

THE ONCE AND FUTURE CONSTITUTIONAL LAW:  
ON *THE LAW OF AMERICAN STATE CONSTITUTIONS*

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Many years ago, Massachusetts sought to ensure that male citizens fulfilled their militia service by authorizing company clerks to bring suit against those who failed to appear on muster day. In one such proceeding, a justice of the peace found against the defendant and refused him an appeal. The Court of Common Pleas nonetheless decided to hear the case and ruled for the defendant, at which point the plaintiff sought relief from the Massachusetts Supreme Judicial Court. Before the Commonwealth's highest court, plaintiff's counsel relied upon a state law providing that "no appeal should be allowed to either party from the judgment of a justice of the peace" in militia cases. For his part, defense counsel maintained that the law violated his client's constitutional right to a jury trial.

The Supreme Judicial Court in *Mountfort v. Hall*<sup>1</sup> sided with the plaintiff. As one judge reasoned, "[t]he constitution has not secured the right of appeal in any case; that is left wholly to the legislature."<sup>2</sup> Thus the court rejected the defendant's *state* constitutional argument. The year was 1805, decades before the Fourteenth Amendment and the incorporation of the Bill of Rights against the states, when a defendant seeking to challenge state action could rely only upon state constitutional protections. It was a time, moreover, when the prospect of judicial review of legislative acts in federal courts was still a relative novelty, *Marbury v. Madison*<sup>3</sup> having been decided just two years earlier; yet the justices in *Mountfort* recorded no doubts about either the court's authority or its ability to determine whether a duly enacted law conformed to the dictates of the Massachusetts constitution.

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<sup>1</sup> *Mountfort v. Hall*, 1 Mass. (1 Will.) 443 (1805).

<sup>2</sup> *Id.* at 452 (Thacher, J., concurring).

<sup>3</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

Two hundred years later, it is a different story. Today, the federal constitution dominates the rights landscape. As Robert Williams has put it, state courts today operate in “the glare” of the U.S. Supreme Court when it comes to interpreting state constitutional provisions protecting individual rights and liberties.<sup>4</sup> Though the “new judicial federalism”—the phenomenon of state courts independently considering the reach of individual rights provisions under state constitutions—is no longer quite so new, lawyers and judges continue to struggle with what to make of state constitutional rights provisions in specific cases. They often rely, in whole or in part, upon the doctrinal rules articulated by the U.S. Supreme Court in like cases, notwithstanding the urging of proponents of independent state constitutionalism, like Professor Williams, to take the interpretation and implementation of state constitutional protections as seriously as the interpretation and implementation of their counterparts in the Bill of Rights. The sustained consideration Williams has given this project and all matters state constitutional is reflected in *The Law of American State Constitutions*,<sup>5</sup> a volume that will likely serve as the most accessible and comprehensive resource on state constitutions and state constitutional law for some time to come.

Since its publication in 2009, Williams’ book has attracted a great deal of positive attention, with commentators praising many of its varied contributions to our understanding of state constitutional law.<sup>6</sup> In particular, reviewers have focused on Williams’ treatment of the origins, evolution, and methodology of the New Judicial Federalism.<sup>7</sup> The story of the New Judicial Federalism begins in the 1970s, after the Warren Court’s rights revolution, when U.S. Supreme Court Justice William Brennan in the pages of the *Harvard Law Review* encouraged lawyers to rediscover their state constitutions as sources of individual rights guarantees in cases in which no protection would be found in the federal constitution.<sup>8</sup>

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<sup>4</sup> Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1027 (1997).

<sup>5</sup> ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009).

<sup>6</sup> See, e.g., John Vail, *A Closer Look at State Constitutions*, TRIAL, June 2010, at 56, 58 (concluding the book “will enrich the understanding of any practitioner who seeks deeper knowledge of any constitution, state or federal”); Peter Buchsbaum, Book Review, 42 URB. LAW. 761, 763 (2010) (concluding the book “provides a very fine compendium of information” on state constitutional law).

<sup>7</sup> See, e.g., Patrick O. Gudridge, *There There? On What Terms Does State Constitutional Law Exist? For Example, in Florida?*, 41 RUTGERS L.J. (forthcoming 2011).

<sup>8</sup> See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*,

The story continues to this day, with scholarly efforts aimed at developing innovative interpretive approaches to, and theories of, the practice of interpreting and implementing state constitutional rights provisions.<sup>9</sup>

The story of the New Judicial Federalism is one worth telling, and I address some of Williams' conclusions about its significance below. First, though, I provide an overview of *The Law of American State Constitutions*, to convey some sense of its scope and its utility as a resource for lawyers and judges. Next, I turn to Williams' consideration of state constitutional interpretation outside of the individual rights context, when recourse to federal doctrinal concepts may not be an option. Here, I focus on Williams' discussion of judicial construction of structural provisions that guide the process of political decision-making, an issue without parallel under the U.S. Constitution. Finally, I return to the subject of rights interpretation by state courts operating in constitutional space dominated by the Supreme Court. Here, I examine the value of independent state constitutionalism in light of Erwin Chemerinsky's recent argument that state constitutions are "a second-best alternative for advancing liberty and equality."<sup>10</sup>

## I. OVERVIEW

*The Law of American State Constitutions* is, first and foremost, a treatise. I mean this as praise. Given the growing complexity of almost any given area of law in the modern day, it is no mean feat to capture an entire field in one volume, and to set out its many dimensions in a manner that is both approachable and scholarly. Williams has organized his discussion of the dimensions of state constitutional law into five parts, ranging from the history and nature of state constitutions before the framing of the federal constitution to the current efforts of state courts to address the process and substance of state constitutional amendment and revision.

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90 HARV. L. REV. 489, 491 (1977). As Justin Long has noted, Brennan's article "promoted a great awakening of state constitutionalism as the antidote to the United States Supreme Court's increasing tendency to defer to government actors, rather than maintain or expand Warren Court era human rights protections." Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 50-51 (2006).

<sup>9</sup> See, e.g., JAMES A. GARDNER & JIM ROSSI, *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* (2011); JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005).

<sup>10</sup> Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1703 (2010).

The book begins before the framers of the federal constitution met in Philadelphia, as Williams explores in appropriate detail the role of what he refers to as “the other American Constitutions”<sup>11</sup> in the development of American constitutional federalism. Here, in the early sections of *The Law of American State Constitutions*, he covers the initial differences among state constitutions of the Revolutionary era and the influence of the pre-federal constitutions on the framers.<sup>12</sup> He moves on to discuss the constitution-making efforts in the states following ratification of the federal constitution and the ways in which the states adopted or adapted their constitutions to meet changing demands in the early days of the new republic.<sup>13</sup> Williams concludes this part of the book by addressing the federal limits on state constitutions, limits that may be found not only in the U.S. Constitution itself, but also in federal statutes, regulations, and the Congressional enabling acts that authorized the admission of new states into the union.<sup>14</sup>

The second part of *The Law of American State Constitutions* concerns the New Judicial Federalism and the evolution of independent state constitutional rights interpretation. As noted above, commentators have viewed this section as forming the core of the book. It is here that Williams addresses what he calls the “stages” of this evolution, beginning with the “thrill of discovery.”<sup>15</sup> The thrill gave way in the second stage to a backlash against independent state constitutional interpretation, fueled by the perception that the movement appeared to be concerned more with results than analysis.<sup>16</sup> The third stage, Williams continues, has centered on “the long hard task” of developing interpretive approaches to state constitutions.<sup>17</sup>

After speculating about what the shape the next stage of independent state constitutionalism may take,<sup>18</sup> Williams moves on to issues surrounding the methodology of state constitutional rights interpretation,<sup>19</sup> with a particular focus on lockstepping.

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<sup>11</sup> WILLIAMS, *supra* note 5, at 15.

<sup>12</sup> *See id.* at 15–71.

<sup>13</sup> *See id.* at 73–98 (discussing the evolution of state constitutions).

<sup>14</sup> *See id.* at 99–110 (discussing Federal Constitutional limits, federal statutory limits, and other federal limits including administrative regulations, federal common law, treaties, and interstate compacts).

<sup>15</sup> *Id.* at 119.

<sup>16</sup> *See id.* at 127–30.

<sup>17</sup> *Id.* at 130.

<sup>18</sup> *See id.* at 131–33 (discussing a fourth stage of state and federal constitutional dialogue and how future stages of New Judicial Federalism will be defined).

<sup>19</sup> *See id.* at 135–92.

Lockstepping is the jurisprudential practice of adopting federal constitutional doctrine as state law.<sup>20</sup> Throughout this part of the book, Williams argues that the various methodological approaches to interpreting and implementing state constitutional rights should, in the end, reflect the fact that these are *constitutions* the courts are interpreting, however different from the federal constitution they may appear. This foundational principle animates Williams' hope that even the courts that prefer to tie the development of their state constitutional rights doctrines to the efforts of the U.S. Supreme Court will "recognize that . . . where they adopt federal constitutional law," they ought do so "in a way that does not chill, or even cast doubt on the value of, independent state constitutional arguments."<sup>21</sup>

In the third part of *The Law of American State Constitutions*, Williams turns to the structure of state governments—to the state constitutional distribution of powers and the authority of the legislative, judicial, and executive branches under state constitutions.<sup>22</sup> In the fourth part, he addresses the unique interpretation issues associated with state constitutional law.<sup>23</sup> Finally, in the last part, Williams discusses state constitutional amendment and revision.<sup>24</sup> Each of these parts of the book examines the nature of state constitutional structures, institutions, and practices, often as contrasted with the U.S. Constitution. Consider just three distinctive aspects of state constitutions: unlike the federal charter, state constitutions may feature plural and fragmented executive branches;<sup>25</sup> state courts often rely upon the intentions of the voters who ratified particular constitutional provisions when interpreting those provisions;<sup>26</sup> and state constitutional amendment is comparatively easy under many state constitutions, with many constitutions providing for voter-initiated amendment processes.<sup>27</sup>

This is just a summary of the breadth of *The Law of American State Constitutions*. And Williams' ambition is as deep as it is wide:

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<sup>20</sup> See *id.* at 193–232.

<sup>21</sup> *Id.* at 232.

<sup>22</sup> See *id.* at 233–310.

<sup>23</sup> See *id.* at 311–56.

<sup>24</sup> See *id.* at 359–409 (discussing state constitutional revision in the Twentieth and Twenty-First century and the judicial involvement in such state constitutional amendment and revision).

<sup>25</sup> See *id.* at 309–10.

<sup>26</sup> See *id.* at 315–18.

<sup>27</sup> See *id.* at 390.

he takes us in the text through the various subjects encompassed within the field of state constitutional law, while in the footnotes he provides abundant citations to cases, articles, and books addressing the range of state constitutional questions members of the bench and bar are likely to encounter in practice. Thus, *The Law of American State Constitutions* should serve as a valuable resource for all judges and lawyers involved with state constitutional litigation.<sup>28</sup>

## II. THE PROBLEM OF LEGISLATIVE PROCEDURAL PROVISIONS

Williams remains an objective guide to the intricacies of state constitutional law throughout the book, but he is not uncritical. Indeed, in respect to many of the state constitutional issues he covers in *The Law of American State Constitutions*, he suggests that certain paths and doctrines ought to be preferred, often by illustrating the consequences of regrettable jurisprudential moves that state courts have made in the past. This is true of both his discussion of unique state constitutional rules and his thorough exploration of the New Judicial Federalism. For example, Williams argues that state courts must pay close attention to the complicated issue of determining when a constitutionally mandated legislative procedure has been violated. Many state constitutions provide specific instructions and rules about how lawmaking can be accomplished. Disputes about whether a state legislature is honoring these requirements in particular cases raise legitimate concerns about the judiciary's role in interpreting and enforcing these kinds of constitutional provisions.

As Williams observes, state courts "have developed a surprisingly wide range of approaches to enforcing restrictions on legislative procedure under circumstances where an act does not violate procedural limitations on its face."<sup>29</sup> He explains that the array of approaches can be viewed as situated on a continuum, from complete judicial indifference to the circumstances of a bill's enactment, to judicial involvement in determining whether the way in which a bill became a law satisfies constitutional standards.<sup>30</sup> An example of the former approach would be the "enrolled bill rule," which prevents a court from considering any evidence of constitutional violations that may have occurred in the lawmaking

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<sup>28</sup> See Buchsbaum, *supra* note 6, at 763 (making a similar point).

<sup>29</sup> WILLIAMS, *supra* note 5, at 267.

<sup>30</sup> *Id.* at 268.

process.<sup>31</sup> In states that follow this approach, Williams notes, “citizens have laws that they can rely on,” but “no guarantee that those laws were enacted constitutionally.”<sup>32</sup> The latter approach is characterized by the “extrinsic evidence rule,” which permits a bill to be challenged if evidence can be adduced that demonstrates procedural defects in the enactment process.<sup>33</sup>

Evaluating these approaches, as well as the ones that fall in between on the continuum of judicial involvement, requires a state court to consider not just normative claims about the separation of powers and the practical limits of the judiciary’s ability to enforce constitutional mandates, but also the substance of both the statutes at issue and the nature of the challenges to them. As Williams correctly notes, “[l]itigants seeking adjudication of a statute’s invalidity on the basis of alleged procedural defects generally are not neutral, good-government watchdogs seeking enforcement of the state constitution as an abstract value.”<sup>34</sup> At the same time, however, ensuring that a state constitution retains its abstract value is a responsibility the judiciary is bound to accept. Thus the dilemma: following the enrolled bill approach might result in under-enforcement of state constitutional norms, but the extrinsic evidence approach risks involving a court deeply in political thickets it would just as soon prefer to avoid.

Debates about how the federal constitution in general should be interpreted are not helpful to a state court trying to negotiate this dilemma. Those debates often seem to turn on the appropriateness and applicability of a high theoretical approach to constitutional interpretation. But however bright a theory of interpretation may appear, state courts must consider the real-world effects of their rulings. They must be sensitive to the potential disruption their decisions may cause, particularly in respect to procedural challenges to legislative enactments, if only because they may well see similar challenges—and even challengers—time and again. Accordingly, Williams recommends that courts

look to whether the evil at which the constitutionally prescribed procedure was aimed has occurred. If it has, the court should not hesitate to invalidate the act in question, possibly in a ruling that applies only prospectively to avoid the reliance problems. On the other hand, acts of the

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<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at 269.

<sup>33</sup> *See id.* at 273.

<sup>34</sup> *Id.* at 274.

legislature should not be invalidated when only “harmless error” has occurred. Judicial lines must be drawn, and deference to the legislative branch must be preserved.<sup>35</sup>

State courts cannot abdicate their responsibility to enforce the state constitution; at the same time, Williams counsels, they should seek to enforce procedural norms only in appropriate cases. This is an essentially pragmatic approach, one that allows a state supreme court to balance competing objectives—vindication of procedural lawmaking rules and respect for the limits of the judicial role—and provide guidance for resolving future disputes. It is an approach that creates a way for state supreme courts inclined toward deference to act in egregious cases and thereby take seriously the business of implementing the state constitution while remaining alert to the peculiar institutional dynamics of their state’s government.

### III. INDEPENDENT STATE CONSTITUTIONALISM AS A SECOND-BEST ALTERNATIVE

Legislative procedural challenges and other unique state constitutional issues aside, an examination of the New Judicial Federalism lies at the center of *The Law of American State Constitutions*. It is in individual rights cases that we often see a state court’s most explicit effort to make sense of its constitution’s commands. And it is in these cases that the glare of the United States Supreme Court’s work product may well be blinding. The failure of state courts to engage in the hard work of constitutional interpretation by instead relying upon federal doctrinal constructs has frustrated many commentators, and Williams is no exception. He questions whether “interpretations of the federal Constitution can somehow authoritatively set the meaning for similar provisions of state constitutions,”<sup>36</sup> and he reminds judges and lawyers that “[t]he state constitution . . . is the binding supreme law of the state,”<sup>37</sup> and should be treated as such.

Consider a set of relatively recent cases that have received extraordinary attention, those involving state constitutional challenges to same-sex marriage prohibitions. These challenges have met with mixed success. Courts in Massachusetts,<sup>38</sup> Iowa,<sup>39</sup>

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<sup>35</sup> *Id.* at 277 (citation omitted).

<sup>36</sup> *Id.* at 170.

<sup>37</sup> *Id.* at 136.

<sup>38</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

and Connecticut<sup>40</sup> have struck down prohibitions on same-sex marriage as unconstitutional. The New York Court of Appeals upheld such a ban,<sup>41</sup> while the California Supreme Court invalidated its state prohibition on same-sex marriage<sup>42</sup> but later upheld a subsequent initiative, known as Proposition 8, which overruled the court's original decision.<sup>43</sup>

Canvassing these cases, Erwin Chemerinsky has concluded "state constitutional law is a necessary, but inadequate second best to advancing individual liberties when that cannot be accomplished under the United States Constitution."<sup>44</sup> In his view, "the ability to protect individual rights through state constitutions is inherently limited."<sup>45</sup> This is so for a variety of reasons. State courts are confined by U.S. Supreme Court decisions that impose federal constitutional limits on state governmental action.<sup>46</sup> The probability of successfully advancing the cause of individual rights in these cases is relatively low; for example, if the New York Court of Appeals did not strike down a marriage prohibition, what is the likelihood judges in South Carolina, Oklahoma, or Mississippi would?<sup>47</sup> The costs of pursuing claims using state constitutions, on the other hand, are quite high, as a separate suit must be brought in each state.<sup>48</sup> And given the ease with which state constitutions can be amended via the initiative, successes might be fleeting.<sup>49</sup> Finally, a national patchwork of rules regarding individual rights protections could create its own problems.<sup>50</sup>

Chemerinsky makes clear that he is responding to the hope that state constitutions will augment or even replace the U.S. Constitution as a source of individual rights protections.<sup>51</sup> This hope, he insists, is misplaced: rights advocates should not look to state constitutions as a substitute for rights enforcement under the federal constitution, because by definition, these constitutions can

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<sup>39</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

<sup>40</sup> *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008).

<sup>41</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

<sup>42</sup> *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

<sup>43</sup> *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

<sup>44</sup> Chemerinsky, *supra* note 10, at 1696.

<sup>45</sup> *Id.* at 1697.

<sup>46</sup> *See id.* at 1698.

<sup>47</sup> *See id.* at 1699.

<sup>48</sup> *See id.* at 1700–01 (discussing the relative costs of state and federal constitutional litigation).

<sup>49</sup> *See id.* at 1701.

<sup>50</sup> *See id.* at 1702.

<sup>51</sup> *See id.* at 1702–1703.

never provide the citizenry of the nation with what the federal constitution could (and, in Chemerinsky's view, should).<sup>52</sup> Indeed, that is the whole point of incorporation under the Fourteenth Amendment—to provide all Americans an equal and reliable level of individual rights protection. No state court interpreting a state constitution could do that, and the probability of all fifty state courts acting in concert to achieve the same result is zero.

But that does not mean Chemerinsky sees independent state constitutional rights interpretation as an ultimately hollow pursuit. He acknowledges that benefits flow from the dual enforcement of constitutional norms—the value to federalism, for example, in states having “their own robust constitutional traditions.”<sup>53</sup> And Chemerinsky recognizes that state constitutional analysis in rights cases may influence the United States Supreme Court's thinking about the meaning of the correlative federal constitutional provision. It has happened in the past, but perhaps not as often as it should.<sup>54</sup>

There is another benefit, of course; one that Williams likely believes is most important: through independent state constitutionalism, state courts give meaning to their state charter's foundational commitments, which is of inestimable value to a state's citizens.<sup>55</sup> State constitutions, after all, would not fail of their purpose if the current membership of the United States Supreme Court were suddenly to be possessed by the same impulses that animated the constitutional decision-making of Earl Warren, William Brennan, and Thurgood Marshall. In other words, regardless of what the U.S. Supreme Court considers to be reasonable governmental action in a particular case, Williams and others who believe in the vitality of state constitutions still would urge state courts to engage in their own analysis of a rights guarantee—just as they would with a textual provision that lacked a federal cognate.<sup>56</sup> Unlike rights proponents, state courts cannot regard the independent interpretation of individual rights provisions as simply a means to an end.

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<sup>52</sup> See *id.* at 1703 (“state constitutionalism is a second-best alternative for advancing liberty and equality”).

<sup>53</sup> *Id.* at 1702.

<sup>54</sup> See *id.* at 1703.

<sup>55</sup> See, e.g., WILLIAMS, *supra* note 5, at 354–55 (discussing the effect of state constitutions on public policy).

<sup>56</sup> See *id.* at 232 (“[E]ven where [state courts] adopt federal constitutional law, they must do it in a way that does not chill, or even cast doubt on the value of, independent state constitutional arguments.”).

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#### IV. CONCLUSION

Williams provides no broad summing-up at the conclusion of *The Law of American State Constitutions*. It's not clear how he could. State constitutions are inextricably linked to everything that a particular state is or does; state constitutional law is protean, frustrating, complicated, and essential. Visitors to the worlds these constitutions define, worlds at once old and new, would do well to consult Williams's constitutional Baedeker before taking the trip.