

# Tulsa Law Review

---

Volume 45  
Number 4 *Book Review*

---

Summer 2010

## America's Other Constitutions: The Importance of State Constitutions for Our Law and Politics

Sanford Levinson

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Sanford Levinson, *America's Other Constitutions: The Importance of State Constitutions for Our Law and Politics*, 45 *Tulsa L. Rev.* 813 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol45/iss4/23>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# AMERICA'S "OTHER CONSTITUTIONS": THE IMPORTANCE OF STATE CONSTITUTIONS FOR OUR LAW AND POLITICS

Sanford Levinson \*

Robert F. Williams, *The Law of American State Constitutions* (Oxford U. Press 2009).  
Pp. 433. \$95.00.

What is the subject matter of "American constitutional law"? The standard answer, alas, is the United States Constitution. "When Americans speak of 'constitutional law,'" James Gardner has written, "they invariably mean the U.S. Constitution and the substantial body of federal judicial decisions construing it."<sup>1</sup> To put it mildly, this is a mistake, in every conceivable way. Almost all of the 300+ million residents of the United States - the most important exceptions are those who reside in the District of Columbia - live under *two* constitutions, one the United States Constitution, the other the constitution of the state in which that person happens to live.<sup>2</sup> Indeed, things can become even more complex for certain enrolled members of American Indian tribes who may also be subject to tribal constitutions.<sup>3</sup>

In a 1988 poll, however, as Robert Williams tells us on the opening page of his excellent new book on American state constitutions, "52 percent of the respondents did not know that their state had its own constitution."<sup>4</sup> More dismaying, perhaps, is a report issued the following year by the Advisory Commission on Intergovernmental Relations

---

\* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. I am grateful to Mark Graber for his comments on an earlier draft of this review.

1. James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System*, 23 (U. Chi. Press 2005). Even worse, as former Oregon state justice Hans Linde - also, of course, a distinguished legal academic - has observed, "General constitutional law courses, which everyone takes, create the impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as the agenda of constitutional litigation." Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 Rutgers L.J. 927, 933 (1993). If I can ride one of my own hobbyhorses, I note as well that by limiting "constitutional law" to what happens to be currently litigated, those who teach such courses never both to inform their students by far the most important parts of the Constitution, with regard to structuring our political order, are those that are *never* litigated. See, for an elaboration of this argument, Sanford Levinson, *Our Undemocratic Constitution: Where The Constitution Goes Wrong (And How We The People Can Correct It)* (Oxford U. Press 2008).

2. Or, for that matter, consider "cosmopolitans," rootless or otherwise, like my wife and me, who split our time between Texas and Massachusetts, not to mention the obvious fact that anyone who travels at all from one state to another becomes at least temporarily subject to the constitution of the host state.

3. See the extensive listing of American tribal constitutions at The University of Oklahoma Law Center, *Constitutions*, <http://thorpe.ou.edu/const.html> (last accessed Oct. 12, 2010).

4. Robert F. Williams, *The Law of American State Constitutions* 1 (Oxford U. Press 2009).

that concluded that even “lawyers tended to be unaware of their state constitutions.”<sup>5</sup> Judge Jeffrey Sutton compared such ignorant lawyers to basketball players, awarded two shots after a foul, who choose to take only one shot. There are, of course, no such ballplayers, but there are, says Sutton, all too many such lawyers who ignore the potential relevance of their state constitutions in their exclusive reliance on federal constitutional norms. By in effect giving up “the second free throw,” they condemn their clients to more losses than would otherwise be the case.<sup>6</sup> In the case of practicing lawyers, Sutton is suggesting the de-facto presence of widespread malpractice. Let me suggest that most professors of “constitutional law,” especially those who fancy themselves to be “constitutional theorists,” should also be deemed as committing malpractice of sorts insofar as they so resolutely ignore the importance of America’s “other constitutions” for the issues they purport to be interested in.<sup>7</sup>

One might easily explain (and justify) this disregard of state constitutions if it were the case that the state governments established by them dealt with mere trivialities of no interest to ordinary people (or even if they raised no interesting “interpretive issues” of the kind that obsess legal academics). But either assertion is preposterous. As Daniel Rodriguez has noted, “the basic range of policies and policy choices made by state and local officials dwarf—indeed *always have dwarfed*—national political activity.”<sup>8</sup> Many state choices may be made “in the shadow” of the national Constitution<sup>9</sup> or of potentially pre-emptive congressional statutes, but some significant number are made basically autonomously and in light of *state* constitutional norms. One can debate whether the United States has a robust “federalism,” especially if we define that term by reference to

---

5. *Id.* at 1-2.

6. Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 Okla. City U. L. Rev. 165, 166 (2009). I am grateful to Justin Driver for drawing this article to my attention.

7. Sutton, a member of the United States Court of Appeals for the Sixth Circuit who is also an adjunct professor at Ohio State, describes state constitutional law as “an underdeveloped area of the law.” *Id.* One measure of this “underdevelopment” is the fact that of the twenty-four law schools that offered a course in 2007-2008 on “State Constitutional Law” (as distinguished from state-specific state constitutional law courses), none was ranked that year in “the top fifteen law schools, as measured by U.S. News and World Report.” *Id.* at 166-167 (footnote omitted). I am happy to note for the record that my colleague Dan Rodriguez taught a course on “state constitutional law” at the University of Texas Law School - tied for number 14 in the most recent US News poll on academic reputation in the spring of 2010, but this only barely challenges Judge Sutton’s altogether accurate critique.

8. Daniel B. Rodriguez, *State Constitutionalism and the Scope of Judicial Review*, in *New Frontiers In State Constitutional Law: Dual Enforcement of Norms* (James A. Gardner & Jim Rossi eds., Oxford U. Press forthcoming 2010). Consider, for starters, only the issues of zoning (and general land-use planning) and property taxes, two issues guaranteed to roil any state or local polity. Similarly, a recent “op-ed” in the *New York Times* by former Justice Sandra Day O’Connor, who had been both an elected official and a state judge within Arizona, states that “[s]tate courts resolve the most important legal matters in our lives, including child custody cases, settlement of estates, business-contract disputes, traffic offenses, drunken-driving charges, most criminal offenses, and most foreclosures.” She presents this in the context of a column condemning the way that most states currently elect their judges. Sandra Day O’Connor, *Take Justice Off the Ballot*, N.Y. Times D9 (May 23, 2010). Obviously, most of the examples chosen by O’Connor rarely involve constitutional issues as such, though states often have state-constitutionally-mandated norms of criminal procedure that differ in important ways from national norms as interpreted by the Supreme Court. For example, eleven states extend “constitutional protection to privacy, which has been interpreted as affording a broader substantive right than the Fourth Amendment’s search-and-seizure claims.” See Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, in *New Frontiers In State Constitutional Law* (Oxford U. Press forthcoming 2010).

9. See Robert Cooter, Stephen Marks, & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. Leg. Stud. 225 (1982).

constitutionally entrenched autonomy of sub-national units with regard to matters of significant public importance.<sup>10</sup> There can, however, be little doubt that many issues of great public importance are decided within the states and that state constitutions are frequently thought to be relevant to such decisions. This is most obviously true with regard to decisions by state courts,<sup>11</sup> but one should also be aware of the consequences of the structures established by state constitutions for the actualities of governance

Think only of California's almost spectacularly dysfunctional constitution.<sup>12</sup> Thus the distinguished magazine *The Economist*, in a 2009 article entitled "The ungovernable state," noted that "California has a unique combination of features which, individually, are shared by other states but collectively cause dysfunction." The first is "the requirement that any budget pass both houses of the legislature with a two-thirds majority," a requirement found in the constitutions of two other states, Rhode Island and Arkansas. "But California, where taxation and budgets are determined separately, also requires two-thirds majorities for any tax increase. Twelve other states demand this. Only California, however, has both requirements."<sup>13</sup> And, of course, California also allows constitutional amendment through initiative and referendum, which has included, in recent years, adoption of amendments mandating certain expensive state policies.<sup>14</sup> Perhaps Congress *could*, through its various powers especially as interpreted by the post-New Deal Court, displace all such decisions through federal legislation. But we know both that Congress has not done so and is quite unlikely to do so in any foreseeable future.

Williams also amply demonstrates that state constitutions present interpretive dilemmas that are no less interesting than those generated by the national constitution. Sometimes these dilemmas involve features that are unique to state constitutions, such as the "single subject" rule that many constitutions impose on state legislatures when

10. See e.g. Malcolm M. Feely & Edward Rubins, *Federalism: Political Identity and Tragic Compromise* 7 (U. Mich. Press 2008), for an argument that American federalism is both very weak and, to the extent it exists at all, basically unfortunate (as distinguished from "decentralization," (at p. 20) which is a non-constitutionally-demanded political choice with regard to the creation or implementation of given public policies).

11. Recall in this context Alexis de Tocqueville famous remark that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings." Alexis De Tocqueville, 1 *Democracy In America* 1, Ch.16 (Am. Stud. Programs 1835) (available at [http://xroads.virginia.edu/~Hyper/DETOC/1\\_ch16.htm](http://xroads.virginia.edu/~Hyper/DETOC/1_ch16.htm)). Mark Graber has demonstrated that this is simply false with regard to the federal judiciary at the time Tocqueville was writing (or thereafter, for that matter). See Mark Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 Const. Commentary 485 (2004). It may, however, have considerable more validity with regard to state courts and constitutions. Thus Jed Handleman Shugerman, in his recent article on the rise of the elected judiciary in antebellum America states, has shown that one consequence of moving to an elected judiciary was the increased frequency of judicial review of purported legislative overreaching, which, according to Shugerman, was the point of placing the appointment power in the hands of the public rather than leaving it in the hands of elected legislators. See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1063, 1115 ("A Boom in Judicial Review"), 1147 ("Appendix B.1: State Supreme Court Cases Declaring State Laws Unconstitutional") (2010).

12. See e.g. *Constitutional Reform in California: Making State Government More Effective and Responsive* (Bruce E. Cain & Roger G. Noll eds., Inst. Govtl. Stud. Press 1995).

13. *California: The Ungovernable State*, *The Economist* 33 (May 16-22, 2009) (available at [http://www.economist.com/world/unitedstates/PrinterFriendly.cfm?story\\_id=13649050](http://www.economist.com/world/unitedstates/PrinterFriendly.cfm?story_id=13649050)).

14. See Bruce E. Cain et al., *Constitutional Change: Is it Too Easy to Amend Our State Constitution*, in Cain & Noll, *supra* n. 12, at 288-289.

passing legislation<sup>15</sup> or the California distinction between “amendment,” open to initiative and referendum, and “revision,” which requires legislative participation.<sup>16</sup> But there are also fascinating challenges posed by the presence of similar clauses, occasionally in the very same language, designed to protect individual rights. Should state courts necessarily follow the lead of the United States Supreme Court, or should they feel free to offer more robust readings of certain clauses than those adopted by the nine justices in Washington? Williams strongly endorses the independence of state courts in several well-argued chapters that should interest any devotee of “constitutional interpretation.”<sup>17</sup>

Not only do our fifty state constitutions often present fascinating variations in resolving basic issues of governance,<sup>18</sup> but it is also the case, as Donald Lutz demonstrated several years ago, that in many states one can do an archeology of constitutions, inasmuch as the current constitution, like one of the ancient cities of Troy, rests on top of a significantly greater number of discarded and supplanted predecessors. If nineteen states have had only one constitution, twenty-two have had three or more, and six have had more than half-a-dozen, led by Louisiana (11) and Georgia (10).<sup>19</sup> There is a treasure trove of material in front of our very eyes, if only we could be torn away from our fixation on the United States Constitution, even as supplemented by glances at other national constitutions.

Excellent books have recently been published (with more coming through the pipeline) on state constitutionalism.<sup>20</sup> Joining them is this *magnum opus* by Robert F. Williams. By any measure Williams is, with his Rutgers colleague Alan Tarr,<sup>21</sup> the “dean” of American state constitutionalism. He has been publishing copiously on the topic since 1973,<sup>22</sup> not surprisingly, he is a long-time teacher of a course on state constitutional law. It may help that he teaches in a state that not only got a new constitution in 1948, but also has one of the most interesting (some would, no doubt, say “activist”) state supreme courts in the country.<sup>23</sup> In any event, all of us have reason to be

15. See Williams *supra* n. 4, at 261-263.

16. *Id.* at 403-404.

17. See *id.* at 195-232.

18. See especially John Dinan, *The American State Constitutional Tradition* (U. Press Kan. 2006).

19. Donald Lutz, *Toward a Theory of Constitutional Amendment*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237, 249 (Sanford Levinson ed., Princeton U. Press 1995). The mean number of constitutions/state is 2.9. *Id.* It is, of course, telling that Lutz, like John Dinan and Alan Tarr, is a political scientist. There have long been political scientists interested in the politics of state and local government. Indeed, one of the best-known books in political science in the past sixty years is Robert Dahl's seminal *Who Governs? Democracy and Power in an American City* (Yale U. Press 1961). (elaboration of politics in New Haven, Connecticut).

20. For already published books, see, e.g., the bibliographical essay in Williams, *supra* n. 5, at 411-415. Forthcoming is *State Constitutional Law: Dual Enforcement of Norms*, *supra* n. 8.

21. See G. Alan Tarr, *Understanding State Constitutions* (Princeton U. Press 1998).

22. See Rutgers Law, *Directory*, <http://camlaw.rutgers.edu/bio/968> (last accessed Oct. 21, 2010).

23. See e.g. Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* 62 (Stanford U. Press 2010) (focusing in part on school finance cases in New Jersey between 1973-2009); Charles M. Harr, *Suburbs Under Siege: Race, Space, and Audacious Judges* (Princeton U. Press 1996) (study of Mt. Laurel litigation concerning land-use and low-income housing). I should also note that by far the most luminous moment in my slender career as a practicing lawyer came in *State v. Schmid*, 423 A.2d 615, 633 (1980), in which the New Jersey Supreme Court interpreted the New Jersey Constitution to protect my client, Chris Schmid, against a trespassing charge filed by Princeton University triggered by his attempting to distribute controversial political leaflets.

grateful to Williams putting his almost unique bank of knowledge on the subject into a very accessible work that should be on the shelves of every academic (and others) who presumes to be interested in "constitutional law."

"This book," he writes, "is not intended to provide an exhaustive catalog of the provisions in the 50 American state constitutions," nor, even more, does it "analyze all of the judicial decisions and the interpretation techniques they reflect, expounding on the meaning of the states' constitutional provisions."<sup>24</sup> Nor is it organized by narrow substantive topic (such as, say, "education" or "land-use planning"). Instead, he offers (and divides his book into sections devoted to):

- [1] a selective, general survey of the origins, evolution, and functions of the state constitutions;
- [2] a comparative and illustrative analysis of the contents of the state constitutions;
- [3] a detailed consideration of their rights provisions that operate simultaneously with federal constitutional rights provisions;
- [4] a review of state constitutional structure and distribution of power together with considerations of the nature, powers, and interrelationships of each of the three branches;
- [5] examples of policy matters that have been inserted into state constitutions; and
- [6] the processes of state constitutional amendment and revision.<sup>25</sup>

He rather modestly offers the book "as a reference tool" that "therefore need not be read through from start to finish".<sup>26</sup> A reference book it certainly is, but it is just as certainly not written in a deadly "encyclopedic" style, and my own interest was sustained from beginning to end. Indeed, for reasons I will elaborate presently, I wish it were longer.

Williams begins his historical section by asserting "[s]tate constitutions are *sui generis*, differing from the federal Constitution in their origin, function, form, and quality"<sup>27</sup> Two state constitutions still in operation, though much amended, precede the national Constitution, the Massachusetts Constituion of 1780 drafted by John Adams and the New Hampshire Constitution of 1784.<sup>28</sup> But, as noted earlier, many states, including some quite "old" ones, have far "younger" constitutions; Georgia adopted its tenth constitution only in 1983, while Virginia adopted its sixth constitution in 1971.<sup>29</sup> This ability of states not only to frequently amend, but also to out-and-out supplant their existing constitutions is ample evidence that there is, perhaps fortunately, little or none of the "veneration" applied to them as exists with regard to the United States Constitution.<sup>30</sup> Given my own belief that the veneration directed toward the national Constitution is grotesquely excessive and, indeed, an impediment to reforms necessary to

24. See Williams *supra* n. 5, at 9.

25. *Id.*

26. *Id.*

27. *Id.* at 20.

28. Lutz, *supra* n. 19, at 248.

29. *Id.*

30. See Sanford Levinson, *Constitutional Faith* 9 (Princeton U. Press 1988).

give us a political system suitable for our 21st century realities,<sup>31</sup> it may well be an advantage that state constitutions, when they are thought of at all, are treated often with a ruthless instrumentality. How well, that is, *are* a state's citizens served by the existing constitution? If the answer is "not very well," then there is a manifest willingness to amend it and, with some regularity, even to replace it. As John Dinan notes in his own valuable book, there have been more than 225 state constitutional conventions in our 220 year history, not least because fourteen states include within their constitutions provisions whereby the state electorate is given recurrent opportunity to call such conventions.<sup>32</sup> Thus New Hampshire might still be operating under the aegis of its 1784 constitution (itself a replacement for the earlier 1776 exemplar), but it leads all other states in the number of conventions (17), the most recent having occurred in 1984.<sup>33</sup>

Williams notes that "[t]he central controversies of the first state constitutions had little to do with rights. The focus was on how the new state governments would be structured and which groups in society would have the dominant policy-making role under the new governments"<sup>34</sup> But one might say, of course, that the same thing was true of the Philadelphia convention that drafted the United States Constitution, and for extremely good reason. Whether or not one agrees completely with James Madison's dismissal of rights provisions as "parchment barriers"<sup>35</sup> that would prove least effective "on those occasions when its control is most needed,"<sup>36</sup> it is hard to gainsay that structures almost certainly explain far more about the actualities of American politics i.e., those policies that are adopted, rejected, or, indeed, are never seriously considered than do the rights provisions. Moreover, and just as importantly, most of the arguments for and against particular structures were made by reference to their ostensible ability to protect rights. (One's view about the presidential or gubernatorial veto power, for example, is likely to be linked with the trust one has in legislatures and the likelihood one assigns to the probability that the separately elected executive will protect rather than be indifferent to the rights of the people.) And, as a matter of fact, early state constitutions especially were far more attentive to bills of rights - something notably lacking in the 1787 Constitution - precisely because the fundamental theory of state government is that it possessed plenary powers, making it vitally important to specify what state government *could not* do, as against the mantra of the United States Constitution, that it constituted only a "limited government of assigned powers."<sup>37</sup>

31. See Levinson, *supra* n. 1, at 16-20.

32. Dinan, *supra*, n. 18, at 11.

33. *Id.* at 8. Williams also offers a valuable discussion of 20th century state conventions in his final chapter. Williams *supra* n. 5, at 364-378.

34. *Id.* at 41.

35. See e.g. James Madison, *Federalist No. 48*, in Alexander Hamilton, James Madison, & John Jay, *The Federalist Papers* 279 (ABA 2009).

36. See Ltr. From James Madison to Thomas Jefferson (Oct. 17, 1788) (available at [http://www.constitution.org/jm/17881017\\_bor.htm](http://www.constitution.org/jm/17881017_bor.htm)).

37. James Madison pointed to this essential difference between state and national constitutions in his speech to the House of Representatives explaining his view that Congress had no power to charter the Bank of the United States. He

took notice of the *peculiar manner* in which the federal government is limited. It is not a general grant, out of which particular powers are excepted - it is a grant of particular powers only, leaving the general mass in other hands. So it had been understood by its friends and its foes, and so it was

However interesting rights provisions in state constitutions might be, it is a shame, in some ways, that Williams shares so much of the American law professors' fascination with rights and their constitutional protections. Thus he devotes more space<sup>38</sup> to "Rights Guarantees Under State Constitutions: The New Judicial Federalism" than to "Structure of State Government."<sup>39</sup> Although he mentions the important reality, for example, that "[m]ost states . . . now have a *plural*, fragmented, or 'unbundled'<sup>40</sup> executive, with a variety of elected state constitutional executive officers, each with their own statewide constituency,"<sup>41</sup> he pays less attention to this than the subject warrants, especially given the insistence, thanks to certain overreadings of Hamilton's statements about executive power in *The Federalist*, that a "unitary executive" is the only sensible way to organize that branch of government (assuming, of course, that one rejects a parliamentary form of government).<sup>42</sup> It is simply and demonstrably utterly false to say that this captures any "American view" of executive branch organization, since it has so overwhelmingly been rejected by the drafters of state constitutions from the earliest period of constitution drafting.

Similarly, I wish that Williams, when discussing the organization of the legislature, had spent some time on Nebraska's so far sole venture into unicameralism (even though former Minnesota Gov. Jesse Ventura altogether correctly suggested that Minnesota emulate Nebraska). Given the transformation in state apportionment generated by *Reynolds v. Sims*,<sup>43</sup> it is difficult indeed to figure out why most states are benefitted by the expense of paying for an extra house of the legislature. This is especially true in a "separation of powers" system in which the governor is assigned, as is true now in all the American states, a veto power that, as Williams well recognizes, is often substantially greater than that enjoyed by the United States President.<sup>44</sup> The veto power creates a de-facto *tricameral* system, and one must ask if states are well served by the creation of so

---

to be interpreted .

James Madison, *Speech to the House of Representatives* (Washington D.C., Feb. 2, 1791), in *James Madison: Writings* 482 (Jack Rakove ed., Lib. of Am. 1999) (emphasis added). See also John Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.

What is "*peculiar*" about the national constitution is precisely this emphasis on assigned powers, in contrast with state governments that are presumed to have unlimited power unless their own constitutions explicitly limit it.

38. Williams, *supra* n. 5, at 113-232.

39. *Id.* at 235-310.

40. See Christopher R. Berry & Jacob E. Gersten, *The Unbundled Executive*, 75 U. Chi. L. Rev. 1385 (2008). See also Jacob Gersten, *Unbundled Powers*, 96 Va. L. Rev. 301 (2010); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446 (2006).

41. Williams, *supra* n. 5, at 303.

42. See, for the most enthusiastic expression of this argument, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power From Washington to Bush* (Yale U. Press 2008).

43. *Reynolds v. Sims*, 377 U.S. 533, 537 (1964).

44. See Williams, *supra* n. 4, at 306-309; Dinan, *supra* n. 18, at 99-123.

many veto points, especially when one realizes that all bicameral states emulate the national government in giving each house of their legislature an absolute veto power over legislation passed by the other house.

This is not to say, of course, that rights issues do not offer a host of important issues that Williams consistently illuminates. As already suggested, an especially interesting issue for constitutional interpretation buffs is the relationship between state and national constitutional norms. After all, the “new judicial federalism” that Williams alludes to in the title of the longest section of his book, was substantially sparked by a 1977 article by Supreme Court Justice William J. Brennan in the *Harvard Law Review* that called on lawyers to recognize the relevance of state constitutions in protecting individual rights.<sup>45</sup> By 1986, Brennan would say that “[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence in our times.”<sup>46</sup>

One might doubt the accuracy of Brennan’s assertion,<sup>47</sup> but there can be no doubt that a number of state courts exhibited exceptional vigor in interpreting state constitutions in a variety of areas. One area may indeed involve “overlapping” rights, such as freedom of speech, criminal procedure, or, as we have seen especially in recent years, the meaning of state “equal rights” provisions with regard to same-sex marriage.<sup>48</sup> But, even with regard to rights, Williams might have spent more pages on certain important textual differences between the national and state constitutions. As already noted, the United States Constitution left Philadelphia without an explicit bill of rights, and those rights that were almost immediately added were “negative rights” dealing with personal liberties that could be summarized, in important aspects, as instantiating “the right to be left alone,” described by Justice Brandeis as “the most comprehensive of rights and the right most valued by civilized men.”<sup>49</sup> Many contemporary debates, however, both at home and abroad, concern demands by the citizenry to certain kinds of affirmative protections by the state against the vicissitudes of fate, what has come to be called the “welfare state.”

Although Frank Michelman (Brennan’s former law clerk) famously provided a way to “protect the poor through the Fourteenth Amendment,”<sup>50</sup> any such interpretation of the United States Constitution, as every American law student knows, was rejected by

---

45. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 489 (1977).

46. Williams, *supra* n. 5, at 113 (quoting *Natl. L.J.* S1 (Sept. 29, 1988), as quoted in G. Alan Tarr, *Understanding State Constitutions* 165 (Princeton U. Press 1998)).

47. See G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 *Notre Dame L. Rev.* 1097, 1098-1099 (1997); Barry Latzer, *State Constitutions and Criminal Justice* 11-13 (Greenwood Press 1991) (both suggesting that state courts rarely decided criminal cases on independent state grounds). One reason for this, as Williams noted, is that it was often easier for state judges finding in behalf of a criminal defendant to, in effect, blame the federal judges who had read the U.S. Constitution to protect their rights rather than to take the responsibility themselves of offering an inevitably controversial reading of the state constitution. See Williams, *supra* n. 4, at 231.

48. See e.g. Neal Devins, *Same Sex Marriage and the New Judicial Federalism: Why State Courts Should Not Consider Out-of-State Backlash*, in Gardner & Rossi, *supra* n. 8.

49. *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928).

50. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7 (1969).

a majority of the Supreme Court in the early 1970s. Best known is probably the 1973 case that rejected federal oversight of educational expenditures.<sup>51</sup> But here, especially, one makes a profound error in confining one's understanding of American constitutionalism to the national Constitution and its interpretation by the Supreme Court. As Professor Hershkoff writes, "every state constitution in the United States addresses social and economic concerns and provides the basis for a variety of positive claims against the government. False. [M]ore than a dozen state constitutions provide explicit protections for the poor."<sup>52</sup> Almost certainly the most important such right is education. As Douglas Reed notes, the constitutions of "[f]orty-nine of fifty states have an education clause that specifies some required level of public education; many, in fact, declare public education to be a fundamental state right."<sup>53</sup>

Perhaps it is not surprising to discover that the Montana Constitution of 1972 established as "the goal of the people to establish a system of education which will develop the full educational potential of each person" and pronounced as well that "[e]quality of educational opportunity is guaranteed to each person of the state," with the legislature being directed to "provide a basic system of free quality public elementary and secondary schools."<sup>54</sup> But consider as well the Massachusetts Constitution of 1780, drafted by John Adams. After an encomium to the importance of a "diffused" "wisdom" and "knowledge" being essential to preserving popular "rights and liberties," it goes on, rather charmingly, to say that "it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . ."<sup>55</sup> The Massachusetts Supreme Judicial Court used this language as the basis of a 1993 case<sup>56</sup> requiring significant changes in the way that the state financed its public schools.

*Rodriguez* in 1973 was thus scarcely the last word regarding litigation concerning the adequacy of America's public school systems. Instead, such litigation was displaced from the federal courts to state courts.<sup>57</sup> Since the 1973 defeat in the United States Supreme Court by those seeking reform in the funding of public education, "school

51. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973). As Judge Sutton has written, "the majority in *Rodriguez* tolerated the continuation of a funding system that allowed serious disparities in the quality of the education a child received based solely on the wealth of the community in which he parents happened to live or could afford to live." Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 Va. L. Rev. 1963, 1971 (2008). See also Richard Schragger, *San Antonio v. Rodriguez and the Legal Geography of School Finance Reform*, in *Civil Rights Stories* 85 (Myrian E. Gilles & Risa L. Goluboff eds., Foundation Press 2008).

52. Hershkoff, *supra* n. 8, at 135.

53. Douglas Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* 55 (Princeton U. Press 2003).

54. Mont. Const. art. X, § 1 (available at <http://www.montanahistory.net/state/constitution1972X.htm>).

55. Mass. Const. Ch. V, § II (available at <http://www.malegislature.gov/Laws/Constitution>).

56. *McDuffy v. Sec. Exec. Office Educ.*, 615 N.E.2d 516, 547-548 (Mass. 1993). The Court later withdrew from the area in *Hancock v. Commr. Educ.*, 822 N.E.2d 1134, 1155 (Mass. 2005).

57. As, indeed, had been suggested by Justice Thurgood Marshall in his anguished dissent in *Rodriguez*, where he explicitly noted that "nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions." 411 U.S. 1, 133 n. 100 (Marshall, J., dissenting).

finance litigation has been sustained, widespread, and ongoing.”<sup>58</sup> By 2007, “lawsuits challenging state school finance systems had reached the high courts” of 43 of the 50 American states. Plaintiffs (i.e., self-styled “reformers”) “prevailed in court in twenty-six states, and they have failed in seventeen.”<sup>59</sup> As one might imagine, there might well be different notions of what it means to have “prevailed,” especially if one is interested in translating judicial paragraphs into changes on the ground that truly affect the lives of one’s clients. But there can be almost no doubt that school financing practices have changed in many states at least partly because of the willingness of state courts to offer vigorous interpretations of their respective state constitutions. It is a shame that Williams did not choose to say more about this important development in “judicial federalism,” which, as a practical matter, is probably more important for many more people than are differences between state and federal norms of criminal justice.

### CONCLUSION

It should go without saying that anyone already interested in state constitutional must (and undoubtedly will) read this book. But these readers do not need my review. They are already well aware both of the importance of the subject and of Robert Williams’s mastery of it. So the real audience for this review is the far larger number of people who are unaware of either. Not only will they learn a great deal, as I most certainly did, but also, and more importantly, if they are teachers, they should be led to revise their syllabi and to recognize that we are collectively disserving our students, whether we imagine them as our colleagues in theoretical argument or as practitioners of the law, if we fail to inform them of the potential relevance of state constitutions to their practices. And, for that matter, if there are students reading this review, they should be encouraged to ask about the potential relevance of their own state’s constitution to the issues being discussed in their traditional “constitutional law” classes. In any event, Robert Williams has given all of us a marvelous resource to draw on, and we should take advantage of it.

---

58. Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* 46 (Stanford U. Press 2010).

59. *Id.* Judge Sutton, in his 2008 article, indicates that “as of June 2008, forty-five States have faced state-constitutional challenges to their systems of funding public schools,” of which 28 were successful. Sutton, *supra* n. 51, at 1974.