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FOREWORD: WESTERN STATE CONSTITUTIONS IN THE AMERICAN CONSTITUTIONAL TRADITION

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It has been more than a quarter century since state supreme courts—both in the Western states and elsewhere—began to rediscover their states' declarations of rights and confer greater protections than are available under current interpretations of the United States Constitution.[1] It is now commonplace to attribute this new judicial federalism to the anticipated/dreaded/welcomed erosion of Warren Court rulings on civil liberties by the Burger Court.[2] What is less recognized is the marked effect that this path to the rediscovery of state constitutions has had on our understanding of those documents. First, the new judicial federalism focused attention on one part of the state constitution, the state declaration of rights, rather than on the entire document. Even when scholars and litigators looked beyond the confines of the declaration of rights, as occurred in school-finance litigation, they did so in the service of rights, transforming state-responsibility provisions into rights guarantees.[3] Second, proponents of the new judicial federalism approached the rights guarantees in state constitutions in terms of how judges should interpret them, looking to state courts (as they had to federal courts) as the engine of constitutional reform. Third, in addressing the interpretation of state constitutions, scholars of the new judicial federalism viewed state constitutions in a vertical relational context, tending to read state provisions in view of their relation to analogous federal provisions.[4] Thus, an extensive literature developed about the conditions under which state courts were justified in diverging from Supreme Court interpretations of analogous federal provisions.[5] Finally, perhaps because of the narrow focus of research on the new judicial federalism, this research remained divorced from the broader body of constitutional law research, with a consequent loss in stature and in intellectual excitement.[6]

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1. For overviews of the new judicial federalism and its consequences, see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997); and Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

2. *See, e.g.*, Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism"*, 2 EMERGING ISSUES ST. CONST. L. 233, 235 (1989).

3. For overviews of the school-finance litigation, see *Symposium: Investing in Our Children's Future: School Finance Reform in the '90s*, 28 HARV. J. ON LEGIS. 293 (1991); and G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING, ch. 11 (1998).

4. Patterns of interaction between state and federal courts and among state courts have been described as vertical judicial federalism and horizontal judicial federalism, respectively. *See* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 5 (1988).

5. *See* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); 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); *and* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997).

6. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L. J. 841 (1992).

These comments are not meant as criticism—new fields of inquiry cannot spring forth fully developed. Nevertheless, the best current research on state constitutionalism reveals that the field has been transformed. This Symposium on the constitutions of the Western states both reflects this transformation and contributes significantly to what is now a rapidly advancing field of study. The editors of the New Mexico Law Review are to be commended for the outstanding set of articles they have collected for this Symposium examining Western state constitutions at the dawn of the twenty-first century.

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Although current research continues to address how judges should interpret state constitutions, most of the legitimacy concerns associated with state judges' development of state rights guarantees have been resolved.[7] Thus, in recent years, scholars began to explore alternative approaches to state constitutional interpretation, linking their research to the constitutional theory literature that has dealt with the interpretation of the Federal Constitution.[8] Professor Rachel Van Cleave's fine contribution to the symposium demonstrates the benefits of this connection.[9] At the same time, her article reveals why distinctive features of state constitutions, such as the ease and frequency of their amendment, and the different eras in which they were adopted, require a distinctive approach to their interpretation.[10] This is particularly true for Western state constitutions, many of which were drafted over a century after the Federal Constitution and thus reflect a quite different understanding of constitutional design and of politics.[11] The articles by one of the present authors, Robert Williams,[12] and by Professor Michael B. Browde,[13] examine the rights adjudication issue in the context of one specific Western state: New Mexico. The new judicial federalism was in many ways fueled from the West, with California[14] and Oregon[15] making early and sustained contributions to the increase in state constitutional rights protections.

The distinctiveness that Professor Van Cleave has highlighted has emerged as a major theme in state constitutional studies, as scholars have directed their attention

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7. See sources cited *supra* note 5.

8. *See* Tarr, *supra* note 6, and Roundtable: *Responses to James A. Gardner, The Failed Discourse of State Constitutionalism*, 24 RUTGERS L. REV. 927 (1993).

9. *See* Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199 (1998).

10. For further treatment of these themes, see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS ch. 1 (1998).

11. Leading sources on Western constitutionalism include Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L. J. 945 (1994); DAVID A. JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-1890 (1992); GORDON MORRIS BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING: 1850-1912 (1987); and JOHN D. HICKS, THE CONSTITUTIONS OF THE NORTHWEST STATES (1924).

12. *See* Robert F. Williams, *New Mexico State Constitutional Law Comes of Age*, 28 N.M. L. REV. 379 (1998).

13. Michael B. Browde, State v. Gomez *and the Continuing Conversation Over New Mexico's State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387 (1998).

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

15. *See, e.g.*, David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992), *and* David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES ST. CONST. L. 275 (1989).

beyond declarations of rights to look at state constitutions as a whole. One distinctive feature of state constitutions is that they tend to address a wider range of topics than the Federal Constitution, serving not only as a framework for governing but also as an instrument of governance. The regulation of corporations by Western constitutions drafted during the late nineteenth and early twentieth centuries illustrates how states have constitutionalized aspects of public policy.[16] Some states incorporated into their constitutions detailed legislation regulating railroads and other corporations and protecting consumers and labor.[17] Idaho's 1889 charter declared railroads to be public highways and subjected their rates to legislative regulation.[18] The Montana and Wyoming Constitutions abrogated the "fellow-servant" rule, a common-law doctrine that prevented workers from collecting in court litigation for work-related injuries. The Wyoming charter also forbade labor contracts that released employers from liability for injuries suffered by workers, and the North Dakota Constitution forbade the exchange of worker "black lists" between corporations.[19] States also created institutions designed to monitor and, where necessary, curb illicit practices and abuses. Thus, the Idaho Constitution established a labor commission, and the Wyoming Constitution an inspector of mines.[20] In addition, states specifically withdrew legislative authority to enact statutes that might advantage corporate interests. The Idaho and Montana

16. A full account of the Western constitution-makers' approach to the regulation of corporations, however, must recognize a basic ambivalence. Many convention delegates opposed stringent restrictions on corporations. This opposition to regulation was not confined to apologists "owned" by the corporations. For if corporations were feared as a source of corruption and oppression, their importance as a source of capital for economic development was also recognized. Constitution-makers acknowledged, albeit reluctantly, that the prosperity of their states was inextricably linked to the success of large "foreign" corporations and feared that excessive restrictions might drive those corporations from the state. Western delegates in particular perceived this connection and, while imposing some restrictions, rejected more stringent ones and offered important concessions designed to attract corporations. One such concession, incorporated into the Colorado and Idaho constitutions, permitted the taking of private property for private as well as public use, provided that just compensation was paid. *See* COLO. CONST. art. II, § 14, *and* IDAHO CONST. art. I, § 14. Such provisions supported the development of mining interests in those states, particularly large-scale, capital-intensive quartz mining. Another significant concession was Nevada's elimination of taxation on mines. Opponents of the exemption charged that its beneficiaries would be "foreigners—aliens, who wish us no good." JOHNSON, *supra* note 11, at 224. Proponents conceded the point but successfully maintained that taxation of mines would drive away the "foreign" capital that was essential to developing the only resource the state possessed. These same arguments were reiterated as other conventions considered what constitutional restrictions to place on corporations. In Montana, for example, a proposal to make corporation directors and stockholders jointly liable for corporate debts was defeated after a delegate argued that it would "not only drive all foreign capital invested in the state away but would prevent all future inquiries." BAKKEN, *supra* note 11, at 78. In Colorado, another limitation was defeated after a delegate charged that if adopted, "not another mile of railroad [would] be built" in the state. *Id.* at 77.

17. In fact, the constitutionalization of detailed economic legislation can be traced as far back as the Florida Constitution of 1839, whose banking article was patterned after a New York statute of the previous year. The provision was sufficiently detailed and complete that the Florida legislature did not need to enact a state banking law. *See* ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 163 (1917).

18. *See* IDAHO CONST. art. XI, § 5. For discussion of the development of the Corporations Article of the Idaho Constitution, see DENNIS C. COLSON, IDAHO'S CONSTITUTION: THE TIE THAT BINDS 125 (1991).

19. *See* MONT. CONST. of 1889, art. XV, § 16; WYO. CONST. of 1889, art. IX, § 4, and art. X, § 4; *and* N.D. CONST. of 1889, art. XVII, § 212. For a discussion of these provisions, see HICKS, *supra* note 11, at 92-95; BAKKEN, *supra* note 11, at 80; and ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION: A REFERENCE GUIDE, at 188-89 and 193-196 (1993).

20. *See* IDAHO CONST. of 1889, art. XIII, §§ 1, 8; *and* WYO. CONST. of 1889, art. IX, § 1. For a discussion of these provisions, see BAKKEN, *supra* note 11, at 79-80; COLSON, *supra* note 18, at 127-129; and HICKS, *supra* note 11, at 92-95.

Constitutions, for instance, both specifically forbade enactment of retroactive laws favorable to railroads.[21] Finally, states attempted to prevent corruption of state officials by corporate interests by establishing constitutional limitations on the gifts and other benefits that those officials could accept from them.[22] Professor Daniel Rodriguez's impressive contribution to this Symposium addresses how the states have constitutionalized public policy and the effects this has had on governance.[23] His study focuses on the constitutional limitations that California has chosen to impose on the development of local fiscal policy. However, it raises much broader questions about the appropriate scope of constitutional limits on local fiscal decision-making. It also raises the crucial question of how state constitutions affect state politics by subtly analyzing how local authorities have adapted to the constitutional limitations imposed upon them.

The recent literature on state constitutionalism has also moved beyond judicial interpretation of state constitutions to a broader perspective on the dynamics of constitutional change in states.[24] Perhaps the most striking discovery has been the ease with which state constitutions are revised and amended and the frequency with which states have availed themselves of the formal avenues for constitutional change.[25] The Western states stand out in their unwillingness to jettison their original constitutions—only three of the fifteen Western states have replaced their original constitutions, and only Montana has done so since 1900.[26] However, this is not because of an unwillingness to tamper with the framers' handiwork—the Western states have been quite willing to amend their fundamental law. In fact, over the course of the twentieth century, the frequency of constitutional amendment in the Western states has increased. New Mexico's experience is in many respects typical: from 1912-1969, it adopted seventy-three amendments, but from 1969 to 1995, it adopted ninety-eight.[27] The ratification rate for proposed amendments has also increased. Once again, New Mexico illustrates the trend: from 1912-1945, it ratified only thirty-five percent of proposed amendments, but from 1945-1995, it ratified sixty-five percent.[28]

In their preference for amendment over revision, the Western states reflect a century-long national trend: only twelve states have revised their constitutions since

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21. *See* IDAHO CONST. of 1889, art. XI, § 12; *and* MONT. CONST. of 1889, art. XV, § 13. The Idaho provision is discussed in COLSON, *supra* note 18, at 125; and DONALD CROWLEY & FLORENCE HEFFRON, THE IDAHO STATE CONSTITUTION: A REFERENCE GUIDE 206 (1989).

22. For surveys of pertinent provisions, see HICKS, *supra* note 11, at 56-63, and LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 349-350 (2d ed. 1985).

23. *See* Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271 (1998).

24. In addition to the sources listed in note 11, see CONSTITUTIONAL POLITICS IN THE STATES (G. Alan Tarr ed., 1996).

25. For data on the frequency of state constitutional revision and amendment, see COUNCIL OF STATE GOVERNMENTS AND THE AMERICAN LEGISLATORS' ASSOCIATION, BOOK OF THE STATES (1997).

26. This is not for lack of effort. During the late 1960s, when Montana began considering constitutional revision, other states in the region did so as well. In 1970, new constitutions were proposed in Idaho and Oregon, but the voters in those states refused to ratify them. Two years later, the voters in North Dakota also rejected a proposed constitution. We classify the following as Western states: Alaska, Arizona, California, Colorado, Hawai'i, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

27. *See* CHUCK SMITH, THE NEW MEXICO STATE CONSTITUTION: A REFERENCE GUIDE 15-24 (1996).

28. *See id.*

1900.[29] What is atypical is the mechanism that several Western states have relied upon for constitutional reform. In most states, amendments can only be proposed by the state legislature.[30] Eight of the Western states, however, permit constitutional amendment by popular initiative as well.[31] The effects of this Western innovation, which has since spread eastward, have been the subject of intense debate in recent years.[32] Professor John Cooper's contribution to this Symposium thus performs a major service by replacing the sometimes overheated rhetoric about the constitutional initiative with a balanced and thoughtful evaluation of the current debate and of the operation of the initiative in the late twentieth century.[33]

The states' development of distinctive institutions and practices, such as the constitutional initiative, has stimulated research designed to address why state constitutions differ from the Federal Constitution and from each other. Daniel Elazar has identified patterns in state constitutional development, and some later scholars have built upon his stimulating analysis.[34] Other studies have looked intensively at constitutional development in a single state or sets of states.[35] Patrick Baude's interesting contribution to this Symposium demonstrates how important such research can be.[36] Western state constitutions are justly famous for their devices for direct popular input in government: the initiative, referendum, and recall. Indeed, as Edward S. Corwin has observed, "one of the greatest lures to the westward movement of population was the possibility which federalism held out to the advancing settlers of establishing their own undictated political institutions, and endowing them with the generous powers of government for local use."[37] Professor Baude's study shows, however, that this movement for popular involvement in governing has its roots in a shift in political thinking that occurred as early as the Jacksonian era, when the constitutional ideal of a negative constitution, that sought to protect liberty by limiting government, gave way to the ideal of a positive constitution, that sought to do so by granting power to the citizenry.

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29. Georgia and Louisiana have revised their constitutions three times during the twentieth century, and Michigan twice.

30. For data on modes of constitutional amendment, see BOOK OF THE STATES, *supra* note 25.

31. These states include Arizona, California, Colorado, Montana, Nevada, North Dakota, Oregon, and South Dakota. Altogether, eighteen states nationwide have some version of the constitutional initiative.

32. *See, e.g.*, Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143 (1995).

33. *See* John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227 (1998). For another thoughtful account that expresses a considerably more negative assessment about the use of the initiative for state constitutional change, see Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L. J. 787 (1997).

34. *See* Daniel J. Elazar, *The Principles and Traditions Underlying American State Constitutions*, 12 PUBLIUS 11 (1982); and Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottleib eds., 1991).

35. See, in addition to the sources listed *supra* note 11, the volumes in REFERENCE GUIDES TO THE STATE CONSTITUTIONS OF THE UNITED STATES (G. Alan Tarr Series ed., 1990-97).

36. *See* Patrick Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. REV. 343 (1998).

37. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 22 (1950).

His study also illustrates how constitutional ideas are transmitted from state to state. This horizontal federalism has been crucial in state constitution-making.[38] It was particularly important in the West, because Western constitution-makers had a wide range of constitutional models on which to draw. Indeed, there is evidence that state constitutional ideas were being developed and implemented by settlers from the Eastern states on their trek West.[39] Yet if Western constitutions were influenced by earlier Eastern models, the relationship was reciprocal. The Eastern states, in the words of Frederick Jackson Turner, felt the "stir in the air raised by the Western winds of Jacksonian democracy."[40] Thus, the winds of state constitutional change blew not only to the West, but also back to the East.

Much work remains to be done on the patterns of interstate influence in constitution-making. Nevertheless, the recent work of Christian Fritz has demonstrated the thoughtfulness and care with which the Western state constitution-makers built upon the lessons of their predecessors, and his conclusion is worth quoting at length:

> these states did not fashion their fundamental law in isolation or unaware of constitution-making in the other states. The notion of "frontier" constitution-making must be regarded as a myth. Sophistication among delegates and the work they produced varied, but in the process of drafting constitutions (and on one occasion revising an existing constitution), delegates to Western conventions demonstrated their connection with broader regional and national developments in constitutionalism.[41]

Professor Matthew Schaefer's account of state efforts to compete for investment through subsidies to private corporations offers an interesting complementary perspective.[42] As Professor Schaefer notes, most state constitutions impose limitations on this use of state authority, in part in reaction to the misuse of such authority during the nineteenth century. Although the Western states did not experience such abuses, they learned from the experience of sister states and banned public subsidy of private enterprise. This demonstrates once again the interstate influence on state constitutions. Yet since the adoption of those provisions, many states have reconsidered the relationship between government and private industry, and these provisions now stand as barriers to economic development programs. His article thus surveys alternative means, ranging from amendment to circumvention by judicial interpretation to external intervention through the World Trade Organization or the Federal Government. In doing so, he underscores not only the

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38. *See* TARR & PORTER, *supra* note 4, at 27-29.

39. *See* John Phillip Reid, *Governance of the Elephant: Constitutional Theory on the Overland Trail*, 5 HASTINGS CONST. L. Q. 421 (1978).

40. FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 192 (1920).

41. Fritz, *supra* note 11, at 995-96.

42. *See* Matthew Schaefer, *State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response*, 28 N.M. L. REV. 303 (1998). For other treatments of these topics, see William Green, *State Constitutions, Industrial Recruitment Incentives, and Japanese Automobile Investment in Mid-America*, 22 URB. LAW. 245 (1990); and THE POLITICS OF INDUSTRIAL RECRUITMENT: JAPANESE AUTOMOBILE INVESTMENT AND ECONOMIC DEVELOPMENT IN THE AMERICAN STATES (Ernest J. Yanarella & William C. Green eds., 1990).

importance of state economic provisions but also the range of possible influences on the meaning of state constitutional provisions.

We conclude by noting how the change in focus in state constitutional studies has helped to integrate that research into the larger body of constitutional research, both within the legal academy and in other disciplines. The concern for the constitutive role of state constitutions parallels the recent research of Bruce Ackerman, Paul Kahn, and Cass Sunstein.[43] The concern for constitutional dynamics beyond judicial development coincides with the pioneering work of Sanford Levinson and others.[44] The interest in state constitutions' contribution to state political development complements important research in political science and in history.[45] Finally, the concern for the consequences of various constitutional arrangements is pertinent to the new constitutionalism in Central and Eastern Europe and in Africa.

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43. *See* BRUCE A. ACKERMAN, WE THE PEOPLE: (1991); PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992); *and* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

44. *See* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

45. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982); *and* MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA (1977).