

STATE STRUCTURALISM—A REPLY TO PROFESSOR LONG

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In *State Constitutional Structures Affect Access to Civil Justice*, Professor Long makes an important contribution to our understanding of how state constitutions actually function.¹ He has at least two core insights. First, he observes that substantive constitutional protections are often only as effective as the constitutional structures that exist to enforce them. Professor Long helpfully refers to these as “second-order constitutional structures.”² He identifies the separation-of-powers, court structure, authority for regulating lawyers, and several other second-order structures that are relevant to how civil justice protections are enforced. Professor Long’s second insight is that state constitutional structures are often wildly different than their federal counterparts, and frequently there are no analogous federal arrangements.³ Professor Long therefore encourages state courts to draw confidence from these distinctive institutional arrangements in their interpretation and application of civil justice protections. Overall, Professor Long offers a new and compelling account of how state courts might develop independent state constitutionalism based on unique state structures.

Professor Long’s insights strike me as entirely correct and promising for the future of state constitutionalism. In this essay, I offer two preliminary thoughts in response.

First, Professor Long’s emphasis on second-order state constitutional structures likely represents an underexplored perspective on state constitutional distinctiveness. Much has been written about how “unique state sources” might provide state judges with justifications for deviating from federal constitutional precedent.⁴ However, this point has been subject to compelling criticism and courts have struggled to consistently find unique state sources that would justify alternative constitutional

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1. Justin R. Long, *State Constitutional Structures Affect Access to Civil Justice*, 70 RUTGERS U. L. REV. 937 (2018).

2. *Id.* at 938–39.

3. *See id.* at 939–71.

4. *See* ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 135–92, 313–55 (2009) (summarizing and assessing this literature).

outcomes.⁵ Indeed, even Professor Long has suggested that state courts struggle to consistently interpret their state constitutions independent of the Federal Constitution because of barriers to finding and using unique state sources.⁶

Professor Long's structural approach may offer a more fruitful and accessible basis for state courts to exercise independence from the inertia of federal constitutional norms. For one thing, unique state structural arguments are less difficult to construct. They do not necessarily depend on obscure state convention debates buried somewhere in the state's library. They emanate largely from the face of the constitution and the real operation of constitutional structures within the state. Thus, to the extent that state structures are meaningfully different from federal structures, state courts may be more inclined to use them than historical arguments based on the state's unique constitutional history. I see in Professor Long's article, the promise of a largely underdeveloped approach to independent state constitutionalism.⁷

My second comment regarding Professor Long's article is that there may be another important institution to add to his list: formal amendment. One of the most obvious institutional differences between the Federal Constitution and state constitutions is the frequency of formal amendment. On average, state constitutions are amended over ten times more frequently than the Federal Constitution.⁸ Those amendments cover a wide variety of issues and are often directed at overturning or modifying state court rulings.⁹

The reality under state constitutions is that state judicial review does not have the same permanence or insulation from popular response as

5. Paul W. Kahn and James Gardner both level serious criticisms at the "doctrine of unique state sources." See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148–56, 1159–63 (1993). On the court's erratic and application of the doctrine, see Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN. ST. L. REV. 783, 802–31 (2011); Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 58–72 (2006).

6. Long, *supra* note 5, at 69.

7. See also Laurent Sacharoff, *Montejo and the New Judicial Federalism*, 50 TEX. TECH. L. REV. 599, 599 (2018) (exploring state structural arguments in the criminal procedure context).

8. JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* 23 (2018).

9. State amendments touch on almost every aspect of American political life. For the definitive work surveying and analyzing the substantive breath of state amendment politics, see *id.* For a specific discussion of how state amendments are used to "overrule" state court decisions, see John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007).

does judicial review under the Federal Constitution. When the Supreme Court of the United States exercises its power of judicial review, the only realistic way of changing that rule is for the Court to later reverse itself. At the state level, however, court rulings can be and are targeted by constitutional amendment. Thus, if substantive state constitutional protections are dependent on judicial review for their enforcement, they are also more vulnerable to change by formal amendment than under the Federal Constitution.

What this means for state courts is that their exercise of judicial review is a fundamentally different kind of review than federal review. State court rulings do not have the promise of permanence or finality claimed by federal courts. Yet this is another area where state courts often behave as if they were operating under the Federal Constitution. State courts frequently speak of their constitutional rulings as if they are final and permanent. In reality, those rulings are often just the beginning of a robust public debate regarding constitutional meaning.

So what should state courts do about their vulnerability to formal amendment? The prevailing approach seems to be denial. Most state courts say nothing about formal amendment and the broader institutional context within which they operate.¹⁰ This is understandable, but there may be negative effects associated with it. For one thing, it might invite (or even incite) dramatic, popular responses that could be mediated. Under the right conditions, state courts may actually benefit from candor regarding their vulnerability to formal amendment. Placing state constitutionalism in context may help undermine popular narratives regarding “judicial activism” and focus popular discussion on constitutional substance rather than ad hominem attacks on the judiciary.

In all, Professor Long’s article is thought provoking and useful. It drives us to consider how state government actually operates and how state structures might vary in important ways from federal government.

10. See generally LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY (2002) (finding evidence that state judges are influenced by institutional constraints even though judicial opinions do not reference those constraints explicitly); Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 261–63 (2016) (surveying few instances where state courts explicitly acknowledge amendability in opinions related to power of judicial review).