

### *Symposium on The New Judicial Federalism: A New Generation*

## Looking Back at the New Judicial Federalism's First Generation

Robert F. Williams

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Robert F. Williams, *Looking Back at the New Judicial Federalism's First Generation*, 30 Val. U. L. Rev. i (1996).

Available at: <https://scholar.valpo.edu/vulr/vol30/iss2/13>

This Symposium is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



**SYMPOSIUM ISSUE  
THE NEW JUDICIAL  
FEDERALISM:  
A NEW GENERATION**

**FOREWORD: LOOKING BACK AT  
THE NEW JUDICIAL FEDERALISM'S  
FIRST GENERATION**

**ROBERT F. WILLIAMS\***

[T]here are . . . four practical advantages to a viable state Bill of Rights. First, on some matters states can and will go further at any given time in protecting individual rights than the Supreme Court. Second, while state courts have many competing interests to reconcile when considering problems involving conflicts between the state and individuals, they do not have to feel restrained by the additional problem of federalism. There have been repeated examples of restraint by the national government where state interests are also involved. The Supreme Court, for example, not only considers what it believes to be the best legal approach to problems, but also the effect of its decisions on federal-state relations.

---

\* Distinguished Professor of Law, Rutgers University, School of Law, Camden.

A third ground is the ability of the states to experiment. Examples of such experimentation are not easy to find in the individual rights area. Still, there are some examples and much potential, particularly in such areas as privacy. Finally, the most important consideration involves the implementation of rights. It is one thing for the Supreme Court to say that a particular practice invaded individual rights, but a completely different matter for all of the local authorities involved in the practice to correct or discontinue the activity. It seems that there would be a better chance of local public officials accepting or enforcing local laws and decisions than those which emanate from Washington.<sup>1</sup>

When Professor Robert Force, then an Associate Professor at Indiana University School of Law, Indianapolis, published the above-quoted words in Volume Three of the *Valparaiso University Law Review* twenty-seven years ago, he probably could not have known that he was anticipating a quarter century of intense state constitutional activities. In fact, however, Professor Force's too-little recognized article foresaw virtually all of the major themes and developments in state constitutional law between 1969 and the present. Professor Force, after writing his article, moved on to other endeavors in teaching and scholarship, but a current reading of his article by people deeply involved in the field results in nods of approval of which he must be proud.

The events leading to Professor Force's choice of the topic of state constitutional rights were fairly typical of what has led many law professors and political scientists to an interest in this field—actual involvement with advising the state legislature, a constitutional commission, or a constitutional convention.<sup>2</sup> My own interest can be traced to a similar “hands-on experience.”<sup>3</sup> Professor Force served as a volunteer advisor to a legislative committee examining the Indiana Declaration of Rights in 1968. This was part of a larger legislative study of the Indiana Constitution.<sup>4</sup> The question at the beginning of Professor Force's article, presented as fictional, about why there was any real need for a state constitutional Bill of Rights, was, in fact, actually asked during the course of this real legislative study. His article grew out of his report to the legislative committee about the function of, and need for, a state

---

1. Robert Force, *State “Bills of Rights”: A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 163-64 (1969).

2. Telephone Interview with Robert Force, Professor of Law, Tulane University School of Law (Jan. 29, 1996).

3. I was involved with the development of the 1968 Florida Constitution as a legislative staffer. See Robert F. Williams, *A Generation of Change in Florida State Constitutional Law*, 5 ST. THOMAS L. REV. 133, 136-39 (1992).

4. Many states revised, or considered revising, their state constitutions during this period. *Id.* at 135.

constitutional Bill of Rights.

Professor Force also served as General Counsel to the Indiana Chapter of the American Civil Liberties Union. His concern with rights, and the different sources of their protection, had already led him to an appreciation of the potential of state constitutions. Another professor from Valparaiso University Law School was advising a different legislative committee studying the Indiana Constitution. He and Professor Force became acquainted and when he heard of the article Professor Force was working on, he asked that it be submitted to the still-fledgling *Valparaiso University Law Review*. Professor Force agreed, and the article was published.

In 1986, Justice William J. Brennan, Jr., commented that the “[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 time.”<sup>5</sup> Justice Brennan is, of course, generally credited with initiating the attention given to state constitutional law in the area of individual liberties.<sup>6</sup> Justice Brennan’s famous *Harvard Law Review* article,<sup>7</sup> although only published in 1977, is among the “most frequently cited law review articles of modern time.”<sup>8</sup> Professor Force’s article predated Justice Brennan’s by eight years.

In 1969, state constitutional law had barely made a ripple upon the waters of constitutional law.<sup>9</sup> Even the extremely influential work of Justice Hans A. Linde of Oregon, which began when he was a professor rather than a judge,

5. *State Constitutional Law*, NAT’L L.J., Sept. 29, 1986, at S-1, quoted in G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS: J. FEDERALISM, Spring 1994, at 63, 73.

6. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). See Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 459 n.2 (1996).

7. See Brennan, *supra* note 6.

8. Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge Who Believes in State’s Rights*, 20 J. MARSHALL L. REV. 1, 2 n.3 (1986). Justice Stewart G. Pollock of the New Jersey Supreme Court referred to Justice Brennan’s article as the “Magna Carta of state constitutional law.” Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

See also Justice William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (updating his views).

9. See generally William F. Swindler, *State Constitutional Law: Some Representative Decisions*, 9 WM. & MARY L. REV. 166 (1967); Roger H. Thompson, Note, *The Theory of State Constitutions*, 1966 UTAH L. REV. 542; see also Stanton S. Faville, *Dissecting a Constitution*, 13 WAYNE L. REV. 549 (1967); Lester J. Mazor, *Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326; Peter P. Miller, Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318 (1968).

would not appear until the beginning of the 1970s.<sup>10</sup> Interestingly, Justice Linde himself, in 1984, credited Professor Force with beginning the academic discussion of state constitutional law.<sup>11</sup> There had been a few earlier articles,<sup>12</sup> but none as comprehensive as Professor Force's. Professor Eugene Wilkes' important work in state constitutional criminal procedure, suggesting state court "evasion" of conservative United States Supreme Court decisions, appeared in the mid-1970s.<sup>13</sup>

The California Supreme Court's well-known 1972 decision in *People v. Anderson*,<sup>14</sup> declaring the death penalty unconstitutional under the California Constitution, drew national attention. This decision also sparked the beginning of a substantial scholarly debate about the legitimacy of independent state constitutional interpretation in rights cases.<sup>15</sup> *Anderson* also cast a national spotlight on the importance of the federal jurisdiction adequate and independent state ground doctrine as a catalyst for independent state constitutional interpretation. Justice William O. Douglas was quick to notice the developments in California:

A month later, the California Supreme Court decided that the state's death penalty violated the California constitution's prohibition against "cruel or unusual punishment." Douglas's chambers got advance notice of the decision, and within three days, Douglas had distributed a *per curiam* draft dismissing the one hundred California cases that were awaiting the Court's ruling.<sup>16</sup>

---

10. See, e.g., Hans A. Linde, "Without Due Process": *Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

11. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 175 n.23 (1984) ("The rediscovery of state constitutional law is still very new. Contemporary discussion in the law reviews began only in 1969."). See also Randall T. Shepard, *A Bill of Rights for the Whole Nation*, 26 VAL. U. L. REV. 27, 35 n.49 (1991) ("This renaissance in state constitutional rights litigation was called for some twenty years ago in the *Valparaiso University Law Review*.").

12. See *supra* note 9.

13. Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976).

14. 493 P.2d 880 (Cal.), cert. denied, 406 U.S. 958 (1972).

15. See, e.g., Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Jerome B. Falk, Jr., *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Donald R. Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CAL. L. REV. 1262 (1972); Edward L. Barrett, Jr., *Comment, Anderson and the Judicial Function*, 45 S. CAL. L. REV. 739 (1972).

16. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 212 (1979).

Now, of course, the New Judicial Federalism is no longer new at all.<sup>17</sup> The United States Supreme Court's 1980 decision in *Pruneyard Shopping Center v. Robins*,<sup>18</sup> in which the Court upheld the California Supreme Court's protection of free speech in privately-owned shopping centers, called national attention to the potential of state constitutions. *Harvard Law Review* devoted one of its prestigious and influential annual *Developments in the Law* issues to the topic in 1982.<sup>19</sup> In 1983, the United States Supreme Court again called attention to state constitutional law in *Michigan v. Long*<sup>20</sup> in which it reformulated the adequate and independent ground doctrine. In 1984, the influential National Conference on *Developments in State Constitutional Law* took place in Williamsburg, Virginia.<sup>21</sup>

The current picture with respect to state constitutional law, therefore, looks very different from the 1969 situation viewed by Professor Force. Indiana's Chief Justice, Randall T. Shepard, has written about the Indiana Bill of Rights.<sup>22</sup> He continues his state constitutional law scholarship in this Symposium.<sup>23</sup> A course in state constitutional law is offered at Indiana

---

17. Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi (1985); Ronald K.L. Collins, *The Once "New Judicial Federalism" & Its Critics*, 64 WASH. L. REV. 5 (1989).

18. 447 U.S. 74 (1980).

19. Symposium, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982). Also in 1982, Justice Shirley Abrahamson of Wisconsin accurately predicted:

State constitutions are coming out of the archives into the legal literature and into the classroom. They are coming out of the literature and the classroom into the courtroom. State constitutions will go from the courtroom back into the legal literature and into the classroom, and maybe back to the courtroom, through the lawyers trained in the 1980s.

Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 971 (1982).

20. 463 U.S. 1032 (1983). In 1983, I was able to claim that "we are experiencing a new 'Constitutional Revolution' in the judicial interpretation of state constitutions." Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 171 (1983).

21. See DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (Bradley D. McGraw ed., 1985) [hereinafter DEVELOPMENTS IN STATE CONSTITUTIONAL LAW]. This book, published as a public service by West Publishing Company, has become somewhat of an "underground classic" in state constitutional law circles.

22. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989); Randall T. Shepard, *Foreword to Indiana Law, The Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 504-07 (1991). See also Patrick Baude, *Free Speech and the Indiana Constitution: First Thoughts on Price v. State: Has the Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994); Daniel O. Conkle, *The Indiana Supreme Court's Emerging Free Speech Doctrine*, 69 IND. L.J. 857 (1994); Patrick Baude, *Is There Independent Life in the Indiana Constitution?*, 62 IND. L.J. 263 (1987).

23. See *infra* note 98 and accompanying text.

University School of Law, Indianapolis, where Professor Force taught in 1969.<sup>24</sup> My casebook, which treats state constitutional law as a national topic, is used at many law schools around the United States.<sup>25</sup> A recent survey indicated that in 1993 there were twenty-four law professors in twenty-one law schools teaching courses on state constitutional law.<sup>26</sup> There are now excellent treatises available covering state constitutional rights generally<sup>27</sup> and the area of state constitutional criminal procedure.<sup>28</sup>

The fifty-state series of volumes on each state's constitution continues to grow. This series, published by Greenwood Publishing Group, currently numbers over twenty volumes with more volumes to be published this coming year.<sup>29</sup> There have been literally hundreds of law review articles and symposia published since Professor Force's article appeared.<sup>30</sup> *Rutgers Law Journal* has recently published its Seventh Annual Issue on State Constitutional Law.<sup>31</sup> By 1994, Dean Neil H. Cogan could observe:

The legal literature of state fundamental law was, but is no longer, sparse. This is due in part to a new realization by lawyers and judges that the form of most state fundamental law is progressive rather than static, and also to an awakening within many communities that state fundamental law may be revised by amendment as well as construction. To put it crassly, there is now movement in state constitutional law, and there is now a market for books about the

---

24. In the fall semester of 1995, Professor James W. Torke offered a course in state constitutional law.

25. ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (2d ed. 1993). This casebook is reviewed in Charles H. Baron, *State Constitutional Law: Cases and Materials*, 67 *TEMP. L. REV.* 1077 (1994) (book review). See also NEIL COLMAN MCCABE & CATHERINE GREENE BURNETT, *STATE CONSTITUTIONAL CRIMINAL PROCEDURE: CASES AND MATERIALS* (1994).

26. Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 *WIDENER J. PUB. L.* 25, 32-33 (1993). See also Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 *J. LEGAL EDUC.* 243 (1991).

27. JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* (1994).

28. BARRY LATZER, *STATE CONSTITUTIONAL CRIMINAL LAW* (1995).

29. G. Alan Tarr, *State Constitutions and State Political History*, 81 *J. AM. HIST.* 1863, 1866-67 (1995) (appendix listing authors, titles, and dates of the volumes).

30. Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law, 1980-1989*, 20 *RUTGERS L.J.* 1093 (1989).

31. *Seventh Annual Issue on State Constitutional Law*, 26 *RUTGERS L.J.* 909 (1995). See also Symposium, *Emerging Issues in State Constitutional Law*, 67 *TEMP. L. REV.* 925 (1994) (an annual issue for the past five years); Symposium, *Emerging Issues in State Constitutional Law*, 68 *TEMP. L. REV.* 1035 (1995); *Annual Issue on New York State Constitutional Law*, 11 *TOURO L. REV.* 729 (1995) (an annual issue for the past five years).

movement.<sup>32</sup>

Actually, 1969, the year of Professor Force's article, marks the beginning of the New Judicial Federalism for another reason. Dr. John Kincaid recently pointed out that President Richard Nixon's 1969 appointment of Chief Justice Warren E. Burger reflected the President's campaign promise to turn the United States Supreme Court in a more conservative direction. This, in turn, as agreed by most analysts, was a moving force behind the New Judicial Federalism.<sup>33</sup>

Dr. G. Alan Tarr has argued that, prior to the beginning of the 1970s, the conditions were not right for the development of an expansive state constitutional rights jurisprudence.<sup>34</sup> He noted:

What was missing was a model of how state judges could develop a civil liberties jurisprudence. Because Americans had not come to rely on courts to vindicate civil liberties, state courts throughout the 19th and early 20th centuries gained little experience in interpreting civil liberties guarantees. Nor could they look to federal courts for guidance in interpreting their constitutional protections. . . . Only when circumstances brought a combination of state constitutional arguments, plus an example of how a court might develop constitutional guarantees, could a state civil liberties jurisprudence emerge. Put differently, when the Burger Court's anticipated—and to some extent actual—retreat from Warren Court activism encouraged civil liberties litigants to look elsewhere for redress, the experience of the preceding decades had laid the foundation for the development of state civil liberties law.

This, in turn, suggests that, paradoxically, the activism of the Warren Court, which was often portrayed as detrimental to federalism, was a necessary condition for the emergence of a vigorous state involvement in protecting civil liberties.<sup>35</sup>

Professor Force's article certainly was there at the beginning of these developments and was available to provide a roadmap of the progress of the last twenty-seven years.

32. Neil H. Cogan, *Moses and Modernism*, 92 MICH. L. REV. 1347, 1353 (1994) (book review of three books on state constitutional law).

33. John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 914-15 (1995).

34. Tarr, *supra* note 5, at 72-73.

35. *Id.*



Also, the waves of revision of state constitutional *texts* through the 1960s did not focus much on rights provisions.<sup>36</sup> Rather, the emphasis was on modernizing governmental provisions and the tax and finance articles. If state constitutional rights were to flourish, it would require state *courts* to make it happen. All of the necessary conditions were in place by 1969 for this to happen.

Many of the concepts and perspectives contained in the current scholarly and judicial doctrines for the judicial protection of state constitutional rights were anticipated in Professor Force's 1969 article.<sup>37</sup> For example, he used the image of federal constitutional rights as a "floor." "This paper suggests that in the long run, it will be better to construe Supreme Court decisions involving conflicts between individuals and states as providing for all states only a floor or minimum level of protection."<sup>38</sup> He warned about the danger of viewing United States Supreme Court decisions as "ultimates," eliminating any room for independent state constitutional interpretation.<sup>39</sup> Professor Force also pointed out that during the early development of constitutional doctrines, treatise writers such as Judge Thomas Cooley often used federal and state cases together to illustrate constitutional doctrines.<sup>40</sup> He noted the common law<sup>41</sup> origins of constitutional rights as well as the potential for common law and statutory<sup>42</sup> protection of individual liberties. Professor Force provided an exhaustive, fifty-state comparative study of state constitutional provisions protecting rights.<sup>43</sup>

---

36. See Robert S. Rankin, *Civil Rights, in COMPACTS OF ANTIQUITY: STATE CONSTITUTIONS* 9 (Richard H. Leach ed., 1969); Albert L. Sturm & Kaye M. Wright, *Civil Liberties in Revised State Constitutions, in CIVIL LIBERTIES: POLICY AND POLICY MAKING* 179 (Stephen L. Wasby ed., 1976).

37. See Force, *supra* note 1.

38. *Id.* at 129.

39. *Id.* See also Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095 (1985); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984); Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143 (1987) [hereinafter Williams, *Methodology Problems*].

40. Force, *supra* note 1, at 131. See also Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1162-63 (1993).

Cooley looked to the cases coming from the different state courts to find the common principles of state constitutionalism—and, ultimately, of American constitutionalism. Just as his contemporaries looked to the case law from different jurisdictions to find the common principles of tort or contract, Cooley aimed to describe an American constitutionalism that was the common object of each state court's interpretive effort. The diversity of state courts, each claiming a unique authority, did not prevent their engagement in a common interpretive enterprise.

*Id.* at 1163 (footnotes omitted).

41. Force, *supra* note 1, at 130-32.

42. *Id.* at 132-35.

43. *Id.* at 137.

This was particularly important before the advent of the national research sources cited earlier.<sup>44</sup> It is this kind of comparative analysis, both of the state constitutional textual provisions themselves, as well as the judicial interpretations thereof, that facilitates what we now refer to as “horizontal federalism”<sup>45</sup> as a component of the New Judicial Federalism.

Professor Force pointed out something that is still not widely recognized enough—that state constitutions “include a number of subjects not covered in the Federal Bill of Rights.”<sup>46</sup> He included an appendix to his article providing the citations to all of the state constitutional rights provisions.<sup>47</sup> These charts are still useful today.

In 1988, two commentators on the status of state constitutional law scholarship observed: “[M]ost of the literature, like many of the state cases themselves, offers more in terms of approval and encouragement than of analytical insight and innovation . . . . More attention must be devoted to *new* conceptualizations in constitutional doctrine.”<sup>48</sup>

Dr. G. Alan Tarr observed in 1991:

The new judicial federalism, now middle-aged, can no longer be sustained by the sense of discovery that sparked it initially. If advances are to be made in state constitutional law, they will come through more sustained reflection about the nature of state constitutions and through a dialogue with scholars outside the field of state constitutional law. State constitutional scholars have long recognized the distinctive origins and character of state constitutions. Now they need to reflect on the implications of that distinctiveness for

44. See *supra* notes 25, 27-31 and accompanying text.

45. This is a term from MARY CORNELIA PORTER & G. ALAN TARR, *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* xxi-xxii (1982). In the words of New Jersey Supreme Court Justice Stewart G. Pollock, “[H]orizontal federalism, a federalism in which states look to each other for guidance, may be the hallmark of the rest of the century.” Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985).

46. Force, *supra* note 1, at 141.

47. *Id.* at 165.

48. Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 217-18 (1988). Collins and Skover suggested that law schools’ constitutional law curricula, generally ignoring *state* constitutional law, contributed to this lack of quality scholarship about state constitutional law. *Id.* at 218. Jefferson Fordham observed: “Another aspect of constitutional law to be noted is the slighting of state constitutional law in legal education . . . . [S]tate constitutional law is both a substantial component of the constitutional system and something of very real professional significance to lawyers.” Jefferson Fordham, *Some Observations Upon Uneasy American Federalism*, 58 N.C. L. REV. 289, 293 (1980).

state constitutional interpretation.<sup>49</sup>

Not everyone, of course, applauded the New Judicial Federalism. As Dr. Barry Latzer has observed: "Conservatives, dismayed by rights-expansive repudiations of Supreme Court doctrine by state courts, argue that such rejectionism is often unprincipled, especially when textual differences between the state and federal constitutional provisions are minor."<sup>50</sup>

Even more recently, James A. Gardner has argued that "state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements"<sup>51</sup> and that "state constitutional discourse is impoverished and inadequate to the tasks that any constitutional discourse is designed to accomplish."<sup>52</sup>

After having concluded that state constitutional discourse is impoverished, Professor Gardner asserted that this is caused by the failure of state constitutionalism generally.<sup>53</sup> He pointed to the inclusion of mere statutory detail in state constitutions (reflecting political compromise), and the frequency with which they are amended or revised to conclude that state constitutionalism is a failed enterprise.<sup>54</sup> The "poverty of state constitutional discourse merely reflects the limited narrative possibilities that state constitutions offer to erstwhile interpreters."<sup>55</sup> A truly diverse set of independent constitutional values, at least in rights cases, was even said to be dangerous to our national community.<sup>56</sup> Ultimately, Professor Gardner contended that "the communities in theory defined by state constitutions simply do not exist, and debating the meaning of a state constitution does not involve defining an identity that any group would recognize as its own."<sup>57</sup>

---

49. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 861 (1991).

50. Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 863 (1991).

51. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

52. *Id.* at 766.

53. *Id.* at 812 (noting "the failure of state constitutionalism itself to provide a workable model for the contemporary practice of constitutional law and discourse on the state level").

54. *Id.* at 818-22.

55. *Id.* at 822.

56. *Id.* at 827.

57. *Id.* at 837.

These are very strong and provocative conclusions. They are continuing to stimulate useful discussions of what state constitutional law is all about.<sup>58</sup> Much of that discussion will continue to analyze state constitutional law as it relates to federal constitutional law, in comparative or relational terms.

We now know that state constitutional law is here to stay. There is much importance in the field beyond rights cases. Regarding rights cases, though, whether one views judicial interpretation of state constitutions in neutral political terms,<sup>59</sup> or as a welcome avenue for progressive litigation in the face of conservative changes in federal constitutional law and federal courts,<sup>60</sup> or, by contrast, as an unwarranted reflection of "political liberalism,"<sup>61</sup> state constitutional law is a fact of life. Methodology problems in interpreting and applying state constitutional rights provisions, however, especially those which have been overshadowed by similar federal constitutional provisions, will not be worked out overnight, or even within a single generation.<sup>62</sup> As Justice Shirley S. Abrahamson of Wisconsin recently observed:

Just as it seems strange to lawyers in 1990 that in the early part of the twentieth century the federal Bill of Rights did not extend to protection of individuals against state government, future generations may look back and wonder why state courts have ignored their state constitutions for so long.<sup>63</sup>

State constitutions are, actually, difficult to appreciate. Justice Hans A. Linde recognized this but moved beyond it:

Most state constitutions are dusty stuff — too much detail, too much

58. Professor Gardner's article has generated a wide response. See, e.g., Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992); David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Jeffrey A. Parness, *Failed or Uneven Discourse of State Constitutionalism?: Governmental Structure and State Constitutions*, 5 ST. THOMAS L. REV. 155 (1992); Neil H. Cogan, *In Praise of Diverse Discourse*, 5 ST. THOMAS L. REV. 173 (1992). See also James A. Gardner, *Discourse and Difference—A Reply to Parness and Cogan*, 5 ST. THOMAS L. REV. 193 (1992); Roundtable, *Responses to James A. Gardner*, 24 RUTGERS L.J. 927 (1993).

59. Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

60. See generally Daniel R. Gordon, *Progressives Retreat: Falling Back from the Federal Constitution to State Constitutions*, 23 ARIZ. ST. L.J. 801 (1991). See also Kahn, *supra* note 6, at 464 ("State Constitutionalism represented a kind of forum shopping for liberals.").

61. Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES ST. CONST. L. 233, 233 (1989).

62. See generally Williams, *Methodology Problems*, *supra* note 39.

63. Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 744 (1991).

diversity, too much debris of old tempests in local teapots, too much preoccupation with offices, their composition and administration, and forever with money, money, money. In short, no grand vision, no overarching theory, nothing to tempt a scholar aspiring to national recognition. Serious theorists understandably care about methods, principles, and outcomes that have nationwide importance. They are willing to let the states pursue their local peculiarities by statutes, by common law, or by interpreting or amending state constitutions; and who can blame them?

Yet I think this is a loss to theory.<sup>64</sup>

This current Symposium is a striking example of how far the field of state constitutional law has come since 1969. After the calls in the 1980s for a higher-level of intellectual analysis of state constitutional law, the discussion in recent years has become much more sophisticated.<sup>65</sup>

Paul Kahn's article<sup>66</sup> presents a "big picture" look at the first generation of the New Judicial Federalism. He notes that the New Judicial Federalism is a "complex reaction"<sup>67</sup> to changes in the United States Supreme Court. Professor Kahn aims his analysis at the potential for state constitutional law to contribute to fairness or "doing the right thing."<sup>68</sup> He notes that a "government can be judged unfair either because of the values it pursues or because it acts in an arbitrary manner. The first form of unfairness reflects substantive disagreement over the correct public values; the second reflects disagreement with particular efforts to apply common values."<sup>69</sup> Professor Kahn then makes a very interesting, although likely controversial, argument that state courts interpreting state constitutions are less able to achieve the former type of fairness than the latter. Professor Kahn then utilizes a case study of the

---

64. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 196-97 (1984).

65. See Kahn, *supra* note 40; Gardner, *supra* note 51; Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635 (1994); James G. Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985 (1993); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269 (1994); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169 (1992); John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819 (1990).

66. Kahn, *supra* note 6.

67. *Id.* at 459. Professor Kahn also notes that Justice Brennan's 1977 article "is often taken as the starting point of a new scholarly attention to state constitutionalism." *Id.* at 459 n.2.

68. See Suzanna Sherry, *Foreword, State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935 (1994).

69. Kahn, *supra* note 6, at 460.

well-known educational finance litigation under state constitutions to illustrate his thesis.

It is true, of course, that the litigation seeking equity in the financing of public schools has been one of the leading and most sustained areas of state constitutional litigation. As the article by Dean Frank Macchiarola and Joseph Diaz<sup>70</sup> points out, the school finance litigation has spanned the entire first generation of the New Judicial Federalism. Much of this litigation has centered on explicit provisions concerning education that are contained in state constitutions. The inclusion of such education provisions has been described by James Gray Pope as an example of an instance where "state constitutional lawmaking clearly includes episodes of determined popular deliberation and struggle over issues of high principle."<sup>71</sup> In addition to its focus on these specific state constitutional education provisions, the school finance litigation has also relied strongly on equality arguments.<sup>72</sup> Dean Macchiarola and Mr. Diaz trace the interaction between those two complimentary legal theories.<sup>73</sup> The area of school finance litigation has been a favorite for scholars of state constitutional law to illustrate the "states-as-laboratories" metaphor.

James Gardner, in his article in this Symposium looks directly at, and challenges, the "states-as-laboratories" metaphor.<sup>74</sup> Justice Brandeis' famous reference to the experimental potential of state law is cited by almost all commentators on state constitutional law. Professor Gardner, though, joins Earl

70. Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551 (1996).

71. Pope, *supra* note 65, at 991. Professor Pope reported:

During the nineteenth century, educational reformers placed free public education on the constitutional agenda of many states. At stake were such basic issues as whether the state should take over the function, traditionally performed by churches, of educating children in moral fundamentals, whether poor families could obtain the benefits of education without declaring themselves paupers, and whether an ethnically and economically diverse country needed common schools to provide its people with common values.

*Id.* at 992-93.

I have referred to these educational provisions as examples of "other provisions, not usually found in bills of rights, [which] expressly require equality in specific and limited instances." Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1214 (1985).

72. Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675 (1992).

73. Macchiarola & Diaz, *supra* note 70, at 561-77. See also Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995).

74. James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996).

Maltz in suggesting that the experimental model does not really further the objectives of federalism.<sup>75</sup> Professor Gardner sheds important light on the actual context of the famous Brandeisian quote. I myself recently referred to Florida's Interest on Trust Account Program, under which the interest from lawyers' trust accounts is pooled for the benefit of legal services and other public interest projects, as "one of the most spectacularly successful Brandeisian 'state laboratory' experiments of our time."<sup>76</sup> Florida's innovation, under the leadership of then Chief Justice Arthur England, was accomplished through judicial rulemaking.<sup>77</sup>

Interestingly, in a case eleven years before Justice Brandeis' famous statement, Justice Holmes, in a similar context, dissented from a decision striking down a state statute.<sup>78</sup> He stated, using the now-familiar metaphor:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of *social experiments* that an important part of the community desires, *in the insulated chambers afforded by the several States*, even though the *experiments* may seem futile or even noxious to me and to those whose judgment I most respect.<sup>79</sup>

Justice Brandeis also dissented in the case,<sup>80</sup> but his opinion said nothing about experiments. Eleven years later he used the "states-as-laboratories" metaphor in the way we all now recognize.<sup>81</sup>

---

75. Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 100-01 (1988); see also Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988).

76. Robert F. Williams, *Introduction: The Stories of State Constitutional Law*, 18 NOVA L. REV. 715, 718 (1994).

77. *Id.* at 718 n.12. See also Maeva Marcus, *Louis D. Brandeis and the Laboratories of Democracy*, in FEDERALISM AND THE JUDICIAL MIND 75 (Harry N. Scheiber ed., 1992); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 85-86 (1995).

78. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

79. *Id.* (emphasis added). See generally Samuel Krislov, *Oliver Wendell Holmes and the Federal Idea*, in FEDERALISM AND THE JUDICIAL MIND, *supra* note 77, at 37.

80. *Truax*, 257 U.S. at 354 (Brandeis, J., dissenting).

81. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting):

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

*Id.* at 311.

The term that political scientists use for the "states-as-laboratories" metaphor is the study of the "diffusion of innovations."<sup>82</sup> Political scientists are normally referring to the diffusion of *legislative* innovations which, of course, is what Justice Brandeis was talking about. The metaphor has had great power not only for scholars of *American* state constitutional law this century, but also for scholars of *European* federalism last century. For example, an analyst of Swiss federalism in 1898 gave the following description of the Swiss cantons:

The Swiss cantons are the democratic workshops of Europe. On their twenty-five anvils are hammered out almost every conceivable experiment in political mechanics; and if a particular experiment proves successful, it is adopted by one canton after another, until it ultimately receives a definite consecration by becoming part of the Federal Constitution, which is, indeed, largely moulded on cantonal experience.<sup>83</sup>

Professor Gardner's article will help all of us to evaluate the real power and applicability of the metaphor.

The article by Judge Rex Armstrong analyzes the impact of Holmes' aphorism about the life of the law being based on experience, not logic.<sup>84</sup> Using the experience of state constitutional law adjudication in Oregon<sup>85</sup> under the leadership of Justice Hans A. Linde, Judge Armstrong provides an explicit response to Professor Gardner's earlier critique of state constitutional law.<sup>86</sup> I read his article as also responding, albeit by inference, to Gardner's critique of the "states-as-laboratories" metaphor in this Symposium.<sup>87</sup> Judge Armstrong provides the important voice of a sitting judge to the Symposium.

One of the reasons that Paul Kahn gives for his conclusion that state constitutional law is more likely to be able to resolve problems of arbitrariness than to confront the debate over "correct public values" is that state judges are often elected.<sup>88</sup> Professor Joseph R. Grodin was, of course, one of the three members of the California Supreme Court who was defeated in the well-known

82. For an interesting study of the extent to which states actually have "experimented," see Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969).

83. SIMON DEPLOIGE, *THE REFERENDUM IN SWITZERLAND* xiv (1898).

84. Rex Armstrong, *State Court Federalism*, 30 VAL. U. L. REV. 493 (1996).

85. *Id.* See also Schuman, *supra* note 58, at 274.

86. See *supra* notes 51-58 and accompanying text.

87. See *supra* notes 74-83 and accompanying text.

88. Kahn, *supra* note 6, at 471-72.



1986 election.<sup>89</sup> Professor Grodin's article in this Symposium,<sup>90</sup> a review of a recent book about Justice Hans A. Linde's achievements in constitutional law,<sup>91</sup> also reflects the events of the first generation of the New Judicial Federalism. Justice Linde's contributions to state constitutional law span the entire first generation of the New Judicial Federalism. His state constitutional law contributions have been described as "one of this century's most important judicial contributions . . . ."<sup>92</sup> Professor Sanford Levinson has stated that Justice Linde is "easily one of the three most important state court judges in this century," comparing his work to that of Benjamin Cardozo and Roger Traynor.<sup>93</sup>

As Professor Grodin points out in his article, Justice Linde is well-deserving of these accolades. His work, both academic and judicial, was a central feature in the growth of the New Judicial Federalism. Professor Grodin's article locates Justice Linde's work, both academic and judicial, in the larger evolving context of the growth of state constitutional law. Professor Grodin himself, of course, has made both judicial and academic contributions to the development of state constitutionalism.<sup>94</sup> He continues those contributions here.

The scholarship on state constitutional law has focused primarily on substantive state constitutional rights. Much less attention has been given to the collateral, but very important, areas such as retroactivity<sup>95</sup> and waiver of state constitutional rights. Professor Eugene L. Shapiro's article in this Symposium provides an in-depth analysis of the waiver issue in the specific context of the

---

89. Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

90. Joseph R. Grodin, *State Constitutionalism in Practice*, 30 VAL. U. L. REV. 601 (1996).

91. INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995) [hereinafter INTELLECT AND CRAFT]. There were a number of tributes to Justice Linde in 1984 ANN. SURV. AM. L. vii (1984).

92. Louis H. Pollak, *Judge-Professor Linde*, 70 OR. L. REV. 679, 682 (1991), quoted in INTELLECT AND CRAFT, *supra* note 91, at 3 n.2.

93. Sanford Levinson, *Tiers of Scrutiny -- From Strict Through Rational Bases -- And the Future of Interests: Commentary on Fiss and Linde*, 55 ALB. L. REV. 745, 746 (1992), quoted in INTELLECT AND CRAFT *supra* note 91, at 3 n.3.

94. JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989); Joseph R. Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391 (1988).

95. *But see* Mary C. Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 ALA. L. REV. 421 (1993).

right to counsel.<sup>96</sup> He points out the important potential differences between waiver of federal and state constitutional rights.<sup>97</sup>

Chief Justice Randall T. Shepard's article<sup>98</sup> takes a long view back to the origins of the New Judicial Federalism which he convincingly traces to well before Justice Brennan's article, or even Professor Force's, for that matter. Furthermore, he gives his response to both Professor Kahn's and Professor Gardner's earlier work on state constitutional law. He also provides the much-needed voice of a sitting judge.

The article by Harvey Rishikof and Alexander Wohl<sup>99</sup> addresses one of the most interesting new emerging issues, the constitutional status, both inside and outside, of Residential Community Associations (RCAs). This is an area that may well be left entirely to *state* constitutional law and reflects the larger discussion of whether the United States Supreme Court's state action doctrine will be followed at the state level.<sup>100</sup>

At the 1984 National Conference on Developments in State Constitutional Law, Professor Sanford Levinson made the following observations:

It is also worth mentioning that not only shopping centers and private universities are implicated in any doctrines of access to private property. Other candidates for access include privately owned "residential" or "retirement" communities, trailer parks, migrant labor camps, and nursing homes, all of which may make deliberate attempts to discourage any outsiders from entering their grounds. At least one New Jersey case involved a trespass conviction deriving from an attempt by a "planned retirement village" to bar unauthorized visitors from the community grounds.

The defendant was attempting to circulate a petition involving political issues in the local township where the retirement village was

---

96. Eugene L. Shapiro, *Waiver of a State Constitutional Right to Counsel During Post-Attachment Interrogation*, 30 VAL. U. L. REV. 581 (1996). For a recent, very thoughtful treatment of the waiver issue in a slightly different context, see *State v. Stephenson*, 878 S.W.2d 530, 544-47 (Tenn. 1994).

97. See generally Shapiro, *supra* note 96. See also WILLIAMS, *supra* note 25, at 384-85.

98. Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996).

99. Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call,"* 30 VAL. U. L. REV. 509 (1996). See also David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995).

100. See WILLIAMS, *supra* note 25, at 214-55.

located, and the court invalidated the conviction. Although the court stated that it did “not wish to open wide the gates of Rossmoor and [thus] allow anyone to come in at anytime, for any purpose[,] [n]evertheless, this court feels compelled to hold ajar the gates of Rossmoor under the present circumstances. To hold otherwise would, in effect, create a political isolation booth.” Here again it is certainly understandable that courts hesitate to grant a general right of access to the property even as they protect one especially important type of speech—that concerning politics and elections.<sup>101</sup>

The New Jersey case referred to by Professor Levinson was a trial-court decision called *State v. Kolcz*.<sup>102</sup> Until the Rishikof and Wohl article in this Symposium, Professor Levinson’s point has not been followed up.

Ultimately, one of the great questions about federalism is whether it advances the course of individual rights protections. As Professor Dick Howard recently noted, the record in the United States is mixed.

American federalism has had its dark chapters; its association with the unhappy story of race and discrimination is one of those chapters. It has had, at the same time, its rewards; to the extent that it has helped promote pluralism, experimentation, and limits on undue concentration of power, federalism has been a benign force in American history.<sup>103</sup>

Given what we have learned from the first generation of the New Judicial Federalism, there is substantial hope for the future.

Rights protections under state constitutions, though, are not simply a “one-way ratchet.” State constitutions may be interpreted to provide more rights than the federal constitution, but state constitutions can be amended by majority vote to take away such rights. These twin perspectives, the protection of individual rights under state constitutions coupled with the relative ease of amendment, create a paradox for state constitutional law.<sup>104</sup> Professor Harry Witte described this paradox using the example of Pennsylvania:

---

101. Sanford Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 21, at 59-60.

102. 276 A.2d 595 (N.J. Super. Ct. Law Div. 1971).

103. A.E. Dick Howard, *Does Federalism Secure or Undermine Rights?*, in FEDERALISM AND RIGHTS 11, 25 (Ellis Katz & G. Alan Tarr eds., 1996).

104. See Harry L. Witte, *Rights, Revolution and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383 (1993).

Two fundamental principles were set down in the 1776 constitution: the inviolability of basic, individual rights, and the inherent right of the people to control, reform, or abolish their government as they saw fit. Although each principle may be seen as critical to one ideal of democracy or another, together they placed the right of the majority to govern and the right of minorities to be free of certain reaches of government in potential opposition.<sup>105</sup>

Professor Lynn Baker recently analyzed one of the recommended solutions to this problem—the adoption of supermajority requirements for the adoption of initiated state constitutional amendments affecting rights.<sup>106</sup> There is much work left to be done.

So, the New Judicial Federalism has begun to mature. Still, much remains to be done in the way of scholarship.<sup>107</sup> A fully developed study of state constitutional law must continue to include constitutional theory,<sup>108</sup> as well as political theory.<sup>109</sup> It must be interdisciplinary. There is much we lawyers can learn from historians and political scientists, and *vice versa*.<sup>110</sup> The research also must include state constitutional history, with a focus on both individual states,<sup>111</sup> as well as comparative regional and national treatment.<sup>112</sup> The relationship between state constitutional rights and state common-law and statutory rights must be considered.<sup>113</sup> Finally, the treatment

105. *Id.* at 384. See also Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS: J. FEDERALISM, Winter 1987, at 153, 178-79.

106. Lynn A. Baker, *Governing by Initiative: Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143 (1995).

107. The following paragraph is based on Robert F. Williams, *Foreword: A Research Agenda in State Constitutional Law*, 66 TEMP. L. REV. 1145, 1149 (1993).

108. Tarr, *supra* note 49, at 861.

109. Daniel J. Elazar, *The Principles & Traditions Underlying State Constitutions*, 12 PUBLIUS: J. FEDERALISM, Winter 1982, at 11.

110. See Robert F. Williams, *Introduction to Annual Issue on State Constitutional Law*, 22 RUTGERS L.J. 815, 816 (1991) (demonstrating importance of interdisciplinary approach to study of state constitutions reflected in forewords by law professors, political scientists and historians).

111. See, e.g., Christian G. Fritz, *More Than "Shreds and Patches": California's First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13 (1989) (explaining the extent to which existing nineteenth century state constitutions are drawn upon in creation of bill of rights of California's first constitution); John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759 (1992) (examining North Carolina's three constitutions over last two centuries); David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611 (1995).

112. TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

113. See Judith S. Kaye, *Foreword: The Common Law & State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 728-29 (1992) (examining relationship of common law and state constitutional law in protection of individual rights and suggesting partnership of two).

of judicial interpretation of state constitutions, as well as the study of the state constitutions themselves, must be comparative both with respect to other *state* constitutions as well as the *federal* constitution.<sup>114</sup> Even comparisons with the state constitutions in other federal systems should be considered.<sup>115</sup>

Scholars, lawyers, judges and officials in other federal systems are showing an increasing interest in American *state* constitutions. Judge Dorothy Beasley of Georgia has noted this world-wide interest in state constitutional law:

With the rapid growth in democratic reform and the development of global communications systems, state constitutional law takes on an added significance. Not only do vigorous development and application of state constitutions serve as laboratories on constitutionalism for our own nation's progress, but state constitutional law offers new democracies the opportunity to view varied constitutional theories which may be implemented abroad.<sup>116</sup>

Clearly, as the New Judicial Federalism moves to maturity and gains stature as a field of scholarly endeavor, interest in it should increase. A full agenda remains for both scholars and the courts, and the work of each compliments the other. One of the earliest studies of state constitutional law noted that "what the state courts produce is at least partially a function of what commentators and litigants expect them to produce."<sup>117</sup> Developments during the first phase of the New Judicial Federalism seem to have illustrated this connection. Ultimately, though, the quality of state constitutional discourse depends on what the scholars, lawyers and judges continue to do in the next phase of judicial federalism. Justice Hans Linde predicted, as recently as 1991, that it was not a completely rosy picture.

So the future of the "new federalism" remains doubtful. There is no reason for confidence that most state courts will systematically decide what their state constitutions require, either adapting someone's

---

114. Williams, *supra* note 20, at 172-73 ("[S]tate constitutions do not differ significantly from one another . . . . The recurring themes and issues throughout state constitutional law . . . make it susceptible to treatment on a comparative or 'all states' basis.").

115. James A. Thomson, *State Constitutional Law: Some Comparative Perspectives*, 20 RUTGERS L.J. 1059 (1989) (reviewing ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES & MATERIALS* (1988)); see also Robert F. Williams, *A Research Agenda in Comparative State Constitutional Law*, 20 FEDERALISM REP., Fall 1994, at 3.

116. Dorothy Toth Beasley, *Foreword to Emerging Issues in State Constitutional Law*, 67 TEMP. L. REV. 925, 925 (1994). See also Kincaid, *supra* note 33, at 944-48 (noting the potential interest in the American New Judicial Federalism in federal systems abroad).

117. Project Report: *Toward An Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 320 (1973).

federal analysis or making their own, before deciding whether their state has violated the nation's Constitution. Perhaps the best we can hope for is that those judges who do not abdicate their responsibility outright will put first things first when the case is properly put to them. How often and how well they do it depends on the professionalism of the younger generation of advocates in constitutional cases as well as on the professionalism of the younger generation of judges.<sup>118</sup>

I believe that, with what has taken place in scholarship even since these words were written in 1991, and particularly as evidenced by the contents of this Symposium, the future is much brighter already.

---

118. Hans A. Linde, *Does the "New Federalism" Have a Future?*, 4 EMERGING ISSUES IN ST. CONST. L. 251, 261 (1991).

