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Assessing the State of the State Constitutionalism

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THE LAW OF AMERICAN STATE CONSTITUTIONS. By *Robert F. Williams*. Oxford and New York: Oxford University Press. 2009. Pp. xv, 433. $95.

Robert Williams's *The Law of American State Constitutions*[1] is an impressive career accomplishment for one of the leading academic lawyers writing on state constitutions. Given the need for a comprehensive, treatise-like treatment of state constitutions that transcends individual jurisdictions, Williams's book will almost certainly become the go-to treatise for the next generation of state constitutional law practitioners and scholars. The U.S. Constitution has a grip on how the American legal mind approaches issues in American constitutionalism, but an important recurring theme in Williams's work (as well as that of others) is how state constitutions present unique interpretive challenges.[2] More than any other legal academic, Williams has advanced the view—in this book and elsewhere—that the unique nature of state constitutions requires an appreciation of the text, legal community, and interpretive norms of the specific jurisdiction engaging in the interpretation.

State constitutions are very important legal documents, but their interpretation is remarkably understudied (and, of course, highly undertheorized) in the academic literature. Williams's descriptive account of state constitutions is very informative and lawyerly; his book fills a notable void to the extent it synthesizes many important features and doctrines of state constitutional law, grounding them in historical context. It is the most significant account of modern state constitutions to date, and his book exhaustively surveys a wide range of the issues state courts have struggled with in interpreting their constitutions.

While the publication of Williams's book represents an important step forward for the field of state constitutional law (what serious area of American law lacks a good national treatise?), this area of scholarship remains underdeveloped. Basic issues remain ripe for exploration by scholars, such as how state constitutions should be interpreted, how new constitutional rights evolve, and how state constitutional protections interact with federal

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2. In this sense, Williams's book may be seen as the lawyers' companion to G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998) (a political science account of the distinct constitutional culture of state, as opposed to federal, constitutional politics).

rights and regulatory programs. With many important topics continuing to lack serious analytical study, the field has many opportunities for advancement. However, it is unlikely to take major strides forward as an academic field until lawyers begin to seriously approach state constitutions with an eye toward federalism concerns and with a normative understanding of state power. Scholars must also begin to engage with how variations and similarities across various states are informed and influenced by institutional variables other than text and interpretive style. Legal scholars need to begin paying as much attention to the various features of the "state" of state constitutionalism as they do to its legal sources, such as its constitutional text and history.

Part I of this Review briefly summarizes Williams's book. In Part II, I discuss the normative significance of Williams's book, focusing especially on his discussion of independent state constitutions and the positive theory of interpretation he advances. Part III highlights some areas where the field of state constitutional law is in need of further advancement, including research that positions state constitutions within federalism and engages in serious institutional analysis.

I. A TREATISE IN FIVE PARTS

Williams's book presents a superb treatise-like survey of the substantive legal issues presented by state constitutions. The five-part structure of the book maps nicely onto his widely used casebook on state constitutions, and thus the book is likely to serve some use as an advanced treatise for those who wish to have a more in-depth treatment of specific issues.

The first part of the book examines the historical origins of state constitutions and their role in American federalism. As Williams highlights in Chapter One, state constitutions are unique legal documents in many respects. They are far more detailed than the U.S. Constitution, particularly with respect to their rights provisions (p. 16). They are "subnational" and thus operate within a system of American federalism based on *imperium in imperio* (empire within an empire).[3] This is also true of all state statutes and many other features of state law. But state constitutions reflect far more significant political commitments than do ordinary statutes, defining basic rights available within states and the allocation of powers within state government.

Williams's overview of the legal issues provides a solid and accessible historical introduction to state constitutions and their role in American constitutionalism more generally.[4] As many as eighteen to twenty early state

3. *See* FORREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876 (2000).

4. As Williams acknowledges, another great source for understanding the significance of state constitutions not only on their own terms but also for American constitutionalism more generally is JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2006) (looking to state constitutional conventions as a historical source to shed light on the American constitutional tradition).

constitutions—including those of Massachusetts, New York, and Maryland—provided a rich palette for drafters of the U.S. Constitution during the founding decade of 1776–1787 (pp. 37–39). Many of the ideas in the U.S. Constitution, including fundamental issues of governmental structure and individual rights, were not original but were themselves borrowed from the colonies.[5] Williams emphasizes that the early subnational constitutions of the colonies were focused primarily on issues of the structure of government; only later did they expand into documents that placed rights at the forefront (p. 41).

Williams also surveys the rich variation of early state constitutions. The first wave of state constitutional adoption included the Pennsylvania Constitution of 1776 (p. 43), which vested legislative powers in a unicameral assembly, mimicking Thomas Paine's notorious (if somewhat infamous) call in *Common Sense* for a simple government of a unicameral legislature and a wide elected franchise.[6] The second wave of state constitutional adoption is best exemplified by the Massachusetts Constitution of 1780 (p. 58), which established an elected governor (with no limit on reelection), Senate, and council of government that can veto bills. Adopting a similar approach, New York's 1777 constitution "provided a model based on the blending of governmental powers that appealed to many of those who opposed the Pennsylvania Constitution" (p. 56). This second-wave approach may have proved more influential to the U.S. Constitution, given that it (and eventually most states, including Pennsylvania) ultimately rejected a unicameral legislative model.

The lessons from Williams's survey of the history of forgotten state constitutions are important to understanding features of modern state constitutions. For example, in contrast to the U.S. Constitution, which enumerates legislative powers, the prevailing view among state constitutions is that the basic sovereign power of the state is held by the legislature.[7] This vesting of plenary power in a state legislature (p. 249), rather than enumerating specific powers, seems to have had its origins in the "almost . . . forgotten" (p. 71) 1776 Pennsylvania Constitution. Williams reminds us why historical state constitutional origins should not be ignored by modern legal academics and practitioners.

As Williams emphasizes in Chapter Four, state constitutions are not only integral to a proper understanding of the U.S. Constitution, they are also

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5. Another important historical account is DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980). Historians, of course, have long-recognized the significance of early colonial constitutions in the creation of the American republic and the U.S. Constitution. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969).

6. ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 75 (1976).

7. *See* W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 137 (1919).

subordinate to it. Under the Supremacy Clause,[8] federal laws can limit the content of state constitutions. Despite this, state constitutions continue to play a major role in expanding the interpretation of constitutional rights.

The entirety of part II, spanning more than 120 pages of Williams's book, is focused on rights guaranteed by state constitutions. While state constitutions are fairly expansive in these guarantees, much of state constitutional-rights adjudication focuses on whether state courts should follow or diverge from federal constitutional doctrine.[9] The "New Judicial Federalism," advanced by Justice Brennan in the 1970s, was a rediscovery of state constitutional-rights protections.[10] This movement was sparked by an expansion in constitutional-rights litigation in the 1960s. Although it is questionable that the use of state constitutions to recognize rights is really "new,"[11] Williams's survey provides a strong overview of this twentieth-century development, especially in the context of criminal procedure cases (pp. 178–87, 201–05), free speech and religion protection cases (pp. 182–83, 200–01), and equality protections (pp. 209–24). Recent state same-sex marriage cases[12] are not discussed at length, despite Williams's acknowledgement that these decisions "thrust the field of state constitutional law onto the national stage in a way that had never happened before" (p. 6). It is odd that these landmark cases receive only passing mention and little discussion in the section on constitutional-rights adjudication (pp. 162, 220) and are not really analyzed for more than a sentence or two elsewhere in the book.

In part III, Williams discusses structure-of-government issues. This part is only two-thirds of the length of his discussion of rights provisions. However, the mere fact that Williams has devoted even this much of his book to topics concerning separation of powers is significant. The bulk of scholarship addressing state constitutions has focused heavily on constitutional-rights adjudication as the model for state constitutional discourse,[13] and, given how "new" and innovative Justice Brennan declared the phe-

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8. U.S. CONST. art. VI, cl. 2. The last phrase of the Supremacy Clause explicitly provides for federal preemption of state constitutions ("[A]nd the Judges in every State shall be bound thereby, any Thing in the Constitutions or Laws of any State to the Contrary notwithstanding.").

9. I return to this topic in Section II.B, *infra*.

10. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (stating that rulings of the U.S. Supreme Court "are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them").

11. *See, e.g.*, Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 3 (2007) (noting how early state courts applied the Federal Bill of Rights "to invalidate state laws and otherwise constrain state government").

12. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); In re Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

13. *See supra* notes 11 and 12; *see also* Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 739 (2002) (acknowledging that state constitutions have focused on the expansion of positive rights).

nomenon to be,[14] this is not surprising. But Williams's book begins to make a case for returning the analysis of the structure of government to the imminence in state constitutional law conversations that it has been afforded in discussions about the U.S. Constitution—which frequently view structural issues as informing the enforcement and development of constitutional rights. The historical predicates for this, Williams highlights, can be traced to the earliest debates about state constitutions (pp. 37–51). Although only briefly, he also provides an excellent overview of some of the modern issues presented by the unique state legislative process (pp. 267–81); the nature of judicial power in the states, including advisory opinions, the inherent powers of states courts, and state judicial-lawmaking functions under the common law (pp. 285–301); and the unique problems presented by a fragmented state executive branch (pp. 303–10).

Part IV of Williams's book provides an overview of unique interpretive issues presented in state constitutional law. Williams makes a case that textualism, constitutional construction by the legislature, and precedent all have potentially greater significance in states than they do in our federal system (pp. 313–56). Recognizing the lack of durability of many state constitutional commitments and provisions, the book concludes in part V with an overview of the state constitutional-revision process (another interesting contrast to the U.S. Constitution, given the frequency with which it occurs), along with a discussion of what Williams describes as a well-established role of courts in the constitutional-revision process (pp. 359–99).

II. WILLIAMS'S NORMATIVE THEORY OF STATE CONSTITUTIONS

In addition to his excellent survey of the range of doctrinal issues presented by state constitutions, Williams's book stakes out two important normative positions. One is the legal positivist approach to state constitutions, which argues that the approach to interpreting a state's constitution should derive from the legal sources recognized by a distinct community of practitioners and jurists within a particular jurisdiction. More than any other work published to date, Williams's book convincingly argues that each state's constitution presents a unique interpretive challenge for practitioners and jurists within that jurisdiction. This position rejects an open-ended common law approach to state constitutional interpretation. The second normative position is Williams's opposition to rigid lockstepping of state and federal constitutional provisions.

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14. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (4th ed. 2006); BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW (1995); JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW, at xvii (2008); *see also* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005) (advancing state constitutional interpretation as focused on protecting individual liberty from federal encroachments).

A. *The Legal Positivist Approach*

Along with former Oregon Supreme Court Justice Hans Linde, who has emphasized that state constitutions are "not common law,"[15] Williams has been a leading advocate of a positivist approach that grounds state constitutional law in text and other jurisdictional sources of public law. Linde[16] and Williams treat each state constitution as an independent text. This approach draws on the same interpretive tools used in federal constitutional interpretation—text, history, structure, precedent, character, and values—but applies them to different texts, inviting state supreme courts to adopt more or less the same methods in interpreting state constitutions as the U.S. Supreme Court uses to interpret the Federal Constitution. Such a method constrains judges from making policy through constitutional law and also relies on the traditional tools of constitutional construction that are conventionally used to frame legal arguments in constitutional law.

This approach is often contrasted with what Paul Kahn describes as the "common principles" approach, in which state constitutional law might be approached as a branch of common law, akin to torts or contracts.[17] The common principles approach has a long tradition, beginning with the work of Judge Thomas Cooley more than a century ago.[18] To the extent state constitutional law has identifiable common law principles, many of its doctrines can be generalized across states, and it may become commonplace for one state to borrow from another in developing its constitutional principles. In contrast, Williams advances an understanding of state constitutions not as an "undifferentiated body of general principles existing independent of any particular constitution."[19] Instead, "in specific states, based on differences in state constitutional text, constitutional history, judicial precedent, or judicial philosophy, the resolution of interpretive questions will differ" (p. 11).

This positivist approach has many allies in the legal community—it is, after all, what judges and lawyers who litigate about state constitutions do—but the approach faces many challenges in the context of state constitutions. Many of these challenges derive from its jurisprudential approach to constitutional law and assumptions about its relationship to the state as a jurisdictional sovereign. James Gardner has characterized this approach as "the Lockean model,"[20] to the extent it derives from the assumption that a

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15. Hans A. Linde, *State Constitutions are Not Common Law: Comments on Gardner's* Failed Discourse, 24 RUTGERS L.J. 927 (1993).

16. *See generally* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984). As Gardner suggests, Linde relies heavily on the interpretive model presented by PHILLIP BOBBITT, CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION 48 (1982).

17. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1162–63 (1993).

18. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

19. P. 11 (citing James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 126–27 (1998)).

20. GARDNER, *supra* note 14, at 59–60.

single sovereign's law governs within its jurisdiction. However, because of the federal structure in which they exist, state constitutions cannot be interpreted in a jurisdictional vacuum.

While the unique interpretive community of lawyers and judges seems to stand on solid ground within any single jurisdiction, the positive approach is challenged to provide an account of some of the methods state courts use in interpreting their own constitutions, including surveying the approaches of other states or counting the number of states that take a similar approach. For example, state constitutional cases frequently facilitate a type of horizontal federalism, in which one state borrows or looks to another state to interpret constitutional text and to help fill in gaps in its own. At the extreme, John Frank once lamented how state constitutional law was at risk of becoming "a sort of pallid me-tooism."[21] While Williams acknowledges that horizontal federalism is a "very common approach" (p. 352), the practice receives surprisingly little doctrinal attention in his discussion.[22] Ultimately, however, as Williams discusses, given the variation in the history of constitutions across various states, horizontal borrowing is going to vary depending on the state constitutional provision's origins and histories, along with the interpretive approach of that state's legal community.

If states conceive of themselves as participating in a broader national dialogue about constitutional rights, as they surely seem to in the context of issues like same-sex marriage, state courts interpreting constitutional provisions will frame their precedents in broader terms than the positive approach would endorse. On the one hand, the positive approach favors a narrow approach to precedent, insofar as the approach defines its legal sources jurisdictionally. On the other hand, as Williams himself highlights, there is reason to believe that other state judicial decisions interpreting similar constitutional provisions should be afforded greater weight as precedents than U.S. Supreme Court decisions interpreting similar provisions of the federal Constitution (p. 137). Still, the positive approach is challenged to provide an explanatory and normative account of horizontal borrowing of constitutional precedents from other jurisdictions.

B. *Williams's Treatment of Overlapping Constitutional Provisions*

Another challenge for a positivist approach to state constitutions is that state and federal constitutions often operate in a shared space. For example, rights provisions of many state constitutions overlap—and sometimes mimic or serve as a historical predicate for similar rights-oriented provisions in the federal Constitution, such as those that protect speech and the rights of criminal defendants. Williams is a leading critic of the so-called "criteria" approach of deciding when to interpret state constitutional-rights provisions (p. 130). Under this approach, a state court accepts a federal interpretation

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21. John P. Frank, Book Review, 63 TEX. L. REV. 1339, 1340 (1985).

22. One chapter in Williams's book (Chapter Twelve, "Interpreting State Constitutions") discusses the phenomenon and various approaches states take to constitutional borrowing.

of a constitutional provision but also articulates criteria under which the state court will interpret the right more broadly. For example, in *State v. Gunwall*, the Washington Supreme Court articulated several criteria it would look to in assessing whether the Washington Constitution extends broader protections to warrantless searches than the Fourth Amendment of the U.S. Constitution.[23] Such criteria include a variety of sources of law under the Washington Constitution, including "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."[24] Williams sees the criteria approach, which is widely used in constitutional-rights adjudication in states,[25] as a challenge to the notion of independent state constitutionalism. As Williams warns, the concern is that this gives federal constitutional provisions a "presumption of correctness" (p. 185), relegating state constitutional protections to what (then) New Hampshire Supreme Court Judge (later U.S. Supreme Court Justice) Souter called "a mere row of shadows."[26]

In his book, along with his earlier work spanning nearly three decades,[27] Williams advances the notion that state courts have an obligation to independently interpret their own constitutional provisions and not blindly accept U.S. constitutional decisions as presumptively correct. He is unequivocally critical of "kneejerk" and "unreflective" state judicial deference to federal constitutional protections in the form of "lockstepping" interpretation (p. 196). Some state constitutions explicitly require such lockstepping. The provision of Florida's Constitution dealing with unreasonable searches and seizures states, "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."[28] Williams and other advocates of independent state constitutionalism do not claim that such textual provisions should be ignored; instead, they maintain that where state constitutional text fails to speak to the relevance of federal constitutional provisions, courts should take seriously state law. Like Justice Brennan, who argued that state constitutional law should not follow federal law in "lockstep,"[29] Williams argues that lockstepping, at the extreme, would "make a federal case" out

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23. 720 P.2d 808 (Wash. 1986).

24. *Gunwall*, 720 P.2d at 811.

25. Williams's book summarizes cases from Washington, New Jersey, Pennsylvania, Illinois, and Connecticut. Pp. 150–62.

26. State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially).

27. *See, e.g.*, 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); Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343 (1993); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983).

28. FLA. CONST. art. I, § 12.

29. Brennan, *supra* note 10, at 491.

of state constitutional claims (p. 229). In the end, for Williams, "[w]ith some informed attention to constitutional texts, history and the lessons of federalism—aided by the insights of practicing and academic lawyers—state courts can and should have coherent, independent doctrines surrounding their state constitutional provisions" (p. 185).

III. TOWARD A BROADER THEORY OF STATE CONSTITUTIONS

While Williams's book makes significant contributions by surveying a number of issues in state constitutionalism in ways that begin to generalize doctrinally beyond the interpretive limits of specific constitutions, in the end I found the book anticlimactic. The book ends with a very short chapter on judicial involvement in state constitutional amendments and a (very useful) bibliographic essay on state constitution research (pp. 411–15). The concluding lesson of the book seems to be that state constitutions are more prone to modification, and courts will inevitably have some role in managing this process. Of course, there is no doubt that state constitutions present a greater degree of democratic malleability than their federal counterpart, given that so many of them deal with matters of public policy and in their own texts require regular reform or revision.[30] However, apart from this well-recognized point, in the end readers will fail to find any grander theme for the roles of state constitutions and future state constitutional research. If one is looking for this kind of grander view—or for any sort of generalizable theory for approaching state constitutional interpretation in the context of horizontal or vertical federalism—Williams's book will disappoint.

Perhaps this is the hand Williams was dealt. Long ago, James Gardner decried the impoverished discourse of state constitutionalism.[31] Dan Rodriguez has called for a "trans-state" approach to state constitutional law, in which state constitutions would take on a larger significance—akin to borrowing in comparative law.[32] State constitutions have generated much discussion in reaction to particular hot-button social and political issues—*Bush v. Gore*, school vouchers, same-sex marriage, etc.—but by and large when these issues fade to the backdrop, the scholarly discourse also seems to go into hibernation.

For state constitutional discourse to really advance beyond fragmented essays on particular doctrinal issues, the larger theoretical grounding of state constitutional law needs to be articulated and worked through by scholars in ways that transcend specific issues. Unifying themes in state constitutionalism seem to be emerging along three distinctive paths: communitarian theories, functionalist theories, and positive political theories. As I will

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30. Many state constitutions explicitly require regular conventions for the purpose of updating or amending their constitutions. Pp. 359–99.

31. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763–64 (1992).

32. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 290–91 (1998).

argue, only the last of these makes a serious effort to understand states as political institutions vis-à-vis the federal government as well as on their own terms.

A. *Communitarian and Character-Based Theories*

The predominant normative theory grounds state constitutional interpretation in the character of an individual state as a political community. Endorsed by leading state supreme court judges and scholars writing in the tradition of the New Judicial Federalism,[33] this approach sees state constitutions as reflecting the unique character and values of a state's populace. For example, Judge Judith Kaye, now Chief Judge of the New York Court of Appeals, has argued that "[m]any states today espouse cultural values distinctively their own."[34] The political scientist Daniel Elazar has argued that there are "six constitutional patterns among the American states" reflecting two variables, "original constitutional conceptions of the founding era plus differences among the types and goals of pioneers who first settled the Northern, Middle, and Southern colonies of the New World."[35] In his previous work, Williams also appears to approvingly rely on this character-based approach.[36]

Over the years, James Gardner has provided a devastating critique of this view, which he calls "romantic subnationalism."[37] This approach may have presented serious barriers to the recognition of civil liberties, and Gardner's work questions its historical accuracy: "To the extent that southern state constitutions restricted the rights of slaves and free blacks, they did not differ materially from many northern and western state constitutions of the same period."[38]

But even if it were historically accurate, today the communitarian approach seems to be based on little more than a quaint fiction. It relies on a "naturalized view of geographic boundaries as demarcating significantly

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33. This is the view frequently associated with Justice Brennan's call for state courts to "step into the breach" left by a conservative turn in the U.S. Supreme Court's rights jurisprudence. Brennan, *supra* note 10, at 503.

34. *See, e.g.*, Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 244 (Bradley D. McGraw ed., 1985) (Washington Supreme Court Justice) (noting that the state constitution must be interpreted in view of "the vast differences in culture, politics, experience, education and economic status" between the state and national founding generations); Shirley Abrahamson, Speech, *Reincarnation of State Courts*, 36 SW. L.J. 951, 965 (1982) (Wisconsin Supreme Court Justice) (noting that a state's constitution must be interpreted in light of a state's "peculiarities" including "its land, its industry, its people, its history"); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 423 (1987). Other state supreme court justices have also endorsed this view.

35. Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 18 (1982).

36. *See, e.g.*, sources cited *supra* note 27.

37. GARDNER, *supra* note 14, at 21; *see also id.* at 53–79.

38. *Id.* at 74.

different peoples with significantly different characteristics and traditions."[39] Frederick Jackson Turner, a historian of the American West, articulated the "'frontier thesis' . . . that the essence of the American experience . . . [is the] encounter with the constantly receding frontier."[40] Turner identified distinctive areas of the United States—New England, the middle region, and the South—and argued that these "different colonizing peoples" had "distinctive psychological traits."[41] Dan Elazar made similar suggestions when he identified exactly "six constitutional patterns among the American states."[42] While this may have accurately described nineteenth-century America, today media and consumerism provide common experiences regardless of geography and urban problems comprise common themes that tie together Americans as a people.

Finally, even if we were to accept communitarian theory's historical and contemporary accuracy, it is not clear that courts are the best institutions to play this interpretive role. In contrast to state legislatures and executive branch officials, state judges lack the political accountability to accurately identify and implement character-based values. For example, in *Ravin v. State*, the Alaska Supreme Court relied on that state's privacy provisions to find unconstitutional a law that criminalized marijuana use in the home.[43] The court relied on the unique character of Alaskan citizens, "who prize their individuality."[44] Not long after, through an initiative the Alaskan people legalized the criminal prosecution of recreational marijuana use within the home.[45] As *Ravin* illustrates, courts may lack the political accountability to consistently and effectively integrate character-based concerns into constitutional interpretation. State legislatures or other elected officials are more likely than judges to accurately read state cultural norms.

B. *Taking Federalism Seriously*

As an alternative, James Gardner has advanced a functionalist approach, which envisions state constitutions—and states more generally—as representing political commitments of resistance to federal power. Gardner argues that state power exists not only for the benefit of the people of a state, but also for the benefit of the people of the nation. Particularly, on his view state power plays a significant role in securing the liberty of people

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39. *Id.* at 66.

40. *Id.* at 62.

41. FREDERICK JACKSON TURNER, THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY 195 (1932).

42. Elazar, *supra* note 35, at 18.

43. 537 P.2d 494, 511 (Alaska 1975).

44. *Ravin*, 537 P.2d at 504.

45. GARDNER, *supra* note 14, at 67. For a critical review, see Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211 (2006). Also, in the interests of full disclosure, Gardner and I are co-editors of the collection NEW FRONTIERS IN STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS (2010).

against federal intrusion: "to check and counteract abuses of power on the national level—particularly abuses by federal courts of national judicial power."[46] Gardner's view understands federalism as a structural system that divides governmental power to protect liberty.

There are several well-recognized examples of how state courts, in their constitutional-rights rulings interpreting state law, have adopted levels of protection for rights that exceed parallel provisions under the U.S. Constitution.[47] Gardner positions this account of state power within a functional framework that views state constitutions within a federalist system. At a minimum, his approach requires a state constitution to do at least three things:

> First, it should grant the state government sufficient authority to permit it to work directly for the public good of its citizens. Second, it should establish sufficient limits on state power to restrain, at least to some extent, the ability of state officials to use state power for unjust ends. Third, a state constitution should grant the state government sufficient power to assert itself with at least some degree of efficacy against abuses of national power by the national government.[48]

Given these functions, Gardner discusses how state constitutions take different approaches to allocating public versus private power and in allocating power among various branches, based primarily on the degree of distrust among a state's people. For example, many state constitutions provide for term limits for legislators, recalls, and the election of judges. Since state constitutions are amended much more frequently than the U.S. Constitution, Gardner sees state constitutions as a "record of a series of popular *adjustments* to state power"[49]—not, as Williams does, as having firmly rooted commitments based in history and text within a static understanding of the state's power or jurisdiction. The attention Gardner places on federalism and on his functional approach are not necessarily inconsistent with positivism of the type that Williams advances in his book; yet, by embracing a static understanding of jurisdiction, Williams's positivism provides a much more myopic model of resistance to federal power. At the extreme, this approach may represent a type of narrow turf-protective approach to state constitutional interpretation.

In the end, however, both positivism and functional theories alike fail to grapple with two fundamental questions of state constitutionalism that need to be addressed. While Williams seems to assume a static notion of dual federalism in which a state has well-defined jurisdictional space, Gardner's account is based on the primary goal of federalism as protecting liberty

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46. GARDNER, *supra* note 14, at 99.

47. For example, Williams discusses many of these examples involving state counterparts to the First and Fourth Amendments in Chapter Six of his book.

48. GARDNER, *supra* note 14, at 123.

49. *Id.* at 179.

(broadly defined) against intrusion by national authorities.[50] This classical, liberty-based understanding of federalism, however, ignores or downplays the fact that that federalism may be understood in ways that are agnostic toward national authority. As Richard Briffault has noted, the classical notion of federalism "relies on a set of political arguments, quasi-empirical assumptions, and intuitive hunches that may be countered by conflicting arguments, assumptions, and hunches."[51] Edward Rubin and Malcolm Feeley similarly warn against adhering to an idealistic notion of federalism "conjur[ing] up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard."[52] Federalism is not only about states resisting federal power; it also envisions states acting as partners with a national government in pursuing national goals through decentralized government. A broader understanding of federalism would give state courts clearer direction in implementing broader goals of federalism than protecting individual liberty as they interpret state constitutions.[53]

Moreover, functionalist approaches suffer from one of the same defects as character-based and communitarian approaches insofar as they rely on the use of judicial power to resist the reach of national power. Williams seems to assert that judicial power is a protector of rights against majority intrusions and as a referee in political and electoral disputes. Gardner argues for a presumption in favor of judicial resolution of state constitutional issues based on the role of states within his account of federalism. However, these court-centered approaches downplay other important features of state constitutionalism. For example, as the recent disputes over same-sex marriage in California and Oregon remind us, other branches of government could have a superior institutional claim to interpreting a state constitution.[54] Further, in some contexts there are strong reasons for understanding state constitutions as being focused on facilitating, not resisting, federal power.[55] To the extent Gardner's approach views courts as resistors

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50. Of course, this approach has a long tradition. *See, e.g.*, THE FEDERALIST No. 51 (James Madison) (promoting federalism, along with separation of powers, as part of the "double security" for liberty); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 498 (1991) (noting that federalism protects against government abuses of power).

51. Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1327 (1994).

52. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906 (1994).

53. For example, under process-based theories of federalism, states are protected to ensure a legitimate process of national governance. Larry Kramer argues that the more important variables in ensuring state representation in national political processes are political parties and state representation in bureaucratic governance—variables that are primarily political rather than legal. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

54. *See, e.g.*, Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565 (2006).

55. *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343 (2005).

rather than facilitators of national authority, his interpretive tools may be limited in their ability to serve the goals of state constitutions, particularly when a state branch other than a court resists federal power and courts support it. While to its credit Gardner's account is more grounded in federalism than Williams's approach, further groundwork on federalism is necessary before state constitutional law can approach state constitutional interpretation where states serve as cooperative agents in the national system.

C. *Institutional Analysis and Modern Political Science*

While academic lawyers studying state constitutional law to date have drawn heavily on communitarian theories of the state as a way of understanding state constitutional development and interpretation, they have paid less attention to other approaches in modern political science. For example, approaches like positive political theory focus on institutions and how institutional actors behave as rational, self-interested agents.[56] Other accounts, such as American political development, examine how and why political institutions have evolved the way they have.[57] Such approaches take institutions within individual states, and institutional variation across several states, seriously. They also study how institutions create incentives for and influence behavior.[58] Institutional design questions, even fairly small variations in constitutional design, are fundamental to such approaches.[59] Focusing on institutions, behavior, incentives, and institutional design has payoffs for a broader theory of state constitutional interpretation grounded in state political institutions and their agents, and provides opportunities for study of variation in approach and doctrine across states.

As I have highlighted, one major issue that remains seriously underexplored within state constitutional law is federalism. Competing theories of federalism envision different roles for states as sovereigns vis-à-vis the federal government and, in turn, differing roles for state constitutions vis-à-vis the Federal Constitution. Of course, political science is not going to solve these deep normative questions. However, focusing on behaviors of rational agents may assist legal academics in understanding when (and why) states

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56. Classic works in this tradition, also known as the "Rochester School" (after the home of one of its founders, William H. Riker, and many of his disciples), include DAVID AUSTEN-SMITH & JEFFREY S. BANKS, POSITIVE POLITICAL THEORY II: STRATEGY AND STRUCTURE (2005) and WILLIAM H. RIKER & PETER C. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973). For a good overview of the implications for law, see John Ferejohn, *Law, legislation and positive political theory*, *in* MODERN POLITICAL ECONOMY (Jeffrey S. Banks & Eric A. Hanushek eds., 1995).

57. For a good survey, see KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004) (providing a justification for studying politics and political institutions historically as a way of understanding what it teaches about current and ongoing political activities); *see also* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken I. Kersch eds., 2006). A number of legal scholars in constitutional law, including Marc Graber, Keith Whittington, and Mark Tushnet, write in this tradition.

58. See Ferejohn, *supra* note 56.

59. *See also* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY (2007).

cooperate with the federal government on fundamental constitutional issues. In this way, political science may help legal scholars understand when state and federal approaches are likely to compete or be in tension. Approaches to modeling federalism and empirical study of state and federal variation and convergence—when does it occur, and under what kinds of institutional and political variables?—could prove helpful to academic lawyers writing in the field.

Moreover, modern political science reminds us why an assessment of the uniqueness of state constitutions should not be limited to the texts and norms of a legal or political community, but must also include careful and systematic study of political institutions. Institutions matter, and the variation among states in the structure of political institutions is a rich set of data for comparative study. The structure of the legislative and executive branches inevitably influences the contours of state constitutional law doctrine and especially its departure from certain approaches to federal constitutional law.[60] Moreover, there is significant variation in institutional structure among various states. There may be reasons other than simple political preferences—or, as the communitarian paradigm would suggest, a state's "character" of distrust of certain political actors. Some institutions may be afforded power, or be decentralized, to facilitate certain features of state democratic decision making, not simply because of a state's character. Features of state government interact in the democratic process with other aspects and conditions of state institutions, and may in turn influence the content of state constitutional law. Moreover, an understanding of the nature of state political institutions may provide a more powerful explanation for the dynamics of the state constitutional amendment process and its role in influencing the approach of state courts in interpreting constitutional issues. For example, given that many state judges are elected, the state judiciary may not provide the same kind of safeguard for constitutional rights,[61] giving rise to an institutional need to more frequently amend a state constitution to provide durability for constitutional-rights protections.

In addition, serious study of institutional features can shed light on the nature of judicial review in states. Consistent with the predominant paradigm with which most practitioners and scholars approach the U.S. Constitution, it should not be surprising that all of the predominant understandings of state constitutions in the legal academy, including those advanced by Williams and Gardner, give courts a presumption of judicial review. This presumption of judicial review is frequently asserted and is of course consonant with notions that courts are ultimately the protector of constitutional values. However, in the end this presumption seems to rest on little more than the cultural understandings of lawyers rather than on an account of the institution of the judiciary within state government.

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60. *See, e.g.*, William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

61. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

Comparative study has suggested that the operation of judicial review in states is less predictable and more nuanced, and is influenced by a range of political and institutional variables.[62] Judicial review under state constitutions may stand on its firmest ground when state courts adjudicate constitutional rights,[63] but even then other branches may have a more significant role in expanding constitutional rights.[64] Moreover, other branches of government, including governors and legislatures that often have the ability to call for constitutional amendments, play important roles in constitutional change. Particularly given that state constitutions afford plenary power to the legislature, state constitutional law has failed altogether to adequately explain the role of courts in defining the allocation of powers and in the constitutional amendment process.

Academics also need to study the approach to precedent taken by state courts. Since state courts are very different institutions from their federal counterparts, institutional difference may account for some of the differences in how they approach precedent. In addition, it is well-recognized that state courts are not only writing decisions for subordinate courts within their jurisdictions, but also for the national stage as states attempt to influence the evolution of rights and other constitutional issues in other states and in U.S. constitutional jurisprudence. Legal scholars need to develop a better understanding of how state courts approach the issue of framing their decisions, especially those on social and economic rights, within the political process, as precedents for other states, or to influence federal discussions. Neal Devins, for example, has begun to explore why some state courts might fashion certain precedents involving constitutional rights more broadly than others. As he argues, states should pay attention to in-state political backlash in framing their decisions, but to the extent they take into account out-of-state or national backlash they may be framing their precedents too broadly.[65]

Finally, not only law but political science has many opportunities to begin taking seriously the "state" in state constitutionalism. One advantage of studying states is that there are fifty of them, providing rich variation not only for qualitative comparison but for serious empirical study. The assessment of state variation in constitutional texts and doctrine against the backdrop of institutional variation can shed light on important issues that are fundamental to the broader enterprise of American constitutionalism.

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62. *See* LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY (2002) (proposing an understanding of state judges as advancing institutional, policy, and electoral goals).

63. GARDNER, *supra* note 14, at 98–100.

64. To be sure, many scholars in examining judicial review in the context of the U.S. Constitution express skepticism. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing for popular constitutional law, in which judicial decisions are afforded no special authority over other political institutions); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (arguing that judges should defer to legislative understandings of the meaning of ambiguous constitutional provisions).

65. Neal Devins, *Same-Sex Marriage and the New Judicial Federalism: Why State Courts Should Not Consider Out-of-State Backlash*, NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS (James A. Gardner & Jim Rossi eds., 2010).

CONCLUSION

State constitutions are unique. Williams's treatise is a tour de force and a welcome addition to the emerging body of scholarship on state constitutionalism—a topic that has always been influential in American constitutional law but has really begun to come into its own as a field in only the past forty years. Publication of a treatise of this scope is a milestone for the field.

But the state of state constitutional law scholarship still remains underdeveloped. Scholars need to address fundamental issues such as positioning state constitutions within federalism, the role of judicial review, and the interpretation and nature of precedent within states. In studying these issues, the next generation of legal and political science scholars will need to not only study the texts, history, and doctrines of state constitutional law, but also take seriously states as political institutions—including the study of institutions within and across states and how they interact with the development and application of state constitutional law.