

Theme and Variations

STATE CONSTITUTIONAL LAW: CASES AND MATERIALS, 2d edition. By Robert F. Williams.[†] Charlottesville, Virginia: Michie Contemporary Legal Education Series, 1993. Pp. xxxii, 1003.

Reviewed by Hugh D. Spitzer and Charles W. Johnson***

Each of the reviewers teaches a course in state constitutional law: at the University of Washington and Seattle University, respectively. Both use Robert Williams' text together with supplemental Washington State readings.¹ Williams' book is also being used at the state's third law school, Gonzaga University in Spokane, which is offering a state constitutional law course for the first time this year, reflecting a steadily increasing interest in the subject.

The nationwide resurgence of our fifty other constitutions is customarily said to have begun with Justice Brennan's important 1977 essay in the *Harvard Law Review*.² Within ten years the amount of judicial activity in the field of state declarations of rights was surpassed only by the volume of academic debate on the legitimacy of court reliance on state constitutions when the federal constitution also applies.³ Despite that debate, state appellate courts moved firmly ahead, aided by the United States Supreme Court's recognition of the right of state courts to apply their own constitutions and to interpret them differently from the national constitution based on "bona fide

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1. See ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (2d ed. 1993).

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

3. In this same volume, see Hugh D. Spitzer, *Which Constitution: Eleven Years of Gunwall in Washington State*, 21 SEATTLE U. L. REV. 1187 nn. 1-2, 11-19 (1998), for a sampling of the literature of the debate over the use of guarantees in state constitutions when the national Bill of Rights also applies.

separate, adequate, and independent grounds."⁴ The "New Judicial Federalism" is now firmly established,⁵ and in coming years we may well see an acceleration of this trend, given the Supreme Court's recent decisions limiting the federal government's constitutional powers.⁶ Yet the development of independent state constitutional jurisprudence, particularly in the area of rights, has been hobbled by a scarcity of law school courses in state constitutional law and by the rarity of bar exam questions on the topic. Perhaps the modest academic interest in state constitutions is due to the fact that professors who devote their lives to a particular state's document are less likely to be published in "national" law reviews and to "advance" to "national" law schools. This has not hindered Professor Williams in the least. He has produced a large body of work on state constitutions, the quality of which has earned him well-deserved national recognition and a Distinguished Professorship at Rutgers University School of Law, Camden.⁷ Together with Professor Alan Tarr in the Political Science Department of the same campus,⁸ Williams has made Rutgers a national center for the study of state constitutions.⁹

4. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

5. See Ronald K.L. Collins et al., *State High Courts, State Constitutions and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 *PUBLIUS* 141 (1986), reprinted in 13 *HASTINGS CONST. L.Q.* 599 (1986); *The New Judicial Federalism: A New Generation Symposium Issue*, 30 *VAL. U. L. REV.* xiii (1996); *Symposium: The Future of State Supreme Courts as Institutions in the Law*, 72 *NOTRE DAME L. REV.* 1009 (1997).

6. See *Printz v. United States*, 117 S. Ct. 2365 (1997); *Boerne v. Flores*, 117 S. Ct. 2157 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

7. Robert F. Williams' many articles include: *Equality Guarantees in State Constitutional Law*, 63 *TEX. L. REV.* 1195 (1985); "Experience Must be Our Only Guide": *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 *HASTINGS CONST. L.Q.* 403 (1988); *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 *VAL. U. L. REV.* xiii (1996); *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 *NOTRE DAME L. REV.* 1015 (1997); *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 *S.C. L. REV.* 353 (1984); *State Constitutional Law Processes*, 24 *WM. & MARY L. REV.* 169 (1983); *State Constitutional Law: Teaching and Scholarship*, 41 *J. LEGAL EDUC.* 243 (1991); (with John Kincaid) *The New Judicial Federalism: The State's Lead in Rights Protection*, 65 *J. ST. GOV'T* 50 (1992); *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 *TEMP. L. REV.* 541 (1989).

8. G. Alan Tarr's work includes *Constitutional Theory and State Constitutional Interpretation*, 22 *RUTGERS L.J.* 841 (1991) [hereinafter Tarr, *Constitutional Theory*]; *The New Judicial Federalism in Perspective*, 72 *NOTRE DAME L. REV.* 1097 (1997); *Understanding State Constitutions*, 65 *TEMP. L. REV.* 1169 (1992) [hereinafter Tarr, *Understanding State Constitutions*]. See also MARY C.A. PORTER & G. ALAN TARR, *STATE SUPREME COURTS IN STATE AND NATION* (1988); G. Alan Tarr, *Church and State in the States*, 64 *WASH. L. REV.* 73 (1989); G. Alan Tarr, *Religion Under State Constitutions*, 496 *ANNALS AM. ACAD. POL. & SOC. SCI.* 65 (1988).

9. Both *Rutgers Law Journal* and *Temple Law Review* have for several years published annual symposia on state constitutional law.

State constitutions are worth the attention. They are, and have always been, different from the United States Constitution. There are obvious distinctions such as the longer and more detailed protections of individuals from government intrusion; the disbursement of executive power among separately elected officials; the initiative and referendum; and notable "experiments" such as Nebraska's unicameral legislature. There are also subtle contrasts that make a big difference between the day-to-day operations of the state and national governments. These include single-subject legislation rules and balanced budget provisions that ought to be the envy of national politicians; antilending of credit doctrines that keep the public funds from subsidizing private ventures; and positive rights sections that guarantee residents of many states adequate schools, veterans benefits, work safety and care for the disabled, among other things.

Because state constitutions are typically easier to replace or amend than the United States Constitution, they reflect the political movements that have swept the country from time to time. As Professor Tarr has observed, provisions based in Jacksonian Democracy, Populism, and the Progressive movement have caused a "layering" in many state documents, which has affected both substance and interpretation.¹⁰ This makes the study of state constitutions interesting—and important too, because the themes might be similar from state to state, but the variations are remarkably different. Those variations make (and reflect) a qualitative difference in popular attitudes, government activities and daily life in each of America's fifty separate communities.

Professor Williams' textbook does a remarkably good job in setting forth the themes of, and the variations in, America's state constitutions. This is a challenging job, given the surprising diversity in scope, length, style, subject matter and solutions among the fifty jurisdictions. But Williams selects divergent examples from the provisions, cases and commentaries regarding various sections of our constitutions. These, when supplemented with additional local materials, give students a background that will enable them to work with state documents wherever they later practice.

Williams begins by focusing in Chapter 1 on the history, nature and functions of state constitutions, beginning with their origins in Seventeenth Century Whig theory and the political and philosophical

10. Tarr, *Constitutional Theory*, *supra* note 8, at 861-62; Tarr, *Understanding State Constitutions*, *supra* note 8, at 1184.

revolutions that shook England in that era.¹¹ After that, the remainder of the book's first half, Chapters 2 through 7, is devoted to state declarations of rights and the contemporary debate on the use and interpretation of state constitutions in the shadow of the federal document. While Williams' selections from cases and the academic literature are excellent, one might say that he protests too much. The "New Judicial Federalism" has been with us for twenty years now, reliance on state constitutions is an established fact on the ground, and after a couple of hundred pages our students were ready to move beyond the scholarly debate to the nuts and bolts of state constitutions.¹²

With Chapter 8, Professor Williams is finished with that debate and begins his superb overview of the distinct and fascinating "frame of government" provisions in America's constitutions.¹³ In Chapters 8 through 11 he covers the state judiciaries, executives and legislative branches in all their variety, complexity and occasional strife. Chapters 12 and 13 present the disparate constitutional approaches to local government, to state tax systems, to borrowing and to finance. The next chapter is devoted to public education, which in many states uses the largest share of financial resources and is often enshrined as the most important function of state government. Finally, in Chapter 15 he compares how different jurisdictions approach amending their constitutions: through legislative action, popular ratification, constitutional convention, initiative, or a combination of some or all of those procedures.

This text is remarkably successful, measured by how much we have used it in our respective courses. The materials are well selected, intelligently edited and readable. As noted above, we supplement Professor Williams' book with Washington materials to enrich our classes and to better prepare our students for researching and writing papers on this state's constitution. It would be quite possible to conduct a course using Williams' text alone, but this would be something like teaching a basic geology course without taking the

11. WILLIAMS, *supra* note 1, at 5-15.

12. *But see* Charles H. Baron, Book Review, 67 TEMP. L. REV. 1077 (1994) (reviewing ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (2d ed. 1993)). Professor Baron reports that his students very much enjoyed the intellectual stimulation of the text's first half because it highlights basic issues of what constitutes a constitution, and because the intellectual struggle around whether, when, and why to use a state constitution's protections when federal provisions also apply is inherently so interesting. *Id.* at 1081-82.

13. WILLIAMS, *supra* note 1, at 547.

students out into the surrounding countryside to bang on real rocks with their hammers.

Williams is preparing a new edition of his text, and we suggest that it somewhat reduce the theoretical debate in the first half in favor of broadening the second half to include additional topics that arise under state constitutions: the other "positive rights" in addition to education; restrictions on corporations and business generally; state institutions such as prisons; and some of the other matters that on the one hand might be criticized as being "legislative" in nature, but which are obviously of such importance that they reappear in state after state.

However, our students tell us that they very much enjoy the materials on applying and balancing the state and federal constitutions and find the topics intellectually stimulating. When polled, the students suggested that Williams' excerpts from the "best" articles and cases in the first section of his book be expanded and that other repetitive articles and cases be deleted or relegated to notes. They reported that having bits and pieces of the better materials to nibble on left them hungry for more, and that focusing on one or two meaty pieces in each section would be more fulfilling. The students also urged longer introductions to each of the major articles and cases to help put them in context and to make them more meaningful.

But our minor suggestions, and those of our students, should not be seen as diminishing the quality of the book in its current edition. It is a successful, usable book about an important topic that is becoming more important each year.