

2010

## There There? Does State Constitutional Law Exist?

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### Recommended Citation

Pat Gudridge, *There There? Does State Constitutional Law Exist?*, JOTWELL (June 21, 2010) (reviewing Robert F. Williams, **The Law of American State Constitutions** (Oxford University Press: 2009)), <http://conlaw.jotwell.com/there-there-does-state-constitutional-law-exist/>.

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# There There? Does State Constitutional Law Exist?

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Robert F. Williams, *The Law of American State Constitutions* (Oxford University Press: 2009).



Pat Gudridge

Robert Williams, who teaches at the Rutgers-Camden Law School, is a long-time and very distinguished laborer in the field of state constitutional law – really, both a pioneer and a leader. His book looks, at first glance, to be a grand summing up, an attempt at magisterial synthesis. But it is in fact much better than that.

The table of contents tells the story.

The four chapters in part one depict state constitutions as distinctive, separately identifiable legal phenomena. Williams briefly characterizes the form, content, quality, and political resonances typical to state constitutions; something of both their early pre-federal history and their later evolution; and the several constraints that federal law sets. The four chapters in part three sketch the state constitutional law of separation of powers, highlighting differences as against federal approaches. The single chapter that Williams marks as part four addresses interpretive questions, “with a specific focus on those that arise from the unique nature of state constitutions.” (P. 311.) The final two chapters address the modern history of state constitutional revision, noting the differences in approaches taken in the states that have taken the matter seriously in the twentieth century – very briefly summarizing as well the nature of judicial review of constitutional change in state courts.

None of this would surprise Thomas Cooley, we might think, whose *Constitutional Limitations* shaped thinking about state constitutional law across much of the second half of the nineteenth century. But I have omitted so far, obviously, any mention of the second part of Robert Williams’s book – “Rights Guarantees Under State Constitutions: The New Judicial Federalism.” These three chapters show something new – new indeed not only as set against the substance of Cooley’s treatise but also vis a vis the argument of Justice Brennan in “State Constitutions and the Protection of Individual Rights,” his insurrectionary 1977 Harvard Law Review manifesto urging judges and lawyers to seize state constitutional law in service of a strong constitutional rights jurisprudence. Cooley and Brennan might have disagreed about the specific content of “constitutional limitations.” (Not always, of course: in a second treatise Cooley outlined, for example, something very much like the actual malice test that Brennan put to work – acknowledging Cooley – in *New York Times v. Sullivan*.) But both thought that the idea of “constitutional limitations” securing individual rights was crucial. Williams, however, shows that, once past the initial “thrill of discovery,” (P. 119) “backlash” (P. 127) triggered “the long hard task” (P. 130) of “state and federal constitutional dialogue” (P. 131) – a nicely diplomatic way of noting that state courts these days, “in ... the clear majority of cases” (P. 194) in which the question arises, refuse to develop independent state constitutional law of individual rights and instead follow federal law.

Hesitancy, it appears, takes three important forms. State judges frame sequencing rules that work to limit the circumstances in which the question of whether to develop independent state constitutional law of individual

rights may be seen as properly arising; they develop second order criteria for thinking about whether state constitutional law independent of federal constitutional law is a good idea; or they (sometimes state constitutional drafters do this too) affirmatively embrace “lockstepping,” simply preclude the possibility of deviating from federal understandings of individual rights. It is, we might think, a strange combination of Prufrock (“do I dare I eat a peach”) and *Ulysses and the Sirens*. Professor Williams is careful and tactful. He describes the forms of hesitancy in considerable detail, the variations from state to state, the reactions in the commentary – in all, he takes it intensely seriously as a mode of thought. But he also allows himself to note at one point: “It is substance, not form, that counts most.” (P. 144.) And it is clear that Williams thinks that the so-called “criteria” cases verge repeatedly on category error: “At its core, the criteria approach is based on a notion that interpretation of the Federal Constitution can somehow authoritatively set the meaning for similar provisions of state constitutions.” (P. 170) His discussion of lockstepping includes a wonderful image Williams borrows (nicely ironically) from U.S. Supreme Court Justice Souter’s writing in his state court days: “A state’s constitutional provisions need not, and should not, be reduced to a ‘row of shadows’ through too *much* reliance on federal precedent.” (P. 228)

Robert Williams, I should stress, does not write alone (and does not claim to): Jim Rossi and James Gardner are about to publish an important collection of writings about the status of state constitutional law (they are important figures in the field as well). Adrian Vermeule, among many others, has written importantly in the area. But Williams perhaps brings the war back home better than anyone else – as not just a matter of abstract academic contemplation or extraordinary judicial pronouncement, but as a working problem for judges day to day: ordinary constitutional law. And the tension the organization of his book creates is notable: There plainly are state constitutions; there plainly is state constitutional law articulated, sometimes more or less uniformly, sometimes divergently, all over the place. Why such uncertainty with regard to individual rights? Williams suspects, it sometimes seems, that state judges are too much in awe of the Supreme Court. It is also possible to wonder whether – notwithstanding the bravura introduction he writes – matters might be better if we embrace state constitutional law as indeed “a parochial, state-specific matter.” (P. 8.) Perhaps if we are able to recover within the constitutional law of particular states the complexity of particular textual settings, often tragic histories, and the accumulation of judicial improvisations, we might find the medium itself rich enough to sustain strong arguments. Maybe, maybe not: for now, it is clear that Robert Williams has depicted state constitutional law as a challenging paradox: a picture with its vanishing point at its center. (Lots to like here.)

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