

## *Symposium Foreword*

# **Justice William J. Brennan, Jr. and the Evolving Development of State Constitutional Law**

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Perhaps the most distinguished spokesman for the proposition that state constitutions are separate sources of fundamental rights is Justice Brennan. He first drew attention to state constitutions in a speech delivered at the annual meeting of the New Jersey State Bar Association in 1976. His *Harvard Law Review* article in the following year has been regarded as the Magna Carta of state constitutional law. Just two weeks ago, at the dedication of our new courtroom in Trenton, he again referred to the fact that state constitutions may provide greater protection than the federal Constitution. He urged the audience to rejoice in the perception by state courts “that state constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the United States Supreme Court’s interpretation of federal law . . . .”

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### TABLE OF CONTENTS

I. INTRODUCTION.....	204
II. AMENDING STATE CONSTITUTIONS .....	205

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<sup>1</sup>Stewart G. Pollock, Address, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (alteration in original) (footnote omitted) (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)); see also Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11 (1995) (“No doubt in part attributable to his experience as a state court judge, nearly twenty years ago Justice Brennan issued his now famous wake-up call for state courts to ‘step into the breach’ and resuscitate our state constitutions as the living documents they are. I still remember the excitement those stirring words generated.” (footnote omitted) (quoting Brennan, *supra*, at 503)).

III. INTERPRETING STATE CONSTITUTIONS: THE PROBLEM OF LOCKSTEPPING.....	207
IV. STATE CONSTITUTIONS AND ADMINISTRATIVE LAW.....	209
V. CONCLUSION.....	210

## I. INTRODUCTION

The members of *Ohio State Law Journal* are to be commended for their recognition of Justice Brennan's continuing influence on state constitutional law, together with their focus on the current state of the field. As noted above by former Justice Stewart Pollock of New Jersey, Justice Brennan's famous *Harvard Law Review* article had its origins in a 1976 speech to the New Jersey State Bar Association.<sup>2</sup> Over the years, however, Justice Brennan's article and his dissenting opinions calling on state courts to evaluate constitutional issues on their own regardless of what the United States Supreme Court had held, drew not only accolades but also criticism. For example, Paul Bator complained:

And I regard it as inappropriate for Supreme Court Justices themselves to campaign to enact into *unreviewable* state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court. [F]or an example of a not at all subtle invitation of this sort, [see] *Michigan v. Mosley*.<sup>3</sup>

My colleague, Earl Maltz even referred to Justice Brennan as a "false prophet" of the benefits of federalism.<sup>4</sup> Much of this criticism portrayed Justice Brennan as a "Johnny-come-lately" to the field of state constitutional law, "discovering" this alternative route to liberal results only after the change in personnel on the United States Supreme Court left him in the minority. In fact, however, that is quite an inaccurate picture: Justice Brennan was deeply involved with state constitutional law in New Jersey going all the way back to his important work on judicial reform during the 1947 New Jersey Constitutional Convention.<sup>5</sup>

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<sup>2</sup> Pollock, *supra* note 1, at 716. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

<sup>3</sup> Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) (emphasis added) (citing *Michigan v. Mosley*, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting)).

<sup>4</sup> Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 429 (1988); see also Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1007, 1018 (1985); Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES ST. CONST. L. 233, 233-35 (1989).

<sup>5</sup> See Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 772-73 (1998).

Of course when Justice Brennan shined his influential spotlight on state constitutional law in 1977 he was not the first to point out the importance of state constitutions in the protection of individual rights. The recognition of this truism had been pointed out by less influential scholars much earlier.<sup>6</sup> Still, as recognized by this Symposium, and the scholarly articles herein, Justice Brennan's exhortation has been the most important stimulus for consideration of state constitutional rights provisions as possibly providing rights protection beyond the Federal Constitution's national minimum standards, or, the "New Judicial Federalism."<sup>7</sup> For example, Professor Ann Lousin documented the early impact of Justice Brennan's article thirty years ago,<sup>8</sup> an analysis she has continued in these pages. Her article brings up to date the crucial areas of adequate and independent state law grounds, techniques of interpreting state constitutional rights provisions such as "lockstepping," techniques of interpreting state constitutional provisions with no federal counterpart, and whether and when national uniformity is desirable in constitutional interpretation.<sup>9</sup>

Professor Jim Gardner, in his usually slightly contrarian style, provides a detailed retrospective of the evolution of state constitutional rights protections under the influence of Justice Brennan's article, followed by a clear-headed description of the remaining inadequacies in state constitutional rights adjudication.<sup>10</sup> He then provides an important "alternative view" of the American state constitutions as constituting an integral component of a larger system of "dual agency" in the enforcement of constitutional guarantees.<sup>11</sup>

## II. AMENDING STATE CONSTITUTIONS

One of the key distinctions between state constitutions and the Federal Constitution is the relative ease of amending *state* constitutions.<sup>12</sup> Based on this relative availability of textual change in state constitutions, involving a vote of the people in forty-nine out of the fifty states, I have suggested that

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<sup>6</sup> See, e.g., Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 126 (1969); Robert F. Williams, Foreword, *Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii, xiv-xvi (1996).

<sup>7</sup> See Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415, 416 (2004) (explaining that the New Judicial Federalism refers to the renewed interest in state constitutional rights, dating from the early 1970s).

<sup>8</sup> See generally Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge Who Believes in State's Rights*, 20 J. MARSHALL L. REV. 1, 1-2 (1986).

<sup>9</sup> Ann M. Lousin, *Justice Brennan's Call to Arms—What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387 (2016).

<sup>10</sup> James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355 (2016).

<sup>11</sup> *Id.* at 374-84.

<sup>12</sup> ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 28 (2009).

state constitutions are “more democratic” than the Federal Constitution.<sup>13</sup> Further, Dr. Alan Tarr and I have suggested a number of innovative approaches to state constitutional change, some of which have not been very widely utilized.<sup>14</sup> In this Symposium Dr. Tarr provides a detailed analysis of the forms of “popular constitutionalism” in the states as compared to at the federal level.<sup>15</sup> Professor Sanford Levinson, a relatively recent convert to the study of *state* constitutional law,<sup>16</sup> and his coauthor Professor William Blake, have provided important new, empirical analysis of the details of the different processes of state constitutional change.<sup>17</sup> This article adds greatly to our understanding of these different processes, and promises to stimulate further useful research.

The state of Ohio is currently engaged in a multiyear review of its state constitution by the Ohio State Constitutional Modernization Commission. Dean Steven Steinglass, senior policy director for the Commission, provides a unique perspective on this process.<sup>18</sup> Dean Steinglass is the leading scholar of the Ohio state constitution.<sup>19</sup> His article in this symposium provides invaluable information both to Ohioans and to those in other states considering techniques of amendment and revision to their own state constitutions.<sup>20</sup> Other states have utilized the Commission method, whereby a small group of experts studies the constitution and makes recommendations to the legislature for needed change.<sup>21</sup> The only exception to this approach is in Florida, where two

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<sup>13</sup> Robert F. Williams, Response, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 905 (2011).

<sup>14</sup> G. Alan Tarr & Robert F. Williams, Foreword, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1076–77 (2005).

<sup>15</sup> G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 OHIO ST. L.J. 237 (2016).

<sup>16</sup> See, e.g., Sanford Levinson, Foreword, *State Constitutions as Artifacts of Experimentations*, 44 RUTGERS L.J. 579, 579 (2014).

<sup>17</sup> Sanford Levinson & William Blake, *When Americans Think About Constitutional Reform: Some Data and Reflections*, 77 OHIO ST. L.J. 211 (2016). See also generally SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006). In reviewing Professor Levinson's book *Framed*, I suggested reference to a number of state constitutional methods of revision and amendment as having possible applicability to Professor Levinson's call for changes to the Federal Constitution. See Robert F. Williams, *Unsettling the Settled: Challenging the Great and Not-So-Great Compromises in the Constitution*, 91 TEX. L. REV. 1149, 1159–62 (2013) (book review).

<sup>18</sup> Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281 (2016).

<sup>19</sup> See, e.g., STEVEN H. STEINGLASS & GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE* (2004).

<sup>20</sup> See generally Steinglass, *supra* note 18.

<sup>21</sup> WILLIAMS, *supra* note 12, at 381–87.

automatic, periodic commissions are authorized in the state constitution itself to present their proposed changes directly to the electorate.<sup>22</sup>

### III. INTERPRETING STATE CONSTITUTIONS: THE PROBLEM OF LOCKSTEPPING

Early in the evolution of the New Judicial Federalism then-Justice Shirley Abrahamson noted the phenomenon of “lockstepping” in state constitutional rights litigation. In 1985, she noted that state constitutional law rights cases could be “classified into . . . two distinguishable groups”:

On one side stand the cases intentionally adopting federal decisional law as interpretive of their own constitutions. Some state courts merely say that the texts of the two constitutions are substantially similar and should be similarly construed. Other state courts analyze the state constitution, or the federal doctrine, or both, and explain the reasons for adopting federal decisional law.<sup>23</sup>

She concluded that:

[S]tate cases adopting federal law as state constitutional law will have to be studied carefully to analyze the reasons for and manner of adopting federal law, and to determine whether state courts change their interpretations of the state constitutions as United States Supreme Court and sister state court decisions take new paths.<sup>24</sup>

Being a little slow on the uptake, and preoccupied with Justice Abrahamson’s second category of those cases (departing from federal constitutional law), it was twenty years until I realized the importance of the first category. Borrowing from Dr. Barry Latzer’s formulation,<sup>25</sup> I identified three categories of lockstepping: (1) unreflective adoptionism, (2) reflective adoptionism, and (3) prospective lockstepping.<sup>26</sup> The first possibility,

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<sup>22</sup> Robert F. Williams, Foreword, *Is Constitutional Revision Success Worth Its Popular Sovereignty Price?*, 52 FLA. L. REV. 249, 252 (2000); Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215, 220 (1998).

<sup>23</sup> Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1181–82. Justice Abrahamson continued: “The second group of cases . . . do depart from federal precedent. These cases will also have to be studied to analyze the reasons for and manner of the departure.” *Id.* at 1182.

<sup>24</sup> *Id.* at 1182.

<sup>25</sup> Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991); see also Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 323–24 (1986) (discussing the “equivalence model”).

<sup>26</sup> Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-*

*unreflective* adoptionism, is unjustified because it reflects a knee-jerk, “pavlovian”<sup>27</sup> response to a state constitutional claim that is similar to federal constitutional doctrine by simply adopting federal doctrine without discussion. This is, of course, less common after a number of decades of the New Judicial Federalism. Coincidentally, I utilized two Ohio cases to illustrate the next two categories. First, I cited *Simmons-Harris v. Goff* as an example of *reflective* adoptionism.<sup>28</sup> The Ohio Supreme Court, in the context of a challenge to school vouchers, examined the state constitutional religion clauses as well as the First Amendment. It concluded that the state and federal provisions, although differently worded, could both be enforced using the federal *Lemon* test.<sup>29</sup> Notably, however, the court concluded by stating: “We reserve the right to adopt a different constitutional standard pursuant to the Ohio Constitution, *whether because the federal constitutional standard changes* or for any other relevant reason.”<sup>30</sup> Thus, the court did adopt federal constitutional doctrine for the interpretation of its state constitutional provision, but only for that case.

There is relatively uniform agreement that reflective adoptionism is clearly legitimate because, as Professor Gardner has stated: “[T]here is nothing at all wrong with state judges adopting U.S. Supreme Court terminology and analyses merely because they think the Court’s approach does an effective job of protecting the relevant liberties.”<sup>31</sup>

The real problem with lockstepping, however, comes when state courts decide to incorporate federal constitutional doctrine and results into their state constitutional interpretation for specific cases *and in the future*.<sup>32</sup> Again, I pointed to an Ohio decision, *Eastwood Mall, Inc. v. Slanco*, where the Ohio Supreme Court decided that free speech and expression in private shopping malls would not be protected under the Ohio Constitution.<sup>33</sup> The court added to its holding the following statement: “When the First Amendment does not protect speech that infringes on private property rights, Section 11 does not protect that speech either.”<sup>34</sup> I have criticized this form of “prospective

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*by-Case Adoptionism or Prospective Lockstepping?* 46 WM. & MARY L. REV. 1499, 1505–1513 (2005).

<sup>27</sup> *State v. Havlat*, 385 N.W.2d 436, 447 (Neb. 1986) (Shanahan, J., dissenting).

<sup>28</sup> *Simmons-Harris v. Goff*, 711 N.E.2d 203, 207–16 (Ohio 1999).

<sup>29</sup> *Id.* at 211.

<sup>30</sup> *Id.* at 212 (emphasis added).

<sup>31</sup> James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1059 (2003); see also Williams, *supra* note 26, at 1506–09.

<sup>32</sup> Williams, *supra* note 26, at 1509; see also James K. Leven, *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63, 64–65 (2012).

<sup>33</sup> *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 60 (Ohio 1994). I had earlier analyzed these Ohio decisions in Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415, 434–35 (2004).

<sup>34</sup> *Eastwood Mall*, 626 N.E.2d at 61.

lockstepping” as beyond an actual holding that a state court may reach, that has the effect of chilling state constitutional research and argument, and in effect inappropriately amending the state constitution without any amendment procedure.<sup>35</sup>

Notably, these issues of lockstepping in state constitutional law remain a current issue in the Ohio courts. In the recent case, *State v. Brown*, the Ohio Supreme Court, in a 5–2 decision, has continued to debate whether, and the extent to which, the Court should interpret Ohio’s state constitutional search and seizure provision as “coextensive” with the United States Supreme Court’s interpretation of the Fourth Amendment.<sup>36</sup> The members of the Court also disagreed over whether there were “compelling reasons” to interpret the state constitution to be more protective than its federal counterpart.<sup>37</sup>

#### IV. STATE CONSTITUTIONS AND ADMINISTRATIVE LAW

Just as at the federal level, state governments have evolved to include an important element of the “Administrative State.” Therefore, again just as at the federal level, state administrative agencies and processes must comport with the governing constitutional standards.<sup>38</sup> Very important structure-of-government issues such as the nondelegation doctrine, and separation-of-powers limitations on legislative appointments to administrative boards in the executive branch also occur at the state level just as often as under federal constitutional law. Just as in the area of rights protections, and even slightly more so in the ways states decide to structure their governments, federal constitutional decisions and doctrines do not need to be followed by the states. As Dean Robert A. Schapiro has pointed out, by contrast to federal constitutional rights protections, most of which have been incorporated to apply to the states, “federal separation of powers doctrine does not apply directly to the states. This factor, in particular, means that the pragmatic and institutional benefits of following federal individual rights case law do not apply in the separation of powers area.”<sup>39</sup>

He continued:

For similar reasons, interpreting state constitutions in lockstep with federal separation of powers law would not further the cause of uniformity. Because federal doctrine in this realm does not apply to the states, only one body of separation of powers law will exist. . . .

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<sup>35</sup> Williams, *supra* note 26, at 1520–29.

<sup>36</sup> See generally *State v. Brown*, 39 N.E.3d 496 (Ohio 2015). I am indebted to Steve Steinglass for pointing out this case to me.

<sup>37</sup> *Id.* at 503–07 (French, J., dissenting). I have referred to this as the “criteria approach.” WILLIAMS, *supra* note 12, at 146.

<sup>38</sup> See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

<sup>39</sup> Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 92–93 (1998).

The unincorporated status of federal separation of powers law also means that judicial restraint does not counsel lockstep interpretation. . . . To put it slightly differently, in the separation of powers area state courts have nowhere to hide. Federal law provides no constitutional floor. . . . Deviating from federal doctrine and adopting a more flexible approach might better advance the goal of judicial restraint.<sup>40</sup>

Dean Schapiro's perspective is extremely important when analyzing state separation of power questions in the administrative law context, and simply reflects the well established view of Justice Holmes: "We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."<sup>41</sup>

Professor Jim Rossi is probably the leading expert in the country on the interaction of state and federal administrative law.<sup>42</sup> His article in this Symposium continues his careful coverage of this complex and increasingly important field of law, by analyzing the delegation of legislative authority, already different under state constitutions,<sup>43</sup> not to *state* agencies but to *federal* law and regulations.<sup>44</sup> He makes strong legal and practical arguments for why this incorporation of future federal law into state statutes should be permitted even though it seems at first blush to abdicate state lawmaking power to a different sovereign.

Professor Aaron Saiger breaks new ground in his important and provocative article drawing similarities between state administrative law and local government law.<sup>45</sup> He shows that much would be added to our understanding of these two seemingly disparate areas if we took more seriously their interconnection.

## V. CONCLUSION

This symposium successfully links Justice Brennan's stimulus of the New Judicial Federalism, and its resulting new interest in state constitutions to the current, continuing issues in state constitutional law. These issues are not going away and these contributions will add greatly to further analysis and understanding of this important component of constitutional law.

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<sup>40</sup> *Id.* at 93–94.

<sup>41</sup> *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908).

<sup>42</sup> *See, e.g.*, 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).

<sup>43</sup> WILLIAMS, *supra* note 12, at 255–57.

<sup>44</sup> Jim Rossi, *The Dynamic Incorporation of Federal Law*, 77 OHIO ST. L.J. 457 (2016).

<sup>45</sup> Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423 (2016).