1173 n.71 for a list of cases between 1982 and 2002.
22 See McLoughlin, supra note 13.
The impact on state constitutional law of Chief Justice Durham’s extra-judicial service activities also has been widespread. Her twelve years on the Utah Constitutional Revision Commission, while obviously demonstrating the experience and perspective that she brings to questions of state constitutional law, are only the starting point. She has brought the same wisdom and thoughtfulness to her role as a member of the Council of the American Law Institute for the past twenty years, where she has had numerous opportunities to contribute to the development of American law throughout the nation. Her selection in recent years as President of the Conference of Chief Justices, as Chair of the Board of Directors of the National Center for State Courts, and as recipient of the William H. Rehnquist Award for Judicial Excellence in 2007, though properly honoring the many major contributions she has made to the American legal system, undoubtedly reflect in part her prominence in expanding the attention paid to state constitutions and courts.

In short, it is hard to summarize the many impressive aspects of Chief Justice Durham’s career without recognizing her continuing dedication to the study and promotion of state constitutional law. And it is hard to think about the field of state constitutional law without contemplating the impact of the career of Chief Justice Durham. This issue of the *Albany Law Review* is but one way of acknowledging the importance of her contributions to this emerging field, and of encouraging those who follow in her footsteps to continue the work to which she has contributed so significantly.

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26 And where I am once again the direct beneficiary of her insight, in my capacity as an Associate Reporter on an ALI project.