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Introduction

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Symposium

Introduction

State Constitutionalism in the 21st Century

This Symposium was built upon a simple and perhaps naïve conceit. We decided to recruit the leading thinkers and scholars, within and without the legal academy, to write on what they saw as the cutting edge issues regarding state constitutionalism. Rather than pre-ordain a set of topics, we elected simply to witness where that scholarship led.

Developing the concept was simple; making it a reality was a formidable challenge. To that end, our most important and inspired decision was to enlist the talent and prestige of Robert Williams, Distinguished Professor of Law at Rutgers University. Professor Williams graciously agreed to not only participate and to help us identify the leading luminaries in this field, but also to allow us to shamelessly exploit his good name to entice these faculty and judges to participate.

To our surprise and delight, the result of our open-textured outreach to the academic and judicial communities did not result in a series of unrelated pieces. Rather, the articles coalesced around and served to identify the issues that will dominate state constitutional discourse in the 21st century.

The first set of articles address what we have learned about the interpretation of state constitutions in the forty or so years since the “rediscovery” of state charters as an independent source of protection of individual rights. Professor Lawrence Freidman opens our dialogue with a discussion of path dependence and external constraints on state constitutions. We were particularly honored that Justice Jack Landau of

the Oregon Supreme Court agreed to offer his thoughts and observations from the perspective of one who is tasked with giving meaning to state constitutions in a principled manner.

While the first wave of the renewal of state constitutions of necessity focused principally on the substantive contours of the rights, litigants and courts now face the equally important task of discerning what remedies should be afforded to persons deprived of these “new” rights. Professor Gary S. Gildin addresses how state constitutional law can and should emerge “outside the shadows” of federal constitutional remedies jurisprudence. Professors Helen Hershkoff and Stephen Loffredo then examine state constitutional remedies in the context of socio-economic, as opposed to political, rights.

Moving the dialogue from individual right-based analysis to structural issues and federalism, Professor Robert A. Schapiro brings to our attention the challenges of state standing in the context of two prominent fields today: the new health care law and the Clean Air Act and the ways in which states’ presence in litigation can “open the courthouse doors.” Professor John Dinan examines patterns of state constitutional amendments in controversial areas including medical marijuana, health care, redevelopment takings, and minimum wage. Professor Joseph Blocher develops his theory of “reverse incorporation,” where the federal courts treat state constitutional law as a source of persuasive authority in interpreting the federal constitution. Finally, Professor Johanna Kalb compiles a unique data set of state court citations to international treaties and argues that courts should employ these instruments when interpreting state constitutions. Each of these authors further develops and underscores the now dominant theme in federal/state constitutional dialogue studies: the authority to make law in our system is organized neither vertically nor horizontally, but rather *diagonally*.

State constitutional interpretation is not a static enterprise. Thus, it is crucial to assess how state constitutions do and should change. Professor Daniel B. Rodriguez posits that state constitutional law cannot be entirely divorced from politics; what he terms “constitutional law/politics in high fidelity” inevitably impacts state constitutional evolution. Professor Ann Lousin draws on her practical experience in helping to draft the 1970 Illinois State Constitution to analyze whether amendment or a constitutional convention is the better avenue to amend a state constitution.

Most of the commentary to date has viewed state constitutionalism as a largely American phenomenon. In fact, the role of subnational constitutions turns out to be a topic worthy of transnational study. Professor Williams draws upon his unparalleled wealth of experience

and expertise to advocate teaching and researching comparative subnational constitutional law. Professor G. Alan Tarr, Director of the Center for State Constitutional Studies at Rutgers University-Camden, articulates the “space” that the architecture of federal systems leaves for subnational constitutions. And Jonathan Marshfield, a recent LL.M. graduate from New York University School of Law, explores differing models of subnational constitutionalism, in particular the constitutional and federal theories.

This Symposium would not have been possible without the dedicated support of many people who devoted tireless energy, effort, and creativity in making the live event and publication a success. Mention of all who contributed would command an undue amount of print. We particularly thank Professors James Gardner, Jim Rossi, Justin Long, and Gerald Benjamin for sharing their analyses during the live Symposium. We are extremely grateful for the tireless efforts and patience of Brenda Johnson who coordinated the innumerable logistical details of the Symposium. Assistant Dean Nancy LaMont and Director of Business Services Kar Souders helped us navigate various internal hurdles in the way that only they can. Sherry Miller’s formatting abilities brought the print law review to life and Pam Knowlton and Ellen Foreman lent their public relations acumen so the Symposium could receive the public attention that it rightfully deserved.

Finally, we thank the Law Review Editorial Board and Staff members who both helped coordinate the live Symposium and then undertook the arduous task of editing and publishing this volume. The Law Review recognized the value that our Symposium would have in the broader legal community and relished the opportunity to engage in this scholarly dialogue. In particular, we thank Michael Sabet, Executive Articles Editor, for his tireless work, and his Articles staff of Matthew Westover, Brad Gorter, Paul Van Fleet, and David Cramer. Each of these editors spent many long evenings making this final product as close to perfect as possible.

State constitutional law is a vibrant, albeit still underappreciated, area of legal study. With this Symposium, we hope that the contours of this field have been expanded, the debate over its use, application, and future grows, and that state constitutional law continues to take its rightful place alongside the federal charter in the continued debate over constitutional jurisprudence in the United States.

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