LexisNexis Law School Publishing
Advisory Board

Bridgette Carr
Clinical Professor of Law
University of Michigan Law School

Steven I. Friedland
Professor of Law and Senior Scholar
Elon University School of Law

Carole Goldberg
Jonathan D. Varat Distinguished Professor of Law
UCLA School of Law

Oliver Goodenough
Professor of Law
Vermont Law School

Paul Marcus
Haynes Professor of Law
William and Mary Law School

John Sprankling
Distinguished Professor of Law
McGeorge School of Law
Dedication

Second Edition
For Alaine, Sarah, and Tyler

Third Edition

Fourth Edition
For Betty C. Williams
and
Robert H. Williams
My Parents

Fifth Edition
For Alaine, Sarah, Tyler, and Lakshmi
—RFW

For Elizabeth and Piper
—LF
Preface to the Fifth Edition

I am very pleased to be working with Professor Lawrence Friedman on this new edition. He was also instrumental in the 2011 supplement. Lawrence has been a significant scholar of state constitutional law for a number of years and brings important new energy and ideas to the coursebook.

The field of state constitutional law continues, as it has for many years, to grow in importance and recognition. This edition eliminates some of the material from the last edition in order to accommodate new content, but it follows closely the earlier organization. We have continued the use of fairly extensive Notes and Questions not only to expand on the excerpts but also in the hopes that this book may also serve a continuing reference and research function for students, lawyers, judges, and scholars.

Again, I thank Denise Johnson-Steinert and David Batista, as well as the LexisNexis Law Publishing staff.

Robert F. Williams
Camden, New Jersey
August, 2014

Lawrence Friedman
Boston, Massachusetts
August, 2014
Preface to the Fourth Edition

The field of state constitutional law continues to grow in both its breadth of understanding by lawyers, judges, law professors and students and its depth of sophistication. I continue to learn from our Rutgers law students, who are approaching their twentieth year of our Law Journal’s Annual Issue on State Constitutional Law. In addition, the articles appearing there continue to make major contributions to the field and to this casebook.

Further, I have continued to learn from the many state judges with whom I have interacted at judicial conferences in their states and in the programs of the America Bar Association’s Appellate Judges Seminar Series and the New York University Institute for Judicial Administration’s summer programs for appellate judges. These judges have a lot to say about state constitutional law and their opinions provide the “stuff” for this book.

The fourth edition, as in the past, follows the organization of earlier editions, but I have added important new material.

I want to thank Denise Johnson Steinert for her tireless word processing efforts and David Batista, one of our excellent research librarians, for his cheerful assistance in the face of my limited technological skills. The Lexis Law Publishing staff, including Leslie Levin and Gregory Ealick, make this work enjoyable.

Robert F. Williams
Camden, New Jersey
February, 2006
Preface to the Third Edition

In the time since the second edition of this coursebook appeared in 1993, interest in state constitutional law has continued to increase. Scholarship on the topic has become much more sophisticated. A growing number of legal and political science scholars have fixed their attention on state constitutional law. The second edition has been used successfully at a number of law schools, and has been reviewed favorably. I have received constructive feedback from a number of professors who have used the book, for which I thank them.

I continue to benefit from the interaction with law students participating in Rutgers Law Journal’s Annual Issue On State Constitutional Law, which is now in its eleventh year. Also, I have gained valuable insights from participation in a number of programs in the American Bar Association’s Appellate Judges Seminar Series. The lessons gained from state judges working directly with state constitutions are invaluable.

The third edition follows the organization of the earlier edition quite closely, but there are a number of important changes that I believe improve the book.

Finally, I want to thank Debbie Comuso for her monumental efforts in organizing and producing the new edition. The Lexis-Nexis editorial staff, including M. Lyndon Whitmore and Bruce Ponman, are a delight to work with and a great help.

Robert F. Williams
Camden, New Jersey
June, 1999
Preface to the Second Edition

This book is the result of many positive developments over the past fourteen years. The first, and most important, was the foresight of my colleagues at Rutgers University School of Law, Camden, who permitted me to offer a new course in 1980 called State Constitutional Law. At the time, there was no course like it in the country, approaching the topic on a comparative, or allstates, basis. The opportunity to teach this course over the past fourteen years has permitted me to develop the materials contained in this book.

Professor Frank P. Grad, of Columbia Law School, has been unfailingly supportive of these efforts. He has not only shared his writings, both published and unpublished, but has been very generous with his ideas and support. This book owes a much greater debt to him than is reflected by the excerpts and citations contained in it.

Over the years, the students at Rutgers University School of Law, Camden, who have taken the course have added to my interest and understanding immeasurably. Their excitement at discovering another way of looking at constitutional law is a sustaining force for me to continue the investigations reflected in the book. Also, for the past five years the law students who have participated in Rutgers Law Journal’s Annual Issue on State Constitutional Law have served as, in effect, the best research assistants any professor could have. The sheer amount of work it takes to gather and analyze every state constitutional case in the country is hard to describe. I always learn from their insights, together with those of the authors of the articles included in the Annual Issue. I include my thanks here as well to the many dedicated research assistants who have worked directly for me.

I have also been helped immeasurably by a small but dedicated group of law professors who have taken an interest in this subject. Our discussions by letter and on the telephone, as well as our Roundtables on State Constitutional Law at the Annual Meeting of the Association of American Law Schools, from 1982 through 1988, always gave me new ideas and understanding.

A generous fellowship from the American Council of Learned Societies for the academic year 1985-86 enabled me to do in-depth research into the first state constitutions, which predated the federal Constitution. In addition, several Rutgers sabbaticals were also indispensable in providing the time to develop the ideas and approaches reflected in the book.

In 1988 the Advisory Commission on Intergovernmental Relations published the first edition of this book. I owe John Kincaid, the Executive Director of ACIR, a debt of gratitude for his idea to publish the materials and promote them. Publication of the book in that form made it available generally, so that its appeal and usefulness could be “tested” around the country. It met with enough success to convince the current publisher to adopt it. That would never have happened without the commitment of ACIR.

A number of state court judges around the country have been extraordinarily supportive. By naming a few, I do not intend to exclude others. Hans A. Linde of Oregon (now retired), Stanley Mosk of California, Robert Utter of Washington, Shirley Abrahamson of Wisconsin, Stewart Pollock of New Jersey, Judith Kaye of New York, Christine Durham of Utah, and Dorothy Beasley of Georgia have all been especially supportive. Several programs of the National Conference of Chief Justices have been
Preface to the Second Edition

devoted to state constitutional law, at which a number of the ideas in this book were disseminated.

I owe a substantial debt to a number of professors who have taught the course with the book as published by ACIR, and have generously shared their ideas with me. Once again, without intending to exclude anyone, I want to give special thanks to Charles “Buzzy” Baron of Boston College, Michael Libonati of Temple, Harry Martin of North Carolina and Harry Witte of Widener. A. E. Dick Howard of Virginia has also given me valuable assistance over the years. Harold Levinson of Vanderbilt taught me Florida Constitutional Law at Florida, opened my eyes to the possibilities of looking beyond one state, and has encouraged me ever since.

My political science colleague, G. Alan Tarr has guided me in interdisciplinary approaches to state constitutional law and always provides encouragement and a ready sounding board for many of the ideas contained in this book. My wife, Alaine S. Williams, who practices state constitutional law extensively in Pennsylvania, always lends a practical, “feet-on-the-ground” perspective in the brief moments in her busy schedule that she can devote to these academic matters.

Members of the law library staff at Rutgers Law School left no stone unturned in searching out and obtaining materials. The Michie Company editorial staff, including Fran Warren and Don Whitenack, are a pleasure to work with and a great help. Finally, in some ways most importantly, my thanks go to Sandra Hill and Thea Dugan, the “wizards of the word processor” who made it possible to produce this Second Edition.

Robert F. Williams
Camden, New Jersey
June, 1993
Foreword to the Second Edition

The U.S. Advisory Commission on Intergovernmental Relations (ACIR) is pleased to have helped give birth to this important, ground-breaking text. State Constitutional Law: Cases and Materials lays a solid foundation for more comparative and systematic attention to state constitutional law by students, teachers, and practitioners of the law, and for more widespread understanding and appreciation of state constitutional issues by citizens of our country’s fifty states.

For many Americans today, “constitutional law” is associated only with the great Constitution of the United States. Although citizens are frequently asked to vote on amendments to state constitutions, in ACIR’s 1991 national opinion poll, only 52 percent of adult Americans realized that their state has its own constitution. Yet, the states, beginning while colonies, pioneered the idea of written constitutions, and the Massachusetts Constitution of 1780 is the oldest written republican constitution still in effect in the modern world.

State constitutions are important for many reasons, but three are especially notable.

For one, state constitutions are expressions of democratic self-governance in our diverse society. Although they are frequently criticized for excessive detail and revision, state constitutions reflect the efforts of successive generations of Americans to come to grips with changing conditions of society and changing conceptions of governance while retaining the people’s authority over government through their sovereign power to frame, adopt, and amend these constitutions. The state constitutions, therefore, reflect the diversity of American society more dramatically than the U.S. Constitution — all the way from Delaware, the last holdout against popular ratification of constitutional amendments, to California, a hotbed of amendment by popular initiative. Unlike the U.S. Constitution, which has evolved primarily through elite judicial interpretation punctuated by reform amendments, state constitutions have evolved primarily through legislative and public action marked by waves of reform and reaction often sparked by major changes in the composition of state electorates and makeup of state economies. As such, the history of state constitutions captures the history of grassroots America in more vivid detail than the history of the U.S. Constitution.

Second, state constitutions are the bedrock of American constitutionalism. The federal Constitution is one of limited, delegated powers. Although those powers have been interpreted broadly since the 1930s, for the first 150 years of U.S. history, state constitutions were the primary consequential documents in the governance of American society. Even today, in the face of vastly expanded federal power, the limits of reliance on the federal Constitution have been made apparent, for example, by the now old “new judicial federalism” in which state court reliance on state declarations of rights has highlighted the importance of state constitutions and of the states themselves as laboratories of democracy. As such, developments in state constitutional law also continue to serve as forerunners and models for federal constitutional law.

Third, state constitutions play crucial roles in intergovernmental relations. They are especially important in structuring relations between the states and their local...
governments and in granting and limiting powers exercised by our nation’s 86,692 local
governments. State constitutions also establish and structure the ground rules for
interlocal relations (e.g., annexation, consolidation, cooperation, and tax-base sharing and
competition) — matters of great significance for metropolitan governance in America.

For these and other reasons, ACIR believes it important to focus more attention on
state constitutions. ACIR is an independent, bipartisan federal commission established by
law in 1959 to monitor and evaluate developments in the American federal system and to
make recommendations for improving intergovernmental cooperation. ACIR consists of
26 members: three private citizens, three members of the U.S. House, three U.S. senators,
three Cabinet-level officers of the federal executive branch, four governors, three state
legislators, four mayors, and three county officials. Except for the congressional
members, the members of ACIR are appointed by the president for two-year terms. Thus,
ACIR is a unique intergovernmental forum with a keen interest in the constitutional and
legal, as well as fiscal and administrative, structure of federalism.

ACIR published an earlier version of this text, compiled by Professor Williams, in
October 1988 and reissued it in October 1990 with a supplementary update. ACIR also
issued a complementary policy report in July 1989, State Constitutions in the Federal
System: Selected Issues and Opportunities for State Initiatives. These reports stimulated
more awareness of the place of state constitutions in the American federal system,
particularly among elected officials, and encouraged more law schools to give greater
attention to the teaching of state constitutional law.

Having achieved its objectives, ACIR takes great pleasure in placing this important
and ongoing work in the capable hands of Professor Williams, where it can establish an
enduring foothold in the commercial marketplace and the profession of law.

John Kincaid
ACIR Executive
Director
Washington, DC
Introduction

This is a book about constitutional law. It recognizes, though, that the study of American constitutional law has been dominated by a virtually exclusive focus on the federal Constitution and its judicial interpretation. Legal scholars and political scientists have contributed to this by their preoccupation with constitutional matters as defined by the U.S. Supreme Court. In fact, however, the federal Constitution is “incomplete” in the sense that it relied extensively on mechanisms established in state constitutions, and leaves nearly all matters within the sphere of state power to be regulated by state constitutions and laws. Realistically, however, casebooks on constitutional law are unlikely to include any significant treatment of state constitutions.

In the last forty years there have been striking developments in state constitutional law. We have experienced a “constitutional revolution” in the judicial interpretation of individual rights provisions of state constitutions since the early 1970s. The era of major state constitutional innovation prior to the turn of this century was concerned primarily with changes in constitutional texts. Similarly, the wave of state constitutional change that took place between 1945 and 1970 dealt with revisions to, and modernization of, the constitutions, themselves. The rediscovery of state constitutional law in the past four decades, however, involves judicial interpretation of the rights guarantees in state constitutions.\(^1\)

Although state constitutional interpretation always has been important in areas of civil litigation such as state taxation and eminent domain, and in areas of criminal procedure such as bail rights, a broader spectrum of the private bar and a growing number of law professors, political scientists, students, and even the media now are discovering state constitutional law for the first time. This is attributable directly to the many “evasion cases”\(^2\) of the past four decades; that is, state supreme courts have relied on their own constitutions (1) to provide greater civil liberties protections for their citizens than are required by United States Supreme Court interpretations of the federal Constitution and (2) to insulate their decisions from Supreme Court review.

These events have captured the attention of the legal and political community, as well as the media and the public, in a way that a state constitutional convention’s increase in gubernatorial powers or modernization of fiscal and budgetary provisions never could. Such structural of political reforms were relegated to the domain of a few political scientists. Their interests have included the structure and power allocations of state and local government, as well as the ways in which such powers actually are exercised. Lawyers and law teachers, by contrast, tend to be concerned with the extent and limit of governmental powers and with the interpretation of constitutional provisions in litigation. It is no surprise, therefore, that the state bill of rights “explosion” of recent decades has


\(^2\) This “new” use of state constitutions will be detailed in Chapters 3 and 4.

\(^3\) Donald E. Wilkes, More on the New Federalism in Criminal Procedures, 63 KY. L.J. 873 n. 2 (1975).
Introduction

captured the attention of lawyers and legal scholars. This new attention, however, has generally been limited to state constitutional protection of individual liberties as an alternative to federal constitutional protections.

The field of state constitutional law, like federal constitutional law, is by no means limited to cases involving the application of state bills of rights. The structure and power of state and local governments, state-local relations, state judicial systems, taxation and public finance, and public education all are affected by the state constitution and its interpretation. Furthermore, the issues governed by state constitutions do not differ significantly from one state to another. State constitutional law, however, has not been treated as a matter of political or legal theory or as a subject for comparative treatment; rather, it usually is thought of as a parochial matter. The recurring themes and issues found throughout state constitutional law make it susceptible to treatment on a comparative or “all state” basis.

State constitutions operate within, and are limited by, the federal Constitution. As V.O. Key, Jr. noted “[T]he American states operate not as independent and autonomous political entities, but as units of the nation.”

Each of the states has a constitution. All 50 of these documents, although varying widely as to detail and length, perform the same general function in our federal system of law and government. This function is very different from that of the Constitution of the United State — the constitution usually thought of when we refer to “constitutional law.” See Christian G. Fritz, Foreword: Out From Under the Shadow of the Federal Constitution: An Overlooked American Constitutionalism, 41 RUTGERS L.J. 851 (2010).

A state constitution serves as a charter of law and government for the state — the supreme law of the state — and prescribes in more or less detail the structure and functions of government. Further, it provides limitations on the otherwise plenary, sovereign power of states to make law and govern themselves. At the outset, this fundamental point regarding the legal and political function and effect of state constitutions must be understood. By contrast, the federal Constitution is a grant of enumerated powers, upon which all exercises of federal power must be based. The states delegated to the federal government certain powers and agreed to restrain themselves with respect to other powers and functions. Such restraints are found in the federal and state constitutions.

A study of state constitutional law, while pointing out similarities, also highlights the differences among the legal and governmental systems of our 50 states. In the famous words of Justice Louis Brandeis:

It is one of the happy incidents of the federal system that a single courageous State may, it its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Many common themes appear in the constitutional law of all states. They touch upon many of the same issues, despite differences in how such issues may be resolved. It is the

---

4 V.O. KEY, JR., AMERICAN STATE POLITICS: AN INTRODUCTION 18 (1956).
purpose of this book to focus on these common themes and issues, which are likely to arise in any jurisdiction. This will, in turn, accent the importance of the unique language and judicial interpretation of the constitutions of the states in the resolution of specific issues.

A 1988 national poll by ACIR revealed that 52 percent of the respondents did not know that their state had its own constitution. John Kincaid, *The New Judicial Federalism*, 61 J. STATE GOVT’S 169 (Sept./Oct. 1988). In 1989, ACIR made the following finding:

Even among lawyers, state constitutional law is relatively unknown and little practiced. Compared to the U.S. Constitution, state constitutions are less frequently mentioned in the history and civics classes of public schools or the university, and regular reporting of state constitutional decisions, as well as the statistics of state court activities, has been, until very recently, quite rare. Even the law schools seldom offer courses in state constitutional law. If the American federal system is to be properly balanced — giving full rein to the potentials of local governments, the states, and the national government — then the field of state constitutional law needs to be developed more fully.

The Commission recommended that “law schools teach state constitutional law as part of their regular curriculum, that state bar examiners include a section on state constitutional law in their bar exams, and that public and private institutions support research on state constitutional law.” Advisory Commission on Intergovernmental Relations, *State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives* 2, 3 (1989).

In recent years educators in law and political science have noted the absence of state constitutional law in the curriculum and called for courses and materials on the subject. This gap has been acknowledged by judges as well as by educators. Justice Charles G. Douglas of the Supreme Court of New Hampshire observed: “The fact that law clerks working for state judges have only been taught or are familiar with federal cases brings a federal bias to the various states as they fan out after graduation from ‘federally’ oriented law schools. Justice Douglas deplored the ‘lack of . . . textbooks developing the rich diversity of state constitutional law.’”

Justice Hans A. Linde of the Oregon Supreme Court observed:

> [T]he law schools have nationalized legal education, and constitutional law books deal with the opinions of the United States Supreme Court. perhaps, if we could develop more constitutional law courses that are built around the issues and the choices which exist throughout our fifty-one constitutions and that would treat the opinions of judges as historic but not infallible struggles with those issues and choices. . . .

---


Introduction

This coursebook is intended to fill a major gap in the teaching of American constitutional law, and contribute to the ongoing process identified by Justice Shirley S. Abrahamson of the Wisconsin Supreme Court:

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.

The range of issues that can arise under any state’s constitution, as illustrated by the materials in this book, is treated in Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983). That article follows the same organization and substance as this book.

Invaluable sources of information concerning each state’s constitution can be found in William F. Swindler’s 11-volume Sources and Documents of U.S. Constitutions (1973-1979); and the Legislative Drafting Research Fund, Columbia University, Constitutions of the United States: National and State (various dates), 7 vols. See also Thomas C. Marks, Jr. & John F. Cooper, State Constitutional Law in a Nutshell (1988).


Recent publications addressing the importance of state constitutional law as a subject of inquiry include Sanford Levinson, *Courts as Participants in “Dialogue”: A View from The American States*, 59 U. KAN L. REV. 791 (2011); America’s “Other Constitutions”: The Importance of State Constitutions for Our Law and Politics, 45 TULSA L. REV. 813

---

Introduction


Many state constitutional law resources are available through the Rutgers Center for State Constitutional Studies, www.camlaw.rutgers.edu/statecon/. These resources may help to assist attorneys seeking guidance on how to meet the expectations of the resolution adopted by the Conference of Chief Justices as proposed by the Professionalism and Competence of the Bar Committee at the Conference of Chief Justices 2010 Midyear Meeting:

Encouraging the Teaching of State Constitutional Law Courses

WHEREAS, all lawyers take an oath to support the United States Constitution and the Constitution of their state; and

WHEREAS, although all law schools offer a course in constitutional law, the overwhelming majority of those courses are taught from the perspective of the federal Constitution; and

WHEREAS, the United States Constitution creates a dual system of government with two sets of sovereigns whereby all powers not delegated to the federal government are reserved to the states; and

WHEREAS, state constitutions contain different structures of government, unique provisions, and substantive provisions or declarations of rights that are often greater than federally guaranteed individual rights and liberties; and

WHEREAS, being a competent and effective lawyer requires an understanding of both the Federal Constitution and state constitutional law;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages all law schools to offer a course on state constitutional law.
# Table of Contents

Chapter 1  THE HISTORY, NATURE AND FUNCTION OF STATE CONSTITUTIONS .......................... 1

A.  THE EVOLVING STATE CONSTITUTIONS DURING THE FOUNDING DECADE .............................. 1
   - Robert F. Williams, *The State Constitutions of the Founding Decade:
     Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism* .......................... 1
   - Notes and Questions ........................................ 4
   - Notes and Questions ........................................ 5

B.  THE ADMISSION OF NEW STATES ........................................................................ 7
   - The Northwest Ordinance of 1787 ........................................ 9
   - Notes and Questions ........................................ 10

C.  THE UNIQUE EVOLUTION OF STATE CONSTITUTIONS — ALTERNATIVE VOICES .......................... 11
   - James A. Henretta, Foreword: *Rethinking the State Constitutional Tradition* .......................... 12
   - Notes and Questions ........................................ 16
   - Notes and Questions ........................................ 18
   - John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality* .......................... 18
   - Notes and Questions ........................................ 19
   - David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada* .......................... 20
   - Notes and Questions ........................................ 24
   - Notes and Questions ........................................ 29
   - Eric Foner, *Reconstruction: America’s Unfinished Revolution* .......................... 29
   - Notes and Questions ........................................ 33
   - Michael W. McConnell, *Originalism and the Desegregation* xxi
# Table of Contents

*Decisions* ................................................................. 33

Notes and Questions ..................................................... 35

James C. Harrington, *Free Speech, Press, and Assembly Liberties under the Texas Bill of Rights* .................................... 35

Notes and Questions ..................................................... 37

Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* .................................................. 37

Notes and Questions ..................................................... 39

Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker* ................................................................. 40

Notes and Questions ..................................................... 42

Eric Foner, *Reconstruction: America's Unfinished Revolution* ................................................................. 42

Notes and Questions ..................................................... 44

Amy Bridges, *Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States* ...................... 44

Notes and Questions ..................................................... 45

Dennis C. Colson, *Idaho’s Constitution: The Tie that Binds* ................................................................. 45

Notes and Questions ..................................................... 46

Wythe Holt, *Virginia’s Constitutional Convention of 1901–1902* ................................................................. 47

Notes and Questions ..................................................... 50

John D. Leshy, *The Making of the Arizona Constitution* ................................................................. 50

Notes and Questions ..................................................... 53

Barbara Burns Petrick, *Mary Philbrook, Lawyer and Feminist: Opening the Practice of Law to Women and Establishing a Constitutional Basis for Sex Equality in New Jersey* ................................................................. 54

Notes and Questions ..................................................... 57

Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions* ................................................................. 57

Notes and Questions ..................................................... 61

Daniel J. Elazar, *The American Constitutional Tradition* ................................................................. 63

Notes and Questions ..................................................... 63

D. STATE CONSTITUTIONS AS INSTRUMENTS OF LAWMAKING ................................................................. 64


Notes and Questions ..................................................... 69

Frank P. Grad, *The State Constitution: Its Function and Form for Our Time* ................................................................. 70

Notes and Questions ..................................................... 72

*Omaha National Bank v. Spire* ................................................................. 73

Notes and Questions ..................................................... 79
# Table of Contents

## Chapter 2  
**STATES AND THEIR CONSTITUTIONS IN THE FEDERAL SYSTEM**  
81

### A. INTRODUCTION  
Woodrow Wilson, *Constitutional Government in the United States* 81

### B. FEDERAL INFLUENCE OVER THE CONTENT OF STATE CONSTITUTIONS  
82

- Notes and Questions 83
- *Veto Message of August 11, 1911* 84
- *Coyle v. Smith, Secretary of State of the State of Oklahoma* 85
- Notes and Questions 89
- Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union* 89
- Notes and Questions 92
- *Fain Land & Cattle Co. v. Hassell* 92
- Notes and Questions 98

### C. THE GUARANTEE CLAUSE  
99

- *U.S. Constitution Article IV, Section 4* 99
- Notes and Questions 99
- *Pacific States Telephone & Telegraph Co. v. Oregon* 100
- Notes and Questions 103
- Hans A. Linde, *When Initiative Lawmaking is Not “Republican Government”: The Campaign against Homosexuality* 104
- Notes and Questions 106

### D. THE SUPREMACY CLAUSE  
107

1. Conflict Between State Constitutions and the Federal Constitution 108
   - *Reitman v. Mulkey* 108
   - Notes and Questions 110
   - *Hunter v. Underwood* 111
   - Notes and Questions 115

2. Conflict Between State Constitutions and Federal Statutes 116
   - *North Carolina ex rel. Morrow v. Califano* 116
   - Notes and Questions 120
   a. Preemption 121
      - *Utility Workers of America v. Southern California Edison Co.* 121
      - Notes and Questions 123
      - Calvin R. Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law* 124
      - Notes and Questions 126
   b. Congressional Accommodation of State Constitutions — The Decision Not to Preempt 129
      - *Wheeler v. Barrera* 129
## Table of Contents

Notes and Questions .................................................. 133
c. Congressional Displacement of State Constitutions ............ 134
   Notes and Questions ............................................. 136
3. Conflict Between State Constitutions and Federal Regulations .... 137
E. INTERSTATE COMPACTS AND STATE CONSTITUTIONS ......... 137
   *West Virginia ex rel. Dyer v. Sims* .............................. 137
   Notes and Questions ............................................. 141

---

**Chapter 3** STATE CONSTITUTIONAL PROTECTION OF INDIVIDUAL LIBERTIES IN THE FEDERAL SYSTEM: “THE NEW JUDICIAL FEDERALISM” . . . . . 143

A. STATE CONSTITUTIONAL RIGHTS PRIOR TO THE FEDERAL BILL OF RIGHTS ......................................................... 143
   Notes and Questions ............................................. 143
B. INCORPORATION OF FEDERAL PROTECTIONS AGAINST THE STATES ......................................................... 144
   *McDonald v. Chicago* ............................................. 144
   Notes and Questions ............................................. 147
C. THE REDISCOVERY OF STATE CONSTITUTIONAL RIGHTS . . . 148
   William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights* ............................................. 150
   Notes and Questions ............................................. 151
   *Michigan v. Mosley* ............................................. 152
   Notes and Questions ............................................. 152
   Robert F. Williams, *In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result* ......... 153
   Notes and Questions ............................................. 154
   Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits* ..................................... 155
   Notes and Questions ............................................. 158
D. STATE JUDICIAL RELIANCE ON STATE CONSTITUTIONS — APPROACHES TO STATE CONSTITUTIONAL RIGHTS CASES IN THE SHADOW OF THE SUPREME COURT ............ 158
   1. Independence and Lack of Federalism Concerns ............ 158
      Notes and Questions ............................................. 161
      Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights* ............................................. 162
      Notes and Questions ............................................. 163
      Barry Latzer, *Four Half-Truths about State Constitutional Law* ............................................. 164
      Notes and Questions ............................................. 167
   2. Textual Differences ............................................. 168
      *Hansen v. Owens* ............................................. 168
# Table of Contents

Notes and Questions .................................................. 170

*Bierkamp v. Rogers* .................................................... 170

Notes and Questions .................................................. 173

*Collins v. Day* .......................................................... 174

Notes and Questions .................................................. 177

*Cooper v. Morin* ........................................................ 177

Notes and Questions .................................................. 182

3. Unique State Traditions .............................................. 183

*People ex rel. Arcara v. Cloud Books, Inc.* ...................... 183

Notes and Questions .................................................. 185

4. Sub-Constitutional State Law Rights Protections .............. 186

Notes and Questions .................................................. 189

*Gary v. State* ........................................................... 189

Notes and Questions .................................................. 191


Notes and Questions .................................................. 195

5. Public Policy Reflected in State Constitutions ................. 196

*Hennessey v. Coastal Eagle Point Oil Co.* ....................... 196

Notes and Questions .................................................. 201

E. STATE CONSTITUTIONAL RIGHTS PROVIDING LESS PROTECTION THAN THE FEDERAL CONSTITUTION ............ 203

*State v. Smith* ........................................................... 203

Notes and Questions .................................................. 205

F. STATE ACTION AS A REQUIREMENT UNDER STATE CONSTITUTIONS ........................................ 206

1. Introduction ............................................................ 206

*Sharrock v. Dell Buick-Cadillac, Inc.* ............................ 206

Notes and Questions .................................................. 209

*People v. Zelinski* ...................................................... 209

Notes and Questions .................................................. 213

*Hill v. NCAA* ............................................................ 215

Notes and Questions .................................................. 220

2. Freedom of Speech and Association on Private Property .... 221

*New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.* ................................................. 221

Notes and Questions .................................................. 228


xxv
Table of Contents

Notes and Questions ............................................. 231
Sanford Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law* ............... 231
Notes and Questions ............................................. 235

G. SUBSTANTIVE DUE PROCESS, ECONOMIC REGULATION, AND STATE CONSTITUTIONS ............................................. 236
A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court* ............................................. 236
Notes and Questions ............................................. 238
*Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.* ......................................................... 239
Notes and Questions ............................................. 242
*Department of Insurance v. Dade County Consumer Advocate’s Office* ......................................................... 242
Notes and Questions ............................................. 245

H. “OVERRULING” STATE CONSTITUTIONAL DECISIONS BY STATE CONSTITUTIONAL AMENDMENT ............................................. 246
Notes and Questions ............................................. 247
*Florida v. Casal* ...................................................... 248
Notes and Questions ............................................. 249
*Commonwealth v. Colon-Cruz* ...................................................... 252
Notes and Questions ............................................. 255
Janice C. May, *Constitutional Amendment and Revision Revisited* ......................................................... 256
Notes and Questions ............................................. 257
Notes and Questions ............................................. 260
Lynn A. Baker, *Constitutional Change and Direct Democracy* ......................................................... 260
Notes and Questions ............................................. 263
John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition* ......................................................... 263
Notes and Questions ............................................. 268

Chapter 4 PROCEDURES AND METHODS OF STATE CONSTITUTIONAL RIGHTS INTERPRETATION ............................................. 269

A. THE ADEQUATE AND INDEPENDENT STATE GROUND DOCTRINE ............................................. 269
Notes and Questions ............................................. 269
*Mic...
### Table of Contents

B. **HARMLESS ERROR** ................................. 281

C. **RETROACTIVITY** ................................. 281
   - *Danforth v. Minnesota* ............................. 282
   - Notes and Questions ................................ 282

D. **ADVOCATING AND RESISTING GREATER PROTECTIONS UNDER STATE CONSTITUTIONS** ................................. 283
   1. The Sequence of Constitutional Arguments ................................. 283
      - Notes and Questions ................................ 284
      - *State v. Kennedy* .................................... 284
      - Notes and Questions ................................ 287
      - *Delaware v. Van Arsdall* ............................. 287
      - Notes and Questions ................................ 292
      - Notes and Questions ................................ 296
   2. Abstention ............................................ 296
      - *Guiney v. Roache* .................................... 296
      - Notes and Questions ................................ 300
   3. The “Criteria” or “Factor” Approach ................................. 301
      - *State v. Hunt* ....................................... 301
      - Notes and Questions ................................ 310
      - Robert F. Williams, *In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result* ................................. 310
      - Notes and Questions ................................ 312
   4. Uniform State and Federal Constitutional Interpretation ................................. 316
      - Notes and Questions ................................ 318
      - *State v. Mollica* ...................................... 318
      - Notes and Questions ................................ 324
      - Earl M. Maltz, *The Dark Side of State Court Activism* ................................. 324
      - Notes and Questions ................................ 327
      - Earl M. Maltz, *The Political Dynamic of the “New Judicial Federalism”* ................................. 327
      - Notes and Questions ................................ 328
      - Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response* ................................. 328
      - Notes and Questions ................................ 329
      - Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?* ................................. 330
Table of Contents

Notes and Questions ................................................. 332

E. STATE CONSTITUTIONAL RIGHTS JURISPRUDENCE ............ 333

G. Alan Tarr, Constitutional Theory and State Constitutional Interpretation ........................................ 333
Notes and Questions .................................................. 336
James A. Gardner, The Failed Discourse of State Constitutionalism ........................................ 336
Notes and Questions .................................................. 341
James Gray Pope, An Approach to State Constitutional Interpretation ........................................ 344
Notes and Questions .................................................. 346
Justin Long, Intermittent State Constitutionalism ............. 346
Notes and Questions .................................................. 347
Paul W. Kahn, Interpretation and Authority in State Constitutionalism ........................................ 347
Notes and Questions .................................................. 352
Hans A. Linde, Are State Constitutions Common Law? ....... 352
Notes and Questions .................................................. 354
Robert A. Schapiro, Identity and Interpretation in State
Constitutional Law ...................................................... 355
Notes and Questions .................................................. 360
Daniel B. Rodriguez, State Constitutional Theory and Its Prospects ........................................ 361
Notes and Questions .................................................. 367
Jeffrey L. Amestoy, Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism — Reflections on State Constitutional Theory and Same-Sex Marriage Claims ........................................ 368
Notes and Questions .................................................. 371
Jack L. Landau, Some Thoughts about State Constitutional Interpretation ........................................ 372
Notes and Questions .................................................. 378
James A. Gardner, State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions ........................................ 378
Notes and Questions .................................................. 384
Lawrence Friedman, The Constitutional Value of Dialogue and the New Judicial Federalism .............. 384
Notes and Questions .................................................. 386
Lawrence Friedman, Path Dependence and the External Constraints on Independent State Constitutionalism ........................................ 387
Notes and Questions .................................................. 389
Jim Rossi, Assessing the State of State Constitutionalism .... 389
### Table of Contents

Notes and Questions .................................................. 392

<table>
<thead>
<tr>
<th>Chapter 5</th>
<th>ISSUES REGARDING JUDICIAL ENFORCEMENT OF STATE CONSTITUTIONS</th>
<th>393</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>REMEDIES FOR STATE CONSTITUTIONAL VIOLATIONS ..................</td>
<td>393</td>
</tr>
<tr>
<td>1.</td>
<td>Direct Cause of Action for State Constitutional Violations . .</td>
<td>394</td>
</tr>
<tr>
<td></td>
<td>Hunter v. City of Eugene ...........................................</td>
<td>394</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>396</td>
</tr>
<tr>
<td></td>
<td>Corum v. University of North Carolina ..................................</td>
<td>397</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>402</td>
</tr>
<tr>
<td>2.</td>
<td>Sovereign Immunity ...................................................</td>
<td>403</td>
</tr>
<tr>
<td></td>
<td>Figueroa v. State .....................................................</td>
<td>403</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>405</td>
</tr>
<tr>
<td></td>
<td>Kerns v. Bucklew ....................................................</td>
<td>405</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>408</td>
</tr>
<tr>
<td>3.</td>
<td>Attorneys’ Fees ......................................................</td>
<td>408</td>
</tr>
<tr>
<td></td>
<td>Deras v. Myers .......................................................</td>
<td>408</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>410</td>
</tr>
<tr>
<td>4.</td>
<td>Waiver of State Constitutional Rights ..................................</td>
<td>410</td>
</tr>
<tr>
<td></td>
<td>Woodruff v. Board of Trustees of Cabell Huntington Hospital ....</td>
<td>410</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>411</td>
</tr>
<tr>
<td></td>
<td>State v. Stephenson ...................................................</td>
<td>411</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>413</td>
</tr>
<tr>
<td>B.</td>
<td>SELF-EXECUTING STATE CONSTITUTIONAL PROVISIONS ..................</td>
<td>413</td>
</tr>
<tr>
<td></td>
<td>Rice v. Howard ........................................................</td>
<td>414</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>415</td>
</tr>
<tr>
<td></td>
<td>Johnson v. Wells County Water Resource Bd. .........................</td>
<td>416</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>419</td>
</tr>
<tr>
<td></td>
<td>Commonwealth v. National Gettysburg Battlefield Tower, Inc. ......</td>
<td>419</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>423</td>
</tr>
<tr>
<td></td>
<td>Chesney v. Byram ....................................................</td>
<td>424</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>427</td>
</tr>
<tr>
<td>C.</td>
<td>QUESTIONS OF JUDICIAL ENFORCEABILITY ..................................</td>
<td>427</td>
</tr>
<tr>
<td></td>
<td>D &amp; W Auto Supply v. Department of Revenue .........................</td>
<td>427</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>431</td>
</tr>
<tr>
<td></td>
<td>Robert F. Williams, State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement</td>
<td>432</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>432</td>
</tr>
<tr>
<td>D.</td>
<td>MANDATORY OR DIRECTORY PROVISIONS ..................................</td>
<td>435</td>
</tr>
<tr>
<td></td>
<td>Arnett v. Sullivan ..................................................</td>
<td>436</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions ..................................................</td>
<td>440</td>
</tr>
</tbody>
</table>

xxix
## Table of Contents

Armstrong v. King ......................................................... 440  
Notes and Questions ................................................... 444

**Chapter 6**  
**STATE CONSTITUTIONAL PROTECTIONS**  
**WITHOUT EQUIVALENT FEDERAL PROTECTION** ................. 445

A. **INTRODUCTION — EXAMPLES OF RIGHTS PROTECTIONS**  
**NOT CONTAINED IN THE FEDERAL CONSTITUTION** .............. 445

1. Remedy Guarantees, Tort Law, and Tort Reform ................. 445
   Kluger v. White ...................................................... 445
   Notes and Questions ................................................. 450
   Robert F. Williams, *Foreword: Tort Reform and State*  
   Constitutional Law .................................................. 450
   Notes and Questions ................................................. 452
   Saylor v. Hall ......................................................... 453
   Notes and Questions ................................................. 457
   David Schuman, *The Right to a Remedy*  
   Notes and Questions ................................................. 458
   Constitutional Law .................................................. 462
   Notes and Questions ................................................. 462
   Lakin v. Senco Products, Inc. ....................................... 462
   Notes and Questions ................................................. 471
   Smith v. Printup ...................................................... 472
   Notes and Questions ................................................. 481

2. Prisoners’ Rights, and Reliance on International Law .......... 481
   Sterling v. Cupp ..................................................... 481
   Notes and Questions ................................................. 486
   Johanna Kalb, *Human Rights Treaties in State Courts:*  
   *The International Prospects of State Constitutionalism*  
   After Medellin ....................................................... 488
   Notes and Questions ................................................. 491

3. Privacy ..................................................................... 492
   Ravin v. State ......................................................... 492
   Notes and Comments ................................................. 495
   In re T.W. ............................................................... 496
   Notes and Questions ................................................. 504

4. Sexual Orientation ..................................................... 508
   a. Sodomy ............................................................... 508
      Commonwealth v. Wasson ......................................... 508
      Notes and Questions ................................................. 514
   b. Marriage of Same-Sex Couples ................................. 515
      Goodridge v. Department of Public Health .................. 516
      Notes and Questions ................................................. 530

xxx
# Table of Contents

5. **Social Welfare and Positive Rights** ........................................... 532  
   *Tucker v. Toia* ........................................... 532  
   Notes and Questions ........................................... 535  
   *Butte Community Union v. Lewis* ........................................... 536  
   Notes and Questions ........................................... 539  
   Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights* ........................................... 539  
   Notes and Questions ........................................... 543  
   Notes and Questions ........................................... 548  
   Emily Zackin, *Looking for Rights in all the Wrong Places: Why State Constitutions Contain America’s Positive Rights* ........................................... 549

6. **Environmental and Natural Resource Provisions** ........................................... 552  
   Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance* ........................................... 552  
   Notes and Questions ........................................... 556

7. **Bail** ........................................... 557  
   *Westerman v. Cary* ........................................... 557  
   Notes and Questions ........................................... 559

8. **RELIGION** ........................................... 559  
   *Maylon v. Pierce County* ........................................... 559  
   Notes and Questions ........................................... 563

B. **“UNENUMERATED RIGHTS” PROVISIONS OF STATE CONSTITUTIONS** ........................................... 565  
   *McCacken v. State* ........................................... 566  
   Notes and Questions ........................................... 567

C. **NOTES ON OTHER STATE CONSTITUTIONAL PROVISIONS WITHOUT FEDERAL ANALOGUES** ........................................... 568

## Chapter 7  
**THE UNIQUE INTERPRETATION PROBLEMS OF STATE CONSTITUTIONS** ........................................... 571

A. **INTRODUCTION** ........................................... 571

B. **APPLICATION OF GENERAL CONCEPTS OF INTERPRETATION** ........................................... 572  
   *School Committee of Town of York v. Town of York* ........................................... 573  
   Notes and Questions ........................................... 574

C. **THE “PLAIN MEANING” OF STATE CONSTITUTIONAL PROVISIONS AND THE “VOICE OF THE PEOPLE”** ........................................... 576  
   Notes and Questions ........................................... 578  
   James Gray Pope, *An Approach to State Constitutional Interpretation* ........................................... 579
### Table of Contents

*Lipscomb v. State* ......................................................... 581  
Notes and Questions ............................................... 586  

**D. STATE CONSTITUTIONAL HISTORY** .............................. 587  
  L. Harold Levinson, *Interpreting State Constitutions by Resort*  
  to the Record ..................................................... 587  
  Notes and Questions ............................................... 589  
  *New Hampshire Municipal Trust Worker’s Compensation*  
   *Fund v. Flynn* .................................................... 589  
   Notes and Questions ............................................... 592  
   *Kalodimos v. Village of Morton Grove*  
   Notes and Questions ............................................... 596  
   Ann Lousin, *Constitutional Intent: The Illinois Supreme Court’s use of the Record in Interpreting the 1970 Illinois Constitution*  
   Notes and Questions ............................................... 601  

**E. THE DOCTRINE OF PRECEDENT IN STATE CONSTITUTIONAL LAW** .......................... 607  
  Thad B. Zmistowski, *City of Portland v. Depaolo: Defining the Role of Stare Decisis in State Constitutional Decisionmaking*  
  Notes and Questions ............................................... 608  

**F. INTERPRETATION OF CONSTITUTIONS BY STATE ATTORNEYS GENERAL** .......................... 610  
  *1971 Report of the Attorney General, New Mexico*  
  Notes and Questions ............................................... 613  
  *Gershman Investment Corp. v. Danforth*  
  Notes and Questions ............................................... 616  
  *Draper v. State* .................................................. 617  
  Notes and Questions ............................................... 620  

**G. “INTERPRETATION” OF STATE CONSTITUTIONS BY LEGISLATURES** .................. 620  
  *Ammerman v. Markham* ............................................. 622  
  Notes and Questions ............................................... 624  

---

Chapter 8  
**DISTRIBUTION OF POWERS UNDER STATE CONSTITUTIONS: GENERAL PERSPECTIVES** .................. 627  

**A. INTRODUCTION** .................................................. 627  

**B. SPECIFIC SEPARATION OF POWERS PROBLEMS** .................. 628  
  *Alexander v. State* .............................................. 628  
  Notes and Questions ............................................... 635  
  *Esteybar v. Municipal Court* ................................... 639  
  Notes and Questions ............................................... 644  

xxxii
Table of Contents

State v. Benitez ........................................ 644
Notes and Questions .................................. 645
Application of Nelson ............................... 645
Notes and Questions .................................. 650

C. DELEGATION OF LEGISLATIVE AUTHORITY .... 650
Department of Business Regulation v. National Manufactured Housing Federation .................. 650
Notes and Questions .................................. 654
Brown v. Heymann ..................................... 654
Notes and Questions .................................. 657
Fink v. Cole ............................................. 658
Notes and Questions .................................. 660
People ex rel. Thomson v. Barnett .................. 660
Notes and Questions .................................. 661
To the Honorable the House of Representatives of the Commonwealth of Massachusetts ...... 661
Notes and Questions .................................. 663

Chapter 9 THE STATE JUDICIAL BRANCH .......... 665
A. INTRODUCTION .................................... 665
Notes and Questions .................................. 666
James A. Henretta, Foreword: Rethinking the State Constitutional Tradition ......................... 667
Notes and Questions .................................. 669
Notes and Questions .................................. 672

B. JUDICIAL REVIEW UNDER STATE CONSTITUTIONS 673
Hans A. Linde, Observations of a State Judge .......... 676
Notes and Questions .................................. 679
Helen Herskoff, State Courts and the “Passive Virtues”: Rethinking the Judicial Function .......... 680
Notes and Questions .................................. 683

C. JUDICIAL RULEMAKING UNDER STATE CONSTITUTIONS — PRACTICE AND PROCEDURE 683
Winberry v. Salisbury ................................. 684
Notes and Questions .................................. 687
In re Florida Rules of Criminal Procedure .......... 687
Notes and Questions .................................. 688
### Table of Contents

People v. McKenna ........................................... 689  
Notes and Questions ........................................ 692  

Busik v. Levine ............................................. 693  
Notes and Questions ........................................ 697  

Jeffrey A. Parness, *Public Process and Statecourt Rulemaking* 698  
Notes and Questions ........................................ 702  

D. JUDICIAL REGULATION OF THE PRACTICE OF LAW  
THROUGH RULEMAKING .................................. 703  

*In re Public Law No. 154-1990* .......................... 704  
Notes and Questions ........................................ 707  

*American Trial Lawyers Ass’n v. New Jersey Supreme Court* 708  
Notes and Questions ........................................ 711  

E. INHERENT POWERS OF THE COURTS .................... 712  

*Commonwealth ex rel. Carroll v. Tate* .................. 712  
Notes and Questions ........................................ 716  

*Commonwealth v. Pennsylvania Labor Relations Board* 717  
Notes and Questions ........................................ 719  

F. ADVISORY OPINIONS ...................................... 719  

*Opinion of the Justices* ................................. 721  
Notes and Questions ........................................ 722  

*Arthur Prentice Rugg: A Memorial* ...................... 723  
Notes and Questions ........................................ 724  

G. CERTIFIED QUESTIONS .................................. 725  

*Lehman Bros. v. Schein* .................................. 725  
Notes and Questions ........................................ 726  

*Scott v. Bank One Trust Co.* ............................ 726  
Notes and Questions ........................................ 728  

Chapter 10 THE STATE EXECUTIVE BRANCH ................. 729  

A. THE NATURE OF EXECUTIVE POWER ..................... 729  

*Rapp v. Carey* ........................................... 729  
Notes and Questions ........................................ 732  

*Bourquin v. Cuomo* ....................................... 733  
Notes and Questions ........................................ 737  

*People v. Herrera* ....................................... 737  
Notes and Questions ........................................ 738  

*People ex rel. Madigan v. Snyder* ....................... 739  
Notes and Questions ........................................ 743  

Jim Rossi, *State Executive Lawmaking in Crisis* ........ 743  
Notes and Questions ........................................ 747  

B. EXECUTIVE PRESENTATION AND VETO POWER .......... 747  

xxxiv
Table of Contents

King v. Cuomo ................................................. 748
Notes and Questions .................................... 751
Campaign for Fiscal Equity, Inc. v. Marino .............. 752
Notes and Questions .................................... 753
Richard Briffault, The Item Veto in State Courts .......... 753
Welsh v. Branstad ........................................ 755
Notes and Questions .................................... 757
State ex rel. Sego v. Kirkpatrick ......................... 757
Notes and Questions .................................... 761

C. THE “CONSTITUTIONALIZATION” OF EXECUTIVE AGENCIES AND OFFICERS ........................................ 764
Florida Department of Natural Resources v. Florida Game & Fresh Water Fish Commission .................... 765
Notes and Questions .................................... 767

D. GUBERNATORIAL SUCCESSION ............................... 770
Bryant v. English ........................................ 770
Notes and Questions .................................... 774
Commission on the Governorship of California v. Curb .... 775
Notes and Comments ..................................... 781

Chapter 11 THE STATE LEGISLATIVE BRANCH ............. 783

A. THE NATURE OF STATE LEGISLATIVE POWER ............ 783
B. PROCEDURAL LIMITATIONS ON STATE LEGISLATURES: DUE PROCESS OF LAWMAKING ................................. 786
  Robert F. Williams, State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement .... 786
  Notes and Questions .................................... 789
  Scudder v. Smith ....................................... 791
  Notes and Questions .................................... 793
C. LIMITATIONS ON SPECIAL OR LOCAL LAWS ............... 793
  Anderson v. Board of Commissioners of Cloud County ...... 793
  Notes and Questions .................................... 798
  Benderson Development Co. v. Sciotorno ................... 800
  Notes and Questions .................................... 807
  Justin R. Long, State Constitutional Prohibitions on Special Laws .... 808
  Notes and Questions .................................... 811
  Housing Authority of the City of St. Petersburg v. City of St. Petersburg ..................................... 812
  Notes and Questions .................................... 815
D. DIRECT LEGISLATION ............................................ 815
  Luker v. Curtis ........................................ 816

xxxv
Table of Contents

Notes and Questions ........................................ 821

E.  "LEGISLATIVE VETO" OF ADMINISTRATIVE RULES .......... 823
    State ex rel. Barker v. Manchin .......................... 823
    Notes and Questions .................................... 829
    Philip P. Frickey, The Constitutionality of Legislative Committee
    Suspension of Administrative Rules: The Case of Minnesota .... 830
    Notes and Questions .................................... 832

F.  IMPEACHMENT ............................................. 832
    Peter Charles Hoffer & N.E.H. Hull, Impeachment in America .... 832
    Notes and Questions .................................... 833
    Mecham v. Gordon ....................................... 834
    Notes and Questions .................................... 839

G.  TERM LIMITS ............................................. 839
    California Constitution .................................. 839
    Legislature of the State of California v. EU ................ 841
    Notes and Questions .................................... 846

H.  REAPPORTIONMENT ...................................... 847
    Fonfara v. Reapportionment Commission ........................ 847
    Notes and Questions .................................... 852

I.  PUBLIC PURPOSE ........................................ 854
    In re Marriage of Lappe ................................ 854
    Note and Questions ..................................... 857

Chapter 12 LOCAL GOVERNMENT AND STATE CONSTITUTIONS ........ 859

A.  INTRODUCTION .......................................... 859
    Michael E. Libonati, Intergovernmental Relations in State
    Constitutional Law: A Historical Overview .................. 859
    Notes and Questions .................................... 867

B.  LIMITATIONS ON "SPECIAL COMMISSION" INTERFERENCE
    WITH MUNICIPAL AFFAIRS .............................. 867
    David O. Porter, The Ripper Clause in State Constitutional Law:
    An Early Urban Experiment — Part I .................... 868
    Notes and Questions .................................... 870
    Regional Transportation District v. Department of Labor ........ 873
    Notes and Questions .................................... 877

C.  MUNICIPAL HOME RULE UNDER STATE CONSTITUTIONS .......... 878
    City of Miami Beach v. Fleetwood Hotel, Inc. ............ 879
    Notes and Questions .................................... 882
    Jefferson v. State ..................................... 883
    Notes and Questions .................................... 884

xxxvi
### Table of Contents

Richard Briffault, *Our Localism: Part II — Localism and Legal Theory* 889  
Notes and Questions 892

D. STATE CONSTITUTIONAL LIMITS ON STATE MANDATES TO LOCAL GOVERNMENTS 892  
Notes and Questions 893

E. SPECIAL DISTRICTS 894  
*Foster v. Sunnyside Valley Irrigation District* 894  
Notes and Questions 899  
Richard Briffault, *Who Rules At Home?: One Person/One Vote and Local Governments* 900  
Notes and Questions 901

**Chapter 13 TAXING, BORROWING AND SPENDING UNDER STATE CONSTITUTIONS** 903

A. STATE CONSTITUTIONAL UNIFORMITY REQUIREMENTS FOR TAXATION 903  
1. Uniformity in Property Tax 904  
   Notes and Questions 906  
   *Bettigole v. Assessors of Springfield* 908  
   Notes and Questions 911  
   *Gottlieb v. City of Milwaukee* 912  
   Notes and Questions 916  
2. Property Tax Exemptions 917  
   *Lutheran Home, Inc. v. Board of County Commissioners of Dickinson County* 917  
   Notes and Questions 921  
3. Uniformity in Nonproperty Tax Matters 921  
   *Amidon v. Kane* 921  
   Notes and Questions 927  
   Katherine S. Newman & Rourke L. O’Brien, *Taxing the Poor: Doing Damage to the Truly Disadvantaged* 928  
   Notes and Questions 931  
4. The “Tax Revolt” and State Constitutions 933
## Table of Contents

### Tax Limitation

- Notes and Questions .................................................. 936

### City & County of San Francisco v. Farrell

- Notes and Questions .................................................. 942

### Belas v. Kiga

- Notes and Questions .................................................. 948

### B. LIMITATIONS ON GOVERNMENTAL BORROWING UNDER STATE CONSTITUTIONS

- Brack v. Mossman .......................................................... 949

### State ex rel. Brown v. Beard

- Notes and Questions .................................................. 951

### State ex rel. Lake County v. Zupancic

- Notes and Questions .................................................. 953

### Hayes v. State Property and Buildings Commission

- Notes and Questions .................................................. 957

### Matthew Schaefer, State Investment Attraction Subsidy Wars

- Resulting from a Prisoner’s Dilemma:
  - The Inadequacy of State Constitutional Solutions and Appropriateness of a Federal Legislative Response ................. 962

### Libertarian Party of Wisconsin v. State

- Notes and Questions .................................................. 964

### Lonegan v. State

- Notes and Questions .................................................. 970

### Richard Briffault, Balancing Acts: The Reality Behind State Balanced Budget Requirements

- Notes and Questions .................................................. 983

### Wein v. State

- Notes and Questions .................................................. 987

### Richard Briffault, Foreword: The Disfavored Constitution:

- State Fiscal Limits and State Constitutional Law ................. 991

### David A. Super, Rethinking Fiscal Federalism

- Notes and Questions .................................................. 1003

---

Table contents continued...
# Table of Contents

Chapter 14  
**STATE CONSTITUTIONS AND EDUCATION**  

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>EDUCATION FINANCE</td>
<td>1009</td>
</tr>
<tr>
<td></td>
<td>Robinson v. Cahill</td>
<td>1010</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1015</td>
</tr>
<tr>
<td></td>
<td>Serrano v. Priest (Serrano II)</td>
<td>1016</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1018</td>
</tr>
<tr>
<td></td>
<td>Abbott v. Burke</td>
<td>1018</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1021</td>
</tr>
<tr>
<td></td>
<td>Abbott v. Burke</td>
<td>1021</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1032</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1035</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1037</td>
</tr>
<tr>
<td></td>
<td>Sheff v. O’Neill</td>
<td>1037</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1047</td>
</tr>
<tr>
<td>B.</td>
<td>RIGHT TO EDUCATION</td>
<td>1048</td>
</tr>
<tr>
<td></td>
<td>In re G. H.</td>
<td>1048</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1052</td>
</tr>
<tr>
<td>C.</td>
<td>ALTERNATIVES TO PUBLIC SCHOOLS</td>
<td>1056</td>
</tr>
<tr>
<td></td>
<td>Opinion of the Justices</td>
<td>1056</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1058</td>
</tr>
<tr>
<td></td>
<td>Jackson v. Benson</td>
<td>1058</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1064</td>
</tr>
<tr>
<td></td>
<td>Robert J. Martin, <em>Charting the Court Challenges to Charter Schools</em></td>
<td>1066</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1070</td>
</tr>
<tr>
<td></td>
<td>Sheldon Jackson College v. State</td>
<td>1070</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1074</td>
</tr>
<tr>
<td>D.</td>
<td>FEES FOR PUBLIC EDUCATION</td>
<td>1074</td>
</tr>
<tr>
<td></td>
<td>Cardiff v. Bismarck Public School District</td>
<td>1074</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1079</td>
</tr>
<tr>
<td>E.</td>
<td>HIGHER EDUCATION</td>
<td>1079</td>
</tr>
<tr>
<td></td>
<td>Regents of the University of Michigan v. State</td>
<td>1079</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1088</td>
</tr>
</tbody>
</table>
# Table of Contents

**Chapter 15**

**STATE CONSTITUTIONAL CHANGE: THE PROCESSES OF AMENDMENT AND REVISION** .... 1089

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>INTRODUCTION</td>
<td>1091</td>
</tr>
<tr>
<td></td>
<td>James A. Henretta, *Foreword: Rethinking the State Constitutional</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tradition</td>
<td>1091</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1095</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1097</td>
</tr>
<tr>
<td></td>
<td>William F. Swindler, <em>State Constitutions for the 20th Century</em></td>
<td>1097</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1100</td>
</tr>
<tr>
<td></td>
<td>G. Alan Tarr, <em>Understanding State Constitutions</em></td>
<td>1101</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1105</td>
</tr>
<tr>
<td></td>
<td>Bruce E. Cain &amp; Roger G. Noll, <em>Malleable Constitutions:</em> Reflections on State Constitutional Reform</td>
<td>1105</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1108</td>
</tr>
<tr>
<td></td>
<td>Emily Zackin, <em>Looking for Rights in all the Wrong Places:</em> Why State Constitutions Contain America’s Positive Rights</td>
<td>1109</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1113</td>
</tr>
<tr>
<td>B.</td>
<td>THE NATURE OF STATE CONSTITUTIONAL CHANGE</td>
<td>1113</td>
</tr>
<tr>
<td></td>
<td><em>Opinion of the Justices</em></td>
<td>1113</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1121</td>
</tr>
<tr>
<td></td>
<td><em>Gatewood v. Matthews</em></td>
<td>1121</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1128</td>
</tr>
<tr>
<td>C.</td>
<td>METHODS OF STATE CONSTITUTIONAL CHANGE — AMENDMENT OR REVISION?</td>
<td>1128</td>
</tr>
<tr>
<td></td>
<td><em>Adams v. Gunter</em></td>
<td>1128</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1136</td>
</tr>
<tr>
<td></td>
<td><em>Raven v. Deukmejian</em></td>
<td>1136</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1143</td>
</tr>
<tr>
<td>D.</td>
<td>PROCEDURAL LIMITATIONS ON STATE CONSTITUTIONAL CHANGE: DUE PROCESS OF STATE CONSTITUTION-MAKING</td>
<td>1143</td>
</tr>
<tr>
<td></td>
<td><em>Amador Valley School District v. State Board of Equalization</em></td>
<td>1143</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1147</td>
</tr>
<tr>
<td></td>
<td><em>Grose v. Firestone</em></td>
<td>1149</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1152</td>
</tr>
<tr>
<td></td>
<td><em>Chicago Bar v. State Board of Elections</em></td>
<td>1152</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1157</td>
</tr>
<tr>
<td></td>
<td>Harry N. Scheiber, <em>Foreword: The Direct Ballot and State Constitutionalism</em></td>
<td>1159</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>1165</td>
</tr>
</tbody>
</table>
Table of Contents

E. STATE CONSTITUTIONAL CONVENTIONS AND COMMISSIONS ........................................ 1165
   *The Law Makers* .................................................. 1165
   Notes and Questions ............................................. 1166
   *Snow v. City of Memphis* ...................................... 1167
   Notes and Questions ............................................. 1176
   Notes and Questions ............................................. 1181
   Notes and Questions ............................................. 1184

F. SUBMISSION OF PROPOSED CONSTITUTIONAL CHANGES TO VOTERS ................................ 1185
   *Blair v. Cayetano* ................................................ 1185
   Notes and Questions ............................................. 1190

G. ACCESS TO THE BALLOT FOR STATE CONSTITUTIONAL CHANGE .................................. 1191
   *Meyer v. Grant* .................................................. 1191
   Notes and Questions ............................................. 1198

Table of Cases ..................................................... TC-1

Index ................................................................. I-1